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## **DOCTOR OF PHILOSOPHY**

**The maladministration of the Coalition Provisional Authority in the duty to prevent criminal activities and its effects on illegal funds (causes and solutions)**

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**The Maladministration of the Coalition Provisional Authority in the Duty  
to Prevent Criminal Activities and its Effect on Illegal Funds (Causes &  
Solutions)**

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## **Abstract of Thesis**

The maladministration of the Coalition Provisional Authority in its duty, with respect to its failure to take steps to prevent financial criminal activities, led to the generation of illegal funds in occupied Iraq. This maladministration, and consideration of possible methods for depriving criminals of those funds and recovering them for the Iraqi State, remains largely unexplored by the literature. This thesis addresses this gap by first, establishing the maladministration of the Coalition Provisional Authority to meet its obligations as an occupying administration, and second, proposes mechanisms to deal with the problem and recovery of corruptly obtained funds during the Coalition Provisional Authority's tenure. It is argued that the Coalition Provisional Authority did not take proper and feasible measures in order to prevent financial criminal activities. This maladministration led to the widespread propensity in criminal activities that generated vast amounts of illicit money in occupied Iraq.

This thesis has two Parts. Part One explores the problem of the maladministration of the Coalition Provisional Authority of its duty to prevent financial criminal activities (that generated substantial amounts of illicit funds). It examines the state of military occupation of Iraq, and the duty upon the occupant to create the Coalition Provisional Authority. It demonstrates that there was a duty on the Coalition Provisional Authority to take affirmative steps to prevent financial criminal activities. It considers certain types of financial criminal activities that generated illegal funds, and shows how the Coalition Provisional Authority failed to prevent those activities. In light of the huge amounts of illegal funds generated, Part Two offers solutions for their recovery by examining the feasibility of the criminal forfeiture of corruptly obtained funds generated in Iraq territory and found in US territory; and by showing that civil action is the best alternative mechanism for recovering Iraqi funds that disappeared as a result of corrupt activities during the Coalition Provisional Authority's tenure.

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*United States ex rel DRC, Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617 (E.D.Va., 2005)

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*H CJ 393/82, Jamait Askan et al. v. IDF Commander of Judea and Samaria Region et al.*, 37(4) P.D. 785,792

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*Btselem v Military Judge Advocate*, H CJ 9594/03, (21 August 2011)

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## Table of Abbreviations

CPA	Coalition Provisional Authority
DFI	Development Fund for Iraq
SIGIR	Special Inspector General for Iraq
ICJ	International Court of Justice
SFIR	Stabilization Force Iraq
IGC	Iraqi Governing Council
TAL	Law of Administration for the State of Iraq for the Transitional Period
NSS	United States National Security Strategy
WMD	Weapons of Mass Destruction
PMSCs	Private Military and Security Companies
IAMB	International Advisory and Monitoring Board
KBR	Kellogg, Brown & Root
FPS	Facilities Protection Service
ASP	Archaeological Site Protection

RICO	Racketeer Influenced and Corrupt Organisation
CCE	Continuing Criminal Enterprise
FED. R. CRIM. P	Federal Rules of Criminal Procedure
AFF	Asset Forfeiture Fund
TFF	Treasury Forfeiture Fund
UNCAC	United Nations Convention against Corruption
MLA	Mutual Legal Assistance
MLATs	Mutual Legal Assistance Treaties
ECMA	European Convention on Mutual Assistance in Criminal Matters
CCCI	Central Criminal Court of Iraq
CTRs	Currency Transaction Reports
SAR	Suspicious Activity Reports
RFPA	Right to Financial Privacy Act
FATF	Financial Action Task Force
ORHR	Office of Reconstruction and Humanitarian Relief

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## Introduction

### Problem statement and importance of the study

For almost more than one year, the Coalition Provisional Authority (hereinafter known as the ‘CPA’), under the leadership of Administrator L. Paul Bremer III, was governing Iraq as an occupying power in accordance with the law of occupation, as well as the United Nations Security Council Resolutions.<sup>1</sup> When the Coalition Forces, namely the US, UK, Australia, and Poland, (mainly led by the US), had succeeded in occupying Iraqi territory, the operation of the old civil government was suspended and became incapable of publicly exercising its authority in that territory. As a result, the responsibility to fill the “governance gap” in the occupied area rested with the occupants. In order to discharge such responsibility, the occupants created the CPA to “restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.”<sup>2</sup> This mission shows that the CPA was an occupying power in Iraq and it was required by Article 43 of the 1907 Hague Regulations to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>3</sup> This concise statement is “a sort of mini-constitution for the occupation administration; its general guidelines permeate any prescriptive measure or other acts taken by the occupant.”<sup>4</sup>

In order to administer the occupied Iraq, the CPA granted itself a broad power. According to the CPA Regulation Number 1, “The CPA shall exercise powers of government

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<sup>1</sup> United Nations Security Council Resolution 1483, 4761<sup>st</sup> meeting, UN Doc .S/RES/1483 (2003), 22 May 2003, United Nations Security Council Resolution 1546, 4987<sup>th</sup> meeting, UN Doc. S/RES/1546 (2004), 8 June 2004 and United Nations Security Council Resolution 1511, 4844<sup>th</sup> meeting, UN Doc .S/RES/1511 (2003), 16 October 2003. These Resolutions will be discussed later.

<sup>2</sup> CPA Regulation Number 1 of 16 May 2003, The Coalition Provisional Authority. All the CPA Regulations, Orders and Memoranda are available at <[www.iraqcoalition.org/regulations](http://www.iraqcoalition.org/regulations)> accessed 5 January 2014. This thesis is focused on the duty of the CPA to prevent financial criminal activities in occupied Iraq. Therefore, it does not cover other duties that imposed on the CPA.

<sup>3</sup> Article 43 of Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention of 1907.

<sup>4</sup> Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, Oxford University Press 2012) 69.



temporarily...’ and that ‘‘The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objective...’’<sup>5</sup>The executive function of the CPA made it primarily responsible for preventing financial criminal activities (and secondarily by the judicial branch).<sup>6</sup> It also made it under a duty to manage Iraqi funds and prevent subject them to corruption activities. On the other hand, the legislative function of the CPA made it responsible for respecting the laws in force in the occupied territory.<sup>7</sup>This duty requires the CPA to avoid the repeal or suspension of existing laws, except in cases of ‘‘*empêchement absolu*.’’<sup>8</sup>

However, the CPA, during the period when it was administering Iraqi land, encountered problems arising from the lack of sufficient means relating to law enforcement, which in addition to the mishandling of Iraqi funds, contributed to the failure of the CPA to comply with its duty vis-à-vis preventing financial criminal activities (the crime of kidnapping, corruption activities and the looting of cultural property that are examined in the thesis) that generated huge amounts of funds in occupied Iraq.

Widespread commission of financial criminal activities was possible due to woefully inadequate military resources.<sup>9</sup>Weak strategic and operational planning for the occupation resulted in the failure of units to properly train for the missions that would assist them to prevent financial criminal activities.<sup>10</sup>In this regard, the crime of kidnapping and the looting of cultural property during the CPA’s tenure will be examined in order to show that the CPA failed to take proper measures to prevent them in occupied Iraq. Both of the crime of kidnapping and the looting of cultural property conducted by individuals, criminal groups as

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<sup>5</sup> CPA Regulation Number 1 of 16 May 2003 (n 2).

<sup>6</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (1<sup>st</sup> edn, Cambridge University Press 2009) para 204.

<sup>7</sup> *ibid.*

<sup>8</sup> This thesis is concerned with the duty of the CPA to take proper steps to prevent financial criminal activities. It is not concerned with the meaning and scope of the duty of the CPA with regard to respect the laws in force in occupied Iraq. However, because of the CPA was vested with legislative authority to maintain the orderly government of the occupied Iraq, the thesis will consider the CPA’s legislative function with regard to enact legislations to prevent financial criminal activities.

<sup>9</sup> In Chapter Three, it will be shown that the number of occupying forces were insufficient and they were not trained for carrying out law enforcement operations.

<sup>10</sup> Matthew R. Hover, ‘The occupation of Iraq: A Military Perspective on Lessons Learned’ (2012) 94 (885) *International Review of the Red Cross* 346.

well as armed groups in Iraqi territory,<sup>11</sup> and they can be prosecuted under the Iraqi Penal Code No.111 of 1969.

Whilst the CPA was conceived as a “trustee” over the funds of occupied Iraq in accordance with the law of occupation and the United Nations Security Council Resolution 1483,<sup>12</sup> so that funds were used in a transparent and equitable manner for the benefit of the Iraqi people, it lacked care in the management of those funds that resulted in committing corruption activities. The absence of adequate managerial, financial, and contractual controls over Iraqi funds, as well as a lack of transparency, made the funds under its control susceptible to corruption activities. In this respect, corruption activities in the reconstruction process of Iraq (overcharging, fraud, and bribery), as well as irregularities in disbursements,<sup>13</sup> will be examined in order to demonstrate that the CPA failed to take appropriate steps to prevent those criminal activities in occupied Iraq. As will be seen in Chapter Three and Chapter Four, the personnel of the CPA and individuals, as well as US companies perpetrated corruption activities in occupied Iraq and they have been subjected to the US laws.

The reason for selecting the crime of kidnapping, corruption activities, and the looting of cultural property from, a family of activities of 7 major financial criminal activities,<sup>14</sup> which occurred during the CPA’s tenure, is that the body of literature is available. In addition, the data about the extent of illicit funds that were generated from those activities in occupied Iraq can be collected from different sources. Moreover, the rationale behind the selecting of corruption activities is that approximately, \$8.8 billion from Iraqi funds have disappeared as a result of corruption activities during the CPA’s tenure.<sup>15</sup> The Iraqi State is in urgent need of

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<sup>11</sup> In addition to individuals and criminal groups, armed groups committed the crime of kidnapping and the looting of cultural property in occupied Iraq. For more details, See Chapter Three. Therefore, the rules on use of force in the law enforcement paradigm, and not the rules on the conduct of hostilities would be required by police force or military forces to prevent individuals, criminal groups, and armed groups from committing those activities. For more details, See Chapter Two.

<sup>12</sup> United Nations Security Council Resolution 1483 (n 1).

<sup>13</sup> For more details about the meaning of those activities, See Chapter Three.

<sup>14</sup> Major financial criminal activities took place during the period of the CPA such as theft, smuggling of oil, diversion and car theft. For more details about those activities, See Phil Williams, *Criminals, Militias, and Insurgents: Organised Crime in Iraq* (Strategic Studies Institute 2009) 63-105- 177.

<sup>15</sup> The Special Inspector General For Iraq Reconstruction, ‘Oversight of Funds Provided to Iraqi Ministries Through the National Budget Process’ (Report No.05-004, 30 January 2005) 4. All reports of Inspector General of the Coalition Provisional Authority and the Special Inspector General for Iraq Reconstruction (hereinafter known as the ‘SIGIR’) are available at <[www.sigir.mil](http://www.sigir.mil)> accessed 5 February 2012. The SIGIR is the successor to the Coalition Provisional Authority Office of Inspector General (CPA-IG). It was created by an act of US Congress in October 2004. The SIGIR was a body responsible for overseeing the US-funded Iraq Reconstruction Fund. Stuart W. Bowen, Jr. served as the Special Inspector General for Iraq Reconstruction. The

the recovery of those funds and the way in which the funds can be recovered will be mapped out in Chapter Five.

The analysis of the maladministration of the CPA in its duty to prevent financial criminal activities and its effect on illegal funds should be regarded as an important case that highlights new understanding for the administration of occupied territories in the future. The maladministration of the CPA in its duty in question is considered to be one of the biggest cases of corruption activities in modern history. It raises a number of legal problems, which need solutions.

It is quite clear that the United States' decision about the invasion of Iraq on 19 March 2003 was not aimed to be a defensive decision, but was an offensive decision to topple the former local regime and bring new governance in Iraq.<sup>16</sup> However, the main focus was, at all times, the defeat of the Iraqi army, rather than on the post-conflict administration. This strategy was evident in all announcements of the US officials that they would be “liberating Iraq,” not occupying Iraq.<sup>17</sup> For that reason, the real planning for the post-invasion administration of the Iraqi territory; the number of civil and military forces that would be needed in Iraq in order to execute tasks with respect to maintaining public order; and resources devoted to the occupation, were completely inadequate. All of this contributed to the maladministration of the CPA in its duty to prevent financial criminal activities. Therefore, this inadequate preparation should be considered a lesson before occupation of foreign territories in similar fashion if attempted again in the future.

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SIGIR provided quarterly reports on Iraq Reconstruction to the US Congress. It reported administratively to the US Secretaries of State and Defence. It identified waste, fraud, and abuse in Iraq. Available at <<http://www.sigir.mil/>> accessed 30 September 2014.

<sup>16</sup> On 4 April 2002, George W. Bush flatly stated, “I made up my mind that Saddam needs to go...The policy of my Government is that he goes ... The policy of my Government is that Saddam Hussein not be in power.” States Government United, *Public Papers of the Presidents of the United States George W. Bush 2002 Book I: January 1 to June 30, 2002* (Government Printing Office 2005) 556. However, change in Iraq's regime, as a justification for entry into Iraqi territory has no place in the scheme of the Charter of the United Nations. In this regards, Lord Steyn observed, “In a court of morals there was a strong case for replacing the barbarous regime of Saddam Hussein with a more benign one. Sadly, the best the international community can do is to organise its affairs in accordance with the Charter of the United Nations, so carefully crafted with the crucial aid of the United States and Britain under enlightened leaders after the end of the Second World War. Regime change has no place in the scheme of the Charter. The United Kingdom could not rely on regime change as a justification for invading Iraq, and did not attempt to do so. But 18 months after inception of the Iraq war, it was revealed that the Prime Minister supported regime change.” Lord Steyn, ‘The legality of the invasion of Iraq’ (2010) 1 *European Human Rights Law Review* 4.

<sup>17</sup> See further Chapter One illustrating example of such announcements.

The maladministration of the CPA in preventing corrupt activities to take place led to the disappearance in the region of USD\$8.8 billion from the Development Fund for Iraq (hereinafter known as the ‘DFI’).<sup>18</sup> As steward for the Iraqi populace, the CPA had a fiduciary duty to administer the funds of occupied Iraq in a transparent manner, and only for purposes benefiting the civilian population in occupied Iraq. The administration of the CPA of Iraqi funds should be according to international accounting standards. As will be shown in Chapter Three, the CPA Regulation Number 2 required the CPA to obtain the services of an “internal auditor” in order to ensure that the fund is administered and used in a transparent manner for the benefit of the people of Iraq.<sup>19</sup> In addition, bookkeeping is an important standard for the accounting process. It is the “process of analysing, classifying and recording transactions in accordance with preconceived plan.”<sup>20</sup> In this regard, double-entry bookkeeping system is essential to passing financial accounting. Double entry is “a method of recording business transactions to show the effects of transactions based on the foundation that every transaction give rise to two effects/entries.”<sup>21</sup> Further, cooperation between the auditors and the administration is required to acknowledge the completeness of contracts, and responsibilities for the execution and operations of accounting and internal control systems.

As will be shown in Chapter Three, because of the lack of adequate international accounting standards in place, as well as a lack of transparency, funds have disappeared as a result of corruption activities. Hence, the mishandling of Iraqi funds that led to corruption activities should be considered a lesson for the administration of occupied territory funds in the future.

There is an urgent need to assist the Iraqi State to use better and newer legal mechanisms in order to recover the missing \$8.8 billion. The way in which Iraqi funds misappropriated by criminal means return to Iraq, raises a number of interrelated domestic and international legal problems that need solutions. Amongst them are:

1. The problem of the political will of the leadership in Iraq
2. The problem of legitimacy of the Iraqi Government
3. The problem of pervasive corruption in Iraq
4. The problem of the Iraq legal system

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<sup>18</sup> The Special Inspector General For Iraq Reconstruction, ‘Oversight of Funds Provided to Iraqi Ministries Through the National Budget Process’ (n 15).

<sup>19</sup> Section 5 (4) of CPA Regulation Number 2 of 10 June 2003, Development Fund for Iraq.

<sup>20</sup> K. S. Gangadhar, *Livestock Economics: Marketing, Business Management and Accountancy* (New India Publishing Agency 2009) 131.

<sup>21</sup> Ibrahim Amoo Ganiyu, *Financial Accounting: International Standards* (2011 Lulu.com) 29.

## Research Questions

The law of occupation under Article 43 of the Hague Regulations grants an occupying power a broad duty as to the administration of occupied territory under its effective control. In order to execute its duties, in particular with respect to preventing financial criminal activities, an occupying power requires taking proper and feasible measures so as to protect the inhabitants and property in an occupied area from a meaningful decline in orderly life. Furthermore, as a trustee for the people, an occupying power is duty bound to manage and spend funds that belong to the occupied territory for the benefit of the civilian population under their purview and take appropriate steps in order to prevent subject those funds to corruption activities.

Since it is the aim of Part One of the thesis to establish the maladministration of the CPA with regard to its duty to prevent financial criminal activities that generated illicit funds in occupied Iraq, the quintessential question that then should be asked is: What are the reasons that led to the failure of the CPA to comply with its duty to prevent the crime of kidnapping, corruption activities and looting of cultural property in occupied Iraq? In this regard, the thesis offers appropriate measures that should have been taken by the CPA to discharge its duty; the focus will therefore be on the functional aspect of the CPA.

The funds emanated from financial criminal activities above mentioned should not be kept in possession of wrongdoers, adhering to the fundamental principle that criminals should not benefit from their crimes. In order to make crime a non-profit activity, international conventions, as well as domestic laws provide for methods to do so. The important question that then should be posed is: What are the paradigms that could be pursued in order to deprive criminals of corruptly obtained funds, and recovery of those funds? Solution will be proposed to deal with the problem of corruptly acquired funds that were generated in Iraq territory and found in US territory. Solution will also be proposed to deal with the problem of the disappeared funds as a result of corruption activities during the time that the CPA was the occupying power in Iraq in order to assist the Iraqi State to recover those funds from abroad.

It should be noted that in the absence of the judicial decisions about the forfeiture of illegal funds derived from the crime of kidnapping and the looting of cultural property,<sup>22</sup> this thesis does not deal with the problem of those funds.

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<sup>22</sup> This thesis does not deal with the recovery of antiquities stolen from occupied Iraq. A considerable number of the antiquities stolen have been returned to Iraq. For example, according to United Nations Educational,

## Methodology

This thesis's methodology relies on doctrinal legal research, using a "black-letter law" approach. Vibhute and Aynalem define doctrinal legal research:

Doctrinal legal research is defined as research into legal doctrines through analysis of statutory provisions and cases by the application of power of reasoning. It gives emphasis on analysis of legal rules, principles or doctrines ... To put it in a different way, a doctrinal legal researcher indulges into analysis of "black-letter" of law.

Doctrinal legal research mandates the legal researcher to "locate" the required apt statutory provisions and judicial reflections thereon that have bearing on the legal doctrine, concept or rule under inquiry. Such legislative provisions and judicial decisions constitute the basic data for a doctrinal legal researcher.<sup>23</sup>

This thesis deals with wide-ranging topics in order to establish the failure of the CPA to meet the required standard demanded by the law of occupation vis-à-vis the duty of preventing financial criminal activities, and to provide mechanisms to deal with the problem of corruptly obtained funds. Relying on a black-letter approach has enabled the author to explore and analyse these areas in depth. It is well known that the black-letter approach, in spite of its strength, suffers from limitations of narrowing the scope of the thesis. However, this is essential so as to provide systematic analysis of statutory provisions and legal principles involved therein, or derived therefrom.

## Analytical Research

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Scientific and Cultural Organisation (hereinafter known as the 'UNESCO') in April 2008, Syria returned stolen antiquities to Iraq around 700 pieces of antiquities, including jewellery and gold coins that were stolen after the invasion of Iraq. Available at <<http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/successful-restitutions-in-the-world/>> accessed 9 April 2015. In addition, the UNESCO declared that 7000 artefacts were recovered: 2,000 in the US, 250 in Switzerland, 100 by Italian Carabinieri, 2,000 were stopped in Jordan, others were in Beirut and Switzerland whilst in transit to New York. United Nations Educational, Scientific and Cultural Organisation, 'The Fight against the illicit trafficking of cultural objects The 1970 Convention: Past and Future' (15 and 16 March 2011). Available at <<http://www.unesco.org/new/en/custom-search/?cx=000136296116563084670%3Ah14j45a1zaw&cof=FORID%3A9&ie=UTF-8&q=returns+stolen+antiquities+to+Iraq&hl=en&sa=ok>> accessed 9 April 2015.

Moreover, Iraq reached an initial agreement with the US "on the return of more than 10,000 artefacts stolen from Iraq after the 2003 US-led invasion." Iraq, US reach deal on stolen artefacts. Available at <<http://www.foxnews.com/world/2013/07/26/iraq-us-reach-deal-on-stolen-artefacts-official/>> accessed 4 April 2015.

<sup>23</sup> Khushal Vibhute and Filipos Aynalem, Legal Research Methods. Available at

<<http://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf>> accessed at 1 June 2014.

In Part One, the thesis uses analytical research and can therefore be categorised as doctrinal research. McConville and Chui commented that “The black-letter research aims to systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources.”<sup>24</sup>

Given the fact that the CPA exercised foreign State power in Iraqi land, there must be duties imposed on it in the administration of that land. Using the black-letter approach has enabled the author to analyse the duty of the CPA to prevent financial criminal activities in depth. It has also enabled the author to establish that there was a “military occupation” in Iraq, which is considered as a trigger for imposing obligations on the occupant. Further, it has also enabled the author to assess whether justifications that provided the occupation of Iraqi territory were legal, or illegal.

### **Judicial Decisions**

In Part One, this thesis analyses judicial decisions, and can therefore be categorised as doctrinal research. The value of judicial decisions is encapsulated by Hall:

...decisions of international and domestic courts and tribunals are often highly persuasive evidence for determining the content and scope of international norms derived from custom, treaties and the general principles. These judicial and arbitral decision, as with the writings of eminent publicists, may be used to shed light on the existence, scope and applicability of norms based in custom, treaty and the general principles.<sup>25</sup>

A decision written by a judge or publicist of high repute in international law generally carries more weight than decisions authored by lesser-known figures. Indeed, even dissenting, but thorough and well argued, opinion by a well regarded judge or publicist can frequently be highly persuasive.<sup>26</sup>

Judicial decisions in this thesis have been examined in order to ascertain the existence and scope of the duty of the CPA relating to the prevention of financial criminal activities. Judicial decisions have mainly been included when examining the obligation of the occupying force to establish an “occupying power” in an occupied area; and when answering the question as to what was expected from the CPA to satisfy its due diligence obligation in relation to preventing financial criminal activities. As will be explained in the

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<sup>24</sup> Mike McConville and Wing Hong Chui, ‘Introduction and Overview’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 1 at 4.

<sup>25</sup> Stephen Hall, ‘Researching International Law’ in Mike McConville and Wing Hong Chui (eds), (n 24) 181 at 182.

<sup>26</sup> *ibid* 197.

Chapter Two, the due diligence obligation is derived from Article 43 of the Hague Regulations, which requires the occupant to take all appropriate measures in his power to restore and ensure as far as possible public order and safety in the occupied area.<sup>27</sup> In other words, it requires the occupant to do the best it can. In addition, judicial decisions were examined in order to identify general principles by which the trustee is obligated.

### **The US legal system**

In Part Two, the topics covered are concerned with analysis of legislative measures and cases intended to deprive malefactors of the financial rewards from their corrupt activities and return of funds to the rightful owner. Therefore, this Part of the thesis can be categorised as doctrinal legal research.

Relying on doctrinal legal research has enabled the author to locate the appropriate legal system relating to the forfeiture of criminal wealth and analyse statutory provisions of that system in depth. In this regard, the US legal system, that is to say both criminal forfeiture law and civil action, has been chosen for examination as to its suitability for this purpose. The purpose and value of choosing the American legal system can be identified at this point. Evans comments on the role-played by the US to combat the financial element of crime, “The United States has led the world in proceeds of crime legislation and enforcement action. The array of legal instruments and powers is equalled in no other country.”<sup>28</sup>

The reason why this system was selected is that funds derived from corrupt activities that took place in Iraq were found in the US territory, and were then subjected to the process of criminal forfeiture in the US courts. Moreover, there are Iraqi funds that have disappeared during the CPA’s tenure. As we will assume below, those funds were corruptly obtained by some American citizens, and were located in US territory.

### **US Court Decisions**

The Chapter examining the criminal forfeiture of Iraqi funds generated in Iraq territory and found in the US territory includes cases law analysis. It can therefore be categorised as doctrinal research. Hsieh commented that:

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<sup>27</sup> Article 43 of the Hague Regulations (n 3), See Chapter Two for further details.

<sup>28</sup> John L. Evans, ‘International Money Laundering: Enforcement Challenges and Opportunities’ (1996) 3 (1) Southwestern Journal of Law and Trade in the Americas 197.



Legal research often begins with statutes or regulations, the primary law passed by the legislature or regulatory agency in the relevant jurisdiction. Cases, in turn, interpret those statutes and regulations. Cases may be the sole source of the law when the doctrine is strictly a common law doctrine. Even when law is based on a statute, cases interpreting the terms and intent of the statute are invaluable tools for legal writers.<sup>29</sup>

Using this approach can provide valuable understanding. That is, understanding of literal interpretations of legal rules, principles, or doctrines, but also understanding of how courts interpret statutory provisions. The use of cases in this Part has been incorporated in order to provide interpretations of criminal forfeiture statutes through which Iraqi funds corruptly obtained during and after the disbanding of the CPA were subjected to forfeiture action in the US courts. Furthermore, using cases permits us to determine, to an extent, the likely amount of forfeited funds stemming from corrupt activities that occurred in Iraq. Moreover, it permits us to determine the amounts of restitution emanating from corrupt activities that took place in Iraq.

## Literature review

So far, there has been no comprehensive academic analysis regarding the failure of the CPA in its duty to prevent financial criminal activities that generated illegal funds in occupied Iraq, or on how to deprive malefactors of those funds and recover them as a topic in its own right. The majority of publications deal with the failure of the CPA in its duty to prevent criminal activities, which were not funds-generating.

Kelly, who served in the Office of General Counsel in the CPA in Iraq from May-November 2003 and from March-July 2004, affirmed that after the termination of major combat operations, the security challenge that faced the occupying forces was unprecedented.<sup>30</sup> By way of comparison, Kelly observed that the entirety of the post-conflict deployments of the last 12 years involved States with relatively small populaces of generally no more than five million. In the occupations of Germany and Japan, insurgency campaigns and foreign terrorists did not exist. However, Iraq with a population of 25 million, witnessed during the CPA's tenure acts of sabotage and surprise attacks, carried out by previous government elements, in addition to suicide bombings and terrorist's outrages conducted by foreign terror

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<sup>29</sup>Alice Hsieh, *Using Cases in Legal Analysis*, The writing Centre, Georgetown University law Centre. Available at <<http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Using-Cases-in-Legal-Analysis-Revised.pdf>>accessed 21 August 2014.

<sup>30</sup> Michael J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law' (2003) 6 *Yearbook of International Humanitarian Law* 138.

groups.<sup>31</sup> Although Kelly's work focused on public security and counter insurgency, it does not take account of criminal activities that generated funds, nor did he examine measures that should be adopted to prevent those activities.

In the same way, Alexandra Perina, Attorney Adviser in the Office of the Legal Adviser, US Department of State, agrees that insurgency operations appeared shortly after the cessation of combat operations, with assaults directed against both Coalition Forces and against Iraqis.<sup>32</sup> Perina pointed out those insurgent groups were various, including foreign fighters, Shia militants,<sup>33</sup> Al Qaeda<sup>34</sup> in Iraq, and Baath Party<sup>35</sup> members. Not any of the insurgents were represented or was faithful to the former Iraqi regime with the exception of the Baathists.

Perina lists the sort of activities that insurgent groups used them such as suicide bombs, improvised explosive devices, car bombs, hostage taking, and indiscriminate rocket attacks.<sup>36</sup> Perina made clear that Coalition Forces had the right of self-defence against assaults by hostile forces. They also, however, carried out offensive military operations against counter-

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<sup>31</sup> *ibid.*

<sup>32</sup> Alexandra Perina, 'Legal Bases for Coalition Combat Operations in Iraq, May 2003–Present' in Raul A. "Pete" Pedrozo (eds), *The War in Iraq: A Legal Analysis*, vol 86 (U.S. Naval War College International Law Studies 2010) 81 at 82.

<sup>33</sup> Because of the US forces and Iraqi forces failed to provide protection to Shi'ite Arabs, they turned to militias for security. They joined the long-established Badr Organisation, and the fast growing Mahdi Army. The Mahdi Army, led by Muqtada Al-Sadr, emerged following the invasion of Iraq. Al-Sadr is fervently Islamic, strongly nationalistic, and fiercely opposed to the presence of the US forces in Iraq. Bruce R. Pirnie and Edward O'Connell, *Counterinsurgency in Iraq (2003-2006)*, vol 2 (RAND Corporation 2008) 31.

<sup>34</sup> Al-Qaeda is a global militant Islamist organisation established by Osama bin Laden in the late 1980s. It started as a logistical network in order to support Muslims fighting against the Soviet Union during the Afghan war. Members were recruited throughout the Islamic world. For details about Al-Qaeda See, Heather M. Campbell (ed), *The Britannica Guide to Political and Social Movements That Changed the Modern World* (1<sup>st</sup> edn, Rosen Education Service 2009) 321.

<sup>35</sup> Baath Party was the leading political party in Iraq from 1968 to the end of Saddam Hussein's regime in 2003. See Spencer C. Tucker (ed), *The Encyclopedia of Middle East Wars [5 volumes]: The United States in the Persian Gulf, Afghanistan, and Iraq Conflicts* (ABC-CLIO, 1<sup>st</sup> edn, 2010) 179. The CPA stripped the Iraqi State of Ba'athist ideology. Properly speaking, the CPA led the process of disestablishment of the Ba'ath Party on the grounds that its presence posed a threat to the Iraqi people or to the security of the occupying forces. The Ba'ath Party was formally disestablished by "eliminating the Party's structures and removing its leadership from positions of authority and responsibility in Iraqi society." CPA Order Number 1 of 16 May 2003, De-Ba'athification of Iraqi Society.

<sup>36</sup> Alexandra Perina, 'Legal Bases for Coalition Combat Operations in Iraq, May 2003–Present' (n 32) 82. Major Breven C. Parsons, Judge Advocate, United States Marine Corps, attributed in his Article "Moving the Law of Occupation into the Twenty-First Century" the emergence of the insurgency campaigns to the systematic and fundamental mistakes in the CPA's policy. Breven C. Parsons, 'Moving the Law of Occupation into the Twenty-First Century' (2009) 57 *Naval Law Review* 38-39. Parsons considers that the CPA Order Number 1, concerning 'De-Ba'athification of Iraqi Society' and the CPA Order Number 2, regarding 'Dissolution of Entities' including the Iraqi army, as major factors contributing to the growing of insurgency. In the view of Parsons, these Orders were possibly difficult to reconcile with the law of occupation. *ibid* 38.

insurgency campaigns. During the CPA period, Perina attributed the legal basis for these operations to two sources. Firstly, the law of occupation grants an occupying power the rights and imposes obligations on it to maintain public order and safety in the occupied territory. Secondly, according to Paragraph (13) of the United Nations Security Council Resolution 1511, Coalition Forces were authorised “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>37</sup> While Perina’s analysis recognised that the CPA was obligated to take positive measures to stop criminal activities in occupied territory under its control, it does not pay attention to those activities.

Tucker observes that there were other factors, in addition to the factors above-mentioned, which led to the growth of the insurgency campaigns. Tucker noted that looting was massive, humanitarian assistance was insufficient, public services were lost, and the planning for occupation was inadequate. All factors fuelled the opposition and the insurgency from 2003 until 2006.<sup>38</sup>

Watkin, who described the occupation of Iraq as a “violent occupation” sets out the normative frameworks governing the use of force with respect to military operations governed by International Humanitarian Law on the conduct of hostilities, to maintain public order in an occupied territory.<sup>39</sup> Watkin considered that the use of deadly force is recognised under International Humanitarian Law and is an inherent part of military operations. In addition, he noted that military operations are directed at combatants or civilians directly taking part in hostilities. Therefore, they are not targeted civilians, who are suspected of criminal activities or threatening public order.<sup>40</sup> Nevertheless, Watkin asserted that occupied Iraq did not only witness the insurgency campaigns, but also ordinary crime. He explained the reasons that led to the occurrence of crime, which became the responsibility of the CPA to take steps to prevent it.<sup>41</sup> Watkin also examined the normative frameworks addressing the use of force in relation to police operations, governed by international human rights law, to prevent criminal activities in an occupied territory.<sup>42</sup> However, Watkin’s work does not make

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<sup>37</sup> United Nations Security Council Resolution 1511, (n 1).

<sup>38</sup> Spencer C. Tucker (ed), *Encyclopedia of Insurgency and Counterinsurgency: A New Era of Modern Warfare* (ABC-CLIO 2013) 268.

<sup>39</sup> Kenneth Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ (2012) 94 (885) *International Review of the Red Cross* 297-298.

<sup>40</sup> *ibid* 297.

<sup>41</sup> *ibid* 285.

<sup>42</sup> *ibid* 296.

an attempt to elaborate on the criminal activities, nor does he determine the proceeds generated from those criminal activities.

Roberts confirms that occupying forces faced a wide-ranging violent opposition from the beginning, assuming primarily the forms of attacks against the occupying forces, and against the personnel of the United Nations and International Committee of the Red Cross, as well as against Iraqi people who cooperated with the CPA or the Iraqi Governing Council (hereinafter as the 'IGC').<sup>43</sup> Roberts makes the point that the status of occupation remains, even if opposition to occupying forces reaches the level of a violent conflict, particularly when that opposition has not had absolute control of a part of the State's territory.<sup>44</sup>

The CPA is generally criticised in legal studies for failure to comply with its duty to stop insurgency operations. Glazier observed that opposing the occupying forces became a common aim, which cut across most sectarian lines in Iraq. Some credit the failure of the CPA to maintain order as a key contributor to the increase against the occupation by the opposition, fueling support for the insurgency.<sup>45</sup> Major Breven C. Parsons concurred that the occupants failed to act in accordance with the obligations enshrined in the law of occupation. Parsons claimed that occupying forces did not take appropriate steps in order to safeguard the local population in occupied territory as required under Article 43 of the Hague Regulations and Articles 27 and 64 of the Fourth Geneva Convention of 1949.<sup>46</sup>

Academic literature has set out the reasons for the failure of the occupying army to stop insurgents' activities. The first reason is that a fully comprehensive plan for post-war Iraq was not produced by the United States military and civilian leadership. The lack of planning is attributed to three reasons. Firstly, planning risked political complications.<sup>47</sup> Secondly, a number of civilian defence officials thought that a lack of planning would mean that the

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<sup>43</sup> Adam Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 (1) *International and Comparative Law Quarterly* 34.

<sup>44</sup> *ibid.*

<sup>45</sup> David Glazier, 'Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq' (2005) 58 (1) *Rutgers Law Review* 187.

<sup>46</sup> Breven C. Parsons, 'Moving the Law of Occupation into the Twenty-First Century' (n 36) 37.

<sup>47</sup> As it is well known that Kuwait and Saudi Arabia were key allies to Coalition Forces to invade Iraq. Empowering Iraq's Shia populace through democratic elections might not supported by those countries. In the United States, opponents of the Iraq war might point to contingency plans for extra forces deployments, high cost on reconstruction process, and other potential expenses, as evidence that the invasion could be so costly or could even cause disaster. Daniel Byman, 'An Autopsy of the Iraq Debacle: Policy Failure or Bridge Too Far' (2008) 17 (4) *Security Studies* 621.

“better-organised exile community would have an advantage over potential rivals.”<sup>48</sup> Thirdly, United States administration officials were in disagreement about what to do with post-war Iraq.<sup>49</sup> The second reason is that occupying forces were inadequate to carry out any realistic plan that the senior leaders in theatre may have contrived once the need was finally recognised. While the invading armies were sufficient to defeat the Iraqi army, it was insufficient for post-war occupation, (as General US Army Shineseki informed the President in private meetings and Senate Armed Services Committee in public hearings the month before the war). Melton concludes that the occupying army in Iraq was a thin line of troops.<sup>50</sup>

The third reason is that the United States army units that occupied Iraqi territory in 2003 were lacking in training to fight insurgent activities. Although most of the army had trained for combat in conventional wars, using conventional weapons, only a small number of military personnel had actual experience in performing counterinsurgency operations.<sup>51</sup> They add that given this lack of experience in combating insurgency activities, it should not be unexpected that United States Army counterinsurgency doctrine and training had become weak in the decade following the end of the Cold War. When the terrorist attacks in September 2001 in the United States took place, the Army’s counterinsurgency doctrine had not been updated since 1990.<sup>52</sup>

The committing of financial criminal activities that generated funds in Iraq was first scrutinised by Williams. The real value of Williams’s work is its examination in detail of major financial criminal activities, including the kidnapping of both Iraqis and foreigners, the theft, diversion, and smuggling of oil, car theft, extortion, and the theft and smuggling of antiquities. He also looked at corruption activities.<sup>53</sup> Williams’s work is very useful as a source of information on how armed groups used criminal activities to fund their campaigns of political violence. However, Williams’s analysis of criminal activities was not only limited to the CPA’s tenure, but also extended beyond the termination of the CPA and even back before the occupation of Iraq. However, there is no examination of financial criminal activities that occurred in the period of the CPA as a separate topic *per se*. Furthermore,

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<sup>48</sup> *ibid.*

<sup>49</sup> *ibid* 620-621.

<sup>50</sup> *ibid.*

<sup>51</sup> Donald P. Wright and Timothy R. Reese, *On Point II: Transition to the New Campaign: The United States Army in Operation Iraqi Freedom, May 2003-January 2005* (Military Bookshop 2010) 113.

<sup>52</sup> *ibid.*

<sup>53</sup> Phil Williams, *Criminals, Militias, and Insurgents: Organised Crime in Iraq* (n 14).

Williams offers no analysis of corrupt activities that occurred during the period of the CPA. Moreover, Williams does not pay attention to the duty of the CPA under Article 43 of the Hague Regulations to take appropriate steps to prevent them.

From the above, it can clearly be observed that the failure of the CPA in its duty to take appropriate steps to prevent financial criminal activities that produce illicit funds in occupied Iraq, as well as what are methods of depriving criminals of those funds and recovering them for the Iraqi State, remained unexplored by the literature. This thesis will address this gap by establishing the failure of the CPA to prevent those activities, and suggest mechanisms to deal with the problem of corruptly obtained funds and their recovery.

In this thesis, it will be argued that the CPA did not take appropriate measures in order to prevent financial criminal activities. The lack of adequate means relating to law enforcement made the CPA failed to prevent the crime of kidnapping and the looting of cultural property. In addition, the lack of sufficient international accounting systems and the lack of transparency made the CPA failed to prevent corruption activities.<sup>54</sup>The failure to adopt appropriate measures contributed to the propensity in financial criminal activities, which generated huge amounts of illicit money in occupied Iraq.

### **Scope of the thesis**

In Chapter One, it will be argued that upon gaining control, an occupying force is compelled by virtue of Article 43 of the Hague Regulations to set up an administrative structure over an occupied area in order to carry out the powers and obligations allotted to it by the law of occupation. For that reason, the occupants in Iraq created the CPA to exercise the functions of government temporarily. In his “Freedom Message to the Iraqi People” issued on 16 April 2003, the US General Tommy R. Franks, Commander of the Coalition Forces announced the establishment of the CPA. In his words:

Our stay in Iraq will be temporary, no longer than it takes to eliminate the threat posed by Saddam Hussein’s weapons of mass destruction,<sup>55</sup>and to establish stability and help the Iraqis form a functioning government that respects the rule of law and reflects the will, interests, and rights of the people of Iraq. Meanwhile, it is essential that Iraq have an authority to protect lives and property, and expedite the delivery of humanitarian assistance to those who need it. Therefore, I am creating the Coalition

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<sup>54</sup> For more details about measures that the CPA should be taken to prevent financial criminal activities, See Chapter Three.

<sup>55</sup> Chapter One will show that Iraq has not possessed weapons of mass destruction or any programmers to produce them.

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 the weapons of mass destruction.<sup>56</sup>

As an occupying power, the CPA was obligated to maintain public order and safety, including in particular, the prevention of financial criminal activities towards the civilian population in occupied Iraq (the crime of kidnapping), towards property (the looting of cultural property), and the prevention of the illegal appropriation of Iraqi funds (corruption activities).

This thesis is concerned with the duty of the CPA with respect to preventing financial criminal activities and with examination of how those activities can be prevented in an occupied territory. Its central aim is not to consider criminal activities that do not generate funds, although there is a duty, according to the law of occupation, on the CPA to prevent such activities. The reason for delineating this scope is that one of the objectives of this thesis is to focus on stripping criminals of the proceeds of their criminal activities, which have been corruptly obtained in Iraq territory and recovering the funds that disappeared during the period of the CPA.

In order to establish a sovereign Iraqi Government, the United Nations Security Council Resolution 1546 dissolved the CPA on the 30<sup>th</sup> of June 2004. According to Paragraph (2) of Resolution, “...by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.”<sup>57</sup> As a result, the thesis will not discuss the responsibility of the occupants vis-à-vis preventing criminal activities either prior to the formation of the CPA, (namely 16 April 2003) nor after the termination of the CPA, (namely 30 June 2004).

As will be demonstrated in Chapter Four, the Iraqi funds obtained as a result of corrupt activities during and after the dissolution of the CPA were subjected to criminal forfeiture in the US courts. As will also be seen in Chapter One, the CPA was a US Government enterprise,<sup>58</sup> staffed primarily with American citizens.<sup>59</sup> Hence, it can be assumed that the

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<sup>56</sup> Message cited in *United States ex rel DRC, Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617 (E.D.Va., 2005). This case discussed the creation of the CPA.

<sup>57</sup> United Nations Security Council Resolution 1546 (n 1).

<sup>58</sup> In *United States ex rel DRC, Inc. v. Custer Battles LLC*, the US Government announced that the CPA was “an instrumentality of the US for the purposes of the False Claims Act.” *United States ex rel DRC, Inc. v. Custer Battles LLC*, (n 56). More evidences of the CPA was a US Government enterprise is shown in Chapter One.

<sup>59</sup> The number of US personnel and personnel from other Coalition States will be shown in Chapter One.

\$8.8 billion of Iraqi funds that disappeared during the CPA's tenure was corruptly obtained largely by some American citizens and there is a strong probability that funds are either located in US territory or held by US citizens. The thesis is thus only focused on the territorial jurisdiction of the US to deal with the problem of funds received because of corruption activities committed in Iraq.

### **The concept of “maladministration” in the thesis**

The concept of “maladministration”<sup>60</sup> has no explanation in Treaties. It has also not been defined in the US Administrative Procedure Act (5 U.S.C §551). Looking to the definition of maladministration, however, we observe that this concept has been coined by the European Ombudsman. In his first Annual Report in 1997, the Ombudsman, at the request of the European Parliament, defined maladministration as occurring “when a public body fails to act in accordance with a rule or principle which is binding upon it.”<sup>61</sup> The Report expanded on this, giving the following non-exhaustive list of possible forms of maladministration including: irregularities, omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and lack or refusal of information.<sup>62</sup>

It is clear that the definition of maladministration above-mentioned does not limit maladministration to cases where the rule or principle is *legally* binding. Quite the contrary, the principles of good administration extend beyond the law, requiring the European Union institutions to respect their duties set out in the law, and to be service-minded and to make sure that members of the public are correctly treated and enjoy their rights completely. Therefore, although illegality inevitably implies maladministration, maladministration does not automatically require illegality.<sup>63</sup>

For the purposes of this study, however, “maladministration” means the failure to comply with a legal obligation enshrined in the law. It follows that maladministration herein refers to

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<sup>60</sup> “Mal” is a Latin word used for “evil” or “wrong.” Sir Edmund Compton, the first Parliamentary Commissioner of the UK pointed out, “... Maladministration is a dirty word with unfortunate association, conjuring up actions such as taking bribe or bias, or extreme example of bias or perversity.” Preeti Dilip Pohekar, *A Study of Ombudsman System in India* (Gyan Publishing House 2010) 45.

<sup>61</sup> The European Ombudsman, Annual Report for 1997. The Report is available at <http://www.ombudsman.europa.eu/activities/annualreports.faces> accessed 8 August 2014.

<sup>62</sup> *ibid.*

<sup>63</sup> P. Nikiforos Diamandouros, ‘The European Ombudsman and Good Administration Post-Lisbon’ in Diamond Ashiagbor (ed), *et al, The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 210 at 213.



breach by the CPA of its international obligation (established pursuant to the laws of occupation) in relation to preventing criminal activities in the occupied area. With respect to the form of maladministration, there is omission, that is to say “an obligation to act which has not been fulfilled.”<sup>64</sup>

## The structure of the thesis

This work is divided into two Parts, in addition to the introduction and conclusion. In Part One, the problem of the thesis will be established and will be analysed, that is to say the maladministration of the CPA in its duty to prevent financial criminal activities and the amount of funds derived from those activities. To achieve this, the Part One includes three Chapters.

The **First Chapter** establishes four points:

1. The state of the “military occupation” of Iraq under the law of occupation;
2. The duty of the occupying forces to create the CPA in occupied Iraq territory, in order to discharge the functions of government;
3. The CPA was an occupying power with full responsibilities for running Iraq; and
4. The consequences of the dissolution of the CPA.

This Chapter does not discuss the core problem of the research. The key goal of this Chapter is to build a basis for demonstrating the problem. The Chapter also looks at the justifications for the occupation of Iraqi territory.

The **Second Chapter** focuses on the duty of the CPA to prevent criminal activities in occupied Iraq under Article 43 of the Hague Regulations. The purpose of this is to provide a legal basis for the duty of the CPA to prevent criminal activities in occupied Iraq. The Chapter is divided into two parts. The first part provides an analysis of the duty of the CPA to prevent criminal activities that require the exercise of law enforcement operations. The second part looks at the duty of the CPA to act as a trustee in the management of Iraqi funds and its duty to prevent their illegal use.

The **Third Chapter** sets out certain types of financial criminal activities, which took place during the CPA’s tenure, namely the crime of kidnapping, corruption activities, and the

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<sup>64</sup> See Franck Latty, ‘Actions and Omissions’ in James Crawford (ed), *et al, The Law of International Responsibility* (Oxford University Press 2010) 355 at 357.

looting of cultural property. The purpose of this Chapter is to show that the CPA did not take proper and feasible steps to prevent such criminal activities. It seeks to determine the extent of illicit funds that were generated from those activities in occupied Iraq.

**In Part Two**, the solutions to the problem of corruptly obtained funds that generated in Iraq and found in the US territory, as well as recovering Iraqi funds that corruptly acquired and disappeared during the CPA's tenure will be found. In doing so, this Part contains two Chapters:

The **Fourth Chapter** deals with the criminal forfeiture law in the US designed to deprive individuals of the proceeds of their criminal activities, adhering to the fundamental principle that criminals should not benefit from their crimes. The Chapter is divided into three parts. The first part determines levels of criminal forfeiture of corruptly acquired funds in Iraq and found in the US territory. The second part looks at the criminal jurisdiction of the US courts over corrupt activities perpetrated in Iraq. The third part examines the process of criminal forfeiture of funds generated from corrupt activities, which took place in Iraq.

The **Fifth Chapter** looks at mechanisms designated in the United Nations Convention against Corruption of 2003 (hereinafter known as the 'UNCAC') to recover funds corruptly obtained abroad, by presenting a civil action mechanism as a more effective mechanism for recovering Iraqi funds, which had been corruptly acquired and had been disappeared during the CPA's tenure. The Chapter focuses on the civil action in the US system.

The conclusion to the thesis is a comprehensive analysis of the main findings of all the Chapters and sets forth the recommendations that can be made from the research findings. In this regard, this thesis has found that the CPA was an occupying power in occupied Iraq, and it had a legal duty by Article 43 of the Hague Regulations to prevent financial criminal activities in occupied Iraq. However, while the CPA had a wide power by virtue of the law of occupation, it failed to execute its duty, because it did not take proper and feasible measures in order to prevent those activities. Consequently, substantial sums of illegal funds were generated by those activities in occupied Iraq. Some of the corruptly obtained funds have been found in the US territory. In this respect, the US criminal forfeiture mechanism has been used to forfeit funds derived from corruption activities. Furthermore, the US civil action mechanism has proposed in order to recover the Iraqi corruptly acquired funds that have disappeared during the CPA's tenure.

## **Part One: The Coalition Provisional Authority: legitimacy, duty, and maladministration (Problem)**

Part One examines the maladministration of the CPA in its duty to prevent financial criminal activities in occupied Iraq. The rise of financial criminal activities, as a result of the failure to take proper and feasible measures to prevent those activities, are a direct result of the maladministration of the CPA.

The legal framework that regulates the CPA's administration of the occupied Iraq is the law of occupation. The law of occupation is a body of rules specifically designed for regulating the way in which an occupying power governs occupied territory.<sup>1</sup> The main sources of the law of occupation are the 1907 Hague Regulations,<sup>2</sup> and the 1949 Fourth Geneva Conventions.<sup>3</sup> However, the law of occupation is not confined to a treaty law. A variety of other sources including, customary international law, the domestic law of the occupied territory and the occupying country and United Nations Resolutions may also apply during an occupation.<sup>4</sup>

Occupation of a territory takes place when the territory of one State is actually placed under the effective authority of the hostile army of another State.<sup>5</sup> Because upon occupation, “the authority of the legitimate power having *in fact* passed into the hands of the occupant”<sup>6</sup> the law of occupation imposes a duty on the occupant to establish a system of administration in the occupied area in order to discharge the functions of government, including preventing financial criminal activities.<sup>7</sup> It is of no importance whether the government over an occupied area is a military government, or a civil one, for in either case, it is a government imposed by the necessities of war, and the laws of war alone determine the legality of its acts.<sup>8</sup> What is

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<sup>1</sup> See Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, Oxford University Press 2012), Yoram Dinstein, *The International Law of Belligerent Occupation* (1<sup>st</sup> edn, Cambridge University Press 2009) and Arai-Takahashi, Y, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Brill 2009).

<sup>2</sup> Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention of 1907.

<sup>3</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>4</sup> For more details, See Chapter Two.

<sup>5</sup> Article 42 of Hague Regulations (n 2). This issue will be explained in greater depth in Chapter One.

<sup>6</sup> Article 43 of Hague Regulations (n 2).

<sup>7</sup> Article 43 of Hague Regulations (n 2). This issue will be explained in details in Chapter Two.

<sup>8</sup> UK Ministry of Defence, *The joint service manual of the law of armed conflict (JSP 383)* (Joint Service Publication 2004) 282.

then important is to establish a system of direct administration for carrying out the powers and duties allocated to it by the law of occupation. Therefore, the CPA was created to exercise an occupation authority. In this respect, the law of occupation imposes a duty on the CPA to take steps in order to prevent financial criminal activities in occupied Iraq.<sup>9</sup> As will be explained in Chapter Two, the law of occupation conceives the occupant to be that of a trustee to the occupied population, and thereby, the occupant has a duty to administer funds of the occupied territory in a honest way and prevent subjecting them to illegal activities.<sup>10</sup>

In Chapter One, the author will look at the legal status of the CPA according to the law of occupation in order to consider it as an occupying power. In Chapter Two, the author will analyse the duty of the CPA according to Article 43 of the Hague Regulations to prevent financial criminal activities. In Chapter Three, the author will provide certain types of financial criminal activities, namely (the crime of kidnapping, corruption activities and the looting of cultural property) in order to demonstrate how the CPA failed to prevent those activities, which generated substantial amounts of illegal funds.

## **Chapter One: The Coalition Provisional Authority: legitimacy and governance**

### **1.1. Introduction**

The objective of this Chapter is to provide a basis for the thesis by proving that the CPA was an occupying power in Iraq with full responsibilities according to the law of occupation. Occupation of Iraq was the result of war. Gerson pointed out the motivations for the war, “Indeed, territorial gain, either as a means to increased security or greater protection of nationals, or simply for imperial expansion, will often prove the chief lure to war.”<sup>11</sup> The Chapter begins with an examination of the justifications for the occupation of Iraq. The Chapter concludes that justifications were unconvincing and the occupation was therefore unlawful. Whether the illegal occupation of Iraq would or would not release the CPA from its duties are established.

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<sup>9</sup> Article 43 of Hague Regulations (n 2). This duty will be explained in detail in Chapter Two.

<sup>10</sup> *ibid.* This role will be explained in Chapter Two.

<sup>11</sup> Allan Gerson, *Israel, The West Bank and International law* (Routledge 1978) 2.

Once effective control is established over enemy territory by a foreign army, occupation begins. Dinstein pointed out that the effective control test is a “*conditio sine non* of belligerent occupation.”<sup>12</sup> The test of effective control is then examined in order to demonstrate that Iraq was under a military occupation, and thereby, would refute the political prospective that was presented by Coalition Forces to be a “liberator” rather than an “occupier” in Iraq. The establishment of the legal status of a number of States working with the occupying forces is considered as well. The test of effective control, along with the functional approach is proposed to determine which of those States can be also classified as occupying forces.

Within the Chapter, the author will then move on to consider the duty on the occupant to establish the CPA. The establishment of the CPA is analysed in the Chapter. It shows that the CPA was set up specifically to exercise occupation authority enshrined in the law of occupation. This is of vital importance, as the following Chapter will especially consider the duty of the CPA to prevent financial criminal activities. The characteristics of the CPA are also considered. The way, through which the CPA was dissolved, and the consequences of the dissolution, is mapped out. Whether the military occupation of Iraq was terminated with the dissolution of the CPA is also considered.

## 1.2 Iraq: The cradle of civilisation

Whilst Iraq known as the cradle of civilisation,<sup>13</sup> it is also “one of the most invaded and violated territories in the history of the world...”<sup>14</sup> The land presently known as Iraq was ancient Mesopotamia, the land between the rivers, the Tigris and the Euphrates. Indeed, Kramer, who is one of the world’s leading Assyriologists and a world renowned expert in Sumerian history and Sumerian language, perceives that it is the land where we observe:

The first schools, the first case of juvenile delinquency, the first “war of nerves,” the first bicameral congress, the first historian, the first case of tax reduction, the first legal precedent, the first pharmacopoeia, the first moral ideals, the first animal fables, the first literary debates, the first love song, the first library catalogue, the first “sick” society, the first long-distance champion, the first sex symbolism and labor’s first victory.<sup>15</sup>

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<sup>12</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) para 98.

<sup>13</sup> Tamara L. Britton, *Iraq* (ABDO Publishing Co 2000) 8.

<sup>14</sup> Ali A. Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace* (Yale University Press 2008) 12.

<sup>15</sup> Samuel Noah Kramer, *History Begins at Sumer: Thirty-Nine Firsts in Recorded History* (3<sup>rd</sup> edn, University of Pennsylvania Press 1988).

Nevertheless, Iraq is nowadays no longer that land. Iraq suffers from a great disparity between the State and society.<sup>16</sup> It also suffers from transitional violence (arrangements for criminal activity, which were dominated by the State have broken down); from a culture of anarchy; from the large tidal wave of violence linked with the ready availability of weapons; and from high levels of corruption.<sup>17</sup> Support for the prevalence of criminal activities will be discussed in greater detail in Chapter Three. Therefore, Iraq also qualifies to be categorised as a fragile State. Relying on the Fund for Peace's 2014 Fragile States Index (FSI), Iraq is, at present, ranked thirteen, while it was second in the 2007 survey.<sup>18</sup>

As is well known, the history of Iraq is one of dominating rulers. Iraq was governed by Sumerians, Babylonians, Chaldeans, as well as Persian and Arab rulers, before it fell under the rule of the Ottoman Empire in the 17<sup>th</sup> Century.<sup>19</sup> Soon after the defeat of the Ottoman Empire in the First World War, the League of Nations granted Great Britain a mandate over Iraq, and in 1932, it became a member of the League of Nations, whereby Iraq was formally recognised as an independent State and the Kingdom of Iraq was founded.

The period following 1932 saw a succession of *coup d'état*, invasions and occupations. The pro-British monarchy was overthrown by military *coup d'état* in 1958. The new regime was followed by two other *coups d'états* led by the Baath Party in 1963, and again in 1968. In 1979, Saddam Hussein became President of the Republic of Iraq. For many reasons, Hussein's regime became undesirable to the international community for his dictatorial leadership, eight years of war with neighbouring Iran in the 1980's, and the invasion and occupation of Kuwait in 1990 led to the First Gulf War, authorised by the United Nations Security Council Resolution 678.<sup>20</sup> As will be discussed in greater depth below, from April 2003 to 28 June 2004, Iraq was governed by the CPA as an occupying power.

### 1.3 The legality of occupation of Iraq

Before establishing the military occupation of Iraq and the responsibility of the CPA for the running of Iraq, it is important to examine justifications for the entry into Iraqi territory, and

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<sup>16</sup> Phil Williams, 'Illicit Markets, Weak States and Violence: Iraq and Mexico' (2009) 52 (3) *Crime, Law and Social Change* 326.

<sup>17</sup> *ibid* 323.

<sup>18</sup> All ranks of Iraq are available at The Fund for Peace. Available at < <http://global.fundforpeace.org/>> accessed 25 October 2014.

<sup>19</sup> See for full history of Iraq, Helen Chapin Metz, *Iraq A Country Study* (1<sup>st</sup> edn, Kessinger 2004).

<sup>20</sup> United Nations Security Council Resolution 678, 2963rd meeting, UN Doc .S/RES/678 (1990), 29 November 1990.

thereby classifying whether the occupant was lawful or not. This examination will help to establish whether there is a connection between the status of the occupant and the duties of the CPA. Three justifications were advanced by the Coalition States for entry into Iraqi territory: self-defence, authorisation under United Nations Security Council Resolutions, and humanitarian intervention.

### **A. Self-Defence**

Under Article 2 (4) of the Charter of the United Nations, the threat or use of force is prohibited. It proclaims, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”<sup>21</sup>This Article, as affirmed by the ICJ in the *Case Concerning Armed Activities on the Territory of the Congo*, is a cornerstone of the Charter of the United Nations.<sup>22</sup>In the words of Greenwood, “Article 2(4)...introduces into international law the most far-reaching limitation ever adopted on the use of force by States against one another.”<sup>23</sup>

As an exception to the prohibition of the threat or use of force in international relations is the right of self-defence. This right is enshrined in the Article 51 of the Charter of the United Nations, which proclaims, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>24</sup>

In his State of the Union Address of 29 January 2002, the former president of the US, George W. Bush, declared his plan to fight the war against terrorism. He identified Iraq<sup>25</sup> as comprising of an “axis of evil” because he believed that Iraq posed a serious immediate threat to the security of the US and the international community on the whole.<sup>26</sup> President Bush identified Iraq as being in the category of States “sympathetic to terrorism” and able to

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<sup>21</sup> Article 2 (4) of the Charter of the United Nations 1945.

<sup>22</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, (19 December 2005), I.C.J. Report.para 148.

<sup>23</sup> Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (2003) 4 San Diego International Law Journal 10.

<sup>24</sup> Article 51 of the Charter of the United Nations.

<sup>25</sup> He also identified amongst others, North Korea and Iran. George W. Bush, State of the Union Address, 29 January 2002. Available at <<http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>> accessed 27-10-2013.

<sup>26</sup> *ibid.*

provide Weapons of Mass Destruction (hereinafter known as the ‘WMD’) to terrorist groups with which the US and the “international community” generally were at “war.”<sup>27</sup> Based on this belief, the US contended that it had a right to use force pre-emptively against Iraq. The doctrine of pre-emptive self-defence is formulated in the United States National Security Strategy (hereinafter as the ‘NSS’) of 2002,<sup>28</sup> in response to the belief that Iraq, and others posed a threat to the US. Within the NSS itself, it made clear that the US was entitled to use force pre-emptively.<sup>29</sup> This strategy is exercised as the right of self-defence, often referred to as the “Bush Doctrine.”<sup>30</sup> The US position was thus stated:

While the US will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country...<sup>31</sup>

The NSS went on:

The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security...even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.<sup>32</sup>

The doctrine of pre-emptive self-defence presented in the NSS is not novel. Rather, it is adopted the international customary law of self-defence. According to the NSS:

For centuries, international law recognised that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger. Legal scholars and international jurists often conditioned the legitimacy of pre-emption on the existence of an imminent threat—most often visible mobilisation of armies, navies, and air forces preparing to attack.<sup>33</sup>

It has frequently been argued that an imminent threat is included in the concept of an armed attack enshrined in the Article 51 of the Charter of the United Nations and a State has right of pre-emptive self-defence against an imminent armed attack. As Schachter observed:

On one reading this means that self-defence is limited to cases of armed attack. An alternative reading holds that since the article is silent as to the right of self-defence under

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<sup>27</sup> *ibid.*

<sup>28</sup> The National Security Strategy of the United States of America (September 2002). Available at < <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> > accessed 11 October 2012.

<sup>29</sup> *ibid.*

<sup>30</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (5<sup>th</sup> edn, Cambridge University Press 2011) para 515.

<sup>31</sup> The National Security Strategy of the United States of America (n 28).

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*



customary law (which goes beyond cases of armed attack), it should not be construed by implication to eliminate that right...It is therefore not implausible to interpret article 51 as leaving unimpaired the right of self-defence as it existed prior to the Charter.<sup>34</sup>

This argument is based on Article 51, which speaks of an “inherent” right of self-defence, meaning that it preserves the customary international law of self-defence that pre-existed the Charter.<sup>35</sup> The principal precedent relied upon is the *Caroline* case, in which US Secretary of State Daniel Webster stated that self-defence is confined to “cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>36</sup> The developments in weaponry have caused Judge Rosalyn Higgins to observe:

...in a nuclear age, common sense cannot require one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself. And, even in the face of conventional warfare, this would also seem the only realistic interpretation of the contemporary right of self-defence. It is the potentially devastating consequences of prohibiting self-defence unless an armed attack has already occurred that leads one to prefer this interpretation-although it has to be said that, as a matter of simple construction of the words alone, another conclusion might be reached.<sup>37</sup>

On the basis of this approach, Yoo argued that the US was allowed to resort to use of force against Iraq in pre-emptive self-defence because of the imminent threat posed by Iraq.<sup>38</sup> He said:

Iraq could be said, unfortunately, to represent the coming challenges to international peace and stability as a rogue state that has WMD and supports terrorism. In this type of security environment, the United States and its allies may well have to rely exclusively upon their right to anticipatory self-defence in order to use force against such nations.<sup>39</sup>

Nevertheless, it is correct to say that the term “if an armed attack occurs” as stated in Article 51 of the Charter of the United Nations is a prerequisite for the exercise of self-defence. As Henkin opines, “The fair reading of Article 51 is persuasive,” he writes, “...that the Charter

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<sup>34</sup> Oscar Schachter, ‘The Right of States to Use Armed Force’ (1984) 82 (5) Michigan Law Review 1633.

<sup>35</sup> John C. Yoo, ‘International Law and the War in Iraq’ (2003) 97 (3) American Journal of International Law 571.

<sup>36</sup> *Caroline Case* (1841) in R. Y. Jennings, ‘The Caroline and McLeod Cases’ (1938) 32 (1) American Journal of International Law 89.

<sup>37</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1994) 242.

<sup>38</sup> John C. Yoo, ‘International Law and the War in Iraq’ (n 35)575.

<sup>39</sup> *ibid* 574.

intended to permit unilateral use of force only in a very narrow and clear circumstance, in self-defence if an armed attack occurs.’’<sup>40</sup> Therefore, Brownlie found that ‘‘...the view that Article 51 does not permit anticipatory action is correct and...Arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence.’’<sup>41</sup> Likewise, Professor Yoram Dinstein observes:

When a country feels menaced by the threat of an armed attack, all that it is free to do-in keeping with the Charter-is make the necessary military preparations for repulsing the hostile action should it materialise, as well as bring the matter forthwith to the attention of the Security Council...Regardless of the shortcomings of the system, the option of a preventive use of force is excluded by Article 51.<sup>42</sup>

Even if one considers the view that the notion of self-defence enables a State to use force in anticipation of an actual armed attack: limitations are imposed on the anticipated attack, namely that it has to be ‘‘instant, overwhelming, leaving no choice of means, and no moment for deliberation.’’<sup>43</sup>

Admittedly, Iraq had not attacked the US or its interests abroad, nor was claiming even that an attack was imminent. The additional fact is that so far there has not been any plausible evidence showing that Iraq possessed WMD or any programmers to produce them. David Kay, the Former Head of the Iraq Survey Group, concluded that the team had not unearthed any (WMD) in Iraq, but discovered some dual use components of weapons program.<sup>44</sup> Likewise, Dr. Hans Blix, the Chairman of the United Nations Monitoring, Verification, and Inspection Commission (UNMOVIC), doubted the existence of WMD in Iraq.<sup>45</sup> Moreover, the doctrine of pre-emptive self-defence had not found support by any of the States involved. The UK and Australia did not depend on such a doctrine, as any part of their legal case for entry into Iraqi territory, nor did the other States expressly put forward a rationalisation based on pre-emption. Even the international community expressly rejected the legality of pre-emptive use of force.<sup>46</sup>

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<sup>40</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2<sup>nd</sup> ed, Columbia University Press 1979) 295.

<sup>41</sup> Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 278.

<sup>42</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (n 30) para 529.

<sup>43</sup> *Caroline Case* (n 36).

<sup>44</sup> Max Hilare, ‘International Law and the United States Invasion of Iraq’ (2005) 44 (1) *Military Law and Law of War Review* 122.

<sup>45</sup> *ibid.*

<sup>46</sup> Christine Gray, *International Law and the Use of Force, Foundations of Public International Law* (3<sup>rd</sup> edn, Oxford University Press 2008) 219-220.

## **B. Authorisation under United Nations Security Council Resolutions**

Because of the argument of pre-emptive self-defence became hollow, the US and the UK sought authorisation for entry into Iraqi territory from the Security Council. The argument presented by the US so-called the “*revival argument*,”<sup>47</sup> could be outlined as follows:

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<sup>47</sup> This argument appeared in a letter to the President of the Security Council in which the US stated:

The actions being taken are authorised under existing Council resolutions, including its resolutions 678 (1990) and 687 (1991). Resolution 687 (1991) imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it. It has been long recognised and understood that a material breach of these obligations removes the basis of the ceasefire and revives the authority to use force under resolution 678 (1990). This has been the basis for coalition use of force in the past and has been accepted by the Council, as evidenced, for example, by the Secretary-General’s public announcement in January 1993 following Iraq’s material breach of resolution 687 (1991) that coalition forces had received a mandate from the Council to use force according to resolution 678 (1990).

Iraq continues to be in material breach of its disarmament obligations under resolution 687 (1991), as the Council affirmed in its resolution 1441 (2002). Acting under the authority of Chapter VII of the Charter of the United Nations, the Council unanimously decided that Iraq has been and remained in material breach of its obligations and recalled its repeated warnings to Iraq that it will face serious consequences as a result of its continued violations of its obligations. The resolution then provided Iraq a “final opportunity” to comply, but stated specifically that violations by Iraq of its obligations under resolution 1441 (2002) to present a currently accurate, full and complete declaration of all aspects of its weapons of mass destruction programmes and to comply with and cooperate fully in the implementation of the resolution would constitute a further material breach.

The Government of Iraq decided not to avail itself of its final opportunity under resolution 1441 (2002) and has clearly committed additional violations. In view of Iraq’s material breaches, the basis for the ceasefire has been removed and use of force is authorised under resolution 678 (1990).

Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/351 (21 March 2003).

Similarly, the Attorney General Lord Peter Goldsmith made a statement to the UK Parliament, stating:

Authority to use force against Iraq exists from the combined effect of resolutions 678,687 and 1441. All of these resolutions were adopted under Chapter VIII of the UN Charter which allows the use of force for the express purpose of restoring international peace and security:

1. In resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.
2. In resolution 687, which sets out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area.

Firstly, since Iraqi forces that invaded and occupied Kuwait in August 1990 did not withdraw from that State, the Security Council adopted Resolution 678, which authorised Member States of the United Nations to “use all necessary means” namely to take military action to “uphold and implement...all subsequent relevant Resolutions and to restore international peace and security in the area.”<sup>48</sup>

Secondly, after Iraqi forces were ejected from Kuwait, the Security Council adopted Resolution 687, which set out the cease-fire obligations between Coalition Forces and Iraq. It “imposed a series of obligations on Iraq, including, most importantly, extensive disarmament obligations, that were conditions of the ceasefire established under it.”<sup>49</sup> The United Nations Security Council Resolution 687 *suspended* the authorisation to use force contained in the United Nations Security Council Resolution 678, but did not terminate such authorisation.

Thirdly, Iraq “materially breached” its disarmament obligations under the United Nations Security Council Resolution 687 by failing to cooperate with United Nations inspectors for eliminating of WMD and weapons programmes. By the United Nations Security Council Resolution 1441, Iraq was recognised to be in “material breach” of its obligations.

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Resolution 687 suspended but did not terminate the authority to use force under resolution 678.

3. A material breach of resolution 687 revives the authority to use force under resolution 678.
4. In resolution 1441 the Security Council determined that Iraq has been and remains in material breach of resolution 687, because it has not fully complied with its obligations to disarm under that resolution
5. The Security Council in resolution 1441 gave Iraq “a final opportunity to comply with its disarmament obligations” and warned Iraq of the “serious consequences” if it did not.
6. The Security Council also decided in resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of resolution 1441, that would constitute a further material breach.
7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of the resolution 1441 and continues to be in material breach.
8. Thus, the authority to use force under resolution 678 has revived and so continues today.
9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq’s failures, but not an express further decision to authorise force.

‘Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question, 17 March 2003.’ Available at <[http://www.ico.org.uk/upload/documents/library/freedom\\_of\\_information/notices/annex\\_b\\_-\\_statement\\_by\\_attorney\\_general\\_170303.pdf](http://www.ico.org.uk/upload/documents/library/freedom_of_information/notices/annex_b_-_statement_by_attorney_general_170303.pdf)> accessed 1 November 2013.

<sup>48</sup> Paragraph (2) of the United Nations Security Council Resolution 678 (n 20).

<sup>49</sup> United Nations Security Council Resolution 687, 2981st meeting, UN Doc .S/RES/687 (1991), 8 April 1990.

That Resolution granted Iraq “a final opportunity to comply with its disarmament obligations” or face “serious consequences” if it failed to do so.<sup>50</sup>

Fourthly, a material breach of the United Nations Security Council Resolution 687 “removes the basis of the ceasefire and *revives* the authority to use force under the United Nations Security Council Resolution 678.”

Fifthly, in light of all these factors, and since Iraq failed to avail the final opportunity and was in further material breach, the use of force in March 2003 was necessary.

Upholding the revival argument, Greenwood has argued that the United Nations Security Council Resolution 678 was not limited to liberation of Kuwait but also included an authority to use “all necessary means” for the purpose of restoring peace and security in the region.<sup>51</sup> Likewise, Wedgwood has observed, “...the companion terms of Resolution 678 explicitly authorised United Nations Member States to use all necessary means for two stated purposes: to expel Iraq from Kuwait and to enforce all “subsequent relevant Resolutions.”<sup>52</sup> According to Wedgwood, the United Nations Security Council Resolution 687 qualified within that set of subsequent relevant Resolutions.<sup>53</sup>

With respect to the view that the United Nations Security Council Resolution 678 ended, with the adoption of the United Nations Security Council Resolution 687, it has been observed that the United Nations Security Council Resolution 687 expressly reaffirmed Resolution 678. According to Greenwood, the United Nations Security Council Resolution 687 contained nothing that “expressly (or impliedly) indicated that the Council either considered that the mandate contained in Resolution 678 had been discharged or that it could not be relied upon in the event of Iraq continuing to pose a threat to international peace and security.”<sup>54</sup> Greenwood went further, stating:

The imposition of a ceasefire by Resolution 687 (1991) suspended hostilities and this suspended the authority to use force but, by reaffirming Resolution 678,

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<sup>50</sup> United Nations Security Council Resolution 1441, 4644th meeting, UN Doc .S/RES/1441 (2002), 8 November 2002.

<sup>51</sup> Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (n 23) 26.

<sup>52</sup> Ruth Wedgwood, ‘The Fall of Saddam Hussein: Security Council Mandates and Pre-emptive self-defence’ (2003) 97 (3) *The American Journal of International Law* 579.

<sup>53</sup> *ibid.*

<sup>54</sup> Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (n 23) 34.

Resolution 687 left open the possibility of further military action to achieve the objectives of Resolution 678 in the event of Iraqi violation of the ceasefire terms.<sup>55</sup>

Therefore, with the continued violation of obligations set out in the United Nations Security Council Resolution 687, the United Nations Security Council Resolution 678's authorisation to use force remained valid. Greenwood also argued that whilst the United Nations Security Council Resolution 678 was not intended to remain in force for an indefinite period, it was intended to remain in force as long as Iraq's persistent violation of its obligations under the United Nations Security Council Resolution 687. Furthermore, in the preamble to the United Nations Security Council Resolution 1441, the United Nations Security Council Resolution 678 was reaffirmed. This reaffirmation cannot be dismissed as mere verbiage, and the only potential interpretation was that the Council considered that the United Nations Security Council Resolution 678 was still in force.<sup>56</sup>

In his continued support of the continuing application of the United Nations Security Council Resolution 678, Greenwood takes the view that military actions could be carried out by Member States of the Security Council without the need for further Security Council authorisation.<sup>57</sup> He especially relied for support made by the Secretary-General of the United Nations about the lawfulness of the military action on the grounds of the continued authority of the United Nations Security Council Resolution 678. The Secretary-General of the United Nations stated:

The raid yesterday, and the forces that carried out the raid, have received a mandate from the Security Council according to resolution 678 and the cause of the raid was the violation by Iraq of resolution 687 concerning the ceasefire.

So, as the Secretary-General of the UN, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.<sup>58</sup>

The reference by the United Nations Security Council Resolution 1441 that Iraq was still not in non-compliance with its obligations of disarmament showed that the conditions for the revival of the authority to use force contained in the United Nations Security Council

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<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* 35.

<sup>57</sup> *ibid.* Military actions were taking place in January 1993 and in December 1998 at the time of Operation Desert Fox.

<sup>58</sup> Marc Weller, *Iraq and Kuwait: The Hostilities and Their Aftermath* (Cambridge University Press 1993) 741-742 as cited in Christopher Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq' (n 23) 35.

Resolution 678 existed.<sup>59</sup> What of the requirement in Paragraph (12) of the Security Council Resolution 1441 that the Council should consider the matter? It was argued that this Paragraph did not mean that no action could be taken under the United Nations Security Council Resolution 678 unless the Security Council decided. According to the United Kingdom Foreign Secretary:

Had that been the intention, [resolution 1441] would have provided that the Council would decide what needed to be done to restore international peace and security, not that it would consider the matter. The choice of words was deliberate; a proposal that there should be a requirement for a decision by the Council, a position maintained by several members, was not adopted. Instead the members of the Council opted for the formula that the Council must consider the matter before any action is taken.<sup>60</sup>

The revival argument advanced by the US and UK seems unconvincing. Sands has called it “a bad argument”<sup>61</sup> and Lowe has described it as “fatuous.”<sup>62</sup> The United Nations Security Council Resolution 678 was adopted for a specific goal, namely the ejection of Iraq from Kuwait, and nothing more than that. The authorisation to use force was very unlikely intended to subsist after the liberation of Kuwait for an indefinite period. As Dinstein observes, “Resolution 678 gave the blessing of the Security Council to the military action taken in 1991 and evidently it had nothing to do with operations conducted a dozen years later under totally different circumstances.”<sup>63</sup>

The advanced interpretation of the United Nations Security Council Resolution 687 much-overlooks important aspects of its wording.<sup>64</sup> Reading of the terms of the United Nations Security Council Resolution 687 showed that the Security Council had authority to decide if additional action would be taken against Iraq and what type of action it would be. Crucially, the United Nations Security Council Resolution 687 involved Iraq and the Security Council, but not Iraq and individual Member States. As Franck properly observed:

Resolution 687... is not only a binding decision of the Security Council, but also an international agreement between the United Nations and Iraq, made effective only “upon official notification by Iraq to the Secretary-General and to the Security

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<sup>59</sup> Christopher Greenwood, ‘International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (n 23) 35.

<sup>60</sup> *ibid* 36.

<sup>61</sup> Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin 2006) 189.

<sup>62</sup> Vaughan Lowe, *International Law* (Oxford University Press 2007) 273.

<sup>63</sup> Yoram Dinstein, *War, Aggression and Self-Defence* (n 30) para 866.

<sup>64</sup> Vaughan Lowe, ‘The Iraq Crisis: What Now?’ (2003) 52 (4) *The International and Comparative Law Quarterly* 865.

Council of its acceptance” of the provisions set out therein. In legal form, then, as also in substance, this proviso manifests that it is the Security Council and the United Nations, and not individual members, who are parties, with Iraq, to the cease-fire agreement. It is they who are entitled in law to determine whether Iraq is complying with its commitments to the Council, how long these are to remain in effect, and what is to be done in the event of their violation.<sup>65</sup>

Franck went on to say that neither the text, nor the debates, on the adoption of the United Nations Security Council Resolution 687, disclose the indication that there was an intention to empower individual Member States to make determinations that Iraq was in material breach of its obligations.<sup>66</sup> What was crucial was the determination of the Security Council. If this was not the case, Franck argued that the Security Council would not have explicitly reserved the sole discretion to the Council “to take such further steps as may be required for its implementation” if the Council had simultaneously intended to delegate that function to the sole discretion of Member States.<sup>67</sup>

The assertion that the United Nations Security Council Resolution 1441 did not require an additional Resolution from the Security Council explicitly authorising force against Iraq was bald. A closer look at the debates prior to the adoption of the United Nations Security Council Resolution 1441 clearly showed that some States thought that a second Resolution would be needed, before force could be used against Iraq.<sup>68</sup> Furthermore, Attorney General Lord Peter Goldsmith admitted that “...I remain of the opinion that the safest legal course would be to secure the adoption of a further resolution to authorise the use of force.”<sup>69</sup> Moreover, it is intolerable that a serious action such as the entry into another territory could be legitimated on the basis of such a precarious explanation of an argument. Certainly, the legal argument of the use of force should be based on a more explicit basis. As Lowe stated:

It is simply unacceptable that a step as serious and important as a massive military attack upon a State should be launched on the basis of a legal argument dependent upon dubious inferences drawn from the silences in Resolution 1441 and the muffled echoes of earlier resolutions, unsupported by any contemporary authorisation to use force. No domestic court or authority in the United States or the

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<sup>65</sup> Thomas M. Franck, ‘What Happens Now? The United Nations after Iraq’ (2003) 97 (3) *American Journal of International Law* 612.

<sup>66</sup> *ibid* 613.

<sup>67</sup> *ibid*.

<sup>68</sup> See UN Doc S/PV. 4644, 8 November 2002.

<sup>69</sup> ‘Attorney General’s Advice on the Iraq War Iraq: Resolution 1441’ (2005) 54 (3) *International and Comparative Law Quarterly* 776.



United Kingdom would tolerate governmental action based upon such flimsy arguments.<sup>70</sup>

### C. Humanitarian Intervention

A final justification was made for entry into Iraqi territory and was based on humanitarian intervention. However, the doctrine of humanitarian intervention is very controversial. Proponents of the non-humanitarian intervention argue that the Charter of the United Nations does not include explicit provision to substantiate the unilateral use of force by a State or States under the guise of protecting human rights.<sup>71</sup> Indeed, as has been seen above, Article 2 (4) of the Charter of the United Nations absolutely prohibits the threat and actual use of force except for self-defence, and the authorisation by the United Nations Security Council. Added to this is the fact that, Article 2(7) of the Charter of the United Nations states:

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.<sup>72</sup>

This position has been supported by the judgement in *Nicaragua v. United States of America*, in which the ICJ rejected the idea that the US could use force against Nicaragua to ensure respect for human rights in that country. It states:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.<sup>73</sup>

However, the advocates of humanitarian intervention have sought to argue that the Charter of the United Nations did not prohibit humanitarian intervention. They argue that since one of

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<sup>70</sup> Vaughan Lowe, 'The Iraq Crisis: What Now?' (n 64) 866.

<sup>71</sup> See Thomas Al. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 (2) *American Journal of International Law* 299-302.

<sup>72</sup> Article 2(7) of the Charter of the United Nations.

<sup>73</sup> *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* (27 June 1986), I.C.J. Report. para 268.

the purposes enshrined in the Charter of the United Nations is to promote and to encourage respect for human rights and fundamental freedoms, a reading of the Charter that prohibits humanitarian intervention would have the contrary effect.<sup>74</sup> An additional argument is that Article 2(4) of the Charter of the United Nations prohibits the threat or use of force against “the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>75</sup> The intervention by a State to prevent or terminate human rights violations in another State, in that the latter is reluctant or incapable of doing so, and then withdraws, does not direct against “the territorial integrity or political independence” of the first State, or otherwise “inconsistent with the Purposes of the United Nations.”<sup>76</sup>

In the light of this interpretation, it is claimed that the use of force was a right and a duty in Iraq for protecting Iraqi people from human rights violations at the hands of their Government. In supporting this claim, it enumerated offences committed by the Iraqi regime, such as using chemical weapons against the Kurdish people in the North of Iraq in 1988.<sup>77</sup> On the basis of this view, Professor Brian Orend noted that humanitarian intervention may have been the strongest justification for entry into Iraqi territory. He stated that “...the 2003 Iraq attack was much better justified not on as an anticipatory attack of pre-emptive self-defence but, rather as an act of humanitarian intervention...”<sup>78</sup>

It can be said, with some justifications, that the argument of humanitarian intervention was unconvincing. Whilst it is known that the Iraqi regime violated principles of human rights, the threshold for humanitarian intervention was not met. For Human Rights Watch, the threshold must be *ongoing* atrocities.<sup>79</sup> Ken Roth, Executive Director of Human Rights Watch observed that the Iraqi regime may have met this threshold at times in days gone by, but was not at the time of the war committing such serious atrocities.<sup>80</sup> In addition, it seems that the probability of main human rights crimes decreased in Iraq by 1990s. It is well known that

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<sup>74</sup> See Micheal Reisman and Myres S. McDougal, ‘Humanitarian Intervention to Protect the Ibos’ in Richard B. Lillich (ed), *Humanitarian Intervention and the United Nations* (University Press of Virginia 1973) 167 at 172-175.

<sup>75</sup> Article 2(4) of the Charter of the United Nations.

<sup>76</sup> Micheal Reisman and Myres S. McDougal, ‘Humanitarian Intervention to Protect the Ibos’ (n 72) 177.

<sup>77</sup> Ronald C. Kramer and Raymond J. Michalowski, ‘War, aggression and state crime: a criminological analysis of the invasion and occupation of Iraq’ (2005) 45 (4) *British Journal of Criminology* 450.

<sup>78</sup> Brian Orend, *The Morality of War* (Broadview Press 2006) 82.

<sup>79</sup> Ken Roth, ‘War in Iraq: Not a Humanitarian Intervention’ in Richard Wilson (ed), *Human Rights in the War on Terror* (Cambridge University Press 2005) 134 at 145.

<sup>80</sup> *ibid* 149.

following the 1991 Gulf War, Kurdish people in North of Iraq were given protection against the Saddam's regime by NATO-enforced no fly zones, allowing them considerable home rule. Further, United Nations weapons inspections, and Security Council sanctions reduced violations of human rights in Iraq. Ken Roth concluded that:

The invasion of Iraq failed to meet the test for a humanitarian intervention. Most important, the killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition, intervention was not the last reasonable option to stop Iraqi atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximised compliance with international humanitarian law. It was not approved by the Security Council. And while at the time it was launched it was reasonable to believe that the Iraqi people would be better off, it was not designed or carried out with the needs of Iraqis foremost in mind.<sup>81</sup>

Furthermore, it was even more doubtful as to whether there was overwhelming humanitarian catastrophes in Iraq. As Lord Steyn pointed out, "...in March 2003 the position in Iraq did not amount to "an overwhelming humanitarian catastrophe." The position in Iraq, awful as it was, was not worse than in other tyrannical regimes."<sup>82</sup>

#### **1.4 The illegality of occupation of Iraq and its connection with the duties of the CPA**

For Roberts, the term "illegal occupation" is "almost invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion."<sup>83</sup>This statement seems to be correct for the occupation of Iraq. The self-defence and authorisation by the Security Council remain the only acceptable justifications for entry into foreign territory. In the light of the examination of the justifications advanced for entry into Iraqi territory as considered above, it has shown that the United States and its Coalition partners were not acting in self-defence and were not authorised to use military force against Iraq.

Furthermore, the threshold for humanitarian intervention was not met. It is, therefore, correct to state that entry into Iraqi territory constitutes breach of international law and the Charter of United Nations the concerning the use of force. It could be constituted as a "war of aggression." As Wilmshurst, who was the Deputy Legal Adviser to the UK Foreign Ministry, stated in her letter of resignation:

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<sup>81</sup> *ibid* 155.

<sup>82</sup> Lord Steyn, 'The legality of the invasion of Iraq' (2010) 1 *European Human Rights Law Review* 4.

<sup>83</sup> Adam Roberts, 'What is a Military Occupation?' (1984) 55 (1) *British Yearbook of International Law* 293.

I regret that I cannot agree that it is lawful to use force against Iraq without a second Security Council resolution...an unlawful use of force on such a scale amounts to the crime of aggression; nor can I agree with such action in circumstances that are so detrimental to the international order and the rule of law.<sup>84</sup>

Reaching the conclusion that the occupation of Iraq was illegal under *jus ad bellum*,<sup>85</sup> does not deny the managerial rights of the CPA and does not exempt the CPA from its duties as an occupying power. The principles set out in the law of occupation, as a branch of the *jus in bello*,<sup>86</sup> apply to the occupant, regardless of whether it enters into foreign territory through a war of aggression or the legitimate use of force in self-defence.<sup>87</sup>

Suggestion has however been occasionally made that illegal occupant did not acquire the rights of the occupant under international law.<sup>88</sup> This suggestion would seem to be mistaken. Courts have generally refused to support a distinction in rights accorded occupants based on the lawfulness of their resort to war. The reason for this position was stated by the court in *Aboitiz v. Price*:

An enemy conqueror is not a very likely person in whom to repose the trust of administering the occupied territories. He is on the ground, however, and has the power to enforce his commands. And dangerous as it may be to recognise any authority in him, it is better to encourage some proper government than none at all. Without some kind of order, the whole social and economic life of the community would be paralysed. So international law has recognised the right of the occupant to make regulations for the protection of his military interests and the exercise of police powers.<sup>89</sup>

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<sup>84</sup> Wilmshurst resignation letter in Neil Mackay, *War on Truth: Everything You Ever Wanted to Know About the Invasion of Iraq but Your Government Wouldn't Tell You* (Casmate 2006) 412.

<sup>85</sup> The criteria of the *jus ad bellum* refers to the legality of the use of force *per se*. Quite simply, it means the reasons for going to war. See Rotem Giladi, 'The *jus ad bellum/jus in bello* distinction and the law of occupation' (2008) 41 (1-2) *Israel Law Review* 247.

<sup>86</sup> The criteria of the *jus in bello* refers to the legality of the manner in which force is used. Quite simply, it refers to the means adopted for conducting war. See Rotem Giladi, 'The *jus ad bellum/jus in bello* distinction and the law of occupation' (n 85) 247. Generally, the distinction between *jus ad bellum* and the *jus in bello* signifies that the rules of *jus in bello* apply regardless of questions of legality under *jus ad bellum*. Therefore, all belligerents are subject to the same rules of *jus in bello*, whatever their position under *jus ad bellum*. See Rotem Giladi, 'The *jus ad bellum/jus in bello* distinction and the law of occupation' (n 85) 247.

<sup>87</sup> Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Playfair (ed), *International Law and The Administration of Occupied Territories : Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press, Oxford 1992) 241 at 243.

<sup>88</sup> Finn Seyfersted, *United Nations Forces in the Law of Peace and War* (A. W. Sijthoff 1966) 224.

<sup>89</sup> *Aboitiz & Co v. Price*, 99 F.Supp. 602 (D.C.Utah 1951).

Likewise, the duties of the occupant remain just the same, irrespective of the lawfulness of war. This was made clear in the *United States v. Wilhelm List and others*, in which the United States Military Tribunal at Nuremberg held:

International law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory. There is no reciprocal connection between the manner of the military occupation of territory and the rights and duties of the occupant and population to each other after the relationship has in fact been established. Whether the invasion was lawful or criminal is not an important factor in the consideration of this subject.<sup>90</sup>

## 1.5 The existence of military occupation in Iraq

Before engaging in an examination of the CPA, it is of fundamental importance to establish that there was a foreign military occupation in Iraq, governed by the law of occupation. This issue is important, as upon occupation, the occupant would be responsible for the administration of the occupied territory, and as will be discussed later, would be obligated to establish a direct system of administration for running the occupied territory.

### 1.5.1. The US and the UK were occupying forces in Iraq

While from a legal perspective it was clear that Iraq was considered as being militarily occupied, the political perspective viewed the situation not as an occupation, but as a mere liberation. Both perspectives will be examined below.

#### A. Legal Perspective

The existence of a military occupation is determined on a factual basis. When effective control over enemy territory is established, occupation begins. This effective control test is derived from Article 42 of the Hague Regulations, which provides, “Territory is considered occupied when it is actually placed under the authority of the hostile army.”<sup>91</sup> It further provides, “The occupation extends only to the territory where such authority has been established and can be exercised.”<sup>92</sup> It would appear that what constitutes effective control is unclear. It seems, however, that it could simply require “the presence of a sufficiently strong

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<sup>90</sup> *United States v. Wilhelm List and others (The Hostages Case)*, Trials of War Criminals before the Nuremberg Military Tribunals (19 February 1948), No. 10, Vol. XI, (USA, Government Printing Office, Washington D.C, 1950) 1247.

<sup>91</sup> Article 42 of the Hague Regulations (n 2).

<sup>92</sup> *ibid.*

military force to give effect to the intentions of the occupant.’’<sup>93</sup> Glahn emphasises the distinction here between an invasion and a state of occupation. He notes that while an invasion denotes mere penetration of territory, occupation implies the actual control of territory. An occupation, in other words, is not set up where forces are merely passing through territory.<sup>94</sup> Glahn summarises the effective control test as follows:

As long as the territory as a whole is in the power and under the control of the occupant and as long as the latter has the ability to make his will felt everywhere in the territory within a reasonable time, military occupation exists from a legal point of view.<sup>95</sup>

The existence of hostile armed forces within a territory by invitation or consent of the government of the territory does not constitute an occupation. A military occupation is based on a lack of consent. The non-consensual and coercive existence by a foreign force is required.<sup>96</sup> It also appears that it is not a requirement in the law of occupation that the occupying forces issue a formal proclamation declaring an occupation, although it is considered favoured by international practice.<sup>97</sup> Moreover, local armed resistance to the occupying forces does not call into question a state of occupation. In the *United States v. Wilhelm List and Others (The Hostages Case)*, the American Military Tribunal at Nuremberg considered that the German armed force retained the status of an occupant, though at times resistance forces were able to control parts of occupied territories. It ruled:

It is clear that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is established that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the German armed forces of its status of an occupant.<sup>98</sup>

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<sup>93</sup> H.P. Ridder, *International Law and Belligerent Occupation* (University Microfilms Inc Arbor 1967) 37 in Michael J. Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (Kluwer International Law 1999) 113.

<sup>94</sup> Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) 28.

<sup>95</sup> *ibid* 29.

<sup>96</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) para 78.

<sup>97</sup> Adam Roberts, ‘What is a Military Occupation?’ (n 83) 257.

<sup>98</sup> *United States v. Wilhelm List and others* (n 90)1243.

However, if foreign forces are required to engage in significant combat operations to recapture an area from the enemy, the area cannot be considered to be occupied until the foreign forces have actually managed to establish effective control over it.<sup>99</sup>

All that required to satisfy the test of effective control are two elements. The first element is that the ousted government must have been rendered incapable of exercising its authority in the occupied territory. This occurs when the armed forces of the invaded State withdraws as a consequence of hostilities.<sup>100</sup> It also may occur when there is a foreign military force whose presence in a territory is by consent of a central government and that consent is withdrawn.<sup>101</sup> Furthermore, in situations of a failed State or a State that has been collapsed, this element of the test appears to be easily satisfied.<sup>102</sup>

The second element is the subject of disagreement. The disagreement is as to whether the occupying force must *actually* exercise its authority, (so that its authority “has been established”) or merely that it needs to have the potential to exercise its authority, (so that its authority “can be exercised”). The majority of scholars support the test of potential control.<sup>103</sup> This test is advocated by the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia ICTY in *Prosecutor v. Naletilic and Martinovic*, which stated that, “the occupying power must be in position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.”<sup>104</sup> Judge Pieter Kooijmans in his separate opinion in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* also endorsed the test of potential control. He concluded, “As long as Uganda maintained its hold on these locations, it remained the effective authority, and thus the occupying power, until a new state of affairs developed.”<sup>105</sup>

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<sup>99</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 51.

<sup>100</sup> Marten Zwanenburg, ‘The Law of Occupation Revisited: The Beginning of an Occupation’ (2007) 10 Yearbook of International Humanitarian Law 110.

<sup>101</sup> Adam Roberts, ‘What is a Military Occupation?’ (n 83) 257.

<sup>102</sup> Kristen E. Boon, ‘The Future of the Law of Occupation’ (2008) 46 Canadian Yearbook of International Law 116.

<sup>103</sup> See Marten Zwanenburg, ‘The Law of Occupation Revisited: The Beginning of an Occupation’ (n 100) 110, and Hans-Peter Gasser and Knut Dörmann, ‘Protection of the Civilian Population’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3<sup>rd</sup> edn, Oxford University Press 2013) 231 at 269.

<sup>104</sup> *Prosecutor v. Naletilic and Martinovic*, Judgment of Trial Chamber. Case No. IT-98-34- T (31 March 2003) para 217.

<sup>105</sup> *Democratic Republic of the Congo v. Uganda*, (n 22) paras 45-50.

Nevertheless, in this case, the International Court of Justice (hereinafter known as the ‘ICJ’) has adopted the test of actual control. It has required proof that the Ugandan armed forces had *actually* substituted their own authority for that of the Congolese Government. The ICJ stated:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.<sup>106</sup>

It would seem that the requirement of actual control could absolve the foreign force of its responsibility in a foreign territory under its control. As will be discussed in greater depth in Chapter Two, the occupying power has a duty to prevent financial criminal activities in an occupied territory. If there is a foreign force in control over a territory and it avoids actually *establishing* its authority, it would not be an occupying force, and thereby the duty would not be imposed on it. In this regard, Boon observed that “...application of the more onerous “actual control” test may undermine the protections of individuals that lie at the heart of the Geneva Conventions.”<sup>107</sup> Consequently, once a foreign force has established a presence in a

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<sup>106</sup> *ibid.*, para 173.

<sup>107</sup> Kristen E. Boon, ‘The Future of the Law of Occupation’ (n 102) 119. The Geneva Conventions put emphasis on the protection of the population in the enemy’s hands. This is apparent in the provisions of the Fourth Geneva Convention of 1949. Article 27 proclaims the principle of respect for the human person and the inviolable character of the basic rights of individual men and women. It provides:

“Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.”

Article 34 prohibits the taking of hostages in occupied territory. It reads: “The taking of hostages is prohibited.” Article 47 deals with the principle of intangibility of fundamental guarantees of protected persons in an occupied territory. It provides: “Protected persons who are in occupied territory shall not be deprived, in



land, what counts for preventing criminal activities, is only the ousting of the old government and the ability of foreign force to exert authority in the foreign land and not the actual exercise of such authority.

Relying on the effective control test above, there is no disagreement about the fact that Iraq was under military occupation. When the Coalition Forces began their military operations on 19 March 2003, they found themselves ultimately in control of Iraqi territory, and were in a position to substitute their own authority for that of the old government, which was incapable of exercising its authority in the territory. Identifying the precise date in which the occupation begins is difficult to fix, in that the entire territory of the State does not need to be occupied before occupation rights and duties attach. Rather, Schmitt observes that “...occupations may be “rolling,” expanding and contracting as the extent of territory controlled by the armed force grows or recedes.”<sup>108</sup>

In the situation of Iraq, it is arguable that occupation began during the conflict, which commenced on 19 March 2003. As Schmitt believes that the Southern sectors of Iraq were considered militarily occupied before the final defeat of Iraqi military further north in mid-April 2003. This may be precise, but it is of little importance since the Iraqi forces and the old government were toppling very quickly.<sup>109</sup> In the same vein, Roberts observes that the occupation had already started during the course of the conflict, when more areas of Iraq gradually came under Coalition Forces control. He adds that “Although in particular places and phases determining exactly when occupation began could be difficult, there was apparently no dispute in principle about the status of these areas as “occupied territory,” as

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any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.” Article 78 deals with the internment and assigned residence of protected persons within the territory of a party to the conflict. It provides: “If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.”

<sup>108</sup> Michael N. Schmitt, ‘(2003 Onwards)’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 356 at 365.

<sup>109</sup> *ibid.*

was confirmed by the use of this term in a Security Council Resolution 1472 of 28 March 2003.’’<sup>110</sup> The Resolution in the preamble Paragraph (1) stated:

*Noting* that under the provisions of Article 55 of the Fourth Geneva Convention (Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949), to the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.<sup>111</sup>

Nevertheless, the CPA used the date of 16 April 2003 as the commencement date of the occupation. According to Section 1 (1) of the CPA Order Number 1, ‘‘On April 16, 2003 the Coalition Provisional Authority disestablished the Ba`ath Party of Iraq.’’<sup>112</sup>

## **B. Political Perspective**

The occupant pretending to ‘‘liberate’’ the population of an occupied territory does not alter the legal status of occupation, nor release it from its obligations set out under the law of occupation. Nowadays, the purpose of waging wars is not frequently to defeat the armed forces of the enemy, but also to free a State or a populace.<sup>113</sup> Regardless, however, of the issue of the legality of ‘‘the liberation,’’ when the invading army has effectively control over an enemy territory, it will frequently strive to present itself as a ‘‘*liberator*’’ rather than an ‘‘*occupier*.’’ The reason for such a designation may be a fear of having to apply the law of occupation.<sup>114</sup> It may also be the negative connotations of the term itself. To many, the term ‘‘occupation’’ has connotations of aggression and oppression.<sup>115</sup>

In the case of Iraq, occupying forces sought from the start to describe themselves as liberators, rather than occupiers.<sup>116</sup> However, the United Nations Security Council Resolution

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<sup>110</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 (3) *American Journal of International Law* 609-610.

<sup>111</sup> United Nations Security Council Resolution 1472, 4732nd meeting, UN Doc .S/RES/1472 (2003), 28 March 2003.

<sup>112</sup> CPA Order Number 1 of 16 May 2003, De-Ba`athification of Iraqi Society.

<sup>113</sup> Fabio Minni, ‘Liberation and Occupation: A Commander’s Perspective’ in Yoram Dinstein and Fania Domb (eds), *Israel Yearbook on Human Rights, Vol. 35* (Martinus Nijhoff Publishers 2005) 71 at 82.

<sup>114</sup> It is well known that the application of occupation law means that occupant bears the ultimate and overall responsibility for the occupied territory.

<sup>115</sup> Adam Roberts, ‘What is a Military Occupation?’ (n 83) 301.

<sup>116</sup> Paul Wolfowitz, US Deputy Secretary of Defence in February 2003 said, ‘‘We are not talking about the occupation of Iraq. We are talking about the liberation of Iraq... Therefore, when that regime is removed we will find (the Iraqi population)... Basically welcoming us as liberators.’’ Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (n 110) 608. It comes as a surprise that President

1483 made it quite plain that this distinction is insignificant. The Resolution quite explicitly recognised the US and the UK as “*occupying powers*” that must comply fully with the obligations described in the law of occupation. Pursuant to the preamble Paragraph (13) of the Resolution, the Council stated:

*Noting* the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognising the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the “*Authority*”).<sup>117</sup>

The Letter of 8 May 2003 from the Permanent Representatives of the US and the UK to the United Nations addressed to the President of the United Nations Security Council outlined the basic framework of occupation, but it did not use the term itself. The Letter stated:

The United States of America, the United Kingdom of Great Britain and Northern Ireland and Coalition partners continue to act together to ensure the complete disarmament of Iraq of weapons of mass destruction and means of delivery in accordance with United Nations Security Council resolutions. The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq. We will act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people.

In order to meet these objectives and obligations in the post-conflict period in Iraq, 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, which includes the Office of Reconstruction and Humanitarian Assistance, 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>118</sup>

The United Nations Security Council Resolution 1483 in Paragraph (5) then called “upon all concerned to comply fully with their obligations under international law including in

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George W. Bush and Prime Minister Tony Blair put great emphasis on the liberation mission of their Coalition, despite the fact that Iraq had, in part, been under control of military forces and Baghdad was toppling. They envisioned, “the formation of an Iraqi Interim Authority, a transitional administration, run by Iraqis, until a permanent government was established by the people of Iraq.” Joint Statement by President George W. Bush and Prime Minister Tony Blair on Iraq (8 April 2003). This statement is available at < <http://www.state.gov/> > accessed 21 September 2013.

<sup>117</sup> United Nations Security Council Resolution 1483, 4761st meeting, UN Doc .S/RES/1483 (2003), 22 May 2003.

<sup>118</sup> Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/538 (8 May 2003).

particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.’’<sup>119</sup>In appraisal of Professor Eyal Benvenisti, the United Nations Security Council Resolution 1483 revived the law of occupation “from its slumber,” in that it referred to the concept of occupation for the first time.<sup>120</sup> As has been explained above, the existence of a military occupation is triggered by a state of facts. Any effective control by a hostile army over the territory of an enemy brings with it the application of the law of occupation. It would, therefore, seem that it is of no consequence to an occupation to be labelled an invasion, liberation, administration, peacekeeping operation and so on.

From discussion of legal and political perspectives above, it would seem that there was conflict between two perspectives. It would have been a sound basis if the invading forces from the outset adopted the liberation of Iraq and were bound by the provisions of the law of occupation. This position was ultimately adopted. As is seen above, the United Nations Security Council Resolution 1483 was a clear indication of approval of the US and its Coalition complying with the law of occupation. Relying on the Letter of 8 May 2003, the Resolution also reflected in Paragraph (4) the intention of the occupying forces to promote the welfare of the Iraqi people, legal and judicial reform, human rights, and to transform the former legal and political system in order to facilitate the establishment of institutions of representative governance.<sup>121</sup> The Letter stated:

The United States, the United Kingdom and Coalition partners recognise the urgent need to create an environment in which the Iraqi people may freely determine their own political future. To this end, the United States, the United Kingdom and Coalition partners are facilitating the efforts of the Iraqi people to take the first steps towards forming a representative government, based on the rule of law, that affords fundamental freedoms and equal protection and justice under law to the people of Iraq without regard to ethnicity, religion or gender. The United States, the United Kingdom and Coalition partners are facilitating the establishment of representative institutions of government, and providing for the responsible administration of the Iraqi financial sector, for humanitarian relief, for economic reconstruction, for the transparent operation and repair of Iraq's infrastructure and natural resources, and for the progressive transfer of administrative responsibilities to such representative

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<sup>119</sup> United Nations Security Council Resolution 1483 (n 117). This Paragraph will be discussed below.

<sup>120</sup> Eyal Benvenisti, ‘Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective’ (2003) 1 Israel Defence Forces Law Review 36.

<sup>121</sup> United Nations Security Council Resolution 1483 (n 117).

institutions of government, as appropriate. Our goal is to transfer responsibility for administration to representative Iraqi authorities as early as possible.<sup>122</sup>

### **1.5.2. The Legal Status of Other States Who Worked With the Occupying Forces**

As has been shown above, the US and the UK were occupying forces in Iraq. However, there were other States with armed forces in occupied Iraq. Iraqi territory was occupied by more than one State “Coalition of the Willing.”<sup>123</sup> Furthermore, in order to create a secure environment through which the CPA could discharge its responsibilities as an occupying power, the US and the UK invited many States to contribute troops to Stabilization Force Iraq (hereinafter as the ‘SFIR’).<sup>124</sup>

As one may expect, some States were reluctant to participate in the SFIR in order not to be occupying forces and therefore be responsible for the occupied territory under the law of occupation. A number of States, such as Poland decided to contribute troops to the SFIR, and took up command of a multinational division. Other States, however, while contributing troops, limited their tasks to purely humanitarian in character in an attempt to avoid the label of occupying forces. A case in point was Norway.<sup>125</sup> The Norwegian Defence Department conceded that the Norwegians would be assigned to “a combination of military and humanitarian work.”<sup>126</sup>

The critical question is, therefore, raised as to whether the armed forces of other Coalition Members and troops-contributing States could be considered as occupying forces in Iraq, with full responsibility under the law of occupation. This issue is the subject of dispute. The dispute is as to the language of the United Nations Security Council Resolution 1483. Following the preamble Paragraph (13) of the Resolution 1483 above, referred to the US and

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<sup>122</sup> Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council (n 118).

<sup>123</sup> The phrase “Coalition of the Willing” refers to Coalitions that acted on their own without approval of the United Nations. Even though the phrase was briefly used by the Bush administration in connection with its Afghanistan campaign, it is most commonly used to refer to Bush’s Coalition to invade and occupy Iraqi territory. See James A. Swanson, *The Bush League Of Nations: The Coalition Of The Unwilling, The Bullied And The Bribed: The Gop's War On Iraq And America* (CreateSpace Independent Publishing Platform 2008) 99.

<sup>124</sup> Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’ (2004) 86 (856) *International Review of the Red Cross* 753.

<sup>125</sup> *ibid* 753-754.

<sup>126</sup> *ibid* 754.

the UK as occupying forces, the preamble Paragraph (14) of the same Resolution further noted that “...other States that are not occupying powers are working now or in the future may work under the Authority.”<sup>127</sup>

The Council did not explain why these States could not be considered as occupying forces. It only proclaimed this to be the case. For Dr. Marten Zwanenburg, the Council may have considered that those States did not satisfy the test of effective control found in the Article 42 of the Hague Regulations. On the other hand, the Council may have removed the status of occupying forces from those States, which would, otherwise, have been considered occupation States.<sup>128</sup>

Certain troops-contributing States had invoked the latter interpretation. The Dutch Minister for Foreign Affairs and Defence stressed that the United Nations Security Council Resolution 1483 set up the legal basis for sending his country’s troops to Iraq. Moreover, the Minister was adamant that the Resolution in its preamble indicated that a distinction should be made between the US and the UK as occupying forces, and States that had not that capacity. According to the Minister, the determination by the Security Council, in a Resolution adopted under the aegis of Chapter VII of the Charter of the United Nations, is an authoritative determination regarding the status of troops-contributing States, a determination that is binding on the United Nations Member States.<sup>129</sup>

Closely resembling the Dutch position, the New Zealand Prime Minister also showed in a statement issued on 11 August 2003 that the United Nations Security Council Resolution 1483 permitted it to deploy New Zealand troops in Iraq. The Prime Minister stated, “Under Resolution 1483, we can make a useful contribution without in any way becoming an occupying power.”<sup>130</sup> On the other hand, in operative Paragraph (5) of the United Nations

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<sup>127</sup> United Nations Security Council Resolution 1483 (n 117).

<sup>128</sup> Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’ (n 124) 756.

<sup>129</sup> See P.C. Tange, ‘Netherlands State Practice for the Parliamentary Year 2002–2003’ (2004) 35 *Netherlands Yearbook of International Law* 378.

<sup>130</sup> Archived Media Releases, New Zealand Defence Force (11 August 2003).

Available at <[www.nzdf.mil.nz](http://www.nzdf.mil.nz)> accessed 20 October 2012. The New Zealand Minister of Foreign Affairs stressed in reply to questions by Members of Parliament that New Zealand’s troops would carry out humanitarian tasks, and would not be part of the occupation forces. The Minister stated that:

The proposed deployment of New Zealand Defence Force engineers is in fact in response to Resolution 1483, which was passed, I think unanimously, by the United Nations. These engineers are not part of the occupation forces. They are there to do the job that we said we

Security Council Resolution 1384, the Council itself, acting under Chapter VII of the Charter of the United Nations, called upon “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>131</sup> This Paragraph could be read to “strongly suggest that the observance of occupation law for any State deploying military forces on Iraqi territory can be independent of whether that State is designated as an occupying power.”<sup>132</sup> Moreover, the reference to “all concerned” is a term wider than the language of other provisions in the Resolution, which spoke exclusively of the Authority. This could indicate that in the Council’s view, it is not only the US and the UK who were occupying forces.<sup>133</sup>

While this position is preferred, yet how can it be determined which of the States were acting within the framework of a Coalition exercising effective control over a territory, to be qualified as occupying forces. There are two approaches. The first approach relates to applying the test of effective control discussed earlier above. When a military force of one Member of the Coalition whose presence is in a territory, without the consent of the local governmental authority, and is in a position to exercise authority, instead of the ousted local government over sections of the occupied territory it was assigned to, it should then be considered an occupying force. This approach qualified Poland to be in the position of being an occupying force. Professor Liesbeth Lijnzaad observed that Poland administered and controlled the Southern part of Iraq in a manner to qualify it as an occupying force.<sup>134</sup>

The second approach is the functional approach that was proposed by the International Committee of the Red Cross (ICRC) to deal with the occupation of Iraq. This approach confers the status of occupation on States that performed functions on behalf of the

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would always be there to do, and that is to assist the civil reconstruction of Iraq. Clearly, putting civilian engineers in a situation that is still dangerous is not possible, but there is work, such as sanitation and water supplies, that needs to be done and that our Defence Force engineers can do and will do.

Debates of Parliament, 30 July 2003, The Hon. Phil Goff, quoting from Marten Zwanenburg, ‘Existentialism in Iraq: Security Council Resolution 1483 and the law of occupation’ (n 124) 765.

<sup>131</sup> United Nations Security Council Security Council Resolution 1483 (n 117).

<sup>132</sup> David J. Scheffer, ‘Beyond Occupation Law’ (2003) 97 (4) *American Journal of International Law* 844.

<sup>133</sup> Hans-Peter Gasser and Knut Dörmann, ‘Protection of the Civilian Population’ (n 103) 271.

<sup>134</sup> Liesbeth Lijnzaad, ‘How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation’ in Liesbeth Lijnzaad *et al.*, (eds), *Making the Voice of Humanity Heard: Essays on Humanitarian Assistance and International Humanitarian Law in Honour of HRH Princess Margriet of the Netherlands* (Brill 2003) 291 at 303. See also Robert Kolb, ‘Occupation in Iraq Since 2003 and the Powers of the UN Security Council’ (2008) 90 (869) *International Review of the Red Cross* 43.

occupying forces, and for which respecting the law of occupation would be relevant.<sup>135</sup> To put it another way, the actions of the other Coalition Members and the functions assigned to them would qualify them to be occupying forces. In fact, the actions undertaken by “co-operating” Member States under the command or instruction of the “recognised” occupying forces would be likely to confer the status of occupying forces on those States. As Professor, Liesbeth Lijnzaad observed:

Carrying out tasks under command or instruction of an occupying power tends to confer occupying power status on those cooperating with them, particularly when such tasks are core to the position of an occupying power. This is clearly the case when tasks carried out are crucial to the way in which the Authority executes its role as an occupying power and carries out its administrative responsibilities. Participation may create responsibilities, which may not be politically desirable. Thus, this late participation could confer the status of occupying power on such cooperating states, depending on the nature of their cooperation.<sup>136</sup>

## 1.6 The Coalition Provisional Authority

Once a territory is occupied, the occupant is then required, as will be shown below, to establish a system of administration for the occupied territory for discharging the functions of government. For this reason, the CPA was created to exercise temporary governmental powers in occupied Iraq. This section will trace the duty of the occupying forces to establish the CPA, together with its status under international law, as well as its functions and its organisation.

### 1.6.1. The Duty to establish an Occupation Administration

The occupant, which exerts effective control over an occupied territory, is compelled to create a system of direct administration for running the area. It is true that the judgment of the ICJ in the *Democratic Republic of the Congo v. Uganda* stated, “...in that event, any justification given by Uganda, for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.”<sup>137</sup> Yet, this Judgment contradicts one of the guidelines in the *Prosecutor*

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<sup>135</sup> Knut Dörmann and Laurent Colassis, ‘International Humanitarian Law in the Iraq Conflict’ (2004) 47 German Yearbook of International Law 293 at 302.

<sup>136</sup> Liesbeth Lijnzaad, ‘How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and The Contemporary Law of Occupation’ (n 134) 298.

<sup>137</sup> *Democratic Republic of the Congo v. Uganda* (n 22) para 173.



*v. Naletilic and Martinovic*, which stated, “a temporary administration has been established over the territory” by the occupying force.<sup>138</sup> This position is submitted to be sounder.

At the time of adoption of the Hague Conventions, it was generally assumed that the occupant, having gained control, would establish its authority over the occupied territory by introducing a direct system of administration.<sup>139</sup> This assumption is reflected in Article 43 of the Hague Regulations that refers to a situation in which, “The authority of the legitimate power having in fact passed into the hands of the occupant...”<sup>140</sup>

However, the law of occupation imposes a duty upon the occupant to provide a system of administration in the occupied territory. A closer look at Article 43 of the Hague Regulations shows that the occupant is required to “...take all the measures in his power to restore, and ensure, as far as possible, public order and safety...”<sup>141</sup> This responsibility undoubtedly obligates the occupant to create an administrative structure in occupied territory. It may not be possible to contemplate that the occupant will carry out such responsibility, particularly with respect to preventing criminal activities through ordinary combat units. Professor Adam Roberts has, therefore concluded, that “An open and identifiable command structure is thus a central feature of the Hague definition of military occupation.”<sup>142</sup>

Added to this is the fact that, occupants frequently attempt to establish puppet regimes, making use of arrangements where authority is exercised by transitional governments, rebel movements, or simply refraining from creating an administrative system. In these cases, “the occupants would tend not to acknowledge the applicability of the law of occupation to their own or their surrogate’s activities, and when using surrogate institutions, would deny any international responsibility for the latter’s action.”<sup>143</sup> It is, therefore, the recognition by the occupant of its status under international law, is the first and the all-important initial marker that the occupant will seek to respect the law of occupation. In that case, the occupant will not attempt to elude its responsibilities in the occupied territory. For this reason, Professor Eyal Benvenisti called for recognising a duty to establish an administration in the occupied territory. He emphasises:

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<sup>138</sup> *Prosecutor v. Naletilic and Martinovic* (n 104) para 217.

<sup>139</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 4.

<sup>140</sup> Article 43 of the Hague Regulations (n 2).

<sup>141</sup> *ibid.*

<sup>142</sup> Adam Roberts, ‘What is a Military Occupation?’ (n 83) 252.

<sup>143</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 5.

The duty of the occupant to establish a system of direct administration in the occupied territory was self-evident to the framers of the Hague Regulations. Nowadays, faced with occupants' reluctance to abide by this rule, the point requires emphasis. The establishment of such administration is a decisive indication of the occupant's intentions regarding the treatment of the population under its rule and the final disposition of the territory. The failure to abide by this requirement signifies a potential reluctance to abide by other limitations that the law of occupation imposes on the occupant.<sup>144</sup>

Establishing a system of administration may be unavoidable when the occupation extends to a territory with a high population density, or if the occupation is expected to continue for some time.<sup>145</sup> As in Iraq, when an occupation is transformative, namely an occupation “whose stated purpose (whether or not actually achieved) is to change States that have failed, or have been under tyrannical rule,”<sup>146</sup> the creation of a system of administration is required.

Dinstein believes that the government of an occupied territory must be military.<sup>147</sup> This is probably because Article 42 of the Hague Regulations insisted on a military government, as the territory “placed under the authority of the hostile army.”<sup>148</sup> However, “It is immaterial whether the government over an enemy's territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.”<sup>149</sup> What is important is to adopt an administrative structure in the occupied territory to discharge its responsibilities under the law of occupation. In this respect, the CPA was based on the army's control but is not necessarily of a military nature.<sup>150</sup>

It should be noted that the establishment of an occupation administration in a territory is not a requirement for the existence of an occupation, although it is a clear mark of an occupation. This point is made clear in the *Ansar Prison* case, in which the Israel Supreme Court held that the application of the law of occupation in Lebanon does not necessarily require the establishment of a military administration. The Court stated:

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<sup>144</sup> Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 2004) 212.

<sup>145</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) para 130.

<sup>146</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (n 110) 580.

<sup>147</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) para 131.

<sup>148</sup> Article 42 of the Hague Regulations (n 2).

<sup>149</sup> United States. Dept of the Army, *The Law of Land Warfare*, FM 27-10 (1956) para 368.

<sup>150</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 5.

A military force may invade or enter an area in order to pass through it to its intended goal and it may leave that area without establishing any effective control. But if the military force has taken control of the area in an effective and workable manner, then even though its presence in such area is limited in time or its intention is to set up no more than a temporary military control, the situation thereby created is one to which the rules of warfare dealing with belligerent occupation apply. Furthermore, the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth Geneva Convention are not conditioned upon the establishment of a special organisational framework in the form of a Military Government... Allowing the former government to act does not alter the fact that the military force is maintaining an effective military control in the area, nor does it relieve the occupant from the responsibilities for the consequences of such acts as far as the rules of warfare are concerned.<sup>151</sup>

## 1.6.2 The CPA as Occupying Power in Iraq

An occupying power is the central government of the State (or States) that its armed forces invaded and subsequently occupied a foreign territory.<sup>152</sup> In this case, an occupying power becomes responsible for the administration of the occupied territory according to the Article 43 of the Hague Regulations. Therefore, an occupying power is expected to exercise authority to fill the temporary vacuum resulting from the ousting of the old government and maintain its bases of power until the conditions for the latter's mutually agreed upon.<sup>153</sup>

When one looks at the authority of the CPA, it becomes apparent that it bore a resemblance to the authority of an ordinary occupying power. According to the CPA Regulation Number 1, the CPA outlined the scope of its power and goals in the opening words:

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

*I hereby promulgate the following:*

### Section 1

#### The Coalition Provisional Authority

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<sup>151</sup> *H.C. 593/82, Tzemel Adv. et al. v. (a) Minister of Defence, (b) Commander of the Antzar Camp ('Antsar Prison case')*, English excerpt in Yoram Dinstein (ed), *Israel Year Book on Human Rights*, v.13 (Martinus Nijhoff Publishers 1983) 360 at 363.

<sup>152</sup> Adam Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (n 110) 585.

<sup>153</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 69.

1. The CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future, including by advancing efforts to restore and establish national and local institutions for representative governance and facilitating economic recovery and sustainable reconstruction and development.
  
2. The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.<sup>154</sup>

The CPA was in fact an occupying power in Iraq and hence was subjected to the law of occupation. In order to exercise the powers referred to above, the CPA would issue Regulations, Orders, and interpretive Memoranda.<sup>155</sup> Regulations and Orders would “take precedence over all other laws and publications to the extent such other laws and publications are inconsistent.”<sup>156</sup> Existing Iraqi law would remain in force, subject to the following:

Unless suspended or replaced by the CPA or suspended by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA.<sup>157</sup>

### **Were other actors also part of the Occupation Administration?**

The plenary authority of the CPA above in running Iraq raises the question as to whether other institutional actors participating in the exercising of governmental powers of the CPA. In keeping with the law of occupation, the CPA was obligated to progressively transfer authority back to Iraq. To begin with, the CPA established the IGC,<sup>158</sup> recognising its origins in the United Nations Security Council Resolution 1483.<sup>159</sup> In the words of the CPA, the IGC

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<sup>154</sup> CPA Regulation Number 1 of 16 May 2003, The Coalition Provisional Authority.

<sup>155</sup> *ibid.*, Section 3 (1).

<sup>156</sup> *ibid.*

<sup>157</sup> *ibid.*, Section 2.

<sup>158</sup> CPA Regulation Number 6 of 13 July 2003, Governing Council of Iraq.

<sup>159</sup> It supported “the formation, by the people of Iraq ... of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.” Paragraph (9) of the United Nations Security Council Resolution 1483 (n 117).

is “the principal body of the Iraqi interim administration, pending the establishment of an internationally recognised, representative government by the people of Iraq...”<sup>160</sup>

It would appear that the CPA granted the IGC something of a participation in the running of Iraq. It stated that “In accordance with Resolution 1483, the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council.”<sup>161</sup> However, it seems that the IGC played a “purely advisory” role.<sup>162</sup> Establishing the IGC did not alter the authority of the CPA set forth in the CPA Regulation Number 1 above. In fact, such an authority granted the CPA the capability to ignore the IGC objections to its actions or to bypass consultation in the first place.<sup>163</sup>

While it is true that the CPA declared that it would “consult and coordinate” with the IGC, however the phrase “in accordance with the Security Council Resolution 1483,” put the responsibility for running Iraq firmly on the shoulders of the CPA. The additional fact is that the CPA had the power of “veto” over all the IGC decisions.<sup>164</sup>

In addition to the IGC, the United Nations was active in the CPA’s tenure. However, the role of the United Nations in Iraq was as a “facilitator” not a “ruler.”<sup>165</sup> To put it another way, the United Nations was limited to give advice and assistance in relation to humanitarian and constitutional matters: but it lacked the right of initiative.<sup>166</sup> In Paragraph (8) of the United Nations Security Council Resolution 1483, the Council asked the Secretary-General to appoint a Special Representative of the Secretary-General (SRSG) to address a wide range of responsibilities “in coordination with the Authority.”<sup>167</sup> Responsibilities were nine in the spectrum of humanitarian assistance, reconstruction, and coordination. None was involved in an actual role in the running of Iraq.<sup>168</sup> To enable the United Nations to execute the mandate

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<sup>160</sup> Section 1 of the CPA Regulation Number 6 of 13 July 2003 (n 158).

<sup>161</sup> *ibid.*, Section 2 (1).

<sup>162</sup> Gregory H. Fox, ‘The Occupation of Iraq’ (2005) 36(2) *Georgetown Journal of International Law* 206.

<sup>163</sup> *ibid* 205.

<sup>164</sup> *ibid* 206.

<sup>165</sup> *ibid* 207.

<sup>166</sup> Rüdiger Wolfrum, ‘International Administration in Post-Conflict Situations by the United Nations and Other International Actors’ in Armin von Bogdandy *et al.*, (eds), *Max Planck Yearbook of United Nations Law*, vol 9 (Brill 2005) 649 at 658.

<sup>167</sup> United Nations Security Council Resolution 1483 (n 117).

<sup>168</sup> Responsibilities were “(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organisations; (b) promoting the safe, orderly, and voluntary return of refugees and displaced persons; (c) working intensively with the Authority, the

assigned to it in the United Nations Security Council Resolution 1483, the United Nations Security Council Resolution 1500 created the United Nations Assistance Mission for Iraq (UNAMI).<sup>169</sup> However, its tasks were limited to advise, plan, coordinate, and assist.<sup>170</sup> Returning to the question that has been posed not too long ago, it is now clear that the CPA had a monopoly on the exercise of governmental powers in the running of Iraq. Neither the IGC nor the United Nations had the powers of government.

### 1.6.3 How was the CPA established?

Although the authority and objectives of the CPA were clear, the process by which the CPA was established was unclear. Halchin observed that “Detailed information that explicitly and clearly identifies how the authority was established, and by whom, is not readily available.”<sup>171</sup> This statement requires us to find alternative explanations as to the establishment of the CPA. It has been submitted that a US National Security Presidential Directive (NSPD) established the CPA. Passages in a Report to Congress, provided on behalf of the President, possibly infer that the President may have had a role in setting up the CPA. A 2003 Report to Congress pointed out:

1. The Administrator of the Coalition Provisional Authority (CPA) reports to the President through the Secretary of Defence. He oversees, directs, and coordinates all U.S. Government (USG) programs and activities in Iraq, except those under the command of the Commander, U.S. Central Command (CENTCOM).’
2. The CPA exercises powers of government temporarily in order to provide for the effective administration of Iraq, to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political

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people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognised, representative government of Iraq; (d) facilitating the reconstruction of key infrastructure, in cooperation with other international organisations; (e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organisations, as appropriate, civil society, donors, and the international financial institutions; (f) encouraging international efforts to contribute to basic civilian administration functions; (g) promoting the protection of human rights; (h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and (i) encouraging international efforts to promote legal and judicial reform.” Paragraph (8) of the United Nations Security Council Resolution 1483 (n 117).

<sup>169</sup> United Nations Security Council Resolution 1500, 4808th meeting, UN Doc .S/RES/1500 (2003), 14 August 2003.

<sup>170</sup> See Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483, UN Doc. S/2003/715 (2003), 17 July 2003 at 19-20.

<sup>171</sup> L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (Washington DC: Congressional Research Service 2004) 4.

future...and facilitating economic recovery, sustainable reconstruction, and development.

3. The CPA is vested by the President with all executive, legislative, and judicial authority necessary to achieve its objectives, exercised consistent with relevant U.N. Security Council resolutions, including [U.N. Security Council] Resolution 1483, and the laws and usages of war. The CPA Administrator has primary responsibility for exercising this authority.<sup>172</sup>

The Letter of May the 8<sup>th</sup> 2003 referred to earlier above provided the clearest explanation that the US Government assisted in setting up the CPA. It stated, “...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...”<sup>173</sup> On the other hand, a solicitation issued by the Pentagon Renovation Office, on behalf of CPA, for procuring PMO support services, stated in the “overview,” that the United Nations Security Council Resolution 1483 was instrumental in setting up the CPA. It stated that “the CPA was enacted by the United Nations Security Council under Resolution 1483 (2003).”<sup>174</sup> This position does not appear very convincing. The Security Council only took note of the establishment of the CPA, and reaffirmed that the law of occupation would be applied.<sup>175</sup> Indeed, the Resolution noted and recognised, but did not create the CPA.

It appears that the CPA as the body that would exercise the temporary powers of government in Iraq was created by the US General Tommy R. Franks, Commander of the Coalition Forces, under the laws of war, in his “Freedom Message to the Iraqi People” issued on 16 April 2003, as stated in the Introduction.<sup>176</sup>

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<sup>172</sup> ‘Report to Congress Pursuant to Section 1506 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11) (2 June 2003). Available at <

[http://www.whitehouse.gov/sites/.../Emergency\\_Wartime\\_Supp\\_Daniels\\_Ltr.p.>](http://www.whitehouse.gov/sites/.../Emergency_Wartime_Supp_Daniels_Ltr.p.>) accessed 30 October 2013.

<sup>173</sup> Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council (n 118).

<sup>174</sup> Pentagon Renovation Office, Solicitation W914NS-04-R-0001 (6 Jan 2004) as cited in L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (n 171) 7.

<sup>175</sup> Rudiger Wolfrum, ‘Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’ in Armin von Bogdandy *et al.*, (eds), *Max Planck Yearbook of United Nations Law 2005: vol 9* (Brill 2005) 1 at 21.

<sup>176</sup> See the Message in the main Introduction.

#### 1.6.4 The CPA was a US government enterprise

When the occupant in the singular establishes an administration in the occupied territory, it will be held responsible for an administration through and through. Alternatively, a number of the occupants may establish an administration and act together as a Coalition governing a single occupied territory.<sup>177</sup> The diversity of States within the CPA raises the question as to who was directly responsible for running it. This issue was discussed and analysed in *United States ex rel DRC, Inc. v. Custer Battles LLC*.<sup>178</sup> In this case, the US District Court concluded that the CPA was an international entity, as distinct from a US entity. It stated that there was a high degree of controlling and funding by the US of the CPA, but this degree of control did not reach to the level of exclusive control demanded to qualify as an “instrumentality of the US government.”<sup>179</sup> The Court, therefore, held that the CPA was an “international body” set up by the implicit, multilateral agreement of its Coalition Members, which would not be subject to the specific laws of its members.<sup>180</sup> The Court went on to state that, given the fragile nature of Iraq, and the difficulties of setting up a new regime in a conflict zone, it was not surprising that the CPA occasionally appeared to have been *ad hoc*, and to have depended greatly on the resources of its largest contributing partners. The CPA would, therefore, seem to resemble the North Atlantic Treaty Organisation (NATO), as a wholly distinct entity that is subject to the laws of war, and to its own regulations.<sup>181</sup>

This conclusion agreed with the US Army Legal Services Agency’s argument. In a letter submitted to the Government Accountability Office (GAO), the Agency stated that the CPA was a multi-national Coalition, and not a federal agency:

The CPA is not a Federal agency. Rather, as the HCA [CPA’s Head of Contracting Activity] explains: The Coalition Provisional Authority (CPA) is a multi-national coalition that exercises powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration... The GAO does not have jurisdiction over this protest because CPA is not a Federal agency....The CPA is an Organisation comprised of members from a coalition of countries....CPA is analogous to an Organisation such as NATO’s [North Atlantic Treaty Organisation’s] Stabilisation Force (SFOR) in Bosnia and Croatia. The SFOR has its own contracting organisation, the Theatre Allied Contracting Office (TACO), which may utilise the services of United States military personnel. Like

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<sup>177</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) paras 111-112.

<sup>178</sup> *United States ex rel DRC, Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617 (E.D.Va., 2005).

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*



the TACO, CPA is not a federal agency. Like NATO and SFOR, CPA is composed of an international coalition...<sup>182</sup>

Others have, however, submitted that the CPA was concurrently an international body as well as a US government entity, and thereby it took advantage of some of the benefits of each.<sup>183</sup> This dual structure was assessed as confusing, and it has received little debate by the US Government or among allies regarding it.<sup>184</sup> Another view, such as that put forward by Clayton McManaway, Paul Bremer's closest advisor, felt that the "CPA was the Iraqi Government; it was not an American entity,"<sup>185</sup> at all.

Nevertheless, it would seem that the CPA was a US Government enterprise fairly and squarely. As Andrew Bearpark, the CPA's Director of Operations for the CPA observed, "Throughout its entire existence, the CPA was a US Government Department."<sup>186</sup> Professor Stefan Talmon supported such an assessment from the fact that the CPA was continuously led by a US military or civilian government official who reported to the US Secretary of Defence and was subject to his orders as well.<sup>187</sup>

In addition, Robin Cleveland, the Associate Director for National Security Programs at the Office of Management and Budget argued that there was equivalence between the limitations imposed on the CPA and any other US Government agency, even regarding its handling of Iraqi public funds.<sup>188</sup> Moreover, the CPA had, as shall see later, an office in Washington within the Department of Defence. Final evidence that the CPA was a US Government enterprise can be found in the *Custer Battles* case whereby the US Government announced that the CPA was "an instrumentality of the US for the purposes of the False Claims Act."<sup>189</sup>

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<sup>182</sup> See L. Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (n 171) 8.

<sup>183</sup> Nora Bensahel *et al.*, *After Saddam: Prewar Planning and the Occupation of Iraq* (Rand 2008) 102.

<sup>184</sup> *ibid.*

<sup>185</sup> James Dobbins *et al.*, *Occupying Iraq: A History of the Coalition Provisional Authority* (Rand 2009) 14. Professor Adam Roberts observed that the CPA was governed by the US and UK governments, with the (DOD), and the UK Ministry of Defence as the principal government agencies responsible for it. Practically speaking, Roberts noted that the Pentagon clearly dominated, as the US was the leader of the Coalition, and provided the vast majority of resources to Iraq. Adam Roberts, 'The End of Occupation: Iraq 2004' (2005)54 (1) *The International and Comparative Law Quarterly* 35.

<sup>186</sup> 'US Authority Accused of Ignoring Allies in Iraq' *The Guardian* (16 June 2007).

<sup>187</sup> Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' in Paul Shiner and Andrew Williams (eds), *The Iraq War and International Law* (Hart Publishing 2008) 185 at 192.

<sup>188</sup> James Dobbins *et al.*, *Occupying Iraq: A History of the Coalition Provisional Authority* (n 185) 14.

<sup>189</sup> *United States ex rel DRC, Inc. v. Custer Battles LLC* (n 178).

### 1.6.5 The role of the UK in the CPA

The reality of the CPA, as a US Government enterprise, begs the question as to whether the UK had a role in the running of the CPA. It is common knowledge that the UK was a key partner with the US in the invasion of Iraq, and it had become, together with the US, the occupying force under the United Nations Security Council Resolution 1483. This position had pushed the officials in London to declare the parity in the running of the CPA. As Geoffrey Hoon, the British Secretary of State for Defence said:

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. We are also assisting in the training of a new Iraqi Army and the Iraqi police.<sup>190</sup>

For Talmon, this statement was primarily aimed at a domestic audience.<sup>191</sup> There is no escaping the fact that the CPA functioned completely as an American enterprise with little or no British input. This was understandable, since 90% of the CPA money and staffs were sent from the US.<sup>192</sup> It has been shown that while the US had contributed \$980 million for the running of the CPA, and had donated in the region of \$18.6 billion for reconstruction of Iraq, the UK's contribution to the CPA proved to be a trifling in comparison.<sup>193</sup> Moreover, when the British Foreign Office sent a number of senior diplomats in order to represent it in the CPA, these persons did not exercise line responsibility within the CPA. Even when the Administrator of the CPA at the outset, had refrained from appointing an American deputy officially "respecting the British sensibilities," he did not appoint a UK colleague in this capacity.<sup>194</sup>

### 1.6.6. Organisation and Staffing

The CPA was organised internally and externally. From the internal perspective, there was, in addition to, the Green Zone as headquarters, four administrative regions; Baghdad Central, North, South Central and South East (later renamed 'CPA South'). An appointed regional

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<sup>190</sup> HC Debs 16 July 2003, vol 409, col 34WS.

<sup>191</sup> Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' (n 187) 193.

<sup>192</sup> James Dobbins *et al.*, *Occupying Iraq: A History of the Coalition Provisional Authority* (n 185) 14.

<sup>193</sup> Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' (n 187) 194. Chapter Three will show that the US appropriated \$18.4 billion for supporting reconstruction activities in Iraq.

<sup>194</sup> James Dobbins *et al.*, *Occupying Iraq: A History of the Coalition Provisional Authority* (n 185) 14.

coordinator was assigned to each region. Regions were divided into 18 governorates in Iraq. Each governorate had an appointed governorate coordinator. The regional coordinators received very general outlines, and provided much scope for tailoring the approach to the specific region. Every one of the regional coordinators reported to the Administrator of the CPA.<sup>195</sup>

From the external perspective, the CPA set up an office in Washington within the Department of Defence, led by Reuben Jeffery. The purpose of the establishment of an office in Washington was to relieve the CPA officials in Baghdad by dealing with actors in Washington, such as the White House, Pentagon, and State Department. The CPA rear, as it was, at times called, was headquartered on the fourth floor of the (D) ring in the Pentagon. Their staffs were in the region of 35 people. Some worked with various US Government agencies around Washington, and others worked on personnel issues.<sup>196</sup>

The CPA was directly staffed with a variety of US civilian and military personnel, civilian and military personnel from Coalition States, contractors, and Iraqi expatriates from the Iraq Reconstruction and Development Council (IRDC).<sup>197</sup> However, throughout its tenure, the CPA was in no way adequately manned. In March 2004, it was determined that the CPA had just filled 56 percent of its authorised slots.<sup>198</sup> This situation made the Administrator of the CPA greatly frustrated to report as to the bureaucratic delays in obtaining the staff he needed. In a Memorandum sent to the Secretary of Defence on 7 July 2003, the Administrator emphasised:

Washington was being extremely slow in assigning personnel needed by CPA: of 250 people I had requested weeks before, not a single one had yet arrived in

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<sup>195</sup> Marc Houben, 'Operations in Iraq. The New Face of International Crisis Management' (2004) 6 *Dias Analysis* 10.

<sup>196</sup> James Dobbins *et al.*, *Occupying Iraq: A History of the Coalition Provisional Authority* (n 185) 247.

<sup>197</sup> The US had supplied the vast majority of personnel resources, and US citizens had, therefore, occupied the most positions in the CPA, while other Coalition States had occupied (15) per cent. It stated that there were (1147) staff for the CPA in grand total, of which (332) came from the Department of Defence (DOD), (268) from the US military, (34) from the Department of State (DOS), and (36) from other US government agencies. There were also (284) US contractors paid for by the US Agency for International Development (USAID). In grand total, there were (954) US personnel, while (193) came from other Coalition States. Stefan Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq' (n 187) 191.

<sup>198</sup> Just (1,196) of its (2,117) authorised positions were filled at that time. Inspector General of the Coalition Provisional Authority, 'Audit Report: Management of Personnel Assigned to the Coalition Provisional Authority in Baghdad, Iraq: Report Number 04-002' (25 June 2004).

Baghdad. Washington red tape would slow down reconstruction funds and personnel for almost a year.<sup>199</sup>

The lack of personnel of the CPA attributed to the process of changing the CPA's mission. An Organisation that was so-called the Office of Reconstruction and Humanitarian Relief (hereinafter known as the 'ORHR') was set up to rebuild Iraq in post-war, but not to administrate the country. The CPA replaced the ORHA in order to exercise occupation authority. During the primary staffing process, there was no good coordination between the United States and Iraq. The requirements for personnel were identified and personnel were recruited in an *ad hoc* manner.<sup>200</sup> Additionally, the CPA, in the main, operated with around one-third of its direct positions vacant. This situation can be attributed to the hardship of the posting as well as the budgetary implications. The hardship of the posting has several dimensions. For example, the security situation in Iraq resulted in the lack of attraction and retention of personnel.<sup>201</sup> It also observed that staff who worked in the Iraq often remained for a short time, from 3 to 6 months, and often did not continue working on Iraqi issues when they had returned to their positions in the United States.<sup>202</sup> This signifies that there was a loss in what they had learned, and that the CPA had not enough institutional memory.<sup>203</sup> Since the CPA obtained personnel on a non-reimbursable basis, an unbudgeted expense to the supplying agency was created. Replacing detailers led to extra expenses for the agencies, which their budgets may not have been able to sustain.<sup>204</sup>

The CPA countered challenges to staffing by relying on a special hiring authority under 5 USC 3161 for obtaining temporary civilian staff. This mechanism contributed to supply about 20 % of CPA staff. A specific budget to the CPA, which was obtained through the passage of the emergency supplemental in November 2003, imposed a funding limit on the ability of the CPA to hire staff under the 3161 authority.<sup>205</sup> Additionally, because of the hardship of the posting, agencies resorted to use temporary tours of duty to provide staff to the CPA.

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<sup>199</sup> L. Paul Bremer and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon and Schuster 2006) 114.

<sup>200</sup> United States General Accounting Office, *Rebuilding Iraq resource, security, governance, essential services, and Oversight Issues*, GAO-04-902R (United States General Accounting Office June 2004) 36.

<sup>201</sup> *ibid* 40.

<sup>202</sup> Nora Bensahel, 'Mission Not Accomplished: What Went Wrong with Iraqi Reconstruction' (2006) 29 (3) *The Journal of Strategic Studies* 463.

<sup>203</sup> Bremer and McConnell (n 199) 125.

<sup>204</sup> United States General Accounting Office (n 200) 40.

<sup>205</sup> *ibid* 41.

Agencies also resorted to use incentive packages to compensate civilian personnel, which included danger-pay allowances and hardship differential payments.<sup>206</sup>

## 1.7 The dissolution of the CPA

In the United Nations Security Council Resolution 1546, the Council welcomed that the occupation would terminate and the CPA would cease to exist by 30 June 2004. Iraq would then reassert its full sovereignty as a result of the formation of a “fully sovereign and independent Interim Government of Iraq.”<sup>207</sup> It is apparent that the Council dissolved the CPA by transferring authority to the Interim Government. This way begs two questions as to what the consequences of the dissolution of the CPA were, and as to whether the dissolution of the CPA terminated the military occupation of Iraq.

### 1.7.1 The consequences of the dissolution of the CPA

On 28 June 2004, two days ahead of schedule in the United Nations Security Council Resolution 1546, the CPA formally transferred its authority to the Iraqi Interim Government.<sup>208</sup> As of that time the CPA as an occupying power in Iraq was dissolved. Several consequences flowed from this dissolution. Firstly, it is quite logical that with the dissolution of the CPA, the law of occupation no longer applied to it, and thereby would not have obligations in Iraq. This does not, however, mean that if proven true, acts or omissions of the CPA that breached its obligations under *inter alia*, international humanitarian law or international human rights,<sup>209</sup> will free the CPA from responsibility. The consequence was made clear in the *Democratic Republic of the Congo v. Uganda*, in which the ICJ concluded:

Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.<sup>210</sup>

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<sup>206</sup> *ibid.*

<sup>207</sup> United Nations Security Council Resolution 1546, 4987th meeting, UN Doc. S/RES/1546 (2004), 8 June 2004.

<sup>208</sup> Adam Roberts, ‘The End of Occupation: Iraq 2004’ (n 185) 37.

<sup>209</sup> This thesis is focused on the violation of the law of occupation as a branch of the international humanitarian law by the CPA of its duty with regard to preventing financial criminal activities. It is beyond this thesis to examine whether the CPA violated international human rights law. However, the thesis will use the international human rights law with respect to the duty of the CPA to exercise police powers, which involves law enforcement activities, based mainly on international human rights. For more details, See Chapter Two .

<sup>210</sup> *Democratic Republic of the Congo v. Uganda* (n 22) para 220.

Secondly, the appointments of local judges or other public officials by the occupying power would expire. Such appointees could not claim security of tenure.<sup>211</sup> However, such a consequence can affect the public order in the occupied territory. For this reason, it would have been more useful if the sovereign State remained or extended judges or officials in their positions. Thirdly, the acts lawfully performed by the CPA in harmony with the law of occupation would remain valid, absolved of any retroactive invalidation. This legal effect is derived from the principle of *Uti possidetis*, in which the sovereign State is obligated to respect lawful acts performed by an occupying power.<sup>212</sup> In this regard, Oppenheim states:

...the occupant is *de facto* in authority, he has a right of administration over the territory, with the consequence that all administrative acts which he carries out in accordance with the laws of war and the existing local law must be recognised by the legitimate government after the occupation ceases.<sup>213</sup>

Therefore, the sovereign State must recognise the lawful collection of ordinary taxes by the occupying power and of the sale of fruits from governmental immovables.<sup>214</sup> In contrast, the acts of the CPA, performed in excess of the powers set out in the law of occupation should be regarded as null and void. This consequence is derived from the principle of *Postliminium*, which requires a return to the *status quo* prior to occupation with respect to unlawful modification under the occupying power.<sup>215</sup> Fourthly, with the dissolution of the CPA, legislation that was enacted in accordance with the Article 43 of the Hague Regulations ceases to be valid, unless the sovereign State chooses to allow that legislation to remain unscathed.<sup>216</sup> Whilst the sovereign State is allowed to rescind all legislative measures of the occupying power, it has been submitted that some limits may exist in relation to rescinding acts of the occupying power, which would be regarded as being contrary to legal principle.<sup>217</sup> A clear instance of this can be benevolent actions on behalf of the populace that create equities that would be unfair to rescind.<sup>218</sup>

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<sup>211</sup> Hans Kelsen, *Principles of International Law* (Rinehart 1952) 74.

<sup>212</sup> Michael J. Kelly, 'Iraq and the Law of Occupation New Tests for an Old Law' (2003) 6 Yearbook of International Humanitarian Law 161.

<sup>213</sup> L. Oppenheim, 'Legal Relations Between an Occupying Power and the Inhabitants' (1917) 33 (4) Law Quarterly Review 364.

<sup>214</sup> L. Oppenheim, *International Law: A Treatise*, vol 2 (Longmans, Green, and Co. 1905) 295.

<sup>215</sup> Michael J. Kelly, 'Iraq and the Law of Occupation New Tests for an Old Law' (n 212) 161.

<sup>216</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) para 682.

<sup>217</sup> Felice Morgenstern, 'Validity of the Acts of the Belligerent Occupant' (1951) 28 British Year Book of International Law 299.

<sup>218</sup> See Michael J. Kelly, 'Iraq and the Law of Occupation New Tests for an Old Law' (n 212) 161.

During its tenure, the CPA carried out a whole series of legislative and other measures intended to bring about wide-ranging reforms.<sup>219</sup> The CPA did not however mean that its dissolution would also result in the termination of its legislation. According to the Law of Administration for the State of Iraq for the Transitional Period of 2004 (hereinafter as the ‘TAL’), the CPA legislation was to “remain in force until rescinded or amended by legislation duly enacted and having the force of law.”<sup>220</sup>

An additional fact is that the CPA just before the formal devolution of authority, enacted numerous Orders, which dealt with the post-handover period. The very last CPA Order reaffirmed that the CPA legislation would carry on in force, unless amended or rescinded by legislation in accordance with the TAL.<sup>221</sup> According to the TAL, the possibility of changes to the TAL and to the CPA Orders could only be made “by a three-fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council.”<sup>222</sup> This means that the Iraqi Interim Government would, in effect, not be in position to terminate the CPA Orders, as the elections for the National Assembly were held on 30 January 2005.<sup>223</sup> The protection for the CPA Orders was reinforced by the United Nations Security Council Resolution 1546, which prevented the Iraqi Interim Government “from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumed office.”<sup>224</sup>

### **1.7.2 Did the dissolution of the CPA terminate the military occupation of Iraq?**

When the CPA was dissolved, the military occupation of Iraq may not be terminated. For Oppenheim “Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it.”<sup>225</sup> The assumption established here, that an occupation ends when authority

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<sup>219</sup> See Kaiyan Homi Kaikobad, ‘Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003–June 2004’ (2005) 54 (1) *International and Comparative Law Quarterly* 253-264. See also Gregory H. Fox, ‘The Occupation of Iraq’ (n 162) 208-225, and Eyal Benvenisti, *The International Law of Occupation* (n 1) 257-267.

<sup>220</sup> Article 26 (c) of The Law of Administration for the State of Iraq for the Transitional Period (8 March 2004).

<sup>221</sup> CPA Order Number 100 of 28 June 2004, Transition of Laws, Regulations, Orders, and Directives issued by the Coalition Provisional Authority.

<sup>222</sup> Article 3 of the TAL (n 220).

<sup>223</sup> Article 2 (b) of the TAL (n 220).

<sup>224</sup> Paragraph (1) of the United Nations Security Council Resolution 1546 (n 207).

<sup>225</sup> L. Oppenheim, *International Law - A Treatise. Vol. II, ‘Disputes, War and Neutrality’* (H Lauterpacht (ed), 7<sup>th</sup> edn, Longman 1952) 436. About ways of terminations of occupation, see Adam Roberts, ‘What is a Military

returns into the hands of the displaced sovereign. The devolution of authority must be real and not simply a make-believe, which masks a keeping of authority by the occupant. In the words of Roberts “it is the reality, not the label, that counts”<sup>226</sup> since “...the withdrawal of occupying forces is not the sole criterion of the ending of an occupation; and the occupant has not necessarily withdrawn at the end of all occupations.”<sup>227</sup>

As has been seen above, the United Nations Security Council Resolution 1546 formally determined that by 30 June 2004, the occupation would terminate and the Iraqi Interim Government would assume full responsibility and authority.<sup>228</sup> This Resolution may, however, not reflect the factual situation on the ground. The termination of occupation is determined by various factors, and one pertinent fact is who exercises effective governmental authority.<sup>229</sup>

This factor must be analysed not in the light of formal proclamations, but in light of factual circumstances. The Coalition Forces remained, albeit renamed the Multinational Forces, in direct and effective control over Iraq. Manned with approximately 140,000 troops, the Multinational Forces had continued to enjoy the same powers, which had been given to the Coalition Forces,<sup>230</sup> by authorising them, “to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”<sup>231</sup> Multinational Forces had engaged in daily battles and they certainly were bloody.<sup>232</sup> This situation means that the issue of the maintenance of public order was not closely related to the functions of the Iraqi Interim Government. Indeed, the Iraqi Interim Government was unable to exercise internal and external security functions. This is clear from Paragraph (8) of the United Nations Security Council Resolution 1546, which “*Welcomes* ongoing efforts by the incoming Interim Government of Iraq to develop Iraqi security forces including the Iraqi armed forces...”<sup>233</sup>

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Occupation?’ (n 83) 257-260, and Yoram Dinstein, *The International Law of Belligerent Occupation* (n 1) paras 645-687.

<sup>226</sup> Adam Roberts, ‘The End of Occupation: Iraq 2004’ (n 185) 47.

<sup>227</sup> *ibid* 28.

<sup>228</sup> United Nations Security Council Resolution 1546 (n 207).

<sup>229</sup> Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 (4) *The European Journal of International Law* 682.

<sup>230</sup> Section 2(8) of CPA Order Number 100 of 24 June 2004 (n 221).

<sup>231</sup> Paragraph (10) of the United Nations Security Council Resolution 1546 (n 207).

<sup>232</sup> For example, battles that took place with the supporters a Shia clergyman, Muqtada al-Sadr in Najaf in August 2004, and with insurgents in Fallujah in November 2004. Michael N. Schmitt, ‘(2003 Onwards)’ (n 28) 368.

<sup>233</sup> United Nations Security Council Resolution 1546 (n 207).



Even though the Iraqi Interim Government had invited the Multinational Forces, it had not exercised control over military activities. As Wolfrum observed, reference in the United Nations Security Council Resolution 1546 to the relationship between the Iraqi Interim Government, and the Multinational Forces as a “security partnership,” was a euphemism and meant to camouflage the reality that the Iraqi Interim Government would not be able to influence directly the Multinational Forces in respect of concrete military decisions.<sup>234</sup>

Moreover, the Iraqi Interim Government was not even in a position to review the mandate for the Multinational Forces, or to demand them to withdraw from Iraq. Relying on Paragraph (9) of the United Nations Security Council Resolution 1546, the presence of the Multinational Forces was based on the request of the incoming Interim Government. As long as that is the case, the Iraqi Interim Government ought to have the right to terminate the mandate. However, Paragraph (12) of the same Resolution declared that the government of Iraq and not the Iraqi Interim Government would demand the withdrawal of the Multinational Forces. This statement appears to indicate that the future elected government could claim the right to review of the presence of the Multinational Forces, but it did not include the Iraqi Interim Government.

The Iraqi Interim Government also faced restrictions in respect to legislate. As has been seen above, the Iraqi Interim Government was not given *carte blanche* to legislate since the laws that were issued by the CPA remained in force, despite its dissolution. Moreover, the power of the Iraqi Interim Government was limited “...from taking any actions affecting Iraq’s destiny beyond the limited interim period until an elected Transitional Government of Iraq assumed offices...”<sup>235</sup> The theory behind this limitation was reportedly that certain ethnic and religious groups were anxious over their positions, which might have been undermined irrevocably through actions taken by the Iraqi Interim Government. This limitation had been interpreted by the CPA as limiting the power of the Iraqi Interim Government to conclude agreements. If one looks at this limitation, then one will observe that it is similar to the obligation of the occupying power to refrain from making essential changes to the legal system of the occupied territory, and to behave, in the main, in a trustee-like manner.<sup>236</sup>

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<sup>234</sup> Rudiger Wolfrum, ‘Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’ (n 175) 38.

<sup>235</sup> Paragraph (1) of the United Nations Security Council Resolution 1546 (n 207).

<sup>236</sup> Adam Roberts, ‘The End of Occupation: Iraq 2004’ (n 185) 42.

In the light of the above, it would certainly appear that the Iraqi Interim Government was not exercising effective governmental authority. In that case, there is doubt about the termination of occupation in Iraq. As Professor Adam Roberts stated that the occupation was terminated only “notionally.”<sup>237</sup> He summed up the 28<sup>th</sup> of June 2004 “marks an important stage on the road to full resumption of Iraqi sovereignty, not arrival at that destination.”<sup>238</sup>

However, since an occupation is a matter of fact, not of law, the United Nations Security Council Resolution 1546 must therefore be seen as “overriding the rules of International Humanitarian Law on the subject.”<sup>239</sup> The implementation of plebiscite by the local population in the occupied territory is the basis through which the governmental authority can be devolved to an indigenous local government. This plebiscite came only in January 2005, which marked the devolution of governmental authority to a new Iraqi national authority.<sup>240</sup>

## 1.8 Conclusion

This Chapter builds the first step towards establishing the maladministration of the CPA in its duty relating to preventing financial criminal activities in occupied Iraq. This step demonstrates that there was a foreign military occupation in Iraq and that the CPA was governing Iraq as an occupying power according to the law of occupation. In doing so, the Chapter relies on the test of effective control in Article 42 of the Hague Regulations to determine the legal status of enemy foreign forces that entered into Iraqi territory as a result of war.

Describing the physical presence of foreign troops in occupied Iraq as “liberators” rather than “occupiers” is refuted. Whether an occupation has received approval from the Security Council, what its goal is, or whether it is labelled a “rescue mission,” “invasion,” “liberation,” or “peacekeeping operation,” and so on makes not the slightest difference, as the law of occupation is triggered by a state of facts.

Relying on Article 43 of the Hague Regulations, and supporting one of the guidelines in the *Prosecutor v. Naletilic and Martinovic*,<sup>241</sup> the Chapter emphasises that in exerting effective

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<sup>237</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (n 110) 617.

<sup>238</sup> Adam Roberts, ‘The End of Occupation: Iraq 2004’ (n 185) 46.

<sup>239</sup> Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (n 229) 684.

<sup>240</sup> *ibid.*

<sup>241</sup> *Prosecutor v. Naletilic and Martinovic* (n 104).

control over an occupied area, the occupant is duty bound to create a special structure of administration for the running of the area. In this regard, the judgment of the ICJ in the *Democratic Republic of the Congo v. Uganda*,<sup>242</sup> is refuted, as it does not require the occupant to create an administrative structure of the occupied territory. On the basis of this duty, the CPA was established to temporarily exercise the powers of government in Iraqi territory.

The Chapter identifies the characteristics of the CPA: The CPA was an occupying power in Iraq, whose authority was chiefly derived from the law of occupation. The CPA was a US government enterprise. *United States ex rel DRC, Inc. v. Custer Battles LLC*,<sup>243</sup> was therefore not accurate in saying that the CPA was an international entity. It is interesting to note that other States who worked with the CPA would not be free from responsibility for violations of the law of occupation.

This Chapter acknowledges that the United Nations Security Council Resolution 1546 dissolved the CPA through the transfer of authority to the Iraqi Interim Government, and thereby the CPA was released from assuming future obligations in Iraq. However, the dissolution of the CPA does not free the CPA's personnel or those who contracted with the CPA during the period of its existence from responsibility for violations of the law of occupation. In addition, the dissolution of the CPA did not terminate the military occupation of Iraq. The continued presence of Coalition Forces in the form of the Multinational Force in Iraq after 28 June 2004, with exercising effective governmental authority made no occupation of Iraq ending.

With the analysis of the right to self-defence, authorisation under Security Council Resolutions to use force, and humanitarian intervention, the justifications for the occupation of Iraq have been examined. The conclusion reached was that the entry into Iraqi territory was illegal, a breach of international law and the Charter of the United Nations regarding the use of force. It is striking that this military action recalled Franck's observation in 1970 in which he called into question the continued validity of the Charter's "normative system." Professor Thomas M. Franck observed:

The failure of the UN Charter's normative system is tantamount to the inability of any rule, such as that set out in Article 2(4), in itself to have much control over the behaviour of states. National self-interest, particularly the national self-interest of the super-Powers, has usually won out over treaty obligations. This is particularly

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<sup>242</sup> *Democratic Republic of the Congo v. Uganda* (n 22).

<sup>243</sup> *United States ex rel DRC, Inc. v. Custer Battles LLC* (n 178).

characteristic of this age of pragmatic power politics. It is as if international law, always something of a cultural myth, had been demythologised. It seems this is not an age when men act by principles simply because that is what gentlemen ought to do.<sup>244</sup>

In this Chapter, *United States v. Wilhelm List and others*,<sup>245</sup> is brought forth to establish that whatever the manner in which the occupation was brought about, that is to say lawful or unlawful, duties of the occupant remain exactly the same.

Establishing that the CPA was an occupying power in Iraq with broad authority means that it was required, under the law of occupation, to take proper steps to restore and ensure as far as possible public order and life in the occupied territory, including preventing financial criminal activities from taking place therein. The next Chapter will consider the duty of the CPA to prevent criminal activities in Iraqi territory in great depth.

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<sup>244</sup> Thomas M. Franck, 'Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States' (1970) 64 (4) *American Journal of International Law* 836.

<sup>245</sup> *United States v. Wilhelm List and others* (n 90).

## **Chapter Two: The duty of the Coalition Provisional Authority in prevention of financial criminal activities**

### **2.1 Introduction**

The objective of this Chapter is to examine the duty of the CPA to prevent financial criminal activities in occupied Iraq. The rights of the occupant are only temporary, yet are accompanied by responsibility for administration of the occupied territory. Benvenisti observes that occupation can become “a liability more than an asset.”<sup>1</sup> Linked with this responsibility is a duty by the occupying power to not stand idly by when financial criminal activities are committed by individuals, criminal groups, companies, and armed bands in the occupied territory.

The purpose of the duty under which the CPA was obligated to prevent financial criminal activities is considered herein. The discussion centres on the effective control test as a trigger for commencement of the duty in question. The concept of supremacy in the sky is considered as well, but the physical presence of foreign forces in the occupied territory is required to discharge the duty of preventing financial criminal activities.

The legal source of the CPA’s duty to prevent financial criminal activities is found in Treaty Law: the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949. It is also found in the United Nations Security Council Resolution (1483).<sup>2</sup> The *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*,<sup>3</sup> is discussed to illustrate the CPA’s due diligence obligation. The Chapter raises the question as to how can the CPA prevent criminal activities. To this end, exercising policing powers, which involve law enforcement activities, based primarily on international human rights law is mapped out. The Chapter will then move on to the duty of the CPA to manage Iraqi funds and to prevent illegal use of them. In this Chapter, it is conceived that the CPA will be as a trustee for the benefit of the Iraqi people, as well as for the benefit of the incoming Iraqi Government.

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<sup>1</sup> Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, Oxford University Press 2012) 86.

<sup>2</sup> United Nations Security Council Resolution 1483, 4761st meeting, UN Doc .S/RES/1483 (2003), 22 May 2003.

<sup>3</sup> *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)* (19 December 2005), I.C.J. Report. para 178.

## 2.2 Preventing financial criminal activities comes within the scope of the duty to restore and ensure public order

Article 43 of the Hague Regulations created a duty for the CPA to take proper and feasible steps to restore and ensure public order in occupied Iraq. The term “public order” is generally understood to mean “security or general safety.”<sup>4</sup> Within this, in a broad sense, the CPA was obligated to control public demonstrations, to disarm persons or groups, and to prevent serious crimes, for instance, war crimes, genocide, and crimes against humanity.<sup>5</sup> Importantly, the CPA was primarily obligated to prevent criminal activities. The United States Military Tribunal at Nuremberg put the duty of the occupying power to prevent crime in *United States v. Wilhelm List and others (The Hostages Case)*, as follows:

The status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility. But he is definitely limited by recognised rules of International Law, particularly the Hague Regulations of 1907. Article 43 thereof imposes a duty upon the occupant to respect the laws in force in the country. Article 46 protects family honour and rights, the lives of individuals and their private property as well as their religious convictions and the right of public worship. Article 47 prohibits pillage. Article 50 prohibits collective penalties. Article 51 regulates the appropriation of properties belonging to the state or private individuals which may be useful in military operations.<sup>6</sup>

From the perspective of Dinstein, the duty of the occupying power to restore and ensure public order is only aimed at protecting the civilian populace in the occupied territory from the breakdown of orderly life.<sup>7</sup> He observes that the framers of the Hague Conventions were afraid that the objective of the occupant, by taking possession over the territory, would be

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<sup>4</sup> Edmund H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43 Hague Regulations’ (1945) 54 (2) Yale Law Journal 398.

<sup>5</sup> Timothy McCormack and Bruce M. Oswald, ‘The maintenance of law and order in military operations’ in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 445 at 445.

<sup>6</sup> *United States v. Wilhelm List and others (The Hostages Case)*, Trials of War Criminals before the Nuremberg Military Tribunals (19 February 1948), No. 10, Vol. XI, (USA, Government Printing Office, Washington D.C, 1950) 1244.

<sup>7</sup> Yoram Dinstein, ‘The Israel Supreme Court and The Law of Belligerent Occupation: Article 43 of the Hague Regulations’ in Yoram Dinstein and Mala Tabory (eds), *Israel Year Book on Human Rights: vol 25* (Martinus Nijhoff 1996) 1 at 15.

solely military, but would not make any effort to prevent anarchy from being rampant in the territory paralysing the life of the civilian populace.<sup>8</sup>

Dinstein goes on to state that it can be contemplated that a state of affairs in which roving bands of marauders bring devastation to the civilian populace, while they avoid a conflict with the military forces of the occupying power. In such circumstances, the occupying power may be tempted to feel that as long as its installations and units do not constitute a target, and the sole victims are local inhabitants, it would be better to avoid the allocation of units and resources for the repression of criminal elements.<sup>9</sup>

Yet, Dinstein's view does not take into account the duty of the occupying power to take appropriate steps to provide property with the required protection. A duty to prevent financial criminal activities reaches far beyond the mere protection of the civilian populace and extends to the protection of property within the occupied territory from individuals and armed bands. This was expressed in *United States v. Wilhelm List and others* mentioned above. Moreover, the last Part of this Chapter and also Chapter Three will show that the CPA was obligated to take affirmative measures to protect property in occupied Iraq.

The duty of the CPA to prevent financial criminal activities was immediate and continuous. This dimension came before the Israeli Supreme Court in *Jamait Askan* case. Per Justice Barak, the verb "restore" means to re-establish public order and life, if disrupted, while the verb "ensure" requires ensuring their continued existence, whether disrupted in the past (and restored) or left undisturbed.<sup>10</sup>

### **2.3 The duty of preventing financial criminal activities begins with the effective control over territory**

As discussed in the previous Chapter, an occupation begins once effective control is established over enemy territory. From this statement, it is therefore logical to assume that the duty of an occupying force to prevent financial criminal activities arises from that moment. As Gasser observes, the actual control over a territory of another State by hostile armed

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<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> H CJ 393/82, *Jamait Askan et al. v. IDF Commander of Judea and Samaria Region et al.*, 37(4) P.D. 785,792, as cited in Yoram Dinstein, *The International Law of Belligerent Occupation* (1<sup>st</sup> edn, Cambridge University Press 2009) para 208.

forces makes it impossible to evade the obligations established under the law of occupation toward territory and its populace.<sup>11</sup>

However, Benvenisti has suggested that it is necessary to impose duties on the foreign forces even before the establishment of effective control over the occupied territory.<sup>12</sup> He has argued that in the law regulating the conduct of hostilities, armies are required to take all practicable precautions before launching an attack in order to minimise harm to civilians and civilian objects,<sup>13</sup> and the law of occupation so does. Taking precautions before launching an attack also requires the army to contemplate the outcome of the attack on the civilian populace in the territory, and put in advance emergency assistance plans, and steps to prevent looting, criminal activities and the provision of food and shelter. To be more precise, it has to make efforts to minimise the *lacuna* between the time of seizing control over the land and the establishment of effective governance.<sup>14</sup>

For supporting his argument, Benvenisti uses the Judgement of The Israeli High Court in *Physicians for Human Rights et al v. Commander of the IDF Forces in the Gaza Strip et al.*<sup>15</sup>

In this case, Dorit Beinisch, the President of the Supreme Court of Israel held:

...any military operation requires advance preparation in order to deal with the basic requirements of the inhabitants who are in the line of fire during the fighting, or who are likely to be hurt by its consequences and ramifications. This advance preparation should take into account the humanitarian obligations to the civilian population, the possibility of harm to it, and the serious consequences that should be prevented or at least minimised.

Even if it is not possible to foresee every development that may take place during military operations, there is no doubt that the basic needs of the civilian population which at a time of war are in real danger of damage to life, property and basic subsistence, are known and foreseeable. Therefore, within the framework of the operative planning of a military operation, the army must also take into account that part that guarantees the fulfilment of the humanitarian obligations to the civilian population, which is caught between the cynical exploitation of terrorists without

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<sup>11</sup> Hans-Peter Gasser, 'Protection of the Civilian Population' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> edn, Oxford University Press 2008) 237 at 274.

<sup>12</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 57.

<sup>13</sup> Article 57 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>14</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 57.

<sup>15</sup> HCJ 4764/04 *Physicians for Human Rights v. Commander of the IDF Forces in the Gaza Strip*, 2004 Isr.L.Rep.200. Available at <[http://elyon1.court.gov.il/Files\\_ENG/04/640/047/A03/04047640.a03.htm](http://elyon1.court.gov.il/Files_ENG/04/640/047/A03/04047640.a03.htm)> accessed 7 July 2013.



any inhibitions, and exposure to the activity of a military force operating against the terror infrastructure.<sup>16</sup>

Additional support for his argument, Benvenisti referred to the looting of Iraqi cultural property, erupting, as he claimed, in a post-invasion, pre-occupation.<sup>17</sup> He commented on the duty of protecting cultural property, “it is sensible to give cultural property a higher degree of protection and oblige the invading power actively to secure cultural artefacts against looting. Failure to do so may portend ill for the occupation regime.”<sup>18</sup>

In view of the developments in technology and weaponry, Benvenisti demands a need to rethink as to the rule of imposing duties on the occupant based on the actual military presence in the territory. He has pointed out:

...the neat allocation of responsibilities between occupant and occupied based on physical control of territory (“boots on the ground”) which is envisioned by the traditional concept of occupation does not serve humanitarian and global interests, especially given contemporary technology and weaponry that allows modern armies to control territories from above and afar with precision but without accountability. It is necessary to impose legal restraints on any foreign power that effectively controls activity in a foreign area, even without having actual presence in the territory in the ancient form of full-fledged military administration.<sup>19</sup>

The assertion that effective control over a foreign territory and duties of an occupying force can be maintained through the control of adversary’s sky is supported. In 1957, Glahn raised the hypothesis of “air occupation.” He concluded:

Since international law does not contain a rule prescribing the military arm through which an effective belligerent occupation is to be exercised, it might be theoretically possible to maintain necessary control through the occupant’s air force alone.<sup>20</sup>

Likewise, based on his experience in the First Gulf War in 1990, Colonel John Warden III, developed the concept of “air occupation.” He wrote:

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<sup>16</sup> *ibid.*

<sup>17</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 250-251. The looting of cultural property will be discussed in greater depth in Chapter Three.

<sup>18</sup> *ibid* 251.

<sup>19</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 250.

<sup>20</sup> Nevertheless, he stated that the practical problems, which probably to be encountered with this type of occupation “would seem to rule out such an experiment.” Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (University of Minnesota Press 1957) 28-29.

In the past, occupation (in the rare instances when it was needed or possible) was accomplished by ground forces-because there was no good substitute. Today, the concept of “air occupation” is a reality and in many cases it will suffice.<sup>21</sup>

Benvenisti’s argument relating to imposing obligations on a foreign army that is present in an area, but has not yet established its effective control therein is very welcome to protection of property and populace. Such pre-occupation obligations toward the local populace can be stemmed from the duties under the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 1949 toward persons who “find themselves” in the hands of the invading force.<sup>22</sup>

However, Benvenisti’s argument as to imposing obligations on the occupant without boots on the ground is challenged. The physical presence of military forces on enemy territory is a condition *sine qua non* for the establishment and maintaining of an occupation. As Gasser writes:

The question is whether the armed forces that have invaded the adversary’s territory have brought the area in fact under their control through their physical presence, to the extent that they can actually assume the responsibilities of an occupying power.<sup>23</sup>

Likewise, Roberts has written, “at the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of domination or authority over inhabited territory outside the accepted international frontiers.”<sup>24</sup> Indeed, the context in which the international laws of the military occupation were established is: a military occupation is established with ground forces. In this regard, Schmitt observes, in traditional humanitarian law, “occupation is a term of art for physical control by one belligerent over land territory of another (or of a State occupied against its will, but without resistance).”<sup>25</sup> Added to this is the fact that in the absence of physical

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<sup>21</sup> Col John A. Warden III, ‘Air Theory for the Twenty-First Century’ in Barry R. Schneider and Lawrence E. Grinter (eds), *Battlefield of the Future: 21st Century Warfare Issues* (Air University Press 1998) 103 at 121. Further Major General Amos Yadlin in 2004, an Israeli Air Force Officer stated, “our vision of air control zeroes in on the notion of control. We’re looking at how you control a city or a territory from the air when it’s no longer legitimate to hold or occupy that territory on the ground.” as cited in Iain Scobbie, ‘Gaza’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 297.

<sup>22</sup> Article 4 of Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

<sup>23</sup> Hans-Peter Gasser, ‘Protection of the Civilian Population’ (n 11) 274.

<sup>24</sup> Adam Roberts, ‘What is a Military Occupation?’ (1984) 55 (1) *British Yearbook of International Law* 300.

<sup>25</sup> Michael N. Schmitt, ‘Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement’ 1998 20 (4) *Loyola of Los Angeles International and Comparative Law Journal* 729.

presence of enemy forces, the authority of a legitimate sovereign cannot be suppressed and replaced by that of the enemy.

Accordingly, it cannot be assumed that air superiority establishes a state of occupation. Airspace control together with territorial and internal waters is an appurtenance of the land territory.<sup>26</sup> It would be, as such, inconceivable for a military occupation of the airspace to be independent of effective control over the subjacent land.<sup>27</sup> As Bruderlein observes:

...some form of military presence on land remains a necessary condition for an occupation, i.e. a military occupation cannot be solely imposed by the control of the national airspace by a foreign air force (e.g. no fly zone over Southern Iraq), or of the national seashore by a foreign navy. The law of occupation belongs historically to the law of land warfare, which requires, at its core, a land-based security presence.<sup>28</sup>

Above all, the physical presence of foreign forces in the occupied territory makes a direct link between the concept of effective control and the ability to discharge the duty of preventing criminal activists. Armed forces present in a specific foreign territory could not be regarded as occupying forces unless they are in a position to satisfy the duty to prevent criminal activists.<sup>29</sup> If the occupying power is not able to discharge its duties, the idea of effective control would, then, be meaningless. This would conflict, in the end, with the precondition of effectivity upon which the law of occupation is based.<sup>30</sup> In this regard, Ferraro refers to this effect. He observes:

Lowering the threshold of effective control by ignoring the requirement that the occupant must have a presence in the occupied territory will ineluctably affect the application of occupation law. The rights and duties assigned to an occupying power by IHL have been calibrated in relation to a certain threshold of control that normally presupposes the physical presence in occupied territory of the occupying forces. Any attempt to lower the threshold of effective control-particularly by not requiring the physical presence of hostile troops in the occupied territory-will necessarily diminish the importance and extent of the occupant's obligations since, in such instances, it will generally not be in a position to assume them. To accept a type of effective control that will not permit the occupant to execute the obligations listed under occupation law could harm the relevance of that body of law and could

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<sup>26</sup> Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, Oxford University Press 2003) 117.

<sup>27</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 109.

<sup>28</sup> Claude Bruderlein, 'Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law' (2004) Harvard University Program on Humanitarian Policy and Conflict Research 9, also Dr. Hans-Peter Gasser states "Supremacy in the air alone does not meet the requirement of actual control." Hans-Peter Gasser, 'Protection of the Civilian Population' (n 11) 274.

<sup>29</sup> Tristan Ferraro, 'Determining the Beginning and End of an Occupation Under International Humanitarian Law' (2012) 94 (885) *International Review of the Red Cross* 147.

<sup>30</sup> *ibid.*

potentially prevent it from producing legal effects and responding adequately to the social needs arising from a state of occupation.<sup>31</sup>

## **2.4 Legal sources of the duty of the CPA to prevent financial criminal activities: Treaty Law and the United Nations Security Council Resolution (1483)**

The duty of the CPA to prevent financial criminal activities in occupied Iraq is embodied in two main sources, that is to say Treaty Law and the United Nations Security Council Resolution (1483).

### **2.4.1 Treaty Law**

The paramount source in which the CPA is bound to prevent criminal activities is to be found in Treaty Law, that is to say the Hague Regulations and the Fourth Geneva Convention of 1949.

#### **A. The Hague Regulations**

The Hague Regulations undoubtedly continues to form the bedrock of responsibilities of the occupying power in the occupied territory. This is indeed evident from Article 43 of the Hague Regulations. According to this Article, as has been explained above, the CPA was obligated to take appropriate steps to prevent criminal activities. The rationale behind the duty of the CPA is that the concept of occupation carries with it a connotation of authority and responsibility.

The occupant actually exercises the authority over the occupied territory on the grounds of the *de facto* substitution of the authority. Since the authority of the legitimate sovereign is prevented by the military power of the occupant from exercising authority in the occupied territory, the occupant has substituted his authority over that of the legitimate sovereign.<sup>32</sup> This *de facto* substitution is embodied in Article 43 of the Hague Regulations, which proclaims, “The authority of the legitimate power having in fact passed into the hands of the

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<sup>31</sup> *ibid.*

<sup>32</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (1<sup>st</sup> edn, Cambridge University Press 2008) 116.

occupant...’’<sup>33</sup>It has also been reflected in *Democratic Republic of Congo v. Uganda* in which the ICJ has held:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an “occupying Power” in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.<sup>34</sup>

By virtue of its *de facto* authority, the occupying power can exercise some rights for purposes of preventing criminal activities and for the proper administration of the occupied territory. As Greenspan notes:

In general, since “the occupant” is legally only temporarily in possession of the territory for the purpose of the war he should exercise only the power necessary for those purposes, plus the maintenance of order and safety, and the proper administration of the area.<sup>35</sup>

What is important here is whether the legislation to prevent criminal activities comes within the scope of the authority of the occupying power. For Article 43 of the Hague Regulations, the occupying power is bound to respect the existing national system.<sup>36</sup> It provides, the occupant “shall take all the measures in his power to restore, and ensure... public order... while respecting, *unless absolutely prevented*, the laws in force in the country.’’<sup>37</sup> To put it another way, it must maintain the laws in force and not amend, suspend, or replace them with its own legal system. The occupying power cannot legislate for the occupied people, in that it does not acquire the rights of sovereign State. The authority to legislate laws is incontrovertibly an attribute of sovereignty. Therefore, it must be recognised that the

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<sup>33</sup> Article 43 of Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to the Hague Convention of 1907.

<sup>34</sup> *Democratic Republic of Congo v. Uganda* (n 3) para.173.

<sup>35</sup> Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press 1959) 223.

<sup>36</sup> It provides that the occupant “shall take all the measures in his power to restore, and ensure... public order... while respecting, unless absolutely prevented, the laws in force in the country.’’ Article 43 of the Hague Regulations (n 33).

<sup>37</sup> *ibid.*

displaced sovereign only has the full right to enact laws for the occupied territory.<sup>38</sup> However, the occupying power is free from the obligations of laws enacted by the displaced sovereign.<sup>39</sup>

Notwithstanding the general prohibition on enacting laws in the occupied territory, Article 43 of the Hague Regulations allows exceptions to this principle. This is evident from the term “*unless absolutely prevented.*” This term is the equivalent of the concept of “necessity.”<sup>40</sup> Importantly, it not only refers to “military necessity,”<sup>41</sup> but also to the interests of the civilian populace. As in his seminal Article, Schwenk contends that restriction of the term to the military necessity of the occupying power is too narrow, and even undesirable, particularly in the case of prolonged military occupation. Schwenk argues that the restoration of public order and civil life is chiefly in the interests of the populace.<sup>42</sup> Moreover, Leurquin suggested that in certain circumstances the occupant is even *obligated* to enact legislation intended to “ensure...public order.”<sup>43</sup> Leurquin suggested:

Article 43 of the Hague Convention of the 18th October, 1907, concerning military authority in the territory of the enemy State, enjoins upon the occupant to take all measures in his power to ensure public order and safety, “observing, save where there is absolute hindrance, the laws of the country.”

It results from this provision that the occupant is authorised, in case of necessity, to make modifications in the laws. It could not be otherwise. When the occupation is prolonged, and when owing to the war the economic and social position of the occupied country undergoes profound changes, it is perfectly evident that new legislative measures are essential sooner or later.<sup>44</sup>

On basis of the exception of necessity, the occupying power can then put the local legislation aside and enact new ones. However, in parallel to the authority of the occupant, the Hague Regulations places a responsibility for it to take measures to prevent criminal activities in the occupied territory. As Oppenheim wrote in relation to this basic balance:

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<sup>38</sup> Hans-Peter Gasser, ‘Protection of the Civilian Population’ (n 11) 286.

<sup>39</sup> See Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Brill 2009) 101.

<sup>40</sup> Edmund H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43 Hague Regulations’ (n 4) 401.

<sup>41</sup> Morris Greenspan, *The Modern Law of Land Warfare* (n 35) 224.

<sup>42</sup> Edmund H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43 Hague Regulations’ (n 4) 400-401.

<sup>43</sup> Albert Leurquin, ‘The German Occupation in Belgium and Article 43 of The Hague Convention of the 18th October 1907’ (1916) 1 (4) *International Law Notes* 55.

<sup>44</sup> *ibid.*

The principle underlying these modern rules is that, although the occupant does in no wise acquire sovereignty over such territory through the mere fact of having occupied it, he actually exercises for the time being a military authority over it. As he prevents thereby the legitimate sovereign from exercising his authority and claims obedience for himself from the inhabitants, he has to administrate the country not only in the interest of his own military advantage, but also, as far as possible at least, for the public benefit of the inhabitants. Thus the present international law not only gives certain rights to an occupant, but also imposes certain duties upon him.<sup>45</sup>

Under the Hague Regulations, the CPA was obligated to protect all interests in occupied Iraq from armed bands. In the occupied territory, there are three sets of interests, that is to say the military interests of the occupying forces, the interests of the ousted regime, and the interests of the local populace.<sup>46</sup> It is an axiomatic fact that the military interest of the occupying forces is the major concern of every army of occupation, and therefore, while it administers the occupied territory, the law of occupation authorises the occupant to protect its interests from criminal activities. Nevertheless, because the occupant has effective control over the occupied territory, he is required to take care of the interests of the ousted regime, and of the interests of the civilian populace in the occupied territory. Thus, both interests are required to be protected from individuals and criminal bands.

It may be useful to point out here that the Hague Regulations may possibly give preference to the interests of the ousted regime when they are conflicted with the interests of the civilian populace in the occupied territory. Interference largely in the life of the civilian populace in the occupied territory and creating rights toward that populace was not in the intention of the Hague Regulations. Benvenisti convincingly attributes this to the fact that the Hague Regulations reflected the realities in nineteenth-century Europe: war was limited in scope; civilians were left out of the war, and were to be kept physically and economically unharmed as much as possible. Occupations were of relatively short-term, during which the defeated party territorially conceded. He goes on to state that the occupant, during that brief time, should preserve the political interests of defeated side, but the need was not felt for it to intervene substantially in the daily life of the civilian populace.<sup>47</sup>

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<sup>45</sup> L. Oppenheim, *International Law: A Treatise*, vol 2 (Longmans, Green, and Co. 1905) 169.

<sup>46</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 69.

<sup>47</sup> *ibid* 11.

This idea was expressed in the famous statement of King William of Prussia on 11 August 1870: “I conduct war with the French soldiers, not with the French citizens.”<sup>48</sup> This limited scope of war was coupled with *laissez-faire* theory. This theory believes in the policy of minimal intervention of the government in economic life, and the great respect for private economic rights. It was submitted that States have little interest in regulating the economic activity of their own citizens, and therefore occupying powers should have little interest in regulating or interfering with the economic activity and property of the occupied.<sup>49</sup> Added to the above is the fact that the prevailing view at that time tipped the scales in favour of a military necessity of the occupant against a humanitarian concern for the civilian populace.<sup>50</sup> As such, civilians were not in urgent need of protection in the occupied territory. However, over time, the scale has started to tip to the side of the protection of the inhabitants of the occupied territory. This is clear in the Fourth Geneva Convention of 1949.<sup>51</sup>

## **B. The Fourth Geneva Convention of 1949**

The duty of the CPA to prevent financial criminal activities is also to be found in the Fourth Geneva Convention of 1949. According to the second paragraph of Article 64 of the Fourth Geneva Convention, the occupying power can enact provisions for “*maintaining the orderly government*” of the occupied territory. It states, “The occupying power may, however, subject the population of the occupied territory to provisions which are essential to enabling the occupying power...to maintain the orderly government of the territory.”<sup>52</sup> This paragraph is an exception to the preceding paragraph that provides for general prohibition. It states, “The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.”<sup>53</sup>

What is pertinent to the discussion is the second paragraph. The need to maintain the orderly government of the occupied territory is one of three elements of necessity in which the

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<sup>48</sup> Eyal Benvenisti, ‘The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective’ (2003) 1 Israel Defence Forces Law Review 20.

<sup>49</sup> *ibid* 21.

<sup>50</sup> Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (n 39) 264.

<sup>51</sup> For more details, See Eyal Benvenisti, *The International Law of Occupation* (n 1) 72.

<sup>52</sup> Article 64 of the Fourth Geneva Convention (n 22).

<sup>53</sup> *ibid*.



occupying power may have recourse to legislation.<sup>54</sup> This element has to be seen as a broader concept that deals directly with the duty of the CPA to prevent criminal activities. Dinstein argues that this necessity is more open-ended than a cursory reading of Article 64 of the Fourth Geneva Convention might suggest. It reflects a delicate equilibrium between two magnetic poles of the International humanitarian law; military necessity, on the one hand, and humanitarian considerations, on the other. This dichotomy also exists in the law of occupation. The acute needs of the occupying power are not to negate the requirements of the civilian populace under occupation.<sup>55</sup> Schwenk recognised that the legislative competence vested in the occupying power is adequately wide to take the humanitarian considerations of the civilian populace under occupation into account, particularly by reference to the purpose of restoring public order and civil life under Article 43 of the Hague Regulations.<sup>56</sup> Indeed, the protection of the civilian populace in an occupied territory from roving bands invites legislative measures. As Dinstein observes, “law is a living organism and life cannot come to a standstill: *tempora mutantur*,” and the occupying power must have the right to reform the legislation in force, in order “to maintain the orderly government of the territory.”<sup>57</sup>

On the grounds of necessity of preventing criminal activities in occupied Iraq, the CPA imposed longer prison sentences in order to deter acts of looting, kidnapping, or sabotage of infrastructure, *etc.*<sup>58</sup> In addition, the CPA recognised “weapons control is necessary in order to ensure a secure environment for the people of Iraq and to promote public order and safety.”<sup>59</sup> This Order established a number of rules with respect to carrying weapons and the licensing process.<sup>60</sup>

It should be noted that there are two caveats that should be entered in assessing whether provisions enacted in an occupied territory is legal according to the interests of maintaining

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<sup>54</sup> Other elements are the need to fulfil its obligations under the present Convention and the need to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration. Article 54 of the Fourth Geneva Convention (n 22). See about these elements Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (n 39) 124-128-132-135 and Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) paras 260-267.

<sup>55</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 268.

<sup>56</sup> Edmund H. Schwenk, ‘Legislative Power of the Military Occupant under Article 43 Hague Regulations’ (n 4) 400-4001.

<sup>57</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 269.

<sup>58</sup> CPA Order Number 31 of 10 September 2003, Modifications of Penal Code and Criminal Proceedings Law. This Order will be discussed further in Chapter Three.

<sup>59</sup> CPA Order Number 3 of 31 December 2003, Weapons Control.

<sup>60</sup> *ibid.*

orderly government. Firstly, laws enacted with respect to humanitarian motives may be suspected by the populace as a pretext for annexation of the territory by the occupying power.<sup>61</sup> Gerson refers to this danger when he observes:

...humanitarian' motives were suspect. The ease with which such an exception to the prohibition of institutional change could serve as a ruse for creation of *faits accomplis* to the occupant's advantage was well known. Claims by occupants that such change as they initiated was humanitarian, dictated by "the imperative needs of the population," would, during the course of occupation, be exceedingly difficult to disprove. To prevent this possibility of abuse the Hague Regulations adopted the measure of common law jurisprudence regarding trustees. An occupant, like a trustee, would be severely restricted in his authority, not because certain activities could not be honestly done, but because of the extreme difficulty of proving them to have been dishonest.<sup>62</sup>

Secondly, such a fear among the populace may be reinforced in case specific measures designed to enhance particular cultural values are involved.<sup>63</sup> As Pellet notes, the occupant is not the territorial sovereign and not authorised to legislate in the same manner as it does in its home territory.<sup>64</sup> Pellet warns of the danger of ethnocentrism underlying occupation measures, contending that:

... the occupier is not the territorial sovereign. He cannot legislate for the occupied people as he does within his own frontiers. ... there is nothing to stop him "the occupier" taking into consideration the legislative and statutory evolution of the country whose territory is occupied and considering this evolution as worthy of note, it being understood that he is free to take it into account or not. A solution of this type would have the advantage of countering the risk of opposition to progress entailed in an occupation which is excessively prolonged while not falling into the disadvantages of ethnocentrist subjectivity. ...The lawfulness of the occupier's conduct... can, and should, be judged in relation to a far more objective element, the criterion of the sovereign rights of the people whose territory is occupied.<sup>65</sup>

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<sup>61</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 280.

<sup>62</sup> Allan Gerson, 'War, Conquered Territory, and Military Occupation in the Contemporary International Legal System' (1977) 18 (3) *Harvard International Law Journal* 538.

<sup>63</sup> Yutaka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (n 39) 130.

<sup>64</sup> Alain Pellet, 'The Destruction of Troy Will Not Take Place' in Emma Playfair (ed), *International Law and The Administration of Occupied Territories : Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press, Oxford 1992) 169 at 201.

<sup>65</sup> *ibid* 201-202.

## 2.4.2 United Nations Security Council Resolution (1483)

In addition to the Treaty law, the United Nations Security Council Resolution 1483, adopted under Chapter VII of the Charter of the United Nations,<sup>66</sup> can be a legal source of the duty of the CPA to prevent criminal activities in occupied Iraq. Considering the subject of this point initially needs to have some understanding of the nature of United Nations Security Council Resolutions adopted under Chapter VII of the Charter of the United Nations. The Security Council, a principal organ of the United Nations, when acting under Chapter VII of the Charter of the United Nations, has the goal of maintaining international peace and security (for which the Members of the United Nations have conferred upon it primary responsibility).<sup>67</sup>To this end, the Charter endows the Security Council with very broad powers to adopt far-reaching decisions that are binding for all the Members of the United Nations, as well as on all States, regardless of the United Nations membership. This binding effect of Security Council Resolutions is explicitly provided for in Article 25 of the Charter of the United Nations, which proclaims, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>68</sup>

This may cover decisions not adopted under Chapter VII of the Charter of the United Nations. On its *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia, Notwithstanding Security Council Resolution 276 (1970)*, the ICJ held that Article 25 does not apply only to United Nations Security Council Resolutions under Chapter VII.<sup>69</sup>The Court stated that the binding effect of Resolutions made under Chapter VII is given in addition by the general stipulation of Article 25, also by the specific terms of Articles 48 and 49.<sup>70</sup> The Court put it as follows:

It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to ‘the decisions of the Security Council’ adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to

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<sup>66</sup> United Nations Security Council Resolution 1483 (n 2).

<sup>67</sup> Article 24 (1) of the Charter of the United Nations.

<sup>68</sup> Article 25 of the Charter of the United Nations.

<sup>69</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (21 June 1971), I.C.J. Report. para 131.

<sup>70</sup> *ibid.*

decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.<sup>71</sup>

The Security Council, whether it adopts Resolutions under Chapter VII or under any Chapter, cannot be qualified as a legislature. Brichambaut observed that it is not within the power of Security Council to make law, but it is in its power to define rights and obligations for the Members States of the United Nations. At times, new rights, and obligations will replace pre-existing rights and obligations.<sup>72</sup> However, it has been suggested that the Security Council has established itself as a world legislature.<sup>73</sup> This suggestion is based on a number of Security Council Resolutions.<sup>74</sup> To mention but one example, in its response to terrorism in the wake of 9/11/2001, the United Nations Security Council Resolution 1373, placed binding obligations on all States to adopt extensive counter-terrorism measures. These included the obligation to prevent and suppress the financing of terrorist acts, freeze the terrorist assets, and criminalise the perpetration of terrorist acts.<sup>75</sup> Commenting on this Resolution, Sassòli states, the Security Council “thus avoided the long treaty-making process needing the formal consent of all those to be bound or long, mysterious and cumbersome customary process that is subject to manipulation and leads to vague results always subject to controversy.”<sup>76</sup>

Nevertheless, the Security Council is an international political organ of limited competence set forth in the Charter of the United Nations. Even though it possesses some of the attributes of a legislature, it is misleading to suggest that the Security Council acts as a legislature,

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<sup>71</sup> *ibid.*

<sup>72</sup> Marc Perrin de Brichambaut, ‘The Role of The United Nations Security Council in the International Legal System’ in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press 2001) 269 at 275.

<sup>73</sup> See Stefan Talmon, ‘The Security Council as World Legislature’ (2005) 99 *American journal of international law* 175, Eric Rosand, ‘The Security Council as ‘Global Legislator’: Ultra Vires or Ultra Innovative?’ (2004) 28 (3) *Fordham International Law Journal* 542, and Paul C. Szasz, ‘The Security Council Starts Legislating’ (2002) 96 *American journal of international law* 901.

<sup>74</sup> See Stefan Talmon, ‘The Security Council as World Legislature’ (n 73) 177.

<sup>75</sup> United Nations Security Council Resolution 1373, 4385th meeting, UN Doc .S/RES/1373 (2001), 28 September 2001.

<sup>76</sup> Marco Sassòli, ‘The Concept of Security in International Law Relating to Armed Conflict’ in Cecilia M. Bailliet (ed), *Security: A Multidisciplinary Normative Approach* (Martinus Nijhoff Publishers 2009) 7 at 15.

rather than imposing obligations on States being concerned with particular situations or disputes.<sup>77</sup> As Sir Michael C. Wood has put it clearly:

The Security Council is not a judicial organ, nor in any real sense does it exercise quasi-judicial functions, though, like the General Assembly, it does have the power, in certain circumstances and in connection with particular situations or disputes, to establish judicial or quasi-judicial organs, such as the Yugoslav and Rwanda International Criminal Tribunals and the Iraq-Kuwait Boundary Demarcation Commission.

In essence, the Security Council is a political organ with powers and functions set forth in the Charter, in particular the powers to make recommendations and to adopt binding measures for the maintenance of international peace and security.<sup>78</sup>

Indeed, the Security Council makes recommendations and takes decisions in order to do with particular situations or disputes. As Article 39 of the Charter of the United Nations proclaims, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>79</sup>

The Security Council may also impose obligations that enjoy supremacy over other treaty obligations. As Article 103 of the United Nations Charter proclaims, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>80</sup> Further, the Security Council may reaffirm existing rules, it may apply existing rules, it may derogate from existing rules in particular cases, but it has no power to establish new rules of general application.<sup>81</sup>

A closer look at the United Nations Security Council Resolution 1483 would certainly show that the Council affirmed the applicability of the law of occupation to the CPA in occupied Iraq. Additionally, the Council determined the identity of the occupying powers. Moreover, the Council *recognised* obligations of the CPA under the law of occupation.<sup>82</sup> In operative

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<sup>77</sup> Michael C. Wood, ‘The Interpretation of Security Council Resolutions’ in Jochen Abr. Frowein and Rudiger Wolfrum (eds) *Max Planck Yearbook of United Nations Law: v. 2* (1<sup>st</sup> edn, Kluwer Law International 1998) 73 at 77.

<sup>78</sup> *ibid* 78-79.

<sup>79</sup> Article 39 of the Charter of the United Nations.

<sup>80</sup> Article 103 of the Charter of the United Nations.

<sup>81</sup> Michael C. Wood, ‘The Interpretation of Security Council Resolutions’ (n 77) 78.

<sup>82</sup> United Nations Security Council Resolution 1483 (n 2). See Chapter One.

Paragraph (4), the Council called upon the CPA to pursue an “effective administration” of Iraq.<sup>83</sup> Requesting for administering the occupied territory “effectively” can be seen to cement both the powers and duties of the CPA, which it has to perform to protect the occupied populace.<sup>84</sup> Clearly, then, while the Resolution did not *per se* create a duty for the CPA to prevent criminal activities, it however recognised pre-existing duties to which the CPA was subject.

## 2.5 The duty of the CPA to prevent financial criminal activities is not an obligation of result but an obligation of conduct

Although the CPA was bound to prevent criminal activities in occupied Iraq, it did not incur an obligation of result, but rather of conduct or means. The obligation of conduct is understood to mean an obligation to undertake all possible means in furtherance of a specific goal, without, however, committing to ensure that this goal will be achieved.<sup>85</sup> Clearly, then, it is not focused on the result, but on the efforts to do the best it can. In this sense, the CPA committed itself to act in a reasonable cautious and diligent manner, by taking all the proper steps to prevent criminal activities, but without the guarantee that this aim would be reached.

This relative character is clearly accentuated in Article 43 of the Hague Regulations, that is to say the occupant shall take “*all the measures in his power*” to restore, and ensure, “*as far as possible*” public order and safety. A closer look at this reveals that it is equivalent to the obligations of diligence, synonymous with the obligations of vigilance. Obviously, the CPA was required to exercise the diligence obligation in relation to its duty of preventing criminal activities. Before turning to consider such an obligation on the CPA, it is of use to have some knowledge of the diligence obligation.

As is well known, the due diligence principle is a basic principle of international law.<sup>86</sup> This statement holds true, as will be shown below, in that the diligence obligation can clearly be seen in many fields of international law. To satisfy this obligation, a State requires making its

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<sup>83</sup> *ibid.*

<sup>84</sup> Ben Clarke, ‘Military Occupation and The Rule of Law: The Legal Obligations of Occupying Forces in Iraq’ (2006) 10 *International Trade and Business Law Review* 154.

<sup>85</sup> Pierre-Marie Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility’ (1999) 10 (2) *European Journal of International Law* 375.

<sup>86</sup> Luigi Condorelli, ‘The Imputability to States of Acts of International Terrorism’ in Yoram Dinstein and Mala Tabory (eds), *Israel Year Book on Human Rights: v. 19* (Kluwer Academic 1990) 233 at 240.

best possible efforts.<sup>87</sup> The language used in identifying best efforts obligations is frequently difficult to determine. Yet, looking at the decisions of the ICJ can help to understand the language in question. In *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the ICJ has held that the obligation to prevent genocide required States exercising due diligence to “employ all means reasonably available” to them in order to prevent genocide so far as possible.<sup>88</sup> It has also held that, “it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had “employed all means reasonably at its disposal,” they would not have sufficed to prevent the commission of genocide.”<sup>89</sup>

Obligations on States not to “allow” certain activities also come within the scope of requiring a due diligence obligation. In the *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, the ICJ declared that States are required not to knowingly “allow” anyone to use its territory in a way that injures the rights of other States.<sup>90</sup> Further, the obligation of due diligence requires States to “ensure” certain activities over which they exercise control. In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ stated that there exists “a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control.”<sup>91</sup>

In addition to the above issues, the due diligence principle covers the international protection of human rights. In *Velásquez Rodríguez Case*, the Inter-American Court of Human Rights held that Inter-American Convention on Human Rights imposes obligation on States to exercise due diligence in order to prevent attacks on a person’s life, physical integrity or liberty. It is put in following manner:

The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognised by the Convention to every person subject to its

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<sup>87</sup> Pierre-Marie Dupuy, ‘Reviewing the Difficulties of Codification: On Ago’s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility (n 85) 378.

<sup>88</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (26 February 2007), I.C.J. Report. para 430.

<sup>89</sup> *ibid.*

<sup>90</sup> *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits)*, 9 April 1949, I.C.J. Report. p 22.

<sup>91</sup> *Legality of the Threat or Use of Nuclear Weapons case, Advisory Opinion*, (8 July 1996), I.C.J. Report. para 29.

jurisdiction. This obligation implies the duty of the States Parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.<sup>92</sup>

The generic nature of the due diligence principle also extends to the duty of the occupying power to take affirmative and feasible measures to restore and ensure, as far as possible, public order in the occupied territory. As has been shown at the beginning of this Chapter, this duty creates an obligation upon the CPA to prevent criminal activities. This responsibility is considered an obligation to exercise due diligence in the occupied territory. The critical question comes to mind immediately concerning what has been expected of the occupying power to satisfy the due diligence obligation with respect to preventing criminal activities in the occupied territory. The answer to this question has been identified by the ICJ in the *Democratic Republic of Congo v. Uganda*.<sup>93</sup> In that case, the ICJ has held that Uganda was an occupying power in the Ituri province of the Democratic Republic of the Congo (DRC), and incurred obligations, one of which was to:

...take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.<sup>94</sup>

The Court has referred to this elsewhere as a “duty of vigilance.”<sup>95</sup> It has held, a vigilance requires the occupying power to take positive steps 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>96</sup>

Whilst it is true that the CPA was required to take proper steps to pursue the aim prescribed, no one can complain if the measures taken would not be crowned with success.<sup>97</sup> This is due to the due diligence obligation being an obligation of conduct, not an obligation of result. It may be that despite the best efforts of the occupying power, criminal activities, nonetheless,

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<sup>92</sup> *Velásquez Rodríguez Case*, 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para 166.

<sup>93</sup> *Democratic Republic of Congo v. Uganda*, (n 3) para 178.

<sup>94</sup> *ibid.*, para 248.

<sup>95</sup> *ibid.*, para 247.

<sup>96</sup> *ibid.*, para 178.

<sup>97</sup> Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 (4) *The European Journal of International Law* 664.



are committed in the occupied territory. The occurrence of criminal activities does not necessarily show that the duty of due diligence has been breached. Their occurrence, however, may create the presumption that the due diligence obligation has not been complied with. In such a case, it would be for the occupying power, which is under the due diligence obligation, to show that it exercised its best efforts to prevent criminal activities in the occupied territory in order to rebut such a presumption. The failure to do this, however, constitutes a wrongful act of omission, which could, then, raise international responsibility of the occupying power. In this regard, it was shown that Uganda had failed to satisfy the due diligence obligation and, then, was made responsible at the international level. As the ICJ has concluded:

It is in possession of sufficient credible evidence to find that Uganda is internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance in regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.<sup>98</sup>

In this Chapter, it is premature to determine whether the CPA met or breached the due diligence obligation in relation to prevention of criminal activities, as this issue relies on the discussion of those activities in the subsequent Chapter. As the government authority in the occupied territory, the occupying power is responsible for both its own conduct and for the conduct of other actors operating in the territory, including unruly-armed bands and non-State armed groups. In this regard, the ICJ has determined that since Uganda was an occupying power in the part of the (DRC)'s territory at the relevant time:

Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.<sup>99</sup>

### **Is the occupying power required to exercise due diligence with respect to private military and security companies?**

The reference by the ICJ above to “other actors present in the occupied territory” brings to mind the question as to whether private military and security companies (hereinafter known

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<sup>98</sup> *Democratic Republic of Congo v. Uganda*, (n 3) para 250.

<sup>99</sup> *ibid.*, para 179.

as the ‘PMSCs’) operating in the occupied territory can come within the scope of “the other actors.” The occupying power may hire PMSCs to perform certain tasks in the occupied territory. Hiring PMSCs by the CPA in Iraq is a case in point. During 2003-2004, estimations put the number of private security contractors in Iraq in the region of (20,000) contractors.<sup>100</sup> The reason why the CPA resorted to hiring the PMSCs can mainly be attributed to the fact that the Coalition Forces were insufficient to restore and ensure public order in occupied Iraq. Therefore, the PMSCs were used as a method of implementing the duties of the CPA enshrined in Article 43 of the Hague Regulations. In this regard, it has been suggested that the presence of civilians as security guards is possibly more suitable for normal daily existence for the population of the occupied territory than if security tasks to deter were undertaken by uniformed military employees.<sup>101</sup>

The PMSCs were also used to provide personal security for Members of the CPA, as well as training of new Iraqi military and police forces. Moreover, the CPA was responsible for the reconstruction projects, and since Coalition Forces were not available to protect those carried out projects; reconstruction firms resorted to hiring the PMSCs in order to protect their employees.<sup>102</sup>

Whether the PMSCs are performing tasks for the occupying power itself or for other State or non-State actors, the occupying power is required to take reasonable measures and exercise due diligence to ensure that violations of the international humanitarian law or the international human rights law do not take place. This duty can be derived from the fact that the occupying power exercises effective control over the occupied territory, and certainly it is therefore under an obligation to protect in relation to the violence carried out of the PMSCs operating in such a territory. In addition, the broad language of the ICJ in *Democratic Republic of Congo v. Uganda* suggests that the occupying power is obligated to ensure that

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<sup>100</sup> Øyvind Østerud, ‘The New Military Revolution-From Mercenaries to Outsourcing’ in Janne Haaland Matlary and Øyvind Østerud (eds), *Denationalisation of Defence: Convergence and Diversity* (Ashgate 2007) 13 at 13.

<sup>101</sup> Lindsey Cameron and Vincent Chetail, *Privatising War: Private Military and Security Companies under Public International Law* (Cambridge University Press 2013) 239.

<sup>102</sup> David Isenberg, *Shadow Force: Private Security Contractors in Iraq* (Praeger 2009) 157.

the PMSCs and their employees respect the international humanitarian law and human right in their activities.<sup>103</sup>

To ensure that violations of the international humanitarian law or the international human rights law do not take place, the occupying power may be required to enact penal legislation allowing it to exercise jurisdiction over offences committed by the PMSCs personnel, and to investigate and prosecute any the PMSCs personnel involved in the commission of these offences.<sup>104</sup>

Furthermore, the hiring contract between the occupying power and the PMSCs should not grant immunity for the PMSCs personnel operating in the occupied territory from prosecution with respect to alleged violations of international humanitarian law or international human rights law. From this, it can be submitted that the occupying power should not enact legislation that provides immunity for the PMSCs personnel operating in the occupied territory, otherwise it may be considered a violation of its obligation of due diligence. During its tenure, the CPA enacted Order Number 17, which granted immunity to the PMSCs personnel operating in Iraq, and thus prevented the application of local Iraqi law to them.<sup>105</sup> According to Order Number 17, “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”<sup>106</sup> Commenting on this Order, Lindsey Cameron and Vincent Chetail, observe “...arguably the knowledge that the Order may have introduced a gap in the possibility to prosecute in itself contravened the due diligence obligations of the occupying power.”<sup>107</sup>

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<sup>103</sup> Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (n 101) 239 and Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (1<sup>st</sup> edn, Cambridge University Press 2011) 202.

<sup>104</sup> See Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions, (2005) Organised by The University Centre for International Humanitarian Law, Geneva, Convened at International Conference Centre, Geneva 29-30 August 2005. Available at <[http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport\\_compagnies\\_privees.pdf](http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf)> accessed 21 November 2013.

<sup>105</sup> CPA Order Number 17 of 27 June 2004 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq.

<sup>106</sup> *ibid.*

<sup>107</sup> Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (n 101) 240. In Chapter Three, it will be shown that *Custer Battles*, a US private security company made fraudulent claims during the period of CPA and thereby it violated the US False Claims Act.

## 2.6 How can the CPA prevent financial criminal activities?

The duty of the CPA to prevent financial criminal activities in occupied Iraq under the law of occupation has been established above. Preventing financial criminal activities in occupied Iraq requires that the CPA exercise policing powers, which involves a law enforcement paradigm, based primarily on international human rights law. This duty is examined below.

### 2.6.1 The importance of policing in a time of occupation

Policing is of fundamental importance to prevent criminal activities in any social order, including an occupied territory. To understand the idea and function of policing, it is essential in the beginning to distinguish it from the idea of police. Police is generally understood to mean a specific kind of social institution, not found in all societies, with the main function of policing.<sup>108</sup> To put it another way, it is not an activity, but a specialised agency of individuals who carries out a policing function. In contrast, policing can be seen as a set of activities, aimed at securing and preserving the security of a specific social order by particular means. These are “the creation of systems of surveillance coupled with the threat of sanctions for discovered deviance-either immediately or by initiating penal processes.”<sup>109</sup>

In this functional sense, policing activities can be performed by a wide variety of individuals and agencies, not only by the police. The police are, of course, the most familiar system that conducts patrols, undertakes investigation, and discovers crime or disorder. However, the police do not monopolise policing tasks any longer. Policing is, at present, widely provided by conventional police forces, commercial security companies, and by communities volunteered for the “policing.”<sup>110</sup> This pluralisation of policing, that is to say by government and its subjects, as well as, but at times, commercial companies have a duty shared. Above all things, the function of policing is concerned with crime control, maintenance of order, and public safety. As Bayley and Shearing observe:

We are interested in all explicit efforts to create visible agents of crime control, whether by government or by non-governmental institutions. So we are dealing with *policing*, not just *police*. At the same time, we say *explicit* attempts to create policing institutions so as not to extend our discussion to all the informal agencies that societies rely on to maintain order ... So the scope of our discussion is bigger than the breadbox of the police but smaller than the

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<sup>108</sup> Robert Reiner, *The Politics of the Police* (4<sup>th</sup> edn, Oxford University Press 2010) 4.

<sup>109</sup> *ibid* 5.

<sup>110</sup> David H. Bayley and Clifford D. Shearing, ‘The Future of Policing’ (1996) 30 (3) *Law and Society Review* 585.

elephant of social control. Our focus is on the self-conscious processes whereby societies designate and authorise people to create public safety.<sup>111</sup>

The duty with which the occupying power is saddled under Article 43 of the Hague Regulations, namely preventing financial criminal activities does not go far beyond the functional sense of policing. It has, in other words, made the occupying power responsible for the policing of the occupied territory. A territory under occupation needs to be policed during the period of occupation, in that the administration of the occupied territory usually confronts security challenges. As has explained in the main introduction, the CPA faced complex security situations, including insurgency campaigns and foreign terrorists.<sup>112</sup> In addition, there were significant criminal justice problems during the period of the CPA. In the wake of the previous government collapse, the criminal justice system became unable to work effectively, with a large number of court facilities damaged and unable to be fixed, as well as there were a large number of judges whom were under suspicion or were directly under allegations of human rights abuses, incompetence and corruption.<sup>113</sup> This situation made the CPA with potential custodial and due process responsibilities for criminal detainees, enemy prisoners of war, and security internees under the relevant the law of armed conflict provisions. The consequence was a substantial logistic and a personnel problem in the attempt to satisfy required standards.<sup>114</sup> Moreover, another security challenge that faced the CPA following the conclusion of combat operations was the increase in financial criminal activities that are examined in this thesis.

The security challenges in occupied territories attribute to the fact that the occupation of a territory does not mean that the armed conflict is terminated for good. As Major Richard R. Baxter observed, the inhabitants of an occupied territory will inevitably chafe under the occupant rule and under the restrictions imposed on them in the interest of the security of the occupant. This situation will result in committing acts, either individually or in unison, inconsistent with the occupant's security.<sup>115</sup>

Along this line of reasoning, a military occupation is odious in the eyes of the local populace. As Dinstein observes, an occupying power is not a democratic regime and its authority does

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<sup>111</sup> *ibid* 586.

<sup>112</sup> See p 10-13.

<sup>113</sup> Michael J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law' (2003) 6 *Yearbook of International Humanitarian Law* 138-139.

<sup>114</sup> *ibid*.

<sup>115</sup> Richard R. Baxter, 'The Duty of Obedience to the Belligerent Occupant' (1950) 27 *British Year Book of International Law* 235.

not come from the will of the local inhabitants.<sup>116</sup> He adds that an occupation is not intended to win the “hearts and minds” of the population of the occupied territory; it has military interests and its foundation is the “power of the bayonet.”<sup>117</sup>

Added to this is the fact that, if an occupation is transformative, in the company of various factions in the occupied territory competing for political control, the security environment can be more complex.<sup>118</sup> As has explained in the main introduction, the insurgency developed after the end of combat operations on 1 May 2003. Paul Bremer, the Administrator of the CPA asserted that the Iraqi authorities planned the insurgency in advance, prior to March 2003.<sup>119</sup> It is always likely that the existence of foreign troops in an area that witnessed colonialism, war, invasion, and occupation caused tension.<sup>120</sup> The emergence of resistance movements during occupation explains a possible danger, and vulnerability, of transformative occupations. It is likely that the opposition to the occupying forces provoke in any attempt at a major restructuring of society, particularly when a considerable part of that society—in this respect the Sunni Muslim population—saw restructuring as threatening a traditional pattern of political and economic dominance.<sup>121</sup> Moreover, the policy of the CPA to disestablish the Ba'ath Party<sup>122</sup> and dissolve most of the Iraqi military and security institutions<sup>123</sup> added to the risks.

The insurgency had effects on all of the country, but it was primarily occurred in three of Iraq's eighteen provinces, namely Sunni provinces. As has explained in the main introduction, the insurgency was directed against the occupying forces, United Nations officials, the personnel of the International Committee of the Red Cross, and Iraqi people. This attack led to discourage other States from sending military forces or other employees to Iraq. On August 19, 2003, Sergio Vieira de Mello, the United Nations Secretary-General's Special Representative in Iraq was killed in the bombing of the United Nations headquarters in Baghdad. Robert commented on this attack, “This was a clear sign that the insurgents

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<sup>116</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 80.

<sup>117</sup> *ibid.*

<sup>118</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 (3) *American Journal of International Law* 615-616.

<sup>119</sup> L. Paul Bremer III and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (Simon and Schuster Audio 2006) 126-127.

<sup>120</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (n 118) 615.

<sup>121</sup> *ibid.*

<sup>122</sup> CPA Order Number 1 of 16 May 2003, De-Ba'athification of Iraqi Society.

<sup>123</sup> CPA Order Number 2 of 23 May 2003, Dissolution of Entities. This Order will be discussed below.

were aiming at vulnerable targets, and sought to stop international assistance for the transformation project.’’<sup>124</sup>The insurgents used suicide bombers who were difficult to distinguish them in appearance between that of civilians. This led to increase the tension between Coalition staff and ordinary Iraqis, any of who might pose a hidden threat.<sup>125</sup>

Accordingly, a military occupation is not often a “calm” occupation. This possibility is clearly demonstrated in the occupations of the Second World War and the occupation of Iraq.<sup>126</sup>Above all, and the *leitmotif* throughout this Part of this thesis is that the increase in financial criminal activities during the period of occupation is another security challenge to the administration of the occupied territory. In the view of these security situations, the occupying power is obligated to police the occupied territory.

## **2.6.2 The CPA had a duty to exercise policing powers**

The security vacuum created by the ousting of the Iraqi Government by the military forces of the occupants imposed on the CPA a duty to police occupied Iraq. Overall, it was expected that Coalition Forces would not need much security efforts in post-conflict Iraq. It was believed that they would inherit a State fully functioning with its institutions all in one piece,<sup>127</sup>or they could come to an agreement with those who had survived the Iraqi administrative capacity, or possibly a successor government.<sup>128</sup>However, contrary to all expectations, a vacuum in power, as well as the need for security emerged. Sir Jeremy Greenstock, the first British envoy to Iraq after 2003, described the situation in the following manner:

In the days following the victory of 9 April (2003) no one, it seems to me, was instructed to put the security of Iraq first. To put law and order on the streets first. There was no police force. There was no constituted army except the victorious invaders. And there was no American general that I could...establish who was given the accountable responsibility to make sure that the first duty of any Government-and we were the Government-was to keep law and order on the streets.

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<sup>124</sup> Adam Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (n 118) 615.

<sup>125</sup> *ibid.*

<sup>126</sup> See Kenneth Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ (2012) 94 (885) *International Review of the Red Cross* 276-283.

<sup>127</sup> David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime* (Lynne Rienner 2010) 7.

<sup>128</sup> Michael J. Kelly, ‘Iraq and the Law of Occupation: New Tests for an Old Law’ (n 113)128.

There was a vacuum from the beginning in which looters, saboteurs, the criminals, the insurgents moved very quickly.<sup>129</sup>

This vacuum can in large part be attributed to the fact that the invading army was insufficient. Because there was intention to use sophisticated technological weapons in the war, it had decided to send in the region of 150,000 troops for the occupation of Iraq.<sup>130</sup> However, often that took the view that at least 300,000 and ideally, 400,000-500,000 troops were needed to restore and ensure public order in Iraq.<sup>131</sup> In addition, plans for the administration of post-conflict Iraq were not solid. As David L. Phillips observes, although there were goals for the invasion of Iraq, there was not a coherent strategy for achieving them and, in effect, a strategy was almost completely absent. The policy of the invader was based on a ‘‘combination of naivet , misjudgement, and wishful thinking.’’<sup>132</sup> This lack of preparation can be derived from a specific purpose of the Office for Reconstruction and Humanitarian Assistance (ORHA) that was set up to deal with any expected humanitarian crisis, but was not the actual administration of Iraq.

Moreover, yet more importantly, the near total disappearance of the Iraqi police, even before the beginning of occupation created a very large security vacuum. In the same spirit, the Iraqi Republican Guard and security services, as well as Ba'ath Party operatives had simply gone home.<sup>133</sup> This situation had subsequently been exacerbated when the CPA issued Order Number 2, which disbanded the Iraqi Army and all internal security forces.<sup>134</sup> The Administrator of the CPA justified the Order on the grounds that the Iraqi Army had been defeated and many units had disbanded themselves in the wake of the invasion.<sup>135</sup> In addition,

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<sup>129</sup> Nicholas J. Mercer, ‘The Maintenance of Law and Order in the Aftermath of International Armed Conflict-Lessons Learned From Iraq’ in Roberta Arnold (ed), *Law Enforcement within the Framework of Peace Support Operations* (Martinus Nijhoff 2008) 123 at 123. Lieutenant Colonel Nicholas J. Mercer saw the situation in Iraq precisely as what Greenstock described.

<sup>130</sup> G khan  etinsaya, ‘Security, Politics and Constitution: Developments in The New Iraq, 2003-2006’ (2007) 12(1) *Perceptions: Journal of International Affairs* 46.

<sup>131</sup> *ibid.*

<sup>132</sup> David L. Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* (Westview Press 2005) 156.

<sup>133</sup> David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime* (n 127) 6.

<sup>134</sup> CPA Order Number 2 of 23 May 2003, (n 123).

<sup>135</sup> L. Paul Bremer III and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (n 119) 54-59. While it was true insofar as the Iraqi Army melted away, but it has argued that the Army had not continued to fight the invading army as they already warned of fighting the invader. James P. Pfiffner, ‘US Blunders in Iraq: De-Baathification and Disbanding the Army’ (2010) 25 (1) *Intelligence and National Security* 81.



the Administrator later noted that the previous military was an instrument of oppression. As the Administrator pointed out:

It is absolutely essential to convince Iraqis that we are not going to permit the return of Saddam's instruments of repression—the Baath Party, the Mukhabarat security services, or Saddam's army. We did not send our troops halfway round the world to overthrow Saddam only to find another dictator taking his place.<sup>136</sup>

As a result, it has been estimated that the CPA Order Number 2 left 385,000 soldiers, 285,000 police forces, and 50,000 presidential security units out of work.<sup>137</sup> In addition to creating almost a complete security vacuum, the disbanding of security forces without reintegrating them into Iraqi society has been a major factor contributing to the emergence of the insurgency, and contributed to the increase in criminal activities. Exacerbating this situation was the release of 38,000 common criminals from prisons in late 2002,<sup>138</sup> meaning the policing of the occupied territory became the responsibility of the CPA. Even if the CPA was not directly affected by the ensuing security vacuum and disorder, it was obligated not to allow an anarchic or lawless environment to carry on in occupied Iraq. As Dinstein observes:

The occupant cannot sit idly by if marauders pester the occupied territory, killing local inhabitants, even though no soldiers of the army of occupation get injured. The occupant must maintain law and order, and he is not at liberty to tolerate a situation of lawlessness and disorder in the occupied territory.<sup>139</sup>

It should be noted that the occupying power remains, by virtue of Article 43 of the Hague Regulations responsible for the policing of the occupied territory, even if local police forces of the occupied territory are capable of doing so. Whilst many Iraqi police returned to their stations, and programmes were subsequently put in to train new Iraqi police forces,<sup>140</sup> that did not exempt the CPA from its duty to police the territory.

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<sup>136</sup> L. Paul Bremer III and Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope* (n 119) 54.

<sup>137</sup> Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq, 2003 to 2005* (Penguin Group 2006) 162-192.

<sup>138</sup> David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime* (n 127) 7.

<sup>139</sup> Yoram Dinstein, 'The International Law of Belligerent Occupation and Human Rights' in Yoram Dinstein (ed), *Israel Year Book on Human Rights: vol 8* (Martinus Nijhoff 1978) 104 at 111.

<sup>140</sup> David H. Bayley and Clifford D. Shearing, 'The Future of Policing' (n 110) 8-17.

### **2.6.3 The CPA was obligated to perform law enforcement operations for preventing criminal activities**

In exercising of policing powers in occupied Iraq, the CPA was required to prevent criminal activities by means of a law enforcement paradigm and not by means of rules on the conduct of hostilities. It is necessary here to clarify exactly what is meant by the law enforcement paradigm. An attempt to trace the term of law enforcement in international law is a difficult task. However, looking at soft law-instruments issued by international organisations shows that the idea has been used therein. The relevant United Nations documents, that is to say the United Nations Code of Conduct for Law Enforcement Officials, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,<sup>141</sup> show that the term refers to the exercise of police powers by States agents.<sup>142</sup>

By the same token, the European Code of Police Ethics: Recommendation 2001, “applies to traditional public police forces or police services, or to other publicly authorised and/or controlled bodies with the primary objectives of maintaining law and order in civil society, and who are empowered by the State to use force and/or special powers for these purposes.”<sup>143</sup> This functional sense of the law enforcement paradigm includes all persons entrusted with using force to prevent criminal activities, regardless of military or civilian status.<sup>144</sup> Therefore, it could be said that the term of law enforcement comprises all steps adopted by State agents to restore and ensure public order or, to otherwise exercise its authority or power over persons.<sup>145</sup> Added to the functional sense of law enforcement paradigm is the fact that law enforcement operations can be carried out not only by States, but also in exceptional circumstances, by collective entities that have obligations in international law, such as Multilateral Organisations.<sup>146</sup> As a result, it can be said that law enforcement operations are usually not a task carried out by military forces within domestic legal contexts. Rather, it is typically a task conducted by police forces, which are entrusted

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<sup>141</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112 (1990).

<sup>142</sup> Article 1 (a) of the United Nations Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

<sup>143</sup> The European Code of Police Ethics: Recommendation (2001) 10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and Explanatory Memorandum.

<sup>144</sup> Article 1 (b) of the United Nations Code of Conduct for Law Enforcement Officials (n 142).

<sup>145</sup> Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 88.

<sup>146</sup> Nils Melzer, ‘Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities’ in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford University Press 2010) 33 at 36.

with enforcing domestic criminal law under highly prescribed legislative regimes that ensure appropriate “due process.”<sup>147</sup> However, it is assumed that in occupied territory, law enforcement operations are performed by military police of the occupying power, trained for such operations. The United Nations forces or Multinational Forces can also perform those operations.<sup>148</sup>

In the absence of the military police, the occupying power relies on military forces to carry out law enforcement operations in the occupied territory. This situation was evident during the CPA’s tenure.<sup>149</sup> In addition to carrying out military operations in occupied Iraq, military forces were required to carry out police-like functions such as “protecting key installations, controlling access to relatively secure areas, manning checkpoints, or detaining spoilers.”<sup>150</sup> The problem with military forces is that they are generally not trained to conduct law enforcement operations and are not equipped with appropriate weapons. More precisely, military forces usually carry out military operations; directed at combatants, aimed at weakening the military potential of the enemy, and governed by the international humanitarian law on the conduct of hostilities.<sup>151</sup>

#### **2.6.4 Rules on use of force in the law enforcement paradigm**

The CPA was obligated to meet rules on the use of force in law enforcement paradigm, which in essence provides a normative framework on how the human right of life is to be preserved when it is needed to prevent financial criminal activities. The right to life is undoubtedly the cardinal right. If an individual is deprived of that right, other human rights would, indeed, be meaningless. In this regard, the International Convention on Civil and Political Rights (ICCPR) describes the right to life as being an inherent right and is protected: it proclaims,

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<sup>147</sup> Dale Stephens, ‘Military Involvement in Law Enforcement’ (2010) 92 (878) *International Review of the Red Cross*.

<sup>148</sup> Lindsey Cameron and Vincent Chetail, *Privatising War: Private Military and Security Companies under Public International Law* (n 101) 489.

<sup>149</sup> Kenneth Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ (n 126) 285.

<sup>150</sup> David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime* (n 127) 80.

<sup>151</sup> Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (n 97) 665.

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>152</sup>

Moreover, the law of occupation is informed by the duty to respect the right to life. As Justice Beinisch states, “The right to life is engraved in international conventions of human rights and is given to inhabitants protected by the laws of war and occupation.”<sup>153</sup> It follows that the right to life is a norm of *jus cogens*, which is not derogated from even in times of public emergency.<sup>154</sup> It also forms part of customary international law and, therefore applies even to States that are not party to Conventions.<sup>155</sup> Nevertheless, a fundamental challenge here is that the human right to life is not given absolute protection. As is known, the State has a responsibility to restore and ensure public order in society. In doing so, it may, at times, resort to use of lethal force, but its power is not absolute and its actions are “subject to law and morality.”

By the same token, the need to prevent financial criminal activities in the occupied territory may require the occupying power to use force under rules of the law enforcement paradigm, which is basically not the same as rules on the conduct of hostilities under the international humanitarian law.

The use of force for carrying out law enforcement activities is governed by the principle of necessity and proportionality. It can observe that the two principles are embodied in Article 2 of the European Convention on Human Rights of 1950. It declares “Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary.”<sup>156</sup> In *Stewart v United Kingdom*, the European Commission on Human Right stated that “the test of “necessity” includes an assessment as to whether interference with the Convention right was proportionate to the legitimate aims pursued.”<sup>157</sup> It also set out its test of proportionality-one requiring “the nature

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<sup>152</sup> Article 6 (1) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

<sup>153</sup> *Btselem v Military Judge Advocate*, HCJ 9594/03, (21 August 2011) para 9, cited in Benvenisti, *The International Law of Occupation* (n 1) 14. Also, see Articles 27 and 147 of the Fourth Geneva Convention of 1949 (n 22).

<sup>154</sup> W. Paul Gormley, ‘The Right to Life and the Rule of Non-Gerogatability: Peremptory Norms of Jus Cogens’ in Bertrand G. Ramcharan (ed), *The Right to Life in International Law* (Martinus Nijhoff 1985) 120 at 135.

<sup>155</sup> *ibid* 122.

<sup>156</sup> Article 2 of the European Convention on Human Rights of 1950.

<sup>157</sup> *Stewart v United Kingdom*, (Application No 10044/82), Decision of 10 July 1984, para 18

of the aim pursued, the danger to life and limb inherent in the situation, and the degree of risk that force employed might result in loss of life...’’<sup>158</sup>

The principle of necessity and proportionality form the basis of the standards embodied in the three instruments. The United Nations Code of Conduct for Law Enforcement Officials empowers law enforcement officials to use force only when strictly necessary and to the extent required.<sup>159</sup>The Basic Principles on the Use of Force and Firearms by Law Enforcement Officials require no-violent means to be as the first choice, while use of lethal force and firearms should be the last choice. They provide ‘‘Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.’’<sup>160</sup>They require law enforcement officials (1) to exercise restraint and to act in proportion to the seriousness of the offence and the legitimate objectives to be achieved; (2) to minimise damage and injury, and respect and preserve human life; (3) ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; (4) ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.<sup>161</sup>

The European Code of Police Ethics requires that ‘‘the police may use force only when strictly necessary and only to the extent required to obtain a legitimate objective.’’<sup>162</sup>This implies that the force used should be proportionate to the legitimate aim to be achieved through the measure of force. As far as firearms are concerned, their use against individuals is justifiable only on the grounds of personal defence. This is the standard expressed in Article 3 of the United Nations Code of Conduct for Law Enforcement Officials ‘‘when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others’’<sup>163</sup>It is also expressed in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials which reads:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person

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<sup>158</sup> *ibid*, para 19.

<sup>159</sup> Article 3 of the United Nations Code of Conduct for Law Enforcement Officials (n 142).

<sup>160</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 141) para 4.

<sup>161</sup> *Ibid*, para 5.

<sup>162</sup> The European Code of Police Ethics: Recommendation (n 143).

<sup>163</sup> Article 3 of the United Nations Code of Conduct for Law Enforcement Officials (n 142).

presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>164</sup>

### **2.6.5 The role of the human rights law in regulating law enforcement paradigm**

The international human rights law is the main law, but not the only body of law, that provides a legal framework governing law enforcement activities undertaken by the CPA with respect to its duty to prevent financial criminal activities in occupied Iraq. It is a beginning point required to affirm that the applicability of international human rights law during the military occupation is now generally, but in no sense unanimously recognised. This position is supported by the ICJ. The ICJ in its *Advisory Opinion on Nuclear Weapons* phrased it in the following way, “The protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>165</sup>

In the *Advisory Opinion on the Wall*, the ICJ dealt with the same ground, “the court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provision for derogation of the kind to be found in Article 4 of the Covenant of Civil and Political Rights.”<sup>166</sup> Added to this is the principle that, if the occupied State becomes party to human rights treaties, it may be possible that the occupying power will be subject to such treaties. This comes from two dissimilar sources. The first source is that the law of occupation insists on complying, by the occupant with the existing laws in the occupied State, and includes international treaties, which are existing in the State.<sup>167</sup> Therefore, the CPA was obligated to respect international human rights treaties that signed, ratified, or acceded by the Iraq.<sup>168</sup> The second source derives from human rights

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<sup>164</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (n 141) para 9.

<sup>165</sup> *Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion* (8 July 1996), I.C.J. Report. para 25.

<sup>166</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* (9 July 2004), I.C.J. Report. para. 106.

<sup>167</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 15.

<sup>168</sup> Iraq signed, ratified, or acceded to a large number of international human rights treaties. Treaties are (1) The 1948 Universal Declaration of Human Right. (2) International Covenant on Economic Social and Cultural Rights, signed on 23 February 1969, ratified on 25 January 1970, entered into force on 3 January 1976. (3) International Covenant on Civil and Political Rights, signed on 23 February 1969, ratified on 25 January 1970, entered into force on 23 March 1976. (4) International Convention on the Elimination of All Forms of Racial

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Discrimination, signed 18 February 1969, ratified 14 January 1970, entered into force on 12 February 1970. (5) International Convention on the Elimination of All Forms of Discrimination Against Women, acceded on 13 August 1986, entered into force on 12 September 1986. (6) Slavery Convention acceded on 18 January 1929, entered into force on 9 March 1927. (7) Protocol amending the Slavery Convention acceded on 23 May 1955, entered into force on 7 December 1953. (8) Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery signed on 7 September 1956, ratified on 30 September 1963, entered into force on 30 April 1957. (9) Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others acceded on 22 September 1955, entered into force on 25 July 1951. (10) Convention on the Rights of the Child acceded on 15 July 1994, entered into force on 2 September 1990. (11) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour ratified on 9 July 2001, entered into force on 19 November 2000. (12) Right to Organise and Collective Bargaining Convention signed on 27 November 1962, entered into force on 18 July 1951. (13) Convention concerning Forced or Compulsory Labour ratified on 27 November 1962, entered into force on 1 May 1932. (14) Equal Remuneration Convention ratified on 28 August 1963, entered into force on 23 May 1953. (15) Abolition of Forced Labour Convention ratified on 15 Jun 1959, entered into force on 17 January 1959. (16) Discrimination (Employment and Occupation) Convention ratified on 15 Jun 1959, entered into force on 16 June 1960. (17) Employment Policy Convention ratified on 2 Mar 1970, entered into force on 15 July 1966. (18) Convention against Discrimination in Education ratified on 28 June 1977, entered into force on 22 May 1962. (19) Convention on the Prevention and Punishment of the Crime of Genocide acceded on 20 January 1959, entered into force 12 January 1951. (20) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ratified on 14 February 1956, entered into force on 21 October 1950. (21) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ratified on 14 February 1956, entered into force on 21 October 1950. (22) Geneva Convention relative to the Treatment of Prisoners of War ratified on 14 February 1956, entered into force on 21 October 1950. (23) Geneva Convention relative to the Protection of Civilian Persons in Time of War ratified on 14 February 1956, entered into force on 21 October 1950. (24) International Convention Against the Taking of Hostages signed on 14 October 1980, ratified on 26 Aug 2013, entered into force on 3 June 1983. (25) International Convention for the Suppression of Unlawful Seizure of Aircraft signed on 22 February 1971, ratified on 3 December 1971, entered into force on 14 October 1971. (26) International Convention on the Prevention and Punishment of Crimes Against International Protected Persons ratified on 28 February 1978, entered into force on 20 February 1977. (27) Convention on the Privileges and Immunities of the United Nations ratified on 15 September 1949, entered into force on 17 September 1946.

In addition to international human rights treaties above-mentioned, the CPA was obligated to respect human right law provisions in force in occupied Iraq. For example, Article 152 of the Criminal Procedure Code 23 of 1971 provides that trial sessions must be open. Article 92 provides that arrests must be effectuated pursuant to a judge-issued warrant. Article 127 prohibits the use of illegal methods to influence the accused or extract a confession.

Furthermore, the CPA was obligated to respect human rights legislations that it issued in occupied Iraq.

To bring Iraqi laws into compliance with international human rights standards, the CPA passed many acts.

CPA Memorandum Number 3 regarded the Criminal Procedure Code 23 of 1971 deficient “with regard to fundamental standards of human rights.” CPA Memorandum Number 3 of 27 June 2004, Criminal Procedures. Therefore, the CPA made amendments to the Code. The CPA believed it was obligated to “ensure fundamental standards for persons detained” based on the Fourth Geneva Convention of 1949. Therefore, law enforcement officers were required to “inform that person of his or her right to remain silent and to consult an attorney” in case of arrest. CPA Memorandum Number 3 of 27 June 2004. CPA Oder Number 53 also recognised the “fundamental human right and indispensability to justice of representation at court by competent criminal defence counsel.” CPA Oder Number 53 of 16 January 2004, Public Defender's Fees. In order to “ensure safe and humane prisons” the CPA prescribed standards to be applied in all Iraqi prisons. These standards included non-discrimination on the grounds of race, sex, language... accommodation, personal hygiene, treatment,

law pursuant to the principle of the continuity of obligations, as endorsed by the United Nations Human Rights Committee, and applied most effectively in Kosovo:

...the rights guaranteed under the (International Covenant on Civil and Political Rights) belong to the people living in the territory of a State party, and that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory.<sup>169</sup>

As such, the application of the international human rights law in times of occupation can be bound to the occupying power to take it into account in obligations it is bound to discharge in the occupied territory.

When the occupying power has effective control over the territory, and needs to take measures to prevent criminal activities, it is the human rights law that would mainly be regulated as to how the occupying power would use force during law enforcement activities.<sup>170</sup> This conclusion, however, does not sufficiently take into account the law of occupation. The law of occupation can provide a normative framework for carrying out law enforcement activities during the period of occupation. A closer look at the law of occupation shows that it incorporates several substantive rights, which are the backbone of the law enforcement paradigm. To mention but one example, Articles 27 of the Four Geneva Conventions provide:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be

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physical separation of different categories of detainees, psychiatric care, discipline and punishment, medical services food, clothing and bathing, exercise and sport and more. CPA Memorandum Number 2 of 8 June 2003, Management of Detention and Prison Facilities.

CPA Order Number 89 noted that “labour by young persons is endemic in Iraq and is deleterious to the health, safety and morals of children.” CPA Order Number 89 of 30 May 2004, Amendments to the Labour Code-Law No.71 of 1987. Because of this noting and because of Iraq’s obligations under the International Labour Convention, which required taking “affirmative steps towards eliminating child labour” an amendments to the Iraqi Labour established a minimum age of 15 for employment and sought to prohibit the “worst forms of child labour” for instance slavery, illicit activities, in particular for the production and trafficking of drugs, and prostitution. CPA Order Number 89 of 30 May 2004.

<sup>169</sup> Concluding Observations of the Human Rights Committee, Serbia, U.N. Doc. CCPR/C/UNK/CO/1 (2006) para 4.

<sup>170</sup> See Kenneth Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ (n 126) 267 and Tristan Ferraro, ‘The Law of Occupation and Human Rights Law: Some Selected Issues’ in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2013) 273 at 285.



protected especially against all acts of violence or threats thereof and against insults and public curiosity.<sup>171</sup>

In addition, it is significant that the duty of the occupying power under Article 43 of the Hague Regulations with respect to preventing criminal activities, in addition to the recognition of human rights for the civilian population of occupied territories, preceding the substantive development of treaty-based human rights law at the end of the Second World War. Such norms, together with those relating to law enforcement have been and remain part of “the general principles of law recognised by civilized nations.”<sup>172</sup> Furthermore, those rights have, since that time, continued to be recognised and integrated into humanitarian treaty and customary international law.<sup>173</sup> The law enforcement paradigm can, therefore, be applied in occupied territory, not as a matter of human rights law, but as a matter of the law of occupation as stipulated in key provisions of the Hague Regulations and the Fourth Geneva Convention.

## 2.7 The duty of the CPA to manage Iraqi funds

The CPA was obligated to manage Iraqi funds in a transparent manner and to prevent use of funds illegally. This duty can be derived from the controversial notion that the occupying power should administer an occupied territory as a “trustee.” The concept of a trusteeship and conceiving the CPA as a trustee on Iraqi funds, as well as whether the CPA played a role as a trustee in serving the US’s interests are examined here.

### 2.7.1 The concept of trusteeship

In his Separate Opinion *in the International Status of South-West Africa* case, Judge Sir Arnold McNair of the ICJ explains that “Nearly every legal system possesses some institution whereby the property (and sometimes the persons) of those who are not *sui juris*, such as a minor or a lunatic, can be entrusted to some responsible person as a trustee or *tuteur* or *curateur*.”<sup>174</sup>

Judge Arnold McNair furthermore explains that there are three general principles common to the institution of trust: (a) “that the control of the trustee, *tuteur* or *curateur* over the property

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<sup>171</sup> Article 27 of the Four Geneva Conventions (n 22).

<sup>172</sup> Kenneth Watkin, ‘Use of Force during Occupation: Law Enforcement and Conduct of Hostilities’ (n 126) 304.

<sup>173</sup> *ibid* 305.

<sup>174</sup> *International Status of South-West Africa, Advisory Opinion*, (11 July 1950), I.C.J. Report. 148.

is limited in one way or another; he is not in the position of the normal complete owner, who can do what he likes with his own, because he is precluded from administering the property for his own personal benefit.” (b) “that the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose.” (c) “that any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by the law.”<sup>175</sup>

The international law is no exception to the institution of trust in the domestic law. Under the United Nations trusteeship system, the United Nations and Member States together undertook to administer a certain territory in order to promote self-government or independence of the inhabitants, and to further international peace and security in those regions.<sup>176</sup> The responsibility of the trustee was therefore to develop the territory toward eventual self-government “while respecting the right of the peoples of the territory to permanent sovereignty over indigenous natural wealth and resources.”<sup>177</sup> Accordingly, a trusteeship is whether in the context of domestic law or international law, an institution founded upon law.

## **2.7.2 The CPA as a trustee**

### **A. The CPA as a trustee on Iraqi funds**

The CPA should be conceived as a trustee for the interests of the future Iraqi Government and for the interests of the Iraqi populace, including among those interests the protection of Iraqi funds and the wise management of those funds. The duty of the CPA to manage the funds of occupied Iraq is uncontroversial. Article 43 of the Hague Regulations demands the obligation to discharge of functions of government from the CPA.

However, the claim that the CPA acted as a trustee in the management of Iraqi funds is controversial. For Greenwood, the occupying power does not administer an occupied territory as a trustee. In his view, conceiving the occupation as a form of trusteeship is to overlook the fundamental fact that the occupant’s authority in the occupied territory is the successful use of force, whereas trusteeship is an institution founded upon law. Greenwood has put the

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<sup>175</sup> *ibid* 149.

<sup>176</sup> Article 76(b) of the Charter of the United Nations.

<sup>177</sup> W. Ofuatey-Kodjoe, Self Determination, in Oscar Schachter and Christopher Joyner (eds), *United Nations Legal Order, vol 1* (Cambridge University Press 1995) 349 at 354.

difference between the concept of occupation and the concept of trusteeship in the following manner:

...occupation, like war itself, is a fact recognised and regulated by international law, not an institution created by it. Unlike the administering authority in a mandated or trust territory, the belligerent occupant derives its authority not from international law but from the successful exercise of military power. International law imposes certain limitations upon the occupying power's exercise of that authority and requires certain positive acts on the part of the occupying power. In doing so, however, it is seeking to impose a degree of regulation upon a situation which in many cases will have been created in violation of international law and which, in any event, falls short of the ideal to which the international legal system aspires. The occupying power does not, therefore, administer occupied territory as a trustee, either for the population or for the displaced power.<sup>178</sup>

With respect to the duties imposed by the law of occupation on the occupying power, Greenwood has observed that these duties may mean that an occupying power is, on occasion, required to perform certain trustee-like functions. For instance, the occupying power is under a duty to regulate the economic activity of the occupied territory in the interests of that territory. Whilst it may consider the needs of the occupation, it may not take advantage of the economy of the occupied territory in order to benefit the economy of its own State. However, in Professor Christopher Greenwood's view, those duties are far more rudimentary than those of any concept of trusteeship. This is because the law of occupation seeks to regulate conflict between the military interests of the occupant, the humanitarian interests of the populace, and the preservation, pending a final settlement, of certain interests of the ousted sovereign, rather than requiring the occupant to act as disinterested administrator for the benefit of the populace.<sup>179</sup> Considering an occupying power as not being a trustee is supported by Dinstein who writes:

It is wrong to suggest, as is done-perhaps wistfully-by some commentators, that an occupying power can or should administer an occupied territory as a "trustee." A position of a trustee postulates trust. Incontrovertibly, no premise of trust between enemies in wartime is warranted. An occupied territory is not entrusted in the hands of the occupying power. The latter wrests control over the land from the displaced sovereign and wields power in it-as a war related measure-energised by the military capability to do so. When the occupying power looks after the welfare of the inhabitants, its good will is generally spawned by (i) obligations imposed by the law of belligerent occupation, as well as the law of human rights; and (ii) a natural

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<sup>178</sup> Christopher Greenwood, 'The Administration of Occupied Territory in International Law' in Emma Playfair (ed), *International Law and The Administration of Occupied Territories : Two Decades of Israeli Occupation of the West Bank and Gaza Strip* (Clarendon Press, Oxford 1992) 241 at 250.

<sup>179</sup> *ibid* 251.

desire to hold sway in the territory under occupation with maximum tranquillity and minimum friction with the civilian population.<sup>180</sup>

Nevertheless, considering an occupation as not a sort of trusteeship is strongly challenged. Occupied territories constitute a sacred trust. As Sir Arnold Wilson suggested in 1932:

...enemy territories in the occupation of the armed forces of another country constitute (in the language of Article 22 of the League of Nations Covenant) a sacred trust, which must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title.<sup>181</sup>

Conceiving occupation on a trusteeship basis is based on the fact that the occupant does not enjoy sovereignty over the territory concerned. Rather, it administers the territory for the displaced sovereign with a status akin to that of trustee. As Glahn considers the occupying power as a trustee on the grounds that the legitimate government of an occupied territory retains its sovereignty, which is only suspended in the area for the duration of occupation. Glahn put it another way: “the occupant does not in any way acquire sovereign rights in the occupied territory, but exercises a temporary right of administration on a trustee basis until such time as the final disposition of the occupied territory is determined.”<sup>182</sup>

Elaborating on this theme, namely the occupant does not acquire sovereignty over the occupied territory and is prohibited to annex it during the armed conflict, Benvenisti observes:

The foundation upon which the entire law of occupation is based is the principle of inalienability of sovereignty through unilateral action of a foreign power, whether through the actual or the threatened use of force, or in any way unauthorised by sovereign. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty. Because occupation does not transfer sovereignty over the territory to the occupying power, international law must regulate the inter-relationship between the occupying force, the ousted government, and the local inhabitants for the duration of the occupation. From the principle of inalienable sovereignty over a territory springs the basic structural constraints that international law imposes upon the occupant. The occupying power thus precluded from annexing the occupied territory or otherwise unilaterally changing its political status...<sup>183</sup>

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<sup>180</sup> Yoram Dinstein, *The International Law of Belligerent Occupation* (n 10) para 81.

<sup>181</sup> Arnold Talbot Wilson, *The Laws of War in Occupied Territory*, 18 Transactions of the (Grotius Society 1932) 38.

<sup>182</sup> Gerhard Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (n 20) 31.

<sup>183</sup> Eyal Benvenisti, *The International Law of Occupation* (n 1) 6.

On basis of this understanding, the occupant is obligated to act in the interests of the populace and in the interests of the displaced sovereign. Benvenisti goes on:

...instead, it “the occupant” is bound to respect and maintain the political and order institutions that exist in that territory for the duration of the occupation. The law authorised the occupant to safeguard its interests while administering the occupied area, but impose obligations on the occupant to protect the life and property of the inhabitants and to respect the sovereign interests of the ousted government.<sup>184</sup>

This duty is of a temporary duration and the occupying power exercises its authority as a trustee of the sovereign. As Benvenisti concludes, “because occupation does not amount to sovereignty, the occupation is also limited in time and the occupant has only temporary managerial powers, for the period until a peace solution is reached. During that limited period, the occupant administers the territory on behalf of the sovereign. Thus the occupant’s status is conceived to be that of a trustee.”<sup>185</sup>

Moreover, the notion of trusteeship is implicit in the law of occupation. The Hague Regulations and the Four Geneva Conventions put the occupant in a role, in some respects similar to that of a trustee.<sup>186</sup> This role is implicit in the principle that the occupant is vested with the authority “to take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>187</sup> It can also be found in a number of economic rules enshrined in the Hague Regulations, particularly Articles 48-56.<sup>188</sup> To mention but one example, the

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<sup>184</sup> *ibid.*

<sup>185</sup> *ibid.*

<sup>186</sup> Adam Roberts, ‘What is a Military Occupation?’ (n 24) 295.

<sup>187</sup> Article 43 of the Hague Regulations (n 33).

<sup>188</sup> The role of the CPA, as a trustee, was similar to the role of the United Nations Trusteeship Council that suspended operation on 1 November 1994, with the independence of Palau, the last remaining United Nations trust territory, on 1 October 1994. Available at <http://www.un.org/en/mainbodies/trusteeship/> accessed 15 April 2005. According to Article 78 of the Charter of the United Nations, the objective of the Trusteeship Council was to promote peace and security, encourage respect for human rights and equal treatment of people, and advance the economic, social, and political goals of the native people. It provides: “The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be

(a) to further international peace and security;

(b) to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

(c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

occupying power is required to be only as administrator and usufructuary of immovable property, including oil, which must administer in accordance with the rules of usufruct,<sup>189</sup> that prevent using the property in a wasteful or negligent manner.<sup>190</sup> Therefore, the occupying power is not allowed to confiscate such property or take the “corpus” of such property and it has to safeguard them much like a trustee.<sup>191</sup>

When one looks at the role of the CPA, it becomes apparent that it was acting like a trustee for the future Iraqi Government and for the benefit of the Iraqi people. Beginning with the future Iraqi Government: since Coalition States were planned to invade Iraq, the general consensus of the post-war administration was to prepare the Iraqi population for eventual self-governance, which is one of the basic objectives of the trusteeship system. The Security Council Resolutions established a legal framework for eventual self-governance. As explained in the previous Chapter, the United Nations Security Council Resolution 1483 determined the identity of the authorities exercising control in Iraq, while furthermore

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(d) to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.” The CPA pursued to achieve all those goals. See Brian Deiwert, ‘A New Trusteeship for World Peace and Security: Can an Old League of Nations Idea be applied to a Twenty-first Century Iraq?’ (2004) 14 (3) *Indiana International & Comparative Law Review* 803.

It should be noted that the CPA did not enjoy sovereignty over occupied Iraq. Once Iraq was occupied, its sovereignty was suspended. It is known that according to Article 78 of the Charter of the United Nations, the trusteeship system cannot “apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.” Seemingly, Article 78 does not allow the imposition of trusteeship status on Iraq, as it is Member of the United Nations. However, the issue of sovereignty was not the main stumbling block to apply a trusteeship to Iraq because Iraq was under a military occupation that prevented the exercise of Iraqi sovereignty. Furthermore, the establishment of a trusteeship would not breach the right of an indigenous population of a territory to self-determination. Looking into Article 76 (b) of the Charter of the United Nations shows that the Charter states that the progressive development of trust territories towards self-government and independence should consider “freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.” It seems that the Charter of the United Nations does not find conflict with the principles of trusteeship and self-determination. Hence, it would seem that “as with the notion of sovereignty, in Trusteeship Territories self-determination is a right held in suspension or abeyance until the Administering Authority can create the circumstances in which it can once more receive expression.” Tom Parker, ‘The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21st Century’ (Centre for European and Asian Studies at Norwegian School of Management 2003). Available at <[www.bi.edu/.../03-03The\\_Ultimate\\_Interv](http://www.bi.edu/.../03-03The_Ultimate_Interv)> accessed 20 April 2015.

<sup>189</sup> Article 55 of the Hague Regulations (n 33).

<sup>190</sup> See Eyal Benvenisti, *The International Law of Occupation* (n 1) 82.

<sup>191</sup> Jordan J. Paust, ‘The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War’ (2003-2004) 27(1) *Suffolk Transnational Law Review* 12.

embracing self-determination for Iraq.<sup>192</sup> The same Resolution unequivocally invited the CPA to play the role of trustee. It called upon:

The Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.<sup>193</sup>

The Resolution also called for a local Iraqi body in order to play a role in the occupation administration. It supported:

The formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority.<sup>194</sup>

The Resolution further requested the Secretary-General to appoint a “Special Representative” for Iraq in order to coordinate United Nations, international-agency and the CPA activities in Iraq, and to support the development of local governmental institutions.<sup>195</sup>

On the other hand, the United Nations Security Council Resolution 1511 urged the CPA to transfer power to local institutions as soon as practicable. The Resolution called upon the CPA to return governing responsibilities and authorities “to the people of Iraq as soon as practicable and requests the Authority, in cooperation as appropriate with the Governing Council and the Secretary-General, to report to the Council on the progress being made.”<sup>196</sup>

The Resolution also provided for a strengthened United Nations role in supporting local institutions without suggesting any power to make governmental decisions. It resolved:

The United Nations, acting through the Secretary-General, his Special Representative, and the United Nations Assistance Mission in Iraq, should strengthen its vital role in Iraq, including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable

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<sup>192</sup> “Stressing the right of the Iraqi people freely to determine their own political future and control their own natural resources, welcoming the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly.” United Nations Security Council Resolution 1483 (n 2).

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

<sup>196</sup> United Nations Security Council Resolution 1511, 4844th meeting, UN Doc .S/RES/1511 (2003), 16 October 2003.

development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government.<sup>197</sup>

Under the Resolution, the local institutions were responsible for designing and implementing a process to write a constitution and hold national elections supported by the United Nations.

The Resolution:

*Takes note* of the intention of the Governing Council to hold a constitutional conference and, recognising that the convening of the conference will be a milestone in the movement to the full exercise of sovereignty, calls for its preparation through national dialogue and consensus-building as soon as practicable and requests the Special Representative of the Secretary-General, at the time of the convening of the conference or, as circumstances permit, to lend the unique expertise of the United Nations to the Iraqi people in this process of political transition, including the establishment of electoral processes.<sup>198</sup>

For the benefit of the Iraqi people, the CPA as a trustee was obligated to balance the needs and interests of all the different groups inhabiting Iraq.<sup>199</sup> Furthermore, the CPA conceived itself as a trustee for the property of the Iraqi Baath Party. By the CPA Order Number 4, this property could be seized by the CPA “on behalf, and for the benefit of the people of Iraq.”<sup>200</sup> The same Order then proclaimed, “The CPA will hold in trust and for the use and benefit of the people of Iraq all the said property and assets of the Ba`ath Party that have seized in accordance with this Order.”<sup>201</sup>

Moreover, as a trustee, the CPA was authorised and in fact was required to manage Iraqi oil. In letter to the President of the Security Council, the occupants proclaimed that they “will act to ensure that Iraq’s oil is protected and used for the benefit of the Iraqi people.”<sup>202</sup> The CPA emphasised that “a major CPA objective is to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including Iraqi petroleum and petroleum products, are dedicated to the well-being of the Iraqi people.”<sup>203</sup> Commenting on this authorisation,

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<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*

<sup>199</sup> See Joshua S. Miller, ‘Putting Iraq in Trust: Reviving the U.N. International Trusteeship under General Principles of International Fiduciary Obligation to Manage the Natural Resources of a Post-Saddam Iraq’ (2003) 27 (1) *Suffolk Transnational Law Review* 71.

<sup>200</sup> Section 3 (1) of CPA Number 4 of 25 of May 2003, Management of Property and Assets of the Iraqi Baath Party.

<sup>201</sup> *ibid.*, Section 3 (4).

<sup>202</sup> Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/538 (8 May 2003).

<sup>203</sup> CPA Regulation Number 2 of 18 June 2003, Development Fund for Iraq.



Paust observes, the CPA was obligated to “safeguard the Iraqi oil and obligated to administer extraction processes as a trustee for the Iraqi State or for the populace.”<sup>204</sup> Paust commented on the legality of the “privatisation” of the duty to administer occupied public property by the occupying power:

Thus, an occupying power cannot engage or participate in “privatisation” of Iraqi oil or the State-owned oil production and distribution industry and must not tolerate rates of extraction beyond prior “normal” rates of extraction or excessive fees or profits by others administering such properties. Similarly, the occupying power must not contract with private companies in such a manner as to allow them to engage in the same sorts of prohibition.<sup>205</sup>

The United Nations Security Council Resolution 1483 demanded that the proceeds from export oil were to be deposited into the DFI. It stipulated that the funds in the DFI were to be disbursed at the discretion of the CPA.<sup>206</sup>

## **B. The role of the CPA as a trustee in serving the US’s interests**

Chapter One has examined in great details the legal justifications presented by the United States to enter into Iraqi territory, namely the right to self-defence, authorisation under the Security Council Resolutions and humanitarian intervention. A detailed analysis of those justifications showed that they were unconvincing and the military intervention was an illegal and a violation of international law as well as the Charter of the United Nations in relation to the use of force.<sup>207</sup>

Accordingly, the question that repeatedly arises as to whether there was unstated motivations behind the decision to invade and occupy Iraq. A considerable amount of literature has been published on the hidden agendas for the United States to enter into Iraqi territory. Published studies list set of the hidden agenda on the invasion of Iraq, namely Israeli security, oil, the ideology of free markets, and gain regional military bases, war for partisan political gain, neoconservative belief in efficacy of unilateral force.<sup>208</sup> Analysis of those agendas shows that

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<sup>204</sup> Jordan J. Paust, ‘The United States as Occupying Power over Portions of Iraq and Special Responsibilities under the Laws of War’ (n 191)12.

<sup>205</sup> *ibid.*

<sup>206</sup> United Nations Security Council Resolution 1483 (n 2). Professor David J. Scheffer observed that the establishment of the (DFI) was additional obligation, not required by the law of occupation. David J. Scheffer ‘Beyond Occupation Law’ (2003) 97 (4) *American Journal of International Law* 846.

<sup>207</sup> See Chapter One.

<sup>208</sup> See Daniel Lieberfeld, ‘Theories of Conflict and the Iraq War’ (2005) 10 (2) *International Journal of Peace Studies* 1-15, Jane K. Cramer and A. Trevor Thrall, ‘Introduction: Why Did the United States Invade Iraq’ in

the CPA might have played a role as a trustee in serving some of those agendas, namely Israeli security, oil, and the ideology of free markets that are examined below.

### 1. Israeli security

Lieberfeld pointed out that the invasion of Iraq might have been motivated by Israeli security.<sup>209</sup> This perspective is based on that the previous Iraqi regime supported the Palestinian militancy. The loss of Iraqi backing would result in decreasing the Palestinian militancy in the conflict with Israel. It would also enable an Israelis and Palestinians to make accord on conditions acceptable to Israel. Furthermore, the United States government hoped that the existence of the United States in Iraqi territory would place Syria under pressure, as it is considered an enemy government for both the United States and Israel.<sup>210</sup>

The invasion of Iraq for enhancing Israel's security was an important motivation for the neoconservatives. It claimed that the neoconservatives encouraged the entry into Iraq because they think that the security of Israel is concerned as much as a concern for the security of the United States.<sup>211</sup> They strongly believed that the overthrow of the Iraqi regime as a powerful regional enemy would strengthen Israel's strategic position in the Middle East.<sup>212</sup> The link between the neoconservatives and Israeli security was explicit in many statements:

[The invasion was motivated by] Neocon ideology which thought they could remake the Middle East in a manner more favourable to the US (and Israeli) interests.<sup>213</sup>

Although I think the originally given reasons [by the administration] are part of the explanation, they do not include an extremely important component, i.e., the neo-cons behind the President who saw regime change in Iraq as a beginning for the creation of a democratic Middle East from which a "benign" spill over would emanate to other Arab states as well as Iran. Democracy's advance in this region would, in turn, help ameliorate the Arab world's relations with Israel; and the American neo-con vision of a muscular Wilsonian world would begin to take shape.<sup>214</sup>

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Jane K. Cramer and A. Trevor Thrall (eds), *Why Did the United States Invade Iraq?* (1<sup>st</sup> edn, Routledge 2012)1-25, and Jeffrey Record, *Wanting War: Why the Bush Administration Invaded Iraq* (Potomac Books Inc 2010).

<sup>209</sup> Daniel Lieberfeld, 'Theories of Conflict and the Iraq War' (n 208) 4.

<sup>210</sup> *ibid.*

<sup>211</sup> Mearsheimer, John, and Stephen Walt, *The Israel Lobby and U.S. Foreign* ( 1<sup>st</sup> edn, Farrar, Straus and Giroux 2007) 238-240.

<sup>212</sup> Dov Waxman, 'From Jerusalem to Baghdad? Israel and the War in Iraq' (2009) 10 (1) *International Studies Perspectives* 5.

<sup>213</sup> Jane K. Cramer and A. Trevor Thrall, 'Introduction: Why Did the United States Invade Iraq' (n 208) 12.

<sup>214</sup> *ibid.*

Bush's neo-con advisors, led by Wolfowitz, had a more complex idea, that US military action could promote wholesale reshaping of the Middle East in a democratic direction. The long term security interest of Israel was part of that package. So was oil ...<sup>215</sup>

The question that poses, therefore, as to whether the CPA played role in enhancing Israeli interests. It is possible to hypothesise that the CPA might have protected the Israeli security. As has been explained, the CPA Order Number 1 disestablished the Ba`ath Party of Iraq.<sup>216</sup> The Ba`ath Party sought to make the Iraqi State the most powerful State in the area, therefore challenging the military dominance of Israel. For this aim, Iraq sought to develop military forces to be one of the strongest forces in the world, equipped with sophisticated weapons.<sup>217</sup> However, as has seen, the CPA Order Number 2 dissolved the Iraqi army.<sup>218</sup>

## 2. A war for oil

The desire to have control over oil can be a motivation for the United States' decision to invade Iraq. It is known that United States main interests in the Persian Gulf came from the oil in area. Sick wrote:

the interests of the United States in the Persian Gulf region have been very simple and consistent; first, to ensure access by the industrialised world to the vast oil resources of the region; and second, to prevent any hostile power from acquiring political or military control over these resources...Other objectives, such as preserving the stability and independence of the Gulf States or containing the threat of Islamic fundamentalism, were derivative concerns and were implicit in the two grand themes of oil and containment.<sup>219</sup>

Sick's opinion recalls us to the Carter doctrine of 1980. In his State of the Union Address of 23 January 1980, the former president of the United States, Jimmy Carter stated that it is healthy of the United State economy to have access to the Persian Gulf area oil fields, and therefore any aggressive attempt to obstruct such access would be regarded as an attack on

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<sup>215</sup> *ibid.*

<sup>216</sup> CPA Order Number 1 of 1 May, (n 122).

<sup>217</sup> Eric Davis, 'The Persian Gulf War: Myths and Realities' in Hooshang Amirahmadi, *The United States and the Middle East: A Search for New Perspectives* (State University of New York Press 1993) 251 at 274.

<sup>218</sup> CPA Order Number 2 of 23 May, (n 123).

<sup>219</sup> Gary Sick, 'The United States in the Persian Gulf: From Twin Pillars to Dual Containment' in David W. Lesch (ed), *The Middle East and the United States: A Historical and Political Reassessment* (4<sup>th</sup> edn, Westview Press 2007) 291 at 307.

the vital interests of the United State, and therefore would be faced with any means necessary, including military action.<sup>220</sup>

Klare believed that the Carter doctrine has continued to govern United State foreign policy. e, He therefore argued that the invasion of Iraq could be considered as a natural extension of the Carter doctrine, in addition to other United State military moves in the Persian Gulf area.<sup>221</sup>Historically speaking, the presence of the United State troops in the Gulf region after the invasion and occupation of Kuwait by Iraq in 1990 (that was posed an irrefutable threat to the strategic interests of the United State in the Gulf area as encapsulated in the Carter doctrine) was to defend the Saudi Arabia fields. Known, the Iraqi army was defeated during the 1991 Gulf War. It is also known that the United State government began imposing the “containment” of Iraq and the strategy of economic sanctions, which was later adopted by the former president of the United States, Bill Clinton in the hope of turning the populace against the Iraqi regime.<sup>222</sup>

However, Klare claimed that the economic sanctions were enhancing the stature of Iraqi leadership as a strong adversary of the United States imperialism. Furthermore, the Iraqi army was still posed a threat to the strategic interests of the United States in the Gulf area, particularly the oil-driven United States alliance with Saudi Arabia and Kuwait. Moreover, the thought that the Iraqi regime was seeking to have weapons of mass destruction supplemented to the impression of a considerable Iraqi threat.<sup>223</sup>Therefore, the main jeopardy to the interests of the United States was that Iraq would have sought to employ its military capabilities to achieve its ambitions in the Gulf area. As Vice president of the United States, Dick Cheney warned in the Annual Convention of the Veterans of Foreign Wars on 26 August 2002:

Armed with an arsenal of these weapons of terror and a seat at a top 10 percent of the world’s oil reserves, Saddam Hussein could then be expected to seek domination of the entire Middle East, take control of a great portion of the world’s

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<sup>220</sup>Jimmy Carter, State of the Union Address, 23 January 1980. Available at <<http://www.jimmycarterlibrary.gov/documents/speeches/>> accessed 20 April 2015.

<sup>221</sup>Michael T. Klare, ‘Oil, Iraq, and American Foreign Policy: The Continuing Salience of the Carter Doctrine’ (2006-2007) 26 (1) International Journal 32.

<sup>222</sup> ibid 35.

<sup>223</sup> ibid 36.

energy supplies, directly threaten America's friends throughout the region and subject the United States or any other nation to nuclear blackmail.<sup>224</sup>

Pollack expected that there would be the dire consequences if Saddam Hussein achieves his objectives. He noted:

He [would] use this power to advance Iraq's political interests, even to the detriment of its economic interests and the world's... If Saddam Hussein were ever to control the Persian Gulf oil resources, his past record suggests that he would be willing to cut or even halt oil exports altogether whenever it suited him, in order to force concessions from his fellow Arabs, Europe, the United States, or the world as a whole. And even if he failed, he could still wreak considerable havoc on the region and world oil supplies.<sup>225</sup>

For removing this threat and thereby protecting the vital interests of United States in accordance with the principles of the Carter doctrine, George W. Bush came to conclusion that the invasion of Iraq and the destruction of the Iraqi regime once and for all would be the only way.<sup>226</sup>

Some went further when they argued that the purpose of the invasion of Iraq was to secure Iraq oil for United States oil companies and could earn substantial benefits from the process. Paul concisely argued, "the war primarily a "war for oil" in which large multinational oil companies and their host governments acted in secret concert to gain control of Iraq's fabulous oil reserves and to gain leverage over other national oil producers."<sup>227</sup> Similarly, Rogers argued that the purpose of the invasion of Iraq was to permit United States oil companies to seize Iraqi oilfields and make considerable benefits from the process. The massive lobbying power of multinational oil companies in search of short-term gain or plunder was seen as a key motivator of United States strategy.<sup>228</sup> Rogers said "Whether or not direct lobbying had an effect, the result of the Iraq war has certainly been "good" for the oil

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<sup>224</sup> 'In Cheney's Words: The Administration Case for Removing Saddam Hussein' *New York Times* (27 August 2002).

<sup>225</sup> Kenneth M. Pollack, *The Threatening Storm: The Case for Invading Iraq* (1<sup>st</sup> edn, Random House USA 2002) 152, 211.

<sup>226</sup> Michael T. Klare, 'Council Oil, Iraq, and American Foreign Policy: The Continuing Salience of the Carter Doctrine' (n 221)36.

<sup>227</sup> James A. Paul, Oil Companies in Iraq (November 2003). Available at <<https://www.globalpolicy.org/component/content/article/185/40586.html>> accessed 10 April 2015.

<sup>228</sup> Paul Rogers, It's the oil, stupid (24 March 2006). Available at <[https://www.opendemocracy.net/conflict/article\\_2393.jsp](https://www.opendemocracy.net/conflict/article_2393.jsp)> accessed on 10 April 2015.

industry. Oil-related companies like Halliburton have found Iraq immensely profitable, and the oil companies themselves are currently enjoying exceptional profitability.’’<sup>229</sup>

In this regard, Rutledge argued that the United States’ decision to invade Iraq was mainly driven by the close synergy between the Vice president, Dick Cheney, and the oil firms.<sup>230</sup> Cheney is a “single-minded representative of oil capitalism. someone who, given the opportunity, would not hesitate to mould US foreign policy into a form conducive to the business opportunities and profit maximisation so earnestly sought after by the huge energy multinationals of which his own company was a leading representative.’’<sup>231</sup>

One question that needs to be asked, therefore, as to whether the CPA played a role in serving the United States oil interests. The occupation of Iraq as a rich-oil country raised concerns to many. As has been seen, for allaying such concern, the occupants, in a joint letter to the President of United Nations Security Council on 8 May 2003, stated that they “will act to ensure that Iraqi’s oil is protected and used for the benefit of the Iraqi people.’’<sup>232</sup> The CPA itself stressed that a main CPA goal is to make sure that the DFI for Iraq and other Iraqi resources, including “Iraqi petroleum and petroleum products, are dedicated to the well-being of the Iraqi people.’’<sup>233</sup> Security Council Resolution 1483 approved the plan and inserted methods to make sure of compliance. The Resolution demanded that;

all export sales of petroleum, petroleum products, and natural gas from Iraq... shall be made consistent with prevailing international market best practices, to be audited by independent public accountants reporting to the International Advisory and Monitoring Board ... in order to ensure transparency, and (that) all proceeds from such sales shall be deposited into the Development Fund for Iraq until such time as an internationally recognised, representative government of Iraq is properly constituted.<sup>234</sup>

Accordingly, the CPA determined that “ninety-five percent of the proceeds of all export sales of petroleum, petroleum products, and natural gas from Iraq, as well as funds from other sources, shall be deposited into the Development Fund for Iraq until an internationally

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<sup>229</sup> *ibid.*

<sup>230</sup> Ian Rutledge, *Addicted to Oil: America's Relentless Drive for Energy Security* (I.B.Tauris 2005) 65.

<sup>231</sup> *ibid.*

<sup>232</sup> Letter dated 8 May 2003 from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2003/538 (8 May 2003).

<sup>233</sup> CPA Regulation Number 2 of 10 June 2003, Development Fund for Iraq.

<sup>234</sup> United Nations Security Council Resolution 1483, (n 2).

recognized, representative government of Iraq is properly constituted.’’<sup>235</sup>The remaining five percent were to be deposited into the compensation fund created in accordance with Security Council Resolution 687 for the victims of the Gulf War.<sup>236</sup>

With regard to oil security and supply reasons, there is nothing in the CPA Regulations, Orders, and Memoranda that served the United States interests about securing the oil in the Gulf area and Iraq. Regarding secure access to Iraqi oil resources for United States oil companies, we found that the CPA might play a role in seeking to this goal. During the last years of the Iraqi regime, Iraq attempted to re-open its oil industry to foreign capital. This step can be considered a very political. In an attempt to obtain support for the ending of sanctions imposed by United Nations, contracts were negotiated with and awarded mainly to corporations from United Nations Security Council member countries Russia, France, and China.<sup>237</sup> China signed a \$1.3 billion a development and production contract with the Iraqi regime to develop the Al-Ahdab oil field in central Iraq. The production potential of the field was approximately at ninety thousand barrels a day.<sup>238</sup> By 2001, China and Iraq negotiated for the rights to develop Halfayah field.<sup>239</sup> However, in an attempt to secure that United States companies would control over Iraqi oil resources, the CPA nullified all per-existing contracts and promises, and therefore China lost its share in Iraq’s oil fields.<sup>240</sup>

Nevertheless, it should be noted that for securing the United States commercial control of Iraqi oil resources, it is essential in the beginning to privatise of the Iraqi oil industry. As will be seen later, the Iraqi National Oil Company (INOC) was pointedly exempted from the comprehensive privatisation regulations made by CPA Order 39. In addition, during the CPA’s tenure, Iraq did not withdraw from OPEC.<sup>241</sup> Gause commented on the failure of hypothesis that the war was about American control of Iraqi oil, ‘‘If the war was about

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<sup>235</sup> CPA Regulation Number 2 of 10 June 2003, (n 233).

<sup>236</sup> United Nations Security Council Resolution 1483, (n 2).

<sup>237</sup> Greg Muttitt, ‘Crude Designs: The rip-off of Iraq’s oil wealth’ (November 2005). Available at < [www.carbonweb.org/documents/crude\\_designs\\_large.pdf](http://www.carbonweb.org/documents/crude_designs_large.pdf)> accessed 20 April 2015.

<sup>238</sup> Ahmed Hashim, ‘China’s Evolving Relationship with Iraq’ in Gabriel B. Collins, *China’s Energy Strategy: The Impact on Beijing’s Maritime Policies* (Naval Institute Press 2012) 162 at 172.

<sup>239</sup> David Jonsson, *Islamic Economics and the Final Jihad: The Muslim Brotherhood to the Leftist/Marxist - Islamist Alliance* (Xulon Press 2006) 296.

<sup>240</sup> *ibid.*

<sup>241</sup> F. Gregory Gause III, ‘The Iraq War and American National Security’ in John Duffield and Peter Dombrowski (eds), *Balance Sheet: The Iraq War and U.S. National Security* (Stanford Security Studies 2009) 68 at 79.

American commercial control of Iraqi oil, the Bush Administration did a remarkably poor job in consolidating that control while it had the chance.’’<sup>242</sup>

### 3. The ideology of free markets

In addition to the motivations above, the ideology of free markets may be considered as a motivation for the invasion of Iraq. Stokes and Raphael believed that the United States government made the decision to invade Iraq in order to unlock the Iraqi economy up to investment by global capital and reinventing it as a showcase for a neoliberal doctrine.<sup>243</sup> Quite simply, the removal of the Iraqi regime would provide the chance to substitute it with a ruling stratum more acquiescence to the interests of global capital.<sup>244</sup>

This logic is supported by Robinson who argued that the decision to enter into Iraqi territory was not a ‘‘US imperialist plan to gain the upper hand over French, German, and Russian competition’’ by dominating over oil reserves in Iraq. Instead, since the invasion of Iraq, the United States regime has worked to open mainly the Iraqi economy to the penetration of global capital, with the incorporation of its substantial oil reserves as a productive circuit within the global economy remaining an essential element of this strategy.<sup>245</sup> The main aim of the United States in Iraq has been to ‘‘cultivate transnationally-oriented elites who share Washington’s interest in integrating Iraq into the global capitalist system and who can administer the local state being constructed under the tutelage of the occupation force.’’<sup>246</sup>

Bacon claimed that ‘‘The free trade ideology of the Bush administration sees the occupation of Iraq as a beachhead into the Middle East and south Asia.’’<sup>247</sup> The ideology was aimed at transforming the State-dominated economy that was one time one of wealthiest States in the region. With free-market, Iraq would therefore put new basic principles for the rest of the area.<sup>248</sup>

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<sup>242</sup> F. Gregory Gause III, ‘The Iraq War and American National Security’ (n 241)79.

<sup>243</sup> Doug Stokes and Sam Raphael, *Global Energy Security and American Hegemony* (Johns Hopkins University Press 2010) 96.

<sup>244</sup> *ibid.*

<sup>245</sup> William I. Robinson, *A Theory of Global Capitalism: Production, Class, and State in a Transnational World* (Johns Hopkins University Press 2004) 140.

<sup>246</sup> William I. Robinson, ‘What to expect from US democracy promotion’ in Iraq in Joseph G. Peschek (eds), *The Politics of Empire: War, Terror and Hegemony* (Routledge 2005) 174.

<sup>247</sup> David Bacon, ‘Privatised Iraq: Imposed economic and social policies raise human rights question’ (2004) 11 (1) *Race, Poverty & the Environment* 47.

<sup>248</sup> *ibid.*



The free trade ideology is part of the United States national security strategy. According to the National Security Strategy of the United States of 2002, the United States national security strategy is based on a “distinctly American internationalism that reflects the union of our values and our national interests. The aim of this strategy is to help make the world not just safer but better. Our goals on the path to progress are clear: political and economic freedom...”<sup>249</sup> George W. Bush supported the ideology of free markets. Bush stated that governments that do not take advantage of private enterprise and the exploitation of natural resources efficiently suppress “freedom,” “independent thought and creativity,” and will never have a “strong and successful society.”<sup>250</sup> Bush spoke generally about the Middle East, when he stated that the whole of Middle Eastern societies “remain stagnant while the world moves ahead. These are not the failures of a culture or a religion. These are the failures of political and economic doctrines...Successful societies privatize their economies and secure the rights of property.”<sup>251</sup>

The important question to be asked, therefore, as to whether the CPA played a role in creating free markets in occupied Iraq. Looking into the CPA’s Orders shows that CPA Order 39 installed a free market system in Iraq. The purpose of the Order 39 was to “promote and safeguards the general welfare and interests of the Iraqi people by promoting foreign investment through the protection of the rights and property of foreign investors in Iraq and the regulation through transparent processes of matters relating to foreign investment in Iraq.”<sup>252</sup> The Order 39 decreed the transition of the Iraqi economy from “a non-transparent centrally planned economy to a market economy characterised by sustainable economic growth through the establishment of a dynamic private sector.”<sup>253</sup> Looking into the Order 39 shows that it contained several important points.

First, the Order allowed complete privatisation of all two hundred of Iraq’s State-owned businesses, and allowed for %100 of foreign ownership of businesses.<sup>254</sup> Foreign investment

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<sup>249</sup> The National Security Strategy of the United States of America (September 2002). Available at < <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> > accessed 3 April 2015.

<sup>250</sup> President George W. Bush, Remarks by President George W. Bush at the 20th Anniversary of the National Endowment for Democracy (6 November 2003). Available at < <http://www.ned.org/george-w-bush/remarks-by-president-george-w-bush-at-the-20th-anniversary> > accessed 3 April 2015.

<sup>251</sup> *ibid.*

<sup>252</sup> CPA Order Number 39 of 19 September 2003, Foreign Investment. The Iraq Investment Law No. 13 of 2006 revoked CPA Order Number 39.

<sup>253</sup> *ibid.*

<sup>254</sup> Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (1<sup>st</sup> edn, John Wiley & Sons 2008)118.

allowed throughout Iraq,<sup>255</sup> and in all economic sectors of Iraq, except natural resources, including oil. It provides, “Foreign investment may take place with respect to all economic sectors in Iraq, except that foreign direct and indirect ownership of the natural resources sector involving primary extraction and initial processing remains prohibited.”<sup>256</sup> Furthermore, foreign investment does not apply to banks and insurance companies.<sup>257</sup>

Second, the Order granted national treatment to foreign investors. It provided, “A foreign investor shall be entitled to make foreign investments in Iraq on terms no less favourable than those applicable to an Iraqi investor.”<sup>258</sup> Therefore, the Iraqi government would be unable to favour Iraqi nationals, businesses, or providers over foreign investors. In addition, it would be unable to require that United States companies hire any local Iraqi workers or any contractors.<sup>259</sup> Further, it would be unable to require that qualified Iraqi corporations to obtain contracts over foreign-owned corporations to improve the Iraq’s economy.<sup>260</sup>

Third, the Order permitted foreign investors to transfer funds overseas without delay all of funds associated with its foreign investment, including shares or profits and dividends.<sup>261</sup> Fourth, the Order banned foreign ownership of real property. It provided, “...a foreign investor or a business entity with any level of foreign investor participation may not under any circumstances purchase the rights of disposal and usufruct of private real property.”<sup>262</sup>

However, the Order allowed the assignment of licenses to use such property for 40-year terms, which are renewable for further periods. It provided, “The duration of any license to use property shall be determined by the duration of operations related to the foreign investment. The initial term of a license shall not exceed 40 years, but may be renewed for further such periods. Licenses may be reviewed by the internationally recognised, representative government established by the people of Iraq upon its assumption of the

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<sup>255</sup> Section 6 (2) of CPA Order Number 39 of 19 September 2003 (n 252).

<sup>256</sup> Section 6 (1) of CPA Order Number 39 of 19 September 2003, (n 252).

<sup>257</sup> *ibid.*

<sup>258</sup> Section 4 of CPA Order Number 39 of 19 September 2003, (n 252).

<sup>259</sup> John Cavanagh and Jerry Mander, *Alternatives to Economic Globalization* (ReadHowYouWant 2010)xxxiv.

<sup>260</sup> *ibid.*

<sup>261</sup> Section 7 (2) of CPA Order Number 39 of 19 September 2003, (n 252)

<sup>262</sup> Section 8 (1) of CPA Order Number 39 of 19 September 2003, (n 252)

responsibilities of the CPA.’’<sup>263</sup>This means that foreign investors would be present in Iraq long after the dissolution of the CPA.

## 2.8 Conclusion

This Chapter builds the second step towards establishing the maladministration of the CPA in its duty with respect to preventing financial criminal activities in occupied Iraq. In doing so, this Chapter has relied mainly on Article 43 of the Hague Regulations to establish a duty on the CPA to prevent individuals, criminal groups, and armed groups from perpetrating criminal activities in occupied Iraq. The rationale behind the imposition of such a duty is not only to provide the safety for the inhabitants of the occupied territory, but also as *United States v. Wilhelm List and others*,<sup>264</sup> stated, to provide the protection for property within the occupied area from persons and armed mobs.

The Chapter considers that the exercise of effective control over foreign territory is a trigger for the obligation of the occupant to prevent criminal activities. However, in order to provide protection to inhabitants and property, the invading army that is present in an area, but has not yet established its effective control over that area, is obligated to prevent criminal activities therein. The argument about the duty of the occupant to prevent criminal activities without boots on the ground is refuted. The foreign military presence on the ground in the occupied area is required in order to discharge the duty relating to prevention of criminal activities therein. It is therefore submitted that control over air space neither establishes a state of occupation nor enables the occupant to fulfil its duty in relation to preventing criminal activities.

The Chapter asserts that the law of occupation, both the Hague Regulations of 1907 and the Fourth Geneva Convention of 1945, continues to be the foremost source, which obligates an occupying power to prevent criminal activities in occupied territory. Therefore, the United Nations Security Council Resolution 1483 did not itself create a duty for the CPA to prevent criminal activities, but it recognised such a duty according to the law of occupation.

In this Chapter, it has been determined that the duty of the CPA with regard to preventing criminal activities requires due diligence. The judgment of the ICJ in *Democratic Republic of Congo v. Uganda* has been employed in order to show what is expected of the CPA to meet

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<sup>263</sup> Section 8 (2) of CPA Order Number 39 of 19 September 2003, (n 252)

<sup>264</sup> *United States v. Wilhelm List and others* (n 6).

the due diligence obligation in relation to preventing criminal activities. While the Chapter has left the question as to whether the CPA violated the due diligence obligation to the Chapter Three, it was found that one of the primary catalysts for such violation, that is to say a lack of military personnel.

In order to make the CPA obligated to police Iraqi territory, the Chapter has established that the security vacuum was stemmed from the disappearance of the old civil Iraqi Government. It is interesting to note that the existing security vacuum was exacerbated by the CPA's policy on the running of Iraq. The CPA Order Number 2, concerning the disbanding of the Iraqi army and much of the country's police and internal security forces was unwise.

The Chapter has established that the CPA, in order to prevent criminal activities, needed to exercise police operations, which involve law enforcement operations, not military operations governed by international humanitarian law on the conduct of hostilities. In this regard, it has been found that whilst human rights law is primarily considered as a framework for the regulation of the use of force in law enforcement tasks in the occupied territory, the law of occupation also has a valuable role, as stated in Articles 27 of the Fourth Geneva Conventions, in regulating the use of force in law enforcement operations.

The Chapter has deemed that the CPA was acting as a trustee for the Iraqi people and its incoming government. This role is derived from the cardinal principle of the law of occupation: the occupant does not acquire the right of sovereignty over the territory it occupies. Conceiving the CPA as a trustee put it under a duty to administer Iraqi funds in sagacious ways and in transparent manner for purposes benefiting Iraqi people. Commenting on the role of the CPA as a trustee, Perritt, Jr observes, "the intervention in Iraq exemplifies a political trusteeship in that it recognised a duty to develop eventual self-governance and to govern for the benefit of the Iraqi people."<sup>265</sup>

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<sup>265</sup> Henry H. Perritt, Jr, 'Structures and Standards for Political Trusteeship' (2003) 8(2) *UCLA Journal of International Law and Foreign Affairs* 410.

## Chapter Three: Cases about the maladministration of the Coalition Provisional Authority

### 3.1 Introduction

The previous Chapter demonstrated that the CPA was obligated to take affirmative and feasible measures to prevent financial criminal activities in occupied Iraq. The purpose of this Chapter is to show that there were financial criminal activities took place in occupied Iraq and the CPA failed to take appropriate measures to prevent those activities, and this therefore led to an increase in criminal activities that generated vast amounts of illegal funds. To this end, and as has explained in the main introduction, three financial criminal activities are examined in this Chapter, namely the crime of kidnapping, corruption activities and the looting of cultural property, which occurred during the CPA's tenure.

The Chapter begins with the crime of kidnapping. Kidnapping is defined as “the unlawful seizure and detention of a person usually for a ransom.”<sup>1</sup> Because of the kidnapping of both Iraqis and foreigners conducted in occupied Iraq by individuals, criminal groups, as well as armed groups, the Iraqi Penal Code No.111 of 1969 applied to them. Kidnapping as a criminal activity in the Iraqi law is then examined. The stream of kidnapping of Iraqi citizens, and the stream of kidnappings of foreigners are mapped out. The numbers abducted and the amounts of illegal funds generated are estimated. Measures adopted by the CPA to prevent the crime of kidnapping are evaluated. Because of the kidnapping is a transnational criminal activity,<sup>2</sup> measures to be taken to combat the crime of kidnapping are proposed by the Report of the Secretary-General,<sup>3</sup> according to the request of the Economic and Social Council in its Resolution, entitled “International Cooperation in the Prevention, Combating and Elimination

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<sup>1</sup> Stephen J. Romano, ‘International Kidnap Negotiations: Preparation, Response and Related Issues’ in Ozgur Nikbay, Suleyman Hancerli (eds), *Understanding and Responding to the Terrorism Phenomenon: A Multi-dimensional Perspective* (1<sup>st</sup>edn, IOS Press, 2007) 250. The Economic and Social Council Resolution 2002 defined kidnapping as the illegal detention of an individual against his will for demanding illicit gain, economic gain, or other material benefit; or in order to compel someone to act or not act in return for liberation of the victim. The Economic and Social Council Resolution 2002/16: International Cooperation in the Prevention, Combating and Elimination of Kidnapping and in Providing Assistance for the Victims, 37<sup>th</sup> plenary meeting, (Agenda Item 14 c), 24 July 2002.

<sup>2</sup> This point will be discussed later.

<sup>3</sup> United Nations Economic and Social Council, International cooperation in the prevention, combating, and elimination of kidnapping and in providing assistance to victims, Report of the Secretary-General, U.N. E/CN.15/2003/7.

of Kidnapping and in Providing Assistance for Victims.”<sup>4</sup> Those measures are then examined. Failure to adopt such measures by the CPA is demonstrated.

The Chapter then moves on to the consideration of corruption activities in the reconstruction process of Iraq. It is possible to observe what constitutes corruption, but it is not possible to define the concept “corruption.” As Rider observes, the concept of corruption is protean and can mean different things at different times in different societies.<sup>5</sup> However, the most used definition of corruption is the “misuse of public power for private gain.”<sup>6</sup> This definition generally includes a wide range of illicit activities such as bribery, fraud, and overcharging. As will be set out later, these activities took place in the reconstruction of Iraq during the CPA’s tenure. In addition, irregularities in disbursements made by the CPA.

For some reasons, corrupt activities that occurred during the period of the CPA were not subject to the Iraqi law, but to United States laws. First, CPA Order Number 17 granted the personnel of CPA, Coalition Forces and contractors or sub-contractors of the CPA immunity from the Iraqi legal process.<sup>7</sup> Second, in Chapter Four, it will be shown that even though the United States criminal law is territorial, it has in a number of ways, jurisdiction over corrupt activities committed during the CPA’s tenure.

Bribery is the primary form of corruption. It is a crime under the Federal Bribery Statute (18 U.S.C § 201), which defines it as follows: “Whoever - directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent to:

(A) to influence any official act; or

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<sup>4</sup> The Economic and Social Council Resolution 2003/28: International cooperation in the prevention, combating and elimination of kidnapping and in providing assistance to victims, 44<sup>th</sup> plenary meeting, (Agenda Item 14 c), 22 July 2003.

<sup>5</sup> Barry Rider, ‘Recovering the Proceeds of Corruption’ (2007) 10 (1) *Journal of Money Laundering Control* 5.

<sup>6</sup> Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press 1999) 91.

<sup>7</sup> CPA Order Number 17 of 26 June 2003, Status of the Coalition, Foreign Liaison Missions, Their personnel and contractors.

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person.”<sup>8</sup>

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<sup>8</sup> 18 U.S.C § 201(b) (1). The US Foreign Corrupt Practices Act of 1977 contained anti-bribery provisions. The Act prohibits any issuer, domestic concern, or any person from making “use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value.” 15 U.S.C. § 78dd-1(a). For constituting a crime under the Foreign Corrupt Practices Act, these acts must be directed to “any foreign official,” “any foreign political party or official thereof or any candidate for foreign political office,” or “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office.” 15 U.S.C. § 78dd-1(a) (1) (2)(3). The Act defines a foreign official as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organisation.” 15 U.S.C. § 78dd-1(f) (1) (a). Moreover, the bribe must have one of the following purposes; “(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist ... in obtaining or retaining business for or with, or directing business to, any person.” 15 U.S.C. § 78dd-1(a)(b) (2)(b).

However, the Foreign Corrupt Practices Act did not apply to bribery cases that committed during the CPA’s tenure. The Act is designed to put an end to the phenomenon of bribery of foreign government officials by individuals and United States firms. As an occupying power, the CPA was responsible for awarding contracts. As will be seen later, United States citizens or United States firms bribed the personnel of the CPA (and not Iraqi officials) to obtain contracts. See about the Foreign Corrupt Practices Act: Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* (Edward Elgar Publishing 2014), Robert W. Tarun, *The Foreign Corrupt Practices Act Handbook: The Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (1<sup>st</sup> edn, American Bar Association 2011) and Martin T. Biegelman, Daniel R. Biegelman, *Foreign Corrupt Practices Act Compliance Guidebook: Protecting Your Organisation from Bribery and Corruption* (1<sup>st</sup> John Wiley & Sons 1 2010).

It should be noted that the United States has signed on 9 December 2003 and ratified on 30 October 2006 the United Nations Convention against Corruption (hereinafter known as the “UNCAC”), which is legally binding on Member States. Bribery is a crime under the UNCAC when committed intentionally; “(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.” Article 15 of the UNCAC.

An equivalent provision makes it a similar crime for “Whoever-being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

- (A) being influenced in the performance of any official act;
- (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
- (C) being induced to do or omit to do any act in violation of the official duty of such official or person.’’<sup>9</sup>

Fraud also comes within the scope of corrupt activities. It is not easy to give a definition of fraud.<sup>10</sup> However, a basic definition of fraud can be a deceitful act against another in order to gain some form of advantage.<sup>11</sup> In the United States False Claims Act of 1986 (hereinafter known as the ‘FCA’)(31 U.S.C. § 3729), fraud occurred when a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”<sup>12</sup> It further “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>13</sup>

Overcharging is charge someone too high a price for goods or a service.<sup>14</sup> Since the FCA was enacted in 1863, during the United States Civil War in order to prevent the government contractors from overcharging the government,<sup>15</sup> overcharging activities committed during the CPA’s tenure was subject to the FCA. In addition to the corruption activities above, irregularities in disbursements occurred during the CPA’s tenure. Irregularities are the state or quality of being irregular.<sup>16</sup>

The responsibility of the CPA for the reconstruction of Iraq and funds allocated for reconstruction are scrutinised. The delay in creating oversight agencies over Iraqi funds and the weakness of those agencies are considered. The nationality-based eligibility criteria in

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<sup>9</sup> 18 U.S.C § 201(b) (2).

<sup>10</sup> See Ellen S. Podgor, ‘Criminal Fraud’ (1999) 48 (4) American University Law Review 783.

<sup>11</sup> Neal R. Bevans, *Tort Law for Paralegals* (3<sup>rd</sup> ed, Aspen Publishers 2009) 416.

<sup>12</sup> 31 U.S.C § 3729 (a) (1).

<sup>13</sup> 31 U.S.C § 3729 (b) (1).

<sup>14</sup> Angus Stevenson and Christine A. Lindberg (eds), *New Oxford American Dictionary* (3<sup>rd</sup> edn, Oxford University Press 2010).

<sup>15</sup> Roberta Sue Alexander, *A Place of Recourse: A History of the U.S. District Court for the Southern District of Ohio, 1803-20* (1<sup>st</sup> edn, Ohio University Press 2005) 184.

<sup>16</sup> Angus Stevenson and Christine A. Lindberg (eds), *New Oxford American Dictionary* (n 14).



awarding reconstruction contracts are considered. The policy of relying mainly on Iraqi funds to fund reconstruction contracts is shown. The CPA Memorandum Number 4,<sup>17</sup> is considered in order to find out how competition requirements were most often waived. Cases concerning corrupt activities above mentioned are set out. The failure of the CPA in the management of the Iraqi reconstruction funds, and the amount of funds that disappeared, will be established.

The Chapter ends with an examination of the looting of cultural property. The looting of cultural property denotes take culturally or archaeologically significant objects away from native sites.<sup>18</sup> It is a crime under the Antiquities and Heritage Law in Iraq No.55 of 2002. The Iraqi law is then examined. The looting of cultural property is also specifically prohibited by the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict adopted in 1954 under the auspices of the United Nations Education, Scientific, and Cultural Organisation (UNESCO).<sup>19</sup> This Convention is considered in order to scrutinise how this Convention operates for protecting cultural property in the times of occupation.

The looting of cultural property is further prohibited by the 1907 Hague Regulations.<sup>20</sup> It imposes a duty on an occupying power to take measures in order to prevent looting from taking place.<sup>21</sup> The responsibility of the occupying forces for the looting of the Iraqi National Museum is established. The duty of the CPA to prevent looting of cultural property is analysed. The illicit trade in stolen Iraqi cultural property and the extent of illegal funds that generated of that trade is examined. Failure to take positive measures by the CPA to prevent looting of cultural property will be demonstrated.

### 3.2 Kidnapping

The CPA was responsible for protection of the local population and foreigners in occupied Iraq from kidnapping. According to Bailliet, “The global criminal phenomenon of kidnapping is on the rise around the world...”<sup>22</sup> Bailliet observes that kidnapping can prosper in failed States in which the rule of law and civic trust are considered to be very weak,

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<sup>17</sup> CPA Memorandum Number 4 of 19 August 2003, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq.

<sup>18</sup> Stuart P Green, ‘Looting, Law, and Lawlessness’ (2007) 81 (4) *Tulane Law Review* 1139.

<sup>19</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

<sup>20</sup> Article 28 provides “The pillage of a town or place, even when taken by assault, is prohibited.” Article 47 provides “Pillage is formally forbidden.” The looting of cultural property is also prohibited by the Geneva Convention of 1949. Article 33 provides “Pillage is prohibited.”

<sup>21</sup> Article 43 of the Hague Regulations.

<sup>22</sup> Cecilia M. Bailliet, ‘Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping’ (2010) 38 (4) *Denver Journal of International Law and Policy* 581.

corruption is prevalent, and administration is fragmented.<sup>23</sup> Iraq was no exception to the phenomenon of kidnapping during the period of the CPA. In the words of Looney, kidnapping has become an institutionalised criminal activity in Iraq.<sup>24</sup> Kidnapping as a criminal activity in the Iraqi Penal Code, and the kidnapping industry in Iraq that can be recognised in terms of the stream of kidnapping of Iraqi citizens, and the stream of kidnappings of foreigners are examined below, along with the failure of the CPA to take proper measures to prevent kidnapping.

### **3.2.1 Kidnapping is a criminal activity in the Iraqi Penal Code**

Kidnapping is a criminal offence in the Iraqi Penal Code No.111 of 1969. It comes under the scope of the title “Offences affecting the freedom of an individual and the deprivation of such freedom” of the Part Three, Chapter Two of the Code. It is then a form of aggravated unlawful deprivation of liberty. Article 421 of the Code provides, “Any person who seizes, detains or deprives a person of his liberty in any way without an order from a competent authority in circumstances other than those described in the laws and regulations to that effect is punishable by detention.”<sup>25</sup> The Code states that the penalty of the crime of kidnapping is a death sentence in the following circumstances:

- (1) If the offence is committed by a person who is wearing the uniform of a government employee without being entitled to do so or a distinctive official insignia belonging to such employee or assumes a false public identity or issues a false order for the arrest, imprisonment or detention of a person while claiming it to be issued by a competent authority;
- (2) If the offence is accompanied by the threat of death or physical or mental torment;
- (3) If the offence is committed by two or more persons or by a person openly carrying a weapon;
- (4) If the period of seizure, detention or deprivation of freedom exceeds 15 days;
- (5) If the motive for the offence is financial gain or the sexual assault of the victim or the taking of vengeance on the victim or on another;

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<sup>23</sup> *ibid* 581-582.

<sup>24</sup> Robert Looney, ‘The Business of Insurgency: The Expansion of Iraq’s Shadow Economy’ (2005) 81 *The National Interest Journal* 4.

<sup>25</sup> Article 421 of the Penal Code No.111 of 1969.

(6) If the offence is committed against a public official or agent in the execution of his duty or employment or as a consequence of it.<sup>26</sup>

It is clearly that the crime of kidnapping is considered a violation of international human rights laws, as it is a violation of the right to freedom and personal security. Article 3 of the Universal Declaration of Human Rights of 1948 states, “Everyone has the right to life, liberty and security of person.”<sup>27</sup> Furthermore, the crime of kidnapping may be considered a violation of the Charter of the United Nations of 1945 because it does not encourage respect for human rights and fundamental freedom. Paragraph (3) of Article 1 of the Charter of the United Nations states that one of the purposes of the United Nations is “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language.”<sup>28</sup>

It should be noted that kidnapping is a transnational criminal activity. It is indisputable that criminal networks, in effect, transcend borders. In its Resolution 2002, called “International cooperation in the prevention, combating and elimination of kidnapping and in providing assistance for the victims” the United Nations Economic and Social Council concerned by “the growing tendency of organised criminal groups to resort to kidnapping, especially kidnapping for the purpose of extortion, as a method of accumulating capital with a view to consolidating their criminal operations and carrying out other illegal activities.”<sup>29</sup> In the same the Resolution, the United Nations Economic and Social Council vigorously condemned the world-wide practice of kidnapping.<sup>30</sup>

### **3.2.2 The stream of kidnapping of Iraqi citizens**

Before governing Iraq by the CPA, the kidnapping of Iraqi citizens was not a prominent criminal activity. According to the Iraqi Police Service reports, the level of kidnapping

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<sup>26</sup> *ibid.*

<sup>27</sup> Article 3 of The Universal Declaration of Human Rights of 1948.

<sup>28</sup> Paragraph (3) of Article 1 of the United Nations Charter. See Paragraph (c) of Article 55 of the Charter of the United Nations that provides, United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” See Preamble of the Charter of the United Nations “ We the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small..”

<sup>29</sup> The United Nations Economic and Social Council Resolution 2002/16, (Agenda Item 14 c) 37th plenary meeting, 24 July 2002.

<sup>30</sup> *ibid.*

amounted to only 1% of their cases.<sup>31</sup> However, during the period in which the CPA was governing Iraq, the crime of kidnapping became a daily event. Williams has attributed the phenomenon of kidnapping to the fact that Iraq did not have a legitimate central government after the occupation,<sup>32</sup> and in this case, the rule of law was extremely feeble, corruption was endemic, and sectarian groups managed to infiltrate the police. Furthermore, Iraq showed high levels of lawlessness, the increase of anomie, merciless opportunism, and the availability of a large and very vulnerable target population or victim pool.<sup>33</sup>

Looney determined the identity of the kidnap gangs who appeared to be criminals, unemployed soldiers, and former *mukhabarat* agents with a great deal to gain as well as with little to lose in Iraq's security vacuum.<sup>34</sup> Identification of the kidnap groups does not mean that they were independent of each other. It seems probable that some groups were a hybrid, and others shifted and move from group to group, in a constant changing pattern of allegiance, motives, and membership.<sup>35</sup>

Furthermore, it was believed that there had been cooperative relationships between criminal gangs, and armed groups in this environment. In its Report of 2005, Amnesty International observed, "...there are many credible reports suggesting that hostages, in particular foreign nationals, taken by criminal gangs are then handed over to armed political groups in exchange for money."<sup>36</sup> In the same context, it was believed that "Sometimes terrorists pay criminal gangs to kidnap hostages, other times criminal groups sell the hostages to terror organisations when they play a political role or when relatives are unable to pay the ransom."<sup>37</sup>

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<sup>31</sup> *ibid.*

<sup>32</sup> Although the CPA was created to exercise powers of government temporarily, it did not a democratic government and its authority did not derive from the will of the civilian population. The CPA was the government of the occupying forces. The legitimate government of the occupied Iraq was the ousted government. For more details about the ousted government, See Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, Oxford University Press 2012) 104.

<sup>33</sup> Phil Williams, *Criminals, Militias, and Insurgents: Organised Crime in Iraq* (Strategic Studies Institute 2009) 106.

<sup>34</sup> Robert Looney, 'The Business of Insurgency: The Expansion of Iraq's Shadow Economy' (n 24) 4.

<sup>35</sup> Phil Williams, *Criminals, Militias, and Insurgents: Organised Crime in Iraq* (n 33) 105.

<sup>36</sup> Amnesty International, Iraq: In Cold Blood: Abuses by Armed Groups. Available at <<http://www.amnesty.org/en/library/asset/MDE14/009/2005/en/337be8c7-d4f4-11dd-8a23-d58a49c0d652/mde140092005en.html>> accessed 11 December 2013.

<sup>37</sup> Loretta Napoleoni, *Insurgent Iraq: Al Zarqawi and the new generation* (Seven Stories Press 2005) 155.

Obtaining the ransom payments was the primary objective for kidnap gangs by negotiating directly with the hostage's family or employers.<sup>38</sup> Armed groups were also engaged in the kidnappings of Iraqi citizens. The motivation seems to be diverse. However, it was certainly used as a source of funding, and it supported their main ambition in a more subtle, wide-ranging way. It sought to contribute to the increase of the already widespread dissatisfaction with the CPA, which could be seen as unable to manage the country. Moreover, it showed that the CPA was incapable of providing security effectively.<sup>39</sup>

Estimates of the number of Iraqis kidnapped are extremely hard to determine. The core problem is that the majority of victims did not report this offence to the authorities because of fear of retaliation. While estimates have been suggested, they are incomplete. The Iraqi Interior Ministry estimated that there were in the region of 5,000 Iraqis abducted nationwide between December 2003 and April 2005.<sup>40</sup> The average ransom value was in the region of \$30,000 per victim.<sup>41</sup> It can therefore be assumed that the illegal funds during that period were in the region of \$150,000,000.

The number abducted while the CPA was governing Iraq is not available. However, the Brookings Institution has estimated that there were 2 abductions per day in January 2004, in Baghdad alone.<sup>42</sup> Therefore, there were in the region of 358 Iraqis abducted between January 2004 until the dissolution of the CPA on 28 June 2004. Relying on the average ransom value of \$30,000 per victim, the illegal funds generated were in the region of \$10,740,000 over the course of 6 months.

Reports have indicated that the kidnap gangs targeted a particular category among Iraqi citizens. At the outset, the gangs had been targeting children and teenagers. More often than not, the motivation was financial. Victims were from wealthy families, but particularly from the wealthy Christian minority, who traditionally lack tribal links to fight back against the kidnapping gangs.<sup>43</sup> The kidnap gangs also targeted women and girls. It has been suggested

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<sup>38</sup> Robert Looney, 'The Business of Insurgency: The Expansion of Iraq's Shadow Economy' (n 24) 4.

<sup>39</sup> *ibid.*

<sup>40</sup> Haifa Zangana, 'Blair Made a Pledge to Iraqis Once' *The Guardian* (London, 22 April 2005).

<sup>41</sup> Kirk Semple, 'Kidnapped in Iraq: Victim's Tale of Clockwork Death and Ransom' *New York Times* (7 May 2006).

<sup>42</sup> Iraq Index, Tracking Variables of Reconstruction and Security in Post –Saddam Iraq (29 January 2007). Available at < <http://www.brookings.edu/fp/saban/iraq/index> 20070129.pdf> accessed at 11 October 2011.

<sup>43</sup> Robyn Dixon, 'Kidnap Gangs Add to Iraqis' Insecurity' *Los Angeles Times* (6 August 2003) 1.

that a number of gangs specifically focused on kidnapping girls.<sup>44</sup> The motivation seems to be diverse. Some victims were kidnapped for rape, and then subsequently released. It has been claimed that such victims had a bad reputation and were kidnapped for a short period.<sup>45</sup> Other victims were kidnapped for sex trafficking and labour exploitation. It has been suggested that victims were trafficked in Iraq, Syria, Lebanon, Jordan, Kuwait, The United Arab Emirates, Turkey, Iran, Yemen, and Saudi Arabia for forced prostitution and sexual exploitation within households.<sup>46</sup> Accurate statistics of the number of kidnapping victims are not available. However, the Organization of Women's Freedom in Iraq (OWFI) has estimated that more than 2000 young women have been missing since 2003.<sup>47</sup> This Organisation believes that many of these women have been smuggled abroad for sex work.<sup>48</sup>

### **3.2.3 The stream of kidnappings of foreigners**

According to Thomas, the stream of kidnappings of foreigners was a somewhat recent occurrence and development in Iraq. It began abruptly in early April of 2004, almost 3 months before the dissolution of the CPA. Prior to April 2004, kidnapping of foreigners was a rare occurrence because they had typically been targets of violence but not kidnap.<sup>49</sup>

The stream of kidnappings of foreigners was attributed to simultaneous attacks by the occupation forces on Falluja city and Najaf city in April 2004.<sup>50</sup> In response, kidnap groups began to kidnap foreigners from specific countries, in an attempt to dissuade those countries from joining the occupation forces or from sending additional troops.<sup>51</sup> The kidnapping were also aimed at discouraging international companies and Organisations from being in Iraq.

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<sup>44</sup> Human Rights Watch, 'Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad' (Human Rights Watch 2003), vol 15, No. 7 (E) 3.

<sup>45</sup> Victoria Fontan, *Voices from Post-Saddam Iraq: Living with Terrorism, Insurgency and New Forms of Tyranny* (Praeger Security International 2008) 126.

<sup>46</sup> United States Department of State, *2011 Trafficking in Persons Report-Iraq*. Available at <<http://www.unhcr.org/refworld/docid/4e12ee7237.html>> accessed 11 November 2011.

<sup>47</sup> Irving Epstein and Leslie Limage, *The Greenwood Encyclopaedia of Children's Issues Worldwide, vol 4* (Greenwood Press 2008) 97.

<sup>48</sup> *ibid.*

<sup>49</sup> Phil Williams, *Criminals, Militias, and Insurgents: Organised Crime in Iraq* (n 33).

<sup>50</sup> Ibrahim Al-Marashi, 'Iraq's Hostage Crisis : Kidnapping, Mass Media and the Iraqi Insurgency' in Defence Against Terrorism Centre of Excellence (ed), *The Media: The Terrorists' Battlefield (NATO Science for Peace and Security Series E: Human and Societal Dynamics)* (IOS Press 2007) 62, 65.

<sup>51</sup> Judith Tinnes, 'Counting Lives in a Theater of Terror - an Analysis of Media-oriented Hostage Takings in Iraq, Afghanistan, Pakistan and Saudi Arabia' (2010) 4 (5) *Perspectives on Terrorism* 6.

Furthermore, it was aimed at gaining ransoms; the postponement of the reopening of diplomatic missions, and to draw the attention of sympathisers inside and outside Iraq.<sup>52</sup>

Therefore, there was motivation behind each kidnapping, which was most likely either economic, vigilante, or political, or a combination of the aforementioned. As is well known, *economic kidnapping* is represented by kidnappings for ransom. This type seemed to be targeted specifically towards businessmen from Arab countries such as Jordan and Lebanon, which was not reported very widely, and generally not accompanied by statements tailored for the media.<sup>53</sup> With respect to *vigilante abductions*, it has been suggested that foreigners who were suspected of collaborating with Israel or spying against the Iraqi resistance were kidnapped. In this way, armed groups held a large number of suspected foreigners. Many of the abductees were subsequently released from detention, and most likely, without any demands being met,<sup>54</sup> but not before making sure that they were not spies. Journalists were a target of this type of abduction. It has been suggested that there has been justification for targeting some journalists by armed groups, in that journalists were spies or informants for the occupation forces.<sup>55</sup> Finally, the purpose of *political abductions* was not designed for monetary aim or gain. It was aimed at pressuring countries to withdraw their troops or companies from Iraq; to obtain prisoner release or by an act, which is deemed politically symbolic, for instance, demanding an apology by the president of the State. This type of abduction is the typical type of abduction, which without a doubt includes clear demands and videotaped statements in order to influence the media.<sup>56</sup>

According to the Brookings Institution, the number of foreigners abducted between May 2003 and December 2010 were 312 abductions.<sup>57</sup> The number abducted during the period of the CPA was in the region of 49 abductions. There was 1 abduction in November 2003 (later released). The year 2004 accounted for the highest number of abductions, specifically during the month of April, which recorded 43 abductions (30 later released). As has been mentioned, a main catalyst for this development was attributed to the assault on Falluja city and Najaf

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<sup>52</sup> Ibrahim Al-Marashi, 'Iraq's Hostage Crisis: Kidnapping, Mass Media and the Iraqi Insurgency' (n 50) 65- 70.

<sup>53</sup> Hegghammer Thomas, *The Iraq Hostage Crisis: Abductions in Iraq, April-August 2004* (FFI 2004) 10.

<sup>54</sup> *ibid.*

<sup>55</sup> Human Rights Watch, 'Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad' (n 44) 83.

<sup>56</sup> Hegghammer Thomas, *The Iraq Hostage Crisis: Abductions in Iraq, April-August 2004* (n 53) 10.

<sup>57</sup> According to Brookings Iraq Index, the total number of abductions is (406). The status of (94) kidnappings is unknown or unreported. Available at <<http://www.brookings.edu/about/centers/middle-east-policy/iraq-index>>accessed 11 October 2011.



city by occupation forces. The exceptionally high number for April 2004 was followed by a relatively quiet period, with only two abductions in May and 3 in June 2004. Therefore, it seems that the abuse and torture of Iraqi prisoners at Abu Ghraib prison, which emerged in late April 2004, did not result in an increase in the level of abductions. Information about whether foreigners were released following payment of ransom or by diplomatic efforts was not publicised.<sup>58</sup>

### **3.2.4 Inadequacy of measures adopted by the CPA to prevent the crime of kidnapping**

As has been explained, under the Iraqi Penal Code No.111 of 1969, the crime of kidnapping is a form of unlawful deprivation of liberty. It is well known that kidnapping takes place when an individual takes or detains another individual, without the other individual's consent. The penalty of kidnapping was determined by the treatment of the victim, whether the victim is man or woman and the circumstances surrounding the kidnapping. In any event, the penalty did not amount to life imprisonment.<sup>59</sup>

However, during the CPA's tenure, the phenomenon of kidnapping was representing a serious threat to the security of the civil population in occupied Iraq. Therefore, the CPA, as an occupying power, was obligated to take affirmative measures in order to decrease in the rate of commission of the crime of kidnapping. According to CPA Order Number 31, the CPA imposed longer sentences for kidnapping offences. It became life imprisonment.

#### **Coalition Provisional Authority Order Number 31**

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

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<sup>58</sup> There is only one case publicised; businessman released after family paid a \$50,000 ransom. 'Canadian hostage released in Iraq' *BBC News* (5 May 2004).

<sup>59</sup> Articles 422 of the Penal Code provides, "Any person who himself or through another kidnaps a person under the age of 18 without the use of force or deception is punishable by a term of imprisonment not exceeding 15 years if the victim is female or by a term of imprisonment not exceeding 10 years if the victim is male. If the kidnapping is carried out with the use of force or deception or there exists any aggravating circumstance described in Paragraph 421, the penalty will be imprisonment if the victim is female or a term of imprisonment not exceeding 15 years if the victim is male." Articles 423 of the Penal Code provides, "Any person who himself or through another kidnaps a woman over the age of 18 with the use of force or deception is punishable by a term of imprisonment not exceeding 15 years. If the kidnapping is accompanied by any sexual intercourse with the victim or an attempt to have intercourse with her, the penalty will be death or life imprisonment."



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

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

## **Section 2**

### **Modifications of Sentences for Kidnapping**

1. The penalties for kidnapping offences set forth in the Penal Code Paragraphs 421, 422, and 423 are hereby modified to provide a maximum punishment of life imprisonment for each offence. Sentences for the commission of kidnapping offences may not be reduced as a result of mitigating circumstances pursuant to Paragraph 130 of the Penal Code. The maximum sentence limitation of Paragraph 87 of the Penal Code shall not apply to the specified kidnapping offences. For the purposes of this modification, sentences of life imprisonment shall mean the remaining natural life of the person.
2. Penal Code Paragraphs 426 (1) and 426 (2) providing for the further mitigation of the sentence for kidnapping offences is hereby suspended. Cooperation following the offence shall serve as a mitigating factor to be considered by the trial judge in determining the sentence.
3. Penal Code Paragraph 427 providing for the cessation of actions in the event the offender marries the victim is hereby suspended.<sup>60</sup>

Increasing penalties for deterring the crime of kidnapping is, in fact, vested in the CPA. As has been explained in a previous Chapter, the rule is that the penal laws of the occupied territory shall remain in force. However, the CPA had legislative power under Article 64 of the Fourth Geneva Convention to maintain the orderly government of the territory in occupied Iraq as an exception. The crucial question is whether the imposition of longer sentences is a proper and feasible measure to reduce the crime of kidnapping. It is now widely accepted that increasing the severity of penalty has not often, if ever, produced the desired reduction in crime rates. As Darley concluded on this response, ‘‘it seems that increasing the severity of sentences is not reducing the rate of crimes.’’<sup>61</sup>

What measures, which should be taken in response to kidnapping, have been proposed by the Report of the Secretary-General according to the request of the Economic and Social Council

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<sup>60</sup> CPA Order Number 31 of 10 September 2003, Modifications of Penal Code and Criminal Proceedings Law.

<sup>61</sup> John M Darley, ‘On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences’ (2005) 13 (1) Journal of Law and Policy 195.

in its Resolution, entitled “International cooperation in the prevention, combating and elimination of kidnapping and in providing assistance for victims”.<sup>62</sup>

The Report states that measures should be adopted to combat kidnapping are categorised in four specific areas: law enforcement training; security force restructuring (for instance, the setting up of specific units to confront the problem); cooperation and coordination between law enforcement and security structures; and the more effective collection of data, intelligence, and evidence.<sup>63</sup> Let us examine whether the CPA adopted such measures.

Beginning with law enforcement training, forces that invaded and occupied the Iraqi territory were military. They were not accompanied by military police trained to perform law enforcement activities.<sup>64</sup> As has been explained in a previous Chapter, military forces are trained for combat operations. They are generally neither equipped nor trained for carrying out law enforcement operations. Training troops for carrying out law enforcement activities is a very tall order.<sup>65</sup> While some civil affairs soldiers who were sent to Iraq, namely in the region of 1,800 soldiers,<sup>66</sup> were trained to deal with “internally displaced persons, burning oil fields, and chemical decontamination,” as opposed to focusing on the Iraqi government, the legal system, infrastructure, and local leadership.<sup>67</sup> In this regard, Major Matthew R. Hover has commented on the lack of training:

The result of the poor planning and training for Phase IV was a military that was spinning its wheels in an unfamiliar type of conflict, and this directly impacted on its ability to carry out the responsibilities of an occupier under international law.

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<sup>62</sup> United Nations Economic and Social Council Resolution on International Cooperation in the Prevention, Combating, and Elimination of Kidnapping and in Providing Assistance to Victims (n 3). From Article 62 of the Chapter of the United Nation it observes that the Resolutions of the Economic and Social Council are not binding on Member States. Article 62 provides, “(1)The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned.

(2) It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

(3)It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

(4)It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.”

<sup>63</sup> *ibid.*

<sup>64</sup> A.P.V. Rogers, *Law on the Battlefield* (2<sup>nd</sup> edn, Manchester University Press 2004) 159.

<sup>65</sup> Nicholas J. Mercer, ‘The Maintenance of Law and Order in the Aftermath of International Armed Conflict-Lessons Learned From Iraq’ in Roberta Arnold (ed), *Law Enforcement within the Framework of Peace Support Operations* (Martinus Nijhoff 2008) 123 at 126.

<sup>66</sup> While the (6,000) officers alone trained and sent to Germany. Matthew R. Hover, ‘The occupation of Iraq: A Military Perspective on Lessons Learned’ (2012) 94 (885) *International Review of the Red Cross* 342.

<sup>67</sup> *ibid.*

The military was losing the initiative quickly, owing to lack of planning and training for the occupation, and the structure of the US-led occupying administration and some of its resulting decisions also prevented them from getting things back on course in a timely manner.<sup>68</sup>

Regarding security force restructuring, it is highly improbable that the CPA set up specialised police and law enforcement units to deal with the issue of kidnapping. This is because of the lack of enough forces to execute law enforcement operations in occupied Iraq.

With respect to cooperation between law enforcement and security structures, it seems that there was friction between the CPA and the military forces. The occupation of enemy territory requires a level of inter-agency coordination between civilian personnel and military forces. Major Matthew R. Hover concluded that the US entities in occupied Iraq were not prepared and not accustomed to that level. Hover has commented on the lack of coordination:

While some level of inter-agency friction is commonplace and expected in the US Government, and perhaps even healthy, the relationship between the CPA (Department of State) and the military (Department of Defence) during the occupation of Iraq was poisonous...Just as the intelligence failures prior to the terrorist attacks of 11 September 2001 were partially caused by a failure of inter-agency co-ordination and co-operation, so too were the difficulties experienced by the CPA and the military.<sup>69</sup>

### **3.3 Corruption activities in the reconstruction process**

The CPA was responsible for the reconstruction of Iraq. According to the CPA Regulation Number 1, one of the CPA's missions was "facilitating economic recovery and sustainable reconstruction and development" of Iraq.<sup>70</sup> As it is well known, reconstruction processes needed huge sums of funds. Therefore, the United Nations Security Council Resolution 1483 established the DFI 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,...and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq."<sup>71</sup> However, the reconstruction process of Iraq witnessed widespread corruption activities. As Dr. Dave Whyte observes, "corruption became a routine activity, embedded in

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<sup>68</sup> *ibid* 344.

<sup>69</sup> *ibid*.

<sup>70</sup> CPA Regulation Number 1 of 16 May 2003, The Coalition Provisional Authority.

<sup>71</sup> United Nations Security Council Resolution 1483, 4761st meeting, UN Doc .S/RES/1483 (2003), 22 May 2003. The DFI and other sources of funds will be discussed later.

the key institutional apparatuses of the economy.’’<sup>72</sup>Corruption activities in the reconstruction process of Iraq and the failure of the CPA to prevent those activities are examined below.

### **3.3.1 Funds allocated for the reconstruction process of Iraq**

The occupant in addition to International Financial Institutions (IFIs), Nations, and Non-Governmental Organisations (NGOs) pour vast amounts of funds into an occupied territory for supporting reconstruction activities. It has been estimated that total US assistance to Germany for the years of direct military government (May 1945-May 1949) and the overlapping Marshall Plan years (1948/1949-1952) was in the region of \$4.3 billion (\$29.6 billion in 2005 dollars).<sup>73</sup>Likewise, during the period from 1946-1952, Japan received in the region of \$2.2 billion (\$15.2 billion in 2005 dollars) in aid from the US in the occupation period, of which nearly \$1.7 billion was grants and \$504 million was loans.<sup>74</sup>

In the case of occupied Iraq, there were three main sources that funded the reconstruction processes during the CPA’s tenure. Firstly, the US appropriated \$18.4 billion for reconstruction projects.<sup>75</sup>Secondly, Iraqi funds derived from three categories. (A) Approximately \$900 million in Iraqi assets were seized from various places across Iraq, much of it found in presidential palaces. (B) Approximately \$1.7 billion in vested Iraqi assets drawn from various bank accounts, were deposited into the US Federal Reserve Bank of New York.<sup>76</sup> (C) Moreover, the DFI’s proceeds derived from the sale of oil, funds remaining from the United Nations Oil-for-Food Programme and Iraqi funds repatriated from other States. Approximately \$20 billion, mainly from oil sales were being deposited into the DFI between May 2003 to the dissolution of the CPA in June 2004.<sup>77</sup>Therefore, during its tenure as an occupying power, the CPA controlled over \$23.4 billion in Iraqi funds.<sup>78</sup>Thirdly,

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<sup>72</sup> Dave Whyte, ‘The Crimes of Neo-Liberal Rule in Occupied Iraq’ (2007) 47(2) British Journal of Criminology 189.

<sup>73</sup> Nina Serafino *et al.*, *U.S. Occupation Assistance: Iraq, Germany and Japan Compared* (Congressional Research Service 2006) 4.

<sup>74</sup> *ibid* 5.

<sup>75</sup> Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience* (Us Independent Agencies and Commissions 2009) 103.

<sup>76</sup> *ibid* 79.

<sup>77</sup> *ibid* 154.

<sup>78</sup> United States Government Special Inspector General for Iraq Reconstruction, *Learning From Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction* (CreateSpace Independent Publishing Platform 2013) 9.

international donors in the Madrid Donors Conference in October 2003 pledged grants and loans totalling \$13.5 billion towards the reconstruction of Iraq.<sup>79</sup>

### 3.3.2 Monitoring Agencies

For providing oversight of the DFI and for ensuring that the CPA would use Iraqi funds in a transparent manner and for the benefit of the Iraqi people, the United Nations Security Council Resolution 1483 created the International Advisory and Monitoring Board (hereinafter as the 'IAMB'). The Resolution noted:

The establishment of a Development Fund for Iraq to be held by the Central Bank of Iraq and to be audited by independent public accountants approved by the International Advisory and Monitoring Board of the Development Fund for Iraq and looks forward to the early meeting of that International Advisory and Monitoring Board, whose members shall include duly qualified representatives of the Secretary-General, of the Managing Director of the International Monetary Fund, of the Director-General of the Arab Fund for Social and Economic Development, and of the President of the World Bank.<sup>80</sup>

Notwithstanding the importance of the IAMB's mission, it did not meet until 5 December 2003; more than 6 months after the CPA began using the DFI. Furthermore, it did not appoint an auditor until April 2004,<sup>81</sup> nearly 3 months before the CPA would dissolve. Moreover, the IAMB had no real power over the CPA with regard to its financial accountability. It was not granted the authority to sanction the CPA for financial maladministration, nor to force it to collaborate in its investigations.<sup>82</sup>

In addition to the above, the US Congress under the Emergency Supplemental Appropriations Act for Defence and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004 created a new oversight agency called the Inspector General for the CPA.<sup>83</sup> The Inspector General of the CPA arrived in Baghdad in February 2004. This means that the CPA was without an inspector general for many months after its inception. A later audit report stated that:

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<sup>79</sup> Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience* (n 75) 103.

<sup>80</sup> United Nations Security Council Resolution 1483 (n 71).

<sup>81</sup> Eric Herring and Glen Rangwala, 'Iraq, Imperialism and Global Governance' (2005) 26 (4-5) *Third World Quarterly* 674.

<sup>82</sup> Christine Cooper and Lesley Catchpole, 'US imperialism in action An audit-based appraisal of the Coalition Provisional Authority in Iraq' (2009) 20 *Critical Perspectives on Accounting* 723.

<sup>83</sup> Emergency Supplemental Appropriations Act for Defence and for the Reconstruction of Iraq and Afghanistan, 2004.

US Public Law 108–106 established an Inspector General (IG) function for the CPA on 6<sup>th</sup> November 2003, while the CPA was established in May 2003. This law stated that the IG would be appointed within 30 days thereafter, however, the IG was appointed only on 20th January 2004. The IG initially visited Baghdad in Feb 2004 and additional IG staff mobilised during March 2004. The delay in appointment of the IG may have resulted in the loss of performance improvement opportunities. The IG informed us that work had commenced and no reports have been completed to date.<sup>84</sup>

Almost a year after the DFI had been created and less than 3 months before the CPA would dissolve, the CPA with the approval of the IAMB appointed on 5 April 2004 the accounting firm called KPMG in Bahrain as the external auditor. Many things made it difficult for KPMG to perform their audits. Aside from more clear and expected problems with performing an audit in Iraq, KPMG reported that it had faced resistance from the CPA personnel. The firm said they encountered bureaucratic obstacles in respect of obtaining entrance to the Green Zone.<sup>85</sup> This led to a delay in the completion of their procedures. Furthermore, it resulted in difficulties in obtaining evidence concerning funding programs, and projects or contracting files.

In addition, the auditors regretted not having information provided to them regarding sole source contracts from the DFI. Those contracts were among the most contentious of the DFI's operations, and concerns were raised by the IAMB about them. KPMG stated that they had not been given access to audits carried out by the CPA of those sole source contracts.<sup>86</sup>

### **3.3.3 Why corruption activities occur in reconstruction funds?**

Zaum and Cheng have attributed corruption in external funds, in particular in post-conflict countries to the problem of absorption. They have observed that “Given that there is more aid money than capacity to absorb it, the “excess” money is more likely to be misspent, creating greater scope for corruption.”<sup>87</sup> Ware and Noone have observed that the problem of absorption capacity in post-conflict countries is because of the fact that after years of war, famine, decolonisation, or general institutional decay; developed and functioning systems to

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<sup>84</sup> Christine Cooper and Lesley Catchpole, ‘US imperialism in action An audit-based appraisal of the Coalition Provisional Authority in Iraq’ (n 82) 723.

<sup>85</sup> *ibid* 723.

<sup>86</sup> Iraq Revenue Watch, ‘Auditors Find Poor Practices in Management of Iraqi Oil Revenues’ (Open Society Institute. No. 8, June 2004) 2.

<sup>87</sup> Christine Cheng and Dominik Zaum, ‘Selling the Peace? Corruption and Post-Conflict Peacebuilding’ in Christine Cheng and Dominik Zaum (eds), *Corruption and Peacebuilding: Selling the Peace?* (Routledge 2011) 1 at 13.

manage or “absorb” incoming development and reconstruction funds are non-existent in the conflict State.<sup>88</sup>

In addition, banking systems are ineffective, financial management tools are non-existent, buildings and infrastructure are frequently badly damaged, and technical expertise to manage multimillion-dollar construction projects is frequently limited. Moreover, there is no monitoring by donors of aid funds, which are given to fledgling governments. Even when donor groups have sufficient supervisory staff for this money, ingenious schemes are implemented to siphon off these precious funds illegally.<sup>89</sup> Nevertheless, as will be discussed below, the problem that occupied Iraq faced, in addition to problems above, was that the CPA did not take proper and feasible measures to manage the reconstruction funds in a transparent manner. In addition, political and personal interests were responsible for the diversion of reconstruction funds from their intended purposes. These interests frequently overcame the duty. As Gibson has observed, officials and politicians might devote all their efforts to obtain larger and larger grants, often for personal gain, instead of working to improve conditions and operate a functioning government.<sup>90</sup> Therefore, Rose-Ackerman has assumed that reconstruction funds are frequently diverted into the private bank accounts of both politicians and business people, making reconstruction non-existent, if it occurs at all, and excessively costly.<sup>91</sup>

### **3.3.4 Policies of reconstruction of Iraq**

The CPA followed three policies with respect to awarding reconstruction contracts. These are now examined below.

#### **A. Nationality-Based Eligibility Standard**

The CPA awarded reconstruction contracts to firms from States that supported the US invasion of Iraq, but most of those contracts went to US firms. According to a Memorandum called “Determination and Findings,” competition for the US-funded reconstruction contracts

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<sup>88</sup> Glenn T. Ware and Gregory P. Noone, ‘The Culture of Corruption in the Post conflict and Developing World’ in Antonia Chayes and Martha L. Minow (eds), *Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict* (1<sup>st</sup> edn, Jossey Bass 2003) 191 at 194-195.

<sup>89</sup> *ibid.*

<sup>90</sup> Susan S. Gibson, ‘The Misplaced Reliance on Free and Fair Elections in Nation Building: The Role of Constitutional Democracy and the Rule of Law’ (1998) 21 *Houston Journal of International Law* 1.

<sup>91</sup> Susan Rose-Ackerman ‘Corruption and Government’ (2008) 15(3) *International Peacekeeping* 337. Chapter Four will explain many corrupt activities in the reconstruction of Iraq and how Iraqi funds ended up into banks.

was limited to firms from certain States. The Memorandum provided, “It is necessary for the protection of the essential security interests of the United States to limit competition for the prime contracts of these procurements to companies from the United States, Iraq, Coalition partners and force contributing nations. Thus, it is clearly in the public interest to limit prime contracts to companies from these countries.”<sup>92</sup>Therefore, firms from non-Coalition Countries would not be permitted to compete for the reconstruction contracts. However, in fact the CPA awarded the largest reconstruction contracts to US firms. It has been estimated that out of 59 US-funded prime contracts, 48 more than 80% went to US firms.<sup>93</sup>The remaining prime contracts were allocated to Australian, British, Italian, Israeli, Jordanian and Iraqi companies.<sup>94</sup>

With respect to Iraqi-funded prime contracts, the CPA also awarded US firms most of those contracts. It has been estimated that “the CPA awarded US firms 74% of the value of the total \$1.5 billion in contracts paid from Iraqi funds. When British firms are added to the equation, US and UK companies wind up receiving 85% of the value of all such contracts.”<sup>95</sup>The most active and well-known firm was Halliburton, a Texas-based company, where “the value of Halliburton’s Iraq contracts has crossed the \$10 billion threshold.”<sup>96</sup>Considering nationality in awarding contracts raises concerns over the nature of the contracting process. The policy of nationality-based eligibility, in awarding reconstruction contracts, is not only limited the competitiveness of CPA tenders for contracts funded with Iraqi funds, but also raises concerns about compliance with the duty of preventing corrupt activities. As Bonheimer observed, “Insofar as nationality-based exclusions limited competition for reconstruction contracts funded with Iraqi assets, these exclusions raise concerns over compliance with the duty to prevent waste.”<sup>97</sup>

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<sup>92</sup>The Memorandum is available at <[http://www.foxnews.com/projects/pdf/121003\\_dod.pdf](http://www.foxnews.com/projects/pdf/121003_dod.pdf)> accessed 18 March 2010. The Memorandum listed (63) countries eligible to compete.

<sup>93</sup> Some of the remaining (11) contracts were with companies, in which US capital had a significant stake, including “three with Fluor AMEC, a US–UK joint venture, and one US- Jordanian joint venture, ANHAM.” Eric Herring and Glen Rangwala, ‘Iraq, Imperialism and Global Governance’ (n 81) 673.

<sup>94</sup> *ibid.*

<sup>95</sup> Iraq Revenue Watch, ‘Disorder, Negligence and Mismanagement: How the CPA Handled Iraq Reconstruction Funds’ (Open Society Institute. No. 7, September 2004) 2.

<sup>96</sup> Rep. Henry A. Waxman, Ranking Minority Member, Committee On Government Reform U.S. House of Representatives, ‘Fact Sheet: Halliburton’s Iraq Contracts Now Worth over \$10 Billion’ (9 December 2004).

<sup>97</sup> Owen Bonheimer, ‘The Duty to Prevent Waste of Iraqi Assets During Reconstruction; Taming Temptation Through ICJ Jurisdiction’ (2005) 34(4) Public Contract Law Journal 687.



## **B. The opportunistic disbursement of Iraqi funds**

The CPA relied primarily on Iraqi funds to fund reconstruction contracts. As of 4 April 2004, the Contracting Office of the CPA awarded 1,988 contracts, and other delivery orders, valued in the region of \$1.04 billion. 97% of those contracts, valued in the order of \$847 million were paid for from Iraqi funds.<sup>98</sup> In addition, by the end of June 2004, the CPA left behind only \$2.8 billion for the Interim Iraqi Government out of \$23.4 billion Iraqi funds collected since the DFI's inception. In contrast, only 56% of the \$24 billion appropriated by the US Congress for relief and recovery activities had been obligated, with no more than \$3.7 billion actually expended. Moreover, out of \$13.5 billion pledged by international donors, only in the region of \$2 billion had been allocated.<sup>99</sup>

This imbalance between domestic and international funding may have allowed the CPA to avoid following many of the rules, and regulations that apply to spending US funds,<sup>100</sup> and help explain why it generally spent Iraqi funds in preference to US appropriations. This curtailed the future financial independence of the Iraqi Government, and opened the road to a pro-cyclical management of oil revenues. Moreover, it allowed for future US aid leverage over the Iraqi authorities, without having to ask for more money from the Congress. Such financial leverage may be used by the US, and other donors to push the Iraqis to open up the Iraqi oil sector to international companies, given that nearly all Iraqi oil revenues would probably remain committed to recurring expenditure, and prevent the Iraqi Government from massively investing in national oil companies.<sup>101</sup> In sum, Billon observes that “the US sought to buy Iraqi friends with Iraqi money, leaving little behind for the future Iraqi government to buy friends of its own.”<sup>102</sup>

It should be noted that the treatment of US funds allocated for reconstruction in Iraq was better than Iraqi funds. No less than four separate audits monitored the use of US funds: the

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<sup>98</sup>Office of the Inspector General-Coalition Provisional Authority, Coalition Provisional Authority's Contracting Processes Leading up to and Including Contract Award, Report Number 04-013, July 27, 2004.

<sup>99</sup> Philippe Le Billon, 'Corruption, Reconstruction and Oil Governance in Iraq' (2005)26 (4-5) Third World Quarterly 696.

<sup>100</sup> For example, the US Competition in Contracting Act of 1984(41 U.S.C. § 253) requires that contracts be entered into after “full and open competition through the use of competitive procedures.” However, it will be shown later that the CPA frequently awarded reconstruction contracts that had not been subject to competitive bidding.

<sup>101</sup> Philippe Le Billon, 'Corruption, Reconstruction and Oil Governance in Iraq' (n 99) 696.

<sup>102</sup> *ibid.*

US Government Accountability Office; the Defence Contract Management Agency; the Defence Contract Audit Agency, and the CPA's Inspector General.<sup>103</sup>

### **C. Non-Compliance with Competition Requirements**

As will be shown below, the CPA often awarded reconstruction contracts without competition requirements. CPA Memorandum Number 4 provided that there must be competition for all contracts. It provided as follow, "...competition is mandatory for all contracts. Reasonable efforts will be made to obtain competitive offers by publicising a solicitation through bulletin boards, the CPA World Wide Web page, the UNDB, vendor databases developed by the Head of Contracting Activity, and other means."<sup>104</sup>The Memorandum however recognised that there may be circumstances under which open competition would be not required, and in this case, "...a written justification describing the exigencies requiring contracting without competition will be documented in the Contract file."<sup>105</sup>

Nevertheless, the CPA awarded contracts without competitive bidding, which had not been justified. It has been estimated that 73% of all contracts worth more than \$5 million paid for from Iraqi funds were awarded as sole-source contracts with no competitive bidding.<sup>106</sup>The US auditor was concerned about contracts in the region of \$1.5 billion in Iraqi funds had been awarded to the Halliburton firm without a competitive bid doing process.<sup>107</sup>In addition, the Inspector General for the CPA found that a senior CPA advisor signed contracts without competition and without authority to sign.<sup>108</sup> It further found that another CPA advisor signed 20 contracts without contract authority, including at least 7 contracts that were not competitive, most of which were inadequately documented.<sup>109</sup> In another instance, KPMG auditors found that they were not able to obtain evidence of a tendering process (contract

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<sup>103</sup> Christine Cooper and Lesley Catchpole, 'US Imperialism in Action An Audit-Based Appraisal of the Coalition Provisional Authority in Iraq' (2009) (n 82) 730.

<sup>104</sup> Section 6 (2) of CPA Memorandum Number 4 of 19 August 2003 (n 17).

<sup>105</sup> *ibid.*

<sup>106</sup> Iraq Revenue Watch, 'Disorder, Negligence and Mismanagement: How the CPA Handled Iraq Reconstruction Funds' (n 95) 3.

<sup>107</sup> Owen Bonbeimer, 'The Duty to Prevent Waste of Iraqi Assets During Reconstruction; Taming Temptation Through ICJ Jurisdiction' (n 97) 685.

<sup>108</sup> The Special Inspector General For Iraq Reconstruction, 'Oversight of Funds Provided to Iraqi Ministries Through the National Budget Process' (Report No.05-004, 30 January 2005) 9-10.

<sup>109</sup> *ibid.*

value \$95,560,000.<sup>110</sup> They also found two cases where documentation of the contract award decision was not available in the contract file \$97,574,185.<sup>111</sup> They further found:

One case where a contract was entered into despite the specific objections of the Iraqi representative to the PRB. No evidence of the bidding process was available, the contract was inappropriately signed by the CPA Senior Advisor (rather than a contracting officer) and an advance payment of (\$2,915,000) was paid without justification. The contract was later cancelled and the CPA Senior Advisor subsequently left the CPA.<sup>112</sup>

According to the CPA Memorandum Number 4, contracts were supposed to have at least three bidders. It provided, “Large Purchase Contracts will be competed, except as authorised below. All Large Purchase Contract opportunities will be posted and advertised to the maximum extent practicable, with a goal of obtaining at least three competitive offers.”<sup>113</sup> However, KPMG auditors found “one contract where only two bids were received. We found that the CPA Contracting Officer was not aware of key elements of CPA Memorandum 4, notably the restrictions regarding a minimum of three bids on contracts \$84,357,625.”<sup>114</sup>

Furthermore, the auditors were concerned that contracts had been awarded without competitive bidding and that justification was not always recorded in the contract file in accordance with the CPA’s contracting procedures. Indeed due “to a high level of staff turnover, lack of organisation in the CU and missing files, we were unaware whether certain contracts were sole sourced or had been tendered for. All sole source contracts should be clearly documented in the contract file.”<sup>115</sup> By the same token, it reported that the CPA awarded contracts worth hundreds of thousands of dollars by telephone contact without any formal bidding process.<sup>116</sup>

In addition to the above, when the CPA did tender bids competitively, they incorporated very short periods of notice. A short tendering process is generally considered to aid and

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<sup>110</sup> KPMG, Development Fund For Iraq, Report of Factual Findings in Connection with Disbursements for the Period From 1 January 2004 to 28 June 2004.

<sup>111</sup>Christine Cooper and Lesley Catchpowle, ‘US imperialism in action An audit-based appraisal of the Coalition Provisional Authority in Iraq’ (n 82) 727.

<sup>112</sup> *ibid.*

<sup>113</sup> Section 7(3) of CPA Memorandum Number 4 of 19 August 2003 (n 17).

<sup>114</sup> KPMG, Development Fund For Iraq (n 110).

<sup>115</sup>Christine Cooper and Lesley Catchpowle, ‘US imperialism in action An audit-based appraisal of the Coalition Provisional Authority in Iraq’ (n 82) 727.

<sup>116</sup> See Dave Whyte, ‘The Crimes of Neo-Liberal Rule in Occupied Iraq’ (n 72) 187.

encourage corruption, in that it creates unassailable competitive advantages for contractors that are given advance warning of the contract window.<sup>117</sup>

#### **D. Evidence of corruption activities**

The funds allocated for the reconstruction of Iraq suffered maladministration making them susceptible to overcharges, fraud, bribery, and irregularities. These activities are demonstrated below.

##### **1. Overcharging**

The introduction has shown that submitting a fraudulent claim demanding payment of government funds is an offence under the FCA. Overcharges were pervasive in reconstruction contracts. To mention but one example, the work of Halliburton had been plagued by overcharging. Under the contract to import fuel for the Iraqi people, to prepare oil field damage assessments, as well as to the repair oil facilities, Halliburton received in the region of \$2.5 billion. Of this sum, Halliburton received \$1.6 billion derived from Iraqi funds.<sup>118</sup> According to the Defence Contract Audit Agency auditors, Halliburton's overcharges under the oil contract were in excess of \$218 million. Of this sum, \$177 million in overcharges were paid from Iraqi funds.<sup>119</sup>

In addition to the above, Halliburton had been accused of overcharging the Pentagon for 42,000 meals when only 14,000 were served. The Pentagon's auditors found \$27.4 million in overcharging at 5 dining facilities. This prompted the Pentagon to review Halliburton's works at 53 other dining facilities in Iraq and Kuwait.<sup>120</sup> In March 2004, the Defence Contracting Accounting Agency found that Halliburton's subsidiary Kellogg, Brown & Root (hereinafter as the 'KBR') had "significantly and systematically" breached the US federal contracting rules by providing faulty information regarding its own costs.<sup>121</sup> In June 2004, KBR had been accused of charging the US military 40% more for meals served to troops in Kuwait than the contract should have cost.<sup>122</sup>

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<sup>117</sup> *ibid.*

<sup>118</sup> See Committee on Government Reform; U.S. House of Representatives, *Rebuilding Iraq: U.S. Mismanagement in the Middle East* (Cosimo Reports 2005) 13-14.

<sup>119</sup> *ibid.*

<sup>120</sup> See The Open Society Institute and the United Nations Foundation, *Iraq in Transition: Post-Conflict Challenges and Opportunities* (Open Society Institute 2004) 64.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

## 2. Fraud

As has been explained in the introduction, submitting a false or fraudulent claim demanding payment of government funds is a crime under the FCA. The 2009 case of *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,<sup>123</sup> demonstrated that *Custer Battles* violated the FCA by submitting fraudulent claims for payment to the CPA regarding one of contracts with the CPA. In 2003, the CPA entered into two separate contracts with *Custer Battles*, a global risk management firm.<sup>124</sup> The first contract signed on 27 August 2003 was a Currency Exchange Contract, namely replacing the old Iraqi dinars bearing Saddam Hussein's picture with a new Iraqi currency. This contract was a cost-plus contract, namely *Custer Battles* would be reimbursed for its actual expenses, plus 25% of its actual expenses to cover overheads and provide a profit.<sup>125</sup>

Ultimately, *Custer Battles* was paid in the region of \$15 million for work performed under the contract. The CPA paid *Custer Battles* \$3 million advance “with a US Treasury check funded by its “seized assets” account, consisting of assets seized from Iraqi government sources as part of the war effort.”<sup>126</sup> The remaining \$12 million was paid with the DFI funds. In order to receive payment under the Contract, *Custer Battles* submitted invoices to US personnel working with the CPA. The quality of *Custer Battles*' performance was problematic. This led to a meeting between representatives of the CPA, the US Military, and *Custer Battles*' co-owners Michael Battles and Scott Custer. Following a meeting, Michael Battles “accidentally left behind an astonishing spreadsheet, which contained rows listing items invoiced under the Dinar Exchange Contract and separate columns listing the “Actual Cost” for the items and the amounts “invoiced” for the items.”<sup>127</sup> For instance, the spreadsheet showed that *Custer Battles* invoiced trucks at \$80,000 when the actual cost was \$18,000. In addition, *Custer Battles* invoiced generators at \$400,000 when the actual cost for the generators was \$74,000. Moreover, for the Basra hub, it spent \$4,000 to provide laundry facilities but invoiced the CPA for \$12,000. Therefore, under the Dinar Exchange Contract,

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<sup>123</sup> *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 562 F.3d 295 (4<sup>th</sup> Cir. 2009).

<sup>124</sup> *Custer Battles* was founded, managed, and owned by two former U.S. Army Rangers, Scott Custer and Michael Battles, it described itself as a “leading international risk management firm with extensive experience assisting large organizations reduce and manage risk in extremely volatile environments.” *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

“*Custer Battles* improperly received the difference between the actual costs and the inflated invoiced amounts and 25% of the inflated invoiced amounts.”<sup>128</sup>

The Court of Appeal concluded, “We thus conclude that all false or fraudulent claims made by *Custer Battles* under the Dinar Exchange Contract were “claims” as defined in 31 U.S.C. § 3729(c) and used in § 3729(a).”<sup>129</sup>

The second contract that was signed on 31 August 2003 was for the provision of security at the Baghdad International Airport (the Airport Contract). The contract was “a firm-fixed price” contract in the amount of \$16,840,832. As a result, *Custer Battles* did not include the cost of personnel as part of the invoices submitted to receive payment, but rather received advances and subsequent monthly fees, as specified in the contract. “Neither the request for proposal nor the contract itself specified a fixed number of personnel to perform the contract, but at least at the start, *Custer Battles* provided more than 138 personnel, a number that fluctuated thereafter as needs changed.”<sup>130</sup>

It claimed that *Custer Battles* submitted inflated invoices to the CPA and that it understaffed its Airport Contracts by not providing a consistent level of at least 138.5 persons, in violation of the FCA.<sup>131</sup> However, the Court of Appeal agreed with the district court that there is not sufficient evidence presented to support the finding that *Custer Battles* violated the FCA with regard to the Airport Contract. The Court stated;

A review of the record, however, reveals that the proposal submitted by *Custer Battles* to the Coalition Authority neither stated nor promised that *Custer Battles* would provide 138 security personnel, nor did any of the relevant contracts refer to that number. And because the Airport Contract was for a fixed price, no invoices for personnel expenses were submitted. Indeed, Franklin D. Hatfield, the Coalition Authority’s Minister of Transportation, testified in his affidavit that “*Custer Battles* was not required to maintain any particular staffing levels in order to receive payment under the [Airport] Contract.” Moreover, relator Robert Isakson testified in his deposition that *Custer Battles* actually commenced performance of the contract with more than 138 personnel, although the number throughout the performance of the contract fluctuated.<sup>132</sup>

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<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

### 3. Bribery in return for awarding contracts

As has been seen in the introduction, bribery of public officials is a crime under 18 U.S.C. § 201. The *United States v. Michael Wheeler et al*, demonstrated that some top officials at the CPA were demanding bribes in exchange for awarding contracts and they were then in violation of 18 U.S.C. § 201 (b)(2). In that case, Wheeler, a former Lieutenant Colonel in the US Army Reserves, who was an adviser and project officer for the CPA reconstruction projects, participated in a wide-ranging bribery conspiracy.<sup>133</sup> From December 2003 through December 2005, Wheeler along with 5 other individuals participated in that conspiracy. These individuals were Curtis Whiteford, former Colonel in the US Army Reserve, who was appointed Chief of Staff for the CPA-South Central Region., Debra Harrison, a Lieutenant Colonel in the US Army Reserve, who served as a financial specialist and Deputy Comptroller for the CPA-South Central Region., Robert Stein who was the comptroller and funding officer for the CPA-South Central Region., Philip H. Bloom, a US citizen who owned and operated several companies in Iraq and Romania., and Bruce D. Hopfengardner, Lieutenant Colonel in the US Army Reserve, who was an Operations Officer for the CPA-South Central Region.<sup>134</sup>

They conspired to rig the bids on contracts being awarded by the CPA-South Central Region, so that more than 20 contracts were awarded to Bloom. In total, Bloom received over \$8.6 million in rigged contracts. In exchange, Bloom had paid them over \$1 million in cash, SUVs, sports cars, a motorcycle, jewellery, computers, business class airline tickets, liquor, future employment with Bloom, and other items of value.<sup>135</sup>

Bloom confessed that he laundered in excess of \$2 million in currency that the conspirators above and others stole from the CPA-South Central Region, which had been designated to be used for the reconstruction of Iraq. Then, Bloom sent some of the stolen money through his foreign bank accounts in Iraq, Romania and Switzerland to Harrison, Stein, Hopfengardner and other Army officials in exchange for them awarding contracts to Bloom and his companies.<sup>136</sup>

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<sup>133</sup> *United States v. Michael Wheeler et al*, U.S. Dist. Cr., unreported (22 January 2010).

<sup>134</sup> *ibid*.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid*.

In addition to the above case, another violation of 18 U.S.C. § 201(b) (2) illustrated in *United States v. John Allen Rivard*. Rivard a former Major in the US Army Reserves deployed to Logistical Support Area Anaconda near Balad, Iraq, as the Acting Chief of Contracting and later the Deputy Chief of Contracting from in or around April 2004 through in or around February 2005. Rivard conspired with a government contractor to steer federally funded contracts to the contractor's company in exchange for a bribe. He received more than \$220,000 in bribe payments to facilitate the award and payment of contracts to the contractor's company.<sup>137</sup>

#### **4. Irregularities in disbursements to provincial governments**

The CPA granted local provincial governments amounts of money from the DFI to assist in performing their operations. According to KPMG, the Iraqi Board of Supreme Audit reported that total disbursements for the Provincial Treasuries visited during the period amounted in the region of \$1,000,000,000.<sup>138</sup> However, the auditors found that there was no “supporting documentation available at Provincial Treasuries for disbursements made by the CPA on behalf of Provincial Treasuries.”<sup>139</sup> Furthermore, many disbursements to and from the Provincial Treasuries and their divisions were not recorded or wrongly recorded by either party.<sup>140</sup>

#### **3.3.5 The CPA failed to administer occupied Iraq's funds**

As a trustee, the CPA violated its duty with respect to the administration of occupied Iraq's funds through the failure to provide adequate financial and physical controls over those funds. Financial audits are usually undertaken by firms of practicing accountants who have expertise in financial reporting. One of the many assurance functions supplied by accounting firms is financial auditing.<sup>141</sup> Auditing encourages the degree of transparency and accuracy in the financial disclosures made by an administration. Hence, it is probable that such corporations whom hide their unscrupulous dealings would decrease.<sup>142</sup> In this functional sense, the CPA Regulation Number 2 was required the CPA to hire “an independent auditing firm” in order to help in the accounting of the Iraqi funds. The Regulation directed:

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<sup>137</sup> *United States v. John Allen Rivard*, U.S. Dist. Cr., unreported (19 October 2007). This case will be discussed in more detail in Chapter Four.

<sup>138</sup> KPMG, Development Fund for Iraq (n 110).

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

<sup>141</sup> R.L. Ladda, *Nature of the Audit* (Lulu.com 2014 ) 5.

<sup>142</sup> *ibid.* 6.



The CPA shall obtain the services of an independent, certified public accounting firm to support the objective of ensuring that the Fund is administered and used in a transparent manner for the benefit of the people of Iraq, and is operated consistent with Resolution 1483. The accountants performing this function shall be separate from those public accountants (auditors) approved by the International Advisory and Monitoring Board.<sup>143</sup>

Nevertheless, the CPA did not obtain the services of a certified public accountancy firm. As an alternative, the CPA hired an obscure consulting firm named North Star Consultants, Inc., “to promote the effective administration of DFI funds in a transparent manner for the benefit of the Iraqi people.”<sup>144</sup> North Star Consultants was a firm, which reportedly operate out of a private home near San Diego.<sup>145</sup> Furthermore, North Star Consultants firm did not carry out any review of the CPA’s internal controls. According to the SIGIR:

In October 2003, a \$1.4 million contract was awarded to North Star Consultants, Inc. that required the contractor to perform a review of internal controls and provide the CPA a written report of their evaluation. The North Star Consultants did not perform a review of internal controls as required by the contract. Consequently, internal controls over DFI disbursements were not evaluated. In addition, the Comptroller verbally modified the contract and employed the contractor to primarily perform accounting tasks in the Comptroller’s office.<sup>146</sup>

In addition, the process of accurately recording of financial transactions is essential for preventing corruption activities. This is called a bookkeeping process. It is “the art of recording financial transactions in a set of books in a systematic manner.”<sup>147</sup> Businesses and Organisations use two common bookkeeping systems; the single entry bookkeeping system and the double entry bookkeeping system. Under the single entry bookkeeping system, each transaction is written down just once. It is actually a simple listing of funds paid and received.<sup>148</sup> Double entry bookkeeping is much better than single entry bookkeeping. Under double entry bookkeeping, every transaction includes both of the giving of a benefit, and the receiving of a benefit. As a result, every transaction is written into the benefit as a double; once as a debit and once as a credit.<sup>149</sup>

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<sup>143</sup> Section 5 (4) of CPA Regulation Number 2 of 10 June 2003, Development Fund for Iraq.

<sup>144</sup> Committee on Government Reform; U.S. House of Representatives, *Rebuilding Iraq: U.S. Mismanagement in the Middle East* (n 118) 10.

<sup>145</sup> *ibid.*

<sup>146</sup> The Special Inspector General for Iraq Reconstruction, ‘Coalition Provisional Authority Comptroller Cash Management Controls Over the Development Fund for Iraq’ Report No 04-009 (28 July 2004).

<sup>147</sup> P. Mohana Rao, *Fundamentals of Accounting for CPT* (SAB 2012) 9.

<sup>148</sup> Roger Mason, *Instant Manager: Bookkeeping and Accounting* (2<sup>nd</sup> edn, Hodder Arnold 2008).

<sup>149</sup> *ibid.*

However, the CPA's bookkeeping systems was criticised. The auditors said that bookkeeping systems were open to "fraudulent acts" and susceptible to mistakes in that they used "spreadsheets and tables maintained by a single accountant rather than a double-entry system."<sup>150</sup> It said:

The CPA had originally implemented spreadsheet-based accounting records that became rapidly insufficient to meet the requirements of the Fund. The revised accounting system consists of excel spreadsheets and pivot tables maintained by one individual by the consulting firm. The accounting system designed and implemented is a cash-based, single entry transaction listing rather than an accrual based, double-entry bookkeeping system.<sup>151</sup>

Furthermore, the CPA's record keeping was poor. The auditors noted that it did not always that the Program Review Board<sup>152</sup> minutes include detailed, full, or plain documentation to obtain knowledge of discussions and issues. In addition, they found that the Program Review Board minutes did not contain voting details for each of the Program Review Board program recommended or refused and explanation of the decision.<sup>153</sup>

Record keeping was a serious matter when there were high levels of an employee turnover, as the same issue was with the CPA. KPMG noted that progress payments could be made to contractors, based on invoices issued instead of on performance of the contract. They found "four cases where advance payments had been made to the Defence Energy Support Centre (DESC) for fuel imports \$645,000,000. We were not provided with access to contracting procedures, documentation or details of monitoring for contracts awarded by DESC."<sup>154</sup> They also found that "37 cases where contracting files could not be located (\$185,039,313)."<sup>155</sup> Further, they found "two cases where documentation of the contract award decision was not available in the contract file (\$97,574,185)."<sup>156</sup>

In addition to the above, the CPA did not provide sufficient physical controls to safeguard the Iraqi funds. According to the SIGIR, there were several physical safeguard violations. The

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<sup>150</sup> Christine Cooper and Lesley Catchpowle, 'US Imperialism in Action An Audit-Based Appraisal of the Coalition Provisional Authority in Iraq' (n 82) 726.

<sup>151</sup> *ibid.*

<sup>152</sup> CPA set up Program Review Board that was responsible for recommending specific DFI expenditures for the CPA administrator to approve. CPA Regulation Number 3 of 18 June 2003, Program Review Board.

<sup>153</sup> Christine Cooper and Lesley Catchpowle, 'US Imperialism in Action An Audit-Based Appraisal of the Coalition Provisional Authority in Iraq' (n 82) 726.

<sup>154</sup> *ibid* 727.

<sup>155</sup> *ibid* 726.

<sup>156</sup> *ibid.*

SIGIR observed, “The CPA Comptroller did not have adequate control or access to their field safe. The key was located in an unsecured backpack.”<sup>157</sup> It also observed, “the disbursement officer left the room and lost *prevue* over the open safe.”<sup>158</sup> Likewise, KPMG reported that \$774,300 in cash was stolen from a division’s vault.<sup>159</sup>

Moreover, there was lack of physical security over Iraqi funds. In the absence of electronic banking in post-war Iraq,<sup>160</sup> numerous transactions were for cash. According to the SIGIR, when contractors were needed to be paid, cash payments were made from the back of a pick-up truck. It also stated that cash was stored in unsecured gunnysacks in Iraqi ministry offices.<sup>161</sup> Some transactions were for letters of credit. In their sampling of letters of credit, KPMG noted that “The sample comprised of 91 disbursements from the CPA to JP Morgan for 346 LCs (\$1,183,207,635). Each LC has a corresponding contract. We noted the following deviations: We were unable to obtain contract or Approval of Funds, at the CPA, for 90–91 disbursements.”<sup>162</sup>

It would appear that controls over the disbursement of Iraq’s funds broke down in the last days of the existence of the CPA. In the run-up to the handover, the CPA hastily allocated in the region of \$2 billion of Iraq’s funds for projects that did not seem to have been planned correctly. In its last 2 months of existence, the CPA sent almost \$1.8 billion in cash to the Kurdish Regional Government, in addition to its regular financing to the Region. KPMG was unable to access records of the Kurds. The auditors met with Minister of Finance in the Region and were informed that there were no disbursements from the \$1.4 billion transferred to the Kurdish Regional Government on 22 June 2004.<sup>163</sup> In another instance, one disbursing official was given in the region of \$6.75 million in cash on 21 June 2004 “with the expectation of disbursing the entire amount before the transfer of sovereignty” on 28 June 2004.<sup>164</sup>

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<sup>157</sup> *ibid.*

<sup>158</sup> *ibid.*

<sup>159</sup> KPMG, Development Fund for Iraq (n 110).

<sup>160</sup> Christine Cooper and Lesley Catchpole, ‘US Imperialism in Action An Audit-Based Appraisal of the Coalition Provisional Authority in Iraq’ (n 82)726.

<sup>161</sup> Committee on Government Reform; U.S. House of Representatives, *Rebuilding Iraq: U.S. Mismanagement in the Middle East* (n 118) 13.

<sup>162</sup> Christine Cooper and Lesley Catchpole, ‘US Imperialism in Action An Audit-Based Appraisal of the Coalition Provisional Authority in Iraq’ (n 82)726.

<sup>163</sup> *ibid* 730.

<sup>164</sup> Special Inspector General for Iraq Reconstruction, ‘Control of Cash Provided to South- Central Iraq’ Report No. 05-006 (30 April 2005).

From above, it is clear that the CPA's management of the Iraqi funds was burdened by severe insufficiency and maladministration. The CPA was unable to account for billions in Iraqi funds spent or disbursed. According to the SIGIR:

The CPA provided less than adequate controls for approximately \$8.8 billion of (DFI) funds provided to Iraqi ministries through the national budget process. The CPA did not establish or implement sufficient managerial, financial, and contractual controls to ensure that DFI funds were used in a transparent manner. Consequently, there was no assurance that the funds were used for the purposes mandated by United Nations Security Council Resolution 1483 (UNSCR 1483).<sup>165</sup>

### 3.4 Looting of cultural property

According to Koumantos, cultural property is of great importance for all peoples and its protection is a duty imposed on everybody. He writes:

The importance of cultural property for individuals, nations or the whole of humanity does not need to be proved. It gives each person his intellectual identity, irrespective of whether he is a creator or simply a user. Cultural property in its entirety constitutes a huge heritage, which determines our awareness and inspires new bursts of creativity. Any reduction in this heritage, built up over the centuries and constantly added to, means a loss. The protection of cultural property is rightly considered to be everybody's duty.<sup>166</sup>

Nevertheless, the looting of cultural property in occupied Iraq was large-scale. It erupted in the post-occupation pre-establishment of the CPA period and continued throughout the CPA's tenure. The looting of cultural property as a criminal activity in the Antiquities and Heritage Law in Iraq No.55 of 2002 is outlined. The duty of the CPA to protect the cultural property in occupied Iraq and the illicit trade in stolen Iraqi cultural property are examined below.

#### **3.4.1 The looting of cultural property is a criminal activity in the Antiquities and Heritage Law in Iraq No.55 of 2002**

The looting of cultural property is a criminal offence under the Antiquities and Heritage law in Iraq No. 55 of 2002. Paragraph (1) of Article 40 of the Law makes it a crime when any person stole an artefact or heritage antiquity in the possession of the Antiquity Authority. In this case, the sentence is imprisonment for a period not less than 7 years and not exceeding 15

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<sup>165</sup> Special Inspector General for Iraq Reconstruction, 'Oversight of Funds Provided to Iraqi Ministries through the National Budget Process' (n 108) 4.

<sup>166</sup> Council of Europe, *International Legal Protection of Cultural Property: Colloquy Proceedings* (Stationery Office Books 1984) 12.

years, and paying compensation 6 times the evaluated value of the artefact or the heritage antiquity.<sup>167</sup> If the crime is committed by in charge of running, keeping or guarding the stolen artefact or the heritage antiquity, the sentence is life imprisonment.<sup>168</sup> Looting of an artefact or heritage antiquity by force or threatening by two individuals or more those carry any weapons (concealed or apparent), carries the death sentence.<sup>169</sup>

It is well known that the crime can be committed through the cooperation of more than one person. In this respect, the Antiquities and Heritage law does not make any difference between actor and partner in the looting of an artefact or heritage antiquity. Paragraph (2) of Article 40 provides “The participant of committing the crime laid down in the provision 1 of this Article, shall be considered as a guilty of an offence.”<sup>170</sup>

In order to combat the exporting of antiquities from Iraq, the Antiquities and Heritage Law provides for the death sentence when any person has exported or intended to export, deliberately, an antiquity, from Iraq.<sup>171</sup> If heritage antiquity has been exported from Iraq deliberately, the sentence is imprisonment for a period not exceeding 3 years or a fine not exceeding 100,000 I.D. (Iraqi Dinars).<sup>172</sup> The illicit traffic in antiquities is a crime under the Antiquities and Heritage Law. It provides that any person whom traffics in antiquity, the sentence is imprisonment for a period not exceeding 10 years and a fine not exceeding 1,000,000 I.D.<sup>173</sup> If the illicit traffic in antiquities is committed by a staff member of the Antiquity Authority, the sentence is the imprisonment and a fine not exceeding 2,000,000 I.D., and the antiquity in his possession shall be liable to be confiscated.<sup>174</sup>

There is no doubt that the Antiquities and Heritage Law applied by the Iraqi courts to prosecute criminals whom have looted the Iraqi cultural property while they are on Iraqi soil. This Law may also be applied by the US courts in support of a charge under the National Stolen Property Act of 1934 in the event that antiquities, heritage material, or Iraqi origin is transported to the US territory. The Act makes it a crime to “receive, possess, ... sell, or dispose of any goods, wares, or merchandise ... of the value of \$5,000 or more, ... which have

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<sup>167</sup> Paragraph (1) of Article 40 of the Antiquities and Heritage Law No.55 of 2002.

<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.*

<sup>170</sup> Paragraph (2) of Article 40 of the Antiquities and Heritage Law.

<sup>171</sup> Paragraph (1) of Article 41 of the Antiquities and Heritage Law.

<sup>172</sup> Paragraph (2) of Article 41 of the Antiquities and Heritage Law.

<sup>173</sup> Article 44 of the Antiquities and Heritage Law.

<sup>174</sup> *ibid.*

crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken ...’’<sup>175</sup>

In *United States v. Schultz*, the Court of Appeals sets a precedent in relation to the enforcement by the US courts of foreign cultural property laws. In this case, the Court enforced the Egyptian Law on the Protection of Antiquities No. 117 of 1983 which provides ‘‘All antiquities are considered to be public property...it is impermissible to own, possess or dispose of antiquities except pursuant to the conditions set forth in this law and its implementing regulations.’’<sup>176</sup> Those who are convicted under 18 U.S.C§ 2315 may subject them to be fined or imprisoned not more than ten years, or both.<sup>177</sup>

### **3.4.2 The protection of cultural property in the time of occupation**

The protection of cultural property in occupied territories, which means in effect its protection from pillage, damage, destruction has been considerably bolstered since the Second World War. Following the wanton destruction, and pillage of cultural property committed by the Nazi belligerents in occupied territories during the Second World War, The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict was adopted in 1954. The 1954 Hague Convention is the first international convention, which defined the term ‘‘cultural property.’’<sup>178</sup> It deals extensively with cultural property as its main subject, and not just as ‘‘an element in an otherwise comprehensive instrument regulating conduct under the law of war.’’<sup>179</sup> The 1954 Hague Convention seeks to make the scope of the 1899 and 1907 Hague Conventions more broad. It takes into account the events of World

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<sup>175</sup> 18 U.S.C § 2315.

<sup>176</sup> This Article cited in *United States v. Schultz*, 333 F.3d 393 C.A.2 (N.Y.)2003.

<sup>177</sup> 18 U.S.C § 2315.

<sup>178</sup> Article (1) of the 1954 Hague Convention provides a very wide definition of ‘‘ cultural property’’:

For the purposes of the present Convention, the term ‘‘cultural property’’ shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) Centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as ‘‘centres containing monuments.’’

<sup>179</sup> Gael M. Graham, ‘Protection and Reversion of Cultural Property: Issues of Definition and Justification’ (1987) 21(3) International Lawyer 755.

Wars I and II, by premising the law on the need to protect the “cultural heritage of mankind.”<sup>180</sup> It has also incorporated certain provisions of the 1949 Geneva Convention to create a truly effective and comprehensive agreement on the protection of cultural property during hostilities. As such, the 1954 Hague Convention applies to international and non-international armed conflicts including periods of occupation.<sup>181</sup>

The application of the protection of cultural property in times of occupation does not mean that the occupying power is primarily obligated to care for and preserve the cultural property of the occupied territory. A key assumption is that the responsibility for safeguarding and preserving the cultural property rests mainly with the competent national authority of the occupied territory. According to Article 5 (1) of the 1954 Hague Convention, “Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.”<sup>182</sup>

Despite the fact that the occupying power is bound to respect cultural property, the competent national authority continues to have the obligation to safeguard and to preserve all cultural property, even whilst under occupation.<sup>183</sup> Therefore, the occupying power is obligated to co-operate with, and support the competent national authority in that task. It also should in particular, facilitate them to discharge their duties.<sup>184</sup>

O’Keefe has suggested that the terms “safeguarding” and “preserving” denote two distinct aspects.<sup>185</sup> The safeguarding term refers to the measures of safeguard required by Article 3 of the 1954 Hague Convention. It denotes measures to protect the cultural property from the foreseeable effects of armed conflict.<sup>186</sup> The preserving term refers to measures that must be taken after the cessation of active hostilities to conserve, and to protect cultural property in occupied territory.<sup>187</sup> This second element is very broad. It can even be extended to require the occupying power to co-operate with the competent national authorities, in implementing

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<sup>180</sup> James A. R. Nafziger *et al*, *Cultural Law: International, Comparative, and Indigenous* (Cambridge University Press 2010) 349.

<sup>181</sup> *ibid*.

<sup>182</sup> Article 5 (1) of the 1954 Hague Convention (n 19).

<sup>183</sup> Kevin Chamberlain, *War and Cultural Heritage* (Institute of Art & Law 2004) 42.

<sup>184</sup> Armin Von Bogdandy *et al.*, (eds), *Max Planck Yearbook of United Nations Law*, vol 9 (Brill 2005) 12.

<sup>185</sup> Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) 136.

<sup>186</sup> Article 3 of the 1954 Hague Convention (n 19).

<sup>187</sup> Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (n 185) 136.

the legislative and administrative regime, such as compliance with local planning regulations, enforcement of penal sanction against illegal trade in antiquities and any other practical measures.<sup>188</sup>

Nevertheless, the duty of the occupying power is limited by the expression “*as far as possible*.”<sup>189</sup> Normally, the occupying power has the upper hand, and regulates what is possible in the circumstances of an occupation, where there is an imbalance of power.<sup>190</sup> Accordingly, it would not be expected that a commanding officer should take action, which exposes him and his soldiers to a military disadvantage or endanger the lives of his troops.<sup>191</sup>

The scheme for safeguarding and preserving the cultural property between the national authority and the occupying power requires in particular cases, the latter *per se* to take most necessary measures to preserve cultural property. This can be observed when the cultural property has been “damaged by military operations.”<sup>192</sup> It would seem that when such damage takes place in times of occupation, the responsibility of the occupying power is greater.<sup>193</sup> However, this responsibility is limited to the most urgent cases. Such appropriate measures, of course, must be taken, but only where they are strictly necessary, only when the competent national authorities are unable to undertake such measures by themselves, and only in close co-operation with the competent national authorities.<sup>194</sup>

In addition, the occupying power is *per se* obligated to prevent the exportation of cultural property from the occupied territory. According to Paragraph 1 (1) of Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954, “Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property.”<sup>195</sup> If the occupying power fails to do so, it must indemnify the holders in good faith of any cultural property that has to be returned. According to Paragraph 1 (4) of Protocol for the Protection of Cultural Property in the Event of Armed Conflict of 1954, “The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity

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<sup>188</sup> *ibid.*

<sup>189</sup> Article 5 (1) of the 1954 Hague Convention (n 19).

<sup>190</sup> Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (UNESCO 1996) 84.

<sup>191</sup> Kevin Chamberlain, *War and Cultural Heritage* (n 183) 42.

<sup>192</sup> Article 5(2) of the 1954 Hague Convention (n 19).

<sup>193</sup> Armin von Bogdandy *et al.*, (eds), *Max Planck Yearbook of United Nations Law* (n 128)12.

<sup>194</sup> Article 5(2) of the 1954 Hague Convention (n 19).

<sup>195</sup> Paragraph (1) of the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (*HPI*), The Hague, 14 May 1954.



to the holders in good faith of any cultural property that has to be returned in accordance with the preceding paragraph.’’<sup>196</sup>

Further, the occupying power is required to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory,<sup>197</sup> and is required to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property that is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph.<sup>198</sup>

The occupying power, regardless of whether it is a legal or illegal occupation, must prohibit, prevent, and if necessary put a stop to any theft, pillage, confiscation or other misappropriation of, and any acts of vandalism directed against, cultural property in occupied territory.<sup>199</sup> This is an absolute obligation, and therefore, without any possibility of waiver based on “imperative military necessity.”<sup>200</sup> Further, it is not only qualified to prohibit, prevent theft, pillage, and other unlawful activities, but also encompass affirmative duties. The occupied territory is normally in a state of anarchy and the occupying power is obligated to prevent armed groups, mobs, or other individual persons of taking advantage otherwise engaging in any of the prohibited acts.<sup>201</sup>

As shortcoming of the scheme mentioned above is that it does not give a definition of the term “occupation,” nor does it state when an occupation begins. Recall from Chapter One that an occupation begins when “effective control over a foreign territory” is established by a foreign entity.

### **3.4.3 The looting of cultural property in occupied Iraq**

The looting of cultural property in occupied Iraq erupted in the post-occupation pre-establishment of the CPA period and continued throughout the CPA’s tenure. After the occupying forces entered the centre of Baghdad in April 2003, “pre-establishment of the CPA,” the Iraqi National Museum was extensively looted within a few days. The Iraqi

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<sup>196</sup> *ibid.*, Paragraph 1 (4).

<sup>197</sup> *ibid.*, Paragraph 1 (2).

<sup>198</sup> *ibid.*, Paragraph 1 (3).

<sup>199</sup> Article 4 (3) of the 1954 Hague Convention (n 19).

<sup>200</sup> Yutuka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law* (Brill 2009) 246.

<sup>201</sup> *ibid.*

National Museum was regarded as the “storehouse of priceless artefacts from the earliest stage of Mesopotamian civilization.”<sup>202</sup>

According to a detailed account of Colonel Matthew Bogdanos, who led the official US investigation into the National Museum thefts, the looting began on 8 April and ended 12 April 2003.<sup>203</sup> The investigation listed 40 major pieces taken from the public galleries, 3138 items taken from storage rooms on the first and second floors, and 10,337 pieces taken from the basement storage room, a total of about 13,500 items.<sup>204</sup>

As has been seen in Chapter Two, Benvenisti claimed that the looting erupted in post-invasion, pre-occupation.<sup>205</sup> Likewise, A.P.V. Rogers noted that the looting of the Iraqi National Museum took place in the time of chaos between war fighting, and the establishment of an occupation regime.<sup>206</sup> This means that the US forces were not an occupying force and therefore was not bound to prevent pillaging of the Iraqi National Museum. Nevertheless, as has been shown in Chapter One, the US was an occupying force of some portions of Iraq during the course of conflict.

The core legal problem, however, is that the US was not party at the time to the 1954 Hague Convention, and would not therefore be under legal obligation to observe its provisions. Nevertheless, it is submitted that the duty of the US to prevent looting is derived from Article 43 of the Hague Regulations, which obligates the occupant to take proper measures to restore and ensure public order in the occupied territory. In this regard, Phuong has observed that the protection of Iraqi cultural property comes within the scope of the broad obligations of an occupying power to restore, and maintain good order and security.<sup>207</sup> In addition, Johnson asserted that the clearest legal obligation binding upon the US was Article 43 of the Hague Regulations. Even though, it is aimed at preventing public chaos, and threat to public safety, rather than, specifically cultural property, it applies to the looting of Iraqi public property,

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<sup>202</sup> Wayne Sandholtz, ‘Iraqi National Museum and International Law: A Duty to Protect’ (2005) 44 (1) Columbia Journal of Transnational Law 185.

<sup>203</sup> Colonel Matthew Bogdanos, USMC, ‘Iraq Museum Investigation: 22Apr-8Sep03.’ Available at <<http://www.defense.gov/news/Sep2003/d20030922fr.pdf>> accessed 27 September 2011.

<sup>204</sup> *ibid.*

<sup>205</sup> Eyal Benvenisti, *The International Law of Occupation* (2<sup>nd</sup> edn, Oxford University Press 2012) 250-251.

<sup>206</sup> A.P.V. Rogers, *Law on the Battlefield* (2<sup>nd</sup> edn, Manchester University Press 2004) 159.

<sup>207</sup> Catherine Phuong, ‘The Protection of Iraqi Cultural Property’ (2004) 53 (4) International and Comparative Law Quarterly 985.

including cultural property, which was an infringement of public order.<sup>208</sup> Moreover, the 1907 Hague Conventions are, at present, generally accepted as part of customary international law.<sup>209</sup> Other scholars have argued that the 1954 Hague Convention has achieved the status of customary international law. Sandholtz asserts that the prohibitions on pillage from cultural sites, and on attacking or on utilising them for military purpose, have emerged as norms of customary international law.<sup>210</sup>

Likewise, Roberts and Guelff have concluded that given the “long-established and general acceptance of the principle of special protection of cultural property .... this special protection may be viewed as part of customary international law.”<sup>211</sup> Lastly, Meyer argues that the basic principles of the 1954 Convention have attained the status of customary international law. Meyer observes, “the absence of significant reservations to the 1954 Convention supports its status as customary international law,” at least with regard to general principles, which include Article 4 (3) and the Convention may, therefore, be binding on non-parties.<sup>212</sup>

Additional support for supporting the argument that the US was under a duty to prevent looting can be derived from its signature of the 1954 Convention.<sup>213</sup> Signing a Convention shows that “the provisions were conceptually acceptable.”<sup>214</sup> Moreover, a doctrine has been developed by customary international law to deal with the issue of force, and effect of treaties pending ratification. This doctrine appears in Article 18 of the Vienna Convention on the Law of Treaties (VCLT),<sup>215</sup> which has been signed by the US, but not yet been ratified. This “object and purpose” doctrine, of customary international law obligated the States, which have expressed intent to be bound to a treaty by signature to refrain from any activity that might defeat the “object and purpose” of that treaty for the period of time ratification is

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<sup>208</sup> John C. Johnson, ‘Under New Management: The Obligation to Protect Cultural Property during Military Occupation’ (2007) 190/191 *Military Law Review* 146.

<sup>209</sup> United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (William S Hein & Co 1997) 13.

<sup>210</sup> Wayne Sandholtz, ‘Iraqi National Museum and International Law: A Duty to Protect’ (n 146) 188.

<sup>211</sup> Adam Roberts and Richard Guelff, *Documents on the Laws of War* (Clarendon Press 1989) 339.

<sup>212</sup> David A. Meyer, ‘The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law’ (1993) 11(2) *Boston University International Law Journal* 356.

<sup>213</sup> The US signed the 1954 Hague Convention on 14 May 1954 and ratified on 13 March 2009.

<sup>214</sup> David A. Meyer, ‘The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law’ (n 156) 354.

<sup>215</sup> Vienna Convention on the Law of Treaties *opened for signature* May 23, 1969.

pending.<sup>216</sup>This obligation persists until “a signatory State has taken appropriate steps to demonstrate a clear intention not to become a party to the treaty.”<sup>217</sup>

The looting of the Iraq National Museum in the early days of the occupation was only one part of a much larger problem: the looting of archaeological sites continued throughout the CPA’s tenure.<sup>218</sup> Russell has pointed out “virtually all of Iraq is an archaeological site. More than 10,000 sites have been identified in Iraq and many more await discovery.”<sup>219</sup>The looting of those sites gradually became an industry, particularly in the Southern portion of the country. Sites such as Isin, Larsa, and Umma can be described as a “moonscapes” when seen from the sky.<sup>220</sup>

Because the security situation was unstable, the extent of looting at archaeological sites had been difficult to document from earth. Therefore, satellite and aerial images were used. The work of Stone, showed patterns in looted archaeological sites and the extent of this looting in 10,000 square kilometre in Southern Iraq.<sup>221</sup>Likewise, an investigation by Hritz into the looting at the ancient site of Isin in Southern Iraq showed the rise in looting between the winter of 2003 and the winter of 2006. Hritz found that at the ancient site of Isin the looted area increased from 37 hectares to 69 hectares at a site that is only 193 hectares in total.<sup>222</sup>

### **3.4.4 The illicit trade in stolen Iraqi cultural property**

According to the United Nations Security Council Resolution 1483, illicit trade in Iraqi cultural property is banned:

All Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon

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<sup>216</sup> *ibid.*

<sup>217</sup> *ibid.*

<sup>218</sup> See Peter G. Stone and Joanne Farchakh Bajjaly (eds), *The Destruction of Cultural Heritage in Iraq* (Boydell Press 2008).

<sup>219</sup> John Malcolm Russell, ‘Robbing the Archaeological Cradle’ (2001) 110 (1) *Natural History* 45.

<sup>220</sup> Gaetano Palumbo, ‘The State of Iraq’s Cultural Heritage in the Aftermath of the 2003 War’ (2005) 12 (1) *Brown Journal of World Affairs* 229.

<sup>221</sup> Elizabeth C. Stone, ‘Patterns of looting in southern Iraq’ (2008) 82 (315) *Antiquity* 125.

<sup>222</sup> Carrie Hritz, ‘Remote Sensing of Cultural Heritage in Iraq: A Case Study of Isin’ (2008) 3-1 *The American Academic Research Institute in Iraq*.

the United Nations Educational, Scientific, and Cultural Organisation, Interpol, and other international organisations, as appropriate, to assist in the implementation of this paragraph.<sup>223</sup>

Nevertheless, the international antiquities market has been supplied massively by stolen Iraqi antiquities since the occupation of Iraq in 2003. Brodie's detailed analysis of this market in Iraqi antiquities between 1980 and 2009 shows that the objects stolen from the Iraqi National Museum, and from archaeological sites arrived at auction houses in London and New York in large numbers.<sup>224</sup> Brodie asserts that the market for unprovenanced Iraqi artefacts on the Internet is continuing and flourishing. The quantity should have been known, and expected, when Iraqi objects and antiquities have been offered for sale on at least 55 Websites on one day.<sup>225</sup> Brodie does not put a total value on the stolen materials because the more important pieces are still missing. Brodie merely attempts to put a value on the types of objects offered for sale. In 2006, Brodie estimated that the 5,144 cylinder seals, which had been stolen from the Iraqi National Museum, would have been worth at least \$1 million in New York or London markets, and potentially much more. At the time seals were selling for sums between \$200 to \$1000.<sup>226</sup> Inside Iraq, cylinder seals were for sale for much less than that. In Baghdad, the journalist Joseph Braude paid \$200 for two cylinder seals looted from the Iraqi National Museum.<sup>227</sup>

Illicit trade of Iraqi artefacts and the huge sums of illegal funds generated from them raises the issue of the extent of its link with organised criminal activities in Iraq. The issue is certainly a challenge for research, investigation and exploration, as Iraq is a conflict-affected country, making it appear impossible to secure valid data and undertake serious research. Therefore, Brodie concedes that the link remains obscure. This obscurity may be due to the

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<sup>223</sup> United Nations Security Council Resolution 1483 (n 71).

<sup>224</sup> Neil Brodie, 'The Market in Iraqi Antiquities 1980-2008 and Academic Involvement in the Marketing Process' in Stefano Manacorda and Duncan Chappell (eds), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property* (Springer 2011) 117 at 117-118.

<sup>225</sup> *ibid* 122.

<sup>226</sup> Neil Brodie, 'The Plunder of Iraq's Archaeological Heritage, 1991-2005, and the London Antiquities Trade' in Neil Brodie, Morag M Kersel *et al.*, (eds), *Archaeology, Cultural Heritage, and the Antiquities Trade* (University Press of Florida 2008) 206 at 212.

<sup>227</sup> Katharyn Hanson, 'Ancient Artefacts and Modern Conflict: a Case Study of Looting and Instability in Iraq' in Peter G. Stone (ed), *Cultural Heritage, Ethics and the Military* (Boydell Press 2011) 113 at 125.

fact that military or law enforcement agencies possess intelligence about broader criminal articulations, where it is in the nature of such intelligence that it cannot be made public.<sup>228</sup>

Colonel Matthew Bogdanos is one of the few people who claimed that, there is a link with the illicit antiquities trade and organised criminal activities, but only with terrorist groups. Colonel Matthew Bogdanos claimed that the non-State armed groups were using antiquity theft, and trafficking to finance their activities.<sup>229</sup> This claim was, to some extent, based on the case that in June 2005, US Marines in Northwest Iraq arrested five insurgents, holed up in underground bunkers filled with automatic weapons, ammunition stockpiles, black uniforms, ski masks, and night-vision goggles. Furthermore, there were “thirty vases, cylinder seals, and statuettes that had been stolen from the Iraq National Museum.”<sup>230</sup>

Colonel Matthew Badonos, therefore, suggested that just like “the Taliban in Afghanistan, who have learned to finance their activities through opium, insurgents in Iraq have discovered a new source of income in Iraq’s cash crop: antiquities.”<sup>231</sup> Nevertheless, Colonel Matthew Badonos observed that the phenomenon in the trafficking in art for arms is still too recent, and therefore, cannot provide hard value numbers, and due to the link with terrorists, certain of the investigations remain top secret. Colonel Matthew Badonos went on to add that the illicit art trade has generated growing revenue for the insurgents; “ranking just below kidnappings for ransom and “protection” money from local residents and merchants.”<sup>232</sup>

The WikiLeaks Organisation<sup>233</sup> supports Colonel Matthew Bogdanos’ claim, when it posted the following that shows the link between illicit antiquities trade and insurgency in Iraq.

(FRIENDLY ACTION) RAID RPT : \_\_\_ INJ/DAM

2007-12-07 00:00:00

A FORCE FROM THE NATIONAL SECURITY ALONG WITH A FORCE FROM THE CRIMINAL \_\_\_ ONE OF THE HOUSES AFTER RECEIVING SOME TIPS THAT THEIR

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<sup>228</sup> Neil Brodie, ‘The Market in Iraqi Antiquities 1980-2008 and Academic Involvement in the Marketing Process’ (n 224) 131.

<sup>229</sup> Matthew Bogdanos, ‘Thieves of Baghdad: Combatting Global Traffic in Stolen Iraqi Antiquities’ (2007) 31 (3) Fordham International Law Journal 725.

<sup>230</sup> *ibid.*

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

<sup>233</sup> WikiLeaks Provides Evidence Linking Illicit Iraqi Antiquities to Weapons Sales. Available at <<http://larryrothfield.blogspot.com/2010/10/wikileaks-provides-evidence-linking.html>> accessed 10 October 2011.

IS SOME ILLEGAL \_\_\_\_ ( SELLING WEAPONS AND ANTIQUES) THE HOUSE LOCATED AT \_\_\_\_ KUT - BAGHDAD \_\_\_\_ ROAD THEY ALSO FOUND A , \_\_\_\_ ,FOUR MORTAR , AND TWO GRENADES FOR ATTACKS.THEY ALSO CAPTURED \_\_\_\_ SUSPECTS.

### **3.4.5 Inadequacy of measures adopted by the CPA to protect cultural property**

As has been explained above, the CPA was responsible for protection of cultural property in occupied Iraq. Furthermore, the United Nations Security Council Resolution 1483 stressed in its preamble “the need for respect for the archaeological, historical, cultural, and religious heritage of Iraq, and for the continued protection of archaeological, historical, cultural, and religious sites, museums, libraries, and monuments.”<sup>234</sup>Likewise, the United Nations Security Council Resolution 1546 stressed in its preamble “the need for all parties to respect and protect Iraq’s archaeological, historical, cultural, and religious heritage.”<sup>235</sup>

As an occupying power, the CPA was duty bound to take proper steps in order to stop the looting at archaeological sites. According to CPA Order Number 27, the CPA established the Facilities Protection Service (hereinafter as the ‘FPS’) to protect governmental buildings.

#### **Coalition Provisional Authority Order Number 27**

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

*Recognising* the need for a body of trained and appropriately equipped personnel that can contribute to efforts to protect the governmental installations of Iraq,

I hereby promulgate the following:

#### **Section 1**

##### **Establishment of the Facilities Protection Service**

This order establishes the Facilities Protection Service (FPS). The FPS is an organisation of trained, armed, uniformed entities charged with providing security

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<sup>234</sup> United Nations Security Council Resolution 1483 (n 71).

<sup>235</sup> United Nations Security Council Resolution 1546, 4987th meeting, UN Doc. S/RES/1546 (2004), 8 June 2004.

for ministry and governorate offices, government infrastructure, and fixed sites under the direction and control of governmental ministries and governorate administrations.<sup>236</sup>

The CPA Order Number 27 granted the FPS the authority to apprehend wrongdoers, to detain suspects for up to twelve hours in order to turn them over to the Iraqi police,<sup>237</sup> to carry out searches of individuals and vehicles,<sup>238</sup> and to carry weapons and use lethal force under prescribed circumstances.<sup>239</sup> The establishment of the FPS was contributed to create a force to protect archaeological sites. The CPA approved the proposal for the establishment of Archaeological Site Protection (hereinafter as the ‘ASP’), using the FPS guards, which was put forward by Italian Ambassador Mario Bondioli Osio, Senior Advisor for Culture for the CPA.<sup>240</sup>

However, the ASP project faced problems. The acquisition of vehicles was the most difficult part of this project. According to Russell, Deputy Senior Advisor for Culture for the CPA from September 2003 to June 2004, the CPA did not have procurement office at Department of State. The Department of Defence administered and funded the CPA procurement office. Therefore, it was unable to help with Department of State procurement. Russell went on that method of securing bids from traders within Iraq was non-existent. Procurement from traders outside of Iraq faced the uncertainty of safe delivery.<sup>241</sup> Russell added that a CPA administrator in Southern Iraq promised \$1 million to support the ASP project, in addition to logistical help in obtaining the needed equipment. Unfortunately, the employee that the CPA administrator assigned to this project was under investigation for charges of being in business for himself.<sup>242</sup> Russell pointed out, “In any event, no funding materialised and we heard nothing further from the CPA in southern Iraq.”<sup>243</sup> On 15 January 2004, Russell flew over five sites in Southern Iraq. Three sites were rife with looter’s craters. Russell wrote a memorandum to Administrator of the CPA that concluded, “As the temporary steward of our

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<sup>236</sup> CPA Order Number 27 of 4 September 2003, Establishment of the Facilities Protection Service.

<sup>237</sup> *ibid.*, Section 3 (1).

<sup>238</sup> *ibid.*, Section 3 (2).

<sup>239</sup> *ibid.*, Section 3 (3)

<sup>240</sup> John M. Russell, ‘Efforts to Protect Archaeological and Monuments in Iraq 2003-2004’ in Geoff Emberling and Katharyn Hanson (eds), *Catastrophe, The Looting and Destruction of Iraq’s Past* (Oriental Institute of the University of Chicago 2008) 29 at 37.

<sup>241</sup> *ibid.* 38.

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid.*



human past in Iraq, the CPA is the only force here that can act immediately and decisively to stop the loss.’<sup>244</sup> The Administrator did not take action.

In order to protect cultural property, there must be sufficient civil or military police trained and equipped with appropriate weapons. The core problem that has been explained in the previous Chapter is that military forces in occupied Iraq were inadequate and not trained for performing law enforcement activities. In this regard, Stahn observed that occupying forces had no necessary means in order to protect cultural property against looting or destruction.<sup>245</sup>

This problem led to the failure of the CPA to protect the cultural property in occupied Iraq. As Wolfrum observed, ‘It is more than doubtful whether the Coalition Provisional Authority has lived up to its general obligation under international law to provide for effective protection of the museums and the sites of archaeological relevance.’<sup>246</sup>

### 3.5 Conclusion

The failure to take proper and feasible measures to prevent financial criminal activities in occupied Iraq that has been shown in this Chapter, indicates that the CPA violated its duty set out in Article 43 of the Hague Regulations. This failure has been demonstrated in three financial criminal activities. With regard to the crime of kidnapping, the Chapter has established the phenomenon of kidnapping during the CPA’s tenure toward Iraqi citizens, as well as foreigners. In this Chapter, estimates were listed about the amount of funds generated by the crime of kidnapping. The Chapter finds that increased punishment for deterring the crime of kidnapping as a measure made by the CPA in Order Number 31 was not effective.

Relying on the United Nation Economic and Social Council Resolution on International Cooperation in the Prevention, Combating, and Elimination of Kidnapping and in Providing Assistance to Victims, the Chapter has discussed a set of measures that should have been adopted by the CPA so as to combat the crime of kidnapping. The Chapter has shown that the CPA did not take such measures. It was difficult to train military forces to carry out law enforcement operations. Although there were some civil affairs soldiers, they were not trained to deal with the combating of financial criminal activities. The CPA was highly

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<sup>244</sup> *ibid* 40.

<sup>245</sup> Carsten Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (1<sup>st</sup> edn, Cambridge University Press 2008) 372.

<sup>246</sup> Rüdiger Wolfrum, ‘Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference’ in Armin von Bogdandy *et al.*,(eds), *Max Planck Yearbook of United Nations Law 2005: vol 9* (Brill 2005) 1 at 13.

unlikely to establish specialised police and law enforcement units to deal with the crime of kidnapping. The cooperation between the CPA and security structures was poor.

With respect to corruption activities, the Chapter has detailed major corruption activities that took place during the reconstruction process of Iraq, which was run by the CPA. In this Chapter, data has shown that while there were funds coming from the US and international donors for the Iraq reconstruction program, the CPA used mainly Iraqi funds to fund reconstruction contracts. It has also been shown that the CPA mostly awarded reconstruction contracts to US firms and mainly without observing competition requirements. The Chapter has found evidence of commission of illegal activities in relation to the funds allocated for reconstruction. The Chapter concludes that the CPA was “dishonest” in its management of Iraq funds, because it omitted to provide adequate financial and physical controls over those funds. Relying on the SIGIR, the Chapter observes that in the region of \$8.8 billion disappeared as a result of the mismanagement by the CPA.

In relation to the looting of cultural property, the Chapter relies on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict to set out the scheme for safeguarding and preserving the cultural property in occupied territories. The Chapter considers that the occupying forces were responsible for the looting of the Iraqi National Museum. This responsibility is mainly derived from Article 43 of the Hague Regulations, which obligates the occupant to take proper measures to restore and ensure public order in the occupied territory. The Chapter has established that the looting of cultural property continued throughout the CPA’s tenure. Estimates were made about the amount of funds generated from trade in stolen Iraqi cultural properties. The Chapter has attributed the failure to prevent the looting of cultural property to the lack of law enforcement means.

The failure of the CPA in its duty with regard to preventing financial criminal activities, which have been examined in this Chapter, does not mean that the law of occupation needs to reforms in order to enable an occupying power to discharge its legal duty in question in the future. It is clear that Article 43 of the Hague Regulations grants an occupying power a broad authority to run the occupied territory. It “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country.”<sup>247</sup>

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<sup>247</sup> Article 43 of the Hague Regulations.

However, as has explained in the main introduction and in this Chapter, the problems that made the CPA failed to prevent financial criminal activities (the crime of kidnapping and the looting of cultural property) were a product of the lack of adequately law enforcement means. Therefore, there is no fault in the law of occupation. Kelly commented on the ability of the law of occupation to deal with public order and safety in occupied Iraq;

The security regimes that are provided for in the Hague Regulations and GC IV were adequate to the task. The problems encountered in this area were a product of the sheer scale of the challenge and the logistic and organisational impediments to meeting it. That is a lesson for military planners and capability analysis but there was no fault in the law or in the attempts of the military lawyers to help the Coalition forces to come to grips with the law.<sup>248</sup>

Even with regards to the failure of the CPA to prevent corruption activities in occupied Iraq, there is no fault in the law of occupation. The fault lay with the CPA as to which failed to take appropriate steps to prevent those activities. Article 43 of the Hague Regulations conceived the CPA as a trustee on Iraqi funds to be used in a transparent manner and for benefiting the Iraqi people. As has been explained in the main introduction and in this Chapter, the failure of the CPA was as a result of the absence of adequate international accounting standards and a lack of transparency.

Criminals should not be allowed to retain funds derived from criminal activities set out in this Chapter. The forfeiture of those funds and the recovering of corruptly obtained Iraqi funds are therefore the next logical step, and it is to this effort that the discussion will now be focused.

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<sup>248</sup> Michael J. Kelly, 'Iraq and the Law of Occupation: New Tests for an Old Law' (2003) 6 Yearbook of International Humanitarian Law 163.

## **Part Two: Making crime a non-profit activity (Solutions)**

Part One of the thesis has established the maladministration of the CPA, leading to an increase in criminal activities that generated huge sums of illegal funds in the Iraqi territory. These illegal funds must not accrue and accumulate in the hands of those who perpetrate criminal activities, following the fundamental principle that malefactors should not benefit from their criminal activities. Commenting on the importance of depriving individuals of their ill-gotten gains, Cassella writes:

Asset forfeiture takes the profit out of the crime. Obviously, there is an element of simple justice in ensuring that wrongdoers are deprived of the fruits of their illegal acts. But there is also an element of general deterrence as well. Surely the incentive to engage in economic crime is diminished if persons contemplating such activity understand that there is high likelihood that they will not be allowed to retain any profits that might flow from their temporary success. Conversely, convicting defendants but leaving them in possession of the riches of wrongdoing gives others the impression that a life of crime is worth the risk.<sup>1</sup>

The focus of Part Two of the thesis is to suggest solutions to the problem of corruptly obtained funds. The solution is set out in two Chapters. Chapter Four will examine the process of criminal forfeiture of corruptly obtained funds generated in Iraq and found in the US. Chapter Five will consider a civil action mechanism as the best alternative mechanism to recovering Iraqi corruptly acquired funds during the CPA's tenure, which are located abroad.

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<sup>1</sup> Stefan D. Cassella, 'Overview of Asset Forfeiture Law in the United States' (2004) 17 (3) South Africa Journal of Criminal Justice 348.

## **Chapter Four: Criminal forfeiture of corruptly obtained funds generated in the Iraqi territory and found in the US territory**

### **4.1 Introduction**

The objective of this Chapter is to examine a criminal forfeiture law in the US relating to the forfeiture of corruptly acquired funds that were generated in Iraq and then found in the US. Before proceeding to analyse criminal forfeiture measures, it is of fundamental importance at the beginning of this Chapter to determine the amount of the forfeiture funds derived from corrupt activities committed by some of the CPA's personnel, or by some persons contracted with the CPA during the CPA's tenure, as well as after the dissolution of the CPA.

Since there were corrupt activities taking place in the Iraqi territory and funds from those activities have been found in the US territory, the Chapter analyses whether US criminal law has extraterritorial application over those activities. It has been shown that US criminal law does not usually apply over criminal activities committed abroad, and the US courts would thereby have no criminal forfeiture jurisdiction. However, in this Chapter, it has been found that there are certain limited circumstances under which the law can apply outside of the US territory, and there would thereby be criminal forfeiture of proceeds for those offences. Within this, it has been demonstrated that in a number of ways, US criminal law has jurisdiction over corrupt activities committed during the CPA's tenure, as well as after the termination of the CPA.

The Chapter then moves on to examine the process of criminal forfeiture of corruptly obtained funds in the courts of the US. Measures are formulated to strip a wrongdoer of the proceeds of criminal activities in accordance with the principle that crime does not pay. As has been set out in the main introduction, this Chapter will only focus on the criminal forfeiture system in US law. Depriving an individual of profits derived from, as well as the property used in, the criminal's illegal schemes as a criminal sanction is a novel concept as "from 1790 until 1970 no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States."<sup>2</sup> Criminal forfeiture statutes and the rationale behind the adoption of those statutes are explained. The concept that criminal forfeiture is considered part of the defendant's sentence in a criminal case is mapped out. Categories of property that are subject to the criminal forfeiture are identified. *United*

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<sup>2</sup> 'Proposal to Reform Criminal Forfeiture under RICO and CCE' (1984) 97 (8) Harvard Law Review 1930.

*States v. Bryant Williams*,<sup>3</sup> is used to illustrate that the proceeds emanating from corrupt activities are subject to forfeiture. The actual funds being laundered is subject to forfeiture under *United States v. John Markus*.<sup>4</sup> *United States v. Eddie Pressley et al*,<sup>5</sup> illustrates that property that was the subject matter of the money laundering transaction is also subject to forfeiture. The *United States v. Robert Young*,<sup>6</sup> illustrates the forfeiture of the facilitating property. The nexus requirement between property to be forfeited and the offence committed by the defendant is established. This Chapter addresses the issue of the forfeiture of substitute assets instead of tainted assets. *United States v. Peleti "Pete" Peleti Jr*,<sup>7</sup> is brought in to support the money judgment. The ancillary proceeding that is aimed at providing the protection to the property that belonged to *bona fide* third parties in the criminal case is considered. Criminal forfeiture proceedings are laid out. The standard of the preponderance of the evidence is considered in order to prove the nexus between property and the offence. *United States v. Charles E. Sublett*,<sup>8</sup> is employed in order to identify the time in which the title of property was vested to the State.

The Chapter brings *United States v. William Rondell Collins*,<sup>9</sup> to explain that the court may order the defendant to forfeit property, as well as to pay a fine. The difference between a forfeiture order and restitution order is drawn. In this regard, the Chapter determines the amounts of the restitution of corrupt activities that took place during the period of the CPA, as well as after the dissolution of the CPA. Benefits of the asset forfeiture for the government, and in particular, for the benefit of local, State, Federal, or international law enforcement agencies taking part in the seizure are set out. The Chapter does not come to any conclusion as to the effectiveness of criminal forfeiture system in the deterrence of wrongdoers by taking the profit out of criminal activities.

## **4.2 Levels of a criminal forfeiture of the proceeds of corrupt activities committed in Iraq**

Statistical data regarding the amount of forfeited funds in the US courts of corrupt activities, which were committed in Iraq by some of the CPA's personnel, or by some individuals

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<sup>3</sup> *United States v. Bryant Williams*, U.S. Dist. Cr., unreported (17 August 2011).

<sup>4</sup> *United States v. John Markus*, U.S. Dist. Cr., unreported (12 March 2012).

<sup>5</sup> *United States v. Eddie Pressley et al*, U.S. Dist. Cr., unreported (6 January 2012).

<sup>6</sup> *United States v. Robert Young*, U.S. Dist. Cr., unreported (6 November 2009).

<sup>7</sup> *United States v. Peleti "Pete" Peleti Jr*, U.S. Dist. Cr., unreported (20 February 2008).

<sup>8</sup> *United States v. Charles E. Sublett*, U.S. Dist. Cr., unreported (8 October 2010).

<sup>9</sup> *United States v. William Rondell Collins*, U.S. Dist. Cr., unreported (16 July 2010).

contracted with them during the CPA’s tenure or after the dissolution of the CPA, does not exist. However, there have been collections of criminal cases that were published by the United States Department of Justice. Since 2005, the author has learned of 136 criminal cases.<sup>10</sup> Because of the absence of statistical data, with respect to criminal cases from non-US courts and from court-martials, the present study is not taking those cases into account. Having analysed these criminal cases, the following conclusions have been drawn:

- Criminal forfeiture is the only method used to forfeit proceeds of corrupt activities. Therefore, civil forfeiture is completely absent from application.
- Out of 136 criminal cases, there have only been 4 final criminal forfeiture orders with respect to corrupt activities committed during the CPA’s tenure. The total amount of such orders amounted to \$ 8,344,500 million.(Table 4.1)
- Out of 136 criminal cases, there have been 22 final criminal forfeiture orders with respect to corrupt activities that took place after the dissolution of the CPA. The total amount of such orders amounted to \$68,594,843 million.(Table 4.2 )

Table 4.1: The Criminal Forfeiture Amounts

<b>Name</b>	<b>Date of Conviction</b>	<b>The Amount of the Forfeiture</b>
Robert Stein	2/2/2006	\$3,60000
Philip Bloom	3/10/2006	\$3,60000
Bruce Hopfengardner	8/25/2006	\$144,500
John Rivard	7/23/2007	\$1,000,000
<b>Total</b>		\$ 8,344,500

**Source:** United States Department of Justice

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<sup>10</sup> There are 18 criminal cases still pending before the courts.

Table 4.2: The Criminal Forfeiture Amounts

<b>Name</b>	<b>Date of Conviction</b>	<b>The Amount of the Forfeiture</b>
Peleti 'Pete' Peleti Jr.	2/9/2007	\$50,000
Austin Key	12/19/2007	\$108,000
Roy Greene Jr	5/18/2009	\$103,000
Elbert George III	5/18/2009	\$103,000
Robert Young	7/24/2009	\$1,000000
Michel Jamil	7/27/2009	\$75,000
Terry Hall	2/17/2010	\$15,757,000
William Collins	4/21/2010	\$5,775
Charles Sublett	7/7/2010	\$107,900
Ismael Salinas	10/1/2010	\$807,904
Frankie Hand Jr.	12/7/2010	\$757,525
Michelle Adams	12/7/2010	\$757,525
Bryant Williams	12/17/2010	\$57,030
Eurica Pressley	3/1/2011	\$21,000000
Eddie Pressley	3/1/2011	\$21,000000
Derrick Shoemake	6/13/2011	\$68,100
Thomas Manok,	9/19/2011	\$73,500
Gaines Newell	4/10/2012	\$861,027
Billy Joe Hunt	5/8/2012	\$236,472
Ahmed Kazzaz	5/21/2012	\$947,585



John Markus	9/7/2012	\$3,700000
Edward William Knotts	7/10/2013	\$91,500.00
<b>Total</b>		\$68,594,843

**Source:** United States Department of Justice

### 4.3 The criminal forfeiture of the proceeds of extraterritorial offences

US criminal law is ordinarily territorial, but in certain specified circumstances, it can apply to offences perpetrated beyond the territorial boundaries of the US. Crime is usually prohibited, tried, and punished pursuant to the laws of the place where it is committed. As the US Supreme Court in *American Banana Co v. United Fruit Co* concluded, “The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”<sup>11</sup>

The justification for applying criminal law only within the territorial jurisdiction is that it can be said to be rooted in the idea of law enforcement as a means of keeping the peace within the territory.<sup>12</sup> Furthermore, sovereignty requires States to prescribe and to enforce their laws in their territory. States that do not maintain this prescriptive and enforcement jurisdiction within their territory are not sovereign.<sup>13</sup> The US Supreme Court in *American Banana Co v. United Fruit Co* put it in the following manner:

...For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.<sup>14</sup>

Accordingly, considering the US criminal law as territorial, means that the US courts cannot use the criminal forfeiture process over offences committed in a foreign country. However, American criminal law can apply outside the geographical confines of the US. Application is in general a question of legislative intent, expressed or implied. When the Congress declares

<sup>11</sup> *American Banana Co v. United Fruit Co.*, 213 U.S. 347 (1909).

<sup>12</sup> Rollin M. Perkins, ‘The Territorial Principle in Criminal Law’ (1971) 22 (5) *Hastings Law Journal* 1155.

<sup>13</sup> Christopher L. Blakesley, ‘United States Jurisdiction Over Extraterritorial Crime’ (1982) 73(3) *The Journal of Criminal Law and Criminology* 1114.

<sup>14</sup> *American Banana Co v. United Fruit Co.*, (n 11).

that there is a particular statute that applies beyond the territorial borders of the US, it is an evident evidence of intent to create extraterritorial jurisdiction.<sup>15</sup>The extraterritorial application of federal criminal law is most frequently by prohibition of various forms of conducts when they take place “within the special maritime and territorial jurisdiction of the US.”<sup>16</sup>An express example of extraterritorial jurisdiction appears in the Military Extraterritorial Jurisdiction Act of 2000 (MEJA).<sup>17</sup>Furthermore, the explicit extraterritorial application of criminal law can be found in international principles. Known, the Congress and the US courts are not bound to the obedience of international law when it enacts or interprets laws with extraterritorial application. As the court in *United States v. Yunis* held:

Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.<sup>18</sup>

Likewise, the Court of Appeals in *United States v. Yousef* held:

In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law.<sup>19</sup>

However, Congress considers international law when it assesses the policy considerations associated with legislation that may have international consequences. Therefore, the courts interpret Congress’s legislation with the presumption that it does not go beyond the bounds of international law, unless it indicates otherwise.<sup>20</sup> In 1935, Harvard Research on International Law (Harvard Research) identified five general principles that represent the potential bases for States to claim a criminal jurisdiction over offences that occurred overseas and is proscribed by their criminal law. Firstly, the territorial principle that allows for jurisdiction over action that occurs within the territory of a country. Secondly, the nationality principle in which jurisdiction is based on the nationality of the wrongdoer. Thirdly, the protective

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<sup>15</sup> Charles Doyle, *Extraterritorial Application of American Criminal Law* (Congressional Research Service 2012)14.

<sup>16</sup> *ibid.*

<sup>17</sup> 18 U.S.C. 3261. It is related to members of US armed forces overseas and those accompanying them.

<sup>18</sup> *United States v. Yunis*, 924 F.2d 1086, 1091(C.A.D.C., 1991).

<sup>19</sup> *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

<sup>20</sup> Charles Doyle, *Extraterritorial Application of American Criminal Law* (n 15) 11.

principle in which jurisdiction is based on whether the national interests of the State is injured. Fourthly, the passive personal principle in which jurisdiction is based on the nationality of the victim. Lastly, the universal principle in which jurisdiction is conferred “in any forum that obtains physical custody of the perpetrator of certain offences considered particularly heinous and harmful to humanity.”<sup>21</sup>

In addition to the above, the federal courts have found that certain statutes are implicitly intended to have extraterritorial application. For instance, the Court of Appeals in *United States v. Cotten*,<sup>22</sup> considered extraterritorial jurisdiction appropriate to a case in the theft of federal property abroad. The Court held *inter alia* that:

When a citizen of this country, while without the territorial jurisdiction of the United States, violates federal statute prohibiting the theft of government property, he is amenable to resulting criminal prosecution in United States District Courts; likewise, he is answerable to charges of conspiring to violate that statute under similar circumstances; both the conspiracy statute and theft of government property statute have extraterritorial application.<sup>23</sup>

To illustrate this extraterritorial jurisdiction, take the example of *United States v. Kurt Bennett*.<sup>24</sup> In that case, Judge Terrence W. Boyle on the US District Court for the Eastern District of North Carolina sentenced Bennett to 36 months in prison, followed by 3 years of supervised release for conspiring to take and convert property belonging to the US government in violation of 18 U.S.C §371,<sup>25</sup> and for theft and conversion of government property, in violation of 18 U.S.C § 641.<sup>26</sup>

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<sup>21</sup> See Christopher L. Blakesley, ‘United States Jurisdiction Over Extraterritorial Crime’ (n 13) 1110.

<sup>22</sup> *United States v. Cotten*, 471 F.2d. 744 (9<sup>th</sup> Cir. 1973).

<sup>23</sup> *ibid.*

<sup>24</sup> *United States v. Kurt Bennett*, U.S. Dist. Cr., unreported (15 November 2013).

<sup>25</sup> It provides “If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offence, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.”

<sup>26</sup> It provides “Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Bennett was, at the time of the offence, an Apache helicopter pilot in the US Army assigned to the 1<sup>st</sup> Battalion, 3<sup>rd</sup> Aviation Regiment, at Hunter Army Air Field in Savannah, Georgia. During the time of his deployment with his unit to Contingency Operating Base (COB) Speicher in Iraq from 18 October 2008, through 18 October 2009, Bennett stole government property and hid the stolen items in military connexes. Bennett then sent the stolen items to the US, in addition to, the rest of his unit's property to Fort Drum, New York. Bennett, after returning to the US from Iraq, went to Fort Drum and transferred the connex and its contents of stolen items with his own vehicle back to Georgia. The total value of the stolen government property was approximately \$1.3 million.<sup>27</sup>

John Strong, Special Agent in Charge of the Federal Bureau of Investigation (FBI) in North Carolina has commented on Bennett's behaviour:

Kurt Bennett dishonoured his country and put the lives of his fellow soldiers at risk by stealing property intended to further our war efforts in Iraq and Afghanistan. His sentence should reassure the public the FBI and our outstanding military partners will make sure those who betray our trust are held accountable.<sup>28</sup>

Looking at *United States v. Cotten* above, it shows that conspiracy Statute also has extraterritorial application. A good example of this extraterritorial jurisdiction is found in *United States v. Billy Hunt*, in which Judge Abdul Karim Kallon on the US District Court for the Northern District of Alabama sentenced Hunt to 15 months in prison; 3 years supervised release for kickback<sup>29</sup> conspiracy,<sup>30</sup> related to the reconstruction efforts of Iraq in violation of 18 U.S.C §874.<sup>31</sup> Judge Kallon also ordered Hunt to forfeit \$236,472 and \$66,212 restitution to the Internal Revenue Service.<sup>32</sup>

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Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.”

<sup>27</sup> *United States v. Kurt Bennett*, (n 24).

<sup>28</sup> *United States v. Kurt Bennett*, (n 24). Bennett's co-conspirator was Sergeant First Class Robert Alan Walker. On 25 September 2013, Walker was sentenced to 18 months imprisonment. *United States v. Kurt Bennett*, (n 24).

<sup>29</sup> Under the Anti-Kickback Act of 1986 (41 U.S.C. § 8701), the term “kickback” is defined as any “money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee to improperly obtain or reward favourable treatment in connection with a prime contract or a subcontract relating to a prime contract.”

<sup>30</sup> 18 U.S.C §371(n 25)

<sup>31</sup> Under 18 U.S.C§874, giving kickbacks to public works employees is a criminal offence. It provides “Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United

Hunt was employed by The Parsons Company, an international engineering and construction firm in Iraq, as deputy program manager under a contract that Parsons held to support the Coalition Munitions Clearance Program managed by the US Army Corps of Engineers in Huntsville.<sup>33</sup> From 2005 to 2007, Hunt and Gaines R. Newell Jr,<sup>34</sup> took more than \$1 million in kickbacks from Ahmed Sarchil Kazzaz,<sup>35</sup> a United Kingdom citizen, and his company, Leadstay Company, in exchange for arranging to award lucrative subcontracts on the Munitions Clearance Program.<sup>36</sup>

Likewise, in *United States v. Thomas Manok*, Judge Anthony J. Trenga, on the US District Court for the Eastern District of Virginia in Alexandria sentenced Manok to 20 months in prison; 3 years supervised release,<sup>37</sup> \$73,500 forfeiture and \$100 special assessment,<sup>38</sup> for conspiring to receive bribes from Iraqi contractors in violation of 18 U.S.C §201 (b) (2).<sup>39</sup>

Manok, a former employee of the US Army Corps of Engineers stationed in Baghdad, Iraq, abused his authority to conspire with Iraqi contractors to accept cash bribes in return for recommending that the US Army Corps of Engineers approve their contracts and payment requests. Manok agreed in March and April 2010 to receive a \$10,000 payment from a contractor who had been involved in constructing a kindergarten and girls' school in the Abu Ghraib neighbourhood of Baghdad. Manok was to receive an additional bribe payment once

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States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.’’

<sup>32</sup> *United States v. Billy Hunt*, U.S. Dist. Cr., unreported (10 October 2012).

<sup>33</sup> The Coalition Munitions Program sought to prevent insurgents groups from obtaining munitions that stockpiled, seized or abandoned, and using them against Coalition forces or the Iraqi public. *ibid*.

<sup>34</sup> Gaines R. Newell Jr was employed by The Parsons Company as program manager. As a result of his participation in a kickback conspiracy, Judge Virginia Hopkins on United States District Court for the Northern District of Alabama sentenced Newell to 27 months in prison, 3 years of supervised release, \$1,102,115 in restitution (\$861,027 to the U.S. Army Corps of Engineers and \$241,088 to the Internal Revenue Service) and forfeiture of \$861,027. *United States v. Gaines Newell*, U.S. Dist. Cr., unreported (10 October 2012).

<sup>35</sup> It stated that Kazzaz and Leadstay received from April 2006 through August 2008 over \$23 million in US funds for services under the Coalition Munitions Clearance Program. *United States v. Ahmed Sarchil Kazzaz*, U.S. Dist. Cr., unreported (13 March 2012).

<sup>36</sup> *United States v. Billy Hunt*, (n 32).

<sup>37</sup> *United States v. Thomas Manok*, U.S. Dist. Cr., unreported (9 December 2011).

<sup>38</sup> Special Inspector General for Iraq Reconstruction, Final Report to the United States Congress (9 September 2013).

<sup>39</sup> It provides that it is a criminal offence for anyone ‘‘being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person.’’

the contractor's claim had been approved. In addition, Manok planned to camouflage the payments from authorities by transferring them to Armenia.<sup>40</sup>

With respect to corrupt activities committed in occupied Iraq by some the CPA's personnel, or by some persons contracted with the CPA, as well as by some persons remained in Iraq after the dissolution of the CPA, it observes that US law has jurisdiction over those activities in a number of ways. For instance, US law would have extraterritorial jurisdiction over anyone who defrauded or committed bribery in relation to an entity receiving US Government funds. Section 18 US 666 provides, in part, as follows:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organisation, or of a State, local, or Indian tribal government, or any agency thereof—

(A) Embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at \$5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organisation, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organisation, government, or agency involving anything of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organisation or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organisation, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

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<sup>40</sup> *United States v. Thomas Manok*, (n 37).

(b) The circumstance referred to in subsection (a) of this section is that the organisation, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.<sup>41</sup>

It is clear that the language of Section 666 does not contain direct or explicit grant of extraterritorial application. However, Section 666 falls accurately in line with the limited type of criminal statutes addressed in *United States v. Bowman*.<sup>42</sup> In that case, the US Supreme Court had provided for exception to the territoriality of US criminal law in the case of:

...criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents.<sup>43</sup>

For such offences to avoid “curtail[ing] the scope and usefulness of the statute and leav[ing] open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home,” a court must conclude that the statute applies extraterritorially, even if Congress does not so expressly provide.<sup>44</sup> The Court held “in such cases, Congress has not thought it necessary to make specific provision in the law that the locus shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offence.”<sup>45</sup>

The US Supreme Court in *Sabri v. United States* stated that Congress had the authority to enact Section 666 under the Necessary and Proper Clause of the Constitution, Art. I, § 8, cl. 18, “to see to it that taxpayer dollars...are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off.”<sup>46</sup> Looking at the legislative history of Section 666 showed that the purpose of Section was generally to “protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.”<sup>47</sup>

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<sup>41</sup> 18 U.S. 666.

<sup>42</sup> *United States v. Bowman*, 260 U.S. 94, 43 S.Ct. 39 (U.S. 1922).

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.*

<sup>45</sup> *ibid.*

<sup>46</sup> *Sabri v. United States*, 541 U.S. 600, 124 S.Ct. 1941 (U.S.2004).

<sup>47</sup> *Sabri v. United States*, (quoting S. REP. NO. 98-225, at 370 (1983) (n 46).

In addition to the above, CPA Order Number 17 granted the US criminal law extraterritorial criminal jurisdiction over offences committed in Iraq. The Order stated that “All Multinational Force, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States.”<sup>48</sup> The Order stated that “They shall be immune from Iraqi legal process.”<sup>49</sup> Accordingly, since the US criminal law has extraterritorial criminal jurisdiction over offences committed in Iraq, the US courts can use the criminal forfeiture process over those offences.

#### 4.4 Scope of laws

It is clear that an unprecedented legislative approach in US law has taken place with respect to the attack on the financial element of crime. This innovative approach was put in motion in the 1970s, and was “vigorously endorsed by the Reagan administration.”<sup>50</sup> In the light of the infiltration of organised crime into lawful businesses, and more importantly, the dramatic increase in drug trafficking, the Congress of the US sought to find techniques, which were more effective than the traditional crime combating policy of fines and imprisonment. Therefore, criminal forfeiture statutes were enacted, with the main purpose being to diminish the economic power of organised crime, including drug enterprises. The first of these statutes was the Racketeer Influenced and Corrupt Organisation (hereinafter known as the ‘RICO’) Act of 1970 (18 U. S.C. § 1963). The second statute was the Continuing Criminal Enterprise Act of 1970 (hereinafter known as the ‘CCE’) (21 U.S.C. § 853).

In addition to these two criminal forfeiture statutes, the problem of money laundering was later considered in the Money Laundering Control Act 1986 (hereinafter known as the ‘MLCA’) (18 U.S.C. § 982). According to the US Customs Service, money laundering is “the process whereby the proceeds, reasonably believed to have been derived from criminal activity, are transported, transferred, transformed, converted, or intermingled with legitimate funds, for the purpose of concealing or disguising the true nature, source, disposition, movement or ownership of those proceeds. The goal of the money laundering process is to make funds derived from, or associated with illicit activity appear legitimate.”<sup>51</sup> Money

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<sup>48</sup> Section 2 (3) of CPA Order Number 17 of 27 June 2004, Status of The Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq.

<sup>49</sup> *ibid.*

<sup>50</sup> M. Michelle Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (Edward Elgar 2005) 75.

<sup>51</sup> James R. Richards, *Transnational Criminal Organizations, Cybercrime, and Money Laundering* (CRC Press 1998) 44.



laundering is making tainted funds look untainted. Quite simply, money laundering is the attempt to make illicit funds appear to be legitimate.<sup>52</sup> Money laundering process comprises of three stages; placement,<sup>53</sup> layering,<sup>54</sup> and integration.<sup>55</sup> The Financial Action Task Force (hereinafter known as the 'FATF') recommends that countries should "criminalise money laundering on the basis of the Vienna Convention and the Palermo Convention. Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences."<sup>56</sup> More specifically, money laundering is a criminal

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<sup>52</sup> Umut Turksen, 'Implications of anti-money laundering law for accountancy in the European Union- a comparative study' in Nicholas Ryder, *et al.*, (eds) *Fighting Financial Crime in the Global Economic Crisis* (Routledge 2015) 75 at 75.

<sup>53</sup> Placement is keystone to lend legitimacy to criminal proceeds, which more often than not are substantial amounts of cash. It means physical disposal of dirty cash into financial institutions. Duncan E. Alford, 'Anti-Money Laundering Regulations: A Burden on Financial Institutions' (1994) 19 (3) *North Carolina Journal of International Law and Commercial Regulation* 439. The placement stage is the most vulnerable to detection by law enforcement officials in that there is still direct connection between the proceeds and crime. Hence, legislators have paid attention in dealing with the placement. For examples, the United State's Bank Security Act of 1970 (hereinafter known as the 'BSA') requires banks to file Currency Transaction Reports whenever US\$10,000 or more is withdrawn from or deposited into one account during a single day. 31 U.S.C. § 5313 (a).

<sup>54</sup> Once the funds have been successfully entered into the financial system, the layering stage takes place. In layering; the launderer will seek to set up a series of complex multiple financial transactions that due to their frequency, volume, or complexities often resemble legitimate financial transactions. Trevor Millington and Mark Sutherland Williams, *The Proceeds of Crime: Law and Practice of Restraint, Confiscation, Condemnation and Forfeiture* (2<sup>nd</sup> edn Oxford University Press 2007) 573. Certainly, the purpose of these transactions whether domestically or internationally is to distance the illicit proceeds from their original source, to camouflage audit trail and to provide anonymity. This can be accomplished in many ways; commonly, by wire- transfer funds through offshore-banking havens, which often offered privacy, little or no currency-exchange restrictions and global market access, *etc.* The most famous offshore-banking havens are the Cayman Island, Panama, the Bahamas, the Netherland Antilles, and, increasingly, Pakistan and Chile. James R. Richards, *Transnational Criminal Organizations, Cybercrime, and Money Laundering* (n 51) 49-78. The creating of shell companies with fictitious income streams is another common way to achieve this stage. Edward Rees, Richard Fisher, and Richard Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002* (3<sup>rd</sup> edn Oxford University Press 2008) 128. Hence, the layering stage is a rather carrying of an international nature through moving the funds among foreign accounts. Indeed, this is occasioning a myriad of challenges for law enforcement officials with regard to tracking down the source of the money.

<sup>55</sup> In the final stage of the money laundering, or what is also known as integration, the launderer wants to make the illicit money acquire the appearance of legitimacy for utilising it in legitimate or illegitimate enterprises. This can be accomplished by the money being integrated or reintroducing it into the legitimate economic or financial system and is assimilated with all other assets in the system. Alain Sham, 'Money laundering laws and regulations: China and Hong Kong' (2006) (9) 4 *Journal of Money Laundering Control* 382. Thus, it is extremely difficult, if not impossible, for law enforcement officials to track down the money. Moreover, this method uses exactly like the approach that is employed in disguising the trail of money so as to further reinforce the steps before money acquires the cloak of legitimacy. Jyoti Trehan, *Crime and Money Laundering: The Indian Context* (James Bennett Pty Ltd 2004) 113.

<sup>56</sup> FATF Recommendation 3. The FAT is an inter-government organisation committed to combating money laundering and terrorist financing. It has developed sets of Recommendations that are recognised as the international standard for the fighting of money laundering and the financing of terrorism. The Forty Recommendations that was issued in 1990 were revised in 1996, 2001, 2003 and recently in 2012 to ensure that

offence by virtue of the MLCA. The MLCA makes three money laundering offences, namely a financial transaction, a monetary instrument, and an international transportation offence.

With regard to a financial transaction offence, the MLCA makes it an offence for any person, “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity

(1) with the intent to promote the carrying on of specified unlawful activity; or

(2) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.<sup>57</sup>

Regarding an international transportation offence, the MLCA makes it an offence for any person “transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law.”<sup>58</sup>

Concerning a monetary instrument offence, the MLCA also makes it an offence for any one engaging in monetary transaction in property derived from specified unlawful activity. It provides that it is a criminal offence for any person to “knowingly engage or attempt to

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they remain up to date and relevant, and they are intended to be of global application. Available at <<http://www.fatf-gafi.org/pages/aboutus/>> accessed 11 April 2015.

<sup>57</sup> 18 U.S.C § 1956 (a)(1).

<sup>58</sup> 18 U.S.C § 1956 (a) (2).

engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity.’’<sup>59</sup>

Objectively speaking, all of the above mentioned criminal forfeiture statutes are similar and represent, at this moment in time, the pinnacle of the US forfeiture law.<sup>60</sup>

Before proceeding to examine the main criminal forfeiture provisions, it is essential to present a definition of the term “forfeiture.” Forfeiture, in a working definition is “the transfer of all legal interest in property, real or personal, from an entity holding such an interest to government.”<sup>61</sup> *United States v. Eight (8) Rhodesian Stone Statues*,<sup>62</sup> perhaps offers a more concise description of forfeiture: “the divestiture without compensation of property used in a manner contrary to the laws of the sovereign.”<sup>63</sup>

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<sup>59</sup> 18 U.S.C § 1957. Money laundering offences are also described in Anti-Money Laundering Act of 2004 in Iraq as follows: “Whoever conducts or attempts to conduct a financial transaction that involves the proceeds of some form of unlawful activity knowing that the property involved is the proceeds of some form of unlawful activity, or Whoever transports, transmits, or transfers a monetary instrument or funds that represent the proceeds of some form of unlawful activity knowing that the monetary instrument or funds represent the proceeds of some form of unlawful activity-(a) With the intent to promote the carrying on of unlawful activity, to benefit from unlawful activity, or to protect from prosecution those who have engaged in unlawful activity; and (b) Knowing that the transaction is designed in whole or in part-(i) to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity; or (ii) to avoid a transaction or other reporting requirement, shall be sentenced to a fine of not more than 40 million Iraqi dinar, or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than 4 years, or both” Article 3 of CPA Order Number 93 of 2 June 2004, Anti-Money Laundering Act of 2004.

On an international level, Article 23 of the United Nations Convention against Corruption of 2003 requires that States Parties establish the four offences related to money laundering. The first offence is conversion or transfer of the proceeds of crime. It provides “The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.” Article 23 (1)(a)(i). The second offence is concealment or to disguise the proceeds of crime. It provides “The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.” Article 23 (1)(a)(ii). The third offence is acquisition, possession or use of proceeds of crime. It provides “The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime.” Article 23 (1)(b)(i). The fourth set of offences involves participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences. It provides “Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.” Article 23 (1)(b)(ii).

<sup>60</sup> However, it should be noted that the offences give rise to forfeiture, and what property is liable to be forfeited vary per statute.

<sup>61</sup> Montgomery Blair Sibley, *Federal Forfeiture Practice Manual* (3<sup>rd</sup> edn, Lulu 2009) 2.

<sup>62</sup> *United States v. Eight (8) Rhodesian Statues*, 449 F.Supp 193 (C.D. Cal. 1978).

<sup>63</sup> *ibid*.

Fundamental principles emerge from the definition of forfeiture. Firstly, forfeiture has to be of a governmental nature. Divestiture of property used illegally or the product of an illegal action may only be made by the government or certain law enforcement agencies. Even though many of the States have taken this principle, their divestiture of property, as will be seen later in US law, should not be understood to take effect upon a specific type of property. Secondly, as one might expect forfeiture does not involve any compensation, otherwise crime *does pay*.

#### 4.5 Criminal forfeiture order

A criminal forfeiture is an *in personam* order directed at a specific defendant, and is considered an integral part of the sentencing process in a criminal case.<sup>64</sup> In the words of the US Supreme Court in *Libretti v. United States*, ‘‘Criminal forfeiture is an element of sentence imposed for violation of certain drug and racketeering laws, not element of the offence.’’<sup>65</sup>

Since a criminal forfeiture order is part of the defendant’s sentence, the conviction of the defendant for an offence is a prerequisite for the making of a criminal forfeiture order. It cannot take place in a criminal case unless and until the defendant has been convicted of the offence. In this regard, an US politician, Rep. Henry Hyde, in his critique of the civil forfeiture system in US, has indicated that after a trial of the defendant at which constitutional and procedural safeguards of due process entirely apply, there will be criminal forfeiture. Henry Hyde has said, ‘‘No conviction; no forfeiture. No wrongdoing; no property confiscation. The issue at trial is the individual’s misconduct, not the fictional guilt of an inanimate object, as in civil forfeiture cases.’’<sup>66</sup>

Accordingly, if the defendant’s conviction for offence has been vacated, the criminal forfeiture order must thus be vacated too. The Court of Appeals in *United States v. Harris*,<sup>67</sup> reversed the defendant’s conviction for money laundering offence and conspiracy to commit money laundering, which meant that the forfeiture money judgment \$1.5 million that was premised on that conviction must be reversed too.<sup>68</sup> However, if there is an independent basis for the criminal forfeiture order, it need not be vacated. When the Court of Appeals in *United States v. Bader*, reversed the defendant’s conspiracy conviction, but not his convictions on

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<sup>64</sup> D. Scott Broyles, *Criminal Law in the USA* (Kluwer Law International 2011) 103.

<sup>65</sup> *Libretti v. United States*, 516 U.S. 29, (U.S.Wyo. 1995).

<sup>66</sup> Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (Cato Institute 1995) 26.

<sup>67</sup> *United States v. Harris*, 666 F.3d 905, (5<sup>th</sup> Cir. 2012).

<sup>68</sup> *ibid*.

other counts, it remanded the case to the district court to see if all or part of the forfeiture judgment could survive based on the other convictions.<sup>69</sup>

Furthermore, since a criminal forfeiture order is part of the defendant's sentence, the order affects only defendants who have been convicted of the offence upon which the forfeiture order is based. With respect to co-defendants who were acquitted or who were convicted of a different offence, are the third parties as far as the forfeiture order are concerned.<sup>70</sup> As the Court of Appeals in *United States v. Davenport*, held that “if the defendant pleads to a crime that does not give rise to forfeiture, she is not subject to the forfeiture order, but becomes a third party with the right to oppose the forfeiture in the ancillary proceeding.”<sup>71</sup>

#### 4.6 Proceeds forfeiture

A criminal forfeiture order may be made vis-à-vis the proceeds of offence. One of the well-established provisions of the RICO is that any property, which is constituted, or derived from any proceeds, which the person convicted, obtained directly or indirectly from the commission of racketeering activity is subject to forfeiture.<sup>72</sup> This language is also tracked by the CCE. Indeed, it provides that any property, which is constituted, or derived from any proceeds, which the person convicted, obtained directly or indirectly from the drugs offence activity would be forfeitable.<sup>73</sup> An advantage of having such provisions allowed to forfeit the proceeds of crime is that it is aimed at divesting the malefactor of the benefit that was acquired from the offence.

The *United States v. Bryant Williams* illustrates the forfeiture of proceeds derived from offence. In that case, Judge Barbara S. Jones on the US District Court for the Southern District of New York sentenced Williams to 36 months in prison for demanding and accepting bribes in violation of 18 U.S.C § 201 (b) (2).<sup>74</sup> Jones also ordered Williams to forfeit \$57,030 as proceeds stemming from bribes.<sup>75</sup> From 2005 through 2006, Williams was stationed in Baghdad, and served as a Captain and procurement officer with the US Army's 101<sup>st</sup> Airborne Division. On behalf of the US Army, Williams had the power to buy supplies

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<sup>69</sup> *United States v. Bader*, 678 F.3d 858 (10<sup>th</sup> Cir. 2012).

<sup>70</sup> Stefan D. Cassella, ‘Criminal Forfeiture Procedure in 2012: An Annual Survey of Developments in the Case Law’ (2012) 48 (5) Criminal Law Bulletin 866.

<sup>71</sup> *United States v. Davenport*, 668 F.3d 1316(11<sup>th</sup> Cir. 2012).

<sup>72</sup> 18 U.S.C. § 1963(a).

<sup>73</sup> 21 U.S.C. § 853(a).

<sup>74</sup> 18 U.S.C § 201 (b) (2) (n 39).

<sup>75</sup> *United States v. Bryant Williams*, ( n 3).

and services that cost lower than \$2,500. In addition, William's responsibilities included taking part in the solicitation of bids, assisting in the selection of contractors, and overseeing the administration and completion of US Army contracts that were worth between \$2,500 and \$200,000.<sup>76</sup>

In return for using his formal position to assist favoured contractors to receive more than \$930,000 in US government contracts, Williams illegally demanded and accepted bribe payments. As part of this scheme, on behalf of other companies, Williams counterfeited bids. He also knowingly gathered false and counterfeited bids from certain contractors. Williams, on one occasion, menaced a contractor with a firearm in the course of demanding bribes payment. In an attempt to hide a portion of the corrupt payments he received, Williams provided a contractor with a mailing address in Iowa and directed that the contractor send in the region of \$20,000 in cash payments to that address. In addition, Williams instructed another contractor to wire in the region of \$12,000 in bribery proceeds from the contractor's bank account in Dubai, United Arab Emirates, to another individual's bank account in the US. He then collected the money when he returned to the US.<sup>77</sup>

Manhattan U.S. Attorney Preet Bharara has commented on Williams's behaviour, "Bryant Williams abused his position of authority to extract bribes from military contractors and to enrich himself in the process."<sup>78</sup>

Likewise, in *United States v. Derrick Shoemake*,<sup>79</sup> the US District Court Judge Dolly M. Gee in the Central District of California sentenced Shoemake to 41 months in prison; 2 years supervised release; and \$181,900 restitution for receiving bribery in violation of 18 U.S.C § 201 (b) (2).<sup>80</sup> Gee also ordered Shoemake to forfeit \$68,100 as proceeds derived from bribery related to contracting in support of US troops in Iraq. Shoemake, a retired Lieutenant Colonel in the US Army, was deployed to Camp Arifjan, Kuwait, as a contracting officer's representative, responsible for coordinating and accepting delivery of bottled water in support of Iraq War. Shoemake agreed to help a contractor with his delivery of bottled water in exchange for the contractor paying in the region of \$215,000. The most of that amount delivered to Shoemake's designee in the city of Los Angeles. From a second contractor,

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<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

<sup>79</sup> *United States v. Derrick Shoemake*, U.S. Dist. Cr., unreported (14 June 2012).

<sup>80</sup> 18 U.S.C § 201 (b) (2) (n 39).

Shoemake received an extra \$35,000 for his perceived influence over the grant of bottled water contracts in Afghanistan. From those two contractors in 2005 and 2006, Shoemake received, in total, in the region of \$250,000.<sup>81</sup>

It can be observed, despite the fact that the American Congress chose the term “proceeds” in both the RICO and the CCE, it did not define what precisely constitutes “proceeds.”<sup>82</sup> It was thought that the Congress chose the term “proceeds,” instead of “profit,” to make clear that “all property purchased with and traceable to criminal profits is forfeit, including appreciation in value attributable to the criminal activity.”<sup>83</sup> This interpretation raises the issue of whether proceeds equate to gross receipts or to net profits. It is observed that the Courts of Appeal have been equivocal on this issue. The Seventh Circuit’s decision, in *United States v. Masters*, held that the term proceeds under the RICO means net profits, not gross receipts. It held, “Proceeds to which Racketeer Influenced and Corrupt Organisations Act RICO forfeiture provision refers to are net, not gross, revenues (profits, not sales), for only the former are gains.”<sup>84</sup> This opinion has been reaffirmed in *United State v. Genova*.<sup>85</sup> The Court of Appeals held:

To trigger forfeiture under provision of Racketeer Influenced and Corrupt Organisations Act (RICO) requiring forfeiture of property constituting, or derived from, proceeds of racketeering activity, there must be “proceeds,” in the sense of profits net of the costs of the criminal business.<sup>86</sup>

In a similar way, the Seventh Circuit supported the undefined term “proceeds” in the CCE to be limited to net profits not gross receipts.<sup>87</sup> However, the interpretation of the Seventh Circuit of the proceeds has been rejected by the other Circuits. In *United States v. McHan*, the Fourth Circuit held:

Under forfeiture statute for continuing criminal enterprise (CCE), “proceeds” from illegal transactions included gross proceeds, rather than just net profits; thus, court

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<sup>81</sup> *United States v. Derrick Shoemake* (n 79).

<sup>82</sup> Initially the CCE required the forfeiture of the profits of drug enterprises, whereas the RICO only required forfeiture of the interest of the defendant in the criminal enterprise. This distinction showed insupportable. Thus, statutes, at present, provided for the forfeiture of proceeds in every case they cover. David J. Fried, ‘Rationalising Criminal Forfeiture’ (1988) 79 (2) *Journal of Criminal Law and Criminology* 375.

<sup>83</sup> *ibid.*

<sup>84</sup> *United States v. Masters*, 924 F.2d 1362 (7<sup>th</sup> Cir. 1991).

<sup>85</sup> *United States v. Genova*, 333 F.3d 750 (7<sup>th</sup> Cir. 2003).

<sup>86</sup> *ibid.*

<sup>87</sup> Lisa K. Halushka, ‘Does the Word Proceeds In the Federal Money Laundering Statute Refer to Gross Receipts or Profits Derived from Unlawful Activities’ (2007-2008) 53 (1) *Preview of United States Supreme Court Cases* 31.

ordering forfeiture of property related to marijuana distribution business should not have deducted cost to defendant of drugs sold.<sup>88</sup>

In any event, the theory of proceeds is whether to extend to gross receipts or to net profits in the narrow sense; it may not be applied completely to forfeited property. To be more precise, it permits only forfeiting the proceeds of the unlawful activity *per se*, as well as the direct property traceable to it. Therefore, a wide approach has been taken in the MLCA where the statute provides that on conviction of the defendant, any “property involved” in the money laundering offence is liable to be forfeited. It provides “The court, in imposing sentence on a person convicted of an offence...shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.”<sup>89</sup>

A determination of what constitutes “property involved” was completely absent from the MLCA. However, it has been observed that the term “property involved” is to be defined broadly: “the term “property involved” is intended to include the money or other property being laundered (the corpus), any commissions or fees paid to the launderer, and any property used to facilitate the laundering offence.”<sup>90</sup> This definition implies that there are two categories of property, which are subject to forfeiture in a money laundering case, that is to say the actual funds being laundered and the facilitating property.<sup>91</sup>

The actual funds being laundered is the money or other property that was the subject matter of the money laundering transaction. To illustrate the category of the money being laundered, takes the example of *United States v. John Markus*.<sup>92</sup> In that case, Jose L. Linares, Judge of the United States District Court for the District of New Jersey sentenced Markus to 13 years in prison; 3 years supervised release; \$75,000 fine; and \$3.7million forfeiture for multimillion-Dollar bribery in violation of 18 U.S.C § 201 (b) (2),<sup>93</sup> for kickback scheme in

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<sup>88</sup> *United States v. McHan*, 101 F.3d 1027 (4<sup>th</sup> Cir. 1996).

<sup>89</sup> 18 U.S.C. § 982 (a)(1).

<sup>90</sup> Stefan D. Cassella, ‘Forfeiture of Property Involved in Money Laundering Offences’ (2004) 7(2) Buffalo Criminal Law Review 615.

<sup>91</sup> The facilitating property will be discussed within the scope of the facilitating forfeiture.

<sup>92</sup> *United States v. John Markus*, (n 4).

<sup>93</sup> 18 U.S.C § 201 (b) (2) (n 39).



violation of 18 U.S.C. § 874,<sup>94</sup> and for money laundering in violation of 18 U.S.C. § 1956 (a) (2).<sup>95</sup>

The case involved a multimillion-dollar bribery and kickback scheme where Markus, a former US Army Corps of Engineers Project Engineer deployed to Tikrit, Iraq, from July 2007 to June 2008, received more than \$3.7 million with regard to US Army Corps of Engineers contracts awarded to many companies linked to two foreign contractors. In order to receive bribe and kickback payments from foreign contractors, Markus opened or established control over many foreign bank accounts in Egypt and Jordan. Markus used the foreign bank accounts to receive and transfer those funds from foreign contractors to at least 11 bank accounts opened, established and controlled by Markus in New Jersey and Pennsylvania.<sup>96</sup> This is formed money laundering offence in violation of 18 U.S.C. § 1956 (a) (2).<sup>97</sup> The funds that transferred are the money being laundered, and are property involved in the money laundering offence that is subject to forfeiture.

A good illustration of the category of property that was the subject matter of the money laundering transaction is *United States v. Eddie Pressley et al.*<sup>98</sup> In that case, Eddie, a former US Army contracting official, received about \$2.9 million in bribe payments in violation of 18 U.S.C. § 201 (b) (2),<sup>99</sup> and used the money bribery to buy expensive automobiles, real estate, and home decorating services, among other things. This is formed money laundering offence in violation of the 18 U.S.C. § 1956 (a)(1).<sup>100</sup> For his taking part in bribery, as well as money laundering scheme related to contracts awarded in support of the Iraq war, the US District Court Judge Virginia Emerson Hopkins for the Northern District of Alabama ordered Eddie to forfeit \$21 million, as well as real estate and several automobiles.<sup>101</sup> Real estate, and automobiles, are the subject matter of the money laundering transaction, which can be forfeited.

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<sup>94</sup> 18 U.S.C. § 874 (n 31).

<sup>95</sup> 18 U.S.C. § 1956 (a) (2) (n 58).

<sup>96</sup> *United States v. John Markus*, (n 4).

<sup>97</sup> 18 U.S.C. § 1956 (a) (2) (n 58).

<sup>98</sup> *United States v. Eddie Pressley et al.*, (n 5).

<sup>99</sup> 18 U.S.C. § 201 (b) (2) (n 39).

<sup>100</sup> 18 U.S.C. § 1956 (a)(1) (n 57).

<sup>101</sup> *United States v. Eddie Pressley et al.*, (n 5).

In that case, Eddie conducted a variety of acts in favour of certain contractors, including Terry Hall.<sup>102</sup> In February 2005, Eddie arranged for a blanket purchase agreement (BPA),<sup>103</sup> to be awarded to Hall's company, to deliver goods and services to the US Department of Defence and its components in Kuwait and somewhere else. Before Eddie would issue bottled water calls to Hall, he demanded a \$50,000 bribe. In April 2005, Hall and his associates, arranged for Eddie to receive the bribe money in a bank account set up in the name of a shell company, EGP Business Solutions Inc. Shortly after the amount of \$50,000 was received, Eddie and John Cockerham,<sup>104</sup> raised the bribe demand to \$1.6 million, which was \$800,000 for Eddie and \$800,000 for Cockerham. Hall and others agreed to pay the funds and Eddie and Cockerham therefore took a range of actions in favour of Hall, including, for example, issuing calls for bottled water and fencing. Eddie enlisted the assistance of his wife Eurica to receive the bribe money.<sup>105</sup>

In May 2005, Eurica went to Dubai City in the United Arab Emirates and to the Cayman Islands in June 2005 for opening bank accounts to receive the amount of bribes. In addition, Eurica took control of the US-based account in the name of EGP Business Solutions Inc. Eurica made a range of false and misleading statements to a law enforcement agent, including

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<sup>102</sup> Hall operated companies that had contracts with the US military in Kuwait, including Freedom Consulting and Catering Co. and Total Government Allegiance. The US District Court Judge Virginia Emerson Hopkins for the Northern District of Alabama sentenced Hall to 39 months in prison for his participation in a bribery in violation of 18 U.S.C. § 201 (b)(1) (a). It provides that it is an offence for any “(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent— (A)to influence any official act .” The Judge also ordered Hall to serve one year of supervised release following the prison term, to forfeit \$15,757,000 as well as real estate and a Harley Davidson motorcycle. *United States v. Terry Hall*, U.S. Dist. Cr., unreported (20 March 2012).

<sup>103</sup> “A BPA is a type of contract by which the Department of Defence agrees to pay a contractor a specified price for a particular good or service. Based on a BPA, the Department of Defence orders the supplies on an as-needed basis. The contractor is then obligated to deliver the supplies ordered at the price agreed upon in the BPA. The term for such an order by the Department of Defence is a “call.” *United States v. Eddie Pressley et al*, (n 5).

<sup>104</sup> The US District Court for the Western District of Texas, San Antonio Division, Judge Royal Furgeson sentenced John Cockerham to (210) months in prison, and was ordered to serve (3) years of supervised release following the prison term and to pay \$9.6 million in restitution for their participation in a bribery and money laundering scheme related to related to the Department of Defence contracts in Support of Iraq War. *United States v. John Cockerham et al*, U.S. Dist. Cr., unreported (2 December 2009).

<sup>105</sup> “On 9 March 2005, he sent his wife an e-mail in which he told her, among other things: “You will be getting some paperwork with your maiden name on it”; “I need you to sign it and mail to whatever (sic) address on it”; “I am doing some consulting”; and “Of course I am not going to turn down any money, but I can't have anyone paying me in my name because I am in the military so I had them put everything in your maiden name.” *United States v. Eddie Pressley et al*, (n 5).

her denial that she had any foreign bank accounts. In addition, it demonstrated that “the Pressleys, Hall and others attempted to conceal the true nature of their corrupt scheme by having Eurica Pressley execute bogus “consulting agreements.” They also prepared false invoices that were designed to justify the bribe payments as payment for non-existent “consulting services.”<sup>106</sup>

#### 4.7 Facilitating forfeiture

In addition to the proceeds forfeiture, a criminal forfeiture order can be made with respect to the facilitating property. It is part and parcel of the CCE that property that has been used or is intended to be used to commit or to facilitate the commission of a drug offence is subject to forfeiture. It provides that property subject to criminal forfeiture “any of the person’s property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.”<sup>107</sup> In US jurisprudence, such property is often called “facilitating property.”<sup>108</sup> The ruling in *United States v. Huber*, helps to define such property. In this case, the Court of Appeals held that facilitating property is property that makes the unlawful conduct “less difficult or more or less free from hindrance.”<sup>109</sup> Perhaps a better quote is *United States v. Schifferli*, “it is property that makes the offence easier to commit or harder to detect.”<sup>110</sup> This includes, but is not limited to, ships, cars, or planes used to transport the drugs for sale.

The *United States v. Robert Young*,<sup>111</sup> illustrates the forfeiture of the facilitating property. In or about October 2007, Young, a former captain in the US Army, while serving as a contractor in Iraq, along with his co-conspirators: Lee Dubois,<sup>112</sup> and Robert Jeffery,<sup>113</sup>

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<sup>106</sup> *ibid.*

<sup>107</sup> 21 U. S. C. § 853 (a) 2.

<sup>108</sup> Facilitating property is often used interchangeably with instrumentality. However, it is the view of Dee R. Edgeworth that a subtle distinction is made between them. Instrumentality is property that contributes directly to commit the offence. In contrast, facilitating property, which has been defined as above, facilitates the commission of the offence. Dee R. Edgeworth therefore indicates that facilitating forfeiture has a much wider sweep than instrumentality forfeiture. It may, according to 21 U.S.C. § 881 (a) (7), encompass property that “is used or intended to be used in any manner or part to commit or facilitate the commission of a violation...” Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* (American Bar Association 2004) 13.

<sup>109</sup> *United States v. Huber*, 404 F.3d 1047 (8<sup>th</sup> Cir. 2005).

<sup>110</sup> *United States v. Schifferli*, 895 F.2d 987 (4<sup>th</sup> Cir. 1990).

<sup>111</sup> *United States v. Robert Young*, (n 6).

<sup>112</sup> The US District Court Judge Gerald Bruce Lee in the Eastern District of Virginia sentenced Lee Dubois, a former Department of Defence contractor, to three years in prison for his participation in a scheme. *United States v. Lee Dubois*, U.S. Dist. Cr., unreported (25 August 2008).

agreed to take part in the scheme to steal fuel from the US Army in Iraq. Between October 2007 and May 2008, Young and his co-conspirators pretended that they represented Department of Defence contractors in Iraq, using documents that were fraudulently obtained to gain access to the Victory Bulk Fuel Point (VBFP) in Camp Liberty, Iraq, and presented false fuel authorisation forms to steal large quantities of fuel from the (VBFP) for subsequent sale on the black market. In order to retrieve and transport the stolen fuel from the (VBFP), Young and his co-conspirators employed several drivers and escorts of trucks containing the stolen fuel. During the course of the scheme, Young and his co-conspirators stole in the region of 10 million gallons of fuel. As a result of the scheme, Young received proceeds in the region of \$1 million in personal profits.<sup>114</sup>

The US District Court Judge Claude M. Hilton in the Eastern District of Virginia sentenced Young to 97 months in prison and 3 years of supervised release to follow his prison term for conspiracy to defraud the United States Department of Defence, in violation of 18 U.S.C. § 371,<sup>115</sup> and theft of and aiding and abetting the theft of the property of the United States, in violation of 18 U.S.C. § 641.<sup>116</sup> Judge Hilton also ordered Young to pay \$26,276,427 in restitution and to forfeit \$1 million in profits derived from the scheme above.<sup>117</sup> The trucks that used to facilitate the commission of theft of fuel are subject to forfeiture.

In the RICO, it is believed that the forfeiture of facilitating property was not in the mind of the Congress, as the Congress was paying attention to the control features of the interest more than its value or use.<sup>118</sup> Nevertheless, the scope of property that is subject to forfeiture under the RICO is broader than the forfeiture that extends only to the facilitating property. In *United States v. Cauble*, the Court of Appeals held that the conviction of the defendant under the RICO makes all his interests in the enterprise subject to forfeiture, independent of

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<sup>113</sup> The US District Court Judge Claude M. Hilton in the Eastern District of Virginia sentenced Robert Jeffery, a former master chief petty officer in the US Navy, to (4) years in prison for his participation in a scheme. *United States v. Robert Jeffery*, U.S. Dist. Cr., unreported (11 December 2009).

<sup>114</sup> *United States v. Robert Young* (n 6). In connection with the theft scheme, Michel Jamil received between \$75,000 and \$87,500 in personal profits. The US District Court Judge Claude M. Hilton in the Eastern District of Virginia sentenced Michel Jamil to (40) months in prison; (2) years supervised release; 75,000 forfeiture; and 27,806,879 restitution, for his participation in a scheme. *United States v. Michel Jamil*, U.S. Dist. Cr., unreported (12 March 2010).

<sup>115</sup> 18 U.S.C. § 371 (n 25).

<sup>116</sup> 18 U.S.C. § 641(n 26).

<sup>117</sup> *United States v. Robert Young* (n 6).

<sup>118</sup> William W. Taylor, 'Forfeiture under 18 U.S.C. § 1963-RICO's Most Powerful Weapon' (1980) 17 (3) *American Criminal Law Review* 392.

whether those assets were themselves “tainted” by use in respect of the racketeering activity.<sup>119</sup>

The advantage of permitting forfeiture of the facilitating property is that it primarily provides greater deterrence for the criminal, by prescribing an additional punishment for the offence. In addition, facilitating forfeiture may make the society free from means of offence, and it seems probable that they will not be used for more offences in the future. Pimentel put it in the following manner:

Property used in the commission of a crime may also be subject to forfeiture. Vehicles are often confiscated under these provisions, as well as real property used for the manufacture or cultivation of illegal narcotics. This type of forfeiture has been justified on two separate grounds: (1) it provides greater deterrence for the wrongdoer by prescribing an additional penalty for the crime, and (2) it provides an incentive to the property owner to take precautions that prevent others from using his property for criminal activity.<sup>120</sup>

As has been noted above, facilitating property is not outside the scope of the “property involved” in the MLAC. This interpretation is often allowed to forfeit clean funds that are used to facilitate the laundering of dirty funds. To illustrate the idea, in *United States v. Tencer*, the Court of Appeals concluded that as long as it demonstrates that the legitimate funds have been used to facilitate the laundering of illegitimate funds, it is not wrong for a forfeiture order to be made in relation to all the of the funds.<sup>121</sup>The Court concluded:

In this case, the money laundering counts arose from six transfers of funds by wire and cheque from various accounts throughout the country into one account in Tencer’s name at California Federal. All of the funds...both legitimate and illegitimate...were quickly moved into the account within a few days in order to conceal the nature and source of the mail fraud proceeds. Faced with such evidence, the jury was entitled to infer that all of the funds in the account were ‘involved in’ the money laundering and subject to forfeiture pursuant to § 982. Because sufficient evidence supports the jury verdict, the district court was bound by the mandatory provisions of § 982 and erred in reducing the forfeiture.<sup>122</sup>

It is clear that the fundamental principle of this conclusion is based on the “facilitation theory.”In essence, the facilitation theory suggests that the clean funds facilitated the

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<sup>119</sup> *United States v. Cauble*, 706 F.2d 1322 (5<sup>th</sup> Cir.1983).

<sup>120</sup> David Pimentel, ‘Forfeiture Procedure in Federal Court: An Overview’ (1999) 183 F.R.D. 1. 3. See also David Pimentel, ‘Forfeiture Procedure Revisited: Bringing Principle to Practice in Federal Court’ (2012) 13 (1) Nevada Law Journal 41.

<sup>121</sup> *United States v. Tencer* 107 F.3d 1120 (5<sup>th</sup> Cir. 1997).

<sup>122</sup> *ibid.*

laundering of the dirty funds. It has been observed that when the dirty money is mingled with the clean money, clean money is acting to hide or conceal the nature of the dirty money, and then the clean money is tainted. In consequence, the entire funds, regardless of how large, are subject to forfeiture.<sup>123</sup>

#### 4.8 Nexus requirement

A criminal forfeiture order can only be made when there is a “nexus” between property and offence for which the defendant has been convicted. It is not possible that the court issues a forfeiture order with respect to the property that is not involved in the offence. In *United States v. Adams*, the Court of Appeals held that property derived from conspiracy offence that commenced “not later than 2001,” could only be ordered to forfeit. With respect to the property derived from fraud offence perpetrated in 1999, the Court said that it could not be ordered to forfeit, as it was the proceeds of a different offence.<sup>124</sup>

The nexus requirement is not clearly formulated. The courts have however developed the requirement based on the conclusion that it is implicit in the statutory language.<sup>125</sup> This requirement is only important when property forfeited, comes within the scope of the facilitating property. The government is required to demonstrate a “substantial connection” between the property to be forfeited and the offence.<sup>126</sup> With respect to the property that is forfeited as proceeds, the nexus inevitably existed; “the property was by definition generated by the crime.”<sup>127</sup> The advantage of having the nexus requirement lies in the fact that it determines the scope of property, which is subject to forfeiture. Furthermore, it determines the time at which the defendant’s interest in the property is vested in the government.

#### 4.9 Substitute assets

Where a criminal forfeiture order is intended for a specific tainted property, in certain particular circumstances, the court may order the forfeiture of any property of the defendant as substitute assets, if, the specific tainted property is due to some act or omission of the defendant:

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<sup>123</sup> Robert W. Hubbard *et al.*, *Money Laundering and Proceeds of Crime* (Irwin Law 2004) 421.

<sup>124</sup> *United States v. Adams*, 189 Fed.Appx. 600 (9<sup>th</sup> Cir. 2006).

<sup>125</sup> Sarah N. Welling and Jane Lyle Hord, ‘Friction in Reconciling Criminal Forfeiture and Bankruptcy: The Criminal Forfeiture Part’ (2012) 42 (4) *Golden Gate University Law Review* 558.

<sup>126</sup> See Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* (n 108) 13.

<sup>127</sup> Sarah N. Welling and Jane Lyle Hord, ‘Friction in Reconciling Criminal Forfeiture and Bankruptcy: The Criminal Forfeiture Part’ (n 125) 558.

- cannot, upon the exercise of due diligence, be located;
- has been transferred to a third party in order to avoid a forfeiture order;
- has been located outside the jurisdiction;
- has been substantially diminished in value or rendered valueless; or
- has been commingled with other property which cannot be divided without difficulty.<sup>128</sup>

The rationale for granting the government the power to forfeit substitute assets is to ensure that a defendant cannot evade the forfeiture.<sup>129</sup> When the government shows one of the above five situations, the forfeiture of substitute assets becomes mandatory. As the Court of Appeals in *United States v. Alamoudi*, held that “Section 853(p) is not discretionary...When the government cannot reach the property initially subject to forfeiture; federal law requires a court to substitute assets for the unavailable tainted property.”<sup>130</sup> The burden of proof for one of the five situations above-mentioned is not high. In *United States v. Hailey*, it was sufficient that the government reviewed the defendant’s bank accounts and observed that he spent the proceeds of his criminal activity.<sup>131</sup> Furthermore, if one of the above five situations cannot be shown, it may rely on another situation. More precisely, they are “disjunctive.”<sup>132</sup> In *United States v. Zorrilla-Echevarria*, the court agreed with the defendant that the government was able to locate the directly-forfeitable property, but it held that Section 853(p) was satisfied because the money had been “deposited with a third party.”<sup>133</sup>

When any one of the five situations applies, the government can acquire any other property of the defendant, “up to the value of any property that is to be forfeited.”<sup>134</sup> Rather, this appears to be a wide definition, as it does not specify certain types of property as substitute assets. The government can therefore forfeit anything that belongs to the defendant as a replacement for the lost property. In *United States v. Shepherd*, the defendant argued that his family home should be immune from the substitute asset statute, and free from a forfeiture order due to its intangible value. The Court of Appeals rejected, and stated that Section 853(p) or the Due

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<sup>128</sup> 21 U.S.C. § 853 (p); 18 U.S.C. § 1963(m); 18 U.S.C. § 982 was revised to incorporate 21 U.S.C. § 853 (p).

<sup>129</sup> Sarah N. Welling and Jane Lyle Hord, ‘Friction in Reconciling Criminal Forfeiture and Bankruptcy: The Criminal Forfeiture Part’ (n 125) 559.

<sup>130</sup> *United States v. Alamoudi*, 452 F.3d 310 (4<sup>th</sup> Cir. 2006).

<sup>131</sup> *United States v. Hailey*, 887 F.Supp.2d 649 (D. Md. 2012).

<sup>132</sup> *United States v. Zorrilla-Echevarria*, 2012 WL 359745 (D.P.R. Feb. 2, 2012).

<sup>133</sup> *ibid.*

<sup>134</sup> 21 U.S.C. § 853 (p); 18 U.S.C. § 1963(m).

Process Clause does not include immunity of the family home, or any other property from forfeiture as a substitute asset as long as the government has a rational basis for the forfeiture. The Court stated that the substitute assets statute counteracts “the tendency of criminals to hide their assets from the state” and “allows the government to remit funds to victims of crimes, making them whole again;” thus it has a rational basis.<sup>135</sup>

Since substitute assets are untainted, there is no defence as to their forfeiture. However, the defendant has the right to stand against the forfeiture of substitute assets in two cases. Firstly, if the value of the substitute asset goes beyond the sum the defendant has to forfeit. Secondly, if the tainted property is absent and is not related to the defendant’s fault.<sup>136</sup>

Critically, the forfeiture of substitute assets gives rise to the question of how the forfeitability of substitute assets acts in accordance with the nexus requirement above-mentioned, despite the fact that substitute assets have no link to the criminal activity. By virtue of the wide definition of substitute assets, it is clear that the forfeiture of substitute assets does not comply with the nexus requirement. Therefore, a substitute asset can be forfeited without showing any nexus between the property and the offence. In *United States v. Akwei*, the court held that if the defendant was jointly and severally liable to forfeit the value of smuggled drugs, and the only asset the government was able to locate was \$3,200 found in the defendant’s house at the time of his arrest, the government was not needed to show a nexus between the money and the offence, but was entitled to forfeit the money as a substitute asset.<sup>137</sup> Nonetheless, in order to satisfy the nexus requirement, a presumption is needed. The forfeiture of substitute assets is based on presumption that when replacement has taken place, the substitute assets qualify and are parallel to the original property. Consequently, it takes the place of the unlawfully obtained property.

At the end of the day, it should be noted that the most common use of forfeiture of substitute assets is to satisfy any money judgment that has been acquired.<sup>138</sup> In *United States v. Moses*, the court stated that any property that is not forfeitable as proceeds or facilitating property may be forfeited as substitute assets to satisfy a money judgment.<sup>139</sup> In addition, the

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<sup>135</sup> *United States v. Shepherd*, 171 Fed. Appx. 611 (9<sup>th</sup> Cir. 2006).

<sup>136</sup> Stefan D. Cassella, ‘Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case’ (2004) 32 (1) *American Journal of Criminal Law* 62.

<sup>137</sup> *United States v. Akwei*, 2012 WL 1869205, (E.D. Va. 2012).

<sup>138</sup> Dee R. Edgeworth, *Asset Forfeiture: Practice and Procedure in State and Federal Courts* (n 108) 149.

<sup>139</sup> *United States v. Moses*, 2010 WL 3521725 (D. Vt. Sept. 7, 2010).



provisions relating to the forfeiture of substitute assets only applies to the property of the defendant and not to the property of third parties.<sup>140</sup>

#### 4.10 Money judgment

A criminal forfeiture order may take the form of a personal money judgment. In a personal money judgment, the defendant has to pay a quantity of money to the government, equal to the value of the property, derived from the offence.<sup>141</sup> As one might expect, such an order is made where the defendant has acquired a certain quantity of money, which represents the proceeds of an offence, but the government is unable to locate the whereabouts of the money.

In *United States v. Peleti "Pete" Peleti Jr*,<sup>142</sup> Judge Michael M. Mihm on the US District Court for the Central District of Illinois sentenced Peleti to 28 months in prison; \$57,500 fine; in addition to a \$50,000 money judgment and forfeiture of items, including watches and souvenirs, bought with the money Peleti received for accepting a cash bribe, in violation of 18 U.S. C § 201(b) (2) (a),<sup>143</sup> and smuggling cash in violation of 31 U.S.C §5332.<sup>144</sup>

In that case, Peleti, a US Army Chief Warrant Officer, while in December 2005, was serving as the Army's Theatre Food Service Advisor for Kuwait, Iraq, and Afghanistan, and was stationed at Camp Arifjan, Kuwait, received a \$50,000 bribe in \$100 bills from the head of a Kuwaiti company that sought a food services supplies contract to the US military. In addition, Peleti smuggled approximately \$40,000 of the cash in his clothing and luggage from Kuwait City to Dover, Delaware on or about December 2005.<sup>145</sup> US Attorney Rodger A. Heaton, Central District of Illinois commented on Peleti's conduct, "Mr. Peleti's criminal conduct brought dishonour to him and had the potential to undermine the public's confidence in

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<sup>140</sup> Sarah Newcomb Welling *et al*, *Federal Criminal Law and Related Actions: Crimes, Forfeiture, The False Claims Act, and RICO* (St. Paul 1998) 569-570.

<sup>141</sup> Stefan D. Cassella, 'An Overview of Asset Forfeiture in the United States' in Simon N. M. Young (ed), *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (Edward Elgar 2009) 23 at 48.

<sup>142</sup> *United States v. Peleti "Pete" Peleti Jr*, (n 7).

<sup>143</sup> 18 U.S. C § 201 (b) (2) (n 39).

<sup>144</sup> It provides that it is an offence for any one "with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than \$10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States ..."

<sup>145</sup> *United States v. Peleti "Pete" Peleti Jr*, (n 7).

military contracting. This prison sentence sends a clear message that those who corrupt the integrity of the contracting process face serious punishment.”<sup>146</sup>

Likewise, in *United States v. Bradley Christiansen et al.*,<sup>147</sup> the plea agreement required that Christiansen agree to the imposition of a money judgment against him for \$1,687,310.84. It also required that all assets stemming from Christiansen’s criminal activity, including his residence that was to a large extent refashioned with kickbacks from the foreign nationals subject to forfeit. In that case, Christiansen, a former officer of Laguna Construction Company, Inc, (LCC),<sup>148</sup> pleaded guilty to conspiracy to solicit and accepting kickbacks from the foreign companies in exchange for awarding them the subcontracts related to rebuilding efforts in Iraq in violation of 41 U.S.C. § 53,<sup>149</sup> and his efforts to evade federal taxes on the money and assets he received as kickbacks in violation of 26 U.S.C. § 7201.<sup>150</sup> As a result, Christiansen received in the region of \$360,000 in monetary kickbacks. In addition, Christiansen received a 2006 Porsche Cayman valued at \$65,163, a Ford GT350 Shelby valued at \$290,000, and several watches collectively worth \$103,800 as kickbacks from the foreign nationals. Furthermore, Christiansen confessed that he wilfully failed to declare the kickback payments and assets he received from the foreign nationals as personal income when filing his federal income tax returns in 2006, 2007, and 2008. As a result, Christiansen evaded in the region of \$389,413 in federal taxes.

Stuart W. Bowen, Jr, Special Inspector General for Iraq Reconstruction has commented on Christiansen’s conduct, “Bradley G. Christiansen’s defrauding of the American taxpayer through contract kickbacks and other illegal practices is made even more egregious by his use of a disadvantaged minority business to gain Iraq reconstruction contracts.”<sup>151</sup>

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<sup>146</sup> *ibid.*

<sup>147</sup> *United States v. Bradley Christiansen et al.*, U.S. Dist. Cr., unreported (9 July 2013).

<sup>148</sup> *ibid.*

<sup>149</sup> It provides that “It is prohibited for any person-

(1) to provide, attempt to provide, or offer to provide any kickback;

(2) to solicit, accept, or attempt to accept any kickback; or

(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.”

<sup>150</sup> It provides “Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”

<sup>151</sup> *United States v. Bradley Christiansen et al.*,(n147).

Even though this form of forfeiture has been debated, at long last, it was resolved in a number of cases, which have upheld the money judgment. One of the important cases is *United States v. Vampire Nation*. In this case, the Court of Appeals stated:

Expressly rejecting the argument that a forfeiture order must order the forfeiture of specific property; as an *in personam* order, it may take the form of a judgment for a sum of money equal to the proceeds the defendant obtained from the offence, even if he no longer has those proceeds, or any other assets, at the time he is sentenced.<sup>152</sup>

Accordingly, it has been held that the authority to issue a money judgment is clear from the text of Rule 32.2 of Federal Rules of Criminal Procedure of 1944 (hereinafter known as ‘FED. R. CRIM. P’), which clearly contemplates entering of money judgments in forfeiture cases.<sup>153</sup> If the government has found part of the forfeited property, Rule 32.2(b) (2) of FED. R. CRIM. P makes it clear that a forfeiture order can combine a money judgment, directly forfeitable property, and substitute assets. It provides:

If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment, directing the forfeiture of specific property, and directing the forfeiture of any substitute property if the government has met the statutory criteria. The court must enter the order without regard to any third party's interest in the property...<sup>154</sup>

This is what happened in *United States v. McGinty*.<sup>155</sup> In this case, the Court of Appeals required that the defendant pay a \$500,000 money judgment, with credit for a house, in addition to a boat being forfeited as directly traceable to the offence.<sup>156</sup> In this respect, the requirement of forfeiture of the substitute assets above-mentioned, should not be satisfied prior to the government obtaining a money judgement.<sup>157</sup>

At the end of the day, one must question how the court determines the amount of the money judgment. A closer look at Rule 32.2 (b) (1) of FED. R. CRIM. P shows that the court requires determining the amount of money that the defendant will have to pay. It provides, ‘‘If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.’’<sup>158</sup> However, Rule is silent as to which method should be determined. Therefore, it is observed that the courts make assumptions as

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<sup>152</sup> *United States v. Vampire Nation*, 451 F.3d 189 (3<sup>d</sup> Cir. 2006).

<sup>153</sup> *United States v. Padron*, 524 F.3d 1156 (11<sup>th</sup> Cir. 2008).

<sup>154</sup> Rule 32.2(b) (2) of FED. R. CRIM. P.

<sup>155</sup> *United States v. McGinty*, 610 F.3d 1242 (10<sup>th</sup> Cir. 2010).

<sup>156</sup> *ibid.*

<sup>157</sup> *United States v. Roberts*, 696 F. Supp.2d 263 (E.D.N.Y. 2010).

<sup>158</sup> Rule 32.2 (b) (1) of FED. R. CRIM. P.

to the amount of the money judgment, and need not be exact as to the calculation of the forfeiture money judgment. For instance, in *United States v. Prather*, the Court of Appeals held that the statute does not require “mathematical exactitude” with respect to calculating the amount subject to forfeiture. Rather, the court may make “reasonable extrapolations” from the facts, including defendant’s admissions about the amount of drugs he sold.<sup>159</sup> In addition, in another instance, the court has held that calculation of the amount need not be exact; multiplying estimate of the number of loads by average weight, and low estimate of wholesale value is appropriate; for the weight, court may use the weight of the two loads actually seized by the government as representative.<sup>160</sup>

#### 4.11 Third Parties

*Bona fide* third parties might have a valid interest in the forfeitable property. Therefore, protection should be provided to the property that belonged to them in the criminal case, as they are barred from taking part in a criminal trial.<sup>161</sup> Furthermore, forfeiture of the third parties property would infringe the due process rights of a third party.<sup>162</sup> In essence, the protection of the property rights of third parties is satisfied through “ancillary proceeding” following the completion of the criminal trial. Of course, it goes without saying that the main purpose of the ancillary proceeding is to provide third parties with the opportunity to demonstrate that the court has made a mistake in forfeiting the property, as the third parties have an interest in the property, rather than the defendant. In addition, for proving that the defendant has owned the property, and subsequently it has been transferred legally to the third party.<sup>163</sup>

Normally, the government begins the ancillary proceeding by publishing the notice of the criminal forfeiture order, and may provide direct written notice to the third parties.<sup>164</sup> However, if notice is delivered to the attorney who represented the claimant in the criminal case, it would be adequate.<sup>165</sup> Failure to provide the requisite notice might be considered an

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<sup>159</sup> *United States v. Prather*, 2012 WL 205804 (8<sup>th</sup> Cir. 2012).

<sup>160</sup> *United States v. Bourne*, 2012 WL 526721 (E.D.N.Y. 2012).

<sup>161</sup> 18 U.S.C. § 1963(i)(1) ; 21 U.S.C. § 853(k)(1).

<sup>162</sup> Stefan D. Cassella, ‘An Overview of Asset Forfeiture in the United States’ (n 141) 40.

<sup>163</sup> Stefan D. Cassella, ‘Third Party Rights in Criminal Forfeiture Cases’ (1996) 32 (6) Criminal Law Bulletin 514.

<sup>164</sup> 18 U.S.C. § 1963(l)(1); 21 U.S.C. § 853(n)(1).

<sup>165</sup> *United States v. Muckle*, 709 F. Supp.2d 1371 (M.D. Ga. 2010).

infringement of due process.<sup>166</sup> A third party who claims that he has a valid interest in the forfeited property has to file a claim within thirty days from his receipt of the notice, or at the last date of publication, whichever is earlier.<sup>167</sup> A claim that is filed outside the deadlines may be dismissed.<sup>168</sup> Clearly, there is no special form for the third-party petition. However, it must be signed by the petitioner under penalty of perjury, and should explain the nature, and extent of his title, and interest in the property.<sup>169</sup> If the claim does not conform to the requirement, it should be dismissed.<sup>170</sup>

The judge then conducts a hearing, which must be within thirty days of the third party filing his claim. A hearing proceeding is conducted in front of the court only. It does not include a jury,<sup>171</sup> as the ancillary proceeding fundamentally determines the ownership of the forfeited property. Evidence and witnesses must be provided by the government, and by the petitioner to advocate their respective positions.<sup>172</sup> In this case, the petitioner seems to be in an unequal position, as the US had previously proven its allegations through beyond a reasonable doubt standard in the criminal case. Thus, the petitioner must prove by preponderance of the evidence that:

1. the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
2. the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section.<sup>173</sup>

If a third party manages to bring such evidence, the court will modify the original order of forfeiture and therefore grant the third party his ownership interest in the property.<sup>174</sup> If not, the US obtains a definitive title to the property.<sup>175</sup>

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<sup>166</sup> *Barrera-Montenegro v. United States*, 74 F.3d 657 (5<sup>th</sup> Cir. 1996).

<sup>167</sup> 18 U.S.C. § 1963(1)(2) ; 21 U.S.C. § 853(n)(2).

<sup>168</sup> See *United States v. Marion*, 562 F.3d 1330 (11<sup>th</sup> Cir. 2009).

<sup>169</sup> 18 U.S.C. § 1963(1)(3); 21 U.S.C. § 853(n)(3).

<sup>170</sup> *United States v. Weekley*, 2010 WL 5247936 (N.D. Iowa 2010).

<sup>171</sup> 18 U.S.C. § 1963(1)(2); 21 U.S.C. § 853(n)(2).

<sup>172</sup> Nathalie Kohler, 'The Confiscation of Criminal Assets in the United States and Switzerland' (1990)13 (1) *Houston Journal of International Law* 22.

<sup>173</sup> 18 U.S.C. § 1963(1)(6)(B); 21 U.S.C. § 853(n)(6)(A).

<sup>174</sup> 18 U.S.C. § 1963(1)(6) ; 21 U.S.C. § 853(n)(6).

## 4.12 Criminal forfeiture proceedings

A general rule of the criminal judicial forfeiture process is that a forfeiture order may not be entered in a criminal proceeding, unless and until, the defendant receives notice in the indictment that the government seeks forfeiture as part of a criminal sentence.<sup>176</sup> Official notice is therefore given at the primary stage of the indictment and failure to give notice gives rise to dismiss the entire indictment.<sup>177</sup> As one might expect, the purpose of notice is to put the defendant in the picture as to the government's intention for forfeiture of his property, so that he is able to prepare any defences, for property he may have to forfeit.

Even though the government has to describe the property sought in the indictment, Rule 32.2(a) of FED. R. CRIM. P expressly provides that it does not have to itemise the property in the indictment or specify the amount of the money judgment. In the same vein, according to the Court of Appeals in *United States v. Bollin*, the government does not have to itemise the substitute assets in the indictment.<sup>178</sup> Nevertheless, it is adequate if a notice is provided in a bill of particulars,<sup>179</sup> or in a special verdict form, in advance of the forfeiture phase of the trial.<sup>180</sup>

A related question is whether the nexus between the property and the offence should be explained in the indictment. In *United States v. Palfrey*, the court held that since the government is not required to spell out the property in the indictment, it could hardly be required to explain the nexus between the property and the offence.<sup>181</sup> Once an indictment has been returned in a criminal case, the government will seek to preserve the forfeitable property by the use of a restraint order.<sup>182</sup> As the name implies, a restraint order is such an order that is aimed at preventing the dissipation or destruction of the property that may be subject to a forfeiture order.<sup>183</sup> Therefore, a restraint order does not result in taking the property. Rather, it aims to conserve the *status quo*, and consequently is constitutional.

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<sup>175</sup> 18 U.S.C. § 1963(l)(7) ; 21 U.S.C. § 853(n)(7).

<sup>176</sup> Rule 32.2(a) of FED. R. CRIM. P.

<sup>177</sup> Irving A. Pianin, 'Criminal Forfeiture: Attacking the Economic Dimension of Organised Narcotics Trafficking' (1982) 32 (1) American University Law Review 239.

<sup>178</sup> *United States v. Bollin*, 264 F.3d 391 (4<sup>th</sup> Cir. 2001).

<sup>179</sup> See *United States v. Vasquez-Ruiz*, 136 F. Supp. 2d 941 (N.D. Ill 2 001).

<sup>180</sup> See *United States v. Diaz*, 190 F.3d 1247 (11<sup>th</sup> Cir. 1999).

<sup>181</sup> *United States v. Palfrey*, 499 F. Supp.2d 34 (D.D.C. 2007).

<sup>182</sup> 21 U.S.C. § 853(e)(1).

<sup>183</sup> Bruce A. Baird and Carolyn P. Vinson, 'RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport' (1990) 65 (5) Notre Dame Law Review 1013.

Furthermore, the property will generally remain in control of the defendant who is pending the effect of his trial.<sup>184</sup>

Typically, the court takes into account four factors when issuing restraining orders in criminal forfeiture cases. Firstly, the government makes an adequate showing as to the defendant's guilt, no greater than "probable cause."<sup>185</sup> Secondly, there is evidence manifesting that the defendant has attempted to transfer or dispose of forfeitable property, and, that it would constitute requisite irreparable harm. Thirdly, a restraining order would not affect other parties. And, lastly, the purpose of the issuance of the restraining order is to protect public interest that lies in preventing attempted transfers, and removal of illegitimate capital.<sup>186</sup>

At trial, the forfeiture has no function if the defendant is not convicted.<sup>187</sup> To be more precise, the trial is bifurcated. Once the defendant is convicted, the jury or the court, in cases with no jury, or where a party waives the jury for the forfeiture phase to determine, whether a nexus exists between the specific forfeitable property and the offence.<sup>188</sup> Once a finding that a property is subject to forfeiture, Rule 32.2(b) (2) of FED. R. CRIM. P provides that the court has to "promptly" enter a preliminary order of forfeiture, stating the amount of the money judgment, or the specific assets ordered forfeited. Under Rule 32.2(b)(3) of FED. R. CRIM. P the preliminary order permits the government to seize any specific property not already in the custody of the government that is subject to the forfeiture order. In addition, it permits carrying out discovery, if needed, to locate the property, and to begin proceedings consistent with the third-party rights. The order of forfeiture, according to Rule 32.2(b) (4) of FED. R. CRIM. P, remains preliminary regarding the defendant until sentencing. It also remains preliminary regarding the third parties until the end of the ancillary proceeding.

In *United States v. John Allen Rivard*,<sup>189</sup> the US District Court Judge Sam Sparks of the Western District of Texas sentenced Rivard to 10 years in prison; 3 years supervised release; \$5,000 fine and entered a \$1 million preliminary order of forfeiture for bribery in violation of

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<sup>184</sup> *United States v. Scalzitti*, 408 F. Supp. 1014 (D.C.Pa. 1975).

<sup>185</sup> Irving A. Pianin, 'Criminal Forfeiture: Attacking the Economic Dimension of Organised Narcotics Trafficking' (n 177) 248.

<sup>186</sup> *ibid.*

<sup>187</sup> Rule 32.2(b) of FED. R. CRIM. P.

<sup>188</sup> Rule 32.2(b) (1) of FED. R. CRIM. P.

<sup>189</sup> *United States v. John Allen Rivard*, U.S. Dist. Cr., unreported (19 October 2007).

18 U.S.C§201 (b) (2),<sup>190</sup> for conspiracy in violation of 18 U.S.C §371,<sup>191</sup> and for conspiracy to commit money laundering in violation of 18 U.S.C§ 1957.<sup>192</sup>

In that case, from April 2004 through August 2005, Rivard, a former Major in the US Army Reserve deployed to Logistical Support Area Anaconda near Balad, Iraq, conspired with the government contractor's company to illegally steer contracts to company in return for a bribe payment in the amount of five percent of the value of the contract awarded. In total, the value of the contracts awarded was in the region of \$21 million. Rivard received more than \$220,000 in bribe payments in return for facilitating the award and payment of contracts to the company. In addition, Rivard conspired with others in the US to launder the proceeds derived from the bribery, transferring funds to the others for, among other things, hire on a West Hollywood, Calif., apartment, and a down payment on a new BMW convertible.<sup>193</sup>

In any event, a forfeiture order is mandatory. As the Supreme Court in *United States v. Monsanto* stated “Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applies.”<sup>194</sup> In this regard, one must question whether failure to include a forfeiture order in the judgment is a fatal error, or it would be a clerical error that is correctable. Rule 32.2(b) (4) (b) of FED. R. CRIM. P provides that “The court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing. The court must include the forfeiture order, directly or by reference, in the judgment.”<sup>195</sup> Therefore, some courts have held that failure to issue the forfeiture order at, or prior to, the time of sentencing is fatal.<sup>196</sup> For instance, the Court of Appeals in *United States v. Shakur*, blasted the government and the district court for what it called the “wholesale violation of Rule 32.2(b).”<sup>197</sup> The errors included the failure to issue a preliminary order of forfeiture prior to sentencing, the failure to conduct an evidentiary hearing and to make a finding of forfeitability at sentencing, and the failure to issue any forfeiture order until 83 days after sentencing. These failures, the court said, deprived the defendant of his due process rights

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<sup>190</sup> 18 U.S.C§201 (b) (2) (n 39).

<sup>191</sup> 18 U.S.C §371 (n 25).

<sup>192</sup> 18 U.S.C§ 1957 (n 59).

<sup>193</sup> *United States v. John Allen Rivard*,(n189).

<sup>194</sup> *United States v. Monsanto*, 491U.S.600 (1989).

<sup>195</sup> Rule 32.2(b) (4) (b) of FED. R. CRIM. P.

<sup>196</sup> See for example; *United States v. Petrie*, 302 F.3d 1280 (11<sup>th</sup> Cir. 2002); *United States v. Ferguson*, 385 Fed. Appx. 518 (6<sup>th</sup> Cir. 2010); *United States v. Westmoreland*, 2010 WL 5441976 (D. Conn. 2010); *United States v. Crutcher*, 689 F. Supp.2d 994 (M.D. Tenn. 2010).

<sup>197</sup> *United States v. Shakur*, 691 F.3d 979 (8<sup>th</sup> Cir. 2012).



and right to appeal all aspects of his sentence at one time. So the forfeiture order was vacated.<sup>198</sup>

Other courts, nevertheless, have held that it is permissible to enter a forfeiture order belatedly as long as the record is obvious that the defendant was aware, at the time he was sentenced, that a forfeiture order would be part of his penalty.<sup>199</sup> For instance, the Court of Appeals in *United States v. Marquez*, held that Rule 32.2(b) of FED. R. CRIM. P are “not empty formalities;” they are mandatory; but if the defendant does not object, the district court’s failure to enter any forfeiture order until three weeks after sentencing or to mention forfeiture in the oral announcement, while “plainly erroneous,” does not render the forfeiture void in the absence of showing prejudice to the defendant.

At the end of the day, the Supreme Court in *Dolan v. United States*, held that the statute does not divest the court of the ability to enter an order belatedly if it misses the time limit, at least in cases where the defendant was aware at sentencing that a restitution order would be forthcoming. The Court suggested that it is a significant policy consideration to make the defendant conscious as to all aspects of his sentence at the time, but it does not “mandate a rule rendering aspects of the sentence entered belatedly null and void.”<sup>200</sup>

#### 4.13 Standard of proof

As has been explained above, if the government seeks to forfeit the property, it must prove the nexus between property and the offence for which the defendant has been convicted. It is observed, however, that criminal forfeiture statutes are virtually silent as to what standard of proof should be applied. Therefore, the burden of proof has been left to the courts. Based on the theory that a criminal forfeiture order is a part of the defendant’s sentence, the Appellate Courts were almost unanimous on holding that the “preponderance of the evidence” was required.<sup>201</sup>

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<sup>198</sup> *ibid.*

<sup>199</sup> See for example; *United States v. Pelullo*, 305 Fed. Appx. 823 (3th Cir. 2009); *United States v. Holder*, 2010 WL 478369, (M.D. Tenn. 2010); *Cohen v. United States*, 2010 WL 1252550 (D. Ariz. 2010).

<sup>200</sup> *Dolan v. United States*, 130 S. Ct. 2533 (2010).

<sup>201</sup> See for example: *United States v. Dicter*, 198 F.3d 1284 (11th Cir. 1999); *United States v. Garcia-Guizar*, 160 F.3d 511 (9th Cir. 1998); *United States v. Hasson*, 333 F.3d 1264 (1st Cir. 2003); *United States v. Cherry*, 330 F.3d 658 (4th Cir. 2003); *United States v. DeFries*, 129 F.3d 1293 (D.C. Cir. 1997); *United States v. Patel*, 131 F.3d 1195 (7th Cir. 1997); *United States v. Rogers*, 102 F.3d 641 (1st Cir. 1996); *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999).

For instance, the Court of Appeals in *United States v. Bader* stated “a forfeiture judgment must be supported by a preponderance of the evidence.”<sup>202</sup> This opinion implies that a forfeiture order is the product of the defendant’s culpability for the commission of the offence, which ought not to be confused with culpability *per se*. Furthermore, it can be observed that another explanation for upholding the preponderance of the evidence standard is 21 U.S.C. §853 (d). This section particularly embodies congressional intent to apply the preponderance standard in drug cases, by instituting a “rebuttable presumption” that the proceeds are subject to forfeiture, if the government proves, by preponderance of the evidence that: 1) the defendant acquired the proceeds during or within a reasonable time after the drug violation and 2) the drug violation is the only likely source of the proceeds.<sup>203</sup> Therefore, a forfeiture order is established if the presumption is not rebutted. It is clear that the presumption is only found in 21 U.S.C. §853. Neither 18 U.S.C. §1963, nor 18 U.S.C. §982 includes it. Hence, it seems probable that this presumption may be more relevant to the “war on drugs” rather than to strictly legal forfeiture considerations.

It is very rare to find that the reasonable doubt standard is required. However, an exception is *Apprendi v. New Jersey*. In that case, the US Supreme Court decided, “...any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”<sup>204</sup> This decision raises a matter, whether issues, in relation to the amount of property subject to criminal forfeiture, must be proved beyond a reasonable doubt.<sup>205</sup> It seems, however, that the reply is not positive since: “...factors that assist the court in determining the sentence need not be presented to a jury nor proved beyond a reasonable doubt, so long as the sentence falls “within the limits fixed by law”, and “the range of sentencing options prescribed by the legislature.”<sup>206</sup>

In the end, it should be noted that if the government is unable to satisfy the burden of proof, the court would refuse to enter a forfeiture order. This is precisely what happened in *United States v. Simon*, when the government had not demonstrated that the amounts in question were “proceeds traceable to” the mail fraud offences.<sup>207</sup>

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<sup>202</sup> *United States v. Bader*, (n 69).

<sup>203</sup> 21 U.S.C. §853 (d).

<sup>204</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>205</sup> Stefan D. Cassella, ‘Does Apprendi v. New Jersey Change the Standard of Proof in Criminal Forfeiture Cases?’ (2000) 89 (3) *Kentucky Law Journal* 631.

<sup>206</sup> *ibid* 637.

<sup>207</sup> *United States v. Simon*, 2010 WL 5359708 (N.D. Ind. Dec. 21, 2010).

#### 4.14 Relation back doctrine

Once a criminal forfeiture order is made, it certainly results in the transfer of property title to the State. Unlike the usual principle with which the property title is transferred to the State at the time by which the judicial judgment ordering the forfeiture becomes final, the US interest in property vests “as of the time of an unlawful event” giving rise to the forfeiture. It provides that “All right, title, and interest in property...vests in the United States upon the commission of the act giving rise to forfeiture...”<sup>208</sup>This is called the “relation back doctrine.”<sup>209</sup>It relies on legal fiction of “guilty” property to claim that it is subject to forfeiture as of the time of offence with its title vesting in the government at that precise moment.<sup>210</sup>The US Supreme Court in *United States v. Stowell* provided an important description of the relation back doctrine:

By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right of the United States at the time the offence is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.<sup>211</sup>

To illustrate the relation back doctrine, take the example of *United States v. Charles E. Sublett*.<sup>212</sup>In that case, Sublett, a US Army Major, served as a contracting officer while he was deployed to Balad Regional Contracting Centre on Logistical Support Area (LSA) Anaconda,<sup>213</sup>in Iraq from August 2004 through February 2005. His duty was, *inter alia*, evaluating and supervising contracts with companies that provide goods and services to the US Army. On 11 January 2005, Sublett sent a package from Balad, Iraq to Killeen, Texas, which was seized by agents of the US Customs and Border Protection officers in Memphis. Sublett, on the international air waybill, falsely described the contents of the package as a jewellery box, books, papers, and clothes with a total declared customs value of \$140 when, in effect, Sublett was aware of the package contained \$107,900 in US currency, as well as

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<sup>208</sup> 18 U.S.C. § 1963 (c); see also 21 U.S.C. § 853(c).

<sup>209</sup> See Mark A. Jankowski, ‘Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases’ (1990) 76 (1) Virginia Law Review 165.

<sup>210</sup> *ibid* 175-176.

<sup>211</sup> *United States v. Stowell*, 133 U.S. 1 (1890).

<sup>212</sup> *United States v. Charles E. Sublett*, (n 8).

<sup>213</sup> LSA Anaconda is a US military installation that was established in 2003 in order to support US military operations in Iraq. *United States v. Charles E. Sublett*, (n 8).

17,120,000 in Iraqi dinar. As required by federal law, when transporting currency in amounts more than \$10,000 into or out of the US, the sender is required to file a Currency or Monetary Instruments Transaction Report (CMIR). Sublett failed to file a CMIR. Sublett made false claims to investigators concerning his attempt to bring the currency into the US in an effort to impede their investigation.

As a result of making false statements to a federal agency in violation of 18 U.S.C. §1001,<sup>214</sup> and smuggling cash in violation of 31 U.S.C. § 5332,<sup>215</sup> the US District Court Judge Samuel H. Mays in Memphis, Tenn sentenced Sublett to 21 months in prison; 2 years supervised release; forfeiture of \$107,900 and 17,120,000 Iraqi dinar.<sup>216</sup> Under the relation back doctrine, the government became owner of the \$107,900 and 17,120,000 Iraqi dinars at the time of making false statements.<sup>217</sup>

Consequently, any transfer of property after an offence but before a conviction is null and void, in that the owner no longer possesses any valid interest in the property.<sup>218</sup> With respect to conspiracy cases, the Court of Appeals in *United States v. Monea Family Trust I*, stated that the government's interest in property, which is involved in a conspiracy vests when the first overt action in furtherance of the conspiracy takes place.<sup>219</sup> However, the question that remains unresolved is a case of the substitute assets, as to whether the relation back doctrine applies, and how. Some courts have held that the relation back doctrine applies to substitute assets, and the government's interest vests at the actual time the criminal offence took place; precisely which it does for directly forfeitable property.<sup>220</sup> Other courts, however, have held that the relation back doctrine does not apply to substitute assets until the court finds that the

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<sup>214</sup> It provides that it is an offence for “whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and wilfully—  
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;  
(2) makes any materially false, fictitious, or fraudulent statement or representation; or  
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.”

<sup>215</sup> 31 U.S.C. § 5332 (n 144).

<sup>216</sup> *United States v. Charles E. Sublett*, (n 8).

<sup>217</sup> *ibid*.

<sup>218</sup> M. Michelle Gallant, *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies* (n 50)16, and Sarah N. Welling and Jane Lyle Hord, ‘Friction in Reconciling Criminal Forfeiture and Bankruptcy: The Criminal Forfeiture Part’ (n 125) 558.

<sup>219</sup> See *United States v. Monea Family Trust I*, 626 F.3d 271 (6<sup>th</sup> Cir. 2010).

<sup>220</sup> See for example; *United States v. McHan*, 345 F.3d 262 (4th Cir. 2003); *United States v. Wittig*, 525 F. Supp.2d 1281 (D. Kan. 2007); *United States v. Woods*, 436 F.Supp.2d 753 (E.D.N.C. 2006); *United States v. Loren-Maltese*, 2006 WL 752958 (N.D. Ill. 2006).

statutory requirements are satisfied and includes the property in an order of forfeiture.<sup>221</sup> It goes without saying that an advantage of having the relation back doctrine provision is that it thwarts the wrongdoer's efforts to hide his unlawful property.

Nonetheless, an exception is made to the relation back doctrine, with respect to innocent owners. It provides that a person, who acquired an interest in the forfeited property, after the government's interest vested, may nonetheless prevail in the ancillary proceeding if he was a *bona fide* purchaser for value.<sup>222</sup> For the exception to apply, the claimant must show three elements.<sup>223</sup> Firstly, that he possesses a valid interest in the forfeited property. Therefore, the defendant's creditors and victims cannot prevail under the exception in that they lacked valid interest in the forfeited property.<sup>224</sup> The court in *United States v. Carmichael* stated "their interest lies against the debtor personally as opposed to any specific property."<sup>225</sup> Secondly, the interest was acquired as a *bona fide* purchaser for value. Therefore, a person who receives the particular assets subject to forfeiture as a gift is not a "purchaser."<sup>226</sup> In addition, the claimant has to show that he acquired the property in exchange for something of value. Thirdly, the interest was acquired at a time when the claimant was reasonably without cause to believe that the property was subject to forfeiture.<sup>227</sup> Therefore, the claimant is not a *bona fide* purchaser if he had cause to believe that the property was subject to forfeiture.

#### 4.15 The relationship between the forfeiture order and a fine

The court may order the defendant to forfeit property, as well as to pay a fine. In *United States v. William Rondell Collins*,<sup>228</sup> Judge Liam O'Grady in the US District Court in Virginia sentenced Collins to 42 months in prison and ordered to forfeit \$5,775, as well as to pay a fine of \$1,725 for bribery in violation of 18 U.S.C. § 201(b)(2),<sup>229</sup> and unlawful salary supplementation in violation of 18 U.S.C. § 209(a).<sup>230</sup> In that case, Collins, a former US Army

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<sup>221</sup> See for example; *United States v. Salvagno*, 2006 WL 2546477 (N.D.N.Y. Aug. 28, 2006); *United States v. Kramer*, 2006 WL 3545026 (E.D.N.Y. Dec. 8, 2006).

<sup>222</sup> 18 U.S.C. § 1963(c); 21 U.S.C. § 853(n)(6)(B).

<sup>223</sup> *ibid.*

<sup>224</sup> Stefan D. Cassella, 'Third Party Rights in Criminal Forfeiture Cases' (n 163).

<sup>225</sup> *United States v. Carmichael*, 440 F. Supp.2d 1280 (M.D. Ala. 2006).

<sup>226</sup> See *United States v. Kennedy*, 201 F.3d 1324 (11<sup>th</sup> Cir. 2000).

<sup>227</sup> 18 U.S.C. § 1963(c); 21 U.S.C. § 853(n)(6)(B).

<sup>228</sup> *United States v. William Rondell Collins*, (n 9).

<sup>229</sup> 18 U.S.C. § 201(b)(2) (n 39).

<sup>230</sup> It provides that it is an offence for "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source

Contracting Official, was employed by the US Army Area Support Group-Kuwait (ASG-KU).<sup>231</sup> Collins worked in the ASG-KU's off-post housing office as a housing specialist responsible for supervising private contractors and procuring off-post apartment rentals. Collins agreed to submit an inflated off-post apartment lease to the US for approval. Collins then split with an Egyptian businessman more than \$23,100 that resulted from the inflated lease payments. Between July and December 2009, Collins also solicited about \$8,400 from the Egyptian businessman and agreed in return to provide advice and preferential treatment with regard to a fixed-price US government contract awarded to the Egyptian businessman's company. The contract was for maintenance services for off-post housing supervised by Collins and the ASG-KU off-post housing office.<sup>232</sup>

Likewise, in *United States v. Bruce D. Hopfengardner*,<sup>233</sup> Judge Colleen Kollar-Kotelly for the US District Court for the District of Columbia ordered Hopfengardner to forfeit \$144,500, as well as to pay a fine of \$200 for conspiracy in violation of 18 U.S.C. § 371,<sup>234</sup> and money laundering scheme in violation of 18 U.S.C. § 1956(a)<sup>235</sup> and 1957,<sup>236</sup> involving contracts in the reconstruction of Iraq.

It is clear that forfeitures and fines are independent aspects of the defendant's sentence. Whilst the forfeiture is a mandatory part of the defendant's sentence and not affected by the sentencing Guidelines, the imposition of a fine is discretionary and determined in accordance with what the Guidelines provide. Nothing in the sentencing Guidelines permits a court to consider forfeiture in computing the amount of the fine.<sup>237</sup> Furthermore, as has been explained above, under the relation back doctrine, the government's interest in the property vests at the time of the offence giving rise to the forfeiture. Since, the defendant is required to pay his

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other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection.''

<sup>231</sup> The ASG-KU is responsible for maintaining Camp Arifjan, a S military installation that provide support for operations in Afghanistan, Iraq and other locations in the Southwest Asian Theatre. *United States v. William Rondell Collins*, (n 9).

<sup>232</sup> *ibid.*

<sup>233</sup> *United States v. Bruce D. Hopfengardner*, U.S. Dist. Cr., unreported (25 June 2007). For more details, See Chapter Three P. 127.

<sup>234</sup> 18 U.S.C. § 371 (n 25).

<sup>235</sup> 18 U.S.C. § 1956 (a) (n 57).

<sup>236</sup> 18 U.S.C. § 1957(n 59).

<sup>237</sup> Stefan D. Cassella, *Asset Forfeiture Law in the United States* (2<sup>nd</sup> edn, Juris Publishing, Inc 2007) 607.

fine out of his own money; he cannot use the forfeited property to do so. Therefore, the forfeiture cannot be used to offset the defendant's fine.<sup>238</sup>

#### 4.16 Forfeiture order unlike restitution order

In some instances, the court may order the defendant to forfeit property, as well as to pay restitution. However, forfeiture and restitution have dissimilar goals. A criminal forfeiture order is part of the defendant's penalty, while a restitution order is intended to reimburse the victim. A quote from the Court of Appeals in *United States v. McGinty* clarifies the difference between forfeiture and restitution in the following manner:

Criminal forfeiture and restitution are separate remedies with different purposes. "Criminal forfeiture is an *in personam* action in which the forfeiture of and the vesting of title in the United States in the defendant's tainted property is imposed as a punishment against the defendant." Restitution is not punitive, but is instead designed to compensate victims. "Forfeiture and restitution are distinct remedies. Restitution is remedial in nature, and its goal is to restore the victim's loss. Forfeiture, in contrast, is punitive; it seeks to disgorge any profits that the offender realised from his illegal activity." Because restitution and forfeiture are distinct remedies, ordering both in the same or similar amounts does not generally amount to a double recovery.<sup>239</sup>

Accordingly, the critical question arises as to whether the defendant is permitted to credit against a forfeiture order for the quantity he has paid as restitution. It seems that courts, in general, hold that such offset is not permitted. In *United States v. Emerson*, the Court of Appeals stated that "Forfeiture and restitution are not mutually exclusive; defendant may be made to pay twice and is not entitled to reduce restitution by the amount of the forfeiture."<sup>240</sup> Conversely, the defendant is also not permitted to an offset against a restitution order for the quantity he has forfeited.<sup>241</sup> Contrary to popular opinion, it is observed that the offset principle is used just when the forfeited funds have been sent to the victims, so that restitution would amount to double recovery by the victims.<sup>242</sup>

In any event, there is no right awarded to the victims of crime to oppose the forfeiture of the defendant's property on the basis that forfeiture resulted in weakening their capability to

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<sup>238</sup> *ibid.*

<sup>239</sup> *United States v. McGinty*, (n 126), See also Scott Jones, 'Forfeiture and Restitution in the Federal Criminal System: The Conflict of Victim's Rights and Government Interests' (2011) 6 (2) Criminal Law Brief 27.

<sup>240</sup> *United States v. Emerson* 128 F.3d 557 (7<sup>th</sup> Cir. 1997).

<sup>241</sup> *United States v. Bright*, 353 F.3d 1114 (9<sup>th</sup> Cir. 2004).

<sup>242</sup> See Stefan D. Cassella, 'Criminal Forfeiture Procedure in 2010: An Annual Survey of Developments in the Case Law' (2010) 46 Criminal Law Bulletin 951.

obtain restitution.<sup>243</sup> It should be noted that the quantity of restitution is generally determined in accordance with a report prepared by a Probation Officer prior to sentence. The report rests on the evidence given to the jury and also the facts predetermined in the plea agreement. Nonetheless, the evidence submitted by the victim is, in most cases, considered by the Probation Officer.<sup>244</sup>

#### 4.17 Levels of the restitution of corrupt activities committed in Iraq

Statistical data regarding the amounts that was returned as restitution to victims of corrupt activities, which took place in Iraq by some of the CPA personnel, or by some of those who contracted with them during the CPA's tenure, or after the dissolution of the CPA does not exist. However, having analysed the 136 criminal cases involving financial criminal activities from 2005 to date, the amounts of restitution emanated from corrupt activities, which were committed during the period of the CPA are \$7.100, 000 million. (Table 4.3).

Table 4.3: The Amounts of Restitution

Name	Date of Conviction	The Amount of Restitution
Robert Stein	2/2/2006	\$3,50000
Philip Bloom	3/10/2006	\$3,60000
<b>Total</b>		\$7,100,000

**Source:** United States Department of Justice

Table 4.3 shows that the amount of restitution \$3.5 million took place in *United States of America v. Robert Stein*.<sup>245</sup> In that case, the US District Court for the District of Columbia by Judge Colleen Kollar-Kotelly sentenced Stein to 9 years in prison; ordered to forfeit \$3.6 million, and \$3.5 million restitution for taking part in conspiracy in violation of 18 USC § 371,<sup>246</sup> bribery in violation of 18 U.S.C.§201(b)(2),<sup>247</sup> money laundering in violation of 18

<sup>243</sup> *In re W.R. Huff Asset Management Co., LLC*, 409 F.3d 555 (2<sup>d</sup> Cir. 2005).

<sup>244</sup> See Scott Jones, 'Forfeiture and Restitution in the Federal Criminal System: The Conflict of Victim's Rights and Government Interests' (n 239) 29.

<sup>245</sup> *United States v. Robert Stein*, U.S. Dist. Cr., unreported (29 January 2007).

<sup>246</sup> 18 USC § 371(n 25).

<sup>247</sup> 18 U.S.C.§201(b) (2)(n 39).



U.S.C. § 1956(a) (1), 18 U.S.C. § 1957,<sup>248</sup> being a felon in possession of a firearm in violation of 18 U.S.C. § 922 (g) (1),<sup>249</sup> and unlawful possession of machine guns in violation of 18 U.S.C. § 922 (o),<sup>250</sup> with regard to a scheme to defraud the CPA in Iraq.

Stein, a former Department of Defence contractor, served as the Comptroller and Funding Officer for the CPA, South Central Region in Al-Hillah, Iraq. Stein, along with other public officials, including several US Army officers conspired from December 2003 through December 2005 to rig bids for and funnel contracts to Philip Bloom, a US citizen who owned and operated numerous construction and service companies in Iraq and Romania. In return, Stein and his co-conspirators received bribes of more than \$1 million in cash, SUVs, sports cars, computers, a motorcycle, jewellery, liquor, business class airline tickets, future employment with Bloom, as well as other items of value from Bloom. The total value of the contracts awarded to Bloom was more than \$8.6 million in rigged contracts.<sup>251</sup>

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<sup>248</sup> 18 U.S.C. § 1956(a) (1)(n 57), 18 U.S.C. § 1957(n 59).

<sup>249</sup> It prohibits the following from possessing, shipping/ transporting, or receiving any firearm or ammunition: “(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(26)));

(6) who has been discharged from the Armed Forces under dishonourable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)

(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanour crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

<sup>250</sup> It provides “it shall be unlawful for any person to transfer or possess a machinegun.”

<sup>251</sup> *United States v. Robert Stein* (n 245).

As part of the scheme, Bloom laundered more than \$2 million in currency, slated to be used for the reconstruction of Iraq, which Stein and his co-conspirators stole from the CPA-South Central Region. Bloom then used his foreign bank accounts in Iraq, Romania, and Switzerland to send the stolen money to his co-conspirators in exchange for them directing contracts to Bloom. Stein and his co-conspirators used stolen US currency to buy illegally controlled weapons including grenade launchers, assault rifles, and silencers.<sup>252</sup>

Table 4.3 also shows that the amount of restitution \$3.6 million took place in *United States of America v. Philip Bloom*.<sup>253</sup> As has been seen above, Philip Bloom participated in conspiracy in violation of 18 U.S.C. § 371,<sup>254</sup> bribery in violation of 18 U.S.C. § 201(b)(1),<sup>255</sup> and conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(a) (1) and 18 U.S.C. § 1957,<sup>256</sup> while seeking contracts for his company during the war in Iraq. As a result, the US District Court in the District of Columbia by the Honorable Colleen Kollar-Kotelly sentenced Bloom to 46 months in prison, and 2 years of supervised release. The court also ordered Bloom to forfeit \$3.6 million as well as \$3.6 million restitution.<sup>257</sup>

The number of restitution orders coming from corrupt activities that occurred after the dissolution of the CPA is 71. This figure yielded \$96,998,164.19 million. (Table 4.4).

Table 4.4: The Amounts of Restitution

<b>Name</b>	<b>Date of Conviction</b>	<b>The Amount of Restitution</b>
Glenn Powell	8/1/2005	\$90,973.99
Stephen Seamans	3/1/2006	\$380,130
Mohammad Shabbir Khan	6/23/2006	\$133,860
Gheevarghese Pappen	10/12/2006	\$28,900
Luis Lopez	11/13/2006	\$66,865

<sup>252</sup> *ibid.*

<sup>253</sup> *United States v. Philip Bloom*, U.S. Dist. Cr., unreported (16 February 2007).

<sup>254</sup> 18 U.S.C. § 371 (n 25).

<sup>255</sup> 18 U.S.C. § 201 (b)(1)(n 120).

<sup>256</sup> 18 U.S.C. § 1956(a) (1)(n 57), 18 U.S.C. § 1957(n 59).

<sup>257</sup> *United States v. Philip Bloom* (n 253).

Derryl Hollier	11/13/2006	\$83,657.47
Carlos Lomeli Chavez	11/13/2006	\$28,107
Jennifer Anjakos	11/13/2006	\$86,557
Steven Merkes	2/16/2007	\$24,000
Jesse Lane, Jr.	6/5/2007	\$323,228
Anthony Martin	7/13/2007	\$200,504
Kevin Smoot	7/20/2007	\$17,964
Raman Corporation	6/3/2008	\$378,192
Levonda Selph	6/10/2008	\$9,000
Melissa Cockerham, John Cockerham's wife	6/24/2008	\$1,400,000
John Cockerham Jr.	6/24/2008	\$9,600,000
Debra Harrison	7/28/2008	\$366,640
James Momon Jr.	8/13/2008	\$5,800,000
Robert Bennett	8/28/2008	\$6,000
Lee Dubois	10/7/2008	\$450,000
Michael Wheeler	11/7/2008	\$1,200
Curtis Whiteford	11/7/2008	\$16,200
Theresa Baker	12/22/2008	\$327,192
Christopher Murray	1/8/2009	\$245,000
Carolyn Blake, John Cockerham's sister	3/19/2009	\$3,100,000
Stephen Day	4/13/2009	\$41,522

Frederick Kenvin	4/30/2009	\$2,072,967
Roy Greene Jr.	5/18/2009	\$52,286.60
Elbert George III	5/18/2009	\$52,286.60
Diane Demilta	5/27/2009	\$70,000
Jeff Thompson	6/16/2009	\$144,000
Tijani Saani	6/25/2009	\$816,485
Robert Young	7/24/2009	\$26,276,472
Michel Jamil	7/27/2009	\$27,806,879
Nyree Pettaway, John Cockerham's niece	7/28/2009	\$5,000,000
William Driver	8/5/2009	\$36,000
Gloria Martinez	8/12/2009	\$210,000
Michael Nguyen	12/7/2009	\$200,000
Theresa Russell	12/7/2009	\$31,000
Janet Schmidt	5/17/2010	\$2,150,613
Ryan Chase	4/21/2010	\$1,400,000
Eric Schmidt	5/17/2010	\$2,150,613
Faustino Gonzales	6/24/2010	\$25,500
Dorothy Ellis	9/2/2010	\$360,000
Mariam Steinbuch	10/5/2010	\$25,000
Osama Ayesch	2/2/2011	\$243,416
Kevin Schrock	2/8/2011	\$47,241

Richard Razo	2/28/2011	\$106,820
Charles Bowie	5/11/2011	\$400,000
David Pfluger	3/25/2011	\$24,000
Derrick Shoemake	6/13/2011	\$181,900
Barry Szafran	7/15/2011	\$7,169
Francisco Mungia III	7/22/2011	\$30,000
Eric Hamilton	8/10/2011	\$124,944
Robert Nelson	6/28/2011	\$44,830
John Hayes	11/10/2011	\$12,000
Amasha King	2/14/2012	\$20,500
Michael Rutecki	3/7/2012	\$10,500
David Welch	4/2/2012	\$160,000
Christopher Bradley	4/9/2012	\$20,000
Gaines Newell	4/10/2012	\$1,102,115
Billy Joe Hunt	5/8/2012	\$66,212
Ahmed Kazzaz	5/21/2012	\$947,585
Gilbert Mendez	12/6/2012	\$150,000
Jill Charpia	8/9/2012	\$920,000
Julio Soto Jr.	8/29/2012	\$62,542
Mohammed Shihaden Amin	9/10/2012	\$47,000
Daniel Hutchinson	9/14/2012	\$12,000
Sean Patrick O'Brien	11/9/2012	\$37,500

Gregory Light	12/17/2012	\$81,886
Ulysses Hicks	1/3/2013	\$65,409.53
<b>Total</b>		\$96,998,164.19

**Source:** United States Department of Justice

#### 4.18 Dealing with forfeited assets

For the most part, forfeited assets are used to supplement general government revenues. However, the approach adopted in the US is quite different. In the US, when cash is ordered to be forfeited, it is deposited into an appropriate federal asset forfeiture fund. If cash is deposited into the Department of Justice Asset Forfeiture Fund (hereinafter as the ‘AFF’),<sup>258</sup> the Attorney General may then use funds to pay:

- forfeiture related expenses
- rewards to informants in relation to illegitimate drug cases
- rewards to informants in relation to forfeiture cases
- liens and mortgages against forfeited property
- remission and mitigation in relation to forfeiture cases
- to provide cars, boats and planes for law enforcement purposes
- to purchase evidence of money laundering or of federal drug offences
- to pay state and local real estate taxes on forfeited property
- to pay overtime, travel, training and the like for assisting state and local law enforcement personal
- federal correctional construction costs
- the Special Forfeiture Fund and
- to pay for joint state, local and federal cooperative law enforcement operations.<sup>259</sup>

However, when cash is deposited into the Department of the Treasury Forfeiture Fund (hereinafter as the ‘TFF’),<sup>260</sup> the Fund is available to the Secretary of the Treasury to pay:

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<sup>258</sup> 28 U.S.C. 524(c).

<sup>259</sup> *ibid.*

<sup>260</sup> 31 U.S.C. § 9703.

- expenses linked with the forfeiture
- claims against the property
- liens and mortgages against forfeited property
- remission and mitigation
- rewards for information concerning violations of the customs laws
- rewards for information or assistance resulting in a Department of Treasury forfeiture
- to provide cars, boats and planes for law enforcement purposes
- to purchase evidence of various offences traditionally within the jurisdiction of the Department
- to reimburse the expenses of private individuals associated with Department law enforcement activities
- for equitable sharing, if not accomplished before deposit in the Fund
- for “overtime salaries, travel, fuel, training, equipment, and other similar costs of State and local law enforcement officers that are incurred in joint law enforcement operations” and
- to train foreign law enforcement personnel in Department forfeiture related matters.<sup>261</sup>

As one might expect, forfeited assets may be personal or real property. In this regard, federal agencies are authorised to sell property or to conduct any other commercially feasible means. The proceeds from the sale of forfeited assets are transferred either into the AFF or into the TFF. Subsequently, the government may use the proceeds, as it would forfeited cash.<sup>262</sup>

In certain specified circumstances, when statute is permitted, the government may sell seized assets before forfeiture, either in a stipulated sale or in an interlocutory sale. The former requires the agreement of all interested parties to the terms of the sale, as well as a district court that agrees to the transaction. Contrary to this, the latter does not need agreement by all interested parties. However, it may be essential for such a sale by reason of the expense or difficulty in maintaining certain types of seized property.<sup>263</sup> Instead of selling personal or real property, the government is authorised to retain and use forfeited property.<sup>264</sup> More often, law enforcement agencies need boats, vehicles, aircrafts, electronic equipment, camera

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<sup>261</sup> 31 U.S.C. 9703 (a)

<sup>262</sup> 21 U.S.C. § 853(h); 18 U.S.C. § 1963(h) (g).

<sup>263</sup> Howard E. Williams, *Asset Forfeiture: A Law Enforcement Perspective* (Charles C. Thomas 2002) 253.

<sup>264</sup> 19 U.S.C. § 1616a (c) (1).

equipment, *etc.*, for official use inside the agency. With respect to the real property, it may only be retained and used if it is not inconsistent with a law enforcement aim.<sup>265</sup>

In addition to the above, equitable sharing of federally forfeited assets is very useful. In an equitable sharing system, the State, local, federal, and foreign law enforcement agencies that directly participate in the investigation or prosecution that gives rise to federal forfeiture may request an equitable share of the proceeds of the forfeiture.<sup>266</sup>

According to a Guide to Equitable Sharing for State and Local Law Enforcement Agencies in 2009, the agencies took part in the equitable sharing through two methods. Firstly, a joint investigation may be made between the State or a local agency with a federal investigative agency. This cooperation is especially common with drug and gang task forces involving federal, State, and local law enforcement agencies. The percentage of funds shared is based on the role and effort of the agency in a particular seizure.<sup>267</sup> Secondly, adoptive forfeitures, whereby State or local agency seizes property alone, and then provides seized property to federal law enforcement agencies that then can choose to “adopt” property for federal forfeiture proceedings. The federal agency will be responsible for the case, and if successful, the State and local agencies acquire 80 % of the value of the assets, and the federal agency retains 20 percent to offset costs linked with federal fund operations.<sup>268</sup>

As one might expect, equitably shared property is intended to improve and supplements law enforcement resources. Forfeited funds and property may be used to improve future investigations, law enforcement training, detention facilities, investigation facilities and equipment, drug education and awareness programs, and the costs of tracking and accounting for shared property. Impermissible expenditures include payment of salaries for existing positions, non-law enforcement expenses, and uses contrary to law, nonofficial government use, and extravagant expenditure.<sup>269</sup>

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<sup>265</sup> Howard E. Williams, *Asset Forfeiture: A Law Enforcement Perspective* (n 263) 253.

<sup>266</sup> *ibid* 254.

<sup>267</sup> United States Department of Justice, Asset Forfeiture and Money Laundering Section, *Guide to Equitable Sharing For State and Local Law Enforcement Agencies* (U.S. Department of Justice, Criminal Division, Asset Forfeiture and Money Laundering Section 2009) 6-12.

<sup>268</sup> *ibid*.

<sup>269</sup> *ibid* 19.



## 4.19 Conclusion

When criminals are incarcerated, they should not find their ill-gotten gains waiting for them when they are released. Even worse, criminal prisoners can work through their friends so as to back additional criminal enterprises, and thus gather a greater wealth *in absentia*. Therefore, stripping criminals from their corruptly obtained funds has to remain a necessary approach. This Chapter provides an answer to the second question that was posed in the main introduction about the paradigms that could be pursued, in order to deprive criminals of the proceeds of corruption that were generated in Iraq and found in the US territory. In this regard, a criminal forfeiture system in the US is selected as a method of (that use by the US courts removing corruptly obtained funds in Iraq and located in the US territory).

By depriving criminals of their corruptly obtained funds, the incentive for individuals to take part in criminal activities can be reduced, in that they consider that there would be a high likelihood that they will not be permitted to retain any criminal wealth that might be generated from their provisional success. In addition, by stripping criminals of their criminal assets, the government, as well as law enforcement agencies, would greatly benefit from those assets. Further, removing the criminal's funds makes those who obey the law well aware that the benefits of a life of criminal activities are illusive and provisional. Furthermore, depriving wrongdoers of their corruptly acquired funds can constitute a form of penalty. Moreover, measures that are designed to deprive individuals of their corruptly obtained funds would contribute to prevention of use of those funds in criminal enterprises perhaps in the future.

This Chapter has brought forth 136 criminal cases with respect to the corrupt activities that took place during the period when the CPA was governing Iraq, in addition to the corrupt activities that occurred after the dissolution of the CPA. Four major findings have emerged from the analysis of those cases. The first major finding is the determination of the levels of the criminal forfeiture of funds, which were generated from corrupt activities perpetrated in Iraq during the period of the CPA. The second major finding is the determination of the levels of the criminal forfeiture of funds derived from corrupt activities that occurred after the termination of the CPA. The third major finding is the determination of the levels of the restitution of corrupt activities that occurred during the CPA's tenure. The fourth major finding is the determination of the levels of the restitution of corrupt activities that took place after the disbanding of the CPA.

In this Chapter, it has been shown that in many ways, the US criminal law, as an exception to the presumption against extraterritorial application, applies outside the territory of the US. In this regard, the Chapter has brought a number of ways in which the US courts have had the criminal forfeiture jurisdiction over corrupt activities that have taken place in Iraq since 2003. This criminal jurisdiction has prevented the Iraqi courts from exercising criminal jurisdiction over corrupt activities that occurred during and after the termination of the CPA. Moreover, the Iraqi courts have no criminal jurisdiction over those activities by virtue of the CPA Order 17 that granted the US law extraterritorial criminal jurisdiction over those activities.

Whether the criminal forfeiture system in the US is a powerful and effective tool in the deterrence of criminals by taking the profit out of crime is very difficult to confirm. Not all funds derived from corrupt activities that took place in Iraq have been subjected to criminal forfeiture in the US courts. As has been shown in Chapter Three, the mishandling of the CPA of Iraqi funds resulted in missing funds that were in the region of \$8.8 billion. This amount remains disappeared in a foreign country. Recover of Iraqi funds is then the next logical step to examine.

## **Chapter Five: Recovering Iraqi funds that disappeared as a result of corruption activities during the period of the CPA (Civil Action Mechanism)**

### **5.1 Introduction**

In Chapter Three, it has been shown that the mismanagement of the CPA of Iraqi funds led to a disappearance as a result of corruption activities approximately \$8.8 billion. The objective of this Chapter is to find legal mechanisms to recover those funds from where they are located. In Chapter V of the United Nations Convention against Corruption of 2005 (hereinafter known as the ‘UNCAC’),<sup>1</sup> there is the full panoply of mechanisms that are aimed at recovering the proceeds derived from corruption activities. Mechanisms are criminal forfeiture, civil forfeiture, mutual legal assistance (hereinafter known as the ‘MLA’) and civil action. This Chapter will scrutinise such mechanisms in order to reach a conclusion that a civil action mechanism is more effective for recovering Iraqi funds than other mechanisms.

Beginning with the criminal forfeiture mechanism, the Chapter examines the factors that inhibit obtaining a criminal conviction that is a prerequisite for criminal forfeiture. The Chapter then analyses the civil forfeiture mechanism, which is still relatively new. Both of the mechanisms are not effective for the Iraqi courts to be used to recover Iraqi funds that disappeared as a result of corrupt activities that took place during the CPA’s tenure. This is because that the CPA Order 17 gave the CPA’s personnel, Coalition Forces, and contractors or sub-contractors immunity from Iraqi legal processes for their conduct during the CPA’s tenure and subjected them to the exclusive jurisdiction of their Sending States.<sup>2</sup>The examination of the MLA shows that it may not be feasible for newly formed governments. As a result, the Chapter selects and examines a civil action mechanism as the best alternative tool for recovering Iraqi funds from abroad.

As has been explained in the main introduction, the analysis of a civil action will be according to the US legal system. Before examining a civil action mechanism, the Chapter recognises the international legal framework for a civil action. The Chapter then moves on to

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<sup>1</sup>The Convention entered into force on 14 December 2005.

<sup>2</sup> CPA Order Number 17 of 27 June 2004 (Revised), Status of The Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq.

the scrutiny of a civil action. Who may be a claimant and who may be a defendant in such civil action is determined. The civil court that will be competent at civil action will be selected. Challenges that encounter the Iraqi State to bring civil action are explored. Potential claims and remedies that exist in the civil action context are mapped out.

To enjoy the \$8.8 billion that has disappeared as a result of corruption activities during the CPA period, corrupters are compelled to launder those funds in an attempt to camouflage their illegitimate origins. As a result, if investigators know how and where to look, the link between funds and corruption activity will be established. The sufficient evidence that is gathered from this link will enable investigators to trace and locate funds that have been disappeared. Therefore, the process through which corruptly obtained funds can be traced and be located is examined. Since a defendant, in respect of corruptly obtained funds, often attempts to dissipate or remove funds from the jurisdiction for rendering a future money judgment worthless, the Chapter sets out safeguards that are provided to a State in order to prevent such harm. These safeguards will be analysed, given their importance in preserving funds for a judgment.

## **5.2 The criminal forfeiture mechanism**

A criminal forfeiture mechanism can be an effective tool for recovering the corruptly acquired funds if its conditions are fulfilled. As has been discussed in the Chapter Four, a criminal forfeiture order requires a conviction of the defendant associated with the criminal activity. Where such an order is made in domestic courts against those who corruptly obtained funds located in a foreign country, the UNCAC expressly requires State Parties to give effect to such an order through the MLA mechanisms. According to Article 54 (1) (a) of the UNCAC, each State Party, in order to provide the MLA shall, in accordance with its domestic law, “take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party.”<sup>3</sup>

Nevertheless, in certain specific circumstances, it may be difficult to use the criminal forfeiture mechanism to recover the proceeds of corruption that are deposited in a foreign country. It is common knowledge that criminal proceedings, in most cases, need to present

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<sup>3</sup> Article 54 (1) (a) of the UNCAC.

the defendant before the court to stand trial. The demise of the defendant will stymie criminal proceedings. This was the case of General Sani Abacha of Nigeria who died on 8 June 1998.<sup>4</sup>

Another factor that inhibits affirmation of a conviction is that wrongdoers often flee the country in order to evade arrest or prosecution at home, and they are, therefore, highly unlikely to return or be extradited. This hindrance can be found in the case of criminal proceedings brought in England against the former Governor of a Nigerian State, Diepreye Al Alamyeseigh of Bayelsa State, who was released on bail, and then promptly fled back to Nigeria evading a trial.<sup>5</sup>

Another factor that inhibits conviction is where the defendant is an influential and a powerful individual. Eva Joly, Special Counsellor to the Norwegian Government observed that main characters frequently owe their political or fiscal achievements to their private skills, that is to say, “intelligence, charisma, popularity, and vast networks.”<sup>6</sup> It is most likely that they seek to utilise those skills throughout the investigation, as a powerful instrument to influence the procedure and its result. As one might expect, those defendants remain in conflict and have no intention to avoid it. Such defendants tend to have an experienced defence team who are able to contrive lengthy adjournments and appeals, and other stalling tactics to drain public opinion, which is more likely to demand outcomes faster than sound judicial systems can deliver.<sup>7</sup>

Joly also noticed that the power of main characters under judicial scrutiny, in some cases, allows them to deliberately enfeeble a sound legislative framework even throughout, at times, lengthy investigations. The role of the defendant rises to prominence even during the trial, particularly when the case is heard before a jury.<sup>8</sup> Joly pointed out that a large number of people show seemingly “instinctive” tendencies in order to support the defendant, and are often especially sympathetic toward the more well dressed, well-spoken, and politically or

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<sup>4</sup> General Sani Abacha governed Nigeria from 1993 to 1998. It is believed that he plundered between US \$3 and \$5 billion over the five years of his rule. See Enrico Monfrini, ‘The Abacha Case’ in Mark Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 41 at 41.

<sup>5</sup> See Colin Nicholls QC *et al.*, *Corruption and Misuse of Public Office* (2<sup>th</sup> edn, Oxford University Press 2011) 280.

<sup>6</sup> Eva Joly, ‘Coping With High-Profile Judicial Cases: Experience of Prosecutors From Asia and the Pacific, and From Europe’ in Asian Development Bank, *Effective Prosecution of Corruption* (Asian Development Bank 2003) 1 at 2.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid.*

economically successful defendants, who are most likely to be involved in high-profile cases.<sup>9</sup>

With respect to the impact of influential defendants upon the judge, Bernard Bertossa, former Attorney General of Geneva, Switzerland writes:

Even the judge does not always have enough independence vis-à-vis the executive power, nor-at times-the necessary integrity or courage. There are corrupted magistrates, who are more interested in “carrying out orders” or advancing their careers than in concluding investigations. The judge is frequently accused of being used as an instrument by one political party against another, by one state figure against the other, or by one regime against another. These accusations, even when they are completely false, manage to discredit the investigation.<sup>10</sup>

Another factor that inhibits conviction is that in criminal proceedings, if a person’s conviction must be established beyond a reasonable doubt, this diminishes substantially the prospects of recovering corruptly obtained funds.<sup>11</sup>

In addition to the factor above-mentioned, when a conviction is made in domestic courts against a defendant in relation to his assets located in a foreign country, it is, in all probability, two main points that will arise by the defendant and by the foreign jurisdiction. The first is as to the integrity of the criminal justice system within the country. As is well known, criminal justice systems in post-conflict countries are often highly ineffective and almost completely dysfunctional, suffering from corruption and from lack of compliance with international human rights standards.<sup>12</sup> Therefore, defendants will probably challenge the fairness of their criminal trial, if the foreign jurisdiction gives effect to a criminal forfeiture order, resulting from a conviction made in domestic courts. Proving so will give rise to delay, or at worst, it may lead to the case having to be tried again.<sup>13</sup>

The second and related idea is whether a criminal forfeiture order, resulting from conviction, is enforceable in a foreign country. In general, a criminal forfeiture order may not be enforceable where assets are held in the names of associates, companies, or trusts.

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<sup>9</sup> *ibid.*

<sup>10</sup> Bernard Bertossa, ‘Difficulties Encountered by The Judiciary: A Summary of Key Issues’ in Asian Development Bank, *Effective Prosecution of Corruption* (Asian Development Bank 2003) 9 at 9.

<sup>11</sup> Tim Daniel and James Maton, ‘Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials’ in Mark Pieth (ed), *Recovering Stolen Assets* (n 4) 243 at 244.

<sup>12</sup> This has been found by the Report of the Human Rights Watch about Iraq. The report will be discussed later.

<sup>13</sup> Tim Daniel and James Maton, ‘Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials’ (n 11) 244.

Furthermore, foreign courts cannot, in most cases, enforce a criminal forfeiture order until and unless appeals are completely exhausted against the order, as well as the conviction. An important problem will, therefore, be created for countries where appeals, made as from right, can take years to be determined.<sup>14</sup>

### **Does a criminal forfeiture mechanism is effective for recovering Iraqi funds from abroad?**

A criminal forfeiture mechanism is not available to the Iraqi courts to use to recover funds that disappeared during the period of the CPA. An occupying power, by way of an order, may grant their personnel immunity from prosecution by the courts of the occupied territory. Pursuant to his authority as Administrator of the CPA, and under the laws and usages of war, and consistent with relevant United Nations Security Council Resolutions, including Resolutions 1483 (2003), 1511 (2003) and 1546 (2004), Paul Bremer issued CPA Order Number 17.<sup>15</sup> The Order provided that all personnel of the Multinational Force, the CPA, Foreign Liaison Mission, and International Consultants are immune from Iraqi legal process, which are defined to include “arrest, detention or legal proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative.”<sup>16</sup> Such individuals are, however, expected to respect applicable Iraqi law, but they are subject to the exclusive jurisdiction of their Sending States.<sup>17</sup> In addition, the Order gave contractors,<sup>18</sup> immunity from Iraqi legal process. According to Section (4), “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.”<sup>19</sup>

In addition to the above, in Chapter Four, it has been explained that the American criminal law, in some instances, applies to criminal activities that take place beyond the geographical

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<sup>14</sup> *ibid.*

<sup>15</sup> Order Number 17 issued in 26 June 2003 by which all personnel of Coalition and Foreign Liaison Mission were immune from Iraqi legal process. CPA Order Number 17 of 26 June 2003, Status of the Coalition, Foreign Liaison Missions, Their personnel and contractors. On 27 June 2004, that is one day before the formal handover of authority to the Iraqi Interim Government, the CPA promulgated a revised version of CPA Order 17, which extended immune to include all forces and personal acting under Security Council Resolutions authorising the deployment of Multinational Force to Iraq. CPA Order Number 17 of 27 June 2004 (Revised) (n 2).

<sup>16</sup> Section 1(10) of CPA Order Number 17 of 27 June 2004 (n 2).

<sup>17</sup> *ibid.*, Section 2 (3).

<sup>18</sup> Contractors mean non-Iraqi legal entities or individuals not normally resident in Iraq, including their non-Iraqi employees and Subcontractors not normally resident in Iraq, supplying goods or services in Iraq under a Contract. *ibid.*, Section 1 (11).

<sup>19</sup> *ibid.*, Section 4 (3) .

confines of the US territory. In this regards, it has been shown that American law has, in a number of ways, jurisdiction over criminal activities that were committed in occupied Iraq by some the CPA personnel, or by some who contracted with the CPA, as well as by some those who remained in Iraq after the dissolution of the CPA. This has been shown through explaining some of the criminal cases in which US courts exercised the criminal forfeiture jurisdiction.

### 5.3 The civil forfeiture mechanism

Whilst a civil forfeiture mechanism may address some of the challenges identified in the criminal forfeiture mechanism explained above, it would certainly appear that it encounters other challenges, which can prevent the necessary international co-operation from taking place to ensure the recovery of corruptly obtained funds. The UNCAC itself envisages in civil forfeiture without obtaining a criminal conviction. According to Article 54 (1) (c) of the UNCAC, each State Party, in order to provide the MLA shall, in accordance with its domestic law, “consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.”<sup>20</sup>

This international support for a civil forfeiture mechanism requires us to introduce a definition for it. A civil forfeiture or *in rem* forfeiture is made against the property, not against individuals through civil proceedings, and it does not require a criminal conviction as a precondition for the forfeiture, or even the prosecution of the property owner.<sup>21</sup> This means, in effect, that the property itself is the subject of the forfeiture. In addition, the purpose of a civil forfeiture is not regulatory, *e.g.* to secure temporary control of property or to destroy dangerous contraband, but acquisitive, that is to say, “to vest State ownership in the property for the public benefit.”<sup>22</sup> Further, unlike most civil cases to recover criminal proceeds, a civil forfeiture can only be set up by a State, not by individuals. Therefore, a State is the plaintiff, the property is the defendant, and the individuals who oppose to the forfeiture are referred to as the “claimants.”<sup>23</sup>

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<sup>20</sup> Article 54 (1) (c) of the UNCAC.

<sup>21</sup> Henry J. Hyde, *Forfeiting Our Property Rights: Is Your Property Safe from Seizure?* (Cato Inst 1995) 26.

<sup>22</sup> AJ Van Der Walt, ‘Civil Forfeiture of Instrumentalities and Proceeds of Crime and the Constitutional Property Clause’ (2000) 16 (1) South African Journal on Human Rights 3.

<sup>23</sup> Stefan D. Cassella, ‘The Case for Civil Forfeiture: Why *In Rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime’ (2008) 11 (1) Journal of Money Laundering Control 9.



More often than not, a civil forfeiture takes place by one of two methods. The first method is that it can be done through criminal proceedings, but without the requirement of the need to obtain a criminal conviction. This method can be seen in countries such as Liechtenstein, Switzerland, Thailand, and Slovenia. In those jurisdictions, the civil forfeiture laws are incorporated into criminal codes, such as Criminal Law, Anti-Money Laundering Law, *etc.* and are seen as “criminal” proceedings to which the criminal procedural laws apply.<sup>24</sup>

The second method is that a civil forfeiture can be conducted via an independent legal basis, including a separate proceeding that can take place alone or parallel to related criminal proceedings. Often, this proceeding is governed by the rules of civil procedure, instead of criminal procedure statutes.<sup>25</sup> This method is useful as it is completely separate from any criminal case. It minimises the probability that excessive influence, which could be brought to bear in a criminal prosecution may be avoided.<sup>26</sup> Jurisdictions that employ this approach are such as Colombia, South Africa, the United Kingdom, and the United States.<sup>27</sup>

As a general observation, property that represents the proceeds of crime or has been used, or is intended to be used to commit or to facilitate a crime, is subject to a civil forfeiture. Property would not be seized, or an action is not to be commenced unless and until the government demonstrates, through the balance of probabilities standard, that the property was tainted by its link with the unlawful activity. After that, the burden of proof shifts to the property owner to demonstrate that the property is not forfeitable, or that he has a legal pre-existing interest in the property that is not forfeitable, such as a pre-existing mortgage on house or car.<sup>28</sup>

The advantage of having a civil forfeiture mechanism is that it is a specifically preferred option when the evidence is not strong enough to obtain a conviction against the defendant so as to successfully pursue a criminal forfeiture order. This would, undoubtedly, be a powerful weapon with respect to corrupt officials who, by the use of influence and power, are able to avoid a criminal conviction, and therefore secure their corruptly acquired proceeds beyond

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<sup>24</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (World Bank 2011) 106.

<sup>25</sup> *ibid.*

<sup>26</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (World Bank 2011) 67.

<sup>27</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 106.

<sup>28</sup> James R. Richards, *Transnational Criminal Organisations, Cybercrime, and Money Laundering* (CRC Press 1998) 194.

the reach of the law.<sup>29</sup> A civil forfeiture may also be useful where the defendant is impossible or unavailable to be present for a prosecution, such as when he has died, fled the country, or where political or other considerations may hinder a criminal prosecution. Moreover, a civil forfeiture permits the government to forfeit the assets of a defendant who is unknown, but assets are seized in the hands of a courier who was not engaged in the commission of the unlawful activity.<sup>30</sup>

Nevertheless, a civil forfeiture mechanism cannot be used by Iraq courts to recover funds that disappeared during the CPA's tenure. The civil forfeiture mechanism is still new; relatively few States have adopted it.<sup>31</sup> However, Iraq has not adopted it yet. Therefore, the required level of international co-operation may be difficult to achieve where the requested State does not allow a civil forfeiture mechanism. In addition, even if Iraq has the civil forfeiture system, the Iraq courts, as has been seen above, have no jurisdiction over criminal activities that occurred in Iraq during and after the dissolution of the CPA.

Further, even if a civil forfeiture mechanism operates in both the requesting State and requested State, systems vary significantly in relation to the identification of the court (civil or criminal) in the procedures, as well as the standard of proof required. In some jurisdictions, a civil forfeiture order is *in rem*, that is to say that an order is made against property, but *in personam* in others, that is to say that a claim is made against the individual for an offence or infringement of a legal duty.<sup>32</sup> For *in rem* proceedings, it is sufficient that the property exists in the State in order to set up a jurisdiction to proceed with a civil forfeiture.<sup>33</sup> Furthermore, a civil forfeiture will, in some jurisdictions, follow only after criminal proceedings are abandoned or are not successful, while it follows, in others, in parallel to the related criminal proceeding.<sup>34</sup>

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<sup>29</sup> Stefan D. Cassella, 'The Case for Civil Forfeiture: Why *In Rem* Proceedings are an Essential Tool for Recovering the Proceeds of Crime' (n 23) 11.

<sup>30</sup> *ibid.*

<sup>31</sup> Jurisdictions that adopt civil forfeiture are 'Anguilla, Antigua and Barbuda, Australia, some of the provinces of Canada (Alberta, British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan), Colombia, Costa Rica, Fiji, Guernsey, Honduras, Ireland, Isle of Man, Israel, Jersey, Liechtenstein, New Zealand, the Philippines, Slovenia, South Africa, Switzerland, Thailand, the United Kingdom, the United States, and Zambia.' Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 23) 11.

<sup>32</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (n 26) 67.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

At the end of the day, it should be noted that a civil forfeiture mechanism should not be used as an alternative to the criminal prosecution if a State is able to prosecute a criminal. The abandonment of the criminal prosecution in favour of a civil forfeiture certainly weakens the effectiveness of the criminal law, as well as the confidence of citizens in law enforcement. Where a criminal prosecution is abandoned, although it is available, in return for a civil forfeiture, a criminal is “purchasing” his way out of prosecution. Thus, criminal prosecutions should be pursued whenever possible to avoid the risk that prosecutors, courts, and the public would view disgorgement of assets as a sufficient sanction where criminal laws have been seriously violated.<sup>35</sup> Nevertheless, a civil forfeiture should be complementary to criminal prosecutions and convictions. It may be available before a criminal indictment, or in parallel criminal proceedings. Moreover, in all cases, the civil forfeiture option should be conserved so that it can be instigated when criminal prosecution is unavailable or is ineffective; this principle should be positively stated in the law.<sup>36</sup>

#### 5.4 Mutual legal assistance mechanism

A mutual legal assistance mechanism can be effective to recover the proceeds derived from corrupt activities. Where the proceeds of corruption have an international element, in order for a State to successfully trace and recover them, the MLA co-operation would be needed from foreign jurisdictions. As the name implies, the MLA is a process by which one State gives assistance to another State in the investigation and prosecution of criminal activities.<sup>37</sup> In order to combat the financial element of organised criminal activity, the MLA has extended to include the tracing, freezing, forfeiture of the proceeds of crime, and their recovery.<sup>38</sup> Mutual assistance can, thus, be thought of as the process used “to unlock similar laws between countries on behalf of another.”<sup>39</sup>

Speaking generally, there exist two forms of mutual assistance, needed at different stages of the process. The first form is an informal assistance. In informal assistance, coercive powers

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<sup>35</sup> Theodore S. Greenberg *et al.*, *Stolen Asset Recovery: A Good Practices Guide for Non- Conviction Based Asset Forfeiture* (World Bank 2009) 29.

<sup>36</sup> *ibid.*

<sup>37</sup> William C. Gilmore, *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge University Press 1995) XII.

<sup>38</sup> *ibid.*

<sup>39</sup> George J Kriz, ‘International Co-operation to Combat Money Laundering: The Nature and Role of Mutual Legal Assistance Treaties’ (1992) 18 (2) Commonwealth Law Bulletin 729.

are not required by the requested State.<sup>40</sup> It can be done through co-operation between law enforcement authorities, *e.g.* the informal police-to-police contact, such as through Interpol, or co-operation between Financial Intelligence Units in respect of exchanging financial information, such as regarding money laundering activities. This form usually requires only some or no formalities, and it is therefore expeditious. Since informal assistance can be completed without invoking coercive powers, the process of tracking proceeds, to a large degree, can be completed by way of this method.<sup>41</sup>

However, what has been acquired through an informal assistance may possibly be used as operational intelligence, and it is therefore not as evidence admissible in a court. It can, nevertheless, be used as a lead for additional investigation or may be used in relation to decide whether formal assistance should be sought.<sup>42</sup> The second form is formal assistance, often known as the MLA. In formal assistance, assistance is traditionally obtained through letters rogatory. Even with the existence of direct Mutual Legal Assistance Treaties (hereinafter known as the ‘MLATs’) and domestic legislation, letters rogatory are still essential for both civil and criminal matters, which are not addressed by the provisions of the MLATs. In its most traditional form, letters rogatory are letters of request made by the court in the requesting State, seeking assistance in gathering evidence from a court in the requested State. Such a request is normally transmitted through “diplomatic” channels, such as the Ministry of Foreign Affairs.<sup>43</sup>

Usually, formal mutual legal assistance requests in forfeiture matters will be required when evidence, such as bank statements are needed, or for any request to assist in relation to the freezing or forfeiture of proceeds in the requested State.<sup>44</sup> Evidence obtained is admissible in a court in the requesting State.<sup>45</sup> As such, there is advantage in using the formal assistance route. However, in the light of the inclusion of an additional party (the Ministry of Foreign

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<sup>40</sup> Willie Hofmeyr, ‘Navigating Between Mutual Legal Assistance and Confiscation System’ in Mark Pieth (ed), *Recovering Stolen Assets* (n 4) 4135 at 139.

<sup>41</sup> *ibid.*

<sup>42</sup> Torsak Buranaruangroj, ‘International Cooperation in Criminal Matters in Thailand’ in ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Asset Recovery and Mutual Legal Assistance in Asia and the Pacific* (Asian Development Bank 2008) 93 at 93.

<sup>43</sup> James P. Springer, ‘Obtaining Foreign Assistance to Prosecute Money Laundering Cases: A US Perspective’ (2001) 9(2) *Journal of Financial Crime* 158.

<sup>44</sup> Willie Hofmeyr, ‘Navigating Between Mutual Legal Assistance and Confiscation System’ (n 40) 139.

<sup>45</sup> Torsak Buranaruangroj, *International Cooperation in Criminal Matters in Thailand* (n 42) 94.

Affairs), the process involved in letters rogatory is very time-consuming.<sup>46</sup> In addition, another difficulty is that there is no obligation on the requested State to give assistance to a requesting State. It is simply a matter of comity.<sup>47</sup>

Consequently, the requested State may decline assistance, and it does not need to provide justification for declining to assist. Since the requested State has dealt with the request according to its procedural laws, the evidence thereby obtained may not be in a form admissible in the requesting State. Furthermore, private counsel may have to be hired by the requesting State and this is frequently expensive.<sup>48</sup> Moreover, letters rogatory cannot overcome local bank secrecy laws and other restrictions<sup>49</sup> in the requested States legal system.

These problems have led States to enter into the MLATs. The main purpose of such treaties whether bilateral or multilateral is to enable each and every one of the States Parties to obtain, upon request, assistance from the requested State in the investigation and prosecution of criminal activities. They are also intended to help a member State to stop the dissipation of assets, which may be possible and if they can be forfeited in a foreign State, as well as assisting in the enforcement of forfeiture orders along with recovering crime proceeds.<sup>50</sup>

In general, the treaty provisions are binding and define areas of co-operation between the respective States Parties. They include governing procedures, and therefore bringing lucidity and predictability to the process. More often than not, the MLATs allow more wide forms of co-operation than just the conventional promise of reciprocity or letters rogatory, such as direct contacts between central authorities, instead of diplomatic channels.<sup>51</sup> For example, the European Convention on Mutual Assistance in Criminal Matters (hereinafter as the 'ECMA' of 1959) allows the letter of request to be sent between Justice Ministers of States concerned. According to Article 15 (1) of the (ECMA), "Letters rogatory referred to in Articles 3, 4 and

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<sup>46</sup> In the main, the letters rogatory issued by the court must go through the Minister of Justice. It then goes through the Foreign Minister that will transmit it to the Foreign Minister of requested State. The requested State will forward it to the Justice Minister and at long last, to the court of the requested State. See James P. Springer, 'Obtaining Foreign Assistance to Prosecute Money Laundering Cases: A US Perspective' (n 43) 158.

<sup>47</sup> Bruce Zagaris, 'United States treaties on Mutual Assistance In criminal matters' in M. Cherif Bassiouni (ed), *International Criminal Law: v. 2: Multilateral and Bilateral Enforcement Mechanisms* (3<sup>rd</sup> edn, Brill 2008) 385 at 385.

<sup>48</sup> Alan Ellis and Robert L. Pisani, 'The United States Treaties on Mutual Assistance in Criminal Matters' (1985) 19 (1) *International Lawyer* (ABA) 189.

<sup>49</sup> Joseph J. Aronica, 'Globalisation of law enforcement efforts' (2001) 4 (4) *Journal of Money Laundering Control* 327.

<sup>50</sup> *ibid* 325.

<sup>51</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 139.

5, as well as the applications referred to in Article 11 shall be addressed by the Ministry of Justice of the requesting Party to the Ministry of Justice of the requested Party and shall be returned through the same channels.’’<sup>52</sup>

In case of urgency, the letter of request can be sent even between respective judicial authorities. According to Article 15 (2) of the (ECMA), ‘‘In case of urgency, letters rogatory may be addressed directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party. They shall be returned together with the relevant documents through the channels stipulated in paragraph 1 of this article.’’<sup>53</sup>In addition, the UNCAC requires the States Parties to designate a central authority responsible for receiving a request, and then either execute or transmit it to the competent authorities for execution. According to Article 46 (13) of the UNCAC:

Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organisation, if possible.<sup>54</sup>

Within the UNCAC, there are two major approaches to forfeiture by the MLA. Firstly, it can be done through recognition of foreign forfeiture orders. According to Article 54 (1) (a) of the UNCAC, each State Party, in order to provide the MLA shall, in accordance with its domestic law ‘‘take such measures as may be necessary to permit its competent authorities to

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<sup>52</sup> Article 15 (1) of the European Convention on Mutual Assistance in Criminal Matters (ECMA), Strasbourg, 20.IV.1959. ETS No. 30.

<sup>53</sup> *ibid.*, Article 15 (2).

<sup>54</sup> Article 46 (13) of the UNCAC.

give effect to an order of confiscation issued by a court of another State Party.’<sup>55</sup> This approach is quick and effective, in that the foreign order is simply needed for the enforcement by the requested State as though it was a domestic one. Secondly, it can be done after adjudication of money laundering or other offences. According to Article 54 (1) (b) of the UNCAC, each State Party, in order to provide the MLA shall, in accordance with its domestic law:

Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law.<sup>56</sup>

In this approach a trial of the substantive offence is required (even if it is the easier-to-prove money laundering offence), a finding of liability, followed by an order of the forfeiture and finally enforcement. In the two approaches mentioned above, their success, especially the second one, depends on the value of the information, as well as its adequacy provided by the requesting State. It depends also on the responsiveness and diligence by the requested State.<sup>57</sup>

In addition to the above, some States have adopted domestic legislation that provides the MLA process for foreign jurisdictions without the MLATs. This is based most often on the condition of reciprocity. As one might expect, such assistance is optional: without the MLATs in place, there is no international obligation to give requested assistance, it is thus uncertain that the request would be accepted.<sup>58</sup>

### **Does a mutual legal assistance mechanism work well for recovering Iraqi funds from abroad?**

From above, it seems clear that the MLA is an essential mechanism in recovering the ill-gotten gains from abroad. However, international co-operation in criminal matters is based on the assumption that the requested State does not provide the MLA unless it has great faith in the criminal justice system of the requesting State. When the prosecution system of the requesting State is biased, when there is no independence of the judiciary, and when the

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<sup>55</sup> Article 54 (1) (a) of the UNCAC.

<sup>56</sup> Article 54 (1) (b) of the UNCAC.

<sup>57</sup> Simon N.M. Young, ‘Why Civil Actions Against Corruption?’ (2009) 16 (2) *Journal of Financial Crime* 150.

<sup>58</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 157.

process of the forfeiture of proceeds of crime is arbitrary, the requested State would probably hesitate or refuse a request for assistance.<sup>59</sup>

With respect to the criminal justice system in Iraq, it seems that the system has failed to comply with the international law standards. According to a Report by Human Rights Watch, the Central Criminal Court of Iraq (hereinafter the ‘CCCI’)<sup>60</sup> is:

...the country’s flagship criminal justice institution. Yet it is an institution that is seriously failing to meet international standards of due process and fair trials. Defendants often endure long periods of pretrial detention without judicial review, and are not able to pursue a meaningful defence or challenge evidence against them. Abuse in detention, typically with the aim of extracting confessions, appears common, thus tainting court proceedings in those cases.<sup>61</sup>

Human Rights Watch went on to say that, the CCCI has ‘‘failed to provide basic assurances of fairness, undermining the concept of a national justice system serving the rule of law.’’<sup>62</sup>

Further, Human Rights Watch observed court proceedings and met with judges, defendants, defence lawyers, and others. It found that the large numbers of defendants endured long-lasting pretrial detention without judicial review, that they had inefficient legal counsel, and the court often depended on the testimony of secret informants and confessions were likely extracted under duress. In many instances, judges admitted these failings and dismissed some cases accordingly, especially those involving alleged torture, but the numbers of cases where such allegations arise suggest that serious miscarriages of justice are common.<sup>63</sup> It is therefore quite probable that the request of the Iraqi State for the MLA, with respect to recovering its funds in a foreign country, will be refused by the requested State.

Furthermore, it can put forth two probabilities to explain why foreign jurisdictions will probably refuse the request of the MLA of the Iraqi Government. A first probability is that the requested State may not recognise the Iraqi Government, in that it is fragile or because of its political condition. The way in which a former president of State is removed from power will affect the process of recovering stolen assets. It goes without saying that where a

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<sup>59</sup> David Chaikin, ‘Policy and Legal Obstacles in Recovering Dictator’s Plunder’ (2005) 17(2) Bond Law Review 29.

<sup>60</sup> CPA Order Number 13 established the (CCCI), with specific jurisdiction over serious crimes offences, including cases involving terrorism, money laundering, drug trafficking, war crimes, and sabotage. CPA Order Number 13 of 22 April 2004, The Central Criminal Court of Iraq.

<sup>61</sup> Human Rights Watch, *The Quality of Justice Failings of Iraq’s Central Criminal Court* (Human Rights Watch 2008) 1.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*



dictatorship is toppled and replaced by a radical or revolutionary government, legal co-operation in relation to asset recovery may not be upcoming. It is improbable that other countries will assist the new government concerning the investigation and recovery of stolen funds if it does not formulate and put into operation a plan of democratic renewal.<sup>64</sup>

A second probability is the problem of pervasive corruption in Iraq. Indexes of corruption compiled by the Transparency International suggest that Iraq is among the most corrupt countries in the world. (Table 5.1).

Table 5.1: The Corruption Perceptions Index/Iraq

<b>Year</b>	<b>Rank</b>	<b>Number of countries</b>
2013	171	177
2012	169	176
2011	175	177
2010	175	178
2009	176	180
2008	178(T)	180
2007	178	180
2006	160(T)	163
2005	137(T)	159
2004	129(T)	146
2003	113(T)	133

**Source:** Corruption Perceptions Index, Transparency International

This problem can be attributed to various factors. As Looney observed that the pervasive violence, lack of trust, and conflict, in addition to unique factors, for example oil revenues and the existence of a serious criminal element, have combined to create the ideal climate in

<sup>64</sup> David Chaikin, 'Policy and Legal Obstacles in Recovering Dictator's Plunder' (n 59) 29.

which the extent and impacts of corruption are even more pronounced than those observed,<sup>65</sup> by Philp in “normal” post-conflict settings:

In post-conflict societies its [corruption’s] impact is potentially still more serious, because it can undercut the emergence of stable expectations and the processes by which they are legitimated, it can maintain or further exacerbate situations in which outcomes lack legitimacy, making it difficult for any serious form of authority to emerge, it can lead to the squandering of aid and external political will, and it can make the weak weaker, the poor poorer and the vulnerable still less secure.<sup>66</sup>

As a result of the pervasiveness of corruption in Iraq, it is therefore probable that the requested State will refuse to provide assistance to recover funds on the grounds that funds could possibly be stolen again.

### **5.5 Civil action mechanism**

A civil action is specifically directed toward corrupt individuals or toward a legal entity by a State. This mechanism does not rely on State-to-State co-operation. It is a mechanism by which a State employs lawyers to bring a claim in foreign civil courts in the same way as a private citizen.<sup>67</sup> The purpose of a civil action is clearly to recover the funds stemming from corruption activities, in addition to recovering damages for corrupt actions. Further, a State may be entitled to recover the illicit profits, which have been acquired by corrupt individuals and others from corrupt actions or even from investing corruptly acquired funds.

It should be noted that bringing a civil action by a State to recover the proceeds of corruption in the civil courts of the foreign jurisdiction does not mean that the criminal justice system is not able to return those funds. However, as has been highlighted in the above discussion, in the light of ineffectiveness of the other mechanisms for recovering corruptly obtained funds, a civil action would be a better alternative mechanism.

### **5.6 International legal framework for a civil action**

The international legal framework governing a civil action mechanism with respect to recovering corruptly acquired funds is found in the UNCAC.<sup>68</sup> Multilateral instruments and declarations in relation to corruption have not recently paid sufficient attention to a civil

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<sup>65</sup> Robert E. Looney, ‘Reconstruction and Peacebuilding Under Extreme Adversity: The Problem of Pervasive Corruption in Iraq’ (2008) 15(3) *International Peacekeeping* 425.

<sup>66</sup> Mark Philp, ‘Peacebuilding and Corruption’ (2008) 15 (3) *International Peacekeeping* 314.

<sup>67</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 159.

<sup>68</sup> Iraq acceded to the UNCAC on 17 March 2008.

action. While it is true that the Council of Europe Civil Law Convention on Corruption of 1999 deals with a civil action, it is primarily regional in focus, and not focused at an international level.

Since it is admitted that a grand corruption has devastating consequences and this, in turn, has no adequate instruments to alleviate its effects, it is sought to set up a new framework for recovering the proceeds of corruption. An unprecedented innovative approach has, therefore, been taking place at an international level when the UNCAC recognises a civil action as a mechanism for recovering the proceeds deriving from corruption activities. The UNCAC, in Chapter V, places the assets recovery at its heart. Indeed, Article 51 of UNCAC proclaims, “The return of assets is a fundamental principle of this convention, and States Parties shall afford one another the widest measure of co-operation and assistance in this regard.”<sup>69</sup>

The reference, at the beginning, to the objective of “return” means that Article 51 provides a clear view of the result envisioned and stresses on the main importance of recovering corrupted State funds over other criminal proceeds.<sup>70</sup> In a similar way, Article 51 reaffirms the need for the MLA in order to recover corruptly obtained funds. In this manner, Article 51 puts the tone for the rest of the Chapter and forms a significant part of the Chapter’s efforts to realign the treatment of asset recovery as one of shared responsibility measured by actual results.<sup>71</sup> The range of measures is designed to adhere to the primary principle that criminals should not benefit from their crimes and to recover assets. There are, in general, two channels for recovering assets. The first channel is direct recovery of property by method of civil and administrative actions.<sup>72</sup> The second channel is the recovery of property through international co-operation by recognising and /or taking action rested on foreign forfeiture orders.<sup>73</sup> As far as a civil action is concerned, Article 53 provides that Parties are required to:

- (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay

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<sup>69</sup> Article 51 of the UNCAC.

<sup>70</sup> Daniel Claman, ‘The Promise and Limitations of Asset Recovery Under The UNCAC’ in Mark Pieth (ed), *Recovering Stolen Assets* (n 4) 333 at 336.

<sup>71</sup> *ibid.*

<sup>72</sup> Article 53 of the UNCAC.

<sup>73</sup> Article 54, 55 of the UNCAC.

compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognise another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.<sup>74</sup>

Accordingly, it can be observed that Article 53 expressly creates three methods of direct recovery that have to be made available by States Parties for other States Parties. The first method is that States Parties allow civil actions by other State Parties in its national courts in order to establish title or ownership of property obtained through corrupt actions.<sup>75</sup> The second method is that national courts of one State Party may order the criminals to pay damages to another State Party, which has been harmed by offences.<sup>76</sup>

The UNODC in the Legislative Guide for the Implementation of the United Nations Convention against Corruption observes that there is a fundamental difference between the first and second method. In the first method, the victimised State is a party in a civil action it initiates. In contrast, in the second method there is “an independent proceeding at the end of which the victim State must be allowed to receive compensation for damages.”<sup>77</sup> However, this independent proceeding, whether it is to be criminal or civil in nature is not specified in the Convention.<sup>78</sup> The third method of direct recovery is to recognise another State Party's claim as a legitimate owner of property when deciding on confiscation.<sup>79</sup>

All of the above methods are focused on States to initiate, to intervene, or to appear in domestic proceedings to enforce their claim for compensation.<sup>80</sup> Private individuals are, thus, not allowed to take such measures.

It should be noted that the purpose of UNCAC is not only to find legal mechanisms to return corruptly obtained funds, but also to find preventive measures to combat corruption. Article 1 of the UNCAC provides that the purposes of this Convention are...(b)“To promote and

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<sup>74</sup> Article 53 of the UNCAC.

<sup>75</sup> Article 53 (a) of the UNCAC.

<sup>76</sup> Article 53 (b) of the UNCAC.

<sup>77</sup> United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (United Nations 2006) para.715 at 245.

<sup>78</sup> *ibid.*, para.714 at 244.

<sup>79</sup> Article 53 (c) of the UNCAC.

<sup>80</sup> United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (n 77) para.710 at 244.

strengthen measures to prevent and combat corruption more efficiently and effectively.’’<sup>81</sup> For attaining this, Article 5 of the UNCAC puts the main objectives of prevention and the means to be used for their achievement, in accordance with the fundamental principles of domestic law. It provides that States parties are required to ‘‘develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.’’<sup>82</sup> It goes on to require that States parties are to work together and with relevant international and regional bodies to promote and develop the preventive measures.<sup>83</sup> For preventive, Article 6 of the UNCAC requires States parties to have independent anti-corruption bodies to implement and oversee anti-corruption policies and to rise and disseminate knowledge concerning anti-corruption measures.<sup>84</sup> Furthermore, States parties are urged to strengthen systems for recruitment, hiring, retention, promotion, and retirement of civil servants and other non-elected public officials.<sup>85</sup> In addition, States Parties are urged to introduce codes of conduct for public officials in connection with the United Nations International Code of Conduct for Public Officials.<sup>86</sup> Further, States Parties are obligated to set up transparent and competitive public procurement systems.<sup>87</sup> Furthermore, States Parties are obligated to take measures to enhance transparency in public administration.<sup>88</sup> Concerning the judiciary and the prosecutorial sphere, Article 11 of the UNCAC obligates that States Parties to take measures in order to strengthen judiciary integrity and to prevent opportunities for corruption.<sup>89</sup> Regarding the private sector, Article 12 of the UNCAC includes many other preventive measures.<sup>90</sup>

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<sup>81</sup> Article 1 of the UNCAC.

<sup>82</sup> Article 5 (1) of the UNCAC.

<sup>83</sup> Article 5 (4) of the UNCAC.

<sup>84</sup> Article 6 (1) of the UNCAC.

<sup>85</sup> Article 7 of the UNCAC.

<sup>86</sup> Article 8 of the UNCAC.

<sup>87</sup> Article 9 of the UNCAC.

<sup>88</sup> Such measures may include, inter alia; ‘‘(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’’ Article 10 of the UNCAC.

<sup>89</sup> Article 11 (1) of the UNCAC.

<sup>90</sup> Measures may include, inter alia; ‘‘(a) Promoting cooperation between law enforcement agencies and relevant private entities; (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the

## 5.7 Who May be involved in a civil action?

In a civil action for recovering Iraqi funds, the Iraqi State will be the claimant. The Iraqi State, which is the victim of corrupt activities, is the most obvious class of the claimant. Corrupt activities take place mainly where there is a contractual relationship by which the State is represented by an agent who owes a duty of loyalty to the State. If the agent corruptly acquired funds, the trust or duty placed in that agent is then breached.<sup>91</sup>

The situation during the period of occupation, however, is quite different. As has been explained in the Chapter Two, when a State is occupied, it cannot or will not exercise the functions of government. The occupying power must do so, and contractual relationships would chiefly be taking place between the occupying power and its personnel or with contractors, as with individuals of the occupied territory. All would owe a duty of loyalty to the occupying power.

In addition, if the State is not willing to take action, a third party can initiate a civil action. A good illustration is the case regarding the Heads of State of the Republic of Congo, Equatorial Guinea, and Gabon, in which Transparency International France and the anti-corruption NGO SHERPA initiated an action calling for an investigation into how assets (properties and cars, as well as bank accounts) were acquired in France by the Heads of State and their relatives. In October 2010, the French Supreme Court decided that an investigating judge could be appointed and a judicial enquiry be opened. The objective of the action was to invoke Article 57 of the UNCAC, and achieve restitution of the assets to the looted States.<sup>92</sup> As such, a civil action by a third party can be a powerful weapon to recover stolen assets for States.

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activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State; (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities; (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities; (e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure; (f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.” Article 12 (2) of the UNCAC.

<sup>91</sup> See Colin Nicholls QC *et al.*, *Corruption and Misuse of Public Office* (n 5) 300.

<sup>92</sup> Transparency International Organisation <[www.transparency.org](http://www.transparency.org)> accessed 2 February 2014.

In turn, the individuals, who are defendants to a civil action arising from corruption, are the personnel of the CPA, who as explained in Chapter One, were primarily American citizens. In addition to these, are those who have taken part in the acts of corruption or hold assets, such as the family of corrupt individuals and their associates.<sup>93</sup> Moreover, a defendant may conduct sophisticated schemes designed to launder and conceal the proceeds of corruption, and funds are therefore no longer in possession of the defendant. In this situation, attempts by a claimant to affirm an interest in those funds would be useless. The victim of acts of corruption is, therefore, unable to recover funds from the wrongdoer, and they may seek to sue those who have received or facilitated the corruption activities.<sup>94</sup>

Banks, lawyers, and financial intermediaries, are among those targeted for their engagement in money laundering processes.<sup>95</sup> Banks would indeed be the preferred defendant in a civil action.<sup>96</sup> The important question comes to mind regarding the role that can be played by banks and lawyers in the prevention and detection of money laundering. Corrupters use banks to place and launder their corruptly acquired funds.<sup>97</sup> In addition to cash transactions, banks can be used for facilitating fund transfers. Wire transfers are the most common way of moving substantial amounts of funds around the world. Therefore, they are the most common means employed to layer illegal funds.<sup>98</sup> Further, banks provide different forms of loans, such as for

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<sup>93</sup> See Colin Nicholls QC *et al.*, *Corruption and Misuse of Public Office* (n 5) 306.

<sup>94</sup> Tim Daniel and James Maton, 'Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials' (n 11) 246.

<sup>95</sup> *ibid.* For more details about the money laundering crime, See Chapter Four.

<sup>96</sup> C.E.F. Rickett, 'The Banker's Liability for Receipt in Equity and at Common Law' (1995) 16 (2) *Company Lawyer* 35.

<sup>97</sup> To put the amount, in general, into perspective, in 2007, the World Bank and the United Nations Office on Drugs and Crime (UNODC), through the Stolen Asset Recovery (StAR) Initiatives have estimated that between \$1 trillion and \$1.6 trillion per year is moving around the global financial system, resulting from criminal activities, corruption, and tax evasion, with half coming from developing and transition economies. The World Bank and the United Nations Office on Drugs and Crime (UNODC), *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan*: report (World Bank 2007). <[http://www.unodc.org/pdf/Star\\_Report.pdf](http://www.unodc.org/pdf/Star_Report.pdf)> accessed 1 July 2012. From developing and transitioning countries alone, an estimated \$20 billion to \$40 billion is lost each year through bribery, misappropriation of funds, and other corrupt practices. This figure is equivalent to approximately 20-40 percent of flows of official development assistance (ODA). *ibid.* In addition, in Chapter Four, it has been shown by cases that the personnel of the CPA who corruptly obtained funds in Iraq put their funds in banks abroad.

<sup>98</sup> See James R. Richards, *Transnational Criminal Organizations, Cybercrime, and Money Laundering* (n 28) 80.

real estate purchase.<sup>99</sup>All of the banks services above mentioned can form a part of money laundering transactions.

As a result, banks have been obligated to comply with the laws, which are designed to prevent and detect money laundering transactions. Transaction reporting is one of the main responsibilities imposed by the US Bank Secrecy Act of 1970 (hereinafter known as the 'BSA'). It is a helpful method for the early detection of money laundering offence. Reporting requirements could be demarcated into two general categories, namely Currency Transaction Reports (hereinafter known as the 'CTRs') or Suspicious Activity Reports (hereinafter known as the 'SARs').

According to the regulations outlined in the BSA, banks have an obligation to report to the designated authority for any transaction over \$10,000. It provides that financial institution, including banks "shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than USD10,000."<sup>100</sup>

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<sup>99</sup> See Charles O. Stapleton, and Martha R. Williams, *California Real Estate Principles* (5<sup>th</sup> edn, Dearborn Trade Pub 2004)232.

<sup>100</sup> 31 C.F.R 103.22 (b) (1). Financial institution means;

- (A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (h)));
- (B) a commercial bank or trust company;
- (C) a private banker;
- (D) an agency or branch of a foreign bank in the United States;
- (E) any credit union;
- (F) a thrift institution;
- (G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.);
- (H) a broker or dealer in securities or commodities;
- (I) an investment banker or investment company;
- (J) a currency exchange;
- (K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;
- (L) an operator of a credit card system;
- (M) an insurance company;
- (N) a dealer in precious metals, stones, or jewels;
- (O) a pawnbroker;
- (P) a loan or finance company;
- (Q) a travel agency;
- (R) a licensed sender of money or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;
- (S) a telegraph company;
- (T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;



This Article caused money launderers sought to create techniques for avoiding of the CTRs. This technique consists of dividing large transactions into smaller ones and carrying out multiple cash transactions just below the \$10,000 reporting threshold. Welling describes those who achieved these transactions as “smurfs.” Welling said, “The army of persons who scurried from bank to bank to accomplish these transactions became known as “smurfs” because, like their little blue cartoon namesakes, they were pandemic.”<sup>101</sup>

Reaction to this situation was enacting aggregation rules, in which banks require to aggregate multiple transactions. It provides “multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totaling more than \$10,000 during any one business day (or in the case of the Postal Service, any one day). Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.”<sup>102</sup> Additionally, a new criminal provision, the 1987 “Anti-Smurfing” Statute was adopted and made structuring a transaction for avoiding the CTR filing requirements as a

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- (U) persons involved in real estate closings and settlements;
  - (V) the United States Postal Service;
  - (W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;
  - (X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than \$1,000,000 which—
    - (i) is licensed as a casino, gambling casino, or gaming establishment under the laws of any State or any political subdivision of any State; or
    - (ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act);
  - (Y) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or
  - (Z) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. 31 U.S. Code § 5312 (a) (2).

The Anti Money Laundering Law No. 93 of 2004 in Iraq obligates banks to file a CTR for each transaction, which exceeds more than 15 million Iraqi Dinars (approximately \$10,000) in cash. Article 20 provides “The CBI may by regulation require each financial institution to file a report with the MLRO of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency or other monetary instrument of more than 15 million Iraqi dinars... In the case of suspected structuring transactions to evade reporting requirements, the financial institution shall file a report of the transaction or transactions regardless of amount involved.”

<sup>101</sup> Sarah N. Welling, ‘Smurfs, Money Laundering and the Federal Criminal Law: The Crime of Structuring Transactions’ (1989) 41 (2) Florida Law Review 288.

<sup>102</sup> 31 C. F. R. §103.22 (c) (2).

criminal offence.<sup>103</sup> Failure to comply with BSA requirements results in civil penalties,<sup>104</sup> and criminal penalties.<sup>105</sup>

The second category of reporting is SARs. Under the BSA, banks are required to file SARs with regard to any transaction that is, in the aggregate, at least \$5,000; if they not only have suspicions, but have reason to suspect a financial transaction that involves funds derived from illegal activities.<sup>106</sup> A report must be filed if (1) “the transaction was designed to evade BSA requirements ... or (2) The transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction.”<sup>107</sup>

In the SARs, banks reveal information about the names of persons or entities carrying out the suspicious transactions, an account of the transaction, the reality that the bank suspects or has reason to suspect that the transaction infringes the law or involves funds which came from illegitimate activities, and the basis for the bank’s concerns. Therefore, SARs are “a potential treasure trove for plaintiffs and their attorneys who may be fishing for new evidence or looking to exploit a bank’s vulnerable spots for use in civil litigation.”<sup>108</sup> A SAR may grant a plaintiff a very useful roadmap to potential claims against a bank or its clients and many other

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<sup>103</sup> 31 U.S.C § 5324.

<sup>104</sup> The Treasury Department may assess civil penalties on domestic financial institutions and on any of their partners, directors, officers, or employees who wilfully take part in a BSA violation. 31 C.F.R. § 103.47 (a). For example, for reporting requirement violations, penalty would be equal to the greater of \$25,000 or the amount involved in the transaction, if any, up to \$100,000. 31 C.F.R. § 103.47 (g). For wilful BSA record keeping requirement violations, penalty would be equal to \$10,000. 31 C.F.R. § 103.47 (b). Any domestic financial institution that negligently violates the BSA, penalty would be of up to \$500. 31 U.S.C. § 5321(6)(a).

<sup>105</sup> For example, for wilful recordkeeping requirements violations, penalty would be fines of up to \$1000, imprisonment of up to one year or both. If the violation is committed in furtherance of any major violation of federal law, penalty would be fined not more than \$10,000 or be imprisoned not more than 5 years, or both. 31 C.F.R. § 103.49 (a).

<sup>106</sup> 31 CFR 103.18 (a) (2).

<sup>107</sup> 31 CFR 103.18 (a)(2). In the Anti Money Laundering Law in Iraq, Article 19 requires banks to report suspicious activity. It provides “A financial institution that has reason to know that a suspicious transaction has occurred, whether effected by a customer or other person, where the total value of the transaction or series of potentially related transactions is equal to or greater than 4 million Iraqi dinars or, in the case of suspected structuring transactions to evade reporting requirements, regardless of the amount, shall notify the Money Laundering Reporting Office of the transaction, including all facts and circumstances. Such a report shall be made as soon as is reasonably possible, but in no case later than 14 days after the occurrence of the event causing suspicion or giving reason for suspicion. An institution making a report under this paragraph shall not reveal that fact to a customer or other third party.”

<sup>108</sup> Alex C. Lakatos and Mark G. Hanchet, ‘Confidentiality of Suspicious Activity Reports’ (2007) 124 (9) *Banking Law Journal* 794-795.

insights into facts and manner, which bank management usually, considers confidential.<sup>109</sup> Failure to file a SAR may be a violation of the reporting rules of the BSA.<sup>110</sup>

The FATF supports a compulsory system for reporting suspicious transactions. Recommendation 20 provides “If a financial institution suspects or has reasonable grounds to suspect that funds are the proceeds of a criminal activity, or are related to terrorist financing, it should be required, by law, to report promptly its suspicions to the financial intelligence unit (FIU).”<sup>111</sup> It also recommends that those in the regulated sector should be “prohibited by law from disclosing (“tipping-off”) the fact that a suspicious transaction report (STR) or related information is being filed with the FIU.”<sup>112</sup> Further, it recommends that special awareness should be paid to all unusual large transactions, and all unusual patterns of transactions, which have no apparent economic or lawful purpose and the background and purpose of such transactions should be examined.<sup>113</sup>

For assisting in re-constructing a “paper trail” of a customer’s financial activities, banks are required by law to keep for a prescribed time, records of their customers’ transactions. Under the BSA, financial institutions, including banks have to identify and record information concerning transactions involving the purchase of monetary instruments using cash in amounts of \$3000 or more.<sup>114</sup> To comply, banks record the name of purchaser, the date of purchase, the type of instruments purchased, their serial numbers, and in the dollar amount each instrument.<sup>115</sup> In addition, banks require creating and retaining records relating to domestic and international fund transfers in amounts of \$3000 or more.<sup>116</sup>

The FATF recommends rules requiring financial institutions to keep certain financial records for at least five years. Recommendation 11 provides:

Financial institutions should be required to maintain, for at least five years, all necessary records on transactions, both domestic and international, to enable them to comply swiftly with information requests from the competent authorities. Such records must be sufficient to permit reconstruction of individual transactions

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<sup>109</sup> *ibid* 795.

<sup>110</sup> See (n 104-105).

<sup>111</sup> FATF Recommendation 20.

<sup>112</sup> FATF Recommendation 21 (b).

<sup>113</sup> FATF Interpretive Note to Recommendation 10 (Customer Due Diligence).

<sup>114</sup> 31 U.S.C. § 5325.

<sup>115</sup> 31 C.F.R. § 103.29(a)(2).

<sup>116</sup> 12 U.S. Code § 1829b.

(including the amounts and types of currency involved, if any) so as to provide, if necessary, evidence for prosecution of criminal activity.<sup>117</sup>

Recommendation 11 also requires financial institutions to maintain all records acquired via customer due diligence measures (such as copies or records of official identification documents like identity cards and passports), account files and business correspondence, including the outcomes of any analysis undertaken (such as enquiries to set up the background and purpose of complex, and unusual large transactions), for at least 5 years following the business relationship's end, or following the date of the occasional transaction.<sup>118</sup> Further, Recommendation 11 required financial institutions, by the Act to keep records on transactions and information acquired via the customer due diligence measures. The customer due diligence information and the transaction records should be available to domestic competent authorities upon appropriate authority.<sup>119</sup>

One of the most effective means for banks to deter money laundering is the proper identification of customers, known as “know your customer.” It requires the banks to monitor and audit relevant information regarding their customers before taking part in financial transactions with them. This program is aimed at precisely identifying the bank's customers, reviewing and verifying the source of customer funds and permitting a bank to monitor closely the banking activities of its customers following setting up a formal relationship.<sup>120</sup>

In addition to banks, lawyers can be linked to money laundering schemes. Lawyers are able to convert the cash that derived from criminal activities into other less suspicious assets by depositing illegally obtained funds into bank accounts, facilitating the buying of real estate, or buying monetary instruments.<sup>121</sup> In addition, lawyers have been involved in transmitting illicit funds to a tax-haven, including setting up shell companies in these countries.<sup>122</sup>

Accordingly, lawyers are required to comply with the laws, intended to prevent money laundering transactions. According to Section 60501 of Internal Revenue Code of 1986, any person engaged in a trade or business is required to report cash receipts of more than \$10,000

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<sup>117</sup> FATF Recommendation 11.

<sup>118</sup> FATF Recommendation 11.

<sup>119</sup> *ibid.*

<sup>120</sup> Genci Bilali, ‘Know Your Customer-or Not’ (2012) 43 (2) University of Toledo Law Review 320.

<sup>121</sup> Margaret E. Beare and Stephen Schneider, *Money Laundering in Canada: Chasing Dirty and Dangerous Dollars* (University of Toronto Press, Scholarly Publishing Division 2007)137.

<sup>122</sup> *ibid.*

on an Internal Revenue Service Form 8300.<sup>123</sup> Information required on the reporting includes the name of the person from who the cash was received, the sum of cash received, the date and nature of the transaction, and “such other information as the secretary may prescribe.”<sup>124</sup> Lawyers are covered by the Internal Revenue Code because they have long been considered to be engaged in a “trade or business.”<sup>125</sup> In fact, Section 60501 regulations use a lawyer as an example. It provides:

An attorney agrees to represent a client in a criminal case with the attorney’s fee to be determined on an hourly basis. In the first month in which the attorney represents the client, the bill for the attorney’s services comes to \$8,000 which the client pays in cash. In the second month in which the attorney represents the client, the bill for the attorney’s services comes to \$4,000, which the client again pays in cash. The aggregate amount of cash paid (\$12,000) relates to a single transaction ... the sale of legal services relating to the criminal case, and the receipt of cash must be reported under this section.<sup>126</sup>

In the end of the day, it should be noted that the advantage of targeting the receipt of funds or facilitating parties is that it may make the opportunity of restitution or of damages from individuals or entities more than the corrupt individuals. In addition, information and assistance from third parties or co-plotters may be occasionally obtained.

## 5.8 Where can the Iraqi State bring a civil action?

The Iraqi State can bring a civil action in the civil courts of the US for securing and recovering its disappeared funds. The strong probability of existence of Iraqi funds within the US territory or have transited the jurisdiction enables the Iraqi State to bring a civil action in that territory. The basis for such an action is subject matter jurisdiction. Subject matter jurisdiction refers to the power of a court to hear classes of claims, without inevitably considering the relationship of the parties to particular cases to the forum.<sup>127</sup>

However, in order for the US court to adjudicate a civil action, it must also have personal jurisdiction over the defendants. If, the defendants who corruptly acquired funds live in the US territory, the Iraqi State can then bring a civil action in that territory. The basis on which

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<sup>123</sup> 26 U.S.C § 6050(a).

<sup>124</sup> 26 U.S.C § 6050(a) (b).

<sup>125</sup> 26 U.S.C § 162.

<sup>126</sup> 26 C.F.R. § 1.6050I-1(e)(7)(iii).

<sup>127</sup> See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). For more details about subject matter jurisdiction, see Gary Born, *International Civil Litigation in United States Courts* (3<sup>rd</sup> edn, Kluwer Law International 1996).

the Iraqi State relies on its personal jurisdiction. The meaning of personal jurisdiction is found in *Shaffer v. Heitner*, where the US Supreme Court was stated that it ‘involves the power of a court to adjudicate a claim against the defendant’s person and to render a judgment enforceable against the defendant and any of its assets.’<sup>128</sup>

In order to gain jurisdiction over the defendants, and to satisfy the due process clause of the US Constitution in terms of fair play and substantial justice, the presence of the defendants within the territory is required. That is, minimum contact with the forum is considered as a prerequisite, according to the US Supreme Court’s decision in *Pennoyer v. Neff* ‘‘no State can exercise direct jurisdiction over persons or property without its territory.’’<sup>129</sup>

If the defendant resides outside of the US territory, he is also subject to personal jurisdiction on grounds of nationality. This jurisdiction was approved by the US Supreme Court in *Blackmer v. United States*, where a federal court, in accordance with Walsh Act, ordered a US citizen living in Europe to return to the US in order to give testimony in pending US criminal proceedings.<sup>130</sup>

It is irrefutable that the US has the right to exercise the power legitimately to arrest and bring within the jurisdiction of its courts the defendant who is located in the US territory. However, the power of the US becomes limited with respect to arrest of a potential defendant in another State’s territory. This is because the exercise of law enforcement actions is an exercise of sovereign State power. In this regard, Professor Vaughan Lowe asserts that ‘‘The exercise of enforcement jurisdiction is an exercise of State sovereignty, and the rule that governs it is simple. No State may exercise its enforcement jurisdiction in the territory of another State without that State’s permission.’’<sup>131</sup> This basic rule is reflected in the Restatement (Third) of Foreign Relations Law of 1986. It notes that even though a State is in general free to enforce its criminal law within its territorial borders,<sup>132</sup> ‘‘a State’s law enforcement officers may exercise their functions in the territory of another State only with the consent of the other State, given by duly authorised officials of that State.’’<sup>133</sup> The Restatement observes:

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<sup>128</sup> *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977).

<sup>129</sup> *Pennoyer v. Neff* 95 U. S. 714 (1877).

<sup>130</sup> *Blackmer v. United States*, 284 US 421 (1932).

<sup>131</sup> Vaughan Lowe, *International Law* (Oxford University Press 2007) 184.

<sup>132</sup> 432 (1) of Restatement (Third) of Foreign Relations Law of 1986.

<sup>133</sup> 432 (2) of Restatement (Third) of Foreign Relations Law (n 132).

It is universally recognised, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter's consent. Thus, while a state may take certain measures of nonjudicial enforcement against a person in another state, ... its law enforcement officers cannot arrest him in another state, and can engage in criminal investigation in that state only with that state's consent. Within a state's own territory, the rules governing arrest and other steps in criminal law enforcement generally apply regardless of the nationality, residence, or domicile of the person accused or investigated, subject only to defined exceptions for persons enjoying diplomatic or consular immunity ... and to the obligation to observe basic human rights.<sup>134</sup>

Because of the limits on the arrest of a defendant in the territory of another State, formal arrangements exist for the return of such a defendant, generally by a request to the foreign State for his extradition. Although there are extradition agreements in place, the US Government resorted to abduction methods in quest to bring defendants within the personal jurisdiction of its courts. The landmark case for this is *Ker v. Illinois*,<sup>135</sup> where *Ker* was forcibly abducted from Peru by a Pinkerton detective, and brought him back to the US to face embezzlement charges in an Illinois State court. This case was confirmed by the US Supreme court in *United States v. Alvarez-Machain*,<sup>136</sup> where a Mexican national was forcibly kidnapped from Mexico and brought into the US to stand trial for the 1985 murder of DEA agent Enrique Camarena-Salazar. The US Supreme Court held that although there is an extradition treaty between the US and Mexico and an official protest by the Mexican government, the forcible abduction of the defendant does not violate the extradition treaty, and it did not divest the court of *in personam* jurisdiction to try the defendant.<sup>137</sup>

## 5.9 Challenges for the Iraqi State to Recover Funds that disappeared during the CPA's Tenure

### 5.9.1 Lack of Political Will

Iraq lacks of political will to recover its funds in abroad. It is well known that strong national political will is of fundamental importance to successful and effective recovery for corruptly acquired funds. Before turning to consider the importance of political will, it is essential to define the term political will. In general, the term is difficult to describe and is one of the most unclear terms debated in international forums. However, in the context of recovering stolen funds, the term refers to “the demonstrated and credible intent of political actors, civil

<sup>134</sup> 432, Comment (b) of Restatement (Third) of Foreign Relations Law (n 132).

<sup>135</sup> *Ker v. Illinois*, 119 U.S. 436 (1886).

<sup>136</sup> *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

<sup>137</sup> *ibid.*

servants, and organs of the state to combat corruption and recover and repatriate stolen assets.’’<sup>138</sup> Even though it is difficult to define this intent accurately, it is possibly the most relevant prerequisite for successful international cooperation in relation to recovering the proceeds derived from corruption activities.<sup>139</sup>

The presence of strong political will has been identified as one of the most important preconditions for securing successful asset recovery. In this regard, the first OECD/STAR survey on asset recovery, an OECD and International Bank for Reconstruction and Development /The World Bank publication, *Tracing Anti-Corruption and Asset Recovery Commitments*,<sup>140</sup> found that political will is the most important feature in the quest to recover the proceeds of corruption. It states that ‘‘Strong and sustained political leadership backed by necessary laws is directly linked to actual progress on foreign corruption and asset recovery.’’<sup>141</sup>

Furthermore, in order to change laws, to create impetus to government authorities to make this a real precedence, to ensure allocation of sufficient resources, and to support more aggressive enforcement by regulators, political will is then required. Moreover, it is essential on the implementation side: absent such political commitment, some banks will not be motivated to make a meaningful commitment to improving customer due diligence procedures with a view to detecting the proceeds of corruption.<sup>142</sup>

However, the lack of political will can be considered as one of the main impediments to the recovery of the proceeds of corruption. Before proceeding further, it is worth considering the meaning of the lack of political will. It is ‘‘a lack of a comprehensive, sustained, and concerted policy or strategy to identify asset recovery as a priority and to ensure alignment of objectives, tools, and resources to this end.’’<sup>143</sup> The absence of political will manifests itself in a diversity of ways. Firstly, a reluctance to pursue a case forward, especially if it is large or

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<sup>138</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (n 26) 24.

<sup>139</sup> *ibid.*

<sup>140</sup> Organisation for Economic Cooperation and Development and Stolen Asset Recovery Initiative, ‘Tracking Anti-Corruption and Asset Recovery Commitments: A Progress Report and Recommendations for Action’ (Organisation for Economic Cooperation and Development and the World Bank 2011).

<sup>141</sup> *ibid.* 12.

<sup>142</sup> Theodore S. Greenberg *et al.*, *Stolen Asset Recovery: Politically Exposed Persons, A Policy Paper on Strengthening Preventive Measures* (The World Bank 2009) XV.

<sup>143</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (n 138) 2.



complex, or cooperate with foreign jurisdictions. Secondly, a lack of adequate capacity to carry out complex investigations. Thirdly, a lack of independence for investigating authorities. Fourthly, a lack of competent practitioners, a lack of resources, and a lack of expertise.<sup>144</sup>

The lack of political will exists in Iraq. The Iraqi State lacks the intention to initiate a civil action. The leadership in Iraq does not seem to consider recovering funds from abroad to be a priority. This is most likely because the top priority is given to security situation and political problems that encounter the country. This factor leads to the absence of a comprehensive policy in relation to funds recovery. In order to establish a clear funds recovery strategy, Iraq needs to implement policies, pass legislation, secure adequate resources, training for practitioners, and utilise the legal instruments available in a comprehensive, consistent, creative, and committed way.<sup>145</sup> Most important in this regard, Iraq needs to commence civil action in the civil courts of the US, as to where the defendants and corruptly acquired funds are located.

### **5.9.2 Funding Civil Action**

Although Iraq is a wealthy country, a civil action for recovering its funds from abroad is too expensive. It is common knowledge that Iraq is an oil-rich country. According to the US Energy Information Administration (EIA), “Iraq has the fifth largest proven crude oil reserves in the world, and it passed Iran as the second largest producer of crude oil in OPEC at the end of 2012.”<sup>146</sup>

Nevertheless, a civil action is complicated, a very time-consuming exercise, and frequently multi-jurisdictional. In addition to lawyers, it requires financial investigators, forensic accountants, translators, and expert viewpoints.<sup>147</sup> Clearly, then, private law firms are costly and for some States unaffordable. It has been estimated that the costs of a team of skilled investigators can be in the region of \$18,000 per day, as well as the high costs of the top lawyers that are required.<sup>148</sup> While it is true that the recovered sums can be extremely high,

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<sup>144</sup> *ibid* 25-26.

<sup>145</sup> *ibid* 26.

<sup>146</sup> See US Energy Information Administration. Available at <<http://www.eia.gov/countries/country-data.cfm?fips=iz>> accessed 1 August 2014.

<sup>147</sup> Anne Lugon-Moulin, ‘Asset Recovery: Concrete Challenges for Development Assistance’ in Mark Pieth (ed), *Recovering Stolen Assets* (Peter Lang 2008) 297 at 301.

<sup>148</sup> Willie Hofmeyr, ‘Navigating Between Mutual Legal Assistance and Confiscation System’ (n 40) 145.

and normally they substantially exceed the costs of law firms, there can be, no doubt, that such costs are exorbitant and frequently significantly reduce the recovered amounts and repatriated. Furthermore, the victim State of corruption activities usually remains responsible for legal fees even if recovery is unsuccessful.<sup>149</sup>

The high costs to bring a civil action may dissuade the Iraqi State from endeavouring to recover its funds from abroad. However, the Iraqi State can request assistance from donors to cover the costs of a civil action. In the case of the President of the Republic of Mali, General Moussa Traore who deposited illegitimately obtained assets in Switzerland, the Swiss, at the request of the Malian State, agreed to pay for the fees of a Swiss lawyer who was funded by the Swiss Agency for Development and Co-operation (SDC).<sup>150</sup> Although this type of arrangement is a viable alternative for countries that are unable to pay the costs of private law firms, it is a short-range tool available to the donor community. Therefore, establishing a Multilateral Trust Fund would be a helpful complement. It could also be considered a type of emergency measure. Such “quick-win” action could, however, deliver long-term pay-offs as the completion of successful cases would not only provide precedents in asset recovery, but also help to deter future misappropriation and build a well-functioning judicial system in the requesting State.<sup>151</sup>

Another option for the Iraqi State would be to promote private law firms to offer services *pro bono* (for the public good). In order to make such participation attractive, public awards can be established and public announcements can be made to support professionals that frequently offer services *pro bono* to help with the MLA.<sup>152</sup> Contingency fee systems can also assist the Iraqi State in obtaining legal services for their claims. In that system, a lawyer, under agreement, represents the State in return for a percentage of the recovery usually 30%-35%.<sup>153</sup> If there is no favourable result, the lawyer would not receive fees for his effort on the

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<sup>149</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (n 138) 95.

<sup>150</sup> Anne Lugon-Moulin ‘Asset Recovery: Concrete Challenges for Development Assistance’ (n 147) 301.

<sup>151</sup> *ibid* 302.

<sup>152</sup> Kevin Stephenson *et al.*, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action* (n 138) 95.

<sup>153</sup> John Bilyeu Oakley and Amar D. Vikram, *American Civil Procedure: A Guide to Civil Adjudication in US Courts* (Kluwer Law International 2009) 207.

case. As a result, lawyers usually take contingency fee cases if the probabilities of a substantial recovery are high.<sup>154</sup>

## 5.10 Remedies

Once the Iraqi State has established the substantive right against the defendants, it is entitled to a remedy. Prior to a remedy being requested, it is of fundamental importance to know the substantive right that is being enforced. As Professor Dan B. Dobbs observes, “...the remedy should reflect the right or the policy behind that right as precisely as possible.”<sup>155</sup> Availability of a particular remedy depends on the nature of the cause of action. If the Iraqi State’s action is based on unjust enrichment, it will be entitled to restitution.<sup>156</sup> In an action for breach of contract, the Iraqi State will be entitled to damages and alternatively as stated by the US Supreme Court in *United States v. Winstar Corp*, restitution.<sup>157</sup>

In an action for ownership, a constructive trust remedy can be sought against the defendant. Justice Benjamin Cardozo in *Beatty v. Guggenheim Exploration Co* captured the essence of the remedy, when he described it, as “the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”<sup>158</sup> In a constructive trust remedy, the plaintiff would have to prove the existence of proprietary interest in property to which it was originally entitled or its traceable product. The court will then hold that the defendant who has the property in his possession has only the legal title, which he holds as constructive trustee for the plaintiff.<sup>159</sup> Therefore, it can be seen that the constructive trust remedy has two main components; ownership and identification. Any property-based remedy cannot be obtained unless there is property in the defendant’s possession over which the plaintiff can assert his equitable claim.<sup>160</sup> In order to show ownership, or to establish an equitable claim, the plaintiff has to demonstrate that the

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<sup>154</sup> *ibid.*

<sup>155</sup> Dan B. Dobbs, *Law of Remedies: Damages - Equity – Restitution* (2<sup>nd</sup> edn, West Publishing Co 1993) 22.

<sup>156</sup> Doug Rendleman, ‘Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages’ (2011) 68 (3) *Washington and Lee Law Review* 975.

<sup>157</sup> *United States v. Winstar Corp*, 518 U.S. 839, 116 S.Ct. 2432 (1996).

<sup>158</sup> *Beatty v. Guggenheim Exploration Co*, 225 N.Y. 380 (1919).

<sup>159</sup> Doug Rendleman, ‘Measurement of Restitution: Coordinating Restitution with Compensatory Damages and Punitive Damages’ (n 156) 991.

<sup>160</sup> Restatement of Restitution: Quasi Contracts & Constructive Trusts § 160, cmts. a, d (1937) in Claire Seaton Rosa, ‘Should Owners Have to Share? An Examination of Forced Sharing in the Name of Fairness in Recent Multiple Fraud Victim Cases’ (2010) 90 (3) *Boston University Law Review* 1337.

transfer of the original property to the defendant was reversible.<sup>161</sup> The defendant will thus be unjustly enriched unless the property is returned to the plaintiff.<sup>162</sup>

In addition to establishing a right to restitution of particular property, the plaintiff has to identify the property in the hands of the defendant. The process whereby a plaintiff is able to follow his property is called tracing. Tracing is the identification of “specific property held by the debtor as a substitute of the claimant’s rightful property and thus a proper subject matter of her claim.”<sup>163</sup>

The advantage of gaining a constructive trust as a remedy is that it confers on the plaintiff an ownership interest in an identifiable asset. This ownership interest grants a plaintiff an effective priority in recovering his property over the claims of other creditors.<sup>164</sup> Priority over other creditors should be limited to property that has some link to the wrong, and should not extend to the general assets of the wrongdoer.<sup>165</sup> Constructive trust remedy also has the benefit of granting the plaintiff the right to any increase in the value of the property.<sup>166</sup>

Constructive trust remedy enables the plaintiff to recover not only the property, but also the proceeds of such property. In *Attorney General of Hong Kong v. Reid*,<sup>167</sup> the Hong Kong Government sought to recover properties bought in New Zealand by Warwick Reid who was a crown prosecutor in Hong Kong and worked as the Acting Director of Public Prosecution. Properties were bought with bribes received for not prosecuting certain offenders. Two of the properties were vested in the joint names of Reid and his wife, while one was assigned to his solicitor. The Privy Council in *Reid* held that the plaintiff had an equitable proprietary right to the moneys received by Reid and could therefore trace them into properties. It held that the properties were held on constructive trust. Lord Templeman said:

When a bribe is accepted by a fiduciary in breach of his duty, he holds that bribe in trust for the person to whom the duty was owed. If the property representing the bribe decreases in value, the fiduciary must pay the difference between that value and the initial amount of the bribe because he should not have accepted the bribe or incurred the risk of loss. If the property increases in value, the fiduciary is not

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<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*

<sup>163</sup> Hanoch Dagan, ‘Restitution in Bankruptcy: Why All Involuntary Creditors Should Be Preferred’ (2004) 78 (3) *American Bankruptcy Law Journal* 251.

<sup>164</sup> Dan B. Dobbs, *Law of Remedies: Damages - Equity - Restitution* (n 155) 392.

<sup>165</sup> Douglas Laycock, ‘The Scope and Significance of Restitution’ (1989) 67 (6) *Texas Law Review* 1291.

<sup>166</sup> *ibid.*

<sup>167</sup> *Attorney General of Hong Kong v. Reid*, [1994] 1 AC 324 PC.

entitled to any surplus in excess of the initial value of the bribe because he is not allowed by any means to make a profit out of a breach of duty.<sup>168</sup>

The decision in the Reid case was a praiseworthy step. Formerly, the plaintiff had no proprietary interest in bribe moneys received by the defendant, and he had therefore no such interest in property that the defendant made with bribery moneys. This was the approach taken in *Lister v. Stubbs*.<sup>169</sup> In that case, the defendant was a purchasing agent and was bribed to divert business to a third party. The defendant invested the bribes in freehold properties and investments. It was decided that where the defendant accepts a bribe, he does not hold it as a constructive trustee. The relationship between the defendant and the plaintiff was merely a personal one of debtor and creditor. As such, the plaintiff had no proprietary interest to the property acquired with the bribery moneys.<sup>170</sup> Consequently, Reid's decision is of great significance for dealing with corrupt officials who work on the assumption that they can usefully abuse their positions.

In addition to the remedies above, a court may grant the Iraqi State damages in respect of losses caused by a corrupt act.<sup>171</sup> If an action is under the RICO, a successful Iraqi State may recover triple the actual damage that it suffered as a result of the corrupt act.<sup>172</sup> To measure treble damages, courts determine the harm that has been suffered by the Iraqi State. Courts will then triple the amount of damages it assessed.<sup>173</sup> Damages are, however, limited to harm to "property."<sup>174</sup> The advantages of treble damages remedy, as stated by the US Supreme Court, are that it is a significant incentive for private citizens to bring RICO actions,<sup>175</sup> and is to deter future violators,<sup>176</sup> as well as compensate plaintiffs for all accumulative harm.<sup>177</sup>

## 5.11 Show me the money

It has been demonstrated that \$8.8 billion has been disappeared as a result of corrupt activities during the period of the CPA. Recovering of those funds is a difficult task.

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<sup>168</sup> *ibid.*

<sup>169</sup> *Lister v. Stubbs*, (1890) 45 Ch. D. 1 .

<sup>170</sup> *ibid.*

<sup>171</sup> According to Article 53 (b) of the UNCAC, States parties should allow requesting jurisdictions to claim compensation for damages caused by a corrupt act.

<sup>172</sup> 18 USC 1964 (c) of the RICO.

<sup>173</sup> Gregory P. Joseph, *Civil RICO: A Definitive Guide* (American Bar Association 1992) 112.

<sup>174</sup> *ibid.*

<sup>175</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

<sup>176</sup> *Russello v. United States*, 104 S. Ct. 296 (1983).

<sup>177</sup> *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982).

Corrupters frequently multi-national companies, often used the opportunities offered by financial operators in order to conceal and enjoy their corruptly obtained funds,<sup>178</sup> therefore leading to complicated efforts by law enforcement agencies to identify and trace those funds. For identifying and locating the Iraqi funds that disappeared as a result of corruption activities, an investigation will then be required. To initiate the investigation, intelligence is also needed. In this section, the intelligence-gathering phase, and the investigative process will be examined below.

### **A. The intelligence-gathering phase**

Intelligence can play an important role in the tracing of the corruptly obtained funds. Before turning to examine the role of intelligence, it is essential to understand the meaning of intelligence. According to the International Association of Law Enforcement Intelligence Analysts, intelligence is an analytic process:

...deriving meaning from fact. It is taking information collected in the course of an investigation, or from internal or external files, and arriving at something more than was evident before. This could be leads in a case, a more accurate view of a crime problem, a forecast of future crime levels, a hypothesis of who may have committed a crime or a strategy to prevent crime.<sup>179</sup>

In a law enforcement community context, intelligence is therefore, in essence, regarding the flow of information and how that information is weighed up, analysed, and disseminated to law enforcement agencies. In a corruption activities context, and the tracing of funds derived from those activities, intelligence is the key to know how funds flow and, in an ideal world, where the funds are.<sup>180</sup> In the context of the tracing of the corruptly acquired funds, the intelligence plan should cover three types of intelligence, namely, open source intelligence, human intelligence and financial intelligence that are examined below.

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<sup>178</sup> Phyllis Atkinson, 'Introduction' in International Centre for Asset Recovery (eds), *Tracing Stolen Assets - A Practitioner's Handbook* (Basel Institute on Governance 2009) 19 at 19.

<sup>179</sup> International Association of Law Enforcement Intelligence Analysts, *Successful Law Enforcement Using Analytic Methods* (Alexandria 1996) 1. For more details about the definition of intelligence, See John Buckley, *Managing Intelligence: A Guide for Law Enforcement Professionals* (CRC Press 2013) 49 and Jerry H. Ratcliffe, *Intelligence-led Policing* (Willan 2008) 91.

<sup>180</sup> Alan Bacarese, 'The role of intelligence in the investigation and the tracing of stolen assets in complex economic crime and corruption cases' in International Centre for Asset Recovery (eds), *Tracing Stolen Assets - A Practitioner's Handbook* (Basel Institute on Governance 2009) 37 at 38.

## **1. Open source intelligence**

Open source intelligence is able to provide a great amount of information for law enforcement agencies. It involves finding, selecting and acquiring information from publicly available sources and analysing it.<sup>181</sup> As is expected, the Internet provides an extensive range of information resources for the analysts. It also provides simple examinations on a person's name or his address, which may disclose information that can be useful to intelligence. Open source information is extensive and contains, amongst other materials, the following:

- All types of media;
- Commercial vendors of information;
- Directories;
- Government reports and documents;
- Databases of people, places, and events;
- Statistical databases;
- Websites that are open to the general public even if there is an access fee or a registration requirement;
- Publicly available databases;
- Social networking sites and web-based communities such as chat rooms;
- Search engines of Internet site contents.<sup>182</sup>

## **2. Human intelligence**

Human intelligence is one of the key effective tools for law enforcement agencies. In many countries, immunities and /or plea bargain arrangements are offered to turn participating suspects into co-operating witnesses.<sup>183</sup> Co-operating witnesses are valuable. They are able to help in identifying the goal of the investigation and in prioritising the business, persons, and

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<sup>181</sup> Charles Monteith and Pedro Gomes Pereira, 'Asset Recovery' in Neil Boister and Robert J. Currie (eds), *Routledge Handbook of Transnational Criminal Law* (Routledge 2014) 137 at 147.

<sup>182</sup> Alan Bacarese, 'The role of intelligence in the investigation and the tracing of stolen assets in complex economic crime and corruption cases' (n 180) 47.

<sup>183</sup> Charles Monteith and Pedro Gomes Pereira, 'Asset Recovery' (n 181) 147.

places for investigation. In addition, they are able to give direct evidence on the corrupt crime. Reluctance to be formal witnesses and testify against the main wrongdoers does not mean that participating suspects are not valuable. They can frequently provide important information all through all stages of the investigation and they are under an obligation to co-operate completely throughout.<sup>184</sup>

In addition to co-operating witnesses, innocent informers and whistle-blowers are able to provide vital information. There is no doubt that the law enforcement agencies take persons who provide information regarding corruption activities into account. In this respect, the law enforcement agencies are under an obligation to provide adequate protection for the secrecy of the person, and his personal as well as professional risk.<sup>185</sup> Moreover, the law enforcement agencies have a responsibility for the evaluation of the information provided, which may be developed into vital intelligence, however which might be dirtied. In this regard, the intelligence analysts need to exercise substantial caution the rationale behind the person's wish to provide information, what potential motives can exist, and whether those motives may be spiteful.<sup>186</sup> On a human level, for ensuring that the person is not at personal risk, the conditions of how the information came to be offered must be weighed up with awareness.<sup>187</sup>

### **3. Financial intelligence**

Financial intelligence is considered to be one of the most significant sources of intelligence for law enforcement agencies. Where funds are corruptly obtained, they are frequently distributed among different accounts and under different corporate names. Any investigation into those funds generally needs to external information, for example, financial documents and suspicious transfer reports filed in the banks and with law enforcement agencies.<sup>188</sup>

For receiving and processing financial information from financial institutions, Financial Intelligence Units (hereinafter known as the 'FIUs') is established. The Statement of Purpose of the Egmont Group of the Financial Intelligence defines an FIU as "A central, national agency responsible for receiving, (and as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected

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<sup>184</sup> *ibid* 147.

<sup>185</sup> Alan Bacarese, 'The role of intelligence in the investigation and the tracing of stolen assets in complex economic crime and corruption cases' (n 180) 45.

<sup>186</sup> *ibid*.

<sup>187</sup> *ibid* 46.

<sup>188</sup> Charles Monteith and Pedro Gomes Pereira, 'Asset Recovery' (n 181) 147.



proceeds of crime and potential financing of terrorism, or (ii) required by national legislation or regulation, in order to combat money laundering and terrorism financing.”<sup>189</sup>

Under the FATF Recommendation 29, all countries should establish a FIU. It recommends:

Countries should establish a financial intelligence unit (FIU) that serves as a national centre for the receipt and analysis of: (a) suspicious transaction reports; and (b) other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis. The FIU should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly.<sup>190</sup>

It can observe that an FIU has three basic functions. The first function is that any FIU has a “repository function” this is to say that the unit is called upon to be the centralised point of information on money laundering. Not only does it receive disclosed information on financial transactions, it also yields at least a certain degree of control over what happens to this information.<sup>191</sup>The FATF Interpretive Note to Recommendation 29 refers to repository function as follow:

The FIU serves as the central agency for the receipt of disclosures filed by reporting entities. At a minimum, this information should include suspicious transaction reports, as required by Recommendation 20 and 23, and it should include other information as required by national legislation (such as cash transaction reports, wire transfers reports and other threshold-based declarations/disclosures).<sup>192</sup>

A second function is the analysis function. The unit usually provides additional value when it deals with the information it receive. Clearly, the act of this processing function is depended on the information sources to which the financial intelligence unit has access. Processing information may permit a financial intelligence unit to decide whether or not the information warrants a judicial investigation.<sup>193</sup>Under FATF Interpretive Note to Recommendation 29, FIUs should carry out the following forms of analysis:

1. Operational analysis uses available and obtainable information to identify specific targets (e.g. persons, assets, criminal networks and associations), to follow

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<sup>189</sup> Statement of Purpose of the Egmont Group of Financial Intelligence Unites (Guernsey 2004). Available at <sdm.gov.ua/.../statement%20of%20purpose%20of%20the%20Egmont%> accessed 20 April 2015.

<sup>190</sup> FATF Recommendations 29.

<sup>191</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press 2000) 184.

<sup>192</sup> FATF Interpretive Note to Recommendation 29.

<sup>193</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (Cambridge University Press 2000) 184.

the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of crime, money laundering, predicate offences or terrorist financing.

2. Strategic analysis uses available and obtainable information, including data that may be provided by other competent authorities, to identify money laundering and terrorist financing related trends and patterns. This information is then also used by the FIU or other state entities in order to determine money laundering and terrorist financing related threats and vulnerabilities. Strategic analysis may also help establish policies and goals for the FIU, or more broadly for other entities within the AML/CFT regime.<sup>194</sup>

A third function is the clearinghouse function. The unit acts as a channel for facilitating the exchange of information on suspicious or unusual financial transactions. This exchange can be linked to information in numerous types and can be occurred with a variety of partners; with domestic judicial authorities, with domestic regulatory agencies, or with foreign financial intelligence units.<sup>195</sup>

The FATF Interpretive Note to Recommendation 29 required the unit to be able to disseminate, spontaneously<sup>196</sup> and upon request,<sup>197</sup> information and the outcomes of its analysis to relevant competent authorities.<sup>198</sup> In addition to collect, analysis, and dissemination of information provided by financial institutions relating to suspicious transaction, there are some FIUs, which collect and keep currency transaction reports.<sup>199</sup> FIUs build up profiles of persons and money laundering techniques.<sup>200</sup> It should be noted that the FIU must securely protect information received, processed, held or disseminated and exchanged. That information should only be employed in accordance with agreed measures, regulations, policies, and applicable Statutes.<sup>201</sup>

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<sup>194</sup> FATF Interpretive Note to Recommendation 29.

<sup>195</sup> Guy Stessens, *Money Laundering: A New International Law Enforcement Model* (n193)184.

<sup>196</sup> Spontaneous dissemination: “The FIU should be able to disseminate information and the results of its analysis to competent authorities when there are grounds to suspect money laundering, predicate offences, or terrorist financing. Based on the FIU’s analysis, the dissemination of information should be selective and allow the recipient authorities to focus on relevant cases/information.” FATF Interpretive Note to Recommendation 29.

<sup>197</sup> Dissemination upon request: “The FIU should be able to respond to information requests from competent authorities pursuant to Recommendation 31. When the FIU receives such a request from a competent authority, the decision on conducting analysis and/or dissemination of information to the requesting authority should remain with the FIU.” FATF Interpretive Note to Recommendation 29.

<sup>198</sup> FATF Interpretive Note to Recommendation 29.

<sup>199</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 48.

<sup>200</sup> Charles Monteith and Pedro Gomes Pereira, ‘Asset Recovery’ (n 181) 147.

<sup>201</sup> FATF Interpretive Note to Recommendation 29.

## **B. The investigative phase**

It is well known that corrupters will do everything possible in order to conceal their corruptly acquired funds. For identifying and locating those funds and making the link to the corrupt action, the investigation will then be needed. The investigative process is the core activity that ought to come before any efforts to recover illicit funds.<sup>202</sup> Unless evidence is presented, connecting them to corruption action, a jurisdiction where funds have been hidden will not forfeit or repatriate the funds to the country of origin. In this case, the evidence has to be admissible in court proceedings.<sup>203</sup>

The investigation process has multiple aims. The first aim is that the investigation will connect corruptly obtained funds to the corrupt action. This connection may lead to forfeiture of those funds, and can be achieved by the collecting and presenting of either direct or circumstantial evidence. The second aim is that the investigation should set up adequate evidence to prosecute the corrupters for corruption, as well as money laundering. The last aim is that the evidence collected will further enable the State to trace and identify the proceeds of corruption. Hence, the tracing of funds, the investigation in money laundering, the setting up of the corruption charges and the seizure of funds are essentially all the same investigation.<sup>204</sup>

For the same goals, the FATF defines a “financial investigation” as an enquiry into the financial affairs linked to an illegal activity, in order to identify the extent of criminal networks and/or the level of criminality; identify and trace the proceeds of criminal activity, terrorist funds; and develop evidence that can be used in criminal proceedings.<sup>205</sup>

Especially in large cases, it will be necessary to create investigative teams. Investigative teams should consist of persons who have expertise in analysing of financial documents. In addition, they ought to include investigators who have experience in gathering business and financial intelligence; identifying complex unlawful schemes; following the money trail; and

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<sup>202</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia, “Effective Means of Investigation and Prosecution of Corruption” (2010). Available at < [www.oecd.org/corruption/acn/47588859.pdf](http://www.oecd.org/corruption/acn/47588859.pdf) > accessed 31 March 2015.

<sup>203</sup> OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 202).

<sup>204</sup> Tom Lasich, ‘The Investigative Process – a Practical Approach’ in International Centre for Asset Recovery (eds), *Tracing Stolen Assets - A Practitioner’s Handbook* (n) 49 at 49. OECD Anti-Corruption Network for Eastern Europe and Central Asia (n 202).

<sup>205</sup> FATF Interpretive Note to Recommendation 30 (Responsibilities of law enforcement and investigative authorities).

using such investigative techniques as electronic surveillance, search warrants, and witness interviews.<sup>206</sup>

For facilitating the exchange of information and skills, as well as help in debates and reviews about the recent developments in the case, the creating of joint task forces would be important. Joint task forces encompass a variety of agencies and law enforcement authorities. It may comprise of representatives from foreign affairs, treasury, and justice, as well as from the FIU.<sup>207</sup> Since corruptly obtained funds have an international nature, successful recovery of those funds cannot be achieved by the isolated actions of any individual jurisdiction, but via coordinated actions with other jurisdictions. A joint investigation with other jurisdictions should then be considered. Under Article 49 of the UNCAC, States Parties require to consider bilateral or multilateral agreements or arrangements concerning the establishment of joint investigative bodies. It provides:

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.<sup>208</sup>

For many years, joint investigations have been used as a type of international cooperation in transnational crimes, especially in respect of organised crime.<sup>209</sup> By using a joint investigation, efforts would not be duplicated. In addition, a joint investigation can facilitate cooperation and the exchange of information, as well as the development of a common strategy, that is, “a case may be pursued in one jurisdiction or multiple jurisdictions.”<sup>210</sup> Further, a joint investigation can avoid some of the pitfalls of making an MLA request, for example, alerting the targets to the investigation, and losing time with subsequent appeals because the practitioners are all working with a common purpose. Furthermore, where there are various venues with litigation in progress, a joint investigation can assist ensure that

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<sup>206</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24)23.

<sup>207</sup> *ibid* 24.

<sup>208</sup> Article 49 of the UNCAC.

<sup>209</sup> United Nations Office on Drugs and Crime, *Technical Guide to the United Nations convention against corruption* (United Nations 2009). Available at < [www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf) > accessed 10 April 2015.

<sup>210</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24)24.

litigants are told of what is occurring in the other jurisdictions.<sup>211</sup>In planning joint investigations, there are many issues that may need to be considered such as:

1. The criteria for choosing the location of a joint investigation;
3. The level of control exerted by judges or investigators;
2. The designation of a lead investigator to direct and monitor the investigation;
4. Financing and resourcing of joint investigations.<sup>212</sup>

The success of an investigation frequently mainly depends on the selection of investigative techniques. Interviews are a necessary element of any investigation and very important in a funds recovery case. An interview is “a specialised form of oral, face-to-face communication between people that is entered into for a specific task-related purpose associated with a particular subject matter.”<sup>213</sup>The purpose of interview is to obtain information through which the allegation or criminal activity under investigation is established or refuted. In addition, it helps to obtain all information and documents that in possession of the witness relative to the financial investigation. Further, it assists to obtain leads for further development of the case and to obtain the assistance of the witness for any later legal proceeding. Furthermore, it helps to obtain background and personal information regarding the witness and incentive for participation in the criminal activity.<sup>214</sup>Identifying and interviewing any straw men who involved in the case would be important. These individuals have taken considerable danger with little reward, and they may prefer to inform authorities about the individuals they are hiding rather than be implicated in a scheme.<sup>215</sup>

Evidence can be gathered by physical surveillance technique. It is the human act of secretly watching investigation targets to obtain information regarding the identity and activity of those targets.<sup>216</sup>This technique can be useful for identifying the following: co-conspirators; potential witnesses; real property or other assets; bankers, lawyers or accountants who perhaps involved in facilitating the laundering of corrupt proceeds; businesses; patterns of

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<sup>211</sup> *ibid* 25.

<sup>212</sup> United Nations Office on Drugs and Crime, *Technical Guide to the United Nations convention against corruption* (United Nations 2009) (n 209).

<sup>213</sup> Don Vogel, *Financial Investigations: A Financial Approach to Detecting and Resolving Crimes* (Diane Pub Co 1999) 228.

<sup>214</sup> Don Vogel, *Financial Investigations: A Financial Approach to Detecting and Resolving Crimes* (n213)230.

<sup>215</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24)52.

<sup>216</sup> Don Vogel, *Financial Investigations: A Financial Approach to Detecting and Resolving Crimes* (n 213)277.

conduct; and other types of intelligence that could be essential to the investigation.<sup>217</sup> As known as electronic surveillance, this is a formidable technique in the hands of the investigators. Generally, it is intended to capture the conversations of the targets.<sup>218</sup> It is probably extended to the use of listening devices, e-mail intercept, or phone, and the use of tracking devices.<sup>219</sup>

An undercover operation is another investigative technique. In an undercover operation, law enforcement agencies assume an identity different from their own for gathering information about criminal activity.<sup>220</sup> The purpose of such operations is to take part in contact with the corrupt parties, and thereby the undercover operatives can witness and expose the corrupt practices.<sup>221</sup> In funds recovery cases, this might include the controlled delivery of funds via an undercover agent.<sup>222</sup> However, in addition to that undercover operations are risky, they are time consuming and costly. It may take 3 to 6 months and cost as much as \$100,000.<sup>223</sup>

Mail cover is another investigative technique. It collects information by recording contained on the outside of pieces of mail. It does not involve recording or reading the contents of the postal item.<sup>224</sup> Mail covers can provide excellent sources of leads to the location of funds.<sup>225</sup> Information that obtains through mail cover is restricted and regarded confidential. Information cannot be used as evidence in court. It is only be used as an investigative tool.<sup>226</sup>

Many investigators employ investigative techniques known as a trash run. Investigators frequently find that picking up a suspect's rubbish is a helpful tool for identifying leads. Frequently, individuals get rid of significant documents and information related to their illegal activities when they throw out their garbage.<sup>227</sup> Information obtained such as banking information, bills, and documents related to financial assets, *etc* could be utilised to support

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<sup>217</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n24) 51.

<sup>218</sup> United Nations Office on Drugs and Crime, Technical Guide to the United Nations convention against corruption (United Nations 2009) (n 209).

<sup>219</sup> *ibid.*

<sup>220</sup> Don Vogel, *Financial Investigations: A Financial Approach to Detecting and Resolving Crimes* (n213)274.

<sup>221</sup> United Nations Office on Drugs and Crime, Technical Guide to the United Nations convention against corruption (United Nations 2009) (n209).

<sup>222</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n24)60.

<sup>223</sup> Eugene F. Ferraro, *Investigative Interviewing: Psychology, Method and Practice* (CRC Press 2014) 24.

<sup>224</sup> Hank Prunckun, *Scientific Methods of Inquiry for Intelligence Analysis* (2<sup>ed</sup> end, Rowman & Littlefield 2015)155.

<sup>225</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24)52.

<sup>226</sup> Kevin B. Kinnee, *Practical Investigation Techniques* (CRC Press 1994) 26.

<sup>227</sup> Don Vogel, *Financial Investigations: A Financial Approach to Detecting and Resolving Crimes* (n 213)282.

applications for search warrants by demonstrating a link between a target and other persons or funds.<sup>228</sup>

In addition to the above investigative techniques, search and seizure warrant can be an effective technique of gathering evidence. It assists to reduce the opportunity of the destruction and concealment of document. It can also avoid intentional or unintentional failure to produce documents following an agency request.<sup>229</sup> Search and seizure warrant can be executed on a house and business. Therefore, it is a great opportunity to collect evidence about criminal activity, identify co-conspirators, discover information regarding funds, and develop other leads that support the investigation.<sup>230</sup>

Since corrupters, in essence, operate in a borderless world, effective international cooperation by way of the MLA is then an essential element of transnational investigations. As has been explained, the MLA is a process by which one State provides help to another State with respect of gathering evidence for use in the investigation and prosecution of illegal activities.<sup>231</sup> As has been explained, there are two types of mutual assistance; informal assistance and formal assistance. The purpose of informal assistance is to obtain intelligence and information to assist investigation. The purpose of the formal assistance is to obtain evidence for use in criminal trial and forfeiture.<sup>232</sup> The type of informal assistance is no coercive investigative measures, joint investigation, and opening of a foreign case. The type of formal assistance is coercive investigative measures for example as search orders.<sup>233</sup>

## 5.12 Tools of the civil action

In order to enable the Iraqi State to locate and to secure its disappeared funds that may be subject to judgment, a framework has evolved within a civil action for assisting it. In the following section, the tools through which the Iraqi State can identify and preserve funds will be examined below.

### 5.12.1 Information gathering powers

#### A. Discovery

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<sup>228</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n24)51.

<sup>229</sup> Charles Monteith and Pedro Gomes Pereira, 'Asset Recovery' (n 181) 149.

<sup>230</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n24)54.

<sup>231</sup> See p 236.

<sup>232</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n24)129.

<sup>233</sup> *ibid* 129.

Since “mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation”<sup>234</sup> the parties to the case should, therefore, be required to disclose to each other each and every relevant document, which has been in their possession, custody or control, whether supportive or damaging to their case. Almost all the plaintiffs and their lawyers make certain efforts to gather facts as to the events that caused the lawsuit. Yet, this type of self-help may merely advance the fact gathering thus far for some reasons. There can be no doubt that many of the all-important facts are frequently in the defendant’s possession and within his knowledge. A cautious potential defendant may stonewall the lawyer who attempts to interview him. Unilateral interviews also entail the lawyer to walk a tight ethical line.<sup>235</sup>

To best serve justice, the parties to the lawsuit should completely disclose all potential information to the claim. This notion is particularly embodied in Rule 26 of the Federal Rules of Civil Procedure of 1938 (hereinafter known as the ‘FRCP’), which requires disclosure of certain information to the other party without the necessity of formal discovery requests.<sup>236</sup> An underlying purpose of such discovery is to avoid “trial by ambush” by removing evidentiary surprises at trial.<sup>237</sup> It can also be used to preserve evidence for trial and to narrow or eliminate issues.<sup>238</sup> Moreover, discovery is useful for identifying persons who deal with or acquired corruptly obtained funds, and thus identify parties to the proceedings. In the same vein, it is helpful for obtaining other injunctions, such as a temporary restraining order.

In addition to the required discovery of information from parties, the party may be required to obtain the requested information from its affiliates. In *Japan Halon Co. v. Great Lakes Chemical Corp*, a Japanese corporation filed an action for misappropriation of trade secrets. The defendant moved to compel discovery of unprivileged documents from the plaintiff’s Japanese parent companies, arguing that such documents were within the plaintiff’s possession, custody, and control due to the close nature of the three corporate entities. The court granted the motion, agreeing that coordination sufficed to show control within the

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<sup>234</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>235</sup> Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* (3<sup>rd</sup> edn, LexisNexis 2002) 303.

<sup>236</sup> Rule 26 of the Federal Rules of Civil Procedure of 1938.

<sup>237</sup> William W. Schwarzer, ‘Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?’ (1991) 74 (4) *Judicature* 178.

<sup>238</sup> Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* (n 235) 305.



meaning of Rule 34 of the FRCP despite a lack of actual managerial power and no overlapping directors.<sup>239</sup>

Whilst discovery is wide and permitted in relation to any matter not privileged that is relevant to the claim or defence of any party,<sup>240</sup> it is nevertheless not without limitations. The court may rule, on request from any party, on the propriety of particular document requests and enquiries seeking information. When there is a disagreement about pre-trial discovery, a “motion to compel” the other party to act in accordance with the discovery demand may be filed by the party seeking the discovery. In turn, a “motion for protective order” by which the court is requested to forbid or limit the other party’s discovery requests may be filed by the party resisting discovery.<sup>241</sup>

## **B. Interrogatories**

Interrogatories may be helpful in discovering the location of the disappeared Iraqi funds. The process of litigation is “a machine which you go into as a pig and come out as a sausage.”<sup>242</sup> This description seems to be quickly supported by litigants in corruption cases. Burdensome interrogatories cannot be separated from the popular folklore of corruptly obtained funds litigation. As the name implies, interrogatories are written questions submitted by one party to another party. The responding party must answer the questions separately and fully in writing and under oath within a prescribed period of time.<sup>243</sup> Whilst the underlying facts completely or partly, yet frequently are provided, by the client, the answers as well as the objections are almost always drafted by their lawyer.<sup>244</sup>

The main purpose of interrogatories is to gather information relevant to the facts of the case. They may also be used to determine the contentions of the opposing party and to identify persons or documents that support those contentions. Further, well-drafted interrogatories can be used to narrow the issues in preparation for trial. At last, interrogatories can facilitate settlement of the case.<sup>245</sup> Interrogatories may only be submitted to individuals who are a party

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<sup>239</sup> *Japan Halon Co. v. Great Lakes Chemical Crop.*, 155 F.R.D. 626 (N.D.Ind. 1993).

<sup>240</sup> Rule 26 (b) (1) of the FRCP (n236).

<sup>241</sup> Birgit Kurtz, ‘U.S. Discovery: An Introduction’ (2012) 37 (1) DAJV Newsletter 7.

<sup>242</sup> Ambrose Bierce and Chaz Bufe, *Devil's Dictionaries: The Best of the Devil's Dictionary and the American Heretic's Dictionary* (2<sup>ed</sup> edn, See Sharp Press 2004) 38.

<sup>243</sup> Rule 33 (b) of the FRCP (n236).

<sup>244</sup> Gene R. Shreve and Peter Raven-Hansen, *Understanding Civil Procedure* (n 235) 337.

<sup>245</sup> Peggy Kerley *et al.*, *Civil Litigation* (6<sup>th</sup> edn, Cengage Learning 2011) 289.

to the litigation. They may not be submitted to individuals who are not parties to the lawsuit.<sup>246</sup>

To avoid abuse of interrogatories, parties are permitted to serve no more than 25 interrogatories on each other, but that number may be increased with leave of the court.<sup>247</sup> In *Kendall v. GES Exposition Services, Inc.*, the court stated that interrogatory “subparts” are considered as one interrogatory “if they are logically or factually subsumed within and necessarily related to the primary question.”<sup>248</sup> The court also said that the appropriate enquiry is “whether the first question is primary and subsequent questions are secondary to the primary question” or “can the subsequent questions stand alone.”<sup>249</sup>

One of the most common objections to interrogatories is that they are unduly burdensome. This can be taken place if interrogatories are excessive in quantity, inappropriate or not tailored to the case, or both,<sup>250</sup> cumulative of other discovery,<sup>251</sup> or preceded by cumbersome, if not unintelligible, definitions.<sup>252</sup> In this regard, Professor Wayne D. Brazil writes:

Some attorneys serve lengthy sets of canned interrogatories if they perceive some advantage to be gained by psychologically or economically harassing an opposing party or counsel. Litigators also may use interrogatories to pressure or manipulate opposing counsel into doing such initial case preparation as factual investigation and legal research and analysis that properly should be undertaken by the propounding counsel and paid for by that counsel’s client.<sup>253</sup>

If this situation arises, a party may move the court for a protective order limiting the interrogatories or limiting their scope.<sup>254</sup> At the end of the day, one must question whether the answers to interrogatories are admissible in evidence. Rule 33 (b) of the FRCP provides that answers to interrogatories may be used to the extent permitted by the rules of evidence.<sup>255</sup> Thus, they can generally be admissible in evidence as the admissions of a party. However,

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<sup>246</sup> Robert Barr Smith and Celia Elwell, *Practical Legal Writing for Legal Assistants* (Delmar Cengage Learning 1996) 416.

<sup>247</sup> Rule 33 (a) of the FRCP (n 236).

<sup>248</sup> *Kendall v. GES Exposition Services, Inc.*, 174 F.R.D. 684 (D. Nev. 1997).

<sup>249</sup> *ibid.*

<sup>250</sup> *Frost v. Williams*, 46 F.R.D. 484, 485 (D. Md. 1969).

<sup>251</sup> *Spector Freight Sys., Inc. V. Home Indem.Com* 58 F.R.D. 162 (N.D. Ill.1973).

<sup>252</sup> *Diversified Products Corp. v. Sports Center Co.*, 42 F.R.D. 3 (D.Md. 1967).

<sup>253</sup> Wayne D. Brazil, ‘The Adversary Character of Civil Discovery: A Critique and Proposals for Change’ (1978) 31 (6) *Vanderbilt Law Review* 1312.

<sup>254</sup> Rule 26 (c) of the FRCP (n 236).

<sup>255</sup> Rule 33 (b) of the FRCP (n 236).

this value does not make those answers binding admissions. Departing from answers or an amendment to them may be filed at any moment before trial.<sup>256</sup>

### ***C. Subpoena duces tecum***

A non-party can play an important role in discovering information through which the disappeared Iraqi funds can be traced. Not often documents that advance the Iraqi State's claim are to be found in the defendant's control. Occasionally, a non-party has documents the Iraqi State needs. Therefore, if there is a good cause that the information sought will help to discover or keep the corruptly obtained Iraqi funds, *subpoena duces tecum* may then be ordered against a non-party including a bank. A *subpoena duces tecum* is a peremptory order compelling a non-party to bring the documents to the court. As Sir Frederick Jordan put it in an oft-repeated passage:

If duly served with such a writ and provided with the proper conduct money the person served must obey it and bring to the court the documents mentioned in the subpoena if he has them, unless he procures the writ to be set aside as oppressive; and he must produce to the court the documents brought unless he satisfies the court that some good reason exists why they should not be produced: this he is always at liberty to do if he can.<sup>257</sup>

A *subpoena duces tecum* would not comply with a bank's duties of confidence. There can be no doubt that a bank does owe a duty of confidentiality to its customers concerning the customers' banking affairs. This is a legal duty, which arises from an implied contract. The Supreme Court of Idaho in *Peterson v. Idaho First National Bank*, held:

It is implicit in the contract of the bank with its customer or depositor that no information may be disclosed by the bank or its employees concerning the customer's or depositor's account, and that, unless authorised by law or by the customer or depositor, the bank must be held liable for breach of the implied contract.<sup>258</sup>

The purpose of the banker-customer confidentiality relationship is the need to provide protection to the private affairs of the person from unwarranted third party scrutiny.<sup>259</sup> This protection is found in the Fourth Amendment to of the United States Constitution. It protects persons from unreasonable searches and seizures and explicitly mentions the right to be secure in one's "papers." It provides, "The right of the people to be secure in their persons,

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<sup>256</sup> Rule 33 (b) advisory committee's notes (n 236).

<sup>257</sup> *Commissioner for Railways v. Small*, 38 SR.N.S.W. 564 (1938).

<sup>258</sup> *Peterson v. Idaho First Nat. Bank*, 578, 367 P.2d 284 (Idaho 1961).

<sup>259</sup> Kris Hinterseer, *Criminal Finance, The Political Economy of Money Laundering in A Comparative Legal Context* (1<sup>st</sup> edn, Kluwer Law International 1989) 287.

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’’<sup>260</sup>

However, in response to restrictive interpretations of the Fourth Amendment in *United States v. Miller*,<sup>261</sup> the Right to Financial Privacy Act of 1978 (hereinafter known as the ‘RFPA’) was enacted to protect banking customers from undue intrusion into their financial privacy rights. The RFPA states, ‘‘no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution described...’’<sup>262</sup>

Nevertheless, the duty of the bank to maintain the confidentiality of customer records is not absolute, but subject to a series of qualifications. The RFPA allows disclosure of financial information only when the bank’s customer has given consent in accordance with the Statute, or when the disclosure is in response to an administrative subpoena or a summons, search warrant, judicial subpoena, or formal written government request that meets certain requirements.<sup>263</sup> The RFPA provides that a customer may authorise a financial institution to disclose his financial information by means of a signed and dated statement including specified information.<sup>264</sup> The government may obtain records by means of an administrative subpoena or summons only if ‘‘there is reason to believe that the records are relevant to a legitimate law enforcement inquiry.’’<sup>265</sup> Nevertheless, the government is required to send a copy of the subpoena or summons and a privacy notice to the customer, or personally serve him with a copy and a notice on or before the date of service on the financial institution.<sup>266</sup> The government is not entitled to receive the records sought by administrative subpoena or summons until the end of 10 days from service of the notice on the customer, or until the end of 14 days from the mailing of the notice to him.<sup>267</sup>

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<sup>260</sup> Fourth Amendment to the United States Constitution.

<sup>261</sup> In that case, the US Supreme Court did not interpret that the Fourth Amendment protected information voluntarily conveyed to a third party. *United States v. Miller*, 425 U.S. 435 (1976).

<sup>262</sup> 12 U.S.C § 3402.

<sup>263</sup> *ibid.*

<sup>264</sup> 12 U.S.C § 3404 (a).

<sup>265</sup> 12 U.S.C § 3405 (1).

<sup>266</sup> 12 U.S.C § 3405 (2).

<sup>267</sup> 12 U.S.C § 3405 (3).

Further, customer financial records may be obtained under a search warrant obtained through the Federal Rules of Criminal Procedure.<sup>268</sup> No later than 90 days after service of the warrant on the financial institution, the government must mail a copy of the warrant and a privacy notice to the customer. Upon application by the government, a court may extend the 90 days period.<sup>269</sup>

In addition to the above, customer financial records can be obtained via judicial subpoena. There must be a law that authorised the judicial subpoena. The judicial subpoena must be used only when the records sought “are relevant to a legitimate law enforcement inquiry.”<sup>270</sup> Like administrative subpoenas, copies of judicial subpoenas, together with privacy notice, must be served upon, or mailed to, customers whose records are being sought. Customer financial records may not be obtained until the end of 10 days after service of the notice upon the customer or until the end of 14 days after mailing of the notice.<sup>271</sup>

In the absence of administrative summons or subpoena authority reasonably available, the government that seeks financial records which “are relevant to a legitimate law enforcement inquiry” it can seek those records by a formal written request.<sup>272</sup> Nevertheless, a formal written request must be authorised by regulations promulgated by the head of the agency or department.<sup>273</sup> For using the formal written request method, the government must serve upon, or mail to, the customer a copy of the request and a privacy notice.<sup>274</sup> Customer financial records may not be obtained until the end of 10 days after service of the notice upon the customer or until the end of 14 days after mailing of the notice.<sup>275</sup>

None of the above-mentioned exceptions applies when a bank chooses to supply information voluntarily to government authorities upon suspicion of a breach of Statute deduced from records in its custody. It provides, “Nothing in this chapter shall preclude any financial institution, or any officer, employee, or agent of a financial institution, from notifying a Government authority that such institution, or officer, employee, or agent has information

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<sup>268</sup> 12 U.S.C § 3406 (a).

<sup>269</sup> 12 U.S.C § 3406 (b).

<sup>270</sup> 12 U.S.C § 3407 (1).

<sup>271</sup> 12 U.S.C § 3407 (2).

<sup>272</sup> 12 U.S.C § 3408 (1).

<sup>273</sup> 12 U.S.C § 3408 (2).

<sup>274</sup> 12 U.S.C § 3408 (4) (a).

<sup>275</sup> 12 U.S.C § 3408 (4) (b).

which may be relevant to a possible violation of any statute or regulation.’’<sup>276</sup> Under the exception, a bank may supply the name or identifying information regarding any person, firm, or account involved in and the nature of any suspected illegitimate activity,<sup>277</sup> and any additional information that may be essential for law enforcement authorities to establish if a crime has been perpetrated or to begin an investigation.<sup>278</sup> Suspicious activity reports do not make a bank accountable to those suspected of such activity.<sup>279</sup>

In addition to the above, the BSA adopts a different approach toward the relationship between banker and customer. As has been explained in this Chapter, it requires banks to report to the federal government regarding certain financial transactions. Failure to comply with the reporting requirements of the BSA resulted in civil and criminal penalties.<sup>280</sup>

Mark Nestmann has commented on the BSA’s approach ‘‘Although most people don’t know it, the federal government requires US financial institutions to spy on their customers. This is a consequence of the Financial Recordkeeping, Currency, and Foreign Transactions Act, more often referred to as the Bank Secrecy Act (BSA)’’<sup>281</sup> He adds that in the BSA, secrecy strips away from the large number of financial transactions by US citizens, and progressively more, by any person who in the world conducting business in US dollars.<sup>282</sup> The consequence is that bankers and other financial professionals do not work only in the interests of their customers any longer. The obligation to carry out surveillance and notify the government if any suspicious activity occurred was replaced with the obligation of discretion and to look after customers. Nestmann has observed that ‘‘Instead, the highest duty of financial professionals, reinforced by civil and criminal sanctions, is to act as unpaid undercover police.’’<sup>283</sup>

### **5.12.2 Preserving assets for judgment**

When the Iraqi State sues the defendants for its disappeared funds, it will probably encounter a risk that the defendants will make an effort to be unable to satisfy an expected future

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<sup>276</sup> 12 U.S. C § 3403 (c).

<sup>277</sup> *ibid.*

<sup>278</sup> Rutledge G. Philip, ‘Bank Secrecy Laws: An American Perspective’ (1996) 14 (3) *Dickinson Journal of International Law* 608.

<sup>279</sup> 12 U.S. C § 3403 (c).

<sup>280</sup> See p 250.

<sup>281</sup> Mark Nestmann, *The Lifeboat Strategy: vol 1* (4<sup>th</sup> edn, The Nestmann Group, Ltd. 2011-2012).

<sup>282</sup> *ibid.*

<sup>283</sup> *ibid.*

judgment by dissipating or hiding the funds. For preventing such a risk, safeguards are available to the Iraqi State, which will be examined below.

### **A. Pre-judgment attachment order**

Where there is a strong likelihood that a defendant will dissipate or remove Iraqi funds from the jurisdiction in a method designed to frustrate a future judgment, a legal representative of the Iraqi State can obtain a pre-judgment order to attach the defendant's assets, and therefore prevent the dissipation of assets. A pre-judgment attachment order is an *in rem* order, usually obtained *ex parte* (without notice being given to the defendant).<sup>284</sup> It is aimed at securing satisfaction of a money judgment, which a plaintiff may obtain after trial, and grant the attaching plaintiff security interests in the assets, as well as conferring on him priority over later creditors.<sup>285</sup>

In order to obtain a pre-judgment attachment order, a legal representative of the Iraqi State must show the probable validity of its claim in addition to a likelihood that a defendant will remove or dissipate his own assets from the jurisdiction.<sup>286</sup> Yet, the requirement of irreparable injury is assumed by meeting one of the statutory triggers. In addition, balancing of interests is not required in issuing an attachment.<sup>287</sup> If a court finds that attachment is illegitimate, namely that a legal representative of the Iraqi State established the action maliciously and lack of probable cause, a defendant can therefore seek to recover damages.<sup>288</sup>

Excluding usually wages and property, exempt from execution, an attachment order would virtually permit seizure of all the defendant's real and personal property, whether tangible or intangible. It may even be extended to property in the hands of non-party garnishees.<sup>289</sup> The availability of a pre-judgment attachment order mainly depends on the State statute.<sup>290</sup> Where there is no statute providing for the order, it does not exist. Clearly, any order issued without

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<sup>284</sup> See Rhonda Wasserman, 'Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments' (1992) 67 (2) Washington Law Review 270.

<sup>285</sup> Barry L. Zaretsky, 'Attachment without Seizure: A Proposal for a New Creditors' Remedy' (1978) 1978 (4) University of Illinois Law Forum 820.

<sup>286</sup> Rhonda Wasserman, 'Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments' (n 284) 270-271.

<sup>287</sup> Thomas E Patterson, *Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions* (Amer Bar Assn 2009) 293.

<sup>288</sup> *White Lighting Co. v. Wolfson*, 68 Cal. 2d 336, 66 Cal. Rptr. 697 (1968).

<sup>289</sup> Thomas E Patterson, *Handling the Business Emergency: Temporary Restraining Orders and Preliminary Injunctions* (n 171) 291.

<sup>290</sup> *Miller v. Smith*, 1 F.2d 292 (8<sup>th</sup> Cir. 1924).

a statute is null and void.<sup>291</sup> When in federal court, individuals involved in an action are subject to Rule 64 of the FRCP, which incorporates State law by making available to plaintiffs all the seizure remedies, which are obtainable under the laws of the State in which the district court sits.<sup>292</sup>

However, the main problem with a pre-judgment attachment order is a jurisdictional limitation. The order requires jurisdiction *in rem*, that is to say it only affects assets located within the court's jurisdiction. Consequently, a court cannot attach the defendant's assets, which are located outside its jurisdiction. Furthermore, a domestic court would not be able to attach assets located abroad. It may be very doubtful whether within a foreign court power an attachment order in relation to assets located in its jurisdiction can be issued, whether the court can well-timed be identified and whether attachment proceedings can well-timed be started to secure the meaningful substance matter adjudication.<sup>293</sup>

In that case, the US State and federal courts have prevented preserving defendants' assets to protect a possible future judgment. To mention but one example, in *Land Mfg., Inc. v. Highland Park State Bank*, it was held that where a person possessed a sum on deposit in Chase Manhattan Bank in New York, "the monies or credits were not located or attached in Kansas."<sup>294</sup> Federal courts also noted that attachment orders apply only against assets located within the State in which the federal court sits. In *Ebsco Industries, Inc. v. Lilly*, it was found, "attachment remedy was inadequate because it could not reach assets located outside State."<sup>295</sup>

It may be remarked from what has been said above that a pre-judgment attachment order is inefficient at attaching assets found outside the State or abroad. In that case, the plaintiff would need to commence proceeding (or numerous proceedings if assets are located in several States) in the State in which the defendant's assets are located.<sup>296</sup>

## **B. Preliminary injunction**

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<sup>291</sup> *Cecrle v. W.H. Jeffries*, 12 Ohio Misc. 25, 229 N.E.2d 477, (Ohio Com.Pl. 1967).

<sup>292</sup> Rule 64 of the FRCP (n 236).

<sup>293</sup> Peter F. Schlosser, 'Coordinated Transnational Interaction in Civil Litigation and Arbitration' (1990) 12(1) Michigan Journal of International Law 158.

<sup>294</sup> *Land Mfg., Inc. v. Highland Park State Bank*, 470 P.2d 782, 784 (Kan. 1970).

<sup>295</sup> *Ebsco Industries, Inc. v. Lilly*, 840 F.2d 333 (6<sup>th</sup> Cir. 1988).

<sup>296</sup> *ibid*. In this case, it found that, "attachment remedy inadequate because it could not reach assets located outside State, and plaintiff would have to initiate attachment proceedings in several States."



As an alternative to, or in addition to, a pre-judgment attachment order, preventing the defendant from dissipating or removing his assets from jurisdiction in an effort to render the judgment worthless may be through a preliminary injunction. A preliminary injunction operates *in personam*, and cannot be issued without notice being given to the defendant,<sup>297</sup> made completely within the discretion of the court.<sup>298</sup> It is issued to preserve the *status quo* and to prevent the defendant from irreparably injuring the plaintiff's interests prior to trial.<sup>299</sup>

In order to persuade a court to grant a preliminary injunction, a legal representative of the Iraqi State will usually need to demonstrate the following:

- that he will probably succeed on the merits of his claim
- that he will suffer irreparable injury if the preliminary injunction is not granted
- that this injury will outweigh the prospective injury to the defendant and
- that the granting of the preliminary injunction will not violate the public interest.<sup>300</sup>

Unlike a pre-judgment attachment order, a preliminary injunction does not confer on the Iraqi State a security interest in the defendant's property, and does not grant it priority over other creditors of the defendant. In *Delaware Trust Co. v. Partial*, the court noted, "issuance of the writ requested [injunction] would, presumably, not itself create a lien on the property subject to the order, as would a garnishment."<sup>301</sup> The issuance of a preliminary injunction may, in fact, assist creditors by barring the debtor from dissipating or hiding assets.<sup>302</sup>

When a legal representative of the Iraqi State obtains a preliminary injunction, any proprietary interests of a defendant in his frozen assets will be gone, and it therefore deprives the defendant of the use of his assets other than those needed for normal living expenses, legal costs, and business expenses. Where a defendant has no funds, aside from those subject to the preliminary injunction, and he wants the funds to conduct business, if he would be prevented from using them, the business possibly would suffer. If a defendant wants the funds to meet ordinary living expenses, or to pay his legal expenses, the injury will be even

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<sup>297</sup> Rule 65 (a) (1) of the FRCP (n 236).

<sup>298</sup> *Yakus v. United States*, 321 U.S. 414, 440 (1944).

<sup>299</sup> *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2<sup>d</sup> Cir. 1953).

<sup>300</sup> Lea B. Vaughn, 'A Need for Clarity: Toward a New Standard for Preliminary Injunction' (1989) 68 (4) Oregon Law Review 839.

<sup>301</sup> *Delaware Trust Co. v. Partial*, 517 A.2d 259, 261 (Del. Ch. 1986).

<sup>302</sup> Rhonda Wasserman, 'Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments' (n 184) 301-302.

greater. In *Commodity Futures Trading Comm'n v. Morgan, Harris & Scott*,<sup>303</sup> the court noted that “for a corporate defendant, freezing assets might cause disruption of defendant’s business affairs and, accordingly, threaten the very assets to be available for victims of the illegal actions. For an individual defendant, freezing assets might cause serious personal hardship.”<sup>304</sup>

In their efforts to reduce the injury to the defendant, courts can require the plaintiff to post bond “in such sum as the court deems proper” before the issuance of a preliminary injunction. The bond requirement serves to ensure the payment of costs and damages that the defendant may sustain if he is wrongfully enjoined.<sup>305</sup> Alternatively, courts can initially limit the scope of the preliminary injunction. Therefore, the court can freeze all assets except those needed for ordinary living expenses or legal costs.

Although the bipolar structure of lawsuits, (that affect only two private parties) have demised,<sup>306</sup> a preliminary injunction to frozen assets is highly unlikely to affect the rights of innocent non-parties, who may be in control of, or in possession of the defendant’s assets. It only affects defendants, whoever has a part or interest in an action, and those people in concert with them to overcome the claim of the plaintiff.<sup>307</sup>

A preliminary injunction, unlike a pre-judgment attachment order, acts *in personam*, and it may, therefore, be granted affecting assets outside the jurisdiction of the court. In *Ebsco Industries, Inc. v. Lilly*, a purchaser of a company brought an action against the seller for fraud. The defendant concealed his assets and refused to cooperate in locating these assets. In that case, the court granted a preliminary injunction that extended to assets outside the jurisdiction (which was Ohio).<sup>308</sup>

A related issue may arise where the defendant dissipates or conceals his assets abroad. The question may then be posed whether a preliminary injunction can apply to the defendant’s assets located abroad. In *Republic of the Philippines v. Marcos*, in response to the plaintiff’s petition for a preliminary injunction, the district court granted an injunction barring the

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<sup>303</sup> *Commodity Futures Trading Comm'n v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678 (S.D.N.Y. 1979).

<sup>304</sup> *ibid.*

<sup>305</sup> Rule 65 (c) of the FRCP (n 236).

<sup>306</sup> See Abram Chayes, ‘The Role of the Judge in Public Law Litigation’ (1976) 89 (7) *Harvard Law Review* 1289.

<sup>307</sup> Rule 65 (d) of the FRCP (n 236).

<sup>308</sup> *Ebsco Industries, Inc. v. Lilly*, (n 295).

defendants from disposing of their assets located in the U.K. and Switzerland.<sup>309</sup> The Court of Appeals upheld a district court order and ruled:

The injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach ... A court has the power to issue a preliminary injunction to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies ...The injunction here enjoins the defendants from secreting those assets necessary to preserve the possibility of equitable relief.<sup>310</sup>

### C. Temporary restraining order

Only in exceptional circumstances, but in urgency, the court may issue a temporary restraining order to preserve *status quo* and to prevent immediate and irreparable injury to the Iraqi State until a full hearing can be held. When dissipation of assets is a manifest threat, a legal representative of the Iraqi State can obtain a temporary restraining order to freeze assets.<sup>311</sup> It is not an ordinary order, but as stated by the US Supreme Court it is an extraordinary remedy that is reserved for real emergency situations.<sup>312</sup>

A temporary restraining order may be issued *ex parte* without notice to the adverse party if facts clearly show that the order is needed to evade immediate and irreparable harm, and the attorney certifies the efforts made to give notice or reasons supporting why notice should not be required.<sup>313</sup> This rule meets constitutional “due process” requirements. In *Carroll v. President and Commissioners of Princess Anne*, the US Supreme Court stated, “there is a place in our jurisprudence for the *ex parte* issuance, without notice, of temporary restraining orders of short duration ...”<sup>314</sup>

This situation justifies considering that, a temporary restraining order is ordinarily not appealable, as it would be unfair to permit an appeal when the trial judge did not command sufficient time for a full presentation of the facts and law.<sup>315</sup> Regarding the standards that use in issuing a temporary restraining order, the Supreme Court of Alabama stated, “the elements

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<sup>309</sup> *Republic of the Philippines v. Marcos*, 862 F. 2d 1355 (9<sup>th</sup> Cir.1988).

<sup>310</sup> *ibid.*

<sup>311</sup> Rule 65 (b) of the FRCP (n 236).

<sup>312</sup> *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133 U.S., (1988).

<sup>313</sup> Rule 65 (b) (1) of the FRCP (n 236).

<sup>314</sup> *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347 (1968).

<sup>315</sup> *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414 (5<sup>th</sup> Cir.1957).

required for the issuance of a temporary restraining order (TRO) are the same as the elements required for the issuance of a preliminary injunction.’’<sup>316</sup>

### 5.13 Final dispositions

The Iraqi State can recover its corruptly obtained funds not only through the judgment of the court with a full trial, but also through settlement and summary judgments or default judgments. Once a legal representative of the Iraqi State succeeds in locating and securing defendant’s funds, and obtained disclosure of evidence to help his claim, he will seek to recover funds as long as the defendant has no reasonable defence that can overcome a case. In many cases, litigation is terminated through settlement. As the name implies, a settlement is an agreement (contract) between dispute parties, thereby an action is terminated without going to trial.<sup>317</sup> To put it another way, settlement is a rational manner of avoiding the risk of the potential results, which would not be as good as settlement.<sup>318</sup> The reasons why the disputing parties want to settle the case are various. Professor Stephen N. Subrin has pointed out six reasons:

- the uncertainty of legal proceedings
- efficiency, time, and expenses
- more level playing field and lower expectations
- hassle
- fear and anxiety
- lawyer perception of client’s needs and reactions.<sup>319</sup>

All of these reasons put pressure on the defendant to settle the case before or after the trial has started. Indeed, in light of settlement enables the defendant to keep a percentage of his funds, it will probably only be attractive to him in this situation. Whether the State desires to a make settlement or not will hinge on the strength of the case and on conditions offered. However, more often than not, there is unwillingness by States to come to an agreement, which will permit the defendant to keep some of his corruptly acquired funds.<sup>320</sup>

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<sup>316</sup> *Lott v. Eastern Shore Christian Center*, 908 So.2d 922 (Ala.2005).

<sup>317</sup> Peggy Kerley *et al.*, *Civil Litigation* (245) 391.

<sup>318</sup> Stephen N. Subrin, ‘A Traditionalist Looks at Mediation: It’s Here to Stay and Much Better than I Thought’ (2002-2003) 3 (2) Nevada Law Journal 204.

<sup>319</sup> *ibid* 203.

<sup>320</sup> Tim Daniel and James Maton, ‘Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials’ (n11) 261-262.

In any event, there can be no doubt that a settlement is useful, as it avoids high action costs, as well as decreasing a judge's caseloads, it also ensures that funds derived from corruption activities will return to the State. Indeed, the Interim Military Government of Nigeria, which took over after General Sani Abacha passed away, recovered in the region of \$700 million through settlements in 1999.<sup>321</sup> For having a reasonable possibility of settlement of the claim, the minimum offer of the plaintiff, that is to say, the smallest amount he would accept in settlement of the claim-be smaller than, or equal to, the maximum amount the defendant would offer.<sup>322</sup>

When the settlement agreement is chosen, careful wording of the agreement is essential to guarantee the desired results. It is necessary to ensure that settlement agreement is not complete and final of all claims against the defendant unless this is the definite intent. Seldom do those who corruptly obtained funds are honest regarding disclosure of his funds, and rarely do all of his funds identified at the time of settlement.<sup>323</sup> The State should, therefore, verify that a settlement agreement does not prevent recovery of further funds that are revealed after settlement.<sup>324</sup> Perfectly, a defendant will be required to make complete disclosure of his funds as part of a settlement. Failure to do so will allow additional action.<sup>325</sup>

Most civil actions are not only settled, but also most are settled in secrecy. Such a secret settlement requires disputing parties to keep certain and secret all of the settlement information.<sup>326</sup> Both a defendant and a State have an incentive for entering into a confidential settlement. The defendant has an incentive to settle an action secretly for creating value in the settlement.<sup>327</sup> If the defendant is able to suppress information as to the settlement, such information is not likely to be publicised. In this regard, the value is to avoid the dissemination of information concerning the potential fault of the defendant or crime. In addition, there exists an incentive to suppress the truth that the defendant was litigated, and not considered a fault or a crime. The existence of a claim only frequently creates aspersions

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<sup>321</sup> *ibid.*

<sup>322</sup> Geoffrey P. Miller, 'Some Agency Problems in Settlement' (1987) 16 (1) *Journal of Legal Studies* 191.

<sup>323</sup> Tim Daniel and James Maton, 'Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials' (n 11) 261-262.

<sup>324</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 173.

<sup>325</sup> Tim Daniel and James Maton, 'Civil Proceedings to Recover Corruptly Acquired Assets of Public Officials' (n 11) 261-262.

<sup>326</sup> Erik S. Knutsen, 'Keeping Settlements Secret' (2010) 37 (4) *Florida State University Law Review* 950.

<sup>327</sup> See Christopher R. Drahozal and Laura J. Hines, 'Secret Settlement Restrictions and Unintended Consequences' (2006) 54 (5) *University of Kansas Law Review* 1471.

of fault when there is no fault, in effect, that exists. This can damage the reputation of the defendant, as well as client base.<sup>328</sup>

Moreover, the defendant may frequently want to keep secret the facts regarding any payments to the plaintiff. If there is the dissemination of information as to a payment or settlement, the public is able to infer, rightly or wrongly, that there must have been some fault on the part of the defendant.<sup>329</sup> Request for a secrecy settlement by the defendant with State may be refused, as it is too difficult to get the courts to “seal” a file. Courts are open to the public and exceptionally reluctant to issue a confidentiality order.

In addition to the above, a plaintiff also has an incentive to settle an action secretly for creating value in the settlement talks. It could theoretically be possible that a plaintiff’s just bargaining counter in a dispute is secrecy itself. Imagine that the plaintiff has inadequate evidence of a defendant’s fault, it is very perilous and costly for a plaintiff to gamble on a trial to show fault. At least, the plaintiff has the option to bargain for secrecy if a particular defendant values secrecy to any degree. Similar to the defendant, a plaintiff may frequently want to keep the financial value of the settlement confidential. If the amount of the settlement is substantial, a plaintiff may be concerned about the undue and unwelcome attention, which a sudden monetary arrival may bring. In an opposite way, if the amount of the settlement is not substantial, a plaintiff may be concerned that the public may view his settled dispute as unsuccessful (even if, in effect, it is not).<sup>330</sup>

As an alternative to or in addition to the settlement, the judgment of the court will be another way for recovering corruptly obtained funds. This may take place at the end of trial proceedings. In addition, if the Iraqi State has strong evidence supporting its claim, and the defendant does not have a reasonable defence to the claim, the State may move for the summary judgment against the defendant. A summary judgment is a procedure whereby the State can dispose of part or all of a claim without the need for trial. Such a procedure is helpful for bringing concentration on the true aspects of dispute in a case, and thus weak cases would be ended from dragging on. In a similar way, if the defendant fails repeatedly to comply with court orders that are concerned with asking for explanation in depth on facts and documents, it may result in judgment for the State in default of compliance. Both summary

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<sup>328</sup> Erik S. Knutsen ‘Keeping Settlements Secret’ (n 326) 951.

<sup>329</sup> *ibid* 952.

<sup>330</sup> *ibid*.

and default judgments permit courts to abbreviate the process and give judgments without the need for a full trial.<sup>331</sup>

## 5.14 Conclusion

A civil action mechanism outlined in this Chapter can be a powerful tool for securing and recovering Iraqi funds that have disappeared as a result of corruption activities during the period when the CPA was governing Iraq. This Chapter has brought mechanisms, set out in Chapter V of the UNCAC in order to recover the proceeds of corruption activities from abroad. In the analysis of the criminal forfeiture mechanism, it has shown that there are limits to its effectiveness. Criminal proceedings are constrained by jurisdictional barriers and require a higher standard of proof. This can cause problems with respect to obtaining a conviction and lower prospects of a successful recovery of corruptly obtained funds. Moreover, a criminal forfeiture mechanism cannot be used by the Iraqi State, as the CPA Order Number 17, as well as American criminal law grants, the US courts the jurisdiction over criminal activities that took place in Iraq during and after the termination of the CPA.

A scrutiny of the civil forfeiture mechanism has shown that it is a powerful weapon against corruption activities. It may also address some of the difficulties identified in the criminal forfeiture mechanism. Yet, a civil forfeiture is still new; relatively many States do not have a system of civil forfeiture, and Iraq has not adopted it yet. Examination of the mutual legal assistance mechanism has shown that it may not be effective to recover disappeared Iraqi funds. The legal system of the Iraqi State does not act in accordance with international law criteria; the Iraqi Government is fragile, and corruption is prevalent in Iraq. All those reasons can make the requested State hesitate or reject a request for assistance from the Iraqi State.

Therefore, the Chapter concludes that a civil action mechanism is more effective for recovering disappeared Iraqi funds, than other are mechanisms. The Chapter identifies the CPA's personnel; those who have taken part in the acts of corruption or hold assets, and those who have received or facilitated the corrupt activities are defendants in a civil action. Relying on the probability of the existence of Iraqi funds within the US territory, or the presence of the defendants in the US territory, the civil courts of the US will be the place to bring a civil action by the Iraqi State. The Chapter has shown that formal arrangements and surreptitious

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<sup>331</sup> Jean-Pierre Brun *et al.*, *Asset Recovery Handbook: A Guide for Practitioners* (n 24) 173.

devices are methods in which the US brings defendants, who are outside of the US territorial borders, within the personal jurisdiction of its courts.

Whilst a civil action has muscle with respect to recovering corruptly obtained funds, it cannot be free from challenges. The lack of political will of the leadership in Iraq has been explored as a challenge. In order to overcome such a challenge, it is suggested that Iraq needs to adopt a comprehensive strategy to identify recovering its disappeared funds as a priority, as well as to ensure alignment of objectives, tools, and resources to this end. Iraq needs to commence civil action in the civil courts of the US, as to where the defendants and corruptly acquired funds are located. With respect to the challenge of the expensive costs of bringing a civil action, it is found that assistance from donors to cover the costs of a civil action, services *pro bono* (for the public good), and contingency fee systems can contribute to solve the problem.

A civil action is essentially remedial in nature, granting the Iraqi State with a remedy against the violator of its rights. It enables the Iraqi State to recover its funds and /or to be compensated for its injury by corrupt acts. In order to track, identify, and locate corruptly obtained funds, and to develop the evidence necessary to prove the corruption activity, the Chapter provides tools and techniques used by investigators to trace those funds. Because of the international nature of corruptly obtained funds, international cooperation in tracing those funds has established. Since defendants attempt to transfer or dissipate their funds in an effort to frustrate the potential judgment against them, and since such action causes harm to the Iraqi State, the Chapter has provided safeguards to prevent the defendants from hiding or dissipating funds from the jurisdiction.

The Chapter has shown that the judgment of the court is not always the only way to recover the proceeds of corruption. The ill-gotten gains can also be recovered, without the need for a full trial, through summary judgments or default judgments. Whilst settlement is of use in avoiding prolonged and high costs litigation, it may not be attractive to the Iraqi State to reach a deal that will permit defendants to keep some of their illegal funds.



## **Conclusion**

### **Introduction**

The main objective of this thesis was to diagnose lessons that should be learned from the CPA's failure in its duty relating to preventing financial criminal activities in order to heed the lessons learnt, that should be known and understood, before an occupying power can be established in a foreign country. It has also sought to propose a mechanism for assisting the Iraqi State to recover its funds that disappeared as a result of corrupt activities during the period when the CPA was governing Iraqi territory.

This thesis has demonstrated that the CPA failed to discharge its legal duty as the occupying power in occupied Iraq with respect to preventing financial criminal activities. As a result, huge sums of illicit funds were generated by those activities, and those who hold these proceeds should not be allowed to retain those funds. That is to say that the CPA did not exercise its due diligence obligation as required by Article 43 of Hague Regulations; namely the CPA did not act in a reasonable precautions and diligent manner by not taking all the necessary and appropriate measures in order to prevent criminal groups from committing acts against the inhabitants of occupied Iraq, and against property. In addition, the CPA omitted to act and did not exercise due diligence in preventing some of its personnel from illegal use of funds of the occupied territory.

This thesis has examined the proper and feasible measures that were supposed to be taken by the CPA to prevent financial criminal activities in occupied Iraq. Therefore, the research question posed in terms of those measures was: What are the reasons that led to the failure of the CPA to comply with its duty with regard to preventing financial criminal activities in occupied Iraq? The thesis has also sought to find solutions to corruptly obtained funds generated in occupied Iraq. Hence, the research question asked was: What are the mechanisms that could be proposed to make crime a non-profit activity?

This concluding Chapter is an analysis of the main findings at each stage of the research and sets out recommendations that can be made as a result of undertaking this work.

### **Summary of research findings**

**Introduction:** The Introduction Chapter set out the problem statement and the rationale behind the undertaking of this thesis. The available literature was reviewed. It was found that research into the failure of the CPA to prevent financial criminal activities in occupied Iraq that produced illegal proceeds; the process of the criminal forfeiture of funds stemming from corrupt activities that took place in Iraq and funds were found within the territory of the US; as well as the process of recovering Iraqi funds that disappeared because of corrupt activities during the CPA's tenure; was a gap in the body of existing literature that stimulated and shaped this work.

### **Part One: The Coalition Provisional Authority: legitimacy, duty, and maladministration (Problem)**

The occupation of enemy territory has produced a series of international rules in order to regulate the conduct of an occupying power therein. Among those rules is the principle that an occupying power is, throughout its existence, duty bound to take positive measures, as is necessary and proper, so as to maintain public order and life, including preventing financial criminal activities in an occupied area. Part One of the thesis assessed whether the CPA as an occupying power in Iraq territory had satisfied this standard, and highlighted widespread types of financial criminal activities (the crime of kidnapping, corruption activities and the looting of cultural property) to show that the CPA had breached the rule by its failure to take reasonable steps or to provide measures required to prevent those activities to a reasonable degree. Part One also sought to put estimates in relation to the amount of illegal funds generated from financial criminal activities that occurred in occupied Iraq.

**Chapter 1. Analysing the CPA as an occupying power in Iraq territory:** Chapter One (The Coalition Provisional Authority: legitimacy and governance) established that the CPA was created so as to fill the spatial problem, namely the exercise powers of government temporarily, according to a legal obligation, enshrined in the law of occupation, imposed on the occupants that entered into Iraqi territory as a result of illegal war. The Chapter scrutinised the authority of the CPA in the administration of occupied Iraq, and found that even though there were other actors during the period of occupation, the CPA had the upper hand as the occupying power in the running of Iraqi territory. Although the CPA was comprised of members of Coalition countries, it is considered that the US enjoyed official decision-making power. Nevertheless, the US's power does not absolve other countries of their responsibility within the area subject to their effective control. The Chapter traced the

consequences of the termination of the CPA, and brought forth the judgment of the ICJ in *Democratic Republic of the Congo v. Uganda*, in order to confirm that international responsibility for the violation of occupation law did not expire with the disbanding of the CPA.

***Theoretical implications:*** This Chapter highlighted the need for the proper establishment of an occupying power in an occupied territory for fulfilling its legal duties. Therefore, with regard to the duty to prevent financial criminal activities, there is a requirement as to the creation of an occupation administration, containing specialised units to carry out law enforcement activities in the occupied territory to provide a reasonable degree of security for the citizenry of that territory.

## **Chapter 2. The duty of the CPA to prevent financial criminal activities in occupied**

**Iraq:** In Chapter Two (The duty of the Coalition Provisional Authority in prevention of financial criminal activities) an analysis was carried out on the nature of the duty by which the CPA was obligated under the law of occupation to prevent financial criminal activities in the occupied area. The main findings and theoretical implications of this analysis are set out below.

***(I) The duty of prevention of financial criminal activities requires the actual physical presence of the foreign forces in the occupied territory:*** It is therefore suggested that financial criminal activities cannot be effectively prevented by exercising power from outside the boundaries of the occupied territory. In addition, it has been shown that superiority in the sky cannot establish a state of occupation.

***(II) The duty of the CPA to prevent financial criminal activities emanates from the law of occupation:*** It is therefore found that the United Nations Security Council Resolution (1483) did not create the duty in question: it simply recognised that it already existed in the law of occupation and called upon the CPA to comply with it.

***(III) The duty of prevention of financial criminal activities requires the obligation of due diligence:*** It was therefore established that the CPA was obligated to take affirmative and feasible steps *as far as possible* in order to prevent criminal bands from perpetrating criminal acts towards the civilian population and property in occupied Iraq. That is to say, the CPA incurred an obligation not of result, but of conduct. The Chapter applied the judgment of the ICJ in *Democratic Republic of the Congo v. Uganda*, in order to show what was expected of

the CPA in order for it to meet the due diligence obligation with regard to preventing *financial* criminal activities in occupied Iraq, that is to say the obligation to take proper and positive measures to prevent crime.

*(IV) The duty of prevention of financial criminal activities requires the CPA to exercise policing operations, which involves law enforcement activities:* It was established that criminal activities that produced funds (the crime of kidnapping and the looting of cultural property) are not effectively prevented through military operations, which are governed by International Humanitarian Law on the conduct of hostilities. Furthermore, the opinion that the International Human Rights Law is the only body of law that regulates the use of force in law enforcement operations in occupied territory is refuted. The Law of Occupation can provide a valuable legal framework for carrying out law enforcement activities within the framework of the CPA's duty to prevent criminal activities in occupied Iraq.

*(V) The duty of prevention of illegal use of funds in occupied Iraq:* It was found that an occupation is a form of trusteeship, under which an occupying power is obligated to act with a status akin to that of a trustee on behalf of the occupied population, or on behalf of the displaced power. It is therefore certain that the role of trustee required the CPA to manage and spend the funds of occupied Iraq for the benefit of the Iraqi population in a shrewd and transparent manner. It must handle funds in accordance with the general principles of trusteeship, which were set out by Judge Arnold McNair in his Separate Opinion in *the International Status of South-West Africa* case.

### **Chapter 3. Failure of the CPA to prevent financial criminal activities in occupied Iraq:**

In Chapter Three (Cases about the maladministration of the Coalition Provisional Authority) research was carried out on certain major categories of financial criminal activities, namely (the crime of kidnapping, corruption activities and the looting of cultural property) that took place during the CPA's tenure in Iraq. Estimates were put forth about the extent of illicit funds that emanated from those activities. The main findings and the practical measures of this analysis are set out below.

*(I) Existence of financial criminal activities in occupied Iraq:* Chapter Three has shown that by using data, that there were widespread financial criminal activities committed, during the time in which the CPA was governing Iraq territory, by criminal bands and armed groups against the civilian population, as well as against property in Iraq territory. Corruption activities were also perpetrated by some CPA personnel, or by some persons contracted with

the CPA against the funds of occupied Iraq. This Chapter is concerned only with criminal activities that have been categorised as money-generating. With regard to the crime of kidnapping and the looting of cultural property, the Chapter requires law enforcement action to be undertaken to combat them in accordance with international human rights law and the law of occupation in order to reasonably attempt to prevent those activities. Regarding corruption activities, it requires international accounting standards to be used in order to prevent corruption activities. Furthermore, the Chapter highlights the proper and feasible measures that the CPA was required to take in order to comply with its duty with regard to preventing financial criminal activities.

**(II) Failure of the CPA to exercise due diligence:** It is evident that the framers of Article 43 of the Hague Regulations granted an occupying power a broad authority, so as to take all reasonable or necessary measures to prevent criminal activities in an occupied area. The Chapter sets out what are the appropriate steps that were required of the CPA to adopt in order to execute its legal duty, and thereby avoid the international responsibility for breaching international obligations enshrined in the law of occupation. It was found that whilst the CPA took some measures, they were inappropriate, and did not satisfy the required standard, that is to say the due diligence obligation.

**(III) The extent of illegal funds derived from criminal activities:** Accurate estimates vis-à-vis the amount of illicit money generated in occupied Iraq were difficult to measure, by reason of the lack of sufficient data. An analysis of the available data found evidence of generating funds from criminal activities that took place during the CPA's tenure. It is certain that the illicit funds thereby generated was substantial, in particular with respect to corruption activities noted in the Report, 'Oversight of Funds Provided to Iraqi Ministries through the National Budget Process' compiled by the Special Inspector General for Iraq Reconstruction, who estimated misappropriated funds to be in the region of \$8.8 billion.<sup>1</sup>

**Practical measures for discharging the duty of preventing financial criminal activities:** The Chapter found that the military forces that are present on the territory of another State, as the result of a war, are required to be sufficient in number and properly trained for performing law enforcement operations, in order to prevent major criminal activities such as kidnapping and the looting of cultural property. Alternatively, military forces should be accompanied by

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<sup>1</sup> Special Inspector General for Iraq Reconstruction, 'Oversight of Funds Provided to Iraqi Ministries through the National Budget Process' No. 05-004 (30 January 2005).

specialised law enforcement units that are adequate to deal with criminal activities in an occupied land.

These measures are different from the measures required to prevent corruption activities. An occupying power should administer the funds of occupied territory in accordance with international accounting standards. It should at the earliest hire an independent auditing firm and uses double-entry bookkeeping system, as well as uses effectively record keeping. It also should establish implementing agencies in order to conduct oversight of the spending of funds in, and for the occupied territory's benefit, in order to ensure that the occupying administration uses those funds in a transparent way and for the benefit of the occupied population.

## **Part Two: Making Crime a Non-Profit Activity (Solutions)**

Part Two of the thesis scrutinised what legal tools that could be suggested for stripping wrongdoers of financial rewards emanating from corruption activities and how to recover Iraqi funds that disappeared as a result of corruption activities during the period of the CPA. Illegal funds are to be considered as an evil, a plague of malevolence, which is spreading through society. This understanding of illegal funds formed the foundation for emergence of legislative strategies for an attack on the financial element of crime. This Part of the thesis analysed specific types of those strategies through which the corruptly obtained funds could be possibly forfeited and recovered to the rightful owner or to its country of origin.

### **Chapter 4. Criminal forfeiture of funds derived from corruption activities committed in**

**Iraq:** In Chapter Four (Criminal forfeiture of corruptly obtained funds generated in the Iraqi territory and found in the US territory) research was carried out on the process of criminal forfeiture of corruptly acquired funds obtained by some the CPA's personnel, or by some who contracted with the CPA, as well as by some who remained in Iraq after the end of the CPA. This section will consider the main findings of this Chapter.

*(I)The amount of forfeited funds in the US courts does not represent all funds illegally generated in Iraq:* even though the US criminal forfeiture statutes have been successfully used to forfeit some corruptly obtained funds, it is small compared with the amounts of funds that have disappeared during the CPA's tenure. It is therefore very difficult to draw conclusions about the effectiveness of the US criminal forfeiture system in acting as an effective deterrence of malefactors by depriving them from their ill-gotten gains.

However, the determination of the amount of forfeited funds in the US courts is useful to understand the size of funds deposited into the Federal Asset Forfeiture Fund. In this way, the thesis shows the benefit of funds deposited into that Fund to local, State, federal, or international law enforcement agencies taking part in the seizure.

***(II) Jurisdiction for criminal forfeiture:*** The way in which funds were generated in Iraq territory, and have been forfeited in the US territory, demonstrates that the criminal forfeiture jurisdiction of the US courts can be applied over funds stemming from corruption activities that occurred in Iraq. That is to say, there was no jurisdiction for the Iraqi courts over those activities, and thereby no criminal forfeiture jurisdiction. This US criminal forfeiture jurisdiction illustrates that American law has extraterritorial jurisdiction. It is also the outcome of the CPA Order Number 17, which exempted from the Iraqi legal process the personnel of the CPA.

**Chapter 5. Proposal for Recovering Iraqi funds that had gone missing because of corruption activities during the CPA's tenure:** In Chapter Five (Recovering Iraqi funds that disappeared as a result of corruption activities during the period of the CPA (Civil action mechanism)) an analysis was carried out on the mechanisms enshrined in the United Nations Convention against Corruption of 2005 relating to recovery of the proceeds derived from corrupt activities and hidden in foreign jurisdictions. The main findings and proposals this Chapter makes are set out below.

***(I) The Iraqi State cannot use the criminal forfeiture mechanism for recovering it funds that disappeared during the period of the CPA's existence:*** This is because the CPA Order Number 17 effectively shields the CPA's personnel who committed criminal activities in Iraq from Iraqi jurisdiction. However, this immunity does not mean that the CPA personnel's acts were legitimate. In addition, their immunity does not mean that the Iraqi State cannot sue them for their illegal actions in the jurisdiction of their sending States.<sup>2</sup>

***(II) The Iraqi State has not adopted the civil forfeiture mechanism:*** It may be difficult to achieve the required level of international co-operation where the requested State does not

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<sup>2</sup> “Sending State means a State providing personnel, International Consultants, services, equipment, provisions, supplies, material, other goods or construction work to: (a) the CPA, (b) the MNF, (c) international humanitarian or reconstruction efforts, (d) Diplomatic or Consular Missions, or (e) until July 1, 2004, Foreign Liaison Missions.” Section (1) of CPA Order Number 17 of 27 June 2004 (Revised), Status of The Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq.

allow civil forfeiture. In addition, even if Iraq has a civil forfeiture system, the Iraq courts, have no jurisdiction over criminal activities that occurred in Iraq during and after the dissolution of the CPA because of the CPA Order Number 17, which prevented the Iraqi State from exercising jurisdiction over the CPA's personnel.

*(III) Mutual legal assistance is not effective:* it is suggested that Iraq needs to improve its criminal justice system in order for other States to have confidence and trust in that system. In order for other States to provide assistance to the Iraqi State, Iraq needs to possess effective legal and practical measures and machinery to fight corruption. However, this suggestion is difficult to achieve, as Iraq is considered a fragile State.

*(III) Civil action is the best mechanism:* it is suggested that the Iraqi State, in order to recover its disappeared funds, should bring a civil action in the civil courts of the US, based on subject matter jurisdiction or personal jurisdiction. The civil action would enable the Iraqi State to recover corruptly acquired funds and/or to obtain compensation for injury arising from corrupt acts that took place during the CPA's tenure. Complexities were explored in relation to the possibility of bringing a civil action. The political will of the leadership in the Iraqi State, and the costs of bringing a civil claim, should be considered at the forefront of any civil proceedings. Toolkit and techniques for tracking and identifying, and locating Iraqi funds are suggested.

## **Conclusion and Recommendations for Future Research**

The perpetration of financial criminal activities in occupied Iraqi territory on a large scale, leading to the generating of substantial illicit funds by virtue of the failure of the CPA to take necessary and proper steps to deter and prevent such activities confirms that the CPA breached its duty enshrined under the Law of Occupation. The thesis demonstrates that intending occupying administration should have a profound understanding of the affirmative measures that should be adopted by it as an occupying power in order to comply with its duty, and thereby avoid international responsibility for violation of the Law of Occupation.

The scope of this study was acknowledged in the main introduction. Several specific areas of the thesis could be considered for further research in the future. First, since it has been shown that the occupation of Iraq did not terminate with the dissolution of the CPA on 28 June 2004, the possibility of carrying out a study after that date in relation to the duty of the occupant,<sup>3</sup> to

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<sup>3</sup> The occupant was the Multinational Forces, led by the US. See Chapter One.



prevent financial criminal activities that generated illegal funds could be considered in the future. Second, because of the CPA's failure to prevent financial criminal activities, a study with respect to the capability of the Iraqi State to challenge the US or UK before the ICJ over violation of their duty and to seek compensation could be undertaken in the future. Third, if there were corporations that lost bids as a result of a competitor's bribe during the period in which the CPA awarded reconstruction contracts, research could then be undertaken in the future with regard to bringing a civil action by those corporations seeking damages for loss suffered.

The idea behind this thesis was to diagnose the lessons to be learned from the maladministration of the CPA in its duty relating to prevent financial criminal activities, and to provide a mechanism that could assist the Iraqi State to recover corruptly obtained funds from the US territory. It is hoped that the proper measures set out in this thesis for discharging the duty of preventing financial criminal activities will be considered by any occupying power in the future. It is also hoped that the proposed mechanism, that is to say a civil action, will be used by the Iraqi State in order to recover its funds, which disappeared as a result of corruption activities during the period of the CPA's existence.

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