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Subcommittee on International Organizations, Human Rights and Oversight

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**Iraq's Status Under Chapter VII Decisions of the UN Security Council**

I have been asked to comment on the current efforts to re-examine Iraq's status under the Chapter VII decisions of the UN Security Council, in light of the provisions of the November 2008 US-Iraq Security Agreement and of recent Security Council decisions.

Article 25 of the Security Agreement <sup>1</sup> provides:

Recognizing also the dramatic and positive developments in Iraq, and noting that the situation in Iraq is fundamentally different than that which existed when the UN Security Council adopted Resolution 661 in 1990, and in particular that the threat to international peace and security posed by the Government of Iraq no longer exists, the Parties affirm in this regard that with the termination on December 31, 2008 of the Chapter VII mandate and authorization for the multinational force contained in Resolution 1790, Iraq should return to the legal and international standing that it enjoyed prior to the adoption of UN Security Council Resolution 661 (1990), and that the United States shall use its best efforts to help Iraq take the steps necessary to achieve this by December 31, 2008.

This did not actually occur by the end of 2008, but on December 22 the Security Council adopted Resolution 1859, which agreed with the same general objective.

In fact, the Security Council had already taken a number of steps after the removal of the regime of Saddam Hussein to revoke or modify many of

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<sup>1</sup> Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, 17 November 2008.

the measures that it had adopted under Chapter VII of the UN Charter after the Iraqi invasion and occupation of Kuwait in 1990. This included: the termination of the restrictions on trade and financial transactions with Iraq;<sup>2</sup> the ending of UN control over proceeds from Iraqi oil and gas sales<sup>3</sup> and the transfer of those proceeds to a Development Fund held by Iraq;<sup>4</sup> the termination of the arms embargo against the Iraqi government;<sup>5</sup> and finally, the expiration of the mandate of the multinational force that had exercised control over Iraqi territory.<sup>6</sup> These steps have already substantially restored Iraq to the independent sovereign status it enjoyed prior to the Gulf War. However, Iraq remains subject to Chapter VII measures in a number of respects. It may be possible and desirable to phase out some of these measures in the near future; but others might continue to serve useful functions, at least for some period of time.

In Resolution 1859, the Council requested the UN Secretary-General to “report, after consultations with Iraq, on facts relevant to consideration by the Council of actions necessary for Iraq to achieve international standing equal to that which it held prior to the adoption of such resolutions . . . .”<sup>7</sup> The Secretary-General issued his report on July 27 of this year.<sup>8</sup> It notes the progress achieved on many points since 2003 and supports “gradually restoring Iraq to the international standing it enjoyed before 1990.”<sup>9</sup> On the other hand, it describes a number of unresolved matters concerning the Council’s previous actions under Chapter VII and suggests steps that might be taken to resolve them.

In a literal sense, each of the Chapter VII measures that are still in force could be ended at any time by action of the Security Council. However, this would not be sensible in any particular case until outstanding issues are resolved, and in some cases the Council may not wish to take such action for the time being. The following is a summary of these issues.

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<sup>2</sup> UNSC Res. 1483 (2003), para. 10.

<sup>3</sup> UNSC Res. 1483 (2003), paras. 12, 16.

<sup>4</sup> UNSC Res. 1546 (2004), para. 24.

<sup>5</sup> UNSC Res. 1546 (2004), para. 21.

<sup>6</sup> UNSC Res. 1790 (2007), para. 1-2.

<sup>7</sup> UNSC Res. 1859 (2008), para. 5.

<sup>8</sup> UN Doc. S/2009/385, 27 July 2009.

<sup>9</sup> *Id.*, p. 17.

## Compensation for Gulf War Losses

The Iraqi invasion and occupation of Kuwait caused immense human and financial losses. Among other things, more than a million foreign workers were forced to leave Iraq and Kuwait; many foreign nationals were imprisoned, killed, or injured; immense damage was done to the Kuwaiti economy and Kuwaiti property; many foreign nationals and corporations suffered contract and property losses; and Iraqi forces caused vast damage to Kuwaiti oil fields and widespread environmental damage. Providing compensation for these losses was a priority objective of the international community to meet urgent humanitarian needs, to assist Kuwait and other states in recovering from this catastrophe, and to help in restoring stability to the region.<sup>10</sup>

To meet these objectives, the Security Council created an ambitious and innovative regime to assess the damage, adjudicate claims, and provide compensation to those affected. The Council decided that Iraq would be liable “for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait;” it created the UN Compensation Commission to adjudicate claims and decide on priorities for payment; and it decided that 30% of Iraqi oil export revenues would be used for payment of these claims.<sup>11</sup>

Iraq initially attempted in various ways to impede this effort, but in the end the program resulted in the successful adjudication of more than 2.6 million claims (including substantial sums for American claimants), the awarding of compensation in excess of \$52 billion, and the actual payment to date of nearly \$28 billion to claimants. In particular, compensation was promptly paid to the hundreds of thousands of individuals who were most in need of such relief. However, due to the very large volume of awards, much of the compensation due has not yet been paid; to date, this amounts to about \$24 billion for damage to the environment and oil sector of Kuwait.<sup>12</sup>

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<sup>10</sup> See Michael J. Matheson, Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War (U.S. Institute of Peace 2006), p. 168-82.

<sup>11</sup> UNSC Res. 687 (1991), paras. 16-19; Res. 705 (1991).

<sup>12</sup> The July 29 report of the Secretary-General reported payments totaling \$27.1 billion to date; at the end of July further payments were made in excess of \$400 million.

In light of the removal of the regime of Saddam Hussein, the Security Council has reduced the deduction from Iraqi oil export revenues to 5%,<sup>13</sup> but significant amounts continue to flow into the Compensation Fund from this source. In December 2007 the Iraqi Government asked the Council to review the matter “with a view to reducing that percentage as much as possible”. It argued that the continuing deduction “creates a financial burden for Iraq at a time when it is in dire need of those funds to rebuild its infrastructure”, and that recent increases in the price of oil had inflated the value of the deduction.<sup>14</sup> Iraqis have also argued that they should not have to continue bearing the burden of the misdeeds of the previous regime in which they had no part. In 2009, Iraq asked that payments be reduced to 1% if not eliminated altogether; Kuwait, however, asked that payments continue at the 5% level.<sup>15</sup>

Hopefully this is a matter on which Iraq and Kuwait might reach some mutually acceptable accommodation, given the fact that each has an important long-term interest in good relations with the other. Apparently Iraq and Kuwait have had preliminary discussions on this matter, including the possibility of investment of the unpaid amounts in projects in Iraq.<sup>16</sup> Article 26 of the Security Agreement promises that the United States will “support Iraq” in achieving a “comprehensive and final resolution” of such reparation claims.

### **Other Iraqi Debts and Assets**

In December 2008 the Security Council decided – at the request of Iraq – to continue in force for another year the arrangements it had earlier adopted for the orderly handling and use of Iraqi oil revenues. Specifically, proceeds from the sale of Iraqi oil and gas are deposited into the Development Fund for Iraq that is now under Iraqi administration, and an International Advisory and Monitoring Board monitors the accounting and use of those proceeds.<sup>17</sup> Iraqi oil and gas assets and proceeds, as well as the Development Fund itself, are immune from attachment by creditors (except for damages occurring as a result of ecological accidents after May 2003 or contractual obligations entered into after June 2004); and all states are

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<sup>13</sup> UNSC Res. 1483 (2003), para. 21.

<sup>14</sup> Letter from Prime Minister al-Maliki to the President of the Security Council, December 7, 2007.

<sup>15</sup> See UN Doc. S/2009/385, 27 July 2009, p. 3-4.

<sup>16</sup> See *id.*, p. 4.

<sup>17</sup> See UNSC Res. 1483 (2003), para. 20; Res. 1859 (2008), paras. 1-2.

required to take any steps under their domestic legal systems that are necessary to ensure this protection.<sup>18</sup> The Security Agreement notes that the United States has already done this.<sup>19</sup> (To date, this has been done by executive order.) States are also required to freeze and transfer to the Development Fund all financial assets of the Saddam Hussein regime.<sup>20</sup>

In requesting the extension of these arrangements, Iraq said:

Iraq has inherited debts and claims from the previous regime and has made great progress in settling them. However, much remains to be done, and our efforts to settle those claims and debts will require some time. Temporary support from the international community will continue to be required during the coming phase. Therefore, we hope that the international community will continue current protections and arrangements . . . until such time as the Government of Iraq is able to take the measures necessary to settle those debts and claims inherited from the previous regime. . . .

The Government of Iraq believes that the provisions . . . relating to the deposit of proceeds into the Development Fund for Iraq will help to ensure that proceeds from Iraq's natural resources will be used for the benefit of the Iraqi people, as will the role played by the International Advisory and Monitoring Board. The Iraqi Government recognizes that the Development Fund for Iraq plays an important role in helping Iraq to reassure donors and creditors that Iraq is administering its resources and debts in a responsible manner in the service of the Iraqi people. . . .<sup>21</sup>

According to the July 2009 UN report, an Iraqi entity called the Committee of Financial Experts is now ready to assume oversight responsibilities for the Development Fund, but more needs to be done to strengthen internal controls over oil sales, financial management and corruption. Furthermore, there apparently are still substantial sums that have not yet been transferred into the Development Fund because of unresolved

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<sup>18</sup> See UNSC Res. 1483 (2003), para. 22; Res. 1546 (2004), para. 27.

<sup>19</sup> Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, 17 November 2008, Art. 26.

<sup>20</sup> UNSC Res. 1483 (2003), para. 23. There is an exception for assets that "are themselves the subject of a prior judicial, administrative, or arbitral lien or judgement."

<sup>21</sup> Letter dated 7 December 2008 from the Prime Minister of Iraq to the President of the Security Council.

questions about deliveries, letters of credit and other matters.<sup>22</sup> In a further report in August 2009, the Secretary-General said that as the Security Council prepares to discuss the possible transfer of oversight responsibilities, “it will be important to ensure that a proper succession mechanism and process be considered.”<sup>23</sup>

Beyond this, it will be desirable to resolve the outstanding Iraqi debts and claims against Iraq as soon as possible (including claims by U.S. nationals resulting from the actions of the previous regime), so that Iraq can return to normal responsibility for its assets and its liabilities. For example, apparently Iraq has made considerable progress in settling commercial claims, although the process is not yet complete. Article 26 of the 2008 U.S.-Iraq Agreement committed the United States to assist in this:

To enable Iraq to continue to develop its national economy through the rehabilitation of its economic infrastructure, as well as providing necessary essential services to the Iraqi people, and to continue to safeguard Iraq’s revenues from oil and gas and other Iraqi resources and its financial and economic assets located abroad, including the Development Fund for Iraq, the United States shall ensure maximum efforts to . . . support Iraq to obtain forgiveness of international debt resulting from the policies of the former regime.

### **Weapons of Mass Destruction**

Resolution 687 also imposed significant constraints on Iraqi acquisition and possession of items that might be used for a program for weapons of mass destruction (WMD). Iraq was required to accept the elimination of the following and not to acquire or develop them in the future:

-- “all chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto;”

-- “all ballistic missiles with a range greater than one hundred and fifty kilometres, and related major parts and repair and production facilities;” and

<sup>22</sup> See UN Doc. S/2009/385, 27 July 2009, p. 11-14.

<sup>23</sup> UN Doc. S/2009/430, 24 August 2009, p. 3.

-- “nuclear weapons or nuclear-weapon-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above”.

Resolution 707 went even further, requiring Iraq to halt “all nuclear activities of any kind, except for isotopes for medical, agricultural or industrial purposes” until: (1) the Council determined that Iraq was in full compliance with Resolution 707 and paragraphs 12 and 13 of Resolution 687 (both of which relate to Iraq’s nuclear program), and (2) the International Atomic Energy Agency (IAEA) had determined that Iraq was in full compliance with its nuclear safeguards agreement. (Neither of these preconditions has yet been met).

In addition, Iraq was required to accept comprehensive on-site inspections to verify its compliance with these constraints, to be carried out by the International Atomic Energy Agency (IAEA) in the case of nuclear materials, and a newly-created agency – the UN Special Commission (UNSCOM) – for the other items.<sup>24</sup> UNSCOM was later replaced by the UN Monitoring, Verification and Inspection Commission (UNMOVIC).

IAEA and UNMOVIC resumed their inspection functions after the removal of Saddam Hussein, but in June 2007 the United States and the United Kingdom advised the Council that all appropriate steps had been taken to eliminate the prohibited systems and activities, and the Council determined that these international inspections were no longer necessary to verify Iraqi compliance and terminated these broad inspection mandates. However, the Council expressly reaffirmed Iraq’s disarmament obligations under the previous resolutions to refrain from acquiring or developing the various prohibited items.<sup>25</sup>

Iraq is party to certain agreements that constrain some of these prohibited items, such as the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention, and the Chemical Weapons Convention. On the other hand, the restrictions of the Security Council decisions that remain in effect impose stricter constraints on Iraq than its current obligations under international treaties in some respects. In particular:

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<sup>24</sup> UNSC Res. 687 (1991), par. 7-14.

<sup>25</sup> UNSC Res. 1762 (2007).

-- The Nuclear Non-Proliferation Treaty allows a non-nuclear-weapon state party to acquire or develop nuclear materials and facilities – including nuclear-weapons usable material, provided that such materials are not being used for weapons purposes and that the state party accepts IAEA safeguards and inspections to verify this.<sup>26</sup>

-- Iraq has no treaty obligations with respect to long-range ballistic missiles and related parts and facilities.

-- Iraq might in the future withdraw unilaterally from any of its various treaty commitments, but could not unilaterally terminate its obligations under the Council's decisions.

It may well be that Iraq is not considered likely to develop or acquire WMD items. On the other hand, there may be a need for further work on technical issues related to possible Iraqi peaceful nuclear activities; and beyond that, consideration might be given to whether relieving Iraq of these constraints at this time enhances or detracts from our non-proliferation objectives with respect to other states in the region, particularly Iran.

### **Other Issues**

There are other matters on which Iraq continues to be the subject of measures taken by the Council under Chapter VII. The dispute over the Iraq-Kuwait boundary was one of the ostensible causes of the Gulf War, and following the war, the Council acted under Chapter VII to create an Iraq-Kuwait Boundary Commission for its demarcation, and later to guarantee the demarcated boundary.<sup>27</sup> Apparently there is still work to be done with respect to the maintenance of the boundary markers.<sup>28</sup> Beyond that, it would be undesirable for there to be any doubt about the enduring validity of that demarcation, which suggests that it might be desirable for the Council's guarantee of the boundary to continue in force.

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<sup>26</sup> Treaty on the Non-Proliferation of Nuclear Weapons, Art. III. In addition, as noted above, Resolution 707 prohibited almost all Iraqi nuclear activities until it was determined that Iraq was in full compliance with these requirements and its nuclear safeguards agreement.

<sup>27</sup> UNSC Res. 687, paras. 2-4 (1991); Res. 833 (1993).

<sup>28</sup> See UN Doc. S/2009/385, 27 July 2009, p. 4-5.

Also remaining in force under Chapter VII are: the Council's requirement to continue efforts to locate, identify and repatriate Kuwaiti and third-state remains, persons, archives and property still missing from the Gulf War;<sup>29</sup> the embargo on arms shipments to non-governmental entities;<sup>30</sup> and the requirement for steps to facilitate the return of Iraqi cultural property.<sup>31</sup> There are apparently still unresolved issues with respect to each of these matters.<sup>32</sup> It may be desirable to continue these provisions in force as well until they are resolved.

### **Conclusion**

All parties seem to agree on the general principle that Iraq should be restored to the international and legal status it enjoyed prior to the Gulf War. However, the matter is not quite so simple. Some measures have been continued for an interim period – such as the administration of Iraqi oil and gas proceeds and their protection from attachment – and it is not entirely clear how soon these measures can be terminated. Some measures could only be eliminated when issues between Iraq and other states are satisfactorily resolved – such as Iraqi responsibility for compensation for Gulf War losses. Other measures might be desirable for a longer period – such as restrictions on Iraqi WMD and the boundary guarantee.

These issues were not resolved by the termination of the Chapter VII mandate of the multinational force at the end of last year, nor are they obviated by the perception that the Iraqi Government no longer presents a threat to international peace and security. Some measures are for Iraq's own benefit – such as the protection of Iraqi assets from attachment. Each would have to be dealt with on its merits before Iraq could literally be removed from Chapter VII measures and restored to its previous legal position in all respects.

Furthermore, Chapter VII measures need not represent an unacceptable derogation from the sovereignty of the states to which they apply. For example, the Council has used Chapter VII to deploy peacekeeping forces in many states without compromising their international status; and all states are subject to certain Chapter VII requirements, such as

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<sup>29</sup> UNSC Res. 1483 (2003), para. 6.

<sup>30</sup> UNSC Res. 1546 (2004), para. 21.

<sup>31</sup> UNSC Res. 1483 (2003), para. 7.

<sup>32</sup> See UN Doc. S/2009/385, 27 July 2009, p. 6-8, 15-16.

the requirement to act against international terrorists who may be found in their territory. Nor does the adoption of Chapter VII measures necessarily require a determination that the government of the state in question is a threat to international peace – only that there is such a threat from some quarter that requires action. Therefore, if it were thought desirable to continue some Chapter VII actions in force with respect to Iraq, this need not necessarily be seen as any derogation of Iraqi sovereignty or any barrier to its resumption of normal rights and responsibilities within the international community.