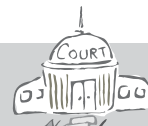


## Star LAW analysis



## COURT corridor



# Problem of legitimacy of the occupying powers in Iraq

PROF M SHAH ALAM

WHILE the United Nations failed to avert war in Iraq, failing thereby to prevent violation of international law by two permanent members of the UN Security Council, one of them the only super power of contemporary world, the world organisation suffered a serious set-back. But contrary to pessimism expressed by many has not lost the power and relevancy, which the founding fathers attributed to it in 1945. The history of the United Nations is a history of its successes and failures. While the organisation has failed to prevent armed conflicts in many regions of the world, it has succeeded in preventing such conflicts in many others, or has enforced cease-fire to make way for peaceful settlement of disputes. Undoubtedly, the UN has been successful so far 'to save succeeding generations from the scourge of (a global) war', the resolve which was solemnly expressed in the very first sentence of the preamble of the UN Charter. The UN has relentlessly laboured ever since for creating material conditions for peace and security by ensuring friendly and fruitful cooperation amongst the member states in different fields, and by contributing to worldwide protection and promotion of human rights.

### Power, politics & Int. Law

International peace and security has always been a function of power, politics and law. The factor of law has definitely gained prominence under the United Nations, but at times becomes helpless bystander before power and politics. The whole world listened in utter awe when the US President George Bush in his address in the UN Security Council early this year called upon the Council to approve use of force against Iraq and thereby prove the relevancy of the United Nations. It was a covert threat to the very existence of the UN. The use of force was not approved but could not be stopped either. Good thing was that the Council was able to withstand the mounting pressure from the USA and UK. UN approval of the use of force would have been a violation of its Charter seriously undermining the credibility of the organisation.

Violation of law in the international arena is not the end of law. Violation also takes place within the state, of the state laws, and often by the state itself. Nonetheless, pursuit for better provision for the rule of law continues. USA and UK defied the United Nations but again turned to it to decide how and what to do in Iraq in the aftermath of the war. The result has been the UN Security Council resolution no. 1483 (May 22, 2003) to rebuild Iraq and restore its sovereignty to the people of Iraq.

Any action otherwise illegal cannot be made legal by any decision or resolution of any national or international body. The results of such illegal actions are also illegal. Hence, the resolution no. 1483 has no consequence as to legalise the act of invasion of Iraq. However, the United Nations, not a sovereign entity, although primarily responsible for international peace and security, and its power limited by the Charter, cannot but take into account the imperatives of power and politics, and accept the presence of the occupying forces in Iraq as "fait accompli" and determine its role afresh to restore the sovereignty of Iraq to the Iraqi people. For that to happen, resolution 1483 is an important move taken by the Security Council. The resolution provides a legal framework within which UN can work and enhance its authority in post-war rebuilding of Iraq.

### Resolution 1483-a necessary evil

In the entire scenario of illegality of invasion of Iraq by the USA-UK forces, the continued presence of these forces in Iraq, economic, political, social and administrative disruption in Iraq and resultant discontentment of the Iraqi people, resolution 1483 is a concrete first step to restore Iraqi sovereignty in a peaceful way. Should its objectives remain as they are, it can provide legitimacy to the activities, which have been considered and assigned to the relevant parties under the resolution. It is worth repeating that the resolution 1483 has not legalised the US led act of aggression and occupation of Iraq, but it has accorded legitimacy to the works which the occupying powers are to undertake with the ultimate aim of returning power to Iraqi people. No question, the degree of legitimacy would depend on how sincerely, seriously and rationally they would perform their works within a reasonable time frame, and on the support they would get from the people of



PHOTO: AFP

Iraq.

Belligerents of war whether the war is lawful or unlawful, are bound by the Geneva conventions of 1949 and Hague conventions of 1907 relating to the laws and customs of war. These laws, where necessary, continue to operate even after the cessation of hostilities. While the resolution 1483 recognises 'the specific authorities, responsibilities, and obligations under applicable international law of these states (USA and UK) as occupying powers (in Iraq) under unified command - the "Authority" (preamble), it also calls upon the occupying powers to act in accordance with 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 may freely determine their own political future' (Para 4). Occupying powers are under strict international obligation to secure the life and property of the Iraqi people and to protect their cultural heritage.

The resolution 1483 reaffirms the sovereignty and territorial integrity of Iraq, stresses the rights of the Iraqi people to control their own natural resources, and expresses '..... resolve that the day when Iraqis govern themselves must come quickly' (preamble)

While the resolution has accepted the Authority (USA-UK) as central to internal administration of Iraq and to all efforts to be made for creating conditions of stability and transition to representative government. It has also provided for active role and involvement of the United Nations in monitoring, coordinating and helping these efforts. The resolution envisages a vital role of the United Nations not only in humanitarian relief and reconstruction of Iraq but also in the restoration and establishment of national and local institutions for representative governance (preamble). Concretely, the resolution provides for an UN 'Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution.....' (para 8).

The Special Representative would assist the people of Iraq through, inter alia 'working intensively with the Authority, the 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' (para 8/c).

The resolution also 'supports the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibility of the Authority' (para 9).

The resolution takes into cognizance 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. The resolution urges that the Fund be used by the Authority in consultation with the Iraqi interim administration in a transparent manner to meet the needs of Iraq and Iraqi people (paras 12, 13 & 14). The resolution also provides for lifting of economic sanctions against Iraq imposed on it by SC resolution 661 in 1990, and requires the sale proceed from oil to be deposited into the Fund.

Another significant aspect of the resolution is that it welcomes 'the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority' (preamble), and also 'appeals to Member States and concerned organisations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution' (para. 1).

### Advocacy for cooperation

More are the numbers of states willing to respond to the call of the Security Council to assist the people of Iraq, presumably, stronger and more effective are likely to be the involvement and position of the United Nations vis-a-vis the Authority during the transitional period in Iraq. Assuming that the decisive power remains with the Authority, exercise of that power has more scope to be rationalised by the participation of increased number of states for expeditious transition to Iraqi sovereignty. Such participation and assistance would facilitate the review of the implementation of the resolution, which is provided for in the resolution (para 25), in more meaningful way i.e. taking of concrete steps within a definite time-frame to hand over power to a representative government established by the people of Iraq. Only such perspective would earn the confidence and trust of the people of Iraq and ensure their cooperation with the efforts to be made by the relevant parties under resolution 1483. Cooperation and support of the people and perspective of fulfilling their aspirations are primary conditions for the implementation of the resolution.

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## Appointment of justice in SC Legal standards should be introduced

MUHAMMAD SAMSUL HOQUE

The appointment, confirmation and promotion of judges of the Supreme Court have recently taken a shape of greater concern than before. It deserves a solution in the light and spirit of the Constitution. A solution as permanent as it is possible would be a solution indeed. The permanent solution has to be traced out from the Constitution and nothing should be accepted as a substitute for the rule of law. Recommendation of the Chief Justice with regard to any matter of the judiciary should be weighed with much importance there may be none to oppose this proposition. Though the provision for consultation with the Chief Justice has been omitted by the 4th amendment of the Constitution, in view of the scheme and practice in this regard it is accepted that the Hon'ble President has an obligation to consult the Chief Justice.

It is to be accepted without any hesitation that the recommendation of the Chief Justice cannot carry weight more than a decision of the highest court of the country. Therefore the recommendation of the Chief Justice is not immune from being constitutionally tested and before the recommendation is sought to be judicially enforced it's constitutionality has to be ensured. Taking it as an accepted principle the President usually consults the Chief Justice before appointment of Judges in the Supreme Court. In the process of such consultation the Chief Justice makes recommendation to the President. We know not much as to how the learned Chief Justice takes decision for recommendation due to absence of law, rules or regulation in this regard. For the purpose of appointment as a Judge some disqualification have been provided in clause (2) of Article 95 of the Constitution. In sub-clause (c) of clause (2) of Article 95 there has been a directive for making necessary law prescribing qualification for appointment as a Judge of the Supreme Court. In the last three decades no law has been enacted in this regard.

The 'List of Members - Bangladesh Supreme Court Bar Association, Dhaka, 2003' contains serial numbers 1-3048. Excluding only those who are disqualified as per clause (2) to Article 95 of the Constitution, the rest of the members are qualified to be the judge of the Supreme Court. Further there are a quite good number of judicial officers who are also not disqualified as per the provision of Constitution. So the number of the qualified persons for appointment as a Judge of the Supreme Court at present may be about 1000 and the number is increasing.

The learned Chief Justice may recommend for about 10-15 persons in one time for appointment as a Judge. It is not humanly conceivable without any basis, that is, without any law, rules or legal instrument, to find out 10/15 most qualified persons from amongst 1000 or more. In making such recommendation does the Chief Justice enjoy absolute freedom?

Decision for appointment of judges in the higher judiciary must be made judiciously and constitutionally and of course not politically. The higher judiciary as the last hope of people should be filled with best available qualitative persons and therefore a standard legal instrument for best selection is indispensable. If the legislature is found to have been reluctant to make rules in this regard, the Supreme Court, being guardian of the Constitution can do so.

True that the Judiciary cannot constitutionally encroach upon the Legislature. But it can and must, to resist encroachment upon itself by any other organ of the State. In democracy a party in power might have some partisan views and that partisan views might reflected in appointment of judges of the Supreme Court. So the Supreme Court in the exercise of its authority as guardian of the Constitution can resist such encroachment and direct the executive to act within the constitutional demarcation.

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## LAW opinion

# Fear of contempt discourages people to inquire court's transparency

BARRISTER M MOKSADUL ISLAM

THE legislative, the administrative and the judiciary are the three apex organs run a democratic country with rule of law. Each one ought to work separately under the doctrine of 'separation of power'. One also ought to check other when anyone oversteps its mandate and this ensures a balance between them.

It often alleged that many of the administrative institutions of this country are controlled by incompetent people. Probably none of the aforesaid institutions would contest these observations. And apparently that is the only democratic right we still enjoy, although no one cares about what we say as there is hardly any accountability. We can talk and write about the aforesaid two apex organs in good faith and portrait their genuine picture without the fear of being indicted. However, what do we know about the third organ that is 'The Judiciary'? The common answer is either you keep yourself quiet otherwise a contempt proceedings will be drawn up against you. However, is that so easy?

### Confusion over 'Contempt'

What is 'Contempt of Court'? Contempt of Court is so manifold in its aspect that it is really difficult to lay down any exact definition of the offence. A person can be held on contempt if his mucky hand touches the pure fountain of justice that is, inter alia, by scandalising the Court itself, or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard. Lord Chancellor Hardwicke said 'there cannot be anything of greater consequence than to keep the streams of justice clear and pure.....'. This happens when someone acts or writes to bring a court or a judge into contempt or to lower his authority or to interfere with the continuity of the crystal clear flow of the stream of justice or the lawful process of the Court.

However, under no circumstance contempt proceeding should be drawn up against someone for criticising the judicial authority, in good faith, for corruption and inefficiency. The object of contempt proceeding is not to afford protection of judge personally from imputations from which they may be exposed as individuals. Blackburn J said "The phrase 'contempt of court' often misleads persons not lawyers, and causes them to

misapprehend its meaning and to suppose that a proceeding for contempt of court amounts to some process taken for the purpose of vindicating that personal dignity of the Judges, and protecting them from personal insults as individuals. Very often it happens that contempt is committed by a personal attack on a Judge or an insult offered to him; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself...."

### The issue to be addressed

As a last resort people beg before the Court but do they get justice? A Court can put you behind the bar and take away your freedom and human rights, it can hang you to death and take away your precious life, it can evict you from your home, and it also can take away your children and give it to someone else. It can keep police officials standing for hours for not saluting its flag. The Court can also issue a suo moto Rule Nisi calling upon an editor and reporter to explain as to why contempt proceeding should not be drawn up against them for publishing a particular news item even though there were other pressing issues which escaped their Lordships kind attention. Actually anything and everything their lordships may deem fit and proper can be ordered by the Court. And for these acts of kindnesses, as in duty bound, we always pray before the learned and honourable Court.

Judges are hardly accountable to anyone but, well to some extent, to themselves. However, if you are aggrieved by a decision of Appellate Division of the Supreme Court you are stuck.

Given that judges hold such enormous powers there is hardly any information general people know about these learned and honourable people and their activities. People possess wrong notion about 'Contempt of Court'. Like the other two main institutions people deserves to know how judiciary is handling their cases. They also deserve to know whether there is any room for improvement to set up a modern and effective judiciary. There is hardly any writing or discussion about a particular judgement. Considering the time and cost involved in the justice system if someone fails to appeal against a decision of the court, which may be was an erroneous one, it will remain buried as a flawed decision. If the same is reported in any 'law decision book' one might even tried to



take advantage by citing or submitting that flawed judgement before the Court. One must not forget judges are also human being and to err is human. So it is obviously possible for any judge to come to a conclusion, which was erroneous, and a reasonable observation or comment on it cannot amount to 'contempt of court' unless the matter is sub-judice.

Contempt proceedings should only be drawn up only when there is extremely strong reason for doing so. Post-mortem report of a judgement would not only enlighten the general people of this country about a case but the same would also be a good reading stuff for the law students and other judges alike and would certainly avoid any future miscarriage of judgement. People deserve to know whether the judges reasonably applied their judicial mind when they exercised their discretionary powers given under the law.

A judgement not only should decide the case before the Court but may also approve or overrule older decisions if it respectively agrees and does not agree with the previous one under the 'doctrine of precedent'. Different decision on a single 'point of law' given by the two benches or courts of the same tier could put the lawyers in trouble when advising their clients. To avoid any confusion we need some kind of mechanism to monitor court activities. An academicians could help the judiciary by speaking out in good faith about a judgement and comparing with other decisions by using prudent knowledge they certainly possess. How come there is hardly any discussion or criticism about the judiciary and its decisions unless any valid reason of not doing so. The answer is the fear of 'contempt of court' proceedings.

### Concluding remarks

Recent protests and writings about the supersessions, in the High Court Division, were really deserves appreciation. Citizen of this country are in dark about the judiciary as no one wants to find himself before the court with a contempt proceedings hanging over their head. Actually people are scared about the judiciary and the fear of being getting caught in the trap always remain active in the back of their head before uttering a word about the judiciary.

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