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The Obligations to Protect of the Occupying Powers in Iraq According to International Law

Christian Schaller

After the attack on the UN headquarters in Baghdad on August 19, UN Secretary-General Kofi Annan told press that the United Nations had been aware of the dangerous situation in Iraq. At the same time the UN also had hoped that the occupying powers, the United States and the United Kingdom, would take the necessary precautions to enable the UN staff in Iraq to exercise their mandate in a safe environment. This comment raises the fundamental question of the nature and extent of the protection duties of an occupying power under international law.

In the preamble to resolution 1483 (2003) of 22 May 2003, the UN Security Council expressly acknowledged the US and the UK as occupying powers in Iraq and recognised their specific authorities, responsibilities, and obligations under international law. In the operational part of the resolution, the Security Council called upon the two states to promote the welfare of the Iraqi people through the effective administration of the Iraqi territory, including in particular working towards the restoration of conditions of security and stability. Beyond this the resolution contains no further stipulations on the occupying powers' responsibilities. Instead the Security Council again explicitly called upon all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions and the Hague Regulations.

Basic laws pertaining to occupying powers

Of particular relevance are Articles 42ff. of the Hague Regulations respecting the Laws and Customs of War on Land of 1907 as well as Articles 27ff. and 47ff. of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949. Additional Protocol I to the Geneva Conventions, which contains further stipulations was ratified by the United Kingdom but not by the United States, which is thus not bound by Protocol I.

The applicable rules of the Hague Regulations and Geneva Conventions stipulate that the occupying powers assume responsi-

bility for the occupied territory and its inhabitants. This is not a matter of exercising sovereign power, but only a provisional control for a limited period. During this time the sovereignty of the occupied state is suspended. Accordingly, the occupying power is not allowed to transfer its own system of government onto the occupied territory. The available legal institutions as well as the sociological structure of the population must be left unchanged as far as possible. The occupying powers also do not become the legal successors of the replaced government. Within these constraints the occupant is obliged to take all the measures in his power to restore, and ensure, as far as possible, public order and safety.

Protection and provision for the civilian population

Extensive rules apply to protecting and providing for the civilian population. The above-mentioned rules of the Fourth Geneva Convention, which contain numerous prohibitions and imperatives such as the general dictate of humane treatment or the prohibition of reprisals, also call, in certain cases, for the active intervention of the occupying power. In particular the obligation to protect the civilian population is explicitly stated. This includes not only the safeguarding of life and health but also the protection of private property from plundering. The rules make no distinction here between culprits that were members of the armed forces participating in the conflict or private individuals.

Of essential importance, moreover, is the additional duty of the occupying power to supply the civilian population with food and medical goods using all available options. This does not mean that the occupying power is completely responsible for these provisions from the beginning. In the first instance the civilian population should be given the opportunity to provide for itself. If the goods available in the occupied territory are not sufficient, the occupying power must take additional action and if necessary import the necessary goods or permit relief measures of other states or humanitarian organisations. In such an emergency, it must ensure, with all its available resources, that relief action can be carried out without interruption.

In addition, hospitals and schools must be maintained in co-operation with the national authorities and protected against plundering. Moreover, the necessary precautions must be taken for the functioning and safety of the public drinking water supply. The same applies to the protection of oil wells and pipelines on Iraqi territory, which are even more strongly exposed to the danger of terrorist assaults.

Justice and public order

The protection of the population from acts of violence requires the creation of institutions for crime prevention and criminal prosecution. Fundamentally, the national legal system of the occupied territory retains its validity. The jurisdiction of the national courts as well as the responsibilities of the administrative authorities are not automatically suspended by the occupation. However, the occupying power has the possibility to intervene in the system of national law, justice and administration under certain conditions and to make changes that are necessary for the maintenance of public order and safety. The available procedures and the requirements that must be observed are stated in detail in the Fourth Geneva Convention.

If the judicial and administrative officials of the occupied state are not willing or able to carry out their functions properly, the occupying power is authorised to establish new courts and to install a transitional administration. If the national criminal courts are inoperative, the occupying power can set up military courts. In specific cases it has the right to issue its own penal laws.

To prevent an escalation of violence among the civilian population, it may be necessary to recruit and train additional police forces.

Protection of cultural property

Another problem is the destruction and theft of Iraqi cultural treasures, partially by spontaneous plundering and in part by organised gangs.

Although the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Additional Protocols contain concrete regulations that also specifically apply for cases of occupation, neither the US nor the UK are signatories to these treaties. Also the special rules in Additional Protocol I of the Geneva Conventions are obligatory only for the UK. What remains applicable is basically the general obligation from the Hague Regulations on Land War to refrain from and any destruction and damage of historical monuments and works of art and science and to punish infringements.

With regard to the special situation in Iraq, the UN Security Council in the preamble to resolution 1483 stressed the need for respect for the archaeological, historical, cultural and religious heritage of Iraq, and for the continued protection of the cultural sites, museums, libraries and monuments. At the same time the Security Council, acting under Chapter VII of the UN Charter, decided that all member states shall take appropriate steps to facilitate the safe return of Iraqi cultural property that have been illegally removed from Iraq, including by establishing a prohibition on trade in or transfer of such items. This resolution also places a special responsibility on the US and the UK for the protection of Iraqi cultural property. This responsibility involves not only the receipt and custody of returned objects but also the maintenance and protection of threatened sites and facilities as well as the promulgation of transitional regulations if the national laws in effect do not guarantee adequate protection of cultural property.

Protection of UN personnel

The obligation of the occupying powers to protect UN staff derives from resolution 1483 in connection with the general stipulation in Article 43 of the Hague Regulations on Land War, which is also established under customary international law, and the regulations of the Fourth Geneva Convention on the protection of civilians. The Convention on the Safety of United Nations and Associated Personnel, which entered into force in 1999, and according to which the contracting parties are obliged to take all appropriate measures to ensure the safety and security of UN and associated personnel, was only ratified by the UK and not by the US.

Article 43 of the Hague Regulations on Land War stipulates that an occupying power must take all precautions in its power to restore and maintain public order and safety. Regardless of the fact that any terrorist attack violates public order and safety in the sense of Article 43, a particular obligation can be derived from this rule to protect UN personnel who are engaged in an official function in the occupied territory and who are entrusted with the restoration of public order and the reconstruction of the occupied territory.

The Fourth Geneva Convention contains no explicit rules on the protection of UN personnel. Regardless of whether the wording of Article 4 of the Convention can be interpreted to include UN personnel directly in the scope of protected persons, it can surely be concluded from the intention and purpose of the Convention that also UN personnel dispatched to the occupied territory to support the occupying power in supplying the civilian population must be correspondingly protected. This is the case since the above obligations of the occupying power to provide for the population fundamentally also include measures for the protection of necessary relief operations

and the involved humanitarian organisations.

This interpretation is supported by resolution 1483, specifically by Paragraph 4, which requires the occupying powers to work towards the restoration of conditions of security and stability in Iraq. On the other hand, Paragraph 8 forms the basis for the sending of a UN Special Representative whose mandate explicitly includes intensive co-operation with the occupying powers. Therefore, the resolution, based on Chapter VII of the UN Charter, presupposes a special constellation characterised by the simultaneous presence of occupying powers and a civilian UN mission in Iraq.

Outlook

The mutual dependence of both actors is becoming increasingly clear in this case. The reconstruction in Iraq can only succeed in the long term if all member states share responsibility and work together within the framework of the United Nations. This is also clearly reflected by resolution 1483, which provides an unambiguous foundation for this co-operation. The occupying powers cannot solve all the problems on their own and are dependent on help from the United Nations. The first steps for the co-ordination and preparation of the reconstruction have been taken by sending a UN Special Representative and by setting up a UN Assistance Mission for Iraq. UN personnel in Iraq can only perform their tasks effectively, however, if they are sufficiently protected against attacks while carrying out their mandate. Only the occupying armed forces stationed in Iraq have the necessary means for such protection.

As long as the United Nations does not send any of its own Blue Helmets into Iraq and as long as the Security Council does not issue a mandate for a multinational peacekeeping force, the sole responsibility for the protection of the UN mission in Iraq rests with the occupying powers of the US and the UK.

Even a conscious renunciation of military safety measures, which the UN personnel in Iraq apparently declared, cannot relieve the occupying powers of their protection responsibilities. It is not at the discretion of individual staff to decide on the safety and effectiveness of the entire UN mission and on the life and physical integrity of all members of the UN mission.

The fact that the protection of UN staff and humanitarian personnel is a major concern of the Security Council is demonstrated in the current resolution 1502 (2003) of 26 August which deals with this problem in a general form. The unity of the Security Council members expressed in this resolution must now be used to improve the protection of UN personnel active in Iraq.

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