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The Multinational Force in Iraq and Its Status under International Law after the Transfer of Power

Christian Schaller

The first phase of the political transition in Iraq officially began with the end of the occupation and the transfer of full governing powers to a sovereign Interim Government on June 28 – two days earlier than expected. During the transition period, a UN-mandated Multinational Force (MNF), already stationed in Iraq for some time, together with local troops, will contribute to the maintenance of security and stability in Iraq. The basic conditions of the MNF's mission under international law were not clarified in detail until the very last moment. Several important decisions regarding the force's future status – especially the question of immunity from Iraqi jurisdiction – were made only the day before the transfer of power.

The mandate of the MNF has its current legal basis in UN Security Council Resolution 1546 (2004) of June 8, 2004. Additionally, the resolution provides for a security partnership with the Iraqi armed forces.

A Status of Forces Agreement (SOFA), a formal agreement on the MNF's legal status, has yet to be concluded with the Iraqi Interim Government. Instead, one day before its dissolution, the Coalition Provisional Authority (CPA), issued a revised version of CPA Order Nr. 17, which establishes the force's status for the period after the transfer. The order of June 27, 2004, whose legal validity remains controversial, handles several highly contentious legal and political issues, in particular juris-

diction over the MNF as well as the status of private contractors in Iraq.

The legal basis of the mission

With Resolution 1511 (2003) of October 16, 2003, the UN Security Council, on the basis of Chapter VII of the UN Charter and with legally binding effect, authorized a Multinational Force under unified command to take all necessary measures – including the use of military force – to contribute to the maintenance of security and stability in Iraq. In particular, the Resolution authorized the Force to create the necessary preconditions for the political transition.

Resolution 1546, which is now in force, reaffirms this authorization and puts it in

concrete terms, again with reference to Chapter VII of the UN Charter, and in doing so provides the legal basis for the MNF's continued deployment in Iraq.

In Paragraph 9 of Resolution 1546, the UN Security Council explicitly notes that the MNF's presence in Iraq is based on a request from the Iraqi Interim Government that Prime Minister Ayad Allawi submitted in writing to the UN Security Council on June 5, 2004. In a letter dated the same day and also addressed to the UN Security Council, U.S. Secretary of State Colin Powell confirmed the MNF's readiness to continue contributing to the maintenance of security in Iraq. Both letters are attached to Resolution 1546 as annexes and were formally taken into account by the UN Security Council in Paragraph 10 in order to put the mandate in concrete terms.

Does Iraq have the right to decide on the MNF's departure?

In spite of the explicit Iraqi request, the MNF's mission is not an intervention based on an invitation in the legal sense of the word. Legally speaking, an invitation is an act taken by a government granting authorization under international law to foreign troops for a specific mission on its own territory. Interventions can only be said to take place on invitation if their legality depends on this invitation. In the case of the MNF, a parallel binding UN Security Council decision based on Chapter VII of the UN Charter provides the main legal basis for the MNF's mission.

Without a corresponding resolution, the MNF would be on legally shaky ground, because a non-democratically elected interim government, as exists in Iraq, is in principle exposed to accusations of being inadequately representative and lacking legitimacy. Moreover, its authority for inviting foreign armed forces is disputed under international law.

In accordance with Paragraph 12 of Resolution 1546, the Security Council decided »that the mandate for the multinational

force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out in paragraph four«. The Security Council further declared »that it will terminate this mandate earlier if requested by the Government of Iraq«. This declaration, however, contains no automatic mechanism. Rather, a new UN Security Council decision based on Chapter VII of the UN Charter is necessary for this take effect. Such a decision can be blocked by any one of the five Permanent Members exercising its veto right according to Article 27, Paragraph 3 of the UN Charter.

If this were an intervention based on an invitation, Iraq itself would have the right to order the immediate departure of foreign troops from its sovereign territory at any time. In the present case, however, the UN Security Council alone will continue to hold the responsibility for the MNF's mission.

Security partnership

Details on how the mandate is to be executed derive from Resolution 1546 in connection with the two letters of June 5, 2004, from Prime Minister Allawi and U.S. Secretary of State Powell. According to these letters, the following primary tasks are incumbent upon the MNF:

- ▶ countering ongoing security threats, including combat operations against terrorist structures and insurgents;
- ▶ training and equipping Iraqi security forces and institutions;
- ▶ provision of humanitarian assistance, civil affairs support, and relief and reconstruction assistance, and
- ▶ protecting UN personnel and facilities.

These tasks are to be fulfilled within the framework of a strategic security partnership between the Iraqi Interim Government and the MNF. The interim constitution of March 8, 2004 (Law of Administration for the State of Iraq for the Transitional Period,

TAL), which came into force with the transfer of power, also provides for a partnership between the Iraqi armed forces and the MNF under Article 59 (B).

According to the perceptions expressed in the letters from Prime Minister Allawi and Secretary Powell, this type of security partnership includes close coordination in addressing the full range of fundamental security and policy issues. Furthermore, regular coordination and consultation between the Iraqi armed forces and MNF units at the national, regional, and local levels are planned to ensure unity of command and effective allocation of resources in joint military operations. Finally, the MNF command and the government are to notify one another of their activities, consult regularly, and exchange intelligence.

The necessary institutional structures for such a partnership are to be created by the Interim Government. This pertains first and foremost to the appointment of a Ministerial Committee for National Security, a body that will determine the guidelines of Iraqi security policy. MNF commanders are to be invited to the committee's deliberations. Furthermore, both letters provide for the establishment of coordination bodies on a sub-ministerial level.

Control over the Iraqi armed forces

The current legal framework does not provide for a clear and strict distribution of command and control authority over the Iraqi armed forces during the political transition.

CPA Order Nr. 67 of March 21, 2004, which addressed the creation of a ministry of defense, allocates general responsibility for establishing and administering the armed forces to the ministry of defense, but subordinates these forces in the event of joint military operations with coalition troops to MNF command.

Whether legal measures enacted by an occupation authority remain in force after the occupation is highly questionable. The TAL, however, assumes the legal measures

enacted by the CPA remain in force until superseded by due legislative process (more on this below).

At the same time, Articles 5 and 39(B) of the TAL state that the Iraqi armed forces are subject to the civilian control of the Transitional Government and, where operations are concerned, the command of the Prime Minister and the Minister of Defense. Furthermore, according to Article 59(B) of the TAL, the Iraqi forces are to be considered a principal partner in the MNF.

The Security Council in Paragraph 11 of Resolution 1546 notes that Iraqi security forces are responsible to the Iraqi government, and that the government has authority to commit its own security forces to the MNF to participate in joint operations. Furthermore, the MNF and the Iraqi government are to reach agreement on decisions concerning sensitive offensive military operations. This applies to measures for combating armed resistance groups and suspected terrorists, operations in which the newly formed Iraqi army, contrary to the occupying powers' original plans, are to take a greater part.

Neither Resolution 1546 nor the letters of June 5, 2004, contain more specifics on the division of control and command structures. The legal situation is especially unclear in the case that no agreement can be reached in fundamental questions of military interventions. Within the framework of a security partnership, the Interim Government was to be given the opportunity to exercise greater influence on MNF military decisions. The UN Security Council, however, did not grant the Iraqi government a right to veto individual operations.

Why does no Status of Forces Agreement exist?

An agreement reached between the CPA and the then Iraqi Governing Council on November 15, 2003, envisaged the conclusion of a security arrangement regarding the status of coalition forces by the end of March 2004. This intention, however, was

quashed due to the opposition of Grand Ayatollah Ali Sistani and some Governing Council members. It was argued that only an elected Iraqi government would be able to conclude such an agreement.

Normally, when armed forces are stationed abroad, special agreements concerning legal relations between a sending state's armed forces and a host country are concluded. These Status of Forces Agreements (SOFA) always regulate the division of jurisdiction over the troops between the states involved.

Essentially, there are two opposing types of SOFA agreements:

- ▶ concurrent agreements, providing a scheme of overlapping jurisdiction, based on the model of NATO's SOFA-rules, by which far-reaching authority for exercising jurisdiction remains with the host country;
- ▶ exclusive agreements, giving the sending state an exclusive right to exercise jurisdiction over its military personnel.

The latter type of agreement is typically concluded to govern the stationing of troops at the conclusion of an occupation regime, for example, in the case of the U.S. occupation of Japan and Germany after the Second World War. In the recent past, such agreements have usually been concluded when armed forces are sent to a state whose present political situation does not allow for a more balanced distribution of judicial responsibilities, taking into account military necessities. Examples are the agreements governing the stationing of NATO troops in Bosnia and Herzegovina, the KFOR presence in Kosovo, and the International Security Assistance Force (ISAF) force in Afghanistan. UN peacekeeping forces are regularly protected by similar agreements, called Status of Mission Agreements (SOMA).

The establishment of the MNF states' exclusive jurisdiction over their personnel in Iraq and the immunity of their soldiers from Iraqi prosecution is nothing new. What is more significant here is that this immunity is based not on a formal agreement with the host country, but on an

order promulgated by the authority of a departing occupational power, even if the installed Interim Government was consulted before issuing the order.

Political considerations, along with doubts surrounding the representative authority of the non-democratically elected Interim Government, most likely formed the basis of this decision. The granting of such far-reaching immunity on a contractual basis would have severely shaken the credibility of the Interim Government, both within Iraq as well as within the greater Arab world, especially after the incidents in the Abu Ghraib military prison. In the 1960s, similar concessions on the part of the Shah's regime in Iran in favor of U.S. forces contributed significantly to the rise of Ayatollah Ruhollah Khomeini, who branded the action a betrayal of the Iranian people and thereby tried to incite the population against the government.

At the earliest, the United States and other troop contributing states will attempt to reach such a military-technical agreement after the election of an Iraqi Transitional Government at the beginning of the second phase of the political transition in January 2005.

Unilateral legislation by the CPA

In order to bridge the time until such a status agreement can be concluded, the CPA passed a revised version of Order Nr. 17, which was to take effect on June 27, 2004, one day prior to the end of the occupation, and which was to secure the rights of the MNF and its personnel until a SOFA agreement could be concluded.

The CPA, under the leadership of L. Paul Bremer, temporarily exercised powers of government during the occupation from May 2003 until June 2004. In addition to granting occupying powers the temporary authority to exercise administrative and judicial competences on a limited scale, the norms of international law of occupation laid out in the Hague Convention on Land Warfare and the Fourth Geneva Convention

grant occupying powers the authority to enact legal regulations so long as these are necessary for the restoration and maintenance of public security and order in the occupied territory or so long as military necessity exists.

Referring to these competences and UN Resolution 1483 (2003) of May 22, 2003, in which the UN Security Council first emphasized the responsibilities and obligations of the occupying powers in Iraq, the CPA passed numerous legally binding regulations and orders, including Order Nr. 17 of June 26, 2003, on the status of the coalition troops, foreign liaison missions and their personnel, and contractors. This order was, as described above, extensively revised on June 27, 2004, expanded, and tailored to the future needs of the MNF.

The revised version of Order Nr. 17, instead of a SOFA agreement, addresses numerous central aspects regarding the legal status of foreign troops in Iraq. In addition to the questions of jurisdiction and immunity, these include freedom of movement, the entry, residence, and departure of personnel, the import and export of goods, the bearing of arms and wearing of uniforms, the use of communication and traffic installations, exemption from fees, charges, taxes, and duties as well as the building and maintenance of facilities on Iraqi soil.

Are CPA orders still in force after the handover?

According to Section 20 of CPA Order Nr.17, the provisions of the order are to remain in force for the entire duration of the MNF mandate until the last MNF element has left Iraq – unless the order is »rescinded or amended by legislation duly enacted and having the force of law«.

The legal basis for such a far-reaching order is not readily apparent. In principle, occupying powers are not authorized to impose obligations on the occupied state or to issue measures that go beyond the end of an occupation.

Section 3 of CPA Regulation Nr. 1 of May 16, 2003, which was enacted by the CPA as a set of rules of procedure, states that all future CPA regulations and orders will remain in force until repealed by the CPA itself or superseded by legislation enacted by Iraqi democratic institutions. However, because the CPA does not have the power to bestow competences upon itself that surpass those granted by international law of occupation, this decree fails to constitute the sufficient legal basis for the continued validity of Order Nr. 17. UN Security Council Resolutions 1483, 1511, and 1546 also provide no basis for such an expansion of competences.

Article 26(C) of the TAL, however, likewise states that all laws, regulations, orders, and directives of the CPA shall remain in force even after the transfer of power »until rescinded or amended by legislation duly enacted and having the force of law«. Thus, Section 20 of Order 17 conforms to Iraqi constitutional law now in force.

The legitimacy of the TAL is, of course, partly called into question on the grounds that it was not drafted and adopted by a democratically legitimized constituent assembly, but instead was significantly shaped by the occupying powers and decreed by the then Iraqi Governing Council. On the other hand, the UN Security Council, with Resolution 1546, has clearly expressed its support for the political transition process and approved the steps already taken.

During the transition period, the legislative power necessary for amending legal measures enacted by the CPA, according to Article 30 of the TAL, rests in principle with the National Assembly. Elections to the Assembly, however, are not scheduled to take place before the end of 2004.

Until the National Assembly assumes office, decision-making power, as well as the authority to deploy the Iraqi armed forces and to approve international agreements, is located with the current Interim Government's Council of Ministers. This arrangement derives from a special annex

of June 1, 2004, which supplements the transitional constitution and regulates the organization, responsibilities, and authority of the Interim Government in greater detail. Thus, at least in a legal sense, the current administration in Iraq has the possibility of repealing legal measures enacted by the CPA.

It is open to speculation as to how the U.S. government would actually respond were this body to make a decision that aimed at annulling Order Nr. 17. For the time being, however, it is to be assumed that the coalition forces can count on the Iraqi Interim Government's readiness to maintain Order Nr. 17 even if the order is in effect unlawful or even legally null and void.

According to high-ranking representatives of the CPA, the Iraqi authorities were informed of the planned arrangements concerning the MNF's status, in particular the controversial immunity provisions, and greeted these arrangements with appropriate approval. Due to Iraq's longer-term dependence on the MNF in establishing and maintaining security and stability in the country and its dependence on the states involved in the MNF for economic assistance in reconstruction and for political support in reincorporating Iraq into the international community, the Interim Government, acting on its own initiative, will hardly be in a position to pass legislation encroaching on the MNF's status.

Issues of jurisdiction and immunity

Without a special legal arrangement, foreign troops stationed abroad in principle fall under the host country's jurisdiction.

In accordance with Section 2 of Order Nr. 17, all members of the MNF, the CPA, and foreign liaison missions as well as all international consultants are obliged to respect Iraqi law. At the same time, however, they enjoy immunity from Iraqi criminal, civil, and administrative process and are subject to the exclusive jurisdiction of their sending state. Moreover, the sending

states are granted the right to exercise their military and disciplinary jurisdiction on Iraq's sovereign territory.

In accordance with Section 5 of Order Nr. 17, immunity can be waived by the relevant sending state if the waiver is express and in writing.

With regard to questions of liability, Section 18 of Order Nr. 17 contains a provision by which the claims of a third party, in the event of injury to person or property or other legally protected rights and goods, shall always be submitted to the respective sending state and tried before its courts.

These provisions also apply to the punishment of criminal offences committed during the occupation – for example, those committed at the Abu Ghraib military prison – as well as to compensation for the resultant violation of rights.

Another aspect concerns the jurisdiction of the International Criminal Court (ICC) for possible crimes committed in Iraq by MNF personnel. According to Article 12, Paragraph 2 of the ICC Statute, the court can only exercise its jurisdiction if either the state on whose territory the alleged crime was committed or the state whose nationality the accused holds is a party to the Statute or has recognized the ICC's jurisdiction. Legal proceedings in accordance to Article 17 of the ICC Statute are set in motion only when the state having jurisdiction is unwilling or unable genuinely to carry out an investigation or prosecution. Neither the United States nor Iraq are parties to the ICC Statute, in contrast to most of the other sending states.

Within the framework of UN Security Council Resolutions 1422 (2002) of July 12, 2002, and 1487 (2003) of June 12, 2003, which were introduced by the United States and were extremely controversial both legally and politically, the UN Security Council in accordance with Article 16 of the ICC Statute, requested the ICC to refrain from investigating or prosecuting for a period of twelve months any citizen of non-parties to the ICC Statute taking part in UN-established or UN-authorized operations. A

current draft resolution for a renewal of this request for another twelve months has not yet been introduced by the United States primarily due to strong opposition in the UN Security Council and from the Secretary-General. This hesitancy is also probably caused by a desire not to jeopardize the consensus reached on common action in Iraq.

Parallel to this process, in accordance with Article 98, Paragraph 2 of the ICC Statute, the United States has for some time been trying to conclude bilateral agreements that prohibit parties to the ICC Statute from turning over U.S. citizens to the ICC without the United States' consent. A corresponding clause is to be found, for example, in an annex to the military-technical agreement between ISAF and Afghanistan's Interim Administration. Taking into account the theoretical possibility that Iraq might accede to the ICC Statute, a future military-technical agreement on the MNF's status in Iraq will most likely contain such a passage as well.

Contractors

The legal status of contractors in Iraq poses a special problem. According to the definition of contractor in Section 1 of Order Nr. 17, these are non-Iraqi legal entities and individuals not normally resident in Iraq supplying goods or providing services in Iraq on behalf of the MNF, sending states, or diplomatic and consular missions under a contract. Aside from private companies officially participating in humanitarian assistance and reconstruction, Order Nr. 17 explicitly includes private security companies under this definition.

Section 4 of Order Nr. 17 regulates the status of such contractors in Iraq. Their contracts and their registration are in principle not subject to Iraqi law. An exception is made for private security companies. Furthermore, all contractors enjoy immunity from Iraqi criminal, civil, and administrative process, however, only insofar as they operate within the confines of their con-

tractual agreements. Written certification by the relevant sending state is to suffice in a trial before an Iraqi court as conclusive evidence that the contractor concerned acted according to the terms and conditions contained in his or her contract. In addition the same regulations for waiving immunity and other questions of liability apply to contractors as to MNF personnel.

It is unclear whether the Iraqi Interim Government has in the meantime completely given up its initial resistance to such a special regulation for foreign civilians or whether a new solution is already being negotiated at the highest level. It remains to be seen whether a joint status agreement negotiated with an elected Transitional Government will contain a similar clause.

Summary

Without question, the legality of the MNF mission in Iraq derives from the authorization contained in Resolution 1546. However, the way the legal relations between the MNF and Iraq were regulated is problematic. Instead of a typical SOFA agreement between sending states and the host country, only an order on the status of forces exists as promulgated by the now dissolved CPA one day prior to the transfer of power. In any case, the norms of international law of occupation as enshrined in the Fourth Geneva Convention provide no basis for the granting of such far-reaching lawmaking competences by an occupying power.

In the case of Iraq, therefore, a passage in the TAL is primarily cited to provide legitimacy and compensate this deficit. Pursuant to this passage legal measures enacted during the occupation shall remain in force until they are superseded by Iraqi legislation. Doubts about the legitimacy of such provisions are difficult to allay due to the fact that the TAL was significantly shaped by the occupying powers.

Therefore, the lawfulness and legal force of the status order cannot be conclusively

confirmed here. Until a democratically elected Transitional Government in Iraq is ready to grant the MNF the necessary rights and privileges on a contractual basis, the mission of the forces on the ground is tainted with some degree of legal uncertainty, especially with regard to the critical question of immunity from Iraqi jurisdiction.

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