

Reconstructing Iraq and Who Pays: Is There an International Responsibility to Reconstruct a Country Destroyed by War?

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As soon as major fighting was over the public discussion focussed on the question who would reconstruct Iraq and repair the damages caused by the hostilities. While the most discussed question concerned the countries or companies actually carrying out the reconstruction, the question of who would finance it played a minor role in the public discussion.

This paper will examine the question whether the belligerent states, *i.e.* the Coalition forces and those states aiding and assisting them, could be held responsible to finance the reconstruction regardless of who actually carries them out, if the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission (ILC) in 2001¹ were to enter into force and apply to such a situation. Though the ILC draft articles represent, at least partly, customary public international law,² they have not formerly entered into force and thus are not binding by unto themselves.

According to these rules, a state is responsible for internationally wrongful acts and omissions, if the wrongfulness is not excluded by special circumstances.³

¹ Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (visited 09-06-2003).

² ILC Commentary on the draft articles, Commentary on article 1 with further references; available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (visited 09-06-2003); Otto Kimminich/Stephan Hobe, Einführung in das Völkerrecht, 7th ed., Tübingen/Basel 2000, p. 232.

³ Cf. in general for the international responsibility of states the ILC Commentary on the draft articles, available at http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm (visited 09-06-2003); Otto Kimminich/Stephan Hobe, Einführung in das Völkerrecht, 7th ed., Tübingen/Basel 2000, p. 232;

A. Internationally Wrongful Act, Article 1 ILC Draft Articles

Article 1 of the draft articles reflects the customary international law rule that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”

According to article 2 lit. (b), an act is internationally wrongful if it constitutes a breach of an international obligation of the state. This characterization is governed by international law.⁴

The acts in question are the use of military force leading to the destruction of infrastructure and to the disappearance of effective state authority and the omission to replace the authority and to subsequently re-install public order. The use of force is prohibited by article 2(4) UN Charter and is thus wrongful if no exception applies.⁵ The omission to re-install effective state authority ensuring public order is wrongful if the destruction of the original state authority was so and thus has led to a responsibility to reparation in form of restitution of the public order.⁶

B. No Circumstances Precluding Wrongfulness, Articles 20 Through 25 ILC Draft Articles

The UN Charter knows two possible exceptions to the prohibition of the use of force in article 2(4) UN Charter: the compliance with a Security Council (SC) decision based on Chapter VII of the Charter, namely article 42, and the right to self-defence laid down in article 51.⁷

⁴ Article 3 ILC draft articles.

⁵ Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, came into force on 24 October 1945. Concerning the use of force in general cf. Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, EJIL 11 (2000), p. 361; Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, EJIL 10 (1999), p. 1; Albrecht Randelzhofer, in: Bruno Simma (ed.), *The Charter of the United Nations - A Commentary*, 2nd ed., Oxford New York 2002, Art. 2(4); Rudolf Geiger, *Grundgesetz und Völkerrecht*, 3rd ed., Munich 2002, at § 64; the contributions in: Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 1st ed., Dordrecht 1986.

⁶ Cf. article 35 ILC draft articles.

⁷ Bruno Simma, *NATO, the U.N. and the Use of Force: Legal Aspects*, EJIL 10 (1999), p. 1.

I. Resolution 1441 (2002)

The SC Resolution 1441(2002) of 8 November 2002 would serve as a base for military action, if it did allow the use of force.

There is no explicit authorization to the use of force found in this resolution, it only refers to “serious consequences”.⁸ Had the SC wanted to allow the use of force in this resolution, it would have done so *expressis verbis*.⁹ Whenever the SC wants to take a measure on the basis of Chapter VII, it has to adopt it in such certain terms, and no such decision was made in the case of a second Iraqi war. It is not sufficient that the SC fails to preclude the use force.¹⁰

Moreover, the fact that the new draft resolution eventually was not brought to a vote in March 2003 showed that it did not reflect the will of the SC, which definitely would not have adopted it. It was sure that three of the permanent members would veto the decision.¹¹

Thus, the legality of the use of force cannot be based upon an authorization by the SC under article 42 of the Charter.¹²

II. Self-defence, Article 51 Charter and 21 ILC Draft Articles

The right to individual or collective self-defence, the second exception to article 2(4) recognized by the Charter and the ILC draft articles, requires the occurrence of an

⁸ Resolution 1441 (2002), Adopted by the Security Council at its 4644th meeting, on 8 November 2002, para. 13.

⁹ As it did in previous resolutions when it authorized states to use „all necessary means“, cf. Res. 678 (1990), Adopted by the Security Council at its 2963rd meeting, on 29 November 1990, para. 2.

¹⁰ The implications of Resolution 1441(2002) have been broadly discussed during the last months, a review of opinions can be found e.g. under <http://www.globalpolicy.org/security/issues/iraq/attack/lawindex.htm> (visited 25-06-2003).

¹¹ Article 27 para. 3 Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, came into force on 24 October 1945. The decision of France to veto any resolution proposing the use of force is reported at <http://www.humanite.presse.fr/journal/2003-03-11/2003-03-11-318200> (visited 25-06-2003); <http://www.ledevoir.com/2003/03/17/22608.html> (visited 25-06-2003); Jacques Chirac, Interview given march 16, 2003, available at http://www.elysee.fr/rech/rech_.htm (visited 25-06-2003).

¹² Concurring 16 academic lawyers from the UK and France, cf. their open letter dated march 7, 2003, published in the Guardian and on BBC, http://news.bbc.co.uk/1/hi/uk_politics/2829717.stm (visited 09-06-2003).

armed attack.¹³ The legality of preventive self-defence is controversial in case of an imminent threat of an armed attack such as the use of nuclear weapons.¹⁴ But “[t]he doctrine of pre-emptive self-defence against an attack that might arise at some hypothetical future time has no basis in international law.”¹⁵

III. State of War Persistent Since the 1991 Gulf War

A third argument for the legality of the use of force in this context might be that the state of war between Iraq and the Coalition forces still persists, due to the fact that the 1991 gulf war never has been officially terminated but only brought to an armistice. Taking the state of war as an exception to article 2(4), however, would mean misinterpreting its scope and intention. Article 2(4) prohibits the use of force in general, regardless of the question whether there is a state of war or not. Exceptions might arise in the case of armed conflict, where acts of military force cannot always be attributed to concrete precedent armed attacks in every single case. Yet the concept changed from “war” to “armed conflict”, implicating that only in armed conflict the prohibition of the use of force can be limited. A declared state of war with an armistice is not and cannot be sufficient to rule out the strict and comprehensive prohibition in article 2(4).

¹³ Article 51 Charter of the United Nations, signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, came into force on 24 October 1945 reads: “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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”

¹⁴ Concerning this debate cf. Albrecht Randelzhofer, in: Bruno Simma (ed.), *The Charter of the United Nations - A Commentary*, 2nd ed., Oxford New York 2002, Art. 51, no. 39; Otto Kimminich/Stephan Hobe, *Einführung in das Völkerrecht*, 7th ed., Tübingen/Basel 2000, p. 281; Niko Krisch, *Selbstverteidigung und kollektive Sicherheit*, 1st ed., Berlin 2001; Stanimir A. Alexandrov, *Self-Defense Against the Use of Force in International Law*, 1st ed., The Hague 1996, p. 98; Antonio Cassese, *Why States Use Force With Impunity: The “Black Holes” of International Law*, in: Antonio Cassese, *Violence and Law in the Modern Age*, 1st ed., Oxford 1988, p. 30, at p. 35; Horst Fischer, in: Knut Ipsen, *Völkerrecht*, 4th ed., Munich 1999, § 59, no. 29 with reference to the Caroline incident of 1837 as origin of this discussion.

¹⁵ 16 academic lawyers from the UK and France, cf. their open letter dated march 7, 2003, published in the Guardian and on BBC, http://news.bbc.co.uk/1/hi/uk_politics/2829717.stm (visited 09-06-2003).

The claim that the authority by the Security Council from its resolutions 678 (1990) and 687 (1991) is still on-going meets similar concerns.¹⁶ Several Security Council members specifically rejected such an analysis in their explanations for their votes on resolution 1441 (2002).¹⁷

Therefore, there is no circumstance precluding the wrongfulness of the use of force by the Coalition forces against Iraq.¹⁸ The use of force was a series of acts constituting a breach of the international obligation as set out in article 2(4) of the Charter of the United Nations, leading to the Coalition forces' international responsibility according to the ILC draft articles on state responsibility.

C. Consequences: Cessation, Restitution, Compensation and Satisfaction, Articles 30 Through 37

The consequence of the international responsibility of a state are laid down in articles 30 through 37 of the ILC draft articles. They include obligations to cease the breach of the rule of international law and to guarantee the non-repetition, to compensate or provide restitution for damages caused by the wrongful act and to make satisfaction, in form of a recognition of the wrongfulness by way of formal apologies and the like, for the breach.

I. Cessation, Article 30

The state responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing.¹⁹ The use of large-scale military force is not continuing. What is continuing, however, is the presence of the Coalition forces and the replacement of the preexisting, effective Iraqi state administration with those forces. But withdrawing military forces would lead to greater anarchy and insecurity instead of the recreation of an effective Iraqi state administration and thus is not viable.

¹⁶ Resolution 678 (1990), Adopted by the Security Council at its 2963rd meeting, on 29 November 1990, para. 2 and Resolution 687 (1991), Adopted by the Security Council at its 2981st meeting, on 3 April 1991, para. 4.

¹⁷ Matthew Happold, The legal case for war with Iraq, <http://www.guardian.co.uk/theissues/article/0,6512,913589,00.html> (visited 25-06-2003).

¹⁸ 16 academic lawyers from the UK and France, cf. their open letter dated march 7, 2003, published in the Guardian and on BBC, http://news.bbc.co.uk/1/hi/uk_politics/2829717.stm (visited 09-06-2003).

¹⁹ Article 30 lit. (a) ILC draft articles.

II. Reparation, Article 31

The responsible State is under an obligation to make full reparation for the injury, *i.e.* moral or immoral damage, caused by the internationally wrongful act.²⁰ This provision reflects a general principle of the consequences of an internationally wrongful act and thus actually is part of contemporary customary international law.²¹

Reparation must be directed to eliminate all the consequences of the illegal act as far as possible and re-establish the situation which probably would have existed if that act had not been committed.²²

Article 31 requires the establishment of a causal link between the internationally wrongful act and the injury. It also requires that the damage is not too remote or indirect from the act.²³ Thus, only those damages which are attributable to the wrongful use of force are subject to the duty to repair as laid down in article 31.

This condition is problematic as to the question of the looting. The looting mainly took place in hospitals, public service institutions, foreign embassies and institutions and in cultural institutions such as universities and museums.²⁴ It resulted in damages to the civil population, foreign property and the cultural heritage. This damage is attributable to the individual looters, but also to the omission of the Coalition forces as the *de-facto* state authority and occupying forces which bear the responsibility to prevent looting and to re-establish public order.²⁵ The looting of public buildings is something which is to be expected if a state removes the effective authority of another state. According to the principles set out in the Diplomatic

²⁰ Article 31 ILC draft articles.

²¹ Acknowledged as early as in the *Factory at Chorzów, Jurisdiction*, 1927, P.C.I.J., Series A, No. 9, p. 21; cf. the International Court's reference to this decision in *LaGrand (Germany v. United States of America)*, Merits, judgment of 27 June 2001, para. 48.

²² *Factory at Chorzów, Merits*, 1928, P.C.I.J., Series A, No. 17, p. 47, cited by ILC Commentary to Art. 31 para. 2, p. 223-4.

²³ ILC Commentary to Article 31 para. 9-10, p. 227-8.

²⁴ David Wimhurst, Transcript of the UN humanitarian briefing in Amman, Jordan, 9 April, <http://www.un.org/apps/news/infocusnewsiraq1.asp?NewsID=485&sID=9> (visited 25-06-2003).

²⁵ As to the responsibility of the occupying military forces under international humanitarian law to maintain a secure environment for the civilian population cf. David Wimhurst, Transcript of the UN humanitarian briefing in Amman, Jordan, 9 April, <http://www.un.org/apps/news/infocusnewsiraq1.asp?NewsID=485&sID=9> (visited 25-06-2003).

and Consular Staff case²⁶ these damages are thus attributable to the Coalition states' acts and omissions.

There exist three forms of reparation to be applied singly or in combination, namely restitution, compensation and satisfaction.²⁷

It is implicit that reparation may not be paid for with money seized from Saddam Hussein or the State of Iraq during or after the war or resulting from the sale of Iraqi petrol, but has to be financed by the states internationally responsible, because the obligation to full reparation lies with them, not on the injured state Iraq.²⁸ The Development Fund, which the SC established by paragraphs 12 to 14 of Resolution 1483 (2003) on 22 May 2003, therefore would have to be endowed with capital from the responsible states.

III. Restitution, Article 35

The first form of reparation with which the ILC draft articles deal is restitution in kind, *i.e.* re-establishment of the situation that existed before the internationally wrongful act was committed, provided that this is not materially impossible.²⁹ Where infrastructure is destroyed, restitution in kind is generally possible. The loss of life, however, can never be the subject of restitution in kind.³⁰ If restitution is possible, but constitutes a burden out of all proportion to the benefit of restitution instead of compensation, restitution may not be required but the responsible state may fulfill its obligation to reparation by compensation.³¹

IV. Compensation, Article 36

If the damage is not made good by restitution reparation may and must be made by compensation.³² The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.³³

²⁶ United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports, 1980, p. 3 at p. 33, para. 68.

²⁷ Article 34 ILC draft articles.

²⁸ Article 31 ILC draft articles.

²⁹ Article 35 ILC draft articles.

³⁰ The restitution of the loss of life is materially impossible in the sense of article 35 lit. (a) draft articles.

³¹ Article 35 lit. (b) ILC draft articles.

³² Article 36 ILC draft articles.

Compensation is also to be paid for personal injury, including both material and non-material damage such as the “loss of loved-ones, pain and suffering”.³⁴ Usually, claims for compensation of personal injuries are raised by the national state on behalf of the individual exercising that state’s diplomatic protection.³⁵ In this case, however, diplomatic protection is not possible because the state in charge, Iraq, has no effective representation which could file the claim. This obstacle in implementing the obligation of reparation does not, however, affect its existence.

V. Satisfaction, Article 37

The third form of reparation is satisfaction.³⁶ The responsible state is obliged to give satisfaction only insofar as the injury cannot be made good by the other two forms.³⁷ Therefore the obligation to make satisfaction applies mostly to non-material damages, which cannot be assessed in terms of financial value. The obligation encompasses immaterial reparation such as an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality as pointed out by article 37 para. 2. The obligation to provide satisfaction for non-material damage is generally acknowledged in international law.³⁸

D. Conclusion

The foregoing analysis raises questions about whether the Coalition forces were internationally responsible for the destruction in Iraq, caused by the use of force. The assumption of state authority and administration by those forces, which did not effectively prevent looting and crimes committed by individuals, may also give rise to international responsibility were the ILC draft articles on state responsibility in force.

Their international responsibility then would encompass the obligation to make full reparation for all damages caused by these acts and omissions which can be attributed to the Coalition forces. This obligation to reparation has to be fulfilled mainly

³³ Article 36 para. 2 ILC draft articles.

³⁴ ILC Commentary to Article 36, para. 16, p. 252 and para. 19, p. 254 with further references.

³⁵ *Ibid.*

³⁶ Article 37 para. 1 ILC draft articles.

³⁷ Article 37 para. 1 ILC draft articles.

³⁸ Article 37, para. 4, p. 264 with further references.

by restitution in kind and/or compensation. The costs for these reparations have to be born by the belligerent states and those who assisted or aided them,³⁹ regardless of the state or company who effectively carries them out. Seized capital is not to be used for the reconstruction by foreign companies. First, its origin and the proper owner have to be established, once this is done this capital either must be returned or kept in a trusteeship until its return is possible. Devoting this capital to the reconstruction of Iraq would entail a new form of international responsibility on the part of the respective state or states for it would be in breach of those states' obligation to make restitution and compensate for the injuries caused by them.

³⁹ In the sense of article 16 ILC draft articles.