Recurring Themes / Thèmes récurrents

International Law in the Aftermath of the War on Iraq

Introduction

Deciding to embark on a recurring themes column dedicated to the aftermath of the war on Iraq was not a decision that the Board of Editors took lightly, especially after our condemnation of the war and of the legal arguments put forward to justify the war (see editorial, volume 5, No. 2, 2003, p. 94 et seq.). The assertion that international law had failed to prevent the use of force in the hegemonic exercise of power, was in many ways baffling. Yet, we also realized that as international lawyers we could not simply leave it at that – baffled or not.

While individuals, including United Nations (UN) personnel, continued to lose their lives and suffer other predicaments in Iraq, we asked several authors to reflect on the role of international law in the aftermath of the war, a question that might seem mundane to some in view of the ongoing chaos in the country. It, however, is a question that we believe international lawyers must face in view of that very same chaos. That is, we must consider the question as to how international law might address the present situation as well as the role that international law should play in addressing the root causes of situations such as those in Iraq. We found eight authors brave enough to share their thoughts with you. I say “brave” because, as I approached them, I realized that inevitably their task would involve recognizing that there is a lack of international law governing the aftermath of the war and that relevant rules were developing as they were writing. Moreover, relevant rules continue to develop as you are reading this issue of FORUM.

Jarna Petman focuses on the difficulty that international law encounters in trying to capture evil. She argues that international law cannot capture evil as long as we perceive of evil as the “radical Other”. Pointing to the fact that today’s liberation movement might be tomorrow’s terrorist group, she discusses the problem encountered in developing general rules that outlaw undesirable behavior. The indeterminacy of international law is the result. A point illustrated by subsequent contributions.

Terry Gill in his contribution asserts that the pre-Iraq rules on the use of force are still the law. Insufficient state practice and opinio juris justify the conclusion that it remains illegal for states to engage in preventive self-defense in case of potential and thus uncertain threats of an armed attack. However, he also points out that the United States, as the sole “great power” in existence at the moment, is willing and able to set those rules aside when it deems it to be in its interest to do
so. He suggests that the world “exhibits elements of both the Charter and a post-
Charter era in terms of the *jus ad bellum*.”

Outi Korhonen addresses the question what stance the UN should take given
the manner in which it and international law was sidestepped prior to the war. She
asserts that the role that the UN takes on during the aftermath of the war will be
crucial for the future of international law. The challenge that the UN faces in this
respect is especially to “strike a deal with the US that does not compromise the
humanitarian and developmental principles of the UN”. According to Korhonen,
this challenge if it is to be met requires a renewal of international law: a reinterpre-
tation of the Charter or adding to the doctrine on “peace-building” will not suffice.
Instead, a renewal of the Western self is involved. This entails that the root causes
of 9/11 and the related situations in Afghanistan and Iraq need to be addressed
and a “credible internationally-led post conflict management model” developed.

Laurence Boisson de Chazournes in her contribution assesses the role of the
UN in rebuilding Iraq. She traces the problematic relationship between the UN
and Iraq back to the beginning of the period after the Kuwait war, during which
UN Security Council Resolutions served to outcast the country from the interna-
tional community. Boisson de Chazournes focuses on the problematic nature of
the relationships between Iraq, the Special Advisor on Iraq of the Secretary-Gen-
eral, and the Authority, *i.e.* the US and the UK as occupying powers under unified
command. Limited law is available to guide those relationships. She illustrates this
point amongst others, with reference to the manner in which Iraq’s vast oil reserves
are to be exploited.

Phillip Weckel concentrates on the manner in which Iraqi’s suspected of com-
mitting serious crimes prior to the military attack might be brought to justice.
Weckel discusses both the problems involved in establishing an international or-
gan for this purpose as well as those involved in establishing a national organ. He
concludes that the preferred option is probably a mixed tribunal that is integrated
into the national judicial system and which is able to apply human rights stand-
ards. He also points out that before such a body can be established numerous
uncertainties need to be resolved and that a degree of political reconstruction needs
to be achieved in Iraq.

Geert van Calster focuses on the WTO rules on government procurement in
view of the discussion regarding the allocation of contracts to rebuild Iraq mainly
to US companies. He illustrates that those rules might be characterized as a set of
bilateral inter-state exceptions rather than a system of generally applicable har-
monized trade rules. His contribution also clarifies that while the accusing finger
might be pointed at the US for a variety of reason when it comes to the situation in