

COMMENT

THE RELEVANCE OF HUMANITARIAN AND DIPLOMATIC LAW TO THE CONFLICT IN THE GULF*

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I. INTRODUCTION

The experience of armed conflicts in the twentieth century shows that if a state deliberately violates such fundamental principles of contemporary international law as the principles of the non-use of force and non-intervention, it is highly unlikely that it will show greater respect towards other norms protecting basic community interests. The Persian Gulf crisis of 1990-91 confirms this experience once again. The actions of Iraq shocked the consciousness of humanity not only because of the unlawful and brutal subjugation of a small neighboring country but also because the aggressor violated a number of generally recognized principles of international law of a humanitarian character and long-standing norms of diplomatic law.

While there are many different questions that can be raised in connection with violations of these norms, the political legal issues involved often are similar. A major component building these similarities is the fact that both humanitarian and diplomatic law reflect deeply held community values. Violations of these norms may be serious breaches of international law that trigger a special regime of responsibility. Yet, notwithstanding the importance of the rules involved, the existing legal structures fail to provide adequate mechanisms to secure their implementation and enforcement. The situation in Iraq and Kuwait dramatically reveals that the weakest point of the existing international law system is its implementation. As the international community is struggling in the post-Cold War period to establish a new world order based on the rule of law, it is worthwhile to reassess the available community responses to be-

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havior which so blatantly disregards emerging hopes for a safer and more peaceful world.

It is well known that after Iraq invaded Kuwait, thousands of foreigners were detained in Iraq as "guests" of Iraq, meaning hostages. In a move unprecedented in modern history, Iraqi authorities decided to use these "special guests" or civilian hostages for creating defensive "human shields" around certain military bases, industrial sites and other potential targets of a military attack. The international community also learned that Iraq committed numerous acts of violence against foreign diplomatic missions and their personnel while occupying Kuwait. In taking notice of these unlawful acts, the United Nations Security Council expressed deep concern "for the safety and well being of third-state nationals in Iraq and Kuwait."¹ It demanded that Iraq "permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries."² The Security Council also called on Iraq to "rescind its orders for the closure of diplomatic and consular missions in Kuwait and the withdrawal of the immunity of their personnel."³ In another resolution, the Security Council demonstrated concern about "acts of violence against diplomatic missions and their personnel in Kuwait."⁴ It also expressed outrage at "violations by Iraq of diplomatic premises in Kuwait and at the abduction of personnel enjoying diplomatic immunity and foreign nationals who were present in these premises."⁵

Of primary importance here is Security Council Resolution 674, which was devoted largely to violations of humanitarian and diplomatic law. The Security Council used much stronger language when it condemned "the actions by the Iraqi authorities and occupying forces to take third-state nationals *hostage* and to mistreat and oppress Kuwait and third-state nationals."⁶ The resolution expressed alarm "over the situation of nationals of third states in Kuwait and Iraq, including the personnel of the diplomatic and consular missions of such states."⁷ The Security Council demanded that "Iraqi authorities and occupying forces immediately cease and desist from taking third-state nationals *hostage*"⁸ and reaffirmed its demand that Iraq "immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and

1. UN SC Res 664, UN Doc S/RES/664 (1990) ("UN SC Res 664").

2. *Id.*

3. *Id.*

4. UN SC Res 667, UN Doc S/RES/667 (1990) ("UN SC Res 667").

5. *Id.*

6. UN SC Res 674, UN Doc S/RES/674 (1990) ("UN SC Res 674") (emphasis added).

7. *Id.*

8. *Id.*

in Iraq, [and] take no action to hinder these diplomatic and consular missions in the performance of their functions.”⁹

There doubtless will be more detailed public information about specific violations of international law by Iraqi authorities at a later date. The Security Council reminded the members of the international community of the importance of collecting substantiated information on Iraq's violations of humanitarian law. It also asked countries to make available to the Security Council any information in their possession regarding Iraqi actions during the crisis.¹⁰ This call will not remain unheeded.¹¹

The existing evidence is sufficient, however, for the purposes of a general legal analysis of the relevant legal political issues raised by the first phase of the Gulf crisis. From a broad perspective, Iraqi actions constitute violations of certain fundamental legal principles deeply rooted in the international community. Clearly, these are not mere technical breaches, but violations of long-standing norms supported by all states, notwithstanding differences in their social and political systems or ideological and cultural traditions.

II. APPLICABLE PRINCIPLES OF HUMANITARIAN LAW

The laws of war long have prohibited the taking of hostages. The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War,¹² to which Iraq is a contracting party, declares that “the taking of hostages is prohibited.”¹³ It also contains a rule that “the presence of a protected person may not be used to render certain points or areas immune from military operation.”¹⁴ The 1977 Additional Protocol (Protocol 1) to the Geneva Convention¹⁵ reaffirms the ban on the taking of hostages “at any time and in any place whatsoever, whether committed by civilian or by military agents.”¹⁶ The Protocol also contains a more

9. *Id.*

10. *Id.*

11. The United Nations itself might have been more active in this field. In this connection, it may rely on its prior practice in establishing several fact-finding missions and ad-hoc investigatory organs. See *Question of Methods of Fact-Finding*, UN GA Res 2329 (XXII), 22 UN GAOR Supp No 16, UN Doc A/6995 (1967). For support for such an approach on the doctrinal level, see G. Abi-Saab, *The Implementation of Humanitarian Law*, in Antonio Cassese, ed, *The New Humanitarian Law of Armed Conflict* 310, 332-33 (Oceana, 1979).

12. Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, [1955] 6 UST 3516, TIAS No 3365, 75 UNTS 287 (signed August 12, 1949; in force October 21, 1950) (“Fourth Geneva Convention”).

13. *Id.* at Art 34.

14. *Id.* at Art 28.

15. Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 1125 UNTS 3 (signed June 8, 1977; in force December 7, 1978) (“Protocol 1”). Iraq is not a party to this protocol.

16. *Id.* at Art 75(2).

detailed rule relating to the prohibition of "human shields." Protocol 1 states that "the presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations."¹⁷

Whatever the state of treaty law and Iraqi obligations arising from it, Iraq should be bound by general principles of law applicable to all states. The taking of hostages also violates the general principle prohibiting the deprivation of basic human rights. The International Court of Justice confirmed this view in its judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*. Commenting on the detention of American hostages in Tehran, the Court found that:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraints in condition of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.¹⁸

Under the laws of war, a general principle exists independently of any treaty obligations that prohibits the taking of hostages. The basic rules contained in the Geneva Conventions have passed into the corpus of general customary law. The judgment of the International Court of Justice in the *Nicaragua Case* supports such a view; it placed a special emphasis on "the general principles of humanitarian law to which the [Geneva] Conventions merely give specific expression."¹⁹ International legal doctrine supports this approach.²⁰ Significantly, the Security Council also appears to support the view that violations of such humanitarian norms result not only from the breaches of treaty commitments, but also from the infringement of general rules of law. Thus, when discussing Iraq's failure to meet its international obligations with respect to the well-being of third-state nationals, the Security Council reaffirmed "that Iraq retains full responsibility in this regard *under international humanitarian law* including, where applicable, the Fourth Geneva Convention."²¹ The Security Council stressed that acts committed by Iraq constitute violations not only of the Fourth Geneva Convention, but also of "international law" and "general principles of international law."²²

17. *Id.* at Art 51(7).

18. *Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment)* (US v Iran), 1980 ICJ 3, 42 (1980) ("*Iran Hostages Case Judgment*").

19. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits, Judgment)* (US v Nicaragua), 1986 ICJ 14, 114 (1986) ("*Nicaragua Case*").

20. For a detailed presentation, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford U Press, 1989).

21. UN SC Res 666, UN Doc S/RES/666 (1990) ("UN SC Res 666") (emphasis added).

22. UN SC Res 674 (cited in note 6).

The taking of hostages is a "grave breach" of the Fourth Geneva Convention.²³ The perpetrators have a direct individual criminal responsibility under international law and the principle of universal jurisdiction.²⁴ According to Protocol I, such breaches of the Protocol fall under the definition of "war crimes."²⁵ However, "grave breaches" of the rules contained in the Fourth Geneva Convention and in Protocol I also would be war crimes independent of any definition contained in Protocol I. Acts such as the taking of hostages or the practice of using civilians as "human shields" qualify as war crimes in any event under the principles enunciated by the Charter of the Nuremberg Tribunal,²⁶ which have been generally recognized and regarded as part of international law.

These considerations are of major importance for decision to punish individual offenders committing war crimes. The Security Council already has issued a serious warning to perpetrators of war crimes on behalf of the international community by stressing that "individuals who commit or order the commission of grave breaches" of the Fourth Geneva Convention are liable under it.²⁷ While from a policy perspective this declaration is of great significance, it is not clear that the international community can prosecute the war criminals as long as they remain under the jurisdiction of Iraq. At this stage, the international community has no central authority entitled to initiate criminal proceedings or impose punishment on the offenders. The United Nations International Law Commission (the "Commission")²⁸ still debates the question of establishing an international criminal court or other international criminal trial mechanisms with jurisdiction over persons alleged to have committed war crimes as it continues its work on the Draft Code of Crimes Against the Peace and Security of Mankind.²⁹

23. Fourth Geneva Convention at Art 147 (cited in note 12).

24. *Id* at Art 146.

25. Protocol I at Art 85 (cited in note 15).

26. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat 1544, 82 UNTS 279 (signed and in force August 8, 1945).

27. UN SC Res 670, UN Doc S/RES/670 (1990) ("UN SC Res 670"). See also UN SC Res 674 (cited in note 6).

28. The International Law Commission (the "Commission") has started to consider the question of establishing an international criminal court upon the request of the U.N. General Assembly. See *International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction Over Such Crimes*, UN GA Res 44/39, 44 UN GAOR Supp No 49, UN Doc A/44/49 (1989). For a detailed discussion of the prospects for an international criminal court, see Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1991 Duke J Comp & Intl L 135.

29. For a detailed discussion, see B. Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, to be published in 1 Eur J Intl L (1991) and the authors cited there.

From a political legal perspective there are serious grounds to regard certain rules of humanitarian law as norms of *jus cogens*. The United Nations International Law Commission has pointed out that at least some of the rules of humanitarian law "are, in the opinion of the Commission, rules which impose obligations of *jus cogens*. . . ."³⁰ There is evidence that the prohibition against the taking of hostages may fall under this category.³¹ Violations of this prohibition and of other norms of special importance to the international community will be a significant factor shaping the regime of state responsibility Iraq must face in connection with events in Kuwait.

III. APPLICABLE PRINCIPLES OF DIPLOMATIC LAW

Breaches of diplomatic law also concern principles of fundamental importance for the international community. All members of the international community recognize the critical importance of the right of diplomatic immunity both in times of war and peace. Iraq is bound to respect these norms not only as a contracting party to the Vienna Conventions on Diplomatic and Consular Relations³² but also under the principles of customary law reflecting deeply rooted community traditions.

The International Court of Justice stressed the importance of diplomatic law in the *Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment)*. The Court emphasized the gravity of the Iranian offense in taking the American diplomats hostage by noting that the obligations breached by Iran were "not merely contractual . . . but also obligations under general international law."³³ The *Case Concerning United States Diplomatic and Consular Staff in Tehran (Provisional Measures)* is also of special significance in view of the fact that the Court put a special emphasis on the "imperative obligations inherent in" diplomatic and consular law.³⁴ In the *Iran Hostages Case (Judgment)*, the Court also emphasized the "imperative character of the legal obligations incumbent upon the Iranian government."³⁵ The Court stressed that the taking of hostages by Iran "undermine[s] the edifice of law carefully constructed . . .

30. *Report of the International Law Commission on the Work of Its Thirty-Second Session, 5 May-25 July 1980*, UN GA Res 35/10, 35 UN GAOR Supp No 10, UN Doc A/35/10 at 98 (1980).

31. See Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* 489 et seq (Helsinki Finnish Lawyers' Pub Co, 1988).

32. Vienna Convention on Diplomatic Relations, [1972] 23 UST 3227, TIAS No 7502, 500 UNTS 95 (signed April 18, 1961; in force April 24, 1964); Vienna Convention on Consular Relations, [1970] 21 UST 77, TIAS No 6820, 596 UNTS 261 (signed April 24, 1963; in force March 19, 1967).

33. *Iran Hostages Case Judgment*, 1980 ICJ at 31 (cited in note 18).

34. *Case Concerning United States Diplomatic and Consular Staff in Tehran (Provisional Measures)*, (US v Iran), 1979 ICJ 1, 20 (1979) ("*Iran Hostages Case Provisional Measures*").

35. *Iran Hostages Case Judgment*, 1980 ICJ at 41 (cited in note 18).

over a period of centuries. . . . [R]ules developed to maintain the ordered progress of relations between [states] should be constantly and scrupulously respected."³⁶

This confirmation of the importance of diplomatic law for the relations between members of the international community also applies to Iraq. In condemning the violations by Iraq of diplomatic premises in Kuwait and the abduction of personnel enjoying diplomatic immunity, the Security Council stressed the importance of the relevant principles of law in language resembling the Court's pronouncement. The Security Council stated that the Iraqi actions constitute "aggressive acts and a flagrant violation of its international obligations which strike at the root of the conduct of international relations."³⁷

Although the pronouncements just quoted do not expressly affirm that norms relating to diplomatic immunity are principles of *jus cogens*, violations of these principles are regarded as affecting the interests of the entire international community. In other words, here we deal with violations of obligations "toward the international community as a whole"³⁸ which, according to the judgment of the International Court of Justice in the *Barcelona Traction Case*, are "the concern of all states."³⁹ Violations of humanitarian law such as the taking of hostages also involve norms affecting the fundamental interests of the international community.

IV. REGIME OF STATE RESPONSIBILITY

The foregoing considerations will play an important role in establishing the regime of state responsibility applicable to actions of Iraq during the invasion and occupation of Kuwait. Since the Iraqi actions are serious breaches of international obligations affecting the interests of the international community as a whole, at least some of these acts may be international crimes. An international crime is defined as an "internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."⁴⁰ While at this stage of the development of the international legal order the exact legal consequences of the characterization of a wrongful act as an international crime are a mat-

36. *Id.* at 43.

37. UN SC Res 667 (cited in note 4).

38. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, 1970 ICJ 1, 32 (1970) ("*Barcelona Traction Case*").

39. *Id.* at 32.

40. Draft Articles on State Responsibility at Art 19(2), *Report of the International Law Commission on the Work of Its Twenty-Eighth Session 3 May-23 July 1976*, UN Doc A/31/10, 31 UN GAOR Supp No 10, reprinted in 2(2) *YB Intl L Comm* 75 (1976).

ter for debate,⁴¹ there appears to be a consensus that from a broad political legal perspective crimes of states are likely to encounter a much stronger condemnation by the international community than a wrongful act. It is also clear that not only directly affected states, but also the international community as a whole, are interested in the enforcement of the relevant fundamental rules of humanitarian and diplomatic law. In view of this, the perpetrating state hardly can hope to avoid international responsibility as a result of a possible general toleration of its unlawful activities.

While these policy considerations supporting the case against Iraq are important, at this time the international community lacks compulsory enforcement structures to deal effectively with violations of basic community norms. There is only one area of law in which the international community has created a special regime of responsibility and a special organ, the United Nations, dealing with violations of fundamental community norms. However, the enforcement functions of the Security Council relate only to enumerated violations such as threats to the peace, breaches of the peace, and acts of aggression.⁴² Under the prevailing view the Security Council lacks the power to deal with any other violations of basic community norms. Still, in some cases it may be indirectly involved in implementing norms not necessarily related to the enumerated violations. Thus, by rejecting a narrow interpretation of its functions under the United Nations Charter, the Security Council emerged during the Gulf crisis as a community organ willing to deal with broader legal issues resulting from the Iraqi invasion into Kuwait. The Security Council reaffirmed that under international law Iraq "is liable for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait."⁴³ By dealing with these legal issues, the Security Council did not determine what remedies might be used by states for restitution or financial compensation. However, the relevant Security Council resolution envisages that certain "arrangements . . . may be established in accordance with international law."⁴⁴

41. For a detailed discussion, see H. H. Weiler, Antonio Cassese, and Marina Spinedi, eds, *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (de Gruyter, 1989).

42. See Chapter VII of the Charter of the United Nations, 59 Stat 1031, Treaty Ser No 993, 1 UNTS xvi (signed June 26, 1945; in force October 24, 1945).

43. UN SC Res 674 (cited in note 6).

44. *Id.*

V. CONCLUSION

While the specific form these future arrangements might take is not clear, grave breaches of humanitarian and diplomatic law certainly will be among charges which the international community will continue to press against the perpetrating state and its nationals. Iraq cannot become a normal member of the international community as long as it fails to restore the previous situation and to satisfy claims arising from its wrongful acts. In a world in which there are no supranational courts or similar institutions able to punish an offender, there is no other way but to rely primarily on the community pressure as a major tool to promote the rule of law.

