
International Law and Iraq: The Safe Haven Imperative

by Chibli Mallat

Director, Center of Islamic Law, University of London

It is with a major failure in the application of international law in the second Gulf War that it is necessary to start. The Cease-fire Resolution, Resolution 687, is the longest in the history of the security Council. Yet one crucial element in international law is missing from it: the responsibility for the war of those in Iraq who made the decision, on August 2, 1990, to invade Kuwait.

It was ominous that in the fifteen Resolutions that separate the first UNSC Resolution 660 from the Cease-fire Resolution, the government of Iraq was not once identified separately from the state of Iraq, or from the people of Iraq. Following this, the one major established principle since Nuremberg, responsibility for war crimes, was deleted from the agenda of international law. And yet, these very same Resolutions have listed more than fifteen explicit breaches of international conventions and rules, ranging from the occupation of Kuwait to crimes against the environment. The logical consequence had one name: responsibility. But the opposition of some "European quarters" on the Security Council in the name of efficacy,

and the self-indulgence of the US administration which wanted a clean and unadulterated "victory" deleted the clause included in the draft of the Cease-fire Resolution, which had originally called for the establishment of responsibility for the War. This mistake is yet to be corrected.

Nor was Saddam Hussein breaching international peace on a grand scale for the first time. On 22 September 1980, his divisions marched into Iran in the longest and bloodiest war in the Middle East this century, the first Gulf War. When this violation of the neighbour's territory was repeated ten years later, it had been several months since the responsibility clause of Resolution 598 had been mooted by the international community. The indictment of Secretary-General Perez de Cuellar, followed by his last major stance before the end of his mandate, on December 9, 1991, was a personal one labelling the dictator of Baghdad. It was, and still is, not acted upon.³

Failure to establish responsibility for the war tribunal must become again a high priority for the new World Order. "In truth, if the tyrant and his aides are not presented before an international tribunal, then there is no meaning to values in this life." So wrote the conscience of the Arab world, the Nobel prize winner, Naguib Mahfuz, in the wake of the Gulf War. This call has yet to be heeded.

But the tribunal, then or now, is not sufficient. We need, beyond the establishment of the responsibility for the war by a proper tribunal under international law, the immediate domestic protection of Iraqi citizens. We need a safe haven for the people of Iraq.

A watershed has taken place in international law on April 5, 1991, when resolution 688 was hesitantly passed by the Security Council. The legal fight unfolding since over Iraq sets at loggerheads two powerful logics of international law. The first logic develops from Article 2.7 of the UN Charter, which calls for the "non-interven(tion) in matters which are essentially within the domestic jurisdiction" of a sovereign state. The nemesis of Art. 2.7 was resolution 688, requiring the gov-

ernment to stop its aggression against its people, and derives from the legal principles, notably the requirement, also in Article 2 of the UN Charter "that international peace and security, and justice, (be) not endangered". Against the matrix offered by Art. 2.7 and its derivations, which all meant that any move regarding Iraq would need the imprimatur of the Iraqi "legitimate" government, all UN resolutions on Iraq must be assessed for what in them serves the logic of resolution 688, that is for any measures which serve the people of Iraq over the head, and, if necessary, against the obstruction, of Saddam Hussein's government.

The battery of international law sub-principles which is supported by the logic of resolution 688 has slowly developed since April 1991. On the side of resolution 688 are forgotten parts of resolution 687 which put terrorist acts by the government of Iraq in breach of the Cease-fire, as is the imposition of the no-flight zone in the South. Within this logic also lie those parts of resolutions 706 and 712 which remove the ban on sale of oil on the condition that the proceeds of sales go directly to the people of Iraq, under strict international supervision. It must be constantly emphasized that it is the ruler of Baghdad who is refusing to sell oil, and that the mechanism established under the resolutions offers the only instrument which will prevent Saddam Hussein from continuing to use oil proceeds and food for the Iraqis as a weapon of his political domination.

Pursuing those instruments in international law which follow the logic of resolution 688 is important and diversified. But in the areas of Iraq which continue to bear the brunt of the repression, notably in the relentless destruction of the Southern Marshes the problem at hand is more pressing and requires to go back to the decisive consequence of the principle, in that Resolution, which "insists that Iraq allow immediate access by the international humanitarian organisations to all those in need of assistance in all parts of Iraq".

We now know that the safe haven was the only response

for the unfolding Kurdish tragedy. We know that, but for the safe haven, thousands more children would have died on the mountain sides of Turkey and Iraq. We also know that but for the stark daily reminder of the Allies' aircraft in the freed sky of Kurdistan, the spectre of the Anfal genocide would be back, in no time, with a vengeance.

With the strength of the precedent in Northern Iraq, the safe haven is the only effective way to react to the ever mounting cycle of violence in Iraq and to stop the genocide against the people of the Marshes. Although the safe haven as concept has taken root in other circumstances, in famished Somalia, in raped Sarajevo and in the beleaguered cities of East Bosnia, it has become a full-fledged reality of international law most remarkably in Northern Iraq. To the conditions of the genesis of the first safe haven and its persisting success we must turn. Only through understanding how the concept of the protected zone was formed, implemented, and continued, is there a chance to bring back those people in the Marshes, a unique people that have been slowly shaped in four millennia, and whom we see destroyed in a few months of governmental comprehensive batteries of cleansing. Through the implementation of Resolution 688 in a way that points decisively to the safe haven on the largest possible scale, the promised new world order may start to be vindicated.

* * *

Many veils remain in the corners of Whitehall on those fateful days of 5-8 April 1991. But there is little doubt that the idea emerged in London, even if the exact genesis of the safe haven will remain obscure for years to come. The formation of an internationally protected zone was the direct result of Resolution 688, which "urges the government (of Iraq) to stop its aggression against its people." But the legitimacy of the safe haven is much deeper in international law. Resolution 688 and the safe haven did not come as a thunderous lightening on a

clear summer sky. They came as a necessary step to redress the balance, away from the exercise of absolute domestic sovereignty and the impotence before genocide that the logic of Art.2.7 entails. But until Resolution 688, international law had stubbornly refused to address the axiomatic reality of war, adumbrated long ago by Clausewitz as the "continuation of state policy by other means" and by Shakespeare's immortal character, who, in Henry V, wanted a war with France "to busy giddy minds with foreign quarrels." The protected zone was then for the Iraqi Kurds, as it is today for the Arabs of the Marshes, the only conceivable response under international law to the emerging international standards of basic human rights, a right which is unjustly violated in the most gruesomely effective manner in times of war.

There are two conditions, in law, for the safe haven to survive: the first is its temporary, provisional nature, which brings up the principle in international law against which the safe haven must also be assessed: the integrity of a nation's boundaries. The moment of a safe haven is conceived as an indeterminate measure, it becomes the open gate to pandemonium. Against this constant peril, the Kurdish leadership of Iraq has made a historic decision to achieve freedom through participating in the future all-Iraqi rule in Baghdad. For the Iraqi Kurds, the safe haven is a temporary measure on the way, together with other Iraqis, to participate in the government of Iraq. For this future government, and independently from the persons who will be part of it, the principle is unity, and the constitutional mechanism of devolution is called federalism.

This bears directly on the call for a safe haven in the Marshes, and beyond, in Basra, and in Najaf, en route to a safe haven in Baghdad, where the people do not need it any more because they can express themselves through the ballot box. A safe haven in the Marshes is a necessary and temporary

We now know
that the safe ha-
ven was the only
response for the
unfolding
Kurdish tragedy.

A safe haven in the Marshes is a necessary measure to save a people from eradication, and a product of Near Eastern civilisation from destruction.

measure, to save a people from eradication, and a unique product of Near Eastern civilisation from destruction. It is necessary because of the nature of the regime in Baghdad, and the safe haven will be lifted when this regime is terminated, that is when Iraq has become safe for all its people.

The other element in the conditions of duration for a safe haven- human rights and democracy inside the Protected zone- may appear premature: it should not, in law, appear so. Why it is that the safe haven has succeeded beyond all imagination in Northern Iraq (and why it has been faltering in later variations, such as in Somalia and in Yugoslavia) is a question to the heart of success and durability of the

Kurdish precedent.

The response may sound naive, but there is little to be gained from avoiding its plain message: a safe haven can last only on the basis democracy and human rights. It is because the Kurdish population have offered the world a unique example of tolerance and democracy, against all odds, and in a situation where the machinery of the UN is dead set against it because of Art. 2.7. It is among the Kurdish population, in the past two and a half years that a model of tolerance and human rights, as well as free elections in May 1992 in the most adverse circumstances, that the safe haven has succeeded and persisted. It is when the sounds of internecine war and the trampling human rights on the street, as was disturbingly seen in the factional fighting between Kurdish groups, in December 1993, rather than the permission of Turkey to allow the Allies planes using its territory, that the real danger for the safe haven in the North lay.

This affects the rest of Iraq in a way which must be ap-

praised against the failure of the Intifada three years ago. We must always have in mind the Charybdis and Scylla of the safe haven mechanism: that international forces do not get drawn in protracted war in the area which is being protected. In other words, Iraqis must, sooner rather than later, secure the safety of the protected area. If these Iraqis reek of Tehran, even if distantly, or if they pervade of anti-Western opposition, it is not conceivable that the West will allow them the luxury of a safe haven. This will appear evident in realpolitik terms, But it may not be so far-fetched in international law, if the principle of human rights and the respect of democracy are to be inscribed in the legal conditions of the emergence and durability of a safe haven. Groups reared and protected by Tehran simply do not offer the minimal criteria for the upholding of the rule of law and human rights in the protected zone they are calling for. This should not be on the cards: since the experience of democracy has been the linchpin of the duration of the duration of the safe haven in the North, it is also an essential legal condition for its establishment in the Marshes and elsewhere.

* * *

We find ourselves in this turbulent area at the crossroad of civilisations. A temporary safe haven shall be or it shall not be democratic. For this to happen, there must be a controlled consensus on the mechanisms of its creation, as well as the measure of its protection by those who advocate it. Only one way of control, short armed troops on the ground, is envisageable: it is an international team of human rights monitors, as called for repeatedly by the UN Special Rapporteur on Iraq, Mr Van der Stoel.

We must develop the scheme, and insist that its implementation should start immediately, as a first legal step on the way to the safe haven. Human rights monitors for the South of Iraq and the Marshes are a part and a parcel of the legal

conditions for the duration in time of the safe haven. On the strength of extensive discussions with the Iraqi oppositional leadership, including in the House of Commons, on the occasion of the Iraqi National Congress to the British Prime Minister in April 1993, a formula in law was devised. It derived directly from the recommendation of the UN Special Rapporteur to send " a team of human rights monitors who would remain in Iraq until the human rights situation has drastically improved", and sets out the three following objectives:

(1) ensuring that human rights are respected by the Iraqi Kurds and the Iraqi National Congress over the territory they control;

(2) ensuring that these rights are respected in those same areas by the regime, so that it ceases its operations of terrorism in these regions;

(3) The third aspect of the task, which is the one specific to the marshes, would allow the monitors to carry on, from within Iraq, their Iraqi global mandate.

Most importantly, a positioning of human rights monitors is possible in Northern Iraq *immediately*: Saddam Hussein cannot prevent human rights monitors from establishing their operation in Kurdish Iraq.

Would that solve the situation in the Marshes and elsewhere in the country? Perhaps not at once. But a qualitative change would be introduced on the scene, with the new face of international law appearing in practice for the first time with a view to its appeal in the centre and south of the country: Saddam Hussein cannot prevent human rights for Iraq operating from within Iraq. This is a feasible step, and can be undertaken immediately. With human rights monitoring established as long-term objective for Iraq, in the way that the issue of monitoring has proved possible with the weapon inspec-

tors, a safe haven will be established in principle by international law, and it will then be a matter of sheer political pressure to cloak human rights inspectors with the same efficacy achieved by the weapon inspectors established under Resolution 687. Then, the new order would have started to come of age.

Nothing is more repugnant to a lawyer than the extraordinary insistence on weaponry with more than a hundred missions of various sizes by international inspectors, whilst the request, which has been repeated time and again by the UN official in charge for Iraq, Mr Van der Stoel, for human rights monitors to be imposed on Baghdad. Meanwhile, a request which is a mild response considering the genocide at hand, is being ignored by the parties and by the Secretary-General. The new world order, surely, should put human lives before weapons. It should put the task of Mr Van der Stoel on a more urgent course than that of Mr Ekeus. The rest, for the law, is details. ♀

Notes

¹This study is part of a work in progress on domestic law, international law and Iraq. It was presented for the first time at the House of Commons on 8 December 1993.

² Director of the Centre of Islamic and Middle Eastern Law, School of Oriental and African Studies, Univeristy of London.

³ It is opportune to remember that in the summer of 1982, Saddam Hussein sent a hit squad under the order of an Iraqi intelligence officer to offer the like-minded Ariel Sharon the excuse he needed to invade Lebanon. Then, in early June, the Israeli ambassador in London, Shlomo Argov, was severely wounded. By so doing, Hussein succeeded in deflecting international attention from his troubles in the first Gulf War, as his troops were on the verge of rout before the advancing Iranians. Ariel Sharon, of course, would have probably found another excuse, but the "hero of Arabism" did not hesitate to offer the Israelis what they needed to invade a "brotherly Arab country", leading onto the Sabra and Chatilla massacre and the expulsion of the PLO from the country. One of the terrible ironies of the occasion is that Saddam Hussein offered at the time to the beleaguerd Palestinians trucks of dates for their war effort, a gesture which was rewarded by Yasser Arafat's support to Saddam Hussein order of the mother of Battles", which he, like for the dates earlier, gracefully accepted.