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978-0-521-19350-4 - Claims Against Iraqi Oil and Gas: Legal Considerations and Lessons Learned

Rex J. Zedalis

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CLAIMS AGAINST IRAQI OIL AND GAS

Legal Considerations and Lessons Learned

This book presents the first and only comprehensive examination of the legal issues surrounding international debt recovery on claims against Iraqi oil and gas. It offers a snapshot view of Iraq's outstanding debt obligations and an analysis of the significance of the theory of odious debt in the context of the Iraqi situation. The list of legal issues examined includes relevant provisions of the 2005 Iraqi Constitution, controlling United Nations Security Council resolutions, pertinent articles of the 2007 Kurdistan Regional Government oil and gas law (No. 22) and the many nuanced and technical questions raised thereby, legal pronouncements of Iraq and selected other nations that aim to protect Iraqi oil and gas, and general problems associated with recognition and enforcement of awards or judgments that may involve such oil and gas or revenues from their sale. Also discussed are the lessons learned by the handling of the Iraqi debt experience and the transferability of those lessons to future situations in which resource-rich nations may have outstanding financial obligations to other members of the world community or their nationals.

Rex J. Zedalis is a member of the faculty at the University of Tulsa, College of Law, where he has received numerous awards for his excellent teaching, including an award in 2004 for the university's most outstanding professor. He also has been recognized for his extensive publication record in both U.S. and European international law journals. He is currently the Phyllis Hurley Frey Professor of Law and the Director of the Comparative and International Law Center (CILC) at the University of Tulsa. He has served as a Fellow with, and a former Assistant Director of, the College of Law's National Energy Law & Policy Institute. Professor Zedalis also acted as consultant to international organizations, foreign governments, and domestic as well as international law firms during his thirty-five-year career. Professor Zedalis is the author of *The Legal Dimensions of Oil and Gas in Iraq: Current Reality and Future Prospects*.

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LEGAL CONSIDERATIONS AND LESSONS LEARNED

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University of Tulsa



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This book is dedicated to my wife, Catherine, and my two sons, Ian and Bryce, who sustain, humor, and endure me through thick and thin, as well as to my many teachers, mentors, and colleagues who have served over the years as models of the academic scholar. Special recognition is deserved by David S. Clark (Willamette University), Walter Gellhorn (Columbia University), W. T. Mallison, Jr. (George Washington University), and Oscar Schachter (Columbia University). The support of the University of Tulsa, College of Law, Faculty Research Fund; the funding associated with holding the Phyllis Hurley Frey Professorship; and the encouragement and enthusiasm of the College of Law's Dean, Janet Koven Levit, are deserving of particular acknowledgment.

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PREFACE

The general topic of legal claims against any foreign nation for debts owed to other nations raises an exceptionally long and involved list of intricate and complex issues from susceptibility to lawsuits, to jurisdiction, to potential defenses, to enforcement of judgments, and numerous associated matters. Similarly, the topic cannot avoid the possible significance related to distinguishing between claimants that are governments and those that are private individuals or legal entities, as well as the practical ramifications that emerge from the existence and location of assets from which any successfully sought judgment may be satisfied. Similarly, there are the questions of whether the relief desired is to proceed from an adjudicative- or arbitral-type process and whether such a process is to (or must) take place before an international or national tribunal.

Broadly speaking, whenever one foreign sovereign owes a form of debt to another sovereign, the traditional mechanism of diplomacy is most often employed to secure payment. When not completely efficacious, the creditor nation may resort to alternatives to seek satisfaction, including various types of internationally mediated, arbitrated, or adjudicated claim-resolution processes. Clearly, a substantial portion of the debts claimed by one foreign sovereign against another involve debts with their fundamental origins in obligations owed by the creditor sovereign to private individuals or private legal entities considered nationals of the foreign sovereign advancing the claim. This is because most often, the rules of international law are viewed as speaking not to nationals but rather to the nation-states that protect and represent them.

When causes of action have been maintained in national fora, whether adjudicative or otherwise, it is more often the result of the

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initiative of private individuals or private legal entities. Although at the level of international claims resolution it is typically the government of the claimant that advances the claim, before any national fora, the claimant is recognized as vested with the authority to speak for itself. In some instances, claims are initiated before national fora because of an absence of an international mechanism established to address the claims of natural or juridical persons; in other cases, the claims may proceed from dissatisfaction with the results from the use of any such mechanism and an attempt to sidestep compulsory resort thereto. Regardless of the reason, actions brought in such fora can present many of the issues raised herein. The nation of the forum in which the action is commenced may endorse certain notions about the limited susceptibility of foreign sovereign creditors to prosecution. The party maintaining the action may face hurdles obtaining effective jurisdiction allowing it to move forward or find the creditor nation without sufficient assets to permit full satisfaction from any judgment successfully received.

It is well known that Iraq's substantial oil and gas reserves and the potential for huge amounts of revenues from international crude oil exports place it in a position of having assets that can be applied to extinguishing debts owed to other nations, private individuals, and private legal entities. Estimates suggest that proven Iraqi crude-oil reserves are approximately 115 billion barrels,¹ with unproven reserves totaling perhaps more than 100 billion barrels.² Through 2008 and into early 2009, Iraq was producing only 2.4 million to 2.5 million barrels per day (mbpd),³ exporting approximately 2 mbpd⁴; however, before the two Gulf Wars, it had reached production levels of 3.5 mbpd⁵ and has its

¹ See Energy Information Administration, U.S. Dep't of Energy, Official Energy Statistics from the U.S. Government (Aug. 2007), available at www.eia.doe.gov/emeu/cabs/Iraq/Oil.html (accessed Jan. 14, 2009).

² See *id.* See also Weshad Rassak, "Iraq: Private Ownership of Oil and the Quest for Democracy," MPRA Paper No. 54 (Oct. 10, 2007) (100 billion barrels); "Foreign Firms Covet Iraq Oil Reserves, Global Energy," *Iran Daily* (Feb. 6, 2006) (265 billion barrels), available at www.iran-daily.com/1384/2494/html/energy.htm (accessed Jan. 14, 2009).

³ See Bureau of Near Eastern Affairs, U.S. Dep't of State, Iraq Weekly Status Report, Dec. 31, 2008, at 18 (graph), available at www.state.gov/documents/organization/113677.pdf (accessed Jan. 14, 2009).

⁴ This is based on the fact that Iraqi domestic consumption has run around 500,000 bpd.

⁵ See U.S. Energy Information Administration, U.S. Dep't of Energy (1998), available at www.arabchamber.com/arab-countries/iraq/Y/iea2.htm (see graph) (accessed June 19, 2008).

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eye on a production level of 6 mbpd,⁶ with most supplied to the international market. Even at current production and export levels, when international crude prices return to prerecession heights, Iraq could have revenues that exceed by tens of millions of dollars its per-year budget expenditures. To illustrate this point, during the height of summer 2008 international crude-oil price run-up, indications were that Iraqi oil-export revenues were on track to outstrip budget expenditures by almost \$80 billion.⁷

Recognizing the potential for Iraq to use oil revenues to satisfy outstanding debts, as early as Spring 1991 the UN Security Council established in Security Council resolution 687 the UN Compensation Commission (UNCC) to oversee and address claims against Iraq for debts reportedly incurred because of the invasion of Kuwait by the military forces of Saddam Hussein in August 1990 – the invasion that led to the First Gulf War.⁸ Oil revenues were to be used to satisfy relevant debts entitled to payment under the UNCC rules. Notably, debts antedating the invasion or not resulting from the military action and the consequent wartime civil disorder or hostage taking were not cognizable under the UNCC mandate. In other words, the UNCC was not designed to consider all debts claimed to be owed by Iraq, regardless of when they were accrued or the circumstances under which they emerged. Iraqi oil revenues were to serve as the basis for compensating claimants against that nation but only with respect to debts said to be directly attributable to the military action involving the invasion of Kuwait.

Many other claimants against Iraq remained on the sidelines – including those with debts predating the Kuwait military operations and the First Gulf War and debts not arising from military action, civil disorder, or hostage taking, as well as those with claims that developed as a result of post-First Gulf War relations or dealings with Iraq. It also was believed to be important to ensure that Iraqi oil revenues

⁶ See Ahmed Rasheed, “Iraq Opens 11 Oil and Gas Fields for Foreign Bids,” *AFX News* (Dec. 31, 2008), available at www.freerepublic.com/focus/f-news/2156746/posts (accessed Jan. 14, 2009).

⁷ See James Glanz & Campbell Robertson, “As Iraq Surplus Rises, Little Goes Into Rebuilding,” *New York Times* (Aug. 5, 2008), available at www.nytimes.com/2008/08/06/world/middleeast/06surplus.html (accessed Jan. 14, 2009).

⁸ See UN Security Council Res. 687, UN SCOR, 46th Sess., 2981st mtg., UN Doc. S/RES/687 (1991), especially at paras. 16–19.

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would be preserved from creditor claims in order to be available for any future rebuilding of that country. Perhaps in partial acknowledgment of these facts, the UN Security Council adopted a series of resolutions insulating Iraqi hydrocarbon revenues, as well as the hydrocarbons themselves, from legal action, directing that member states adopt their own domestic measures to implement that UN obligation.⁹ Additionally, the Iraqi government, including the Kurdistan Regional Government (KRG), in order to provide adequate flexibility regarding oil and gas contracts and other commitments earlier entered into, inserted provisions in controlling legal enactments addressing reconsideration and alteration of such contracts and commitments, the effect being to limit the legal consequences for moving to modify or change previous arrangements with international oil and gas companies. The significance of both actions for those owed debts by or in contracts with Iraq cannot be understated, especially in view of the fact that 95 percent of the country's revenues come from the sale and export of crude oil and oil products, which any effective legal recourse against Iraq would be compelled to have as the object of its remedial desires.¹⁰ Stated another way, the insulation by the Security Council of Iraqi hydrocarbons and proceeds of their sales – as well as the legal protection under Iraqi law for reconsideration of certain contractual commitments – would appear to seriously complicate the ability of claimants to secure satisfaction for Iraqi failures to completely fulfill obligations owed to the claimants.

In view of the foregoing discussion, the central and exclusive focus of this book is on the various legal issues and juridical nuances related to two matters: (1) the specific international measures (from the Security Council and other bilateral agreements) and associated domestic enactments designed to protect Iraqi hydrocarbons and revenues

⁹ See UN Security Council resolution 986 (1995) at paras. 14–15, available at www.iraqwatch.org/un/unsresolutions/s-res-986.htm (accessed Jan. 14, 2009); resolution 1483 (2003) at paras. 22–23, available at www.iraqwatch.org/un/unsresolutions/s-res-1483-052203.pdf (accessed Jan. 15, 2009); resolution 1546 (2004) at para. 27, available at www.iraqwatch.org/un/unsresolutions/s-res-1546.pdf (accessed Jan. 15, 2009); and resolution 1790 (2007) at para. 3, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N07/650/72/PDF/N0765072.pdf?OpenElement> (accessed Jan. 15, 2009).

¹⁰ See “Blood and Oil: How the West Will Profit from Iraq’s Most Precious Commodity,” *The Independent* (7 Jan. 2007), available at www.independent.co.uk/news/world/middle-east/blood-and-oil-how-the-west-will-profit-from-iraq-s-most-precious-commodity-431119.html (accessed Jan. 15, 2009).

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generated from being available to meet creditor claims; and (2) those particular provisions of Iraqi national law – constitutional and statutory – that appear designed to provide protection from legal claims resulting from alleged alterations by Iraq in the terms of contractual commitments concerning oil and gas. Most of this book’s attention is devoted to examining the meaning and significance of the relevant Security Council formulations associated with the first item, and the legal measures implemented in the United States to execute those formulations, as well as the second item dealing with relevant provisions of Iraqi law addressing changes in contractual rights and duties. Nevertheless, regarding the protection of hydrocarbons and revenues from claims by creditors, attention also is given to measures adopted in selected other countries in which potential claimants are likely to reside or Iraqi assets are likely to be found. Additional discussion pertains to certain relevant parallel provisions of the U.S.–Iraq Status of Forces Agreement (SOFA) that primarily governs the maintenance of foreign forces in Iraq for the next few months to several years. As shown in the particular discussions, the words of all relevant provisions are parsed closely, with specific terms the focus of one chapter and other terms from the same provisions the focus of subsequent chapters.

With regard to UN Security Council formulations, paragraph 22 of resolution 1483¹¹ – extended first until the end of 2009 by the terms of resolution 1859, which was adopted in the waning days of 2008, and then until the end of 2010 by resolution 1905, adopted December 21, 2009 – it provides that “petroleum, petroleum products, and natural gas originating in Iraq shall be immune, until title passes to the initial purchaser from legal proceedings” and “proceeds and obligations arising from sales [of such] shall enjoy privileges and immunities equivalent to those enjoyed by the United Nations.”¹² Article 26 of the SOFA between the United States and Iraq, adopted just before resolution 1859, recognizes the need “to continue to safeguard Iraq’s revenues from oil and gas” and the fact that the debts of the former Iraqi regime caused the “President of the United States . . . to exercise[] his authority to protect from United States judicial process the Development Fund

¹¹ See resolution 1483, *supra* note 9 at para. 22.

¹² See Security Council resolution 1859 (22 Dec. 2008) at para. 1, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N082666?05/PDF/N0866605.pdf?OpenElement> (accessed Jan. 27, 2009).

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for Iraq and certain other property in which Iraq has an interest.”¹³ With regard to pertinent constitutional and statutory measures of Iraqi national law, article 141 of the Iraqi Constitution indicates that legislation of the KRG since 1992, as well as decisions of the government including court decisions and “contracts, shall be considered valid unless they are amended or annulled” under laws of the KRG and so as not to contradict the Iraqi Constitution.¹⁴ Article 54 of the 2007 KRG oil and gas law (No. 22) provides that “agreements related to Production Sharing Contracts entered into by the [KRG] prior to the entry into force of this Law” must be reviewed for consistency therewith and decisions regarding them “shall be final.” The article also provides that “authorizations and memoranda of understanding related to oil and gas . . . signed by the [KRG] prior to entry into force of this Law” shall be “null and void” unless approved within the KRG.¹⁵ The simple clarity of these provisions obscures the many complexities related to their precise wording – complexities that raise genuine questions about the provisions’ ability to accomplish the “short-circuiting” role they are all designed to play. The nature of the Iraqi assets protected, the obligations they serve to financially secure, the point at which those assets become fair game, the relationship between article 141 of the Constitution and article 54 of the KRG oil and gas law, the existence of other constitutional provisions limiting contract amendment or annulment, and the significance of an agreement related to a production sharing contract (PSC) as opposed to an authorization or Memorandum of Understanding (MOU) all merit sedulous and close examination.

To set the general problem of debts owed by Iraq in the context of the real world, it must be noted that various legal claims have been lodged and adjudicated against Iraq in American courts since the period after that country’s invasion of Kuwait that led to the First Gulf War. Illustrative cases include *Consarc Corp. v. Iraqi Ministry of*

¹³ See U.S.–Iraq Status of Forces Agreement, art. 26, Iraq Oil Report, Breaking: Text of Status of Forces Agreement (Nov. 18, 2008), available at www.iraqoilreport.com/2008/11/18/breaking-text-of-status-of-forces-agreement (accessed Nov. 28, 2008).

¹⁴ See Iraqi Constitution, art. 141, available at www.export.gov/iraq/pdf/iraqi-constitution.pdf (accessed Nov. 15, 2007). Also available at www.uniraq.org/documents/iraqi-constitution.pdf (accessed Mar. 5, 2009).

¹⁵ See Oil and Gas Law (No. 22) of the Kurdistan Region–Iraq (2007), art. 54, available at www.krg.org/uploads/documents/Kurdistan%20Oil%20and%20Gas%20Law%20English_2007_09_06_h14m0s42.pdf (accessed Jan. 27, 2009).

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Industry & Minerals, Brown & Root International, Inc. v. State Company for Oil Projects, and Commercial Bank of Kuwait v. Rafidain Bank, all involving claims of debts owed by Iraq and arising from circumstances prior to the First Gulf War. In view of the inability of claimants to seek recovery under the terms of the very narrow and specific UNCC mandate, and the absence of any other mechanism established by agreement between the United States and Iraq for resolving the claims, petitioners were left with no option other than to pursue relief in an appropriate national court.

In *Consarc*,¹⁶ the New Jersey engineering and production firm had contracted in 1989 with the Iraqi Ministry of Industry & Minerals to supply four powerful laser furnaces associated with the manufacture of specialty metals. Iraq declared to the firm and the U.S. government export-licensing agency that the furnaces were to be used in the production of prosthetics. Subsequently, intelligence reports indicated that the furnaces were actually to be used in Iraq's nuclear-weapons program, and the appropriate export licenses were thus withdrawn. Consarc contended that the actions of Iraq leading to the blocking of the export constituted fraud and a breach of contract for which compensation was payable. The August 1991 invasion of Kuwait by Iraqi forces resulted in the freezing of all Iraqi funds and assets subject to U.S. jurisdiction, thereby compelling Consarc and others similarly situated to secure authorization of the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC) prior to instituting legal action against Iraq. Consarc sought and received such authorization and commenced litigation with a September 1990 filing in the U.S. District Court in Washington, DC. After an April 1991 hearing, Consarc received a favorable summary judgment, which included a \$6.4 million compensatory and a \$55 million punitive-damage award.¹⁷ In the estimation of the Court, Consarc and its U.K. subsidiary had "fully performed all their obligations... [and the Ministry of Industry & Minerals]

¹⁶ *Consarc Corp. v. Iraqi Ministry of Industry & Minerals*, 1991 U.S. Dist. LEXIS 4884 (D. D.C. Apr. 10, 1991).

¹⁷ Several follow-on appeals, litigating various related issues, resulted from the District Court's decision. See, generally, *Consarc Corp. v. Iraqi Ministry*, 27 F.3d 695 (D.C. Cir. 1994), *Consarc Corp. v. U.S. Treasury Dep't Office of Foreign Assets Control*, 871 F. Supp. 1463 (D. D.C. 1994), and *Consarc Corp. v. U.S. Treasury Dep't Office of Foreign Assets Control*, No. 94-5390 (decided Dec. 15, 1995) (D.C. Cir. 1995), available at www.ll.georgetown.edu/federal/judicial/dc/opinions/94opinions/94-5390a.html (accessed Jan. 16, 2009).

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had . . . committed egregious and wantonly malicious and willful acts of fraud and breaches of contract . . . including the knowing submission of a fraudulent end-user certificate [required for exportation].”¹⁸

In *Brown & Root International*,¹⁹ the predecessor of what is known now as Kellogg, Brown & Root (KBR) had performed extensive repair work on Iraq’s offshore oil terminals in the Persian Gulf at Mina al-Bakr, in the far south of the country near the border with Kuwait. According to the plaintiff, the services performed were valued at nearly \$18 million and it sought a default judgment for Iraq’s failure to make payment. In June 1992, Brown & Root was granted a judgment that compensated it for its unpaid services.

*Commercial Bank*²⁰ involved another instance of legal action against an organ or appendage of the Iraqi government, this time for failure to repay certain loans secured by letters of credit and obligations taken on by Rafidain Bank, a wholly owned entity of the Iraqi government, and guarantees of Rafidain’s repayment made by the Central Bank of Iraq (CBI; the equivalent of the U.S. Federal Reserve). The loans made to Iraq and secured by the letters of credit, obligations, and guarantees were all issued from Commercial Bank of Kuwait and a syndicate of other banks in the sum total of \$1.1 billion. Commercial Bank’s share of that total amounted to \$33 million, of which it claimed Rafidain Bank and the CBI had defaulted in repaying \$7.4 million after the invasion of Kuwait and subsequent outbreak of the First Gulf War. The case was referred by the U.S. Federal Court for the Southern District of New York to a magistrate for full consideration of the issues presented. After the magistrate’s report, the Court in late 1992 granted judgment on the CBI’s motion for a default judgment, awarding \$71 million in damages.

It is clear that the nature of legal issues confronted by U.S. courts in *Consarc*, *Brown & Root International*, and *Commercial Bank of Kuwait* involved matters outside the scope of this book. Rather, the focus is limited to questions arising from complexities of the international and national measures specifically insulating Iraqi oil and gas – and the revenues generated – from creditor claims, as well as questions arising

¹⁸ See *Consarc*, supra note 16 at 3.

¹⁹ See *Brown & Root International, Inc. v. State Company for Oil Projects*, 91 Civ. 594 (S.D. Tex. 1991).

²⁰ See *The Commercial Bank of Kuwait v. Rafidain Bank*, 91 Civ. 6500 (S.D.N.Y. Oct. 1, 1992). The District Court case is also described in *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994).

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from the comparable complexities of the terms of various provisions of Iraqi law addressing Iraqi changes in contractual obligations, including those dealing with oil and gas. Although it is accurate to assume that many of the matters wrestled with in the court decisions referenced can be presented in the context of legal disputes involving the matters focused on herein, readers should not expect to gain any insight about such in the chapters that follow. If it does not concern the legal twists and turns of the international or national legal measures insulating Iraqi hydrocarbons and the proceeds of their sale from claims by those contending that Iraq owes some debt, or the implications of those Iraqi legal measures concerning alterations in Iraq's contractual commitments, then it is not the concern of this book. Issues about the efficaciousness of OFAC's power and authority to block lawsuits against foreign assets that it had previously frozen, or the terms and provisions of legislative measures that protect foreign sovereigns against action in national courts, are important in their own right. However, the purpose of the current book is limited and centers on two specific and significant matters: (1) the international and domestic measures that insulate Iraqi oil and gas and proceeds from their sale from legal action; and (2) the Iraqi measures designed to prevent legal action as a result of Iraq altering its contractual obligations with others.

Two final yet extremely important observations are warranted prior to venturing into the specifics of this book. The first addresses the fact that article 25 of the UN Charter clearly and explicitly recognizes resolutions of the Security Council that represent decisions of that body as binding on all member states.²¹ In view of the terms and provisions of international agreements constituting one of the long-acknowledged sources of international law,²² the effect of article 25 is to make the obligations of Security Council resolutions 1483, 1859, and 1905 – referenced previously²³ and in the chapters that follow – part and parcel of the corpus of international law from which the community of nations cannot escape. The second observation concerns where the insulation

²¹ See UN Charter, art. 25, 59 Stat. 1031, T. S. No. 993, 3 Bevans 1153, 24 U.S.T. 2225, T.I.A.S. No. 7739, available at www.un.org/en/documents/charter/ (accessed Sept. 19, 2009).

²² See Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, available at www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (accessed Sept. 19, 2009).

²³ See text accompanying *supra* notes 11–13.

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from creditor claims provided to Iraqi oil and gas by those Security Council resolutions and other provisions of law is situated within the larger context of general international law. This not only implicates the first observation but also calls for recollection of the basic notion of the general legal status of a sovereign and people engaged in war who then regain governmental control over territory earlier lost as a consequence of military operations or subsequent foreign occupation. In the Iraqi situation – in which contractual obligations and debts were incurred by that nation before the outbreak of the First Gulf War in 1991, in the interwar years preceding the Second Gulf War in 2003, and even in the subsequent period when under the control of the U.S.-led coalition occupying forces – this requires reference to what international law states about (1) the effect of war, hostile military invasion, and possible foreign occupation on the dealings of a sovereign whose self-rule is later restored; and (2) the situation's effect on contracts and obligations that may have been transacted by the legitimate sovereign under those or similar circumstances.

Regarding the former – the general effect of war, invasion, and occupation on actions and authority of a later-returned sovereign – a foundational principle of international law and most legal systems is that of *ex injuria jus non oritur*, loosely translated as “illegal acts cannot create law” or “a right cannot arise from a wrong.”²⁴ Although the twists and turns of the principle can be many, at root and as a sweeping generalization, it has the effect of preventing military activities from altering the legal status quo ante, at least to the extent that the territory affected by such activities returned to the control of the sovereign who exercised authority prior to the military operations. Apparently dating from Roman times²⁵ and thoroughly explored by Hugo Grotius²⁶

²⁴ See, generally, Brigitte Stern, “Dissolution, Continuation and Succession in Eastern Europe” (1998); and Gerard Kreijen, “State Failure, Sovereignty and Effectiveness” (2004), the latter contrasting the principle with that of *ex factis jus oritur*, translated as “the facts create the law.”

²⁵ For a discussion of the ancient doctrine, see Randall Lesaffer, “Gentili's *ius post bellum* and early-modern peace treaties” 32–35, available at www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM_DLIV_016258&RevisionSelectionMethod=LatestRevision (accessed Sept. 19, 2009).

²⁶ See Hugo Grotius, *De Jure Belli ac Pacis*, Bk. III, Chpt. 9 (1625), available at www.constitution.org/gro/djbp_309.htm (accessed Sept. 19, 2009). See also Emmerich de Vattel, “The Law of Nations or the Principles of Natural Law,” Bk. 3, Chpt. 14, Secs. 204–222 (1758), available at www.lonang.com/exlibris/vattel/vatt-314.htm (accessed Sept. 19, 2009).

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(a founding father of international law), the doctrine of *postliminium* proved a natural outgrowth of the *ex injuria* principle. The thrust of the doctrine of *postliminium*, although rife with many twists and turns of its own, proclaims the situation and status of the original sovereign and its dominated people to remain unaltered by hostile military presence or occupation, once the legitimate sovereign and its people are returned to power.²⁷ Today, the doctrine can be seen in part as a historical antecedent, given that much of what the doctrine sought has been codified in the laws of war – specifically, the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) of 1907,²⁸ and the various 1949 Geneva Conventions.²⁹ Regarding the effect of the displaced sovereign’s laws and property interests associated with the territory, articles 43, 46, 53, and 55 of the Regulations Respecting the Laws and Customs of War on Land seem especially significant. Article 43 indicates that the displaced sovereign’s laws remain in force unless absolutely prevented by military necessity, whereas article 46 protects private property from confiscation and articles 53 and 55 regard state-owned property as available for the hostile power’s use only pursuant to particular standards.

Regarding what international law states about war, invasion, and occupation’s effect on contracts and other obligations transacted by a legitimate sovereign whose self-rule is eventually restored – the latter of the concepts referenced previously – it seems that a body of law more national than international in character and whose thrust is complementary to that of *ex injuria*, *postliminium*, and the laws of war has developed within the community of states. This law of international transactions accepts the fact that war and activities associated with military hostilities can serve to act on contracts and other obligations in a variety of different ways. First, they may render performance illegal, as in the case of contracts and obligations between enemy states.³⁰ Second, they may provide one party with the defense of frustration for

²⁷ See, generally, *Hall’s International Law* at 577–585 (ed. Pearce Higgins, 8th ed. 1924).

²⁸ Available at www.icrc.org/IHL.NSF/INTRO/195?OpenDocument (accessed Sept. 19, 2009).

²⁹ See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War (1949), 6 U.N.T.S. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

³⁰ See Samuel Williston, “The Law of Contracts” Sec. 1747 (1922); *Zinc Corp. v. Hirsch* [1916] 1 K.B. 541 (1922).

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its failure to perform its commitments.³¹ Third, they may present the problem of performance – interfered with by hostilities – that can be resumed or completed following cessation of those hostilities.³² Fourth, they may raise the distinction between contracts and obligations not yet executed and those that have been completed and involve the accrual of a right of action for a debt owed and not paid.³³ Long ago, it was observed that no general principle of law provides for the abrogation of contracts as a result of war.³⁴ Nevertheless, some authority exists for viewing war as ending even those contracts whose performance could be reinstated following the conclusion of hostilities,³⁵ although support for the contrary position also must be admitted.³⁶ Concerning situations in which performance has been completed and there remains only payment to be made at the time of the outbreak of hostilities, at least Anglo-American jurisprudence suggests that war has no effect on the continuation of the debt owed.³⁷ Indeed, that is an underlying assumption inherent in at least a 1994 Second Circuit decision³⁸ following up on *Commercial Bank of Kuwait*, examined previously in conjunction with *Consarc* as well as *Brown & Root International*. After all, in the Second Circuit’s consideration in *Commercial Bank*, the Iraqi authorities even raised the First Gulf War by way of an important circumstance affecting their ultimate liability. Neither they nor the court, however, came close to suggesting that war somehow exculpated them from having to pay the debt they owed.³⁹ Furthermore, the notion that accrued debts are to be paid – despite the fact that

³¹ See Arnold D. McNair, “Legal Effects of War,” Chpt. 6, “Frustration of Contract” (1944).

³² See *id.* at 83, acknowledging such but indicating that it is a rare event.

³³ See *id.* at 101–107.

³⁴ See, e.g., *Ertel Beiber & Co. v. Rio Tinto Co.* [1918] A.C. 260, 269; *Ottoman Bank v. Jebara* [1928] A.C. 269, 276.

³⁵ See Arnold D. McNair, *supra* note 30 at 98–99.

³⁶ See, e.g., Amos S. Hershey, “The Essentials of International Public Law,” 368–369 (1918).

³⁷ See, e.g., *Shering Ltd. v. Stockholms Enskilda Bank Aktiesbolag and Others*, 12 Int’l Law Rpts. [1943–45] 308 (1951). See also “Effects of War on Contract,” 31 *Harvard L. Rev.* 640–643 (1917–18).

³⁸ See *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F3d 238 (2d Cir. 1994), available at <http://bulk.resource.org/courts.gov/c/F3/15/15.F3d.238.93-7552.533.html> (accessed Sept. 20, 2009).

³⁹ See *Commercial Bank of Kuwait*, *id.* (paras. 34–35 of the opinion discussing the inability of the Gulf War to affect a finding of “willfulness” of Iraqi default).

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military operations may have intervened between the debtor and creditor states – suggests a consonance of this field of law with that involving the general international law concepts of *ex injuria, postliminium*, and the laws of war.

Reviewing the previous discussion in its totality, what is revealed is an international-law approach that essentially preferences the resumption of the same situation – presumably including the contract debt situation – that prevailed before military operations and any subsequent foreign occupation, at least after the legitimate sovereign has been restored to power. Situating Iraqi debts in that type of international-law context certainly favors Iraq's creditors, except for the fact that the international community acted through the Security Council and other mechanisms to provide Iraqi oil and gas and revenues from their sale with a certain level of protection from those creditors. In other words, whereas the community of nations may have participated over many centuries in the development of both international and national principles, doctrines, and codified provisions of law that seem to favor the resumption of the preexisting situation following the ending of hostilities and the return of the earlier sovereign, those same nations are similarly empowered to take the prevailing law in another and entirely different direction if they so choose. Actions of the UN such as those reflected in Security Council resolutions 1483, 1859, and 1905, and actions of various individual nation-states seem to represent efforts to push the relevant international and national law in a direction beneficial to Iraq and clearly distinct from what otherwise appears to be the case. In the chapters that follow, the complexities, nuances, and intricacies of the various legal measures employed to accomplish that task serve as the central and exclusive focus of this book's attention.

Tulsa, Oklahoma
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