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The Legal Status of Foreign Economic Interests in Occupied Iraq

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One of the most interesting and pressing international law questions presented by the current situation in Iraq is the legal status of past, present, and future economic interests of foreign parties in Iraq and their relationship to the United States as an Occupying Power. These questions are governed mainly by the law applicable in armed conflict known today as international humanitarian law, consisting of the "Hague Regulations" (especially the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land [1]), the "Geneva Conventions" (especially the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War [2]), investment treaties, to the extent applicable, and customary international law concerning occupied territory. Of particular relevance in the current context is the "United Nations Law" relating to Iraq, especially Resolution 1483 of May 22, 2003, on the Rebuilding of Iraq. [3] Finally, past U.S. practice regarding occupation of foreign territory—especially its post-World War II occupations of Germany and Japan—may constitute relevant precedent applicable to Iraq. Although the U.S. is subject to certain obligations and foreign parties may have certain rights under this legal framework, a dispute settlement mechanism for adjudicating any remedies such parties may have is not necessarily available and remedies may be difficult to enforce in practice.

I. The Legal Status of Foreign Economic Interests Originating Before U.S. Occupation

Any property interests, including in the form of contracts, that foreign parties had negotiated with the Republic of Iraq prior to Gulf War II should not be affected merely by the ousting of Saddam Hussein's regime and a subsequent change of government in Iraq. **A state's international obligations remain unchanged after a mere change of government—even if such a change is a radical one, such as from a dictatorship to a democracy. [4] International decisions have recognized that it does not matter that the former government represented a dictatorship. [5]** The Hussein government was clearly in effective control of Iraq and was recognized by many states, most of which had diplomatic relations with Iraq. Until recently, Iraq's seat in the U.N. General Assembly was occupied by a representative of Saddam Hussein's government.

Resolution 1483 did not declare null and void any existing contracts entered into by the ousted regime of Saddam Hussein. This is not surprising, as the U.N. Security Council has never declared null and void the contracts of a former government of a U.N. member state and its authority to do so would be questionable. [6] Article 46 of the Hague Regulations makes clear

that "private property," which can be said to include proprietary rights granted in a state contract, "must be respected."

Therefore, if contracts were concluded between the Republic of Iraq and foreign private parties before Gulf War II, both the old and the new government of Iraq will be bound by the state contract, at least if it granted proprietary rights. [7] The Republic of Iraq remains the same state, so there is no reason why a new government made possible by an armed invasion that ousted the old government should be treated any differently from a new government made possible by an internal revolution.

A condition precedent is that any such contracts did not violate any United Nations sanctions.

Article 43 of the Hague Regulations imposes a requirement on the Occupying Powers to respect the laws of Iraq (the occupied territory), which includes Iraq's law on contracts. Thus, absent specific authorization in the existing laws of Iraq or military necessity, the Occupying Powers are prohibited from nullifying-and, arguably, suspending-any legitimate state contracts with foreign parties by amending Iraq's laws or by issuing a legislative declaration to that effect.

U.S. action taken in connection with its occupations of Germany and Japan after World War II confirms U.S. deference to pre-war legal relationships notwithstanding a radical change in governmental authority and control in the defeated state. Even though the U.S. in the WWII context for differing reasons was not subject to the limitations placed on occupying powers by the Hague Regulations, and the Geneva Conventions were not yet in force, it routinely took actions demonstrating its belief that pre-conflict obligations incurred by the defeated state remained in force after the conflict terminated. Thus, peace and reparation treaties signed by the U.S. with Japan, Germany and other Axis states after WWII expressly confirmed that contractual and other obligations made to the government or nationals of the allied states by the defeated state prior to the onset of war remained valid after the state of war terminated. [8]

II. The Legal Status of Foreign Economic Interests During U.S. Occupation

Whereas under the laws applicable to armed conflict enemy private property may, under certain circumstances, be subject to confiscation, [9] the private property of non-belligerent entities is protected against confiscation. As stated above, Article 46 of the Hague Regulations stipulates that "private property"-which presumably means any and all private property within the territory of the occupied state-"must be respected" and "cannot be confiscated" by an Occupying Power. Under Article 43 of the Hague Regulations, an Occupying Power generally must respect "the laws in force in the country" of occupation. [10]

If the U.S. or Iraq directly appropriates property rights lawfully acquired by foreign parties under Iraqi law, or if the U.S. or Iraq renders the economic benefit of such rights meaningless, this will trigger such parties' right to compensation under the established principles of international law regarding the expropriation of foreign property. [11] It is well established that the abrogation of contractual rights such as long-term oil concession rights may constitute expropriation under

international law. [12] This is particularly apparent from international arbitral decisions and the jurisprudence of the Iran-U.S. Claims Tribunal at The Hague.

Given that expropriation does not necessarily constitute or presuppose an internationally wrongful act under international law (provided appropriate compensation is paid), the law of state responsibility in principle is not applicable. However, to the extent there is a violation of international law (e.g., the Hague Regulations) by either the U.S. or Iraq, either state may incur international responsibility if the breach of international law is attributable to such state. Moreover, there may be an emerging rule of state responsibility providing for ancillary responsibility through complicity by one or the other state if stringent conditions are met. A state may incur ancillary responsibility if it aids or assists another state, or directs *and* controls another state, in the commission of an internationally wrongful act, provided (1) the assisting state does so with actual knowledge of the circumstances of the internationally wrongful act, and (2) the act would be internationally wrongful if committed by that state. [13]

It is uncertain, however, whether an injured foreign party will have a forum competent to adjudicate an expropriation or other claim against the states involved. In the case of Iraq, jurisdiction might lie in U.S. courts given that the U.S. Foreign Sovereign Immunities Act, [14] which provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts, includes an exception to immunity with regard to property taken in violation of international law. This exception might be available if the property, or property exchanged for it, comes to the United States or is owned or operated by an agency or instrumentality of Iraq that is engaged in a commercial activity in the United States.

The Hague Regulations do not include a binding dispute settlement mechanism available to private parties. A bilateral investment treaty between Iraq or the U.S., on the one hand, and the state under the laws of which a foreign company is incorporated and in whose territory it has its registered office, on the other hand, may provide for private rights and a dispute settlement mechanism to enforce them.

The United Nations Compensation Commission ("UNCC"), which was created after Gulf War I specifically to decide any claims for loss or damage directly arising from Iraq's unlawful invasion and occupation of Kuwait and which is in its final stages of deciding claims, does not have jurisdiction over claims not related to Iraq's 1990 invasion of Kuwait. [15] Consequently, the UNCC cannot decide claims arising from Gulf War II or the U.S. occupation of Iraq.

Even if the foreign party is successful in obtaining a remedy from some court or tribunal under a contract or a treaty, Iraqi petroleum, petroleum products and natural gas, as well as proceeds arising from sales thereof, until December 31, 2007, are specifically protected against attachment and execution under Paragraph 22 of Security Council Resolution 1483, which creates binding obligations for U.N. member states. Moreover, Iraq is not a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, making it difficult to enforce an arbitral award obtained against the Republic of Iraq.

III. The Legal Status of Foreign Economic Interests After U.S. Occupation

To the extent that the term of any pre-occupation contracts between foreign parties and the previous government of Iraq extends beyond the U.S. occupation of Iraq, the end of the occupation and the emergence of a new Iraqi government should have no effect on their validity- assuming no future U.N. Security Council resolution will affect the legal status of such contracts.

The situation is different with regard to contracts concluded during the occupation under the authority of the U.S. as Occupying Power. Under the Hague Regulations, the authority of an Occupying Power to administer an occupied territory and its resources is limited to the period of the occupation, at least as regards public buildings, real estate (including mineral resources in the ground), forests and agricultural estates belonging to the occupied state. [16] Although the Hague Regulations are silent on this issue, an occupying power in principle is entitled to enter into or grant contracts relating to the occupied territory for the duration of the occupation. However, the legal status of contracts concluded during an occupation and exceeding the length of the occupation is uncertain, especially if such contracts relate to the occupied state's natural resources. [17] At a minimum, such contracts must benefit the occupied state's population and must not result in the occupying power's gains exceeding the costs of its occupation. [18] With regard to contracts awarded by the U.S. during its occupation and exceeding the occupation of Iraq, any new Iraqi government will have the discretion either to honor or nullify (in whole or in part, i.e., the portion of the contract extending beyond the U.S. occupation) such contracts. In other words, under international law it is unlikely that the new Iraqi government would be bound by contracts awarded by the U.S. as Occupying Power, the terms of which exceed the U.S. occupation of Iraq. As concerns legislative and other measures taken by the Occupying Powers during their occupation of Iraq, these will continue in force after the end of the occupation until they are actually altered or repealed by the new Iraqi government.

For further discussion of these and related issues, please see the previous ASIL Insights, "**The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War**," April 2003; "**Security Council Resolution 1483 on the Rebuilding of Iraq**," May 2003.

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[1] Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The U.S. has signed and ratified the Hague Regulations. Iraq has only signed them, so that it is not a party. For the ramifications of

signature under the law of treaties, see ASIL Insight, **U.S. Announces Intent Not to Ratify International Criminal Court Treaty** (May 2002).

[2] Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516.

[3] The Preamble of Resolution 1483 refers to the "obligations under applicable international law of [the United States and the United Kingdom] as occupying powers," leaving no doubt as to their status in relation to Iraq. Paragraph 5 calls upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907." See ASIL Insight, **Security Council Resolution 1483 on the Rebuilding of Iraq** (May 2003), for an overview of the contents of Resolution 1483, which established a new legal regime for post-war Iraq.

[4] A change of government does not trigger the "clean slate" rules of state succession, where the new state would emerge largely unbound by its predecessor state's obligations (except for obligations regarding the state's borders and human rights). It is not settled, however, whether the "clean slate" rules are applicable by analogy to state contracts, outside the context of the law of treaties.

[5] See, e.g., *Tinoco Case (Gr. Br. v. Costa Rica)*, *U.N. Reports of International Arbitral Awards*, Vol. I, 369, 375 (1923), *reprinted in* 18 AJIL 147 (1924) (sole arbitrator Taft holding that the new government of Costa Rica was bound by concessions and bank notes given by Tinoco, the former dictator of Costa Rica, to British companies, and dismissing as irrelevant that Tinoco's regime was unconstitutional under Costa Rican law and had not been recognized by several states).

[6] The closest precedent is in Paragraph 29 of Resolution 687 (1991), where the Council, acting under Chapter VII of the U.N. Charter, decided that the *force majeure* defense would be available to any person that complied with the economic sanctions against Iraq and that consequently did not perform its pre-sanctions contract with Iraq. **In Paragraph 17 of the same resolution, the Council decided that Iraqi statements repudiating its foreign debt were null and void.** It is uncertain whether the Security Council would have the power to nullify state contracts. The Council may well be the final judge of its own authority under Chapter VII, despite the occasional hints from the International Court of Justice that some day it might assert a power of judicial review over other U.N. organs, including the Security Council.

[7] This conclusion would not necessarily apply to contracts entered into for the personal benefit of officials of the ousted government.

[8] See, e.g., Agreement on Reparation From Germany, Jan. 14, 1946, 61 Stat. 3157; Treaty of Peace with Japan, Sept. 8, 1951, Art. 18, 3 U.S.T. 3169 (1952); Ellinor von Puttkamer, "Peace Treaties of 1947," in 3 Encyclopedia of Public International Law 953 (Rudolf Bernhardt ed., 1997).

[9] According to the requisition rules laid down in Article 52 of the Hague Regulations, enemy private property within occupied territory must not be taken or interfered with, unless it is of use

for local military purposes, such as for the army of occupation-but not for its general needs at home or abroad. With regard to enemy private property within the other belligerent state's territory, general state practice today is to sequester such property (i.e., to seize it temporarily) rather than to confiscate it, leaving its subsequent disposal to be dealt with by subsequent arrangements.

[10] Article 43 includes an exception that applies when an occupying power is "absolutely prevented" from respecting an occupied nation's law. The exact scope of this exception is unsettled. The prevailing view appears to be that an occupant may ignore and change pre-existing laws of the occupied territory if such laws undermine the safety and supply of the occupational forces or the public order and civilian life of the occupied population, or if ignoring or changing such laws is justified by necessity either in the interest of the occupied population or in the military interest of the occupying power.

[11] Article 3 of Hague Convention IV confirms that a "belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation."

[12] See, e.g., U.N. General Assembly Resolution (V) of Dec. 2, 1950, acknowledging the status of contractual rights as property ("No one shall be deprived of property, including contractual rights, without due process of law and without payment of just and effective compensation.").

[13] See the International Law Commission's "Articles on Responsibility of States for internationally wrongful acts," Arts. 16-17, text annexed to U.N. General Assembly Resolution 56/83 of Dec. 12, 2001. The text of the ILC's Articles and Commentary is reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility* (2002).

[14] 28 U.S. Code §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611. According to § 1605(a): "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state . . ." Moreover, § 1610(a) states: "The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . (3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law . . ."

[15] See, generally, the **UNCC's Web site**, <www.unog.ch/uncc>; The United Nations Compensation Commission - A Handbook (M. Frigessi di Rattalma & T. Treves eds. 1999).

[16] This principle is derived from Article 55 of the Hague Regulations describing an occupying state as an "administrator and usufructuary." See Department of State Memorandum of Law on Israel's Right to Develop New Oil Fields In Sinai and the Gulf of Suez, October 1, 1976, *reprinted in* 16 ILM 733 (1977).

[17] The Preamble of Resolution 1483 stresses "the right of the Iraqi people freely to determine their own political future and control their own natural resources."

[18] For a Civil War related decision of the U.S. Supreme Court sanctioning a long-term lease exceeding military occupation, see *New Orleans v. Steamship Co.*, 87 U.S. 387 (1874). The Court stressed the special circumstances of the case, which involved large expenditures by the lessee in reliance on the lease. The Court said that it did not "intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases."