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# Iraq's Delictual and Contractual Liabilities: Would Politics or International Law Provide For Better Resolution of Successor State Responsibility?

By  
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## INTRODUCTION

Successor states emerge as the result of a multitude of political or economic processes. Whether one state continues the legal personality of a predecessor or instead rises as a new entity may hinge on issues of territorial integrity and governmental continuity or discontinuity. The contract and tort liabilities of successor states depend on a myriad of circumstances, such as their relationship to the territory, people and government of the predecessor state. These matters are further complicated by the various approaches and theories available to address the issues of state succession and state responsibility.

Two instances from recent history present a valuable opportunity for the examination of the practice of states with regard to succession. The 1978 revolution in Iran, which ended with the overthrow of Shah Pahlavi and the establishment of Ayatollah Khomeini's religious state, exemplifies a situation of state continuity following a government change. By contrast, the dismemberment of the former Yugoslavia invoked difficult questions as to whether the resulting situation was one of state continuity or state succession and if the former, which "new"<sup>1</sup> state would continue the legal personality of the predecessor federation.

Which characterization was given to the emerging states after the Iranian Revolution and the break-up of Yugoslavia was significant to the world community as it would determine the nature of their relationships with the successor states. State succession also affects membership in the United Nations and other

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1. I am placing the word "new" in quotation marks because the successor to the Socialist Federal Republic of Yugoslavia ("SFRY") was the Federal Republic of Yugoslavia ("FRY") consisting of Serbia and Montenegro, which was hardly a new state. The FRY was, however, the largest remnant of the old socialist federation.

international organizations such as the IMF and the World Bank. It also implicates the fate of treaties to which the predecessor state had become a party. This article focuses on a different aspect of succession, namely, successor state liability in contract and tort. The importance of resolving past liabilities is paramount to the aptitude of a newly-emerged state to move forward in a constructive manner.

The lessons of the recent changes in sovereignty in Iran and Yugoslavia lead to the conclusion that, despite the vital importance of international law to state succession, the most direct path to the resolution of disputes concerning responsibility for contracts and delicts incurred by the predecessor state is the political arena. The rules regarding successor state liability and responsibility are quite pliable and have been in flux since the issue came to the forefront of international law with the era of decolonization. International law has attempted to solidify rules, which have emerged through custom and practice in the two Vienna Conventions on State Succession. However, the first Vienna Convention<sup>2</sup> entered into force in 1996 but has only been ratified by nineteen countries. The fate of the second convention<sup>3</sup> is even more dismal.<sup>4</sup> Neither is widely-followed and states have generally sought to tailor the treatment of emerging states to the specifics of the particular situation. In light of past treatment it seems reasonable to speculate that the situation in Iraq would be addressed in a similar manner. The international community would have to negotiate with the future Iraqi government questions of common interest such as debt, pending or past contracts and the responsibility for delicts.

Approaching successor state liability at the political and diplomatic levels offers a better solution to potential disputes than invoking international law. The state of the law is perplexing and that is perhaps due to the misfit between the nature of the problem which entails very specific political conflicts, and the possible remedies or solutions which are based in broad principles for which law in general is suited. State succession usually results from fundamental political changes played out in the arena of national power struggles or international political disputes. Law, on the other hand, attempts to prescribe rules and norms in order to regulate behavior, in this case state behavior, in a systematic manner. Thus, the very stringent and structured nature of solutions proscribed by law often may not be amenable to the idiosyncratic needs of all players in situations following state succession.

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2. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, U.N. Doc A/Conf. 80/31, 17 I.L.M. 1488 (1978) [hereinafter *Convention in Respect of Treaties*]. For more information on status and declarations, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty2.asp>.

3. Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, *opened for signature* Apr. 8, 1983, U.N. Doc. A/CONF.117/14, 22 I.L.M. 3066 (1983) [hereinafter *Convention in Respect of State Property, Archives and Debts*].

4. Only six countries have ratified the second Vienna Convention. See *Multilateral Treaties Deposited with the Secretary-General*, UNITED NATIONS, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty37.asp> (last modified March 31, 2004).

Iraq presents a paradigmatic example, which will require the cooperation of all international powers and all the various states whose interests have been affected. Cooperation will be necessary in order to determine whether and how this successor state may be responsible for delicts committed under the regime of Saddam Hussein. All major economic powers will have to initiate a dialogue with regard to the contracts pertaining to oil and/or pipeline concessions previously granted or revoked in order to tailor a solution which would satisfy the interests of all concerned. One possible framework within which this may be achieved is a proceeding resembling a bankruptcy, in which all unsatisfied creditors participate in order to negotiate a resolution.<sup>5</sup> As a historical example, the Allies arranged for the repayment of the German Reich's debts while helping its reconstruction following both world wars but especially World War II.

Part One of this note sets out the dynamics of the law on state succession as well as the U.S. law on sovereign immunity. Addressing the U.S. doctrine is important as it is foreseeable that the United States will be a crucial forum for some of the potential claims. Parts Two and Three survey state succession through cases arising out of the Iran-United States Claims Tribunal, and cases involving the dismemberment of the former Yugoslavia. Part Four attempts to predict future claims in tort and contract concerning Iraq, which is currently in a state of transition.

## I.

### SUCCESSOR STATE RESPONSIBILITY UNDER INTERNATIONAL AND U.S. LAW

The law on state succession is bewildering because it does not follow a linear doctrinal path. The consequences of different circumstances following a change in sovereignty carry different results. It is important to classify the various causes of succession in order to determine the status of the emerging state because the origins of successions impact the fate of its obligations. International law treats transfers of sovereignty differently from changes in government and assigns separate treatment to state obligations under each situation. In the case of Iraq, U.S. law will also play a determinative role. The United States has been an important player in Iraq and many U.S. actors have been affected by the events surrounding the toppling of the former regime. It is foreseeable that some legal battles concerning contracts and delicts will be brought to U.S. courts.

#### A. *The State of the Law*

The Restatement Third on Foreign Relations, section 208 states, "When a state succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory terminate

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5. This is not meant to imply that Iraq is in any way a bankrupt state. Simply stated, the bankruptcy model is a convenient and efficient method to address unresolved conflicts where multiple interests are at stake.

and are assumed by the successor state . . .”<sup>6</sup> It has already been noted that state succession is a complex area of international law involving issues of recognition of states and governments as well as the duties and obligations at stake. Moreover, questions arise as to the responsibility of the successor state with regard to the contractual and tort obligations of the predecessor. State succession is further complicated by the myriad of circumstances capable of bringing a situation of succession about. For instance, different issues of state succession arise in a situation in which a regime takes over a previous government by force and threat, as the Pinochet regime took over Chile in 1973, compared to the situation when one state secedes from the territory of another by mutual consent, as in the case of the former Czechoslovakia. The term “successor state” therefore may be used to describe very different situations of transfer of sovereignty.

The Restatement defines a “successor state” as one which “wholly absorbs another state, that takes over part of the territory of another state, that becomes independent of another state of which it had formed a part, or that arises because of the dismemberment of the state of which it had been a part.”<sup>7</sup> The Restatement also points out that under international law, there is a marked difference in the succession of states versus governments. The succession of states may rupture the “continuity of statehood” whereas government succession leaves it unaffected.<sup>8</sup> A successor state not only undergoes a change in government but is also subject to a fundamental change in sovereignty. The term “successor state” is used loosely in this note to denote a state following a change both in government and in sovereignty.

The International Law Commission has designed two conventions relating to the succession of states. The codification efforts of the Commission resulted in the 1978 Convention on State Succession in Respect of Treaties<sup>9</sup> and the 1983 Vienna Convention on State Succession in Respect of State Property, Archives and Debts.<sup>10</sup> These attempts to codify international law on state succession have been viewed as unsuccessful because only the first convention has entered into force and because actual practice does not follow either of them.<sup>11</sup>

The various classifications used to describe a state mainly hinge on the end result—whether a new entity under international law emerged or whether an existing state split into fractions. A change in sovereignty over a territory could be the result of varying political processes, such as secession, dismemberment or unification. Secession occurs when a new state severs from a larger predecessor state.<sup>12</sup> An example of secession is the declarations of independence of the

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6. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 (1987) [hereinafter RESTATEMENT THIRD].

7. *Id.* § 208 cmt. b.

8. *Id.* at reporters’ note 2.

9. See Convention in Respect of Treaties, *supra* note 2.

10. See Convention in Respect of State Property, Archives and Debts, *supra* note 4.

11. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 161-62 (7th Revised ed. 2003).

12. *Id.* at 165.

Baltic States<sup>13</sup> from the former Soviet Union.<sup>14</sup> Dismemberment is used to describe a situation where a larger state disintegrates into smaller separate states, such as the fate of the former USSR and Yugoslavia.<sup>15</sup> Whether the Russian Federation and the FRY are the continuators of the former states further complicated the issue of succession. Unification is a unique occurrence of succession in modern history as it has only occurred in the case of Germany in 1990.<sup>16</sup> The unification of the East and West German states followed the principle of “moving treaty boundaries” where one state transfers sovereignty over its territory to another. The treaties entered into by the predecessor state no longer bind that territory, while the treaties of the new successor state automatically apply.<sup>17</sup> International claims, however, are considered “personal” to a state and the rights of claimants or the obligations of defendant states do not transfer to the successor state.<sup>18</sup> This is the so-called doctrine of *tabula rasa*, or clean slate.<sup>19</sup>

An issue of great importance, and of great confusion, is the distinction between succession of states versus succession of governments. States, and not governments, are the subject of international law.<sup>20</sup> A state must possess a defined territory, a permanent population and a government capable of entering into international relations.<sup>21</sup> Some scholars have concluded that true state succession only occurs with “a transfer in sovereignty over a particular territory and a resultant discontinuity in statehood and its concomitant obligations.”<sup>22</sup> A mere change in government does not result in state succession. The “capacities, rights and duties” of a state do not alter due to a change in government.<sup>23</sup> Examples of “radical changes in government” which have not resulted in state succession include the deposition of Napoleon III, the Bolshevik Revolution of 1917 in Russia, the revolution which brought about the People’s Republic of China, and the military coups in Sudan in the 1980s.<sup>24</sup>

The law on state succession becomes even more complex with the issue of succession to contracts and contractual rights and obligations. It seems only fair that a successor state should be responsible for the contracts entered into by the

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13. Estonia, Latvia and Lithuania.

14. MALANCZUK, *supra* note 11, at 165-66.

15. *Id.* at 166-67.

16. *Id.* at 167-68.

17. *Id.* at 163-64.

18. Thomas Ebenroth & Matthew James Kemmer, *The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards*, 17 U. PA. J. INT’L ECON. L. 753, 784 (1996).

19. *Tabula Rasa* simply refers to the concept that the successor state does not succeed to the rights or obligations of its predecessor. *Id.*

20. See MALANCZUK, *supra* note 11, at 2; Statute of the International Court of Justice, June 26, 1946, art. 34(1) (“Only states may be parties in cases before the Court.”), available at [http://212.153.43.18/icjwww/ibasicdocuments/ibasicstatute.htm#Article\\_1](http://212.153.43.18/icjwww/ibasicdocuments/ibasicstatute.htm#Article_1) [hereinafter ICJ Statute].

21. See MALANCZUK, *supra* note 11, at 75 (citing Montevideo Convention on Rights and Duties of States, 1933, art. 1, 165 L.N.T.S. 25 (1936)) (The characteristics of a state mentioned in the Convention follow the doctrine of three elements devised by Georg Jellinek).

22. Michael John Volkovitch, *Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts*, 92 COLUM. L. REV. 2162, 2165 (1992).

23. RESTATEMENT THIRD, *supra* note 6, at cmt. a.

24. Ebenroth & Kemmer, *supra* note 18, at 757-58.

predecessor where the territory has benefited from the transaction. The question whether contractual obligations are inherited by the successor state entails issues of private or acquired rights also known as "*droits acquis*."<sup>25</sup> This doctrine postulates that despite a transfer of sovereignty and the resulting state succession, private property rights remain unaffected.<sup>26</sup> International law imposes liability on successor states with regard to private rights existing against the predecessor state; the successor state may only cancel such rights to the extent permitted by international law.<sup>27</sup>

One international case addressing the problem, brought before the Permanent Court of International Justice, was the German Settlers case.<sup>28</sup> It entailed the eviction of German settlers by the Polish state from territory Poland had received after World War I. The court found that private rights obtained under a particular state's law do not terminate with a change in sovereignty.<sup>29</sup> The court emphasized that despite the change, the law of the predecessor state had continued to "operate in the territory" and that it would be nonsensical to maintain that private rights acquired under that law have "perished."<sup>30</sup>

The issue of the contractual liability of a successor state has also risen in U.S. courts. The case of *Jackson v. People's Republic of China*<sup>31</sup> concerned the liability of the People's Republic of China ("PRC") for bonds issued by the Imperial Chinese Government in 1911 for the financing of the Hukuang Railway construction. Chiang Kai-shek pledged to honor the bonds in 1947,<sup>32</sup> but once the Communist Party gained control in 1949, payments on the bonds ceased.<sup>33</sup> The suit was filed in the court for the northern district of Alabama, which entered a default judgment against the PRC.<sup>34</sup> The court also awarded damages and interest. The court in this case followed the well-established principle that a successor government is liable for the obligations of its predecessor.<sup>35</sup> A bond is a contract giving one party the benefit of current cash flow in exchange for future profits in the form of interest paid out to the other contracting party.<sup>36</sup>

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25. *Id.* at 776.

26. *Id.*

27. See 1 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 237-464 (1967).

28. Advisory Opinion No. 6, Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, 1923 P.C.I.J. (ser. B) No. 6 (Sept. 10).

29. *Id.* at 42.

30. *Id.* at 36.

31. 550 F. Supp. 869 (11th Cir. 1982).

32. *Id.* at 872.

33. *Id.*

34. Monroe Leigh, *Foreign Sovereign Immunities Act - Liability of People's Republic of China for Defaulted 1911 Railway Bonds - State Succession*, 77 AM. J. INT'L L. 146, 147 (1983).

35. *Jackson*, 550 F. Supp. at 872 (citing *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927) (quoting 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 249 (1906))).

36. For the definition of a bond, see ABOUT ECONOMICS, available at <http://economics.about.com/cs/economicsglossary/g/bond.htm> ("A bond is a fixed interest financial asset issued by governments, companies, banks, public utilities and other large entities. Bonds pay the bearer a fixed amount a specified end date. A discount bond pays the bearer only at the ending date, while a coupon bond pays the bearer a fixed amount over a specified interval (month, year, etc.) as well as paying a fixed amount at the end date.").

Since successor governments are responsible for the outstanding contracts of their predecessor, it necessarily follows that they are liable to retire the bonds. The court had jurisdiction pursuant to the “commercial activity exception” to the Foreign Sovereign Immunities Act (“FSIA”)<sup>37</sup> since the case was based on the sale of bonds. The policy behind finding successor states liable for the debts they inherit is amplified in cases where the money generated by the sale of bonds is used to finance major infrastructure projects. Even though the new government or state did not directly negotiate the terms of the bonds or the debt, it has benefited from the cash flow. In *Jackson*, the money was used to build a major vein in China’s transportation system. The railway is still in operation and the state and its populace have benefited from its use. Unjust enrichment would result if a successor state were both permitted to reap the fruits of its acquired bonds and pardoned from repaying its inherited debt because the state was not a part of the bargain.

Section 209 of the Restatement addresses this issue of succession to state property and contracts. Generally, property title is determined by the *situs*; that is, property belongs to the state, whether predecessor or successor, where it is located.<sup>38</sup> Conversely, responsibility for the public debt and contractual rights “remains with the predecessor state” subject to a few important exceptions.<sup>39</sup> For example, local public debt and rights and obligations under contracts “relating” to a particular territory pass with the territory now comprising the successor state regardless of whether it is based on only part or the entire territory of the predecessor state.<sup>40</sup> If a state is absorbed by another, contractual responsibilities and public debt are transferred to the absorbing state. The policy behind these rules is again the notion of possible unjust enrichment. On the other hand, where a state absorbs another, it is assumed that the new larger state would benefit from the expansion of territory and thus, must pay the price of taking responsibility for the obligations of the absorbed predecessor state.<sup>41</sup>

Contractual rights, for example, were respected in the cases brought before the Iran-United States Claims Tribunal in which private parties had come forward with claims arising under contracts negotiated and signed during the regime of the Shah. It follows that, under the current state of the law on state succession, private contractual or acquired rights survive the change in sovereignty or, by an analogy to property law, they “run with the land” in cases where there has not been a redistribution of territory.<sup>42</sup>

In the *Lighthouses Arbitration* between France and Greece, the Permanent Court of Arbitration addressed the issue of responsibility for delicts post-succes-

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37. 28 U.S.C. § 1605(a)(2) (providing that states are not immune to suits in the United States when they are based on a commercial activity carried on in the United States). The issue of the character of an activity as commercial is determined by its nature rather than purpose. *Id.*

38. RESTATEMENT THIRD, *supra* note 6, § 209(1)(a)-(c).

39. *Id.* § 209(2).

40. *Id.*

41. *Id.*

42. *See supra* part II.



sion.<sup>43</sup> France sought compensation from Greece on three claims involving succession.<sup>44</sup> The tribunal found Greece liable on only one of those claims. After World War I, Greece took over the previously autonomous state of Crete. The Cretan government had granted a monopoly to a Greek shipping company whose ship was to be exempted from lighthouse fees.<sup>45</sup> The tribunal rested its decision on the fact that Crete's action was clearly delictual and was knowingly taken in breach of the terms of the concession. Moreover, there was an issue of attribution of knowledge to Greece, which the tribunal considered obvious, since it was the sole beneficiary of the grant of monopoly.<sup>46</sup> Greece succeeded to Crete and was therefore aware of the practices of the Cretan government subsequent to the change in sovereignty. Thus, from the result of the *Lighthouses Arbitration*, it is safe to conclude that in cases of succession where there is continuity of a practice, which is delictual to a third state by its nature, and the successor government perpetuates that practice instead of extinguishing it, it will be found liable for an international delict.

In sum, successor states generally inherit the liabilities of their predecessor under international law where there has not been a significant redrawing of the map. This approach is supported by the inherent logic that a state actor who benefits from the incurred liabilities ought to accept the responsibility of satisfying its obligations. Having examined the underlying issues of succession, the following section will address how liabilities in post-succession situations can be resolved in U.S. courts.

### B. State Succession and U.S. Law on Sovereignty

U.S. sovereignty law is significant to state succession because parties who wish to adjudicate claims against a successor state in U.S. courts must satisfy the requisite jurisdictional requirements. The United States is a major player in the current situation of transition in Iraq. It is, therefore, foreseeable that certain claims will be addressed in this country. In anticipation of these claims, the following discussion will analyze how U.S. courts are likely to address the legal obligation of Iraq as a successor state/government.

In the seminal case of *Schooner Exchange*, Chief Justice Marshall wrote that immunity had its basis in the "perfect equality and absolute independence of sovereigns."<sup>47</sup> For many years, the principle of absolute immunity was followed worldwide and in the United States. This principle dictated that states

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43. *Lighthouses Arbitration (Fr. v. Greece)* 23 I.L.R. 659 (Perm. Ct. Arb. 1956). France had negotiated to construct two new lighthouses as a result of which its concessionaire had made certain disbursements. The construction was to be financed by credits from the Ottoman government, which, in return, was to receive a stream of payments from the lighthouse revenues. There was a change in the arrangement when Crete directed the French company to render the share directly to the Ottoman government. The French firm could not satisfy this demand and had to halt work on the project without being able to recover its invested expenditures. Volkovitsch, *supra* note 22, at 2188.

44. Volkovitsch, *supra* note 22, at 2187.

45. *Id.*

46. *Id.*

47. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

were immune from the jurisdiction of a foreign court in practically any case. Gradually, with the development of commerce and with the increasing complexity of trade relations, this stringent doctrine was eroded in favor of more flexible rules. The first states to implement a "restrictive" principle of sovereign immunity were Belgium and Italy by denying immunity to states in cases where their operation of public vessels for commercial purposes or trade were brought before the courts.<sup>48</sup>

This early practice evolved into the "commercial" transaction exception currently recognized by many countries applying the restrictive theory of sovereign immunity. In American jurisprudence, this exception has been codified in section 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), which allows U.S. federal courts to exercise jurisdiction in cases arising out of "commercial transactions" carried out by foreign states causing a "direct effect" in the United States. Also, the Restatement Third of Foreign Relations, section 451 reads, "Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried on by private persons."<sup>49</sup> Commercial activity is defined in section 1603(d)<sup>50</sup> to include both "a regular course of commercial conduct" such as the operation of a particular type of business, and "a particular commercial transaction or act" such as the purchase of equipment by a governmental instrumentality. An activity is deemed commercial according to the "nature" rather than "purpose" of the activity.<sup>51</sup>

However, exertions of power over foreign sovereigns still must satisfy U.S. constitutional requirements. The Supreme Court has ruled that, in order to subject an "absent defendant to a judgment *in personam*," due process mandates that he have certain minimum contacts with the forum court in such a way as to not offend "traditional notions of fair play and substantial justice."<sup>52</sup>

In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>53</sup> the Supreme Court again examined the propriety of jurisdiction over a foreign defendant corporation in light of the Fourteenth Amendment's Due Process Clause. The Court addressed the difference between "specific jurisdiction" in suits "arising out of or related to the defendant's contacts with the forum" and "general jurisdiction" in suits "not arising out of or related to the defendant's contacts with the forum."<sup>54</sup> Thus, in order to assert jurisdiction over foreign defendants in the United States, courts must establish that the defendant has had at least "minimal

48. RESTATEMENT THIRD, *supra* note 6, ch. 5, subch. A, introductory note.

49. *Id.* § 451 (regarding the immunity of foreign states from jurisdiction to adjudicate).

50. Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(d) (1976).

51. *Id.*

52. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

53. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The case arose out of a helicopter crash in which four United States citizens were killed. The survivors and representatives of the victims brought suit in Texas against Helicol, a Colombian corporation, engaged in the business of helicopter transportation for oil and construction companies in South America. The Supreme Court of Texas ruled that Helicol's contacts with Texas were sufficient to assert *in personam* jurisdiction. The U.S. Supreme Court reversed. *Id.*

54. *Id.* at 413, 414 n.8, 415 n.9.

contacts” with the forum sufficient to show that the conduct of the defendant’s business has a “direct effect” in the United States. It follows that parties who have signed contracts with the previous Iraqi government and wish to bring claims against the successor state must (1) show that they fall within the commercial activity exception and (2) establish the level of the sovereign’s contacts with the United States in order to bring suit in a U.S. forum.

According to the Restatement, “[u]nder international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims in tort for injury to persons or property in the state of the forum.”<sup>55</sup> The injury may be a result of the foreign state’s operation of a particular business in the forum state. Commonly, such suits arise out of injuries sustained in the operation of factories or airlines. Thus, the “commercial activity” exception and the concept of claims in tort are interrelated. Section 1605(a)(5) of the FSIA grants jurisdiction to U.S. courts over tort claims against foreign states only for damages “occurring in the United States” notwithstanding “where the act or omission causing the injury took place.”<sup>56</sup> Therefore, U.S. claimants would need to demonstrate the ways in which a particular injury caused by Iraq’s predecessor government occurred in the United States in order to have their claims heard and adjudicated by U.S. municipal courts.

An examination of the cases adjudicated by the Iran-United States Claims Tribunal shows how successor state liability has developed in practice. It also informs an understanding of how a U.S. court will adjudicate claims since the tribunal was comprised of Iranian as well as U.S. judges trained in the American tradition.

## II.

### IRAN-UNITED STATES CLAIMS TRIBUNAL

#### A. *Cases Concerning Contracts*

In *United States v. Iran*, Award 574-B36-2, the United States sued Iran pursuant to a contract between the two states for the purchase of “certain U.S. surplus military property after the Second World War.”<sup>57</sup> In addition to the sales contract, the Iranian Ambassador in Washington, D.C. requested the United States extend Iran a U.S. \$10 million line of credit to facilitate the purchase. The ambassador made the request acting on behalf of his government.<sup>58</sup> Iran asserted it was not in a situation of state succession and thus accepted responsibility for the obligations of the previous regime.<sup>59</sup> However, Iran argued that this particular debt was “personal to the former regime” and could also

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55. RESTATEMENT THIRD, *supra* note 6, § 454(1).

56. *Id.* at cmt. e.

57. *United States v. Iran*, Award No. 574-B36-2, para. 1 (Dec. 3, 1996) [hereinafter Award No. 574-B36-2], available at 1996 WL 1171809.

58. *Id.* at para. 12.

59. *Id.* at para. 52.

be described as “odious,”<sup>60</sup> thereby making it non-transferable to the new government.<sup>61</sup> The tribunal held that the concept of “odious debts” belonged to the field of state succession, which it found irrelevant in this case.<sup>62</sup> The tribunal stated that the revolutionary events in Iran, resulting in the erection of a new government, cast the case into the realm of “state continuity.”<sup>63</sup> The tribunal noted that “when a Government is removed through a revolution, the State, as an international person, remains unchanged and the new government generally assumes all the previous international rights and obligations of the State.”<sup>64</sup> Therefore, the tribunal held that the new Iranian government was obliged to fulfill the state’s financial obligations despite major “constitutional changes.”<sup>65</sup> In dictum, the tribunal added that even if the law of state succession had applied, the “nature of the debt involved would lead to its passing to the new government” and thus to the successor government’s “consequential duty to repay.”<sup>66</sup> It follows that in cases involving debts, which are not considered odious in nature, subsequent governments, regardless of the extent of their political divergence from the predecessor government, are bound to respect the state’s financial obligations pursuant to contracts.

In *Lockheed Corporation v. The Government of Iran et al.*,<sup>67</sup> the tribunal found in favor of the plaintiff corporation. The case arose out of claims asserted by Lockheed pursuant to contracts with various ministries of Iran.<sup>68</sup> The plaintiff alleged that it had become “increasingly concerned about the safety of [its] employees and their dependents because of the revolutionary events occurring in Iran.”<sup>69</sup> The tribunal found that violence resulting from the revolutionary events had created a sense of anxiety and fear and had compelled a Lockheed director to evacuate his employees from the country.<sup>70</sup> The tribunal further found that Lockheed’s “non-performance of the Contract . . . was excusable.”<sup>71</sup> The “perception of imminent danger” was compelling enough, in the tribunal’s view, to justify evacuation. The tribunal held that Lockheed had not abandoned its responsibilities under the contract.<sup>72</sup> The cross-allegation of abandonment of the

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60. Odious debt is defined as “the genus, whereas ‘war debts’ and ‘subjugation debts’ constitute different species within [it].” War debts are contracted by a state in furtherance of a “war effort” against another sovereign. Subjugation debts are contracted “with a view to subjugating a people and colonizing its territory.” Succession of States in Respect of Matters Other Than Treaties, [1977] 2 Y.B. Int’l L. Comm’n 67, U.N. Doc. A/CN.4/301 and Add. 1, para. 117-140; see also Award No. 574-B36-2, *supra* note 58, at para. 6.

61. Award No. 574-B36-2, *supra* note 57, at para. 54.

62. *Id.*

63. *Id.*

64. *Id.* at para. 54 (citing 1 OPPENHEIM’S INTERNATIONAL LAW 234-6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992)).

65. Award No. 574-B36-2, *supra* note 57, at para. 55.

66. *Id.*

67. Lockheed Corp. v. Gov’t of Iran, Award No. 367-829-2 (1988), available at 1988 WL 637268.

68. *Id.* at para. 1.

69. *Id.* at para. 33.

70. *Id.*

71. *Id.* at para. 39.

72. *Id.*

contract was undermined by the fact that the Iranian Air Force itself had provided an aircraft to facilitate the evacuation. The tribunal held that the contract either expired pursuant to its own terms or was terminated due to "frustration."<sup>73</sup> Seyed Khalilian filed a dissenting and concurring opinion in this award in which he disagreed with the panel's determination that the circumstances at Bandar Abbas airbase were dangerous and amounted to "*force majeure* conditions."<sup>74</sup> Mr. Khalilian viewed the case as one of breach of contract by Lockheed and not as one of frustration or failure to perform due to *force majeure*.<sup>75</sup>

In another case, Questech, Inc. sued the Ministry of National Defense of the Islamic Republic of Iran on a contract, which had formed part of a "project to modernize and expand Iran's electronic intelligence gathering system."<sup>76</sup> The claimant alleged that the respondent ministry had breached the contract by failing to pay on invoices and to evaluate the performance of the claimant under the contract's terms.<sup>77</sup> The tribunal concluded that although both parties were excused from performance for a certain period due to *force majeure*, ultimately, the "Iranian Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations."<sup>78</sup> The contract contained a clause allowing the Respondent to terminate the contract due to "*clausula rebus sic stantibus*"<sup>79</sup> or "changed circumstances."<sup>80</sup> The tribunal observed that since one of the parties was a government entity, it would have been foreseeable that disruption of the contract may occur due to the changes in the political milieu in Iran at the time of the Revolution.<sup>81</sup> The tribunal found that the respondent was entitled to invoke the principle of changed circumstances.<sup>82</sup> However, it also held that the respondent was "obliged to compensate" the claimant for the damages, including only direct costs but not future profits,<sup>83</sup> which would "imply that the respondent was under an obligation to continue the Contract."<sup>84</sup>

Howard Holtzmann filed a separate opinion, which expressed his disagreement with the reasoning of the panel and the basing of its award on the doctrine of changed circumstances. Specifically, Mr. Holtzmann argued that changed circumstances could not derive from a deliberate policy decision of the Iranian government. Mr. Holtzmann noted, "As a matter of law, a party cannot avoid

73. *Id.*

74. *Id.* at para. 6 (Dissenting and Concurring Opinion of Seyed Khalil Khalilian).

75. *Id.*

76. Questech v. Ministry of Nat'l Def. of the Islamic Republic of Iran (Award No. 191-59-1), 9 Iran-U.S. Cl. Trib. Rep. 107 (1985), available at 1985 WL 324068 at \*1.

77. *Id.* at \*2.

78. *Id.* at \*9-10.

79. *Clausula rebus sic stantibus* (Latin): the concept of changed circumstances. The Tribunal noted that "the concept derives from the Civilist maxim "*Conventio omnis intelligitur rebus sic stantibus*" (Every contract is to be understood as being based on the assumption of things remaining as they were, that is, at the time of its conclusion)." *Id.* at \*11-12 n.2.

80. *Id.* at \*11.

81. *Id.* at \*13.

82. *Id.*

83. *Id.*

84. *Id.*

contractual obligations because of circumstances that it created or that are within its own control.”<sup>85</sup> Where the aggrieving party controls the situation, such a conclusion would mean that “in a democratic republic a country could simply vote to repudiate its contracts.”<sup>86</sup> Furthermore, Mr. Holtzman pointed out that, even in cases of state succession, the contractual obligations of the predecessor state emanating from private contracts pass to the successor state.<sup>87</sup>

The contracts cases suggest that successor states would be found responsible for contracts entered into by the predecessor state when the contract is governed by international law. This remains true in cases where, instead of state succession, the situation is one of state continuation. Particularly, in circumstances where an incumbent government is replaced by a new government as a result of a revolution or an insurrectional movement, the new government would be expected to fulfill the state’s obligations even though it had not participated in the contract negotiation. If the new government has the support of the populace in overthrowing the predecessor government, it is still expected to perform pursuant to the contracts it inherits. In cases of private contracts, such as contracts entered into between a state or its instrumentality and a foreign private company, the terms of the contract would govern, including the forum and law selection clauses. Thus, if a tribunal or a court is faced with a contract providing for an exemption from non-performance, as in the *Questech* litigation, one should anticipate that the terms of the contract will be respected and enforced.

One issue complicating this emerging practice is the issue of changed circumstances and *force majeure* clauses. Regarding the question of succession to oil concessions granted by the Hussein regime, the parties involved will need to refer back to the contract to ascertain whether such clauses have been included. The presence of such provisions would create a presumption that the concessionaire anticipated the possibility of a major political change. This would favor a tribunal’s inclination to hold the parties to the fruits of their negotiation and possibly excuse the revocation or breach of the previously granted concession. This problem has already surfaced with regard to Russian oil concessions, which are now being questioned due to the fact that they were acquired pursuant to bilateral negotiations with Saddam Hussein and not via competitive bidding.<sup>88</sup>

Another important category of disputes arising out of state succession is that concerning delictual responsibility. This is often brought about by physical or economic injuries sustained under the prior regime but on the “new” state’s territory.

### B. Cases Concerning Delicts

It has been widely recognized that a successor state is not responsible for the delicts of its predecessor.<sup>89</sup> According to O’Connell, however, the doctrine

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85. *Id.* at \*24.

86. *Id.* at \*26.

87. *Id.* at \*27.

88. See discussion in part IV, *infra*.

89. 1 O’CONNELL, *supra* note 27, at 482.

of delictual responsibility is unclear because there is confusion as to what constitutes a delict. A delict may be a breach of a duty under international law or, alternatively, a tort under municipal law.<sup>90</sup> O'Connell defines an international delict as "an injury for which a State is responsible."<sup>91</sup> It may consist of an injury sustained during a revolutionary uprising but it may also be a simple breach of contract or improper conduct of the judicial process.<sup>92</sup>

Whatever the definition, a few principles are clear. There is no recourse under international law until local remedies have been exhausted. The test as to whether there has been an international delict is two-fold. In addition to ascertaining whether an injury was suffered, one must also examine whether there has been a "denial of justice."<sup>93</sup> The following cases examine the level of proof necessary to establish the occurrence of a delictual act. In order to separate the discussion of delicts from that of contracts, this section focuses on questions of physical and economic injury before the Claims Tribunal.

In a case brought by the United States on behalf of a private individual involving a claim for wrongful expulsion from Iran, the tribunal dismissed the claim. The plaintiff, Mr. Jack Rankin, had been working in Iran for Bell Helicopter International ("BHI"). His employment had been discontinued upon leaving Iran. He claimed a right to compensation for property rights and personal property from the Islamic Republic of Iran.<sup>94</sup> The plaintiff claimed that due to the disorder and insecurity Americans had been experiencing during the revolution, BHI was compelled to repatriate much of its workforce.<sup>95</sup> The tribunal examined whether the actions leading up to the plaintiff's departure were indeed attributable to the State of Iran and then whether they could be characterized as delictual acts requiring compensation. The tribunal sought to determine (1) whether the plaintiff had been forced to leave Iran due to "acts or omissions" attributable to that country and "wrongful as a matter of law"; and (2) whether that potential wrongful expulsion had caused losses to the plaintiff.<sup>96</sup> The tribunal quoted article 15 of the Draft Articles on State Responsibility, stating that acts of an insurrectional movement, which then becomes the official government of the state, are attributable to the state.<sup>97</sup> The tribunal observed that Ayatollah Khomeini's call for "the departure of all foreigners" and the "implementation of this policy could, in general terms, be violative of both procedural and substan-

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (citing D.P. O'CONNELL, INTERNATIONAL LAW 1024 (1965)).

94. Rankin v. Islamic Republic of Iran, Award No. 326-10913-2, para. 1 (Nov. 3, 1987), available at 1987 WL 503860 at \*1.

95. *Id.* at para. 5.

96. *Id.* at para. 20.

97. The International Law Commission has completed work on the Draft Articles on State Responsibility. The acts of an insurrectional movement are attributable to the State if the movement is successful in establishing a new government. Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc> [hereinafter ILC Draft Articles].

tive limitations on a State's right to expel aliens from its territory."<sup>98</sup> However, cases had to be decided on an individual basis to determine whether the "circumstances of each departure" could be attributed to Iran.<sup>99</sup> The tribunal found in favor of Iran due to the presence of conflicting evidence as to the motivations behind the plaintiff's departure, emphasizing that in cases of wrongful expulsion it is the plaintiff who bears the burden of proof.

In a related case of wrongful expulsion in which the United States espoused the claim of another individual, Mr. Yeager, the tribunal did award money compensation.<sup>100</sup> In this case, the plaintiff also worked for BHI and had been compelled to leave Iran before the expiration of his contract. He alleged that he had been subjected to intimidation and threats by his neighbors. The tribunal's findings in Mr. Yeager's case, however, established that various groups of Khomeini supporters organized in "Komitehs" served as "security forces in the immediate aftermath of the revolution."<sup>101</sup> Moreover, it found that Khomeini "stood behind them, and the Komitehs, in general, were loyal to him and the clergy."<sup>102</sup> These groups were assimilated "within the State structure and were eventually conferred a permanent place in the State budget."<sup>103</sup> The tribunal held that unlike Mr. Rankin, Mr. Yeager had been able to establish that the men who escorted him out of his Iranian home belonged to the organized groups supporting the new government. The plaintiff was awarded some relief because the persons who had committed the wrongful act against him acted on behalf of the state.<sup>104</sup> The tribunal noted that because there was sufficient evidence to create a presumption that the "Komitehs" acted on behalf of the state, the burden of proof shifted to the latter to disprove any association.<sup>105</sup>

In a case brought by Arthur Young & Company for "wrongful actions of the Government of Iran" that compelled the plaintiff to close its business in Tehran,<sup>106</sup> the tribunal found for Iran.<sup>107</sup> Arthur Young claimed that U.S. citizens had been the subject of increasing hostilities and, as a result, it was required to close its offices. The threshold question again, was one of attribution. The tribunal stated that attribution of certain acts to a state is "justified only when the identity of acting persons and their association with the State is established with reasonable certainty."<sup>108</sup> The tribunal refused to grant relief on the claim that plaintiff was injured as a result of its clients' flight from Iran. The link between

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98. *Rankin*, *supra* note 94, at para. 30(e).

99. *Id.*

100. *Yeager v. Islamic Republic of Iran*, Award No. 324-10199-1, para. 74(a) (Nov. 2, 1987), available at 1987 WL 503859.

101. *Id.* at para. 39.

102. *Id.*

103. *Id.*

104. ILC Draft Articles, *supra* note 97, at art. 8 (regarding the conduct directed or controlled by a state. The acts of a person or a group are attributable to a state if they are committed "on the instructions of, or under the direction or control of, that State in carrying out the conduct.").

105. *Yeager*, *supra* note 100, at para. 43.

106. *Arthur Young & Co. v. Islamic Republic of Iran*, Award No. 338-484-1, para. 7 (Dec. 1, 1987), available at 1987 WL 503871.

107. *Id.* at para. 59.

108. *Id.* at para. 48.



the breaches of contract by clients as a result of their departure from Iran, and plaintiff's claim for wrongful expulsion and injuries to its business was too attenuated and could not establish the necessary "proximate cause"<sup>109</sup> between the injury and the alleged wrongdoer-state.

Modern cases suggest that in circumstances of turmoil due to a revolution, the alleged wrongful acts are attributable to a state on a case-by-case inquiry. The burden is on the plaintiff to prove that the wrongdoer acted on behalf of the state, as defined in article 8 of the Articles on State Responsibility. If the plaintiff is successful in establishing that a wrongful act was committed with state sanction, then the successor state is responsible for compensating the victim of the delict.

The most recently decided case, which concerned claims based on personal injury and wrongful death, may set the tone for future adjudication of similar claims arising out of the acts of the Hussein regime. The case, which involved a U.S. national and the government of Iran, arose out of the Marine barracks bombing in Lebanon in 1983.<sup>110</sup> The case was brought under the FSIA; families of deceased servicemen and injured survivors sued the Islamic Republic of Iran for wrongful death, battery, assault, and intentional infliction of emotional distress, resulting from state-sponsored terrorism.<sup>111</sup> The court had jurisdiction based upon a provision in the FSIA, 28 U.S.C. § 1605 (a)(7), which creates an exception to the immunity of foreign states officially designated by the State Department as sponsors of terrorism.<sup>112</sup> The Antiterrorism and Effective Death Penalty Act of 1996 carved out an exception to the FSIA allowing civil actions based on commission of terrorist acts.<sup>113</sup> Because Iran was designated a terrorist-sponsoring state, thus falling within the bounds of the exception, the action could be brought under the FSIA. The alleged wrongful acts such as wrongful death and certain intentional torts inherently derive from the responsibility of states. The United States District Court for the District of Columbia found the Islamic Republic of Iran and the Iranian Ministry of Information and Security jointly and severally liable for both compensatory and punitive damages.<sup>114</sup>

The case came at a time when yet another change was arguably ripe within the political climate of Iran. The populace and the government of Iran were in a state of tension in which a majority of the people was highly resentful of the current government.<sup>115</sup> This case was not yet one of state succession. However, in the event that a change of government had taken place, it may have become a case where the plaintiffs would have sought to recover money damages from a potential new successor state. Similar claims may be brought

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109. Proximate cause here is used as shorthand for the idea that the consequences or type of harm were reasonably foreseeable or that the victim was part of a class of foreseeable plaintiffs. This is arguably one of the leading tests for proximate cause under American tort law.

110. *Peterson v. The Islamic Republic of Iran*, 284 F. Supp. 2d 46 (D.D.C. 2003).

111. *Id.*

112. *Id.* at 59.

113. *Id.*

114. *Id.* at 60.

115. *Id.* at 3 n.24.

against Iraq by the families of victims who were killed in bombings by Saddam or by supporter insurgents. These claims would be allowed in district courts provided that they were based on injuries suffered due to terrorist acts. Still, plaintiffs would have to show the effect of the Iraqi sovereign's injurious actions in the United States to satisfy the "minimal contacts" requirements.<sup>116</sup>

The former Yugoslavia provides the next analogous example. During the transition from a federation to multiple states, many difficult questions arose regarding the status of the "successor" Federal Republic of Yugoslavia. The Yugoslavia situation is also relevant because the arrangements the new republics made with international institutions in order to satisfy their inherited obligations provide a model for other potential successor states, including Iraq.

### III. THE FORMER YUGOSLAVIA

On February 3, 2003 the International Court of Justice handed down a decision in *The Case of the Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia).<sup>117</sup> This stage of the litigation concerned whether there had been discovery of a new fact pursuant to article 61 of the Statute of the International Court of Justice ("Statute of the Court").<sup>118</sup> The Federal Republic of Yugoslavia ("FRY") argued that at the time of the court's judgment in July 1996,<sup>119</sup> it was not known that the FRY did not continue the personality of the former Socialist Federal Republic of Yugoslavia ("SFRY"). Because the FRY was formally admitted to the United Nations on November 1, 2000, it was not a member of the organization at the time of the judgment and was therefore not a state party to the ICJ nor was it "a State party to the Statute, and was not a State party to the Genocide Convention."<sup>120</sup> Bosnia and Herzegovina replied that no new fact existed and that the contention of the FRY was really based on "the consequences . . . of a fact, which is and can only be the admission of Yugoslavia to the United Nations in 2000."<sup>121</sup>

The Court examined the sequence of events leading up to the formal admission of the FRY to the U.N. The Court noted that, during the dismemberment of

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116. See part I. B, *supra* for a discussion on § 1605 of the FSIA.

117. Application for Revision of the Judgment of 11 July 1996 in the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections) (Bosn. & Herz. v. Yugoslavia), 2003 I.C.J. 122 (Feb. 3) [hereinafter *Application for Revision of the Judgment of 11 July 1996*].

118. ICJ Statute, *supra* note 20, at art. 61 (allowing for an application for a revision of a judgment when it is based upon the discovery of a fact whose nature renders it a decisive factor). The relevant fact must have been, at the time the judgment was given, unknown to the court and to the party claiming revision, providing such ignorance was not the result of negligence. *Id.*

119. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), 1996 I.C.J. 91, para. 46 (July 11) (holding that the Court has jurisdiction over the contention pursuant to art. IX of the Genocide Convention), available at [http://212.153.43.18/icjwww/idocket/ibhy/ibhyjudgment/ibhy\\_judgment\\_19960711\\_frame.htm](http://212.153.43.18/icjwww/idocket/ibhy/ibhyjudgment/ibhy_judgment_19960711_frame.htm).

120. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, para. 18.

121. *Id.* at para. 21-22.

the former SFRY and the secession of the comprising republics, there was uncertainty as to whether the FRY continued the personality of its predecessor and much ambiguity regarding the status of the successor state. In Resolution 777, the Security Council announced that the SFRY had ceased to exist and considered that the FRY could not “continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations.”<sup>122</sup> As a result, the Security Council recommended the FRY apply for new membership in the U.N. A few days later, the General Assembly adopted Resolution 47/1 agreeing with the Security Council’s recommendation from Resolution 777.<sup>123</sup>

In response to these resolutions, the U.N. Legal Counsel drafted a letter to the representatives of Bosnia-Herzegovina and Croatia in which he elucidated the views of the U.N. Secretariat regarding the status of the FRY. He indicated that as a result of Resolution 47/1, the FRY would not participate in the work of the General Assembly. However, he added, “[T]he Resolution neither terminates nor suspends Yugoslavia’s membership in the Organization.”<sup>124</sup> The Court emphasized that the “legal position of the FRY remained complex” in the period between Resolution 47/1 and its admission to the U.N. in November of 2000.<sup>125</sup> Significantly, the court noted that General Assembly Resolution 47/1 was adopted for the purposes of establishing membership in the U.N. and in “the context of the Charter of the United Nations” but not as a determination that the FRY “was not to be considered a predecessor State.”<sup>126</sup> The Court drew an analogy between the FRY and the former USSR and pointed out that although many of the former republics seceded from the union and became independent states, the Russian Federation (continuing the personality of the USSR) “continued to exist as a predecessor state” whose treaty obligations continued to apply to the remaining territory.<sup>127</sup>

The Court ultimately held that these same principles applied to the FRY. The FRY contested that it was a party to the Genocide Convention during the preliminary objections phase of the case in 1996. The Court observed that the SFRY had signed the Genocide Convention and ratified it without reservation. At the time of the FRY’s proclamation of a new republic in 1992, the FRY declared it was “continuing the State, international legal and political personality” of the SFRY and would “strictly abide by all the commitments” the SFRY had assumed.<sup>128</sup> The Court concluded that because the former Yugoslavia was a party to the Convention, the FRY was also bound by it since the start of the case in 1993. The Court rejected the contention that a new fact was revealed following the FRY’s admission to the U.N. in 2000. According to Article 61 of the Statute of the Court, the new fact must exist at the time of the judgment but

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122. U. N. SCOR, 3116th mtg., U.N. Doc. S/RES/777 (1992) (citing U.N. SCOR, 3028d mtg., U.N. Doc. S/RES/757 (1992)).

123. G.A. Res. 47/1, 7th plen. mtg., U.N. Doc. A/RES/47/1 (1992).

124. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, at para. 31.

125. *Id.* at para. 33.

126. *Id.* at para 38.

127. *Id.*

128. *Id.* at para. 62.

remain unknown to the parties.<sup>129</sup> The Court observed that the alleged “new fact” occurred in November of 2000, after it had rendered its judgment in 1996.

The Court went on to address the difficulties in determining the legal position of the FRY in the period between the General Assembly’s resolution and its admission to the U.N. The Court indicated that, because the circumstances of the FRY were so unique, “the precise consequences of this situation were determined on a case-by-case basis” such as the decision not to allow the FRY to participate in the work of the General Assembly and the fact that its continuation of the “international legal personality of the Former Yugoslavia was not ‘generally accepted.’”<sup>130</sup> However, the Court made a distinction between the legal consequences of the U.N.’s non-acceptance of the FRY as the continuation of the SFRY and the consequences of the dismemberment of a state under international law. The Court found that the FRY was bound by the Convention, and its application was subsequently dismissed.

In a dissenting opinion, Judge Dimitrijevic asserted that the discontinuation of SFRY state personality and the resulting discontinuation of the FRY as a member of the U.N. or party to treaties “ratified by the SFRY (including the Genocide Convention), [were] ‘unknown’ [facts] to the Court and to the FRY.”<sup>131</sup> Whether a state continues the personality of a predecessor state, he observed, is a result of “one of the decentralized acts of the international community.”<sup>132</sup> The continuity of a predecessor state by a new one therefore is based not on the new state’s “self-perception but on the perception of others.”<sup>133</sup> Judge Dimitrijevic recalled the long and strained history of ascertaining the precise status of the FRY. For him, the admission of the new Yugoslavia to the U.N. in 2000 marked the end of the FRY’s duty to carry the state personality of the SFRY. This, in turn, led to the “discovery” of the new fact, i.e. that the FRY had not been a member of the U.N. and had not been bound by Article IX of the Genocide Convention on which the court had solely based its jurisdiction.<sup>134</sup>

Judge Vereschetin also dissented on the ground that there had been “an incorrect or erroneous assumption”<sup>135</sup> of the legal status of a claimant and analogized to *Schreck’s* case.<sup>136</sup> Judge Vereschetin found a conflict in the precarious position in which the FRY had found itself since its declaration to observe the commitments of the SFRY was “sufficient ground for its continued partici-

129. ICJ Statute, *supra* note 20, art. 61.

130. *Application for Revision of the Judgment of 11 July 1996*, 2003 I.C.J. 122, para. 70.

131. *Id.* at para. 12 (Dissenting Opinion of Judge Dimitrijevic).

132. *Id.* at para. 45.

133. *Id.*

134. *Id.* at para. 49.

135. *Id.* at para. 12 (Dissenting Opinion of Judge Vereschetin).

136. *Schreck’s* case involved a decision by Sir Edward Thornton, which had been based on the assumption that the claimant was a Mexican citizen since he had been born in Mexico. In order to obtain relief, the claimant needed to have been an American citizen. The claimant was not a Mexican citizen and, upon discovering this unknown fact, the empire ruled for the claimant. *Id.* at para. 12 (referring to 2 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, 1357 (1898)).

pation in the Genocide Convention” but not enough for participation in other human rights treaties.<sup>137</sup>

This case strengthens the following proposition advanced by the international community since the conflict in Yugoslavia erupted: the situation of the former SFRY was one of complete dissolution or dismemberment where no single state continued the personality of the federation. This resolution in turn has presented questions regarding the succession to the contractual and delictual obligations of the predecessor state and their apportionment among the respective successors. The case is also significant because it elucidates the view of the ICJ with regard to the status of Yugoslavia and thus, its view with regard to obligations for which successor states may potentially be held liable. ICJ jurisprudence on issues emanating from the dissolution of the former Yugoslavia so far address matters under international human rights and criminal law. However, as will be demonstrated later, there have already been cases in the United States dealing with private contractual rights.<sup>138</sup> Most probably, disputes under international private law would be submitted to arbitration or a special tribunal. However, the position taken by the ICJ is significant because it demonstrates a willingness to hold the FRY liable for acts of its predecessor. One may predict that even though the FRY is not a continuator of the SFRY but a successor state resulting from dissolution, it may be held responsible for delicts and contracts incurred by its predecessor especially where the territory has benefited from the predecessor’s acts.

Although Iraq’s situation is not one of dismemberment, it entails some of the same dilemmas as Yugoslavia’s. The international community will have to decide when and how an independent Iraq will be recognized and to what responsibilities and obligations its government will be held. As Judge Dmitrijevic pointed out, often issues of succession are “decentralized acts”<sup>139</sup> of the international community. States will have to resolve the status of Iraq with regard to its membership in international organizations and the fulfillment of its obligations under international treaties. Another important outstanding issue is that of Iraq’s debt. The international community’s decision to recognize an independent Iraq would bear on its ability to recover on debt owed by the former regime and also the extent to which sovereign lenders may be willing to forgive part of this debt. Diplomacy would best address these issues. The multiple interested parties, their sovereign character and the large stakes render these problems unsuitable for the international or municipal courts to resolve. The repayment of the Iraqi debt in times when the country’s economy has been brought to a standstill would only be practically possible if lenders make compromises. Therefore, the politicians and diplomats are better equipped to accomplish a resolution through negotiations.

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137. Application for Revision of the Judgment of 11 July 1996, 2003 I.C.J. 122, para. 17 (Dissenting Opinion of Judge Vereschetin).

138. See discussion of New York cases, *infra* text accompanying notes 143-151.

139. “Decentralized acts” in this context signifies the importance of recognition of a new state by individual members of the international community.

In June 2001, the five<sup>140</sup> successor states of the SFRY signed the Agreement on Succession Issues.<sup>141</sup> Specifically, annex G of the agreement provides “extensive guarantees for the protection of private property and acquired rights” and article 2(1)(a) makes a specific reference to international law with regard to the protection of property located in successor states.<sup>142</sup> There are, however, unresolved disputes concerning the private property rights of foreign citizens vis-à-vis the FRY. In a case decided by the Second Circuit, a group of landlords who had leased space to the SFRY for use by its consulate, brought actions against the successor states claiming that they were liable for the outstanding debt of the former SFRY and sought to allocate the debt among them.<sup>143</sup> The district court held that the issue presented a political question, which was non-justiciable in U.S. federal courts.<sup>144</sup> The Second Circuit upheld the lower court in this regard. However, it reversed the stay of action entered by the district court judge holding instead that the action must be entirely dismissed.<sup>145</sup> It is significant that the United States submitted a brief as *amicus curiae* supporting the appellee successor states. The executive branch was of the view that the resolution of various private interests and the allocation of responsibility to the successor states must be facilitated through international negotiation.<sup>146</sup> The brief stated that “[the] appropriate share of each successor state in such liabilities, and indeed whether successors will be held directly accountable at all for such debts incurred by the former sovereign, is simply not susceptible to judicial determination and can be decided only in the political arena.”<sup>147</sup>

In an earlier case, a Cyprus corporation brought suit against Slovenia, one of the SFRY’s successor states, in the Southern District of New York.<sup>148</sup> The issue presented by the case was “whether Slovenia [was] liable for the obligations of the former Yugoslavia and its state-controlled banking institutions.”<sup>149</sup>

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140. Bosnia and Herzegovina, the Republic of Croatia, the Republic of Macedonia, the Republic of Slovenia, and the Federal Republic of Yugoslavia.

141. Agreement on Succession Issues Between the Five Successor States of the Former State of Yugoslavia, June 29, 2001, 41 I.L.M. 3 (2002).

142. Carsten Stahn, *The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia*, 96 AM. J. INT’L L. 379, 395 (2002).

143. 767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000).

144. The political question doctrine was set out by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962). The factors determining whether an issue raises a non-justiciable political question are: (i) whether the case involves a “textually demonstrable constitutional commitment of the issue to a coordinate political department;” or (ii) “a lack of judicially discoverable and manageable standards for resolving it;” or (iii) “the impossibility of deciding without an initial policy determination of a kind clearly of non-judicial discretion;” or (iv) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” or (v) “an unusual need for unquestioning adherence to a political decision already made;” or (vi) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 217.

145. 767 Third Ave. Assoc., 218 F.3d at 156.

146. *Id.* at 157.

147. Brief of Amici Curiae United States of America at 10, *Carlyle v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000).

148. *Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209 (S.D.N.Y. 1997).

149. *Id.* at 212.

Yugoslavia had guaranteed \$29.5 million in loans made to banks under a refinancing agreement. Following the dissolution of the SFRY, Slovenia had assumed a share of the former federation's debts in order to secure newly-issued debt to the successor republic by the same creditors.<sup>150</sup> The court held that as a successor state Slovenia was not bound by the predecessor's obligations. Particularly, the judge emphasized that Slovenia was a "full successor state" and not simply one which had experienced a change of government and thus it would not be held responsible for the contracts "executed by the former sovereign."<sup>151</sup>

The Agreement on Succession Issues coupled with the willingness of the successor states to accept pro rated responsibility for SFRY obligations stand for the proposition that issues of successor state liability in private international law are better left to the realm of negotiation and diplomacy. Slovenia opted for the "direct negotiation route" and reached agreements with both the Paris and London Club member creditors on restructuring its part of the predecessor state's debt.<sup>152</sup> Its active involvement as a successor state willing to carry its part of Yugoslavia's debt "heritage" has made it a model for the other successor states. The impetus for assuming responsibility is acceptance by the international financial community and the prospects for future financing as a new fledgling economy strives to stabilize.

The International Monetary Fund ("IMF") and World Bank are two other institutions with which successor states have had to negotiate. It is important for new economies to establish relationships with the World Bank in order to facilitate development. The Articles of Agreement of the Bank postulate that membership in the IMF is a prerequisite to membership in the bank.<sup>153</sup> The Articles of Agreement do not directly address issues of successor state membership.<sup>154</sup> The IMF therefore has the prerogative to decide whether membership would transfer to the successor state by continuity or whether the state must apply for admission pursuant to a decision by the organization's executive board.<sup>155</sup> Although issues of outstanding debt are not a direct way to examine contractual responsibility, they provide a channel for surveying international practice. Moreover, loans are generally extended under lending agreements, which are contracts. Thus, successor state responsibility in respect to national or territorial debt, and especially debts owing to major creditors, is instructive on the subject of contractual successor liability.

150. *Id.*

151. *Id.* at 217; cf. *Trans-Orient Marine Corp v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990), *aff'd*, 925 F.2d. 566 (2d Cir. 1991).

152. Mojmir Mrak, *Succession to the Former Yugoslavia's External Debt: The Case of Slovenia*, in *SUCCESSION OF STATES* 159, 166-170 (Mojmir Mrak ed., 1999).

153. International Bank for Reconstruction and Development, Articles of Agreement, art. II, § 1(a)-(b) (as amended Feb. 16, 1989), available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040600~menuPK:34625~pagePK:34542~piPK:36600~theSitePK:29708,00.html>.

154. Ibrahim F. I. Shihata, *Matters of State Succession in the World Bank's Practice*, in *SUCCESSION OF STATES* 75, 79 (Mojmir Mrak ed. 1999).

155. *Id.*; see also International Monetary Fund, Articles of Agreement, art. II, § 2, art. III, § 1, art. XII, § 2(b) (as amended effective Nov. 11, 1992) [hereinafter IMF, Articles of Agreement], available at <http://www.imf.org/external/pubs/ft/aa/index.htm>.

The IMF determined that the SFRY had "ceased to exist" and allowed the transfer of membership to all the successor states subject to certain conditions.<sup>156</sup> The World Bank followed a similar approach, which also required the successor states to reach a final agreement on both their respective shares of the former Yugoslavia's debt to the bank and the "elimination of arrears of the republic concerned to the Bank," or an acceptable plan providing for the elimination of such arrears on the debt.<sup>157</sup> The redistribution of subscribed shares in the World Bank was accomplished pursuant to an agreement among all the successor states. This allocation of shares followed the IMF's approach in determining each state's quota.<sup>158</sup> The allocation of obligations was facilitated by agreements between the World Bank and the successor states. The agreements generally provided for the assumption of debts, which financed projects in a particular territory thereby ensuring their localization by the specific successor state as well as the "apportionment of national debt according to the assumed benefits accruing to each republic."<sup>159</sup> Thus, matters of allocation of Special Drawing Rights ("SDRs")<sup>160</sup> and debts owed to the World Bank were both resolved by way of negotiation among the successor states and between them and the bank. The agreements reached determined the future participation and responsibilities of each successor state upon the dissolution of the SFRY. Although the IMF and World Bank are both creatures of international cooperation and are not states subject to international law, the approaches adopted by them in matters of succession are telling. They have not adopted rigid rules which apply to all current and future members. Rather, they seem to have adopted a case-by-case approach tailored to fit the needs of each state while taking into consideration issues of economic status and payment capability with a view to ascertaining the financial interests of the institutions.

The IMF and the World Bank will also have to address issues pertaining to Iraq and examine its financial condition. Their interaction with the successor state will most probably follow the model discussed above. However, the situation in Iraq poses challenges different from those of the former Yugoslavia. The new state is not yet fully functioning nor represented by a national government with which institutions like the IMF and World Bank or other creditors may negotiate. In fact, the last loan to Iraq was approved in 1973 and in 1990 Iraq

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156. Shihata, *supra* note 154, at 83 (The conditions generally required that each state (1) agree to an allocation of its share of both assets and liabilities of the former Yugoslavia as set by the IMF, (2) notify the IMF, (3) agree with the terms and conditions of the IMF enabling succession to membership and that it take the necessary steps to fulfill its obligations under the IMF's articles. The executive board must also make a determination that the state can meet its responsibilities under the articles and that the state has no "overdue financial obligations to the Fund.").

157. *Id.* at 84.

158. Each member is assigned a quota expressed in special drawing rights ("SDRs"). See IMF, Articles of Agreement, *supra* note 155, at art. III, § 1 (The subscription of each member in the IMF equals its quota and is paid in full to the fund. The original formula according to which quotas were calculated was the Bretton Woods formula, which was revised and updated in 1963.); see also Shihata, *supra* note 154, at 86.

159. *Id.* at 91.

160. For a definition of Special Drawing Rights, see *supra* note 158 and accompanying text.



attained a "non-accrual status" by virtue of its failure to service its debt.<sup>161</sup> Its current obligations to the World Bank amount to over \$106 million.<sup>162</sup> IMF staff has already visited Baghdad to assess the economic and financial situation and to set priorities with regard to assistance.<sup>163</sup> It has been estimated that the overall stock of reconstruction needs approximate \$36 billion over the next three years for fourteen priority sectors not including oil and security.<sup>164</sup> The relationship between Iraq and the IMF and World Bank will therefore require cooperation in order to satisfy each party's interests. The IMF and the World Bank are interested in repayment of loans previously and potentially made to Iraq, which would not be possible without their assistance in the reconstruction of the country since the economy has hardly commenced to function.

The fulfillment of all interests will require long-term arrangements, which can only be achieved through extensive negotiation. The overall lesson of this brief examination of IMF and World Bank practices leads to the inevitable conclusion that, where events specific to each country define matters of state succession, there is no one rule which may be uniformly applied. Instead, negotiation and agreement in the political arena may provide amicable solutions.

The valuable lesson of transition in Iran and, most recently, in Yugoslavia allow predictions about the fate of Iraq's liabilities. The following section will examine how post-conflict Iraq and the international community are approaching issues of the successor state's liabilities.

#### IV. IRAQ: ANALYSIS OF THE SITUATION

The main problem potentially arising out of the situation in Iraq concerns oil contracts, also known as concessions. A concession is a type of contract, usually between a government and a private company. It is, by nature, an intangible asset. More specifically, it is the grant of a license, spanning a significant period of time, by a state to a private enterprise for the undertaking of economic activities requiring large outlays of initial capital.<sup>165</sup> A typical type of economic concession involves mining rights over state property. In the case of Iraq, the most predictable type of concession that will be in dispute is one concerning oil exploration and drilling as well as the construction and management of pipelines carrying oil from the Middle East to Europe. The main type of delict will probably involve breaches of contracts signed by the predecessor and injuries or

161. For debt information on Iraq, see *Status of Operations*, THE WORLD BANK GROUP, at <http://lnweb18.worldbank.org/mna/mena.nsf/0/B159E92EFE1EBBC485256CF500753888?OpenDocument> (last modified Jan. 2004).

162. For Iraq current debt info, see *Data Sheet for Iraq*, WORLD BANK, at [http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Datasheet/\\$File/iraqprototype.pdf](http://lnweb18.worldbank.org/mna/mena.nsf/Attachments/Datasheet/$File/iraqprototype.pdf) (last modified Jan. 28, 2004).

163. *The IMF and the Middle East and North Africa*, IMF, Aug. 2003, at <http://www.imf.org/external/np/exr/ib/2003/081503.htm>.

164. News Release No. 2004 /115/S, World Bank, World Bank Indicates Lending Framework for Iraq (Oct. 14, 2003), available at <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,menuPK:34463~pagePK:117705~piPK:34515~theSitePK:4607,00.html>

165. I O'CONNELL, *supra* note 27, at 304.

wrongful death claims due to the former political or current insurgent movements.

### A. Concessions and Succession

A dominant definition of concession, cited by O'Connell and used by Gidel, is "a contract by which one or several persons are engaged to execute a work on the consideration of being remunerated for their efforts and expenses, not by a sum of money paid directly to them by the administration after the completion of the work, but by a receipt of a return levied for a more or less lengthy period of time on the individuals who profit from the work."<sup>166</sup> A concession therefore is a contract between a government and a private corporation (the concessionaire) involving an investment by the latter for a major project or for the "exploitation of the public domain" for which the concessionaire is rewarded by profits from the undertaking.<sup>167</sup> The governing law is usually specified in the contract itself.

This section will show, however, that there may be instances under which international law operates and thereby protects the agreement "for its full maturity."<sup>168</sup> These will typically involve disputes regarding concessions where the successor state expropriates the rights granted by its predecessor. International law serves to protect those rights by exacting compensation. This rule is subject to the condition that the concession be bona fide and obtained "in observance of legal forms" and that it not have been conditioned upon the "survival of the predecessor" or any other factor which could not be fulfilled.<sup>169</sup>

The *Mavrommatis Concession* cases, which are still referred to in the literature on concessions, provide important precedent.<sup>170</sup> The cases dealt with concessions granted by the Ottoman Empire, before its fall, in territories, which were severed from the Empire following World War I. The Greek government espoused the claim of one of its nationals before the Permanent Court of International Justice. Mr. Mavrommatis, who held concessions to certain public works, sought to bind the British government to respect his concession during its administration of Palestine. The Court noted that "the Administration of Palestine would be bound to recognize the Jaffa concessions . . . in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory [British Government] created no exception."<sup>171</sup> This statement was made in dictum while the Court dismissed the issue with regard to the Jaffa Concession<sup>172</sup> due to a lack of jurisdiction. The opinion therefore does not give authority for international law. However, O'Connell points out that the

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166. *Id.* (citing G. GIDEL, *DES EFFETS DE L'ANNEXION SUR LES CONCESSIONS* 123 (1904)).

167. *Id.* at 305.

168. *Id.*

169. *Id.* at 351.

170. See MALANCZUK, *supra* note 11, at 171 n.78 (discussing *Mavrommatis Concessions*, P.C.I.J. (ser. A), No. 5, at 28.).

171. See O'CONNELL, *supra* note 27, at 325 (citing *Mavrommatis Concessions*, P.C.I.J. (ser. A), No. 5, at 28.).

172. The case concerned two concessions: Jerusalem and Jaffa.

pleading submitted by the Greek government showed its reliance on “principles taken from general international law”<sup>173</sup> because it stated that “all rights validly acquired by individuals in a given territory preserve their force and value despite any change of sovereignty which has come over [the] territory.”<sup>174</sup> O’Connell concludes that the *Mavrommatis* cases demonstrate the existence of a principle in international law, which binds successors to respect the concessions granted by the predecessor government or state.

### B. *Subsisting Oil Contracts and Debts*

Iraq holds more than 112 billion barrels of proven oil reserves. It commands just over 11% of world oil reserves,<sup>175</sup> the second largest after Saudi Arabia.<sup>176</sup> The country is at a strategic junction allowing access to pipeline routes spanning territories between the Mediterranean and Caspian Seas and the Indian Ocean. Reports concerning oil contracts under Saddam Hussein’s Ba’athist regime vary with regard to dollar amounts and the exact extent to which certain countries were involved. Iraq had purportedly signed multi-billion dollar deals with oil companies from Russia, China, France and Germany.<sup>177</sup> The Energy Information Administration cites estimates by Deutsche Bank according to which there would be \$38 billion of “greenfield,” or new oil, development if the alleged deals were executed. This course of events is, however, doubtful because of the disputed status of some of the oil contracts negotiated by the Hussein government. The main players in this area will have to negotiate a mutually acceptable distribution of oil concessions once the fate of all existing contracts has been decided by the Iraqi government.

According to one account, only “three minor contracts” were signed under Hussein: China National Petroleum Corporation and Norinco, a state-owned arms manufacturer contracted to develop the al-Ahdab field and Petrovietnam, the Amara field.<sup>178</sup> The largest contract, worth \$3.7 billion, was signed between Iraq and a Lukoil-led consortium of Russian oil companies for the development of the West Qurna field.<sup>179</sup> The contract is highly contested because it was signed in 1997 while U.N. sanctions against Iraq were implemented.<sup>180</sup> Saddam Hussein cancelled the contract in late 2002 due to suspicions that Lukoil was cooperating with opposition leaders in order to secure the viability of its concessions in case of a regime change.<sup>181</sup> A Russian Energy Ministry official expressed the view that projects signed with the previous regime, including those

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173. 1 O’CONNELL, *supra* note 27, at 325.

174. *Id.*

175. *Iraq: Home to 11 Percent of the World’s Oil*, AGENCE FRANCE-PRESSE, Sept. 24, 2003, available at [http://quickstart.clari.net/qs\\_se/webnews/wed/ds/Qopec-oil-iraq-facts.Rx1b\\_DSO.html](http://quickstart.clari.net/qs_se/webnews/wed/ds/Qopec-oil-iraq-facts.Rx1b_DSO.html).

176. *Iraq Country Analysis Brief*, Energy Information Administration, at <http://www.eia.doe.gov/emeu/cabs/iraqfull.html> (last visited Dec. 1, 2003).

177. *Id.*

178. *Iraqi Oil Deals under Saddam*, REUTERS, Oct. 24, 2003.

179. *Id.*

180. *Russian Companies May Invest \$4B in Iraq; \$3B in West Qurna*, DOW JONES INT’L NEWS, Oct. 24, 2003.

181. *Update 2 – Russia Wants to Resume Talks on Iraqi Oil Deals*, REUTERS, Oct. 28, 2003.

of Lukoil, were concluded with "legitimate authorities" and should be respected.<sup>182</sup> However, Iraqi Oil Ministry Chief Executive Thamer al-Ghaddhban stated that oil contracts approved between the Hussein government and Russian companies are "frozen" and the Governing Council, appointed by the United States, has the discretion to decide their fate.<sup>183</sup> Moreover, the Russian contracts were signed pursuant to bilateral negotiations with the previous regime, without being subject to competitive bidding.<sup>184</sup>

Another Russian company with outstanding contracts is Stroitransgraz, which had undertaken to develop "block four" in the Western Desert.<sup>185</sup> Under the oil-for-food program, Zarubezhneft, Tatneft and Mashinnoimort had also concluded agreements for oil drilling.<sup>186</sup> Both Iraq and Russia have an interest in resolving these issues as Iraq's debt to Russia amounts to \$8 billion.<sup>187</sup> To resolve these pending issues, Vagit Alekperov, Lukoil's president, planned to visit Iraq in December while both countries, Iraq and Russia, simultaneously arranged a visit by Iraqi Oil Minister Ibrahim Bahr Al-Uloum to Russia.<sup>188</sup> Russia's Foreign Minister, Yuri Fedotov also expressed his country's intention "to play an active role in the rehabilitation of the Iraqi economy" at the Madrid Conference of Donor Countries.<sup>189</sup>

The French company TotalFinaElf ("Total") had also negotiated a deal for development rights in the Majnoon field potentially worth \$4 billion.<sup>190</sup> Total, however, refused to sign the contract and in 2001 Iraq announced it would not give priority to French companies with respect to oil contracts due to France's support for sanctions against Iraq.<sup>191</sup> Instead, Iraq favored Russian companies.<sup>192</sup> Total's CEO has stated that the company will actively pursue participation in the Iraqi oil industry during the transition period.<sup>193</sup> The Iraqi Oil Ministry's Chief Executive has indicated that only three exploration contracts are still valid: Indonesia's Pertamina, Russia's Stroitransgas and India's Oil and Natural Gas Corporation.<sup>194</sup>

Another area where the new Iraqi government will have to negotiate the country's liability is foreign debt. Iraq's debt is estimated at \$116 billion, not

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182. *Id.*

183. *Iraqi Oil Minister Plans Russian Visit to Discuss Old Oil Deals*, DOW JONES CAPITAL MARKETS REPORT, Oct. 28, 2003.

184. *Iraq Oil Minister to Talk with Saudis on Pipeline*, DOW JONES ENERGY SERVICE, Oct. 30, 2003.

185. *Iraqi Oil Deals under Saddam*, *supra* note 178. The various sources often conflict as to which contracts the Hussein government actually signed—hence, the contentious nature of the agreements.

186. *Id.*

187. *Iraqi Oil Minister Plans Russian Visit to Discuss Old Oil Deals*, *supra* note 183.

188. *Moscow, Baghdad Coordinating Date of Iraqi Oil Minister's Visit*, ITAR-TASS WORLD SERVICE, Nov. 4, 2003.

189. *Id.*

190. *Iraq Country Analysis Brief*, *supra* note 176.

191. *Id.* (regarding the status of oil development deals with foreign companies).

192. *Id.*

193. *Id.*

194. *Id.*

including \$200 billion in reparation payments owed to Kuwait due to the 1990 Gulf War.<sup>195</sup> The Paris Club<sup>196</sup> is considering writing off some of the \$40 billion debt Iraq owes its members.<sup>197</sup> The outstanding debt is not held only by sovereign creditors but also by private companies, which have rendered services or signed contracts with Iraq. The country may have to appeal to the London Club<sup>198</sup> for possible debts owed to commercial banks under lending agreements and letters of credit.

In addition to debt obligations, Iraq may confront claims arising out of delictual acts. Some companies may seek to hold Iraq responsible under an international delict theory due to a breach of contract pertaining to oil. Other possible claims derived from international delicts could be brought by persons injured in the two Gulf Wars. Adjudicated claims by individuals stemming from the first Gulf War amount to approximately \$25 billion and have been paid by subtracting 25 per cent of Iraqi oil export revenues.<sup>199</sup> Further, as indicated, Iraq owes burdensome amounts of reparations payments to Kuwait. There are also possible pending claims stemming from the Iran-Iraq war.<sup>200</sup>

The new Iraqi government will inherit significant obligations. This poses a burden on its already crumbling economy. The government and the "lenders"<sup>201</sup> will have to engage in a multilateral dialogue to resolve all claims.

### C. Future Developments

The disputes regarding the successor state's obligations require the intervention of the political arena as opposed to the mechanical application of international law due to the ambiguity of the outstanding contracts and the heterogeneity of Iraq's debts. The Coalition Provisional Authority and the Governing Council are currently in charge of rebuilding Iraq and facilitating its transition to democracy. The United States has also devised the Office of Reconstruction and Humanitarian Assistance ("ORHA"), which appointed Mr.

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195. *Id.*

196. The Paris Club is a group of creditors dating back to 1956. After the Peronist revolt, Argentina's financial crisis had put the country in dire straits. Argentina negotiated a rescheduling of its debt payments with certain of its sovereign creditors. Since then, the Paris Club has devised methods to facilitate timely debt payments by developing countries while insuring that creditor nations are repaid. The Club meets approximately 11 times per year at the French Treasury. Debtors reviewed by the Paris Club come upon recommendation by the IMF after they have already implemented austerity reforms. *Description of the Paris Club*, Paris Club, available at <http://www.clubdeparis.org/en/presentation/presentation.php?BATCH=B01WP01> (last visited Apr. 29, 2004).

197. *Paris Club Could Consider Canceling Part Of Iraq's Foreign Debt*, AGENCE FRANCE PRESSE, Nov. 7, 2003, available at [http://quickstart.clari.net/qs\\_se/webnews/wed/dc/Qus-iraq-debt.RJQs\\_DN7.html](http://quickstart.clari.net/qs_se/webnews/wed/dc/Qus-iraq-debt.RJQs_DN7.html).

198. The London Club is a group of creditors constituting various commercial banks. The London Club does not hold scheduled meetings. Instead, it meets on an *ad hoc* basis. *Description of the Paris Club*, *supra* note 196.

199. Edwin M. Truman, *The Right Way to Ease Iraq's Debt Burden*, INSTITUTE FOR INTERNATIONAL ECONOMICS, April 28, 2003, available at <http://www.iie.com/publications/papers/truman0403.htm>.

200. *Id.*

201. "Lenders" here means any party to which Iraq may have outstanding obligations: under concessions or by virtue of delictual responsibility.

al-Ghadban as the Oil Ministry's Chief Executive.<sup>202</sup> The resolution of the debates regarding the oil contracts concluded under Saddam Hussein would entail the involvement of these institutions and the cooperation of a future Iraqi government. As already discussed above, initial steps have been made to undertake negotiations between Russia and Iraq. Complete settlement of all claims arising out of old oil contracts would require intricate negotiations among multiple sovereigns and private companies. Many of the claims currently pending involve competing interests such as those of France and Russia.<sup>203</sup> The bone of contention is obvious: a tremendous profit potential derived from oil exploration and development of the Iraqi oil reserves. Companies with existing contracts approved by the fallen regime will want to fight for their viability while the coalition powers and the future Iraqi government is more interested in redistributing the oil concessions on a clean slate.

There appears to be some precedent, albeit not universal, that concessionary rights are respected under international law.<sup>204</sup> Concession contracts, which cannot come to fruition, give the concessionaire some recourse by virtue of compensation. Then, per O'Connell's discussion, the concession is subject to the two-prong test of whether it was a bona fide concession and whether it was signed subject to the condition that the existence of the predecessor state perpetuate. The answers to both inquiries are vulnerable to differing interpretations. Some contracts may be detailed and provide answers to the questions. It is, however, doubtful that an agreement between the Hussein regime and a private company can resolve the issue of whether it is bona fide and executed according to proper legal form. The regime existing at the time of the contracts' conclusion must have perceived itself as legitimate and vested with the power to approve concessions on behalf of Iraq. The rest of the world, however, is likely to have viewed Saddam Hussein's government through a different lens. The resolution of these concessions' legitimacy may necessitate a search for answers not only under international law but also under the umbrella of foreign relations. Therefore, the disputes regarding the successor state's or the successor government's responsibility under the old oil concessions is best left to the international political arena.

Iraq's economy is burdened with a large amount of debt and is highly-leveraged as demonstrated by the country's foreign debt. The reconstruction bill for 2004 alone is currently estimated at \$20 billion.<sup>205</sup> The Madrid Conference of Donor Countries for Iraq has demonstrated the international community's willingness to cooperate in order to rebuild Iraq in the aftermath of two wars. Moreover, Iraq's sovereign creditors are considering cancellation of part of its debt. The coalition powers, the United Nations, the European powers and Rus-

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202. *Iraq Energy Chronology*, Energy Information Administration, at <http://www.eia.doe.gov/cabs/iraqchron.html> (March 2004).

203. They are important players and I assume that this will have to happen.

204. See discussion in part IV.A with regard to concessions.

205. See *Iraq Country Analysis Brief*, *supra* note 176. The United Nations Humanitarian Coordinator for Iraq, Mr. Ramiro Lopez da Silva quoted this number on August 8, 2003. *Id.*

sia all recognize that the successful reconstruction of Iraq and the satisfaction of all the lenders' interests require their common political will.

#### D. Approaches

One approach to resolving Iraq's liabilities would be to look at Germany post-World War II and the Allied effort to rebuild the Federal Republic while holding it responsible for reparations. Another approach would be to negotiate, unburdened by precedent, and tailor all agreements according to the needs of this particular country and its specific creditors. Iraq and post-war Germany are, to a certain extent, in analogous situations: they were both defeated in wars, they both carry large outstanding debts and they are both governed by provisional post-war coalition administrations. However, the circumstances are also somewhat different. Germany was in a strategic geopolitical position, one which was of great importance to the Allies in post-war bipolar Europe. The United States and the West were determined to curb Soviet expansion further west. Germany was important strategically in the era of the Cold War whose underlying contention was not only political and ideological but also economic. The West would not allow the Soviet Communist model to spread through the Continent and transform its *laissez faire* economies into planned state-enterprise establishments. The West had a vested interest in rebuilding Germany and creating a viable economic and political state in the heart of Europe. The Allies were successful. In fact, the famed Russian singer-poet Vladimir Visotsky is rumored to have exclaimed upon his visit to the then-Federal Republic of Germany, "My God, is this the defeated country?" comparing life there to the austere conditions in his native USSR.

While the Cold War has been over for over a decade, ideological, economic and political interests pervade. Iraq's most obvious importance is economic; it holds some of the world's largest oil reserves. It also has strategic-economic significance because of its location and its capacity to govern a network of pipeline routes carrying oil to major markets in Europe. Iraq has also increased geopolitical importance with the new political dynamic of the War on Terror. A successful Iraq in the heart of the Middle East has the potential to prove the coalition's critics wrong. It also has the capacity to grow a democracy among largely theocratic monarchies, which also would further the coalition's interest. The European Union and Russia would be interested in securing a steady flow of oil and in "fuelling" their economies. The countries in the Middle East would have an additional outlet for their oil through pipelines routes in Iraq. However, there may be possible conflicts with OPEC due to the organization's practice of restricting oil supply in order to maintain prices. Moreover, destabilization in the region is conceivable due to the presence of a Western-influenced nation in the midst of theocracies.

Iraq's interests tend toward establishing a sovereign government capable of conducting the country's affairs and resolving all the subsisting and potential claims. The future Iraqi government will arguably strive to spare the country from burdensome obligations incurred by the predecessor. According to inter-

national law, this posture is unacceptable because Iraq's legal position is one of continuation and not of succession since it has undergone only a change of government. International law would hold Iraq responsible in terms of its economic relations with other sovereigns and for contracts concluded with private parties. The only area in which a new democratic government may escape liability under international law is in the area of delicts resulting from injuries. Such cases will most likely arise due to injuries sustained in the battle against insurgent movements still supporting the former regime. The successor government will not identify itself with these movements, nor will the new state sanction their delictual acts or embrace them within its institutions. Thus, Iraq would not be found liable as a state for these delicts under international law. The situation in Iraq is different from that in Iran where Khomeini's regime had overtly and openly condoned the presence of the "Komitehs"<sup>206</sup> who harassed and drove foreign citizens out of the country.

The German approach may be an appropriate paradigm for the reconstruction of Iraq and the resolution of its outstanding liabilities. Just as the Allies were successful in restoring the German economy to an incredibly powerful functioning state, the Coalition Powers should be capable of doing the same for Iraq. The genius of the German approach was that the transitional government managed to rebuild the country while ensuring that it fulfilled its war obligations, which undoubtedly were derived from the exercise of authority by the Furer's regime. The successor state managed both to repair its economic engine and satisfy its liabilities.

One way to implement this approach would be to establish an international tribunal (possibly arbitral), following a bankruptcy law paradigm, which would resolve all claims pursuant to political and diplomatic negotiations.<sup>207</sup> The tribunal's task would be to inventory Iraq's assets, current and potential, as well as its outstanding debt, contractual liabilities and delictual obligations. Each creditor would have recourse only through the tribunal and, if entitled to recovery, would receive a share of the total asset "pool." The tribunal should not be bound to follow international law. Instead, it should facilitate negotiations between the government of Iraq and the relevant concerned creditors, preferably in multilateral talks. This approach would allow the parties to tailor custom solutions, thereby ensuring the satisfaction of each creditor, rather than attempting to "squeeze" the situation in the cast of international law. A proceeding of this type would be most suitable to Iraq since its economy is encumbered with heavy debts and subject to multiple claims. The only way each creditor could find satisfaction is by ensuring that Iraq's economy returns to full-fledged functioning status and is able to grow and generate revenues, which can then be used to settle all outstanding claims. Since a vital part of Iraq's economy is oil and oil revenues, multilateral negotiations should determine the parties best able to per-

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206. See part II *supra*, for a discussion of cases adjudicated in the Iran-United States Claims Tribunal.

207. I would like to thank Professor Richard M. Buxbaum for his guidance and assistance. It is he who suggested the bankruptcy model.



form on oil concessions and the parties which can most efficiently explore and process crude oil, market it and then make payments to the new government. A percentage of the oil revenues could be used to satisfy the debt, the usage of the concessions would satisfy the demands of the concessionaires, and the remaining revenues could meet the needs of the new Iraqi state and economy.

#### CONCLUSIONS

The Iran-United States Claims Tribunal presents an example of how a well-structured tribunal is able to function and adjudicate claims by competing interests without engaging international law at the level of the International Court of Justice. The two parties, Iran and the United States, realized that their disputes, specific to a bilateral conflict would be best resolved by a body over which they had complete control and whose rules they could shape. Because of this "tailoring," the tribunal has been successful in curbing further conflict from claims arising from the Iranian Revolution and in rendering judgments respected by the claimants.

A more recent example is that of the former Yugoslavia's dismemberment. The successor states did not establish a tribunal to resolve the predecessor's obligations vis-à-vis its creditors. Instead, each nation undertook an active role in negotiating with the major international players, both state and institutional, in order to resolve its share of outstanding obligations. The negotiation model appears to have worked remarkably well for the new nations as they have been able to restructure the debts incurred by the former Yugoslavia and become active and functioning participants on the world financial scene.

The overall circumstances of post-war Iraq entail players of economic, political and international significance. There are both sovereign and private parties with claims against various assets and profitable contracts in Iraq, especially in the cases of oil concessions and reconstruction. While reconstruction is an issue brought about by the emergence of a new political entity—a new state—concessions disputes and claims have existed since before the toppling of Hussein's regime. Therefore, concessions disputes involve questions of successor state liability. These disputes would be best resolved in a political forum pursuant to multilateral negotiations. Bankruptcy law provides a suitable paradigm for the disposition of all claims. A proceeding of this type would be enormously complex and would require the establishment of an arbitral body to compile and review all outstanding claims. The major advantage of this type of arrangement is the opportunity for participation by all interested parties and the possibility of simultaneous resolution of all claims.