

**WHAT HAPPENS TO THE OIL:
INTERNATIONAL LAW AND THE OCCUPATION OF IRAQ**

by

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INTRODUCTION

There has been little knowledgeable discussion regarding the details of an occupation should the U.S. and its allies commence and win a war with Iraq. It is not unusual to read that the U.S. is motivated in its policy regarding Iraq by the desire “to get Iraq’s oil.” Such claims and the disclaimers usually omit any reference to the considerable body of international law pertaining to the rights and duties of an occupying force, the “belligerent occupant” (the BO). Can the U.S. after a victory in Iraq “take” its oil? What must it do and what can it do regarding the vast petroleum resources of this country? How does Iraqi oil complicate the occupation picture? It is to these questions that this paper is committed.

It is an error to discuss Iraq as merely Afghanistan with weapons of mass destruction. Iraq is no Afghanistan, and it is the differences--primarily the existence of a well-developed petroleum industry--that justify a careful analysis.

IRAQ’S OIL

Iraq has reserves of at least 112 billion barrels.¹ The significance of this number is often overlooked. Imagine all the oil reserves in the U.S., the North Sea, China, the Caspian Sea, and West Africa all combined under one jurisdiction. This oil is not to be found under high seas in 1,000 feet of water or more, in arctic snows, in equatorial jungles or in third world conditions where men and material must be brought in from great distances. Iraq’s oil is on land in a flat, temperate, geographically compact area and at a depth which is commonly drilled without difficulty. Iraq is not a third world country and possesses considerable experience and skill in petroleum development. Unlike Iran and Saudi Arabia ,where religious extremism impedes easy western development, the Iraqi brand of secularism is much less difficult for westerners to cope

¹ International Petroleum Encyclopedia 2002, p. 99, PennWell Publishing, Tulsa, Oklahoma.

with. The Iraqi oil reserves also appear to be nicely dispersed--a fact that makes development more attractive.² Many different players can seek development without overtaxing the infrastructure of any particular area. There are major fields with major reserves in the Kurdish north--Kirkuk, the central area, and in the south--Rumalia³, Majnoon and West Qurna. In short, Iraq is certainly one of the most attractive petroleum provinces in the world. It is 10 Caspian Sea fields with no sturgeon, no water and no pipeline problems. It's 10 to 20 ANWRs with no permafrost, good pipeline access, a good labor supply and no Caribou.

Iraq's petroleum is not merely a case of future potential. Iraq produces approximately 2.4 million barrels per day⁴ under difficult circumstances.⁵ In fact, the attainment of the 2.4 million

² U.S. Energy Information Administration. See attached map.

³ It is the southern Rumalia field that occupies a disputed border with Kuwait and was one of the causes of the Iraqi attack in 1991.

⁴ www.eia.doe.gov/emeu/cabs/iraq This is the 2001 average, the latest number available. Sustainable capacity is thought to be at least 2.8, and Iraq has announced a goal of production increases to 3.1 MBD by the end of 2002.

⁵ The Gulf War destruction was followed by years of sanctions barring imports of needed

barrel level is an achievement of considerable proportions and an indication of how rapidly Iraq could increase its production if it were not restricted by the sanctions--and periodically bombed.⁶

Saddam Hussein has estimated that Iraq's production could be rapidly escalated to six million barrels per day.⁷

It is impossible to consider Iraq's future without a careful and extensive analysis of the impact that petroleum will have. The threshold question involves the rights and duties under international law of the occupying power, whoever that might be.

THE ROLE OF INTERNATIONAL LAW

materials. Since 1996 the Food for Oil program has allowed import of needed petroleum equipment, but on a limited basis.

⁶ EIA op. cit. p.6 et seq.

⁷ Saddam was responsible for Iraq's oil program in the 1970s preceding his attaining the presidency, and he is undoubtedly as knowledgeable on oil as the U.S. President, who was in the oil business at about the same time. See "The Relationship of Oil Companies and Foreign Governments," p.81, Federal Energy Administration, June 1975, Washington, D.C.

Although international law is honored frequently in the breach and not the observance, the U.S. has stated that it would comply with international law in the case of an occupation⁸ as did the U.S. in previous occupations.⁹ Whether it has done so in all instances is not as clear.¹⁰ But the

⁸ Meet the Press, December 20, 2002, Secretary of State Colin Powell in TV interview with Tim Russert.

⁹ Reports of General MacArthur - MacArthur in Japan: The Occupation: Military Phase, p. 11, Washington, D.C., 1966. Japan had a considerable store of rare gems, precious metals and jewelry in their national treasury—from years of depredations in the Japanese-occupied Pacific. The report of the U.S. occupation mentions in passing that these items were appropriated as was proper under international law providing they were used to meet occupation costs. Needless to say, the vast amounts expended in rehabilitation of Japan far exceed such minor amounts. MacArthur seemed to take pride in our compliance with international law. “Accordingly, provisions for enforcing the requirements of the occupation were made; these were strictly in accordance with the established rules of land warfare”

¹⁰ Ibid, p.230. MacArthur reports that Japanese “military or naval holdings, as such, were confiscated as surrendered enemy equipment and installations.” This would apparently violate the rule regarding treatment of immovable or real property. MacArthur also confiscated all the rare metals, coins and jewels in the Japanese treasury, much of which had been acquired

desire to be perceived as a country worthy of its mantle as world leader as well as the desire to receive widespread support for its efforts should lead to a serious attempt to comply with the general prescriptions of international law, both written and customary. In the event of a conflict between international law and public opinion, the starting point should be the law itself.

THE LAW OF LAND WARFARE - BACKGROUND AND HISTORY

by looting in southeast Asia. As funds of the occupied country, these items could be used for occupation expenses under 403 LLW, HR art. 53. The de-nazification campaign arguably contravened the Hague Regulation proscription against alteration of the form of government and the laws previously in force. See HR art. 43 and Charles Fahy, "Legal Problems of German Occupation," 47 Mich. L. Rev. 111 (1948-49).

In 1907 a series of treaties were promulgated and widely adopted which carefully spelled out both duties and obligations of combatants and belligerent occupants generally.¹¹ The Hague Convention No. IV Respecting the Laws and Customs of War on Land delineated the rights and duties of an occupying army. Although subsequently the more well-known Geneva Conventions (1929, 1949 and 1985)¹² provided additional protection to combatants and non-combatants alike, the Hague Regulations remain in effect and contain the more specific provisions regarding property, both public and private, in the occupied territory.

¹¹ Hague Conventions III, IV, V, IX, X.

¹² Doris Appel Graber, *Development of the Law of Belligerent Occupation*, Am. Press, New York (1949-rep 1968).

The first code of conduct for occupying armies in modern times was the Lieber Code, prepared during the U.S. Civil War at Lincoln's behest by a German-born Columbia professor, Francis Lieber.¹³ This code was used by Union officers in their occupation of Confederate territory. It was as humane and civilized as it was successful,¹⁴ and constituted "the world's first formal guideline for the conduct of armies in the field."¹⁵ The Lieber Code was emulated at the next international conference at Brussels in 1874. Another failed attempt occurred at Oxford in 1800. The Brussels formulation of the Law of Land Warfare was not ratified, and another unsuccessful attempt was made in 1880 at Oxford. Finally, a Conference in The Hague in 1907 was successful in promulgating a Code which has been universally accepted.¹⁶ It bears a significant resemblance to the Lieber code. Its wide ratification and use in the decades since its adoption has resulted in its being considered customary law binding even on the few non-signatories.¹⁷ This Code was referred to in the aftermath of WWI and WWII as well as other occupations since 1907.¹⁸ In 1956 the U.S. Department of the Army codified the Hague and Geneva Conventions, together with customary law, into a single volume, a field manual, "The Law of Land

¹³ Ibid, pp.14-17.

¹⁴ "Men who take up arms against one another in public war do not cease in this account to be moral beings, responsible to one another, and to God." - Lieber Code quoted by Graber.

¹⁵ The Code began as an essay by Lieber at the behest of General H.W. Halleck, "Guerilla Parties Considered with Reference to the Laws and Usages of War," and evolved into General Order No. 100 (April 24, 1863), popularly referred to as the Lieber Code. See Civil War Desk Reference, Finkelman, Wagner, and Gallagher, eds., Simon & Schuster, N.Y., 2002.

¹⁶ The original text of the Hague Conventions of 1907 are in French and it is the French version which is controlling. See The Law of Land Warfare, foreword, FM 27-10, U.S. Dept. of the Army, 1956. Cited herein as LLW 27-10.

¹⁷ Edward R. Cummings, "Oil Resources in Occupied Arab Territories Under the Law of Belligerent Occupation," 9 Journal of Int. L. and Econ., p. 592, 1974.

¹⁸ A relatively large body of case law has developed around the Hague and Geneva Conventions, although a number of well-known cases predate either, e.g., cases relating to the British occupation of the Maine coastline in the War of 1812 and the U.S. occupation of Mexico in 1846 as well as the U.S. occupation of the Confederacy.

Warfare.”¹⁹

DUTIES OF THE BELLIGERENT OCCUPANT

The prime objective of the Hague and Geneva Conventions was to establish a rule of law which would, to the extent possible in a conflict situation, protect noncombatants and private property from the scourge of war. As such, its provisions are universally subject to the dictates of military necessity. That being said, the scope of the occupying duties is impressive in its breadth and specificity. The primary duty is to “Restore and Maintain Public Order.”

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” (H.R. Art. 43; LLW Art. 363)

¹⁹ The LLW combines six separate Geneva Conventions, two 1929 Geneva Conventions, four 1949 Geneva Conventions, the six Hague Conventions of 1907, the Roerich Pact of April 15, 1935 and the Uniform Code of Military Justice.

This general prescription is supplemented with many more specific prohibitions and obligations. The BO must honor the “family honor and rights” as well as the lives and private property of the people of the occupied country. Mass deportations and pillaging are prohibited. Food and medicine are to be made available; children are to be protected and educated--in their native language and by persons of their culture and religion. Property is to not to be destroyed unless such destruction is justified by military necessity. Personal property shall not be requisitioned unless a receipt is given or payment promptly made, except in limited circumstances regarding the stores and munitions of war. The destruction of historic and cultural property is forbidden. International law not only creates restrictions but also imposes affirmative duties on the BO to govern properly and to ensure public order within the occupied territory, and the failure to recognize these limitations and duties may now result in criminal liability on the responsible officials.²⁰

RIGHTS OF THE BELLIGERENT OCCUPANT

Accompanying these obligations are the rights of the occupying party. These rights are intended to empower the BO to meet his responsibilities to the occupied country and its populace. These can be briefly listed as follows:

- To exercise limited sovereignty on a temporary basis²¹.
- To exercise judicial power if courts have ceased to function to ensure order. (LLW 373)
- To “regulate commercial intercourse in the occupied territory.” (LLW 376)
- To censure the press and restrict new publications. (LLW 377)
- To control property to prevent its military use against the occupant (LLW 399), but “measure of control must not extend to confiscation.”
- To take “possession of cash, funds, and realizable securities which are strictly the

²⁰ Morris G. Shanker, Comment, 50 Mich. L. Rev. 1075 (1951-52). See Application of Yamashita, 327 U.S. 1, 66 S. Ct. 340 (1946), also Madsen v. Kinsella (4th Cir. 1951), 188 F.2d 272, affd. 72 S. Ct 699 (1952).

²¹ Sovereignty returns to the occupied country upon the termination of the occupation or the entry of a peace treaty.

property of the State . . . stores . . . and, generally all movable property belonging to the State which may be used for the operations of the war.” (HR art. 53, LLW 403) This extends to all movable property which is capable of being used for military purposes.

- To requisition private movable property subject to payment or the giving of a receipt.²²
- To use without charge the immovable property, i.e., real estate of the occupied power. (HR Art. 55, LLW 400)

This latter provision (HR Art. 55) is key to the issue of the production of Iraqi oil in the event of an occupation.

“The occupying State shall be regarded only as the administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.”²³

²² The JAG Corps in Panama in Operation Just Cause passed out receipts on the spot where possible for all private property seized (mostly vehicles needed by the airborne troops.) See Borsch, “Judge Advocates in Combat Office of the Judge Advocate General and Center of Military History,” Washington 2001. In Desert Storm receipt forms had been prepared in advance. SJA Form 27-1.

²³ HR art. 55, The Lieber Code, the Brussels Convention of 1874, and the Oxford Convention of 1880 all had similar formulations. Lieber: “The victorious army . . . sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government Title remains in abeyance during military occupation . . .” (Art. 31) Oxford: “The occupant may only provisionally administer the immovables . . . forests He must safeguard the capital of these properties . . .” Art. 52.

PETROLEUM AS IMMOVABLE PUBLIC PROPERTY
SUBJECT TO USE UNDER RULES OF USUFRUCT

The initial question regarding whether oil reserves are immovable property, i.e., a realty interest, has been answered in the affirmative.²⁴ It has been treated as such in the litigation on the issue. (See *N.V. DeBataafsche Petroleum Maatschappi v. The War Damage Commission*, 23 I.L.R. 810, Ct. of Appeals, Singapore.) A more complex question is the extent and nature of rights and duties of the “administrator or usufructuary” of producing petroleum fields. The hallmark of a “usufruct” is the right to use without depleting the corpus or capital of the asset. The analogy of the fruit from a tree is often used.

In regard to mining, there has been an historic exception to the proposition that the asset must be returned undiminished after the period of use. Referred to in the U.S. as the “open mine doctrine,” it holds that the usufructuary or life tenant can continue to produce any mine or oil well that was open or producing at the time the usufruct was created.

THE OBLIGATIONS OF THE USUFRUCTUARY

The use of this term in the 1907 Hague Regulations requires a careful analysis before unquestioning application to the oil fields of Iraq. The right of usufruct has been defined as “The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce without altering the substance of

²⁴ See also Cummings, n. 101 to the effect that commentators generally do not contest the conclusion that petroleum is an immovable in this context. Such a conclusion is consistent with mineral law in the U.S. and Great Britain. See generally Hemenway, “The Law of Oil and Gas,” Chapter 1, West Pub. Co., 1971.

the thing.”²⁵ The usufruct has the duty of maintaining the property and, if necessary, repairing it.

²⁵ Bouvier’s Law Dictionary.

This property right devolves from Roman times where it was understood that a usufruct could work mines already open but could not open new mines.²⁶ The “open mine” exception is widely adhered to.²⁷ The usufruct is analogized generally as equal to a life estate with the usufruct’s obligations identical to the life tenant who can produce already existing mines or oil wells but may not do more. The U.S. military handbook²⁸ on land warfare capsulizes the law on this point: “The occupant does not have the right of sale or unqualified use of such property (non-military real property). As administrator or usufructuary, he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however . . . sell the crops, cut and sell timber, and work the mines.” (LLW 402)

Belligerent occupancy cases have followed the law on this issue. Several cases following WWI involved substances other than oil, i.e., timber and guano.²⁹ In each case the BO exercising his rights as usufructuary was entitled to continue to reap the benefits of the production. The Japanese occupation of the Dutch East Indies and its appropriation of all petroleum production for use by the Japanese war machine provide the first instance of litigation regarding petroleum. In the *Batasschfe* case, a British court held that the oil was in fact immovable property that could be taken by the Japanese. Its use for general war purposes as opposed to payment for costs of

²⁶ See Cummings, *op. cit.* p. 563; W. Buckland and A. McNair, *Roman Law and Common Law* 130 (2d ed. rev., F. Lawson 1952).

²⁷ Cummings refers to Italian Law, French Law and Blackstone’s Commentaries. In the latter, the “Digging for gravel, lime, clay . . . or for mines of metal, coal or the like, hidden in the earth and were not open when the tenant comes in, is waste.” See also Comment, “The Open Mine Doctrine,” *Houston L. Rev.* 753 (1971). This issue arises in U.S. oil and gas business often when a life estate or a term of years in producing minerals is conveyed. The tenant for the term of years or the life tenant is entitled to continue to reap the benefits of whatever mines or oil wells were in existence at the time the estate was created, although the reserves are undoubtedly depleted to some extent.

²⁸ FM 27-10, *The Law of Land Warfare*, Dept. Army 6 1956 (Referred to herein as LLW).

²⁹ 15 U.N.R.I.A.A. 125 (1901). This decision predated the Hague Convention but reflected the consensus at that time and was eventually incorporated into the Hague Regulation.

the occupation, however, constituted a violation of international law.

ISRAEL AND THE OCCUPATION OF THE SINAI

The most notable example of the exercise of the rights of the belligerent occupant to produce oil wells came after the Israeli seizure of the Abu Rhodeis fields in the Sinai after the Six Day War. The Israelis commenced producing wells from several fields immediately and attained production of several hundred thousands of barrels per day which they both sold and used for the occupation and other purposes. Before the wells were returned to Egypt, this action had been the subject of considerable legal analysis. Virtually all the issues faced with regard to the current Iraqi situation come into play. The first requisite is that the oil wells be government owned. If they are privately owned, they can only be “requisitioned” and thus must be paid for. In Egypt’s case the wells were in significant part owned by the Italian company ENI by virtue of concessions and contracts, although the Egyptian government held a majority interest. In the case of Iraq, the production and the reserves are owned in their entirety by the government through the instrumentality of the INOC. (There may be significant private interests in the form of contract rights, i.e., contracts to produce the wells or provide services. Those private rights would have to be honored or paid for.) It is this aftermath of the Six Day War which has precipitated the largest body of law on this issue. Not only did Israel and the U.S. State Department exchange detailed memoranda regarding their different views of the proper interpretation of Article 55 of the Hague Convention, but a series of well-reasoned law review articles followed.³⁰ The U.S. Department of State³¹ as well as Claggett and Johnson and

³⁰ Edward R. Cummings, *op. cit.*, Allan Gerson, “War, Conquered Territory, and Military Occupation in the Contemporary International Legal System,” 18 *Harvard Int. Law J.* 525 et seq. 1977, Brice Claggett and O.T. Johnson, Jr. “May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?” 72 *Am. J. of Int. Law* p. 558 et seq., 1978. The article of Cummings is particularly extensive and detailed and is recommended for anyone studying this issue.

³¹ 16 I.L.M. 733(1977) Dept of State Memorandum of Law on Israel’s Right to Develop New Oil Fields in Sinai and Gulf of Suez, Monroe Leigh. The Israeli response can be found in 17 I.L.M. 432 (1978), “Ministry of Foreign Affairs Memorandum of Law on the Right to

Cummings concluded that although the BO could produce already-producing wells and utilize that petroleum by sale or actual use for purposes of the occupation, no new wells could be drilled or new exploration be undertaken. The Israeli Attorney General³² and Gerson³³ took an expanded view of the BO's rights, i.e., that the provision in the Hague regulations only prohibited "spoilation," that is, wanton waste or destruction of the asset. In addition, Gerson argues that new wells and exploration actually enhance the value of the asset and thus cannot be objected to by the remainderman, which in this case is the occupied country. The Gerson position, as vigorously argued as it is, seems to treat the limited open mine exception to the general rules of usufruct as infinitely expandable. The argument that the BO may conduct exploration if it in fact returns the asset enhanced in value, even if slightly reduced in numerical quantity of the resource, is not to be dismissed legally and will be discussed below.

CAN NEW WELLS BE DRILLED?

In the case of a producing province such as Iraq with thousands of producing wells and many highly productive formations, the matter of drilling new wells could be delayed for many years. Years could be spent bringing existing wells back to peak production, installing waterfloods and other pressure maintenance techniques and penetrating additional zones in existing wells. However inefficient, no oilman would be depressed by the prospect of not being able to drill additional wells in fields where the upside potential of the existing wells was so significant.

One author in particular has taken the position that the only restriction on the occupying power is

Develop New Fields in Sinai and the Gulf of Suez."

³² Israeli Ministry Memo, op. cit.

³³ Gerson, op. cit.

that it refrain from committing wanton dissipation or “spoilation” in its production of the oil.³⁴

³⁵ Gerson, 71 Am.J. I. L. 731.

Alan Gerson argues that not only may new wells be drilled in existing fields, but that exploration can seek the opening of entirely new areas. This is in part because the discovery of new fields in fact enhances the value of the real estate in which the owner has a reversionary interest subject to the temporary interest of the occupant. Gerson took the position that Israel was entitled to drill exploratory wells in the West Bank as well as the offshore areas of the Sinai.³⁵ This argument would have more force in a case such as Iraq's where the reserves are so vast that depletion is beyond the life of most of the actors. Could an owner in Iraq's position object to a usufructuary who, after a limited term of years, returns the petroleum asset not with 5,000 wells and 2.5 million barrels a day production but 7,500 wells and 4 million barrels a day, even though in the latter case reserves might have been depleted by an extra billion barrels? Claggett and Johnson, the authors with the most restrictive view, argue that the history of Article 55 indicates a unanimous view that the usufructuary was obligated not to impair the substance of the property held. "Moreover, the civil law prohibition against opening of new mines by usufructuaries makes no exception for mines that would increase the value of the land involved."³⁶

This broad interpretation has been challenged by a number of authors as well as the U.S. State Department. The consensus would appear to be that of E.R. Cummings:

"It can be concluded that an occupying power does not have a right to exploit oil from an area . . . when oil resources were not exploited prior to commencement."³⁷

This was the position of the U.S. State Department in its memo on the topic. This would seem to leave open the option of drilling infill wells, for they are not in an area "not exploited."

³⁵ Gerson, Notes and Comments, 71 Am. J. Int. Law 725 et seq. (1977); Gerson, 18 The Cont. J. of the Legal System, p. 525 et seq. (1977).

³⁶ Claggett and Johnson, "May Israel as Belligerent Occupant Lawfully Exploit Previously Unexploited Resources of the Gulf of the Suez?" 72 Am. J. of Int. Law 558 et seq. (1978) (The authors were involved in the dispute between Israel and Amoco, a U.S. oil company, over wells drilled in the Gulf of Suez where Amoco claimed concessionary rights.)

³⁷ Cummings, 9 J. of Int. Law and Econ. 533 (1974).

Those familiar with petroleum operations are aware of the many activities that can be undertaken to enhance production without “drilling new wells.” Wells may be reworked by replacement of down-hole pumps and tubing, acidization, re-fracing, injection of water, surfactants, CO₂ or natural gas. Of course, new surface equipment such as pump jacks, valves, heater-treaters, pipelines and tanks can have a striking effect on production levels as well. These would all be permissible under the Cummings analysis.

DIRECTIONAL DRILLING OR SIDETRACKING

A closer case would involve the BO’s right to sidetrack an existing well using directional drilling techniques now common. This would involve not only reaching portions of an existing formation that had yet to be drained, but it could result in production from formations not available to the original borehole, i.e., formations that otherwise would require a new well. An analogy could be drawn to an existing mine and the opening of a new drift or shaft. A reasonable rule would be that the BO could, using current best technology, continue to develop wells existing at the time of occupation even if that meant enhancing production by any number of means. With sidetracking and pressure maintenance techniques such as water or CO₂ floods, the new well/old well dichotomy may be more illusory than real. For example, a large unproduced area between producing wells might justify a new well or might be “swept” with a well-designed water flood.

APPLYING THE USUFRUCTUARY RULE TO IRAQ

The vast reserves of Iraq would seem to justify a different approach. Surely if a country had a finite amount of a natural resource, the usufructuary would be obligated to return it without unnecessary depletion. Iraqi reserves at current rates of production would last more than 127 years.³⁸ A prudent owner would not object to the usufructuary accelerating the production during his tenure. To do so would enhance the present value of the asset using any reasonable figure for the present value of the cash flow from the field. Suppose allied power in a 60-month occupation, by drilling “new wells” and other means, increased production to 6 million barrels

³⁸ 2.4 x 365 divided by 112 billion.

a day and then turned the fields back to the Iraqis themselves and departed. Also assume that the proceeds of production at the increasing rate during occupation were used by the occupant strictly for occupation purposes, i.e., nation building and support of the people. Would the BO have violated Article 55? The question answers itself. It could be argued furthermore that with an asset of such immense size, the BO has a duty to pursue its development as the owner would were he in control. As anyone involved in evaluating petroleum assets knows, the level of current production is more important than the level of reserves, even if they are deemed “proved.”³⁹ The BO would have to produce the field for many years, perhaps one-quarter of the life of the wells, to return them to the owner valued at less than they would be without the new wells. That is, the enhanced value that comes from moving oil reserves from the “proved undeveloped” or “probable” category to “proved producing” is so great that the same amount of incremental production is more than offset. Furthermore, all the incremental production from “new wells” would have gone to improving the lot of the Iraqi people. The usufructuary should be under a duty to act as a prudent operator and enhance the value of the asset by continuing to develop the fields by drilling new wells if necessary. The better test would be whether the asset when returned was of equal or greater value than when taken.

THE COMPLICATION OF PRIVATE PROPERTY

Both the Hague and Geneva Conventions contain provisions regarding the taking, destruction or seizure of private property.

“Pillage is formally forbidden” (HR Art. 47)⁴⁰

“Private property cannot be confiscated” (HR Art. 46, para. 2)

“Immovable private property may under no circumstances be seized. It may, however,

³⁹ Normally reserves are characterized as “proved producing,” “proved non-producing” (i.e., shut in for some reason), “proved undeveloped,” probable and possible. The substantial discounts for the latter three classes (often 25%, 50% and 75%, respectively) means that new wells which increase the amount of “proved producing” enhance the value of the asset dramatically.

⁴⁰In the Lieber Code it was specified that if an officer confronted a soldier pillaging or raping, the officer was authorized to shoot him on the spot.

be requisitioned.” (HR Art. 52)

“Any destruction by the Occupying Power of real or personal property belonging . . . to private persons . . . is prohibited, except where such destruction is rendered absolutely necessary by military operations.” (GC Art. 53)

The public-private classification is important due to the very different manner in which it is treated under international law. Public property, if movable, can be taken by the occupying power to pay for the costs of occupation. Immovable property can be used pursuant to the rules of usufruct for the same purposes. This includes, as we have seen, the right to work mines and produce oil fields. Private real and personal property cannot be confiscated or seized, i.e., requisitioned without compensation.⁴¹ If personal property is “requisitioned,” it must be paid for promptly or a receipt given with the value fixed “by agreement, if possible.”⁴² Requisitions must be “in proportion to the resources of the country”⁴³ During Desert Storm the U.S. army took a prepared form complete with carbon copies for making requisitions in the field into battle.⁴⁴

FOREIGN PETROLEUM INTERESTS

This clear proscription against taking private property without compensation and justification raises the issue of the many private petroleum-related assets within Iraq in the petroleum sector.⁴⁵ These would include interests in joint ventures such as petrochemical plants, refineries

⁴¹ LLW paras. 406, 407.

⁴² LLW paras. 412, 416, 417.

⁴³ HR Art. 52.

⁴⁴ Borch, op. cit. At page 176 you can see the Army form printed in English and Arabic which was to be used for requisitions. On the back were instructions and warnings (“Combat operations do not give you a license to loot.”).

The white copy went to the owner, blue copy went to the battalion commander, etc. This Property Control Record Book was intended to avoid the chaos surrounding the battlefield seizure during the Grenada and Panama campaigns.

⁴⁵ Foreign companies with assets or operations in Iraq include Agip, BHP, Can. Oxy.

and other infrastructure. More importantly, it would include private contract rights owned by nationals and by nonnationals, such as oil and gas concessions and production agreements as well as drilling contracts and contracts for construction or services. Such property rights, if valid, would have to remain inviolate, although natural disruption by war and, later, occupation might give rise to a claim for damages to those rights.⁴⁶

But the determination of the validity of claimed production sharing, concessionary rights or other forms of participation in the Iraqi petroleum resource would be difficult. It is clear that despite sanctions imposed on Iraq after the Gulf War, many nations and their national oil companies have been involved in negotiations of various types and intensities. Periodically the news reports the granting of a concessionary right or the entry of a development contract in Iraq. As anyone familiar with international deal making can attest, the road from initial negotiations to an enforceable and binding agreement is a long one, fraught with delays and disappointments. In many cases the foreign aspirant seeks not only a binding signature of the relevant official but an act of the legislature, however lacking in authority it might be. Often binding agreements are unilaterally rescinded or modified by the granting country without compensation. In short, the “value” of a commitment, even if seemingly valid, is always subject to question up to the point of performance and then only so long as the agreement appears to serve the interests of both sides. So what should the BO do when faced with a multiplicity of claims by various foreign interests that a binding and recognizable contract right existed which must be recognized? The issue will be complicated by the fact that a number of the claimants will either be State oil companies (e.g., Chinese National Oil Company) or companies which are strongly supported by

LNPL, Crescent Petroleum, Elf, Gaz de France, IPL, Lukoil, ONGC, Petronas, Ranger Oil, Repsol, Shell, Sonatrach, Total. www.smi-online.co.uk/Reports

⁴⁶ No indemnification is owed for destruction in the course of a justified attack or military operation. P.C. Jessup, 38 Am. J. Int. Law 458, 1944.

their national governments, e.g., Total of France, Lukoil of Russia, etc.

A good example would be the 10 to 30 billion barrel Majnoon field in which the French have claimed concessionary rights.⁴⁷ Iraq has subsequently attempted to withdraw those rights because of France's continued compliance with UN sanctions. It is likely that the "rights" are far from clear in this and many other cases. Is the BO to use preexisting Iraqi law, such as it is, to unscramble these claims, or should it rely on post-invasion provisional government decisions? How can the BO avoid having these issues further complicate the difficult task of forming a new Iraqi government? Already there are reports of the Iraqi National Congress seeking support in Houston, London and elsewhere from major international oil companies.⁴⁸ Whether an invasion represents a broad coalition or not, the number of countries vitally interested in the occupation will be large. The issue of petroleum rights will substantially complicate the picture. If the BO does not have total physical control over the oil fields and petroleum infrastructure and the country goes through a warlord or quasi-warlord phase, then the complications will be even greater as separatist factions, rebels or terrorists obtain access to ready sources of cash flow.

WHEN ARE COMMERCIAL ACTIONS OF THE BELLIGERENT OCCUPANT ENFORCEABLE?

⁴⁷ USIA, Petroleum Finance, reported in The Washington Post. See attached map.

⁴⁸ Confidential interviews of author.

Necessary actions of a BO taken in the course of an occupation for a valid purpose and to benefit the local inhabitants are enforceable in an appropriate forum after the conflict.⁴⁹

“If the occupant acts in good faith for the management of the community under war conditions and not for his own enrichment, and if the rights of the individual owner under local law are respected, the occupant’s action has a solid basis in law.”⁵⁰

⁴⁹ Felice Morgenstern, “Validity of the Acts of the Belligerent Occupant,” *The British Yearbook of International Law*, 1951, p. 291 et seq.

⁵⁰ P.C. Jessup, “A Belligerent Occupant’s Power over Property,” 38 *Am. J. Int. Law* 461. For example, in the case of *Marjamoff v. Wloclawek*, 1924, the Supreme Court of Poland confirmed the action of the German Governor General in taking private property for use as a public hospital in occupied territory. Currency issued by the Japanese during the occupation of the Philippines has been held legal tender. See *Aboitiz & Co. v. Price*, 99 F. Supp 602, June 16, 1951, D. Ct. Utah.

The key to enforceability is the intent (i.e., the effectuation of an orderly occupation for the benefit of the local citizens) and necessity. Thus, public property seized pursuant to the Hague regulations vested title to the property in the BO to the extent that it could transfer valid title.⁵¹ Although the Law of Belligerent Occupancy has been clarified with numerous cases, few have involved the magnitude and complexity of petroleum development rights and concessions. The complexity in the occupation phase of sorting out the claims of those who claim contract rights ante-dating the war would compel the U.S. as BO to establish a procedure or tribunal for the determination of rights and resolution of disputes. It is doubtful that the U.S. would welcome such a sensitive task. However, the alternatives are not altogether palatable. If no decisions are made, the oilfield rehabilitation may be impeded. To leave these decisions involving billions of barrels of reserves and billions of dollars to a provisional or ad hoc coalition government might unnecessarily burden that group with highly political decisions they would make, or to possible corruption. The establishment of a functioning court system and government would appear necessary before such actions could be routinely decided. The BO has the authority under HR Art. 43 to establish courts with authority to issue binding orders. Similarly, courts of several countries have held that the tribunals established by the occupant in accordance with Article 43 “. . . must be regarded as lawfully established courts whose judgments have the authority of Res Judicata.”⁵²

Assume that a Russian drilling company claims a contract right to drill at a prescribed rate a designated number of wells for INOC. The BO in his usufructuary capacity would be entitled to recognize that contract claim, and if he does so, that decision would be enforceable after the war, say for payment of amounts due. But the BO should not have to recognize a contractual claim when there is true ambiguity regarding its validity.

Another issue which arises is the effect of an action by the BO which is clearly beyond its

⁵¹In re Lepore, Foro Italiano, 19047, p.133.

⁵²Morgenstern at p. 296.

authority. Is it null and void or merely the basis for a claim for damages? In one case, coffee was requisitioned for use not by German troops in the occupied area but for persons on the home front. As such, it was violative of the Hague principle that requisitions can be made only for the purpose of the occupation. In this case⁵³ the action was held valid but giving rise to a cause of action for damages.“ The fact that the limits contemplated by Article 52 were in the present case exceeded cannot automatically lead to the consequence that the requisition was without legal effect.”⁵⁴ On the other hand, the U.S. Supreme Court has invalidated an act of the U.S. forces in the Philippines as exceeding their authority under the Hague Regulations.⁵⁵ *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 33 S. Ct. 1033 (1913). In that case the commanding general issued a decree changing the prescriptive period for adverse possession.

⁵³ *Testdorf v. German State* quoted in *Morgenstern* at p. 308.

⁵⁴ *Ibid.*

⁵⁵ *Shanker*, p. 1074.

The test for validity of actions or decisions of the BO during its occupancy is whether they are “necessary to public order and the ordinary operation of civil society Following this theory, the courts have fully validated . . . issuance of a special currency . . . issuance of occupation government securities . . . creation of special courts . . . leasing of public land by the occupation authorities, building of a hospital”⁵⁶ If a tribunal was essential to decide claims to Iraqi oil fields by alleged concessionaires and joint venturers and thus establishing production needed to provide funds for the occupation, then perhaps the U.S. as BO could claim the right to undertake that step, however unpopular it might be, with the claimants. But if robust Iraqi production can be established without fully litigating and deciding claims regarding executing contracts, such claims could be deferred until as worthy and competent government is established.

THE COOPERATION OF THE IRAQI NATIONAL OIL COMPANY

⁵⁶ Ibid. p. 1080.

Any rebuilding of the Iraqi nation, repair of war damage, and care of the Iraqi people by the BO hinges to a significant extent on the cooperation of the extant Iraqi petroleum and business infrastructure. Labor can be requisitioned⁵⁷ by coercive measures to secure the petroleum facilities in question, limited to only that which is necessary.⁵⁸ But as the French learned in the post WWI period when they attempted to extract from the Ruhr the considerable coal reserves there, even peaceful passive resistance can have a devastating impact on the objective of seizing natural resources. The French objective was an even less difficult attainment than petroleum production, for the French sought only to ship already-mined coal to France.⁵⁹ Despite increasing the occupation force from 80,000 to 140,000, the French were able to divert only 25% of the German coal deliveries.⁶⁰ Even with little overt or violent resistance, there was one Allied soldier for every 90 Germans in the occupied area. In Iraq, this would mean an occupying army of 250,000. The cooperation of the INOC and its employees is essential.

What are the rights of the BO to secure the services of those in the occupied country? Although the BO may withdraw or restrict the freedom of movement of citizens and require ID cards (LLW 375), there are substantial restrictions on requisitioning labor.

- No one can be compelled to serve in the BO's armed forces.
- No one under 18 can be requisitioned.
- No one can be compelled to work other than on the "needs of the army of occupation, or for the utility services or for the feeding (etc.) or health of the population." (LLW sec. 418)
- Workers shall, if possible, be kept in their same jobs and they should be paid a fair wage.
- Laws in effect regarding wages, hours and terms of employment shall remain in effect.

These provisions clearly contemplate a reasonable compensated requisitioning of labor and

⁵⁷ LLW para. 419.

⁵⁸ HR art. 52, GC art. 33, LLW 397.

⁵⁹ Peter Lieberman, "Does Conquest Pay," Princeton University Press, 1996.

⁶⁰ These efforts were referred to as the "Verdun of the Peace Battle."

services. This provision, coupled with the general provision found in section 376 (“The occupant has the right to regulate commercial intercourse in the occupied territory.”) would seem to empower the BO to mandate all employees of the Iraqi National Oil Company to remain at their posts with the same responsibilities and same pay. The law clearly contemplates such a situation:

“The services which may be obtained from inhabitants by requisition include those of professional men, such as engineers, physicians . . . and of artisans . . . The officials and employees of railways . . . gas, electric and waterworks . . . whether employed by the state or private companies, may be requisitioned to perform their professional duties” (LLW se. 419)

A strike or intentional withholding of services would leave the occupant without remedy other than to replace the striking workers and perhaps detain them if a case could be made that their hostility presented a threat to the occupation.

HOW ARE THE PROCEEDS TO BE USED?

Assuming that the petroleum produced is sold in the ordinary course, the proceeds must be devoted to defraying the costs of the occupation.⁶¹ As Jessup states, “If the occupant acts in good faith for the management of the community under war conditions and NOT FOR HIS OWN ENRICHMENT, and if the rights of the individual owners under local law are respected, the occupant’s action has a solid basis in law.”⁶² International law not only places the burden of the restoration of order squarely on the BO, but it gives him the tools to meet that obligation, within limits, although he may not impose taxes and levies beyond the capability of the population to bear. Once the use is determined to be for the sole benefit of the local population, the restrictions regarding the use of public and private property are even further reduced. In order to ensure public order and safety, “An occupant is authorized to expropriate either public or private property solely for the benefit of the local population.” Article 43, HR (para. 363). This would presumably exclude general costs of occupation, i.e., maintenance of occupant’s troops, in which case the more restrictive rules, i.e., compensation, etc., would apply.

⁶¹ Jessup Phillip, C. 38 Am. J. Int. Law 461.

⁶² Ibid. at page 461.

The Israeli case appears to be one of clear violation, for the oil produced was used for meeting the general needs of Israel to fuel its national and war needs and not merely to meet fuel needs within the Sinai or to pay costs of the occupation army and restoration of order. The Japanese handling of petroleum in Dutch Indo-China was also violative of the Hague Regulations. If one considers the violation of international law by the Nazis, the Japanese Imperial Army, and the Russian Army, it is clear that the very clear and defensible Hague and Geneva Conventions have been honored in the breach rather than the observance.

MARTIAL LAW AND BELLIGERENT OCCUPANCY DISTINGUISHED

U.S. OCCUPATION OF GERMANY AND JAPAN

A conspicuous difference between the post WWII occupation and a possible occupation of Iraq is that neither Germany nor Japan had either cash flow or substantial liquid assets after the war due to the devastation of allied bombing.

THE DURATION OF OCCUPATION UNDER INTERNATIONAL LAW

Although the period of an occupation is a matter of policy or military necessity, the applicability of the Law of Land Warfare and the mandates of the Hague and Geneva Conventions have a defined duration, however difficult to determine in practice.⁶³ It is clear that the commencement of the period of applicability is not the declaration of war. Mere hostilities and not a declared war are required.⁶⁴ Although the Hague Conventions apply to “war,” the Geneva Conventions provide that they apply during war “or any other armed conflict which may arise . . . even if the state of war is not recognized by one of them.”⁶⁵ The LLW makes it clear that both the HR and

⁶³ See LLW paras. 9, 10.

⁶⁴ LLW para. 9.

⁶⁵ Geneva Convention Relative to Treatment of Prisoners of War, 1949 (GPW), Geneva Convention for the Amelioration of the Condition of Wounded or Sick of Armies in the Field, 1929 (GWS), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 1949 (GWS Sea), etc.

the GC apply regardless of whether a state of war has been formally declared.⁶⁶

Nor are the obligations of the BO extant during what would be considered the combat phase, unless circumstances permit.⁶⁷ Warfare has traditionally been divided with elegant simplicity into three phases: Combat, Belligerent Occupation and the Post Peace Treaty relationship.

Occupation is a flexible term which would encompass any territory that had been secured and was no longer involved in actual combat, even though the battle continued a short distance away.

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”⁶⁸ The LLW ceases to be applicable by its own terms in the following circumstances

⁶⁶ LLW para. 9.

⁶⁷ LLW para. 352b.

⁶⁸ HR para. 42.

termination by agreement, i.e., peace treaty; termination by unilateral declaration of one party acceded to by the other; complete subjugation; or simple cessation of hostilities. However, both the Geneva Conventions of 1949 and the customary law of war (inclusive of the mandates set forth in the HR) continue to apply after the termination of hostilities and during the continuation of occupation even if subjugation has occurred.⁶⁹ Since the rationale for these treaty obligations is the humane and civilized treatment of the conquered populace, it would be nonsensical to prematurely end the occupant's obligations and international law does not do so.⁷⁰ A peace treaty, of course, will terminate the occupant's responsibility under the Law of Land Warfare and replace it with the stated obligations of the Treaty. See *Cobb v. U.S.* 191 F.2d. 604 (9th Cir.) 1951.⁷¹ The purpose of the law is to protect the population until a peace treaty can be arrived at. Post-surrender occupation is a relatively modern phenomenon. In earlier times annexation was customary. The duties and rights of the respective parties after a peace treaty are beyond the scope of the law of land warfare and this paper.⁷²

AVOIDING CHAOS IN A POST-WAR IRAQ

⁶⁹ GC art. 6, para. 249.

⁷⁰ LLW para. 10.

⁷¹ Holding that, although hostilities had long ceased, the U.S. authorities on Okinawa were bound by the Hague Regulations (art. 43) "until the terms of peace have been finally settled by treaty, proclamation or otherwise."

⁷² For a realistic, if not pessimistic, view of the post-occupation phase, see Peter Liberman's "Does Conquest Pay," Princeton Univ. Press, 1996.

A war in Iraq will almost certainly raise the issue of the termination of the legal obligations discussed herein. If a complete destruction of the Baathist regime of Saddam Hussein occurs, the issue of the proper governing body will immediately arise. It can be seen from pre-war conferences and comments⁷³ that there is a plethora of interest groups that desire to achieve or share power. The post-war period could well be chaotic and contentious, if not violent, as multiple Kurdish groups, multiple Sunni and Shiite groups and tribal interests struggle for power, perhaps with backing from various interested outside parties and interests.⁷⁴ To these should be added the interests and likely involvement of the Turks and Iranians and others such as the French, Russians and Chinese with commercial—mainly petroleum—interests and a potential witches’ brew of contending factions and intrigue. Due to decades of repression, a period of intense score settling and revenge will be averted with difficulty. A firm hand will be needed in the months and perhaps years after a war to put the nation on a peaceful and prosperous trajectory.

INTERNATIONAL LAW MANDATES A REASONABLE OCCUPATION PERIOD

If the U.S. and its allies select to commence a war with Iraq with the effect of removing the current leadership and commencing a power struggle in a devastated nation, the conquering power would be obligated to exercise its dominant power to meet its obligations under the law. Surely the clear mandates of the Hague and Geneva Conventions and the customary law cannot be avoided by a rapid departure from the scene. It is clear that neither Convention contemplated a situation where the conqueror would prematurely relinquish control, leaving chaos in its wake.

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures to restore, AND ENSURE, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” (Emphasis added)⁷⁵

⁷³ Salah Nasrawi, Associated Press, December 18, 2002; NYT “Iraqi Opposition is Pursuing Ties with Iranians,” December 17, 2002.

⁷⁴ In addition to the multiple groups reflected in the expatriate community, there are undoubtedly an equal number of indigenous groups.

⁷⁵ HR Art. 43.

The obligations of the occupying power are extensive and continuing. Examples:

- “duty of ensuring food and medical supplies of the population . . .”⁷⁶
- “duty of ensuring and maintaining . . . the medical and hospital establishment”⁷⁷

⁷⁶ LLW para. 384a, GC art. 55.

⁷⁷ LLW para. 386, GC art. 56.

- “shall facilitate” relief measures⁷⁸
- “shall . . . facilitate . . . the proper working of all institutions devoted to the care and education of children”⁷⁹

Just as an immediate post war abandonment of Iraq to chaos would constitute a violation of an implied duty, so would an early departure after a superficial and clearly inadequate provisional government. Such departures will be difficult to resist, for there will be many parties both domestic and foreign who will be arguing strenuously for it. It may be due to continued terrorist or guerilla activity that the post war period will see considerable loss of life on the part of the occupying parties. A review of the history of Iraq since its creation after WWI reveals what might be considered an artificial conglomeration of peoples and interests.⁸⁰ That history is replete with autocracy and violent shifts in power leading to the recent terror-controlled decades under Saddam Hussein. Nothing indicates that a post war period will be any less violent and tumultuous than the past. In fact, the repression and suffering of recent years may make a civil conflagration inevitable. It would be unconscionable and violative of the clear duties of an occupying power to prematurely terminate its occupation or turn control over to a provisional government clearly unable to meet the minimum standards of governing transparency and control.

THE ROLE OF PETROLEUM IN AN OCCUPIED IRAQ

⁷⁸ GC art. 60.

⁷⁹ GC art. 50.

⁸⁰ See Judith Miller and Laura Mylroi, “Saddam Hussein and the Crisis in the Gulf,” Random House, New York (1990) for a lively, brief history of the creation of Iraq and the accession to power of Saddam.

The situation in Iraq is without precedent in modern times, that is, a country defeated on the battlefield, yet with a steady and substantial source of income. Both Japan and Germany were, at the time of occupation, in shambles without substantial sources of cash flow. Lesser countries such as Bosnia, Somalia and Grenada had few resources to begin with. Assuming no effective destruction of the petroleum producing capacity by Saddam, Iraq will have a capability of generating approximately \$50 million of cash per day or \$18 billion per year. This assumes a continued production of at least 2 million barrels of oil, a figure considerably below Iraq's current capacity if its fields are well operated and maintained.

Under international law, all of these proceeds can be used by the occupying power to meet its obligations as a BO. This would include rebuilding the infrastructure, educating the children, and caring for the sick and wounded as well as refurbishing the oil facilities. It would also be available to pay reasonable costs of the occupation itself. To the question "Who gets the oil?", the answer is that bona fide purchasers get the oil and the occupying powers get the proceeds in trust for the people of Iraq. The U.S. has said as much, although the fact bears repeating. On Meet the Press, December 29, 2002, interviewer Tim Russert asked Secretary of State Colin Powell, in the event the U.S. occupies Iraq, "Who gets the oil?" Powell responded that the oil "belongs to the people of Iraq" and that we would use it "for their benefit pursuant to international law." After a lifetime in the military, Powell is undoubtedly more familiar than most with the dictates of Field Manual 27-10.

THE ADVANTAGES AND DISADVANTAGES OF PETROLEUM

Assuming the occupation of Iraq by the U.S., the U.N. or an alliance, the issue of oil will be a positive factor, providing cash for nation building, but it will also be a problem. The widely dispersed petroleum industry, unless firmly within the control of the occupying power, will provide a substantial and steady source of funds to terrorists, dissidents, warring factions and rebel groups. In addition, there will commercial and political interests around the globe that will be tempted to support and fund dissident and warring factions with the hope of obtaining preferred treatment regarding oil in a post war Iraq. Just as international support has kept the

violence in Northern Ireland alive, the petroleum interests around the world could not be expected to be disinterested in the outcome of a struggle for power in Iraq. To fail to control the petroleum proceeds is to relinquish real control of the country. Since international law allows the occupant to take control of all cash, funds and movable property that might be used for operations of war, it should be able to maintain order by controlling the assets which might be used by hostile groups in the aftermath of war.⁸¹

CORRUPTION IN A PROVISIONAL GOVERNMENT

It is clear that the BO owes a quasi-fiduciary duty to the conquered state regarding immovable property, i.e., realty in which it has the usufructuary rights or over which it is the administrator. That is, it can reasonably utilize such assets for the benefits of the occupation without damaging them for ultimate return. This presents a problem with regard to a likely lack of transparency on the part of an interim or provisional government. To turn the considerable petroleum proceeds over to an ad hoc or irresponsible faction might well result in the loss or theft of considerable sums which would then not be available for nation building and other objectives of the occupation. One does not have to look far to see governments where the petroleum riches are largely dissipated by inefficiency and corruption. An occupying power would violate its duty by knowingly permitting such waste and corruption to occur by a premature departure.

PROTECTIVE SEIZURE OF IRAQI OIL FIELDS

The shocking action of Saddam Hussein in causing widespread destruction of the Kuwaiti oil fields during the first Gulf War raises the possibility of similar actions early in any conflict with the U.S. Would the U.S. and its allies be entitled under international law to make a preemptive strike to obtain control of the oil-producing regions, or a portion of them unrelated to the fundamental military objectives? Article 23 sets forth the prohibitions in waging hostilities. Included in the list is the destruction or “seizure” of enemy property “unless such seizure or destruction be imperatively demanded by the necessities of war.”⁸² Certainly the fields could be

⁸¹ HR art. 53.

⁸² HR art. 23g.

seized to deny the use of the petroleum to Iraq. Since the objective of a preemptive seizure would be primarily their preservation and not denial to the Iraqi army, a question could be raised under Article 23.

Another provision specifically provides that militarily useful goods can be seized from either public or private ownership, although in the latter case compensation must eventually be made. HR para. 53 provides, “all kinds of ammunitions of war may be seized even if they belong to private individuals . . .” Ammunitions of war, a translation from the French “munition de guerre,” has been translated broadly to include any militarily useful product or object. But it is clear that the interdiction of the Iraqi oil supply could be effected in many ways other than seizure in place. Bombing of supply depots and pipelines or even refineries would meet military objectives in a war of short duration.

The seizure or sequestration of the Iraqi oil fields, however, could be justified as an action to prevent internationally significant environmental damage. Under the terms of Protocol I of the Geneva Convention, “It is prohibited to use fighting means or methods intended, or expected, to cause extensive widespread damage to the natural environment.” Article 55 states, “Protecting the natural environment against extensive long-term damage should be observed during fighting.” In the detailing of the many war crimes committed by Iraq against Kuwait, the “Crime of Damaging the Natural Environment” is included along with the “Crime of Seizing and Damaging Property,” which referred to the destruction of the oil wells *inter alia*.⁸³ To the extent that massive intentional environmental damage is a violation of international law, a preemptive seizure of the oil fields and other petroleum infrastructure would be justified before such damage could be inflicted even though the right to do so might not be justified as a military necessity.

⁸³ Hussain Isa Mal Allah, ed. “The Iraqi War Criminals and their Crimes During the Iraqi Occupation of Kuwait,” Center for Research and Studies on Kuwait, 1998. The destruction to the oil fields was as senseless as it was extensive. Of 1555 wells, 618 were set afire, 77 were opened to gush and 462 were damaged. Iraq not only released huge quantities of oil into the Persian Gulf, but it senselessly destroyed sewage treatment stations, causing untreated sewage to flow into the Gulf as well.

THE WORLD WAR II OCCUPATIONS AS A MODEL

Discussions of a post invasion Iraq frequently mention the occupation of Germany and Japan as successful paradigms. These examples are of little help regarding the issues involved in the instant discussion. Both Germany and Japan were defeated, devastated countries with prostrate or nearly prostrated economies. No substantial resources were being produced, and support for the restoration of order and the health of the people almost entirely came from the allied powers, at least initially. Assuming no destruction of the oil fields by the war itself or by Saddam Hussein, the occupying powers will have a substantial engine of economic benefit to harness for the accomplishment of legitimate objectives of the occupation, restoration of order and improving the lot of the Iraqi people. The objective in those two cases was the restoration of a varied and potentially vibrant western-style economy. In Iraq, initially the objective will be to take advantage of a robust natural resource-producing infrastructure. Although absolute control of the proceeds of oil sales by the BO or the U.N. on its behalf is important to prevent breakup of the country, factionalism, and warlordism, the role of the BO in the Iraqi economy and society should be considerably more limited than was the case in post-war Germany and Japan.

THE OPEC QUESTION

Among the several questions that involve post-war macro policy rather than the pragmatic issues of occupation is the stance a BO would take toward production levels and OPEC. If substantial production increases are feasible and accomplished, would this production continue at a pace that would subvert OPEC? One option would be a periodic level of production designed to meet occupation needs which would after a prescribed period of time revert to OPEC-determined levels. A more serious shift in policy would be the establishment of a high production level which would destroy OPEC's effectiveness. High production levels could definitely reverse the current trend toward higher prices and could even drive prices to their 1986 low, which occurred when Saudi Arabia sought to regain its declining market share by dramatically increasing production. The benefits to U.S. and other importing states of \$15 oil would be substantial (e.g., the EU, Japan, China, India). But it would present difficulties for Saudi Arabia, Indonesia,

Venezuela, Mexico and the other OPEC states.⁸⁴ More significantly, this would impact Russia, which has used higher oil prices to turn its domestic plight around. Effective control of Iraqi oil production coupled with substantial capital investment from U.S. and other oil companies thus presents the real option of “destroying” OPEC. This, of course, could result in considerable unrest and instability in the petroleum exporting countries including, perhaps, Russia. It would present the possibility of the destabilization of the Saudi regime, imperiling that large source of production. The flames of anti-Americanism in the Middle East would be further fanned. On the other hand, U.S. and other consumers around the world would substantially benefit if oil prices dramatically declined. (Ten dollars a barrel equals an annual \$65.7 billion transfer of value to the U.S. alone.⁸⁵) The health of airlines and other energy-intensive industries would provide further economic stimulus. Of course, the domestic petroleum industry would be damaged, as it was in 1986 with that precipitous decline. The practical problems and the inevitable delay in securing dramatically higher production in Iraq may mean that this issue is more theoretical than real, at least in the immediate future.

WHO GETS THE OIL

It is a matter of misleading oversimplification to speak of “getting the oil.” Petroleum, like any other property right, consists of a bundle of rights and opportunities. In many situations, international oil companies operating abroad do not “get the oil” at all, but merely the right to sell it and receive a portion of the proceeds. In some cases they get only a fee for producing based on the quantity produced. In almost all cases the owner of the mineral rights--the national government itself in most cases, except for the U.S., where mineral rights can be privately owned--receives a cost-free portion or royalty and the producing company gets the balance after paying both cost of production and taxes. Sometimes this right includes the right to select the purchasers of the oil and sometimes it does not. There is a huge and profitable world of energy enterprise which does not seek ownership of oil or the right to sell it. This is the world of

⁸⁴ For this listing Mexico is deemed an OPEC state although it is only an “observer” formally.

⁸⁵ Assuming U.S. imports of 12 million bpd x 15\$ x 365 =

services and supplies. If the Iraqi fields are to be rehabilitated, who will get the workover and drilling contracts? Who will sell the pipe, valves and drilling mud and provide the engineering, geophysical and logging services?

As those involved in petroleum development know, the control of “operations” includes the right to select the suppliers and service companies; hence the very high value placed on acquiring “operations” as opposed to a mere income stream from the production. In the post invasion Iraq, who will have the discretion normally accorded the operator, i.e., where and when to drill, what formations to seek, what suppliers to use, what drilling contractors and other service companies to hire and how and to whom the sales are to be made.⁸⁶ While the Hague and Geneva Regulations answer many of the questions regarding the actions of the BO, they are silent regarding its rights to make this type of commercial decision. If the BO can operate the mine, can it buy new mining equipment from whomever it pleases, even if they are vendors of its own nationality? Can the BO call in mining engineers from its own populace and give them jobs which would otherwise go to locals? What is the BO’s obligations to the local vendors and suppliers? Even more troublesome, what are the BO’s obligations to other non-nationals, many of whom may be allies?

In brief, the issue of “who gets the oil” should be broken into its constituent parts:

- Who selects the buyer and determines the price?
- Who controls the hiring of contractors, service companies, experts and their rate and method of compensation?
- Who makes the in-field strategic decisions? (How many wells, and where? What techniques will be used?)
- Who decides the production level and tactics regarding OPEC?

⁸⁶ Under the standard Joint Operating Agreement in the U.S., the royalty owners and other partners can elect to take their oil or gas in kind, but due to practical difficulties, few do so. The operator, of course, is obligated to properly and fairly market the oil or gas on behalf of the non-operating parties.

- Who deals with third parties claiming preexisting rights in the fields?
- Who initially receives and controls the proceeds of sale?
- Who gets the benefits of the oil sale proceeds?

It is clear under international law, the answer to the latter question is “the Iraqi people” by way of an enlightened occupation program. (The BO is, of course, entitled to pay for his own in-country occupation costs.) All the other incidents of ownership and control would be in the hands of the BO unless it elects to relinquish control of a particular matter. For example, the U.S. and its allies could leave the machinery of the U.N. “oil for food” program largely intact, which would empower the U.N. to hold the funds subject to decisions regarding expenditure. The issue of commercial opportunities, as well as the issue of determining contract rights, may lead France, Russia and Germany to intervene in the occupation phase.⁸⁷

CONCLUSION - THE U.S. INTERNATIONAL POSTURE

Although the U.S. Secretary of State has declared that the oil will be used for the “benefit of the Iraqi people,” thus complying with international law, it would be more credible and more supportive of the international rule of law for the U.S. to be more legalistic and formalistic in its pronouncement and for it to come from the President. It might also be more believable. Bush should say, “International law clearly spells out our responsibilities as an occupying power. We take international law seriously and want to assure all nations that we intend to comply in both the letter and the spirit of that law as set forth by the Hague and Geneva conventions as well as interpretations of those treaties. The rights of private parties will be respected.” The world seeks an international order which is both protective of its rights and restrictive of alleged U.S. “unilateralism.” One of the problems of Bush’s handling of the Kyoto Treaty was that it appeared dismissive of the international process and not merely critical of various aspects of the treaty itself. It is not enough to say, “We will behave well in Iraq as we have behaved well in the past.” We need to say, “Despite our power and prominence, we see ourselves as governed by the mandates of international law and we will fully comply with it.”

⁸⁷ In Bosnia, Russia without NATO approval or request landed troops in the country.

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