

## THE RECONSTRUCTION OF IRAQ: DEALING WITH DEBT

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We're dealing with a country that can really finance its own reconstruction relatively soon.

Paul Wolfowitz, Deputy Defense Secretary,  
Testimony to Congress, March 2003<sup>1</sup>

Today, Iraq has almost \$200 billion in debt and reparations hanging over its head as a result of Saddam's economic incompetence and aggressive wars . . . Iraq is in no position to service its existing debt, let alone to take on more.

Ambassador Paul Bremer, Testimony to  
Congress, September 2003<sup>2</sup>

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<sup>1</sup> Warren Vieth, *War With Iraq, Iraq Debts Could Add Up to Trouble*, L.A. TIMES, Apr. 4, 2003, at 1. See also March 2003 Statement of Donald Rumsfeld, Secretary of Defense:

I don't believe the United States has the responsibility for reconstruction in a sense . . . and the funds can come from those various sources I mentioned: frozen assets, oil revenues and a variety of other things, including the Oil for Food [Program], which as a very substantial number of billions of dollars in it.

149 CONG.REC. S13751-08 (daily ed. Nov. 3, 2003), WL 22478851 at 6 (statement of Sen. Durbin quoting Secretary Rumsfeld).

<sup>2</sup> Testimony of Ambassador Paul Bremer in Hearings before the Senate Foreign Relations Committee (Sept. 24, 2003), 2003 WL 22212512 (F.D.C.H.) at 14 [hereinafter Hearings].

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## I. INTRODUCTION

In examining the challenge of reconstructing Iraq and the relation of that challenge to Iraq's debt, one must bear in mind the quite limited meaning presently given to the term "reconstruction." Many countries in the world are in dire straits with governments facing large external debt, failing infrastructure and internal instability.<sup>3</sup> It is important to remember that "reconstruction" is not about those many cases. Rather, reconstruction is about those cases where the use of force has seriously destabilized a country and it is believed that external assistance is needed to get a country back on its feet.<sup>4</sup> Secretary of State George Marshall described his plan for the reconstruction of post-World War II as one whose "purpose should be the revival of a working economy so as to permit the emergence of political and social conditions in which free institutions and social conditions in which free institutions can exist."<sup>5</sup> In addition to the classic example of Europe after World War II, the more recent and often discussed examples of post-conflict reconstruction are Kosovo, Afghanistan<sup>6</sup> and Iraq. This limited understanding of reconstruction is

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<sup>3</sup> There have been systematic efforts to address the economic situation of the poorest states, consider, for example, the HIPC ("Highly Indebted Poor Countries") Initiative within the World Bank. But the difficult and so far unsuccessful effort to approach this situation systematically reveals indirectly how debt relief is *ad hoc* and approached country by country. As to HIPC, see, e.g., Timothy Giethner & Gobind Nankani, *The Enhanced HIPC Initiative and the Achievement of Long Term External Debt Sustainability*, International Monetary Fund and International Development Association, Apr. 15, 2002, at <http://siteresources.worldbank.org/INTDEBTDEPT/PolicyPapers/20252822/2002-Apr15-LongTerm.pdf>. Similarly, the *ad hoc* nature of debt relief can be seen by contrast to the International Monetary Fund's still recent proposal for a Sovereign Debt Restructuring Mechanism. For a discussion of this mechanism with comparison in particular to collective action clauses, see Hal Scott, *A Bankruptcy Procedure for Sovereign Debtors*, 37 INT'L LAWYER 103 (2003).

<sup>4</sup> See generally THE STANLEY FOUNDATION, WHO REBUILDS AFTER CONFLICT: 38TH CONFERENCE ON THE UNITED NATIONS OF THE NEXT DECADE (2003); Jacob S. Kreilkamp, *U.N. Postconflict Reconstruction*, 35 N.Y.U. J. INT'L L. & POLITICS 671 (2003) (reviewing practice of last decade).

<sup>5</sup> As quoted by Ambassador Bremer, Hearings, *supra* note 2, at 13.

<sup>6</sup> Peter Mardsen, *Afghanistan, the reconstruction process*, 79 INT'L AFFAIRS 91

important because one must always bear in mind that these countries, despite what likely will be continued invocations of their special claim to assistance, will at some point slide back into the large pool of countries desperately needing humanitarian or development assistance.

Reconstructing any country is a daunting task.<sup>7</sup> Among experts, there was never any thought that the reconstruction of Iraq would be somehow less than daunting.<sup>8</sup> A big part of a reconstruction effort involves finding the money to pay for it, and part of the task of finding money is dealing with other (non-reconstruction) demands placed on such funds. And although Ari Fleischer, the White House Press Secretary, stated in early 2003 that as far as reconstruction, “[th]e one thing that is certain is Iraq is a wealthy nation,”<sup>9</sup> experts in the main also thought that the financing of the reconstruction of Iraq would be difficult. Moreover, this initially difficult task of reconstructing Iraq was seriously compounded by the Bush Administration’s failure to pay heed to the views of experts and even the lengthy study completed by its own Department of State as to necessity for planning concurrent with the invasion.<sup>10</sup> The cost of reconstructing Iraq was significantly magnified by the resultant late planning both in terms of the Coalition’s choice of targets during the war and its failure to secure various facilities at the end of major hostilities.

In financing reconstruction, one may look to sources of revenue within the country and to outside donor support. Often there is precious little domestic revenue. Kosovo and Afghanistan are examples of such nations with little domestic revenue to contribute to the task of reconstruction. Iraq possesses oil reserves, thus, an important post-conflict effort there involved putting Iraq’s oil industry quickly back into production. Initially, this effort was complicated legally by the unilateral action of the U.S. and the question of whether the Coalition Provisional Authority (“CPA”) possessed the necessary title to sell Iraq’s oil.<sup>11</sup> This legal question was resolved in time by a

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(2003).

<sup>7</sup> For an interesting presentation of U.S. efforts at nation building, see James Dobbins & Seth G. Jones, *America’s Record on Nation Building: Are We Getting Better?*, N.Y. TIMES, June 13, 2003, at A31.

<sup>8</sup> See generally James Fallows, *Blind into Baghdad*, THE ATLANTIC MONTHLY 52 (Jan./Feb. 2004) [hereinafter Fallows].

<sup>9</sup> See Vieth, *supra* note 1, at 1.

<sup>10</sup> Fallows, *supra* note 8, at 54.

<sup>11</sup> The unilateral nature of a military action can not serve to legitimately dissolve the legal rights of others. Thus when the Coalition Provisional Authority first assumed authority in Iraq there was a substantial question of whether the CPA could transfer

Security Council resolution,<sup>12</sup> and as oil exports progressively came back on line with periodic disruption from insurgency or terrorist actions. In addition to domestic sources of funds, there is also a search for new external funds from donors, lenders and investors. In the case of Iraq, a donor conference in Madrid in the fall of 2003 garnered pledges from countries other than the U.S. of thirteen billion dollars to be delivered over four years, although the monies have in fact been forthcoming slowly.<sup>13</sup> Moreover, the prospect of multilateral lending was initially complicated by U.S. unilateral action and the legal question of whether the CPA should be accepted as representing the State of Iraq in such matters. Indeed, a central lesson of the Iraqi experience is that the task of finding funding was seriously complicated by the United States' decision to undertake its military action in Iraq both without the authorization of the United Nations and despite the serious misgivings of several allies.<sup>14</sup> Commenting on an appeal by Secretary Colin Powell to the U.N. Security Council for troops and aid from other U.N. members shortly after the August 2003 invasion, the deputy ambassador of France to the U.N., Michel Duclos, was reported to say, "[w]ould we be in this state if there had been set up at the outset a genuine international partnership."<sup>15</sup> Similarly, Senator

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legal title to the oil of Iraq given the United Nations' rights to such oil under various Security Council resolutions. For a thorough analysis, see R. Dobie Langenkamp & Rex J. Zedalis, *An Analysis of Claims Regarding Transferable "Legal Title" to Iraqi Oil in the Immediate Aftermath of the Gulf War II: Paradigm for Insight on Continuation of UN Juridical Regimes Following the Initiation of belligerent Occupation*, 63 ZAÖRV 605-629 (2003).

<sup>12</sup> S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).

<sup>13</sup> By October of 2004, only \$1.3 billion of the \$13 billion in pledges had been provided with over half of that coming from Britain and Japan. See Steven Weisman, *U.S. Pressures Rich Nations to Fill Gap in Iraq Reconstruction Created by Security Needs*, N.Y. TIMES, Oct. 1, 2004, at A16. Although the U.S. Congress approved some \$18.4 billion for reconstruction in Iraq, only a little more than \$1 billion had been spent by October 2004. Moreover in September 2004, the Administration with Congressional approval diverted \$3.5 billion of the approved reconstruction funds to security matters within Iraq. See Richard W. Stevenson, *Seeing Threat to Iraq Elections, U.S. Seeks to Shift rebuilding Funds to Security*, N.Y. TIMES, Sept. 15, 2004, at A12. All of these U.S. actions were thought likely to complicate the negotiating position of the U.S. at the next donor's conference in Tokyo in mid October 2004. Weisman, *supra* note 13, at A16.

<sup>14</sup> Much has been written of the unilateral nature of the decision to use force against Iraq in 2003, less has been written as to the continuing implications of that unilateral decision for the task of reconstruction. See Phillip James Walker, *Iraq, Failed States, and the Law of Occupation*, 33 INT'L L. NEWS 1 (2004).

<sup>15</sup> Felicity Barringer, *U.S. Presses U.N. Members to Bear More of Iraq Burden*, N.Y. TIMES, Aug. 22, 2003, at A12.

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Joseph Biden in September 2003 stated that

[t]he United States typically covers about 25% of the post-conflict reconstructions costs . . . . But we so poisoned the well in the lead up to this war that no one expects the international community to provide more than \$2 or \$3 billion at the donor's conference next month.<sup>16</sup>

The main undertaking of this comment is in Part II where I outline the different parts of the debt of Iraq: the portions that are often discussed, the portions usually overlooked and the portions that have been forgiven. In Part III, I briefly discuss how the United States has approached this mountain of debt as part of the reconstruction effort. In Part IV, concluding observations are offered. The two central points stressed here and which are still relevant to policy concerning Iraq's debt are: (1) the importance of distinguishing between different categories of debt, and (2) acknowledging that the payment of some debts may be itself important to the process of reconstruction.

## II. UNDERSTANDING IRAQ'S DEBT

To understand Iraq's debt is to appreciate the power and madness of Saddam Hussein.

In the spring of 1979, I stood on the edge of a crowd observing a protest against the Shah of Iran outside Iran's consulate in San Francisco. A young woman in chador approached me with a leaflet. The leaflet told the story of Saddam Hussein's many accomplishments and praised his imminent rise to the Presidency of Iraq.<sup>17</sup> It ended with the sentence: "And he is only 41 years old, what more greatness can we expect?" In truth, it is rare that one person has brought more suffering into the world.

Presently the Iraq's debt is often introduced solely in tabular summaries that strip away the context. The following description seeks to put back into the numbers an appreciation of their source.<sup>18</sup>

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<sup>16</sup> Statement of Senator Joseph R. Biden, Hearings, *supra* note 2, at 8.

<sup>17</sup> See Mark Bowden, *Tales of the Tyrant*, THE ATLANTIC MONTHLY, May 2002, at 35, 39-40 (describing the brutality of his assumption of the Presidency).

<sup>18</sup> The definitions of debt are important but unfortunately vary. The E2 Panel of United Nations Compensation Commission for claims arising out of Iraq's illegal invasion and occupation of Kuwait in 1990-1991 wrote of the word "debt":

the Panel notes that the most widely-shared international definition of the phrase "foreign debt" includes any debt incurred both by the State (public debt) and its residents (private debt) as soon as that debt is incurred. The Organization for Economic Development and Cooperation (OECD), for

My purpose here is not to offer an exact statement of Iraq's debt in many categories or to various countries.<sup>19</sup> Rather, it is to provide a fairly accurate sense of the major elements of Iraq's debt, their sources and status. In thinking about Iraq's debt in this way, an important starting point is that it had virtually no foreign debt before its war with Iran in 1980. Since then, debt has built up in four stages: The Iran-Iraq War from 1980 to 1988, the Iraqi Invasion and Occupation of Kuwait from 1990 to 1991, the U.N. Sanctions Period from 1991 to 2003, and the Iraq War and reconstruction effort from 2003 to the present. The following sections examine each of these periods considering the debt often discussed, the debt usually overlooked, and the debt forgiven. Table 2 summarizes this discussion.

A. *The Iran-Iraq War: 1980 to 1988*

The Iran-Iraq War is largely unappreciated in the United States and the world. Iran in 1979 had taken U.S. nationals hostage, ignored the judgment of the International Court of Justice that they be released, and in general, seemed a threat to regional stability and therefore U.S. interests. When the war broke out between Iraq and Iran in 1980, Iran's attempts to invoke the U.N. Charter in response to Iraq's aggression fell on deaf ears. Iran's own actions had made itself an outlaw in the eyes of the world community and its effort to now invoke the very machinery it had flaunted was not successful. As a result, the world seemingly passed over a war that raged from 1980 to

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example, defines foreign debt to include short, medium and long-term debt from four main sources: bilateral and multilateral developmental debt; debt arising from non-concessional lending by multilateral institutions; export credit debt (official and officially guaranteed private export credits); and other private debts, set at market terms (citing to External Indebtedness of Developing Countries: Present Situation and Future Prospects (OECD, Paris, 1979), p. 6. "The amount of outstanding debt is merely an expression of foreign loan resources which have not yet been repaid," p. 16.)

*Report and Recommendations Made by a Panel of Commissioners Concerning the First Installment of "E2" Claims ('The Precedent Decisions')*, U.N. Doc. S/AC.26/1998/7 (1998) [hereinafter E2(1) Report].

<sup>19</sup> In my experience, such numbers can vary significantly. Some of the debt of Iraq to foreign states involves state loans while other portions of the debt involve the provision of goods and services by foreign states. My experience as a U.N. Compensation Commissioner, however, indicates that many of the claimed amounts for goods and services, particularly from non market economies, could not be legally established. In addition, some of the "loans" made to Iraq during the Iran-Iraq War have been argued to have been grants of assistance rather than loans *per se*.

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1988 and involved a tremendous loss of life.

The Iran-Iraq War was Saddam Hussein's war. Hussein attended a conference of unaligned nations in Cuba in September of 1979. While there, he and his Ambassador to the United Nations, Salah Omar al-Ali, met with the new Minister of Foreign Affairs for the then-new Islamic Republic of Iran to discuss, among other things, the dispute between the two nations over the Shatt-al-Arab waterway between the two nations. The Iraqi Ambassador is reported to recall with surprise the especially agreeable tone that the Iranian representatives brought to the meeting.<sup>20</sup> Later as Hussein and al-Ali sat in a garden alone, al-Ali's perception that a peaceful resolution of the issue might follow was crushed. Mark Bowden reports al-Ali's version of the exchange:

"Well, Salah, I see you are thinking of something," Saddam said. "What are you thinking about?"

"I am thinking about the meeting we just had, Mr. President. I am very happy, I'm very happy that these small problems will be solved. I'm so happy that they took advantage of this chance to meet with you and not one of your ministers, because with you being here we can avoid another problem with them. We are neighbors. We are poor people. We don't need another war. We need to rebuild our countries, not tear them down."

Saddam was silent for a moment, drawing thoughtfully on his cigar. "Salah, how long have you been a diplomat now?" he asked.

"About ten years."

"Do you realize, Salah, how much you have changed?"

"How, Mr. President?"

"How should we solve our problems with Iran? Iran took our lands. They are controlling the Shatt-al-Arab, our big river. How can meetings and discussions solve a problem like this? Do you know why they decided to meet with us here, Salah? They are weak is why they are talking with us. If they were strong there would be no need to talk. So this

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<sup>20</sup> Bowden, *supra* note 17, at 35, 47.

gives us an opportunity, an opportunity that only comes along once in a century. We have an opportunity here to recapture our territories and regain control of our river.”

That was when al-Ali realized that Saddam had just been playing with the Iranians, and that Iraq was going to go to war. Saddam had no interest in diplomacy. . . . Within a year the Iran-Iraq war began.

It ended horrifically, eight years later, with hundreds of thousands of Iranians and Iraqis dead. To a visitor in Baghdad the year after the war ended, it seemed that every other man on the street was missing a limb. The country had been devastated. The war had cost Iraq billions . . . .<sup>21</sup>

The significance of the Iran-Iraq War for the Iraqi economy and for Iraq’s debt situation today cannot be overstated. That war generated at least three categories of debt or obligations: (1) external public debt, (2) external private debt, and (3) possible liability for damages suffered by Iran.

First, Iraq’s external public debt increased as Iraq borrowed from other nations to finance the war. Indeed, almost all present estimates of Iraq’s external public debt find their origin in the period of the Iran-Iraq War. As to the amount of this debt, the Secretary General of the United Nations wrote in 1991 that:

Iraq’s total external debt and obligations have been reported by the Government of Iraq at \$42,097 million as of 31 December 1990. However, the exact figure of Iraq’s external indebtedness can only be ascertained following discussions between Iraq and its creditors. To estimate debt servicing requirements it is assumed that Iraq reschedules its debts at standard Paris Club terms.<sup>22</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> Letter from the Secretary General of the United Nations to the President of the Security Council, para. 6, U.N. Doc. S/22661 (May 30, 1991) (In accordance with Security Council Resolution 687, paragraph 19, the Secretary-General had presented a report to the Council on May 2, 1991 (U.N. Doc. S/22559), which contained, at paragraph 13, an undertaking by the Secretary-General to suggest to the Security Council a percentage figure of the value of Iraq’s petroleum exports that would represent Iraq’s contribution to the Fund to serve as the source of monies for satisfaction of decisions of the UNCC. On May 30, 1991, the Secretary-General presented his analysis in the form of a note, annexed to the above cited letter). In its letter to the Security Council dated August 16, 1991, the Government of Iraq confirmed the “external debt and financial commitments” figure of US\$42,097 million. *See* Letter



Other accounts of the debt are greater. Lawrence Freedman and Efraim Karsh write: “[I]t increasingly became evident that Iraq had emerged from the war a crippled nation. From a prosperous country with some \$35 billion in foreign exchange reserve in 1980, Iraq had been reduced to dire economic straits, with \$80 billion in foreign debt and shattered economic infrastructure.”<sup>23</sup>

The situation with Iraq’s external private debt, i.e. foreign debts of Iraqi residents, is more difficult to estimate. The magnitude of this debt is unclear, but it is thought to be small inasmuch as the Iraqi economy was essentially controlled by the state and, whatever private economy there was, it tended to be small in scale particularly in the international realm. However, the government’s dominant presence in the private economy did serve to increase Iraq’s external public debt in a second way. In particular, Iraq’s external public debt also increased as Iraq’s ability to purchase foreign goods and services diminished during the war. Iraq began to default on contractual payments due and commenced renegotiating the terms of contracts for payment. The payment period was no longer the previous customary period of at

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from the Permanent Representative of Iraq to the United Nations, addressed to the President of the Security Council, U.N. Doc. S/22957 (1991).

<sup>23</sup> Lawrence Freedman & Efraim Karsh, *The Gulf Conflict 1990-1991, Diplomacy and War in the New World Order* 37 (1993). See also Alnasrawi Abbas, *The Economy of Iraq: Oil, Wars, Destruction of Development and Prospects 1950-2010*, 109 (1994):

Iraq has always been one of the few developing countries that managed to stay away from contracting foreign loans. The only significant exception was a number of loans extended by the Soviet Union and other centrally planned economies, most of which were to be paid in oil.

As the war with Iran continued, the government found itself forced to borrow to finance the war. Three sources of loans were identified. First, loans extended by the Arab Gulf states, mainly Saudi Arabia and Kuwait, soon after the outbreak of the war. The government of Iraq has always maintained that such funds, which amounted to \$40 billion, were supplied as assistance rather than loans to help it in its war with Iran. Another \$35 billion was owed to Western governments and banks. Third, another \$11 billion was owed to the Soviet Union and other Eastern European governments. It should be pointed out that Iraq’s debt-service obligations were projected to be \$8 billion, 55 per cent of its oil revenue in 1989.

*Compare Iraq Country Profile 1989-90*, THE ECONOMIST INTELLIGENCE UNIT 33 (1990) (“Iraq’s balance of payments situation before the war with Iran was such that the government was able to avoid raising loans abroad as a matter of principle for many years. Since 1981, however, in the face of growing current account deficits, the country has taken on enormous overseas borrowing.”).

most three months, but in some cases as long as forty eight months.<sup>24</sup> In essence, the sellers had begun to provide financing for Iraq's purchases.

This external public debt situation in Iraq at the end of the Iran-Iraq War was examined as a part of the U.N. Compensation Commission's ("UNCC") consideration of claims arising out of Iraq's later illegal invasion and occupation of Kuwait ("the Gulf War"). The jurisdiction of the UNCC extended to claims *arising out of* the invasion and occupation. Some claimants who had either lent monies to Iraq during the Iran-Iraq War or sold goods or services to Iraq during that period argued that but for the Gulf War, they would have received

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<sup>24</sup> See, e.g., Robert S. Mason, *Iraq, A Country Study*, Area Handbook Series, Federal Research Division, Library of Congress, 126 (1990) ("[i]n a process of constant renegotiation with its creditors, Iraq had deferred payment by rescheduling loans"). See also E2(1) Report, *supra* note 18:

83. Iraq's substantial foreign debt is a relatively recent phenomenon. Indeed, Iraq's practice with respect to foreign suppliers of goods and services until the late 1970s, or even the early 1980s, appears to have been to pay its debts on a current basis . . . .

. . . .

85. Iraq's foreign debt became significant only during the 1980s. The main factors which contributed to its emergence and rapid growth are generally identified as the decline in oil prices at the end of the 1970s (with the resulting corresponding decrease in Iraq's oil revenues), the adverse effect of the war with the Islamic Republic of Iran on Iraq's economy (in terms of both increased military expenditures and decreased income due to the destruction of assets, including oil exporting facilities), and the maintenance – and in some cases the increase – of public sector spending by Iraq notwithstanding the constraints created by the first two factors.

86. With the rapid growth of its foreign debt, Iraq changed its foreign trade practices and began to request credit from its suppliers, even for ordinary consumer goods and medical supplies, where it had previously incurred foreign credits "only with the greatest of care." The country became increasingly dependent on the willingness of foreign suppliers to finance operations in Iraq through, among other things, extended payment terms. The distortion of normal conditions in Iraq's international trade during the mid- to late 1980s resulting from Iraq's foreign debt was also manifest in the fact that it no longer paid its then existing debts on originally-contracted terms, but required deferments in order to allow it the time needed to gather the funds necessary to make payments that became due and to clear debts that were overdue. As time went on, Iraq continuously renegotiated and rescheduled its debts with its contracting partners.

payments on their outstanding debts. For the UNCC, these claims led it to interpret a jurisdictional limitation included in Security Council Resolution 687, the basic constitutive instrument for the Commission. In particular, a panel of the Commission noted that the jurisdictional grant in Resolution 687 to decide claims arising directly out of Iraq's illegal invasion and occupation of Kuwait was explicitly to be "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990" (hereinafter referred to as the "arising prior to" clause).<sup>25</sup> The Panel found "the object and purpose of the Security Council's insertion of the 'arising prior to' clause was to exclude from the jurisdiction of the Commission Iraq's old debt."<sup>26</sup> Consequently, such "old debt" was not addressed through the UNCC process and remains an outstanding element of today's discussion.

If this tremendous external public debt is often raised and discussed today as an area for possible debt relief, the possible debt only rarely discussed is Iraq's potential liability to Iran. Although the Iran-Iraq War arguably involved violations of applicable law by both sides, it appears that Iraq was the initial aggressor and on balance, Iraq would be liable to Iran for damages arising from the war. The size of this possible debt is unknown, although one State department official stated to me that Iran has stated on occasion that the amount owing to it was on the order of \$100 billion.

*B. Iraq's Invasion and Occupation of Kuwait: 1990 to 1991*

On August 2, 1990, Iraq invaded Kuwait. On that same day, the Security Council of the United Nations adopted Resolution 660 which provided that the Council:

Condemns the Iraqi invasion of Kuwait;  
Demands that Iraq withdraw immediately and  
unconditionally . . . .<sup>27</sup>

Resolution 678, adopted in November 1990, authorized member states "cooperating with the Government of Kuwait" to take measures to restore peace and security to the region. The member states cooperating with the Government of Kuwait formed a Coalition with the United States and its military coordinating the various forces, and

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<sup>25</sup> For a further discussion of this "precedent decision" of the UNCC, see David D. Caron, *The United Nations Compensation Commission for Claims Arising Out of the 1991 Gulf War: The "Arising Prior To" Decision*, 15 FLA. ST. J. TRANSNAT'L L. & POL'Y (forthcoming 2005).

<sup>26</sup> E2(1) Report, *supra* note 18, para. 72.

<sup>27</sup> S.C. Res. 660, U.N. SCOR, 2962th mtg. at 19, U.N. Doc. S/RES/660 (1990).

contributed to the task of ending Iraq's occupation of Kuwait. After a bombing campaign that started in mid-January 1991, a land campaign began and the war ended very quickly. On March 2, the war was essentially over. The formal cease-fire emerged from the Security Council in Resolution 687 on April 2, 1991.

The Gulf War resulted in two new possible categories of debt. One has been addressed in significant part and the other has been, as a practical matter, forgiven.

First, Iraq in Security Council Resolution 687 was declared liable for damages arising from its illegal invasion and occupation of Kuwait. Paragraph sixteen of the Resolution provides:

*Reaffirms* that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.<sup>28</sup>

The task of resolving the claims expected was given to the UNCC. The docket in terms of both the number of claims and the aggregate amount sought is staggering: some 2.5 million claims from over eighty nations for an amount in excess of 250 billion U.S. dollars. The UNCC has resolved all but 45,000 of these claims awarding compensation in total of 48 billion dollars and administering the payment of 18 billion of that amount. Although the remaining 45,000 claims represent primarily specially authorized late filed claims for individual damage, they also include some 27 claims for damage to the environment, health and safety of the region that in total seek in excess of 69 billion U.S. dollars. The status of the UNCC's docket as of May 2004 is summarized in Table 1.

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<sup>28</sup> S.C. Res. 687, U.N. SCOR, 2981st mtg. at 11, U.N. Doc. S/RES/687 (1991).

TABLE 1. STATUS OF UNCC CLAIMS PROCESSING AS OF MAY 7, 2004<sup>29</sup>

No. of claims left to be resolved	Compensation sought by claims left to be resolved (US\$ approx.)	No. of claims resolved	Compensation sought by claims resolved (US\$)	No. of resolved claims awarded compensation	Compensation awarded (US\$)	US\$ paid
44,270	82,620,139,000	2,604,482	265,992,097,839	1,507,374	48,170,438,256	18,395,310,375

It is important to note that the UNCC in resolving 2,604,482 claims awarded compensation only as to 1,507,374 claims. In part, this reduction in the number of claims represents an important function the UNCC has played in both identifying unsubstantiated claims and reducing the amount of damages sought by particular claims. In part, it also reflect jurisdictional decisions excluding certain claims from the purview of the Commission on grounds such as “the arising prior to” clause mentioned above. The important point to note is that exclusion from the jurisdiction of the UNCC does not extinguish these claims, but rather shift these claims to different legal fora or to later possible diplomatic discussions.

The second category of debt created by Iraq’s invasion and occupation of Kuwait was the cost of the Coalition’s military operations to end Iraq’s occupation of Kuwait. The total cost of the Gulf War to the Coalition’s lead armed force, the United States, was estimated to be in the range of at least seventy billion dollars. As an international legal matter, such costs represented a potential debt of Iraq. However, for two reasons this debt has as a practical matter been forgiven. First, at least ninety percent of the costs incurred by the United States were reimbursed by several other States, principally Saudi Arabia, Kuwait, Japan, Germany and Korea, thereby spreading the costs of the Gulf War over a larger group of States.<sup>30</sup> Second, the costs of the Coalition’s military operations are specifically excluded from the jurisdiction of the UNCC.<sup>31</sup> Again, exclusion from the

<sup>29</sup> Status of UNCC Claims Processing (May 7, 2004), at <http://www.unog.ch/uncc/status.htm>.

<sup>30</sup> See David Rosenbaum, *U.S. Has Received \$50 Billion in Pledges for War*, N.Y. TIMES, Feb. 11, 1991, at A7. The figure of ninety percent reimbursement can be found in Gordon Adams & Nigel Holmes, *The Price of War*, N.Y. TIMES, June 28, 2004, at A19.

<sup>31</sup> As to the exclusion of military costs, see *Governing Council Decision 19*, U.N.

jurisdiction of the UNCC does not extinguish the possible liability of Iraq for these amounts, but it does make their recovery in a practical sense quite unlikely. Indeed, I am not aware of any effort before or after the 2003 Iraq War to recover such costs from Iraq.

*C. The U.N. Sanctions Period: 1991 to 2003*

From the end of the Gulf War until the commencement of the 2003 Iraq War, Iraq was subject to one of the most extensive sanction regimes of modern times. Even though recent revelations point to substantial gaps in that regime, it nonetheless was sufficiently strict that a significant amount of attention in the second half of the 1990s was directed at avoiding undue imposition of suffering on the Iraqi people and developing, as they were called at the time, smart sanctions. A curious consequence of this sanction regime's isolation of Iraq was that it prevented Iraq from assuming further external debt.<sup>32</sup>

Particularly interesting from the vantage point of a new Iraq seeking to confront its past, Iraq may have incurred a significant amount of internal debt during the sanctions period. In particular, during the sanctions period, Kurdish lands and property were seized in the Northern Iraq<sup>33</sup> and there were extensive human rights violations against the Shiite population in Southern Iraq.<sup>34</sup>

*D. The Iraq War and Subsequent Reconstruction Efforts: 2003 to the Present*

The most striking thing concerning the debt associated with the

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Doc. S/AC.26/Dec.19 (1994), adopted Mar. 24, 1994, stating "[t]he Governing Council confirms that the costs of the Allied Coalition Forces, including those of military operations against Iraq, are not eligible for compensation."

<sup>32</sup> And to the extent that new external debt is claimed, it likely is appropriate to investigate the consistency of that debt with the sanctions regime. One study of Iraqi debt states that there is 57.2 billion U.S. dollars in pending contracts from this period, with 52 billion of this amount with Russian entities. See Frederick D. Barton & Bathsheba N. Crocker, *A Wiser Peace: An Action Strategy For a Post Conflict Iraq*, Supp. I: Background Information on Iraq's Financial Obligations (2003) (unpublished paper, Center for Strategic and International Studies).

<sup>33</sup> See, e.g., Edward Wong, *Back From Exile, Kurds Demand Political Power and Reparations for Seized Property*, N.Y. TIMES, Jan. 19, 2004, at A8. The Coalition Provisional Authority and Iraqi Governing Council undertook actions aimed at the restoration of property. See Coalition Provisional Authority Regulation 8 (Jan. 14, 2004) and Coalition Provisional Authority Regulation 12 (June 24, 2004), at <http://www.cpa-iraq.org>.

<sup>34</sup> See Doug Struck, *Iraqis Begin Confronting The Burdens of the Past, Millions Persecuted by Hussein May Seek Redress*, WASH. POST, July 13, 2004, at A11.

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2003 Iraq War is the sharp contrast of that debt with the debt arising out of the 1991 Gulf War. There were very significant costs incurred principally by the United States and, to a lesser degree, by the United Kingdom in conducting the 2003 war. Indeed, the United States alone is reported to have spent upwards of \$150 billion on the conduct of the 2003 Iraq War and that number is expected to grow. As in the Gulf War, there has been no claim against Iraq for these costs. But unlike the Gulf War, there is no group of states stepping forward to reimburse any of the costs of the United States or its allies.

At the same time, the Hussein era, the U.N sanctions regime and the conduct of 2003 Iraq War have all left Iraq desperately in need of reconstruction so as to provide it stability as it rebuilds itself politically and socially. It is clear that Iraq needs assistance in some form. The challenge of approaching Iraq's debt as a part of the challenge of reconstructing Iraq is discussed in the next Part.

TABLE 2. IRAQ'S DEBT: THE DISCUSSED, THE OVERLOOKED AND THE FORGIVEN

Category of Debt	Often Discussed Debt (US dollars)	Usually Overlooked Debt (US dollars)	Forgiven Debt (US dollars)
<b>The Iran – Iraq War (1980 to 1988)</b>			
External Public Debt	This amount is often described to be about 125 billion. It is with the addition of interest since 1991 that the figure of 125 billion is reached	—	This category of debt was the focus of former Secretary of State Baker's mission to seek partial debt forgiveness both within and outside of the 'Paris Club'
External Private Debt	—	Difficult to estimate, but thought to be low	—
Possible Claims of Iran	—	Unknown, but as much as 100 Billion	—
<b>The Gulf War (1990 to 1991)</b>			
Cost of Coalition Military Operations	—	—	Approx 70 billion incurred by the US, reimbursed in large part by Saudi Arabia, Kuwait, Japan, Germany

			and Korea
Claims for Damage Arising out of the Invasion and Occupation of Kuwait	48 billion has been awarded, with 30 billion of that amount unpaid as of May 2004. Some 45,000 claims seeking in excess of 80 billion remain unresolved – much of this amount relates to environmental damage	–	The issue of interest owing on amounts awarded has been deferred by the UNCC and ultimately may be excluded from the jurisdiction of the UNCC making recovery unlikely.
<b>The UN Sanctions Period (1991 to 2003)</b>			
The presence of the sanctions prevented Iraq from assuming further external debt. Internally, further debt of Iraq may have arisen. Kurdish property was seized in the Northern Iraq and there were extensive human rights violations against the Shiite population in Southern Iraq.			
<b>The Iraq War and Reconstruction (2003 to present)</b>			
Cost of Coalition Military Operations	–	–	Approx 150 billion as of late 2004 incurred by the US
Reconstruction	–	Certain costs such as cleanup of armaments apparently not yet discussed	CPA and World Bank 2003 estimates were similar at 70 billion over 5 years.
Claims for Damage Arising out of Military Operations	–	Unknown, partly built into cost of reconstruction.	–

### III. APPROACHING IRAQ'S DEBT

As stated at the outset of this article, many nations are desperately poor and require foreign assistance. Given the limited political will to provide such assistance, a common response is that such countries receive only a portion of what is needed and that it is received in some mix of loans and grants. In the case of Iraq prior to the war, the Administration testifying to Congress pointed to Iraq's wealth and the



unlikely need for U.S. or any external funding of reconstruction.<sup>35</sup> Since the war, the Administration has pointed instead to Iraq's debt, the need for U.S. assistance in the form of grants and not loans,<sup>36</sup> and to the importance of all creditor nations providing debt relief to Iraq through debt forgiveness. Iraq has been argued by the Administration to occupy a special position relative to other countries in need of assistance in that it is crucial that its transition to an elected government succeed, and that the chances of such success will be enhanced through a rapid reconstruction.

At the outset, it is important to recognize that the tie between debt forgiveness and reconstruction is not as clear as it appears at first blush. As already stated, reconstruction may be funded from both domestic and foreign sources. A heavy external debt thus siphons off monies, regardless of their source, otherwise possibly available for reconstruction and thus impedes the rebuilding effort. But the strength of that conclusion depends in part on the relative amounts involved, particularly the amount of foreign debt, and the amount of domestic revenue possibly available. Unlike most other states calling for assistance, Iraq is a country with oil that will in time bring in a steady stream of revenue.<sup>37</sup> In this sense, Iraq in theory could deal with its debt at some distant future date if there was a moratorium on debt repayment rather than on debt forgiveness. But there are two other important aspects to Iraq's debt picture. First, in the eyes of many Iraqis, there is a sense that this debt not only should be forgiven, but rather that it is, in the main, void *ab initio* given the illegitimacy of President Hussein's regime (encapsulated in the notion of "odious debt"). Second, it is important, given the unilateral nature of the U.S. entry into Iraq to the perceived legitimacy of the presence of U.S. forces in Iraq, that there not be a sense of self-dealing and self-enrichment by the U.S. during its presence in Iraq.

Considering all this, one can perceive four aspects, whether they are officially articulated or not, to U.S.'s basic strategy thus far in approaching Iraq's debt:

1. Place a moratorium on debt repayment,
2. Seek forgiveness of the debt that is discussed,

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<sup>35</sup> Vieth, *supra* note 1, at 1.

<sup>36</sup> Hearings, *supra* note 2.

<sup>37</sup> See, e.g., Neela Banerjee, *A Revival for Iraq's Oil Industry As Output Nears Prewar Levels*, N.Y. TIMES, Mar. 1, 2004, at A1 (noting that Iraq is producing 2.3 to 2.5 million barrels a day as compared with a prewar level of 2.8 million barrels adding 14 billion to Iraq's budget, and that at 6 million barrels a day, Iraq's earnings would be 55 billion a year at OPEC's target price of \$25 per barrel).

3. Do not discuss the debt that is usually overlooked, and
4. Do not distinguish between the relatives merits of different pools of debt.

Let us briefly review all four aspects of this strategy. First, a moratorium on Iraq's debt was gained in large measure through Security Council resolutions granting, for example, Iraqi petroleum product immunity from legal proceedings.<sup>38</sup> Second, the forgiveness of Iraqi debt held generally by creditor states was sought by a tour of such nations in late 2003 and early 2004 by former U.S. Secretary of State James Baker. Such debt forgiveness is not without precedent; indeed two-thirds of Yugoslavia's external foreign debt was forgiven following its breakup and descent into violence.<sup>39</sup> Secretary Baker visiting individual members of the Paris Club, particularly France and Russia, was able to secure pledges of support for debt reduction.<sup>40</sup> But such negotiations may have hidden costs or tradeoffs. The Russian government was reported to link other issues, for instance, resumption of an oil contract in Iraq, to such willingness.<sup>41</sup> Four Arab creditor nations of Iraq, not members of the Paris Club, were also reported willing to enter into negotiations on substantial debt reduction. But this was conditioned on restoration of Iraq's sovereignty and, particularly in the case of Kuwait, acceptance that Iraq's liability would not be waived for damages resulting from Iraq's 1990 invasion of Kuwait.<sup>42</sup> Less obviously, forgiveness (in effect) of Iraq's debt for the 1990 Gulf War has been sought through efforts primarily by Iraqi nationals to close down the UNCC and bring its remaining work to an end. Although this would not entail a formal termination of such claims, it would close down the primary mechanism by which they might be resolved and satisfied. Although the UNCC has been allowed to complete its work, the percentage of the Iraqi oil revenues that are directed to the satisfaction of UNCC awards for damages arising out of the 1991 Gulf War was reduced in 2003 from twenty to

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<sup>38</sup> See, e.g., S.C. Res. 1483, *supra* note 12, at para. 22.

<sup>39</sup> See James Sterngold, *Another enemy looms – Iraq debt*, S.F. CHRON., May 23, 2004, at A1.

<sup>40</sup> Secretary Baker also visited with Germany (see Craig S. Smith, *France and Germany Join U.S. in Effort to reduce Iraq's Debt*, N.Y. TIMES, Dec. 17, 2003, at A1), Italy (*Italy Lines Up on Iraq Debt*, N.Y. TIMES, Dec. 18, 2003, at A26), and Japan (Norimitsu Onishi, *Japan Says It Will Forgive Most of Debt Owed by Iraq*, N.Y. TIMES, Dec. 30, 2003, at A8).

<sup>41</sup> Christopher Marquis, *Russia Sees Iraqi Debt Relief as Link to Oil, U.S. Aides Say*, N.Y. TIMES, Jan. 17, 2004, at A6.

<sup>42</sup> Steven Weisman, *4 Arab Nations Agree to Reduce Debt Owed by Iraq*, N.Y. TIMES, Jan. 22, 2004, at A12. See also Sterngold, *supra* note 39, at A1.

five percent, thus greatly extending the payment schedule for such awards.<sup>43</sup> Third, there has been no mention of Iraq's potential debt for its aggression against Iran in the 1980 to 1988 Iran-Iraq war. This is not suggesting that the task of raising Iran's possible claim somehow belongs to the United States. It does not. However, it should be recognized that, even absent Iran's pressing of the claim, this matter will continue to occupy a prominent spot in Iraqi-Iranian relations. Fourth and last, there is little apparent distinction by the Administration as to the relative merits of various aspects of Iraq's debt. The U.S. ultimately supported the continuation of the UNCC, albeit with a reduced contribution from Iraqi oil revenue, which probably recognized some greater priority to those claims rather than the older Iran-Iraq war debt. In contrast, Iraqi groups and commentators in several nations have called for a sharp distinction between odious debts and other debts.<sup>44</sup>

#### IV. CONCLUDING OBSERVATIONS

Iraq after the 2003 war stands apart from previous examples of reconstruction. Like Germany after World War II, Iraq has the capacity to generate domestic revenue and a treasury facing substantial pre-war debt. Unlike Germany, Iraq does not possess the same homogenous social fabric upon which the new Iraq is to be constructed. Rather, Iraq, like Afghanistan, must reconstruct its physical infrastructure at the same time it seeks to construct its political and social identity as a state. Unlike Afghanistan, Iraq possesses the oil reserves that will provide in time for Iraq's continued growth. The issue for Iraq is how to undertake such multifaceted economic and political reconstruction while addressing a complicated and substantial debt situation in this transition period.

What we know of Iraq's debt is that although it has several components and that different portions of it are pursued more actively than other parts, it stems in large part from the time of the Iran-Iraq War. In Table 2, this article describes these various components in their respective context.

In reviewing that debt and the U.S. Administration's approach to forgiving portions of that debt, two observations seem particularly important in closing. First, the Administration does not, at least

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<sup>43</sup> S.C. Res. 1483, *supra* note 12, at para. 21.

<sup>44</sup> As to Iraqi groups, see Jubilee Iraq Website at <http://www.jubileeiraq.org>. As to commentators in other nations, see the range of views discussed in Mark Medish, *Make Baghdad Pay*, N.Y. TIMES, Nov. 4, 2003, at A25.

openly, appear to acknowledge that the past is not entirely separable from the future, and that the repayment of some categories of the debt actually furthers the goal of reconstruction. For example, resolution of claims regarding Iraq's debt to nations in the region for its invasion of Kuwait in 1990 would go far to reconstructing the health of the greater region. Indeed, such monies often go to actual physical reconstruction. A specific and crucial example is the UNCC's treatment of environmental claims by States in the region. Although these claims probably constitute one of the largest clusters of potential Iraqi debt remaining before the UNCC, it is also true that under UNCC practice, the funds awarded would actually be required to remediate the damaged environment, thereby enhancing the reconstruction and environmental health of a highly integrated region. Second and related, although it may be politically difficult to undertake debt differentiation given the range and variety of creditors, it is appropriate at the final negotiations that distinctions be drawn between the various categories of debt. These distinctions should be drawn between state and private holders of debt, and between commercial debt and debt which arose out of violations of international law in Iraq's use of force in the region. I would argue that such distinctions will help clarify that some categories of debt are less susceptible to forgiveness and would in fact, if repaid, contribute to the reconstruction of the region.

As noted, Secretary Baker's tour seeking debt forgiveness, although partially successful, also met with the objections that (1) other countries also merited such debt relief, and (2) Iraq did not occupy a special position in this regard. In June 2004, President Jacques Chirac of France, for example, reportedly remarked to President George Bush in response to a question concerning debt relief for Iraq that "It would be unfair to treat Iraq more generously than the world's poorest nations."<sup>45</sup> Although pledges were gained from foreign leaders regarding debt relief, both such relief and the delivery of pledged aid have been slow.<sup>46</sup> Ironically, as this article goes to publication, the drive to gain relief for Iraq will probably spur initiatives long sought for debt relief in general. The Editors of the New York Times recently wrote:

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<sup>45</sup> Elaine Sciolino, *For Bush and Chirac, It's a Cow Connection*, N.Y. TIMES, June 6, 2004, § 1, at 20.

<sup>46</sup> Paul Richter, *The Conflict in Iraq, Nations Slow to Deliver Iraq Aid*, L.A. TIMES, July 12, 2004, at A1. Some analysts believe the delay in debt forgiveness is related to a desire to wait for the U.S election to be held, and that the real test of the stated pledges will be late in 2004. *Id.*

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[T]he United States is simply proposing to cancel the debts of the world's 30 poorest countries, and Britain has joined in . . . . One motivation for President Bush's efforts in this area is that he wants the world to greatly reduce Iraq's debt.<sup>47</sup>

As the Editors of the Christian Science Monitor observe, "The widespread forgiveness of much of Iraq's debt has set an example of what the US can do when it musters its political will."<sup>48</sup> Amidst all the reasons for the military action in Iraq, global debt relief was never mentioned. It may be the most significant unintended beneficial consequence of that action.

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<sup>47</sup> Editorial, *Ending the Cycle of Debt*, N.Y. TIMES, Oct. 1, 2004, at A22.

<sup>48</sup> *Iraq and Global Debt Relief*, CHRISTIAN SCI. MONITOR, Apr. 27, 2004, at 8.