

§Law in Context

MICHAEL B. LIKOSKY



Law, Infrastructure,
and Human Rights

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Iraq

I Introduction

Infrastructure projects stand on the frontline of U.S. attempts to maintain influence over Iraqi political and commercial affairs. If, as many commentators assert, the war was in part about oil, then it is unsurprising that the postwar reconstruction is also in part about safeguarding oil supplies and laying the infrastructure necessary to bring them to international markets. Controlling the country's strategic assets also involves winning the peace, delivering on wartime promises to the Iraqi public. The United States here is attempting to power the country, supply vital water supplies, build bridges, lay railway and telecommunications lines, and also ensure safe travel. It is doing this through transnational public-private partnerships (PPPs); the financing is public and foreign, whereas the rehabilitation and building of projects is domestic and foreign, public and private. Realizing the importance of infrastructure in postwar plans, insurgents in Iraq have targeted projects, blowing up pipelines, disabling power, and exploding roads.¹

Are insurgents signaling with attacks that the infrastructure projects are impediments to their own brand of self-determination, an expression of human rights freed from foreign intervention?² Or does the application of a human rights framework

- 1 See e.g. E Watkins "U.S. to Deploy Airborne Snipers to Protect Iraqi Pipelines" (10/13/03) 1010(39) Oil & Gas Journal 37; E Watkins "Iraqi Oil Exports Hampered by Pipeline Saboteurs" (08/25/03) 1010(39) Oil & Gas Journal 37; "Special Report: Who'll Help Us? We Ourselves, Mostly – Rebuilding Iraq" (9/13/03) 368(8341) Economist 21; K M Peters "Dirty Work" (October 2003) 35(15) Government Executive 47; T F Armistead "Oil and Gas Transport Hinges On Tigris River Bridge Repair" (6/16/03) 250(23) Engineering News Round 18; K Johnson "Iraqi Oil Fields Grow Weak With Age – Long Abuse of Kirkuk Wells Hobbles Work to Restore Industry to Its Old Potency" Wall Street Journal (Eastern Edition) (6/23/03) A12; "International: But It All Depends on Iraq; Reconstructing the Middle East" (6/28/03) 367(8330) Economist 41; "International: Walking on Eggshells; Post-war Iraq" (7/5/03) 368(8331) Economist 53; "Problems, Problems" Economist.com; Global Agenda (6/30/03) 1; S Wright "One Year Later: Restore Iraqi Oil Mission" 1(2) Essayons Forward 6, 7; K Johnson "Iraq May Rue Its Oil Integrity; Years of Patchwork Engineering Hinder Oil Industry's Revival" Wall Street Journal (Eastern Edition) 7/10/03 A8; T Sawyer, T F Armistead and M B Powers "Changes Coming in Iraq's Oil Fields" (7/7/03) 251(1) Engineering News Round 12.
- 2 For a discussion of the aims of insurgents see F Zakaria "Reach Out to the Insurgents" (7/5/04) 144(1) Newsweek 31.

to understand the insurgent attacks obscure another set of intentions? Instead, do human rights figure into Iraq solely by reference to U.S. attempts to deliver on human rights promises to Iraqis through an international financial aid-based infrastructure program carried out by private companies? Here attacks by insurgents are roadblocks to the expression of foreign-facilitated human rights, impediments to the delivery of humanitarian relief and the realizing of a right to development. By contrast, some question the human rights credentials of the U.S. infrastructure reconstruction program itself, claiming that the government aims simply to deliver large-scale, lucrative contracts to companies with close ties to the present administration. Regardless of the actual motivations of insurgents and the function of infrastructure reconstruction within U.S. plans, in response to insurgent attacks, the United States has mounted a counterinsurgency.

Christopher McCrudden tells us: “governments currently attempt to use contracts to produce desired social policy outcomes through public procurement.”³ Emerging U.S. policy toward Iraq may be understood through an evolving infrastructure policy, expressed in government reconstruction contracts. “Law always emerges in a context”⁴ and in this case clauses of these contracts are placed in the context of ongoing insurgencies and counterinsurgencies. These battles are waged on the terrain of infrastructure projects, memorialized in legal documentation. The legally effectuated counterinsurgency is the civilian version of the special nationwide military force established by the Coalition Provisional Authority (CPA) to deal exclusively with the sabotage of oil pipelines.⁵

This chapter first sets out the infrastructure reconstruction plan, covering prewar infrastructure damage, controversy around tendering processes, and how plans are legally facilitated. Then it turns to a discussion of the Iraqi insurgency targeting of infrastructures and the U.S. counterinsurgency.

II The state of play and the plan

Regardless of whether oil was the prime driver of the war, in the military campaign the Coalition had its eye on preserving Iraqi infrastructure. The Coalition dropped leaflets during the campaign imploring workers to protect the oil infrastructure from sabotage by Saddam’s forces. Leaflets warned workers that they would be held personally liable for any damage.⁶ Also, carbon bombs were used to target electricity infrastructure because they disable rather than destroy.⁷

3 C McCrudden “Using Public Procurement to Achieve Social Outcomes” (2004) 28 *Natural Resources Forum* 257.

4 S F Moore “An International Legal Regime and the Context of Conditionality” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 333.

5 C Cummins “Iraq’s Oil Industry Is Slowly Rebounding; Oil Buyers Await Comeback; Officials Hope Revenue Can Speed up Reconstruction Efforts” *Wall Street Journal* (Eastern Edition) (11/6/03) B2.

6 S Wright “Corps Oil Mission’s Early Days: Civilians under Fire to Perform” 1(2) *Essays on Forward* 10.

7 Open Society Institute and the United Nations Foundation, *Iraq in Transition: Post-Conflict Challenges and Opportunities* 40.

Despite these wartime efforts, postwar infrastructures in Iraq are in serious disrepair. The 1991 war is partially to blame for this as is over a decade of economic sanctions.⁸ In characteristic style and with an element of hyperbole, U.S. Secretary of Defense Donald H. Rumsfeld places the blame for the poor state of infrastructure affairs wholly on the doorstep of Iraqi leadership, blaming “thirty years of Saddam Hussein imposing a Stalinistic economic regime on [Iraq].”⁹ Despite efforts to minimize infrastructure damage during the campaign, computing and telecommunications infrastructures are believed to have been seriously damaged.¹⁰ Infrastructures have also been degraded by postwar sabotage and looting.¹¹

This is where the postwar reconstruction plan comes in. Infrastructure in the immediate term was to bring humanitarian relief into the country. This relief was the purpose of the initial wave of reconstruction contracts that covered non-oil-based infrastructures. The contracts prioritized such things as ensuring potable water.¹² In fact, infrastructure assistance fell under the umbrella of humanitarian relief, the subject of United Nations Resolution 1483, making it an appropriate activity for the CPA to engage in when it held power.¹³ The purpose of infrastructure reconstruction has broadened with time as UN Resolution 1511 has joined Resolution 1483. Resolution 1511 allowed “resources necessary for the rehabilitation and reconstruction of Iraq’s economic infrastructure.”¹⁴ In line with these dual directives, the U.S. Agency for International Development (USAID) contracts with Bechtel for the reconstruction of non-oil-based infrastructures state that work in the infrastructure sector “is necessary immediately to protect human health and secure economic growth”¹⁵ and to bring “political security and economic prosperity.”¹⁶

The United States has tendered and awarded major contracts for billions of dollars of infrastructure reconstruction. The lucrative contracts have themselves been presented as emblematic of the Bush administration’s approach to domestic and international affairs. Controversially, major contracts have been awarded to companies with close ties to the administration.

8 K M Black “After Saddam: Assessing the Reconstruction of Iraq” (Brookings Institute) 24.

9 “United States Department of Defense News Transcript: Presenter Secretary of Defense Donald H. Rumsfeld” Tuesday, September 16, 2003.

10 P McDougal “Bearingpoint Gears up for Iraq Rebuilding” (8/4–8/11/03) 950 Information Week 22.

11 M Lorenzetti “Iraqi Oil Facility Sabotage Stunts Postsanctions Recovery” (6/2/03) 101(22) Oil & Gas Journal 32; S Winston, T Sawyer and T F Armistead “Nation-Building Is Hard Work” (6/9/03) 250(22) Engineering News Round 14; S Winston, T Sawyer and T F Armistead, “New Team in Iraq for Second Try” (5/19/03) 250(19) Engineering News Round 12; J Kahn “Making Iraq Safe for Capitalism” (7/7/03) 148(1) Fortune 64; L Diamond “What Went Wrong in Iraq” (2004)83 Foreign Affairs 34, 36.

12 Contract No. EEE-C 00-03-00018-00 between USAID and Bechtel National Inc. 4/17/03 C.II.2 *Rapid Assessment of Infrastructure Conditions in Selected Regions*.

13 S Winston “Bechtel Advances in Awarding Iraq Rebuild Subcontracts” (5/12/03) 250(18) Engineering News Round 13.

14 United Nations Resolution 1511.

15 Contract No. SPU-C-00-04-0001-00 between USAID and Bechtel National Inc. 1/5/04 10 C.I. BACKGROUND.

16 Contract No. EEE-C 00-03-00018-00 between USAID and Bechtel National Inc. 4/17/03 C.I. BACKGROUND.

The first wave of reconstruction contracts was criticized for being based on noncompetitive tenders. USAID selected Bechtel, a prime contractor, from a field of seven companies that had been invited to bid.¹⁷ Critics argued that this tendering process was contrary to U.S. procurement laws.¹⁸ Although USAID defended the process, when a second wave of contracts came up in the area, the tender was open.¹⁹ Bechtel was awarded the follow-up contract.²⁰

In addition, the media paid particular attention to the U.S. government's award to Kellogg, Brown & Root, a subsidiary of Halliburton, the company that Vice President Dick Cheney headed before stepping down to run for office.²¹ The Kellogg contract was not subject to open tender and was awarded before the start of the war itself. The government denied any impropriety, asserting that Cheney did not influence the award.²² Instead, it claimed that the contract had been awarded to Kellogg because the company had been involved in wartime logistics and was thus privy to top-secret documents. As a result, it had been prescreened to take over the militarily sensitive job of reconstructing the oil infrastructure. Given time constraints, the argument went, this previous experience was determinative.²³ Just as with Bechtel, when a follow-up tender was issued, it was open. The project was divided into two and Kellogg was awarded one contract.

The Center for Public Integrity has mapped the extensive connections at the level of personnel between the prime contractors and the U.S. administration. It also details the campaign contributions made by companies involved in the reconstruction effort to the administration as well as amounts spent on lobbying.²⁴ Critics of the tendering process extend beyond the nonprofit world to members of Congress. For example, U.S. Senator Bob Graham of Florida stated, "I will not support a dime to protect the profits of Halliburton in Iraq."²⁵ This opposition has not stopped Halliburton. However, the company is now under a congressional investigation,

17 "Fixing Iraq's Infrastructure: U.S. Contractors Restored Power and Bridges while Repairing Neglected Water and Sewage Systems Vital to Iraqi's Health" in U.S. Agency for International Development, *A Year in Iraq: Restoring Services* 5, 6 (May 2004).

18 On the laws governing the procurement of the first round of the major infrastructure contracts see P S Fitzsimmons "First Round of Iraq Reconstruction Contracts Provide Insight into Agency Authority, Misunderstood Procurement Techniques" (2004) 56 *Administrative Law Review* 219.

19 Bechtel provides a defense of its position on its web site see www.bechtel.com/news/morenews.asp?ID=413.

20 P Dwyer and F Balfour "IRAQ DEALS: WHO GOT WHAT – AND WHY: How the Big Contracts to Rebuild the Nation Are Awarded" (5/5/03) 3831 *Business Week* 34.

21 See generally J Thottam "The Master Builder" (6/6/04) 163(23) *Time* 38, 40–42, 44; C Cummins "Costs Creep Up In Halliburton's Contract in Iraq" *Wall Street Journal* (Eastern Edition) (9/19/03) A4.

22 G Anders and S Warren "Military Service: For Halliburton, Uncle Sam Brings Lumps, Steady Profits; Margins in Iraq Aren't Great, But Pacts Help Weather A Storm Over Asbestos; Pros and Cons of Cheney Ties" (1/19/04) *Wall Street Journal* (Eastern Edition) A 1.

23 C Cummins "Costs Creep Up In Halliburton's Contract in Iraq" *Wall Street Journal* (Eastern Edition) (9/19/03) A4.

24 See www.publicintegrity.org.

25 J M Biers "Leading the News: Costs Escalate for Iraq Contracts of Halliburton" *Wall Street Journal* (Eastern Edition) (9/12/03) A3.

although not for its close ties to the administration. Instead, Halliburton is under fire for its alleged overspending on oil supplies and questions over billing for meals. There also has been controversy over alleged kickbacks.²⁶

If the administration and its allies are fighting battles at home in policy-making arenas, in Iraq they are in the midst of a more physical contest. Since the close of the war, attacks on infrastructures have been “constant” and “ongoing.”²⁷ In an open letter to the *Wall Street Journal* on June 20, 2003, L. Paul Bremer III, then the Administrator of the CPA in Iraq, told us “deliberate attacks on oil facilities and electricity lines continue to undermine our efforts and hurt the Iraqi people.”²⁸ More than four workers of Kellogg, the Halliburton subsidiary, have been killed²⁹ with some even mutilated.³⁰ These deaths include both contractors and subcontractors.³¹ Over seven hundred power transmission towers have been attacked.³² Insurgents have used an array of weapons including light arms, bombs, and rocket-propelled grenades.³³ One stretch of the road infrastructure leading to the airport has been dubbed “Ambush Alley” because of regular insurgent attacks on it.³⁴ As a result of insurgent strikes, infrastructure plans have had to be reconfigured.³⁵

Infrastructure projects have long been a part of postwar reconstruction.³⁶ This was the case following World War II. However, Noah Feldman argues that “Iraq was nothing like post-war Germany and Japan”³⁷ and Simon Chesterman discusses the limitations of the analogy.³⁸ The Marshall Plan allusions do have their shortcomings. The power disparities between the United States and Iraq are qualitatively different than those that characterized the relationships between the United States

- 26 N King Jr. “Halliburton Tells the Pentagon Workers Took Iraq-Deal Kickbacks” *Wall Street Journal* (1/23/04) A1.
- 27 “Coalition Provisional Authority Operational Briefing” (Presenter Paul Bremer, U.S. Presidential Special Envoy to Iraq) (8/23/03).
- 28 L P Bremer, III “Operation Iraqi Prosperity” *Wall Street Journal* (Eastern Edition) (6/20/03) A8.
- 29 “Business; You Don’t Have To Be Mad to Work Here; Doing Business in Dangerous Places” (8/14/04) 372(8388) *Economist* 53.
- 30 N King Jr. “Power Struggle: Race to Get Lights On in Iraq Shows Perils of Reconstruction and Despite Stumbles, Attacks, Corps of Engineers’ Team Is Finally Making Progress; Col. Semonite’s Travel Tips” *Wall Street Journal* (Eastern Edition) (4/2/04) A1.
- 31 G Carey, T F Armistead and G Tulacz “Contractor Fatalities Prompt Suspension of Work in Iraq” (12/8/03) 251(23) *Engineering News Round* 18.
- 32 R Nordland and M Hirsch “The \$87 Billion Money Pit” (11/3/03) 142(18) *Newsweek* 26.
- 33 B Bennett “Who Are the Insurgents?” (11/24/03) 162(21) *Time* 38.
- 34 K Johnson “Everything but Passengers to Reconstruct Iraq, They’ll Need Commercial Aviation, Too” (9/1/03) 159(9) *Aviation Week & Space Technology* 46.
- 35 B Bahree and K Johnson “Commodities Report: Iraqi Shortfall Means Oil Prices Could Stay High This Year” *Wall Street Journal* (Eastern Edition) (6/24/03) A14.
- 36 The Iraqi reconstruction is the largest since the Japanese and German post-World War II reconstruction effort. At the same time, the Marshall Plan was vastly larger. See “The Challenge: One Year of Relief and Reconstruction” in U.S. Agency for International Development “A Year in Iraq: Restoring Services” 2.
- 37 N Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton University Press New Jersey 2004) 1. He makes the point that the reconstruction of Germany and Japan aimed to deter those countries from moving under the Soviet Union’s sphere of influence. *Id.* 7.
- 38 S Chesterman, *You the People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press Oxford 2004) 185–187.

and the defeated Axis powers. Also, although both wars were nominally defensive ones,³⁹ the reconstruction of Iraq has an expansionist quality. Even though aid-based reconstructions have always benefited U.S. companies, the situation in Iraq seems to be directed at establishing an offshore center for American businesses. Naomi Klein, the globalization critic, goes so far as to say, "Iraq is the foothold, the wedge into an entire region that represents a massive new market opportunity."⁴⁰ At the same time, although general comparisons are of limited value, with regard to infrastructure reconstruction specifically, important similarities exist.

To realize its ambitions, just as during the Marshall Plan and following the wars in Kosovo and Afghanistan, the United States has accorded infrastructure projects a central role.⁴¹ Infrastructure reconstruction was one of the three mandates of the CPA.⁴² The U.S. infrastructure plan is divided into two: oil-based infrastructures and non-oil-based infrastructures. The non-oil-based projects include sectors such as power, transportation, banking and finance, and also communications. A precondition for economic development and also necessary for the transporting of humanitarian aid, the stated purpose of these projects is high-minded. Some claim though that in reality they are geared toward supplying companies with strong connections to the U.S. administration with lucrative contracts.

Under the plan, infrastructure services are first to be restored to prewar levels. The United States claims that this has already happened, although no reliable prewar benchmark exists. Although national power levels have arguably been restored, a transformation has taken place in how power is distributed to different regions and cities throughout the country. Before the war, an imbalance existed in the distribution of power with Baghdad and other cities being favored over the countryside.⁴³ However, the United States has sought to redress this historical imbalance. This effort has resulted, according to a Brookings Institute report, in the fact that "electricity is now available in parts of Iraq that previously had none."⁴⁴ Not all infrastructure reconstruction has aimed to redress power disparities. The so-called hived-off Green Zone, the former command center of the CPA, benefited from early communications infrastructure projects making domestic and international telephone calls possible.⁴⁵

39 Feldman distinguishes the two by saying that the Iraq war was voluntary. Feldman 2.

40 N Klein "Bomb Before You Buy: The Economics of War" (*Summer 2004*) 2 *Seattle Journal for Social Justice* 331, 334. See also N Klein "Pillaging Iraq in Pursuit of a Neocon Utopia" *Harper's Magazine* (*September 2004*).

41 On the political dimension of reconstruction focusing on the role of the United Nations in relation to the U.S.-led occupation see S Chesterman, *You The People: The United Nations, Transitional Administration, and State-Building* (Oxford University Press Oxford 2004) 92–97.

42 Contract No. SPU-C-OO-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 10. C. I. BACKGROUND.

43 G Ehrenman "Rebuilding Iraq" (*June 2003*) 125(6) *Mechanical Engineering* 48.

44 K M Black "After Saddam: Assessing the Reconstruction of Iraq" (Brookings Institute) 24.

45 The U.S. plan was for the elected Iraqi leadership to oversee decisions on communications infrastructure for the remainder of the country. N King Jr. "U.S. Wants Iraqis to Oversee Development of Phone Systems" *Wall Street Journal* (Eastern Edition) (*5/2/03*) B2. Some controversy existed

Although the aim is first to restore prewar infrastructure levels, according to some in Iraq, the actual demand for infrastructures has increased as a result of the war. The Iraqi Ministry of Electricity argues that the increased demand for infrastructure is being driven by a shift in personal expectation within the country. Iraqis are here apparently rushing out to buy modern appliances. This drives a need for more power. Thus, a Ministry fact sheet reads: "With more than half a million new jobs created, new industries and new factories coming on line and with the sale of thousands of washing machines and air conditioners, Iraq has experienced a rapid increase in electricity demand."⁴⁶ If we are to take this statement at face value, then perhaps increased infrastructure demand is an outgrowth of an opening transnational economy.

The United States sits atop a vast network of infrastructure projects in post-war Iraq. This network is held together primarily through government contracts. The contractual model is reminiscent of how contracting was structured by the U.S. Defense Department during the Cold War. There, Don K. Price noted that the mix of public and private contracts emanating from the Defense Department created a system of "federalism by contract."⁴⁷ The relationship between the public and private sector was "marbled"⁴⁸ with industry officials even sitting on boards charged with dispensing government contracts and also with the federal government paying private firms money to facilitate their bidding on government tenders. One important output of this public-private partnership was the Internet.⁴⁹

In the Iraqi context, through a transnational mix of public and private contracts, the United States has established pyramidal power over the contractors and sub-contractors. The United States finances many of the projects. This financing has been the subject of some controversy.⁵⁰ It comes from a diverse range of sources. The U.S. Congress has earmarked large amounts. Other money comes from seized Iraqi assets. Some members of Congress want the Iraqis to repay U.S. expenditures on projects carried out by infrastructure companies, many of which are American.⁵¹

Although the United States controls the purse, the infrastructure reconstruction effort is transnational. Most significantly, it is undertaken in close collaboration

over what type of system to install. I Brodsky "The (Wireless) Battle for Baghdad" (5/1/03) 107(7) *America's Network* 22.

46 Quoted in M Frazier "New Technology Brings More Electricity to Iraq: Installation of Chiller Pack at Power Station Near Naja Boosts Production" 1(9) *Essays Forward* 13.

47 Quoted in M D Reagan, *The Managed Economy* (Oxford University Press Oxford 1967) 193.

48 Reagan 191.

49 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) Chapter 2.

50 See e.g. Open Society Institute "Reconstructing Iraq: A Guide to the Issues" (5/30/03) 47; J Marburg-Goodman "USAID's Iraq Procurement Contracts: Insider's View" (2003) 39 *Procurement Law* 10; R Wherry "Contracts for Contracts" (6/23/03) 171(13) *Forbes* 65.

51 M M Phillips and D Rogers "Price of Rebuilding Iraq Is Put At \$56 Billion Over Four Years" *Wall Street Journal* (Eastern Edition) (10/2/03) A4.

with Iraqi leadership and other governmental and nongovernmental actors.⁵² The second contract between USAID and Bechtel, a prime contractor, makes this aim clear:

CPA and USAID will determine regional and sector priorities in collaboration with Iraqi counterparts, civilian and military authorities, international relief and development organizations, USAID implementing partners, the IIR2 Contractor and other US government agencies.⁵³

Nonetheless, decisional power appears to rest ultimately with the U.S. government. The fact that the United States is donating the bulk of the reconstruction money reinforces its power over other grant-making bodies. At the same time, the Iraqi people ultimately own the infrastructure projects.

Unlike many other projects discussed in this book, the projects themselves will revert to Iraqi state control in an assumedly short period of time. In other infrastructures discussed, control over infrastructures will only revert once the company has recouped sunk costs and garnered an agreed-on profit. In Iraq, are companies not looking to future revenue streams to recoup sunk costs for their financial backers and profits for themselves? Is the U.S. government financing the reconstruction of infrastructures with no expectation of financial return? This assumedly limited life span of foreign involvement is important when it comes to the transition of control over infrastructures away from the Coalition companies and toward the Iraqi ones. It is not clear when this will happen. It is possible that companies foresee a longer stay in Iraq, beyond the exit of Coalition military forces and after the expiration of U.S. financial aid.

Although the United States is underwriting the bulk of the postwar reconstruction effort, other donor countries are pursuing a parallel strategy. This non-U.S. program has been mobilized in part at the impetus of the United States. It has been organized around funding conferences that include large numbers of countries, intergovernmental organizations, and nongovernmental organizations. Similar conferences were held following the tsunami disaster in Asia. The United Nations is directing the multilateral conferences.⁵⁴ This role is in line with Security Council Resolution 1483, which requested the appointment of a Special Representative for Iraq who would assist the Iraqi people with, among other things, “the reconstruction of key infrastructure.”⁵⁵ The European Union has pledged \$230 million⁵⁶ and

52 See Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 01/05/04 10. C. I. BACKGROUND; Contract No. EEE-C-00-03-00018-00 between USAID and Bechtel National Inc. 04/17/03 CIII STATEMENT OF WORK.

53 See Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 01/05/04 10. C. I. BACKGROUND.

54 B Davis “The Assault on Iraq: Massive Task of Rebuilding Iraq Is Now Confronting U.S.” Wall Street Journal (Eastern Edition) (4/10/03) A9.

55 United Nations Security Council Resolution 1483 (Adopted by the Security Council at its 4761st meeting, on May 22, 2003) 8(d).

56 M M Phillips and D Rogers “Price of Rebuilding Iraq Is Put At \$56 Billion Over Four Years” Wall Street Journal (Eastern Edition) (10/2/03) A4.

the United Kingdom £270 million.⁵⁷ Multilateral funds are being pooled in the International Reconstruction Facility for Iraq.

Furthermore, the dominance of the United States over Iraqi infrastructure projects has been challenged at times by a less hospitable group of Russian and Chinese companies. This group had prewar contracts with Iraq. The status of these contracts is not yet clear. The companies have been slow to bring claims. With the transition in leadership now away from the Coalition and toward Iraqis, some have speculated that the companies will step forward.⁵⁸ One Chinese company, CMEC, has shown up in Iraq to perform a prewar contract in the power sector.⁵⁹ Although foreign governments and companies are involved in the postwar Iraqi infrastructure effort, the U.S. infrastructure pyramid is dominant.

On the top of the U.S. contractual pyramid is the U.S. Project and Contracting Office (PCO), which is in charge of both the oil and non-oil-based infrastructures. The United States created the PCO to manage aid that would otherwise be overseen by USAID. Ngaire Woods correctly observes: “Creating a new institution to manage aid to Iraq has not obviated a number of key problems in delivering aid.”⁶⁰ Directly underneath are USAID and the U.S. Army Corps of Engineers.

The pyramid is transnational. At the contracting and subcontracting levels, it includes Australians, Bangladeshis, Indians, Iraqis, South Africans, and others. USAID and the prime contractors have gone to great lengths to ensure that a transnational array of subcontractors has the opportunity to bid on projects. Bechtel, a prime contractor, has a long history of working in the region and thus has ties to regional companies.⁶¹ A special desire exists to involve Iraqis. It is within this subcontracting matrix that the United States is fighting its counterinsurgency.

Law is the mortar that holds together this pyramid. Lawyers work for governments and private companies. Much of the legal discourse surrounding Iraq is rightly preoccupied with the legality of the war and the postwar treatment of prisoners. At the same time, lawyers are also playing a prominent role in the reconstruction of Iraq. This role extends not only to the political and judicial reconstruction but also to the commercial reconstruction. A number of law firms have established special practice areas devoted to servicing businesses that are interested in investing in Iraq.⁶²

57 P Shishkin, N King Jr. and C Vitzthum “Europe May Give Scant Funds for Iraq” Wall Street Journal (Eastern Edition) (9/26/03) A4.

58 E Watkins “Disputes Flare Anew over Iraq E&D Contracts” (6/2/03) 1010(22) Oil & Gas Journal 22, 34–35; “A Post-War Pot of Gold” Economist.com/Global Agenda (4/15/03) 1; Anonymous “Dispute over Postwar Iraqi Oil Control Getting Nastier” (4/14/03) 1010(15) Oil & Gas Journal 15, 20–24; “Business: The People’s Oil; Oil in Iraq” (4/12/03) 367(8319) Economist 55.

59 P Wonacott “Chinese Firms Find Their Iraq Projects in Limbo; Pursuit of Prewar Contracts Raises Issue: Who Qualifies and Who Chooses Winners?” Wall Street Journal (Eastern Edition) (7/10/03) A8.

60 N Woods “The Shifting Politics of Foreign Aid” Global Economic Governance Programme Working Paper (2/25/05) 1, 7.

61 D Luhnow “Arab Firms Want In on Iraq Action – Helping Nation They View As a Future Regional Power May Aid Whole Mideast” Wall Street Journal (Eastern Edition) (5/6/03) 22.

62 B Sherwood “Features – Law & Business: Legal Reconstruction” Financial Times (3/11/03).

USAID is in charge of non-oil-based projects. It has been involved in reconstruction efforts in Bosnia, Serbia, Kosovo, Afghanistan, East Timor, Mozambique, and others.⁶³ Its major contracts have gone to Bechtel, a San Francisco–headquartered company.⁶⁴ USAID has contracted the U.S. Army Corps of Engineers to oversee these projects.⁶⁵ The Corps is a civilian branch of the U.S. military. It is also technical advisor to the entire reconstruction program.⁶⁶ The non-oil-based contracts include work in a variety of infrastructure sectors such as air transportation, bridges, ports, power, railways, roads, telecommunications, and water.⁶⁷

The U.S. Army Corps of Engineers' role in Iraq extends to the oil-based infrastructures over which it holds prime responsibility under the umbrella of the Project and Contracting Office. It has contracted the projects to Kellogg, Brown & Root of Virginia, a subsidiary of Halliburton, and also to Parsons of Texas in partnership with the Worley Group of Australia. The contracts are for the northern and southern areas of Iraq, respectively. They are indefinite delivery indefinite quantity (IDIQ) contracts and their scale and scope thus depend on the services needed in practice.⁶⁸ The U.S. government indicates that an IDIQ contract “provides for an indefinite quantity, within stated limits, of supplies and services during a fixed period.”⁶⁹ Typically, this type of contract puts a ceiling on quantity of services and applies for a fixed period. The government must order a minimum amount of services or supplies and the contractor must deliver them.⁷⁰

IDIQ contracts were created by the U.S. Department of Defense in the context of its dealings with the North American Treaty Organization.⁷¹ Often the attraction of this type of contract is that it can consolidate “multiple orders over a period of time

63 “The Challenge: One Year of Relief and Reconstruction” in U.S. Agency for International Development *A Year in Iraq: Restoring Services 2*.

64 For an anecdotal critique of Bechtel's role in Iraq see A K Reinhart and G S Merritt “Reconstruction and Constitution Building in Iraq” (2004) 37 *Vanderbilt Journal of Transnational Law* 765 (remarks by A. Kevin Reinhart).

65 N Conway “One Year Later: Corps Support to USAID Continues” 1(5) *Essayons Forward* 8.

66 “FACT SHEET: Iraq Monitoring and Evaluation Program” (9/17/03).

67 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 10, C.III.3.

68 The General Services Administration schedule contract, a type of indefinite delivery indefinite quantity contract, is the U.S. “government-contracting vehicle of choice.” E Aaserud “GSA Schedule Contracts: Opportunities and Obligations” (Summer 2004) 39 *Procurement Lawyer* 4. On indefinite delivery indefinite quantity contracts see D W Lannetti “The Confluence of Convenience Terminations and Guaranteed Minimums in Government Contracts: What is the Proper Remedy When the Government Fails to Order the Minimum Quantity Specified in an Indefinite-Delivery, Indefinite Quantity Contract” (2003) 13 *Federal Circuit Bar Journal* 1.

69 48 CFR 16.504 “Indefinite-quantity contracts” (a).

70 *Id.* (a)(1); M J Lohnes “Note: Attempting to Spur Competition for Orders Placed Under Multiple Order and MAS Contracts: The Journey to the Unworkable Section 803” (Spring 2004) 33 *Public Contract Law Journal* 599, 601; D B Sirmons “Federal Contracting with Women-Owned Businesses: An Analysis of Existing Challenges and Potential Opportunities” (Summer 2004) 33 *Public Contract Law Journal* 725, 769.

71 D Farris “Checking Your Indefinite Delivery/Indefinite Quantity (IDIQ) IQ” (Fall 2002) 22 *Construction Lawyer* 24.

under a single umbrella contract. This in turn reduces the time and expense associated with the preparation of multiple competitive bid solicitations.”⁷² This type of contract potentially compounds problems arising from controversial tendering processes. Some critics note, “the increasingly unregulated use of indefinite delivery contracts allows agencies to blur the transparency of traditionally rule-bound federal procurement.”⁷³ At the same time, it is also considered a risky type of contract for the company.⁷⁴

Although Bechtel, Kellogg, and the Worley Group are the largest contractors, a number of other contractors have agreements with the U.S. government worth millions of dollars. These include Fluor Corporation, International American Products Incorporated, Perini Corporation, Research Triangle Institute, and Washington Group International.⁷⁵ Contractors are meeting their obligations through a vast subcontracting matrix. The exception here is perhaps in the banking and financial infrastructure sector in which a J. P. Morgan Chase led group of six banks has been accused of “crowding out” Iraqi banks.⁷⁶

Below the tier of prime contractors, radiating outward is an extensive subcontracting matrix. It is at the subcontracting tier that the counterinsurgency is being mounted. Infrastructure projects are important to the U.S. reconstruction effort because they are a precondition to both Iraq’s economic development and also to making Iraq’s economy transnational. As we have seen, the primary contracts for the reconstruction of Iraq involve infrastructure. These include the much-publicized contracts with Bechtel and Halliburton. Realizing the importance of infrastructure for establishing economic and social stability in the country, insurgents have targeted projects. By no coincidence, in doing so, they have attacked U.S. commercial enterprise.

III Insurgency and counterinsurgency

Infrastructure projects are targeted because they are vital to the reconstruction effort. For Iraqis without water or electricity, the need to rehabilitate infrastructures

72 *Id.* See 48 CFR 16.504(c) “Multiple award preference.”

73 K D Thornton “Fine Tuning Acquisition Reforms Favorite Procurement Vehicle: The Indefinite Delivery Contract” (*Spring 2002*) 31 *Public Contract Law Journal* 383.

74 D Farris “Checking Your Indefinite Delivery/Indefinite Quantity (IDIQ) IQ” (*Fall 2002*) 22 *Construction Lawyer* 24.

75 Coalition Provisional Authority, Program Management Office “\$8 Billion Available for Work on Iraqi Public Infrastructure: Funds are Gift from the People of the United States” (3/30/04).

76 C Caryl, B Dehghanpisheh and P Pejan “How to Make it Work Better” (11/3/03) 142(18) *Newsweek* 38. On the reconstruction of the banking and financial infrastructure see G Platt “Total Rebuild: Reconstructing Iraq’s Banking System Starts from Scratch” (*November 2003*) 17(10) *Global Finance* 44–46; K E Mack “Opportunities for US Companies in Iraq” (*November 2003*) 14(11) *Journal of International Taxation* 6–11; Y J Dreazen “How a 24-Year-Old Got a Job Rebuilding Iraq’s Stock Market; An Accident, Mr. Hallen Says, But He Promises Results; Investors Are Skeptical” *Wall Street Journal* (Eastern Edition) (1/28/04) A1.

is self-evident. Similarly, for foreign corporations interested in transporting oil to market, pipelines must be reliable. It is widely recognized that the peace on offer by the Coalition is impossible to realize without a functioning infrastructure. Thus, the contract between USAID and Bechtel specifies “[f]ailure to provide these [infrastructure] services to the greatest number of people in the shortest period of time is cause for public distrust and civil unrest.”⁷⁷

This insight is clearer to no one more than the insurgents who regularly target infrastructure projects, disrupting oil, water, transportation, and power. Although there is not a readily apparent coherent position from insurgents, it seems that they are holding out for a self-determination-based reconstruction of the country into which the United States does not figure.

As insurgents have targeted U.S. underwritten and carried out infrastructure projects, the government and its allies have mounted a counterinsurgency. It goes beyond the military solutions, such as the deployment of U.S. airborne snipers to patrol the pipelines.⁷⁸ Through a linguistic slight of hand and a subcontracting strategy, they are attempting to rename U.S. infrastructure projects as Iraqi ones. Accordingly, when insurgents attack U.S. projects, they are striking at Iraqis rather than at the United States. So, Bremer says: “I think it’s important to stress that these attacks are not attacks on the coalition.” Instead, Bremer tells us: “These are attacks on the Iraqi people.”⁷⁹ Peter Gibson, the former CPA Senior Advisor for the Commission on Electricity, asserts: “Acts against the infrastructure are considered acts against the Iraqis.”⁸⁰ Major Erik Stor, Operations Officer for the U.S. Army Corps of Engineers Restore Iraqi Electricity Directorate, explains “anti-Iraqi forces [are] intent on obstructing the country’s progress.”⁸¹

In a concession to the insurgents, the American contractors have been directed by the U.S. government to make the infrastructure projects Iraqi at the level of personnel. Thus, the secondary objective of the U.S. government’s contract with Bechtel directs the company to “provide employment opportunities for Iraqis and Iraqi firms.”⁸² Generally, the U.S. government ties its aid to the participation of American firms in overseas aid projects. However, in postwar Iraq, it has gone to great lengths to open up its bidding to non-U.S. firms.⁸³ In response to this

77 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 C. I. BACKGROUND.

78 E Watkins “US to Deploy Airborne Snipers to Protect Iraqi Pipelines” (10/13/03) 1010(39) Oil & Gas Journal 37.

79 Coalition Provisional Authority Briefing: Presenter: Paul Bremer, U.S. Special Envoy to Iraq (9/2/03).

80 T O’Hara “One Year Later: Putting More Megawatts on the Grid” 1(1) Essayons Forward 8, 10.

81 M Frazier “A Month of New Power Success” 1(8) Essayons Forward 8.

82 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 01/05/04 10.

83 S Winston “Bechtel Advances in Awarding Iraq Rebuild Subcontracts” (5/12/03) 250(18) Engineering News Record 13; A Barrionuevo, N King Jr. and J Carlton “Distrust Swirls Over Iraq Contracts – Swarms of Subcontractors Knock at Bechtel’s Door; A Blacklist of Countries?” Wall Street Journal (5/22/03) A2.

directive, 119 out of 158 Bechtel projects employ Iraqi subcontractors⁸⁴ and 90 percent of Kellogg, Brown & Root's subcontracting work goes to Iraqis.⁸⁵ Over one hundred thousand Iraqi workers are employed in the infrastructure reconstruction process. Priority is given to Iraqis over other foreign nationals for subcontracting opportunities.⁸⁶

The U.S. government made two successive contracts with Bechtel for the reconstruction of non-oil-based infrastructures. The two waves of contracts demonstrate an underlying transformation of the U.S. infrastructure policy in Iraq. This policy goes from one based on a top-down imposition of a U.S. firm dominated reconstruction effort toward one in which Iraqi subcontractors play a prominent role in reconstruction projects. This shift resulted from insurgent attacks. The second contract is part of a larger U.S. counterinsurgency in Iraq.

The first contract reinforced CPA Order 39, which sought to open up the Iraqi economy to transnational investment. Infrastructure figured into this initial plan. It was explicitly mentioned as an area of potential foreign direct investment. Also, infrastructure reconstruction was a precondition for foreign investment in other sectors of the economy. U.S. infrastructure investments here were then part of an attempt to forge long-term business relationships in Iraq. This was true also for some infrastructure companies. For example, Jack Hermann, the spokesperson for Washington Group International told the Engineering News Round, "We want to develop long-term relationships in that country after stability returns."⁸⁷ Naomi Klein claims that these long-term relationships will be created at the impetus of the U.S. companies now involved in reconstruction.⁸⁸

CPA Order 39 aimed to establish the country as a popular offshore setting for U.S. corporations. Several commentators have questioned whether its hubris ran against international laws governing occupying powers.⁸⁹ It is not alone though, as the World Bank and the International Monetary Fund have both urged open economic policies for Iraq. Some see this opening as conducive to the fostering of an indigenous commercial class. Speaking in their individual capacities, Theodore W.

84 B Potter "Iraqi Contractors Are Bidding Amid Increasing Attacks" (7/26/04) 253(4) Engineering News Round 17.

85 J Thottam "The Master Builder" (6/7/04) 163(23) Time 38, 40, 42, 44.

86 T F Armistead "Coalition Point Man Says Iraqi Contractors Are in Critical Condition" (6/30/03) 250(25) Engineering News Round 50.

87 "Corps Seeks Firms to Bid as New Bombings Rock Iraq" (11/3/03) 251(18) Engineering News Round 13.

88 N Klein "Bomb Before You Buy: The Economics of War" (Summer 2004) 2 Seattle Journal for Social Justice 331, 337.

89 On the legality see J T Gathii "Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Context" (Summer 2004) 25 University of Pennsylvania Journal of International Economic Law 491; R D Tadlock "COMMENT: Occupation Law and Foreign Investment in Iraq: How an Outdated Doctrine Has Become an Obstacle to Occupied Populations" (Fall 2004) 39 University of San Francisco Law Review 227. On the Coalition Provisional Authority and human rights law, see R Wilde "The Application of International Human Rights Law to the Coalition Provisional Authority (CPA) and Foreign Military Presence in Iraq" (Spring 2005) 11 ILSA Journal of International and Comparative Law 485.

Kassinger, the Deputy Secretary of the U.S. Department of Commerce, and Dylan J. Williams, an attorney with the Office of General Counsel of the U.S. Department of Commerce, hope that the legacy of Order 39 will live past the occupation “unleashing the evident Iraqi spirit of entrepreneurship.”⁹⁰

Although Order 39 is not without its critics, some argue for further liberalization of the Iraqi legal order to make it more receptive to foreign direct investment. Order 39 speaks of the need to “transition [Iraq] from a non-transparent centrally planned economy to a market economy characterized by sustainable economic growth through the establishment of a dynamic private sector.”⁹¹ It does this through a variety of legal means, including establishing nondiscriminatory treatment for foreign investors and allowing hundred percent foreign ownership of business activities. The first post-war Iraqi finance minister reinforced the Order.⁹²

However, it is unclear whether the infrastructure companies will be in the country for the long haul. Right now, they are being financed through direct aid. Most likely, this subsidy has an expiration date. Once Iraq is able to generate sufficient revenue from its oil resources, the plan is for the country to take over the reconstruction.

Will Iraqis then contract in Bechtel, Halliburton, and others? Order 39 makes explicit mention of infrastructure investments: “*Noting* that facilitating foreign investment will help develop infrastructure.”⁹³ Does this mean that there are plans ultimately to privatize the infrastructure projects with foreign companies playing a significant role? Will the U.S. companies install infrastructures that are American, requiring Iraq’s ongoing dependence on U.S. parts and service? Will strong relational ties be created between Iraqi infrastructure builders and U.S. ones? Or will American infrastructure companies be the first to go in an environment in which there is a political cache attached to anti-American sentiment?

This strategy of an externally imposed, top-down opening up of the Iraqi infrastructure sector met with resistance from insurgents. As it became impossible to unfold plans as conceived, the United States and its prime infrastructure contractors reconfigured their plans. The result was contractualized in the second wave.

The second contract between the U.S. government and Bechtel evidences the counterinsurgency plan making explicit the channeling of subcontracting work to Iraqis. A comparison of the two contracts between USAID and Bechtel demonstrates an evolving government policy toward subcontracting. Although the first contract makes no mention of the use of Iraqi subcontractors,⁹⁴ the second contract makes it an important goal, listing it as the secondary objective of the contract itself.⁹⁵ The

90 T W Kassinger and D J Williams “COMMENT: Commercial Law Reform Issues in the Reconstruction of Iraq” (Fall 2004) 33 Georgia Journal of International and Comparative Law 227.

91 Coalition Provisional Authority Order Number 39.

92 F Fassih “Iranian Businessmen See Opportunity in Iraq’s Need to Rebuild” Wall Street Journal (Eastern Edition) (9/29/03) A16.

93 Coalition Provisional Authority Order Number 39.

94 For the relevant subcontracting provision see Contract No. EEE-C00-03-00018-00 between USAID and Bechtel National Inc. (4/17/03) C.III.6.1 “Subproject Implementation.”

95 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 B.1-PURPOSE.

intervening event was the attacks by the insurgents. In response to these attacks, the United States is hoping contractually to refashion the infrastructure projects disclaiming their American look.

Coinciding with the use of Iraqi subcontractors, a shift has been effectuated transforming the United States' understanding of the attacks on the projects that it has underwritten. Whereas previously the attacks on these projects were seen as attacks on the U.S. occupation, now the U.S. Army Corps of Engineers, for example, sees the attacks as being on Iraqis. This transforming of the U.S.-financed projects into Iraqi ones is performative. Will this makeover succeed? Will it throw off the insurgents? Or, will this simply be seen as an occupation by another name?

Although U.S. corporations leading the reconstruction effort continue to be the recipients of large-scale lucrative government contracts to rehabilitate infrastructure projects, the government and these companies are attempting to make the infrastructures Iraqi. The United States vows not to allow the insurgents to spoil the postwar reconstruction effort. Insurgents are nonetheless forcing a shift in U.S. policy. The initial reconstruction plan seemed to have been that U.S. corporations would rehabilitate infrastructures quickly, safeguarding the country for a flood of foreign commerce that would come in as a part of CPA Order 39. However, as infrastructures have been targeted as unmistakably American, the plan has shifted.

How does one make a U.S. project Iraqi? The United States is attempting to dissociate itself from the projects and associate Iraqis with them through a vast subcontracting matrix. The second contract with Bechtel specifies that the company "is to provide employment opportunities to Iraqis and Iraqi firms."⁹⁶ This is to be done "[t]o the maximum extent practicable."⁹⁷ Clifford G. Mumm, Program Director at Bechtel, states: "We're committed to developing a work program that maximizes the use of Iraqi contractors and workers."⁹⁸ Like other imperial enterprises, the solution is to set up an intermediary system. This is the essence of indirect rule, which was practiced by the British and the Dutch.⁹⁹ The policy here is to train Iraqis and to send them in to rehabilitate infrastructure projects.

Infrastructure hiring also has been a reemployment strategy designed to take recruits away from the insurgency. The disbanding of state-owned enterprises by the CPA left large numbers of Iraqis unemployed. According to a writer for the *Economist*, unemployed workers are being turned into "disgruntled protestors."¹⁰⁰ To counteract this trend, the United States offered subcontracting jobs to Iraqi companies and to unemployed Iraqi laborers.

96 *Id.*

97 *Id.*

98 S Winston, T Sawyer and T F Armistead "Nation-Building Is Hard Work" (9/6/03) 250(22) *Engineering News Record* 14–16.

99 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) Chapter 4.

100 "International: Jobs for the Boys – and for Foreigners; Iraqi Business" (10/11/03) 369(8345) *Economist* 48.

Importantly, the employment of Iraqi workers serves a strategic purpose for U.S. companies. Roliff Purrington, a senior U.S. State Department consultant, makes the point: "If they can go to work that solves a lot of their problems and helps us execute the 18 billion dollar supplemental budget."¹⁰¹ Over one hundred thousand Iraqi workers are employed by the infrastructure reconstruction effort.¹⁰² Also, a large pool of highly skilled Iraqi workers is seen as a resource for U.S. enterprise. Iraq has a high number of skilled engineers who had been underemployed during the rule of Saddam Hussein. They are now unemployed following the war.

Although the U.S. sources are quick to point out that Iraqis warmly welcome U.S.-created jobs, they also recognize that Iraqis are careful not to associate themselves publicly with their American employers. These Iraqis have become targets for insurgents.¹⁰³ Just as in previous imperial enterprises, these intermediaries are placed in a precarious position. On the one hand, they rely on the foreign power for their paycheck and position. On the other hand, to do their jobs successfully, they must not be seen as agents for the United States. Association with this principal in a situation in which the American companies are targets of insurgent attacks must be carefully avoided. As a result, Iraqi intermediaries take care not to be seen in the proximity of Coalition forces. The transfer of electricity plants from the Coalition forces to the Iraqis are often obscured from sight "so as to lessen the appearance of working with Americans."¹⁰⁴ Also, Kellogg, Brown & Root does not publicize its list of Iraqi subcontractors.¹⁰⁵

Just as in other imperial contexts, the United States is investing in a strategy that involves fostering ties with locals. The U.S. Army Corps of Engineers and Bechtel are holding seminars for Iraqis on how to submit tenders for U.S. projects.¹⁰⁶ At a January meeting in 2004, over three hundred Iraqis were in attendance.¹⁰⁷ U.S. Army Corps of Engineers' seminars lead Iraqis through the basic structure of the reconstruction effort and then explain how to submit tenders for specific projects. Iraqis have complained about the U.S. processes. A cultural difference apparently

101 Quoted in M Frazier "A Bright Business Future for Iraq, Corps and Iraqis Meet to Discuss Opportunities" 1(8) *Essayons Forward* 6.

102 M Frazier "New Technology Brings More Electricity to Iraq: Installation of Chiller Pack at Power Station near Najaf Boosts Production" 1(9) *Essayons Forward* 13.

103 G C Carey "Iraqi Contractors Complain About U.S. Work Rules" (2/9/04) 252(6) *Engineering News Round* 12.

104 M Frazier "Baghdad Electricity Plant Returns to Iraqi Government: Plant Manager Risks Life to Bring More Megawatts on Line" 1(10) *Essayons Forward* 12.

105 B Potter "Iraqi Contractors Are Bidding Amid Increasing Attacks" (7/26/04) 253(4) *Engineering News Round* 17.

106 On the Bechtel conferences see "Iraqi Contractors Briefed on Rebuild" (6/30/03) 250(25) *Engineering News-Record* 15; G Jaffe "The Go-Betweens: Rebuilding of Iraq Is a Gold Mine For Middlemen – Ex-Soldiers and Diplomats Open Doors and Broker Deals in a Chaotic Region – Getting Post-Its Post-Bellum" *Wall Street Journal (Eastern Edition)* (6/16/03) A1.

107 G C Carey "Iraqi Contractors Complain About US Work Rules" (2/9/04) 252(6) *Engineering News Round* 12.

needs bridging. Ironically, the United States is spearheading an “American-style” open and competitive tendering process, which it claims is contrary to Iraqi, not its own, custom.¹⁰⁸

Furthermore, the contract between the U.S. government and Bechtel sets forth an obligation to engage in “institution strengthening”¹⁰⁹ and “capacity building.”¹¹⁰ Bechtel is to involve “existing government institutions and utilities in the implementation of the repair and rehabilitation activities.”¹¹¹ Iraqis are to be trained to operate and maintain the country’s infrastructure through classroom time and the generation of training manuals.¹¹²

The U.S. Army Corps of Engineers has spearheaded an effort to train Iraqi engineers for the infrastructure sector. Training is essential to familiarize Iraqis with new foreign technologies. In an interview with Engineering News Round, a specialist practitioner news service, Daniel Hitchings, the Chief of Engineering and Construction at the U.S. Army Corps of Engineers’ Pittsburgh District and also former Senior Advisor for the Office of the CPA to the Iraqi Ministry of Housing and Construction, makes the point that Iraqis “need technology transfer” and as a result “[t]here will be a lot of outreach opportunities.”¹¹³ Thus far, sixteen workers have gone through one particular training course and the Corps expects a dramatic increase in numbers in the future. Iraqis have even been offered financial aid to gain advanced educational training in relevant engineering fields.¹¹⁴ Like other efforts, however, Iraqis have been hesitant to participate because of the dangers of being associated with the United States.¹¹⁵

The U.S. government is providing some support for Iraqi subcontractors through insurance policies.¹¹⁶ The main players of the U.S.-financed projects have found it difficult to cope with insurgents. Legal plans signed into force, no matter how carefully conceived, are by no means a legislative contractual *fait accompli*. Instead, plans are inserted into social situations and must fend for themselves.¹¹⁷ It is difficult to safeguard the legally set out sprawling infrastructure projects from attack. This

108 For a discussion of contracting out work under questionable procedures see S Harriss “Outsourcing Iraq” (7/1/04) 36(11) Government Executive 56.

109 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 C.III.5 Institutional Strengthening.

110 *Id.* 1.

111 *Id.* C.III.5 Institutional Strengthening.

112 *Id.*

113 T F Armistead “Coalition Point Man Says Iraqi Contractors Are in Critical Condition” (6/30/03) 250(25) Engineering News Round 50.

114 P Jones “Intern program Will Help Redesign, Rebuild Iraq Infrastructure” 1(10) Essayons Forward 7.

115 M Frazier “Iraqi, U.S. Engineers Join Forces to Rebuild Country: New Program Partners Local Engineers with U.S. Army Cops of Engineers” 1(10) Essayons Forward 6.

116 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. 1/5/04 H.3(c).

117 S F Moore “An International Legal Regime and the Context of Conditionality” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 333; M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005).

makes them vulnerable at many points.¹¹⁸ Strategic pinpointed attacks can disable entire infrastructure networks. There are approximately seven thousand kilometers of oil pipelines and eighteen thousand kilometers of power lines.¹¹⁹ We see this not only in Iraq, but also in the terrorist attacks on the U.S. banking and financial infrastructure discussed in Chapter 6. This vulnerability makes it difficult to defend projects. Security cannot be in all places at all times. At the same time, Coalition forces have trained Iraqis to protect vital oil and power networks.¹²⁰ This supplements U.S. airborne snipers who patrol the oil pipelines.¹²¹

To provide some financial cover, the U.S. government along with companies have taken out insurance policies, which are essential for infrastructure enterprises operating in Iraq.¹²² For U.S. companies, a legal requirement exists to take out insurance to cover their workers going overseas when they are on government contract. The U.S. government covers personal damage relating to war and the War on Terror. Bechtel is required by contract with the U.S. government to carry Defense Base Act insurance¹²³ and also war risk insurance. This insurance extends to subcontractors.¹²⁴ It is to cover liability for damage caused by “landmines, UXO, acts of terrorism, or to other dangers present in working in Iraq including ethnic or tribal conflicts.”¹²⁵ Contractually, Bechtel is able to withdraw personnel from Iraq or to postpone work “if it is determined that current conditions will be unsafe from a security or safety standpoint due to instability in Iraq.”¹²⁶

Companies in the United Kingdom and the United States are providing the bulk of the coverage. At the same time, some reluctance exists on the part of firms to offer political risk insurance. Policies are pricey.¹²⁷ They involve a range of coverages including protection against terrorist attacks and also traditional political risks.

118 “Problems, Problems” *Economist.com* (6/60/03) 1. They are also vulnerable at many legal points. M B Likosky “Response to George” in M Gibney, ed, *Globalizing Rights: Oxford Amnesty Lectures* (Oxford University Press Oxford 2003) 34, 42–44.

119 Coalition Provisional Authority Operational Briefing: Presenter: Paul Bremer, U.S. Special Envoy to Iraq (9/2/03).

120 “Fixing Iraq’s Infrastructure: U.S. Contractors Restored Power and Bridges While Repairing Neglected Water and Sewage Systems Vital to Iraq’s Health” in U.S. Agency for International Development, *A Year in Iraq: Restoring Services* 5, 6; United States Department of Defense, “News Transcript: Presenter: Secretary of Defense Donald H. Rumsfeld” (10/21/03).

121 E Watkins “U.S. to Deploy Airborne Snipers to Protect Iraqi Pipelines” (10/13/03) 1010(39) *Oil & Gas Journal* 37.

122 C Aldred and M Bradford “Despite Security Concerns, Coverage Available for Iraq” (2/2/04) 38(5) *Business Insurance* 1.

123 On the Defense Base Act see G K Chamberlin “What Constitutes ‘Public Work’ within Meaning of Defense Base Act (42 U. S. C. A. Sections 1651 et seq.)” (2006) 54 *American Law Reports Federal* 889.

124 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. (1/5/04) H.III INSURANCE AND SERVICES.

125 *Id.* C.III.6.6 “Demining.” On landmines in Iraq see Contract No. EEE-C 00-03-00018-00 between USAID and Bechtel National Inc. (4/17/03) C.III.6.5 Demining.

126 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. (1/5/04) H15 SAFETY OF CONTRACTOR PERSONNEL.

127 On the expense of personal accident insurance see P Miller “Iraq Violence Adds Risk” (4/12/04) 38(15) *Business Insurance* 1.

Medical and accident covers appear to be more prevalent than war and terrorism covers.

Subcontractors are also protected by private security forces, which have been hired to supplement the protection afforded by the armed forces. At times, the obligation to provide security forces is contractualized. For example, the USAID contract with Bechtel requires the contractor to “develop a security plan.”¹²⁸ This plan must “be implemented and maintained by subcontractors as well.”¹²⁹ Security is on the forefront of the minds of employees of the infrastructure companies. According to Jack Scott, the President of Parsons Infrastructure and Technology, “[t]here is not a thing that security does not impact.” He goes on to say that “[i]t is the number-one thing we deal with.”¹³⁰

In previous wars like Kosovo and Bosnia, infrastructure reconstruction companies relied on the United Nations for the bulk of their security needs. The needs in Iraq are large and the ratio between guard to worker is two to one in the power sector.¹³¹ Coordination exists between the public and private forces and it is necessary to receive military approval for companies to operate in specific areas.¹³² These private forces are sometimes multinational.¹³³ According to an article in the U.S. Army Corps of Engineers magazine, *Essayons Forward*, at one point, American, African, and Iraqi workers for the U.S. DynCorp security firm battled together to protect infrastructure projects from insurgent attacks. Security forces also draw from former members of Saddam’s Republican Guard.¹³⁴ So, the U.S. counterinsurgency is premised on a transnational public-private partnership.

IV Looking to the future

Thus, if infrastructure projects are under fire because they are seen as American enterprises, then subcontracting the work for the projects to Iraqis makes them less likely targets, so the logic proceeds. Does this policy amount to putting an Iraqi face on U.S. infrastructure reconstruction? Will frontline Iraqi infrastructure infantry obscure the presence of the backroom decision makers, the U.S. government and the U.S. prime contractors? Or, will the insurgent hit list simply expand? Regardless, the attacks by insurgents on infrastructure projects have resulted in a lesson learned

128 Contract No. SPU-C-00-04-00001-00 between USAID and Bechtel National Inc. (1/5/04) C.III.6.12.

129 *Id.*

130 S Winston, D K Rubin and A G Wright “Contractors Tailoring Protection to Projects; Private Forces in Iraq Work Closely with Military and Officials to Minimize Risk in War Zone” (2/9/04) 252(6) *Engineering News Round* 10.

131 *Id.*

132 *Id.*

133 E Watkins “U.S. Officials Underscore Need to Improve Security in Postwar Iraq” (6/2/03) 101(22) *Oil & Gas Journal* 32.

134 M Frazier “Four Iraqis Injured After Attack: Iraqi Security Guards Taken to Hospital, Treated and Released” 1(10) *Essayons Forward* 8.

for the U.S.-led government-industry partnership that makes up the infrastructure reconstruction effort – to have any hope of maintaining power, it is necessary to give some up. Ownership of infrastructure assets still resides in the Iraqi public. Control, however, is U.S.-led and transnational, achieved through a public-private partnership. At the same time, it is contested. As a result, as rule becomes increasingly indirect, the question will be how much power must be conceded to maintain control.