Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions

Article · July 2008

CITATIONS
4

READS
43

1 author:

Dan Stigall
United States Department of Justice
17 PUBLICATIONS **39** CITATIONS

SEE PROFILE

RUTGERS LAW RECORD
The Internet Journal of Rutgers School of Law | Newark
http://www.lawrecord.com

Volume 34 *Iraq at the Crossroads* **Spring 2009**

Refugees and Legal Reform in Iraq: The Iraqi Civil Code, International Standards for the Treatment of Displaced Persons, and the Art of Attainable Solutions

Dan E. Stigall[*]

A recent report by Refugees International notes that Iraq is currently faced with one of the most acute displacement crises in the world.[1] There are over 5 million Iraqis displaced by violence—2.7 million of whom are internally displaced within Iraq.[2] Such a situation creates not only a humanitarian crisis, but also a perverse opportunity for insurgents and militia groups to exploit the displacement crisis in order to legitimize themselves and achieve geo-political goals.[3] Consequently, the issue of displacement and the search for a solution to the current crisis has become a salient issue for military commanders conducting counterinsurgency operations. As the U.S. Army Field Manual 3-24, *Counterinsurgency*, states:

> Long-term success in [counterinsurgency] depends on the people taking charge of their own affairs and consenting to the government's rule. Achieving this condition requires the government to eliminate as many causes of the insurgency as feasible. This can include eliminating those extremists whose beliefs prevent them from ever reconciling with the government. Over time, counterinsurgents aim to enable a country or regime to provide the security and rule of law that allow establishment of social services and growth of economic

---

[*] U.S. Army Judge Advocate (JAG) currently assigned as Special Assistant U.S. Attorney, Eastern District of Virginia, Department of Justice. J.D., 2000, Louisiana State University Paul M. Hebert Law Center; B.A., 1996, Louisiana State University. Any opinion expressed is solely that of the author and not necessarily the Department of Defense. This article began as a working paper for a conference coordinated by the United States Institute of Peace (USIP) in Amman, Jordan and was further developed for a symposium hosted by the Rutgers Law Record. The author would like to thank both of those organizations for their contributions to this complex, daunting, yet critically important topic. The author would also like to thank Professor Haider Ala Hamoudi for taking the time to read the draft of this article and offer his insight.

[1] *See* KRISTELE YOUNES & NIR ROSEN, REFUGEES INT'L, UPROOTED AND UNSTABLE: MEETING URGENT HUMANITARIAN NEEDS IN IRAQ 1 (Apr. 2008) [hereinafter REFUGEES INT'L], *available at* http://www.refugeesinternational.org/sites/default/files/UprootedandUnstable.pdf.

[2] *Id.*

[3] *Id.*

> As part of its assistance programs, the Mahdi Army—Muqtada al Sadr's armed group—also "resettles" displaced Iraqis free of charge in homes that belonged to Sunnis. It provides stipends, food, heating oil, cooking oil and other non-food items to supplement the Public Distribution System (PDS) rations which are still virtually impossible to transfer after displaced Iraqis have moved to a new neighborhood, though it is easier for Shiites to do so.
>
> *Id.* at 3.

> activity. [Counterinsurgency] thus involves the application of national power in the political, military, economic, social, information, and infrastructure fields and disciplines.[4]

Current reports indicate that large-scale displacement in Iraq is driving civilians to join militias (both the Mahdi Army and Sunni militias) because of the need for services and the desire to belong to "new communities."[5] Displacement has become an engine of the insurgency. It is critical, therefore, to find adequate remedies for displaced persons and policies to effect property restitution and resettlement. The solutions forged in the heat of this conflict must be effective, durable, and—most importantly—they must be solutions that can be realistically attained.

The government of Iraq has already taken some minor steps to address the crisis. For instance, funds have been allotted to help resettle displaced persons in the form of limited grants and assistance with rent.[6] Such positive initiatives will certainly assuage the suffering of the displaced and foster return. Even so, the return of displaced persons will require more than the mere provision of funds. It will require the return of property belonging to the displaced—property which, in many cases, is currently occupied by people who have no intention of giving it up.[7] Such property disputes are typically the proper subject of civil courts and a nation's substantive civil law.[8]

In evaluating the state of Iraq's substantive law and seeking solutions, it is important to find remedies and mechanisms for restitution that comport with international standards.[9] Those standards are not the easiest to discern as there is no comprehensive treaty setting forth all the rights and obligations owed by states vis-à-vis displaced persons.[10] As a result, one must look to numerous other instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic,

---

[4] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-4 (Dec. 2006) [hereinafter FM 3-24]. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 3-37 (Oct. 2008) [hereinafter FM 3-07].

> Dislocated civilians are symptoms of broader issues such as conflict, insecurity, and disparities among the population. How displaced populations are treated can either foster trust and confidence—laying the foundation for stabilization and reconstruction among a traumatized population—or create resentment and further chaos. Local and international aid organizations are most often best equipped to deal with the needs of the local populace but require a secure environment in which to operate. Through close cooperation, military forces can enable the success of these organizations by providing critical assistance to the populace.
>
> *Id.*

[5] REFUGEES INT'L, *supra,* note 1, at 4 (noting that the Sadrist movement provides displaced persons with provisions such as rice, flour, and sugar).

[6] *See, e.g.,* Council of Ministers Decree, No. 262 of 2008 (on file with author).

[7] *See* REFUGEES INT'L, *supra* note 1, at ii.

> As in the post-conflict Balkans, property disputes are likely to be a key issue in Iraq, and have already started surfacing, as many returnees were unable to go home since their houses are occupied by others. Property disputes will linger for many years to come and if not handled properly are likely to be a spark for renewed violence.
>
> *Id.* at 15.

[8] *See* Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176, 182-85 (1953); *see also* JOHN BELL, SOPHIE BOYRON & SIMON WHITTAKER, PRINCIPLES OF FRENCH LAW 45 (1998) (noting that French civil courts—the *tribunal d'instance* and the *tribunal de grande instance*—are the proper forums for property disputes).

[9] *See* CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 58–65 (2004).

[10] *Id.*

Social, and Cultural Rights (ICESCR), and the Geneva Conventions.[11] Two nonbinding instruments, however, have been promulgated to assist international actors in identifying rights and duties regarding displaced persons: The Guiding Principles on Internal Displacement and the Pinheiro Principles.[12]

The Guiding Principles on Internal Displacement (Guiding Principles), which were finalized in 1998,[13] are a set of guidelines developed in an attempt to enhance protection and assistance for persons forcibly displaced within their own countries by events such as violent conflicts, gross violations of human rights, as well as natural and manmade disasters.[14]

> The Principles consolidate into one document the legal standards relevant to the internally displaced drawn from international human rights law, humanitarian law and refugee law by analogy. In addition to restating existing norms, they address gray areas and gaps identified in the law. As a result, there is now for the first time an authoritative statement of the rights of internally displaced persons and the obligations of governments and other controlling authorities toward these populations.[15]

The Pinheiro Principles—named for Paulo Sérgio Pinheiro—are a more recently formulated set of international standards which were endorsed by the United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights in 2005.[16] They were "designed to assist all relevant actors, national and international, in addressing the legal and technical issues surrounding housing, land and property restitution in situations where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence."[17] One non-governmental organization (NGO) describes their function as follows:

> They provide practical guidance to governments, UN agencies and the broader international community on how best to address the complex legal and technical issues surrounding housing, land and property restitution. They augment the international normative framework in the area of housing and property restitution rights, and are grounded firmly within existing international human rights and humanitarian law. They re-affirm existing human rights and apply them to the specific question of housing and property restitution. They elaborate what states should do in terms of developing national housing and property

---

[11] *See id.*

[12] *See generally* Giulia Paglione, *Individual Property Restitution: From Deng to Pinheiro—and the Challenges Ahead*, 20 INT'L J. REFUGEE L. 391 (Oct. 2008).

[13] BROOKINGS INSTITUTION, INTERNATIONAL COLLOQUY ON THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT 2 (Sept. 2000) (hereinafter BROOKINGS BACKGROUND PAPER), *available at* http://www.brookings.edu/~/media/Files/events/2000/0921_guidingprinciples/20000921_Background.pdf.

[14] WALTER KÄLIN, THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 2 (NO. 38 STUDIES IN TRANSNATIONAL LEGAL POLICY) (rev. ed. 2008), *available at* http://www.asil.org/pdfs/stlp.pdf.

[15] *Id., Preface to the First Edition,* at xi.

[16] Scott Leckie, *New Housing, Land and Property Restitution Rights*, 25 FORCED MIGRATION REV., May 3, 2006, *available at* http://www.reliefweb.int/rw/RWB.NSF/db900SID/KHII-6PG523?OpenDocument.

[17] UN ECONOMIC AND SOCIAL COUNCIL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HOUSING AND PROPERTY RESTITUTION IN THE CONTEXT OF THE RETURN OF REFUGEES AND INTERNALLY DISPLACED PERSONS, FINAL REPORT OF THE SPECIAL RAPPORTEUR, PAULO SÉRGIO PINHEIRO PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS, U.N. Doc. E/CN.4/Sub.2/2005/17, ¶ 1.1 (June 28, 2005), *available at* http://domino.un.org/unispal.nsf/lce87ab1832a53e852570bb006dfaf6/577d69b243fd3c0485257075006698e6!OpenDocument.

> restitution procedures and institutions, and ensuring access to these by all displaced persons. They stress the importance of consultation and participation in decision making by displaced persons and outline approaches to technical issues of housing, land and property records, the rights of tenants and other non-owners and the question of secondary occupants.[18]

There is considerable overlap between the two instruments and few areas of contrast. Both delineate a number of rights to be afforded displaced persons and both do so in a maximalist fashion which tends, at times, to go beyond existing law.[19] There are, however, differing levels of detail vis-à-vis their interaction with substantive law. The Pinheiro Principles, for instance, contain a more detailed articulation of the procedural and substantive requirements of the restitution mechanism envisioned.[20] Differences in their respective levels of recognition, however, counsel consideration of both instruments when evaluating a domestic legal regime's compliance with international standards. This is because the Guiding Principles, though lacking in detail, have attained a broad measure of international support and are therefore considered to be more authoritative.[21] The Pinheiro Principles, in contradistinction, have more detail but have not yet reached the level of international acceptance of the Guiding Principles.[22]

This article will compare the substantive provisions of Iraqi civil law to both instruments—layering them together as an overlay above a map of Iraq's legal terrain. Upon so doing, one sees the points of intersection between the requirements of international law (as interpreted by these instruments) and a nation's substantive civil law. These intersections occur at three distinct points: the architecture of ownership, the mechanism of restitution, and the protection given to secondary occupants. This article then analyzes the demands of the international standards for the treatment of displaced persons on the substantive civil law of Iraq in order to determine if existing Iraqi civil law comports with such standards

---

[18] Leckie, *supra* note 16.

[19] PHUONG, *supra* note 9, at 60.

[20] *See generally* CTR. ON HOUS. RIGHTS AND EVICTIONS, THE PINHEIRO PRINCIPLES: UNITED NATIONS PRINCIPLES ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS (Dec. 2005) [hereinafter PINHEIRO PRINCIPLES], *available at* http://www.reliefweb.int/rw/lib.nsf/db900sid/ASAZ-7F4JCM/$file/Pinheiro_Principles.pdf?openelement.

[21] KÄLIN, *supra* note 14.

> The Heads of State and Government assembled in New York for the September 2005 World Summit unanimously recognized them as an "important international framework for the protection of internally displaced person." (UN General Assembly GA Resolution A/60/L.1 para. 132), and the General Assembly has not only welcomed "the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard" but also encouraged "all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement" (A/RES/62/153, para. 10). At the regional level, the Organization of African Unity (now the African Union) formally acknowledged the principles; the Economic Community of West African States (ECOWAS) called on its member states to disseminated and apply them; and in the Horn of Africa, the Intergovernmental Authority on Development (IGAD), in a ministerial declaration, called the principles a "useful tool" in the development of national policies on internal displacement. In Europe, the Organization for Security and Cooperation in Europe (OSCE) recognized the principles as "a useful framework for the work of the OSCE" in dealing with internal displacement, and the Parliamentary Assembly of the Council of Europe as well as its Council of Ministers urged its member states to incorporate the principles into their domestic laws. The number of states that have incorporated the Guiding Principles into their domestic laws and policies is growing.
>
> *Id.*, *Preface to the Revised Edition*, at vii–viii.

[22] Though endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights, the Pinheiro Principles have yet to be the subject of the broad member state approval described above.

and, if not, to identify those areas where it is lacking. Such an analysis is useful for determining the extent to which Iraqi civil law, unadulterated by outside mechanisms and foreign interference, can serve as a fully compliant restitution scheme and the degree to which augmentation or legislative reform is required.

I. The Current Schemata

Currently, remedies for displaced Iraqis seeking to regain their property are primarily found in the Iraqi Civil Code.[23] There is currently no mechanism in place to assist with post-2003 property restitution claims or the ongoing displacement crisis. The Commission for the Resolution of Real Property Disputes (CRRPD), the only such entity functioning in Iraq, addresses exclusively those claims that arose between July 17, 1968 and April 9, 2003.[24] Iraqis displaced thereafter, must find recourse through the ordinary court system. This, however, is not cause for grief. The Iraqi civil law system is a sophisticated, modern system, which – in spite of some needed amendments – is more than capable of addressing the needs of displaced persons and those who have lost property.[25]

The Iraqi Civil Code can be aptly described as a member of the civilian (continental civil law) family which is deeply informed by Islamic legal influences. Its history reaches back to the twentieth century, when Iraq blended into its legal culture many elements of the continental civil law tradition with the enactment of its modern civil code.[26] The Iraqi Civil Code was principally authored by Abd al-Razzaq as-Sanhūrī, who was then working as the dean of the Iraqi Law College.[27] Jwaideh notes that as Iraq approached modernity, "[t]he conditions under which [Ottoman law] had been enacted had completely changed and legislation for a new and unified civil code became a necessity."[28] The substance of this new civil code was taken largely from Egyptian law (which mirrored the French civil code), then-existing Iraqi laws (such as those from the *Mejelle* and other Ottoman legislation), and from Islamic law.[29] "The proposal put every effort to coordinate between its provisions which stem from two main sources: Islamic law and Western law, resulting in a synthesis in which the duality of sources and their variance is almost imperceptible."[30]

The Iraqi Civil Code contains the principal legislation dealing with property (of every variety) and, thus, is the primary source of law governing property restitution and remedies associated with displacement.[31] The question then arises as to how that system comports with the international standards set forth and the demands of those standards on a nation's substantive civil law.

---

[23] *See* Jwaideh, *supra,* note 8, at 180–84.

[24] Statute of the Commission for the Resolution of Real Property Disputes, Order Number 2 of the Year 2006, art. 4 (Iraq) (Reparations Programmes Unit unofficial trans.) [hereinafter Statute of the Comm'n for the Resolution of Real Prop. Disputes], *available at* http://www.brookings.edu/projects/idp/Laws-and-Policies/~/media/Files/Projects/IDP/Laws%20and%20Policies/Iraq_2006_PropertyResolution.pdf.

[25] *See* Captain Dan E. Stigall, *Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission (IPCC)*, ARMY LAW., March 2005, at 28. For a further discussion of areas of the Iraqi Civil Code in need of amendment, see Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, Berkeley Journal of Middle Eastern and Islamic Law (Inaugural Issue), Vol. 1, No. 1, 2008.

[26] *See* Jwaideh, *supra,* note 8, at 180–84.

[27] *Id.* at 179-80.

[28] *Id.* at 178.

[29] *Id.* at 178-79.

[30] Oussama Arabi, *Al-Sanhūrī's Reconstruction of the Islamic Law of Contract Defects*, 6 J. ISLAMIC STUD. 153, 167 (1995) (citing AL-QĀNŪN AL-MADANĪ, No. 40 (1951)).

[31] *See* Jwaideh, *supra,* note 8, at 182–85.

I. A Means of Restitution

Catherine Phuong, a Lecturer in Law at the University of Newcastle, England, notes that, while there is no explicit provision in the main international human rights instruments (such as the ICCPR and the ICESCR) which guarantees the right of restitution of property, there is an emerging trend toward providing restitution and compensation for loss of property to displaced persons.[32] Both the Guiding Principles and the Pinheiro Principles—consistent with their maximalist positions—affirmatively require States to supply some sort of restitution mechanism for this purpose. The Guiding Principles state:

> Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.[33]

Those same authorities are also tasked with the primary duty of facilitating the safe, voluntary return of internally displaced persons to their homes or places of habitual residence, or facilitating their voluntary resettlement in another part of the country.[34]

The Pinheiro Principles elaborate on that responsibility, noting that States should establish "procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims,"[35] and that all refugees and displaced persons who were arbitrarily or unlawfully deprived of property have a right to have that property restored to them or, alternatively, to be compensated for such property in a judgment by an independent and impartial tribunal.[36] Thus, both instruments impose an affirmative duty on the part of governments to facilitate the restitution of property of the displaced.

Neither the Guiding Principles nor the Pinheiro Principles, however, give a great deal of substantive detail on the nature of the restitution rights to be afforded. Nonetheless, one may distill from these principles a responsibility on the part of governments to provide a mechanism whereby displaced persons can seek restitution.

As to the type of mechanism to be provided, both sets of principles provide that this can be done via new procedures and mechanisms or through the use of the existing legal infrastructure—so long as it is adequately resourced.[37] The question of the best mechanism for effecting property restitution has been given much attention in recent years. Scott Leckie has noted that "any attempt to deal adequately with housing and property issues must be entrenched within a legal framework" and that "[p]ractice has clearly shown that a consistent legal framework should ideally be in place prior to instigating the claims process. A

---

[32] PHUONG, *supra* note 9, at 64. "It may still be too early today to conclude that a right to restitution of property lost as a result of displacement or compensation for such a loss has been firmly established in international law." *Id.*

[33] KÄLIN, *supra* note 14, princ. 29(2), at 133-34.

[34] *Id.* princ. 28(1), at 127.

[35] PINHEIRO PRINCIPLES, *supra* note 20, princ. 12.1, at 13.

[36] *Id.* princ. 2.1, at 9.

[37] *Id.* princ. 12.1, at 13. ("In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner."). Pinheiro Principle 12.3 provides that States are to take administrative, legislative and judicial measures to support and facilitate the restitution process and should provide all of their relevant agencies with adequate resources to accomplish their tasks. *Id.* princ. 12.3, at 13.

clear and consistent legal framework is vital for restitution programs to succeed."[38] Leckie also notes, however, that legal complexities and problematic regulatory frameworks have served to stall restitution efforts in the past.[39] Such complexities have, unfortunately, resulted in a subtle bias against organic legal institutions and an unnecessary push to effect property restitution extrajudicially. Specifically regarding Iraq, a recent report by the Brookings Institution notes:

> One of the lessons drawn from the CRRPD is that a judicial or quasi-judicial process is unlikely to be successful in dealing with large numbers of claims. The CRRPD which has been a quasi-judicial process has been bogged down with bureaucratic processes, including provision for valuation by multiple experts to assess the value of claims, extensive formal requirements for documentation and application of Iraqi civil and procedural law in some areas. Administrative processes are generally easier than judicial processes to implement and should be the predominant mechanism for future reparation mechanisms. Otherwise, the whole judicial system could be clogged up with property compensation/reparation cases, with lengthy delays not just for those seeking recovery of their property but many other legal issues as well.[40]

The Brookings paper is full of important data and interesting insight. Further, its author – a notable practitioner and scholar of considerable merit – should be lauded for her heroic efforts to draw greater attention to the issue of displacement. Nonetheless, the paper misses the mark when drawing its conclusions from the CRRPD. The CRRPD is not an Iraqi court and does not adjudicate its claims in accordance with the Iraqi Civil Code.[41] It is a *sui generis* commission—akin to an administrative entity—with its own unique structure and procedure.[42] Even if it were considered quasi-judicial, extrapolating from the experience of the CRRPD that "a judicial or quasi-judicial process is unlikely to be successful in dealing with large numbers of claims" is a bit like damning the entire concept of automotive transport because your car has a flat.[43] The CRRPD is but one of a plurality of competing quasi-judicial models.[44] Its success or failure will certainly have causes specific to its unique model and circumstances rather than something common to the entire universe of possible judicial or quasi-judicial models. It is, therefore, improper to foreclose the possibility of a judicial or quasi-judicial role without greater analysis of the specific weaknesses in the existing model.

In addition, it is important that the analysis of the displacement mechanism not be trapped in structures of thought so rigid that the value of domestic legal institutions is completely disregarded. There are very basic reasons for preferring a judicial model, such as a need to resolve conflicting claims and a need to

---

[38] SCOTT LECKIE, RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 397, 399 (Scott Leckie ed., 2003).

[39] *Id.* at 398-99.

[40] ELIZABETH FERRIS, THE LOOMING CRISIS: DISPLACEMENT AND SECURITY IN IRAQ, 5 BROOKINGS POLICY PAPER, 26-27 (2008).

[41] *See* Statute for the Comm'n for the Resolution of Real Prop. Disputes, *supra* note 24, art. 1.

[42] *Id*.

[43] FERRIS, *supra* note 40, at 26.

[44] The number of possible judicial models is as vast and the variations as diverse as the cultures which make use of them. *See, e.g.,* Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 GEO. WASH. INT'L L. REV. 695 (2004) (outlining a number of competing legal models in the Middle East). For an interesting view of how legal cultures influence one another and create even greater variations see Leon E. Trakman, *Legal Traditions and International Commercial Arbitration,* 17 AM. REV. INT'L ARB. 1, 14-16 (2004).

provide a forum in which grievances can be aired and adjudicated peacefully, thus winnowing the appetite for revenge.[45] As Richard A. Posner notes:

> [T]he passion for revenge may seem the antithesis of rational, instrumental thinking—may seem at once emotional, destructive, and useless. It flouts the economist's commandment to ignore sunk costs, to let bygones be bygones. When there is no possibility of legal redress to deter an aggressor, potential victims will be assiduous in self protection.[46]

For such reasons, the role of courts in resolving property disputes is vital. Even, however, if one were to discount the role of judges and courts as a conflict-resolving mechanism, there are two very practical reasons the Iraqi judiciary and Iraqi law cannot be pushed aside in this matter: the immediacy of the crisis and the cultural importance of Iraqi civil law.

A. Acute Crises Require Immediate Responses

Recently, some commentators have advocated abandoning Iraqi courts altogether and have even called for the creation of "new administrative procedures for resolving property disputes" because "Iraq's property laws are complex" and its courts are "not up to the job."[47] As this article will demonstrate, Iraqi civil law does contain some weaknesses but is by no means unusually complex. Moreover, the appropriate solution for the problems associated with a struggling Iraqi judicial system is to make the needed changes, where appropriate, to Iraq's substantive law in a way that is consistent with the Iraqi legal tradition. In that regard, it is essential to focus energy and resources on correcting the Iraqi legal system's institutional weaknesses rather than depriving its courts of their natural jurisdiction, diverting their authority to a nonexistent entity, and ignoring existing legal institutions in favor of a conceptual mechanism which has yet to come into being and which will operate by a new law that has yet to be enacted—or tested in practice.

Further, not every dispute will require lengthy adjudication. Some cases of obvious squatting do not necessitate lengthy legal battles as there is no plausible claim on the part of the illegal occupant. Cases of outright and flagrant squatting are seldom the subject of a court proceeding but, instead, can merely be resolved by direct appeal to law enforcement personnel who can review the property records, evaluate the situation, allow the owner of the property to go back to his or her home, and have the perpetrator removed. Likewise, in Iraq, many of these cases are currently being addressed through direct government action. For instance, Prime Minister Nouri Al-Maliki has issued a general eviction order which gave a one month ultimatum, beginning on August 1, 2008, for all individuals occupying the houses of displaced persons, to either vacate them or face eviction. In order to enforce this order, the Iraq government has begun a large-scale eviction and property restitution campaign.[48] Local authorities have ordered all squatters

---

[45] *See* Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345, 370 (Spring 2000) ("The purpose of the judiciary in any society is to order social relationships among private and public entities and individuals, as well as to resolve conflicts among these societal actors.").

[46] RICHARD A. POSNER, LAW AND LITERATURE 50 (rev. and enlarged ed. 1998).

[47] Elizabeth Ferris & Michael E. O'Hanlon, *Iraq's Displaced Millions*, BROOKINGS INSTITUTION, Aug. 21, 2008. For an interesting discussion of such assertions in international development disclosure, *see* JENNIFER L. BEARD, THE POLITICAL ECONOMY OF DESIRE: INTERNATIONAL LAW, DEVELOPMENT, AND THE NATION STATE 76 (2007) (noting, "[i]ndeed, development theory today can be characterized not by an incapacity to accept Third World lack, but rather by its incapacity not to view Third World peoples as lacking.")

[48] INTERNAL DISPLACEMENT MONITORING CENTRE, IDP WORKING GROUP, INTERNALLY DISPLACED PERSONS IN IRAQ 13 (Update September 2008), *available at* http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D877BC914C6A92B3C125750D004BBF6B/$file/IDP+WG+Update+on+IDPs_returnees_Sep08.pdf.

to leave public property.[49] "In other governorates, local authorities are applying the Eviction Order only to certain areas or land."[50] The Iraqi Army has been given a lead role in directly facilitating return, evicting squatters, and restoring property to true owners.[51] The U.S. military has been assisting in this restitution process.[52] Myriad cases of displacement will be resolved in such a manner and, therefore, will not pose a burden to the Iraqi court system.

The appropriateness of using the existing legal machinery is also apparent when one considers the fact that Iraq's displacement crisis is not a *fait accompli* but an ongoing event.[53] Depriving courts of jurisdiction over such matters at this point would, thus, mean removing a domestic institution from the critical role it was designed to play and creating a legal "deprivation without end." Civil courts would lose their authority to hear property disputes for the foreseeable future. Such long-term institutional starvation is inimical to a broader state-building effort.[54]

The ongoing nature of the displacement crisis also demonstrates the need for immediate action, using existing laws and institutions to the maximum extent possible. As more Iraqis are displaced each day, and as displaced persons rapidly exhaust their savings while living abroad, time is a critical factor. Any hypothetical "concept court" or "new administrative procedure" would take a great deal of time to create as it must be formulated, debated, and then enacted in accordance with the Iraqi legislative process.[55] Opposing political forces would need to agree on its substance, the terms of its operation, the reach of its jurisdiction, its means of compensation, the method of its composition, its duration, and a host of other factors.[56] Only after the completion of this lengthy legislative process could such a hypothetical entity and its new rules even begin to be tested in practice.

In contrast to the lengthy ordeal that would necessarily precede the formation of a new entity or the passage of a sweeping new law, domestic courts are present and functioning now—with a well-defined functional competence and a trained cadre of professional jurists. Progress in strengthening the judiciary is slowly being made, with the number of Iraqi judges more than doubling (from 500 to 1200) over the past

---

[49] *Id.* at 14.

[50] *Id.*

[51] Lourdes Garcia-Navarro, *In Iraq, Those Displaced By Violence Return Home*, NPR (Oct. 9, 2008), *available at* http://www.npr.org/templates/story/story.php?storyId=95567785.

[52] *Id.*

[53] *See generally* Sabrina Tavernise, *Fear Keeps Iraqis Out of Their Baghdad Homes*, N.Y. TIMES, Aug. 24, 2008, at A1.

[54] *See generally* ROLAND PARIS, AT WAR'S END: BUILDING PEACE AFTER CIVIL CONFLICT (2004).

[55] *See* Bill Ardolino, *Inside Iraqi Politics—Part 3, Examining the Legislative Branch*, LONG WAR J., Feb. 13, 2008, *available at* http://www.longwarjournal.org/archives/2008/02/inside_iraqi_politic_2.php (summarizing the Iraqi legislative process and noting that Iraqi laws can be created in two ways: initiated by the executive branch and passed to the Council of Representatives for debate and ratification, or initiated by the Council of Representatives, passed to the components of the executive, and then bounced back through the parliament).

> After majority approval by parliament, bills are presented to the Presidency Council—the president and two vice presidents—who can sign it into law or veto the legislation. Once signed, the proposed legislation becomes law after it is published in the official government gazette, a summary of parliamentary action. This extended debate process—spanning fractious deliberative bodies in both the executive branch (the 40-member Council of Ministers) and the legislative branch (the 275-member COR)—demands a level of coordination difficult for Iraq's politically diverse government and prohibits speedy passage of legislation.
>
> *Id.*

[56] *Id.*

two years.[57] The Iraqi Civil Code, likewise, was enacted decades ago, has been tested in practice, is currently in force, and is ingrained in the socio-juridical consciousness of the Iraqi polity.[58] Given those facts, the acute nature of the current crisis, and the realization that any solution must be one that is capable of immediate implementation, the solution to the current displacement crisis must involve improving the existing judicial apparatus and must be based on Iraqi law now in force.

B. Substantive Law, Cultural Ties, and Legitimacy

Apart from the immediacy of the crisis, cultural factors weigh in favor of utilizing existing legal institutions. Particular sensitivity should be given to a nation's substantive law as it is often deeply engrained as a cultural identifier in the collective conscience of the population and can be a source of cultural or national pride.[59] Further, in the broader view of a state-building effort, the nature of a nation's substantive law becomes particularly salient as the most successful programs to restore the rule of law in weakened or failed states have been those rooted in the traditions of the local citizenry.[60] Pre-existing organic legal systems often have the advantage of being tested through years of legal practice. They are generally part of a political bargain that was struck long ago and which carries with it a certain sense of local ownership and acceptance. As a result, they are more likely to be perceived as legitimate. A legitimacy deficit can lead to rejection, which can quickly lead to failure. Ash U. Bali notes that the better model for a more robust nation-building project is the indigenous ownership of both institutional design and implementation along with external logistical support.[61] Bali posits that "[f]or new state institutions to be stable and durable, they must be the product of local political bargains commanding sufficient consensus to bolster their perceived legitimacy."[62] This echoes the lessons of current counterinsurgency doctrine which holds that "[l]ong-term success in [counterinsurgency] depends on the people taking charge of their own affairs and consenting to the government's rule."[63]

Specifically regarding Iraqi substantive law, Professor Haider Ala Hamoudi, an Associate Professor at the University of Pittsburgh School of Law and a notable scholar of Islamic and Iraqi law, has stated:

> I suppose if I had to analogize, within Iraq, reverence to the Civil Code is more or less like American reverence to the Constitution. In Iraq, constitutions come and go, they are politically motivated, they are hard to take as seriously, but the Civil Code is central to the legal theology. Sure a clause here or there might be amended, but as a general matter it has proved remarkably durable. Get lawyers in Iraq, from any place, including the Kurdish self rule areas that have not been under Arab control for nearly two decades, including the most religious and the most secular, the most Kurdish and the most Arab, the most Sunni and the

---

[57] *See* Donna Leinwand, *Wheels of Justice Slowly Returning to Iraqi Courts*, USA TODAY, Feb 26, 2008, at 8A, *available at* http://www.usatoday.com/printedition/news/20080227/a_iraqicourts27.art.htm.

[58] *See, e.g.*, Haider Hamoudi, *Legal Change and Iraq*, OPINIO JURIS, June 20, 2008, http://opiniojuris.powerblogs.com/archives/archive_2008_06_15-2008_06_21.shtml; *see also* Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 FLA. ST. J. TRANSNAT'L L. & POL'Y 1 (Fall 2006).

[59] *See* Philippe Malaurie, *Les enjeux de la codification,* Actualité Juridique Droit Administratif, n°9 p.642-46 (1997).

[60] *See* Marcia Coyle, *Toward an Iraqi Legal System*, NAT'L L.J., Apr. 25, 2003 (quoting Paul van Zyl, director for country programs, Int'l Ctr. for Transitional Justice).

[61] Ash U. Bali, *Justice Under the Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT'L L. 431, 438 (2005).

[62] *Id.* at 438-39.

[63] FM 3-24, *supra* note 4, para. 1-4.

> most Shi'i and they all know the Civil Code and can quote its provisions, and the commentaries, thereto, very liberally.
>
> . . . .
>
> Finally, Sanhuri's code took years to draft and years to pass. Consultations, discussions, meetings, arguments, within legislatures and the legal community as well as broader society seemed endless. When it was finally done, everyone knew what it was and what it was going to do. It grew fairly deep roots after that. The CPA gave us on the Iraqi side a day to review their drafts. Nobody knew about them until they were enacted. Once enacted, few paid attention because they had not been discussed. No discussion, no understanding, and no understanding, no implementation.[64]

Professor Hamoudi's words resonate much like those of French jurist Phillippe Malaurie, who noted—in the context of French law—that the French *Code Civil* has

> permeated deep into our national culture. The Civil Code is part of our national heritage, just like French-style gardens, the palace of Versailles, Philippe de Champaigne or General de Gaulle. At stake in codification is our culture and our identity. The Civil Code has been more than the symbol of national unity . . . . The Civil Code is at the same time the cause, the witness and the consequence of our cultural identity.[65]

This process of enactment and continuous acceptance within the polity over successive generations imbues such legislation with cultural importance and with a legitimacy derived from what Judge Posner has described as "epistemic democracy."[66] The cultural importance of Iraqi legal institutions must, therefore, be taken into account when proposing long-term modifications to the Iraqi legal system and its substantive civil law. A review of that law reveals some blind spots and areas in need of improvement—but an overall formidable and fair legal regime which is well-suited for the task of restitution.

II. The Architecture of Ownership

Both the Pinheiro Principles and the Guiding Principles articulate a requirement that displaced persons be allowed to exercise full ownership of property without illegal interference or discrimination. The Guiding Principles provide that "[n]o one shall be arbitrarily deprived of property and possessions."[67] Further, "property . . . left behind by internally displaced persons should be protected against destruction . . . [or] appropriation . . . ."[68] The Pinheiro Principles, in turn, state that "[e]veryone has the right to the peaceful enjoyment of his or her possessions"[69] and that "[e]veryone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence."[70] The Pinheiro

---

[64] *See* Hamoudi, *supra* note 58. Professor Hamoudi also authors a blog entitled "Islamic Law in Our Times" which discusses related issues. *See Islamic Law in our Times*, http://muslimlawprof.org/ (last visited Apr. 1, 2009).

[65] Malaurie, *supra* note 59.

[66] Posner, *supra* note 46, at 14.

[67] KÄLIN, *supra* note 14, princ. 21(1), at 95.

[68] *Id.* princ. 21(3), at 96.

[69] PINHEIRO PRINCIPLES, *supra* note 20, Section III, princ. 7.1, at 11.

[70] *Id.* Section III, princ. 5.1, at 10.

Principles also require "States to incorporate protections against displacement into their domestic legislation, consistent with international human rights and humanitarian law and related standards, and [to] extend such protections to everyone within their legal jurisdiction."[71] One may distill from these combined principles a general requirement for the full protection of ownership of private property, untainted by discrimination or governmental arbitrariness—a requirement that the Iraqi legal system fully satisfies.

The Iraqi Civil Code states that everything is subject to ownership except those things which are by their nature or by law excluded from ownership.[72] Property is defined as everything having a material value.[73] The Iraqi Civil Code recognizes the right to complete private ownership of property. Under the Iraqi Code, the owner of the property is considered to be the owner of everything commonly considered to be an essential element of it.[74] Perfect ownership of property vests the owner with the absolute right to dispose of his or her property through use, enjoyment, and exploitation of the thing owned, its fruits, crops, and anything the property produces.[75] No exception is made for gender, class, religion, or sect as it is a right of universal application. Further, as articulated in Section IV, Iraqi civil law protects the owner from displacement through a system of legal protections and actions designed to oust usurpers and fend off adverse possessors. This legal construction of ownership comports with the international standards set forth in the Pinheiro Principles and Guiding Principles as it makes no distinction based on gender or status and is protective of the owner's absolute right over the property owned.

III. Remedies for the Dispossessed

As noted, Iraqi law allows for the full protection of private ownership. To protect this right, the Iraqi Civil Code has in place a number of legal actions. That legislative scheme has been addressed in detail by this author elsewhere[76] and will not be repeated here except to emphasize key points. On that score, it is critical to note two characteristics of Iraqi law that have direct bearing on the plight of the displaced. First, one does not lose ownership through nonuse under Iraqi law. Secondly, adverse possession which is obtained by force, deceit, or in secret has no effect whatsoever.[77] The Iraqi Civil Code's hostility toward possession which is tainted by coercion, clandestinity, or ambiguity is critical to those who are displaced through violent or deceptive means. The fact that possession coupled with coercion is not recognized means that there is no legal recognition of the militia member who forcibly ousts a resident and then maintains possession of that home through the use or threat of force. The Iraqi Civil Code's refusal to recognize ambiguous or secret possession means that persons occupying homes must openly claim them as their own—bringing the fact of their adverse possession into the open and, thus, identifying themselves as "displacers."

Displaced persons can re-obtain possession via a possessory action.[78] In this regard, there are aspects to possessory rights which are uniquely positive in the context of a post-conflict displacement scenario. Should records be lost and the ability to prove ultimate ownership thereby inhibited, a displaced person can

---

[71] *Id.* Section III, princ. 5.2, at 10.

[72] *See* IRAQI CIVIL CODE, art. 61(1) (Nicola H. Karam trans., 1990) [hereinafter IRAQI CIVIL CODE].

[73] *Id.* art. 65.

[74] *Id.* art. 1049.

[75] *Id.* art. 1048.

[76] *See* Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT'L L. & POL'Y 1 (2006); *see also* Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 LA. L. REV. 765 (2008).

[77] Iraqi Civil Code*, supra* note 72, art. 1146.

[78] *Id.* art. 1150.

seek instead to prove that he had uninterrupted possession of an immovable for one full year or more.[79] If the displaced person can meet this standard (which would not require him to prove title) then he may, within one year from the date of being displaced, commence proceedings to have his or her possession restored.[80] It is also important to emphasize that possession may not be obtained by such means—even if it is to retake previous and rightful possession. The only means of reinstating possession is through judicial process. This is consonant with the civil law tradition of reclaiming possession through a possessory action[81] as well as the desired goal of regulating all disputes within a legal framework rather than allowing the displacement crisis to blossom into private inter-neighborhood warfare.[82]

Further, alongside the possessory action imported from the continental civil law tradition, the Iraqi Civil Code maintains remnants of the law of "usurpation" which is derived from the *Mejelle*.[83] Commentators note that Islamic jurisprudence is traditionally hostile to the wrongful taking of property. For instance, the eminent Dr. Khaled Abou El Fadl notes, "Hanafi jurist al-'Ayni (d. 855/1451) argues that the usurper of property, even if a government official [al-zalim], will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property."[84] This is reflected in the modern Iraqi Civil Code's usurpation provisions.[85] A 2002 House of Lords case, when discussing the applicability of such law, noted:

> Articles 192 to 201 of the Iraqi Civil Code provide remedies for the civil wrong of usurpation, or misappropriation. The Code contains no definition of usurpation. Mance J held that under Iraqi law a usurper need not actually take the asset from the possession or control of its owner. Property can be usurped by keeping. Whether keeping amounts to usurpation depends on a combination of factors, including whether the alleged usurper has conducted himself in a manner showing that he was "keeping" the asset as his own.[86]

Under Iraqi law, both moveable and immoveable property which has been usurped by another must be returned to the rightful owner.[87] The codal provisions in this regard label anyone who takes the property of another as a usurper and imposes on such an individual an intimidating set of obligations and liabilities.[88] In the case of immoveables, the Iraqi Civil Code provides that "the usurper is under an obligation to restitute it to the owner together with the comparable (true) rent; the usurper shall be liable if the immoveable has suffered damage or has depreciated even without encroachment on his part."[89] Someone who usurps a usurper (a third possessor) has the same status as the original usurper and the same liability for

---

[79] *Id.*

[80] *Id.* art. 1154.

[81] *See* A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 538 (1991).

[82] *See* FM 3-24, *supra* note 4, para. 7-28 ("Civil security holds when institutions, civil law, courts, prisons, and effective police are in place and can protect the recognized rights of individuals.").

[83] *See* MEJELLE, art. 1635 - 1665 (C.R. Tyser et al. trans., 1980).

[84] Dr. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4, 51 (2003).

[85] *See* IRAQI CIVIL CODE, *supra* note 72, arts. 192–201.

[86] Kuwait Airways Corp. v. Iraqi Airways Co., [2002] A.C. 19 (H.L.)(U.K.).

[87] *See* IRAQI CIVIL CODE, *supra* note 72, arts. 192, 197.

[88] *See id.* arts. 197–198.

[89] *Id.* art. 197.

damage—though the rightful owner has the option of collecting damage from either usurper or claiming part from each.[90]

Regarding those who were forced not only to leave their property but also to convey it to another via a forced contract, the notion of the "vices of consent" reflected in Iraqi law also holds that contracts cannot be tainted by duress, fraud, or error.[91] Duress, under the Iraqi Civil Code, refers to the illegal forcing of a person to do something against his or her will.[92] It exists when there is a threat of death or bodily harm, a violent beating, or great damage to property, but not for lesser threats such as a threat of imprisonment or of a less severe beating.[93] A threat to one's honor, however, may also constitute duress.[94] This characteristic of Iraqi law is crucial to displaced persons, as it means that contracts which are forced or otherwise tainted will not be recognized. The nullification of contracts tainted by duress is a common feature of both continental civil law and Islamic law. In his discussion of the Iraqi Civil Code, Oussama Arabi notes that "[t]he most objective type of legally defective contract is that obtain[ed] under duress, where threats of death, bodily harm, or imprisonment render the contract null and void (*bātil*). This category is the commonest kind of contract defect treated by Muslim jurists . . . ."[95]

There are occasions, however, when the threat is not against the person conveying the property but against a third party with whom the property owner shares a degree of affinity. In that regard, El Fadl notes that "[m]ost Muslim jurists also recognised threats of harm to third parties as duress. But they disagreed over who the third party may be. Some only recognised threats directed at parents or offsprings [sic], and a few recognised even threats directed at strangers."[96] The Iraqi Civil Code, like other civil codes in the French family, takes a middle ground on the issue of third parties, stating only that a threat to cause injury to one's parents, spouse, or an unmarried relative on the maternal side may rise to the level of duress.[97] As addressed more fully below, the Iraqi law in this regard is unduly restrictive and in need of amendment.

Lastly, it is worth mentioning another provision of the Iraqi Civil Code which is of great benefit to displaced persons. Article 435 notes that time limits barring the hearing of a case are suspended by an "impediment rendering it impossible for the plaintiff to claim his right."[98] This rule is of obvious benefit to persons who are unable to reach their home due to violence or who are trapped in Jordan, Syria, Egypt, or elsewhere, and who might otherwise see legal rights extinguished through the passage of time. Together with the provisions protecting ownership, allowing actions to regain property, and allowing rescission of forced contracts, these laws provide a phalanx of protections for the displaced property owner.

A. Destroyed Property

Aside from adverse possession, another cause of displacement is the destruction of property. In the ordinary case, involving non-Coalition actors, the primary civil remedy for the destruction of property is an action in tort. The Iraqi Civil Code contains a general article stating that "[e]very act which is injurious to

---

[90] *Id.* art. 198(1).

[91] *See id.* art. 115.

[92] *Id.* art. 112(1).

[93] *Id*. art. 112(3).

[94] *Id*.

[95] Arabi, *supra* note 30, at 156.

[96] Khalad Abou el Fadl, *The Common and Islamic Law of Duress*, 6 Arab Law Quarterly 121, 129 (1991).

[97] IRAQI CIVIL CODE, *supra* note 72, art. 112(3).

[98] *Id.* art. 435. This rule reflects the civilian concept of *contra non valentum agere nulla currit praescriptio*, a Latin maxim meaning that prescription does not run against a party unable to act.

persons such as murder, wounding, assault, or any other kind of [infliction of] injury entails payment of damages by the perpetrator."[99] In cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to the dependants of the victim who were deprived of sustenance because of the wrongful act.[100] Every assault that causes damage, other than damage expressly detailed in other articles, also requires compensation.[101] This article has been incorrectly interpreted in the past as mandating strict liability for all damages,[102] but Iraqi jurisprudence has actually interpreted it as requiring some deviation from a normal standard of care.[103]

The Iraqi Civil Code allows only limited forms of *respondeat superior*, which are clearly delineated. These include the liability of owners of animals for damage caused by their animals;[104] the liability of the father or grandfather of a minor who causes injury;[105] and the liability of owners of buildings which collapse due to dilapidation.[106] The most significant exception to the rule against vicarious liability, however, is the liability of government municipalities and commercial entities for injuries caused by their employees during the course of their service.[107]

There are, as one might expect, defenses to liability and exceptions to the general rule, such as in situations where there is a *force majeure*.[108] In addition, personal injuries are permissible when committed in order to ward off public injury.[109] No claim for damages resulting from any unlawful act can be brought after three years from the day that the injured person became aware of the injury.[110] In no case can a claim be brought fifteen years from the day of the occurrence.[111] As noted above, however, such time limitations are subject to exceptions, such as when an impediment prevents exercise of a right.

Thus, the Iraqi Civil Code contains a rich and detailed regime of law allowing for civil actions against those who cause damage to another—to include the damaging or destruction of their property. Displaced persons, therefore, have a remedy not only for property taken from them—but for property which has been

---

[99] *Id.* art. 202.

[100] *Id.* art. 203.

[101] *Id.* art. 204.

[102] *See, e.g.,* S.H. AMIN, THE LEGAL SYSTEM OF IRAQ, 413 (1987); *see also* Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 LA. L. REV. 765, 810 (2008).

[103] *See* ABDUL MAJID AL HAKIM, ABDUL BAQI AL BAKRI & MUHAMMAD TAHA AL BASHIR, 1 THE COMPENDIUM ON THE THEORY OF OBLIGATION IN THE IRAQ CIVIL CODE (Haider Hamoudi trans., 1980).

> The objective standard to ascertain the deviation is the deviation from that of a normal person under the same circumstances as the actor . . . and we mean by normal person the person who represents the group of people of the actor with the moderate characteristics, and so he is neither extreme in caution or intelligence, nor negligent in act or intelligence, and he is who is known in French law as the careful paterfamilias.
>
> *Id.* at 216. (Special thanks to Professor Hamoudi for providing this translation).

[104] IRAQI CIVIL CODE, *supra* note 72, arts. 221–226.

[105] *Id.* art. 218(1).

[106] *Id.* art. 229(1).

[107] *Id.* art. 219(1).

[108] *Id.* art. 211. The concept of *force majeure* (or *cas fortuit*) is understood in the context of civil law systems as relating to events beyond a party's control. *See* Viterbo v. Friedlander, 120 U.S. 707, 727 (1887).

[109] *Id.* art. 214(1).

[110] *Id.* art. 232.

[111] *Id.*

intentionally damaged or destroyed. They may both reclaim their property and assert a claim for any diminution in its value due to the action of a third party.

B. Secondary Occupants

The Guiding Principles do not specifically mention secondary occupants. The Pinheiro Principles, however, give this issue express treatment. The Pinheiro Principles provide that States should protect such persons from unlawful eviction but that, when such evictions are warranted, the secondary occupants be afforded due process, an opportunity for consultation, reasonable notice, and appropriate legal remedies.[112] Further, where property has been sold by secondary occupants to third parties acting in good faith, the Pinheiro Principles provide that "States may consider establishing mechanisms to provide compensation to injured third parties . . . ."[113] Where the circumstances indicate that the property being sold was illegally acquired, however, such compensation is not required.[114] Iraqi law fully comports with these requirements.

Under the Iraqi Civil Code, persons who, in good faith, purchase property from secondary occupants are "good faith possessors."[115] Such persons are allowed to appropriate the surpluses and benefits of the thing possessed during the time of their possession.[116] They would also have an action against the secondary occupant who sold the land, through application of the general tort action in Articles 202 and 204.[117] Such persons would not, however, obtain ownership of the property unless it was obtained through a normal means of conveyance or acquisition.

Regarding those living in a place pursuant to a contract of lease (renters), the Iraqi Civil Code provides for a highly regulated legal regime. The Iraqi Civil Code defines a lease as "the alienation of a definite advantage in return for a defined consideration for a certain specified period by which the lessor will be bound to enable the lessee to enjoy the leased [property]."[118] This is a definition that comports with both continental civil law and Ottoman law.[119]

Under Iraqi law, a lessor is "bound to repair and restore any defect in the leased property" that has resulted in interference with its intended use.[120] If the lessor fails in this regard, the lessee may either rescind the contract or, with a court's permission, carry out the repairs and restoration and claim the expenses from the lessor.[121] If, for some reason not imputable to the lessee, the property becomes unfit for its intended use, or if such use is appreciably diminished, the lessor must restore the land to its original condition.[122] If

---

[112] PINHEIRO PRINCIPLES, *supra* note 20, princ. 17.1, at 17.

[113] *Id.* princ. 17.4, at 17.

[114] *Id.*

[115] IRAQI CIVIL CODE, *supra* note 72, art. 1148.

[116] *Id.* art. 1165.

[117] *Id.* arts. 202, 204.

[118] *Id.* art. 722.

[119] *See* LA. CIV. CODE ANN. art. 2669 (1870) ("*Lease* or *hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price."); *see also* MEJELLE, *supra* note 83, art. 421.

[120] IRAQI CIVIL CODE, *supra* note 72, art. 750(1).

[121] *Id.* art. 750(2).

[122] *Id.* art. 751(2).

the lessor fails to do so, the lessee may demand a reduction in the rent or rescind the contract.[123] If the leased property perishes in its entirety during the lease, the contract is considered rescinded.[124]

The leased property is considered to be a trust in the hands of the lessee.[125] Any use by the lessee of the property other than in accordance with ordinary use is considered to be an encroachment and the lessee will be held liable for all damage resulting therefrom.[126] Like other Iraqi contracts, a contract of lease may contain stipulations such as "an option to rescind the lease within a certain period of time."[127] If such an option was for both the lessor and the lessee, the lease will be rescinded if either party rescinds the contract within the stated time limit.[128] There is an automatic option available to every lessee who has leased a thing without inspecting it, allowing him or her to accept or rescind the lease upon inspection.[129] This right does not extend to lessors.[130]

A lease in Iraq may last for quite a long time. Normally, a contract of lease which is perpetual, or which is made for a period exceeding thirty years, may be terminated after the lapse of thirty years.[131] If, however, the lease contract stipulates that the lease will continue in force as long as the lessee continues to pay rent, it is considered as being a contract for the lifetime of the lessee.[132]

If leased property is usurped by another and the lessee is unable to reclaim the property from the usurper, the lessee may claim rescission of the contract or reduction of the rent.[133] If the lessee has not reclaimed the property—and it was possible to do so—the lessee shall not be exonerated from payment of the rent.[134] The lessee may, however, commence proceedings against the usurper for damages.[135]

In situations in which either party has failed to perform any obligation in the lease contract (to pay rent, etc.) the other party may demand rescission of the contract and damages—but only after having first served notice requiring the other party to perform his or her obligation.[136] If the leased property is destroyed, the contract of lease is terminated.[137]

Accordingly, one sees in the Iraqi Civil Codes provisions on lease that the lessee has a number of rights and protections against eviction. The lessor has a number of obligations to maintain the property and, when the property becomes unfit for habitation, the lessee can rescind his contract and is not bound to pay rent. There are, of course, limitations that are inherent in the concept of a lease. For instance, as it is the owner's property, the lessee is primarily reliant on the owner to take action to restore the property and remove

---

123 *Id.*

124 *Id.* art. 751(1).

125 *Id.* art. 764(1).

126 *Id.* art. 764(2).

127 *Id.* art. 726.

128 *Id.* art. 727.

129 *Id.* art. 733.

130 *Id.*

131 *Id.* art. 740(1).

132 *Id.* art. 740(2).

133 *Id.* art. 755(1).

134 *Id.* art. 755(2).

135 *Id.*

136 *Id.* art. 782.

137 *Id.* art. 751.

impediments to its use.[138] Further, the primary remedy of a lessee is always rescission and damages. If property is destroyed, there is no legal right to a new house – only rescission of the contract. Likewise, if the lessee is dispossessed and cannot reclaim possession, his only option is to rescind the contract and find housing elsewhere.

IV. Blind Spots: Military Damage and Interfering Legislation

The analysis above demonstrates that the Iraqi Civil Code provides a system of rules that is well-suited for the task of regulating the claims of those displaced by conflict in Iraq. It provides a mechanism to protect ownership and other rights in property, allows owners a means of redress against adverse possessors, and—where appropriate—protects the rights of secondary occupants. Like any functional legal system, it enforces one property right against another and, thus, serves as an excellent means of effecting restitution in situations where persons have been dispossessed by others. As demonstrated, however, there are weaknesses in substantive Iraqi civil law that arise from legislation external to the Iraqi Civil Code—weaknesses that should be remedied so that Iraqi law can better comply with international standards and more effectively address the needs of its citizenry. Those weaknesses are principally in the areas of military damage and separate statutes which eclipse or otherwise mute the protections provided by the Iraqi Civil Code.

A. Military Damage

Aside from adverse possession of property, another means of causing displacement is through the destruction of property. As noted above, the Iraqi Civil Code offers a clear civil action against those who wrongfully destroy the property of another[139]—though that analysis changes when the property is destroyed by military action undertaken by Coalition Forces. The remedies for persons displaced in such a manner have historically been quite limited. This is because the ability to bring a claim against Coalition Forces or contractors working with the Coalition for combat-related damage is practically nonexistent.

The first Coalition Provisional Authority (CPA) regulation stated that the CPA "shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration" and that it "is vested with all executive, legislative and judicial authority necessary to achieve its objectives."[140] Importantly, the regulation also provided that "'laws in force in Iraq as of April 16, 2003 shall continue to apply' unless they would inhibit the CPA or conflict with its regulations or orders, and only until such time as they were suspended or replaced by the CPA or 'democratic institutions of Iraq.'"[141]

The most important CPA "legislation" in terms of tort liability was Coalition Provisional Authority Order Number 17, which stated that, "[u]nless provided otherwise herein, the [Multi-National Forces] MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International

---

[138] *Id.* art. 750(1), 755(2).

[139] *Id*. art. 186.

[140] *See Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT'L L. 601, 602 (Sean D. Murphy ed., 2004) (quoting COALITION PROVISION AUTHORITY, REG. 1 (May 16, 2003) [hereinafter CPA REG. 1], *available at* http://www.cpairaq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf).

[141] *Id.* (quoting CPA REG.1, §§ 2, 3).

Consultants shall be immune from Iraqi legal process."[142] That same order also stated that all "MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or detention other than by persons acting on behalf of their Sending States . . . ."[143] With regard to contractors, it expressly provided:

> Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State.[144]

As a result, most Coalition personnel working in Iraq were granted a rather generous shield of immunity, while ordinary Iraqi citizens (and others found within the jurisdiction of Iraq) were not. This did not mean, however, that Iraqi citizens were completely without recourse. A means of asserting claims against U.S. forces is allowable under two different statutory schemes: the Foreign Claims Act (FCA)[145] and the International Agreements Claims Act (IACA).[146]

The IACA allows settlement of meritorious claims against the United States pursuant to U.S. obligations under international law.[147] A status of forces agreement (SOFA) is the most common form of agreement to trigger application of the IACA.[148] In such cases, the terms of the applicable SOFA generally provide the mechanisms for investigating and settling (or denying) claims against U.S. forces. Prior to the implementation of the SOFA with Iraq, however, the IACA found no applicability and, as discussed below, even with the current SOFA in force, its current applicability is questionable. Thus, the FCA has been the principle device for Iraqi citizens seeking a remedy for damage occasioned by Coalition Forces.

The FCA permits the settlement of claims arising outside the United States and submitted by foreign governments and inhabitants of foreign countries.[149] Under the FCA, meritorious claims for property

---

[142] *See* Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq sec. 2, para. 1 (2004), *available at* http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.

[143] *Id.* § 2, ¶ 3.

[144] *Id.* § 4, ¶ 3.

[145] Foreign Claims Act, 10 U.S.C. § 2734 (2006). For a more elaborate analysis of the Foreign Claims Act and the Army's foreign claims process, *see* Major Jerrett W. Dunlap, Jr., *The Economic Efficiency of the Army's Maneuver Damage Claims Program: Close But No Cigar*, 190–91 MIL. L. REV. 1 (2007).

[146] International Agreements Claims Act, 10 U.S.C. § 2734a (2006).

[147] *Id.*

[148] *See, e.g.*, Lieutenant Colonel Arthur C. Bredemeye, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F. L. REV. 101, 105 (1997).

> The most commonly recognized international agreement for defining the status of military forces present within the territorial boundaries of another country is the SOFA. A SOFA can be in the form of either a treaty or an executive agreement. It may be a long-standing arrangement or a short-term one. The arrangement can be created by a separate document, or it may be imbedded in any number of broader agreements, such as mutual defense agreements (MDAs), defense and economic cooperation agreements (DECAs), or defense cooperation agreements (DCAs).

[149] 10 U.S.C. § 2734(a).

losses, personal injury, or death caused by military personnel or members of the civilian component of the U.S. forces may be settled in order "to promote and [to] maintain friendly relations" with the country where U.S. forces are operating.[150] The foreign claims commissioners apply local law and customs to determine liability and the amount of any award, and their decisions on claims are final.[151] Claims under the FCA are paid entirely with U.S. funds, but the claimants usually receive payment in the local currency.[152] The statute has been widely used to pay claims submitted by local nationals in Iraq, Afghanistan, Kosovo, and Bosnia-Herzegovina.[153]

The FCA permits recovery for "noncombat activities" and negligent or wrongful acts by U.S. military personnel and employees.[154] Commentators note that there is no requirement that the negligent or wrongful acts occur within the scope of employment.[155] The FCA, therefore, is frequently used by foreign inhabitants to recover for damage caused by off-duty military personnel in traffic accidents and similar incidents.

The key exception to this payment scheme, however, is that it does not permit payment for combat-related damage. Army Regulation (AR) 27-20 notes that

> [a] claim for death, personal injury, or loss of or damage to property may be allowed under this chapter if the alleged damage results from noncombat activity or a negligent or wrongful act or omission of Soldiers or civilian employees of the Armed Forces of the United States . . . regardless of whether the act or omission was made within the scope of their employment.[156]

The Regulation defines "noncombat activities" as "[a]uthorized activities essentially military in nature, having little parallel in civilian pursuits, which historically have been considered as furnishing a proper basis for payment of claims. Examples are practice firing of missiles and weapons, training, and field exercises, maneuvers that include the operation of aircraft and vehicles, use and occupancy of real estate in the absence of a contract or international agreement covering such use, and movement of combat or other vehicles designed especially for military use. Certain civil works activities such as inverse condemnation are also included. Activities excluded are those incident to combat, whether in time of war or not, and use of military personnel and civilian employees in connection with civil disturbances."[157] While the regulation leaves open room for recovery for wrongful acts committed by soldiers, its exclusion of activities "incident to combat" swallows the activities most likely to destroy housing such as bombing or extensive use of weapons.

In an effort to overcome this gap in the ability of Iraqi citizens to file a claim, military commanders used the flexibility of the Commanders Emergency Response Program (CERP), which allows them to expend

---

[150] *Id.*

[151] U.S. DEPT. OF ARMY, REG. 27-20, CLAIMS ¶¶ 10-5a, 10-6f(3) (8 Feb. 2008) [hereinafter AR 27-20].

[152] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES, ¶ 2-80 (21 Mar. 2008); *but see* Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., Feb. 2004, at 39, 41 (noting that certain units have obtained permission to pay claims in U.S. dollars.)

[153] *See* Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW, Sept. 2005, at 29, 46, 62.

[154] *See* 10 U.S.C. § 2734.

[155] *See, e.g.*, Masterton, *supra* note 153, at 45.

[156] AR 27-20, *supra* note 151, 10-3(a).

[157] *Id.*, Glossary, Section II (Terms).

funds in order to facilitate certain specified objectives.[158] In implementing CERP, Congress authorized the Department of Defense (DoD) to use funds "to respond to urgent humanitarian relief and reconstruction . . . by carrying out programs that will immediately assist the Iraqi people, and to establish and fund a similar program to assist the people of Afghanistan."[159] On July 27, 2005, the Under Secretary of Defense (Comptroller) issued guidance which broadened the permissible uses for CERP to include the repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the FCA; condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations; and payments to individuals upon release from detention.[160] Thus, the gap left by the FCA was bridged, to a degree, by military commanders through the use of CERP.

A key feature of CERP, however, is that it is a tool at the discretion of the military commander and does not in any way create a right for the person who has lost property or been displaced.[161] Otherwise stated, CERP is a matter of command grace rather than an Iraqi citizen's right. The ability of the displaced Iraqi citizen to receive restitution for destroyed property through that legal mechanism is, therefore, somewhat limited. Where U.S. contractors or Coalition Forces are concerned, this is a rather pronounced blind spot. Although military commanders palliated this blind spot—to an extent—through the use of CERP, this program is not a restitution mechanism nor does it ensure that each aggrieved Iraqi has a remedy.

Recent developments have done little to bridge the gap. The current SOFA between Iraq and the United States addresses compensation for military damage in Article 21.[162] Pursuant to that provision of the SOFA, Iraq has waived the right to claim compensation for "for any damage, loss, or destruction of property, or compensation for injuries or deaths" inflicted upon "members of the force or civilian component[.]"[163] As for damage to ordinary civilians, however, the treaty provides:

> United States Forces authorities shall pay just and reasonable compensation in settlement of meritorious third party claims arising out of acts, omissions, or negligence of members of the United States Forces and of the civilian component done in the performance of their official duties and incident to the non-combat activities of the United States Forces. United States Forces authorities may also settle meritorious claims not arising from the performance of

---

[158] *See* Major Bobbi Davis, *Contract and Fiscal Law Developments of 2003—The Year in Review: Appendix A: Department of Defense (DOD) Legislation for Fiscal Year (FY) 2004*, ARMY LAW., Jan. 2004, at 199, 204 (quoting Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003)).

[159] *Id.* at 204.

[160] *See* Major Jennifer C. Santiago, *Contract and Fiscal Law Developments of 2005—The Year in Review: Fiscal Law: Operational Funding*, ARMY LAW., Jan. 2006, at 165.

[161] Sharon L Pickup, U.S. Gov't Accountability Office, Memorandum to Cong. Comms.: Military Operations: Actions Needed to Better Guide Project Selection for Commander's Emergency Response Program and Improve Oversight in Iraq, GAO-08-736R (June 23, 2008).

> DOD has established broad selection criteria for CERP projects, which gives significant discretion to commanders in determining the types of projects to undertake. CERP is intended to provide commanders a source of funds that allow them to respond to urgent, small-scale humanitarian relief and reconstruction needs that will immediately assist the local Iraqi population.
>
> *Id.* at 3.

[162] AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF IRAQ ON THE WITHDRAWAL OF UNITED STATES FORCES FROM IRAQ AND THE ORGANIZATION OF THEIR ACTIVITIES DURING THEIR TEMPORARY PRESENCE IN IRAQ [hereinafter "US-Iraq SOFA"] Article 21 (available at http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf).

[163] *Id.*

> official duties. All claims in this paragraph shall be settled expeditiously in accordance with the laws and regulations of the United States. In settling claims, United States Forces authorities shall take into account any report of investigation or opinion regarding liability or amount of damages issued by Iraqi authorities.[164]

The language of the SOFA is striking in three regards: (1) it is mandatory in nature (seemingly obligating the U.S. to pay some claims); (2) it is vague in detail, deferring to U.S. law rather than establishing a claims mechanism; and (3) it limits the sorts of payable claims to those "incident to the non-combat activities of the United States Forces."[165] While the SOFA, therefore, seems to implement some form of official claims process, the language keeps in place the current statutory scheme by formally agreeing that such claims will not encompass combat-related damage and by stating that the claims will be governed according to the "laws and regulations of the United States."[166] This would indicate that claims by Iraqi citizens will continue to be governed by the combination of the FCA and CERP discussed above.

Even if this language, however, is interpreted to implicate the IACA (as that legislative scheme applies to agreements between the United States and other nations if the agreements provide for "settlement or adjudication and cost sharing of claims against the United States"),[167] payment under that legislative scheme is discretionary, allowing that

> [w]hen the United States is a party to an international agreement which provides for the settlement or adjudication and cost sharing of claims against the United States . . . the Secretary of Defense or the Secretary of Homeland Security or their designees *may* . . . reimburse the party to the agreement [or] pay the party to the agreement the agreed pro rata share of any claim, including any authorized arbitration costs, for damage to property owned by it, in accordance with the agreement.[168]

Nothing in the statutory language of the IACA actually requires payment. Further, both the SOFA and the statutory language of the IACA provide that combat-related damage is not payable.[169]

Accordingly, in most cases, the current SOFA does not provide a restitution mechanism for Iraqis who are displaced due to military action. As such, the gap in the current restitution scheme in Iraq is still present. To remedy this deficiency, either the FCA should be amended or new legislation introduced to create a claims process whereby such claims could be "investigated, adjudicated, and settled."[170] This could be effected through U.S. legislation which would modify current restrictions or through Iraqi legislation which would permit such claims to be paid from Iraqi funds. Doing so would completely "close the gap" that was torn open in Iraqi civil law through post-invasion legislative modification.

---

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] 10 U.S.C. § 2734a(a) (2006); *see also* Dunlap, *supra*, note 145.

[168] § 2734a(a) (italics added).

[169] 10 U.S.C. § 2734a(b) (2006).

[170] *See* Major Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, ARMY LAW., June 1998, at 1.

B. Interfering Legislation

Not all weaknesses in Iraqi civil law are due to external interference or foreign intermeddling. At a recent conference in Amman, Jordan, sponsored by the United States Institute for Peace (USIP), Iraqi jurists expressed concern over Iraq's Land Registration Law—a statute separate from the Iraqi Civil Code—which could possibly operate to allow the transfer of property in situations where there has been coercion.[171] This statute, thus, serves to eclipse the protections granted by the Iraqi Civil Code which, as described in this article, would invalidate any transaction which was tainted by undue coercion.[172] Allowing coerced transfers would inflict significant injustice on the victims of such violence and sow further discord among Iraqi citizens. Accordingly, Iraq's Land Registration Law should be amended so that the protections of the Iraqi Civil Code apply in all transfers.

Likewise, although the Iraqi Civil Code's provisions on lease are equitable in operation, Iraqi lease law becomes problematic with the provisions of a separate statute known as Lease Law No. 87 of 1979 – a statute which supersedes the Iraqi Civil Code and prevents Iraqi citizens from availing themselves of its protections.[173] For instance, Article 17(1) of the Lease Law No. 87 states that if the lessee does not pay the rent within seven days after its due date, the lessor shall warn him through notary public that he or she has eight days from the date of notification to pay the rent.[174] The lessee shall pay all the expenses incurred by the lessor in making this notification.[175] The lessee may benefit from this eight-day window of protection once a year starting from the date of the last warning. Thereafter, the lessor may evict the lessee at any time if the lessee does not pay the rent within fifteen days after its due date. [176] Further, Article 17(7) of Lease Law No. 87 states that if the leased estate remains uninhabited for more than forty-five days without any excuse, the lessor may institute eviction proceedings.[177]

Such a legal scheme creates numerous problems for displaced persons as there is no exception in the law which tolls the forty-five-day period for reasons associated with displacement. Thus, displaced persons who rent their homes may return to find themselves legally evicted.[178] Thus, once again, a statute separate from the Iraqi Civil Code serves to problematize the legal scheme and mute its protections. Commentators have noted the undesirability of such legislation in the context of displacement. Rhodri Williams, a consultant with the Brookings-Bern Project on Internal Displacement, has proposed several specific legal initiatives to augment the Iraqi government's ability to remedy the ills associated with its displacement crisis.[179] Among those recommendations, Williams notes:

---

[171] *See* UNITED STATES INSTITUTE OF PEACE AND THE WORLD BANK, ADDRESSING PROPERTY ISSUES ARISING FROM POST-2003 DISPLACEMENT AND RETURN (July 2008).

[172] *Id.*

[173] Ameer Kadhim Al-Shemmary, *The Presidential Dewan: The Problem of Migration and the Displaced*, 2 (citing Lease Law No. 87 (1979) (Iraq)), *available at* http://www.usip.org/ruleoflaw/projects/iraq_property/conf_docs/AnalysisBy_JudgeAmeerAl-Shimaria-En.pdf.

[174] *Id.* at 4.

[175] *See id*.

[176] *Id.*

[177] *Id.* at 5.

[178] *Id.*

[179] RHODRI C. WILLIAMS, APPLYING THE LESSONS OF BOSNIA IN IRAQ: WHATEVER THE SOLUTION, PROPERTY RIGHTS SHOULD BE SECURED (Jan. 2008).

> The Iraqi authorities should clearly state that the longstanding provisions of the Iraqi Civil Code on property title remain in force. These rules specify that true title does not pass with property acquired unlawfully; that transfers of property made under duress are invalid; and that those wrongfully dispossessed are entitled to the return of their property as well as compensation for lost income streams such as rental agreements or crops.[180]

In order to do so, the government of Iraq must undertake a review of all civil legislation in force—including the Law of Land Registration, Lease Law No. 87 of 1979, etc. – and ensure that none operate to eclipse or otherwise mute the protections expressly granted under the Iraqi Civil Code. In other words, the Iraqi Civil Code's provisions which invalidate transfers of property that are made under duress, made fraudulently, or made clandestinely, should prevail in all circumstances and no legislation should operate in a way that interferes with those protections. Any such legislation should be repealed or amended so that the protections of the Iraqi Civil Code again occupy a place of preeminence in the legal order.

V. Legislative Adjustments to Meet Contemporary Challenges

As demonstrated, the Iraqi Civil Code provides an adequate legal scheme for providing restitution to property owners who have been displaced or who have suffered a loss due to damaged property. Given its cultural importance, any adjustments made to Iraqi substantive law should be carefully considered and made within the context of Iraq's legal tradition—one which has strong ties to the French *Code Civil* as well as the law of the Ottoman Empire.[181] In that regard, an analysis of the Iraqi civil law system reveals areas and means by which Iraqi law could be adjusted in order to strengthen the ability of displaced persons to regain their property: the express tolling of prescriptive periods, broadening of the application of duress, and the adoption of the traditional civilian concepts of *lésion* and *negotiorum gestio*.

A. Ensuring Claims Are Not Lost Due to Loss of Time

As noted above, consistent with the civilian concept of *contra non valentum agere nulla currit praescriptio*, the Iraqi Civil Code contains provisions that toll the running of such prescriptive periods where a person has not been capable of exercising his or her right.[182] Rhodri Williams suggests that the Iraqi government "should clearly state that the current violence makes it presumptively impossible for displaced persons to invoke remedies under the Code, in order to ensure that their claims are preserved against the workings of statutes of limitations."[183] Additional legislation could, therefore, be enacted to reinforce the existing protections available under Iraqi law and state unequivocally that claims for lost or damaged property are not to be extinguished due to the passing of time so long as the current conflict and violence endures.

B. Broadening the Scope of Duress

Iraqi civil law contains strong protections for those forced to sign contracts in the Iraqi code's treatment of duress. These protections, however, have significant limitations in terms of scope as duress is only actionable where the threat is to cause injury to one's parents, spouse, or an unmarried relative on the maternal side.[184] This leaves a host of family members available as targets for duress – mainly those

---

[180] *Id.* at 4.

[181] *See* Jwaideh, *supra* note 8, at 180.

[182] IRAQI CIVIL CODE, *supra* note 72, art. 435.

[183] WILLIAMS, *supra* note 179, at 5.

[184] IRAQI CIVIL CODE, *supra* note 72, art. 112(3).

unmarried family members outside the party's immediate family and family members on the maternal side.[185] Given the current circumstances in Iraq and the innumerable ways of inflicting duress and cruelty, such limitations are clearly inappropriate.

In order to remedy this problem, Article 112 of the Iraqi Civil Code should be amended to allow that duress can serve to vitiate a contract when threats are directed against third parties. Models for such legislative changes exist to guide Iraqi legislators in this amendment. The scope of duress was recently broadened in Louisiana, another civil law jurisdiction which adheres to the same basic precepts in the realm of contract defects. Writing on this legislative change, renowned jurist Saul Litvinoff noted that French doctrine favored a broader application of duress so that duress against a wider spectrum of third parties could result in rescission of a contract.[186] Of that change, Litvinoff writes:

> A new article makes duress effective as a vice of consent not only when directed against a spouse, an ascendant, or a descendant of a party to a contract, but also when directed against others, such as a person toward whom a party may feel strong friendship or with whom a party may have a close relationship either based on or productive of strong affection. In such a case the court is allowed the discretion necessary to find whether a particular relation between a party to a contract and a third person is of a nature such as to make that party vulnerable to duress exerted through the creation of a situation of danger to the third person. That solution, which is perfectly consistent with societal values, is recommended by French doctrine.[187]

By emulating this legislative change, article 112 of the Iraqi Civil Code could be changed to allow duress to be actionable against third parties if the court finds that the particular relation between a party to a contract and the third person is of such a nature as to make that party vulnerable to duress. This would keep all contracts from being unreasonably undermined while allowing that – in appropriate circumstances – duress against others can result in undue coercion.

It must be noted that this is not merely a European notion. Citing Islamic jurists, El Fadl notes that

> Ibn Hazm, for example, after citing a *hadith* (*hadith* are sayings of the Prophet often serving as the basis for legislation) stating that Muslims are brothers [argued that] it follows they should protect each other. Since Muslims are joined by mutual empathy, harm to a third party, even a stranger, will cause enough grief to constitute duress.[188]

Broadening the scope of duress in the Iraqi law would, therefore, be consistent with the practices of other civil law jurisdictions (such as France and Louisiana) as well as in keeping with Islamic law. It would also ensure that victims of threats against extraneous family members do not result in valid contracts.

---

[185] *Id.*

[186] *See* Saul Litvinoff, *Vices of Consent, Error, Fraud, Duress, and an Epilogue on Lesion*, 50 La. L. Rev 1, 104-05 (1989).

[187] *Id*. at 105-106.

[188] El Fadl, *supra* note 96, at 152 n.126.

C. Protecting against Forced Transfers of Property through *Lèsion*

Displacement of persons in Iraq has been perpetrated in numerous ways—including violence and the threat of violence.[189] While the sight of someone signing a contract at gunpoint might be an obvious indicator of duress and would give rise to rescission based on the principles discussed above, not all forms of duress are so apparent or easy to prove. Someone who is forced to sell property due to threats made to a family member, or some equally pernicious though indirect exercise of violence, may not be able to prove his or her claim in a legal forum. In such circumstances, Iraqi legislators may provide some relief through the adoption of a variant of the traditional civilian concept of *lésion*.

The term *lésion* refers to the substantive unfairness of a transaction due to the disproportionate nature of the contract.[190] The classic example of *lésion* operating to invalidate a contract is in the sale of an immovable for less than seven-twelfths of its value.[191] Writing in 1833, Professor A. M. Demante explained this concept:

> Quoique en general la lésion ne soit pas une cause de restitution pour les majeurs, la loi, prenant ici en consideration la position du vendeur, que le besoin d'argent force souvent a vendre au-dessous du juste prix, lui accorde l'action en rescission; mais pour cela, il faut: 1. que l'objet vendu soit un immeuble; 2. que la lesion soit plus des sept douzièmes. Du reste, cette rescision, fondée sur l'équité, a lieu nonobstant toute clause ou stipulation contraire; car ces clauses, qui d'ailleurs seraient devenues du style, sone infectées due même vice que la vente.[192]

The French legal tradition, therefore, automatically concludes that certain contracts are so disproportionate or contain certain indicia of unfairness that give rise to an automatic action for rescission by the seller. Commentators note that the concept has expanded through time and, through legislative augmentation, numerous types of contracts in contemporary France are now subject to rescission for various indicia of unfairness.[193]

The Iraqi Civil Code—a descendant of the French *Code Civil*—could be amended to incorporate this concept and tailor it to an Iraqi-specific context. This could be done in a more obvious manner, such as adjusting the proportion in the selling price of the immoveable upwards or downwards. It could also be adopted in a more creative context—such as deeming all transfers of property conducted in a certain place during a certain time unfair due to the level of violence and history of displacement. Displaced persons, therefore, would be granted an additional protection through the ability to rescind certain transfers of immoveable property based on objective criteria.

D. *Negotiorum Gestio*

Another traditional civilian concept that could be incorporated into the Iraqi Civil Code is that of *negotiorum gestio* or *gestion d'affaires*. This concept, which is Roman in origin, is a defining feature of the French

---

[189] *See e.g.*, Katherine Ridolfo, *Iraq: Displacement Crisis Worsened by Violence* (2006), http://www.globalsecurity.org/wmd/library/news/iraq/2006/04/iraq-060421-rferl01.htm (detailing campaigns of intimidation).

[190] *See* BELL, BOYRON & WHITTAKER, *supra* note 8, at 329.

[191] IRAQI CIVIL CODE, *supra* note 72, art. 1674.

[192] A. M. DEMANTE, PROGRAM DU COURS DE DROIT CIVIL FRANÇAIS 174 (1833).

[193] *See* BELL, BOYRON & WHITTAKER, *supra* note 8, at 329.

civil law system.[194] Pursuant to this doctrine, a quasi-contract is formed where a person voluntarily and intentionally performs a useful act for the benefit of another or on another's behalf.[195] The classic example of such an act is boarding up a vacationing neighbor's windows as a hurricane approaches or mending his roof prior to an inundation.

> The justification for the obligations imposed on both parties by *gestion d'affaires* is said to lie in a policy of encouraging citizens to help each other by requiring some recompense when they attempt to do so: it fosters, therefore, a limited altruism. This lies behind the requirement of an intention to act on behalf of or for the benefit of ('*pour le compte*') the *maître* and it distinguishes *gestion d'affaires* from *enrichissement sans cause* where no such requirement is made. As a result, in general it will not arise where a person acts in his own interest even though this benefits the would-be *maître*.[196]

Once such an act has been performed, the *maître* must indemnify the *gérant* for the useful and necessary expenses he or she incurred during the altruistic intervention.[197] Commentators note that this requirement that the *gérant's* acts be useful allows courts to keep philanthropy from becoming "a screen for ill-timed, inappropriate or selfish interventions."[198]

The concept of *negotiorum gestio* serves "the uniquely civilian goal of providing an incentive to protect another's interests in the exceptional case in which a person is unable to manage his own affairs."[199] Amending the Iraqi Civil Code to incorporate a *negotiorum gestio* regime might well, thus, serve to encourage citizens to care for one another's property to a greater degree, take steps to ensure that it does not become occupied by others while they are absent, and deterring others from damaging or taking it. Joseph Raz referred to such norms as "principles guiding behavior" which can shape the social order by providing motivation to induce individuals to behave in a certain manner.[200] As other commentators have noted, "[L]aws may significantly reduce the incidence of certain acts, thereby preventing people from forming habits they might otherwise form; and second, laws may be part of the complex mixture of forces that contribute to the shaping of people's moral ideas."[201] Given the unique property issues that confront contemporary Iraq, such legislative encouragement is worth a try.

E. Summary

None of the legislative modifications proposed above are required in order for the Iraqi Civil Code to comport with the requirements placed upon it by the international standards for the treatment of displaced persons. The provisions of Iraq's civil law system largely meet those standards as they are currently written. Further, none of the proposed modifications would cure all the ills associated with the current displacement

---

[194] *Id.* at 399-406.

[195] *Id.* at 403.

[196] *Id.*

[197] *Id.* at 405.

[198] *Id.* at 404 (citations omitted).

[199] Cheryl L. Martin, *Louisiana State Law Institute Proposes Revision of Negotiorum Gestio and Codification of Unjust Enrichment,* 69 TUL. L. REV. 181, 212 (1994).

[200] JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 124–25 (2d ed. 2003).

[201] *See* Christopher Wolfe, *Forum on Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 68 (2000).

crisis or—without more—reverse the processes giving rise to continued displacement. Nonetheless, the modifications proposed above would constitute definite improvements and would serve as means by which Iraqi civil law could better address the problems confronting displaced persons. Duress can be broadened through minor legislative changes which would leave Iraqi law in line with both continental civil law and the Islamic legal tradition. Moreover, as the concepts of *lésion* and *negotiorum gestio* are firmly grounded in the continental civil law tradition to which Iraq belongs, Iraqi judges may look to the jurisprudence of continental civil law jurisdictions across the globe to help define and apply these new provisions. This is through application of Article 1 of the Iraqi Civil Code which states that judges shall be guided by the judgments of the "judiciary and jurisprudence in Iraq and then of the other countries the laws of which are proximate to the laws of Iraq."[202]

While none of these amendments would be a panacea to all of Iraq's displacement woes, together with the constellation of protections currently available in the Iraqi Civil Code, they would buttress the legal armaments available to the displaced and facilitate the just resolution of property disputes in a forum that is just, effective, and legitimate.

VI. Conclusion

The displacement crisis in Iraqi is real and ongoing. Such large-scale displacement drives civilians to join militias and, thereby fuels an insurgency the United States is seeking to quell.[203] Solutions to this crisis must, therefore, be quickly sought and immediately implemented. Such solutions must comport with international standards but must also—given the nature of the crisis—be effective, immediate, and durable. These criteria mandate that a solution be found within the existing legal machinery in Iraq.

The Guiding Principles on Internal Displacement and the Pinheiro Principles provide an articulation of the rights and obligations relating to displaced persons under international law. Those instruments make certain demands on a nation's substantive civil law, primarily in the way the nation's legal architecture frames the nature of ownership, the means of restitution, and the protection given to secondary occupants. Iraqi's civil law system, currently the only option for those displaced since 2003, is a modern, advanced system which recognizes and protects private ownership through its sophisticated regime of legal actions. It provides for actions by which displaced persons can reclaim their property and even allows for lesser property rights (such as possessory rights) which can be utilized by those whose records have been destroyed during the conflict. A series of articles regulate the rights and duties of secondary occupants, giving them appropriate protections and a fair amount of due process.

As such, in the final analysis, the existing Iraqi civil law system is an adequate legal scheme for providing restitution to property owners who have been displaced or who have suffered a loss due to damaged property. Although it contains a major "blind spot" in a lack of remedies for those who lose property due to military action, such a blind spot is not due to any organic defect in the Iraqi legal system but, rather, the imposition of legislation by the CPA. In addition, further legislative action can provide even greater protections to displaced persons by giving the protections of the Iraqi Civil Code a place of greater preeminence in the legal system, dispensing with unnecessary legal provisions which inhibit the protections contained in the Iraqi code, and ensuring that claims are not extinguished by the passage of time. Further, broadening the scope of duress and incorporating the concepts of *lésion* and *negotiorum gestio* would augment the existing legal system in a way that better serves the interests of the displaced and in a manner consistent with the Iraqi legal tradition.

---

[202] IRAQI CIVIL CODE, *supra* note 72, art. 1(3).

[203] *See* REFUGEES INT'L, *supra* note 1, at 4 (noting that the Sadrist movement provides displaced persons with provisions such as rice, flour and sugar).

The current state of affairs in Iraq cannot suffer delay in finding a solution. With over 5 million Iraqis displaced by violence,[204] and insurgents benefitting from the lack of a solution,[205] time is of the essence. By devoting resources now to Iraq's civil courts, increasing their institutional capacity, making minor legislative modifications, and preparing for the claims to come, the government of Iraq can effectively confront the challenge before it. Acting otherwise will only result in wasted time and prolonged suffering. It will also make Iraqi law—with all its history and cultural importance—merely one more victim of the displacement crisis. Policymakers would do very well, in that regard, to heed the words of Montaigne, who wrote, "[i]t is very easy to accuse the government of imperfection, for all mortal things are full of it. It is very easy to engender in a people contempt for their ancient observances; never did a man undertake that without succeeding. But as for establishing a better state in place of the one they have ruined, many of those who have attempted it have achieved nothing for their pains."[206]

[204] *Id.* at 16.

[205] *Id.* at 2.

[206] MICHEL MONTAIGNE, THE COMPLETE ESSAYS 498 (1958).

Appendix

(Means of Legal Recovery for Displaced Iraqis)

Nature of Dispossession	***Available Remedy***	***Comment***	***Provision***	***Limitation***
Adverse Possession	Possessory Action Usurpation Action	Restitution is possible, and time limits could be tolled via ICC Art. 435. Possessory action available where proof of ownership is lacking.	ICC Arts. 1145 - 1152 ICC Arts. 192-201	Some evidence is required on the part of the claimant.
Property Destroyed by Insurgents/Militia	Civil Tort Action	Allows compensation for destroyed property.	ICC Arts. 202/204 - 231	No real guarantee that the defendant can pay adjudged damages.
Property Destroyed by Military Operation	Military Claim or CERP	This falls into a jurisdictional and administrative blind spot which military commanders can palliate through CERP.	SOFA Article 21 (FCA and CERP)	CERP is a tool at the military commander's discretion and not a restitution mechanism.
Renter (Rented Property Destroyed)	Action under ICC 755 and ICC Art. 202/204.	Rent, however, is no longer paid as contract is rescinded.	ICC Art. 751	In spite of legal recourse, displaced renters are not necessarily entitled to new housing.
Forced Contract	Rescission of Contract under Article 112	An indirect form of coercion that is a sometimes used by militias and others seeking to oust particular residents from their homes.	ICC Art. 112	Only applicable for threats to the person conveying property, his/her parents, spouse, or an unmarried relative on the maternal side.