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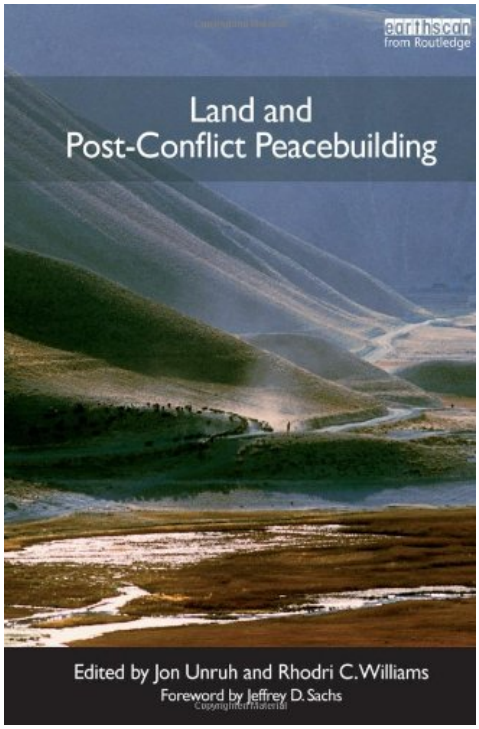


# Refugees and legal reform in Iraq: The Iraqi Civil Code, international standards for the treatment of displaced persons, and the art of attainable solutions

Dan E. Stigall [a]
[a] *U.S. Department of Justice*

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# 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*

Although the U.S. military has withdrawn from Iraq, Iraq continues to face one of the most acute displacement crises in the world (IRC 2011). Over 5 million Iraqis have been displaced by violence, with 2.7 million of them internally displaced within Iraq (Younes and Rosen 2008). Such a situation creates not only a humanitarian crisis but also an opportunity for insurgents and militia groups to exploit the displacement crisis in order to legitimate themselves and achieve geopolitical goals. Consequently, the problem of displacement and the search for a solution to the current crisis— once salient issues for military commanders conducting counterinsurgency operations—will now be left to Iraqi authorities. The goals and challenges of a sovereign Iraq, however, will be largely the same as those faced by the military commanders who once toiled there. 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. . . . 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 activity. [Counterinsurgency] thus involves the application of national power in the political, military, economic, social, information, and infrastructure fields and disciplines (U.S. Army 2006, 13).[1]

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Dan E. Stigall is a trial attorney in the Office of International Affairs of the U.S. Department of Justice. Any opinion expressed is solely that of the author and not necessarily that of the Department of Justice. A version of this article was initially published in the *Rutgers Law Record* and is adapted here with the journal's express permission.

[1] See also U.S. Army (2008b, para. 3-37): "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."

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" (Younes and Rosen 2008, 4). Displacement has become an engine of the insurgency. It is critical, therefore, to find adequate remedies for displaced persons as well as policies to effect property restitution and resettlement. The solutions must be effective, durable, and—most important—attainable.

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 through limited grants and assistance with rent.[2] Such positive initiatives will certainly assuage the suffering of the displaced and foster their return home. 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 that, in many cases, is currently occupied by people who have no intention of giving it up (Younes and Rosen 2008). Such property disputes are typically the proper subject of civil courts and a nation's substantive civil law (Jwaideh 1953; Bell, Boyron, and Whittaker 1998).

Iraq differs in many ways from Afghanistan, the other major front of current U.S. military engagements in the Middle East. While Iraq was a rogue state under Saddam Hussein, it was not a failed state. Unlike Afghanistan, it has historically maintained a strong central government that was capable of extending its power throughout the majority of its realm. Iraq also has maintained some relatively effective governmental institutions. Among the more vibrant elements of Iraqi government are its judiciary and sophisticated legal culture. From the perspective of those seeking to effect reconstruction and to counter certain problems associated with war and insurgency, the existence of such functional institutions allows for options that might be unavailable elsewhere.

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. 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. 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, Social and Cultural Rights (ICESCR), and the Geneva Conventions (Phuong 2004). 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 (Guiding Principles) and the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles) (Paglione 2008).

The Guiding Principles, which were finalized in 1998 (UNCHR 1998; Brookings Institution 2000), are a set of guidelines developed in an attempt to enhance

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[2] See, for example, Council of Ministers Decree, No. 262 of 2008 (on file with author).


protection and assistance for persons forcibly displaced within their own countries by events such as violent conflicts, gross violations of human rights, and natural and manmade disasters (Kälin 2008). As Walter Kälin states:

> 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 (Kälin 2008, xi).

The Pinheiro Principles—named for Paulo Sérgio Pinheiro—are a more recently formulated set of international standards, which were endorsed by the UN Sub-commission on the Promotion and Protection of Human Rights in 2005 (Leckie 2006). 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" (UN 2005, sec. I, para. 1.1). A director of one nongovernmental organization 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 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 (Leckie 2006, 16).

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 that tends, at times, to go beyond existing law (Phuong 2004). 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 they envision (UN 2005). Differences in their respective levels of acceptance, however, suggest 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 (Kälin 2008).[3] The Pinheiro Principles, in contradistinction,

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[3] Kälin summarizes the broad support for the Guiding Principles thus:

> 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 persons" (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 Co-operation in Europe (OSCE) recognized that 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 (Kälin 2008, vii–viii).

have more detail but have not yet reached the level of international acceptance of the Guiding Principles.[4]

This chapter compares the substantive provisions of Iraqi civil law to both instruments—layering them together as an overlay above a map of Iraq's legal terrain. Doing so makes clear 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 chapter 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 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.

## THE CURRENT LEGAL FRAMEWORK

While many Iraqis were displaced prior to 2003, the crisis continues as Iraqis flee to escape unceasing sectarian and ethnic violence. As noted by David Enders in 2011, "the 'Baghdad Belt,' the demographically mixed cities and villages that ring the capital . . . have seen some of the worst violence of the last eight years" (Enders 2011). And according to UNHCR estimates for 2006, approximately 500,000 Iraqis were internally displaced that year alone, with 40,000 to 50,000 fleeing each month (UNHCR 2007). The Commission for the Resolution of Real Property Disputes (CRRPD), the only such entity functioning in Iraq, addresses exclusively—as specified by its statute—those claims that arose between July 17, 1968, and April 9, 2003.[5] There is now no mechanism in place to assist with post-2003 property restitution claims or the ongoing displacement crisis. 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 the need for some amendments—is more than capable of addressing the needs of displaced persons and those who have lost property (Stigall 2005).[6]

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[4] For further discussion of the Pinheiro Principles, see Barbara McCallin, "The Role of Restitution in Post-Conflict Situations," and Samir Elhawary and Sara Pantuliano, "Land Issues in Post-Conflict Return and Recovery," both in this book.

[5] Statute of the Commission for the Resolution of Real Property Disputes, Order Number 2 of the Year 2006. Unofficial English translation by the Reparations Programmes Unit, International Organisation for Migration, Geneva. www.brookings.edu/projects/idp/Laws-and-Policies/~/media/Files/Projects/IDP/Laws%20and%20Policies/Iraq_2006_PropertyResolution.pdf.

[6] For a further discussion of areas of the Iraqi Civil Code in need of amendment, see Hamoudi (2008a).

The Iraqi Civil Code can be aptly described as a member of the civilian (Continental civil law) family that is deeply informed by Islamic legal influences. The code was enacted in the twentieth century, when Iraq blended into its legal culture many elements of the Continental civil law tradition (Jwaideh 1953). The Iraqi Civil Code was principally authored by Abd al-Razzāq al-Sanhūrī, who was then the dean of the Iraqi Law College (Jwaideh 1953). Zuhair Jwaideh notes that as Iraq approached modernity, "the conditions under which [Ottoman law] had been enacted had completely changed and legislation for a new and unified civil code became a necessity" (Jwaideh 1953, 178). 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 (Jwaideh 1953). The code made "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" (Arabi 1995, 167).

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 (Jwaideh 1953). 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.

## A MEANS OF RESTITUTION

Catherine Phuong, a lecturer in law at the University of Newcastle, in England, notes that although there is no explicit provision in the main international human rights instruments (such as the ICCPR and the ICESCR) that guarantees the right of restitution of property, there is an emerging trend toward providing restitution and compensation for loss of property to displaced persons (Phuong 2004). 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 (Kälin 2008, 133–134).

Those same authorities are also tasked with the 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 (Kälin 2008).

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" (UN 2005, sec. V, para. 12.1), 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. Thus, both instruments impose an affirmative duty on the part of governments to facilitate the restitution of property to 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, it is possible to 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 has adequate resources. The question of which mechanism is best 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 "practice has clearly shown that a consistent legal framework should ideally be in place prior to instigating the claims process. A clear and consistent legal framework is vital for restitution programs to succeed" (Leckie 2003, 399). Leckie also notes, however, that legal complexities and problematic regulatory frameworks have served to stall restitution efforts in the past. 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 2008 paper from 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 (Ferris 2008, 26–27).

The Brookings paper is full of important data and interesting insights. Further, its author—a notable human rights advocate and a 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. It is a sui generis commission—akin to an administrative entity—with its own unique structure and procedure. 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" (Ferris 2008, 26) is a bit like damning the entire concept of automotive transport because your car has a flat tire. The CRRPD is just one of many competing quasi-judicial models. Its success or failure will certainly have causes related to its unique circumstances rather than to some feature of 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 the need to resolve conflicting claims and the need to provide a forum in which grievances can be aired and adjudicated peacefully, thus reducing the appetite for revenge (Nagle 2000). As Richard 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 (Posner 1998, 50).

For such reasons, the role of courts in resolving property disputes is vital. However, even if one were to discount the role of judges and courts as a conflict-resolving mechanism, there are two very practical reasons why 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.

## Acute crises require immediate responses

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" (Ferris and O'Hanlon 2008).[7] As this chapter will demonstrate, Iraqi civil law does contain some weaknesses but is by no means unusually

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[7] For an interesting discussion of such assertions in international development discourse, see Beard (2007, 76), who notes: "Indeed, 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."

complex. Moreover, the appropriate solution for the problems associated with a struggling Iraqi judicial system is to make the needed changes 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 on 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 that does not yet exist and that will operate by a new law still to be enacted, let alone 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 be resolved simply 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 squatter removed. In Iraq, many of these cases are currently being addressed through direct government action. For instance, Prime Minister Nouri al-Maliki issued a general eviction order that, beginning on August 1, 2008, gave all individuals occupying the houses of displaced persons one month to either vacate the property or face eviction. In order to enforce this order, the Iraq government undertook a large-scale eviction and property restitution campaign (IDP Working Group 2008). Local authorities ordered all squatters to leave public property, although some "local authorities are applying the Eviction Order only to certain areas or land" (IDP Working Group 2008, 14). The Iraqi Army was given a leading role in directly facilitating displaced persons' return, evicting squatters, and restoring property to its true owners. The U.S. military assisted in this restitution process (Garcia-Navarro 2008). Myriad cases of displacement will be resolved in this manner and, therefore, will not be a burden on the Iraqi court system.

Using the existing legal machinery is also appropriate because Iraq's displacement crisis is not a fait accompli but an ongoing event (Tavernise 2008). Depriving courts of jurisdiction over such matters would have meant removing a domestic institution from the critical role it was designed to play and creating a legal deprivation without end. Civil courts would have lost their authority to hear property disputes for the foreseeable future. Such long-term institutional starvation is inimical to a broader state building effort (Paris 2004).

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 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 would have to be formulated, debated, and then enacted in accordance with the Iraqi legislative process (Ardolino 2008). 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. 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. While reports indicate that there is currently a glaring lack of willingness on the part of some judicial entities in Iraq to enforce court orders and judgments, such unwillingness is not due to a defective judicial model but, quite the contrary, to a lack of political will on the part of those charged with administering the current model. Problems associated with a lack of political will are not solved through the imposition of new institutions but through the ascendance of new governments and new administrators—or through a change in the outlook of those currently in power. In other words, if a government simply does not prioritize the enforcement of court orders, no amount of institutional tinkering is going to improve the enforcement problem. The lack of governmental support becomes a barrier *erga omnes* (Latin for "in relation to everything"). This is because the problem lies not with the institution but with the attitude and philosophy of the government charged with administering it.

That said, there are some signs that issues of displacement are being taken increasingly seriously by the current regime. Further, there are indications of progress in strengthening the Iraqi judiciary, with the number of Iraqi judges more than doubling (from 500 to 1,200) between 2006 and 2008 (Leinwand 2008). If that trend continues, the decisions made by Iraqi courts should be implemented appropriately. As for the means by which such decisions are made and the laws guide them, however, the Iraqi Civil Code was enacted decades ago, has been tested in practice, is currently in force, and is engrained in the socio-juridical consciousness of the Iraqi polity (Hamoudi 2008b; Stigall 2006). Given those facts, the acute nature of the current crisis, and the realization that any solution must be one that can be implemented immediately, the solution to the current displacement crisis must involve improving the existing judicial apparatus and must be based on Iraqi law now in force.

## 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 (Malaurie 1997). Further, in the broader context of a state building effort, the nature of a nation's substantive law becomes particularly salient: 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 (Coyle 2003). Preexisting

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 that 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 Bali notes that a better model for a more robust nation-building project is the indigenous ownership of both institutional design and implementation, along with external logistical support. He posits that "for 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" (Bali 2005, 438–439). This echoes the lessons of current counterinsurgency doctrine, which holds that "long-term success in [counterinsurgency] depends on the people taking charge of their own affairs and consenting to the government's rule" (U.S. Army 2006, para. 1-4).

Specifically regarding Iraqi substantive law, 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 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 [Coalition Provisional Authority] gave us on the Iraqi side a day to review their drafts [of legislation]. 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 (Hamoudi 2008b).

Professor Hamoudi's words resonate much like those of the French jurist Phillippe Malaurie, who noted—in the context of French law—that the French code 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 that the symbol of national unity. . . . The Civil Code is at the same time the cause, the witness and the consequence of our cultural identity (Malaurie 1997).

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 Richard Posner has described as "epistemic democracy" (Posner 1998, 14). 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.

## THE ARCHITECTURE OF OWNERSHIP

Both the Guiding Principles and the Pinheiro Principles require that displaced persons be allowed to exercise full ownership of property without illegal interference or discrimination. The Guiding Principles provide that "no one shall be arbitrarily deprived of property and possessions" (Kälin 2008, 95). Further, "property . . . left behind by internally displaced persons should be protected against destruction . . . [or] appropriation" (Kälin 2008, 96). The Pinheiro Principles, in turn, state that "everyone has the right to the peaceful enjoyment of his or her possessions" (UN 2005, sec. III, para. 7.1) and that "everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence" (UN 2005, sec. III, para. 5.1). The Pinheiro 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 these protections to everyone within their legal jurisdiction" (UN 2005, sec. III, para. 5.2). 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 that, by their nature or by law, are excluded. Property is defined as everything that has a material value. The Iraqi Civil Code recognizes the right to complete private ownership of property. Under the code, the owner of the property is considered to be the owner of everything commonly considered to be an essential element of it. 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, as well as its fruits, crops, and anything else that it produces. No exception is made for gender, class, religion, or sect, as this is a universally applied right. Further, as articulated in section IV of the code, Iraqi civil law protects the property 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 Guiding Principles and Pinheiro Principles, as it makes no distinction based on gender or status and protects the owner's absolute right over the property owned.

## 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 elsewhere (Stigall 2006, 2008), and only key points will be emphasized here. 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. Second, adverse possession that is obtained by force, deceit, or in secret has no effect whatsoever on the property's ownership.[8] The Iraqi Civil Code's hostility toward possession that is tainted by coercion, secrecy, or ambiguity is critical to those who are displaced through violent or deceptive means. The fact that possession coupled with coercion is not recognized by the law means that a militia member who forcibly ousts a resident and then maintains possession of his or her home through the use or threat of force has no legal claim. 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 regain possession via a possessory action. In this regard, there are aspects to possessory rights that are uniquely positive in the context of a post-conflict displacement scenario. Should records be lost and the ability to prove ultimate ownership thereby compromised, a displaced person can seek instead to prove that he or she had uninterrupted possession of an immovable property for one full year or more. If the displaced person can meet this standard (which does not require proof of title) then he or she may, within one year of the date of being displaced, commence legal proceedings to have his or her possession restored. It is also important to emphasize that possession may not be obtained by extrajudicial 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 (Yiannopoulos 1991), as well as with the desired goal of regulating all disputes within a legal framework rather than allowing the displacement crisis to blossom into private, interneighborhood warfare (U.S. Army 2006).

Further, along with 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 (Tyser, Demetriades, and Effendi 1967). Commentators note that Islamic jurisprudence is traditionally hostile to the wrongful taking of property. For instance, the eminent 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

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[8] Iraqi Civil Code. 1990. Reprinted in *Business Laws of Iraq*. Translated by N. H. Karam. London: Graham and Trotman.

a thousand times, unless he returns the stolen property" (El Fadl 2003, 51). This is reflected in the modern Iraqi Civil Code's usurpation provisions. A 2002 case in the English House of Lords, 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.[9]

Under Iraqi law, both movable and immovable property that has been usurped by another must be returned to the rightful owner. The provisions in this regard label anyone who takes the property of another a usurper and impose on such an individual an intimidating set of obligations and liabilities. In the case of immovable property, article 197 of 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." Someone who usurps a usurper (a third possessor) has the same status as the original usurper and the same liability for damage—though the rightful owner has the option of collecting damage from either usurper or claiming part from each.

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 article 115 of the Iraqi Civil Code also holds that contracts cannot be tainted by duress, fraud, or error. Duress, under the Iraqi Civil Code, refers to the illegal forcing of a person to do something against his or her will. 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. A threat to one's honor, however, may also constitute duress. This characteristic of Iraqi law is crucial to displaced persons, as it means that contracts that 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 "the 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" (Arabi 1995, 156).

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

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

shares a degree of affinity. In that regard, El Fadl notes that "most 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" (El Fadl 1991, 129). 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. As addressed more fully below, the Iraqi law in this regard is unduly restrictive and in need of amendment.

It is worth mentioning another provision of the Iraqi Civil Code that 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." This rule is of obvious benefit to persons who are unable to reach their homes due to violence or who are trapped in Jordan, Syria, Egypt, or elsewhere, and who might otherwise see their legal rights extinguished by 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.

## DESTROYED PROPERTY

Aside from adverse possession, another cause of displacement is the destruction of property. In the ordinary case, involving non-Coalition actors,[10] the primary civil remedy for the destruction of property is an action in tort. The Iraqi Civil Code contains a general article, article 202, stating that "every act which is injurious to persons such as murder, wounding, assault, or any other kind of [infliction of] injury entails payment of damages by the perpetrator." In cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to the dependents of the victim who were deprived of sustenance because of the wrongful act. Every assault that causes damage, other than damage expressly detailed in other articles, also requires compensation. This article has been incorrectly interpreted in the past as mandating strict liability for all damages (Amin 1990; Stigall 2008), but Iraqi jurisprudence has actually interpreted it as requiring some deviation from a normal standard of care (Al Hakim, Al Bakri, and Al Bashir 1980).

The Iraqi Civil Code allows only limited forms of *respondeat superior* (literally, "let the master answer," a legal doctrine referring to one person's liability for the actions of another), which are clearly delineated. These include the liability of owners of animals for damage by their animals; the liability of the father or grandfather of a minor who causes injury; and the liability of owners of buildings

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[10] In this chapter, *Coalition* refers to the Multi-National Force-Iraq, an international coalition force composed of twenty-six nations, including the United States. It operated in Iraq under the unified command of the U.S. military officers, at the Iraqi government's request, and in accordance with United Nations Security Council resolutions.

that collapse due to dilapidation. The most significant exception to the rule against vicarious liability, however, is that government municipalities and commercial entities are not liable for injuries caused by their employees during the course of their service.

There are, as one might expect, defenses to liability and exceptions to the general rule, such as in cases of force majeure. In addition, personal injuries are permissible when committed in order to ward off public injury. 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, nor can any claim be brought after fifteen years from the day of the occurrence. As noted above, however, such time limitations are subject to exceptions, such as when an impediment prevents the 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—including the damaging or destruction of their property. Displaced persons, therefore, have a remedy not only for property taken from them but also for property that has been 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.

## SECONDARY OCCUPANTS

The Guiding Principles do not specifically mention secondary occupants. The Pinheiro Principles, however, do address this issue. They provide that states should protect such persons from unlawful eviction but that, when such evictions are warranted, the secondary occupants should be afforded due process, an opportunity for consultation, reasonable notice, and appropriate legal remedies. 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" (UN 2005, sec. V, para. 17.4). Where the circumstances indicate that the property being sold was illegally acquired, however, such compensation is not required. Iraqi law fully comports with these requirements.

Under article 1148 of the Iraqi Civil Code, persons who, in good faith, purchase property from secondary occupants are "good faith possessors." Such persons are allowed to appropriate the surpluses and benefits of the thing possessed during the time of their possession. 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. Such persons would not, however, obtain ownership of the property unless they got the property through a normal means of conveyance or acquisition—such as a donation or sale by the true owner.

Regarding those who sign a lease to live in a place (renters), the Iraqi Civil Code has a highly regulated legal regime. The code defines a lease, in article 722, 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]." This is a definition that comports with both Continental civil law and Ottoman law.[11]

Under Iraqi Civil Code, article 750(1), a lessor is "bound to repair and restore any defect in the leased property" that has resulted in interference with its intended use. If the lessor fails to do so, 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. 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. If the lessor fails to do so, the lessee may demand a reduction in the rent or rescind the contract. If the leased property perishes in its entirety during the lease, the contract is considered rescinded.

The leased property is considered to be a trust in the hands of the lessee. 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. 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," as per Iraqi Civil Code, article 726. 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. There is an automatic option available to every lessee who has leased something without inspecting it, allowing him or her to accept or rescind the lease after inspection. This right does not extend to lessors.

A lease in Iraq may last for quite a long time. Normally, a lease that is perpetual—made for a period exceeding thirty years—may be terminated after the lapse of thirty years. 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 to be a contract for the lifetime of the lessee.

If leased property is usurped by a third party 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. If the lessee has not reclaimed the property—but could have done so—the lessee shall not be exonerated from payment of the rent. The lessee may, however, commence proceedings against the usurper for damages.

If either party fails 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. If the leased property is destroyed, the contract of lease is terminated.

Accordingly, one sees in the Iraqi Civil Code's provisions on leases that the lessee has a number of rights and protections against eviction. The lessor has a

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[11] This legal concept has deep legal roots and is commonly accepted. See, for example, the Louisiana Civil Code of 1870.

number of obligations to maintain the property and, if 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, because the property belongs to the lessor, the lessee is primarily reliant on the lessor to take action to restore the property and remove impediments to its use. Further, the primary remedy of a lessee is always rescission and damages. If property is destroyed, there is no legal right to a new home—only rescission of the contract. Likewise, if the lessee is dispossessed and cannot reclaim possession, his or her only option is to rescind the contract and find housing elsewhere.

## 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, in part, 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 Iraqi citizens. Those weaknesses are principally in the areas of military damage and the separate statutes that eclipse or otherwise weaken the protections provided by the Iraqi Civil Code.

### 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—though that option 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 for combat-related damage against Coalition forces or contractors working with the Coalition is practically nonexistent.

The first regulation of the Coalition Provisional Authority stated that the authority "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" (Murphy 2004, 602). 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'" (Murphy 2004, 602).

The most important CPA legislation in terms of tort liability was CPA Order Number 17, which stated that, "unless provided otherwise herein, the MNF [multinational forces], the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process" (Bremer 2004, sec. 2, para. 1). 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" (Bremer 2004, sec. 2, para. 3). 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 (Bremer 2004, sec. 4, para. 3).

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 International Agreements Claims Act (IACA)[12] and the Foreign Claims Act (FCA).[13]

The IACA allows settlement of meritorious claims against the United States pursuant to U.S. obligations under international law. A status of forces agreement (SOFA) is the most common form of agreement to trigger application of the IACA.[14] 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 did not apply; and, as discussed below, even with the current security agreement in force, its applicability is questionable. Thus, the FCA has been the principal 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. Under the FCA, meritorious claims for property losses, personal injury, or death caused by military personnel or members of the civilian component of the U.S. forces

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[12] 10 U.S.C., sec. 2734(a) (2005).
[13] 10 U.S.C., sec. 2734 (2005).
[14] See, for example, Bredemeyer (1997).

may be settled in order "to promote and maintain friendly relations" with the country where U.S. forces are operating. 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.[15] Claims under the FCA are paid entirely with U.S. funds, but the claimants usually receive payment in the local currency (U.S. Army 2008a). The statute has been widely used to pay claims submitted by local nationals in Iraq, Afghanistan, Kosovo, and Bosnia and Herzegovina (Masterton 2005).

The FCA permits recovery for damages caused by "noncombat activities" and negligent or wrongful acts by U.S. military personnel and employees. Commentators note that there is no requirement that the negligent or wrongful acts occur within the scope of the perpetrator's employment (Masterton 2005). 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."[16] The regulation defines "noncombat activities" as

> authorized 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.[17]

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 Commander's Emergency Response Program (CERP), which allows them to expend funds in order to facilitate certain

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[15] U.S. Department of the Army, Regulation 27-20, Claims, paras. 10-5a and 10-6f(3) (8 Feb. 2008) [hereinafter AR 27-20].

[16] AR 27-20, para. 10-3(a).

[17] AR 27-20, Glossary, sec. II (Terms).

specified objectives (Davis 2004). In implementing CERP, the U.S. Congress authorized the Department of Defense 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" (Davis 2004, 204). On July 27, 2005, the undersecretary of defense (comptroller) issued guidance that broadened the permissible uses for CERP to include the repair of damage resulting 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 (Santiago 2006). 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 (GAO 2008). In other words, CERP is a matter of command grace rather than an Iraqi citizen's right (see table 1). 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.

Recent developments have done little to bridge the gap. The 2008 security agreement between Iraq and the United States addresses compensation for military damage in article 21.[18] Pursuant to that provision, Iraq waived the right to claim compensation "for any damage, loss, or destruction of property, or compensation for injuries or deaths" inflicted upon "members of the force or civilian component." As for damage to ordinary civilians, however, article 21 provides that:

> 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 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.

The language of the security agreement is striking in three regards: (1) it is mandatory in nature (seemingly obligating the United States to pay some claims); (2) it is vague in detail, deferring to U.S. law rather than establishing a claims

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[18] 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, signed in November 2008 and put into effect in January 2009. For its complete text, see http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf.

**Table 1. Means of legal recovery for displaced Iraqis**

| *Nature of dispossession* | *Available remedy* | *Comment* | *Provision* | *Limitation* |
|---|---|---|---|---|
| Adverse possession of property | Possessory action | Restitution is possible, but time limits in ICC art. 435 could apply. | ICC arts. 1145–1152 | Some evidence is required on the part of the claimant. |
| | Usurpation action | Possessory action is available where proof of ownership is lacking. | ICC arts. 192–201 | |
| Property destroyed by insurgents/militia | Civil tort action | This allows compensation for destroyed property. | ICC arts. 202, 204–231 | There is no guarantee that the defendant can pay damages that are awarded. |
| Property destroyed by military operation | Military claim or CERP | This falls into a jurisdictional and administrative blind spot, which military commanders can avoid through CERP. | SOFA art. 21 (Foreign Claims Act and CERP) | CERP is a tool to be used at the military commander's discretion, not a restitution mechanism. |
| Rented property destroyed | Action under ICC arts. 202, 204, and 755 | Rent is no longer paid once the contract is rescinded. | ICC art. 751 | Displaced renters are not necessarily entitled to new housing. |
| Forced contract | Rescission of contract under ICC art. 112 | This is an indirect form of coercion that is sometimes used by militias and others seeking to oust particular residents from their homes. | ICC art. 112 | This applies only in cases of threats to the person conveying property and his or her parents, spouse, or an unmarried relative on the maternal side. |

*Note*: ICC: Iraqi Civil Code; CERP: Commander's Emergency Response Program; SOFA: status of forces agreement.

mechanism; and (3) it limits the sorts of payable claims to those "incident to the non-combat activities of the United States Forces." While the SOFA, therefore, seems to implement some form of official claims process, the language seems to keep 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." This would indicate that claims by Iraqi citizens will continue to be governed by the combination of the FCA and CERP discussed above.

However, even if this language 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"),[19] payment under that legislative scheme is discretionary, stating that "when 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" (emphasis added). Nothing in the statutory language of the IACA actually requires payment. Further, both the security agreement and the statutory language of the IACA provide that combat-related damage is not payable.

Accordingly, in most cases, the current security agreement does not provide a restitution mechanism for Iraqis who are displaced due to military action. Therefore, 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 should be introduced to create a claims process whereby such claims could be "investigated, adjudicated, and settled" (Prescott 1998, 1). This could be effected through U.S. legislation modifying current restrictions, or through Iraqi legislation permitting such claims to be paid from Iraqi funds. While such a solution would not necessarily empower a domestic Iraqi entity, it must be remembered that domestic courts rarely have the ability to enforce judgments against other sovereign nations. Unlike a judgment against an Iraqi, when it comes to a judgment against another sovereign nation, a host of legal realities and jurisdictional limitations would necessarily render Iraqi judgments against the United States useless. Accordingly, any realistic solution must rely on modifications to U.S. law or an agreed-upon settlement mechanism in order to completely close the hole that was torn open in Iraqi civil law through post-invasion legislative modification. Although U.S. troops have withdrawn from Iraq, numerous claims related to military damage likely still linger, and those aggrieved Iraqis should not be left without recourse.

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[19] 10 U.S.C., sec. 2734a(a) (2006).

## Interfering legislation

Not all weaknesses in Iraqi civil law governing the rights of displaced persons are due to external interference or foreign meddling. Procedural requirements, some of which are addressed in detail below, can serve to hinder displaced persons' return and resettlement by creating obstacles that they are in no position to surmount. Some areas of substantive law, likewise, are cause for concern. A comprehensive review of Iraqi legislation should be undertaken to identify all such legal hindrances. What follows in this chapter does not constitute a complete analysis of all aspects of Iraqi civil law in need of modification. While such a project (and the concomitant reforms it would surely bring) would be of great benefit to Iraq, the aims of this chapter are far more modest. The discussion below seeks to identify a few of the most obvious shortfalls of the legislation currently in force and some easy steps that could be taken to address some of Iraq's most pressing legal issues regarding land.

At a 2008 conference in Amman, Jordan, sponsored by the U.S. Institute for Peace, Iraqi jurists expressed concern over Iraq's Land Registration Law—a statute separate from the Iraqi Civil Code—which could possibly allow the transfer of property in situations where there has been coercion (Isser and Van der Auweraert 2009). This statute could overrule the protections granted by the Iraqi Civil Code that, as described above, would invalidate any transaction tainted by undue coercion. Allowing coerced transfers of property 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 leases 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 that supersedes the Iraqi Civil Code and prevents Iraqi citizens from availing themselves of its protections. For instance, article 17(1) of Lease Law No. 87 states that if a lessee does not pay the rent within seven days after its due date, the lessor shall warn him or her through a notary public that he or she has eight days from the date of notification to pay the rent. The lessee shall pay all the expenses incurred by the lessor in making this notification. 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. Further, article 17(7) of the law states that if the leased property remains uninhabited for more than forty-five days without any excuse, the lessor may institute eviction proceedings.

Such a legal scheme creates numerous problems for displaced persons, as there is no exception in the law to extend the forty-five-day period for reasons associated with displacement. Thus, displaced persons who rent their homes may return to find themselves legally evicted. Once again, a statute separate from the

Iraqi Civil Code serves to undo the protections of the legal scheme. 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. For example, Williams notes: "The Iraqi authorities should clearly state that the long-standing 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" (Williams 2008, 4).

In order to do so, the government of Iraq must undertake a review of all civil legislation in force—including the Land Registration Law and Lease Law No. 87 of 1979—and ensure that none of them operate to eclipse or otherwise limit the protections expressly granted under the Iraqi Civil Code. In other words, the code's provisions invalidating transfers of property that are made under duress, fraudulently, or 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.

## LEGISLATIVE ADJUSTMENTS TO MEET CONTEMPORARY CHALLENGES

As demonstrated above, 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 Civil Code as well as to the law of the Ottoman Empire (Jwaideh 1953). In that regard, an analysis of the Iraqi system of civil law reveals means by which Iraqi law could be adjusted in order to strengthen the ability of displaced persons to regain their property: providing exemptions from time limits, broadening the application of duress, and adopting the traditional civilian concepts of *lésion* (the substantive unfairness of a transaction due to the disproportionate nature of the contract) (Bell, Boyron, and Whittaker 1998) and *negotiorum gestio* (management of the affairs of another).

### Revising statutes of limitations to protect claimants

As noted above, consistent with the civilian concept of *contra non valentum agere nulla currit praescriptio* (a Latin maxim meaning "prescription does not run against a party unable to act"), the Iraqi Civil Code contains provisions that

lift time limits in cases where a person has not been capable of exercising his or her rights. 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" (Williams 2008, 5). 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 continues.

## Broadening the scope of duress

The Iraqi Civil Code's treatment of duress contains strong protections for those forced to sign contracts. 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. This leaves a host of family members available as targets for duress—mainly those unmarried family members outside the party's immediate family and married family members on the maternal side. 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. In 1984, the scope of duress was 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, the 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 (Litvinoff 1989). 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 (Litvinoff 1989, 105–106).

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, Khaled Abou El Fadl notes that "Ibn Hazm, for example, after citing a *hadith* (*hadith* are sayings . . . by the Prophet often serving as the basis of legislation) stating that Muslims are brothers, argues that it follows that 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" (El Fadl 1991, 152n126). Broadening the scope of duress in 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 contracts involving threats against people who are not family members of the victim are not considered valid.

## Protecting against forced transfers of property through lésion

Displacement of persons in Iraq has been perpetrated in numerous ways, including violence and the threat of violence.[20] While the sight of someone signing a contract at gunpoint might be an obvious indication 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 classic example of lésion as a reason to invalidate a contract is in the sale of an immovable property for less than seven-twelfths of its value. In 1830, Antoine Marie Demante explained this concept:

> Though, in general, lésion is not a cause of restitution in major transactions, the law, taking into account the position of the seller and that the need for money often forces a seller to sell property for less than the fair price, grants the seller an action in rescission; but to use that action it is necessary: 1) that the object sold be immovable property; 2) that the lésion is more than seven-twelfths. As for the rest, this action for rescission, founded on notions of equity, exists notwithstanding any clause or contrary stipulation because such clauses, which elsewhere have become the style, are infected with the same vice that plagues the underlying sale (Demante 1830, 174).[21]

The French legal tradition, therefore, automatically concludes that certain contracts are so disproportionate or contain certain indications of unfairness that give

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[20] See, for example, Ridolfo (2006).

[21] Translation provided by Dan E. Stigall, author of this chapter.

rise to an automatic right of rescission to the seller. Commentators note that the concept has expanded through time and that, through legislative augmentation, numerous types of contracts in contemporary France are now subject to rescission because of various indications of unfairness (Bell, Boyron, and Whittaker 1998).

The Iraqi Civil Code—a descendant of the French Civil Code—could be amended to incorporate this concept and tailor it to the specific context of Iraq. This could be done in an obvious manner, such as adjusting the proportion in the selling price of the immovable upward or downward. It could also be done in a more creative way, 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.[22] Displaced persons, therefore, would be granted an additional protection through their ability to rescind certain transfers of immovable property based on objective criteria.

## Managing the affairs of another, or 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 system of civil law (Bell, Boyron, and Whittaker 1998). 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 (Bell, Boyron, and Whittaker 1998). 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 a storm.

> 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* [the owner of the property] 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* (Bell, Boyron, and Whittaker 1998, 403).

Once such an act has been performed, the owner must indemnify the helper for the useful and necessary expenses he or she incurred during the altruistic intervention (Bell, Boyron, and Whittaker 1998). Commentators note that this

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[22] For a discussion of the application and challenges of such an approach in Bosnia and Herzegovina, see Rhodri C. Williams, "Post-Conflict Land Tenure Issues in Bosnia: Privatization and the Politics of Reintegrating the Displaced," in this book.

requirement that the helper's acts be useful allows courts to keep philanthropy from becoming "a screen for ill-timed, inappropriate or selfish interventions" (Bell, Boyron, and Whittaker 1998, 404; citations omitted).

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" (Martin 1994, 212). Amending the Iraqi Civil Code to incorporate a negotiorum gestio provision might well serve to encourage citizens to care for one another's property to a greater degree, take steps to ensure that others do not occupy it while the owner is absent, and deter 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 (Raz 1980, 124–125). As other commentators have noted: "Laws 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" (Wolfe 2000, 68). Given the unique property issues that confront contemporary Iraq, such legislative encouragement is worth a try.

## Summary

It must be reemphasized that the suggestions above do not constitute all the potential modifications that could be made in Iraqi civil law to facilitate the return and resettlement of refugees and displaced persons. Such a project would go far beyond the confines of a single chapter. Furthermore, none of the proposed modifications alone would cure all the ills associated with the current displacement crisis or reverse the processes giving rise to continued displacement. Nonetheless, the modifications would constitute definite improvements and would help Iraqi civil law to better address the problems confronting displaced persons. Duress could be broadened through minor legislative changes that would leave Iraqi law in line with both Continental civil law and 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 could look to the jurisprudence of Continental civil law jurisdictions around the globe to help define and apply these new provisions. This would occur through application of article 1(3) 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."

While none of these amendments would be a panacea for 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 fair, effective, and legitimate.

## CONCLUSION

The displacement crisis in Iraqi is real and ongoing. The large-scale displacement—which once served to drive civilians to join militias and, thereby, fuel an insurgency which plagued the U.S. military effort (Younes and Rosen 2008)—continues to plague Iraq after the U.S. military's departure. The International Rescue Committee notes, "As the U.S. government withdraws its troops from Iraq, it leaves behind a major crisis in the region—with three million Iraqis displaced and desperate and tens of thousands of others in danger because they worked for the U.S. military" (IRC 2011). Solutions to this crisis must, therefore, be quickly sought and immediately implemented. The 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 articulate 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 property 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 that 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) that can be utilized by people whose records have been destroyed during the conflict. A series of legal provisions regulate the rights and duties of secondary occupants, giving them appropriate protections and a fair amount of due process.

Thus, 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 its 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, to the imposition of legislation by the CPA. In addition, further legislative action could 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 that 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.

With the current state of affairs in Iraq, 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 would only result in wasted time and prolonged suffering. It would also make Iraqi law—with all its history and cultural importance—one more victim of the displacement crisis. Policymakers would do very well, in that regard, to heed the words of Michel de Montaigne, who wrote: "It 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" (Montaigne 1580/1958, 498).

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