

Note from the Field

Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission (IPCC)

Dan E. Stigall¹

The issue of property rights and the plight of displaced people has been the object of increasing attention in recent years. International actors interested in maintaining peace in post-conflict settings are increasingly cognizant of the importance of addressing the grievances of people who have been displaced or dispossessed of valued property.

From Bosnia to East Timor, and now Iraq, property rights have been at the center of many of the problems that individuals face in the aftermath of armed conflicts. The importance of a fair, transparent and effective property rights policy, as an element of post-conflict recovery and development, can hardly be overrated. Clear and undisputed property title plays a fundamental role in the economic recovery from conflict and is a prerequisite to attract foreign investment. The protection or restoration of property rights is closely linked to the return of refugees and displaced persons, the protection of human rights and the restoration of the rule of law. Because land is life in many war-torn societies, property right violations tend to affect all parts of the surviving populations.²

Saddam Hussein's government, and the social convulsions of its subsequent overthrow, left a wake of displaced persons.³ After years of ethnic cleansing, forced migrations of ethnic groups, and continuing conflict, up to one million Iraqis are estimated to be displaced in their own country.⁴ At least one American commander has indicated that the instability caused by such displacement is one of the most serious problems facing the Coalition today.⁵

To address this looming crisis, on 14 January 2004, the Coalition Provisional Authority in Iraq (CPA) promulgated a regulation to establish a commission "for the purpose of collecting and resolving real property claims and to promulgate procedures for promptly resolving such claims in a fair and judicious manner"⁶ The impetus for the creation of such an entity was spurred by the desire to ease post-occupation instability and to quell violence caused by ethnic tensions and an otherwise offended polity.⁷ In spite of its noble motive, however, the Iraqi Property Claims Commission (IPCC) has failed.

¹ Captain Dan E. Stigall is an attorney with the U.S. Army JAG Corps who served as a legal liaison to the Coalition Provision Authority in Iraq. He is currently the Chief of Military Justice, U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky.

² See Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 INT'L COMP. L.Q. 429 (Apr. 2004).

³ See United Nations High Commission for Refugees, *Country of Origin Information—Iraq* (Aug. 2004), available at http://www.unhcr.bg/coi/files/coi_iraq.pdf (noting that over 800,000 Iraqis were displaced in Northern Iraq over the past thirty years. In the South, an additional 100,000 to 200,000 Marsh Arabs were displaced due to fifteen years of Ba'athist policies of forced migration. In Central Iraq, pockets of displacement are occurring as a result of the ongoing conflict between the Coalition and Iraqi resistance groups. Further, an estimated 189,000 people have spontaneously returned from Iran).

⁴ See Integrated Regional Information Networks - U.N. Office for the Coordination of Humanitarian Affairs, *Report on Iraq: Refugee Returns Suspended Due to Insecurity and Housing Shortage* (Aug. 18, 2004), at http://www.irinnews.org/report.asp?ReportID=42724&SelectRegion=Iraq_Crisis&SelectCountry=IRAQ. See also Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 1 (2004) (noting in regard to Iraq's Marsh Arabs:

In 1991, after the first Gulf War, the Marsh Arabs and other Shiites in southern Iraq rose up in an unsuccessful attempt to overthrow or at least throw off the control of the Hussein government. The government responded with a nationwide propaganda campaign labeling the Marsh Arabs as "monkey-faced" outsiders, followed by an attack on the environment that sustained Marsh Arab society. Over the next few years, the government built a system of dams, dikes and canals to drain the wetlands, so that today only seven percent of the original area remains.

.....

While the exact number of deaths and of persons displaced as a result will probably never be known, most sources estimate the number of displaced persons to be between 200,000 and 400,000. A similar number may remain in the former marshes in a state of extreme poverty.)

⁵ See Jenne Matthew, *Iraqi Property Commission Failing, 167,400 Displaced Persons Since March*, Agence France-Presse, Sept. 3, 2004, available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/679980ae6343d55849256f040021bdec> [hereinafter *Iraqi Property Commission Failing*] (quoting Major General John R. S. Batiste as saying that the brewing crisis caused by displacement is the biggest problem facing the 1st Infantry Division, outweighing the threats of foreign fighters and insurgents in Sunni Muslim trouble spots north of Baghdad).

⁶ See COALITION PROVISIONAL AUTHORITY, REG. NO. 8, DELEGATION OF AUTHORITY REGARDING AN IRAQ PROPERTY CLAIMS COMMISSION (14 Jan. 2004) [hereinafter CPA REG. NO. 8].

⁷ See *supra* notes 3 and 4.

This article seeks to demonstrate that, given the existence of a functional civil law system in Iraq, the creation and perpetuation of the IPCC is not only an unnecessary waste of time and resources, but detrimental to the goals of the Multinational Forces in Iraq.

Past Precedent: The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC)

In the effort to resolve global crises, international actors increasingly rely on ad hoc entities styled as courts or claims commissions.⁸ As governments (and various nongovernmental actors) have become more willing to intervene in the internal affairs of other governments, property claims commissions have emerged as mechanisms whereby outside actors facilitate the resolution of domestic property disputes. The archetypical property claims commission is the CRPC in Bosnia.

As in post-conflict Iraq, enormous numbers of citizens were displaced in the wake of the Bosnian conflict.⁹ Accordingly, the Dayton Peace Agreement recognized the right of all refugees and displaced persons to freely return to their homes of origin and granted “the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”¹⁰ Annex 7 of that agreement created a CRPC—an administrative body designed for mass claims resolution.¹¹

The CRPC was separate from the normal court system, consisting of nine members, three of whom were appointed by the President of the European Court of Human Rights.¹² It had broad powers and its own separate rules and regulations, guided by domestic property law.¹³ As Hans Das, a former employee of the CRPC, notes, however, compensation was generally not awarded by the CRPC: “[i]nstead, CRPC decisions simply confirm the pre-war interests of the claimants and authorize them to exercise their property rights in any lawful manner.”¹⁴ This is partially because the fund that was to serve as the source of compensation awards was never funded.¹⁵

The CRPC enjoyed some measure of success, collecting 318,780 claims and issuing approximately 290,000 final decisions on property title.¹⁶ The CRPC’s limitations, however, soon became apparent. A proposed “compensation fund” never materialized due to donor unwillingness to provide resources, thus curtailing the amount of redress the commission could provide.¹⁷ It also had no enforcement mechanism and could not, by itself, assist people to recover their property rights (or deal with the problem of secondary occupants) and return home. A decision made by the CRPC in favor of a particular claimant did not mean instant restitution of rights; it merely represented the first step of what turned out, for many owners and rights holders, to be a long process to recover their rights. It did not provide for an appeals mechanism against its decisions, which put the Bosnian government in contravention of the European Human Rights Convention which it had signed. It was not supported by a national legal framework to resolve restitution cases, repeal provisions responsible for the loss of property rights, or force local authorities to provide alternative accommodation for those in need and lay down enforcement procedures. Further, the CRPC faced major teething problems: its low budget, slow access to municipal records, poorly kept pre-war records, illegal construction, and bureaucratic and political obstructions hampered its ability to

⁸ See Nancy Combs et al., *International Courts and Tribunals*, 37 INT’L LAW. 523 (2004) (discussing the International Court of Justice, the United Nations Compensation Commission, the Iran-U.S. Claims Tribunal, and the Claims Resolution Tribunal established to provide Nazi victims or their heirs with an opportunity to claims assets deposited in Swiss banks prior to World War II).

⁹ Das, *supra* note 2, at 430.

¹⁰ See *id.* (citing General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), 35 I.L.M. 75, Annex 7, art. I (1996)).

¹¹ See *id.*

¹² *Id.* at 436.

¹³ See *id.* at 433.

¹⁴ *Id.* at 430.

¹⁵ See *id.* at 441.

¹⁶ *Id.* at 437.

¹⁷ Anne Davies, *Restitution of Land and Property Rights*, 21 FORCED MIGRATION REV. 12 (Sept. 2004), available at <http://www.fmreview.org/text/FMR/21/04.htm>. See also Das, *supra* note 2, at 441.

tackle the massive task of compiling a nationwide register of contested property.¹⁸ The CRPC's mandate expired in late 2003, and undecided claims were released to be handled by domestic bodies.¹⁹

Ann Davies, the acting head of the United Nations Office for the Coordination of Humanitarian Affairs in Monrovia, Liberia, notes that "the CRPC experience has highlighted the necessity to ensure that property rights restitution should be a nationally-owned and directed process. While the international community can assist, it should refrain from imposing its concepts without thinking through how these can be implemented practically."²⁰ Further,

[L]essons learned in [Bosnia] appear not to be being heeded in Iraq where it is estimated that up a million people were displaced as a result of expulsion policies that the former regime used to remove opponents and gain valuable land in the southern marshes and in the north. A worrying start was made when the occupation authorities established an IPCC in January 2004 with little Iraqi involvement. Experts working for the Coalition Provisional Authority (CPA) drafted a document and required the Iraqi Governing Council (IGC) to implement its provisions without paying sufficient attention to realistic enforcement mechanisms.

. . . .

Had more attention been paid to the Bosnian experience it would have been readily apparent to the architects of the IPCC that national involvement from the start is vital to successful implementation of the scheme. Nevertheless, imperfect though it may be, a start has been made.²¹

The IPCC

The initial regulation authorizing the creation of the IPCC was promulgated on 14 January 2004.²² This statute, and its annex, authorized the establishment of a claims commission to resolve claims:

arising between July 17, 1968 and April 9, 2003 involving immovable property, assets affixed to immovable property, easements, or servitudes that were: (i) confiscated or seized for reasons other than land reform; or (ii) expropriated for reasons other than lawfully used eminent domain, or as a result of opposition to the Ba'athist Government of Iraq, or as a result of ethnicity, religion, sect of the owners, or for purposes of ethnic cleansing; or (iii) acquired for less than appropriate value by the Ba'athist Government of Iraq; or (iv) property otherwise affected.

Article 10 of that annex provided the following:

Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by the former governments of Iraq . . . may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence . . . or (iv) may receive compensation for the cost of moving to such area.²³

Article 8 of the initial promulgating regulation contained a list of thirteen general principles to guide the IPCC in the adjudication of claims, but was prefaced with the following language: "The IPCC shall comply with the following principles when resolving property claims. The Governing Council shall issue more detailed provisions regarding the process in the Guidelines and Instructions."²⁴ These general principles were not taken from the *Iraqi Civil Code*, but were ad hoc rules specific to the IPCC and matters within its purview.

¹⁸ See Davies, *supra* note 17, at 12.

¹⁹ See COMMISSION ON THE EUROPEAN COMMUNITIES, REPORT FROM THE COMMISSION TO THE COUNCIL ON THE PREPAREDNESS OF BOSNIA AND HERZEGOVINA TO NEGOTIATE A STABILISATION AND ASSOCIATION AGREEMENT WITH THE EUROPEAN UNION (2003), available at http://europa.eu.int/comm/external_relations/see/docs/com03_692_en.pdf.

²⁰ See Davies, *supra* note 17, at 13.

²¹ *Id.* at 14.

²² See CPA REG. NO. 8, *supra* note 6.

²³ *Id.* Annex, art. 10.

²⁴ *Id.* Annex, art. 8. See also *id.* Annex, art. 14 (stating that "[t]he Governing Council shall issue Guidelines and Instructions that will regulate the procedures to be followed by the IPCC.").

The initial regulation contained a filing deadline of 31 December 2004. Any claim filed thereafter would not be accepted by the IPCC, but could be “referred to the Iraqi Court system, which shall apply the principles included in this Statute.”²⁵

Thus, the CPA envisioned an entity that would provide some means of redress to Iraqis displaced by Ba’athist policies prior to 9 April 2003. The IPCC would settle claims based upon some general principles with the understanding that more detailed rules and procedures would be later promulgated by the Governing Council. By early June, however, it was becoming increasingly clear that the claims commission envisioned by the promulgating regulation was not materializing. The Governing Council had not issued the more detailed guidelines and instructions promised by Article 8. With the clock ticking down toward the final deadline for filing claims, the IPCC process seemed to stagnate. On 24 June 2004, the week the CPA dissolved, the CPA promulgated *Coalition Provisional Regulation Number 12*, noting that the initial regulation did not provide adequate mechanisms for the operation of the IPCC.

In many respects, the new regulation repeated the former’s substance. The new regulation, however, included two annexes containing more detailed procedural and structural information as well as some substantive changes. Notably, the functional competence of the IPCC was expanded to include claims arising between 18 March 2003 and 30 June 2005. In addition, its jurisdiction was expressly made exclusive²⁶—something that was only implicit in the earlier statute. The filing deadline was also extended to 30 June 2005.

The amended and restated IPCC statute envisions a commission that consists of an appellate division (established as a separate chamber of the Iraqi Court of Cassation), regional commissions in each governorate in Iraq, and a National Secretariat, which shall be responsible for overseeing all operational and management activities of the IPCC.²⁷ The National Secretariat was also given the responsibility of issuing the guidelines containing the procedures set forth by the IPCC.²⁸

Once a claimant files a claim at an IPCC office in his area, the Regional Secretariat opens a file, serves notice on the interested parties and the General Directorate of Real Estate Registration, verifies the claim, and authenticates the identity of the parties.²⁹ The regional commission then renders a decision which can be appealed within sixty days.³⁰ Decisions made by the appellate division are final.³¹

Scope and Types of Remedies Available Under the IPCC Statute

Before analyzing the substantive provisions governing dispute resolution, it is important to examine the rules governing the scope and types of remedies available under the IPCC statute.

The current IPCC statute provides redress for claims arising between two time periods. The first jurisdictional grant is for claims arising between 17 July 1968 and 9 April 2003, involving immoveable property, assets affixed to immoveable property, easements, or servitudes that were:

Confiscated, seized, expropriated, forcibly acquired for less than full value, or otherwise taken, by the former governments of Iraq for reasons other than land reform or lawfully used eminent domain. Any taking that was due to the owner’s or possessor’s opposition to the former governments of Iraq, or their ethnicity, religion, or sect, or for purposes of ethnic cleansing, shall meet this standard³²

The second jurisdictional grant is for claims arising between 18 March 2003 and 30 June 2005, involving “real property or an interest in real property” that was or will be:

²⁵ *Id.* Annex, art. 11.

²⁶ *See* COALITION PROVISIONAL AUTHORITY, REG. NO. 12 Annex A, sec. 5, arts. 9 and 11 (24 June 2004) [hereinafter CPA REG. NO. 12].

²⁷ *Id.* Annex A, sec. 2, art. 2.

²⁸ *Id.* Annex A, sec. 5, art. 13.

²⁹ *Id.* Annex A, sec. 3, art. 6.

³⁰ *Id.* Annex A, sec. 3, art. 7.

³¹ *Id.*

³² *Id.* Annex A, sec. 5, art. 9.

confiscated, seized, expropriated, forcibly taken for less than full value, or otherwise acquired and/or reacquired (i) as a result of the owner's or possessor's ethnicity, religion, or sect, or for purposes of ethnic cleansing, or (ii) by individuals who had been previously dispossessed of their property as a result of the former Ba'athist governments' policy of property confiscation.³³

Thus, the statutory language only gives the IPCC jurisdiction over claims regarding immoveable property and interests therein and only for two specific periods of time. Claims for moveable property, damages such as mental anguish or humiliation, or claims occurring outside the statutory timeframe would still fall within the Iraqi civil courts' purview.

The remedies available under the IPCC statute are laid out in Annex A, Article 8, of the current IPCC statute.³⁴ These remedies consist of returning the property to its original (or rightful) owner;³⁵ returning the property to the original (or rightful) owner subject to conditions, such as reimbursement for improvements;³⁶ or receiving compensation for the price of the property.³⁷ Under certain situations, a successful claimant may request that a subsequent purchaser purchase the property, minus the purchase amount paid to the former government by the subsequent purchaser.³⁸ Additionally, presumably to protect innocent purchasers, the statute provides that an original owner, when demanding return of the property, must compensate subsequent purchasers for improvements and additions to the property.³⁹

Article 7(F) states that:

[I]f the property in question is occupied, possessed or used by the non-prevailing party, and such party has no other property, then the non-prevailing party would be granted a prescribed period of time to surrender possession of the premises. The Regional Secretariat shall also inform the displaced person(s) of the availability of any services for assistance.⁴⁰

In addition to the displaced persons, Iraqi citizens used as the means of displacement⁴¹ can also find redress in Annex A, Article 10, which provides that:

Newly introduced inhabitants of residential property in areas that were subject to ethnic cleansing by the former governments of Iraq . . . may be (i) resettled, (ii) may receive compensation from the state, (iii) may receive new property from the state near their residence . . . or (iv) may receive compensation for the cost of moving to such area.⁴²

Thus, the statute provides a means of redress for newly introduced inhabitants of areas that were subject to ethnic cleansing campaigns. The displaced person, depending on his situation, will be allowed one of the remedies available in Article 8.

Though the statute should be lauded for providing some means of redress, its shortcomings are apparent. It allows no compensation for moveable property or immoveable property that was damaged, but not confiscated. Its means of compensation is narrowly focused on the purchase price of property, neglecting other damages such as emotional damages and lost rent. Likewise, as discussed more fully below, the statute also neglects the subject of fruits and products of usurped property and makes no distinction between good faith and bad faith purchasers.

³³ *Id.*

³⁴ *Id.* Annex A, sec. 4, art. 8.

³⁵ *Id.* art. 8(A) – (E).

³⁶ *Id.* art. 8(F).

³⁷ *Id.* art. 8(M).

³⁸ *Id.* art. 8(H).

³⁹ *Id.* art. 8(H)-(K).

⁴⁰ *Id.* Annex A, art. 9.

⁴¹ Major Jeffrey Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96 (2003) (“[T]he actions of Iraq have removed the Kurds and other non-Arabs from oil rich areas near the northern city of Kirkuk. Though these populations were often given the opportunity to “correct” their nationality to Arab, those unwilling to convert were subjected to various forms of harassment, to include arrest and forced relocation. To add to this instability, Iraq relocated Arab Shia populations from the south to Kirkuk to frustrate Kurdish claims to land in the area and “to affirm the ‘Arabic’ character of the city.”).

⁴² CPA REG. NO. 12, *supra* note 26, Annex A, art. 10.

Though the limits on the kinds of remedies available under the IPCC statute make it problematic, its inadequacy becomes more apparent when analyzing the statute's general principles which govern the way in which its remedies are to be awarded.

The General Principles of the IPCC Statute

An important aspect of the CRPC in Bosnia is that, though it possessed its own separate rules and regulations, it was to pay a certain degree of respect to domestic property law.⁴³ Further, it was established with a shelf-life—a designated time after which responsibility would transfer to local courts.⁴⁴ In contrast to its Bosnian ancestor, however, the IPCC statute eschews the provisions of the *Iraqi Civil Code* in favor of fourteen principles that are ad hoc rules designed specifically for the IPCC and that do not necessarily bear any relation to their counterparts in the *Iraqi Civil Code*. They are as follows:

- a. Any properties that were confiscated or seized, or on which liens or other encumbrances were placed by the former governments of Iraq (not in the ordinary course of commercial business), but with title remaining in the name of the original owner shall be returned to the original owner, freed and discharged from any such liens or other encumbrances.
- b. Any properties that were confiscated or seized and whose title was transferred to the former governments of Iraq, or an agent thereof, and which were not sold to a third party, shall be returned to the original owner.
- c. Any properties confiscated by the former governments of Iraq that were used as mosques, other places of worship, religious schools, charities or were associated with such uses shall be returned to the appropriate *waqfs* (religious endowments) connected to such uses or to the appropriate holders of title to such properties prior to their confiscation.
- d. Any properties whose title is in the name of senior members of the former governments of Iraq shall be returned to the rightful owners, if it is established that such properties were improperly acquired.
- e. If a property was confiscated and subsequently sold to a buyer (the “First Buyer”), and (i) title remains in the name of the First Buyer and (ii) no improvements were made to the property, then title to the property will be transferred back to the original owner, and the First Buyer would not be entitled to compensation from the original owner.
- f. If the property was an unimproved property (that is, a property not built upon) when confiscated or otherwise seized, and then subsequently sold to the First Buyer, and the First Buyer has improved the property by building upon it, then the original owner would be entitled to either (i) having title transferred to him, provided that he pays the First Buyer the value of the improvements or (ii) being paid appropriate compensation for the property (as an unimproved property).
- g. If the property was sold to the First Buyer, who subsequently acquired an adjoining property from the state, then title to both the original property and the adjoining property shall be transferred to the original owner, provided that such original owner pay the First Buyer the amount that such First Buyer paid for the adjoining property.
- h. If the property has a building on it and then was sold to the First Buyer, who subsequently demolished the original building and built a new building on it, then the original owner of the property may (i) request that title be transferred to him, after paying for the new building, less the value of the old demolished building, or (ii) may request that the First Buyer acquire the property, including the demolished building (less any amounts paid by the First Buyer to the former governments of Iraq).
- i. If the property was subsequently sold by the First Buyer to other buyers, then the original owner could either (i) request that title be transferred to him, or (ii) request compensation for the value of the property. If the original owner chooses option (i) above, then the final buyer would be entitled to compensation for the value of the property.

⁴³ See Das, *supra* note 2, at 433.

⁴⁴ See *id.* at 437.

j. If the property was charged as security to a lender for a loan to the First Buyer, then title to the property would be freed and discharged from any such charge, and the lender would then have a right of action against the First Buyer to recover any outstanding balance due under the loan.

k. If the property was unimproved and a building was built on it by the First Buyer, and the property was charged to a lender as security for a loan, then any amounts due to the First Buyer by the original owner (pursuant to Paragraph F above) would be paid by the original owner direct to the lender to fully or partially satisfy the loan.

l. If the property was confiscated and sold in a public auction and was purchased by either the original owner or his heirs, then they will be entitled to compensation from the state in an amount equivalent to the purchase price.

m. If the property is currently being used for a public or charitable purpose, the property shall continue to be used for that purpose, and the Government or current owner, user or possessor shall provide the original owner, user or possessor with compensation.

n. Any other relevant situation in line with these provisions.⁴⁵

The section announcing these general principles begins with the following statement: “The IPCC shall comply with, but not be limited to, the application of the following examples when resolving real property claims.”⁴⁶ Thus, along with the language of Article 41, the IPCC statute makes it clear that the adjudicators may veer outside the language of these rules to formulate an appropriate remedy.⁴⁷

The fourteen general principles cover a host of situations. The articulated principles, however, contain major gaps and drawbacks that cannot be overcome merely by noting that the rules are malleable. Particularly, the principles do not address all the situations covered by the jurisdictional mandate of the statute and do not provide adequate remedies for the losses they are meant to address.

Overlooked Claimants

The IPCC statute extends its jurisdiction over claims arising between 18 March 2003 and 30 June 2005, as well as claims from those who lost property that was forcibly acquired for less than full value. Yet, the general principles only address property that was confiscated or seized by the Ba’athist regime.⁴⁸ It would be impossible to hold the regime responsible for property confiscated or seized after the end of the regime—9 April 2003. Accordingly, the general principles in the IPCC statute contain absolutely no language providing a means of redress for persons with claims arising between 9 April 2003 and 30 June 2005, as envisioned by the revised IPCC Statute. Though the jurisdictional mandate was expanded to include a new series of claims, no provisions were added to the general principles of the statute that might provide redress for such claimants.

The obvious cure to the problem caused by such careless drafting is to say that the general principles are mere guidelines and that, as the adjudicators are free to veer outside their constraints, the principles can be applied to claims arising between 9 April 2003 and 30 June 2005 involving immovables taken as a result of the owner’s or possessor’s ethnicity, religion, or

⁴⁵ CPA REG. NO. 12, *supra* note 26, Annex A, sec. 4, art. 8.

⁴⁶ *Id.* Annex A, sec. 4, art. 8.

⁴⁷ *See id.* Annex B, art. 41 (noting that “[t]he IPCC shall comply with, but not be limited to, the application of principles set forth in Article 8 of the Statute.”).

⁴⁸ *See id.* Annex A, sec. 4, art. 8. Subsection A of the Annex states the following:

Any properties that were confiscated or seized, or on which liens or other encumbrances were placed by the former governments of Iraq (not in the ordinary course of commercial business), but with title remaining in the name of the original owner shall be returned to the original owner, freed and discharged from any such liens or other encumbrances.

Id. Subsection B states that “[a]ny properties that were confiscated or seized and whose title was transferred to the former governments of Iraq, or an agent thereof, and which were not sold to a third party, shall be returned to the original owner.” *Id.* Annex A, sec. 4, art. 8(B). The subsequent principles all envision property that was taken by the Ba’athist regime at some point.

sect. In other words, the rules are so pliable that, so long as jurisdiction exists over the claim, the adjudicators can devise something to address the concern.

Such legal gymnastics might allow one to plug up an obvious hole, but it seems curious (if not dangerous) to allow an entire class of disputes to be resolved without any express guidance from the rules that purport to govern such matters. Since the Enlightenment, legal commentators have warned against the dangers of such obscurity in legislation.⁴⁹

Likewise, the guidelines do not address claimants who were forced to sign contracts and transfer their land unwillingly or those whose land was taken for less than its full value. All of the general principles meant to guide the adjudicator in making his or her determination address property that was confiscated or seized. Even if one were to argue, as stated above, that the rules are so pliable that one could fashion an ad hoc remedy, no provisions exist to guide the adjudicator on how to proceed with a forced or faulty contract. Again, the IPCC adjudicator is left to his imagination.

At best, the claimants whose situations have been overlooked by the general principles will face adjudicators operating blindly. At worst, they will be left without any remedy whatsoever. This becomes a serious problem when one considers the language of Article 11(C), which gives the IPCC exclusive jurisdiction over cases within its jurisdictional reach. Thus, claimants could find themselves trapped within the maw of its jurisdiction without a means of escape.

The Importance of Faith

Just as the general principles overlook certain claimants, they also overlook critical elements of property law that any adequate legal system must address—primarily the issue of good or bad faith and the fate of the products of confiscated land.

Subsections E through M of the IPCC statute address the fate of subsequent purchasers. The IPCC statute, lists the following examples of real property claims:

If a property was confiscated and subsequently sold to a buyer (the “First Buyer”) and (i) the title remains in the name of the First Buyer and (ii) no improvements were made to the property, then title to the property will be transferred back to the original owner and the First Buyer would not be entitled to compensation from the original owner.⁵⁰

If the property was an unimproved property (...not built upon) when confiscated or otherwise seized, and then subsequently sold to the First Buyer, and the First Buyer has improved the property by building upon it, then the original owner would be entitled to either (i) having the title transferred to him, provided that he pays the First Buyer the value of the improvements or (ii) being paid appropriate compensation for the property (as an unimproved property).⁵¹

Therefore, under the IPCC statute, the Iraqi citizen dispossessed of his or her property, may wind up owing money to a subsequent purchaser. On the surface, there is nothing wrong with such a scenario; however, the statute makes no distinction between good faith or bad faith purchasers. The statute is completely silent on the issue of the “First Buyer’s” knowledge or state of mind.

Without different provisions for good and bad faith purchasers, the general principles of the IPCC statute are set to work substantial injustice among displaced persons. For instance, according to the general principles’ plain guidance, a person who had the misfortune of having his farm seized and sold by Saddam Hussein would still owe compensation to the subsequent purchaser for improvements and additions—even if that subsequent purchaser had full knowledge that he was buying a farm from Saddam that was wrongfully seized. Likewise, a person displaced for ethnic reasons—an Arab forced out of his home by Kurds in Northern Iraq—would be obligated to reimburse the person who forcefully removed him from his home. Such outcomes are astoundingly unsatisfactory.

⁴⁹ See Cesare BECCARIA, ON CRIMES AND PUNISHMENTS ch. 5 (1764) (noting that “without the written word, a society will never arrive at a fixed form of government . . . in which laws which are unalterable except by the general will, are not corrupted as they make their way through the throng of private interests.”).

⁵⁰ See CPA REG. NO. 12, *supra* note 26, Annex A, art. 8(E).

⁵¹ See *id.* art. 8(F).

Similarly, the fate of fruits of the land is completely neglected by the statute. Not only do the general principles fail to address the topic, but it is not clearly within the jurisdictional purview of the statute. Therefore, even if allowed to address the matter, IPCC adjudicators will have no guidelines for determining what compensation is due the displaced owner of an orchard or farm. The costs of such fruits are not to be underestimated, especially in recent years.

“Iraq’s capacity to generate its own food was severely incapacitated by the Gulf War and virtually no food was imported during this period. By early January 1991, food prices were five to twenty times higher than they had been before the war. In the meantime, salaries plummeted.”⁵² The combination of high food prices and low income makes the issue of reimbursement for wrongfully seized fruits and crops significant. This is even more apparent because much of the land involved in the displacement of Iraqis was used for agriculture. As a recent Human Rights Watch Report noted:

Arabization first occurred on a massive scale in the second half of the 1970s, following the creation by the Iraqi government of an autonomous zone in parts of Iraqi Kurdistan. During that period, some 250,000 Kurds and other non-Arabs were expelled from a huge swath of northern Iraq, ranging from Khanaqin on the Iranian border all the way to Sinjar on the Syrian-Turkish border were forcibly displaced. These comprised entire families, including women and children. Simultaneously, the Iraqi government brought in landless Arabs and their families from the nearby al-Jazeera desert to farm the former Kurdish lands. The land titles of the Kurds and other non-Arabs were invalidated. The land was declared government land, but was leased on annual contracts only to the new Arab farmers.⁵³

Thus, displacement and the wrongful taking of immoveable property are intertwined with the issue of the proper ownership of the fruits of seized land. Nothing in the statute, however, addresses this important matter. Even if one were to construe the jurisdictional language as allowing it, the guidelines focus exclusively on the purchase price of the property, leaving the issue of the ownership of its fruits lost in the silence of inadequacy.

The Iraqi Civil Code: An Organic Solution

What recourse is left to an interim government that wishes to provide a means of redress to its aggrieved citizenry? The answer is astonishingly simple: allow property disputes to be addressed in their proper forum.

Civil courts, in most jurisdictions throughout the world, are the proper forum for property disputes.⁵⁴ Iraq possesses an advanced system of property law that, in contrast to the incomplete, untested, and ad hoc guidelines in the IPCC statute, is more than adequate for resolving property disputes of the most complex sort, including cases in which property was taken unlawfully.

The *Iraqi Civil Code* states that ownership vests unto the owner the right to dispose absolutely of that which he owns⁵⁵ and that “[n]o one can be deprived of his ownership except in the cases and in the manner provided for by law and in consideration for fair compensation payable in advance.”⁵⁶ Thus, true title does not pass with property (moveable or immoveable) not acquired lawfully or for less than fair compensation.

⁵² Cassandra LaRae-Perez, *Economic Sanctions As a Use of Force: Re-Evaluating the Legality of Sanctions From An Effects-Based Perspective*, 20 B.U. INT’L L.J. 161 (2002).

⁵³ See HUMAN RIGHTS WATCH, *CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ*, vol. 16, No. 4(E) (2004) [hereinafter *CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ*].

⁵⁴ See, e.g., *Watson v. Jones*, 80 U.S. 679 (1871) (noting that in the United States, for example,

if the General Assembly of the Presbyterian Church . . . at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up);

JOHN BELL ET AL., *PRINCIPLES OF FRENCH LAW* 45 (Oxford Univ. Press 1998) (noting that French civil courts—the *tribunal d’instance* and the *tribunal de grande instance*—are the proper forums for property disputes); Minh Day, *Alternative Dispute Resolution and Customary Law: Resolving Property Disputes in Post-Conflict Nations, A Case Study of Rwanda*, 16 GEO. IMMIGR. L.J. 235 (2001) (noting that, in Rwanda, *gacaca* tribunals historically resolved disputes related to land use and rights, cattle, marriage, inheritance, loans and damages to property).

⁵⁵ See IRAQI CIVIL CODE, art. 1048 (1990 translation).

⁵⁶ *Id.* art. 1050.

A true owner whose immovable is demolished may leave the rubble to the offending party. Then, that true owner may claim from the offending party the value of the immovable and reparations for other injuries. The true owner also has the option to keep the immovable, claim reparation for other damages, and deduct the value of the immovable from the claim.⁵⁷

A true owner to whom property is returned may demand the removal or uprooting of and new constructions of plants at the cost of the offending person. If the removal would be injurious to the property, the owner has the option of acquiring the works for the cost of their removal.⁵⁸

The *Iraqi Civil Code* defines possession as “a material situation by which a person dominates (controls) directly or by an intermediary a thing which may be the subject of dealings...[or rights].”⁵⁹ The *Iraqi Civil Code* expressly states that

If possession has been coupled with coercion or was obtained secretly or if it contained confusion (was dubious) it shall not have an effect vis-à-vis the person who was the subject of coercion, or from whom possession has been concealed, or who has been confused in respect thereof except from the time these defects have ceased.⁶⁰

A person who is dispossessed of immovable property may file an action to have the property restored to him.⁶¹

Usurped or wrongfully taken property “must be restituted in kind to its owner at the place wherein it was usurped if it is existing.”⁶² In the case of moveable property, the owner of the property may even demand restitution of the property at a different place than the place where it was usurped, even if such a request requires moving of the property. In such cases, “the expense of moving it and the costs of providing for its restitution will be borne by the usurper which thing will be without prejudice to reparations for other injuries.”⁶³ If the usurper has destroyed or damaged the property, he or she is liable.⁶⁴

Specifically regarding immovable property, “the usurper is under an obligation to restore it to the owner together with comparable rent. The usurper shall be liable if the immovable has suffered damage or [if the property] has depreciated even without encroachment on his part.”⁶⁵

When calculating compensation, “the court will estimate the damages commensurately with the injury and the loss of gain sustained by the victim, provided that the [injury and loss of gain are] a natural result of the unlawful act.”⁶⁶

The right to compensation by the aggrieved party entails not only compensation for the economic loss caused by the offender, but also compensation for moral injury, defined by the *Iraqi Civil Code* as “any encroachment on the freedom, morality, honor, reputation, social standing, or financial position.”⁶⁷ Further, damages may be adjudged to third parties, including spouses and next of kin, who have suffered moral injury as a result of the offense.⁶⁸

⁵⁷ *Id.* art. 187.

⁵⁸ *Id.* arts. 1167, 1119.

⁵⁹ *Id.* art. 1145.

⁶⁰ *Id.* art. 1146.

⁶¹ *Id.* art. 1150.

⁶² *Id.* art. 192.

⁶³ *Id.* art. 193.

⁶⁴ *Id.*

⁶⁵ *Id.* art. 197.

⁶⁶ *Id.* art. 207.

⁶⁷ *Id.* art. 205.

⁶⁸ *See id.* arts. 204, 205.

Compensation may also be awarded for lost fruits and crops. Article 196 states the general rule that: “The accessories of the thing usurped are deemed to be usurped like it and the usurper shall be liable if they have perished even without encroachment on his part.”⁶⁹ Beyond this general rule of property law, the *Iraqi Civil Code* has an entire section devoted to “The Appropriation of Surpluses and Benefits and Recovery of Expenses.”⁷⁰ Under these provisions, a good faith possessor “will appropriate the surpluses he has received and the benefits he has collected during the time of his possession.”⁷¹ A bad faith possessor will be liable as of the time when he became of bad faith for all the fruits which he will receive and those which he failed to collect; however, he may obtain reimbursement of that which he has spent on producing the fruits.⁷²

Therefore, assuming a person who receives land in full knowledge that it was wrongfully appropriated by the Ba’athist regime is in bad faith, a person acquiring land containing a farm or orchard in bad faith would be liable to the true owner for the crops or fruits produced on that land. The true owner would only have to return the production costs.

On the other hand, assuming a person who receives land without knowledge that it was wrongfully appropriated by the Ba’athist regime is in good faith, that person would be able to keep any fruits or crops. This seems a fair way of approaching the matter as it does not punish the possessor who had no way of knowing his or her land was wrongfully taken.

The *Iraqi Civil Code* also notes that “[i]f the possessor is of bad faith, he shall be responsible for the perishing or deterioration of the thing even where the same has resulted from a fortuitous event unless he has proved the thing would have perished or deteriorated even if it had been kept in the hand of the person to whom it is due.”⁷³

When a court finds that an offending party owes damages, the court may determine the method of payment according to the particular circumstances. “[T]he damages may be payable in installments or as revenue in the form of a salary in which case the debtor may be required to provide a security.”⁷⁴ The court may also reduce the sum (or even refuse to order payment) if the injured party contributed to the situation, aggravated the injury, or took actions to worsen the debtor’s situation.⁷⁵

Being a complete system of law, the *Iraqi Civil Code* allows recovery for more than property-related issues. Article 202 of the *Iraqi Civil Code* states that “[e]very act which is injurious to persons such as murder, wounding, assault, or any other kind of inflicting injury entails payment of damages by the perpetrator.”⁷⁶ Therefore, Iraqi citizens would be entitled to remuneration from their torturers or other offending parties. It should be noted, however, that the article is broad enough to encompass a vast array of intentional harm—offering redress to Iraqi citizens who have been injured though not dispossessed of property.

Further, unlike the IPCC statute, the *Iraqi Civil Code* contains a sophisticated regime of law governing contracts and other obligations that could be invoked to address situations in which Iraqi citizens were duped or intimidated into signing contracts divesting themselves of property.⁷⁷ Like many civil codes based on the French model, the *Iraqi Civil Code* nullifies obligations if tainted by a vice of consent or defect of the will.⁷⁸ Accordingly, a contract is not valid if executed in mistake,⁷⁹ under duress,⁸⁰ or where a contracting party has made false representations.⁸¹ Like most modern civil codes, the *Iraqi Civil Code* contains provisions for *force majeure*⁸² and other exigencies.⁸³

⁶⁹ See *id.* art. 169.

⁷⁰ See *id.* arts. 1165 -1168.

⁷¹ *Id.* art. 1165.

⁷² *Id.* art. 1166

⁷³ *Id.* art. 1168.

⁷⁴ *Id.* art. 209(1).

⁷⁵ *Id.* art. 210.

⁷⁶ *Id.* art. 202.

⁷⁷ See *id.* arts. 115 and 121.

⁷⁸ See *id.* arts. 112-125.

⁷⁹ *Id.* art. 117.

⁸⁰ *Id.* art. 112.

Therefore, the *Iraqi Civil Code* is superior claims system. It not only has an advanced system of rules designed to address complex property disputes, but also addresses moveable and immoveable property and causes of action beyond confiscation of property. It permits recovery for a broad range of injury, allows recovery for damaged and confiscated property, and contains provisions that consider the good or bad faith of subsequent purchasers. Finally, it allows recovery of lost rent, lost fruits, emotional damages, and moral injury.

The Problem of Prescription

There are distinct and numerous disadvantages to the status quo. From a legal standpoint, the clock is ticking on prescriptive periods (or statutes of limitations.) The *Iraqi Civil Code* states that “[a] case shall not be heard in respect of an obligation whatever its cause . . . if it has not been claimed without lawful cause for a period of 15 years”⁸⁴ In the case of recurring rights, such as rent or income due to a possessor in bad faith, that period is shortened to five years.⁸⁵ In other cases, such as certain commercial exchanges, the prescriptive period is shortened even further to a period of one year.⁸⁶ Such legal limits could, in theory, bar certain actions within civil courts—especially for those acts which took place over fifteen years ago.

Fortunately, the *Iraqi Civil Code* tolls the running of prescription where there is an impediment rendering it impossible for the plaintiff to claim his or her right.⁸⁷ This rule reflects the civilian concept of *contra non valentem agere nulla currit praescriptio*, a Latin maxim meaning that prescription does not run against a party unable to act.⁸⁸ The IPCC statute, so long as it holds claimants in legal limbo, stands as a legal impediment that makes the bringing of a claim impossible. Likewise, an Iraqi civil court should have no hesitation in finding that the oppressive rule of a tyrant served as an impediment to aggrieved civilians filing suit. Accordingly, prescriptive periods should not pose a legal bar to actions by Iraqis who seek redress in civil courts.

The Law Held Hostage

In spite of its clear superiority, the remedies and advantages of the *Iraqi Civil Code* are currently not available to Iraq’s citizenry—at least not those within the IPCC’s jurisdiction. The IPCC statute clearly states that it has exclusive jurisdiction over all claims within its purview⁸⁹ and that its terms trump any law to the contrary.⁹⁰ As a result, no aggrieved Iraqi citizen with a claim cognizable under the IPCC statute may bring his or her claim in an Iraqi Civil Court. This is problematic, not only because the IPCC statute is legally inadequate, but because of an even greater problem: it does not function.

Human Rights Watch noted the following:

[A]s of the end of June 2004, twenty-two offices were reported to be operating and receiving claims. But other key steps had not been taken to implement the provisions of the IPCC statute. Judge Dara Nouredin, a member of the former IGC and head of its Legal Committee, expressed his frustration to Human Rights Watch about the slow pace of developments in this regard, saying that by March 2004 the CPA had not improved the implementing regulations. This belied the optimism expressed by CPA officials at the start of

⁸¹ *Id.* art. 121.

⁸² *Id.* art. 211.

⁸³ *Id.* arts. 212, 213, and 214.

⁸⁴ *Id.* art. 429.

⁸⁵ *Id.* art. 430.

⁸⁶ *Id.* art. 431.

⁸⁷ *Id.* art. 435.

⁸⁸ *See Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986).

⁸⁹ CPA REG. NO. 12, *supra* note 26, Annex A, art. 11(C).

⁹⁰ *Id.* art. 12.

2004 that mechanisms for the receipt and assessment of property claims could begin as early as mid to late February in some areas.⁹¹

By September 2004, months after the dissolution of the CPA, the situation had not improved. *Agence-France Press* reported: “Iraq’s property claims commission for disputed land in oil-rich northern Iraq has failed to process a single claim, despite more than 167,400 Kurds re-settling in dozens of refugee camps since March alone”⁹²

Recent reports indicate that the existing structure is understaffed, plagued by bureaucratic bickering, and the object of skepticism.⁹³

Skepticism of the commission’s value can be found in high places. In an interview with IRIN, Kirkuk Governor Abdulrahman Mustafa said he believed it would not be able to solve the area’s property problem. Asserting that the waves of Arabisation were the result of a decree in Baghdad, he argued that “the only thing that will work is a new decree annulling the first one.”⁹⁴

An honest diagnosis was given by Major General John R.S. Batiste, Commander of the 1st Infantry Division: “The Property Claims Commission is not working.”⁹⁵

Iraq’s courts, however, are functioning. The CPA, during its existence, fostered effective and fair justice systems, rehabilitated each of Baghdad’s courthouses to the point of functionality, and rehabilitated the Iraqi Judicial College (the site of judicial training).⁹⁶ Ambassador L. Paul Bremer, former director of the Coalition Provisional Authority, noted as early as 9 October 2003 that, “[s]ix months ago there were no functioning courts in Iraq. Today nearly all of Iraq’s 400 courts are functioning. Today, for the first time in over a generation, the Iraqi judiciary is fully independent.”⁹⁷

Thus, in contrast to the IPCC, the Iraqi courts are currently working, giving them a distinct advantage when determining which entity is best suited to address important property claims. In spite of that advantage, however, the IPCC statute prohibits aggrieved Iraqis from availing themselves of their newly functioning court system. Their only recourse is to an inoperable entity.

Strategic Considerations

Thus far, this article has demonstrated the numerous disadvantages of the IPCC and the distinct advantages of relinquishing jurisdiction over such matters to the Iraqi civil courts. Such a decision would not only benefit individual Iraqis, but would also advance the goals of the Multinational Forces in Iraq—the clearly articulated goal of fostering competent legal administration.⁹⁸ That goal can only be hindered by depriving the civil judiciary of an enormous part of its natural

⁹¹ See CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53.

⁹² See *Iraqi Property Claims Commission Failing*, *supra* note 5.

⁹³ See Integrated Regional Information Networks - U.N. Office for the Coordination of Humanitarian Affairs, *Report on Iraq: Property Commission Sets to Work Amid Widespread Scepticism* (Sept. 30, 2004), at http://www.irinnews.org/report.asp?ReportID=43436&SelectRegion=Middle_East&SelectCountry=IRAQ.

⁹⁴ *Id.*

⁹⁵ CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53.

⁹⁶ See *An Historic Review of CPA Accomplishments*, available at http://www.cpa-iraq.org/pressreleases/20040628_historic_review_cpa.doc.

⁹⁷ See L. Paul Bremer, Press Conference (9 Oct. 2003) (transcript available at http://www.cpa-iraq.org/transcripts/20031009_Oct-09Bremerpresscon.htm).

⁹⁸ See Richard L. Armitage, Deputy Secretary of State, Remarks to the Iraqi Judiciary (Sept. 15, 2004), available at <http://usinfo.state.gov/dhr/Archive/2004/Sep/h16-299062.html> (noting:

Who better represents the hopes and the aspirations of the Iraqi people than the distinguished judges that sit here? As I mentioned, I’ve had the opportunity to spend quite a bit of time in Iraq lately, and I’ve come to understand several things. I understand that the hopes and the aspirations of those Iraqi people lie very much on your shoulders. And I have absolutely no doubt that you would not be here, you would not be following the profession you do, if you were not absolutely passionate about the law, if you were not absolutely passionate about bringing justice to all the Iraqi people. So when Prime Minister Allawi is talking about the future of Iraq, as far as I am concerned, he is talking about you. You know better than anyone how difficult a road this is going to be. And it’s a dangerous road. *But democracy, justice, and the rule of law demand our fullest efforts. And I can promise you with a 100-percent certainty that President Bush is not going to rest until this job done. He is not going to rest until the Iraqi judges are seated on the*

jurisdiction. As Francis Fukuyama, Professor of International Political Economy at the Paul H. Nitze School of Advanced International Studies, John Hopkins University, has noted, “what is most urgent for the majority of developing countries is to increase the basic strength of their state institutions to supply those core functions that only government can provide.”⁹⁹ By usurping the jurisdiction of ordinary courts, the IPCC statute instead deprives the civil judiciary of the opportunity to resolve important issues affecting the Iraqi citizenry—depriving them of a chance to demonstrate their skill, impartiality, and importance. The statute may indeed deprive Iraqi courts of their best chance to instill among Iraqi citizens much needed confidence in their institution.

The IPCC statute, however, does more than deprive the Iraqi courts of the advantages of resolving these highly visible disputes—it strips them of talent and ability. Iraq does not possess an unlimited supply of skilled jurists and administrators. The IPCC statute calls for the creation of an administrative structure consisting of numerous legal advisers, operational managers, auditors, and data managers.¹⁰⁰ The statute requires that judges be employed to staff the appellate division and regional commissions.¹⁰¹ Thus, talented and skilled legal professionals that would otherwise be working in the Iraqi legal system are diverted to staff the claims commission. As Fukuyama has noted, “Policymakers in the development field should at least swear the oath of doctors to ‘do no harm’ and not initiate programs that undermine or suck out institutional capacity in the name of building it.”¹⁰²

Depriving the civil courts of prestige and manpower can only hinder their development, thus undermining the long-term goal of the Multinational Forces in Iraq. This becomes even more apparent when considering that the IPCC, like any ad hoc entity, is ephemeral, because it is designed to address a unique issue rather than a broad class of problems. Therefore, even if the IPCC begins working in earnest, it will eventually cease to exist—whether by virtue of its complete success or its complete failure. The civil courts, however, will remain. Therefore, long-term interests of those seeking a stable Iraq with a functional, respected judiciary are best served by remitting to Iraqi civil courts the tasks and jurisdiction of the IPCC.

Conclusion

The IPCC, though born of noble motives, has been a failure in its implementation. The statute, poorly drafted, is completely inadequate for the purposes of addressing the kinds of claims the IPCC was designed to resolve. The IPCC’s apparent inadequacy is accentuated by the functional court system that adheres to a civil law system that has been called “one of the most innovative and meticulously systematic codes of the Middle East.”¹⁰³ It is a failed entity, standing out in stark relief against the background of a rejuvenated judiciary and “a code that balanced and merged elements of Islamic and French law in one of the most successful attempts to preserve the best of both legal systems.”¹⁰⁴

Already, millions of dollars have been given to this failed endeavor—millions better spent on further training the Iraqi civil judiciary or establishing a fund to provide compensation for those Iraqis who lost property over the past decades.¹⁰⁵ Given the history of failure and the obvious advantages of returning jurisdiction to the Iraqi civil courts, there is no need to

bench, making just and wise decisions for Iraqi people. And when that day comes, as far as I am concerned, the whole face of the Middle East will begin to change. (emphasis added)

See also Lieutenant Colonel Craig T. Trebilcock, Notes from the Field: *Legal Cultures Clash in Iraq*, ARMY LAW., Sept. 2004, at 48 (noting:

The situation . . . in southern Iraq was a landscape of smoldering and looted courthouses, . . . and a legal system that was broken from years of corruption and political influence. The arrest of looters and the physical repair of courthouses were concrete goals the Coalition accomplished over several months. Yet, the most serious challenge in returning justice to the Iraqi people remains the establishment of a judiciary that holds the interests of the Iraqi people foremost in its heart.)

⁹⁹ See FRANCIS FUKUYAMA, STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 42 (2004).

¹⁰⁰ CPA REG. NO. 12, *supra* note 26, Annex B, art. 4.

¹⁰¹ See *id.* arts. 7, 15.

¹⁰² See FUKUYAMA, *supra* note 99, at 42.

¹⁰³ Khaled Abou El Fadl, *Rebuilding the Law*, WALL ST. J., Apr. 21, 2003.

¹⁰⁴ *Id.*

¹⁰⁵ See CLAIMS IN CONFLICT: REVERSING ETHNIC CLEANSING IN NORTHERN IRAQ, *supra* note 53 (noting that “the Iraq Supplemental bill approved by the U.S. Congress for the post-war reconstruction program provided for \$35 million for property-related compensation claims, of which \$5 million was earmarked for administration costs.”).

continue down this path. Simply because the Coalition has begun the process is not reason enough to continue it. As Marlowe's Old Man advised Dr. Faustus: "Though thou hast now offended like a man, do not persevere in it like a devil."¹⁰⁶

¹⁰⁶ CHRISTOPHER MARLOWE, DOCTOR FAUSTUS sc. 12 (1593).