

Of “Principles” and Property Law: The Iraqi Civil Code and its Compatibility with International Standards for the Treatment of Displaced Persons

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A recent report by Refugees International notes that Iraq is currently faced with one of the most acute displacement crises in the world, with over 5 million Iraqis displaced by violence – 2.7 million of whom are internally displaced within Iraq.¹ Such a situation creates not only a humanitarian crisis but also a perverse opportunity for insurgents and militia groups to exploit the displacement crisis in order to legitimate themselves and achieve geo-political goals.² It is critical, therefore, to find adequate remedies for displaced persons and forge a sustainable, long-term solution to the ongoing displacement crisis.

It is equally 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

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¹ See *The Iraq Displacement Crisis*, REFUGEES INTERNATIONAL, March 3, 2008, available at <http://www.refugeesinternational.org/content/article/detail/9679>

² *Id.* (“As part of its assistance programs, the Mahdi Army — Muqtada al Sadr’s armed group — also “resettles” displaced Iraqis free of charge in homes that belonged to Sunnis. It provides stipends, food, heating oil, cooking oil and other non-food items to supplement the Public Distribution System (PDS) rations which are still virtually impossible to transfer after displaced Iraqis have moved to a new neighborhood, though it is easier for Shiites to do so.”)

International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the Geneva Conventions.³ Two nonbinding instruments, however, have been promulgated to assist international actors in identifying rights and duties regarding displaced persons: The Guiding Principles on Internal Displacement and the Pinheiro Principles.

The Guiding Principles on Internal Displacement (hereinafter the “Guiding Principles”), which were finalized in 1998,⁴ are a set of guidelines developed in an attempt to enhance protection and assistance for persons forcibly displaced within their own countries by events such as violent conflicts, gross violations of human rights, as well as natural and manmade disasters.

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.⁵

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 2005.⁶ 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

³ See Catherine Phuong, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 58 - 65 (2005).

⁴ See Background Paper, International Colloquy on the Guiding Principles on Internal Displacement, Vienna, Austria, September 2000, available at http://www.brookings.edu/~media/Files/events/2000/0921_guidingprinciples/20000921_Background.pdf

⁵ See Walter Kälin, *The Guiding Principles on Internal Displacement: Annotations*, 2nd Edition, [hereinafter “Annotations”] available at <http://www.asil.org/pdfs/stlp.pdf>

⁶ See *New housing, land and property restitution rights*, RELIEFWEB, May 3, 2006, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/KH11-6PG523?OpenDocument>

where displacement has led to persons being arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.” One NGO describes their function as follows:

They provide practical guidance to governments, UN agencies and the broader international community on how best to address the complex legal and technical issues surrounding housing, land and property restitution. They augment the international normative framework in the area of housing and property restitution rights, and are grounded firmly within existing international human rights and humanitarian law. They re-affirm existing human rights and apply them to the specific question of housing and property restitution. They elaborate what states should do in terms of developing national housing and property 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.⁷

There is considerable overlap between the two instruments and few areas of contrast. Both delineate a number of rights to be afforded displaced persons and both do so in a maximalist fashion which tends to, at times, go beyond existing law.⁸ There are, however, differing levels of detail vis-à-vis their interaction with substantive law. The Pinheiro Principles, for instance, contain a relatively more detailed articulation of the procedural and substantive requirements of the restitution mechanism envisioned. Differences in their promulgation, however, counsel consideration of both instruments when evaluating a domestic legal regime’s compliance with international standards. This is because the Guiding Principles, though lacking in detail, have attained a broad measure of international support and, therefore, are considered to be more authoritative.⁹ The

⁷ *Id.*

⁸ Phuong, *supra* note 3, at 60.

⁹ Annotations, *supra* note 5 (“The Heads of State and Government assembled in New York for the September 2005 World Summit unanimously recognized them as an “important international framework for the protection of internally displaced person.” (UN General Assembly GA Resolution A/60/L.1 para.

Pinheiro Principles, in contradistinction, have more detail but have not yet reached the level of acceptance of the Guiding Principles.¹⁰

This article analyzes the demands of these international standards on the substantive civil law of Iraq in order to determine if existing Iraqi civil law comports with such standards and, if not, to find 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 is required. In its analysis, this article will compare the substantive provisions of Iraqi civil law to both the Guiding Principles and the Pinheiro Principles – layering both sets of principles together as a sort of overlay above a map of Iraq’s legal terrain. Upon so doing, one sees the points of intersection between the requirements of international law (as interpreted by these instruments) and a nation’s substantive civil law. These intersections occur at three distinct points: the architecture of ownership, the mechanism of restitution, and the protection given to secondary occupants.

I. The Current Schemata

Currently, remedies for displaced Iraqis seeking to regain their property are primarily found in the Iraqi Civil Code. This is because there currently is no mechanism in place to

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 organisations 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 disseminate and apply them; and in the Horn of Africa, the Intergovernmental Authority on Development (IGAD), in a ministerial declaration, called the principles a “useful tool” in the development of national policies on internal displacement. In Europe, the Organization for Security and Cooperation in Europe (OSCE) recognized the principles as “a useful framework for the work of the OSCE” in dealing with internal displacement, and the Parliamentary Assembly of the Council of Europe as well as its Council of Ministers urged its member states to incorporate the principles into their domestic laws. The number of states that have incorporated the Guiding Principles into their domestic laws and policies is growing.”)

¹⁰ Though endorsed by the UN Sub-Commission on the Promotion and Protection of Human Rights, the Pinheiro Principles have yet to be subject of the broad member state approval described above.

assist with post-2003 property restitution claims or the ongoing displacement crisis. The Commission for the Return of Real Property (CRRPD), the only such entity functioning in Iraq, addresses exclusively those claims that arose between July 17, 1968 and April 9, 2003.¹¹ Iraqis displaced thereafter, must find recourse through the ordinary court system. This, however, is not cause for grief. As this author has previously noted, the Iraqi civil law system is a sophisticated, modern system which is more than capable of addressing the needs displaced persons and those who have lost property.¹²

The Iraqi code can be aptly described as a member of the civilian (continental civil law) family which is deeply informed by Islamic legal influences. Its history reaches back to the twentieth century, when Iraq blended into its legal culture many elements of the continental civil law tradition with the enactment of its modern civil code. The code was principally authored by Abd al-Razzaq Al-Sanhūrī, who was then working as the dean of the Iraqi Law College.¹³ Jwaideh notes that as Iraq approached modernity, “[t]he conditions under which [Ottoman law] had been enacted had completely changed and legislation for a new and unified civil code became a necessity.”¹⁴ 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. “The proposal put every effort to coordinate between its provisions which stem from two main sources: Islamic law and Western law, resulting in a synthesis in which the duality of sources and their variance is almost

¹¹ See Statute of the Commission for the Resolution of Real Property Disputes, Order Number 2 of the Year 2006, Article 4, available at <http://www.brookings.edu/projects/idp/Laws-and-Policies/iraq.aspx>

¹² See Dan E. Stigall, *Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission (IPCC)*, 2005 Army Law. 28, (March 2005).

¹³ Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 GEO. WASH. L. REV. 176, 180 (1953) (footnotes omitted).

¹⁴ *Id.* at 178.

imperceptible.”¹⁵ 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. 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.

II. The Architecture of Ownership

Both the Pinheiro Principles and the Guiding Principles articulate a requirement that displaced persons be allowed to exercise full ownership of property without illegal interference or discrimination. The Guiding Principles provide that “[n]o one shall be arbitrarily deprived of property and possessions.”¹⁶ Further, property left behind by internally displaced persons should be protected against destruction or appropriation.¹⁷ The Pinheiro Principles, in turn, state that “[e]veryone has the right to the peaceful enjoyment of his or her possessions”¹⁸ and that “[e]veryone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence.”¹⁹ 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 such protections to everyone within their legal jurisdiction.²⁰ One may distill from these combined principles a general requirement for the full protection of ownership of private property,

¹⁵ See Oussama Arabi, *Al-Sanhūrī’s Reconstruction of the Islamic Law of Contract Defects*, 6 J. ISLAMIC STUD. 153, 167 (1995) (citing AL-QĀNŪN AL-MADANI, No. 40 (1951)).

¹⁶ See Guiding Principles on Internal Displacement [hereinafter “Guiding Principles”] 21(1).

¹⁷ *Id.* 21(3)

¹⁸ See Pinheiro Principles, princ. 7.1

¹⁹ *Id.*, princ. 5.1

²⁰ *Id.*, princ. 5.2

untainted by discrimination or governmental arbitrariness – a requirement that the Iraqi legal system fully satisfies.

The Iraqi Civil Code states that everything is subject to ownership except those things which are by their nature or by law excluded from ownership.²¹ Property is defined as everything having a material value.²² The Iraqi Civil Code recognizes the right to complete private ownership of property. Under the Iraqi Code, the owner of the property is considered to be the owner of everything commonly considered to be an essential element of it.²³ Perfect ownership of property vests the owner with the absolute right to dispose of his or her property through use, enjoyment, and exploitation of the thing owned, its fruits, crops, and anything the property produces.²⁴ No exception is made for gender, class, religion, or sect as it is a right of universal application. Further, as articulated more fully below, Iraqi civil law protects the owner from displacement through a system of legal protections and actions designed to oust usurpers and fend off adverse possessors. This legal construction of ownership comports with the international standards set forth in the Pinheiro Principles and Guiding Principles as it makes no distinction based on gender or status and is protective of the owner's absolute right over the property owned.

III. A Means of Restitution

Catherine Phuong, a Lecturer in Law at the University of Newcastle, notes that, while there is no explicit provision in the main international human rights instruments (such as the ICCPR and the ICESCR) which guarantees the right of restitution of property, there is

²¹ See IRAQI CIV. CODE art. 61(1) (Nicola H. Karam trans., 1990).

²² *Id.* art. 65.

²³ *Id.* art. 1049.

²⁴ *Id.* art. 1048.

an emerging trend toward providing restitution and compensation for loss of property to displaced persons.²⁵ 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 that “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.”²⁶ Those same authorities are also tasked with the primary duty of facilitating the safe, voluntary return of internally displaced persons to their homes or places of habitual residence, or facilitating their voluntary resettlement in another part of the country.²⁷

The Pinheiro Principles elaborate a bit more on that responsibility, noting that States should establish “procedures, institutions and mechanisms” to assess and enforce housing, land and property restitution claims 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.²⁸ Thus, both instruments impose an affirmative duty on the part of governments to facilitate the restitution of property of the displaced.

²⁵ Phuong, *supra* note 3 at 64 (noting, “It may still be too early today to conclude that a right to restitution of property lost as a result of displacement or compensation for such a loss has been firmly established in international law.”)

²⁶ See Guiding Principles, princ. 29 (2).

²⁷ *Id.*, princ. 28 (1).

²⁸ See Pinheiro Principles, princ. 2.1

This can be done via new procedures and mechanisms or through the use of the existing legal infrastructure – so long as it is adequately resourced.²⁹

Neither the Guiding Principles nor the Pinheiro Principles, however, give a great deal of substantive detail on the nature of the restitution rights to be afforded. Nonetheless, one may distill from these principles a responsibility on the part of governments to provide a mechanism whereby displaced persons can seek restitution. A review of Iraqi law reveals the existence of a formidable legal regime to accomplish this purpose.

A. Possessory Rights Under Iraqi Law

As noted above, Iraqi law allows for the full protection of private ownership. There are, however, lesser rights in property that may be asserted, such as the right of possession. The right of possession is a concept in civil law doctrine that allows for a property right that is separate from ownership, but allows for the right of use of the thing based on continued possession. In civil law systems, the right to possess signifies a possession protected by the possessory action. Thus, possession, as factual authority over a thing, is distinguishable from the right to possess, which is a possessor's claim to remain in undisturbed possession of a thing and to be restored to the possession of the property if he or she has been evicted.³⁰ It is a separate right that may be obtained through continuous possession of the land—and which can even result in its ownership. The elements of possession are physical control over the thing (the *corpus*) and the intent to exercise ownership (the *animus*).³¹ In order for possession to have any effect, it must

²⁹ *Id.*, princ. 12.1 (“In cases where existing procedures, institutions and mechanisms can effectively address these issues, adequate financial, human and other resources should be made available to facilitate restitution in a just and timely manner.”) Pinheiro Principle 12.3 provides that States are to take administrative, legislative and judicial measures to support and facilitate the restitution process and should provide all of their relevant agencies with adequate resources to accomplish their tasks.

³⁰ See A.N. Yiannopoulos, *Possession*, 51 LA. L. REV. 523, 524 (1991).

³¹ See Brigitte Hess-Fallon & Anne-Marie Simon, DROIT CIVIL 128 (5th ed. 1999).

be continuous, peaceful, public, and unequivocal.³² According to the civil law tradition, possession by violence or deceit has no legal effect.³³ Iraqi civil law has largely incorporated this concept.

The Iraqi Civil Code defines possession as the physical domination, directly or through an intermediary, of a thing which may be the subject of a pecuniary right.³⁴ This is in accordance with traditional civilian doctrine that regards possession as a state of fact that consists of the detention of a thing in an exclusive manner and in the performance of material acts of use and enjoyment as if the possessor were owner.³⁵

Iraqi law states that a possessor's good faith is always presumed. The result of this is that, generally, a person is not considered in bad faith unless there is proof to that effect.³⁶ The good faith of the possessor does not cease until he or she becomes aware that the possession is an encroachment on the right of another.³⁷ In the case of a universal successor in title, he or she stands in the shoes of the possessor and may invoke the privileges of good faith even when his or her predecessor was in bad faith. All successors in title, universal or otherwise, may add to their possession the possession of their predecessors.³⁸

³² *Id.* at 128–29.

³³ *Id.* See also Yiannopoulos, *supra* note 29, at 547 (“In Louisiana and in France, the vices of possession are four: violence, clandestinity, discontinuity, and equivocality. In accord, Article 3435 of the Louisiana Civil Code declares: ‘Possession that is violent, clandestine, discontinuous, or equivocal has no legal effect.’” (footnotes omitted)).

³⁴ IRAQI CIV. CODE art. 1145

³⁵ See 3 PLANIOL ET RIPERT, *TRAITE PRATIQUE DE DROIT CIVIL FRANCAIS*, 158 (2d ed. Picard 1952). See also LA. CIV. CODE ANN. art. 3421 (2007) (“Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name. The exercise of a real right, such as a servitude, with the intent to have it as one’s own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.”).

³⁶ IRAQI CIV. CODE art. 1148(1).

³⁷ *Id.* art. 1148(2).

³⁸ *Id.* art. 1149.

There are aspects to possessory rights which are uniquely positive in the context of a post-conflict displacement scenario. Should records be lost and the ability to prove ultimate ownership thereby inhibited, a displaced person can seek instead to prove that he or she had uninterrupted possession of an immovable for one full year or more.³⁹ If the displaced person can meet this standard (which would not require him or her to prove title) then he or she may, within one year from the date of being displaced, commence proceedings to have his or her possession restored.⁴⁰ As “good faith possessors” are allowed to appropriate the surpluses and benefits of the thing possessed during the time of his or her possession,⁴¹ the right of possession would effectively mimic the right of ownership so long as it is maintained. That possession would, as detailed below, also eventually ripen into full ownership.

1. Acquisitive Prescription

The advantage of the right of possession for the possessor is also one of the key dangers (in the legal sense) for a person whose property is in the possession of another. This is because adverse possession of property can – in certain circumstances – lead to acquisition of its ownership. The provisions of the Iraqi code, however, do not allow those who knowingly displace others to acquire ownership. Thus, in the context of a post-conflict displacement scenario, Iraqi law is of great benefit to the displaced person.

Under the Iraqi Civil Code, a person in possession of a thing is presumed the owner of the thing unless the contrary is established.⁴² That presumption can become a reality through the process of acquisitive prescription, which is provided in articles 1157 and

³⁹ *Id.*

⁴⁰ *Id.* art. 1154

⁴¹ *Id.* art. 1165.

⁴² *Id.* art. 1157(1)

1158 of the Iraqi Code. An action by another to prove ownership of a thing or a right *in rem* will be barred after five years if a person continuously possesses property (or possesses a right *in rem* therein) which is not registered in the Land Registration Department and on the assumption that it is his own property. However, the basis of the possession must be valid title or possession occasioned by “valid grounds.” Valid grounds are defined as any of the following circumstances: acquisition of wetlands, transmission of property by inheritance or will, gifts and donations, or sale.⁴³

If a person continuously possesses (or possesses a right *in rem* over) a movable or immovable that is not registered in the Land Registration Department on the assumption that it is his own property, an action by another to prove ownership of the thing or the right *in rem* will be barred after fifteen years.

In the specific case of movables, no case can be brought against a person who has possession of a movable thing and whose possession is based on a valid cause.⁴⁴ Possession alone brings a presumption of valid cause.⁴⁵ The exception to this rule is for movables that have been lost through physical destruction, theft, usurpation, or what the Iraqi Code terms “abuse of confidence.”⁴⁶ In such cases, the owner may recover the movable from a good faith possessor within three years of the loss, theft, usurpation, or abuse of confidence. As with all cases of possession, good faith is presumed.⁴⁷ It is, therefore, easier to attain ownership of moveable property than immoveable property such as land or houses.

⁴³ *Id.* art. 1158(3).

⁴⁴ *Id.* art. 1163(1).

⁴⁵ *Id.* art. 1163(2).

⁴⁶ *Id.* art. 1164.

⁴⁷ *Id.* art. 1163(2).

The regime of law governing Iraq's variant of acquisitive prescription makes acquisition of ownership through possession quite difficult. The shorter "good faith" prescriptive period is five years under the Iraqi Code. The longer "bad faith" prescriptive period is fifteen years. The result is that, under Iraqi law, one may acquire property with bad title, but one must still possess under the assumption that one is the owner of the property. Those who know they do not own the property but adversely possess anyway – which would describe many of those actively displacing others – cannot avail themselves of acquisitive prescription in Iraq.

Iraq's provisions on acquisitive prescription are a classic example of Al-Sanhūrī's blending of two systems of law while preserving essential elements of both. The codal provisions reflect the Islamic notion that property is essentially transferred by limiting the actions that can be brought against the possessor. In all other respects, however, the substance of Iraqi law in this matter mirrors continental civil law. For instance, one does not lose ownership through nonuse under Iraqi law, and possession coupled with coercion or deceit has no effect whatsoever.

2. Available Remedies

Given the desire to facilitate the return of displaced persons and the potential danger of allowing continued adverse possession of corporeal property, what recourse is available to the displaced owner? The answer varies, depending on the nature of the secondary possessor's possession.

a. Possessory Action

If dispossessed of property, the possessor of an immovable may apply to the court within a year of the date of dispossession to have the immovable restored to him or her.

If the dispossession was clandestine in nature, the time limit for bringing the action begins when the dispossession was revealed.⁴⁸ If the person who was dispossessed has not been in possession for a year, he may not recover possession except from someone with inferior possession. The best possession is by a person with title. When two people have title, the person with the oldest title has better possession.⁴⁹ If the titles are of equal value or if neither has title, the person with the oldest possession wins out.⁵⁰ In the odd event that all title and possession are equal, the two are considered to possess jointly.⁵¹

i. Forceful or Deceptive Possession

As noted above, one does not lose ownership through nonuse under Iraqi law, and possession coupled with coercion or deceit has no effect whatsoever. The Iraqi Civil Code takes a strong stance against forceful or deceptive dispossession. If possession is coupled with coercion, obtained secretly, or ambiguous, it has no effect against the person coerced, the person from whom it was concealed, or the person who was confused as to its nature.⁵² Likewise, if a person has been dispossessed but reinstates his or her possession through coercion, the original dispossessor may go to court and get a judgment reinstating his possession.⁵³

It is also important to emphasize that possession may not be obtained by such means—even if it is to retake previous and rightful possession. The only means of reinstating possession is through judicial process. This is consonant with the civil law

⁴⁸ *Id.* art. 1150(1).

⁴⁹ *Id.* art. 1150(2).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* art. 1146.

⁵³ *Id.* art. 1150(3).

tradition of reclaiming possession through a possessory action.⁵⁴ Thus, in matters of dispossession and the reclaiming of land, the Iraqi civil courts occupy a preeminent role.

ii. Peaceable Possession

As nonviolent, nondeceptive possession can actually have some legal effect vis-à-vis the true owner, the nature of the remedy available to the displaced person in this scenario is a bit more complex. A person who has uninterrupted possession of an immovable for one full year but whose possession is impeded may, within one year from the date of the impediment, commence proceedings to have this impediment eliminated and his or her possession restored.⁵⁵ Likewise, a person having possession for one year who fears his possession may be impeded by some pending work may file a claim to have that work suspended, provided that one year has not elapsed since the commencement of the work.⁵⁶ The right of possession is not interrupted by the loss of corporeal possession if the possessor has regained it or commenced proceedings for repossession within one year.⁵⁷

If a dispossessed possessor has commenced proceedings for reinstatement, he may demand that the defendant be prevented from erecting buildings or planting trees on the disputed land for the duration of the proceedings—if he provides some security to cover any loss that would be occasioned by such abstention in the event that the court finds that the defendant is the true possessor.⁵⁸ Conversely, if the defendant has already erected buildings or planted trees before an order to abstain from such activity is issued, the defendant may demand that those buildings or trees remain in his possession for the

⁵⁴ Yiannopoulos, *supra* note 29, at 538.

⁵⁵ See IRAQI CIV. CODE art. 1154

⁵⁶ *Id.* art. 1155(1).

⁵⁷ *Id.* art. 1161.

⁵⁸ *Id.* art. 1151.

duration of the proceedings—again, if he provides some security to cover any loss that would be occasioned by such a ruling should the court find that the defendant is not the true possessor.⁵⁹

3. *Usurpation*

Alongside the possessory action imported from the continental civil law tradition, the Iraqi Civil Code maintains remnants of the law of “usurpation” which is derived from the *Mejelle*. Commentators note that Islamic jurisprudence is traditionally hostile to the wrongful taking of property. For instance, the eminent Dr. Khaled Abou El Fadl notes, “Hanafi jurist al-'Ayni (d. 855/1451) argues that the usurper of property, even if a government official [al-zalim], will not be forgiven for his sin, even if he repents a thousand times, unless he returns the stolen property.”⁶⁰ This is reflected in the modern Iraqi code’s usurpation provisions. A 2002 House of Lords case, when discussing the applicability of such law, noted:

Articles 192 to 201 of the Iraqi Civil Code provide remedies for the civil wrong of usurpation, or misappropriation. The Code contains no definition of usurpation. Mance J held that under Iraqi law a usurper need not actually take the asset from the possession or control of its owner. Property can be usurped by keeping. Whether keeping amounts to usurpation depends on a combination of factors, including whether the alleged usurper has conducted himself in a manner showing that he was 'keeping' the asset as his own.⁶¹

Under Iraqi law, both moveable and immoveable property which has been “usurped” by another must be returned to the rightful owner.⁶² The codal provisions in this regard label anyone who takes the property of another as a “usurper” and imposes on such an

⁵⁹ *Id.* art. 1152(1).

⁶⁰ See Dr. Khaled Abou El Fadl, *Islam and the Challenge of Democratic Commitment*, 27 *Fordham Int'l L.J.* 4, 51 (2003).

⁶¹ See *Kuwait Airways Corporation v Iraqi Airways Company and Others*, [2002] UKHL 19

⁶² See IRAQI CIV. CODE art. 192, 197.

individual an intimidating set of obligations and liabilities. In the case of immoveables, the Iraqi 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.”⁶³ 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.⁶⁴

4. “*Contra Non Valentum*”

It is also worth mentioning that, in spite of the timelines mentioned above, the Iraqi Civil Code contains provisions that toll the running of such prescriptive periods where a person has not been capable of exercising his or her right. Article 435 notes that such time limits are suspended by an “impediment rendering it impossible for the plaintiff to claim his right.” This rule reflects the civilian concept of *contra non valentum agere nulla currit praescriptio*, a Latin maxim meaning that prescription does not run against a party unable to act.⁶⁵ This rule greatly favors displaced persons who, due to mounting violence and an ongoing conflict, were unable to institute property claims in a timely fashion.

B. *Destroyed Property*

In the ordinary case involving non-Coalition actors, the primary civil remedy for the destruction of property is an action in tort. The Iraqi Civil Code contains a general article stating, “Every act which is injurious to persons such as murder, wounding, assault, or

⁶³ *Id.* art. 197.

⁶⁴ *Id.* art. 198 (1).

⁶⁵ See *Crier v. Whitecloud*, 496 So. 2d 305 (La. 1986).

any other kind of [infliction of injury] entails payment of damages by the perpetrator.”⁶⁶

In cases of murder or injuries resulting in death, the perpetrator is obligated to pay compensation to dependants of the victim who were deprived of sustenance because of the wrongful act.⁶⁷ Every assault that causes damage other than damage expressly detailed in other articles also requires compensation.⁶⁸

In addition to redress for physical injury, the right to compensation for wrongful acts under the Iraqi Code entails redress for moral injuries, impingements on freedom, as well as offenses to one’s morality, honor, reputation, and social standing.⁶⁹ Financial damage to third parties also merits compensation.⁷⁰

Damages may be awarded to spouses and immediate relatives of the family of the victim resulting from moral injury caused by disease.⁷¹ However, damages for moral injury do not pass to third parties unless the amount of damages has been determined pursuant to an agreement or a final judgment.⁷²

Courts are to calculate damages commensurately with the injury and the loss sustained by the victim, provided the loss was the result of the unlawful act.⁷³ This calculation includes the loss of benefits of things, lost wages, etc.⁷⁴ If for some reason damages cannot be adequately estimated, a court may reserve a right for the victim to apply for reconsideration of the estimate within a reasonable time.⁷⁵

⁶⁶ IRAQI CIV. CODE art. 202

⁶⁷ *Id.* art. 203.

⁶⁸ *Id.* art. 204.

⁶⁹ IRAQI CIV. CODE art. 205(1).

⁷⁰ *Id.*

⁷¹ *Id.* art. 205(2).

⁷² *Id.* art. 205(3).

⁷³ *Id.* art. 207(1).

⁷⁴ *Id.* art. 207(2).

⁷⁵ *Id.* art. 208.

The amount of damages to be paid is normally calculated monetarily; however a court may, in certain circumstances, order that a party restore the situation to the *status quo ante* or perform a certain act.⁷⁶ When monetary compensation is ordered, the court may determine the method of payment, such as ordering payment in installments or in the form of a salary to be paid to the victim.⁷⁷

In situations where a person is ordered to commit an unlawful act that results in injury of some sort, the perpetrator (rather than the person ordering or procuring the offense) is considered liable for the damage unless the perpetrator was forced to perform the act.⁷⁸ Public officials, however, are not responsible for damage done by their acts when ordered by superiors to perform them. In such circumstances, it is incumbent on the public official to establish that he believed the act he performed was lawful and that his belief was reasonable.⁷⁹

Civil penalties are separate from criminal penalties and the imposition of the former in no way impacts the latter.⁸⁰ Civil courts are bound to decide civil liability and compensation without regard to criminal judgments or principles of criminal law.⁸¹

Although the general notion in Islamic and Iraqi law is that liability attaches irrespective of fault, negligence, or intent on the part of the person who caused it, the Iraqi Code does allow for certain defenses, such as *force majeure*. Generally, unless there is an agreement to the contrary, liability can be evaded if a person can establish that the injury has arisen from a cause beyond his or her control.⁸² Further, a court may

⁷⁶ *Id.* art. 209(2).

⁷⁷ *Id.* art. 209(1).

⁷⁸ *Id.* art. 215(1).

⁷⁹ *Id.* art. 215(2).

⁸⁰ *Id.* art. 206(1).

⁸¹ *Id.* art. 206(2).

⁸² *Id.* art. 211.

reduce the amount of compensation or refuse to order any compensation in circumstances where the victim has contributed through his or her own fault to the injury or aggravated the injury.⁸³ Those who act in self-defense or in the defense of a third party are not liable so long as they do not use more force than is required.⁸⁴ Likewise, personal injuries are permissible when committed in order to ward off public injury.⁸⁵

1. Vicarious Liability

The general articles on Iraqi torts track the Islamic principle of strict liability. Iraqi law also adopts the principle of “specific” liability in mandating that the offensive act is attributed to the person who commits it rather than the person who procures it. Such a rule constrains liability to the actual wrongdoer and, in general terms, eliminates the possibility of vicarious liability. Nonetheless, the Iraqi Code does contain a few narrow—albeit significant—exceptions to this rule which, although not establishing a regime of respondeat superior, effect such a result in specific situations. For instance, owners of animals are liable for offenses committed by their animals when they fail to exercise reasonable control and take precautions to safeguard others from harm.⁸⁶ Likewise, the father or grandfather of a minor who causes injury is obligated to compensate for that harm unless he can establish that he exercised sufficient control over the minor or, where sufficient control was not exercised, that the harm would have occurred regardless.⁸⁷ Liability also attaches to owners of buildings which collapse due to dilapidation.⁸⁸

⁸³ *Id.* art. 210.

⁸⁴ *Id.* art. 212(2).

⁸⁵ *Id.* art. 214(1).

⁸⁶ *Id.* arts. 221–26.

⁸⁷ *Id.* art. 218.

⁸⁸ *Id.* art. 229.

The most significant exception to the rule against vicarious liability in the Iraqi Civil Code—and the one most likely to be invoked in future litigation—is the liability of government municipalities and commercial entities for injuries caused by their employees during the course of their service. Article 219(1) of the Iraqi Code reads: “Government municipalities and other institutions which perform a public service as well as every person who exploits an industrial or commercial enterprise are responsible for the damage (injury) caused by their employees if the injury resulted from an encroachment committed by them in the course of their service.”⁸⁹ Thus, government and commercial employees’ actions can give rise to causes of action against their employers for acts committed in the course of the employees’ service.

Similar kinds of liability are imposed on the owners of buildings that fall and hurt another,⁹⁰ persons who unnecessarily stop an animal in a public road,⁹¹ and owners of machinery that requires special care but who fail to take adequate precautions to prevent injury.⁹²

A defense to this form of liability, however, exists for government and commercial entities in that the employer may relieve itself of liability by establishing that the requisite amount of control to prevent the injury was exercised. Even where the requisite amount of control was not exercised, the employer may still escape liability by showing that the injury would have happened even if the requisite amount of control had been exercised.⁹³

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. In no case can a

⁸⁹ *Id.* art. 219(1).

⁹⁰ *Id.* art. 229.

⁹¹ *Id.* art. 225.

⁹² *Id.* art. 231.

⁹³ *Id.* art. 219(2).

claim be brought fifteen years from the day of the occurrence.⁹⁴ As noted above, however, such time limitations are subject to exceptions, such as when an impediment prevents exercise of a right.

Thus, the Iraqi Civil Code contains a rich and detailed regime of law allowing for civil actions against those who cause damage to another – to include the damaging or destruction of their property. Displaced persons, therefore, have a remedy not only for property taken from them – but for property which has been damaged. They may both reclaim their property and assert a claim for any diminution in its value due to the action of another.

IV. Secondary Occupants

The Guiding Principles do not specifically mention secondary occupants. The issue, however, is given express treatment in the Pinheiro Principles, which provide that States should protect such persons from unlawful eviction but that, when such evictions are warranted, the secondary occupants be afforded due process, an opportunity for consultation, reasonable notice, and appropriate legal remedies.⁹⁵ Further, according to the Pinheiro Principles, where property has been sold by secondary occupants to third parties acting in good faith, “States may consider establishing mechanisms to provide compensation to injured third parties.”⁹⁶ Where the circumstances indicate that the property being sold was illegally acquired, however, such compensation is not required.⁹⁷ Iraqi law fully comports with these requirements.

⁹⁴ *Id.* art. 232.

⁹⁵ Pinheiro Principles, princ. 17.1

⁹⁶ *Id.*, princ. 17.4

⁹⁷ *Id.*, princ. 17.4

Under the Iraqi code, persons who, in good faith, purchase property from secondary occupants are the “good faith possessors” described above. Such persons are allowed to appropriate the surpluses and benefits of the thing possessed during the time of their possession.⁹⁸ 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 it was obtained through one of the mechanisms described above.

Regarding those living in a place pursuant to a contract of lease (“renters”), the Iraqi Civil Code provides for a highly regulated legal regime. The Iraqi code defines a lease as the alienation of a definite advantage in return for a defined consideration for a certain specified period by which the lessor will be bound to enable the lessee to enjoy the leased property.⁹⁹ This is a definition that comports with both continental civil law and Ottoman law.¹⁰⁰

Under Iraqi law, a lessor is bound to repair and restore any defect in the leased property that has resulted in interference with its intended use.¹⁰¹ If the lessor fails in this regard, the lessee may either rescind the contract or, with a court’s permission, carry out the repairs and restoration and claim the expenses from the lessor.¹⁰² 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.¹⁰³ If the lessor fails to do so, the lessee may demand a reduction in the rent or rescind the

⁹⁸ IRAQI CIV. CODE art. 1165.

⁹⁹ *Id.*, art. 722.

¹⁰⁰ *See* LA. CIV. CODE ANN. art. 2669 (1870) (“*Lease or hire* is a synallagmatic contract, to which consent alone is sufficient, and by which one party gives to the other the enjoyment of a thing, or his labor, at a fixed price.”). *See also* MEJELLE art. 421 (C.R. Tyser et al. trans., 1980) (Isr.).

¹⁰¹ *See* IRAQI CIV. CODE art. 750.

¹⁰² *Id.* art. 750(2).

¹⁰³ *Id.* art. 751(2).

contract.¹⁰⁴ If the leased property perishes in its entirety during the lease, the contract is considered rescinded.¹⁰⁵

The lessee may claim from the lessor the cost of repairs carried out with the lessor's permission if they relate to maintaining and repairing the property. However, the lessee is responsible for minor repairs associated with usage.¹⁰⁶ This provision is consistent with the *Mejelle*, which stated more pedagogically:

If the lessee has done repairs, with the leave of the lessor, if the repairs are connected with the improving of the house, like changing the tiles of the roof or with the preservation of it from harm coming to it, if there is no express condition that this expense is to be paid by the lessor, still the lessee takes the expense from the lessor.

And if it concerns, only the benefit of the lessee, like repairing the oven, for that, so far as there is no express condition, the lessee cannot recover from the lessor the expense of it.¹⁰⁷

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.¹⁰⁸ 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.¹⁰⁹ 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.¹¹⁰ There is an automatic option available to every lessee who

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 751(1).

¹⁰⁶ *Id.* art. 763.

¹⁰⁷ See MEJELLE art. 530 (C.R. Tyser et al. trans., 1980) (Isr.).

¹⁰⁸ IRAQI CIV. CODE art. 764.

¹⁰⁹ *Id.* art. 726.

¹¹⁰ *Id.* art. 727.

has leased a thing without inspecting it, allowing him or her to accept or rescind the lease upon inspection. This right does not extend to lessors.¹¹¹

A lease in Iraq may last a very long time. Normally, a contract of lease which is perpetual, or which is made for a period exceeding 30 years, may be terminated after the lapse of 30 years.¹¹² If, however, the lease contract stipulates that the lease will continue in force as long as the lessee continues to pay rent, it is considered as being a contract for the lifetime of the lessee.¹¹³

If leased property is usurped by another and the lessee is unable to reclaim the property from the usurper, the lessee may claim rescission of the contract or reduction of the rent.¹¹⁴ If the lessee has not reclaimed the property – and it was possible to do so – the lessee shall not be exonerated from payment of the rent. The lessee may, however, commence proceedings against the usurper for damages.¹¹⁵

In situations in which either party has failed to perform any obligation in the lease contract (to pay rent, etc.) the other party may demand rescission of the contract and damages – but only after having first served notice requiring the other party to perform his or her obligation.¹¹⁶ If the leased property is destroyed, the contract of lease is terminated.¹¹⁷

V. A Blind Spot: Military Damage.

The analysis above demonstrates that the organic Iraqi legal system provides a mechanism to protect ownership and other rights in property; allows owners a means of

¹¹¹ *Id.* art. 733.

¹¹² *Id.* art. 740(1).

¹¹³ *Id.* art. 740(2)

¹¹⁴ *Id.* art. 755(1)

¹¹⁵ *Id.* art. 755(2)

¹¹⁶ *Id.* art. 782.

¹¹⁷ *Id.* art. 751.

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.

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 analysis changes when the property is destroyed by military action undertaken by the Coalition. The remedies for persons displaced in such a manner are quite limited. This is because the ability to bring a claim against the Coalition or contractors working with the Coalition is practically nonexistent.

The first CPA regulation stated that the CPA “shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration” and that it “is vested with all executive, legislative and judicial authority necessary to achieve its objectives.”¹¹⁸ 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.’”¹¹⁹

The most important CPA “legislation” in terms of tort liability was Coalition Provisional Authority Order Number 17, which stated that, “[u]nless provided otherwise

¹¹⁸ See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law, Use of Force and Arms Control: Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT’L L. 601, 601 (2004), (quoting CPA Regulation 1 (May 16, 2003), available at <http://www.iraqcoalition.org/regulations/index.html#Regulations>).

¹¹⁹ *Id.* (quoting CPA Regulation 1 §§ 2, 3).

herein, the MNF [Multi-National Forces], the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.”¹²⁰ 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 and immune from any form of arrest or detention other than by persons acting on behalf of their Sending States.”¹²¹ 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.¹²²

Thus, 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) are not.

This does not mean, however, that Iraqi citizens are completely without recourse. A means of asserting claims against U.S. forces is allowable under two different statutory schemes: the Foreign Claims Act (“FCA”) and the International Agreements Claims Act (“IACA”).

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

¹²⁰ See Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF—Iraq, Certain Missions and Personnel in Iraq 4 (2004), http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf

¹²¹ *Id.*

¹²² *Id.* at 5.

most common form of agreement to trigger application of the statute. In such cases, the terms of the applicable SOFA would provide the mechanisms for investigating and settling (or denying) claims against U.S. forces. As there is no SOFA with Iraq, the IACA finds no applicability. Thus, the FCA is the principle device for Iraqi citizens seeking a remedy.

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 may be settled in order “to promote and [to] maintain friendly relations” with the country where U.S. forces are operating. Such claims are investigated, adjudicated, and settled or denied by military or civilian attorneys who serve as foreign claims commissioners.¹²³ 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. Claims under the FCA are paid entirely with U.S. funds, but the claimants receive payment in the local currency. The statute has been widely used to pay claims submitted by local nationals in Iraq, Afghanistan, Kosovo, and Bosnia-Herzegovina.¹²⁴

The FCA permits recovery for “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 employment.¹²⁵

¹²³ See Major Jody M. Prescott, *Operational Claims in Bosnia-Herzegovina and Croatia*, 1998 Army Law. 1, 1 (1998).

¹²⁴ See Colonel R. Peter Masterton, *Managing a Claims Office*, 2005 Army Law. 46, 62 (2005)

¹²⁵ *Id.*

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 states that FCA claims may not be paid when the loss arises from “those activities resulting directly or indirectly from action by the enemy, or by the U.S. Armed Forces engaged in armed conflict, or in immediate preparation for impending armed conflict.”¹²⁶ This exception would likely swallow the most destructive activity and, accordingly, the activity most likely to destroy housing – such as bombing or extensive use of weapons.

In order to overcome this gap in the ability of Iraqi citizens to file a claim, Commanders have used the flexibility of the Commanders Emergency Response Program (“CERP”), a program which allows military commanders to expend funds in order to facilitate certain specified objectives. In implementing CERP, Congress authorized the DoD to use funds “to respond to urgent humanitarian relief and reconstruction . . . by carrying out programs that will immediately assist the Iraqi people, and to establish and fund a similar program to assist the people of Afghanistan.”¹²⁷ On 27 July 2005, the Under Secretary of Defense (Comptroller) issued guidance which added new permissible uses for CERP, including the repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the FCA; condolence payments to individual civilians for death, injury, or property damage resulting from

¹²⁶ See U.S. DEPT OF ARMY, REG. 27-20, CLAIMS para. 10-4d (1 July 2003).

¹²⁷ See Major Bobbi Davis, *Contract and Fiscal Law Developments of 2003 – The Year in Review: Appendix A: Department of Defense (DOD) Legislation for Fiscal Year (FY) 2004*, 2004 Army Law. 199, 204 (2004).

U.S., coalition, or supporting military operations; and payments to individuals upon release from detention.¹²⁸ Thus, the gap left by the FCA can be 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. Otherwise stated, CERP is a matter of command grace rather than an Iraqi citizen's right. The ability of the displaced Iraqi citizen to receive restitution for destroyed property is, therefore, extremely limited. Where U.S. contractors or Coalition forces are concerned, this is a rather pronounced blind spot in the domestic court's functional competence. Although military commanders have palliated this blind spot – to an extent – through the use of CERP, this program is not a restitution mechanism nor does it ensure that each aggrieved Iraqi will have a remedy.

¹²⁸ See Major Jennifer C. Santiago, *Contract and Fiscal Law Developments of 2005 – The Year in Review: Fiscal Law: Operational Funding*, 2006 Army Law. 164, 165 (2006).

<i>Nature of Dispossession</i>	<i>Available Remedy</i>	<i>Comment</i>	<i>Provision</i>	<i>Limitation</i>
Adverse Possession	Possessory Action	Restitution is possible, and time limits could be tolled via ICC Art. 435. Possessory action available where proof of ownership is lacking.	ICC Arts. 1145 - 1152	Some evidence is required on the part of the claimant.
	Usurpation Action		ICC Arts. 192-201	
Property Destroyed by Insurgents/Militia	Civil Tort Action	Allows compensation for destroyed property.	ICC Arts. 202/204 - 231	No real guarantee that the defendant can pay adjudged damages.
Property Destroyed by Military Operation	Military Claim or CERP	This falls into a jurisdictional and administrative blind spot which military commanders can palliate through CERP.	Foreign Claims Act (10 U.S.C. § 2734)	CERP is a tool at the military commander's discretion and not a restitution mechanism.
Renter (Rented Property Destroyed)	Action under ICC 755 and ICC Art. 202/204.	Rent, however, is no longer paid as contract is rescinded.	ICC Art. 751	Displaced renters have limited legal recourse.

VI. Conclusion

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

conflict. A series of articles regulate the rights and duties of secondary occupants, giving them appropriate protections and a fair amount of due process.

The issue of displacement due to Coalition action in military operations, however, cannot be addressed by Iraqi domestic courts as they have been stripped of jurisdiction to hear such claims. The FCA, further, bars the administrative claims Iraqis would normally make when property was damaged by Coalition action. Although commanders may use CERP to assist those adversely affected by such action, CERP – as a matter of command prerogative – is not a restitution mechanism. In order to fully comport with international standards, therefore, some greater mechanism should be provided so that Iraqis can consistently make claims – and be consistently recompensed – when their property has been thusly destroyed. Such a change could be effected either through the adjustment of U.S. legislation or through the enactment of Iraqi legislation repealing CPA Order 17. It would not, however, require the alteration of the Iraqi Civil Code nor the creation of an additional institution.

In the final analysis, therefore, the existing Iraqi civil law system is an adequate legal scheme for providing restitution to property owners who have been displaced or who have suffered a loss due to damaged property. Although it contains a major “blind spot” in a lack of remedies for those who lose property due to military action, such a blind spot is not due to any organic defect in the Iraqi legal system but, rather, the imposition of legislation by the CPA. This exception notwithstanding, the provisions of the Iraqi Civil Code provide a legal scheme to effect restitution that is compliant with the demands of international law.