



Restoring Values:

Institutional Challenges to Providing Restitution and Compensation for Iraqi Housing and Land Rights Victims

**Housing and Land Rights Network
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*Restoring Values: Institutional Challenges to Providing Restitution
and Compensation for Iraqi Housing and Land Rights Victims*

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Introduction

This preliminary report concerns the continuing victimization and eventual remedy for Iraqis forcibly evicted, displaced and dispossessed of their homes, lands and other properties. The victims of these acts include the over 800,000 Kurds, Turkomans, Assyrians and others subject to the brutal “Anfal” campaigns, demographic -manipulation policies and other victims of housing and property dispossession during the Ba`thist regime. Estimates of the Iraqi displaced have risen since the 2003 war and occupation, now exceeding one million.¹

The remedy for these losses has yet to be determined in most cases. However, the Coalition Provisional Authority (CPA) initiated the Iraq Property Compensation Commission (IPCC) to manage the task, albeit with imbedded restrictions. Those inheriting the IPCC mandate are now challenged to ensure that justice is done, and that justice is seen to be done in the very near future.

The slow processing of compensation claims and the ongoing displacements during—including those directly attributed to—the occupation are combining to create a brand of instability greater than that which the insurgency has caused to date.² Without proper adjustments, the IPCC mechanism actually could generate new problems or reach unsatisfactory settlements to old conflicts, causing further setbacks in efforts to reconstitute the State of Iraq.

This report began with an inquiry into the methodology that the IPCC is using to document restitution and compensation cases. It was hoped that such an initiative could contribute in practical ways to the remedy of Iraqi victims by offering the expertise that Habitat International Coalition (HIC) and its Housing and Land Rights Network (HLRN) have acquired through the long experience of its specialized global network. In particular, HLRN has applied the guidance in its [Housing and Land Rights Toolkit](#) in order to determine whether or not the IPCC criteria for compensation embodied all the housing and land rights to which victims are entitled.

Not long into the process did it become clear that the founding of the IPCC omitted any reference to the minimum norms guaranteeing the human right to adequate housing that have been developed over decades of international monitoring and jurisprudence. Nor did the IPCC founders, headed by U.S. Ambassador Paul Bremer, apply the principal lessons of analogous antecedents (e.g., Bosnia, Kosovo, Timor l'Este).

Two more contradictions are notable so far. The first is a matter of legal form and legitimacy. Even in the unlikely scenario in which an objective legal authority were to deem the CPA presence and function to be consistent with international law, it still would have to comply with obligatory conventions. The relevant body of law governing war and occupation includes The Hague Convention and Regulations. Article 43 of this seminal instrument prohibits an occupying Power from modifying the indigenous laws and legal system in an occupied

¹ Global IDP Project, “Iraq: continued insecurity adds to vulnerability of over 1 million IDPs” (24 November 2004), <http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wCountries/Iraq>.

² See Jennie Matthew, “Iraqi Property Commission Failing, 167,400 Displaced Persons Since March,” *Agence France Presse*, 3 (September 2004), available at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/679980ae6343d55849256f040021bdec>. The article quotes US Major General John R. S. Batiste to say that the 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).

territory.³ However, the CPA claims that its Regulations and Orders, in general, alter and replace indigenous law and institutions.⁴ Moreover, the statute founding the IPCC effectively disregards and replaces existing Iraqi law,⁵ including the codes that would facilitate the restitution and/or compensation of rights and properties violated. It meanwhile claims “exclusive jurisdiction,” foreclosing other options to claimants seeking a more-adequate basis of law to attain justice.

The second contradiction arises from the narrow class of victims and unique respondents considered under the IPCC’s “exclusive” mandate. It admits only cases from victims of Ba`thist violations, not others. Meanwhile, the multinational Coalition forces of occupation reportedly have been among the principal protagonists of expulsion, eviction and demolitions/destruction of Iraqi homes since the 2003 invasion.⁶ Formally, the CPA has issued and, through the multinational forces (MNF), has implemented Order No. 6, “Eviction of Persons Illegally Occupying Public Buildings,” without the safeguards required under international law⁷ and, again, without any reference to the indigenous law of the country in which the CPA was operating. Moreover, the MNF are credited with regular destruction of civilian habitat without military necessity. The offences by other opportunistic violators are also left out of the IPCC’s mandate. For their part, the multinational forces have elsewhere claimed immunity from prosecution before Iraqi courts⁸ and the International Criminal Court.⁹

³ Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, entered into force 26 January 1910. Section III, “Military Authority over the Territory of a Hostile State,” Article 43 states: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

⁴ Supra, note 2. “Regulations – are instruments that define the institutions and authorities of the Coalition Provisional Authority (CPA). Orders – are binding instructions or directives to the Iraqi people that create penal consequences or have a direct bearing on the way Iraqis are regulated, including changes to Iraqi law.” Coalition Provisional Authority Regulation No. 1, at <http://www.iraqcoalition.org/regulations/index.html#Regulations>.

⁵ CPA Regulation No. 1 claims, in Section 1, “The Coalition Provisional Authority,” Articles 2 and 3, that “The CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator.” Further, it asserts that “As the Commander of Coalition Forces, the Commander of U.S. Central Command shall directly support the CPA by deterring hostilities; maintaining Iraq’s territorial integrity and security; searching for, securing and destroying weapons of mass destruction; and assisting in carrying out Coalition policy generally.” Section 2, “The Applicable Law,” states that: “Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA...” At: http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

⁶ HLRN has received numerous testimonies from Iraqi civil society representatives recounting the practices of the multinational forces in shelling, evicting and punitively burning Iraqi family homes not only during the sieges of Najaf and Faluja, but across the country throughout the period of occupation. The reports have been numerous and consistent in their details of Dutch, Polish, British and US military personnel carrying out such clear violations of the laws of war and their own country’s human rights obligations. The consequences of that behavior can only lead to further suffering and, therefore, breed justifiable grievances against the occupiers that, from the specific field of housing and land rights violations, only add to the existing grievances against the hated regime they replaced.

⁷ UN Committee on Economic, Social and Cultural Rights General Comment No. 7 (1997) on forced evictions states: “Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive lands, as the case may be, is available” (Paragraph 16).

⁸ “Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.” CPA Order No. 17, “Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq, 27 June 2004, Section 2, “Iraqi Legal Process,” para. 1.

⁹ SC/RES/1422 (2002), 12 July 2002, and SC/RES/1487, 12 June 2003, each established a 12-month requirement of Security Council approval for any prosecution by the International Criminal Court (ICC) of any person engaged in a “UN established or authorized operation” who is a national of a country that has not ratified the Rome Statute. However, facing international opposition, the United States withdrew its bid to renew SC/RES/1487 in June 2004.

Nonetheless, as recognized in UN Security Council resolutions 1483 and 1511, foreign forces in Iraq, as occupying powers, are bound to comply with The Hague Regulations and the four Geneva Conventions. Because of the human deprivation they cause, the practices of grand-scale eviction, wanton property destruction and population transfer¹⁰ are codified among the grave breaches of humanitarian law, violations of human rights treaty provisions, and/or criminally indictable as “grave breaches,” “war crimes” and “crimes against” humanity.¹¹

Thus, the internationally recognized gravity of the practices invokes a measure of global responsibility to apply lessons and tools developed to remedy and prevent such housing and land rights violations. It is in this spirit that the Housing and Land Rights Network (HLRN) of Habitat International Coalition is proffering the present form of assistance to the field.

The implementation of housing and land rights alone may not be sufficient to resolve complex disputes and repair the damage done by decades of tyranny. However, lessons from the field on every continent instruct us that formally implementing those rights provides a basis upon which to rationalize the resolution of disputes, even if not all parties realize their optimum interests in the end. Property restitution is organic and essential to the successful return, rehabilitation and reintegration of cross-border refugees and internally displaced persons (IDPs). Conversely, it has been proved that denial of those same rights is sufficient to complicate and/or prolong conflict. The failure to restore property rights, in particular housing and land, perpetuates deprivation and the perception of injustice that lies at the root of armed struggles.

Property restitution is central to the successful return and reintegration of both refugees and IDPs. Without it, perceptions of injustice are perpetuated and underlying conflicts remain unresolved.

Property restitution touches on all aspects related to successful return: protection, law and order, reconciliation and peace building, restoration of livelihoods, strengthening of local institutional capacity and, ultimately, the chance to bury past conflict and working toward a peaceful future.

Annie Davies, “Restitution of Land and Property Rights,” *FMR* (September 2004)

For refugees, IDPs and other dispossessed claimants, property restitution is the basis of sustainable livelihoods, restoration of law and order, protection, capacity building, reconciliation among communities and the return of a revitalizing sense of a future necessary to achieve a much-deserved measure of hope, reconciliation and restoration of civilization in Iraq. Applying neutral law in a truly national effort at restitution would not only correct the IPCC statute’s narrow ideological focus on claims exclusively against the former Ba`thist

¹⁰ See report of the UN Special Rapporteurs on the human rights dimensions of population transfer, including the implantation of settlers and settlements, E/CN.4/Sub.2/1993/17, June 1993.

¹¹ On the US military’s conduct of house demolitions, see “Iraq: US house demolitions could be illegal” [Amnesty International press release MDE 14/177/2003 on letter to U.S. Secretary of Defence Donald Rumsfeld, 20 November 2003], at <http://web.amnesty.org/library/Index/ENGMD141772003?open&of=ENG-366>; Jeff Wilkinson, “U.S. Tactics in Iraq May Backfire, Critics Say,” *Knight-Ridder* (23 November 2003), at <http://www.commondreams.org/headlines03/1123-04.htm>; James Bovard, “Should the U.S. Military in Iraq Adopt Israeli Methods?” *Freedom Daily* [Future of Freedom Foundation] (November 2003), at <http://www.fff.org/freedom/fd0311c.asp>; Joanne Laurier, “Human rights groups: US may be guilty of ‘collective punishment’ war crime in Iraq” (17 January 2004), at: http://www.wsws.org/articles/2004/jan2004/hrww-j17_prn.shtml; “Iraq: U.S. Demolitions May Violate Laws of War,” *Human Rights Watch News* (13 January 2004), at <http://hrw.org/english/docs/2004/01/12/usint6924.htm>; Human Rights Watch, “Letter to Defense Secretary Donald Rumsfeld,” 12 January 2004, at: <http://hrw.org/english/docs/2004/01/12/usint6921.htm>; “IDF-style home demolitions in Iraq?” *Salt of the Earth* (January 2004), at: <http://salt.claretianpubs.org/sjnews/2004/01/sjn0401b.html>.

leadership and allow all legitimate claimants to seek remedy. That also would contribute to the rule of law, in general, rather than perpetuating favoritism and double standards as the rule in Iraqi public life. For these and other reasons, the IPCC will need revamping before it can promise to achieve a meaningful measure of justice for the country. It will surely be more economical to accomplish that sooner, rather than later.

This HLRN report reviews the IPCC's present system for evaluating victims' losses subject to restitution and/or compensation. It concludes with a series of recommendations that seek to complement the current criteria and procedures for addressing property claims. Specifically, it identifies additional and alternative categories of data required to address losses, and practical guidance arising from human rights norms and jurisprudence. That is the original objective of this inquiry. In its course, however, the structural problems have become ominously clear, and make it possible also to identify the larger tasks required to correct the reparation process, to depart from the past, present and continuing state of lawlessness and, ultimately, restore justice for the peoples of Iraq.

Justice on Its Face

For many Iraqis claiming their housing and land rights, their first contact with the Iraq Property Compensation Commission is through the official claim form.¹² This form, which outlines the compensation issues to be adjudicated, should be a cold warning for victims and their representatives. Anyone familiar with the process of documenting housing and land rights violations, like any victim recounting his own case, would notice gaps in the information required to determine terms for settlement of the material and nonmaterial losses arising from the commission of the crime and its aftermath.

This omission can be partly attributed to the IPCC designers' own preference of compensation terms for Iraqi victims. The IPCC statute¹³ is silent on compensation terms, except to assert the *original purchase price*, rather than replacement value, as a basic criterion for assessing a lost property's worth.¹⁴

The original purchase price cannot provide any rightful basis for evaluating losses, especially those endured over time. Such a criterion likely would produce many settlements in which an occupier resorts to an outdated and inferior valuation to pay off a claimant with a mere fraction of the proceeds s/he gained over time from the ill-gotten property. In such a scenario, the rightful owner likely would not be able to obtain a reasonable replacement of the usurped property without a substantial extra expenditure, while the offender benefits from a handsome profit at the victim's continuing expense. Such a settlement, therefore, falls far short of any of the ostensible purposes for establishing the IPCC, including return, restitution, rehabilitation, reconciliation and reintegration. Instead, it would provide a new and formalized basis for perpetuating old grievances, impoverishment and social unrest.

Other problems arising from the original-purchase-price criterion are discussed below. However, it deserves early mention that that shortcoming stands together with the omission of other material loss-assessment criteria, such as contents of the home and other structures, infrastructure and other investments, lost income, replacement housing, etc. The case claim form also makes no provision for, and offers no guidance in assessing nonmaterial costs and losses. While such matters as bodily harm, pain and suffering are always more difficult to quantify, they are no less felt, no less a value and no less lingering—and, thus, no less cumulative—than the material losses. The IPCC claim form does allow for claimants to attach additional information, but offers no guidance as to the content or purpose of such annexes to the form. These issues are left to a future process to establish national compensation guidelines.

While the time is late, especially for those awaiting remedy, as well as those costing out the process, the discussion of quantification criteria and related issues can only aid the process. To address the IPCC's case claim form's exclusion of basic data required, this report

¹² This analysis seeks to compare the criteria and type of information captured in the IPCC claim form with the existing human rights of affected claimants. HLRN does not yet benefit from access to, or review of any explanatory documents, applicable quantification methods, formal interpretations by the IPCC, or other official CPA or Iraqi government sources clarifying the purpose and scope of the prospective compensation due to the victims. If such documents exist, they would appear not to be widely available to victims through the customary sources and channels of information.

¹³ The legal term of art "statute," as in "IPCC statute," is used here to refer to, and is synonymous with CPA Regulation No. 12 that founded the IPCC. The term does not imply that decrees in the form of CPA Regulation or Order constitute formal legislation.

¹⁴ CPA Regulation 12, Annex A "Establishment of the Iraq Property Claims Commission (as Amended and Restated), Section Four, "General Principles," Article 8.L.

provides a “Loss Matrix” taken from the [HLRN Housing and Land Rights Toolkit](#). A summarized version is annexed here for the reader’s consideration.

The apparent openness of the IPCC to receive the advice of other parties¹⁵ creates an opportunity for improvement and the development of a proper loss-assessment methodology. However, optimism is tempered by the additional structural shortcomings of procedure, legality and scope afflicting the IPCC. These also must be remedied, lest the efforts toward reasonable data collection and quantification criteria be in vain .

IPCC Overview

The crisis arising from past dispossessions , ongoing counterdisplacements and general instability prompted the CPA, on 14 January 2004, to promulgate a regulation, or transitional administrative law (TAL), 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....”¹⁶ The Iraq Property Compensation Commission was intended to redress injustices owing to misappropriation and distribution of properties during the former regime; of most concern were the dispossessions created from wrongful appropriation and distribution of properties due to the actions or policies of the former Baathist regime in the petroleum-rich Kirkuk region.¹⁷

The Iraqi Governing Council ratified the establishment of the IPCC, as the CPA regulation required without revising or debating the IPCC statute. The first of the IPCC offices opened in early March 2004, with the sole purpose of distributing claims forms. IPCC offices opened in the north, middle and south of Iraq by the end of May 2004. The IPCC since has worked to establish systems necessary for managing a mass claims system and mobilizing the resources to maintain offices and pay personnel. The process has followed the structure assigned in the subsequent and more-detailed CPA Regulation No. 12, which Amb. Paul Bremer promulgated on 24 June 2004, just days before the end of the CPA’s role. On 28 June, Prime Minister Iyad Alawi and Ambassador Bremer appointed the first Head of IPCC Suhail Al Hashimi to his position.

All governorates in Iraq have IPCC offices. Kirkuk has the largest number of four offices, and Diyala and Salah al-Din Governorates each have two offices. All governorates now have Regional Commissions that have been established with appointed adjudicators trained to decide claims. The Commission is currently reviewing cases in order to start making decisions once a compensation plan has been established.

The Prime Minister’s Office has established an interministerial Working Group on Compensation for the Displaced. The IPCC and the Ministry of Displacement and Migration

¹⁵ The IPCC has announced that it “needs to continue to draw on the long experience of international organizations who have worked in the area of mass claims and property restitution. Strengthening of communication ties needs to occur so that the organizations decisions are guided by experienced recommendation. Cooperation will encourage an understanding of lessons learned and the international context IPCC operates in with the needs of transparency, efficiency and regard for international standards of human rights norms.” “IPCC Status,” IPCC presentation at the UNHCR/IOM/NRC Training on the UN Guiding Principles on Internal Displacement, Amman, 7-9 September 2004, cited in DP Project, Iraq Property Claims Commission (IPCC) overview (2004),” at: <http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wViewCountries/E214086AE5FDD63EC1256F2C0056EB1>

¹⁶ See Coalition Provisional Authority (CPA), Regulation No. 8, “Delegation of Authority Regarding an Iraq Property Claims Commission, 14 January 2004 [hereinafter CPA Regulation 8].

¹⁷ “IPCC Status,” op cit.

(MoDM) head the working group, joined by the Ministries of Finance, Agriculture, Public Works, Housing and Construction, Planning and others.

IPCC has organized a Public Information Department, which has issued public-service announcements in a variety of media to inform IDPs of the IPCC process. It focused especially on Kirkuk and the north of Iraq.¹⁸ At present, the IPCC has received at least 54,726 claims,¹⁹ in advance of the 30 June 2005 deadline for submissions.

The process of adjudicating claims has been slow. However, at least 3,841 claims have been decided to date, with 549 appeals underway.²⁰ Cash awards from government funds will only begin after the Interministerial Working Group develops nationwide compensation guidelines. In addition to restitution, the options include monetary grants, property restitution and soft loans, among others. In some cases, the IPCC has authorized the payment between private parties. Most of the decided cases to date, then, are typically uncontested, or were cases in which the government was the respondent.²¹

The occupier's initiative

The text and context of the IPCC's founding documents, CPA Regulation No. 8 and its successor No. 12, are replete with legal dilemmas and contradictions. Amb. Bremer premised his promulgation of the statutes on a claim to corresponding "authority as Administrator of the Coalition Provisional Authority (CPA), and under the laws and usages of war, and consistent with relevant U.N. Security Council resolutions, including Resolutions 1483 and 1511 (2003) and 1546 (2004)."²² This premise, in itself, is problematic to the subsequent legitimacy of CPA-made laws and institutions in Iraq, particularly in that it distorts the content and meaning of the UN resolutions that Amb. Bremer cites to ground his law-making authority.²³

¹⁸ *ibid.*

¹⁹ "Aggregate Statistics – week ending 4 May 2005," IPCC Advisory Group. This number contrasts with the 39,000 received cases reported in "IRAQ: Focus on increasing displacement in Kirkuk," Integrated Regional Information Networks, UN Office for the Coordination of Humanitarian Affairs--IRIN (3 May 2005), at: http://www.irinnews.org/report.asp?ReportID=46908&SelectRegion=Middle_East.

²⁰ *Ibid.* his number does not include Regional Commissions in some districts that were either slow to become operational, or that are not issuing regular statistics (e.g., Qadisiyya).

²¹ E-mail correspondence with David L. Gandle, deputy senior consultant to the Iraq Property Claims Commission Advisory Group, American Embassy Baghdad, 17 May 2005.

²² Preamble of Coalition Provisional Authority Regulation No. 12, "Iraq Property Claims Commission," CPA/REG/23 June 2004/12 [hereinafter CPA Regulation 12].

²³ Security Council resolution 1483²³ reaffirmed "the sovereignty and territorial integrity of Iraq," stressed "the right of the Iraqi people freely to determine their own political future and control their own natural resources" and welcomed "the commitment of all parties concerned to support the creation of an environment in which they may do so as soon as possible, and expressing resolve that the day when Iraqis govern themselves must come quickly. Paragraph 4 called upon the Authority, "consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future..." Paragraph 5 further called upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907..." In its resolution 1511,²³ the Security Council reaffirmed "the sovereignty and territorial integrity of Iraq," and underscored...the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognized and set forth in resolution 1483 (2003). Paragraph 13 "authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure..." In resolution 1586, the SC *looked forward* to the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq (by 30

It may seem beyond the purpose of—and perhaps also superfluous to—this inquiry into loss-quantification methods to challenge the CPA's claim to authority in establishing the IPCC. However, the relevance of the CPA's lack of legality and inappropriateness as the initiator of the IPCC is borne out particularly by historic lessons.

“Recognizing that the Statute of the Establishment of the Iraq Property Claims Commission (Regulation No.8)²⁴ needed to be amended so that the IPCC could function,”²⁵ Amb. Bremer issued a new Regulation No. 12 to replace its antecedent in the final days of the CPA term. Attached to Regulation 12 are (1) a revision of the previous IPCC statute, as Annex A, and (2) “Instructions for Operation of the Iraq Property Claims Commission,” as Annex B, which is to be applied to all claims filed before the IPCC.

The two annexes to CPA Regulation 12 contain more detailed procedural and structural information as well as some substantive changes to the previous statute. Notably, the new regulation expanded the IPCC's functional competence to include claims arising between 18 March 2003 and 30 June 2005. In addition, Regulation No. 12 imposed the IPCC “exclusive jurisdiction” in matters of compensating property-dispossession victims, which scope the previous regulation only implied.²⁶ The revision extended the filing deadline for claims to 30 June 2005. This apparent attempt at further clarity simultaneously obscured the existing domestic and international criteria of human rights to housing and property, and to return, restitution, rehabilitation and compensation of victims.

Giving and taking away

While specifying the institutional and juridical mechanisms for disposing dispossession claims, the IPCC statute also may prejudice case outcomes by circumscribing (1) the applicable law, (2) the nature and scope of admissible cases, (3) the class of victims served, (4) the values at stake, (5) the methods to be applied and (6) the nature of the settlements. This decree erected obstacles to justice through the *ad hoc* limitation of rights, with potentially harmful consequences for victims, as well as for the country at large. This stage of the present inquiry considers the CPA-prescribed methods of procedure, then explores the scope of cases permitted before the IPCC. This section is then followed by a practical resort to norms arising from applicable Iraqi and international law. This inquiry primarily concerns the evaluation of compensation awards for victims, so will focus its recommendations on that aspect.

The remedies available under the current IPCC statute are laid out in Annex A, Article 8.²⁷ It advises the parties that possible remedies consist of returning the property to its original (i.e., rightful) owner;²⁸ returning the property to the original (or rightful) owner on certain

June 2004).²³ All references to the multinational forces circumscribe authority to measures that contribute to the maintenance of security and stability.

²⁴ The Coalition Provisional Authority Regulation 8,

“Delegation of Authority regarding an Iraq Property Claims Commission,” CPA/REG/14, January 2004/8, came into effect on 15 January 2004.

²⁵ Preamble to CPA Regulation 12, *op cit.*

²⁶ CPA Regulation 12, *op cit.*, Section 5, Articles 9 and 11. Article 11 states: “The IPCC is to have exclusive jurisdiction over all claims involving immovable property, assets affixed to immovable property, easements or servitudes on property or land or other interests in real property brought in accordance with Articles 9A and 9B. Any such cases pending must be transferred by the relevant court to the jurisdiction of the IPCC.”

²⁷ CPA Regulation No. 12, Annex A, sec. 4, art. 8.

²⁸ *Ibid.*, A–E.

conditions, such as the rightful owner reimbursing the subsequent owner for any improvements;²⁹ the subsequent purchaser/occupier purchasing the property from the original owner at a (original-purchase?) price, minus any compensation that the previous government paid as compensation at the time; or receiving compensation for the price of the property.³⁰

IPCC structure and procedure

Section II of Regulation No. 12 lays out the structure of the IPCC, establishing a three-tiered bureaucracy for the Iraqi Interim Government to introduce, fund and manage:

- ❑ An Appellate Division, composed of five sitting or retired judges, and established as a separate chamber of the Iraqi Court of Cassation, having its own secretariat and Appellate Division Clerk's offices to provide operational and legal support;
- ❑ One or more Regional Commissions in each governorate in Iraq (with a maximum of three in the Kurdistan Regional Government area). Each regional commission is composed of (i) a judge, appointed by the Council of Judges, who presides as chairman, (ii) the Director of the Office of Real Estate Registry in the Governorate, or his representative, and (iii) the Director of State Property of such Governorate, or his representative. The regional commission may also request the assistance of persons who are experts on the subject of any claim; and
- ❑ A National Secretariat responsible for overseeing all operational and management activities of the IPCC, including the maintenance of a comprehensive database of claims and oversight of compensation and eviction orders. The National Secretariat is composed of a head, who serves as the highest official of the National Secretariat, and the personnel of operational managers, auditors, data managers, legal advisers, public-relations personnel, and any other necessary staff.

The process of adjudicating claims filed with the IPCC begins with the claimant(s), or his representative filing a claim in the proper form at any IPCC office, including any properly designated IPCC office outside Iraq. Following receipt of a properly completed claim form, the Regional Secretariat registers the claim in a claim file, indicating the:

1. factual background of the case;
2. legal issues involved;
3. parties' arguments; and
4. Clerk's Office's recommendation, made by a legal adviser, as to how the case should be decided.

The relevant Regional Secretariat serves notice on any interested parties, including natural or juridical persons.³¹ The Regional Secretariat also serves notice of the claim on the General Directorate of Real Estate Registration, and the General Directorate of Real Estate Registration ensures that the official title record bears the date and reference number of the claim.³²

²⁹ Ibid, F.

³⁰ Ibid, L-M.

³¹ In accordance with the guidelines issued by the National Secretariat and Instructions for Operation approved by the Administrator, if before 30 June 2004, or by the Iraqi Interim Government, if after 30 June 2004.

³² Article Six of Regulation 12.

After the Regional Secretariat authenticates the identities of the parties, the Commission Clerk's Office reviews and verifies each claim, issuing an impartial recommendation as to how the case should be disposed.³³ The Regional Secretariat bears the responsibility for notifying the claimants and any known interested parties of the Regional Commission's decision, which will be final unless appealed within 60 days,³⁴ "on the grounds of new evidence or manifest error" and within the IPCC's exclusive jurisdiction.³⁵

The Regional Secretariat shall encourage the voluntary resolution of claims, and may arrange mediation or otherwise facilitate the amicable settlement of issues among the claimant(s) and any identifiable interested parties. The National Secretariat is to provide guidance on the procedures.

Where the parties do not arrive at an amicable settlement, or fail to resolve the claim voluntarily, the Regional Commission Clerk's Office is to review the case file and prepare a case report. If the evidence is found sufficient, the Regional Commission may hold a hearing at its discretion to develop the factual record, and may request the assistance of other governmental and nongovernmental parties in that process. The Regional Commission then decides the claim and the appropriate remedy by majority vote with three members present.³⁶

The claim form

Evaluating the problematic procedural matters from the most specific to the most general, one begins at the original subject of this inquiry: the evaluation criteria provided in the IPCC claim form and instructions. The IPCC claim form allows for circumstantial questions about the events causing the property loss. The form does not allow for recording details about the values involved in the property, either as original-cost estimates, or as replacement-cost appraisals.

The form does not allow for collection and documentation of any cost-wise consequences of the dispossession case. It refers only to the structure, land, and the infrastructure on the land affected/lost in the process (sections 15 and 16), but not their values.

The claim form omits any field that would guide the claimant to record other related material costs/losses, including but not limited to replacement housing; transportation; investments in improvements; continuing interest payments of financed improvement; labor; lost rent; moveable property or immovable property that was damaged, but not confiscated.

The form allows for the claimant or the claimant's representative to describe at length the circumstances of the loss and its relation to the policies of the Ba`th regime. The form and

³³ A commissioner would be considered partial and disqualified if s/he (1) were a relative of [any] one of the parties "through parentage, marriage or adoption up to the fourth degree"; (2) were, or were to have a spouse, child, parent, son-in-law or daughter-in-law in an ongoing dispute with one of the parties; (3) had been a legal advisor for one of the parties, business partner of any kind, held an interest in a company, or been a board member of a company in which one of the parties has a controlling interest; (4) had given advice or an opinion on the particular case before it reached the Regional Commission; (5) had any other interest (financial or otherwise) in the claim. In case of such a disqualification, the appointing authorities are to fill the commissioner position with an ad hoc appointment. (CPA Regulation 12, Annex B, Section, Article 20.

³⁴ The Regulation Annex B, Article 35 stipulates that the 60 day period runs from the time the decision is posted, or the date of the notification of each concerned party, whichever is later.

³⁵ *Ibid*, Article 54.

³⁶ CPA Regulation 12, Annex B, Articles 45-49.

“They need a lot of things as compensation for what they lost. You will see people who have no place to live or are just living in unaffordable rental houses, and some families have no clothes for their children. They need financial, emotional, and psychological support.”

(Kurdish woman, Sulaimaniya)

“We lost our land. We lost our houses, our families. We lost everything. We want to return to our land, we want physical support.”

(Anfal widow, near Erbil)

“If their money and their rights were taken from them, then they should be returned.”

(Turkoman man, Kirkuk)

“First, material compensation, because most of them do not own houses to live and they were denied a salary for 20 or 23 years and they were deprived of food and good clothing, and they were not appointed in work positions...”

(Family member of victim, Baghdad)

International Center for Transitional Justice, *Iraqi Voices* (New York: International Center for Transitional Justice 2004), pp. 43–44.

the IPCC mechanism, as such, do not seek to establish justice in the sense of prosecuting violators. However, in the event that this were—or, in future, could be—a matter for such an eventual judicial procedure, it would be essential that the claimant identify as much as possible the duty holders, include the individuals ordering and implementing the violation. This crucial matter of transitional justice also is omitted from the IPCC statute, and falls to indigenous Iraqi initiative to address.

Compensation principles

The IPCC statute’s guide for adjudication of all cases is found in the “General Principles” in Annex A.³⁷ Like the claim form, the statute lacks any provision for claiming the lost use value of the property over the period of dispossession without remedy. In addition to lost rents from the original property, the statute is silent on the fate of the lost values from harvesting crops from illicitly acquired agricultural land. Therefore, even if allowed to address such claims, IPCC personnel and judges find no guidelines in the presumed basis of their authority, and even less instruction for quantifying losses to be restored and/or compensated.

Neither the procedure nor the claim form allows for consideration of the nonmaterial or indirect losses, such as loss of community, illness and injury, lost

educational opportunities arising from the eviction/dispossession. While quantifying these losses may be less objective and quantifiable in monetary terms, they are no less real. Moreover, compensation for these losses is the victim’s right.³⁸

It is essential for claimants, other government bodies and the larger public to know the criteria for compensating these past violations. At the very least, it is important that the victims and public perceive the application of criteria that are standard, consistent and not subject to nepotism, arbitrary change, bribery, or any other impropriety. Without such a safeguard of predictability and transparency, future conflicts may arise between and among persons and communities, as well as against authorities and their institutions.

If lawyers and legal practitioners are to represent their client’s claim on the basis of the existing IPCC statute and ensure that the victims receive what is due, they need to be served with more information on values to be calculated, claimed and compensated. In this

³⁷ CPA Regulation 12, “Coalition Provisional Authority,” Annex A “Establishment of the Iraq Property Claims Commission (As Amended and Restated),” Section Four, “General Principles,” Article 8.

³⁸ See draft “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law,” E/CN.4/2003/63, 27 December 2002.

important aspect of the task of justice, the claimants and/or their representatives now shoulder the burden of devising a method for calculating and asserting values and losses claimed, particularly if the Iraqi government or the IPCC National Secretariat³⁹ does not revise or augment it soon. With such a vast number of claims as those expected before the IPCC, the absence of an IPCC methodology for quantifying values is likely to produce a widely varied approach to compensations, institutionalizing inconsistency and arbitrariness in the application of judicial standards.

Duty holders include current occupants of the dispossessed properties. The IPCC statute's scope, procedures and settlement recommendations make no provision for penalties to duty holders. However, it does provide for a number of rights. Article 7(F) states that:

[I]f the property in question is occupied, possessed or used by the nonprevailing party, and such party has no other property, then the nonprevailing 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

Those Iraqis who benefited from the dispossessions and displacements apparently retain the benefit of the doubt (i.e., the presumption good faith). The IPCC statute 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.⁴¹

These terms of resettlement and compensation for the beneficiaries of illicit gains make no distinction between actors in good faith and those of bad faith. The unconditioned results likely will prove controversial, undermining the IPCC's credibility in the public eye, but also falling short of the requirements of justice for the actual victims.

Types of cases considered for compensation

The IPCC statute provides for restitution to any person, natural or juridical, or their heirs, or their bona fide representative, in Iraq or abroad, provided that their good-faith claim arises from a case that:

1. Arose between 17 July 1968 and 9 April 2003, inclusive;
2. Involves immovable property, assets affixed to immovable property, easements or servitudes ("real property"), or an interest in real property;
3. Involves property confiscated, seized, expropriated, or 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 standard; or

Arose between 18 March 2003 and 30 June 2005, inclusive;

³⁹ As provided in CPA 12, Annex B, Article 66.

⁴⁰ CPA Regulation 12, Annex A, Article 7.f and Annex B, Article 51 (f). However, this referral may not be sufficient to comply with minimum requirements under CESCR General Comment No. 7: "right to housing: forced evictions," para. 16.

⁴¹ CPA Regulation 12, Annex A, Article 10.

1. Involves real property, or an interest in real property;
2. Involves real property confiscated, seized, expropriated, forcibly taken for less than full value, or otherwise acquired and/or reacquired:
 - (a) as a result of the owner's or possessor's ethnicity, religion, or sect, or for purposes of ethnic cleansing, or;
 - (b) by individuals who had been previously dispossessed of their property as a result of the former Ba`thist governments' policy of property confiscation.⁴²

Excluded cases

The IPCC statute's General Principles, however, contain major gaps and drawbacks that cannot be overcome merely by arguing that the rules are mere guidelines. Particularly, the principles in Regulation No. 12 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.

For purposes of the IPCC's jurisdiction, the only cases admissible would involve actions or inactions attributable to the former governments of Iraq, including, but not limited to:

1. The actions or inactions of any State organ in Iraq, whether of the central government or of a territorial unit of the State, and whether the organ exercised legislative, executive, judicial or any other functions within the former governments;
2. The actions or inactions of a Ba'ath party member, or of a relative of a senior official of the Government or party, operating with apparent authority, or under color of authority, or with the implicit or explicit license of the former governments.⁴³

As the General Principles only address property that the Ba`thist regime confiscated or seized, it would be impossible to hold the regime responsible for property confiscated or seized after 9 April 2003. Although the Regulation 12 ostensibly extended the period of violations for the IPCC to address (until 30 June 2005), its General Principles, therefore, provide no means of redress for persons with claims arising from violations in the 9 April 2003–30 June 2005 period.

The principles of the IPCC statute also do not explicitly 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. Such a category of legitimate claims would not be permitted under the IPCC statute, as in the case of lands taken under the Agrarian Reform Law No. 117 (1970).⁴⁴ Even if a claimant were to argue that the rules are so loose as to allow for a more-creative remedy, no provisions exist to guide the adjudicator on how to proceed with claims of a forced or faulty contract.

⁴² CPA Regulation 12, Annex B, "B) Submission of Claims," Article 22, paras. A and B.

⁴³ CPA Regulation 12, Annex B, Article 22.

⁴⁴ This Ba`thist law, published in the Iraqi Gazette No14/1971, limited individual ownership to a maximum of 1,000 dunums (1 dunum = 1,000m²) of rainfall-dependent lands, and abolished compensation payments. While the law was implemented without discrimination throughout Iraq, it also dispossessed many large landowners in Iraq's richest agricultural zone in the north of the country. Individual ownership of such land in the Kurdish north was later limited to 300 dunums.

In the present context, in the particular light of actual displacements and dispossessions that have taken place since 9 April 2003, the IPCC has left thousands of victims in a legal limbo, without recourse. Those victims will have to seek remedy through other means. Otherwise, their judicial options depend on a successful challenge to the IPCC's "exclusive jurisdiction," and narrow identification of respondents (duty holders).

The victims of evictions, house demolitions and dispossessions carried out by the multinational forces will face the further multiple challenge of (1) identifying the duty holders, especially as they rotate in and out of Iraq and, eventually, withdraw; (2) trying and enforcing judgments against duty holders who are physically outside the jurisdiction of Iraqi courts; and (3) challenging the exemption of multinational forces from criminal liability erected by the CPA under CPA Order No. 17.⁴⁵

These obstacles are more fundamental than the relatively technical question about quantification methods. However, none preclude a process of proper quantification in anticipation of a future opportunity to obtain rightful compensation and/or restitution.

Appropriate methods would allow for quantification of, and restitution/compensation for moveable property or immoveable property that was damaged. However, the IPCC statute does not permit such claims.⁴⁶ Although its scope covers properties that were confiscated, the IPCC's methods of determining compensation are distorted by a focus on the purchase price of property (as opposed to replacement value) and neglect other values, including bodily injury, emotional harm, the accumulating lost rent, use of the property, or other potential revenues. Without considering such cases that lack quantification guidelines in the IPCC statute, victims, representatives and adjudicators may be left without any solution whatsoever. This becomes a serious problem when one considers the language of the statute's Annex A, Article 11(C), which gives the IPCC its exclusive jurisdiction.

Methods of resolution

Most of the guidance on the methods of resolution of contentious claims is confined to Section 4 of Regulation 12's Annex B, "Instructions for Operation." The IPCC statute dismisses existing law in favor of fourteen *ad hoc* rules⁴⁷ designed specifically for the IPCC and do not necessarily bear any relation to their counterparts in the Iraqi Civil Code or Criminal Code and international public law standards. This guidance also appears to be arbitrary in so far as it proffers scenarios unguided by the practical lessons accumulated in the past decades of experience in restitution and compensation claims. Instead, that section of the statute lays out a series of scenarios, but provides "that IPCC shall comply with, but not be limited to, the application of" these examples when resolving real property claims.⁴⁸

Within the limited scope of the Regulation, the following scenarios are offered:

- A. Any properties that were confiscated or seized, or on which liens or other encumbrances were placed by the former governments of Iraq,...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.

⁴⁵ See *supra*, notes 6 and 11.

⁴⁶ CPA Regulation 12, Annex B, Article 22.

⁴⁷ CPA Regulation 12, Annex A, Section Four, "General Principles," Article 8.

⁴⁸ *Ibid.*

- 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.
- 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."

Scenarios A, B, D–I also entitle the original owner to compensation for additional losses and costs, including those proposed here. However, the General Principles do not provide for such entitlement. Some proposed scenarios may lead to atavistic problems of loss and social upheaval. For example, the principles propose resolving a dispute by the IPCC deciding to settle the original owners on the original same plot along with the new possessors. Given the ethnic tensions around the past and present dispossessions and displacements, the proposed inadequate compensation for victims begs an explanation.

Applicable norms

One of the obstacles to obtaining adequate compensation for victims is the poverty of the IPCC's founding documents, including the case claim form that is to contain the data upon which adjudication decisions are based. The second type of obstacle is in the form of the IPCC statute's claim to exclusive jurisdiction, severely limiting (1) the class of victims eligible for relief and (2) the victims' options for that ultimate relief. The applicable norms that should lie at the base of any transitional justice mechanism for victims of displacements, dispossessions and population transfer in Iraq derive from three main sources, overlooked in the founding of the IPCC. For our remedial purposes, these include minimum norms found in international human rights law, the guidelines derived from multinational efforts at housing and land restitution, and the rights and responsibilities found in indigenous Iraqi law.

International law: human right to adequate housing and land

In 1966, the General Assembly adopted and opened for ratification the fundamental Covenants covering the range of human rights and corresponding State obligations. Currently, 148 States parties to the Covenant on Economic, Social and Cultural Rights now "recognize the right of everyone to an adequate standard of living...including food, clothing and housing" (ICESCR, article 11[1]). The State of Iraq ratified that treaty on 3 January 1976. Except for the United States, all states occupying Iraq also are parties to ICESCR, and all—including the United States—bear the obligation to apply the covenanted rights for all residing in the occupied Iraqi territory under its effective control.

Standing alone, Article 11 does not provide sufficient guidance as to what entitlements the right contains, or what is entailed in the State's fulfillment of obligations to respect, protect

and defend HRAH. Therefore, the treaty-monitoring body has developed the legal guidance for States parties, based in the problems and solutions arising from the international jurisprudence under the Covenant. In defining the basic elements of “adequate housing” as a human right, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 4,⁴⁹ which applies generally to each and every State party to the Covenant. The absence of denial of any of these constituent elements of the right would likely constitute a violation and, therefore, a subject of remedy, including possible compensation. Giving legal specificity to both the right and the State’s corresponding obligations, the Committee’s GC 4 determined that seven elements must be present and satisfied in order for housing to be considered as adequate in meeting the requirements of the treaty:

(a) *Legal security of tenure*. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats...;

(b) *Availability of services, materials, facilities and infrastructure*. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised...;

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well.

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere...;

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

⁴⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 4 “right to housing, HR/GEN1/Rev.7, or access from the following link:

<http://www.unhchr.ch/tbs/doc.nsf/099b725fe87555ec8025670c004fc803/469f4d91a9378221c12563ed0053547e?OpenDocument#5%2F%20Geneva,%20W>.

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing...⁵⁰

In further experience with implementation and violations of the human right to adequate housing, it has since become clear that other related and separately codified human rights are integral to the respect, protection and fulfillment of the adequate housing, especially in the process of restoring housing rights. This calls for inclusion of the “congruent” rights to:

- Information;⁵¹
- Education and capacity building;⁵²
- Participation;⁵³
- Freedom of association;⁵⁴
- Self-expression;⁵⁵
- Refugee and displaced persons’ rights to resettlement, *nonrefoulement*, restitution, compensation and return;
- Privacy⁵⁶ and
- Security of person.⁵⁷

Again, according to the legal theory and logic of implementation, housing conditions—including in conditions of return, resettlement, restitution and rehabilitation—failure to meet any one of these legally established elements or congruent rights, consequently, may constitute a further violation of the human right to adequate housing, and, potentially, other human rights. The result then would fall short of the remedial objectives and potentially give rise to new problems.

While this explains the content of the right with its interdependent elements, the over-riding principles of application found in all of the major human rights treaties provides the general guidance on “how” that is to be accomplished. Therefore, the State must apply its obligations by ensuring the practice of:

- **Self-determination**⁵⁸: terms of settlement are to be specified locally in a state that embodies the consent of its constituent peoples;
- **Nondiscrimination**⁵⁹: criteria for compensation should be applied uniformly to all claimants and all duty holders;
- **Gender equality**⁶⁰: special efforts should ensure restitution and compensation with tenure for women claimants, including Anfal widows, unmarried women, etc. on an equal basis with the treatment of men;

⁵⁰ Ibid, para. 8.

⁵¹ Universal Declaration of Human Rights (UDHR) (1948), Article 19; International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), 15.1(a) and (b); International Covenant on Civil and Political Rights (ICCPR) (1966), Article 19.2.

⁵² UDHR, Article 26 (1); Convention on the Rights of the Child (CRC) (1989), Article 28.1; ICESCR, Articles 13 and 14.

⁵³ UDHR, Articles 21.b and 22; ICESCR, Article 9; ICCPR, Article 25(c); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), Article 5(e)(iv).

⁵⁴ ICCPR, Article 22.

⁵⁵ UDHR, Article 19; ICESCR, 15.1(a) and (b); ICCPR, Article 19.2.

⁵⁶ UDHR, Article 12; CRC, Article 16.1 and 2; ICCPR, Article 17.1; ICERD, Article 5(b) and (e)(iii).

⁵⁷ Ibid.

⁵⁸ See, among the other major human rights treaties, ICESCR, Article 1.1.

⁵⁹ Ibid, Article 2.2.

⁶⁰ Ibid, Article 3.

- **Rule of law**⁶¹: rights and responsibilities are to be protected and regulated by a system of law, ensuring fair trials, and laws and judgments should be enforced by competent indigenous institutions;
- **International cooperation**⁶²: states able to provide technical and material assistance are treaty bound to do so in the interest of peace, upward development and security; while states in need of resources and assistance should avail themselves to available channels of aid from other states and appropriate international agencies;
- **Progressive realization/nonretrogression**⁶³: state authorities and policy makers must ensure that rights and entitlements realized through the constant improvement of living conditions, and that restitution and compensation arrangements not lead to conditions of life inferior to those before the violation.

(Each of these elements and over-riding principles of application are explained further in the [HLRN Housing and Land Rights Toolkit](#).)

Rights to restitution and compensation

Refugee and displaced persons' rights possess rights are explicit in international law instruments that provide further instructions on how to proceed with the treatment of dispossession and displacement victims entitled to remedy. In customary international law, the Universal Declaration of Human Rights (UDHR) (1948) provides in Article 8 that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." International treaty law, the victim's right to compensation is not in doubt. The Rome Statute on the Establishment of the International Criminal Court (1998) included compensation among the remedies within the Court's authority.⁶⁴

The application of international public law norms has resulted in specific obligations of states in the treatment of victims of displacement. The International Labour Organisation Convention No. 169 concerning Indigenous Peoples in Independent Countries (1989), which Iraq ratified in 1986, provides in Article 16:

...the peoples concerned shall not be removed from the lands which they occupy. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where

⁶¹ Ibid, Article 1.2.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Article 75.1 provides: "The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees. Persons thus relocated shall be fully compensated for any resulting loss or injury.

The Convention on the Elimination of All Forms of Racial Discrimination (1965), which Iraq ratified on 13 February 1970, not only guarantees the right to housing on a nondiscrimination basis,⁶⁵ it recognizes the states' obligation to "assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

International jurisprudence and instruments declaratory of international law have become a source of legal specificity of the nature and scope of compensation for victims. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) is explicit about the victim's right, and the state's obligation to compensate for harms suffered (Articles 8 and 11).

In four serial resolutions of the UN Commission on Human Rights on "The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms" the Commission on Human Rights has called upon "the international community to give due attention to the right to a remedy and, in particular, in appropriate cases, to receive restitution, compensation *and* rehabilitation, for victims of grave violations of international human rights law and humanitarian international law..." (emphasis added).⁶⁶ For its part, the Commission has recognized that these remedies are part of a package, including compensation along with the other appropriate measures. Among the principles established at the UN-sponsored 1997 expert seminar on the practice of forced evictions was recognition of the victims':

right to compensation for any losses of land or personal, real or other property or goods, including rights or interests in property not recognized in national legislation, incurred in connection with a forced eviction. Compensation should include land and access to common property resources and should not be restricted to cash payments.⁶⁷

Normative Content of HRAH

- 1. Security of tenure, freedom from dispossession;**
- 2. Public goods & services**
- 3. Environmental goods & services (incl. land & water);**
- 4. Affordability (incl. access to finance);**
- 5. Habitability;**
- 6. Accessibility (physical);**
- 7. Location;**
- 8. Cultural appropriateness;**
- 9. Information, education, capacity and capacity building;**
- 10. Participation & self-expression**
- 11. Resettlement, rehabilitation, *nonrefoulement*, return and compensation;**
- 12. Security (physical) & privacy**

⁶⁵ ICERD, Article 5(e)(iii).

⁶⁶ Commission on Human Rights resolutions 2000/41, 2003/34, 2004/34 and 2005/35, of the 56th, 59th, 60th and 61st (2005) sessions, respectively.

⁶⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realization of Economic, Social and Cultural Rights, Expert seminar on the practice of forced evictions, Geneva, 11–13 June 1997, Report of the Secretary-General, E/CN.4/Sub.2/1997/7, para. 24.

Moreover, the Declaration on Social Progress and Development (1969) earlier had recognized victims' entitlement to "Compensation for damages, be they social or economic in nature—including restitution and reparations—caused as a result of aggression and of illegal occupation of territory by the aggressor" (Article 26).

The draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provide criteria for remedy that the IPCC founders omitted: the principle that reparation should be "proportional to the gravity of the violations and the harm suffered"⁶⁸ and that remedy be "in accordance with its domestic laws and international legal obligations."⁶⁹ The Guidelines also provide a fundamental principle for reparations to cover also "bodily injury or impairment of physical or mental health as a result of these violations and to the families, in particular, dependants of persons who have died or become physically or mentally incapacitated as a result of the violation." To that end, States should endeavor to establish national funds for reparation to victims and seek other sources of funds wherever necessary to supplement these."⁷⁰

The present Guidelines clarify the purpose of reparation as providing victims: "restitution, compensation, rehabilitation, and satisfaction and guarantees of nonrepetition." They instruct that:

restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.⁷¹

The UN Sub-Commission also has adopted guidance with specificity on the content of compensation required for a remedy to comply with international law norms:

VII. In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of nonrepetition.

12–15. "Reparations may take any one or more of the forms mentioned below, which are not exhaustive, viz:

12. "Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Restitution requires, *inter alia*, restoration of liberty, family life, citizenship, return to one's place of residence, employment of property."

13. "Compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity;
- (e) Costs required for legal or expert assistance.

⁶⁸ Draft "Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law," E/CN.4/2003/63, 27 December 2002 (revised as of 5 August 2004), Article 15.

⁶⁹ *Ibid.*, Article 16.

⁷⁰ Article 18, with particular reference to cases where the perpetrator is not able to meet the demands of reparation to victims.

⁷¹ Article 21.

14. "Rehabilitation shall be provided and will include medical and psychological care as well as legal and social services."⁷²

Practical lessons unlearned

The Dayton Peace Agreement recognized the right of all refugees and displaced persons in Bosnia-Herzegovina 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."⁷³ Annex 7 of that agreement created administrative bodies designed for mass claims resolution: the Office of the High Representative Ombudsperson and the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) to resolve property disputes. Although plagued with implementation obstacles and having little precedent to draw on, the CRPC enjoyed some measure of success. It collected 318,780 claims and issued some 290,000 final decisions on property title.⁷⁴ By April 2004 over 90% of formerly displaced claimants have been able to recover rights on their prewar homes.⁷⁵

The CRPC was authorized by a peace treaty involving indigenous parties to the conflict that included the relevant human rights and humanitarian law treaties not only by reference, but also by full textual inclusion in the Dayton Accords.⁷⁶ The IPCC does not share such a text or context.

Among the lessons to carry forward from the Bosnia-Herzegovina (BiH) and Kosovo experiences is that any property rights restitution should be a nationally created, owned and directed process. While the international community should assist, external powers should refrain from imposing their own concepts and preferences if the effort is to work effectively and the solutions are to be sustainable. However the CPA initiative to establish the IPCC had little Iraqi involvement, with CPA experts instead drafted the guidelines and statute that required the Iraqi Governing Council (IGC) to implement.⁷⁷

In BiH, the proposed Compensation Fund never materialized due to lagging donor will. The CRPC had no enforcement mechanism and could not, by itself, assist aggrieved persons to recover their property rights and to return home. Rather, a CRPC decision represented only the first step toward the eventual end of a long process for victims to recover their rights.⁷⁸ Part of the problem in BiH was a lack of a national legal framework to resolve restitution cases, which is not the case in Iraq, as discussed below.

Partly because it was an internationally imposed mechanism, the CRPC had no power to repeal laws and ordinances provisions contributing to the loss of property rights, nor could it order authorities to implement and enforce its decisions, or to provide accommodation and

⁷² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and Humanitarian Law (E/CN.4/SUB.2/1996/17).

⁷³ General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), 35 I.L.M. 75, "Agreement on Refugees and Displaced Persons," Annex 7, "Rights of Refugees and Displaced Persons," Article I (1996).

⁷⁴ Hans Das, *Restoring Property Rights in the Aftermath of War*, *International and Comparative Law Quarterly*, no. 53, 429-44 (April 2004), at 437.

⁷⁵ Anne Davies, "Restitution of Land and Property Rights," *Forced Migration Review*, vol. 12, no. 21 (September 2004), at <http://www.fmreview.org/text/FMR/21/04.htm>.

⁷⁶ Joseph Schechla, "A Righteous Inconsistency: Applying International Norms to Population Transfer in Bosnia and Palestine," *Critique* (spring 1998).

⁷⁷ Davies, op cit., p. 3; Das, op cit., at 441.

⁷⁸ Davies, op cit., p. 1; Das, op cit., pp. 430, 441.

services to those in need.⁷⁹ Such powers would be essential to an effective compensation scheme. The IPCC statute does not deal with these implementation issues, although it is especially important to do so in an environment where local law-enforcement officials are already beleaguered.

Over a period of weeks, more than 800,000 Kosovo Albanian refugees returned to their country *en masse* along with some 500,000 internally displaced Kosovo Albanians. The inevitable result was *ad hoc* occupation of properties and conflict over land and housing, including conflicts with ethnic dimensions, without a proper legal framework for managing disputes.⁸⁰

The experiences of restoration of property and resettlement in Timor l'Este demonstrated a lack of local administrative capacity, the need for transit housing during the course of repatriation and resettlement and a rise in postconflict land disputes.⁸¹ There, too, with most of the 700,000 persons displaced in 1999 returning after the end of Indonesian occupation, property restitution and resettlement became the burden of the international peace-keeping operation of UNTAET.

In Afghanistan, property restitution has been even more complicated and contentious, where land tenure laws are "complex, uncertain, incomplete and currently unenforceable."⁸² The objective of helping foreign investors to secure land has driven land policy planning in the Afghan Transitional Administration (ATA), further impeding the restoration of rights and conciliation of disputes. In that transitional country, where national authority has not extended far beyond the capital, the property dispute resolution in the postinvasion period has been inadequate, and where new Afghan authorities have authored new housing and land rights violations.⁸³ Similar concerns apply to Iraq, where postwar authorities have taken over properties that Ba`thists previously had confiscated and built on while in power.

These experiences provide lessons to be heeded in Iraq, although each represents unique circumstances. The unregulated return of IDPs in the absence of an effective and efficient dispute-resolution mechanism can produce new layer of violations and subsequent conflicts. Of foremost importance among lessons for Iraq are that property restitution and compensation (1) needs to be an indigenous national process; (2) should draw on local law, where applicable, thereby also identifying the need for law reform and further legislation; and (3) should address the interests of all classes of victim.

Applicability of domestic law

The IPCC statute's only specific reference to existing Iraqi law is in connection with a claimant who brings a claim in bad faith and, after a commissioner determines the claim's

⁷⁹ Davies, *op cit.*, p. 1.

⁸⁰ Scott Leckie, "Housing and Property in Kosovo: Rights, Law and Justice," [UN Habitat consultant report], (30 August 1999).

⁸¹ Daniel Fitzpatrick, "Land Policy in Post-Conflict Circumstances: Some Lessons from East Timor," *The Journal of Humanitarian Assistance* (November 2001), at <http://www.jha.ac/articles/a074.htm>

⁸² Liz Alden Wily, "Land Rights in Crisis: Restoring Tenure Security in Afghanistan," for the Afghanistan Research and Evaluation Unit, March 2003, www.areu.org.pk/publications/land/land.pdf, cited in Davies, *op cit.*, p. 4.

⁸³ For recommendations on expanding capacity of the Special Property Disputes Resolution Court, see "Report of the independent expert on the situation of human rights in Afghanistan, M. Cherif Bassiouni," E/CN.4/2005/122, 11 March 2005, paras. 71–72. Concerning land grabbing, see report of the Special Rapporteur on adequate housing Miloon Kothari, "Mission to Afghanistan, 31 August–13 September 2005, E/CN.4/2004/48/Add.2, 4 March 2004, pp. 7–8.

invalidity, s/he wilfully returns to the currently occupied property and takes measures to force the current occupiers to vacate that property. In both actions, the person(s) are to be considered as having committed a criminal offence under the Iraqi Penal Code.⁸⁴

The Iraqi Civil Code (1951) provides for recovery (including restitution and compensation) for more than property-related issues. Article 202 of the Iraqi Civil Code states: “Every act [that] is injurious to persons such as murder, wounding, assault, or any other kind of inflicting injury, entails payment of damages by the perpetrator.” Article 202 is broad enough to provide redress to Iraqi citizens who have been injured through a wide range of intentional harm, including dispossession of property.⁸⁵

Iraqi law states that ownership vests unto the owner the right to dispose freely and absolutely of his possession and that “no 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.”⁸⁶ Under Iraqi law, true title does not pass to the possessor of with property (moveable or immoveable) not acquired lawfully or with the owner’s free consent.⁸⁷ The Code expressly provides that, if possession has been coupled with coercion or the property was obtained secretly or dubiously, then the acquisition shall not have an effect on the person subject to the coercion, or from whom possession has been concealed, or who has been confused in the course of the acquisition.⁸⁸

A person who is usurped of, or wrongfully dispossessed of immoveable property may file an action to have the property restored to her/him in order to obtain remedy such that the property “must be restituted in kind to its owner at the place wherein it was usurped if it is existing.”⁸⁹ In the case that restitution is made in a place other than the original place, “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.” If the usurper or wrongful possessor has destroyed or damaged the property, s/he is liable.⁹⁰

Beyond the narrow parameters of the CPA Regulation is the provision in the Civil Code that, in the case of usurped immoveable property, “the usurper is under an obligation to restore it to the owner together *with comparable rent* The usurper shall be liable if the immoveable has suffered damage or [if the property] has depreciated even without encroachment on his part.”⁹¹ 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.”⁹² (Emphases added.)

Compensation may also be awarded for the material loss of harvest crops.⁹³ The Iraqi Civil Code is elaborate on rights arising from “The Appropriation of Surpluses and Benefits and Recovery of Expenses.” Under Articles 1165–68, a good faith possessor “will appropriate the surpluses he has received and the benefits he has collected during the time of his

⁸⁴ CPA Regulation 12, Annex B, Articles 23 and 24.

⁸⁵ Stigall, op cit, p. 36.

⁸⁶ Iraqi Civil Code, art. 1048 (1990 translation), as cited in Stigall, op cit., at 36.

⁸⁷ Ibid, Articles 1145–46.

⁸⁸ Ibid, Article 1146.

⁸⁹ Ibid, Article 192.

⁹⁰ Ibid.

⁹¹ Ibid, Article 197.

⁹² Ibid, Article 207.

⁹³ Ibid, Article 196: “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.”

possession.” A bad faith possessor will be liable for all the fruits that s/he will receive and those which s/he failed to collect as of the time when s/he became of bad faith. However, the bad-faith possessor may obtain reimbursement of that which he has spent on producing the fruits.⁹⁴ In this situation, the law makes the bad-faith possessor liable to the true owner for the amount of the fruits/benefits derived from the property, minus the costs incurred in producing that fruit/benefit.⁹⁵

On the other hand, assuming a person who receives land without knowledge that it was wrongfully appropriated by the Ba`thist regime or other party remains legally in good faith. That person would be able to keep any fruits or crops. While this does not punish the possessor who had no way of knowing the property was wrongfully acquired. However, without an alternative mechanism for providing this form of compensation (e.g., state institutions), this protection for the good-faith possessor does not diminish the injury done to the victim.

Subsections E–M of the IPCC statute address the fate of subsequent purchasers and 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.

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).⁹⁶

Under the IPCC statute, therefore, an Iraqi citizen dispossessed of her/his property might actually owe compensation to a subsequent purchaser. While, in certain circumstances, this arrangement could be just; the statute makes no distinction as to the circumstances arising from the subsequent purchaser’s intent or state of mind. Without explicitly recognizing the important distinction between good faith and bad faith purchasers, the prescribed outcome could protect offenders and be wholly unsatisfactory.

In Iraqi law, the aggrieved party’s right to compensation entails not only compensation for the consequent economic loss, but also to compensation for moral injury, defined as “any encroachment on the freedom, morality, honor, reputation, social standing, or financial position” of the affected person or persons.⁹⁷ Further, damages may be adjudged to extend to third party rights holders, such as immediate family members, who also have suffered moral injury as a result of the offense.⁹⁸

Iraqi law provides for a court to determine the method of payment of damages, which “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.”⁹⁹ The court also may reduce or even cancel the sum

⁹⁴ Ibid, Article 1166.

⁹⁵ Stigall, observes that the general principles in IPCC Regulation 12 overlook critical elements of property law that any adequate legal system must address, including primarily the issue of good or bad faith and the fate of the products of confiscated land. See Stigall, op cit., pp. 32–33.

⁹⁶ CPA Regulation 12, Annex A, Section Four, “General Principles,” Article 8.F.

⁹⁷ Ibid, Article 205.

⁹⁸ Ibid, Articles 204–05.

⁹⁹ Ibid, 209(1).

if the aggrieved party aggravated or contributed to the situation, or took actions to worsen the debtor's situation.¹⁰⁰

Unlike the IPCC statute and the system set up to record related injury, the Iraqi Civil Code already offers a complete regime of law providing material remedy for victims of dispossession of property, eviction and population transfer, including recovery of property and/or compensation for damages arising from lost rent, lost fruits, use of usurped property, emotional damages and moral injury. Moreover, it also governs contracts and other obligations that could be invoked in the cases where Iraqi citizens were tricked or coerced into signing away their property.¹⁰¹ The domestic law, therefore, covers cases about which the IPCC is silent; it allows for recovery of losses left unrecorded in the IPCC claim form, and applies to injury not limited to that caused by the exclusive classes of victimizers and victims proscribed in the IPCC statute.

The long timeframe provided for cases admissible under the IPCC statute (17 July 1968 to 30 June 2005) also does not add to existing Iraqi law. The Iraqi Civil Code addresses statute of limitations on claims to within 15 years of its cause.¹⁰² The period is limited to five years in the case of recurring rights and cumulative losses over time, such as rent or income due to a possessor in bad faith. In cases, including certain commercial transactions, the prescriptive period is shortened further to one year.¹⁰³ However, the Iraqi Civil Code allows for suspension of the statute of limitations where an impediment renders it impossible for the victim to claim his or her right.¹⁰⁴

As neutral law, developed outside the framework of ideological and geostrategic interests of the CPA, the Iraqi Civil Code should allow Iraqi civil courts to rule on oppressive actions of a tyrant operating in the country, regardless who that tyrant was. However, the IPCC statute renders the Iraqi Civil Code unavailable to Iraqi citizens seeking resolution of land and property disputes. The CPA-acclaimed "exclusive jurisdiction" prevents an aggrieved Iraqi citizen with a claim cognizable under the IPCC statute from raising her/his claim in an Iraqi Civil Court.

What needs fixing?

On its face, as exemplified in the IPCC claim form, the restitutive process that the CPA designed for Iraqi victims of makes no provision for several categories of loss that are subject to remedy, including by way of compensation. The relief is limited further by the IPCC extending "exclusive jurisdiction" over all cases appearing to come under the IPCC statute's wide ambit, while preventing entire classes of victims injured by parties other than the Ba`th Party, its representatives and/or the Ba`thist former government of Iraq. This disregards the similarity of the losses to those whom the IPCC statute recognizes. Even though the June

¹⁰⁰ Ibid, 210.

¹⁰¹ Ibid, Articles 115 and 121. As in the case of many civil codes based on the Roman and Napoleonic model, the *Iraqi Civil Code* nullifies obligations if tainted by a vice of consent or defect of will (Articles 112–125) Accordingly, a contract is not valid if executed in mistake (Article 117), under duress (Article 112), or where a contracting party has made false representations (Article 121). Like most modern civil codes, the *Iraqi Civil Code* stipulates limits of liability for reasons of *force majeure* (Article 211) and other contingencies (Articles 212–14).

¹⁰² Article 429 provides: "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..."

¹⁰³ Articles 430–31.

¹⁰⁴ Article 435. This rule reflects the civilian concept of *contra non valentem agere nulla currit praescriptio* a Latin maxim meaning that "no prescription runs against a party unable to act," and, consequently, when the reason for the rule ceases, so does the rule.

2004-revised CPA Regulation 12 extends the period of admissible cases to actions occurring up to 30 June 2005, it omits to extend the class of plaintiffs and defendants accordingly.

The IPCC statute also impedes aggrieved civilians by posing a legal bar to actions by Iraqis who seek redress in their own civil courts. This is problematic not only for reasons of substantive inadequacy of the IPCC statute, but also because it undermines the jurisdiction, credibility and public reliance on the indigenous judicial institutions. The IPCC mechanism, by taking cases out of the courts and supplanting the judicial system and the rule of indigenous law, threatens to undermine the Iraqi judicial system at a critical moment.¹⁰⁵ It deprives the Iraqi courts of needed public perception of doing justice in resolving these highly visible disputes.

Meanwhile, those aggrieved Iraqis face another obstacle in their pursuit of justice through the IPCC due to the inefficiency of the IPCC as a new institution. Observers and other concerned parties have criticized the IPCC for not functioning.¹⁰⁶ The IPCC's much-reported underachievement is apparently making the relief efforts even more retrograde in light of the continuing displacements.¹⁰⁷ The new displacements now fall into a legal limbo. By September 2004, "Iraq's property claims commission for disputed land in oil-rich northern Iraq [had] failed to process a single claim, despite more than 167,400 Kurds re-settling in dozens of refugee camps since March [2004] alone..."¹⁰⁸

Moreover, the IPCC siphons off material and human resources from the not-unlimited Iraqi pool of administrators and jurists. The IPCC statute calls for the creation of an additional administrative structure consisting of numerous legal advisers, managers, auditors, data managers and administrative staff. The IPCC statute requires that judges be employed to staff the appellate division and regional commissions, diverted key judicial personnel to staff the claims commission. These concerns are in addition, but not unrelated to the question of adequate relief, including restitution *and* compensation, for Iraqi victims.

The resource requirements also include funding, for which local budgets and international donors will have to provide. Erecting new structures costs additional expenditures, the appropriateness of which must be weighed against the values of restoring and compensating lost properties. Diverting resources to support new administrative structures was a concern in the "Iraq supplemental bill" that the US Congress approved for postwar reconstruction. It appropriated \$35 million for property-related compensation claims, of which \$5 million was earmarked for administration costs.¹⁰⁹ An attorney with the US Army Judge Advocate General (JAG) Corps serving as legal liaison to the Coalition Provision Authority in Iraq has observed: "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."¹¹⁰

¹⁰⁵ As stressed in remarks by U.S. Deputy Secretary of State Richard L. Armitage to the Iraqi Judiciary, 15 September 2004, at: <http://usinfo.state.gov/dhr/Archive/2004/Sep/h16-299062.html>.

¹⁰⁶ Sigall, *op cit.*, pp. 40–41; Matthew, *op cit.*, quoting US Major General John R. S. Batiste to say that "The Property Claims Commission is not working: 5,399 claims have been filed, but 143,222 IDPs are trying to resettle."

¹⁰⁷ According to the Arab Displacement Union (ADU), a local NGO, more than 4,000 Arab families have been made homeless in the Kirkuk area since the 2003 invasion. "IRAQ: Focus on increasing displacement in Kirkuk," *IRIN* (3 May 2005), at http://www.irinnews.org/report.asp?ReportID=46908&SelectRegion=Middle_East.

¹⁰⁸ As reported in Davies, *op cit.* The source is the current acting head of the United Nations Office for the Coordination of Humanitarian Affairs in Monrovia, Liberia.

¹⁰⁹ Human Rights Watch, *Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq*, vol. 16, No. 4(E) (2004), p. 70, at <http://hrw.org/reports/2004/iraq0804/>.

¹¹⁰ Stigall, *op cit.*, p. 28.

The IPCC founders failed to incorporate lessons of recent property-restitution experience omitted indigenous law and Iraqi participation in its founding. The criteria posed for determining lost values and eligibility of claims are insufficient to dispense justice. Putting aside the questions of the IPCC's effect on financial and human resources for the Iraqi judiciary, it is the structural limitations of the IPCC statute and lack of a proper system for assessing values that causes the most immediate concern. Those shortcomings are remediable, but delay could elude the objectives of transitional justice and the ultimate goals of dissolving perceptions of injustice and resolving underlying conflicts.

Posing solutions

The HLRN inquiry into the property restitution and compensation prospects for Iraqi victims housing and land rights violations has raised numerous concerns and revealed serious challenges and shortcomings arising from the IPCC statute and its implementation. Based on these observations, HIC-HLRN offers the following recommendations in the interest of providing the relevant standards of justice and relief for the victims of *all* categories of housing and land rights violations, encompassing, but not limited to, forced eviction, demolition, confiscation, coerced transfer of title and population transfer, including implantation of settlers and settlements for purposes of demographic manipulation.

HIC-HLRN envisions prospects of a transitional justice process for Iraq that seeks to remedy past and ongoing violations, as well as deter current and future replication of these violations, first to identify and then also to disburse the rightful value of losses, and to provide a basis for mediated settlements in cases of counterclaims.

Although the statutory clock is ticking on the admissibility of claims to the IPCC, that does not mean that it is too late to improve the process. The following recommendations seek to promote the lessons of foregoing postconflict experiences and apply the housing and land rights framework as a practical measure to (1) ensure that property issues be resolved as an indigenous national process; (2) draw on local law, where applicable, thereby also identifying the need for law reform and further legislation; (3) address all classes of victim; and at least recognize all of their rights.

For any or all of these purposes, it remains necessary to gather more basic data on each claim in the proper form and with a consistent and clear quantification methodology. It is likewise urgent to correct the obstacles that the CPA has erected for victims and good-willed adjudicators, and replace them with appropriate criteria, methods, laws and institutions. With that alternative in view, HLRN proffers three levels of recommendation for urgent action:

1. that the evidence required and gathered for determining losses arising from cases be far more comprehensive and clear;
2. that indigenous Iraqi institutions apply actual law, including the guidance from international norms where gaps and/or contradictions occur, in adjudicating cases of housing and land rights violations; and
3. interpretation of the available options in the meanwhile to fill gaps and circumvent CPA-created obstructions to justice.

Several of these recommendations are easier said than done in the unstable climate of Iraq at the time of this writing. For example, prosecution of housing and land rights offenders could invite violent retribution against the monitors and investigators. It is not all together clear if the collective political will of the National Assembly is sufficient to rescind self-acclaimed immunity of CPA and MNF personnel and institutions from prosecution in the Iraqi legal system. Victims and defenders should take the interpretations of current legal opportunities proposed here into consideration as part of a comprehensive judicial strategy, weighing tactical advantages and disadvantages along with prevailing political and security considerations. At the time of this writing, it is also unclear whether the IPCC Regional Commission decisions will be practically enforceable. Hence, all ambitious recommendations will have to be determined within the realm of the possible.

Recommendations

Data collection and quantification of losses:

- ❑ In the immediate term, victims and their legal representatives are urged to quantify plaintiffs' losses thoroughly, using existing tools and techniques developed in other contexts to the extent that comprise a full inventory of claims and ultimately serve the full restoration of Iraqi victims' housing and land rights, as well as provide policy and financial planners with the data needed to assess future requirements and options for restitution and compensation.
- ❑ That method should take account of the entire complement of housing and land rights elements provided in the CESCR General Comments Nos. 4 and 7, as well as other congruent and interdependent rights codified in the human rights treaties to which Iraq is a party and elaborated through the jurisprudence of the treaty-monitoring bodies.
- ❑ An authoritative Iraqi body, such as the IPCC National Secretariat, in cooperation with the Ministry of Displacement and Migration or the larger interministerial Working Group on Compensation for the Displaced, should develop and provide to IPCC adjudicators ample guidelines for determining remedies based on Iraqi law and prevailing human rights standards.
- ❑ Such a mechanism also must improve the current claim forms for new submissions and seek additional information from claimants already on record by issuing detailed instructions to claimants and their representatives on how to present data complete enough so as to determine what compensation is due to the displaced and/or dispossessed owner. These guidelines should allow all categories of loss included and omitted in the current IPCC instruments, but allowable under Iraqi law; value assessments based on current market value of structures, lands and harvest crops; lost revenue from the use of property; relocation and alternative housing costs resulting from the violation and required for resettlement; recurrent costs; values for pain and suffering, etc. (A summary of the "Loss Matrix" from the [HLRN Housing and Land Rights Toolkit](#) is annexed here by way of example.)

Institutional correction

- ❑ It is urgent, necessary and consistent with provisions of the CPA Regulations¹¹¹ for the IPCC National Secretariat and/or Iraqi National Assembly to restore the applicability of the Iraqi Civil Code in the adjudication of property disputes and related claims arising from housing and land rights violations. That should allow the admissibility of claims arising from forced or coercive contracts for the transfer of real property for less than its full value, including lands taken under the Agricultural Reforms Law No. 117 (1970). Applying neutral law then would replace the ideological focus on claims exclusively against the former Ba`thist leadership and permit claimants to seek remedy, focusing rather on addressing violations, as such, and relief for victims.
- ❑ The IPCC National Secretariat and/or National Assembly should determine that cases and claims received under the IPCC statute, and all property disputes, be adjudicated in their proper forum; i.e., courts of law, special courts, or other judicial institution directed by Iraqi representatives, having judicial effect, and respecting rights and due procedures of appeal.
- ❑ While restoring the sovereignty and judicial authority of Iraqi courts in housing and property disputes, the IPCC
- ❑ In the meantime, it is urgent and important for victims and their legal representatives to petition for the application of Iraqi law, which is not limited to the service of selective classes of restrictive time prescriptions set forth in the IPCC statute.
- ❑ In the interest of deterring further housing and land rights violations, civil and governmental institutions are needed to complement the IPCC's remedial work by investigating and, where possible, prosecuting housing and land rights violations committed by all parties, in addition to former Iraqi government and Ba`th Party members and institutions, identifying also those acts and omissions committed by the personnel of the CPA, multinational forces occupying the country and other domestic and transnational parties that lead to violations of housing and land rights.
- ❑ The Iraqi National Assembly should assert practical sovereignty and the rule of law by repealing CPA Order No. 17 claiming immunity for multinational forces personnel from the jurisdiction of Iraqi courts in matters of liability for housing and land rights violations.¹¹²
- ❑ The Iraqi National Assembly should assert practical sovereignty and the rule of law by repealing CPA Order No. 6 "Eviction of Persons Illegally Occupying Public Buildings" in favor of local law and procedures that incorporate CESCR General Comment No. 7 "the right to housing: forced eviction," in order to ensure that human rights and well-being be upheld in the conduct of any due-process evictions.
- ❑ Iraqi law makers and political leaders should publicly encourage civil society participation in the monitoring and documentation of past, present and future housing

¹¹¹ In particular CPA Regulation No. 1, "The Coalition Provisional Authority," Article 1 states that "the CPA shall exercise powers of government temporarily..." and Section 2, "The Applicable Law," claims that CPA Regulations remain in force. "Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq; Regulation No. 12, Article 66, which states: "These Instructions may be revised or supplemented by the Iraqi Interim Government. Additional details regarding the claims process may also be found in Guidelines, interpretative memoranda, and literature prepared by the National Secretariat."

¹¹² As compatible with the UN Commission on Human Rights resolution 2005/63, which "stresses the importance of combating impunity in order to prevent violations of international human rights and humanitarian law perpetrated against civilians in armed conflicts, and urges States to end impunity for such crimes by bringing the perpetrators to justice in accordance with their international obligations." E/CN4/RES/2005/63, 20 April 2005, para. 3.

and land rights violations, and should formulate explicit policy and legislation to protect housing and land rights defenders from retaliation.

- ❑ International donors should consider providing aid and technical help to the Iraqi judicial system in tandem with that to the IPCC investigative and mediating functions. This will help mitigate the drain of personnel, funding and prestige from the Iraqi courts arising from the IPCC statute and its implementation, while maintaining the relevance of Iraqi courts for disposing of all IPCC-related claims with judicial effect, not only the potentially great number of valid claims that fall outside the IPCC framework.

Interpretive options

- ❑ Claims for moveable property losses, immovable property damage, and injury arising from mental anguish or humiliation, and other claims outside the IPCC statutory chronological and subject limits still would fall within the purview of the Iraqi Civil Code and Iraqi courts. Claims for remedy should be raised in Iraqi courts now, based on the argument that domestic Iraqi law and international treaty standards continue to apply.
- ❑ Certain plaintiffs mounting their claims in Iraqi courts after the 30 June 2005 IPCC submission deadline will hold an advantage by avoiding the various restrictions of the IPCC statute and availing themselves to the more-complete and inclusive Iraqi Civil Code.
- ❑ The IPCC's "General Principles" are not absolute and are subject to revision by the IPCC National Secretariat and under the legislative jurisdiction of the National Assembly.¹¹³ In the meantime, claimants and adjudicators may exercise their option, even under the IPCC statute, to resort to other legal guidance and norms in arguing or disposing claims.¹¹⁴
- ❑ All adjudicators in Iraq should scrupulously avoid replacing original or replacement land remedies with cash awards, where possible.¹¹⁵
- ❑ Claimants and their representatives before the IPCC, as well as IPCC adjudicators, should take the initiative of invoking both Iraqi and international law in order to ensure full restitution *and* compensation for victims, not a choice between them.

¹¹³ *Ibid.*

¹¹⁴ CPA Regulation 12, Annex A, "Establishment of the Iraq Property Claims Commission (as Amended and Restated)," Section 4, "General Principles," Article 8 sets forth that the "IPCC shall comply with, *but not be limited to* the application of these principles" (emphasis added).

¹¹⁵ *Supra*, note 67.