

RECYCLING THE PAST: RESETTLING
DISPLACED PERSONS COMMUNITIES IN
NORTHERN IRAQ WITH THE AID
OF HEIRLESS PROPERTY

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This part of Kurdistan has been burning. All that remains is the scorched earth, bombed-out villages and the rotting harvest abandoned by more than 5,000 Kurdish refugees What is clear

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*from a helicopter survey of the region today is that dozens of Kurdish villages have been razed, attacked or dismantled in a sweeping campaign by the Baghdad government to remake the face of Kurdistan, ancestral home of at least 2 million Kurds.*¹

I. INTRODUCTION

The current state of affairs in northern Iraq is in disarray, and a substantial amount of the confusion can be attributed to the ethnic cleansing policy of Arabization imposed by Saddam Hussein's Ba'ath party over the course of several decades.² In an effort to make the country uniformly Arab, the Ba'ath regime disenfranchised its ethnic minorities, expropriated their land without compensation, and frequently attempted to exterminate large clusters of the Kurdish population in the northern regions.³ As a result of Arabization, Arabs took title to confiscated Kurdish property while Kurds were murdered or displaced by their own national government within and outside Iraq. Many Kurdish families were demolished in the process.⁴ The U.S.-led Coalition forces (hereinafter "Coalition") that liberated Iraq in 2003 were immediately confronted with overwhelming populations of displaced Kurds returning to northern Iraq, demanding the return of their confiscated real property.⁵ The Iraqi interim government made attempts to control the situation through a claims commission,⁶ but these efforts have failed for a variety of reasons. If the Iraqi government and Coalition consulted the actions taken by the Allied forces in Germany after the Second World War, they would discover a better way in which to reorganize the foundation of their restitution process.

¹ PATRICK E. TYLER, *MIDDLE EAST WATCH, HUMAN RIGHTS IN IRAQ* 88-89 (1990). Tyler was one of the American journalists who were invited to visit Iraq in September 1988, as part of the Iraqi government's effort to refute charges that it used poison gas to exterminate its own people.

² See generally Human Rights Watch, *Claims in Conflict: Reversing Ethnic Cleansing in Northern Iraq*, Human Rights Watch Vol. 16, No. 4(E), Aug. 2004, available at <http://www.hrw.org/reports/2004/iraq0804/iraq0804.pdf> [hereinafter *Claims in Conflict*].

³ *Id.*

⁴ See generally *Genocide in Iraq: The Anfal Campaign Against the Kurds*, Middle East Watch (1993).

⁵ Edward Wong, *Kurds are Flocking to Kirkuk, Laying Claim to Land and Oil*, N.Y. TIMES, Dec. 29, 2005.

⁶ International Organization for Migration in Iraq, *Iraq Property Claims Programme*, <http://www.iom-iraq.net/ipcp.html>.

As the last century's greatest systematic pillage and confiscation of mind, body, and property, the Holocaust and its aftermath represent a period of time from which the world has much to learn. One lesson in particular, which subsequent interim governments have unfortunately overlooked, is that public policy should not permit wrongful states to benefit from their reprehensible acts. When the United States set out to design a restitution plan for Jewish victims of Nazism, it developed a way to achieve two of its morally-based goals: to punish, or at least avoid rewarding Germany, and to resettle thousands of displaced Jews who were scattered across the world.⁷ The United States realized both objectives by designating a Jewish successor organization to make restitution claims for heirless and communal property in West Germany on behalf of the Jewish people as a whole.⁸ Thus, the property that had once belonged to the deceased and heirless German victims of the Holocaust did not escheat to Germany, but rather, the property helped fund Jewish charities in Europe, America, and Israel.⁹ This restitution paradigm can be applied to other situations in which interim governments attempt to rectify the wrongs committed by prior totalitarian regimes. Specifically, the scheme should be applied to the current situation in Iraq.

To date, the new Iraqi government and the Coalition forces there have yet to establish a workable solution for the displacement of Kurds in northern Iraq. If they applied the restitution scheme designed by the United States and its allies after the Second World War,¹⁰ they would find a partial remedy to the problem. The democratic Iraqi government can help fund the resettlement of displaced Kurds with the heirless property of their own people that would otherwise escheat to the state (the human rights criminal at issue) under Iraqi law.¹¹

⁷ Ayaka Takei, *The Gemeinde Problem*, 16 HOLOCAUST AND GENOCIDE STUDIES 266 (2002).

⁸ Ronald Zweig, *Restitution of Property and Refugee Rehabilitation: Two Case Studies*, 6 J. REFUGEE STUD. 58 (1993).

⁹ GREGG J. RICKMAN, *CONQUEST AND REDEMPTION: A HISTORY OF JEWISH ASSETS FROM THE HOLOCAUST* 100 (2007).

¹⁰ See generally SAUL KAGAN & ERNEST H. WEISMANN, *REPORT ON THE OPERATIONS OF THE JEWISH RESTITUTION SUCCESSOR ORGANIZATION, 1947-72* (1972).

¹¹ Benefiting from a wrongful act is a fundamental human injustice that the common law recognizes and seeks to curtail. See generally *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889); see also *Ford v. Ford*, 512 A.2d 389 (Md. 1986) (citing *Schifanelli v. Wallace*, 315 A.2d 513 (Md. 1974) ("No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own

This note examines how the U.S.-led Coalition in Iraq unsuccessfully addressed the Kurdish displaced persons problem in the northern region of the country, and provides a unique method of restitution to help expedite the rehabilitation of destitute communities there. Part I of this note reviews the persecution of ethnic minorities under Saddam Hussein and how the Coalition addressed the issue of restitution since it ended the former regime in 2003. Part II explores an underutilized restitution scheme that should be employed in northern Iraq. The section is a discussion of the United States interim government's participation in its occupied zone in West Germany, and the way in which it established the Jewish Restitution Successor Organization (hereinafter "JRSO") to address both the contextual injustice of escheat and the rehabilitation of displaced Holocaust survivors. Part III examines the challenges of the JRSO, while Part IV recounts the meaningful accomplishments of the organization. Part V offers a partial solution to the displaced persons problem in present-day Iraq by applying the JRSO's heirless property restitution scheme.

In conclusion, this discussion will establish that in order for restitution of real property to be effective in a post-war Iraq, the new Iraqi government and Coalition forces must reevaluate their strategy and consider imparting justice to the persecutees of the Ba'ath totalitarian regime in the form of community rehabilitation via non-traditional legal channels of retribution.

II. IRAQ – PAST, PRESENT, AND FUTURE

A. *Who are the Kurds?*

The Kurdish people, divided by divergent ethnic origins, diverse religious practices,¹² distinct tribal structures,¹³ and separate loyalties to individual villages, do not constitute what the Western

crime . . ."). Legislatures within the United States and internationally have passed laws, commonly known as "slayer statutes," to prevent murderers from inheriting property from those they killed. *See, e.g.*, Killer Not Entitled to Receive Property or Other Benefits by Reason of Victim's Death, F.S. § 732.802 (2007). Even the Uniform Probate Code has a provision that disinherits an individual who feloniously and intentionally kills the decedent from whom he would have otherwise inherited under intestate succession. Uniform Probate Code, § 2-803, Effect of Homicide on Intestate Succession, Wills, Trusts, Joint Assets, Life Insurance, and Beneficiary Designations (2006). These cases, however, do not resolve instances in which the slayer at issue is the state itself.

¹² About eighty-five percent of Kurds identify with Sunni Islam. Within that classification alone, the Kurds can be splintered off into clusters based on varying methods of religious practice. DAVID MCDOWALL, *THE KURDS: A NATION DENIED* 3, 13 (1991).

World traditionally envisions when it refers to “a nation.”¹⁴ Nevertheless, the Kurds as a whole insist that they embrace a common race, lifestyle, geography, and most importantly, a collective desire for autonomy and liberation from external controlling forces.¹⁵ The land to which they claim sovereignty, commonly referred to as “Kurdistan,” is located at the intersection of Iran, Turkey, and the northern territory of Iraq.¹⁶

By the second half of the twentieth century, the Kurds lived in modest spaces. For example, in the village of Koreme, located in the Zagros Mountains, the homes averaged approximately five by eight meters, with a few larger structures interspersed throughout.¹⁷ Some houses were constructed with concrete bricks and limestone walls, but most were framed with mud brick walls.¹⁸ The village school and mosque were similarly composed of limestone and reinforced concrete.¹⁹

Much of the Kurdish population in northern Iraq led a predominantly agricultural lifestyle.²⁰ Kurds owned farmland and livestock and contributed a significant portion of the country's gross domestic product.²¹ The Kurdish countryside was littered with orchards, wells and other water sources, rural electrification, ancient churches dating back to the Fifth Century, old mosques, schools, village cemeteries, forts, public concrete buildings, and medieval homes.²² While the land sat atop some of Iraq's most coveted oil fields, the Kurdish livelihood depended primarily on agricultural activity.

¹³ IRAQ: A COUNTRY STUDY 83 (Helen Chapin Metz ed., Library of Congress cataloging-in-Publication Data 1990).

¹⁴ McDOWALL, *supra* note 12, at 3.

¹⁵ *Id.* at 4; JOHN BULLOCH & HARVEY MORRIS, NO FRIENDS BUT THE MOUNTAINS: THE TRAGIC HISTORY OF THE KURDS 51 (1992); IRAQ: A COUNTRY STUDY, *supra* note 13, at 186.

¹⁶ McDOWALL, *supra* note 12, at 7.

¹⁷ THE ANFAL CAMPAIGN IN IRAQI KURDISTAN: THE DESTRUCTION OF KOREME, MIDDLE EAST WATCH & PHYSICIANS FOR HUMAN RIGHTS 15 (1993).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Kevin S. Cox, *Planting Peace: Agriculture and Postwar Reconstruction in Iraq*, 10 DRAKE J. AGRIC. L. 541 (2005).

²¹ *Id.* at 557.

²² STAFF OF S. COMM. ON FOREIGN RELATIONS, 102D CONG., SADDAM'S DOCUMENTS 8 (Comm. Print 1992); STAFF OF S. COMM. ON FOREIGN RELATIONS, 102D CONG., KURDISTAN IN THE TIME OF SADDAM HUSSEIN 14 (Comm. Print 1992).

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As a people, the Kurds share a long history of struggle and survival, both internally and from oppressive surrounding communities within bordering states.²³ The Kurds' most recent surge of torment in Iraq was led by Saddam Hussein's Ba'athist totalitarian regime from 1968 to 2003.²⁴ The Ba'athist political party, defined by an Arab nationalist ideology and a greed for the oil-rich land of Kurdistan,²⁵ posed a major threat to the survival of Kurds in the northern region of Iraq.

B. Arabization

Iraqi President Saddam Hussein's reign of terror was marked by his aspiration to cleanse Iraq of its minority populations and create a homogenously Arab national citizenry. His Ba'ath party implemented this process, known as "Arabization," through a variety of methods, including the nationalization of private property, expulsion of ethnic minorities from Iraq's oil-rich territories, and genocide.²⁶ Iraq had experienced Arabization long before the Ba'ath party seized power in 1968, but it was Hussein's government

²³ KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 1.

²⁴ DAVID McDOWALL, A MODERN HISTORY OF THE KURDS, 323-27 (2005).

²⁵ *Id.*; IRAQ: A COUNTRY STUDY, *supra* note 13, at 188-89.

²⁶ IRAQ: FORCIBLE EXPULSION OF ETHNIC MINORITIES, HUMAN RIGHTS WATCH 3 (2003), available at <http://www.hrw.org/reports/2003/iraq0303/Kirkuk0303.pdf> [hereinafter FORCIBLE EXPULSION]. A Kurd who escaped a standard village demolition during the Arabization period reported:

on that morning I was awakened by my wife shaking me vigorously. She looked horrified and said: 'our camp is encircled by the Iraqi soldier, we are inside a ring of armored vehicles.' I did not believe what she said but when I looked out of the door I was convinced . . . Ba'ath soldiers were in full control and ready to open fire. Then from all sides the soldiers came down into the camp, firing their guns . . . [T]hey attacked houses, kicked down doors with their boots . . . [C]ries of the women and children of a camp of twenty thousand inhabitants were mixed with the shouts and insults of the Ba'ath soldiers, beating and kicking them. For the inhabitants of our camp it was doomsday.

TYLER, *supra* note 1, at 62 (quoting Eight Thousand Civilian Kurds Have Disappeared in Iraq. What Has Happened to Them? Rep. by a Kurdish Democratic Party Preparatory Committee 14-15 (Nov. 1987)). Seventeen year old Faris Taha witnessed a massacre of Kurdish civilians by chemical warfare and provided the following account to correspondents for the United Nations:

the first body I saw when I came down from the heights was completely black. I heard the cries of a few survivors which were incomprehensible . . . Most of the people there were sprawled around dead. There must have been many more than 3,000. They were all huddled together in family groups, and they had died like that . . . We spent the night in the mountains, and I didn't know how it passed, I have never, never been so scared in my life . . . [The next day] I had binoculars and saw thousands of soldiers with gas masks and gloves enter-

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that took the policy to new levels.²⁷ Although the Kurdish ethnic minority historically demanded autonomy over the predominantly Kurdish controlled territory in northern Iraq,²⁸ the Ba'ath party immediately sought complete control over Kurdish provinces with significant oil deposits, including Sulaimaniya, Arbil, Dunhok, and Kirkuk.²⁹

The Ba'ath campaign's intention was to impose Arab control over Kurdistan by modifying the demographic composition of the northern territories.³⁰ Hussein's party manifested its objectives by forcing the Kurds and other minorities to relocate to desert locations in southern Iraq and other desolate regions in the north, outside of traditionally Kurdish provinces.³¹ In the 1970s, the Iraqi President displaced about 250,000 Kurds from their homes in Kirkuk.³² The government systematically replaced the Kurds with Arabs from the south of Iraq.³³ Iraqi Arabs paid the government a relatively small amount for the properties or the Iraqi Arabs built their own homes on the land that the government offered them.³⁴ While many of the Arabs who replaced the Kurds were aware of the wrongful taking of the real property they came to inhabit, some Arabs purchased their homes from the Iraqi government in good faith.³⁵ Over the course of several years, hundreds of thousands of Kurds were internally displaced by the Iraqi army.³⁶

ing the gorge. From my hiding place, I saw them dragging bodies into piles and then setting fire to them. I saw over a hundred fires.

Id. at 78 (quoting an unpublished letter from Gwynne Roberts to Tom McCarthy (June 1, 1989) (on file with the U.N. Human Rights Centre)).

²⁷ FORCIBLE EXPULSION, *supra* note 26, at 8.

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²⁸ *Id.*

²⁹ *Id.* at 9.

³⁰ *Id.*

³¹ *Id.* at 10.

³² Solomon Moore, *The Conflict in Iraq*, L.A. TIMES, May 12, 2006, at A35.

³³ FORCIBLE EXPULSION, *supra* note 26, at 2.

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³⁴ CLAIMS IN CONFLICT, *supra* note 2, at 25.

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³⁵ FORCIBLE EXPULSION, *supra* note 26, at 7. Alaiwi Sanur Hamid al-Sayeh, an elderly Arab farmer, recounted his experience during the Arabization period:

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[w]e came to Suhaila in 1974. We came from Salahuddin governorate, from the al-Jazeera desert. The government and the Ba'ath moved us from al-Jazeera to this village. The government came to us, and announced that there were lands in these villages, and if we wanted to register [for land], we could. We registered, and one day they brought vehicles to transport us. Before this, we were living like Bedouin [sic] in tents.

CLAIMS IN CONFLICT, *supra* note 2, at 11.

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³⁶ CLAIMS IN CONFLICT, *supra* note 2, at 16.

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Subsequent to the relocation process, Hussein’s government murdered 150,000-200,000 Kurds during what some historians have termed the Anfal campaign of 1988.³⁷ Ali Hasan Majid, President Hussein’s cousin and the governor of the Kurdish region, issued a decree proclaiming thousands of square kilometers of Kurdistan to compose a free-fire zone “in which neither human nor animal life was to remain.”³⁸ The Iraqi army bulldozed entire Kurdish villages and rounded up, raped, tortured, and murdered civilians in the free-fire zone, ultimately dumping them in unmarked mass graves.³⁹ In addition to murder by conventional weapons, the Iraqi army employed chemical warfare, gassing thousands of Kurdish men, women, and children.⁴⁰ Those who survived the Anfal campaign were denied their property rights,⁴¹ and many Kurds who lost their homes in village demolitions were sent to “model villages” resembling concentration camps.⁴²

The Ba’ath party continued its Arabization policy for the next fifteen years, displacing mass populations. In the 1990s alone, over 120,000 people from ethnic minority populations were displaced in their own country.⁴³ By the time U.S.-led Coalition forces took control of Iraq in 2003, an estimated one million of the three million people living in northern Iraq had been displaced at some point during their lives.⁴⁴

C. Operation Iraqi Freedom

In 2003, the United States, along with the United Kingdom and other nations, launched a military campaign known as Operation Iraqi Freedom against Saddam Hussein’s regime.⁴⁵ In less

³⁷ MCDOWALL, *supra* note 24, at 359. The code name for the campaign, “al-anfal,” comes from a Koranic verse legitimizing the right to plunder the women and property of infidels. KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 20-21.

³⁸ KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 21.

³⁹ *Id.*; Middle East Watch & Physicians for Human Rights, *Unquiet Graves: The Search for the Disappeared in Iraqi Kurdistan*, Middle East Watch & Physicians for Human Rights, Feb. 1992, at 1.

⁴⁰ KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 21.

⁴¹ CLAIMS IN CONFLICT, *supra* note 2, at 2.

⁴² KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 9.

⁴³ FORCIBLE EXPULSION, *supra* note 26, at 3.

⁴⁴ CLAIMS IN CONFLICT, *supra* note 2, at 15. This statistic includes Kurds and other ethnic minorities in addition to Arabs who replaced them in the northern provinces of Iraq.

⁴⁵ See The Coalition Provisional Authority, <http://www.cpa-iraq.org/> (last visited Sept. 10, 2008).

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than two months, the multi-decade tyranny of the Ba'athist party ended,⁴⁶ and the landscape of northern Iraq drastically changed as a result. Some Arab settlers fled their homes in the North where Kurds had once lived.⁴⁷ Others remained and met an influx of an estimated 470,000 displaced Kurds and other ethnic minorities returning from the Governorates to which they were evicted, and from displaced communities outside of Iraq.⁴⁸ While thousands of Kurds had eagerly anticipated returning to their homes in Kirkuk from the day they were evicted, others were forced to return to the area against their will.⁴⁹ Because the Iraqi government had leveled scores of Kurdish villages, many Kurds had nothing to reclaim when they returned to their former territories. As a result, they settled in bombed-out military structures and displaced persons camps similar to the ones they had just abandoned.⁵⁰ Returning Kurds who did not own property before their displacement moved into public buildings, including schools and police stations that lacked essential facilities.⁵¹ However, a significant number of

⁴⁶ Press Release, The White House, President Bush Announces Major Combat Operations in Iraq Have Ended (May 2003), <http://www.whitehouse.gov/news/releases/2003/05/20030501-15.html>.

⁴⁷ Stephen Farrell, *As Iraqis Vie for Kirkuk's Oil, Refugee Kurds Become Pawns*, N.Y. TIMES, Dec. 9, 2007; Dexter Filkins, *Kurds Advancing to Reclaim Land in Northern Iraq*, N.Y. TIMES, June 20, 2004.

⁴⁸ CLAIMS IN CONFLICT, *supra* note 2, at 3; UNHCR, COUNTRY OF ORIGIN INFORMATION: IRAQ 29-30 (2005) [Hereinafter UNHCR]. Although thousands of Kurds managed to return to the northern provinces of Iraq, many of the displaced Kurds could not afford to rebuild their homes in what they knew to be Kurdistan, and some could not even afford to pay for the travel expenses to their former villages. CLAIMS IN CONFLICT, *supra* note 2, at 3.

⁴⁹ CLAIMS IN CONFLICT, *supra* note 2, at 4. Some Kurds welcomed the U.S. Coalition forces and their encouragement for the return of Kurds to their former land. In fact, some Kurds named their children "Bush" after the American President. Jim Landers, *Stuck in the Squalor Forced to live in Stadium, Kurdish Families Still Wait for Homes They Hoped to Reclaim Years Ago*, THE DALLAS MORNING NEWS, Oct. 25, 2007. However, other Kurds reported that they felt forced to relocate to their former territories and reclaim their land, only to wait in displaced persons camps for several years. Farrell, *supra* note 47.

⁵⁰ CLAIMS IN CONFLICT, *supra* note 2, at 51; Moore, *supra* note 32. In 2005, the United Nations High Commissioner for refugees reported:

IDPs (Internally Displaced Persons) in Iraq now reside in rented flats, collective towns, makeshift camps and public buildings of tents. Many thousands occupy public buildings which have not been designed for residential usage and lack basic services such as running water and sanitation facilities. Furthermore, IDPs in public buildings are at risk of eviction if and when such buildings are needed for public use.

UNHCR, *supra* note 48, at 28.

⁵¹ UNHCR, *supra* note 48, at 29.

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Kurds have demanded the return of their former property that the Iraqi government spared and gave to Arabs during the process of Arabization. In many instances, the properties in the northern provinces changed hands several times during the Ba'ath era, and as a result, the current Arab occupants are not the original beneficiaries of Arabization. However, the Ba'ath regime operated in a bureaucratic fashion, and much of the relevant documentation that may prove chains of title to the confiscated real property is intact.⁵² Furthermore, many of the landownership records of the pre-Ba'ath period and detailed documents of Arab families who moved while implementing the Ba'ath decrees still exist.⁵³ The Ba'athists expelled a large number of Kurdish urbanites from Kirkuk with no property deeds, but they do have expulsion papers.⁵⁴ Thus, there is sufficient evidence to support a property restitution commission under the new Iraqi Constitution.

D. *The Iraq Property Claims Commission*

Subsequent to the demise of the Ba'ath Party, the United States designed a judicial mechanism to confront the property disputes among the Arabs and the returning Kurds in the Arabized territories.⁵⁵ The intention was to reverse the wrongs committed against the ethnic minority by allowing Kurds to return to their confiscated properties if the properties remained.⁵⁶ Although the Coalition realized that such a program would internally displace the restituting Arab populations, its foremost concern was provid-

⁵² CLAIMS IN CONFLICT, *supra* note 2, at 8.

⁵³ *Id.* In fact, in the aftermath of the fall of the Ba'ath regime, thousands of Iraqis descended on the security offices in Baghdad neighborhoods, tearing through Saddam Hussein's meticulous records documenting the actions taken by the Iraqi government over the last few decades. The United States government confiscated the largest collection of these documents, numbering an estimated 100 million pages. They are allegedly being held in a secure location for use by the Iraqi High Tribunal, which has jurisdiction to prosecute crimes committed by the former regime. Alexandra Zavis, *Millions of Pages of Iraqi Pain*, L.A. TIMES, Sept. 17, 2007. By the fall of 2007, about 58,000 Arabs had left the Kirkuk province, and Kurds collected documents to determine how title to homes was passed since Arabs had arrived in Kirkuk from 1968 until the Coalition ousted the Ba'ath party in 2003. Borzou Daragahi, *The World: Security May Trump Ethnic Divide in Iraqi City*, L.A. TIMES, Sept. 28, 2007. It is likely that many of these documents would be useful in adjudicating land dispute claims as well.

⁵⁴ FORCIBLE EXPULSION, *supra* note 26, at 5.

⁵⁵ Roberta Cohen, *Status of Internal Displacement in Iraq*, THE BROOKINGS INSTITUTION, Aug. 18, 2008, http://www.brookings.edu/interviews/2004/0521humanrights_cohen.aspx.

⁵⁶ *Id.*

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ing a remedy to the Kurds. In January 2004, the Coalition Provisional Authority (hereinafter “CPA”) appointed the Iraq Property Claims Commission (hereinafter “IPCC”) to establish a real property restitution program “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.”⁵⁷

The CPA decreed the IPCC under Regulation Number 8, and later amended the statute in an effort to address problems with the program’s original design.⁵⁸ The Commission was to consist of regional commissions in each Iraqi governorate, with an appellate division composed of judges established as a separate chamber of the Iraqi Court of Cassation.⁵⁹ The regulation further detailed the general principles of adjudication, which set forth property law distinct from the *Iraqi Civil Code* for immovable property claims arising between the date of the Ba’ath Government’s instatement and the date it collapsed.⁶⁰ The *Iraqi Civil Code* provided that any property wrongfully seized, in which title remained in the original owner, or was transferred to and remained in the Ba’athist senior members, would be returned to the original owner.⁶¹ The statute also provided that original owners would gain full title to their confiscated properties even if the title had transferred to subsequent purchasers.⁶² The law only required the original owners to compensate subsequent purchasers for any improvements they made to the properties.⁶³ CPA Regulation 12 extended the filing deadline to June 30, 2005.⁶⁴ Most recently, CPA Regulation 12 was annulled and replaced by the Statute of the Commission for Resolution of Real Property Disputes in March of 2006.⁶⁵ The new commission has roughly the same structure and process as its predecessor, al-

⁵⁷ Coalition Provisional Authority, Reg. 8, Delegation of Authority Regarding an Iraq Property Claims Commission §1 (Iraq).

⁵⁸ *Id.*

⁵⁹ Coalition Provisional Authority, Reg. 12, Iraq Property Claims Commission § 2, art. 2. The participating arbiters were to be either retired or serving judges with experience in adjudicating property disputes. *Id.* § 2, art. 3. Orders from the regional commission were to have been appealed within 60 days of judgment. *Id.*

⁶⁰ *Id.* § 5, art. 9.

⁶¹ *Id.* § 4, art. 8(a), 8(d).

⁶² *Id.* § 4, art.8(e).

⁶³ Coalition Provisional Authority, Reg. 12, Iraq Property Claims Commission § 4, art. 8(f).

⁶⁴ *Id.* §5, art. 11.

⁶⁵ Commission for the Resolution of Real Property Disputes (Coalition Provisional Authority) (Iraq), <http://ipcciraq.org>.

beit some changes.⁶⁶ One difference, for example, is that the new government is required to compensate good faith subsequent purchasers who surrender their property to original owners.⁶⁷

The Coalition forces and the interim Iraqi government placed so much faith in the IPCC that they included a provision for its continued operation in the final draft of the Iraqi Constitution, passed on October 25, 2005.⁶⁸ However, on March 8, 2006, the U.S. Department of State released a report on human rights practices in Iraq, stating that by the end of 2005, the IPCC had received nearly 130,000 claims, and of those claims, the regional commissioners had adjudicated merely 14 percent nationwide.⁶⁹ There is no evidence that successful claimants ever received compensation because the Iraqi government did not establish a mechanism to transfer funds to successful claimants.⁷⁰ The plan for restitution clearly was not functioning as the interim government had hoped.

E. *Northern Iraq Today*

The IPCC has failed the Iraqi people. As of May 31, 2007, more than three years after the government instituted the restitution program, the IPCC had received 132,038 claims, but only 34,649 were decided at first instance.⁷¹ One of the primary criticisms of the Commission, as outlined by a U.S. Army Judge Advocate, Dan Stigall, was that its establishment did not warrant a large expansion of bureaucracy in Iraq when the CPA had already succeeded in rehabilitating Iraqi civil courts relatively quickly.⁷² Furthermore, argument has been made that the restitution program is

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Final Draft of the Iraqi Constitution, art. 132, First, stating that:

[t]he Property Claims Commission shall continue its functions as an independent commission in coordination with the Judicial authority and the Executive institutions in accordance with the law. The Property Claims Commission shall be attached to the Council of Representatives"; "The Council of Representatives shall have the right to dissolve the Commission by a two-thirds majority vote of its members." Final Draft of the Iraqi Constitution, art. 132, Second.

⁶⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2006).

⁷⁰ *Id.*

⁷¹ Iraq Property Claims Programme, International Organization for Migration in Iraq, *supra* note 6.

⁷² Dan E. Stigall, *Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction*, 29 LOY. L.A. INT'L & COMP. L. REV. 1 (2007).

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a failure because it is inherently corrupt.⁷³ Allegedly, there is evidence that some of the same Arabs who benefited from Arabization operate the program, and thus the process intrinsically lacks impartiality.⁷⁴

Nearly six years have passed since the end of the Ba'ath era. Thousands of displaced Kurds remain stranded in a soccer stadium waiting for homes they intend to reclaim while political tensions continue to escalate.⁷⁵ These internally displaced Kurds had initially found hope for return at the encouragement of Kurdish politicians and the United States government.⁷⁶ Although the IPCC failed to meet their needs, these destitute individuals continue to wait because the passage of the Iraqi Constitution at the end of 2005 rekindled their hopes. The Kurdish people in northern Iraq have always been bound by a desire for greater autonomy from the Iraqi Government, and Kurdish politicians viewed the drafting of the new Iraqi Constitution as an opportunity to advocate for that objective in a non-violent political forum.

During the drafting of the permanent Iraq Constitution, Kurdish leaders in Baghdad managed to include a clause known as Article 140.⁷⁷ Article 140 provided for the following three-step process: (1) real property confiscated by the former regime must be returned to Kurdish true owners in a process termed "normalization," (2) a census must be taken, and (3) a 2007 referendum⁷⁸ must be held to determine whether traditionally Kurdish territories should be ruled by the Kurdistan Regional Government or by the central authorities in Baghdad.⁷⁹ Many Kurds anxiously await a territory that they can identify as their own, and demand a place to build permanent homes in which they can comfortably inhabit.

Many Kurds feel that the implementation of this referendum, by way of Article 140, will solve most of their current problems.⁸⁰ However, there are several roadblocks to the provision's imple-

⁷³ Susan Taylor Martin, *With Vote, Kurds Look to Take Back Their City*, ST. PETERSBURG TIMES, Jan. 30, 2005, at A1.

⁷⁴ *Id.*

⁷⁵ Landers, *supra* note 49.

⁷⁶ *Id.*

⁷⁷ Wong, *supra* note 5.

⁷⁸ *Kirkuk, Other Iraq Issues to be Delayed*, ASSYRIAN INTERNATIONAL NEWS AGENCY (Dec. 17, 2007), <http://www.aina.org/news/20071217124429.htm>.

⁷⁹ Wong, *supra* note 5; 2005 Iraq Constitution, art. 140; Transitional Administrative Law art. 58.

⁸⁰ Landers, *supra* note 49.

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mentation. The northern provinces are far from reaching “normalization” and the contested territories covered by Article 140, including Kirkuk, sit atop some of the world’s largest oil fields that the Iraqi central government is not willing to relinquish from its control.⁸¹ For these two reasons, mounting political pressures have forced a six-month extension on the referendum that had been scheduled for December 31, 2007.⁸² In the meantime, the internally displaced Kurds living in “cinder-block hovels”⁸³ inside the Kirkuk soccer stadium and other desperate living situations will just have to wait. Clearly, the CPA’s plan has failed, and there have been no new proposals to dramatically reorganize the structure of the restitution scheme.

Unlike the Coalition forces in modern-day Iraq, the United States during the post-World War II period was successful in its restitution policy because of its unique design. This note will next examine how the United States, as an occupant of West Germany, satisfied its morality and retribution concerns while simultaneously rehabilitating destitute populations of displaced persons.

III. ESTABLISHMENT OF A SUCCESSOR ORGANIZATION

A. *The Need for Restitution in Post-war Germany*

When the Allies set out to restore order to a violated Europe on December 21, 1945, they employed three primary means of retribution in Germany: restitution, reparation, and indemnification. The United States, Great Britain, and France decided at the Paris Conference on Reparations that the large number of people who survived the cruelty of the Nazi war machine were in “dire need of aid to promote their rehabilitation.”⁸⁴ At the same time, the Allies recognized that as displaced persons, these victims were unable to seek assistance as beneficiaries of any state receiving reparations

⁸¹ *Id.*; Mark Mackinnon, *Refugees in Their Own Homeland*, THE GLOBE AND MAIL (London), Dec. 26, 2007, at A19.

⁸² Mackinnon, *supra* note 81. In fact, the occupying U.S. Army also encouraged the delay out of fear that a referendum would spark new violence. *Id.* Moreover, some believe that the referendum was delayed because of additional pressures from neighboring Turkey and Iran, which fear that an independent Iraqi Kurdistan would generate similar movements for autonomy by Kurdish populations in their own lands. *Id.*

⁸³ Farrell, *supra* note 47.

⁸⁴ Agreement on Reparation From Germany on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, art. 8, 61 Stat. 3457, 3171, 555 U.N.T.S. 69, 87.

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from Germany.⁸⁵ Thus, the Allies reviewed ways to fund the rehabilitation of survivors outside of traditional means of post-war reparations.

The Allies found that the once exuberant and flourishing German Jewish community had dwindled from a population numbering nearly 600,000 to a meager 15,000.⁸⁶ The Nazis had successfully demolished entire families and exterminated whole communities across the length of a continent, leaving their fingerprints all over properties that survived deceased and heirless owners in the process. The Allies first tackled the restitution of such identifiable property, and focused their efforts on the restitution of private and communal property within their respective zones of occupation in West Germany.

Based on the concept of escheat, the heirless property that the Nazis left in the wake of their wrath should have reverted to Germany.⁸⁷ However, the Allies found it morally reprehensible that Germany could strip its persecuted victims of their citizenship and send them to extermination camps, only to be awarded legal title to

⁸⁵ *Id.*

⁸⁶ Monroe Karasik, *Compensation and Restitution in Germany and Austria*, 16 LAW AND CONTEMP. PROBS. 448, 451 (1951).

⁸⁷ Under internationally recognized principles of inheritance and succession, the state appropriates the personal and real property of a decedent's estate in the absence of a will or lawful heirs. In other words, heirless property reverts, or *escheats*, to the state in which that property is located. The concept of escheat has its roots in historic England's feudal system of landholding, in which the land of a tenant who died without heirs would pass to his lord, and in the absence of a lord, to the king. Over time, the principle extended to both tangible and intangible property as various state and intrastate succession statutes developed. Thus, escheat came to envelop ownership rights in bank accounts, insurance proceeds, and shares in stock. R. PERRY SENTELL, JR., *A STUDY OF ESCHATEAT AND UNCLAIMED PROPERTY STATUTES 7-8* (Institute of Law and Government, School of Law, The University of Georgia 1962).

In the United States, escheat had become a well-established common law principle by the twentieth century. In 1951, the U.S. Supreme Court reviewed an appellant's due process rights under a New Jersey escheat statute, and affirmed that a state has the right to claim title to property belonging to unidentifiable owners. *Id.* at 8 (citing *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 435-36 (1951)). The high court explained that the principle was justified because by reverting to the state, the heirless property "escapes seizure by would-be possessors and is used for the general good rather than for the chance enrichment of particular individuals or organizations." *Standard Oil Co.*, 341 U.S. at 435. Therefore, the rule of escheat hinges on the paternalistic assumption that the state is the entity most deserving of property that flows neither to next of kin nor to any otherwise designated heirs because it has the capacity to best dispose of the value of the property in the interest of the "greater good." In a post-World War II Germany, however, it was questionable among the allied powers whether the stigmatized German state could be deserving or even capable of determining how to use heirless property for this so-called general good.

the victims' remaining property after the cessation of the war. To Chaim Weizmann, the President of the World Zionist Organization, the solution was clear: the only way to overcome this less than ideal result was to legislatively designate an entity to serve as the legal heir to unclaimed Jewish property. In a letter on behalf of the Jewish agency, Weizmann wrote to the Allied governments that "such properties belong to the victim . . . [T]he true heir, therefore, is the Jewish people, and those properties should be transferred to the representatives of the Jewish people, to be employed in the material, spiritual, and cultural rehabilitation of the Jews."⁸⁸ Designating an ethnic, racial, political, or religious group as a legal entity with juristic personality and the right of succession was unprecedented in international law.⁸⁹ However, the alternative of Germany inheriting any Jewish property that the Nazis did not already destroy or convert was unacceptable to the United States.⁹⁰

B. *U.S. Military Government Law 59: A Successor Organization as the Solution*

On November 29, 1947, the U.S. Military Government in Germany promulgated U.S. Military Government Law 59 (hereinafter "USMGL 59").⁹¹ This law set forth its purpose in the first article. It spoke to those who were wrongfully deprived of their property from the moment Adolf Hitler was sworn in as Chancellor of Germany until Victory in Europe Day. The law stated that it was enacted to effectuate

the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945

⁸⁸ Takei, *supra* note 7, at 268 (citing letter from Chaim Weizmann).

⁸⁹ *Id.* at 269. However, the United States found that this exceptional measure was appropriate considering the extraordinary nature of the circumstances.

⁹⁰ The Soviet Union rejected this plan and enforced escheat to the state in socialist East Germany, while the French favored a secular successor for its zone of influence, and the British initially preferred not to designate the Jewish people as successor in light of its activities in Palestine. *Id.* at 270. However, U.S. military governors in Germany, General Lucius D. Clay and U.S. High Commissioner John J. McCloy, sympathized with the Jewish plight, and their direct influence resulted in the development of a restitution design that would use unparalleled measures to rehabilitate displaced and impoverished victims of war in Germany and around the world. *Id.*; see also KAGAN & WEISMANN, *supra* note 10, at 35.

⁹¹ Military Government, Germany, United States Area of Control, Law No. 59 [hereinafter USMGL 59].

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for reasons of race, religion, nationality, ideology or political opposition to National Socialism.⁹²

Furthermore, the law defined confiscation as the deprivation of property resulting from acts including threats, duress, governmental seizure, or seizure under the Nazi regime.⁹³ Although the statute made no specific mention of the Jewish population, it was understood that most of those who would file claims for restitution under this statutory framework had lost their property because of their Jewish status.⁹⁴

1. *Third Party Possession*

One of the largest impediments to restitution was addressing property that the Nazis confiscated or disposed of via forced sale, and ultimately transferred to third party bona fide purchasers. The second paragraph of Article 1 of USMGL 59 directly dealt with this issue. Remarkably, it commissioned the restoration of property to its former owner or successor in interest, subordinating the interests of even those third parties who lacked knowledge of the

⁹² *Id.* art. 1, para. 1.

⁹³ *Id.* art. 2.

⁹⁴ Takei, *supra* note 7, at 270. Moreover, it is imperative to note that this law not only applied exclusively in Germany, but also, it only concerned identifiable property specifically within the United States' sphere of influence in West Germany. The French had passed a more narrow restitution law on November 10, 1947, and the British adopted Military Government Law 59 on May 28, 1949, which closely paralleled the statute in the U.S. territory. Karasik, *supra* note 86, at 452; KAGAN & WEISMANN, *supra* note 10, at 6. The scope of these laws was limited solely to the property of German and former German citizens and did not extend to any property that was confiscated in other states during the Third Reich. Leo J. Margolin, *First Complete Roundup on the Problem of Restitution*, AMERICAN JEWISH COMMITTEE – PARIS 6 (1951), http://www.ajcarchives.org/AJC_DATA/Files/501.PDF. In fact, many Holocaust survivors who attempted to reclaim their confiscated property in countries outside of Germany were killed. Stephen A. Denburg, *Reclaiming Their Past: A Survey of Jewish Efforts to Restitute European Property*, 18 B.C. THIRD WORLD L.J. 233, 236 (1998).

The American Jewish Committee in Paris reported in 1951 that Italy and Greece had set up semblances of heirless property restitution schemes to subsidize social services for the Jewish populations in their respective countries, but the Swedish government refused to compile figures on Jewish heirless assets because it deemed them “inconsequential.” In Eastern European countries such as Hungary and Poland, Jewish heirless assets escheated to the state governments under nationalization policies. All those countries that fell under the control of the Soviet Union dismissed the notion of funding needy Jewish populations with Jewish heirless assets. All such assets were expropriated by the Soviet Union. Margolin, *supra* note 94, at 7-9. The use of heirless property to rehabilitate displaced persons communities was essentially a novel, morality-driven American idea that had no place in a socialist society.

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wrongful taking of the property.⁹⁵ It further stated that as a default rule, USMGL 59 would disregard any law that both sheltered good faith purchasers and trumped restitution under normal circumstances.⁹⁶ Although the drafters found this provision necessary for the successful restitution of Jewish victims, this noteworthy change in the law created political turmoil within the non-Jewish German citizenry.

2. *Rebuttable Presumption of Confiscation*

The third article of USMGL 59 was a crucial feature of the restitution framework. It preempted the evidentiary problems that Jewish claimants would have otherwise faced when proving confiscation based on religious discrimination.⁹⁷ The article established a rebuttable presumption of confiscation in favor of the persecuted victim.⁹⁸ The transferee could rebut an unsupported presumption by demonstrating that the Jewish transferor had received a fair purchase price in return for his property.⁹⁹

3. *A Jewish Successor Organization*

Articles ten, eleven, twelve, and thirteen of USMGL 59 addressed the pertinent issue of heirless property and provided for the creation of a Jewish successor organization.¹⁰⁰ The law designated standing to a non-state and apolitical successor organization, appointed by the Military Government, for the entitlement of the entire estate of “any persecuted person” that would otherwise escheat to the state.¹⁰¹ Living persecutees or their beneficiaries were allotted six months to file petitions for the restitution of property.¹⁰² After that date, however, the successor organization was designated as the trustee of the ostensibly heirless estates and could file claims on behalf of deceased persecutees by December 31, 1948.¹⁰³ The successor organization assumed the legal position of the deceased person and could only prosecute its claims after the

⁹⁵ USMGL 59, *supra* note 91, art. 1, para. 2; KAGAN & WEISMANN, *supra* note 10, at 7.

⁹⁶ USMGL 59, *supra* note 91, art. 1, para. 2.

⁹⁷ Karasik, *supra* note 86, at 453; *see also* USMGL 59, art. 3.

⁹⁸ Karasik, *supra* note 86, at 453.

⁹⁹ *Id.* at 453-54.

¹⁰⁰ USMGL 59, *supra* note 91, arts. 10-13.

¹⁰¹ *Id.* art. 10.

¹⁰² *Id.* art. 11, para. 1.

¹⁰³ *Id.*

six-month filing deadline.¹⁰⁴ This process permitted individual claimants to prosecute their claims within a year of the law's promulgation without the intervention of the successor organization.

4. USMGL 59 and the German Courts

USMGL 59 designated detailed procedures to effectuate the law. A central filing agency processed claims and delivered them to restitution agencies that attempted to reach a settlement between the parties.¹⁰⁵ When settlement failed, the claims were adjudicated in the restitution chambers of German district courts, whose benches were composed of a presiding judge and two associate judges, one of whom was a member of a persecuted class of people.¹⁰⁶ German appellate courts heard initial appeals, and a Military Government Board of Review heard final appeals.¹⁰⁷ The restitution scheme in the United States Zone of Occupation in Germany set out to punish Germany for its wrongdoing and deny it any further benefit it might have gained from the persecution of its victims. However, the way in which the Military Government designed USMGL 59 was crucial to rebuilding democracy in West Germany. Rather than completely imposing German restitution claims on the American judiciary, or even on an altogether separate bureaucratic entity distinct from the German judiciary, the United States enforced the restitution of Holocaust survivors largely through the German court system itself. In doing so, the United States legitimized the West German judiciary in its nascent stages, which propelled the relatively swift development of the Federal Republic of Germany.

C. *The JRSO in the U.S. Occupied Territory of Germany*

The U.S. Military Government designated the Jewish Restitution Successor Organization (hereinafter "JRSO") under the terms of USMGL 59 to act as the trustee of the "Aryanized" property of deceased and heirless individuals and annihilated communities.¹⁰⁸

¹⁰⁴ *Id.* para. 2.

¹⁰⁵ *Id.* arts. 55, 62.

¹⁰⁶ USMGL 59, *supra* note 91, art. 66; KAGAN & WEISMANN, *supra* note 10, at 7.

¹⁰⁷ USMGL 59, *supra* note 91, arts. 68-69; Karasik, *supra* note 86, at 456; KAGAN & WEISMANN, *supra* note 10, at 8. The U.S. Court of Restitution Appeals was especially cooperative in reinforcing the recognition of the successor organization's legal rights. *Id.*

¹⁰⁸ KENNETH D. ALFORD, NAZI PLUNDER: GREAT TREASURE STORIES OF WWII 117 (2003); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 7 (2001).

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USMGL 59 allowed the JRSO to presume the death of a potential claimant if that person was a persecutee “whose last known residence was in Germany or a country under the jurisdiction of or occupied by Germany and its Allies and as to whose whereabouts or continued life after May 8, 1945, no information is available.”¹⁰⁹ The JRSO was charged with distributing the funds it collected from these private and communal heirless properties for the benefit of destitute Holocaust survivor populations in various locations around the world.¹¹⁰ Headquartered in Nuremberg with a board of directors in New York, the successor organization was comprised of several preexisting Jewish charitable organizations, including the American Jewish Conference and the World Jewish Congress.¹¹¹ By the December 31, 1948 filing deadline for restitution claims, the JRSO had submitted an estimated 163,000 claims.¹¹² Although the JRSO was involved in the restitution of a wide variety of heirless and communal properties,¹¹³ the pertinent claims for the purposes of this note included its recoveries of communal and private real estate.¹¹⁴ The JRSO collected 41,825,000 Deutsche Marks (DM)

¹⁰⁹ USMGL 59, *supra* note 91, art. 51.

¹¹⁰ See generally KAGAN & WEISMANN, *supra* note 10.

¹¹¹ Takei, *supra* note 7, at 269, 271.

¹¹² KAGAN & WEISMANN, *supra* note 10, at 6-7.

¹¹³ RICKMAN, *supra* note 9, at 99.

¹¹⁴ The JRSO was successful in recovering the value of heirless assets, including securities, bank accounts, former Jewish communal property, personal property, and pensions for former community officials. Moreover, it settled with the German Federal Government for the maintenance of abandoned Jewish cemeteries, and the organization succeeded in its indemnification claims for destroyed synagogues, communal and organizational property, and cultural objects. KAGAN & WEISMANN, *supra* note 10, at 10-28. The JRSO's recovery of cultural property has had lasting effects. It salvaged hundreds of thousands of Jewish cultural, artistic, and religious objects that were looted within Germany itself or had been looted in other European countries and delivered to Germany. The JRSO designated Jewish communities as beneficiaries of the objects in an effort to “reconstruct” the cultural and spiritual Jewish identity worldwide. Thus, the organization distributed the cultural property to Jewish museums and other related institutions in Europe, Israel, and the United States. For example, the entire Hermann Cohen Library was transferred to the Hebrew University in Jerusalem. *Id.* at 30-31. Unfortunately, however, there are current allegations that the JRSO did not perform its due diligence in contacting the living heirs of these books, artwork, and *Judaica* (Jewish religious paraphernalia). As a result of the haste of the JRSO in attempting to make as many claims as possible before the filing deadline, survivors and interested parties have asserted that thousands of unidentified cultural objects are wrongfully boxed away in various museum storage facilities. AMIRAM BARKAT, RIGHTFUL OWNERS MAY GET BACK FORMER BELONGINGS OF HOLOCAUST VICTIMS, HAARETZ, Apr. 13, 2007, <http://www.haaretz.com/hasen/spages/848181.html>. In response to these allegations, the Israel Museum has developed a process for heirs to make claims for their property, whereby the claimant may find his property in an online database and

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from individual settlements with German restitutors of confiscated properties and 54,202,144 DM from Jewish Communal Property settlements.¹¹⁵

IV. CHALLENGES CONFRONTED BY THE JRSO

A. *Logistical Issues*

The drafters of USMGL 59 and the JRSO had two primary objectives. They sought both the prompt restitution of Nazi misappropriated property and the rapid resettlement of displaced persons within and outside the U.S. Zone of Occupation of Germany. However, the combination of these noble ambitions served as the source of most complications that the organization encountered.

As previously discussed, the restitution programs in West Germany were largely motivated by concerns of morality and the ideals of atonement and retribution. The U.S. Military Government sought to provide some semblance of justice to surviving persecutees within its control. However, in light of political pressures and the desire to restore a vanquished nation as soon as possible, the Military Government wanted to limit the length of the process. In setting the restitution claims filing deadline at December 31, 1948,¹¹⁶ the Military Government designed a statute of limitations of little more than a year for the JRSO and potential private petitioners, including hundreds of thousands of displaced persons who were still trying to orient themselves in the chaotic aftermath of the war. Moreover, as a result of a delay in the official designation of the JRSO by the Military Government, the JRSO had merely five months to indiscriminately file as many claims as possible.¹¹⁷ In fact, the JRSO staff was so rushed that it resorted to filing claims on behalf of any Jewish-sounding names listed in outdated German phonebooks.¹¹⁸

make further inquiries with the museum. See World War II Provenance Research Online <http://www.imj.org.il/imaginer/irso/index.asp> (last visited Aug. 23, 2008). As of April 15, 2007, the museum had returned about twenty pieces of artwork to claimants. See Matti Friedman, *Israeli Institutions Vie for Looted Art*, WASHINGTON POST, Apr. 15, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/15/AR2007041500455.html>.

¹¹⁵ KAGAN & WEISMANN, *supra* note 10, at 35.

¹¹⁶ RICKMAN, *supra* note 9, at 101.

¹¹⁷ KAGAN & WEISMANN, *supra* note 10, at 6.

¹¹⁸ Interview by Manfred Gerstenfeld with Ronald Zweig, Jerusalem Ctr. for Pub. Affairs, available at <http://www.jcpa.org/phas/phas-zweig.htm>.

Considering the circumstances, the JRSO was effective in filing 163,000 claims by its deadline, but about half of those claims were duplicates of those made by private survivors and heirs.¹¹⁹ The JRSO withdrew its claims for private properties wherever there were legitimate duplicate claims to private property.¹²⁰ After the filing deadline passed, any non-duplicative claims that the JRSO filed gave the organization sole legal entitlement to the potential proceeds of those properties. Late individual claimants protested the validity of the JRSO's claims to property that allegedly belonged to them.¹²¹ In an effort to silence these complaints, the JRSO established an "equity claims" tribunal.¹²² The JRSO carried out the tribunal through a series of amendments and special licenses under the terms of USMGL 59 so that the JRSO could assign its legal rights to late claimants who could prove title to their confiscated property.¹²³ After extending the deadline for late claimants on a number of occasions, the sum total of proceeds that these individuals received amounted to over 12 million DM.¹²⁴ In the end, it is likely that the 163,000 JRSO claims and those filed by private parties only represented a fraction of the property that the Nazis confiscated in the U.S. area of influence in Germany.¹²⁵ The JRSO had very little time to garner its resources and file claims, and it seems as though a large portion of survivors did not have the resources or physical agency to assert ownership over their property in the relatively small amount of time allotted to them. Under the circumstances, the restitution scheme made unprecedented strides in compensating the Jewish people in the aftermath of the war, but it was by no means comprehensive.

From their homes to the gold caps on their teeth, victims of the Nazi regime were pillaged of everything that once belonged to them and had few resources after the war to prove the wrongful taking of property to which they once maintained title. Moreover, many Germans who claimed title to former Jewish property asserted that they lacked knowledge of any wrongful taking prior to their purchases. Thus, the first few provisions of USMGL 59,

¹¹⁹ KAGAN & WEISMANN, *supra* note 10, at 7; Karasik, *supra* note 86, at 457.

¹²⁰ KAGAN & WEISMANN, *supra* note 10, at 29.

¹²¹ *Id.* at 29.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ AMERICAN JEWISH COMMITTEE, *supra* note 94, at 6.

which made significant changes in ordinary property law, were crucial to the success of the restitution claims. The law not only placed the burden of proof on the restitutor to demonstrate that the property was not wrongfully taken, but also denied the restitutor a bona fide acquisition of property defense.¹²⁶ It was this anomalous yet necessary function of USMGL 59 that nevertheless caused one of the largest roadblocks for the JRSO.

Jewish survivors who managed to regain the rights to their property or at least the value thereof would still never be “made whole.” Additionally, the wrongdoers or their successors who invested time and money acquiring property felt unfairly treated by USMGL 59.¹²⁷ Each successful claim by a private individual or the JRSO contributed to a re-burgeoning German resentment of the Jews. The United States had set out to make Germany feel guilty for its war crimes, but USMGL 59 only produced anger. In 1951, the American Jewish Committee reported that efforts to reclaim expropriated Jewish property were meeting overwhelming opposition from both neo-Nazi groups and top German political parties.¹²⁸ A group known as the Association for Loyal Restitution forcefully lobbied for an attack on restitution laws in Germany, specifically USMGL 59, and for review of restitution judgments that were already decided by German courts.¹²⁹ As an outgrowth of this change in the political climate, the JRSO struggled with many Germans who began to litigate their disputes up through the final courts of appeal.¹³⁰ The would-be restitutors, who would have otherwise settled out of court in years prior, felt that if they waited long enough, they might avoid making restitution altogether.¹³¹

The problems of costly case-by-case recoveries, statute of limitations issues, mounting adverse political tension, the pressing need to provide displaced persons with immediate monetary support, and the desire to reinforce the sovereignty of West Germany, collectively imposed a tremendous amount of pressure on the JRSO to settle.¹³² As a result, the JRSO assigned all of its remaining

¹²⁶ See USMGL 59, *supra* note 91, arts. 1-3.

¹²⁷ Karasik, *supra* note 86, at 467.

¹²⁸ Margolin, *supra* note 94, at 1.

¹²⁹ *Id.* at 2.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1, 4; see also Seymour J. Rubin and Abba P. Schwartz, *Refugees and Reparations*, 16 LAW & CONTEMP. PROBS. 377, 390 (1951) (“The rectification of the evils of the Hitler regime is a fundamental Allied policy; but it is a policy which is best implemented by

claims to the four German State Governments (Laender) within the U.S. Zone of Occupation in return for lump-sum cash settlements that amounted to significantly less than the value of the heirless properties themselves.¹³³

B. “The Jewish People”

One of the distinct features of this system of restitution was that the value of the reclaimed heirless assets were aggregated and distributed to a unique legal entity — a collective religious people. Adolf Hitler attempted to obliterate an entire population defined by religion, and the Allies sought to provide a remedy to that same wronged entity in an attempt to make it whole. The drafters of USMGL 59 wrote that the successor organization must be representative of “the entire group or class,” and intended this phrase to refer generally to the Jewish people so that world Jewry could inherit the heirless assets in Germany.¹³⁴ Thus, restitution via a successor organization is essentially a class action lawsuit with class members numbering in the millions. The difficulty in characterizing a claimant as an ethnic population, however, is that no single religious people constitute a monolithic entity with uniform interests and needs. As the JRSO discovered in 1948, “the Jewish people” comprised a diverse variety of individuals and communities with clashing beliefs regarding who should be the direct recipients of the heirless restitution funds.

The internal struggles within the Jewish people reached a crescendo during the controversy over the rights to the Jewish communal property in the Augsburg community of West Germany. The Augsburg community, like several other post-war German Jewish communities, was composed of a handful of Holocaust survivors who were not necessarily originally from Augsburg, but Jews living in a “reestablished” Germany nonetheless.¹³⁵ Augsburg community members filed restitution claims that were duplicative of JRSO claims.¹³⁶ The claims were for a synagogue, a cemetery, and vari-

being quickly implemented, and bulk sum settlements, gross though they may be, are the best instrument for the solution of the political problems which arise out of the operations of the Jewish Restitution Successor Organization in Germany five years after the end of active hostilities and out of the immediate and pressing needs of surviving persecutes.”).

¹³³ Margolin, *supra* note 94, at 4; KAGAN & WEISMANN, *supra* note 10, at 8; BARKAN, *supra* note 108, at 7.

¹³⁴ Takei, *supra* note 7, at 270-71.

¹³⁵ *Id.* at 277.

¹³⁶ *Id.*

ous buildings.¹³⁷ The Augsburgers viewed themselves as the successors to and the continuation of the thriving Jewish community that existed there before the war.¹³⁸ However, the JRSO felt that there was no continuity from the pre-war Augsburg community to the post-war Augsburg community.¹³⁹ Moreover, the JRSO was obligated to dispose of the restitution proceeds to Jewish groups that needed them most and did not consider the few Jews of Augsburg to be a priority.¹⁴⁰ The Court of Restitution Appeals ultimately held that the Augsburg community died out in 1941, and thus the JRSO maintained a legitimate claim to the communal property there.¹⁴¹ The decision was crucial, not only as a precedent to legitimize the Jewish people as heir to demolished German communities, but also to quell the appearance of impropriety by the JRSO before a judgmental and resentful German gentile population.

As legal historian Ayaka Takei observed, “a politically defined notion of Jewish collectivity rather than a universalistic notion of Man served as the basis of postwar Jewish thinking.”¹⁴² After the Holocaust, the “people” had priority over the “individual.” The issue of identifying “the Jewish people” as the beneficiaries of heirless restitution proceeds reverberated in United States courtrooms. In two 1958 lawsuits against the Conference of Jewish Material Claims Against Germany (hereinafter “Conference”), the successor to the JRSO, individual Holocaust survivors alleged that the Conference breached its fiduciary duty by misallocating restitution proceeds among survivors.¹⁴³ In both cases, the Supreme Court of New York County dismissed the claims because the individuals were not specifically designated beneficiaries, and thus lacked standing to bring their respective actions.¹⁴⁴ “The Jewish people” was the true beneficiary and the Conference had the sole authority to determine how to dispense its funds according to the urgency of

¹³⁷ *Id.*

¹³⁸ *Id.* at 272.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 275.

¹⁴¹ *Id.* at 279.

¹⁴² Takei, *supra* note 7, at 280.

¹⁴³ See generally *Revici v. Conference on Jewish Material Claims Against Germany*, 174 N.Y.S.2d 825 (N.Y. Sup. Ct. 1958); *Matter of Jewish Secondary Schools Movement v. Conference of Jewish Material Claims Against Germany*, 174 N.Y.S.2d 560 (N.Y. Sup. Ct. 1958).

¹⁴⁴ *Revici*, 174 N.Y.S.2d at 357; *Matter of Jewish Secondary Schools Movement*, 174 N.Y.S.2d at 359.

the needs of worldwide surviving Jewish populations.¹⁴⁵ A U.S. District Court reaffirmed these holdings in 1997 when it similarly dismissed a claim against the Conference because the plaintiff Holocaust victim had no personal rights in the decisions made by the Conference.¹⁴⁶ The heirless property restitution scheme was never about any particular individual, but rather about the resettlement of world Jewry as a whole.

V. THE SUCCESS AND LEGACY OF THE JRSO

The JRSO recovered over 200 million DM in total based on the claims it filed in the mere five months allotted by USMGL 59.¹⁴⁷ Had the U.S. Military Government extended the filing period, the JRSO would have acquired more.¹⁴⁸ Nevertheless, the expedited process allowed for a substantial amount of funds to reach thousands of indigent victims of the Holocaust so that they could rebuild their lives, and in large part, restore their own homeland in a location far from the cities and towns from which they were evicted.¹⁴⁹ Many preexisting charitable institutions, including United Help, the American Jewish Joint Distribution Committee, and Agudath Israel World Organization, aided in the distribution of JRSO's funds.¹⁵⁰ The restitution proceeds were allocated to finance infrastructure for housing developments, education, agricultural centers, institutional care in hospitals, and homes for the elderly.¹⁵¹

As detailed above, the implementation of USMGL 59 via the JRSO had some problems in practice, but aside from those issues, the crux of the idea behind the restitution program was remarkable. The noteworthy concept of preventing perpetrators of a totalitarian regime from enjoying the spoils of their war crimes, while simultaneously aiding destitute populations, can be a useful paradigm for other post-war retribution schemes. Moreover, as previously demonstrated, if an interim or new sovereign government implements such a strategy within the restituting nation itself, it

¹⁴⁵ *Matter of Jewish Secondary Schools Movement*, 174 N.Y.S.2d at 359.

¹⁴⁶ *Sampson v. Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997).

¹⁴⁷ KAGAN & WEISMANN, *supra* note 10, at 4.

¹⁴⁸ *Id.* at 6-7.

¹⁴⁹ *Id.* at 34.

¹⁵⁰ *Id.* at 34-35.

¹⁵¹ *Id.*

may help foster the legitimization of a fledgling democratic government's judiciary.

Some may argue that customary international law has befittingly focused on individual human rights over the course of the last century,¹⁵² but such an approach to ameliorating the chaos in the aftermath of world conflicts may not always be the most appropriate. It may be more efficient to address the restitution of a persecuted class of people as a whole. Bearing in mind the difficulties faced by the JRSO, the use of heirless assets to assist in relief efforts for refugee and displaced persons can be applied to a number of situations. In light of the ongoing displaced persons problem in northern Iraq, and the repeated failures of the Coalition to implement a solution, the new Iraqi government should highly consider an heirless property restitution scheme for a post-Ba'ath regime Iraq.

VI. HEIRLESS PROPERTY IN NORTHERN IRAQ

Much like the "Jewish people" became a legal entity for the purpose of restitution after the Second World War, the "Kurdish people" should have the legal designation of heir to the otherwise heirless assets of their ethnic cohorts. The Iraqi government disinherited the Kurds of everything they owned over a period of several decades.¹⁵³ During the infamous Anfal campaign alone, 50,000 to 182,000 Kurds, including entire families, were slaughtered.¹⁵⁴ The deceased and their surviving counterparts who lived to file restitution claims left behind real property that the Ba'ath party expropriated.¹⁵⁵ The Coalition focused its restitution efforts on individual private claimants whose real property was expropriated, and the new Iraqi government has completely neglected those properties that belonged to now-obsolete Kurdish communities and now-deceased Iraqi Kurds who have no heirs to collect on their behalf.

Similar to the common law system, under the succession laws of the Continental civil law system, which forms the foundation of Iraqi Law, if one dies without heirs, the State "takes" all of the

¹⁵² SCOTT LECKIE, RETURNING HOME: HOUSING PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 9 (Scott Leckie ed. 2003).

¹⁵³ McDOWALL, *supra* note 12, at 89-102.

¹⁵⁴ KURDISTAN IN THE TIME OF SADDAM HUSSEIN, *supra* note 22, at 21.

¹⁵⁵ HELEN CHAPIN METZ, IRAQ: A COUNTRY STUDY 168 (2004).

decendent's estate.¹⁵⁶ It would be an enormous injustice for any heirless Kurdish property to escheat to the State and settle in the hands of the Iraqi authorities in Baghdad. Therefore, the Iraqi government, under the influence of U.S. occupational forces, should facilitate the creation of a Kurdish successor organization to dispute heirless property restitution claims before a qualified Iraqi arbiter. Likewise, it would be prudent to appoint successor organizations for other ethnic minorities, including the Iraqi Turkmen and Assyrians, who were persecuted under Saddam Hussein's government.¹⁵⁷ Before the new Iraqi government appoints a Kurdish successor organization, however, it must reconsider the structure of the property claims process.

As previously discussed, the Iraq Property Claims Commission is an inefficient program that has produced lackluster results for those it was intended to compensate.¹⁵⁸ The structure of the Commission is at the root of the problem, because it calls for an ad hoc entity that relies on a bureaucracy consisting of an appellate division, regional commissions in each Iraqi governorate, and a National Secretariat.¹⁵⁹ Essentially, the design of the IPCC requires an overextension of Iraq's limited judicial resources. However, the Kurdish people need not rely on a claims commission, separate from the State's court system, because the Coalition's interim government managed to restore a competent Iraqi judiciary that has jurisdiction to hear property claims.¹⁶⁰ The IPCC is unnecessary to address restitution disputes in northern Iraq. Iraq's continued reliance on the Commission is only an additional impediment toward reaching a peaceful solution in the region.

A. *An Independent Judiciary in Modern-day Iraq*

The IPCC, which necessitated an overextension of national resources, failed to reinforce confidence in the new Iraqi government. In a time of severe ethnic and factional tensions, it would

¹⁵⁶ French Succession Law and Tax Planning, Stephen Smith Ltd., <http://www.stephen-smithfranceltd.com/index.html> (last visited Sept. 10, 2008).

¹⁵⁷ John Fawcett & Victor Tanner, *The Internally Displaced People of Iraq*, THE BROOKINGS INSTITUTION, Oct. 31, 2002, <http://www.reliefweb.int/rw/rwb.nsf/db900sid/ACOS-64CMND?>

¹⁵⁸ See Part I.

¹⁵⁹ Dan E. Stigall, *Courts, Confidence, and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission*, 2005 *ARMY LAW* 31 (2005).

¹⁶⁰ Stigall, *supra* note 72.

have been ideal for a new, democratic, independent, and impartial judiciary to have jurisdiction over these thousands of restitution disputes, and legitimize the institution in the process. Fortunately for the Iraqi people, the U.S.-led Coalition forces have already facilitated the emergence of a new, democratic judiciary in Iraq with a civil code that has the capacity to resolve land restitution disputes just as easily as any temporary restitution system.¹⁶¹

When the Coalition began to rebuild a democratic Iraqi infrastructure in the chaotic aftermath of Operation Iraqi Freedom, one of the United States' primary objectives was to reinstate the "rule of law" in Iraq that had been "eviscerated" by Saddam Hussein.¹⁶² The Iraqi interim government¹⁶³ sought to recreate an Iraq governed by the rule of law by "building a legal system that instills confidence in a new government."¹⁶⁴ The interim government believed that the rule of law could only be manifested once the Iraqi citizenry was guaranteed rights to due process in "fair, public, and transparent trials" within an independent Iraqi judiciary.¹⁶⁵ The "secret courts" that Saddam Hussein established were completely unacceptable, so the interim government endeavored to undo the damage the Ba'ath party had done.¹⁶⁶

CPA Order 35, issued in September 2003, began the process with the purpose of re-establishing Iraq's judicial independence. The order reinstated a council of judges to supervise the judicial and prosecutorial systems of Iraq. It also required that the judiciary be independent and separate from the new legislative and executive authorities, including the Ministry of Justice.¹⁶⁷ However, the Iraqi interim government faced a battery of obstacles in re-estab-

¹⁶¹ See generally Stigall, *supra* note 72. The Iraqi Civil Code and judiciary are based primarily on the French legal system. *Id.*; U.S. Gen. Accounting Office, *Rebuilding Iraq: Resource, Security, Governance, Essential Services, and Oversight Issues*, June 2004, at 80, available at <http://www.gao.gov/new.items/d04902r.pdf> [hereinafter GAO].

¹⁶² EXECUTIVE STRATEGIC SUMMARY, THE WHITE HOUSE: NATIONAL STRATEGY FOR VICTORY IN IRAQ (2004), http://www.whitehouse.gov/infocus/iraq/iraq_strategy_nov2005.html. The U.S. executive branch defined the rule of law as "a concept [that] denotes a government of laws, and not of men." *Id.*; The United States viewed the rule of law in Iraq as "a prerequisite for political stability, economic development, and public confidence in public institutions." GAO, *supra* note 161, at 79.

¹⁶³ The U.S.-led Coalition transferred power to a sovereign Iraqi government on June 28, 2004, which implemented a provisional legal framework while a permanent Iraqi government developed. GAO, *supra* note 161, at 1.

¹⁶⁴ Executive Strategic Summary, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Coalition Provisional Authority, Order Number 35 (2003).

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lishing the rule of law in the war-torn country. Not only were the majority of courthouses “damaged or destroyed,” but also, the Coalition was constantly protecting itself from violent threats to its nation-building from insurgent forces.¹⁶⁸ Thus, one of the interim government’s projects was to “reconstruct and fortify courthouses to provide adequate security for judges and prosecutors.”¹⁶⁹ As of June 2004, Iraqi courts were reportedly open and functioning,¹⁷⁰ but not at pre-war levels.¹⁷¹

Another major challenge for the interim government was the need to invest its resources in training hundreds of jurists in modern international humanitarian law, untainted by totalitarian Ba’athist policies.¹⁷² The Judicial Review Committee, established by CPA Order 15, was designed to appraise the adequacy of Iraqi judges and prosecutors.¹⁷³ The committee reviewed approximately 870 judges and prosecutors and removed one-fifth of them, appointed 110 new judges and prosecutors, and reinstated 80 judges and prosecutors who had been removed by the Ba’athists.¹⁷⁴ The selection criteria were allegedly predicated on “Ba’ath party membership, allegations of corruption, and the individual’s competence and reputation.”¹⁷⁵ Moreover, attorneys from the Department of Justice’s Office of Overseas Prosecutorial Development, Assistance, and Training instructed Iraqi judges on the “basic tenets of

¹⁶⁸ GAO, *supra* note 161, at 79; UNHCR, *supra* note 48, at 121.

¹⁶⁹ GAO, *supra* note 161, at 81.

According to CPA, funding from the Commander’s Emergency Response Program played the most significant role in refurbishing courthouses. In addition, an April 2004 report from the Office of Management and Budget indicated that \$135 million had been allocated to add security and repair Iraqi courthouses in fiscal years 2004 and 2005. Some of the construction includes structural repairs such as electrical, sanitary, and civil works To provide security to government infrastructure, including courthouses, CPA created the Iraqi Facilities Protection Service (FPS) CPA also gave FPS advice and training on courthouse security operations through the U.S. Marshals Service.

Id. at 82.

¹⁷⁰ COALITION PROVISIONAL AUTHORITY, HISTORICAL ACCOMPLISHMENTS (2003-2004) (Iraq), *available at* <http://www.cpa-iraq.org/>.

¹⁷¹ GAO, *supra* note 161, at 79. The CPA reported that the Court of Cassation (Iraq’s highest appellate court) heard approximately 3,000 appellate cases in April 2004 and 4,200 in May 2004. *Id.* at 80. However, for example, courts in Baghdad were operating at approximately one third of their pre-war capacity. *Id.*

¹⁷² *Id.* at 80.

¹⁷³ GAO, *supra* note 161, at 81.

¹⁷⁴ *Id.* at 81-82.

¹⁷⁵ *Id.* at 82.

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human rights, due process, and the rule of law.”¹⁷⁶ The CPA also offered weekly training for court-appointed defense counsel.¹⁷⁷ As a more permanent measure, the Iraqi Judicial College reopened, adding due process, rule of law, and human rights to its curriculum.¹⁷⁸

There are about 130 courthouses, 570 courts, and 710 judges in Iraq.¹⁷⁹ The reinstated judiciary has a structure composed of investigative criminal courts and civil courts at the lowest levels.¹⁸⁰ The civil courts are divided into personal status courts that preside over matters involving the personal status of Muslims, magistrate courts that have jurisdiction over claims that do not exceed 50,000 ID, and courts of first instance that deal with claims exceeding 50,000 ID.¹⁸¹ Civil and criminal cases can be appealed up to the court of appeal, and then up to the Court of Cassation, Iraq’s highest court.¹⁸² The Federal Supreme Court is a forum designated for jurisdictional questions and potential legal inconsistencies.¹⁸³ Although the situation in Iraq is not completely stable and the courts, judges, and lawyers continue to face threats from insurgent warfare, these courts are operating despite the relatively short span of time that has passed since the interim government overhauled the system.¹⁸⁴

¹⁷⁶ *Id.* at 83. Some judges and lawyers who had at one time practiced under Saddam Hussein were given crash courses in international human rights law. For instance, “twenty-eight Iraqi judges and Ministry of Justice officials recently attended a Rule of Law training workshop in the Hague, where they discussed the unique challenges facing the Iraqi judiciary. U.S. Supreme Court justices Anthony Kennedy and Sandra Day O’Connor, Lord Chief Justice of England and Wales, Lord Woolf, and other legal experts met with the Iraqi judges to discuss separation of powers, federalism, and the courts’ role in securing fundamental rights. International expertise is helping to strengthen Iraq’s courts so they can play a key role in building the framework for an open, democratic society.” Press Release, U.S. Department of State, International Legal Experts Share Knowledge to Strengthen Iraqi Courts (May 10, 2004), <http://www.whitehouse.gov/news/releases/2004/05/20040510-2.html>. Additionally, forty-eight Iraqi defense attorneys traveled to Dubai to meet with international law experts from Canada, Ireland, Scotland, Egypt, and the United States to learn about the basic human rights of criminal defendants and to review human rights treaties to which Iraq is a party, including the International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture. *Case Law Professors Help Iraq Train New Judiciary*, CASE W. RES. U. NEWS, June 4, 2004, <http://www.case.edu/news/2004/6-04/waters.htm>.

¹⁷⁷ GAO, *supra* note 161, at 83.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 80.

¹⁸⁰ UNHCR, *supra* note 48, at 122.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ COALITION PROVISIONAL AUTHORITY, *supra* note 170.

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The United States and Iraqi governments have invested a great deal of funding in Iraq's permanent democratic institutions.¹⁸⁵ The reinstated civil courts have jurisdiction to hear the real property claims disputes at issue for the thousands of displaced Kurdish Iraqis and their Arab adversaries.¹⁸⁶

After investing millions of dollars and several years worth of manpower, the CPA has facilitated the creation of a functioning independent and democratic Iraqi judiciary. There is no need to invent a commission to hear special claims when a capable court system already exists. Creating a special claims tribunal that requires additional funding and human capital, as the CPA and interim government have done through the IPCC, is an irresponsible mishandling of resources and an unfortunate waste of opportunities to legitimize the new democracy. The Allies of World War II realized this point,¹⁸⁷ and made certain to involve the new German democratic courts in the restitution process. It is not too late for the Iraqi government to take heed.

B. *Real Property Restitution under the Iraqi Civil Code*

The Iraqi government should amend its Constitution, withdrawing the statutory language allocating power to the IPCC to preside over the property disputes in the Iraqi Kurdish provinces. Not only do the Iraqi civil courts offer a proper forum for such adjudications, but also, they already offer a statutory scheme that addresses the legal issues in a fair and democratic nature.¹⁸⁸ Some even argue that the *Iraqi Civil Code* (hereinafter "Code") provides a more comprehensive, and thus superior, set of laws compared to the IPCC statute.¹⁸⁹

The Code, based on the French civil system, was left largely unaltered by the CPA when it reorganized the Iraqi judiciary.¹⁹⁰ However, the Code provisions applicable to the restitution of real property are unavailable to the Iraqi people because the IPCC statute asserts exclusive jurisdiction over all claims within its scope.¹⁹¹

¹⁸⁵ GAO, *supra* note 161, at 82.

¹⁸⁶ Stigall, *supra* note 159, at 36.

¹⁸⁷ See Part II, subsection iv.

¹⁸⁸ THE WHITE HOUSE, AN INDEPENDENT JUDICIARY IN IRAQ (Mar. 24, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040324-14.html>.

¹⁸⁹ *Id.* at 36.

¹⁹⁰ Stigall, *supra* note 72.

¹⁹¹ Stigall, *supra* note 159, at 39.

This is an unfortunate result because the Code addresses the disputes pending in the northern provinces of Iraq, and the Iraqi civil courts are proper forums for application of the Code.

The drafters of the Code included extensive provisions that anticipate instances of misappropriation of property. An individual cannot be divested of his property without “fair compensation” prior to the taking, and the taking must be in accordance with the law.¹⁹² Improperly confiscated property, if still in existence, must be returned to its rightful owner at the “place where it was usurped.”¹⁹³ Even if the transfer of property was contractual in nature, if the contract was forced whereby the potential claimant experienced duress, intimidation, or fraudulent representations during the course of negotiations, the contract is invalid and the claimant still has a valid claim to his former property.¹⁹⁴ Furthermore, the Code provides that a bad faith subsequent purchaser is responsible for the deterioration of the property, unless he can prove that the property would have similarly deteriorated under the control of the true owner.¹⁹⁵

The claims that the returning Iraqi Kurds hope to bring involve wrongful takings of property that occurred anywhere from five to forty years ago. Thus, prescriptive periods, or statutes of limitations, would seemingly pose an extraordinary problem for these potential Kurdish claimants. In fact, the Code affirmatively states that “a case shall not be heard in respect of an obligation whatever its cause . . . if it has not been claimed without lawful cause for a period of 15 years . . .”¹⁹⁶ However, the Code tolls the statute of limitations when the claimant encounters a difficulty that makes it impossible to file a cause of action.¹⁹⁷ It seems quite likely that the current Iraqi judiciary, recently educated in international human rights obligations,¹⁹⁸ would find that the tyranny of a totalitarian regime, like the Ba’ath party, serves as such an impediment.¹⁹⁹

Although the restitution process written into the Code is superior to the process under the IPCC, both schemes fail to address

¹⁹² *Id.* at 36 (citing Iraqi Civil Code (1990 Translation), art. 1050).

¹⁹³ *Id.* at 37 (citing art. 192).

¹⁹⁴ *Id.* at 38 (citing arts. 112, 115, &121).

¹⁹⁵ *Id.* (citing art. 1168).

¹⁹⁶ *Id.* at 39 (citing art. 429).

¹⁹⁷ *Id.* (citing art. 435).

¹⁹⁸ Case Law Professors Help Iraq Train New Judiciary, *supra* note 176.

¹⁹⁹ Stigall, *supra* note 159, at 39.

the legal repercussions for the wrongful taking of property from true owners who died heirless before they had the opportunity to file claims. Thus, under both designs, such property would revert to the State as provided by the civil law system. Considering the circumstances here, in which the wrongful taker is the State itself, such a result is intolerable. Herein lies the need for a successor organization.

C. *A Kurdish Restitution Successor Organization*

By the end of 2007, the United Nations High Commission for Refugees estimated that there were somewhere between 2.3 and 2.7 million internally displaced people in Iraq.²⁰⁰ Although that statistic is by no means entirely composed of Kurds who were displaced as a result of Arabization, a large number of those 2.5 million Iraqis were victims of the Ba'ath regime. In consequence of this displacement, a lack of employment and substantial economic decline has led to the corrosion of basic resources.²⁰¹ Displaced Iraqis need food, water, sanitation, fuel and electricity, shelter, health care, and education.²⁰² Moreover, as the displacement problem escalates, so does competition for limited resources and the impact on temporary settlements, which have reached their capacity.²⁰³ It is understandable that the Iraqi Constitution calls for a semblance of "normalization"²⁰⁴ before further modes of governance are solidified in the contentious northern region. In order for this "normalization" to take effect, however, the Iraqi government must implement a better process of land restitution, namely the one promulgated in its own legal code. Regardless, thousands of displaced Kurds will never benefit from restitution laws in Iraq as it stands, despite being victims of state aggression. The problem of displacement cannot be addressed merely through proceeds to in-

²⁰⁰ CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? 1-2, (2007), <http://fas.org/sgp/crs/mideast/RL33936.pdf>. See also Elizabeth Ferris and Kimberly Stoltz, *The Future of Kirkuk: The Referendum and its Potential Impact on Displacement*, THE BROOKINGS INSTITUTE, Mar. 3, 2008, http://www.brookings.edu/papers/2008/0303_iraq_ferris.aspx ("Failing to reconcile the competing interests and property claims in Kirkuk and other disputed territories and failing to establish a system of compensation for expelled Kurds, Turkmen, and Christians, could lead to further destruction and chaos in a country where one out of six people has already fled his or her home.").

²⁰¹ CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, *supra* note 200, at 4.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Iraq Constitution, art. 140.

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dividuals who have the ability to claim rights to land that they once owned. An individual-based claims process will never completely solve the problem when many Kurdish victims lack the means to prove true ownership, and when many never owned land in the first place. The assignment of a legal successor for the Kurdish people would fill the void that this problem creates.

Extreme death and destruction marked the thirty-year period of Saddam Hussein's dominance in Iraq. An inordinate number of Kurds and other ethnic minorities were forced off of their land, and hundreds of thousands of civilians were murdered in the process. In many cases, villages were demolished in mere days, and entire families were wiped out, leaving no one to claim rightful ownership of property for thousands of individuals once the Coalition forces liberated Iraq. The new Iraqi government, under the encouragement and supervision of the occupational forces, should designate a Kurdish Restitution Successor Organization (hereinafter "KRSO") that would have standing to bring claims on behalf of heirless Kurdish victims as a trustee for "the Kurdish people."²⁰⁵ It would be morally reprehensible for the Iraqi government to monetarily gain from escheat as a result of the tragedy caused by the former regime. Instead, the restitution proceeds that the KRSO would accumulate through the claims process should be dispersed through pre-established charities²⁰⁶ that would help resettle those displaced Kurds in greatest need. Although the KRSO and the charities that it designates for distribution would have authority over how the restitution funds are administered, it is likely that those Kurds who lack the ability to bring personal claims would benefit most from this strategy.

While the Iraqi government should follow the basic structure of the Jewish Restitution Successor Organization when constructing the KRSO, it should be mindful of the difficulties that the JRSO experienced.²⁰⁷ One of the most significant impediments to

²⁰⁵ The KRSO would also have the power to make claims for the communal assets that once belonged to Kurdish communities.

²⁰⁶ Charitable organizations located in northern Iraq such as the Kurdistan Save the Children Children's Fund, Iraqi Aid Council, and Human Relief Foundation are constantly requesting donations because they lack the necessary funding to support their beneficiaries. See, e.g., Kurdistan Save the Children Children's Fund, <http://www.ksc-kcf.com/> (last visited Sept. 10, 2008). These charities should not be scrambling for financial aid when the people they are trying to resettle and rehabilitate already have a moral claim to compensation for the confiscation of heirless property.

²⁰⁷ See Part III.

the JRSO's function was that the U.S. Military Government in Germany had legislated an extremely brief statute of limitations for filing restitution claims.²⁰⁸ If the Iraqi government implements its own civil code, as previously advised, the statute of limitations should not pose a problem for a KRISO because the *Iraqi Civil Code* provides for tolling under special circumstances, including those at issue.

Additionally, the JRSO's lengthy case-by-case adjudications for individual heirless owners create a variety of problems for the organization.²⁰⁹ If the KRISO attempts to file claims on an individual basis, it could take an extraordinary long time. Such a process would result in mounting political pressures from resentful Iraqi Arabs who would seek the dissolution of the organization. Plus, individual restitution decisions would not serve the pressing need to provide displaced persons with immediate monetary support. Moreover, a slow adjudicatory process would be very costly to the KRISO. Thus, the KRISO should focus its efforts on a class action suit on behalf of the entire class of heirless Kurdish property owners. Through this plan, the class damages would be adequately calculated under the supervision of an impartial arbiter. The class action damages would offer some of the same advantages of a bulk settlement made completely outside the courtroom without sacrificing potentially large recoveries of damages. A class action would likely result in a settlement, but it would be based on adjudicated rights overseen by a judge. This system would be superior to the JRSO's method of bulk settlement prepared outside the courtroom, under the administration of German federal authorities.²¹⁰ In fact, under the civil law system, the judge is elevated to a position in which he assumes the primary role of interrogator and reserves a large degree of control over the investigatory process and determinations of both fact and law.²¹¹

The damages that the KRISO would recover through a class action lawsuit would have the potential to fund the rehabilitation of many Kurds who suffered alongside those who perished without heirs. Specifically, the proceeds would help fund the infrastructure for housing, hospitals, and the rehabilitation of agricultural out-

²⁰⁸ See *supra* note 118.

²⁰⁹ See Part III.

²¹⁰ See KAGAN & WEISMANN, *supra* note 10.

²¹¹ See JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* (Federal Judicial Center 1995); GAO, *supra* note 161, at 80.

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posts. Moreover, those Kurds who return to their homes and are individually successful in the restitution process would indirectly benefit from the rebuilt communal infrastructure if the heirless property proceeds reach beyond those who lack personal claims.

VII. CONCLUSION

After five years of attempts at organizing a workable program for restituting the persecuted Kurdish people of Iraq, the U.S.-led Coalition and the new Iraqi government have yet to operate a satisfactory system. The source of this inadequacy is rooted in the current restitution commission's need for excessive funding and manpower to support a program that it cannot afford. If the new Iraqi government and the influential Coalition forces truly believe that restituting expropriated land to displaced persons will help allay the exacerbated ethnic tensions in Iraq, then they should rethink the IPCC, beginning with its foundation. Similar to the way in which the U.S. Military Government in Germany implemented the German civil courts in its restitution scheme,²¹² Kurdish restitution claims can, and should, be processed in Iraqi civil courts. The Iraqi courts are capable of adjudicating these restitution claims, and the *Iraqi Civil Code* was designed to address such issues.²¹³

Regardless of the design of the program, however, the Coalition should understand the lessons of the U.S. Military Government in post-World War II Germany. Specifically, the Iraqi government should strongly consider designating a successor organization as heir to the deceased and heirless Kurdish victims of Hussein's ethnic cleansing policy. USMGL 59's application of heirless property for the resettlement of Nazi victims was rooted in unprecedented genius that subsequent restitution programs have unfortunately overlooked. The new Iraqi government has much to learn from this underutilized restitution model. The internally displaced persons problem in Iraq has reached monumental proportions²¹⁴ since the Coalition forces liberated the country from the Ba'athists, but with the aid of a successor organization, the new Iraqi government may finally begin to reach those in need.

²¹² USMGL 59, art. 66.

²¹³ See generally Stigall, *supra* note 159.

²¹⁴ As of January 2008, there were approximately 2.48 million displaced persons in Iraq. United Nations, *CERF Allocates US \$5 Million to Provide Food Assistance to Displaced Iraqis*, Central Emergency Response Fund, <http://ochaonline.un.org/Default.aspx?tabid=3682>.

