

AFTER REGIME CHANGE: UNITED STATES LAW AND POLICY REGARDING IRAQI REFUGEES, 2003-2008

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I. INTRODUCTION

This is a critical history of the legal and public policy response by the United States to the Iraqi refugee crisis. Its thesis is that a sharp contrast has developed between U.S. immigration courts on one hand, and the U.S. State Department, the United Nations High Commissioner for Refugees (UNHCR), and international non-governmental organizations (INGOs) such as Human Rights Watch on the other, on the question of whether Iraqis driven from the country since the 2003 war are fleeing “random” violence or targeted persecution. U.S. courts have tended toward findings of “random” violence in order to deny Iraqi asylum-seekers the right to remain in the United States under the U.N. Convention Relating to the Status of Refugees of 1951 and its 1967

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Protocol, and the U.N. Convention on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984 (Torture Convention). Thus, U.S. immigration judges, and some federal appellate judges, have concluded that because multi-national forces (MNF) led by the United States and United Kingdom deposed the Ba'athist regime of Saddam Hussein and are now guaranteeing security, even Iraqis who can prove past persecution and torture by the Iraqi government are not refugees and are not entitled to relief under the Convention Against Torture, which protects persons from being deported to face a risk of torture. As a result of these findings and other laws, by 2008 the United States offered protection to only 14,000 out of the 2.5 million refugees that have fled Iraq.¹

In contrast, according to the U.S. State Department and UNHCR, the situation in Iraq is one of violence specifically targeting and killing thousands of Shi'a and Sunni Arabs, as well as Iraqi ethnic and religious minorities such as Assyrians, Mandaeans, and Yezidis. For this reason, the findings of U.S. immigration judges that violence in Iraq is "random" rather than based on protected criteria such as religion, sect, or ethnicity are inconsistent with numerous reports of the U.S. State Department, the U.S. Commission on International Religious Freedom, UNHCR, and INGOs such as Human Rights Watch. All of these entities have

1. See, e.g., Vanessa Parra, *Relocation of Palestinian Refugees from Iraq to Sudan Moving Forward*, REFUGEES INTERNATIONAL (Jan. 28, 2009), available at <http://www.alertnet.org/thenews/fromthefield-/219053/123317493982.htm> (last visited Nov. 5, 2009); Jamie Tarabay, *Iraqi Refugees Find Michigan Is No Land Of Plenty*, NPR (Nov. 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=96830836u> (last visited Nov. 5, 2009); U.S. Department of State, Office of the Spokesperson, *U.S. Surpasses Goal of Admitting 12,000 Iraqi Refugees in FY2008: Assistance Reaches New Heights* (Sept. 12, 2008), available at <http://merln.ndu.edu/archivepdf/iraq/State/109544.pdf> (last visited Nov. 5, 2009). Journalists and the United Nations began reporting in fall 2007 that 2.5 million people had fled Iraq for neighboring countries, some continuing on to Europe, the United States, Australia, New Zealand, or North Africa. See, e.g., Refugee Crisis in Iraq Act, S. 1651, 110th Cong. § 2 (2007) (stating findings of proposed Act, introduced in Senate by Sen. Edward Kennedy) ("[The] United Nations estimates that there are 2,000,000 Iraqis internally displaced and more than 2,000,000 Iraqi refugees in neighboring countries."); Mohamad Bazzi, *Fallout from Iraq*, NEWSDAY (N.Y.), Sept. 16, 2007, at A30; Patrick Cockburn, *UN Warns of Five Million Iraqi Refugees*, THE INDEPENDENT (U.K.), June 10, 2007, available at http://www.independent.co.uk/news/world/middle-east/un-warns-of-five-million-iraqi-refugees_452522.html (last visited Nov. 5, 2009); Andra Jackson, *Australia Urged to Help Iraqi Refugees*, THE AGE (Australia), Sept. 25, 2007, available at <http://www.theage.com.au/news/-national/australia-urged-to-help-iraqi-refugees/2007/09/24/1190486225422.html> (last visited Nov. 5, 2009); Deb Riechmann, *US to Admit More Iraqi Refugees*, ASSOCIATED PRESS/USA TODAY, Oct. 2, 2007, available at http://www.usatoday.com/news/washington/2007-10-02-432757254_x.htm (last visited Nov. 5, 2009).

documented an increase since 2003, rather than a decrease or a transition into randomness, of persecution on religious, sectarian, and ethnic grounds. The U.S. State Department and U.N. Assistance Mission in Iraq, in particular, have reported thousands of deaths of Iraqi civilians at the hands of persecutors singling out Shi'a, Sunni, Assyrian, Mandaean, or Yezidi victims.² UNHCR has recognized that Christians accounted for forty percent of the refugees fleeing Iraq in 2004 and early 2005.³ These sources have also confirmed that Iraq's government is complicit in

2. See, e.g., U.S. DEPARTMENT OF STATE (USDOS), COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2004), *available at* <http://www.state.gov/g/drl/rls/hrrpt/> (accessed by selecting 2004; then Near East and North Africa; then Iraq) (last visited Nov. 5, 2009); USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2005), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm> (last visited Nov. 5, 2009); USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2006), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm> (last visited Nov. 5, 2009); USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ 2007 (2008), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2007/100596.htm> (last visited Nov. 5, 2009); USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008: IRAQ, (2008), *available at* <http://www.state.gov/g/drl/rls/irf/2008/108483.htm> (last visited Nov. 5, 2009); USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2005: IRAQ (2004), *available at* <http://www.aina.org/reports/irfIraq05.pdf> (last visited Nov. 5, 2009); U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), HUMAN RIGHTS REPORT: 1 SEPTEMBER – 31 OCTOBER 2006, at 1, *available at* <http://www.uniraq.org/docsmaps/undocuments.asp> (accessed by selecting Human Rights Report 1 September – 31 October 2006, under UNAMI Human Rights Reports) (last visited Nov. 5, 2009); UNAMI, HUMAN RIGHTS REPORT: 1 NOVEMBER – 31 DECEMBER 2006, 1-2, 7-8, *available at* <http://www.uniraq.org/docsmaps/undocuments.asp> (accessed by selecting Human Rights Report 1 November – 31 December 2006, under UNAMI Human Rights Reports) (last visited Nov. 5, 2009); UNAMI, HUMAN RIGHTS REPORT: 1 JANUARY – 31 MARCH 2007, 1-2, 7-8, *available at* <http://www.uniraq.org/docsmap/undocuments.asp> (accessed by selecting Human Rights Report 1 January – 31 March 2007, under UNAMI Human Rights Reports) (last visited Nov. 5, 2009); U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ANNUAL REPORT (2007), *available at* <http://www.aina.org/reports/uscirf2007.pdf> (last visited Nov. 5, 2009) [hereinafter CIRF, *Annual Report 2007*]. See also USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ (2007), *available at* <http://www.state.gov/g/drl/rls/irf/2007/90211.htm> (last visited Nov. 5, 2009); UNAMI, HUMAN RIGHTS REPORT, 1 JULY – 31 DECEMBER 2007, 16 (2008), *available at* <http://www.uniraq.org/docsmaps/undocuments.asp> (accessed by selecting Human Rights Report 1 July – 31 December 2007, under UNAMI Human Rights Reports) (last visited Nov. 5, 2009).

3. The U.N. High Commissioner for Refugees reported in 2005 that Assyrians constitute nearly 40 percent of Iraqi refugees in Syria, Jordan, Lebanon, and other countries. See UNHCR, BACKGROUND INFORMATION ON THE SITUATION OF NON-MUSLIM RELIGIOUS MINORITIES IN IRAQ 4 (2005), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4371cf5b4> (last visited Nov. 5, 2009); Michael Youash, *Iraq's Minority Crisis and U.S. National Security: Protecting Minority Rights in Iraq*, 24 AM. U. INT'L L. REV. 341, 346 (2008).

massacres of Sunni civilians, has security forces that are dominated by sectarian militias, and has tortured many of its detainees.

II. BASIC PRINCIPLES OF REFUGEE LAW

The first "refugee" crisis, like those today, arose primarily out of religious and sectarian persecution. The word "refugee" was coined in the sixteenth century to refer to the Protestant Calvinists and Huguenots.⁴ Initially used in reference to Belgian and Dutch Calvinists fleeing to France, it entered the English language as a term for French Calvinists fleeing persecution by the Catholic king Louis XIV.⁵ A quarter of French Protestants, or about 200,000 people, fled over a forty-year period in the late seventeenth and early eighteenth centuries.⁶ Later waves of refugees fled the American and French revolutions, including many thousands of French clergy.⁷

In the twentieth century, the Ottoman and Nazi German empires drove two major waves of refugees from their homes and ancestral communities, resulting in dramatic resettlements of peoples and new refugee treaties. Nearly two million Ottoman Christians fled widespread massacres and destruction of cities and villages between the 1890s and 1920s, which rendered uninhabitable such population centers as the Armenian metropolis of Van, the ancient Greek settlement at Smyrna, and the Assyrian spiritual capital of Qudshanis.⁸ Although claiming far

4. ARISTIDE R. ZOLBERG, ASTRJ SUHRKE & SERGIO AGUAYO, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 5 (Oxford University Press 1989). *See also* Henry Kamm, *Age of Terror Undermining Turkish Jews*, N.Y. TIMES, Sept. 10, 1986, at A11 (referring to refugees from Renaissance Spain).

5. *See* ZOLBERG, SUHRKE & AGUAYO, *supra* note 4, at 5.

6. *See id.* at 5-6.

7. *See id.* at 7-9.

8. *See* TANER AKÇAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY* 106-7, 269-70 (2007); TANER AKÇAM, *FROM EMPIRE TO REPUBLIC: TURKISH NATIONALISM AND THE ARMENIAN GENOCIDE* 118, 146-47 (2004); FREDERICK A. NORWOOD, *2 STRANGERS AND EXILES: A HISTORY OF RELIGIOUS REFUGEES* 254-70 (1969); ALFRED J. RIEBER, *FORCED MIGRATION IN CENTRAL AND EASTERN EUROPE, 1939-1950*, at 11-13 (2000); ZOLBERG, SUHRKE & AGUAYO, *supra* note 4, at 13-17; J.G. Harbord, *Plain Facts about Asia Minor and the Trans-Caucasus*, N.Y. TIMES, Feb. 22, 1920, at xx1; Edwin I. James, *Turks Proclaim Banishment Edict to 1,000,000 Greeks*, N.Y. TIMES, Dec. 2, 1922, at 1; Associated Press, *Greece Short of Food.; Only Quick Outside Aid Will Save Refugees from Starvation*, N.Y. TIMES, Sept. 22, 1922, at 2; *Armenian Horrors Grow*, N.Y. TIMES, Aug. 6, 1915, at 16; *Armenian Horrors Seen by Germans*, N.Y. TIMES, Nov. 12, 1916, at 18; *Cry to Germany to End Atrocities*, N.Y. TIMES, Sept. 20, 1916, at 3; *More Atrocities Charged to Turks*, N.Y. TIMES, July 6, 1921, at 13; *Paris Hears of Greek Atrocities*, N.Y. TIMES, July 6, 1921, at 13; *15,000 Massacred as Erzerum Fell*, N.Y. TIMES, May 3, 1916, at 13; Dominik J.

fewer lives of members of other groups, Ottoman policies targeted Muslim Shi'a and Kurds, Iraqi Jews and Yezidis, and Lebanese Maronite Christians and Druzes, prompting hundreds of thousands of members of these groups to seek to escape.⁹ During and after a variety of Ottoman border conflicts and wars of independence, the Russian Empire and other Europeans at war with the Ottomans drove over a million Muslim Turks, Bosnians, Rumelians, Circassians, etc. from lands they had settled for some centuries.¹⁰

The Covenant of the League of Nations provided for "commissions for the regulation of matters of international interest" to be instituted and directed by the League.¹¹ In 1926, Fridtjof Nansen founded the Office of the League's High Commissioner for Russian and Armenian refugees, which had its jurisdiction expanded in 1928 to Assyrians, Assyro-Chaldeans, and Turks.¹² The Office also dealt with Greek and Bulgarian refugees.¹³ The definition of a refugee during the League of Nations

Schaller & Jürgen Zimmerer, *Late Ottoman Genocides: The Dissolution of the Ottoman Empire and Young Turkish Population and Extermination Policies*, 10 J. OF GENOCIDE RES. 7, 7-10 (2008). For sources on the destruction of Van, Trebizond, and Qudshanis, see ARMENIAN VAN/VASPUKAKAN (Richard G. Hovannisian ed., Costa Mesa, CA: Mazda Publishers 2000); RAFAEL DE NOGALES, MEMOIRS OF A SOLDIER OF FORTUNE 270 (2006) (1932); MARJORIE HOUSEPIAN DOBKIN, SMYRNA 1922: THE DESTRUCTION OF A CITY 22 6-7, 30, 66, 83, 201-2 (1972); GEORGE HORTON, THE BLIGHT OF ASIA 114-16 (1926), available at <http://www.hri.org/docs/Horton>; Lady Surma, *Refugees from Hakkari*, in THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE, 1915-1916, at 203-18 (James Bryce, Arnold Toynbee & Ara Sarafian eds., 2000); Mark O. Prentiss, *Eyewitness Story of Smyrna's Horror; 200,000 Victims of Turks and Flames; Kemal Demands Greeks Quit Thrace*, N.Y. TIMES, Sept. 18, 1922, at 1-2; DAVID GAUNT, MASSACRES, RESISTANCE, PROTECTORS: MUSLIM-CHRISTIAN RELATIONS IN EASTERN ANATOLIA DURING WORLD WAR I 135 (2006).

9. See Schaller & Zimmerer, *supra* note 8, at 11-13.

10. See AKÇAM, A SHAMEFUL ACT, *supra* note 8, at 86-89, 98-99, 261, 267; AKÇAM, FROM EMPIRE TO REPUBLIC, *supra* note 8, at 93. More than 100,000 Muslims and non-Russians may have fled or been driven from the Crimea region in the eighteenth century. See RIEBER, *supra* note 8, at 9-10, 24.

11. Covenant of the League of Nations, art. 24 (1919), reprinted in THE LEAGUE OF NATIONS 179-89 (Ruth B. Henig ed., New York: Harper & Row, 1973).

12. See FRIDTJOF NANSEN, ARMENIA AND THE NEAR EAST (reprint ed., New York: Da Capo Press, 1976) (1928); UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS AND LEGAL TEXTS CONCERNING REFUGEES 36 (United Nations, 2007); ZOLBERG, SUHRKE, & AGUAYO, *supra* note 4, at 19. The League of Nations granted "Nansen passports" to Russian refugees in 1922, Armenians in 1924, and Assyrians, Assyro-Chaldeans, Syrians, Kurds, and Turks in 1928. See SANDRA LAVENEX, SAFE THIRD COUNTRIES: EXTENDING THE EU ASYLUM AND IMMIGRATION POLICIES 5 (Central European University Press 1999).

13. See ZOLBERG, SUHRKE, & AGUAYO, *supra* note 4, at 19; see also IRWIN ABRAMS, THE NOBEL PEACE PRIZE AND THE LAUREATES: AN ILLUSTRATED BIOGRAPHICAL HISTORY, 1901-2001, 142 (2001) (Nansen's office administered a passport system for one million refugees from former Ottoman Empire, Soviet Union, and Nazi-occupied Europe; office

period focused on persons who no longer “enjoy[ed] the protection” of the government of the Soviet Union, the Turkish Republic, fascist Spain, or Nazi Germany.¹⁴

World War II created an especially severe refugee crisis. More than four million Jews were internally displaced or crossed international borders as refugees from Nazi rule,¹⁵ along with hundreds of thousands of Poles, Russians, Serbs and other Slavs, Roma people, Germans, and others.¹⁶ After the conclusion of the war, the U.N. General Assembly created the United Nations High Commissioner for Refugees (UNHCR) with responsibility for the protection and settlement of refugees.¹⁷ The next year, the 1951 Convention Relating to the Status of Refugees opened for signature.¹⁸ The 1951 Convention established the principles of prohibiting expulsion to dangerous situations (“nonrefoulement”), saving refugees from persecution without ethnic or national discrimination by countries in which they seek refuge, and repealing laws that punish refugees for failing to pursue legal immigration procedures due to the threat of danger or death.¹⁹

The gravamen of a claim of refugee status is that the claimant is a person who has fled his or her home country and has a well-founded fear of persecution in that country based on his or her race, religion, nationality, political opinion, or social group.²⁰ In addition to persons fleeing the Turkish Republic, fascist Spain, Nazi Germany, and the

was first called High Commissioner for Russian Refugees in Europe, then Nansen International Office for Refugees, and much later the United Nations High Commissioner for Refugees).

14. UNHCR, *supra* note 12, at 36.

15. See FREDERICK A. NORWOOD, *STRANGERS AND EXILES: A HISTORY OF RELIGIOUS REFUGEES* 314-16, 337-44 (1969); MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* 174 (2000).

16. See RIEBER, *supra* note 8, at 13-20 (noting that the Soviet Union also deported hundreds of thousands of Poles and others); see also NORWOOD, *supra* note 8, at 296-314.

17. See Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 130 (2001) (dating this event to 1950).

18. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

19. See Feller, *supra* note 17, at 131, 132; 1951 Refugee Convention, *supra* note 18, art. 33.

20. See Arthur C. Helton, *Criteria and Procedures for Refugee Protection in the United States*, 1340 PLI/CORP 221, 223 (2002) (“[A refugee] generally must seek protection from outside his or her home country; he or she must have a well-founded fear of persecution in the home country; and such persecution must be based on the alien’s race, religion, nationality, social group or political opinion.”).

Soviet Union,²¹ the 1951 Convention defined a “refugee” as any person who, prior to 1951 and as a result of events in Europe,²² is unwilling or unable to return to his or her country of nationality due to “a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”²³ The Protocol Relating to the Status of Refugees of 1967²⁴ removed the references to pre-1951 events occurring in Europe, making individuals affected by similar fears of persecution in other places or contexts entitled to refugee status.²⁵

Under the 1951 Convention and 1967 Protocol, states parties are prohibited from penalizing refugees for “their illegal entry or presence, . . . provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”²⁶ States parties shall not expel refugees lawfully present except after due process of law including an appeals process, and only “on grounds of national security or public order.”²⁷ Above all, they must not expel or return a refugee who is not dangerous to “territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”²⁸ The Convention also calls upon states parties to facilitate the accession to citizenship of refugees “as far as possible,” and to conduct naturalization proceedings at low cost to refugees.²⁹

21. See 1951 Refugee Convention, *supra* note 18, art. 1(A)(1) (applying term “refugee” to those persons who have been “considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization”); OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, COLLECTION OF INTERNATIONAL INSTRUMENTS AND LEGAL TEXTS CONCERNING REFUGEES AND OTHERS OF CONCERN TO UNHCR 36 (2007) (defining these categories of refugees as including Russian refugees from the Soviet Union, Armenians or Turks formerly subjects of the Ottoman Empire, Assyro-Chaldeans who no longer enjoy the protection of the State to which they had previously been subjected, Spanish nationals no longer enjoying the protection of the Spanish government, and Austrian nationals and Stateless persons no longer enjoying the protection of the German government).

22. See SYLVIE DA LOMBA, THE RIGHT TO SEEK REFUGEE STATUS IN THE EUROPEAN UNION 3 (2004).

23. 1951 Refugee Convention, *supra* note 18, art. 1(A)(2).

24. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 268 [hereinafter 1967 Refugee Protocol].

25. See DA LOMBA, *supra* note 22, at 3.

26. 1951 Refugee Convention, *supra* note 18, art. 31(1).

27. *Id.* art. 32(1).

28. *Id.* art. 33(1).

29. *Id.* art. 34.

There are currently 147 parties to either the 1951 Convention or the 1967 Protocol, and only a few small countries that are parties to the 1951 Convention only.³⁰ The United States joined the 1967 Protocol in 1968.³¹ Refusal to sign the 1951 Convention and 1967 Protocol is disproportionately concentrated in the Middle East, however, with only Iran, Israel, and Yemen being parties; Syria, Jordan, Lebanon, Kuwait, and Saudi Arabia failing to sign; and Turkey limiting the application of the treaties to events occurring in Europe.³² However, the right of refugees not to be returned to a country where their lives or human rights are threatened, or the principle of nonrefoulement, is binding even on states failing to sign the refugee treaties.³³ Article 33 of the 1951 Refugee Convention established the principle of nonrefoulement as international law, and the principle has also attained customary international law

30. See UNHCR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, *available at* <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (last visited Oct. 31, 2009).

31. See AUSTIN T. FRAGOMEN & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 6-4 (4th ed. 1996).

32. See UNCHR, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, *supra* note 30, at 5.

33. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428-429 (1987) ("Article 33.1 of the [1951 Refugee] Convention, 189 U.N.T.S. 150, 176 (1954), reprinted in 19 U.S.T. 6259, 6276, which is the counterpart of § 243(h) of our statute, imposed a mandatory duty on contracting States not to return an alien to a country where his 'life or freedom would be threatened' on account of one of the enumerated reasons."); *R. (European Roma Rights) v. Immigration Officer* [2004] UKHL 55, [2005] 2 A.C. 1, INT'L L. REP. 653, 673 (2004) ("The [UNHCR Executive Committee] reiterated in 1981 . . . that '[i]n all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed.'") ("In 1984 the Committee of the Ministers of the Council of Europe . . . adopted Resolution (67)14 and considered that the principle of non-refoulement had been recognized as a general principle applicable to all persons."); JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 364 (Cambridge University Press 2005) ("Of perhaps greatest significance, in 2001 the states parties to the Refugee Convention formally acknowledged 'the principle of non-refoulement, whose applicability is imbedded in customary international law.'") (quoting UNHCR, DECLARATION OF STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND OR ITS 1967 PROTOCOL (2002), *available at* <http://www.unhcr.org/refworld/pdfid/3d60f557.pdf> (last visited Nov. 5, 2009)); HUMAN RIGHTS WATCH, IRAQI REFUGEES, ASYLUM SEEKERS AND DISPLACED PERSONS: CURRENT CONDITIONS AND CONCERNS IN THE EVENT OF WAR n.51 (2003), *available at* <http://www.hrw.org/backgrounder/mena/iraq021203> (last visited Nov. 5, 2009) ("The customary international law norm of nonrefoulement protects refugees from being returned to a place where their lives or freedom are under threat.") [hereinafter HUMAN RIGHTS WATCH: IRAQI REFUGEES]. As Human Rights Watch explains, turning back Iraqi refugees constitutes illegal refoulement, in violation of the obligations of Iran under the Refugee Convention and its 1967 protocol, and of Turkey, Jordan, Kuwait, Saudi Arabia, and Syria under customary international law. See *id.*, § 4.

status, as the “cornerstone of international refugee protection.”³⁴ Article 33(1) of the Refugee Convention prohibits returning a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” on protected grounds.³⁵

In 1979 and again in 1992, the UNHCR provided further guidance as to what constituted “persecution” for purposes of defining a “well-founded fear” of such persecution.³⁶ Among the qualifying events include a fear that violence against one’s “friends and relatives [or] other members of the same racial or social group” will be repeated.³⁷ A lawless environment in one’s country of origin is significant evidence of a well-founded fear of persecution, because the manner in which the laws are applied is revelant. Religious persecution may occur when prohibitions on worship or other “serious measures of discrimination”³⁸ against a religious group are perpetrated, while national or ethno-linguistic minority persecution occurs if “adverse attitudes and measures”³⁹ exist, even short of actual violence. Social persecution may occur when a social group’s perceived politics or economic roles are an obstacle to the majority group in society.⁴⁰

Several aspects of the guidelines promulgated by the UNHCR for determining refugee status are critical in analyzing Iraqi refugee cases. First, private as well as public persecution seems to justify a “well-founded” fear of persecution, as evidenced by the reference in the guidelines to “adverse attitudes and measures” against ethnic minorities without restriction to state-sponsored acts.⁴¹ Second, ethnic conflict creates a heightened danger of persecution. Third, groups suspected of disloyalty to the government are especially at risk. Finally, persecution of one’s family or other group members may show that persecution of oneself is likely. These principles are helpful in analyzing Iraqi refugees’

34. AMNESTY INTERNATIONAL, IRAQ: REFUGEES AND DISPLACED PERSONS - PROTECTION FIRST (2003), available at <http://asiapacific.amnesty.org-/library/Index/ENGMD140382003?open&of=ENG-2D4> (last visited Nov. 5, 2009) [hereinafter AMNESTY INTERNATIONAL, PROTECTION FIRST].

35. 1951 Refugee Convention, *supra* note 18, art. 33. See also *Stevic v. Sava*, 678 F.2d 401, 406 n.8 (2d Cir. 1982) (citing *Matter of Rodriguez-Palma*, Interim Dec. No. 2815 (B.I.A., Aug. 26, 1980)), *rev'd on other grounds*, 467 U.S. 407 (1984).

36. See UNCHR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, 1992 rev. § 39, available at <http://www.hrea.org/learn/tutorials-/refugees/Handbook/hbpart1.htm> (last visited Nov. 5, 2009) [hereinafter UNCHR, HANDBOOK ON REFUGEE STATUS].

37. *Id.* § 43.

38. *Id.* § 72.

39. *Id.* § 74.

40. *Id.* §§ 75, 78.

41. *Id.* § 74.

claims due to the atmosphere of ethnic, religious, and sectarian violence in Iraq, perpetrated by both private and public actors.

In early 1985, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment opened for signature.⁴² Thirteen years later, in 1998, the United States amended its immigration laws to comply with the nonrefoulement provision of the Torture Convention, which the United States had joined in 1994.⁴³ The United States declared that the Convention would not be "self-executing," or in other words would require separate legislation to make it effective for many refugees.⁴⁴ The implementing regulation in the United States defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁴⁵

A public official acquiesces in torture for purposes of this provision when he or she becomes aware "of such activity" and does not intervene to prevent it as required by international law.⁴⁶ An immigrant or asylum-seeker that "is more likely than not to be tortured in the country" to which he or she would be deported is entitled to protection from such torture.⁴⁷ In determining whether this is the case, "all evidence relevant to the possibility of future torture shall be considered, including" evidence of torture of the immigrant or asylum-seeker in the past and the

42. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, 23 I.L.M. 1027, 1465 U.N.T.S. 85.

43. See Foreign Affairs Reform and Restructuring Act, 22 U.S.C. § 6501 (West 1998); FRAGOMEN & BELL, *supra* note 31, at 6-6.

44. See 136 CONG. REC. S17486-92 (daily ed. Oct. 27, 1990); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir. 2001).

45. 8 C.F.R. § 208.18(a)(1) (2003).

46. 8 C.F.R. § 208.18(a)(7).

47. 8 C.F.R. §§ 208.16(c)(4), 208.17(d)(3), (4).

existence “of gross, flagrant or mass violations of human rights within the country.”⁴⁸

Other provisions of U.S. law declare that an immigrant or asylum-seeker may not be deported “to a country if the Attorney General decides that [his or her] life or freedom would be threatened in that country because of [his or her] race, religion, nationality, membership in a particular social group, or political opinion.”⁴⁹ Past persecution creates a presumption of future threat under this law:

If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant’s life or freedom would be threatened in the future in the country of removal on the basis of the original claim.⁵⁰

III. THE DOCTRINE OF CHANGED CIRCUMSTANCES AND REGIME CHANGE IN IRAQ

The United States has distinguished itself on many occasions by granting asylum to victims of persecution, from nearly every continent and conceivable type of conflict, including Spanish, German, and Russian Jews from a very early date; the Armenians, Assyrians, and Greeks of the Ottoman Empire of the late 1800s and early 1900s; 400,000 Jews and others fleeing Nazi-occupied Europe; and the refugees of the Cold War and its aftermath.⁵¹ Two doctrines, however, have

48. 8 C.F.R. § 208.16(c)(3) (2003).

49. 8 U.S.C. § 1231(b)(3)(A) (West 2002).

50. 8 C.F.R. § 208.16(b)(1)(i).

51. See Israel Friedlander, *The Problem of Jewish Education in America and the Bureau of Education of the Jewish Community of New York City*, in UNITED STATES BUREAU OF EDUCATION, REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR ENDED JUNE 30, 1913, 365-94 (Government Printing Office 1914); *Armenian Refugees*, L.A. TIMES, Oct. 20, 1896, at 2; *Armenians in New Plight: Refugees at Ellis Island in Toils of Quota Law*, N.Y. TIMES, Dec. 25, 1922, at 10; *Beat Off 4,000 Turks: Armenian Refugees on Mount Moses Had Only 127 Rifles*, N.Y. TIMES, Mar. 12, 1916, at 3; *Ellis Island Filled; Quota Bars Aliens*, N.Y. TIMES, June 18, 1923, at 14; *Greeks Meet Grief at Ellis Island*, N.Y. TIMES, July 3, 1923, at 2; *Welcomed the Armenians-Americans Gave Them a Hearty Reception at Carnegie Hall*, N.Y. TIMES, Oct. 27, 1896, at 3; VASIL SHOUMANOV, ASSYRIANS IN CHICAGO 8, 10-13 (Arcadia Publishing 2001); NAZI WAR CRIMES AND JAPANESE IMPERIAL GOVERNMENT RECORDS INTERAGENCY WORKING GROUP (IWG), FINAL REPORT TO THE UNITED STATES CONGRESS 16-17 (2007), available at <http://www.archives.gov/iwg/reports/final-report-2007.pdf> (last visited Nov. 5, 2009). The refugees of the Cold War and its aftermath included, among many other nationalities and ethnicities, Soviets, Chinese, Koreans, Cubans, Guatemalans, Nicaraguans,

served to limit the applicability of the 1967 Protocol, which the U.S. has ratified, from providing full protection to Iraqi refugees who make it to U.S. territory. These doctrines are those of “changed circumstances” and “individualized persecution.”

Mass refugee flight from Iraq long predates the most recent war that began in 2003. Thousands of Assyrians escaped Iraq for Syria in 1933 as one of the state’s first independent acts was to massacre Assyrian villagers in and around Semele, Iraq.⁵² Over 100,000 Jews departed for Israel after a massacre in Baghdad during World War II.⁵³ More than 100,000 Kurds fled for Iran and over 600,000 were driven into the mountains spanning the Iranian and Turkish borders as the Iraq army destroyed many northern towns and villages in the 1970s.⁵⁴ The Anfal genocide, which reached a violent climax in 1988, sent over 60,000

Salvadorans, Argentines, Vietnamese, Cambodians, Afghans, Iranians, Iraqis, Sudanese, Ethiopians and Eritreans, Haitians, Somalis, and Yugoslavs. *See, e.g.*, REFUGEES IN AMERICA IN THE 1990S: A REFERENCE HANDBOOK (David W. Haines ed., Greenwood Publishing Group 1996); Associated Press, *Nicaraguan Refugees Leave Miami, Cite Economic Woes*, ST. PETERSBURG TIMES, June 12, 1990, at 22 (stating that 150,000 Nicaraguans settled in Miami between 1980 and 1990, many as refugees from violence); Associated Press, *Salvadoran, Guatemalan Refugees Clash in South Florida*, ST. PETERSBURG TIMES, Sept. 8, 1984, at 10 (noting flight of refugees from Guatemala and El Salvador to southern Florida in 1980s); Mark Dowie, *The General and the Children*, MOTHER JONES, July 1978, at 37, 48, <http://books.google.com/books?id=oOYDAA-AAMBAJ&pg=PA48> (describing flight of Argentine political prisoners and their families as refugees from army, police, and death squads of Argentina).

52. *See* DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* 178 (2005); UNITED STATES DEPARTMENT OF STATE, OFFICE OF STRATEGIC SERVICES, *TRANSFER OF THE ASSYRIANS OF IRAQ* (Oct. 31, 1944); INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *IRAQ: CONTINUOUS AND SILENT ETHNIC CLEANSING: DISPLACED PERSONS IN IRAQI KURDISTAN AND IRAQI REFUGEES IN IRAN*, at 17, (2003), *available at* <http://www.fidh.org/IMG/pdf/iq350a.pdf>; (last visited Nov. 5, 2009) [hereinafter IFHR]; KANAN MAKIYA, *REPUBLIC OF FEAR: THE POLITICS OF MODERN IRAQ* 21, 166-75 (Pantheon Books 1990).

53. *See* Carole Basri, *The Jewish Refugees from Arab Countries: An Examination of Legal Rights - A Case Study of the Human Rights Violations of Iraqi Jews*, 26 *FORDHAM INT’L L.J.* 656, 670-73, 683-85 (2003); Joel Rayburn, *The Last Exit from Iraq*, 85 *FOREIGN AFF.* 29, 37-38 (2006).

54. *See* MAKIYA, *supra* note 52, at 23 (citing Edward Mortimer, *THE TIMES* (U.K.), Nov. 27, 1974).

refugees into Turkey and Iran.⁵⁵ The city of Halabja, which had about 60,000 residents, suffered a chemical weapons attack in 1988.⁵⁶

Hundreds of thousands of Iraqis fled the bombardment of the country and multiple rebellions that followed Iraq's 1990 invasion of Kuwait and its buildup of troops on the border of Saudi Arabia.⁵⁷ Reports surfaced in March and April 1991 of anywhere from 200,000 to 2.5 million Kurds fleeing the Iraqi army's campaign to retake the northern provinces from Kurdish [peshmerga] rebels.⁵⁸ In June 1991, INGOs estimated that five million people were displaced from their homes by the Gulf War.⁵⁹ Over one million Kurds and 100,000 other northern Iraqis fled to Iran, along with more than 700,000 Shi'a predominantly from the south and center of the country.⁶⁰ Doctors Without Borders estimated that 1,000 refugees from northern Iraq, mainly Kurds, died each day at the height of the crisis.⁶¹ Some reports mentioned two million refugees in the early 1990s,

55. See British Refugee Council, *Aftermath of the Gulf Crisis: Stateless People and Returned Migrants*, in HIDDEN CASUALTIES (Saul Bloom, et al. eds., 1994); HUMAN RIGHTS WATCH, GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS 261-303 (1993).

56. See *On the Road in Iraq: First Field Trip*, in HIDDEN CASUALTIES, *supra* note 55, at 152-53.

57. See Feller, *supra* note 17, at 134; Nora Boustany, *Refugees Describe Air Raid Horrors; Iraqi Residential Areas Feel Impact*, WASH. POST, Jan. 21, 1991; Nora Boustany, *Refugees Tell of Residential Bombing; Iraq Puts Death Toll at Only 41; Arabs Fleeing Baghdad Say U.S. Raid Killed Civilians*, WASH. POST, Jan. 23, 1991; Alan Cowell, *Refugees From Baghdad Report Some Casualties Among Civilians*, N.Y. TIMES, Jan. 23, 1991; Mark Fineman, *Allies Bombing Them, Refugees Say-War victims: Finally Iraq allows the first Egyptians to cross the border into Jordan*, L.A. TIMES, Jan. 31, 1991, at A9; Mark Fineman, *Anguished Refugees From Iraq Pouring Into Jordan Frontier: A crossing is reopened by Baghdad*, L.A. TIMES, Jan. 29, 1991, at A1; Mark Fineman, *Refugees From Iraq Describe Hellish Scenes*, L.A. TIMES, Feb. 5, 1991, at A1; Nick B. Williams, Jr., *1 Million War Refugees Expected as Jordan Reopens Its Border With Iraq*, L.A. TIMES, Jan. 19, 1991.

58. See Alan Cowell, *After the War; Kurdish Refugees, by Thousands, Flee Vengeance of the Iraqi Army*, N.Y. TIMES, April 4, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE0D9133DF937A35757C0A967958260> (last visited Nov. 5, 2009); John Kifner & Clyde Haberman, *After the War; Many Kurds Leave Border For Towns They Fled in Iraq*, N.Y. TIMES, May 1, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3D71E39F932A3-5756C0A967958260> (last visited Nov. 5, 2009); Clyde Haberman, *After the War; 6 US Planes Begin Airlifting Relief To Kurds in Iraq*, N.Y. TIMES, Apr. 8, 1991, available at <http://query.nytimes.com/gst/fullpage.html?res=9D0CE4D91F3DF93BA35757C0A967958260> (last visited Nov. 5, 2009).

59. Judith Miller, *Displaced in the Gulf War: 5 Million Refugees*, N.Y. TIMES, June 16, 1991, at 39.

60. See *id.*

61. See *id.*

before the stabilization of northern Iraq by a multinational coalition.⁶² As of 2000, there were still 450,000 refugees outside Iraq and 700,000 internally-displaced persons (IDPs) within Iraq, more than the number from the former Yugoslavia.⁶³ The number was 568,000 including asylum-seekers. The U.S. Committee on Refugees argued that up to two million Iraqis living outside Iraq in 1999 met the Refugee Convention's criterion of having a well-founded fear of persecution by the Iraqi authorities.⁶⁴ Amnesty International estimated 400,000 refugees and one million IDPs in early 2003.⁶⁵

Before the 2003 invasion of Iraq by a coalition of democratic nations, the U.S. and U.K. governments that spearheaded the coalition received numerous warnings of large-scale refugee flight. Amnesty International warned of "large-scale refugee movements," with "many thousands expected to leave their homes in search of safety," the majority of whom would probably be women and children.⁶⁶ Human Rights Watch cited U.N. agency predictions of 900,000 refugees and 1.1 million IDPs in the event of a war against the United States and United Kingdom.⁶⁷ A U.N. official told the *Washington Post* in late 2002 that a "few million" could flee the country, and that six million might be displaced from Baghdad due to the cut-off of water and electricity.⁶⁸

Some of these U.N. predictions eventually came to pass. In 2008, the estimates were that two million Iraqis had become refugees in Syria, Jordan, or elsewhere, and that another 2.5 million were internally displaced within Iraq.⁶⁹ Thousands of refugees fled Baghdad as the MNF

62. See Alex J. Bellamy, *Ethics and Intervention: The 'Humanitarian Exception' and the Problem of Abuse in the Case of Iraq*, 41 J. OF PEACE RES. 131, 138 (2004).

63. LEONORE LOEB ADLER ET AL., MIGRATION: IMMIGRATION AND EMIGRATION IN INTERNATIONAL PERSPECTIVE 14 (2003); HUMAN RIGHTS WATCH, THE SILENT TREATMENT: FLEEING IRAQ, SURVIVING IN JORDAN 20 (Vol. 18, No. 10(e) 2006), available at <http://www.hrw.org/reports/2006/jordan1106/jordan1106webwcover.pdf> (last visited Nov. 5, 2009) [hereinafter HRW, THE SILENT TREATMENT].

64. U.S. COMMITTEE ON REFUGEES, COUNTRY REPORT: IRAQ (2000), available at <http://tinyurl.com/yk87zvr> (last visited Oct. 22, 2009).

65. AMNESTY INTERNATIONAL, PROTECTION FIRST, *supra* note 34.

66. *Id.*

67. See HRW, THE SILENT TREATMENT, *supra* note 63 (citing UNITED NATIONS, LIKELY HUMANITARIAN SCENARIOS at 11, (Dec. 10, 2002), available at <http://www.casi.org.uk/info/undocs/war021210.pdf> (last visited Sept. 24, 2009)).

68. *Id.* (quoting Rajiv Chandrasekaran & Peter Slevin, *This Time Around, War Would Hit Iraq Harder*, WASH. POST, Oct. 29, 2002, at A12).

69. See *No Direction Home: An NGO Perspective on Iraqi Refugees and IDPs: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. On Foreign Affairs*, 110th Cong. 18 (2008) (Statement of Anastasia Brown, Director, Office of Refugee Programs, U.S. Conference of Catholic Bishops), available at <http://foreignaffairs.house.gov/110/42160.pdf> (last visited Nov. 5,

approached the city in April 2003.⁷⁰ A million or more refugees fled the country during the first three years of the war, including up to one million who lived in Jordan by June 2006.⁷¹ About 500,000 lived in Syria by fall 2006.⁷² By late 2006, 1.6 million Iraqis fled the country, while another 1.6 million were internally displaced within Iraq.⁷³ Further flight brought the late 2007 and mid-2008 total of refugees and IDPs to between 4.5 and 4.7 million.⁷⁴

2009) [hereinafter *No Direction Home*, Brown testimony]; INTERNATIONAL RESCUE COMMITTEE, FIVE YEARS LATER, A HIDDEN CRISIS: REPORT OF THE IRC COMMISSION ON IRAQI REFUGEES 18 (2008); Prince Zeid Ra'ad Zeid Al-Husseini, Jordanian Ambassador to the United States; Imad Moustapha, Syrian Ambassador to the United States; Michel Gabaudan, Regional Representative from the Office of the United Nations High Commissioner for Refugees, Speakers at the Villanova University School of Law Matthew J. Ryan Law and Public Policy Forum, *The Iraqi Refugee Crisis: Law, Policy and Practice* (Apr. 4, 2008).

70. See Edward Epstein, *U.S. Thrust Nears Capital*, S.F. CHRON., Apr. 3, 2003, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/04/03/MN294-809.DTL> (last visited Oct. 31, 2009).

71. See *American Morning: Awaiting Word on Two Missing Soldiers in Iraq: Would Refugee Day (Transcript)*, CNN.com (June 20, 2006), available at <http://edition.cnn.com/TRANSCRIPTS/0606/20/ltm.05.html> (last visited Nov. 5, 2009) (one million Iraqi refugees in Jordan by late June 2006); Associated Press, *Iraq Refugees Flee for Jordan, Syria*, S. F. CHRONICLE (June 14, 2006), available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/06/14/national/w160253D47.DTL&-type=politics> (last visited Nov. 5, 2009) (650,000 Iraqis fled for Jordan and Syria in 18 months between Jan. 2005 and June 2006, making 888,000 refugees in all); Kelley Beaucar Vlahos, *U.S. Cautions Against Iraq Refugee Number Claims*, FOX NEWS (May 17, 2006), available at <http://www.foxnews.com/story/0,2933,195761,00.html> (last visited Nov. 5, 2009).

72. See Albert Aji, *Iraqi Refugees Trying to Adjust to Syria*, WASH. POST, Oct. 22, 2006, available at http://www.washingtonpost.com/wpdyn/content/article/2006-10/22/AR20061022-00467_pf.html (last visited Nov. 5, 2009).

73. The Secretary-General, Report of the Secretary-General pursuant to paragraph 30 of resolution 1546, U.N. Doc. S/2006/945, at ¶ 36 (Dec. 5, 2006), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/634/80/pdf/N0663480.pdf?OpenElement> (last visited Nov. 5, 2009) ("UNHCR estimates that an additional 1.6 million people have become refugees outside the country since 2003, of which between 500,000 and 700,000 are currently in Jordan; approximately 600,000 are in Syria, and about 100,000 are in Saudi Arabia and Kuwait. A total of 436,000 Iraqis have moved to Europe, the Americas, Africa and Asia . . . [The] total number of displaced persons in Iraq [is] over 1.6 million people.").

74. UNHCR, GLOBAL REPORT 2007: IRAQ SITUATION (2008), available at <http://www.unhcr.org/cgi-bin/texis/vtx/iraq?page=intro> (last visited Nov. 5, 2009) (4.7 million); AMNESTY INTERNATIONAL, IRAQI REFUGEES FACING DESPERATE SITUATION, (2008), available at <http://www.amnesty.org/en/news-and-updates/report/iraqi-refugees-facing-desperate-situation-20080615> (last visited Sept. 24, 2009); Doug Smith & Ned Parker, *2.3 Million Displaced in Iraq, Groups Say*, L.A. TIMES/SEATTLE TIMES, Nov. 6, 2007, available at http://seattletimes.nwsources.com/html/iraq/2003996200_iraq06.html?syndication=rss.

U.S. refugee law makes it difficult to prove a well-founded fear of persecution because an applicant must prove external, or “objective facts” supporting such fear, while the courts may disregard such proof upon mere “administrative notice” that circumstances have changed for the better in the country of the persecution risk.⁷⁵ Thus, “[t]he applicant must do more than rely on a general threat of danger arising from a state of civil strife; *some* specific showing is required.”⁷⁶ The applicant’s proof must be, it is sometimes said, “credible, direct and specific evidence” that the fear of persecution is objectively reasonable.⁷⁷ In contrast, the tribunal’s finding of changed circumstances rendering a previously reasonable fear into an unreasonable one may be based on taking “administrative notice” of the new circumstances.⁷⁸ To speed up removals, courts sometimes dispense with the requirement of proof by specific, objective facts.⁷⁹ Several courts have recently held that administrative notice alone cannot show that fear of persecution is unreasonable.⁸⁰ In one case, an Iraqi family sought asylum, as well as relief from deportation under the Convention Against Torture (CAT).⁸¹ The head of household had been detained, beaten, and forced to watch a woman being raped while having his own wife threatened with rape by Iraqi officials.⁸² He left Iraq, and was informed that an arrest warrant had been issued for him in his absence, so that he would be killed if he

75. *Matter of Chen*, 20 I & N Dec. 16, 18 (B.I.A. 1989); *see also* *Kazlauskas v. I.N.S.*, 46 F.3d 902, 905 (9th Cir. 1995).

76. *Al-Fara v. Gonzalez*, 404 F.3d 733, 743 (3d Cir. 2005).

77. *Beroteran-Melendez v. I.N.S.*, 955 F.2d 1251, 1256 (9th Cir. 1992) (quoting *Rodriguez-Rivera v. I.N.S.*, 848 F.2d 998, 1002 (9th Cir. 1988)).

78. *Kotas v. I.N.S.*, No. 96-70684, 1997 U.S. App. LEXIS 34530, *4-5 (9th Cir. Dec. 8, 1997).

79. *See, e.g., id.*; *Hadad v. Ashcroft*, 127 F. App’x 800, 802 (6th Cir. Apr. 4, 2005) (approving of “administrative notice” of changed circumstances in Iraq); *Barany v. Gonzales*, 245 F. App’x. 39 (2007); *Shou v. Holder*, No. 06-73879, 2009 U.S. App. LEXIS, *1 (9th Cir. July 14, 2009) (disregarding petitioners’ evidence of “a well-founded fear of future persecution by Muslims on account of their Chaldean Christian religion” as mere “generalized country conditions information,” without citing any objective evidence in support of idea that Chaldean Christians have nothing to fear in Iraq).

80. *See, e.g., Barany*, 245 F. App’x at 41 (internal citation omitted) (“The IJ did not err in taking administrative notice of the fall of the Hussein regime because this fact is ‘commonly known, not subject to reasonable dispute, and easily verifiable.’ However, to the extent that the IJ attempted to take notice of general conditions in Iraq, this was improper as ‘conditions [there] are volatile.’”); *Tambadou v. Gonzales*, 446 F.3d 298, 304 (2d Cir. 2006) (overturning BIA decision for failure to analyze “the complexities of the reported information,” or “make an individualized assessment of [the petitioner’s] situation”).

81. *See Namu v. Gonzales*, 401 F.3d 453, 455 (6th Cir. 2005).

82. *See id.*

returned.⁸³ Even though he therefore proved past torture and a likelihood of future torture, the court refused to find his family entitled to asylum or relief from deportation, concluding instead that the changed circumstances should calm his fears.⁸⁴

A subsequent case went further and actively decided that an asylum-seeker was not entitled to asylum or CAT relief from deportation because of the regime change in 2003.⁸⁵ The court found no “evidence of torture of Chaldean Christians by public officials or other persons acting in an official capacity in post-Hussein Iraq.”⁸⁶ This was despite evidence that the petitioner fled the country after being arrested, beaten and tortured for a month, and threatened with rearrest soon after.⁸⁷ The court refused to consider whether elements of the Ba’ath party or other agents of persecution still lived in Iraq, dismissing the evidence in this regard, including church bombings, as “civil strife” causing “a generalized anxiety among Iraqi Christians” in the spring of 2003.⁸⁸ The court did not preclude petitioner from reopening his case based on the worsening conditions, but for the same reasons as it denied asylum, it declined to prohibit the government from deporting the petitioner to Iraq.⁸⁹

Similarly, when an Assyrian Christian sought asylum in 2002, and again after the war, his claim was twice rejected.⁹⁰ First, his application for asylum upon arrival from Mexico was denied in 2002.⁹¹ Then after the war, an immigration judge (IJ) told him:

The government of Iraq, particularly the Ba’ath Party, have been removed at great expense in terms of lives of the coalition forces as well as the Iraqi people. To ignore the effort that has gone into removing the Ba’ath Party would be a significant injustice to all of those lives that were lost in freeing Iraq from its persecutors.⁹²

The IJ rejected his appeal, but the U.S. Court of Appeals for the Seventh Circuit ordered a rehearing, relying on the first State Department report in human rights in post-regime change Iraq, which stated “[r]eports increased of killings by the government or its agents’ as well

83. *See id.* at 455-56.

84. *See id.* at 458.

85. *Khora v. Gonzales*, 172 F. App’x 634, 640 (6th Cir. 2006).

86. *Id.* at 640.

87. *See id.* at 635-36.

88. *Id.* at 639-40.

89. *See id.* at 640.

90. *See Youkhana v. Gonzales*, 460 F.3d 927, 929-31 (7th Cir. 2006).

91. *See id.* at 929-30.

92. *Id.* at 930.

as by 'common criminals, insurgents, and terrorists . . . sometimes masking their identity in police and army uniforms.'"⁹³ Although this individual may eventually have obtained asylum, the case illustrates the multiple barriers facing persons in his predicament: first, how to get to Mexico; second, how to apply for asylum inside the U.S. after a denial in Mexico; and third, how to overcome the "changed circumstances" argument given the change in regime.

In the critical years of 2005 and 2006, when persecution arguably reached its low point in post-war Iraq, the U.S. Court of Appeals for the Sixth Circuit, a critical venue for Iraqi asylum-seekers who frequently have family or community ties to Detroit or Dearborn, Michigan, construed the right to seek asylum from Iraq very narrowly.⁹⁴ The court denied asylum to one Iraqi because, despite attacks and threatening developments regarding his ethnicity, the regime change was assumed to do away with all state-sponsored or state-tolerated acts of persecution.⁹⁵ The court, which is one level below the U.S. Supreme Court in the hierarchy of the U.S. courts, stated that the Iraqi asylum-seeker "had no objective fear of future persecution" because "the government submitted a speech by the President, given in Dearborn, Michigan, stating that Saddam Hussein was no longer in power and that the coalition forces were creating a democratic state in Iraq."⁹⁶ Without engaging in further analysis, the court simply cited to "documents [which] described the interim government in Iraq and the goal of creating a free state for all people in Iraq."⁹⁷ In another case before that court, the IJ actually required the asylum-seeker to prove a negative—there was "evidence which would establish that, should he return [to Iraq], . . . an attack by a Shiite Muslim would not be met with a response by either the coalition or the government."⁹⁸

In another case, a Chaldean Christian from Iraq, that is, an ethnic Assyrian of the Catholic faith, requested asylum and/or a stay of deportation under Article 3 of the CAT.⁹⁹ He testified that he was harassed, detained, threatened with firearms, and beaten for his Christian faith.¹⁰⁰ He further testified that the Christian women of his community

93. *Id.* at 932-33 (chastising the BIA for "ignoring" the 2001 State Department Country Report on Iraq).

94. *See generally* Hana v. Gonzales, 157 F.App'x 880 (6th Cir. 2005).

95. *See id.*

96. *Id.*

97. *Id.* at 884.

98. Al-Shabee v. Gonzales, 188 F. App'x 333, 338 (6th Cir. 2006).

99. Elias v. Gonzales, 490 F.3d 444, 446 (6th Cir. 2007).

100. *See id.*

were harassed.¹⁰¹ The Immigration Judge found his request for asylum to be “frivolous,” and stated that “Christians were generally not bothered” before 2003, and “no systematic and organized persecution” after that.¹⁰² The IJ dismissed the CAT treaty’s applicability to the torture of this individual in one short paragraph.¹⁰³

The Sixth Circuit reversed because the IJ had demonstrated bias, unfairness, and/or “hostility” to the asylum-seeker and many other asylum-seekers appearing before him.¹⁰⁴ The court did not specifically address the IJ’s arguments as to changed circumstances showing an absence of persecution.¹⁰⁵ One concurring judge did challenge that finding, citing abundant evidence of persecution and torture in Iraq.¹⁰⁶

Other cases have made analogous challenges to Iraqi asylum-seekers’ “generalized” evidence supporting their fear of persecution in Iraq, in the event that they are deported from the United States.¹⁰⁷ One even relied on a political speech by the U.S. President as evidence of freedom and democracy in Iraq.¹⁰⁸ In another, an IJ found that since the Ba’ath party had been removed from power, there was “no information or documentation that would lead it [the court] to believe that Christian or ethnic Chaldeans are singled out for persecution by any group in Iraq.”¹⁰⁹ A third dismissed a claim of persecution based on multiple media accounts of violence targeting civilians of the asylum-seeker’s own ethnic and religious group in Iraq, as simply a reflection of the “random danger faced by the population as a whole.”¹¹⁰

101. *Id.*

102. *Id.* at 448.

103. *See id.* at 446-48.

104. *See id.* at 450-53.

105. *See* Elias, 490 F.3d at 444.

106. *Id.* at 453-55 (citing USDOS, BUREAU OF DEMOCRACY, COUNTRY REPORTS ON HUMAN RIGHTS - IRAQ (2004), *supra* note 2).

107. *See generally* Hanona v. Gonzales, 243 F. App’x 158, 163 (6th Cir. 2007) (“The evidence supports the B.I.A.’s finding that the violence against Christians stems from the high level of violence in Iraq generally.”).

108. *See Hana*, 157 Fed. Appx. at 883-84. For an example of an asylum application denied on similar grounds see Daoud v. Gonzales, 191 F. App’x 782, 783-84 (10th Cir. 2006) (IJ rejected asylum application because “the [new] government in Iraq is really trying to start a democratic process for the people.”).

109. *Dawood*, 2005 U.S. App LEXIS 37773, at *10.

110. *Odisho v. Gonzales*, 206 F.App’x 465, 470 (6th Cir. 2006).

IV. THE DOCTRINE OF "INDIVIDUALIZED PERSECUTION" AS A BAR TO IRAQIS' ASYLUM CLAIMS

A further difficulty confronting Iraqi refugees, even those able to prove that the fall of the Saddam Hussein regime did not remove the danger to their lives, is that U.S. courts sometimes force them to prove that they are subject to a "particularized threat of persecution" in addition to that facing the rest of the population.¹¹¹

This requirement can be extremely rigidly enforced, as illustrated by the cases of Iraqi asylum-seekers during the Ba'ath Party's rule over most of Iraq. One Iraqi refugee asserted in the early 1990s that he would be persecuted in Ba'athist Iraq as a longtime U.S. resident, an Armenian Christian, a son of a communist party official, and a resister of the military draft during the Iran-Iraq war.¹¹² The court rejected this evidence, stating that reports showing all these groups to be in danger of persecution were insufficient to show that the refugee or his family had been "individually persecuted while in Iraq."¹¹³ The court declared that the asylum-seeker's "fear [was] based on generalizations about the ruthlessness of the Iraqi government and the dangerous conditions in Iraq," and that "he did not present any evidence that anyone similarly situated had been persecuted when they returned to Iraq."¹¹⁴

Judging from reported cases, which represent a small fraction of all asylum determinations due to the cost and expense of hiring an appellate lawyer, the doctrine of individualized persecution may be preventing substantial numbers of Iraqi refugees from obtaining asylum in the United States. For example, in one case, a Chaldean Christian from Mosul named Elias who overstayed his tourist visa requested asylum in the United States because he feared being persecuted if he was deported to Iraq.¹¹⁵ He testified that his father lost his job with the Iraqi government because he was a Christian, that his father disappeared when he was twelve or thirteen, that his mother and sister fled with him to the United States when he was thirteen out of fear of being "disappeared" by the secret police, and "that his father told him that killing in Iraq was random, living conditions were very poor, and the overall situation was unsafe."¹¹⁶ The court rejected his petition for asylum due to inadequate

111. *Kotas v. I.N.S.*, 31 F.3d 847, 851-52 (9th Cir. 1994); *cf.* *Ghaly v. I.N.S.*, 58 F.3d 1425, 1431 (9th Cir. 1995).

112. *Krikorian v. I.N.S.*, No. 92-70554, 1994 U.S. App. LEXIS 2627, at *3 (9th Cir. Feb 9, 1994).

113. *Id.*

114. *Id.* at *3-4.

115. *Elias v. Gonzales*, 212 Fed. Appx. 441, 442-43 (6th Cir. 2007).

116. *Id.* at 447.

evidence.¹¹⁷ The court criticized the asylum-seeker for failing to provide an “affidavit from his father,” who disappeared as a result of Iraq’s secret police, or at least so the family thought.¹¹⁸ The court concluded that persecution was “generalized” in Iraq, cutting across Christian and non-Christian groups, therefore he lacked “an objectively reasonable showing of a well-founded fear of future persecution.”¹¹⁹

In a similar case, a “Syrian” Christian Iraqi from Baghdad who overstayed his H1-B specialized occupation visa, submitted evidence that his cousin had been shot and killed in Baghdad, that churches in Iraq had been bombed, and that he was a “Christian from a well-known family that owned a big business,” which, in conjunction with “his time spent in the United States,” made him fear that he would be killed.¹²⁰ He submitted numerous State Department reports, newspaper articles, and a letter from a U.S. infantry officer showing that “Christian Iraqis similarly situated to petitioner have been exposed to extreme danger from . . . extremist groups in Iraq.”¹²¹ In the infantry officer’s opinion “it was because of the precise nature of [petitioner’s] religion, pro-American sentiments, his American family, and his presence here, that he was in grave danger should he be forced to return to Iraq.”¹²² The petitioner asserted a right not to be deported to Iraq under the CAT and its implementing laws in the U.S.¹²³ The court refused, finding his evidence to be too “generalized,” because “general evidence of growing violence against Iraqi Christians [does not] demonstrate[] eligibility for relief.”¹²⁴

The doctrine of individualized persecution works in tandem with that of changed circumstances, as when an Afghan who fled the communists and Soviets in the 1980s sought to avoid deportation to the Afghanistan of the late 1990s, but failed because the communists were out of power and he could not show that “he would be subject to a particularized threat of persecution separate from the general population.”¹²⁵ Many Iraqis who

117. *See id.* at 448 (rejecting Elias’ “unsupported and non-particularized conjecture about what life might be for him in Iraq” because he failed to prove “that he is at particular risk as a Christian and that his predicament is appreciably different from the dangers faced by other non-Christian Iraqis”).

118. *Id.*

119. *Id.* (citations omitted).

120. *Ablahad v. Gonzales*, 230 F. App’x. 563, 565 (6th Cir. 2007).

121. *Id.*

122. *Id.*

123. *See id.* at 564-65, 568 (citing Convention Against Torture; 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.18).

124. *Id.* at 569-70.

125. *Haidri v. I.N.S.*, No. 97-70988, 1999 U.S. App. LEXIS 5246, *3 (9th Cir. Mar. 22, 1999) (citing *Kotas*, 31 F.3d at 851-52).

fled the Ba'athist regime of Saddam Hussein may face an analogous problem resisting deportation to post-Hussein Iraq.

An even more objectionable version of the requirement of an individualized showing are rulings that asylum-seekers have waived important arguments by failing to brief them properly. Courts increasingly have recourse to the excuse that a refugee's plea for protection from murder or torture has not been adequately preserved in the briefing, even though the judges involved, it is apparent from the remainder of their opinions, understand perfectly well what the issue is, and even though the plaintiff is a refugee from a foreign country practicing law pro se.¹²⁶ The case of *Jacob v. Holder* illustrates the unfairness and inefficiency of this procedure by showing how little briefing a court actually needs to make a decision.¹²⁷ In that case, the petitioner retained counsel, who submitted a brief about eight pages long, which contained about a page of argument relating to the issue on which the Ninth Circuit decided the case. In all, the petitioner's brief cited two cases and one *Washington Post* article on that issue, yet the Ninth Circuit ruled in his favor.¹²⁸ This shows that it is hardly necessary for a judge living in the twenty-first century, whose aides have access to millions of cases and news articles on Westlaw and Lexis, to rely upon asylum-seekers from Iraq for instruction on U.S. law and the various State Department and U.N. reports on persecution and violence in Iraq.

V. "SEALING THE DOORS" AND OTHER POLICIES RELATING TO IRAQI REFUGEES

As noted above, a million or more refugees flooded Iraq's neighboring countries between 2003 and 2006, including up to a million in Jordan alone by June 2006¹²⁹ and 500,000 in Syria by fall 2006.¹³⁰ By

126. See, e.g., *Bobo v. Holder*, No. 08-3449, 2009 U.S. App. LEXIS, *1, 5-6 (7th Cir. Sept. 2, 2009).

127. No. 05-73047, 2009 U.S. App. LEXIS 16914 (9th Cir. July 30, 2009).

128. See Pet'r's Opening Br., *Jacob v. Gonzalez*, 2005 WL 4155756, at *i-7 (9th Cir. filed Oct. 27, 2005).

129. See *American Morning (Transcript)*, *supra* note 71 (reporting one million Iraqi refugees in Jordan by late June 2006); HRW, *THE SILENT TREATMENT*, *supra* note 62, at 19 ("close to a million" Iraqis lived in Jordan in May 2006) (citing Sabine Tavernise, *As Death Stalks Iraq, Middle-Class Exodus Begins*, N.Y. TIMES, May 19, 2006, available at <http://www.nytimes.com/2006/05/19/world/middleeast/19migration.htm> (last visited Nov. 5, 2009)); *Iraq Refugees Flee for Jordan, Syria*, *supra* note 71 (reporting 650,000 Iraqis fled for Jordan and Syria in 18 months between Jan. 2005 and June 2006, making 888,000 refugees in all); Vlahos, *supra* note 71 (noting estimates ranged from 500,000 to one million).

130. See Aji, *supra* note 72.

late 2006, 1.6 million Iraqis had departed, while another 1.6 million were internally displaced inside Iraq.¹³¹ About a million Iraqis may have fled in 2007.¹³² Syria admitted 750,000 Iraqis between 2003 and 2006.¹³³ By late 2007, there were fully 1.4 million refugees in Syria.¹³⁴ Jordan had 750,000 Iraqi refugees, the Gulf states 200,000, Egypt 150,000, Iran at 50,000 to 60,000, Lebanon 50,000, and Turkey 20,000.¹³⁵ By late 2008, Iraqi asylum-seekers constituted “by far” the largest such group in the world, despite horrific persecution and even famine-like conditions in countries like Afghanistan, Burma/Myanmar, China, the Democratic Republic of the Congo, North Korea, Somalia, Sudan, and Zimbabwe.¹³⁶

Despite the enormous tide of humanity overflowing Iraq’s borders, Iraqi asylum seekers have faced extreme difficulties in securing refuge in the United States. The United States “suspended admission of Iraqi refugees from the time of September 11, 2001, attacks until April 13, 2005.”¹³⁷ One commentator described the United States in 2005 as keeping its doors to Iraqi refugees “sealed shut,” with only 200 allowed in the entire year, despite ghastly persecution and the deaths of many

131. Report of the Secretary-General, *supra* note 73.

132. U.N.: Iraqi Civilian Death Toll Reaches New Monthly High, CNN.com (Nov. 22, 2006) (About “100,000 per month” fled Iraq in late 2006) *available at* <http://www.cnn.com/2006/WORLD/meast/11/22/iraq.report/index.html> (last visited Nov. 5, 2009).

133. *See Iraqi Refugees A Tragedy Stretching Beyond Syria*, ASIA NEWS (Dec. 19, 2006), *available at* <http://www.asianews.it/index.php?l=en&art=8035&size=> (last visited Oct. 31, 2009).

134. *See* Karen DeYoung, *Balkanized Homecoming: As Iraqi Refugees Start to Trickle Back, Authorities Worry About How They Will Fit Into the New Baghdad*, WASH. POST, Dec. 16, 2007, at A01.

135. *See* Associated Press, *Only 57 Iraqi Refugees Admitted to US in July, Bringing Total to 190 Since Last Year*, INT’L HERALD TRIB., Aug 1, 2007; HRW, *ROT HERE OR DIE THERE: BLEAK CHOICES FOR IRAQI REFUGEES IN LEBANON* (2007), *available at* <http://www.hrw.org/reports/2007/lebanon1207/lebanon1207webwcover.pdf> (last visited Nov. 5, 2009); INTERNATIONAL ORGANIZATION FOR MIGRATION, *ASSESSMENT ON PSYCHOSOCIAL NEEDS OF IRAQIS DISPLACED IN JORDAN* 45, RELIEFWEB (Feb. 2008), *available at* http://www.iom.int/jania/webdav/shared/shared/mainsite/published_docs/-brochures_and_info_sheets/report_psy_assessment.pdf (last visited Nov. 5, 2009) [hereinafter IOM, *IRAQIS DISPLACED IN JORDAN*]; KELLY O’DONNELL & KATHLEEN NEWLAND, *THE IRAQI REFUGEE CRISIS: THE NEED FOR ACTION* 9 (Migration Policy Institute 2007), *available at* http://www.migrationpolicy.org/pubs/MPI-The_Iraqi_Refugee_Crisis_The_Need_for_Action_011808.pdf (last visited Oct. 31, 2009).

136. *See* UNITED NATIONS, *IRAQIS LEADING THE WAY IN GROWING NUMBERS OF ASYLUM-SEEKERS*, SAYS UN AGENCY, (2008), *available at* <http://www.un.org/apps/new/story.asp?NewsID=28611&Cr=Asylum&Cr1=UNHCR> (last visited Nov. 5, 2009).

137. HRW, *THE SILENT TREATMENT*, *supra* note 62, at 99.

thousands of civilians from targeted violence.¹³⁸ The UNHCR did not even bother referring Iraqi Christians or other refugees to the United States, “knowing [it] had no inclination to take them in.”¹³⁹ An American legal journal described the attitude of U.S. immigration authorities towards asylum-seekers in general as “don’t let the door hit you on the way out.”¹⁴⁰ As a Senator from a state with a substantial Iraqi population pointed out, even Iraqi asylum-seekers who fled the Ba’athist regime faced a hostile environment before U.S. authorities.¹⁴¹

In 2006, the United States admitted only forty-three out of the hundreds of thousands of Iraqi refugees in Jordan.¹⁴² The government had shut the door to a flow of refugees that averaged 2800 per year from 1991 to 2001.¹⁴³ The government opened a window into the country in 2007 and 2008, admitting about 1600 and 3000 Iraqi refugees in those years,¹⁴⁴ respectively, despite announced targets of 7000 in fiscal 2007 and 12,000 in fiscal 2008.¹⁴⁵ Total admissions since 2003 reached 14,000 in fall 2008.¹⁴⁶ The number surpassed 30,000 in 2009.¹⁴⁷

138. Lawrence F. Kaplan, *The Plight of Iraq Christians*, THE NEW REPUBLIC, Mar. 20, 2006, at 14 (“[T]he doors to the United States [are] sealed shut While over 40,000 Iraqi Christians have fled their homeland since the invasion, last year the United States permitted fewer than 200 Iraqis to immigrate.”).

139. *Id.*

140. Margaret Graham Tebo, *Asylum Ordeals*, A.B.A. J., Nov. 2006, at 36-42.

141. See U.S. Sen. Carl Levin (D-MI), Two Levin Amendments on Iraqi Asylum and Canadian Trash, Included in Senate-Passed Immigration Bill, May 25, 2006, available at <http://levin.senate.gov/newsroom/release.cfm?id=256165> (last visited Nov. 5, 2009).

142. See HRW, THE SILENT TREATMENT, *supra* note 62, at 99.

143. See *id.* at 102; Liz Sly, *Iraqi Refugees Flood Fragile Region - A Silent Exodus of Iraqis Spurred by 4 Years of Continuous Violence Is Straining Neighbors*, CHI. TRIB., May 8, 2007, at A1, available at http://www.accessmylibrary.com/coms2/summary_0286-30714597_ITM (last visited Nov. 5, 2009) (remarking that the U.S. government was “widely criticized for admitting only 202 Iraqis in 2006 and only 466 since the war began”).

144. See Gregg Krupa, *Michigan No Longer Land of Promise for Iraqi Refugees*, THE DETROIT NEWS, Oct. 3, 2008, at 1A (U.S. admitted Iraqi refugees at rate of 3,000 per year from Oct. 2007 to Oct. 2008); Jessie Mangaliman & Mike Swift, *Refugees from War-Torn Iraq Face Difficult Wait*, SAN JOSE MERCURY NEWS, Dec. 26, 2007 (1,600 figure).

145. See Sly, *supra* note 143; *No Direction Home*, Brown testimony, *supra* note 69.

146. See Krupa, *supra* note 144, at 1A. On Sept. 12, 2008, U.S. Department of State Senior Coordinator for Refugee Issues Ambassador James Foley reported that the United States had admitted more than 12,000 Iraqi refugees to the United States through the U.S. Refugee Admissions Program during fiscal year 2008. See *U.S. Surpasses Goal of Admitting 12,000 Iraqi Refugees in FY2008*, 85 INTERPRETER RELEASES 2521 (Sept. 22, 2008).

147. See Human Rights First, *US Meets Target for Resettling Iraqi Refugees* (Oct 2, 2009), available at <http://www.commondreams.org/newswire/2009/10/02-4> (“[W]hen [the 2009 fiscal] year ended this week (on September 30), [the U.S.] had met – and exceeded – that goal by resettling 18,833 Iraqi refugees.”) (last visited Nov. 5, 2009);

Early 2008 saw further reforms of U.S. law by the “Refugee Crisis in Iraq Act of 2007.” Signed into law by President Bush as part of the National Defense Authorization Act for Fiscal Year 2008, the Act has four priorities.¹⁴⁸ First, it facilitates priority refugee status for Iraqis (and their families) who were or are employed in Iraq by the U.S. government, a U.S. media company or NGO, or any other entity that received official U.S. funding.¹⁴⁹ Second, it provides similar priority status for persecuted religious or minority communities with “close family members” in the United States, while potentially excluding those who may have been persecuted or tortured even worse but who lack such family ties.¹⁵⁰ Third, it provides for motions to reopen Iraqi asylum and withholding of removal cases within six months from the passage of the law, assumed the asylum-seekers have not been deported yet.¹⁵¹ Fourth, it authorizes the allocation of such funds as are necessary to provide assistance to countries, such as Syria, Jordan, Lebanon, Turkey, or Egypt, having significant populations of Iraqi refugees, in order to

Alexander G. Higgins, *UN: Most Iraqi Refugees in Program Go to US*, ASSOCIATED PRESS/USA TODAY, Oct. 16, 2009, available at http://www.usatoday.com/news/world/iraq/2009-10-16-iraq-refugees_N.htm (indicating that the U.S. resettled 13,800 Iraqi refugees in fiscal year 2007-2008, and nearly 19,000 in fiscal year 2008-2009); Nicholas Kralev, U.N. Tightens Iraq Asylum Grants, WASH. TIMES, May 9, 2009, available at <http://washingtontimes.com/news/2009/may-/09/security-gains-cut-refugees-benefits/> (“The U.S. is on track to admit about 17,000 Iraqi refugees during the current fiscal year ending Sept. 30, [a State Department spokesperson] said, adding that about 25,000 have been accepted since 2006.”); see also Sly, *supra* note 143 (noting that in April 2007, U.S. State Department declared Iraqi refugee admissions “could potentially be increased to 25,000.”); *No Direction Home*, Brown testimony, *supra* note 69 (indicating UNHCR referred 24,000 cases by March 2008).

148. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1243, 122 Stat. 390, 391 [hereinafter NDAA]. For excerpts, and a discussion, see IRC, *A HIDDEN CRISIS*, *supra* note 69, at 21.

149. See NDAA § 1243, 122 Stat. at 393-94.

150. See *id.*; Ibrahim v. Holder, No. 08-3759, 2009 U.S. App. LEXIS 19144, at *4-5 (6th Cir. Aug. 26, 2009) (“Section 1243 provides that Iraqis who are members of a religious or minority community and who have close family members in the United States qualify as ‘refugees of special humanitarian concern’ eligible for special processing.”).

151. See NDAA § 1243, 122 Stat. at 394 (“An alien who applied for asylum or withholding of removal and whose claim was denied on or after March 1, 2003, by an asylum officer or an immigration judge solely, or in part, on the basis of changed country conditions may, notwithstanding any other provisions of law, file a motion to reopen such claim in accordance with subparagraphs (A) and (B) of 240(c)(7) of the [INA] not later than six months after the date of the enactment of the [RCIA] if the alien-(1) is a citizen or national of Iraq; and (2) has remained in the United States since the date of such denial.”).

promote the safety and welfare of such refugees.¹⁵² However, it sets up a numerical quota of 5000 Iraqis gaining special immigrant status for ties to the U.S. government from 2009 to 2013.¹⁵³

Even after the enactment of the Refugee Crisis in Iraq Act of 2007, immigration judges and the BIA continued to find ways to exclude persecuted Iraqi minorities with U.S. family ties. In one such case, the BIA denied a motion to reopen a denial of asylum “with little more than a bald statement that it was ‘not persuaded’ that ‘conditions for Chaldean Christians in Iraq worsened.’”¹⁵⁴ More fully, the BIA reiterated the argument that because Iraq is so generally violent, with such a high degree of persecution permeating the society, no one can get asylum.¹⁵⁵ The Sixth Circuit reversed and remanded, finding the BIA’s cursory opinion to be unreviewable and in conflict with other case law on persecuted Assyrians and Chaldeans.¹⁵⁶

Likewise, the BIA rejected another motion to reopen a denial of asylum on the ground that conditions in Iraq reflected “general turmoil” that is merely “unpleasant.”¹⁵⁷ Accordingly, the petitioner, a Chaldean Christian, could not prove “an individualized risk of persecution” or “a pattern or practice of persecution of Chaldean Christians by the Iraqi government.”¹⁵⁸ The Sixth Circuit reversed and remanded because the BIA had found in at least two other cases that “Christians in Iraq are persecuted on the basis of their religion,” creating a potential inconsistency in the case law governing asylum claims.¹⁵⁹ This represented a paring back of the “individualized persecution” doctrine, which eliminates refugee law when taken to an extreme.

When another Christian from Iraq had his asylum hearing in 2007, he submitted State Department reports and news articles documenting anti-Christian persecution in Iraq. The court hearing the appeal of the IJ’s denial of the asylum petition described this evidence as stating “that Christians in some areas of Iraq have been targeted by Islamic extremist

152. See NDAA, Pub. L. No. 110-181, § 1244, 122 Stat. 390, 392. See also IRC, A HIDDEN CRISIS, *supra* note 69, at 23.

153. See NDAA § 1244.

154. *Hanna*, 290 F.App’x at 872.

155. See *id.* (quoting the Board of Immigration Appeals (citing *Margos v. Gonzales*, 443 F.3d 593, 599 (7th Cir. 2006))).

156. See *id.* at 872-73 (citing *In re Pati* (B.I.A. 2006), and *In re Balious* (B.I.A. 2006)).

157. *Id.* at 872 (6th Cir. 2008) (citing *Margos v. Gonzales*, 443 F.3d 593, 599 (7th Cir. 2006)).

158. *Id.*

159. *Id.* at 873.

groups.”¹⁶⁰ The IJ found that generalized violence, and “conditions of general civil strife resulting from the fall of Saddam Hussein’s regime,” were the causes of this targeting, and that this was a reason to deny the asylum-seeker’s claims because civil war is not persecution.¹⁶¹ This ruling is inconsistent with the entire body of U.S. refugee law, because as described above the very concept and most applications of refugee status arise out of civil wars, or combinations of internal and international armed conflict. Yet the Sixth Circuit held that there was only a “random possibility of harm” because the reports submitted showed that “[n]ot all Christians . . . have found themselves to be targets of ethnic-religious persecution.”¹⁶² Under this rationale, there could never be any refugees as long as there were survivors of the applicant’s ethnic or religious group, and therefore refugee law would only come into play once a group had already been wiped out. The court further reasoned that “[t]he ongoing insurgency affects every segment of the population, Sunni, Shi’a, and non-Muslim alike.”¹⁶³ It did not explain how multi-faceted religious warfare is any less likely to produce persecution or torture than a completely one-sided conflict. The court’s rationale, indeed, would deny refugee status to anyone from a society that, like Nazi Germany, persecuted multiple groups, targeting political opponents as well as religious minorities.¹⁶⁴

The U.S. State Department also implemented policies that would foreclose reliance on the 2008 reform by most members of persecuted religious minorities in Iraq. The U.S. Commission on International Religious Freedom documented these policies in a recent report.

“Many of the religious minority asylum seekers, refugees, and IDPs with whom the Commission . . . are extended family or the family members are not yet U.S. citizens or permanent residents; thus, the new [immigration] category . . . will not apply to them.”¹⁶⁵ Iraqi asylum-

160. *Hanna v. Holder*, No. 08-4287, 2009 U.S. App. LEXIS 14083, at *8 (6th Cir. June 30, 2009).

161. *Id.* at *5.

162. *Id.* at *8-9.

163. *Id.*

164. *See, e.g., U.S. v. Leprich*, 169 F. App’x 926, 928-29 (6th Cir. 2006) (describing how Nazi military organization Waffen SS persecuted Jews, Gypsies, Jehovah’s Witnesses, Poles, and other groups by a “variety of methods, including gassing, hanging, strangling, heart injection, electrocution, beating, drowning, burning, starving, and shooting”); *see also* CONCENTRATION CAMP DACHAU: 1933-1945, 31-104 (Barbara Distel & Ruth Jakusch eds., Comité international de Dachau, 1978).

165. UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, IRAQI REPORT – 2008, 34-35 (2008), *available at* http://74.125.47.132/search?q=cache:-LWRuUJncP5oJ:www.pbs.org/newshour/indepth_coverage/middle_east/iraq/20081216_uscirf.pdf (last visited Nov. 5, 2009).

seekers languishing in Iran, Lebanon, or Turkey, given the prevailing anti-refugee sentiment, are likely to have particular difficulties in successfully invoking the 2008 reforms.¹⁶⁶

U.S. policy towards Iraqi refugees between 2003 and 2006 compared unfavorably to its responses to refugee crises unleashed by past wars in which the United States took a leading part. From April 1975 to April 1978, the United States accepted nearly 175,000 Vietnamese and other Southeast Asian refugees.¹⁶⁷ In the 1990s, the United States admitted over 143,000 Bosnian refugees.¹⁶⁸ In 1999, the United States admitted nearly 10,000 Kosovar Albanian refugees in less than three months.¹⁶⁹ As noted above, it took several years to match the latter feat for Iraq, despite far more civilian deaths and a much larger scale of displacement and devastation in Iraq than in Kosovo.¹⁷⁰

The response to the Iraqi refugee crisis is somewhat more consistent with its response to other wars waged by recent Republican administrations. During the 1980s, refugees from wars that the United States was actively fighting or supporting in Latin America saw nearly all of their asylum claims denied, despite genocide in Guatemala and active death squads in El Salvador.¹⁷¹

166. See Omar Sinan, *Iraqi Refugees in Turkey Seek Move to US*, FOXNEWS.COM, Jan. 06, 2008, available at <http://origin.foxnews.com/wires/2008Jan06/0,4670,-TurkeyIraqiRefugees,00.html> (last visited Nov. 9, 2009) (describing bureaucratic challenges faced by refugees); HRW, *ROT HERE OR DIE THERE*, *supra* note 135, § 5 (describing refugee status in Lebanon and detention); IRAQI REFUGEE COUNCIL, *THE SITUATION OF IRAQI REFUGEES IN IRAN* (2008) available at <http://www.icva.ch/doc00002144.doc> (last visited Nov. 9, 2009).

167. See Jack Anderson, *Will U.S. Welcome Indochina's Refugees?*, ST. PETERSBURG TIMES, Mar. 15, 1978, at 14; Oxford Analytica, *US Gives Iraqi Refugees Cold Shoulder*, FORBES.COM, July 10, 2007, available at http://www.forbes.com/business/2007/07/09/-refugee-iraq-immigration-biz_cx_0710oxford.html (last visited Nov. 9, 2009).

168. See U.S. Dep't of State, *Admissions Program for Europe and Central Asia* (Apr. 4, 2005), available at <http://www.state.gov/g/prm/rls/117281.htm> (last visited Nov. 9, 2009).

169. See *First Kosovo Refugees Happily Arrive Home from US*, CNN.COM (July 27, 1999), available at <http://www.cnn.com/WORLD/europe/9907/27/yugoslavia.01/> (last visited Nov. 9, 2009); Associated Press, *Tears of Joy as Refugees Return from USA*, USA TODAY, July 27, 1999, available at <http://www.usatoday.com/news/index/kosovo/-koso1067.htm> (last visited Nov. 9, 2009).

170. See *supra* notes 137 – 147 and accompanying text.

171. See MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX* 85 (2002) ("During the 1980s . . . , the Reagan administration, which played an important role in fueling that violence, denied 97 percent of Salvadoran and 99 percent of Guatemalan asylum applications."); AUSTIN SARAT & STUART A. SCHEINGOLD, *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 104-116 (2006) (describing lobbying campaign against the disparity in 1980s and 1990s); see also VICTORIA SANFORD, *BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA* 61, 147-79, 220-31, 254-57 (2003).

European law more rapidly recognized Iraqi asylum-seekers' rights under international law. Nearly 9000 Iraqis applied for asylum in 2005 alone in Sweden, Germany, the Netherlands, the United Kingdom, Greece, and Belgium.¹⁷² Throughout Europe, 40,000 Iraqis applied for asylum in 2005.¹⁷³ Sweden, a country much smaller in geographic and economic terms than the United States, actually admitted over 40,000 Iraqi refugees between 2003 and May 2008, about three times the U.S. admissions.¹⁷⁴ On a per capita basis, Sweden let in about one Iraqi refugee for every 250 existing residents; the U.S. let in about one Iraqi per 250,000 residents.¹⁷⁵

Still, even European law was restrictive of Iraqi refugees' rights under the 1951 Convention in the first few years after the war. Germany, historically a prime destination of Iraqi refugees, revoked the asylum status of 18,000 Iraqis after mid-2003.¹⁷⁶ Germany changed course and

(describing genocide in Guatemala and death squads in El Salvador during 1980); 8 U.S.C.A. § 1157 note (encouraging petitions for extended voluntary departure made by citizens of El Salvador based on "civil strife"); 8 U.S.C.A. § 1254a note (designating nationals of El Salvador as entitled to temporary protected status under certain conditions); 8 U.S.C. § 1255 note (providing for nationals of Cuba or Nicaragua to file motions to reopen exclusion, deportation, or removal proceedings, based on the Nicaraguan Adjustment and Central American Relief Act of 1997); Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, 111 Stat. 2193, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_public_laws-&docid=f:publ100.105 (providing for issuance of permanent residence by Attorney General to certain Cuban and Nicaraguan nationals); U.S. Dep't of Justice, *Section 203 of the Nicaraguan Adjustment and Central American Relief Act of 1997* (2005), available at <http://www.usdoj.gov/eoir/vll/benchbook/templates/NACARAs203Guatemala.htm> ("Section 203 of the Nicaraguan Adjustment and Central American Relief Act ('NACARA') provides that certain nationals from Guatemala . . . are eligible to apply for suspension of deportation or special rule cancellation of removal . . .").

172. See SATVINDER SINGH JUSS, *INTERNATIONAL MIGRATION AND GLOBAL JUSTICE* 101 (Ashgate 2006).

173. See *id.* at 229.

174. See USDOS, *Sec Rice Remarks with Swedish PM Fredrik Reinfeldt*, SCOOP, May 30, 2008, available at <http://www.scoop.co.nz/stories/WO0805/S00452.htm> (last visited Nov. 9, 2009).

175. Compare U.S. CENTRAL INTELLIGENCE AGENCY, *WORLD FACTBOOK 2008: THE UNITED STATES*, with U.S. CENTRAL INTELLIGENCE AGENCY, *WORLD FACTBOOK 2008: SWEDEN*, available at <https://www.cia.gov/library/publications/download/download-2008/index.html> (last visited Nov. 9, 2009).

176. See EUROPEAN COUNCIL OF REFUGEES AND EXILES, *FIVE YEARS ON EUROPE IS STILL IGNORING ITS RESPONSIBILITIES TOWARDS IRAQI REFUGEES 2* (2008), available at <http://www.unhcr.org/refworld/category,POLICY,ECRE,,,47e1315c2,0.html> (last visited Nov. 9, 2009) (Germany "revoked the refugee status of around 18,000 Iraqis" after Nov. 2003).

agreed in 2008 to admit 2,500 Iraqi refugees.¹⁷⁷ The British Home Secretary drafted a plan to repatriate 40,000 Iraqis in 2004,¹⁷⁸ a time of violence spiraling out of control in Baghdad, Fallujah, Najaf, Mosul, and elsewhere in Iraq.¹⁷⁹ Perhaps as a result, UNHCR referred zero Iraqi refugees to the United Kingdom from April 2003 through May 2006.¹⁸⁰ Throughout Europe, “an estimated 55,000 Iraqi refugees” were repatriated to Iraq in 2005, even “as the war and its fallout caused a new displacement of tens of thousands of Iraqis and long-term refugee residents in the country [for example, Palestinian refugees].”¹⁸¹

One might argue that it does not matter whether Iraqi refugees are admitted to the United States or Europe or stay in Syria, Jordan, etc., as long as they are not being persecuted. Their situation in these neighboring countries, however, is unsustainable, as Iraqi refugees are typically legally banned from working to support their families there, and soon exhaust their savings, forcing them to return to Iraq, where they might be able to work, but face persecution.¹⁸² Syria and Jordan are already struggling with high unemployment rates, poor economies, and high rates of inflation in the fuel, food, and housing markets, due in part to the war in Iraq.¹⁸³ For many years, children of Iraqis could not even attend school in Jordan, although they often could in Syria.¹⁸⁴ Until 2007,

177. See *Germany to Accept Iraqi Refugees within EU Framework*, DDP NEWS AGENCY/BBC ARCHIVE, Nov. 22, 2008, available at [http://nl.newsbank.com/nl-search;Iraqi Refugees Start Arriving in Germany](http://nl.newsbank.com/nl-search;Iraqi%20Refugees%20Start%20Arriving%20in%20Germany), UPI, Mar. 20, 2009, available at http://www.upi.com/Top_News/2009/03/20/Iraqi-refugees-start-arriving-in-Germany/UPI-45531237528985.

178. See Nicholas Hallen, *Blunkett Draws up Plan to Repatriate 40,000 Iraqis*, THE TIMES (U.K.), Feb. 15, 2004, available at <http://www.timesonline.co.uk/tol/news/uk/article1020504.ece> (last visited Nov. 9, 2009).

179. See Alex Rodriguez, *Car Bomb Kills At Least 68 in Iraq*, CHI. TRIB., July 29, 2004, available at <http://www.highbeam.com/doc/1G1-119875770.html> (last visited Nov. 9, 2009); John F. Burns & Alex Berenson, *US Troops Fight Iraq Militiamen on Two Fronts*, N.Y. TIMES, Aug. 11, 2004, at A1; Tom Lasseter & Dogen Hannah, *Churches Attacked in Iraq*, PHILA. INQUIRER, Aug. 2, 2004, at A1.

180. See HRW, *THE SILENT TREATMENT*, *supra* note 63, at 99.

181. *Id.*

182. See *id.* at 52-58; see also IOM, *ASSESSMENT ON PSYCHOSOCIAL NEEDS OF IRAQIS DISPLACED IN JORDAN*, *supra* note 135, at 10-12, 50-52; see generally INTERNATIONAL CRISIS GROUP, *FAILED RESPONSIBILITY: IRAQI REFUGEES IN SYRIA, JORDAN AND LEBANON*, (2008), available at <http://www.crisisgroup.org/home/index.cfm?id=5563> (last visited Nov. 9, 2009) [hereinafter ICG, *FAILED RESPONSIBILITY*].

183. See ICG, *FAILED RESPONSIBILITY*, *supra* note 182, at 19.

184. See *id.*; see also IOM, *ASSESSMENT ON PSYCHOSOCIAL NEEDS OF IRAQIS DISPLACED IN JORDAN*, *supra* note 135, at 10-12, 50-52. ICG, *FAILED RESPONSIBILITY*, *supra* note 182, at 9-25; HRW, *THE SILENT TREATMENT*, *supra* note 63, at 58 (Jordan barred Iraqi children without permanent residence permits from school); *id.* at 59 (similar directive issued in 2006).

“enrollment in [Jordanian] public schools was restricted to those holding a residency permit.”¹⁸⁵ In 2008, inadequate infrastructure and teaching staff, and the loss of school records from Iraq, still kept many Iraqi children from going to school in Jordan.¹⁸⁶ In August 2007, the Jordanian government announced that Iraqi refugee children could enroll in school, however only 20,000, a small fraction of all the children, did so.¹⁸⁷

Prior to the enactment of the National Defense Authorization Act for Fiscal Year 2008, the U.S. Department of Justice meticulously and systematically laid the groundwork for the exclusion of most Iraqi refugees from the United States.¹⁸⁸ Although the Department stopped deporting refugees to Iraq for a time, possibly due to the out-of-control violence and persecution that took root after the invasion,¹⁸⁹ it has consistently advanced legal theories that make it nearly impossible for most Iraqis to claim refugee status. These doctrines, as outlined above, reject evidence that the UNHCR would consider important and valuable as proof of refugee status, including evidence of past persecution and persecution of similarly situated individuals. The Department of Justice utilizes the doctrine of “changed circumstances” to render much evidence of past persecution of little use, even when refugees have been tortured by persecutors in their country of origin.¹⁹⁰ It likewise summons the doctrine of “individualized persecution” to argue that a refugee cannot prove a well-founded fear of persecution until he or she is personally tortured or murdered for his or her ethnicity, faith, etc.¹⁹¹ The “individualized persecution” requirement frustrates refugees’ attempt to appeal to one of the key sources of evidence of a well-founded fear of persecution, according to UNHCR: what “happened to his [or her] friends and relatives and other members of the same racial or social group.”¹⁹²

185. IOM, ASSESSMENT ON PSYCHOSOCIAL NEEDS OF IRAQIS DISPLACED IN JORDAN, *supra* note 135, at 50.

186. *See id.* at 12.

187. Because Iraq has a relatively young population, and many adult Iraqi men have been killed in war and massacres, half or more of the 750,000 to one million plus Iraqi refugees in Jordan may be children. *Cf. id.* at 52. *See also* WOMEN’S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, UNITED STATES AND COALITION FORCES MUST PROTECT IRAQI REFUGEES AND THE INTERNALLY DISPLACED, RELIEFWEB (Mar. 21, 2003), *available at* <http://www.peacewomen.org/resources/Iraq/WCRClivinginfear.pdf> (last visited Oct. 31, 2009).

188. *See* Ann Scott Tyson, *Iraqi Refugee Crisis Seen Deepening: Help for Displaced Urged at Hearing Of Judiciary Panel*, WASH. POST, Jan. 17, 2007, at A04.

189. *See* Jamal-Daoud, 403 F.3d at 925-27, n.1.

190. *See supra* Part III.

191. *See supra* Part IV.

192. UNHCR, HANDBOOK ON REFUGEE STATUS, *supra* note 36, at §§ 42-43.

After the outbreak of war with Afghanistan in 2002, the U.S. government made structural and personnel changes to the refugee claims process that made asylum from persecution more difficult to obtain. The USA Patriot Act of 2001 gave the Department of Justice “broad powers to detain noncitizens on national security grounds, to hold them in custody indefinitely, and to deport them to their country of origin.”¹⁹³ A few months later, Attorney General John Ashcroft removed five members of the Board of Immigration Appeals (BIA), and instructed the remaining members to issue summary orders of deportation.¹⁹⁴ The BIA granted only one in eight asylum appeals in 2002, down from one in three in 2001.¹⁹⁵

The United States has, however, contributed many millions of dollars to the relief of Iraqi refugees outside the U.S. Nearly \$600 million in U.S. funds supported assistance to Iraqi refugees and IDPs between 2006 and 2009.¹⁹⁶ It accounted for about a third of contributions to UNHCR’s Middle East appeals for funding.¹⁹⁷ Its donations to UNHCR paid about \$450,000 towards the maintenance of Iraqi refugees in Jordan in 2005, and \$1.4 million to the International Catholic Migration Commission, which had refugee relief projects.¹⁹⁸ A State Department official charged with addressing the refugee crisis reported in 2007 that \$200 million was allocated “to relieve the suffering of Iraqi refugees and [IDPs].”¹⁹⁹ These contributions reportedly funded the registration of more than 165,000 Iraqis as asylum-seekers, food and other aid for 100,000 persons, and other aid to 300,000 IDPs and 45,000 non-Iraqi (often Palestinian)

193. Colin Nickerson, *Asylum Seekers Turn to Canada - Arabs, Pakistanis Cite US Crackdown*, BOSTON GLOBE, Jan. 4, 2003, at A1. See also Christine Flowers, *The Difficulties Immigrants Face in the Post-9/11 World: How the War on Terror Has Changed Their Status*, FINDLAW.COM, May 1, 2003, available at http://writ.news.findlaw.com/commentary/20030501_flowers.html (last visited Nov. 9, 2009) (“Indeed, in December 2002, thousands of immigrants from Iraq, Iran and several other countries were detained without bond.”).

194. Jaya Ramji-Nogales et al., *Random Refuge: The U.S. Asylum System, Pervaded By Chance, Demands Reform*, LEGAL TIMES, Aug. 20, 2007, available at <http://www.rcusa.org/uploads/pdfs/ramji-NogalesSchoenholtzandSchrag-2--02.pdf> (last visited Nov. 9, 2009).

195. See *id.* These numbers are derived from a study of immigration decisions in four large American cities from 1999 to 2005, which revealed a politicized process that had a severe negative impact on refugees.

196. See CIRF, Annual Report 2009, *supra* note 2, at 52.

197. See HRW, THE SILENT TREATMENT, *supra* note 63, at 102.

198. See *id.*

199. Ellen Sauerbrey, Assistant Sec’y of State, *Sectarian Violence and the Refugee Crisis in Iraq*, Remarks to U.S. Commission on International Religious Freedom Hearing, USDOS (Sept. 17, 2007).

refugees inside Iraq.²⁰⁰ These numbers are small, however, compared to the tens of billions of dollars spent on armaments and military operations in Iraq, or the billions Syria and Jordan spend on social services for Iraqis.²⁰¹

VI. DOCUMENTING THE IRAQI REFUGEE CRISIS MORE OBJECTIVELY

Several investigations by U.S. government agencies, U.N. bodies, INGOs, and the press have revealed that while violence in Iraq may sometimes be “random,” as U.S. courts like to declare dismissively, it is also systematic, and directed at exterminating and/or driving away identifiable religious, sectarian, political, and ethnic groups.²⁰² These investigations have confirmed that tens or even hundreds of thousands of Iraqis have been murdered, hundreds of sites associated with distinct ethnic or sectarian groups have been bombed, and hundreds or even thousands of Iraqis have been tortured for their identity. Iraqis have been targeted on the basis of their ethnic, political, religious, and/or sectarian affiliation, including many Sunni and Shi’a Arab, Christian Assyrian, and neo-pagan Mandaean and Yezidi civilians.²⁰³ The Assyrians are the indigenous population of Iraq, with a Christian heritage that dates back over 1500 years.²⁰⁴ The Yezidis are a group whose faith synthesizes ancient Mesopotamian and Muslim traditions, while the Mandaean faith synthesizes ancient Mesopotamian and Judeo-Christian beliefs.²⁰⁵ There

200. *See id.*

201. *See* David Firestone & Paul Shanker, *After the War; Price Tag; War's Cost Brings Democratic Anger*, N.Y. TIMES, July 11, 2003, at A1, available at <http://www.nytimes.com> (accessed from home page by searching “Price Tag: War’s Cost Brings Democratic Anger”) (last visited Nov. 9, 2009) (indicating that about \$4 billion per month in costs in lead-up and initial months of the war); Nicholas D. Kristof, Op-Ed., *Iraq, \$5,000 per Second*, N.Y. TIMES, Mar. 23, 2008, available at <http://www.nytimes.com/2008/03/23/opinion/23kristof.html?hp> (last visited Nov. 9, 2009) (noting \$10 billion per month in 2008); Nir Rosen, *The Flight from Iraq*, N.Y. TIMES, May 13, 2007, available at <http://www.nytimes.com/2007/05/13/magazine/13refugees-t.html> (last visited Nov. 9, 2009) (stating that Jordan faces \$1 billion per year in refugee-related costs).

202. *See Margo*, 443 F.3d at 599; *see also* Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 13 TEX. WESLEYAN L. REV. 601, 605-8, 627-29, 649-53 (2009).

203. *See* Travis, *supra* note 200, at 605-08, 627-29, 649-53.

204. *See id.* at 618-36 (summarizing Assyrian history from third millennium BCE to present day).

205. Iraq’s Mandaean represent the surviving remnant of worshippers of the ancient Assyro-Babylonian gods, with an admixture of Judeo-Christian elements such as a reverence for John the Baptist. *See* E.S. DROWER, THE MANDAEANS OF IRAQ AND IRAN: THEIR CULTS, CUSTOMS, MAGIC LEGENDS, AND FOLKLORE xviii-xxiii *passim* (Georgia

were over 900,000 members of these indigenous religious minorities living in Iraq in 2007.²⁰⁶

Thus, the State Department, U.S. Commission on International Religious Freedom, and INGOs have demonstrated that contrary to the declarations by U.S. courts, Iraq's Arab and Kurdish groups, and particularly its minority Assyrian, Yezidi, and Mandaean populations have a well-founded fear of persecution based upon serious acts of violence and discrimination directed at persons of the "same racial or social group."²⁰⁷ For purposes of refugee and asylum law, these groups' continued presence in Iraq has become intolerable due to such persecution, or would be intolerable if they were to be returned there.²⁰⁸ Indeed, the violence in Iraq has passed well beyond the stage of persecution, to rise to the level of war crimes and crimes against humanity.²⁰⁹

Press 2002) (1962) (Mandaean scriptures call for worship of Assyro-Babylonian gods Shamash, Sin, Ishtar or Dilbat, Bel, Nirgal, and Tammuz). The Yezidis speak the same languages as and look similar to Assyrians, Kurds, and other Iraqis, and "their religion has points of connexion with old Iranian and Assyrian beliefs and traces of Manicheanism and Nestorianism [i.e. Assyrian Christianity]." YEZIDIS, in 28 ENCYCLOPEDIA BRITANNICA 919 (11th ed., 1911). Their use of fire, statues, towers, and animal sacrifices represents a hold-over from ancient Assyrian religious practice. See HARRY CHARLES LUKE, MOSUL AND ITS MINORITIES 124-28, 136-37 (Gorgias Press 2004) (1925); AUSTEN HENRY LAYARD, DISCOVERIES AT NINEVEH (1854), available at <http://mcadams.posc.mu.edu/txt/ah/Layard/DiscNineveh02.html> (last visited Nov. 9, 2009); AUSTEN HENRY LAYARD, NINEVEH AND ITS REMAINS 95-109 (1850).

206. See USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008: IRAQ (2008), *supra* note 2.

207. UNHCR, HANDBOOK ON REFUGEE STATUS, *supra* note 36, §§ 42-3, 72, 74-75, 78.

208. See *id.*

209. See Massimo Calabresi, *Is Iraq Headed for Genocide?*, TIME MAG., Nov. 29, 2006, available at <http://www.time.com/time/world/article/0,8599,1564270,00.html> (last visited Nov. 9, 2009); Opinion Research Business, *September 2007 – More than 1,000,000 Iraqis Murdered*, available at http://www.opinion.co.uk-/Newsroom_details.aspx?NewsId=78 (last visited Nov. 9, 2009) [hereinafter ORB]; Samantha Power, *How to Stop Genocide in Iraq*, L.A. TIMES, Mar. 5, 2007, available at <http://www.latimes.com/news/opinion/la-oe-power5mar05,0,3348120.story?coll=la-opinion-center> (last visited Nov. 9, 2009) (arguing that "wholesale ethnic cleansing" in Iraq led 3.8 million Iraqis to flee their communities, including 50,000 each month). A pattern of acts such as "murder, . . . intimidation, harassment, and the destruction of sacred and cultural buildings" is a crime against humanity. CHERIF M. BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 329 (Kluwer Law Int'l, 1999) (explaining that "crimes against humanity" include the following acts directed against any civilian population in an international or internal armed conflict: murder, torture, rape, "persecutions on political, racial and religious grounds," and "other inhumane acts"). See also United Nations Commission on Human Rights, Human Rights and Population Transfer: Final Report of the Special Rapporteur, ¶ 10, U.N. Doc. E/CN.4/Sub.2/1997/23 (June 27, 1997); ROY GUTMAN ET AL., CRIMES OF WAR: WHAT THE

Throughout this discussion, it should be remembered that a person having a well-founded fear of persecution may base his or her claim to refugee status on attacks or discrimination emanating from private rather than official sources, as long as the “government authorities . . . condoned it or at least demonstrated a complete helplessness to protect the victims.”²¹⁰ As UNHCR has reiterated, a non-State agent of persecution may be able to chase its targets around the country, and finally attack or kill them in the absence of effective protection from State authorities.²¹¹ Therefore, internal relocation in Iraq is insufficient protection for asylum-seekers, given “the lack of effective protection and absorption capacities in Central and Southern Iraq.”²¹²

A. Persecution of Sunni and Shi’a Arabs

The U.S. State Department has characterized the murders of Arabs by the governing authorities and their sectarian opponents in Iraq as anything but random or “general” in nature. In its last annual report on Iraq before the 2003 war, it described the murder of hundreds of Shi’a and Kurds by the regime, the torture of civilians on a systematic basis, and a “brutal campaign of murder, summary execution, and protracted arbitrary arrest against the religious leaders and followers of the majority Shi’a population.”²¹³ In its first report on post-war conditions, the State Department charged Iraq’s Internal Affairs Unit with murdering ten former Ba’athists, and Baghdad police with killing twelve persons in its custody without holding trials.²¹⁴ The report cited Human Rights Watch for the fact that “torture and ill treatment of detainees by police was commonplace,” with nearly eighty percent of prisoners interviewed claiming to have been mistreated, including beatings with “cables and hosepipes,” electric shocks to the genitals, starvation and denial of water, and overcrowding.²¹⁵ The report identified widespread persecution on religious and sectarian grounds, including: (1) the deaths of thousands of

PUBLIC SHOULD KNOW (1999); ANDREW BELL-FIALKOFF, *ETHNIC CLEANSING* 3 (1996); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 *FOREIGN AFF.* 132 (1993).

210. *Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2000).

211. See UNHCR, *GUIDELINES RELATING TO THE ELIGIBILITY OF IRAQI ASYLUM-SEEKERS*, at 23 (2005), available at <http://www.unhcr.org/refworld/pdfid/4354e3594.pdf> (last visited Nov. 9, 2009) [hereinafter UNHCR, *GUIDELINES ON IRAQI ASYLUM-SEEKERS*].

212. *Id.*

213. USDOS, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ*, *supra* note 2.

214. See USDOS, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ* (2005), *supra* note 2.

215. *Id.*

Iraqis at the hands of insurgents and the disappearance “without a trace” of thousands more; (2) pervasive “Sunni-Shi’a violence” including a bombing near a Shi’a mosque in Baghdad, the bombing of dozens of children at a ceremony, and the bombing of a Karbala bus station; and (3) severe threats against Arab refugees such as Palestinians or Syrians including their detention and “severe treatment in prison.”²¹⁶

Conditions worsened in 2006, according to the State Department, with several massacres of over 100 people at a time. These occurred outside a government health center in Hilla, and in coordinated attacks on Shi’a areas of Baghdad.²¹⁷ The government response revealed a pattern of persecution of Sunni Arabs, with dozens of Sunni men at a time being kidnapped and executed by men in police or commando uniforms.²¹⁸ Police and Ministry of the Interior security forces participated in “extralegal killings” by Shi’a sectarian militias within their ranks.²¹⁹

By late 2006, it was clear that Iraq had crossed the threshold into a civil war between ethnic and sectarian groups, with the overlay of regional and international conflict.²²⁰ A report on the matter prepared in 2006 for the U.N. Security Council called Iraq arguably the worst humanitarian and human rights crisis in the world, with 5000 Iraqis dying violent deaths every month.²²¹ Civilian casualties in Iraq were well over 40,000 in 2006 alone according to U.N. figures. According to a peer-reviewed scientific study authored by faculty from Johns Hopkins University and the Massachusetts Institute of Technology in the British medical journal, *The Lancet*, 400,000 or more Iraqis died between 2003 and 2006 than the death rate at the outset of hostilities would have predicted.²²² This is the same methodology used to statistically sample the number of excess deaths due to atrocities and burning of villages in

216. *Id.*

217. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2006), *supra* note 2.

218. *Id.*

219. *Id.*

220. See Marc Santora, *Sectarian Ties Weaken Duty's Call for Iraq Forces*, N.Y. TIMES, Dec. 28, 2006, at A1; Edward Wong, *Annan Adds His Voice to a Growing Chorus That Is Calling the Situation in Iraq a 'Civil War'*, N.Y. TIMES, Dec. 4, 2006, at A14.

221. Press Release, Security Council, Iraq Stands on Brink of Civil War, ‘Violence Seems Out of Control’, Special Representative Tells Security Council, U.N. Doc. SC/8895 (Dec. 11, 2006), available at <http://www.un.org/News/Press/docs/2006/sc8895.doc.htm> (last visited Nov. 9, 2009); Security Council, Report of the Secretary-General, ¶¶ 38-40, U.N. Doc. S/2206/945 (Dec. 5, 2006), available at <http://www.undemocracy.com/S-2006-945> (last visited Nov. 9, 2009).

222. See Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-sectional Cluster Sample Survey*, 368 THE LANCET 1426-28 (2006).

Kosovo, the Congo, and Darfur.²²³ The death rate in Iraq increased approximately fourfold compared to before the war, and seventy-five percent of violent deaths in 2006 were due to terrorists, militia, insurgents, and unknown attackers.²²⁴ A third of violent deaths among females were among young girls under fifteen years old.²²⁵

Despite U.S. courts' tendency to wax poetic about the dawn of a new freedom in Iraq, the U.S. Secretary of Defense, Robert Gates, confirmed in 2006 that the United States was not prevailing in Iraq on its declared objectives of bringing democracy and stability.²²⁶ This was somewhat surprising because terrorists and insurgents have consistently lost more fighters on the battlefield than U.S.-led coalition forces.²²⁷ Monetary losses are also much greater for Iraq as a percentage of its GDP, with over \$11.35 billion in lost revenue and infrastructure damage through mid-2005, or over ten percent of GDP, compared to about \$320 billion in U.S. direct outlays by mid-2006, or less than five percent of GDP, not counting the cost of deaths and injuries on all sides.²²⁸ Yet in mid-2005, there were an estimated 18,000 insurgents, about three times as many as in late 2003.²²⁹

By 2007, the State Department's reports became increasingly vague about the agents of persecution, although one report stated: "Bomb attacks by Sunni terrorist groups against the government and densely

223. See *id.*; P.B. Spiegel & P. Salama, *War and Mortality in Kosovo, 1998-99: An Epidemiological Testimony*, 355 THE LANCET 2204, 2205 (2000); INTERNATIONAL RESCUE COMMISSION, MORTALITY STUDY, EASTERN DEMOCRATIC REPUBLIC OF CONGO (2001), available at http://www.smallarms.survey.org/files/portal/issueareas/victims/victims_pdf/2001_IRC_DRC_pdf (last visited Nov. 9, 2009); Evelyn Depoortere et al., *Violence and Mortality in West Darfur, Sudan (2003-04)*, 364 THE LANCET 1315 (2004), available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(04\)17187-0/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(04)17187-0/fulltext) (last visited Nov. 9, 2009).

224. See Burnham et al., *supra* note 222, at 1425-27.

225. See *id.*

226. See *Transcript: The Nomination Hearing for Robert Gates*, INT'L HERALD TRIB., Dec. 6, 2006, available at <http://www.nytimes.com/2006/12/06/world/americas/06iht-web.1206gatestext.3797358.html> (last visited Nov. 9, 2009).

227. See, e.g., Cal Perry & Muhammed Shareef, *Marines Report 300 Insurgents Killed in Najaf*, CNN.com, Aug. 6, 2004, available at <http://www.cnn.com/2004/WORLD/meast/08/06/iraq.main/index.html> (last visited Nov. 9, 2009).

228. See Marwan Ibrahim, *New Solutions in the Pipeline for Iraq's Crippled Oilfields*, AGENCE FRANCE-PRESSE, Nov. 17, 2005, available at <http://www.lebanonwire.com/1105/-05111702AFP.asp> (last visited Nov. 9, 2009); Tony Capaccio, *Iraq Costs Said to Hit \$320 Bln, Then Double Before War Ends*, BLOOMBERG.COM, April 27, 2006, available at <http://www.bloomberg.com/apps/news?pid=10000103&sid=a7x0Ra.Z9YZ0> (last visited Nov. 9, 2009).

229. See Erik Leaver, *Building Permanent US Bases in Iraq Sends Wrong Signal*, SEATTLE POST-INTELLIGENCER, May 15, 2005, available at http://seattlepi.nwsource.com/opinion/224055_iraqbases.html (last visited Nov. 9, 2009).

populated Shi'a areas were common and frequently prompted retaliatory attacks by Shi'a militias. Executions of military-age Sunni males became common²³⁰ Other sources are more specific about huge massacres based on sectarian or religious identity in 2007:

- about 400-520 people in Yezidi villages in the Sinjar area of northwestern Iraq died in a bombing on Aug. 14, 2007;
- about 132 people died in a bombing attack on "Sadr City" on Feb. 3, 2007;
- over a hundred people at a time died in several market bombings aiming for maximum casualties in the crowd of shoppers, for example at a market in Amerli on July 7, 2007 (160 people), in Tal Afar on Mar. 27, 2007 (150 people), in Baghdad on Nov. 24, 2006 (200 people), Apr. 18, 2007 (140 people), Feb. 3, 2007 (over 100 people), and Sept. 14, 2007 (over 100 people), and in Hilla on Feb. 1, 2007 (73 people);
- over 115 people in the bombing of a crowd of Shi'a pilgrims in Hilla on Mar. 6, 2007; and
- over 70 people in the bombing of Mustansiriyyah University in Baghdad on Jan. 16, 2007.²³¹

The bombings in 2007 followed a series of similar attacks between 2003 and 2006 that already gave Iraqis of nearly every ethnic group a strong basis to fear for their lives. More than 600 car bombs have blown up thousands of Shi'a Iraqis in their homes, mosques, police stations, and markets, as well as hundreds of Kurds in political offices, police stations, and elsewhere.²³² Terrorists exploded huge car bombs and artillery shells in attempts to kill as many Shi'a or Kurdish civilians as possible, as in

230. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2006), *supra* note 2.

231. See *Large Bombings Claim Ever More Lives*, IRAQBODYCOUNTO.ORG, Oct. 4, 2007, available at <http://www.iraqbodycount.org/analysis/numbers/biggest-bombs> (last visited Nov. 9, 2009). See also Damien Cave, *Cheated of Future, Iraqi Graduates Want to Flee*, N.Y. TIMES, June 5, 2007, at A1; Steven R. Hurst, *At Least 132 Killed in Iraq Bombing*, DENVER POST, Feb. 4, 2007, available at http://www.denverpost.com/movies/ci_5154390 (last visited Nov. 9, 2009); Edward Wong, *Militants Attack Sunnis' Mosques in 2 Iraqi Cities*, N.Y. TIMES, Nov. 25, 2006, at A1; Patrick J. McDonnell & Tracy Wilkinson, *Blast Kills Scores at Iraq Mosque; Toll Tops 90 in Shiite Stronghold*, L.A. TIMES, Aug. 30, 2003, at A1.

232. Mike Davis, *The Poor Man's Air Force* (pt. 1), HARPER'S MAG., Oct. 2006, at 19.

Najaf in 2003, Arbil in 2004, etc.²³³ The bombing of the Imam Ali mosque in Najaf on Aug. 29, 2003 killed over eighty people, and the attack on Kurdish political offices in Arbil killed over a hundred people.²³⁴ About 1000 people, mostly Shi'a pilgrims, died trying to outrun a suspected suicide bomber across Al-Aaimmah bridge on Aug. 31, 2005.²³⁵ "Eleven car bombs went off in a single day in Baghdad and Kirkuk on New Year's Day in 2006 alone, and dozens of car bombs have targeted civilians in the "Sadr City" neighborhood of Baghdad."²³⁶

The Associated Press and U.S. military officials have reported that most of the suicide bombers and most of the terrorists' money in Iraq come from Saudi Arabia and other Gulf Arab states.²³⁷ Saudi individuals reportedly "are giving millions of dollars to Sunni insurgents in Iraq," as "several truck drivers interviewed by the Associated Press described carrying boxes of cash from Saudi Arabia into Iraq, money they said was headed for insurgents."²³⁸ The Iraq Study Group report in 2006 found that "funding for the Sunni insurgency comes from private individuals within Saudi Arabia and other Gulf states."²³⁹

Shi'a militia responded to the many massacres against them with sectarian cleansing campaigns against Sunni Arabs, most notably in

233. DAVID M. MALONE, *THE INTERNATIONAL STRUGGLE OVER IRAQ: POLITICS IN THE UN SECURITY COUNCIL 1980-2005*, 334-36 (2006).

234. See Richard A. Oppel Jr., *After The War: Bombing's Aftermath; U.S. Troops Delay Exit From Najaf*, N.Y. TIMES, Sept. 1, 2003, available at <http://www.nytimes.com/2003/09/01/world/after-the-war-bombing-s-aftermath-us-troops-delay-exit-from-najaf.html> (last visited Nov. 9, 2009); Graham Usher, *Blood and Ashes in Arbil*, AL-AHRAM WEEKLY, Feb. 18, 2004, available at <http://weekly.ahram.org.eg/2004/677/re2.htm> (last visited Nov. 9, 2009).

235. See Reuters, *700 Die in Iraq Stampede*, THE DAILY STAR (Leb.), Sept. 1, 2005, available at <http://www.thedailystar.net/-/2005/09/01/d5090101011.htm> (last visited Nov. 9, 2009).

236. See Davis, *supra* note 232, at 19, part 2; Sabrina Tavernise, *24 Hurt as Bombs Shatter New Year's Calm in Baghdad and Kirkuk*, N.Y. TIMES, Jan. 2, 2006, available at <http://tinyurl.com/yjcw7o> (last visited Nov. 9, 2009).

237. The commander of multi-national forces in Iraq stated in 2005 that foreigners are most often responsible for the hundreds of suicide car bombs that have struck Iraq since the handover of the government ministries to Iraqis. General Abizaid similarly concluded that al Qaeda "brings foreign fighters in from Saudi Arabia and from North Africa," countries where Saudis have financially supported extremist armed groups and ideological messages for decades. See Patrick Quinn & Katherine Shrader, *Foreigners Blamed For Iraq Suicide Attacks*, ASSOCIATED PRESS, June 30, 2005, available at http://www.redorbit.com/news/general/159592/foreignersblamed_for_iraq_suicide_attacks/ (last visited Nov. 9, 2009).

238. *Saudis Reportedly Funding Iraqi Sunni Insurgents*, USA TODAY, Dec. 8, 2006, available at http://www.usatoday.com/news/world/iraq/2006-12-08-saudis-sunnis_x.htm (last visited Nov. 9, 2009).

239. IRAQ STUDY GROUP, FINAL REPORT 25 (2006).

Baghdad where thousands of bodies of tortured and mutilated Sunnis have turned up as a result of death squads linked to the Ministry of the Interior, which has been infiltrated by the Mahdi Army.²⁴⁰ The growth of the Mahdi Army militia from 600 members in 2003 to more than 6000 in 2004 was not exactly surprising, given the widespread massacres and targeting of Shi'a.²⁴¹ The sectarian violence drove embittered civilians out of their homes and neighborhoods, and helped recruit new militia members.²⁴² Iran reportedly stepped up its intervention in Iraq as a result of the massacres of Shi'a, as it did in Afghanistan when Shi'a civilians were being massacred by the Saudi-funded Taliban.²⁴³

B. Persecution of Iraqi Religious Minorities

The U.S. State Department, United Nations and the Catholic and Anglican churches warned before the MNF invaded Iraq in 2003 that the conflict might prove disastrous for human rights, as existing ethnic and religious conflicts could spread, causing widespread poverty and refugee flight.²⁴⁴ In the aftermath of war, the State Department reported

240. See USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ 2007 (2008); UNHCR, GUIDELINES ON IRAQI ASYLUM-SEEKERS, *supra* note 211; U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), HUMAN RIGHTS REPORT: 1 SEPTEMBER– 31 OCTOBER 2006, *supra* note 2, at 1; UNAMI, HUMAN RIGHTS REPORT: 1 NOVEMBER – 31 DECEMBER 2006, *supra* note 2, at 1-2, 7-8; UNAMI, HUMAN RIGHTS REPORT: 1 JANUARY – 31 MARCH 2007, *supra* note 2, at 1-2, 7-8.

241. Peter W. Galbraith, *The Mess*, N.Y. REV. BOOKS, Mar. 9, 2006, <http://www.nybooks.com/articles/18771> (last visited Nov. 9, 2009).

242. See *Iraq's Civil War, the Sadrists and the Surge* 2, INT'L CRISIS GROUP, Feb. 7, 2008, available at <http://www.crisisgroup.org/home/index.cfm?id=5286&l=1> (last visited Nov. 9, 2009).

243. See *id.* at 15. Compare AHMED RASHID, TALIBAN ix-x, 15-18, 23-29, 46, 51, 74-6, 83-85, 95, 101-10, 115, 129-33, 158-59, 166, 176-177, 210, 219 (2000) (describing Saudi-backed Sunni Taliban attacks on Shi'a Afghans, particularly the Shi'a Hazara); AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2001, 27 (2001) (describing "[s]ystematic killings and house burnings in Bamiyan" province populated largely by Shi'a members of Hazara ethnic group); Paul Salopek, *Minority Afghans Tell Taliban Atrocities - Details Emerge of Mass Executions*, CHI. TRIB., Nov. 26, 2001, available at <http://www.chicagotribune.com/news/nationworld/chi-0111260264nov-26,0,5368-139.story> (last visited Nov. 9, 2009) ("Gruesome details of mass executions and Balkans-style 'ethnic cleansing' are beginning to emerge from the central province of Bamiyan as journalists visit the region for the first time since it was conquered by the Taliban in 1998 . . . In Bamiyan, the depopulated provincial capital, . . . every home and business has been damaged or demolished.").

244. See USDOS, THE FUTURE OF IRAQ PROJECT, TRANSITIONAL JUSTICE WORKING GROUP, TRANSITIONAL JUSTICE IN POST-SADDAM IRAQ: THE ROAD TO RE-ESTABLISHING THE RULE OF LAW AND RESTORING CIVIL SOCIETY 28 (Mar. 2003), available at <http://tinyurl.com/yfbcyn> ("Saddam Hussein has used every possible means to ensure

"numerous incidents of violence against the Christian community" based on their religion, including the "bombings of 14 churches in Baghdad and Mosul and [a religious building] in Mosul" which killed forty-three and injured 340 civilians.²⁴⁵ In 2007, the State Department reported targeting of Christians.²⁴⁶ In 2008, an updated report emphasized the targeting of "many individuals because of their religious identity" or "secular leanings." A number of Christian religious leaders were kidnapped or killed, along with several Shi'a sheikhs or imams.²⁴⁷ The report cast Iraqi law enforcement as ineffective to prevent or remedy such acts of persecution, due to bias, corruption, and intimidation.²⁴⁸

Similarly, the U.S. Commission on International Religious Freedom told Congress in June 2006 that Iraq's "non-Muslim religious minorities continue to suffer a disproportionate burden of violent attacks and other human rights abuses," including "religiously motivated attacks on . . . non-Muslim women," such as "acid attacks, kidnappings, and killings."²⁴⁹ The Commission noted that Iraqi Christians "have been

his survival in power. This has taken a heavy human and material toll . . ."); *id.* ("To find support in the region and within Iraq [Saddam Hussein] has played the sectarian card in his policies and official propaganda. He has been suggesting to Sunni army officers that they are the first to be targeted in the coming change."); *id.* at 29 ("Saddam Hussein and his cohorts are guilty of war crimes, genocide, crimes against humanity, extrajudicial killings, plunder, rape, torture, displacement and unlawful expropriation of property. These atrocities have created entire groups of victims impatient for revenge and score-settling when the opportunity presents itself after a regime change with a possible breakdown of security structures . . ."); *id.* ("The period immediately after regime change might offer these criminals an opportunity to engage in acts of killing, plunder, looting, etc."); USDOS, MEMO TO UNDER SECRETARY OF STATE PAULA DOBRIANSKY (Feb. 7, 2003), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB163/iraq-state-03.pdf> (last visited Nov. 9, 2009) (describing Defense Department's "reluctance to take on 'policing' roles," and "failure to address short-term public security and humanitarian assistance concerns could result in serious human rights abuses."); *War with Iraq "Unacceptable": Anglican Archbishop*, XINHUA NEWS AGENCY (P.R.C.), Feb. 2, 2003; Andrew Webster, *Anglicans Oppose War with Iraq*, THE AGE (Austl.), Oct. 8, 2002; Peter Steinfels, *Beliefs; Churches and Ethicists Loudly Oppose the Proposed War on Iraq, But Deaf Ears Are Many*, N.Y. TIMES, Sept. 28, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9802E5D61638F93BA1575AC0A-9649C8B63> (last visited Nov. 9, 2009); Jo Dillon, *'Im Refugees' Will Flee Iraq War*, THE INDEPENDENT (U.K.), Dec. 29, 2002, available at <http://www.casi.org.uk/discuss/2003/msg00021.html> (last visited Nov. 9, 2009).

245. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS: IRAQ (2004), *supra* note 2.

246. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2006), *supra* note 2.

247. *Id.*

248. *Id.*

249. *The Plight of Religious Minorities: Can Religious Pluralism Survive? Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations of the H. Comm. on International Relations*, 109th Cong. 109-202 (2006) (testimony of

forced to fend for themselves in a continuing climate of impunity, and they remain particularly vulnerable given their lack of any tribal or militia structure to provide for their security.”²⁵⁰ The Commission’s 2007 report found “religiously motivated discrimination” against Assyrians, including confiscation of property, and denial of access to “key social benefits, including employment and housing.”²⁵¹ It added that: “Combined with non-state sources of instability, including violence from foreign jihadis and Sunni insurgents, the [Kurdistan Regional Government’s] practices add to the continuing flight of Iraq Christians and other ethnic and religious minorities to sanctuaries outside the country.”²⁵²

The U.N. Assistance Mission in Iraq (UNAMI) has issued even more dramatic reports on the persecution of religious minorities. In its report covering the spring of 2007, it stated:

Throughout May and June, UNAMI also received information indicating a rise in the number of attacks and forced expulsion of members of the Christian community, in particular in Baghdad’s al-Dora district. A number of families received threats, according to accounts received by UNAMI, urging them to leave their homes and their neighborhood on pain of death. Some families described how the so-called Mujahidin of al-Dora, in control of the area at the time, killed their relatives and left their bodies on the street as a warning. Residents stated they were afraid to retrieve the bodies for burial, waiting until an MNF or Iraqi police patrol picked them up.²⁵³

In an incident that occurred in April, gunmen at a makeshift checkpoint removed Yezidi textile workers from a bus and executed them all without trial or mercy.²⁵⁴ The truck bombings carried out against Yezidi areas in the Sinjar district destroyed more than 500 homes,

Nina Shea, Vice Chair, U.S. Comm’n on Int’l Religious Freedom), *available at* http://commdocs.house.gov/committees/intlrel/hfa284-30.000/hfa28430_of.htm (last visited Nov. 9, 2009).

250. *Id.*

251. Mindy Belz, *Binding Up the Wounds of War*, WORLD MAG., Sept. 21, 2007, *available at* <http://www.christiansofiraq.com/bindingwoundssep307.html> (last visited Nov. 9, 2009).

252. CIRF, *Annual Report 2007*, *supra* note 2. *See also* USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ (2007), *supra* note 2.

253. UNAMI, HUMAN RIGHTS REPORT, 1 APRIL – 30 JUNE 2007, 14, (2007), *available at* <http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf> (last visited Nov. 9, 2009).

254. *See id.* at 15.

damaged 2000 homes, orphaned 400 mostly Yezidi children, and widowed at least 100 Yezidi women.²⁵⁵ Moreover, “ongoing targeted attacks” against Assyrian Christians in Baghdad and Mosul killed dozens of them during the last six months of 2007; for this reason, “[e]thnic and religious minorities in various parts of Iraq, including those living in disputed territories in the northern governorates, remained vulnerable to targeted attacks by armed militia.”²⁵⁶

The press has reported that terrorists have killed hundreds of Assyrian Christians for engaging in such supposedly Christian or Western behaviors as appearing in public as women with their faces or legs uncovered, operating convenience stores that sell alcohol, doing the laundry or janitorial or translation work for multi-national forces or civilian contractors, bearing fashionable Western haircuts or clothes, and listening to Western music.²⁵⁷ For such activities, Assyrian children have been beheaded and in one case literally crucified.²⁵⁸ Terrorists have blown up or seriously damaged forty churches and murdered about six priests and bishops.²⁵⁹

U.N. reports also establish that persecution of Iraqi religious minorities is targeted rather than “random.” The UNHCR reported that “Christians are particularly targeted by hard-line extremists.”²⁶⁰ The targeted acts of violence cited by UNHCR included bombings, attacks on shops and shop owners, harassment, kidnapping, and torture.²⁶¹ Mandaeans were subjected to “regular . . . discrimination and persecution” in the form of attacks, kidnappings, robbery, theft of property, threats, rape, abuse and torture.²⁶² Similarly, the Yezidis have

255. UNAMI, HUMAN RIGHTS REPORT, 1 JULY – 31 DECEMBER 2007, *supra* note 2.

256. *Id.* at 16-17.

257. See Kaplan, *supra* note 138, at 14.

258. See *id.*; Loretta Waldman, *A Voice for an Iraqi Minority*, HARTFORD COURANT, Nov. 25, 2006, at B3.

259. See *Plight of Religious Minorities: Can Religious Plurality Survive?*, *supra* note 249 (testimony of Rosie Malek-Yonan).

260. UNHCR, GUIDELINES ON IRAQI ASYLUM-SEEKERS, *supra* note 211, at 9.

261. See *id.* at 10. See also UNHCR, TRAUMA SURVEY IN SYRIA HIGHLIGHTS SUFFERING OF IRAQI REFUGEES, (2008), available at <http://www.unhcr.org/479616762> (last visited Nov. 9, 2008); UNHCR, STATISTICS ON DISPLACED IRAQIS AROUND THE WORLD, (2007), available at <http://www.unhcr.org/egibin/texts/vtx/search?page=search&docid=470387fc2&query=statistics%20on%20displaced%20iraquis%20around%20the%20world> (last visited Nov. 9, 2009); UNHCR, UNHCR'S ELIGIBILITY GUIDELINES FOR ASSESSING THE INTERNATIONAL PROTECTION NEEDS OF IRAQI ASYLUM-SEEKERS (2007), available at <http://www.unhcr.org/46dec4da2.html> (last visited Nov. 9, 2009); UNHCR, 2005 UNHCR STATISTICAL YEARBOOK COUNTRY DATA SHEET – IRAQ (2007), available at <http://www.unhcr.org/4641be5c0.html> (last visited Nov. 9, 2009).

262. See UNHCR, GUIDELINES ON IRAQI ASYLUM-SEEKERS, *supra* note 211, at 10-12.

suffered “[t]argeted attacks,” including “threats, assassinations and public defamation campaigns.”²⁶³

Iraq’s Christian population has been cut nearly in half since 2003, from over a million down to between 600,000 and 800,000.²⁶⁴ Among the Iraqis registered with UNHCR in Syria in the eighteen months or so prior to March 2005, over one-third are Christians, compared to fewer than five percent of Christians in Iraq’s population as a whole.²⁶⁵ A Chaldean painter from Baghdad who fled to Syria after his gallery and house were firebombed told the media that: “Many of the refugees were maimed by their attackers.”²⁶⁶ Many Christians have even fled to Lebanon, despite its own political instability and religious tensions.²⁶⁷

Iraqi population estimates indicate that Iraqi religious minorities such as Assyrians and Mandaeans may be suffering from particularly severe persecution, as the official reports of the U.S. and U.N. also establish. Table 1 sets forth these estimates from 2003 and 2008:

263. *Id.* at 79.

264. See USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008: IRAQ (2008), *supra* note 2; USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2002: IRAQ (2002), available at <http://www.state.gov/g/drl/rls/irf/2002/13996.htm> (last visited Oct. 31, 2009); *The Plight of Religious Minorities*, *supra* note 249; Paul Isaac, *The Urgent Reawakening of the Assyrian Question in an Emerging Iraqi Federalism: The Self-Determination of the Assyrian People*, 29 N. ILL. U. L. REV. 209, 213 (2008) (“According to some reports, nearly half of Iraq’s indigenous Christian population is now living outside the country.”); Cardinal Bagnasco: *Events in India Underscore Urgency of Protecting Religious Freedom*, ASIANEWS (ITALY), Sept. 22, 2008, available at <http://www.asianews.it/index.php?l=en&art=13288> (last visited Nov. 9, 2009).

265. UNHCR, BACKGROUND INFORMATION ON THE SITUATION OF NON-MUSLIM RELIGIOUS MINORITIES IN IRAQ (2005), *supra* note 3.

266. Assyrian Int’l News Agency, *Iraq Is the Fastest-Growing Refugee Crisis in the World*, Dec. 7, 2006, available at <http://www.aina.org/news/20061207013439.htm> (last visited Oct. 31, 2009) (describing a forthcoming policy bulletin from Refugees International).

267. See HRW, ROT HERE OR DIE THERE, *supra* note 135.

Table 1: Evidence of Religious/Sectarian Targeting from the U.S. Department of State

<i>Religious and/or Sectarian Group</i>	<i>Population Estimate, Pre-2003</i>	<i>Population Estimate, 2008</i>
Shi'a Arabs, Kurds, and Turkmen	13.2-14.3 million	16.9-18.3 million
Sunni Arabs, Kurds, and Turkmen	7-8.1 million	8.7-10.7 million
Assyrian ("Chaldo-Assyrian" Christians)	0.8-1.2 million	0.5-0.8 million
Yezidis	Unknown	0.5-0.6 million
Mandaean	60,000	<6,000

Sources: USDOS, International Religious Freedom Report 2008: Iraq; USDOS, International Religious Freedom Report 2002: Iraq (citing Iraq's 1997 census for prewar population estimates)

Even when the State Department's human rights and religious freedom reports are admitted as evidence, they are sometimes misread and distorted by immigration judges. For example, at one asylum hearing in May 2007, the State Department's 2006 International Religious Freedom Report for Iraq and 2006 Country Report on Human Rights Practices for Iraq were admitted as exhibits.²⁶⁸ The IJ concluded that these reports showed that "the present Iraqi government is committed to protecting its multi-religious society."²⁶⁹ One of these reports did declare, with very substantial caveats, that the Iraqi government "has not engaged in the persecution of any religious group, calling instead for tolerance and acceptance of all religious minorities."²⁷⁰ But more to the point, the reports documented "general lawlessness that permitted criminal gangs, terrorists, and insurgents to victimize . . . persons of all ethnicities and religious groups," and that "many individuals were targeted because of their religious identity or secular leanings."²⁷¹ These findings confirm the asylum-seeker's testimony at the 2007 hearing that there is "no official

268. See, e.g., *Bobo*, 2009 U.S. App. LEXIS 20422, at *7.

269. *Id.* at *12-13.

270. USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT: IRAQ (2006), at 576 available at http://ftp.resource.org/gpo.gov/prints/110/s_38274.pdf (last visited Nov. 9, 2009). See also USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: IRAQ (2006), *supra* note 2.

271. USDOS, INTERNATIONAL RELIGIOUS FREEDOM REPORT, *supra* note 270, at 580.

government” authority, and that the government cannot or will not do anything to protect the population from persecution.²⁷²

One might have expected, given the asylum-seeker’s testimony and confirming State Department reports, that the courts would investigate whether the government is legitimate, well-organized, and capable of protecting the Assyrian Christians of Iraq, the group to which the petitioner belonged. Such an inquiry is necessary to apply the standard invoked in this case, whether there is a pattern or practice of persecution against the petitioner’s group, or a “systematic, pervasive, or organized effort to kill, imprison, or severely injure members of the protected group, and this effort must be perpetrated or tolerated by state actors.”²⁷³ This did not occur, as the Seventh Circuit upheld the IJ’s determination that the Iraqi government is committed to religious freedom and prevents terrorist attacks against religious minorities.²⁷⁴

The links between the Iraqi government and persecution of religious minorities are much more abundant and complex than the case law suggests, even according to U.S. officials who support the current Iraqi government. To understand why, some background context is needed.

In the 1980s, ethnic persecution in Iraq reached its peak. By 1987, the regime had designated certain villages as “prohibited,” subjected them to a blockade of food, and ordered the armed forces to kill any human being or animal present in them.²⁷⁵ The government formed “National Defense Battalions” of pro-government Kurds to plunder villages and hunt down deserters.²⁷⁶ Indeed, the *peshmerga* that has controlled northern Iraq since April 1991 is made up in substantial part of former pro-government militia.²⁷⁷ For more than a decade after 1991, the United States, Britain, the Netherlands, and France preserved

272. See *Bobo*, 2009 U.S. App. LEXIS 20422, at *7.

273. See *id.* at 12 (quoting *Mitreva v. Gonzales*, 417 F.3d 761, 765 (7th Cir.2005)).

274. See *id.* at *12-13.

275. Decree No. 28/3650, Mar. 6, 1987, Northern Bureau Command of the Ba’ath Party, quoted in Center of Halabja against Anfalization and Genocide of the Kurds, “Anfal:” *The Iraqi State’s Genocide Against the Kurds* 43-46 (2007), available at http://www.wadinet.de/news/dokus/Anfal_CHAK.pdf (last visited Oct. 31, 2009).

276. See Max van der Stoep, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Iraq, Report on the Situation of Human Rights in Iraq to the U.N. Economic and Social Council, ¶ 95, E/CN.4/1993/45, (Feb. 19, 1993), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/dae4fa61e79b30c6c1256e-580058f523/%24FILE/G9310695.pdf> (last visited Nov. 9, 2009).

277. See MIDDLE EAST WATCH AND PHYSICIANS FOR HUMAN RIGHTS, UNQUIET GRAVES: THE SEARCH FOR THE DISAPPEARED IN IRAQI KURDISTAN 5-7 (Feb. 1992), available at <http://books.google.com/books?id=C-OeFr6EIVkC>.

peshmerga control over northern Iraq with fighter aircraft based in Turkey.²⁷⁸

In the 1990s, a civil war took place between two of the opposition groups organized by the United States into an anti-Saddam coalition, the Kurdistan Democratic Party (KDP) of Massoud Barzani and the Patriotic Union of Kurdistan (PUK) of Jalal Talabani. The fighting killed many Kurds and Assyrians and displaced tens or even hundreds of thousands of villagers.²⁷⁹ After a Kurdish rebellion and United States, United Kingdom, and French intervention in 1991, the Saddam Hussein regime had ceded control over many areas of northern Iraq to the KDP and PUK.²⁸⁰ The KDP, however, alleging that the PUK received Iranian aid in the civil war, invited the Iraqi army to retake the northern city of Arbil from PUK forces in 1995, which resulted in the “indiscriminate shelling” by Iraqi artillery of Arbil and other areas of northern Iraq.²⁸¹ The Iraq Liberation Act of 1998 declared regime change to be the policy of the United States, based on Iraq’s war crimes and poor human rights record. President Bill Clinton designated the Supreme Council for Islamic Revolution in Iraq (SCIRI), a Shi’a religious movement founded in Iran in the 1980s, along with the KDP, PUK, and the Movement for a Constitutional Monarchy, as being qualified to receive \$97 million in U.S. training and arms.²⁸² After the fall of the Saddam Hussein regime, the security forces of the PUK and KDP detained thousands of people without trial, subjecting some of them to electric shocks and others to unlawful disappearances.²⁸³ More than two-thirds of detainees of the PUK and KDP interviewed by the United Nations in 2007 reported being tortured.²⁸⁴

278. *See id.* at 7-9.

279. *See* UK Home Office Immigration and Nationality Directorate Country Assessment – Iraq (Apr. 1, 2002); Alastair Bruton, Letter to the Editor, *Christian Sects in Kurdish Lands Dwindle*, N.Y. TIMES, May 24, 1993, available at <http://www.nytimes.com/1993/05/24/opinion/l-christian-sects-in-kurdish-lands-dwindle-021793.html> (last visited Nov. 9, 2009).

280. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IRAQ 2002.

281. U.N.GAOR, 51st Sess., U.N. Doc. A/51/496 (Oct. 15, 1996), ¶ 91-92, available at <http://www.un.org/documents/ga/docs/51/plenary/a51-496.htm>. *See also* Hugh Pope, *Allies Set to Quiz Barzani over Alliance with Baghdad*, THE INDEPENDENT (U.K.), Sept. 19, 1996, available at <http://www.independent.co.uk/news/world/allies-set-to-quiz-barzani-over-alliance-with-baghdad-1363978.html> (last visited Nov. 9, 2009).

282. *See* Iraqi Liberation Act of 1998, Pub. L. No. 105-338, 112 Stat. 3178 (1998); VOLKER FRANKE, TERRORISM AND PEACEKEEPING: NEW SECURITY CHALLENGES 159-70 (Greenwood Publ’g Group 2005).

283. *See* *Iraq Kurdish Force ‘Beyond Law’*, BBC NEWS (U.K.), Apr. 14, 2009, available at <http://news.bbc.co.uk/2/hi/7997908.stm> (last visited Nov. 9, 2009).

284. *See* UNAMI, HUMAN RIGHTS REPORT, 1 APRIL – 30 JUNE 2007, *supra* note 253, ¶ 88.

On March 1, 2004, the U.S.-backed Iraqi Governing Council released a transitional constitution that made Islam the official religion of Iraq, and prohibited secular laws that contradicted the “universally agreed tenets of Islam.”²⁸⁵ The Ba’athist laws enacted prior to the entry into force of the transition constitution remained in effect unless rescinded under the new constitution.²⁸⁶ On May 28, 2004, Iyad Allawi, the head of a political movement of ex-Ba’athists, began prime minister of Iraq.²⁸⁷ In the elections of January 30, 2005, the Islamic revolutionary parties SCIRI and Da’wa won 48.2 percent of the vote in the first major elections since 1958.²⁸⁸

On April 7, 2005, Da’wa Party leader Ibrahim al-Ja’afari became the first elected prime minister of Iraq.²⁸⁹ On October 15, 2005, Iraq’s permanent constitution was approved in a national vote.²⁹⁰ It declared that Islam would be the official religion and source of legislation, whose provisions no law may contradict.²⁹¹ As a senior U.S.-appointed constitutional adviser to the Coalition Provisional Authority described the thinking that led to this article of the constitution:

[I]t is unlikely that the majority of Iraqis would agree to the omission from their constitution of a provision describing Islam as the official religion of the state. Every Arab constitution has such a provision. The hundreds of Iraqis I have spoken to about this issue in Iraq, both Sunnis and Shi’is, balk at the idea that

285. See Law of Administration for the State of Iraq for the Transitional Period, art. 7, adopted Mar. 8, 2004, available at http://www.servat.unibe.ch/icl/iz00000_.html.

286. See *id.*, art. 26(A).

287. See Hannah Fischer, *Iraqi Police, Civilian, and Security Forces Casualty Estimates*, IRAQ AT THE CROSSROADS 25 (Amy V. Cardosa ed. Nova Science Publishers, 2006).

288. See Andrzej Kapiszewski, *The Iraqi Elections and Their Consequences: Power-sharing, a Key to the Country’s Political Future*, LOOKING INTO IRAQ: IRAQ AT THE CROSSROADS 13-20 (Walter Posch ed., European Union Institute for Security Studies 2005).

289. See *id.* at 16, 20.

290. See *id.* at 20, 23.

291. See IRAQ CONST. art. 2 (2005). See also *id.*, art. 89(2) (“The Federal Supreme Court shall be made up of number of judges, and experts in Islamic jurisprudence and law experts”); Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT’L L. 645, 730 (2006) (“Regardless of whether Sunnis or Shiites are responsible for this judicial activism, arguably the Iraqi positive law supports this religious discrimination in favor of Islamic insurgents.”).

their constitution would declare the formal separation of religion and state.²⁹²

Every Arab state whose constitution describes Islam has the official religion of the state has a poor record on religious freedom, according to the State Department. Among the known results of such a provision at the time that it was being advocated by a U.S. adviser are:

- Laws barring some religious minorities from government employment (Egypt and Syria);
- militias roving the streets to compel religious piety or prohibit non-Islamic behavior (Iraq, Lebanon, and Saudi Arabia);
- laws prohibiting or providing for extremely rigorous regulations on the construction or repair of churches or other non-Islamic or non-Sunni places of worship (Egypt, Kuwait, Libya, Saudi Arabia, and Yemen);
- laws prohibiting criticism of Islam (Bahrain, Egypt, Jordan, Lebanon, and Morocco);
- laws prohibiting public assembly for purposes of practicing Christianity, “heretical” forms of Islam, or indigenous polytheism (Algeria, Tunisia, Egypt, Kuwait, Saudi Arabia, and Tunisia);
- laws prohibiting the importation or distribution of non-Islamic literature (Algeria, Egypt, Jordan, Kuwait, Morocco, Saudi Arabia, Tunisia, and Yemen);
- laws prohibiting the creation of religious political parties like Europe’s Christian Democrats (Egypt and Tunisia);
- laws compelling Islamic religious instruction in school in accordance with state-designated doctrine, or prohibiting religious schools not approved by the government (Algeria, Jordan, Saudi Arabia, and Tunisia);
- laws prohibiting religious practices that conflict with Shari’a law (Egypt, Jordan, and Saudi Arabia); and
- preferential funding and licensing of state-approved religious leaders, and discrimination against and/or detention of unapproved leaders or their followers (Algeria, Bahrain, Egypt, Libya, Palestinian Authority, and Saudi Arabia).²⁹³

292. *Building Democratic Institutions in Iraq and the Middle East, Hearing Before the Comm. on Foreign Relations*, 107th Cong., 9-10 (2003) (statement of Noah Feldman).

293. USDOS, REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, at 518, 521-25, 551-53, 557-59, 563-64, 567-73, 579-92, 597-98 (Washington: U.S. Government Printing Office 2002).

On December 15, 2005, the first elections under the permanent constitution were conducted, and fifty-nine percent of the vote was won by a coalition led by the Supreme Council for Islamic Revolution in Iraq. Nearly six months later, the full Iraqi government under the new constitution assumed power.²⁹⁴ In its report on this government's first year in office, the State Department noted that the following threats to human life and freedoms existed:

Pervasive climate of violence; . . . arbitrary deprivation of life; . . . torture and other cruel, inhuman, or degrading treatment or punishment; impunity; poor conditions in pretrial detention facilities; . . . an immature judicial system lacking capacity; . . . restrictions on religious freedom; large numbers of internally displaced persons (IDPs); lack of transparency and widespread corruption at all levels of government; . . . [and] discrimination against women, ethnic, and religious minorities.²⁹⁵

In the north, the State Department reported that "[t]here were numerous reports of Kurdish authorities discriminating against minorities," basically in the nature of driving them from their homes by arresting and detaining them without due process, encroaching upon their properties to build settlements, and pressuring minority schools to teach in the Kurdish language.²⁹⁶

On April 21, 2008, the BIA granted a motion to reopen a removal order issued in 2005, on the basis of changed country conditions in light of the 2006 and 2007 reports of the State Department and U.S. Commission on International Religious Freedom.²⁹⁷ In its first report after the new constitution had been in place for a significant period of time, the U.S. Commission on International Religious Freedom documented "grave conditions for non-Muslims in Iraq, including ChaldoAssyrian Christians, Yazidis, and Sabeen Mandaeans, who continue to suffer pervasive and severe violence and discrimination at the

294. See Megan K. Stack & Borzou Daragahi, *A New Iraqi Government Takes Office*, L.A. TIMES, May 21, 2006, available at <http://articles.latimes.com/2006/may/21/world/fg-iraq21> (last visited Oct. 31, 2009).

295. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IRAQ (2006), *supra* note 2.

296. USDOS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IRAQ (2007), *supra* note 2. See also Youash, *supra* note 3, at 361.

297. *In re George Yousif Amera Yousif Mancur*, No. A71 686 005, 2008 WL 2079397 (BIA Apr. 21, 2008).

hands of both government and non-government actors.”²⁹⁸ For this reason, the Commission decided in May 2007 to place Iraq on a Watch List of countries of concern as provided by the International Religious Freedom Act of 1998, with Iraq joining such other violators of religious freedom as Afghanistan, Belarus, Cuba, Indonesia, and Nigeria.²⁹⁹ More recently, it has documented that the Iraqi government “continues to commit and tolerate severe abuses of freedom of religion or belief, particularly against the members of Iraq’s smallest, most vulnerable religious minorities – ChaldoAssyrian and other Christians, Sabeen Mandaeans, and Yazidis.” The violence is “targeted” and is characterized by sufficiently severe attacks, “including kidnapping, rape, murder, torture, forced conversion, and the destruction or seizure of property,” that such acts “seriously threaten [religious minorities’] continued existence in the country.”³⁰⁰

The situation in Nineveh province, a diverse area containing the city of Mosul and the homelands of several minority groups, represents an extreme case. It was controlled for some time by Kurdish *peshmerga*, and in some areas even by terrorists and insurgents.³⁰¹ After the insurgents and terrorists drove half of the Assyrians away by selectively murdering them,³⁰² a political party linked to the violence won a majority of the seats on Nineveh’s provincial council.³⁰³ This occurred in a

298. U.S. Commission on International Religious Freedom, USCIRF Names 11 Countries of Particular Concern, Puts Iraq on Watch List (May 2, 2007), *available at* http://www.uscifr.gov/index.php?option=com_content&=1&id=185 (emphasis added) (last visited Oct. 31, 2009).

299. *See id.*

300. CIRF, *Annual Report 2007*, *supra* note 2, at 8, 51.

301. *See id.* at 44 (“Since 2003, Kurdish *peshmerga* security forces and political parties have moved into these territories, effectively establishing de facto control over many of the contested areas.”); Associated Press, *Iraqi Military: Al-Qaida Fleeing Mosul*, MSNBC, May 25, 2008, *available at* <http://www.msnbc.msn.com/id/24819905/wid/7468326/6.a10984/6.b10984/6.b10984/1?cm=WaterCooler-SC> (noting that areas of Mosul and Sadr City “have been under the control of Shiite militias or Sunni insurgents”) (last visited Nov. 9, 2009).

302. *See* Hisham Mohammed Ali, *Christians Abandon Iraqi City*, MCCLATCHY-TRIB. INFO. SERVICES, Nov. 28, 2008, *available at* <http://www.ankawa.com/english/?p=2078#more-2078>; *Christians Growing Tense in Iraq*, UPI, Jan. 16, 2009, <http://www.upi.com> (accessed from homepage but selecting search and entering key phrase “Christians growing tense in Iraq”) (last visited Nov. 9, 2009); Leila Fadel, *Thousands of Christians Flee Killings in Mosul*, MCCLATCHY NEWSPAPERS, *available at* <http://www.mcclatchydc.com/255/story/53808.html>; Erica Goode & Suadad Al-Salhy, *Violence in Mosul Forces Iraqi Christians to Flee*, N.Y. TIMES, Oct. 11, 2008, *available at* http://www.genocidewatch.org/images/Iraq_08_10_11_Violence_in_Mosul_Forces_Iraqi_Christians_to_Flee.doc (last visited Nov. 9, 2009).

303. *See* Sam Dagher, *Another Politician Is Killed as Iraqi Voting Draws Near*, N.Y. TIMES, Jan 19, 2009, at A8 (“Nineveh, wedged between Iraqi Kurdistan and Syria and

January 2009 election that some Iraqis viewed as corrupt and rigged in favor of Prime Minister al-Maliki's coalition of fundamentalists, Ba'athists, and purportedly reformed Sunni terrorists and insurgents.³⁰⁴

close to Turkey, remains a focal point for some Sunni insurgent groups linked to Al Qaeda in Mesopotamia, the homegrown terrorist group that American officials say is led by foreigners.”); *id.* (noting that Hassan Zaidan al-Luhaibi, an army general who ran Iraq's military academy and led troops in the 1990 invasion of Kuwait and was arrested by coalition forces for suspected ties to the insurgency, entered into “in talks to run in Nineveh [elections] alongside Al Hadba, a Mosul-based Sunni political coalition known for its hostility toward Kurdish parties”); Campbell Robertson & Stephen Farrell, *Sunnis Turn to Politics and Renew Strength*, N.Y. TIMES, Apr 18, 2009, at A4 (“In the first years after the invasion, Sunni Arabs, the minority that long ran Iraq and who make up the majority in the northwest [province of Nineveh], mostly stayed away from politics. Many joined or supported the insurgency as the American-allied Kurds took power by default, giving them a political and military ascendance out of all proportion to their numbers in Nineveh Province.”); Sam Dagher, *Tensions in a Northern Iraqi Province, Stoked by Elections in January, Heat Up*, N.Y. TIMES, May 18, 2009, at A4 (describing how a wealthy businessman with ties to Ba'ath Party, possible insurgents, and Arab sheikhs became a leader of Al Hadba Party, won the provincial elections, and “was chosen as the new governor” of Nineveh province, and how several Arab tribal leaders accused their new governor “of being in league with violent extremists,” saying that persons affiliated with terrorist organization Islamic State of Iraq in 2005 said “Vote for Al Hadba” in 2009).

304. See Khalid al-Ansary, *Iraqi PM, Anti-U.S. Group Reach Local Alliance Deal*, REUTERS, Feb. 21, 2009, available at <http://www.reuters.com/article/GCA-GCA-iraq/idUSTRE51K1J320090221> (last visited Nov. 9, 2009) (“Hassan al-Sneid, a lawmaker from Maliki's Dawa Party, said the agreement was just about wrapped up between the Sadrists and the Dawa-led coalition, which trounced other Shi'ite groups in what was Iraq's most peaceful vote since the 2003 invasion.”); Dagher, *Tensions*, *supra* note 303, at A4 (describing how “predominantly Sunni Arab coalition, Al Hadba, which won 19 of the 37 seats on the provincial council, froze out the second-place Kurdish coalition from all senior positions in the new government.”); Sam Dagher, *Fractures in Iraq City as Kurds and Baghdad Vie*, N.Y. TIMES, Oct. 28, 2008, at A1 (noting that Prime Minister al-Maliki favored the Al-Hadba coalition and wanted a former Ba'athist army general to become “next governor of Nineveh to promote a strong central government,” and that other leaders of Al Hadba included “a former Iraqi Army commander who led the invasion of Kuwait in 1990, and a businessman with strong ties to Saddam Hussein's sons, Uday and Qusay”); Sam Dagher, *Another Politician Is Killed*, *supra* note 301, at A8 (noting that Nineveh province “remains a focal point for some Sunni insurgent groups linked to Al Qaeda in Mesopotamia, the homegrown terrorist group that American officials say is led by, and that a Ba'athist army general who “was arrested by coalition forces for suspected ties to the insurgency, entered into “in talks to run in Nineveh [elections] alongside Al Hadba, a Mosul-based Sunni political coalition known for its hostility toward Kurdish parties”); Alissa J. Rubin, *Prime Minister's Party Wins in Iraqi Vote but Will Need to Form Coalitions*, N.Y. TIMES, Feb. 6, 2009, at A6 (noting that allegations of ballot stuffing and biased election workers and election commission officials were leveled after the 2009 provincial elections won by Al Hadba in Mosul); Editorial, *Iraq Voted. Did Democracy Win?*, N.Y. TIMES, Feb. 3, 2009, at A27 (remarking that an Iraqi blogger noted that “Many people I spoke to had no faith in the credibility of the elections, thinking that the winners were already decided. But they

VII. CONCLUSION

Iraq's borders have been shattered by a series of wars, massacres, and campaigns of torture and persecution against religious minorities and ethno-sectarian rivals. The trend towards large-scale flight began prior to 2003, with movements of hundreds of thousands of Iraqis prior to 1980, and millions in the early 1990s. U.N. agencies predicted that a war of regime change in 2003 would cause millions more refugees to flee. The exodus of Iraqis from their cities and villages exceeded even these dire projections, with up to five million persons displaced.

U.S. laws and policies have blocked all but a relatively small fraction of Iraqi refugees from seeking asylum in the United States. The doctrine of changed circumstances renders many of their personal stories of torture and disappearances moot. The doctrine of individualized persecution deprives them of a key source of evidence of persecution according to the U.N., that is, stories about what happened to members of their family or ethnic or religious group. Other U.S. policies implemented after September 11, including a moratorium on Iraqi refugees and the replacement of immigration judges with more skeptical ones, have exacerbated the effect of these doctrines.

U.S. law has begun to give Iraqi asylum claims a fairer hearing, and to loosen existing quotas, but much remains to be done to bring U.S. practice into conformity with the 1967 Refugee Protocol and the Torture Convention. This Article has argued that courts should look to past persecution of an individual and his or her ethnic and religious group as evidence of a well-founded fear of future persecution, a position supported by the UNHCR. It has also demonstrated that some U.S. courts remain ignorant about the extent of targeted persecution of Iraq, and must review the reports of the State Department and the U.N. more closely if they are to issue opinions that are grounded in fact, rather than wishful thinking or broad generalizations.

wanted to do their part, hoping they might be wrong. Others voted to satisfy their consciences -- especially after some religious leaders announced that it would be a sin not to participate.”).