

# Saddam Hussein's Records of Atrocity: Seizure, Removal, and Restitution

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## Abstract

Almost a decade following the 2003 American invasion of Iraq, most Iraqi state documents stemming from Saddam Hussein's regime remain in the possession of the United States. U.S. military forces seized the majority of them in the invasion and occupation for intelligence exploitation, approximately a hundred pages of records and thousands of audio- and videotapes from Hussein's various bureaucracies of repression. Another 5.5 million pages of secret police files chronicling Hussein's Anfal genocidal campaign in Iraqi Kurdistan in the middle to late 1980s also are in American hands. These were seized by Kurdish forces in the uprising in northern Iraq in March 1991 and removed by the Pentagon in 1992 and 1993 to American soil for safe storage and analysis. Moreover, in 2005, an additional seven million pages that once belonged to the Ba'ath Party and security forces were also spirited out of Iraq by military transport with the assistance of the Iraqi Memory Foundation, a private Washington, D.C.-based group that entered Iraq as an American defense contractor to preserve the records of Saddam Hussein's regime. Each of these various caches of state security documents has been removed from Iraq under highly unique circumstances as a result of internal rebellion and more than a decade of hostilities between the United States and Iraq. This article examines the circumstances surrounding these removals, their custody and use, and the status and limits of the international laws of war regarding their capture and return.

Nine years after the 2003 American invasion of Iraq, most Iraqi state documents stemming from Saddam Hussein's regime and his security forces remain in the hands of the United States. The Pentagon seized the majority of them in the invasion and occupation, approximately a hundred million pages of documents and thousands of audio- and videotapes from Hussein's various bureaucracies of repression throughout Iraq. The documents

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were exploited not only for immediate military intelligence and operations, but also in the search for weapons of mass destruction (WMD). Another 5.5 million pages of secret police files, chronicling Hussein's notorious Anfal genocide against the Kurds in the 1980s, also are in American custody. These documents were captured by the Kurdish peshmerga in the 1991 Kurdish uprising in northern Iraq and then transported to the United States in 1992 and 1993 for safekeeping and analysis according to an agreement that recognizes Kurdish ownership of them. An additional seven million pages of documents that once belonged to the Ba'ath Party and security forces were also spirited out of Iraq by the Pentagon with the assistance of Kanan Makiya, a former Iraqi dissident and founder of the private Iraq Memory Foundation (IMF), a Washington, D.C.-based group that entered Baghdad in 2003 to preserve the records of Saddam Hussein's regime. The documents were later deposited at the Hoover Institution at Stanford University amid much controversy.

These various caches of state security documents have been removed from Iraq as a result of more than a decade of hostilities between the United States and Iraq; each has been removed from the country under unique circumstances; each has been scanned and analyzed by U.S. intelligence; each remains outside the control of the current post-Hussein Iraqi government; and each illustrates the limits of international law regarding their return. These circumstances have attracted considerable international controversy and charges of plunder. The director general of the Iraq National Library and Archives, Saad Eskander, has denounced the "illegality" of both the U.S. seizure of records in the invasion and occupation as well as the IMF-Hoover deal, demanding the repatriation of all Iraqi records outside the country.<sup>1</sup> The validity of this assertion and other charges of plunder may be problematic given the current limitations of the international legal regime and the murky circumstances surrounding the capture or taking of these stores of documents in the Iraqi theater of war, occupation, and internal rebellion. What follows is an examination of the circumstances surrounding the seizure and removal of these Iraqi records, their custody and use, and the status and limits of the international laws of war regarding their capture and return. The first part briefly examines the cultural property protections in the laws of war, including the disposition of captured records and the absence of provisions governing their restitution at the end of conflicts. The second part analyzes the state of captured documents in the Pentagon's possession resulting from the 2003 invasion and occupation of Iraq. It discusses the history of U.S. repatriation of seized materials, examines the various levels of Iraqi document and media exploitation for strategic advantage and occupation, explores the controversies surrounding their custody and use,

<sup>1</sup> Saad Eskander, "Minerva Research Initiative: Searching for the Truth or Denying the Iraqis the Rights to Know the Truth?," Social Science Research Council, "The Minerva Initiative," 29 October 2008, <http://essays.ssrc.org/minerva/2008/10/29/eskander/>, accessed 27 January 2010.

and analyzes the limitations of the laws of armed conflict regarding their repatriation. The third part analyzes the seizure of the Anfal documents by the Kurdish peshmerga under Additional Geneva Protocol II, their transfer to American soil, their use for human rights purposes, and the issue of their repatriation. Finally, the fourth part examines the taking of millions of Ba'ath Party documents by the Iraq Memory Foundation, their deposit at the Hoover Institution, the controversy regarding these events, and the limitations of international law relating to their taking and return.

The restitution of the various parts of Hussein's archives of atrocity is likely to be a complicated affair. There are no clear answers as to when the United States should return the hundred million pages of captured intelligence files to authorities in Baghdad, or how to handle the Anfal secret police files that were seized by the Kurdish peshmerga, or when the IMF should return the Ba'ath Party documents under its control. The Iraqis would like the documents returned as soon as possible, much as the Federal Republic of Germany demanded the restitution of its historical patrimony after World War II.<sup>2</sup> The U.S. government agrees that the documents should be sent back, but has given no guarantees on whether some or all of them will be returned or when. A host of issues is likely to complicate the repatriation of the politically charged documents, including the Pentagon's ongoing exploitation of the documents for intelligence, the political instability and sectarianism that still plague the Iraqi government, and U.S. national security concerns involving documents that chronicle Hussein's past efforts to produce weapons of mass destruction and other matters. As already indicated, some of the documents are entangled in prior agreements. The United States has an agreement acknowledging Kurdish ownership of the Anfal files and will have to decide whether or not to honor it. At the same time, the U.S. government has no control over the Ba'ath Party documents on deposit at the Hoover Institution; their ultimate disposition evidently will be decided between the IMF, Hoover, and the Iraqi government. There also are human rights and security concerns that have a bearing on American interests in promoting political stability and the rule of law in Iraq. After all, a substantial risk exists that the security files, which name thousands of Hussein-era collaborators, would be reactivated by Shiite authorities against their political adversaries in the Sunni and Kurdish communities. Given the continuing political crisis in Iraq, American officials are likely to approach this issue with caution, walking a fine line between wanting to be helpful in rebuilding Iraq, including restoring its historical patrimony, while seeking to avoid doing anything that could exacerbate sectarian tensions.

<sup>2</sup> Anne Barker, "U.S. Agrees to Return Iraqi Records," ABC News, 14 May 2010, <http://www.abc.net.au/news/stories/2010/05/14/2899250.htm>, accessed 1 June 2010; and Devin Banerjee, "Iraq Asks Hoover to Return Records," *Stanford Daily*, 25 May 2010, <http://www.stanforddaily.com/2010/05/25/iraq-asks-hoover-to-return-records>, accessed 10 July 2010.

The United States, however, will find no international guidelines or legal norms governing when these documents should be returned beyond its own customary practice of eventually repatriating captured wartime records to the country of origin. A review of the relevant international conventions of war and protocols helps to explain why.

### **Conventions of War: Cultural Property versus Captured Wartime Records**

The relevant international instruments comprising the laws of armed conflict begin with the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land and its annexed regulations. The treaties immunize the property of municipalities and cultural institutions dedicated to religion, charity, education, and the arts and sciences from seizure, destruction, or willful damage. The 1907 convention is now considered customary international law, binding on all nations regardless of ratification.<sup>3</sup> Article 56 of the convention avers that the property of municipalities, and that of institutions devoted to religion, charity, education, and the arts and sciences, are protected from attack and seizure. Nonetheless, the convention permits the seizure of public enemy movable property, including presumably adversary records, imperatively demanded by the necessities of war and occupation. Under article 53, movable government property, which may be used for military operations, is considered spoils of war; it can be freely requisitioned by the occupying power and becomes its property without compensation.<sup>4</sup> According to the Hague regulations, this may include, for example, cash, other funds, realizable securities, military equipment—weapons, ammunition, and so forth—and means of transport.<sup>5</sup> These regulations also have been interpreted to mean enemy government records if they are seen to provide military advantage. Thus, although the convention does not explicitly mention records or archives, it nevertheless provides an implicit distinction between those records that may be captured for military intelligence and occupation and those that carry cultural value

<sup>3</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Annex I ("Hague Regulations") arts. 27, 47, 56, 36 stat. 2277, TS 539; Jennifer K. Elsea and Michael John Garcia, CRS Report for Congress, "Cultural Property: International Conventions and United States Legislation," 8 April 2004. The 1907 convention was preceded by the 1899 Convention on the Laws and Customs of War on Land. Most European countries ratified either the 1899 or the 1907 convention. See International Committee of the Red Cross, "International Humanitarian Law," <http://www.icrc.org/ihl.nsf/WebPAYS?OpenView&Start=150&Expand=232.1#232.1>, accessed 23 April 2010.

<sup>4</sup> See Dieter Fleck, ed., *The Handbook of International Humanitarian Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2008), 292.

<sup>5</sup> See Fleck, *The Handbook of International Humanitarian Law*, 292–93.

(archives), which must be protected from pillage and destruction.<sup>6</sup> The United States codified these laws of war in its field army manual in 1956, which asserts that “public property captured or seized from the enemy, as well as private property validly captured on the battlefield . . . is the property of the United States.” This provision accords with article 53 of the 1907 Hague Convention. The army manual also prohibits looting and provides protection for historical, cultural, and educational institutions.<sup>7</sup> Both the convention and the army manual indicate that seized public enemy records are spoils of war.

After the vast plundering and mass humanitarian violations of World War II, the international community adopted the Fourth Geneva Convention in 1949. The convention’s authors aimed to clarify the responsibilities of soldiers and governments during times of hostility and prevent a recurrence of the inhumane actions that characterized the Second World War. The convention forbids the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>8</sup> Although the convention requires governments to teach soldiers its text, it fails to provide for broader protections than those enumerated in the 1907 Hague Convention.<sup>9</sup>

The war’s devastation also led to passage of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Like the previous treaties, the convention prohibits the pillage, destruction, theft, or misappropriation of cultural heritage by state actors.<sup>10</sup> Unlike its 1907 predecessor, however, the convention explicitly mentions and provides for the protection of historical manuscripts and archives as cultural movable property. The convention does not define what it means by “archives,” but the general definition relates to noncurrent public or private institutional records that have enduring historical, legal, or administrative value. The convention expressly lists repositories of cultural objects, including museums, libraries, and archives, as examples of cultural property that must be safeguarded in times of war. Together with the 1907 Hague Convention, it implicitly distinguishes between historical and cultural records housed in cultural repositories, which are given explicit protective status and must be restored if taken after the cessation of hostilities, and public enemy records of the state, which may be seized for military

<sup>6</sup> Archives are defined as noncurrent records of enduring importance that possess historical, legal, administrative, or evidentiary value.

<sup>7</sup> Department of the Army, *The Law of Land Warfare* (FM27-10), 1956, [www.afsc.army.mil/gc/files/fm27-10.pdf](http://www.afsc.army.mil/gc/files/fm27-10.pdf), accessed 17 November 2009.

<sup>8</sup> The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, 12 August 1949, 75 U.N.T.S., 388.

<sup>9</sup> Mathew D. Thurlow, “Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law,” Vol. 8 *Yale Human Rights and Development Law Journal* 8 (2005): 161.

<sup>10</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, 294, N.T.S. 215, The Hague, 14 May 1954.

operations and occupation and become spoils of war. Although the United States signed the convention soon after its writing, the Pentagon objected to its ratification until after the Soviet Union's collapse and the end of the Cold War. In 1999, President Clinton submitted the convention for Senate ratification, which finally occurred in 2008, five years after the capture of millions of documents from Hussein's bureaucracies of repression in the 2003 invasion.<sup>11</sup>

On the same day as the signing of the 1954 convention, the international community adopted a separate protocol addressing specifically the question of restitution of movable cultural objects. The protocol forbids occupying forces and authorities from exporting cultural spoils from occupied territories and mandates the return of any illegally removed cultural property to the countries of origin. It also requires that any cultural property removed from enemy territory during armed conflict for safekeeping must be returned after the cessation of hostilities.<sup>12</sup> The world community, moreover, adopted Geneva Additional Protocols I and II in 1977. The first protocol covers international armed conflict, while the second protocol applies to noninternational or domestic armed conflict. The protocols forbid the use of civilian property for military purposes and prohibit pillage or any reprisals against cultural property. Article 52(2) of Additional Protocol I restricts attacks to military objectives, or those "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in circumstances ruling at the time, offers a definite military advantage."<sup>13</sup> Presumably, this clause permits the seizure of public enemy documents for military advantage. A similar provision to article 52(2) is absent in Additional Protocol II governing internal hostilities. Article 16 of this protocol, however, prohibits reprisals against "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples. . . ."<sup>14</sup>

<sup>11</sup> See Convention for the Protection of Cultural Property, 13–49; Protocol to the Convention and the Conference Resolutions, and State of Ratifications and Accessions as at 31 July 1982. Also see Patty Gerstenblith, "Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward," *Cardozo Public Law Policy and Ethics Journal* 7 (Summer 2009): 702.

<sup>12</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, [www.icrc.org/ihl.nsf/full/410?OpenDocument](http://www.icrc.org/ihl.nsf/full/410?OpenDocument), accessed 19 May 2010. Also see Patrick J. Boyle, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)*, UNESCO Doc. CLT-93/WS/12 101 (1993); and Patrick J. O'Keefe, "The First Protocol to the Hague Convention Fifty Years On," *Art, Antiquity and Law* 9 (June 2004): 100–103.

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, [www.icrc.org/ihl.nsf/full/470?opendocument](http://www.icrc.org/ihl.nsf/full/470?opendocument), accessed 1 June 2011.

<sup>14</sup> Protocols Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International and Non-international Armed Conflicts, entered into force December 7, 1978, 1125 U.N.T.S. 3 (Protocol I) & 1125 U.N.T.S. 609 (Protocol II).

In 1999, a second protocol to the 1954 Hague Convention was adopted after the targeted destruction of cultural sites during the Balkan wars of the 1990s. The Second Protocol harmonizes the 1954 Hague Convention with many of the customary international principles in the Geneva protocols.<sup>15</sup> It expands the protection of cultural property during armed conflict. The protocol provides improved safeguarding for cultural property, criminalizes violations of the protocols, simplifies procedures for the granting of enhanced protections for cultural property, provides for greater precision in regard to “military necessity,” and extends these provisions to noninternational or domestic armed conflicts.<sup>16</sup> Article 9 prohibits occupying powers from exporting, transferring ownership of, or removing cultural property.<sup>17</sup>

Despite these extensive cultural property protections in the laws of war, none of the Hague or Geneva conventions and protocols conflict with the right to seize public enemy property out of military necessity or occupation.<sup>18</sup> Both the 1907 Hague Convention and the Geneva Additional Protocol I permit the seizure of public enemy property for strategic and occupational advantage. Although these conventions do not define adversary records as either a species of cultural heritage or government enemy property, they provide wide latitude to seize almost anything if it makes an effective contribution to military action or offers a definite military advantage.<sup>19</sup> Article 53 of the 1907 Hague Convention, for example, asserts that an army of occupation can “take possession” of “generally, all moveable property belonging to the State which may be used for military operations.”<sup>20</sup> Not only is this provision sweeping in nature, but it gives overarching discretion to the capturing state in defining what constitutes enemy property to be taken for strategic advantage or occupation. Even if government authorities designate their national archives as cultural property warranting enhanced cultural property protections under the laws of war, this may be trumped or waived by the imperative of “military necessity,” a principle that gives broad latitude in pursuing actions—including destroying or seizing enemy movable property—that are considered indispensable in subduing the

<sup>15</sup> Thurlow, “Protecting Cultural Property in Iraq,” 164. See also Yoran Distein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: University Press, 2004), 164.

<sup>16</sup> See Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, <http://www.icrc.org/ihl.nsf/FULL/590?OpenDocument>, accessed 19 May 2010.

<sup>17</sup> Second Protocol to the Hague Convention of 1954, art. 9.

<sup>18</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict.

<sup>19</sup> Fleck, *The Handbook of International Humanitarian Law*, 443.

<sup>20</sup> 1907 Hague Convention, art. 53.

adversary.<sup>21</sup> Broad latitude is also provided under article 52(2) of Geneva Additional Protocol I; it permits attacks on or seizures of “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in circumstances ruling at the time, offers a definite military advantage.”<sup>22</sup> These provisions reinforce and stand in harmony with one another in granting belligerents broad discretion in seizing enemy property, including adversary records.

Even so, the conventions of war are distinguished by their silence in addressing the fate of public enemy documents captured or seized during war or occupation. Beyond generally allowing the wartime capture of public enemy property for military advantage and occupation, the treaties do not specifically mention the seizure of enemy documents, normalize their custody and use, or regulate how they should be treated after the end of conflicts. Nor do they articulate or envision a transitional process from the status of captured or seized adversary property to the cultural patrimony of the country of origin. Nonetheless, generally speaking, under article 53 of the 1907 Hague Convention, the taking of such property, without compensation, is considered spoils of war. This silence regarding the ultimate fate of captured or seized records in war and occupation is especially notable when considering their importance for the historical patrimony of defeated nation-states. The absence of such provisions appears at variance with the extensive cultural property protections added to the laws of armed conflict after World War II.

### **Captured Iraqi Documents in the Pentagon's Custody**

The absence of legal instruments governing restitution of captured wartime records has continued to leave this issue to diplomacy between formerly warring states. Although the United States customarily repatriates captured records to the home countries of origin after the end of conflicts, these negotiated returns often take years to accomplish.<sup>23</sup> Moreover, in specific cases, differing interpretations of the rules of war, bureaucratic disputes, and foreign policy considerations complicate these returns. The federal government began repatriating captured foreign records as early as 1855 when it returned documents that American forces seized in 1847 during the Mexican-American

<sup>21</sup> 1907 Hague Convention (IV), “Respecting the Laws and Customs of War on Land” and its annex, “Regulations Concerning the Laws and Customs of War on Land,” 18 October 1907, art. 23(g), International Committee of the Red Cross, [www.icrc.org/ihl.nsf/full/195](http://www.icrc.org/ihl.nsf/full/195), accessed 24 April 2011.

<sup>22</sup> Geneva Protocol I, art. 52(2).

<sup>23</sup> Douglas Cox, “Archives and Records in Armed Conflict: International Law and the Current Debate Over Iraqi Records and Archives,” *Catholic Law Review* 54 (Fall 2010): 22.

War.<sup>24</sup> It took considerably longer to return three tons of documents captured in 1898 relating to the Philippine Revolutionary Army and its various factions. These were not returned to the Philippine government until 1958 after many years of negotiations. In the interim, a microfilm copy of the records was produced, which is currently housed in the National Archives.<sup>25</sup>

### ***U.S. Restitution in the Post-World War II Era***

Years of complex negotiations also forestalled the transfer of captured German records to the Federal Republic of Germany after World War II. Following their transfer to American soil, the records were declared federal property, but the United States later entered into a series of bilateral agreements providing for their return between 1953 and 1968.<sup>26</sup> These transfers took place only after the documents were exploited for intelligence, microfilmed, and declassified for historical study.<sup>27</sup> Nonetheless, the United States initially withheld documents whose release could endanger national security or whose contents related to German occupation of other states or glorified the Nazi regime.<sup>28</sup> The U.S. Army also withheld captured personnel and membership documents of the Nazi Party and its affiliated organizations at the Berlin Documents Center (BDC). From July 1945 until 1953, the records captured by the Western Allies were consolidated at the BDC under the authority of the U.S. Army for use in war crimes and denazification trials. After 1953, the BDC operated under the jurisdiction of the U.S. State Department until 1994 when title and control of the documentary material were transferred to a reunited Germany. The transfer agreement provided that copies be made of the records at German expense and deposited at the U.S. National Archives.<sup>29</sup> A small

<sup>24</sup> See Philip P. Brower, "The U.S. Army's Seizure and Administration of Enemy Records Up to World War II," *The American Archivist* 26, (1963): 195; and Roscoe R. Hill, "The Odyssey of Some Mexican Records," *The Hispanic American Historical Review* 24 (February 1944): 39–60.

<sup>25</sup> Claude H. Van Tyne and Aldo G. Leland, *Guide to the Archives of the Government of the United States in Washington* (Washington, D.C.: Carnegie Institution, 1907), 136; Brian McAllister Linn, *The Philippine War 1899–1902* (Lawrence: University Press of Kansas, 2000), ix; and Kevin M. Woods, "Captured Records—Lessons from the Civil War through World War II" (unpublished manuscript, 2008), 9–11.

<sup>26</sup> Cox, "Archives and Records in Armed Conflict," 23.

<sup>27</sup> 83<sup>rd</sup> Congress, 1<sup>st</sup> Sess., H.R. Report No. 1077; and Robert Wolf, "Sharing Records of Mutual Archival Concern to the Federal Republic of Germany and the United States of America," *Proceedings of the 10th Congress of the International Council of Archives* (Bonn, 1984), *Archivum* 32 (1986): 296–97.

<sup>28</sup> See Memorandum, Archivist of the United States General Counsel, Subject: General Schedule—Seized German Records, 5 June 1953 (NARA, RG64, Box PC-62); and Woods, "Captured Records—Lessons from the Civil War through World War II," 26.

<sup>29</sup> U.S. Department of State, "Appendix to Testimony before the Subcommittee on International Organizations, International Security, and Human Rights, April 28, 1994," posted on German History List, 9 May 1994, <http://www.h-net.org/~german/discuss/transfer/whatis.html>, accessed 3 October 2011).

number of documents remained secreted in U.S. intelligence channels for more than sixty years until passage of the 1998 Nazi War Crimes Disclosure Act compelled their declassification and public disclosure.<sup>30</sup>

In 1956, Congress approved returning many of the Japanese records seized during the occupation on similar grounds as the captured German records. Even so, the issue sparked a minor debate in 1952 involving whether international law sanctioned only their custody and use or whether the United States held title to them.<sup>31</sup> The restitution of captured documents to Germany and Japan occurred after both countries became constitutional democracies and posed no further threats to U.S. national security or to their own societies. These returns also served U.S. interests in normalizing relations with former adversaries and seemed to acknowledge the records' implicit transition from wartime intelligence into the cultural (historical) property of the countries of origin.

In more recent conflicts, the United States continued the practice of returning captured records after exploiting and copying them and after an adversary is no longer seen as a national security threat. These returns proceeded on a case-by-case basis, sometimes complicated by political, legal, and diplomatic exigencies. For example, the United States agreed to return captured documents to the new pro-West government of Grenada after overthrowing a Cuban-backed communist regime in 1983. This repatriation occurred after the Defense Intelligence Agency (DIA) microfilmed the records, which were later deposited in the National Archives for general research. The documents captured in the 1989 invasion of Panama, which ousted and brought to justice President Manuel Noriega for drug trafficking, involved a more complicated case. The Pentagon refrained from claiming title to the fifteen thousand boxes of records under the laws of war in favor of declaring them Panamanian property. In 1993, the United States offered to return the documents after the DIA microfilmed them. The new Panamanian president, however, balked at recovering them, and the Panamanian government expressed its intention to destroy some of the files.<sup>32</sup> This impasse has led to their continued possession by the U.S. Army.

The 1994 invasion of Haiti that ousted an oppressive military regime and restored to power Jean-Bertrand Aristide, the exiled president, marked a new pattern. Instead of seeking to eliminate a perceived national security threat, the Clinton-conceived humanitarian intervention sought to restore democracy,

<sup>30</sup> See Nazi War Crimes and Japanese Imperial Government Interagency Working Group, "Final Report to the U.S. Congress," April 2007, 31–41; and Nazi War Crimes Disclosure Act (P.L.105–246), 1998.

<sup>31</sup> See Greg Bradsher, "A Constantly Recurring Irritant: Returning Captured and Seized Japanese Records, 1946–1961," in *Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group, Researching Japanese War Crimes: Introductory Essays* (Washington, D.C.: National Archives and Records Administration, 2006), 169–75. See also Cox, "Archives and Records in Armed Conflict," 23.

<sup>32</sup> Douglas Cox, "The Noriega File," *Los Angeles Times*, 5 October 2011. See also Douglas Cox, "National Archives and International Conflicts: The Society of American Archivists and War," *The American Archivist* 74 (Fall/Winter 2011): 478.

human rights, and the rule of law, although Aristide was nearly as brutal a despot as his predecessors. In the conflict, American forces seized approximately 150,000 pages of documents from the headquarters of the Haitian Armed Forces and the country's most feared paramilitary group. The issue set off a diplomatic row between the United States and Haiti, which demanded their immediate return. While the Pentagon claimed the seized documents as U.S. property, the American embassy in Port-au-Prince lobbied for their return to ease tensions. Representative John Conyers argued that the Law Division of the Congressional Research Service considered the documents to be the property of Haiti, even if this legal analysis failed to examine the laws of war. White House officials introduced a new element in the repatriation issue when they expressed concern that their release could encourage violence against supporters of the military rulers named in the documents.<sup>33</sup> In other words, human rights entered the calculation when it seemed that returned adversary intelligence documents could be misused by the restored Aristide government against its former enemies. Still other members of Congress urged President Clinton to return the records, which finally occurred in 2001.

The documents captured in the first Persian Gulf War (Operation Desert Storm) in 1991, however, were never returned to Hussein's government. Iraq and the United States continued in a state of hostilities from 1991 until 2003 over the no-fly zone. After the DIA digitized them, the National Archives destroyed the original documents because of mold contamination.<sup>34</sup> In other words, the United States treated the documents as federal, not foreign, property. Moreover, American officials never offered Iraq a digital copy of the destroyed records.

#### ***Iraqi Documents Seized in the Second Gulf War (Operation Iraqi Freedom)***

There is no telling when the United States may repatriate some or the majority of the Iraqi documents taken in the 2003 Iraq war. By any measure, the U.S. confiscation of a hundred million pages of Iraqi records represents the largest American documents seizure since World War II. The seizure of the documents was permissible under the 1907 Hague Convention and the U.S. Army field manual. Both permit the capture of public enemy property out of military necessity. Article 52(2) of Geneva Protocol I also allows the capture of

<sup>33</sup> See Larry Rohter, "Haiti Accuses U.S. of Holding Data Recovered by G.I.'s," *New York Times*, 28 November 1995, [www.nytimes.com/1995/11/28/world/haite-accuses-us-of-holding-data-recovered-by-gi-s.html?pagewanted=all&src=pm](http://www.nytimes.com/1995/11/28/world/haite-accuses-us-of-holding-data-recovered-by-gi-s.html?pagewanted=all&src=pm), accessed 2 May 2011; and 142 Cong. Rec. 12, 1996 (Statement of Representative Conyers).

<sup>34</sup> Cox, "National Archives and International Conflicts," 479.

“objects which by their nature” effectively contribute to military action or provide military advantage,<sup>35</sup> even though the United States was not a signatory to the treaty during the Iraq war. The seizure of adversary documents played a critical role in the invasion’s immediate aftermath. Following the fall of Baghdad on 9 April 2003, American forces immediately sought to secure Iraq’s alleged weapons of mass destruction and confirm prewar intelligence of the regime’s connection to global terrorism. American forces scoured Iraqi government ministries, military installations, industrial plants, and other sites for evidence, including documents. By October, the Iraq Survey Group found no evidence of WMD, and Hussein’s links to terrorism, especially al-Qaeda, remained in question. By the end of 2003, American intelligence concluded that any evidence of Iraq’s WMD or links to global terrorism might be found in the regime’s own records, if at all.<sup>36</sup> The seized records were exploited for other critical strategic and operational uses, including support for ongoing battlefield operations, intelligence and counterintelligence, technical analyses, psychological operations, location of mass graves, and evidence of human rights crimes for prosecution in tribunals.<sup>37</sup>

At the same time, the collapse of the Iraqi government and its ministries ignited mass looting of Iraqi museums and archaeological sites as well as the former regime’s documents of repression throughout the country. The search for records for military intelligence, operations, and evidence of WMD eclipsed the imperative of securing critical relevant sites that would yield evidence for the trials of Hussein and key Ba’athist officials. Amid the chaos following Iraq’s defeat, U.S.-led Coalition forces, Iraqi opposition groups, and individuals rushed to seized millions of Iraqi state documents from government ministries, Ba’ath Party headquarters, offices of the former intelligence and security apparatuses, military garrisons, and other sites across the country. The widespread looting and destruction of government property by Iraqis in the days and weeks after the invasion resulted in further destruction of documents, but millions more remained intact as sources of information about Saddam Hussein’s regime. Like other authoritarian governments, the Iraqi regime’s practice involved recording in minute detail the brutal repression of the population by its security and intelligence apparatuses.

<sup>35</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/full/470?opendocument>, accessed 1 June 2011.

<sup>36</sup> Kevin Woods, “Captured Records—Lessons from the Civil War through World War II” (unpublished manuscript, 2008). “This paper was written at the Institute for Defense Analysis. However, this paper represents the author’s personal views, and not the views of IDA, the Department of Defense, or any command or agency of the Department.”

<sup>37</sup> See Jeffrey Richelson, ed., “Iraq and Weapons of Mass Destruction,” National Security Archive Electronic Briefing Book No. 80, 11 February 2004, National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB80/>, accessed 8 July 2011.

Despite the importance of this information in bringing to justice perpetrators of serious past crimes, U.S. forces were left without an effective plan to secure them after the Hussein government's collapse. While U.S. forces seized masses of documents, many others were pilfered, looted, or destroyed, resulting in the loss of vital information.

Human Rights Watch (HRW) warned coalition occupation officials that failure to protect security archives from looting could result in retaliatory violence and vengeance killings given that the documents could identify tens of thousands of security agents and informers by name; the organization called on the United States to secure the information for prosecutions of human rights crimes.<sup>38</sup> The mass looting also ignited concern among professional archival groups.<sup>39</sup> Typifying the profession's concerns, the National Archives and Records Administration (NARA) stated that securing the Iraqi documents would be critical in rebuilding and maintaining the country's infrastructure, protecting property rights, and providing evidence in judicial proceedings. The agency offered its assistance in dealing with the Iraqi documents that were being captured and secured by Coalition forces.<sup>40</sup>

The United States acknowledged its obligation as the occupying power to manage the property and assets of the Iraqi State, a position that accorded with the laws of armed conflict. In war, occupying authorities are required to manage the assets of the state unless they transfer management to the national officials and institutions of the occupied country.<sup>41</sup> As such, various American officials gave assurances that Iraqi property and assets would be held in custody for the Iraqi people. On 16 April 2003, General Tommy Franks, who spearheaded the invasion of Iraq, stated that "Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms."<sup>42</sup> On 14 May 2003, a Pentagon official gave congressional testimony that U.S. policy was "that seized property shall be held on behalf of and for the benefit of the Iraqi people and shall only be used to assist the Iraqi people in support of the reconstruction of

<sup>38</sup> Hania Mufti, *Iraq: State of Evidence* (New York: Human Rights Watch, 2004), 4–10; and "Iraq: Protect Government Archives from Looting" (press release, 10 April 2003), Human Rights Watch, <http://www.hrw.org/en/news/2003/04/09/iraq-protect-government-archives-looting>, accessed 10 April 2010.

<sup>39</sup> "ICA Call to Protect Records and Archives in Iraq," International Council of Archives, [www.unesco.org/webworld/ica\\_sio/docs/news\\_irak.rtf](http://www.unesco.org/webworld/ica_sio/docs/news_irak.rtf), accessed 30 May 2010; "Statement on Iraqi Archives," (press release, April 2003), Society of American Archivists, [http://www.archivists.org/statements/iraqi\\_archives.asp](http://www.archivists.org/statements/iraqi_archives.asp), accessed 3 May 2010; and "Germany Offers Iraq Files Advice," BBC World/Middle East, 4 May 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/2999517.stm](http://news.bbc.co.uk/2/hi/middle_east/2999517.stm), accessed 26 June 2005.

<sup>40</sup> Cox, "Archives and Records in Armed Conflict," 24.

<sup>41</sup> Fleck, *The Handbook of International Humanitarian Law*, 292–93.

<sup>42</sup> Statement by General Tommy R. Franks, "Freedom to the Iraqi People," may be found in L. Elaine Halchin, "The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities" (Washington, D.C.: Congressional Research Service Report, 2006). Also see Cox, "Archives and Records in Armed Conflict," 25–26, 40.

Iraq.”<sup>43</sup> On 25 May, the Coalition Provisional Authority (CPA), which administered Iraq’s civil and judicial affairs during the occupation, issued Order No.4, proclaiming its authority to seize all Ba’ath Party property and assets (including records) and that it would hold all such property and assets in trust for the Iraqi people.<sup>44</sup> The order remained in force until 28 June 2004, when the CPA transferred sovereignty to the Iraqi interim government. Although the CPA as the civilian occupational authority was obligated to manage Iraqi property and assets on behalf of the Iraqi people, this obligation did not contravene the Pentagon’s lawful confiscation of public enemy property and records out of military advantage, necessity, and occupation.

### **Exploitation of Iraqi Documents**

Nonetheless, the CPA’s efforts to assert control over Hussein’s state security and other documents looted by Iraqi citizens and groups largely proved futile. Both the Pentagon’s directive and the CPA’s Order No. 4 failed to convince these groups to turn over the documents in their possession. The CPA sought to assist the secretary of the army to collect and preserve evidence for the prosecution of human rights crimes committed by Saddam Hussein and his senior leadership. In early 2004, the CPA handed the responsibility of asserting control over the records in non-U.S. hands to the Iraqi human rights minister, who proved equally ineffective in gaining possession of the documents.<sup>45</sup>

At the same time, U.S. and Coalition forces proceeded immediately to exploit the seized documents in their possession. The U.S. military defines *exploitation* as any “information that has come to hand for tactical, operational, or strategic purposes.”<sup>46</sup> Current U.S. military guidance notes the value of exploiting enemy archives for intelligence; similarly, the U.S. counterinsurgency manual asserts the importance of “historical documents and records” for analyzing insurgent networks.<sup>47</sup> In war, the exploitation of enemy documents

<sup>43</sup> Testimony of Larry L. Lanzillotta, principle deputy undersecretary of defense (comptroller) and deputy undersecretary of defense (management reform), *Divesting Saddam: Freezing, Seizing, and Repatriating Saddam’s Money to the Iraqis: Hearing before the Subcommittee on Oversight and Investigations of the House Committee on Financial Services*, 108<sup>th</sup> Cong (2003). See also Cox, “Archives and Records in Armed Conflict,” 40.

<sup>44</sup> Coalition Provisional Authority, “Management of Property and Assets of the Iraqi Ba’ath Party,” Order No. 4, 25, May 2003.

<sup>45</sup> Mufti, *Iraq: State of Evidence* (New York: Human Rights Watch, 2004), 19–20.

<sup>46</sup> See Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, 12 April 2001, as amended through 17 October 2007, <http://www.dtic.mil/doctrine/jel/doddict>, accessed 9 October 2010.

<sup>47</sup> See Cox, “National Archives and International Conflicts,” 456. See also Department of Army, GTA 41-01-002, *Civil Affairs, Arts, Monuments and Archives Guide* (Washington, D.C.: Department of the Army, 2005), 19; and Department of the Army, FM3-24, *Counterinsurgency*, Appendix B, B-15 (Washington, D.C.: Department of the Army, 2006).

typically begins immediately after their capture; they are subsequently subjected to more detailed and sophisticated analysis as the records undergo a process of triage, translation, and promulgation. Intelligence analysts use information gleaned from these documents together with other captured data—satellite imagery, hard drives, and other digital apparatuses, as well as emails, landlines, cell phones, and other modes of communication—to construct an understanding of the adversary and attack enemy combatants and targets.<sup>48</sup> Biometric data taken from suspected enemy personnel represent another form of captured intelligence. Despite these technological advances in managing records, a lag time still remains between the point of capture and the harvesting of actionable intelligence.<sup>49</sup>

To exploit the seized materials, the Pentagon constructed the Combined Media Processing Center at Camp As Sayliyah in Qatar (CMPC-Q). The operation began in May 2003 with twelve personnel, but ramped up to four hundred by January 2004. By September 2005, approximately a thousand personnel were sifting through tens of thousands of boxes of materials seized by maneuver units and mobile collection teams in Iraq. Once in Qatar, document and media exploitation followed a sequence of analysis, prioritization, and processing of digital and analog media. The process then comprised triage, scanning, translation of electronic and media files, and extracting high-value information for distribution. These data also were entered into the intelligence community's shared Harmony database to maximize exposure for further analysis. Triage represented the most critical step in the exploitation process, enabling analysts to prioritize extraction of data of highest intelligence value. In Operation Iraqi Freedom, the first priority involved WMD. Other priorities included missile delivery systems, Iraqi regime strategic intent, war crimes and crimes against humanity, and counterintelligence information. Finding information on Special Republican Guard and Special Security Organization leadership and terrorist organization and operatives was also imperative. The Pentagon outlined these priorities in a 2005 document, detailing its standard operating procedures for document exploitation at CMPC-Q. The guidelines reveal the military's sole focus on seizing and utilizing active intelligence to subdue the last remnants of Hussein's armed forces, to defeat the growing insurgency, and to bring to trial former Ba'athist officials responsible for crimes

<sup>48</sup> Woods, "Captured Records."

<sup>49</sup> Woods, "Captured Records."

against humanity.<sup>50</sup> In the end, the search for WMD, including scouring the documentary evidence, led the Iraqi Survey Group to conclude that Hussein had terminated his nuclear weapons program in 1991.

#### **A Failed Experiment in Public Access and Intelligence**

In 2006, with tens of millions of seized documents in U.S. hands, an unusual, if ill-considered, experiment in public access was undertaken, giving anyone with a computer a chance to second-guess the government's intelligence analysts. American intelligence had already concluded that Saddam Hussein possessed no unconventional weapons and no substantive ties to al-Qaeda before the 2003 invasion. Under pressure from congressional Republicans, who said they hoped to leverage the Internet to find new evidence of the prewar dangers posed by Hussein's regime, the government set up a website to make public the vast archives of Iraqi documents seized during the war. The campaign for the online archives—opposed by the U.S. intelligence community—was waged by conservative publications, bloggers, and politicians who argued that the nation's intelligence agencies failed to properly analyze the forty-eight thousand boxes of captured documents. With the public increasingly skeptical about the rationale and conduct of the war, the chairs of the Republican-controlled House and Senate intelligence committees argued that broad analysis of the records would revitalize the search for clues about Hussein's allegedly reconstituted and unconventional arms programs in the years before the March 2003 invasion. The experiment ran afoul when the site posted detailed accounts of Iraq's secret nuclear research before the 1991 Persian Gulf War. The documents constituted a basic guide to building an atom bomb; approximately a dozen documents contained charts, diagrams, equations, and narratives about building a bomb that went far beyond what was available elsewhere on the Internet. This controversy followed earlier warnings about the content of the website when it began posting Iraqi documents about chemical weapons. United Nations arms-control officials won the withdrawal of a report

<sup>50</sup> See "Captured Iraqi Document Exploitation SOP," *Document Exploitation: Captured Documents, War, Intelligence, Law, Archives, Cultural Property*, 27 February 2012, <http://www.docexblog.com/2012/02/captured-iraqi-document-exploitation.html>; and Statement by Brigadier General Anthony A. Cucolo III, director of Joint Center for Operational Analysis, and Lieutenant Colonel Kevin M. Woods, project leader and principal author of Iraqi Perspectives Project, U.S. Joint Forces Command, *The Iraqi Documents: A Glimpse Into the Regime of Saddam Hussein, Hearings before the Subcommittee on Oversight and Investigations of the Committee on International Relations, House of Representatives*, 109<sup>th</sup> Cong., Second Sess., 6 April 2006, 25.

that provided information on making nerve agents that kill by causing respiratory failure. In November 2006, after several months, the website was shut down.<sup>51</sup>

### *Iraqi Perspectives Project: Another Level of Analysis*

The digital database to the documents, moreover, was analyzed by the Pentagon's Iraqi Perspectives Project, a research effort led by the U.S. Joint Center for Operational Analysis, to glean lessons from the 2003 military campaign. The research effort also involved dozens of interviews with senior Iraqi military and political leaders.<sup>52</sup> In one of its published findings, the Perspectives Project reported uncovering strong evidence that linked Saddam Hussein's regime to regional and global terrorist networks with a common enemy in the United States, albeit it found no smoking gun (direct connection) between Hussein's Iraq and al-Qaeda. Instead, following the 1991 Gulf War, Hussein supported an increasingly disparate mix of pan-Arab revolutionary causes and emerging pan-Islamic radical movements as an element of state power and a tool for targeting the regime's perceived enemies.<sup>53</sup>

The Pentagon expanded this intelligence effort in 2008 by providing funding for social science and humanities research into declassified documents of the Hussein regime. The exploitation of the documents to understand the Iraqi regime's inner workings represented the first such effort since World War II, when the United States conducted analyses of captured German and Japanese documents, as well as interviews with key military and civilian leaders of the defeated Axis countries.<sup>54</sup> In 1955, the Pentagon established the American Committee for the Study of War Documents to "direct an organized effort for the fullest scholarly utilization of documents which came into the possession of the Allies as a result of World War II . . ." This effort aimed to secure the aid of relevant governmental agencies in making these documents available for study

<sup>51</sup> See Scott Shane, "Iraqi Documents Are Put on Web, and Search Is On," *New York Times*, 28 March 2006, <http://www.nytimes.com/2006/03/28/politics/28intel.html?>, accessed 12 July 2011; and William J. Broad, "U.S. Web Archive Is Said to Reveal a Nuclear Primer," *New York Times*, 3 November 2006, [www.nytimes.com/2006/11/03/world/middleeast/03documents.html?pagewanted=all](http://www.nytimes.com/2006/11/03/world/middleeast/03documents.html?pagewanted=all), accessed 12 July 2011.

<sup>52</sup> Kevin M. Woods and James Lacey, "Iraqi Perspective Project: Saddam and Terrorism: Emerging Insights from Captured Iraqi Documents," vol. 1 (Institute for Defense Analysis, Joint Advanced Warfighting Program, IDA Paper, P-4287, January 2007). See also Kevin M. Woods, James Lacey, and Williamson Murray, "Saddam's Delusions: The View from the Inside," *Foreign Affairs* (May/June 2006), <http://www.foreignaffairs.org/20060501faessay85301/kevin-woods-james-lacey-williamson-murray/saddam-s-delusions-the-view-from-the-inside.html>, accessed 10 February 2007.

<sup>53</sup> Woods et al., "Saddam's Delusions."

<sup>54</sup> Cucolo and Woods, *The Iraqi Documents: A Glimpse into the Regime of Saddam Hussein, Hearings before the Subcommittee on Oversight and Investigations of the Committee on International Relations*, 6 April 2006, 13–18. See also Woods, "Captured Records," 16. This unpublished paper was written at the Institute for Defense Analysis as part of a project sponsored by the Department of Defense.

by American scholars and to “enlist the support and cooperation of universities and colleges, faculties and graduate students, and of other scholarly organizations, in the systematic exploration of this material . . .” It also sought to involve the expertise of overseas scholars and institutions in these studies.<sup>55</sup>

The Iraqi Perspective Project represents part of the Pentagon’s larger Minerva Research Initiative, named after the Roman goddess of wisdom and war. The initiative funds social science research deemed crucial to national security in five areas, including the development of China’s military and technological prowess, and how religion, culture, economics, and politics interact in the Islamic world to foster political violence and terrorism. In 2009, the Institute for Defense Analysis, a Pentagon-funded think tank, established the Conflict Records Research Center (CRRC). The CRRC operates by migrating declassified digital copies of scanned captured documents from the intelligence community’s shared Harmony database. In other words, this digital migration comprises digital copies of digital copies of the original state records from Saddam Hussein’s Iraq and al-Qaeda terrorists. The CRRC originated with Secretary of Defense Robert Gates’s vision for gleaning new insights into the workings of authoritarian regimes. When proposing this initiative in 2008, Gates noted that only a small number of documents from Iraq and terrorist networks had been exploited; he hoped to develop their full research potential by opening them up to scholars. This “research could yield unprecedented insight into the workings of dictatorial third-world regimes,” he stated.<sup>56</sup> The Minerva initiative initially met opposition from academic anthropologists who argued that it would militarize social science research. Responding to these concerns, a deputy assistant defense secretary for policy planning said that Minerva was not about supporting combat operations, but constituted an effort to fill a void in funding for basic social science scholarship that would improve understanding of fundamental national security issues.<sup>57</sup>

The director of the Iraqi National Library and Archives, Saad Eskander, who has been trying to win back all of the Iraqi records in American hands, has denounced the Iraq Perspectives Project—and by extension, the CRRC—as an “escalation” of America’s violation of international conventions on the safeguarding of cultural heritage of occupied territories.” This condemnation

<sup>55</sup> See “Other Activities,” *American Political Science Review* 50 (June 1956): 614–15.

<sup>56</sup> Institute for National Strategic Studies, Conflict Records Research Center, “Frequently Asked Questions,” <http://www.ndu.edu/inss/index.cfm?secID=143&pageID=4&type=section>, accessed 15 October 2010.

<sup>57</sup> See Maria Glod, “Military’s Social Science Grants Raise Alarms,” *Washington Post*, 3 August, 2008, [www.washingtonpost.com/wp-dyn/content/article/2008/08/02/AR2008080201544.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/08/02/AR2008080201544.html), accessed 15 October 2010; “Anthropologists Express Concern over Government Plan to Support Military-Related Research in Universities,” *MIT Faculty Newsletter* 20 (May/June 2008); and Ronald R. Krebs, “Minerva: Unclipping the Owl’s Wings,” Social Science Research Council, “The Minerva Controversy,” <http://www.ssrc.org/essays/Minerva/2008/11/19/krebs/>, accessed 12 December 2008.

by an Iraqi official whose responsibility involves the preservation of Iraq's cultural heritage is perhaps understandable. But taking adversary records for reasons of imperative military intelligence and occupation is not the same as taking cultural historical records under the meaning of the 1907 Hague Convention, the Geneva Additional Protocol I, or the U.S. Army field manual. Under the 1907 convention, an army of occupation may seize "all moveable property belonging to the State which may be used for military operations."<sup>58</sup> Further, Additional Protocol I permits the capture of objects "which by their nature, location, purpose or use make an effective contribution to military action."<sup>59</sup> The laws of war provide considerable latitude in defining what constitutes public enemy movable property to be seized and exploited out of military necessity, although there is no clear definition of what constitutes military necessity. In other words, virtually any kind of public movable property can be seized if deemed a military imperative, even if such property resides in libraries, archives, municipal facilities, and other cultural institutions. Moreover, although the peacetime UNESCO Convention references archives as historical documents (cultural property), the treaty is primarily concerned with preventing the illicit export or import of cultural property; it does not address the seizure of enemy records for military advantage and occupation.<sup>60</sup> Even Eskander, who both denounced the United States as the "world's hungriest scavenger" of foreign documents and condemned the seizure of Iraqi records as "illegal," notes that the Americans were not interested in cultural records, but "extremely interested in seizing current records of a political and security-military nature."<sup>61</sup> The Pentagon's own document exploitation guidelines, which emphasize the extraction of actionable intelligence, substantiates this observation.

By encouraging university research in the declassified Hussein documents, the Pentagon's Iraq Perspectives Project and CRRC seem to acknowledge the historical and cultural significance of the records. It may be assumed that many of those records have intertwining intelligence and historical value; their dual nature and significance are inseparable, even if the conventions of war allow for their overriding importance for exploitation out of military necessity and occupation. At the same time, even though the project's goal is to "explore the political, social, and cultural workings and changes within Iraq" during Hussein's reign of power, it also aims to further understanding of Middle Eastern dictatorial regimes among the American intelligence community. In other words, the

<sup>58</sup> 1907 Hague Convention, art. 53.

<sup>59</sup> Geneva Additional Protocol I, art. 52(2).

<sup>60</sup> Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 U.N.T.S.231.

<sup>61</sup> Eskander, "Minerva Research Initiative: Searching for the Truth or Denying the Iraqis the Rights to Know the Truth?"

CRRC, which now makes available thousands of declassified digital copies and translated documents with many more to come, acknowledges both the dual significance of the records as well as its own twin purpose of furthering historical and intelligence research and analysis.<sup>62</sup>

It is unlikely that the U.S. defense and intelligence communities will return the physical records as long as they view them as having national security value. After all, the scanned documents have not been completely released into the public domain out of national security concerns and risks to innocents and third parties named in the files, which also identify many who served in Hussein's regime. The CRRC's screening procedures require that university researchers obtain approval to use the database from their university Institutional Review Boards (IRBs), which function to ensure ethical research involving human subjects.<sup>63</sup> Because use of the digital files is limited to researchers subject to IRB approval, the Pentagon and intelligence community evidently do not view the physical records as having wholly matured into the realm of cultural property to be repatriated; they exist in a kind of twilight between wartime intelligence and cultural property. Further, the United States is evidently under no obligation under international law to define when the documents' intelligence and national security value has been exhausted and when some or many of the physical records can be returned, if at all.

In a 2009 blog entry on the Minerva Research Initiative, Eskander attacked the cultural imperialism of the project, arguing for the immediate return of all original Iraqi documents in the Pentagon's possession. There is much to agree with in his essay regarding the moral imperative of restoring and preserving Iraq's cultural memory. Eskander seems to interpret the Minerva project as a usurpation of his mission on behalf of the Iraqi people to collect, preserve, and govern the documents. At the time he wrote this essay, it was not clear whether he knew that the CRRC involved only digital copies of the scanned documents, not the originals. Because the CRRC is a digital resource center with no purview over the original records, it cannot be said to "overtly" usurp his "duty of collecting, preserving and facilitating access to Iraqi records." Eskander's assertions of ownership extend beyond the physical documents to control over their intellectual content, as well as over their access and research use. In his view, by making the materials available to American researchers, the United States is violating the fundamental rights of the Iraqi people; their right to privacy, the right of victims, and the social sensitivities of Iraq. Only Iraq should

<sup>62</sup> Institute for National Strategic Studies, "Conflict Records Research Center," <http://www.ndu.edu/inss/index.cfm?secID=101&page=ID=4&>, accessed 10 October 2011. For information about Iraqi Perspective Project, see Cucolo and Woods, *Hearings before the Subcommittee on Oversight and Investigation of the Committee on International Relations*.

<sup>63</sup> Institute for National Strategic Studies, Conflict Records Research Center, <http://www.ndu.edu/inss/index.cfm?secID=101&page=ID=4&>, accessed 10 October 2011.

determine access to the records and their legitimate use through passage of special legislation and according to its own sensibilities. The Iraq Perspectives Project, he states, constitutes little more than “cultural imperialism” by the “conqueror” or “occupier” over the “conquered” and “occupied” in the service of the Pentagon.<sup>64</sup> Two years later, a 2011 editorial in *Al Ahram Weekly* echoed these sentiments: “by what right,” it asks, “will U.S. academia obtain and research the Iraqi records without Iraqis’ consent and participation?”<sup>65</sup>

Despite the emotional power of these words, the counterargument is that Saddam Hussein’s legacy is no more the exclusive domain of Iraqis than Hitler’s historical record is the absolute property of Germans. Hussein’s wartime entanglements with Iran, Kuwait, the United Nations, the United States and its Western allies, and other countries, as well as his regional support of terrorist organizations, overseas assassinations, genocidal actions against the Kurds, and other lawless international actions had made him a world figure far beyond the borders of Iraq. In essence, under Saddam Hussein, Iraq’s contemporary history had become an inextricable part of world history. Further, the parallel with the post-World War II experience in the handling of captured German and Japanese documents is apt. As already noted, before returning the majority of the vast trove of records captured during World War II to Germany and Japan, the U.S. government screened and microfilmed all documents of historical importance. The federal government made the copied documents available to scholars to encourage exploration into the nature of totalitarian regimes, giving rise to new specialists in Central European and Asian affairs. Most of the copied documents were eventually declassified and entered the public domain; they became freely available for research and analysis, and the writing and understanding of world history. The contents of the records were not considered the intellectual property of the former adversarial nations subject to their exclusive control or political, cultural, or social sensibilities about what constituted legitimate or ethical research. The Minerva Initiative’s CRRC has attempted to follow this example. Nevertheless, Eskander’s concern about protecting the rights of individuals and victims named in the files cannot be dismissed. The CRRC has attempted to address this concern by establishing access protocols that ensure the ethical use of the digitized documents.<sup>66</sup>

<sup>64</sup> Eskander, “Minerva Research Initiative: Searching for the Truth or Denying the Iraqis the Rights to Know the Truth?”

<sup>65</sup> See Salah Nasrawi, “Iraq’s Stolen Memory,” *Al-Ahram Weekly*, n.d., <http://weekly.ahram.org.eg/print/2011/1071/re10.htm>, accessed 20 December 2011.

<sup>66</sup> Bruce P. Montgomery, memorandum to Kevin Woods, Institute for Defense Analysis, “A Few Thoughts: Saad Eskander and the Iraq National Library and Archives,” 2 April 2009.

### *Iraqi Delegation Demands Return of Seized Iraqi Documents*

In an effort to retrieve the documents seized by U.S. forces during the war, in April 2010 a three-member Iraqi delegation, including Eskander, visited Washington to request their return. The delegation met with representatives of the Departments of Defense and State. The American negotiating team involved two Pentagon officials, one of whom was a legal advisor, and seven from the State Department. The Iraqi team emphasized that the seized records were Iraqi property. They asked for American cooperation and assistance in the return of the records and in implementing a pioneer project that would involve placing the documents of the Hussein regime in the "service of justice, national reconciliation, national unity, democratization, and peace and order." American officials responded that they would study the request, presumably concerned that the records could ignite social chaos if publicly exposed, and revenge killings if misused by the Shiite majority government's new security apparatus. The Iraqi delegation characterized the documents as "stolen," a word that implies a wrongful and insidious theft of something that requires returning. The Americans preferred the word "taken," a word used in article 53 of the 1907 Hague Convention regarding the permissible confiscation of enemy public movable property for military operations and occupation. Under both the convention and the U.S. Army field manual, such property becomes, without compensation, the property of the capturing state.<sup>67</sup> The parties finally decided on the term "seized," a word that means to take possession of by legal authority. Under current circumstances, this may play to U.S. advantage if it decides to withhold all or some of the records.

### *Obstacles to Repatriation*

Nevertheless, not all of the Iraqi documents in the Pentagon's possession can be assumed to have intelligence or national security value warranting long-term or indefinite retention. Some of them, in effect, may legitimately constitute cultural property or archives. In the chaos of war in a foreign land where American soldiers are unlikely to know the language and culture, it may be expected that virtually all records in government agencies will be seized and then sorted out later. This was particularly true in the initial stages of the occupation when the search and seizure of enemy Ba'ath Party records became greatly intensified by the hunt for weapons of mass destruction. Some of these records have value, others do not. Those records that have no significance for exploitation could be returned sooner rather than later. If they constitute cultural property or archives, the 1907 Hague Convention would seem to

<sup>67</sup> Jeffrey B. Spurr, "A Report on the Activities of the Iraqi Delegation," IraqCrisis Listserv, 19 May 2010.

mandate their return at the end of hostilities. Nevertheless, the United States is dealing with a hundred million pages of disorganized documents in Arabic and thousands of media tapes, which may take years to sort through to decide what may be considered of little utility and returned, and what may be valuable for long-term exploitation. Other documents may be withheld because they are seen as posing unacceptable risks to national security and other interests. These may include documents detailing Hussein's nuclear weapons program and other sensitive issues. American deliberations over the possible return of the Iraqi records recall similar issues surrounding the repatriation of captured documents to West Germany, when records were withheld if they posed national security risks to the United States and its allies, glorified the Nazi regime, or related to German occupation of other states.

Another consideration regarding the repatriation of Hussein's state security documents involves whether they might encourage violence by the ruling Shiite majority government against its political adversaries in the Sunni and Kurdish communities. In light of the continuing political and sectarian violence and the uncertainty over Iraq's ability to establish democratic governance—given its history of extreme authoritarianism—the United States might withhold select records for an extended time, if not permanently. This could pose a dilemma for the current American administration. After American troops leave Iraq, the United States would like to advance good diplomatic relations with the Iraqi government, both to maintain influence in the Middle East and to counteract the influence of an expansionist Iran in Iraq and the region. These concerns resemble those that led to the returning of captured German records, which was done partly on the diplomatic imperative of promoting friendly relations with the Federal Republic of Germany and keeping it firmly under American influence.<sup>68</sup> But there is a crucial difference: West Germany had become a prosperous democracy, while Iraq may never emerge from its authoritarian past, nor move to form a national identity beyond its ethnic and sectarian divisions.

At the same time, the United States would like to avoid worsening sectarian tensions in a country that has an uncertain political future and has yet to reconcile its bitter differences. Several years after the records' seizure, it remains unclear when U.S. officials may consider any of them to have transitioned from wartime intelligence to Iraq's historical patrimony that can be repatriated. Some of these documents contain the names of numerous former Ba'ath Party informants, security agents, and other information that would place innocents and third parties at risk. What no longer has value for U.S. intelligence may have considerable, if not malevolent, utility to Iraqi security apparatuses, which may

<sup>68</sup> See General Records Schedule, Seized German Records, National Archives and Records Administration, Record Group 242, AGAR-s 3144; and Cox, "Archives and Records in Armed Conflict," 24, fn 114.

exploit them against population groups and undermine U.S. interests in promoting stability, democracy, and the rule of law.

Nonetheless, the limits of the laws of armed conflict regarding cultural property rest in their failure to acknowledge that seized wartime records should constitute the eventual cultural or historical patrimony of the country of provenance. The conventions of war provide capturing states broad discretion in defining what constitutes public enemy property that contributes to military action or offers military and occupation-related advantage; they do not specifically mention the seizure of enemy documents, regulate their custody and use, or obligate their return. The vague, if not open-ended wording, of article 53 of the 1907 Hague Convention has been interpreted to permit the seizure of adversary records as a species of enemy public movable property that may also be treated as spoils of war. Captured wartime records should, however, be deemed, with exceptions, as the enduring property of the home country of origin. When captured documents are no longer needed by the capturing state, they should be returned to the country of provenance, excepting materials that pose grave national security risks or that would be misused or cause social chaos if returned prematurely. With regard to Iraq, if there is to be a confrontation between human rights and the American custom of restitution, human rights should prevail until the documents no longer pose harm.<sup>69</sup> As already noted, however, the final disposition of the documents will be determined by diplomacy and U.S. national interests.

### **Anfal Secret Police Records**

The United States also possesses the Anfal documents, which were taken by the Kurdish peshmerga in its March 1991 uprising against the Hussein regime. The case of the capture and removal of these documents reveals the seeming applicability of the conventions of war regarding their seizure, but their inapplicability concerning their return. The Anfal archives details the systematic razing of villages, forced expulsions or deportations, large-scale disappearances, targeted assassinations, and the torture and mass executions of tens of thousands of Kurds under what was known as the Anfal campaign, an effort to punish the Kurds for their wartime alliance with the Iranians during the Iran-Iraq War in the middle to late 1980s.<sup>70</sup> The Kurds' initial interest in the documents involved finding information about Saddam Hussein's secret police informants, but they

<sup>69</sup> Bruce P. Montgomery, "Returning Evidence to the Scene of the Crime: Why the Anfal Files Should Be Repatriated to Iraqi Kurdistan," *Archivaria* 69 (Fall 2010): 171.

<sup>70</sup> Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign against the Kurds* (New Haven and London: Yale University Press, 1995), xvii–xx; Joost Hilberman, "Case Study: The 1988 Anfal Campaign in Iraqi Kurdistan," in *Online Encyclopedia of Mass Violence*, [www.massviolence.org/the-1988-anfal-campaign-in-iraqi-kurdistan](http://www.massviolence.org/the-1988-anfal-campaign-in-iraqi-kurdistan), accessed 14 June 2009.

soon realized their larger significance. Human rights researchers, moreover, immediately saw the files not as looted property, but as an unprecedented windfall in the investigation of Iraqi atrocities under the genocidal Anfal campaign.<sup>71</sup>

#### ***Seizure of Iraqi Anfal Documents: Geneva Additional Protocol II***

The capture of public enemy property, including adversary records for military advantage, by noninternational or internal combatants is permissible under the laws of war. Article I of Geneva Protocol II defines *noninternational conflicts* as those armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>72</sup> It excludes situations of internal disturbances and tensions, including riots, isolated acts of violence, and other acts of a similar nature. The three defining characteristics of noninternational conflicts therefore include dissident forces that 1) have formed a military command; 2) control part of the territory of the state that enables them to carry out concerted military actions; and 3) possess the ability to implement the provisions of Geneva Additional Protocol II. The control of territory does not necessarily involve actual administration of territory in a governmental sense, but rather enables dissident forces to carry out protracted military operations.<sup>73</sup>

If an internal conflict meets this exacting definition, noninternational combatants must be provided humanitarian protections under the Geneva Conventions. In turn, internal dissident combatants must also respect the humanitarian and other provisions of the conventions, including prohibitions against pillaging, damaging, destroying, or misappropriating civilian and cultural property. In other words, the same prohibitions apply to the forces of warring countries and noninternational combatants. However, the laws of armed conflict (Hague and Geneva) do not define government movable property deemed of military necessity as protected private or cultural property. By extension, just as international combatants can seize public enemy documents for military advantage, so can noninternational combatants.<sup>74</sup> Despite the complexity of what precisely defines a noninternational conflict, it may be

<sup>71</sup> Human Rights Watch, *Iraq's Crime of Genocide*, xx.

<sup>72</sup> Geneva Protocol II, art. I.

<sup>73</sup> See Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3<sup>rd</sup> ed. (Manchester, U.K.: Manchester University Press, 2008), 82–85.

<sup>74</sup> See Fleck, *The Handbook of International Humanitarian Law*, 629.

argued that the 1991 Kurdish capture of the Iraqi Anfal documents constituted a legitimate seizure of public enemy records for military advantage under the laws of war. Under the meaning of Geneva Additional Protocol II, it is arguable that the Kurdish peshmerga meets the high threshold definition of noninternational combatants; it was acting under military and political command, occupied part of the territory of the state in northern Iraq, and had been resisting the Iraqi state from this territory since Iraq's creation after World War I. Further, given the peshmerga's political and military command structure, even if these forces were divided into two primary factions (the Kurdistan Democratic Party and Patriotic Union of Kurdistan), the Kurdish rebels may have been able to implement the provisions of the protocol. But even if the Kurdish resistance to Hussein's rule did not legally meet the definition of noninternational combatant, the laws of armed conflict are silent on document seizures by internal dissident forces. Presumably, under such circumstances, these actions are left to the realm of domestic law.

It is also questionable whether the captured Anfal documents at the time of their seizure could be defined as historical or cultural property given their removal from secret police stations and torture centers in Iraqi Kurdistan, not from institutions dedicated to religion, charity, education, or the arts and sciences, which are provided protected status under the laws of war. Moreover, given what they revealed about the enormity of Iraqi crimes, Hussein's government disavowed any connection to the documents, challenging their authenticity and claiming that they were forgeries.<sup>75</sup> Hussein never demanded their return on behalf of Iraq, in effect, disowning and relinquishing them to the Kurds who claimed them as their property while permitting their removal to the United States for analysis and possible use as evidence against Hussein's regime under the 1948 Genocide Convention.

#### ***Legitimacy of Seizure: Removal, Analysis, and Human Rights***

Iraq's ratification of several seminal international human rights declarations and treaties adds another justifying source for the seizure and removal of the Anfal documents. For example, Iraq voted in favor of the Universal Declaration of Human Rights, adopted on 10 December 1948, by the UN General Assembly. Proclaimed the "Magna Carta of Mankind" by Eleanor Roosevelt, the declaration prohibits any "State, group, or person to engage in any activity . . . aimed at the destruction" of fundamental human freedoms, including the life, liberty and security of the person. In 1959, Iraq acceded to the Convention on the Prevention of and Punishment of the Crime of Genocide, providing for the punishment of

<sup>75</sup> Human Rights Watch/Middle East, *Bureaucracy of Repression* (New York: Human Rights Watch, 1994), 22–23.

those found guilty of this crime, whether they are constitutionally responsible rulers, public officials, or private citizens. Iraq ratified the International Convention on the Elimination of All Forms of Racial Discrimination in 1970, also affirming the “right to security of the person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” In that same year, Iraq ratified the International Covenant on Civil and Political Rights, which states that “[n]o one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment,” while again affirming that everyone “has the right to . . . security of the person.” In violating these treaty obligations, the Hussein regime pursued a genocidal policy aimed at killing as many Kurds as possible to punish them for siding with Iran in the Iran-Iraq War and to pacify them once and for all; the 1991 Kurdish rebellion in Iraqi Kurdistan, including the seizure of internal secret police documents for intelligence, was an act of self-defense to prevent their continued destruction.<sup>76</sup>

Following their Kurdish capture, military transport spirited the records out of Iraq to the United States for safe storage and analysis, where they were made available to a third party, Human Rights Watch. This added a different dimension to the case. The transfer and analysis of the documents took place with the understanding that the documents would remain the property of the Kurds. The laws of war do not regulate or prohibit the seizure by internal dissident forces of public enemy documents that are then turned over to an adversarial state. The United States obtained temporary custody of the documents during continuing hostilities with Iraq, making them seemingly legitimate captured wartime intelligence under the 1907 Hague Convention and Geneva Additional Protocol I, even if they were loaned to American authorities for intelligence. Following the defeat of Iraq in the first Gulf War, the United States and the United Kingdom continued in a state of hostilities with Iraq from 1991 until 2003 after they set up a no-fly zone to protect Iraqi Kurdistan from attack by Saddam Hussein’s forces.

The Defense Intelligence Agency digitized the materials, while providing Human Rights Watch exclusive access to research the files to prepare a possible case of genocide against the Iraqi regime before the International Court of Justice. The hope was that the documents would prove useful in preparing a

<sup>76</sup> Universal Declaration of Human Rights, [www.un.org/en/documents/udhr/](http://www.un.org/en/documents/udhr/), accessed 10 September 2009; and Convention on the Prevention of and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; and International Covenant on Civil and Political Rights, arts. 7 and 9. These may be accessed at <http://www.bayefsky.com/introduction.php/pfriendly/1>, accessed on 10 September 2009.

case against Iraq under the 1948 United Nations Convention on Genocide.<sup>77</sup> The convention, which outlaws repression and killings intended to destroy “in whole or in part” any national ethnic group, was signed by Iraq in 1959. The Anfal documents gave rise to a number of possibilities in preparing such a prosecution. As Peter Galbraith, then a staffer with the U.S. Senate Foreign Relations Committee, explained at the time, consideration was given to bringing Iraq before the International Court of Justice under the genocide convention, or having the UN Security Council set up a special tribunal on the model of Nuremberg to try Saddam Hussein and his senior leadership. Another possibility involved bringing an indictment before an American court against Hussein, al-Majid, and others for the crime of genocide. In the end, HRW was unable to get at least two sponsoring nations required under international law to bring a formal case of genocide against the Hussein regime.

#### ***Repatriation: Baghdad or Iraqi Kurdistan***

In 2005, the Anfal archives was turned over to the Justice Department's Regional Crimes Liaison Task Force whose mission involved gathering evidence for the trials of Saddam Hussein and his senior leadership for their crimes in the Anfal genocide. Following Hussein's 2006 execution, it is arguable that the documents no longer held active intelligence or judicial value and, as such, could be construed as cultural property. Indeed, American intelligence had long ago scanned and analyzed the documents, which had also served their evidentiary purpose in Hussein's trial for the Anfal genocide. Nonetheless, Iraq's continuing sectarianism and fragile political system still pose significant risks for the documents' misuse by the central government's security apparatuses if returned. Given the disintegrating Shiite-Kurdish alliance that once brought stability to parts of Iraq and the threat of conflict over land, oil, and political autonomy, the authorities in Baghdad might well exploit the secret police documents against their Kurdish adversaries. From this perspective, the misuse of the files would undermine international interests in promoting political stability, which continues to be highly tenuous in a country that may never resolve its sectarian differences.

Alternatively, the documents could be returned to Iraqi Kurdistan in accord with the previous U.S.-Kurdish agreement that defined them as Kurdish property. The United States will have to decide whether or not to respect this agreement regarding ownership of the Anfal documents. The advantages of

<sup>77</sup> United Nations, United Nations Convention on the Prevention and Punishment of the Crimes of Genocide, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, entered into force 12 January 1951, [untreaty.un.org/cod/avl/ha/cppcg/cppcg.html](http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html), accessed 14 May 2009.

returning the records to Iraqi Kurdistan would be in avoiding the risk of the Iraqi central government misusing them for malevolent ends, in honoring the U.S.-Kurdish diplomatic agreement, in paying homage to past Kurdish suffering, and in repatriating them to the country of origin.<sup>78</sup> In the final analysis, while the Kurdish peshmerga may have permissibly seized and transferred the Anfal documents to the United States—which continued in a state of hostility with Iraq—under the laws of armed conflict, these treaties are silent on when or if they should be repatriated. Their final disposition will be a matter of diplomacy, or left to the discretion of the United States.

### **Makiya-Hoover Agreement**

Complicating matters further, the taking of approximately seven million pages of Ba'ath Party records by Kanan Makiya, a long-time Iraqi dissident and head of the Iraq Memory Foundation, represents one of the more unusual, if unprecedented, cases regarding the fate of state records during wartime. At the crux of this case, which has ignited charges of pillage, is the limited reach of international law on the actions of a private, nonstate actor in controlling the records of a former authoritarian government both during and after war and occupation.

### **Background Events**

In April 2003, one month after the invasion, an American soldier led Makiya to a major cache of Ba'ath Party records in a warren of rooms under the Ba'ath Party's headquarters in Baghdad. The security records are particularly significant because they document Saddam Hussein's extensive web of collaborators during his final years in power. Makiya took custody of the records with the aim of safeguarding them and collecting other documents to create a memorial center in Baghdad's Green Zone on the site of the Victory Arch, the memorial commissioned by Hussein to commemorate Iraq's so-called triumph in the Iran-Iraq War.

Makiya received permission to take custody of the Ba'ath Party records from the administrator of the Coalition Provisional Authority, L. Paul Bremer III, who served as Iraq's civilian administrator from 13 May 2003 until his departure on 28 June 2004.<sup>79</sup> As CPA administrator, Bremer exercised executive,

<sup>78</sup> Montgomery, "Returning Evidence to the Scene of the Crime," 171.

<sup>79</sup> Joel Brinkley, "A Region Inflamed: The Past; A Paper Trail Follows Iraqi Merchants of Tyranny," *New York Times*, 24 November 2003. Also see Press Briefing, "Remarks Following a Meeting with Secretary of Defense Donald H. Rumsfeld and an Exchange with Reporters," 39 Weekly Comp. Pres. Doc. (6 May 2003), 549.

legislative, and judicial authority over all of Iraq's civil institutions and laws, although he had no authority over American personnel who were under military command.<sup>80</sup> It is unclear why Bremer gave custody to the IMF rather than exerting control over the records for their intelligence and judicial value; they should have been turned over to the Pentagon or the CPA's Office of Human Rights and Transitional Justice, which was responsible for securing and preserving evidence of atrocities committed by Saddam Hussein's regime.<sup>81</sup> If nothing else, this transaction indicated a serious disconnect between the CPA and the Pentagon regarding the disposition of adversary documents. Nonetheless, Makiya further received permission to build his memorial museum and center, which he hoped would preserve Saddam Hussein's atrocities for all Iraqis to see. He aimed to create this resource center in the image of Germany's vast archives of the Stasi, the former East German Secret Police.<sup>82</sup> At least initially, the CPA-IMF arrangement defined the documents more as cultural material than "captured enemy records" to be used to inform the Iraqi people of their authoritarian past. One of the interesting issues in this case is how Makiya and the IMF shifted the definition of the documents between cultural property and wartime intelligence to keep custody of the files and arrange for their transfer to American soil.

The IMF worked as one of thousands of civilian defense contractors in Iraq. It served in this capacity from 2003 until 2009. The IMF won its first contract for \$2.1 million in June 2004, just days before the transfer of sovereignty to the Iraqi interim government on 24 June. It received several other defense contracts in the amounts of \$1,122,968, \$1,141,620, and \$1,198,752 for the years 2005, 2006, and 2007 respectively. The contracts involved creating a video archives of witness testimonies regarding the atrocities of the Hussein era. The IMF aimed to edit the video footage for a series of documentaries that would air to Iraqis on Al Iraqiya TV. The U.S. government offered to assist the IMF in "distributing the documentaries to other global audiences to counter pro-Saddam, pro-Baathist propaganda," even if the "operational intent" was to be "apolitical." Of particular relevance are the 2004 and 2005 contracts, which state the government's requirements for the IMF in carrying out this initiative; the subsequent contracts represent extensions of the original video oral history project. Under the terms of the 2004 and 2005 contracts, the IMF was required "to collect documentary evidence of atrocities and crimes committed by the former Baathist regime of

<sup>80</sup> CPA Regulation 1 (16 May 2003). Bremer also had the authority to dispose of all Iraqi assets and direct all Iraqi government officials. See James Dobbins, Seth G. Jones, Benjamin Runkle, and Siddharth Mohandas, *Occupying Iraq: A History of the Coalition Provisional Authority* (Santa Monica, Calif.: Rand Corporation, 2009), xiii.

<sup>81</sup> Gerstenlith, "Protecting Cultural Heritage in Armed Conflict, 159.

<sup>82</sup> Robert F. Worth, "The Struggle for Iraq: The Past; Planning a Museum to Tell Iraq's Story," *New York Times*, 9 September 2003.

Iraq.” The 2004 contract amplified this clause in another provision, stating that the “contractor will assume sole legal and contractual responsibility for acquisition of ‘other documentary evidence of atrocities and crimes against humanity perpetrated by the former Baathist regime in Iraq against the people of Iraq . . .’” As such, the IMF not only received the blessing of the CPA to take custody of the Ba’ath Party documents, but also was contractually tasked by the Pentagon to undertake the sole legal responsibility for collecting documentary evidence on the atrocities of the Hussein regime. In this respect, both Coalition and American civilian occupation and military authorities sanctioned the IMF’s custody of the documents for an educational and cultural endeavor on behalf of the Iraqi population.<sup>83</sup> The Pentagon also evidently saw the project as a counterintelligence initiative against pro-Hussein and pro-Ba’athist propaganda.

The IMF served perhaps as one of the more unusual defense contractors in Iraq. Contractors performed a wide variety of tasks, from preparing meals and trucking supplies, to conducting armed operations and interrogating prisoners.<sup>84</sup> Their legal status was highly ambiguous. They operated largely as unregulated entities beyond the reach of the law. They were not exactly civilians given that many of them carried out military operations, but they were not soldiers either, subject to the apparatus and oversight of the state or a chain of command.<sup>85</sup> Many of these were “active” firms whose employees were armed in combat areas; neither civilian nor soldier, they comprised a third class of people on the battlefield. Others provided logistical support, such as food service, repair work, or warehouse administration.<sup>86</sup> Laws ostensibly regulated contractor conduct, but these were rarely, if ever, enforced. Like numerous other contractors and subcontractors in Iraq, the IMF operated not as a direct state actor, but as an unregulated and unpoliced private entity. Because its employees did not participate in direct hostilities during the occupation, they fell within the category of civilians under international humanitarian law—specifically the

<sup>83</sup> See Iraqi Memory Foundation, Solicitation/Contract/Order for Commercial Use, Solicitation Number W74V8H-04-T-0094, Code 3V9P5, Awarded 18 June 2004; Iraqi Memory Foundation, Solicitation/Contract/Order for Commercial Use, Solicitation Number W74V8H-05-T-0232, Code 3V9P5, 8 September 2005; Iraqi Memory Foundation, Amendment of Solicitation/Modification of Contract, Contract Number W74V8H-05-P-0684, 31 August 2006; and Iraqi Memory Foundation, Amendment of Solicitation/Modification of Contract, Contract Number W74V8H-05-P-0684, 7 August 2007. The author is grateful to Douglas Cox for sending email copies of these documents that he obtained through FOIA. They may be seen at his website: [www.docexblog.com/2012/01/iraq-memory-foundation-defense.html](http://www.docexblog.com/2012/01/iraq-memory-foundation-defense.html). [The URL links to a secured portal.]

<sup>84</sup> See Patrick Radden Keefe, “Iraq: America’s Private Armies,” *New York Review of Books* 51 (12 August 2004); and P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, N.Y.: Cornell University Press, 2004).

<sup>85</sup> P. W. Singer, “Can’t Win with ‘Em, Can’t Go to War without ‘Em: Private Military Contractors and Counterinsurgency,” Policy Paper No. 4, Foreign Policy at Brookings, September 2007, 11.

<sup>86</sup> Keefe, “Iraq: America’s Private Armies.”

Fourth Geneva Convention and its Additional Protocols of 1977.<sup>87</sup> The IMF's status as a civilian contractor and nonstate actor is important because of the inapplicability of the conventions of armed conflict to private civilian entities in the theater of war and occupation.

Following the invasion, the IMF contended with other Iraqi political groups and local nongovernmental organizations (NGOs), which were looting state security records from Hussein's various bureaucracies and ministries throughout Iraq.<sup>88</sup> The IMF also confronted the rise of a thriving trade in the sale and purchase of Hussein documents that had been looted or collected after the invasion. The Pentagon, however, confiscated the vast majority of documents in the invasion and occupation, leading Makiya to call quixotically for them to be turned over to his own Memory Foundation to make them part of his memorial center.<sup>89</sup>

In the early days of the occupation, before it secured its first defense contract, the IMF struggled with little success to obtain funding from U.S. and CPA officials to sustain its collecting and scanning work for the memorial center. In August 2003, the IMF offered assistance to the CPA in establishing uniform and standard procedures for document processing and scanning efforts.<sup>90</sup> The CPA declined this offer, instead issuing an order on 28 April 2004 to establish an alternative institution, the Iraqi National Foundation for Remembrance, based on a concept similar to Makiya's—to "document, study, and present publicly the history of atrocities suffered under the previous regime."<sup>91</sup> This order came after the CPA moved to assert control over all of the Iraqi state documents that were in private hands. It gave this responsibility to the Iraqi human rights minister, Aabd al-Baset Turki Sa'id, who called unsuccessfully for centralizing the state archives within a legal framework in his ministry.<sup>92</sup> Many of the political groups and NGOs protested the choice of the Human Rights Ministry as a central repository for the records, while others ignored the call for returning the documents altogether, deciding to wait for the election of a

<sup>87</sup> Alexandre Faite, "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law," <http://www.icrc.org/eng/resources/documents/article/other/pmc-article-310804.htm>, accessed 3 June 2011; and International Committee of the Red Cross, "Contemporary Challenges to IHL—Privatization of War: Overview," 29 October 2010, <http://www.icrc.org/eng/resources/documents/faq/pmsc-faq-150908.htm>, accessed 3 June 2011.

<sup>88</sup> Mufti, *Iraq: State of Evidence*, 4–14; and Dobbins et al., *Occupying Iraq*, 9–13.

<sup>89</sup> Gravois, "Tug of War for Iraq's Memory."

<sup>90</sup> Mufti, *Iraq: State of Evidence*, 16–17.

<sup>91</sup> Coalition Provisional Authority Order Number 82: Iraqi National Foundation for Remembrance, signed into force by Paul Bremer on 28 April 2004.

<sup>92</sup> The Iraqi Governing Council comprised twenty-five Iraqi nationals selected by the United States. It was vested with limited responsibility for operating ministries, appointing diplomats, and laying the groundwork for drafting a new constitution. Rajiv Chandrasekaran, "Appointed Iraqi Council Assumes Limited Role," *Washington Post*, 14 July 2003. The council included thirteen Shiites, five Kurds, five Sunnis, one Christian, and one Turkmen.

sovereign Iraqi government. The CPA's efforts to gain control over the documents were soon overwhelmed by security concerns with the rising tide of sectarianism and resistance against the occupation.<sup>93</sup> With the occupation nearing its end and just prior to the CPA disbanding, the IMF successfully achieved its first contract with the Pentagon to collect documentary evidence of Ba'ath Party atrocities. Given the failure of both the CPA and the Iraqi human rights minister to secure the Hussein-related records in private hands, the Pentagon may have opted to give this assignment to the IMF.

In August 2004, one month after the CPA handed off sovereignty to the Iraqis, the IMF also won re-authorization from the prime minister's office of the first postinvasion Iraqi government to gather documents of the former regime and preserve them in a national institution that it would help establish in Baghdad.<sup>94</sup> This new authorization implicitly, if not outright, sanctioned the Pentagon contract and allowed the IMF to keep custody of the records after the CPA disbanded. In so doing, the CPA rescinded its order governing Ba'ath Party property and assets upon transferring power to the Iraqis in June 2004.<sup>95</sup> This arrangement once again underscored the records as cultural material that would form the centerpiece of reconstructing Iraq's recent history of authoritarianism. Nonetheless, Makiya's plans went cold as Iraq descended into resistance against the occupation and sectarian bloodletting. In February 2005, amid the dire security situation, the IMF redefined the records by persuading the Pentagon of their intelligence value for understanding the Sunni insurgency. Reclassifying the documents as wartime intelligence allowed the Pentagon to take temporary custody of them and transfer them to the United States—with the approval of the prime minister's office—even though Iraq was no longer under formal American occupation. Nevertheless, U.S.-led Coalition forces were still responsible for the country's security, including battling the Sunni insurgency, as well as the Iranian-allied Shiite militias and the terrorist group al-Qaeda in Iraq. The deal with the Pentagon proved a deft maneuver amid the worsening civil strife in providing for the transfer of the documents out of Iraq. Eskander later denounced this arrangement, claiming that the prime minister's approval violated Iraqi law.<sup>96</sup>

The records were transferred to a U.S. naval facility in West Virginia where government contractors digitized them; the Pentagon then gave a copy of the

<sup>93</sup> Mufti, *Iraq: State of Evidence*, 19–20.

<sup>94</sup> See Hugh Eakin, "Iraqi Files in U.S.: Plunder or Rescue?," *New York Times*, 1 July 2008; and Nikki Swartz, "Iraq Records Spark Controversy," *Information Management Journal* 42 (September/October 2008): 13.

<sup>95</sup> Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, Coalition Provisional Authority Order No. 100, 28 June 2004.

<sup>96</sup> Saad Eskander, email posts to *Stanford Daily*, 26 and 27 May 2010 in response to Banerjee, "Iraq Asks Hoover to Return Records." Email posts have been removed from this site.

database to Makiya as part of their agreement, which also provided that the files would remain in the IMF's custody. With the scanning project completed in September 2005, Makiya needed to find a place to store the physical documents. Rather than returning them to Iraq because of the security situation and perhaps because he wanted to keep alive his vision for a memorial center, he pursued negotiations with Harvard University; the discussions collapsed over complications surrounding the documents' sensitivity and provenance. He then struck a five-year deal with the Hoover Institution at Stanford University to house the original records, which arrived at Hoover in June 2008.<sup>97</sup> The Hoover agreement provided that after five years, the possibility of returning the documents to Iraq would be explored if conditions permitted. The terms of the agreement imply that Makiya, a private citizen and nonstate actor, will decide when and under what conditions the archives will be repatriated.<sup>98</sup> Despite accusations of plunder, neither Hoover nor the IMF has moved to claim ownership of the records, nor have they sought to profit from them; both agree that the documents must be returned to Iraq in the future. Eskander, however, argues that they have no right to exercise any such control over the documents.

To carry out the Hoover deal, Makiya used his personal contacts in the Iraqi government to secure letters of permission from the Iraqi prime minister's office.<sup>99</sup> The Makiya-Hoover deal, however, ignited immediate controversy and charges of pillage. After Makiya deposited the records at the Hoover Institution, Eskander, the director of the Iraq National Library and Archives, denounced the agreement in a 21 June 2008 open letter to the director of the Hoover Institution. He asserted that the records had been "illegally seized" and that they constituted the property of the Iraqi people, and he demanded their immediate return to Iraq's National Library and Archives. The letter claimed that the IMF's actions were "incontrovertibly illegal," according to a 1969 law that imposes severe punishment on anyone who destroys, hides, steals, forges, publishes, or removes official Iraqi documents.<sup>100</sup> In April 2008, the Society of American Archivists and the Association of Canadian Archivists also condemned the deal; the two societies issued a joint statement alleging that the Ba'ath Party documents

<sup>97</sup> Gravois, "Tug of War for Iraq's Memory."

<sup>98</sup> John Gravois, "Disputed Iraqi Archives Find a Home at the Hoover Institution," *Chronicle of Higher Education*, 1 February 2008, <http://chronicle.com/article/Disputed-Iraqi-Records-Find-a/21469/>, accessed 2 April 2009; and Sudarsan Raghavan, "An Archive of Despair," *Washington Post*, 7 April 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040602196.html>, accessed 2 April 2009. In response to the Iraqi National Library and Archives' request to the Hoover Institution to return the Ba'ath Party records, the *Stanford Daily* reported that "Hoover is resisting because it doesn't deem security in Baghdad sufficient to ensure the documents' security." See Banerjee, "Iraq Asks Hoover to Return Records."

<sup>99</sup> Gravois, "A Tug of War for Iraq's Memory."

<sup>100</sup> Saad Eskander, "An Open Letter to the Hoover Institution," History News Network, [hnn.us/roundup/entries/51649.html](http://hnn.us/roundup/entries/51649.html), accessed 21 September 2008.

may have been obtained through “an act of pillage” prohibited under the laws of war and calling for their return to the Iraq National Library and Archives.<sup>101</sup>

Eskander also argued that under Iraq’s new accountability and justice law, the IMF had no right to retain control of the documents. Shortly after Eskander’s open letter, Iraq’s acting cultural minister, Akram M. Hadi, expressly rejected the IMF’s actions. In the fall of 2008, the *Stanford Magazine*, which was researching an article on Hoover’s possession of the Ba’ath Party records for publication, sought clarification from the Iraqi government. In response, Ahmed Shames, assistant to Iraqi government spokesperson Ali al-Dabbagh wrote that the deal was “done in coordination with the Prime Minister’s Office and through official letters”; therefore, he said, “the Government has agreed to the . . . operation with the Hoover Institute.”<sup>102</sup>

#### *Iraqi Delegation Demands Return of Documents*

In May 2010, the same Iraqi delegation that met with Pentagon and State Department officials also visited the Hoover Institution to demand the return of the Ba’ath Party archives. The parties reached agreement on a number of principles, including that the Ba’ath Party archives is the property of the Iraqi people, that the elected Iraqi government represents the Iraqi people, and that the return of the records is vital for national reconciliation, democratization, justice, and the rule of law in Iraq. The parties also agreed that Hoover would seek the advice and involvement of the State Department in future negotiations with the Iraqi side.<sup>103</sup> In brief, there was no agreement on the immediate return of the documents to Iraq. While the meeting appeared cordial and constructive, the *Stanford Daily* ran a 25 May 2010 story on the discussions that seems to indicate otherwise. The article reported Hoover’s resistance to the Iraqi demand on grounds that Baghdad remained too volatile to assure the documents’ security. It noted Makiya’s claim of a “deep rift” within the Iraqi Ministry of Culture as to whether the documents should be returned; he cited the enthusiastic support of the deputy minister of culture, senior to Eskander, for the IMF’s and Hoover’s roles in securing the documents.<sup>104</sup> Eskander responded

<sup>101</sup> Society of American Archivists and Association of Canadian Archivists, “SAA/ACA Joint Statement on Iraqi Records,” 22 April 2008, Society of American Archivists, <http://www.archivists.org/statements/IraqiRecords.asp>, accessed 2 June 2008. See also Jon Wiener, “Over Pages, War Rages,” *Los Angeles Times*, 8 August 2008.

<sup>102</sup> Email from Ahmed Shames, assistant to Iraqi government spokesperson Ali al-Dabbagh, to *Stanford Magazine*. See “Grim Treasures,” *Stanford Magazine* (November/December 2008), <http://www.stanfordalumni.org/news/magazine/2008/novdec/farm/news/hoover.html>, accessed 17 November 2009).

<sup>103</sup> Spurr, “A Report on the Activities of the Iraqi Delegation.”

<sup>104</sup> Banerjee, “Iraq Asks Hoover to Return Records.”

to the article by accusing Makiya of exploiting the “chaotic situation at the top and ignorance of some of the newly appointed Iraqi officials to get approval for the shipment of the records to the U.S.”<sup>105</sup>

***Limited Reach of Laws of War Regarding IMF and Nonstate Actors***

Despite allegations of illegality and pillage, it is questionable whether Makiya's actions transgressed international or Iraqi law. After all, Makiya received permission to take custody of the documents from the CPA. As a defense contractor, the IMF also was awarded contracts that gave it sole legal responsibility for acquiring documentary evidence of Ba'ath Party atrocities. This arrangement went unopposed by the Iraqi prime minister's office after the June 2004 transfer of sovereignty to the first postwar Iraqi government. Following the transfer of sovereignty, the disposition of the Ba'ath Party records became solely an Iraqi internal affair. Under the interim government, the prime minister held responsibility for the day-to-day management of the government. Iraq's ministers who oversaw the government ministries reported to the prime minister. Before Iraq dissolved the interim government and adopted a new constitution on 15 October 2005, the prime minister's office served as the executive power center of the government responsible for overseeing intelligence, improving security, promoting economic development, and preparing for new democratic elections that were to be held in 2005.<sup>106</sup> The agreement that transferred sovereignty to the Iraqi government also provided American and Coalition contractors, including the IMF, immunity from prosecution in Iraqi courts. Thus, it appears that at no time did the IMF act on its own without authorization from Coalition military and civilian occupation authorities and Iraqi government officials.

There appeared to be no overt opposition from the Iraqi parliament regarding the arrangements involving the IMF either before or after the January 2008 elections, despite passage of the justice and accountability law. The new law, passed on 14 January 2008, both revised the de-Ba'athification process and called for establishing a permanent archives to house Hussein's documents of atrocity. The law asserted that all “files of the dissolved Ba'ath Party shall be transferred to the Government in order to be kept until a permanent Iraqi

<sup>105</sup> Saad Eskander, blog posts to *Stanford Daily* website, 25 and 27 May 2010 in response to Banejee, “Iraq Asks Hoover to Return Records,” [www.stanforddaily.com/2010/05/25/iraq-asks-hoover-to-return-records/](http://www.stanforddaily.com/2010/05/25/iraq-asks-hoover-to-return-records/). Blog posts subsequently removed from website.

<sup>106</sup> *Iraqi Interim Government: Announcement Ceremony Press Packet*, [http://dosfan.lib.uic.edu/ERC/cpa/english/government/press\\_packet.pdf](http://dosfan.lib.uic.edu/ERC/cpa/english/government/press_packet.pdf), accessed 16 July 2011.

archives is established pursuant to the law.”<sup>107</sup> Makiya’s 2005 arrangement with the prime minister’s office and the Pentagon put the records beyond the law’s reach. Moreover, fierce political infighting over the law’s de-Ba’athification process bogged down its implementation; Sunni politicians accused the Shiited government of instituting new punitive measures against them and demanded amendments to the law.<sup>108</sup> In brief, while Iraq’s executive branch authorized the documents’ removal, the Iraqi parliament called for all records in private hands to be turned over to the government.

For several reasons, the cultural property protections of the laws of armed conflict—specifically the Hague Conventions (1907 and 1954), the Hague Protocols (1954 and 1999), and the Fourth Geneva Convention and its Additional Protocols of 1977—have little applicability in this case. These treaties regulate the conduct of contracting nation-states in war and occupation (“High Contracting Powers”), not the conduct of civilians or civilian entities whose actions are governed by the laws and officials of the occupied country. As such, these treaties have little relevance regarding the actions of the IMF, a private civilian firm and nonstate actor, in orchestrating the removal of the Ba’ath Party records through official channels of the Iraqi prime minister’s office and the Pentagon and their deposit at the Hoover Institution.

The 1907 Hague Convention, for example, only imposes direct obligations on contracting states, including mandating measures to govern directly the civilian population when necessary. Article 43 of the convention obligates the occupying power to take all measures “to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>109</sup> The foreign occupying power not only is responsible for the conduct of its own forces, but also (as far as possible and unless absolutely prevented) for maintaining the public order among the civilian population. Presumably, this responsibility involves preventing theft or plunder of cultural property by foreign or local private entities and civilians according to the laws of the occupied country. The phrasing “as far as possible” and “unless absolutely necessary” acknowledges that public order may be difficult to impose during

<sup>107</sup> The Accountability and Justice Law, passed 14 January 2008, was supposed to reform the punitive de-Ba’athification law and provide for rights of action for victims of repression. See Accountability and Justice Law of 14 January 2008, [http://www.pbs.org/weta/crossroads/incl/trial\\_DeBaathification.pdf](http://www.pbs.org/weta/crossroads/incl/trial_DeBaathification.pdf), accessed 5 March 2008.

<sup>108</sup> Miranda Sessions, “Briefing Paper: Iraq’s New Accountability and Justice Law,” International Center for Transitional Justice (ICTJ), 22 January 2008, <http://www.ictj.org/publication/briefing-paper-iraqs-new-accountability-and-justice-law>, accessed 2 April 2009; Kenneth Katzman, “Iraq: Politics, Elections, and Benchmarks,” *Congressional Research Service Report to Congress* (22 October 2008), 5; Ahmed Rasheed, “Iraq Law on Baathists Not Being Implemented,” 17 June 2008, Reuters, <http://uk.reuters.com/article/2008/06/17/uk-iraq-baathists-idUKYAT25157920080617>, accessed 2 April 2009.

<sup>109</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, Annex I (“Hague Regulations”) art. 43 stat. 2277, TS 539.

hostilities. There is no mention of obligations imposed directly on civilians or nonstate entities. The Fourth Geneva Convention and Additional Protocols I and II, moreover, apply primarily to contracting nation-states and internal combatants; they prohibit pillage or any reprisals against cultural property. While Additional Protocol I addresses international conflicts, Protocol II relates exclusively to internal combatants in armed conflict.

Although critics have accused the IMF of pillage under the 1954 Hague Convention and its two protocols, these treaties also only impose obligations on “contracting powers” to protect cultural property. The domestic laws and officials of the occupied country govern the actions of civilians, political and religious groups, and other civilian entities. The convention requires belligerent nations to “prohibit and, if necessary, put a stop to any form of theft, pillage, misappropriation of, and any acts of vandalism directed against cultural property.” This provision addresses any form of theft and requires the occupying power to prevent such criminal violations by both its own forces and, in the absence of national authorities and only as far as possible, by the civilian population and nonstate entities as well. It adds force to article 43 of the 1907 Hague Convention, requiring the occupying power to restore public order while respecting the laws of the occupied country. Article 5 of the 1954 convention, however, imposes the primary responsibility for securing cultural property on the national authorities of the occupied country.<sup>110</sup> The occupying power must support these national authorities when possible, but its responsibility is limited. The occupying power must assume this responsibility only when national authorities are unable to do so, only when cultural property has been damaged by military operations, and only “as far as possible.” In other words, the occupying power has the discretion to decide what “as far as possible” means or to what extent it should govern the civilian population and enforce the laws of the occupied country within its capacity.

### ***Analysis: Allegations of Pillage***

The allegations of pillage are also problematic in light of the IMF's role as a civilian defense contractor and its multiple authorizations in the taking of the Ba'ath Party records. Indeed, it may seem that as a U.S. civilian defense contractor, the IMF was serving as a state agent, but, as already noted, because its employees were not engaged in belligerent activities during the war and occupation, they fell within the category of civilians under international humanitarian law. Further, of particular importance, the United States did not ratify the 1954 Hague Convention and part of the first protocol until

<sup>110</sup> 1954 Hague Convention, art. 5. See also Gersenblith, “Protecting Cultural Property in Armed Conflict,” 697.

25 September 2008.<sup>111</sup> Nor had the United States ratified Geneva Additional Protocol I. In other words, these conventions were not in effect during the occupation, which lasted from 13 May 2003 until 30 June 2004.

The 1970 UNESCO Convention and other peacetime cultural property treaties, as well as United Nations Resolution 1483, also do not apply in this case. These peacetime treaties were adopted to prevent the illicit import, export, and transfer of ownership of cultural property. Although the UNESCO convention does not address the seizure and removal of wartime intelligence, it does cover wartime misappropriation of cultural property, asserting that the “export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”<sup>112</sup> Further, UN Resolution 1483 obligates UN members to establish a “prohibition on trade or transfer of cultural property” illegally removed from Iraqi institutions.<sup>113</sup> The ban on importing Iraqi cultural goods was put in place in August 1990 as part of general trade sanctions when Iraq invaded Kuwait.<sup>114</sup>

The IMF, however, was not engaged in illicit trafficking or the transfer of ownership of cultural goods. Again, the prime minister in his official capacity in overseeing Iraqi security against the Sunni insurgency authorized the transfer of the documents out of Iraq, and the Pentagon assumed responsibility for their physical relocation to the United States for intelligence. These facts do not impugn the IMF for theft, pillage, or misappropriation of cultural property under international law, even if it did orchestrate the transfer agreement with the aim of keeping custody. Given the Iraqi insurgency at the time, it may be understandable that the prime minister would approve their transfer to the United States for analysis. Because of the documents’ status as intelligence, none of the cultural property protections of the laws of armed conflict or any of the peacetime treaties against the illicit trafficking of cultural goods would have

<sup>111</sup> See “1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict,” U.S. Committee of the Blue Shield, “Resources,” <http://www.uscbs.org/resources.htm>, accessed 15 June 2011; and UNESCO, *Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two 1954 and 1999 Protocols: Report on the Activities from 1995 to 2004* (2005), 7.

<sup>112</sup> UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

<sup>113</sup> See UN Security Council Resolution, paragraph 7, Doc. S/RES/1483 (22 May 2003), [www.iamb.info/pdf/unsc1483.pdf](http://www.iamb.info/pdf/unsc1483.pdf), accessed 3 November 2010.

<sup>114</sup> UN Security Council Resolution 1483, paragraph 7, states that the Security Council decides that all “Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraqi National Museum, the Iraqi Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organizations, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.” See also UN Security Resolution 1483, 22 May 2003, [www.iamb.info/pdf/unsc1483.pdf](http://www.iamb.info/pdf/unsc1483.pdf), accessed 3 November 2010.

applied. As already stated, the laws of armed conflict would have been inapplicable for three other reasons: 1) the laws of war apply to state actors (contracting nation-states), not civilians; 2) the United States was not a signatory to the 1954 Hague Convention and protocols, nor to the Fourth Geneva Convention and Additional Protocol I at the time of the documents' removal; and 3) even if the United States were a signatory, the laws would have applied only during the period of occupation, which ended on 30 June 2004; the documents were removed in 2005.

Moreover, as the occupying power, the United States did not compel a transfer of ownership of the documents to the IMF or any other entity, although it did contract with the group to collect documentary evidence of Ba'ath Party atrocities. In fact, all parties to this dispute—the IMF, Hoover, Eskander, the Iraqi Ministry of Culture, and others—agree that the documents are Iraqi property. Although it may be argued that the Iraqi parliament should have been involved in approving the documents' relocation to the United States, its absence in this process is not evidence of the IMF's illicit taking of the Ba'ath Party records. Some archival critics may cite the inalienability doctrine in arguing that the removal of the records without the Iraqi parliament's approval constituted an unlawful act, but this principle has no credibility or standing in international law. If the prime minister violated Iraqi law in authorizing the removal of the records as Eskander has stated, it should be a matter for the Iraqi judicial system to resolve. This case may be hard to argue, however, given that the Iraqi prime minister's portfolio in the interim government involved security matters and that the interim and successor governments relied on American and Coalition forces for security, intelligence, and battling the Sunni insurgency and Shiite militias.

It remains unclear why the Iraqi executive branch authorized the documents' move to the United States rather than to the media processing center at Qatar where the United States was scanning and analyzing the other captured Iraqi documents. On this point, it is difficult to escape the conclusion that Makiya's personal influence on the Iraqi prime minister's office and his aim to keep custody of the documents played a primary role. Even so, while critics have accused Makiya of unethically exploiting his contacts at the highest levels of the Iraqi government and bamboozling other newly appointed members of the Iraqi prime minister's office to secure approval of the records' relocation to the United States, the exercise of personal influence does not constitute an illicit taking of cultural property in this case. During the rising tide of violence, Makiya evidently persuaded the prime minister of the imperative to rescue the documents from physical destruction and malevolent misuse, as well as to make them available for analysis to help counter the insurgency. These were not unreasonable arguments, even if Makiya also envisioned controlling them as

part of his life's work to document Saddam Hussein's legacy of atrocity. But the appearance of undue influence and Makiya's alleged exploitation of a chaotic situation seem to be the primary causes behind the controversy. One can empathize with Eskander's extraordinary commitment to rebuilding Iraq's national library and archives at the risk to his own life amid the insurgency and sectarian violence, as well as his devotion to preserving and reconstructing Iraq's authoritarian past. These achievements are worthy of considerable admiration, and they constitute a case study of how institutions can be rebuilt under dire circumstances after the ravages of war. Both Eskander and Makiya have been engaged in a war of narratives over preserving the recorded memory of Saddam Hussein's regime. But Eskander's efforts to retrieve Iraq's authoritarian legacy and Makiya's labors to do the same, as well as his personal influence on Iraqi and U.S. government officials, do not translate into theft or pillage of cultural property.

It is highly unlikely that the Pentagon would have transported the documents to the United States unless they held potential intelligence for understanding the Sunni insurgency. It would be unreasonable to argue—and there is no evidence to suggest—that the U.S. military acted as Makiya's personal conspirator or bag-agent in spiriting cultural heritage records out of Iraq so he could keep control of them. Nonetheless, after U.S. government contractors completed scanning the records on American soil, the Pentagon turned them over to the IMF. This transfer evidently honored whatever personal agreement Makiya forged with the prime minister's office. Thus, the U.S. government, which under President George W. Bush took a keen interest in the Ba'ath Party files, has now absolved itself of any further responsibility for the documents. The U.S. State Department refuses to intervene in the dispute, considering it a private matter to be resolved among the Iraqi government, the IMF, and Hoover. "This [issue] should be a subject of discussion between Hoover and the Iraqi Memory Foundation and the Iraqi government," said Phillip Frayne, a spokesman for the U.S. embassy in Baghdad. "In other words, they are in the custody of the Hoover Institution right now, not in the custody of the U.S. government."<sup>115</sup>

### ***Complications of Repatriation***

After the Pentagon scanned and transferred the documents to the IMF, the records could no longer be classified as wartime intelligence, and they fell once again under the IMF's private control. At the same time, considering the documents "cultural property" is problematic, given their politically charged

<sup>115</sup> Peter Kenyon, "Saddam's Spy Files: Keys to Healing or More Hurting?," National Public Radio, 24 June 2012, [www.npr.org/templates/story/story.php?storyId=127986894](http://www.npr.org/templates/story/story.php?storyId=127986894), accessed 21 May 2011.

nature and possible misuse if returned to the majority Shiite government in Iraq before reconciliation takes root, if this is at all possible. In 2005, the IMF concurred with Eskander that the files could be a powerful tool for reconciliation and healing for Iraq if handled properly. Hassan Mneimneh, one of the IMF's directors, notes that countries have taken a variety of approaches in revealing secret police files of past regimes, some of which serve as extreme models. South Africa's Truth and Reconciliation Commission, for example, established a model in which victim and perpetrator faced each other. Another extreme model closer to Iraq is the Lebanese example. "A traumatic civil war ends, a page is turned as if nothing has actually happened—this is a model almost of denial." Between these two extremes, Mneimneh says, "we believe Iraqi society is going to try to find its level of comfort, and our role is clearly to advocate for one that is more toward openness."<sup>116</sup> Eskander expresses a similar sentiment in noting the imperative of retrieving the intelligence files as soon as possible: "From a closed society to an open society, that is our slogan."<sup>117</sup> But some victims of Hussein's vast surveillance regime have a different view. As one former victim points out, "This is not Germany." Iraq is not ready to have decades of betrayal revealed all at once, "there would be killing in the streets."<sup>118</sup>

With the records now in Hoover's custody, the documents seem to have assumed a twilight status, no longer wartime intelligence needed by the Americans, but not benign cultural property given their still dangerous political nature to an unreconciled and sectarian society. They perhaps will remain in this indeterminate state until their overriding importance becomes more historical patrimony than potentially malevolent intelligence. But who decides when this transformation takes place is another issue at the crux of the controversy. Eskander and others in the Iraqi government argue that the documents are Iraqi property, that they are the only ones who can legitimately decide their disposition, and that they should be immediately returned. The IMF and Hoover do not contest that the records are Iraqi property, but they obtained the Iraqi delegation's agreement to involve the State Department in negotiations for their return. As such, the restitution of the documents may have taken a more complicated turn. Presumably, Hoover intends to follow the lead of the State Department in repatriating the majority of the hundred million pages of captured records in the Pentagon's possession. The State Department, however, will have to rely on both the U.S. Defense Department and the intelligence community—which control the records—on when the documents can be returned. In other words, given the continuing unstable security situation in Iraq and the records' sensitivity, it appears Hoover intends

<sup>116</sup> Kenyon, "Saddam's Spy Files."

<sup>117</sup> Kenyon, "Saddam's Spy Files."

<sup>118</sup> Kenyon, "Saddam's Spy Files."

to rely on the U.S. government's assessment regarding the repatriation of the documents. When the United States decides to return its share of the documents, Hoover might follow suit with the Ba'ath Party records under its control but perhaps not before, despite its five-year deposit agreement. This matter may be additionally complicated by the probability that the United States will withhold some of the documents out of national security concerns. The records dealing with Hussein's WMD programs, for example, are unlikely to be returned. Other classifications of documents might also be withheld. The question is whether the IMF and Hoover will use the U.S. government's criteria for withholding documents in determining the repatriation of some or all of the Ba'ath Party materials in their custody.

### Conclusion

The fate of the Hussein-era records illustrates the deficiencies of international law regarding the return of captured wartime records as well as documents taken by nonstate actors in the theater of war and occupation. Indeed, the return of public enemy records continues to be wholly at the discretion of the capturing state and an exclusive matter of diplomacy between formerly warring nations. The conventions of war do not regulate the seizure, custody, and use of enemy documents, nor do they provide for their restitution at the end of conflicts. Further, in the chaos and theater of war and occupation, it is not clear what laws, if any, apply to nonstate actors or nongovernmental organizations in the taking of active intelligence documents from adversary government ministries. International laws do not always seem to apply, and domestic laws may be suspended or overridden by occupying authorities as was the case in Iraq.

The restitution of the various parts of Saddam Hussein's archives of atrocity will be a complicated affair. The United States controls the documents seized during the 2003 invasion and occupation as well as the records of the Anfal genocide. American authorities have stated that the United States intends to return the seized documents to Iraq, but have not said when. Conceivably, it could be years before this repatriation occurs, and then only some, not all, of the records might be returned. Moreover, American officials will have to decide whether to honor their agreement with the Kurds who seized the Anfal documents in the 1991 uprising and allowed for their transfer to the United States with the understanding that they remain Kurdish property. Under the 1907 Hague Convention, drafted by European powers in an earlier imperial age, captured records may be treated as spoils of war. The United States has nevertheless traditionally negotiated the return of captured records at some point after the end of hostilities. These returns, however, have commonly been

contingent on the intelligence imperatives of the United States and the political circumstances on the ground regarding the former adversary state. In other words, when former enemy states become constitutional democracies and allies, and no longer pose risks to national security, the United States follows the practice of repatriating captured records as an act of normalizing relations.

Given Iraq's current unsettled political situation, the United States is unlikely to return certain classes of documents, including materials detailing Saddam Hussein's nuclear weapons program or records relating to other American national security issues. It may be reluctant to repatriate materials that the Shiite majority government could put to malevolent misuse against its Sunni and Kurdish political adversaries until Iraq's bitter sectarian divisions can be resolved, if this is possible. Moreover, the United States is watching, warily, the evolving relationship between the Shiite governments in Iraq and in Iran, a geostrategic adversary of the United States; this relationship may further bear on the records' repatriation. In the final analysis, the United States as the capturing and controlling state has the discretion to decide what materials will be returned and when, if at all. Diplomatic negotiations and U.S. national interests will dictate their ultimate fate.

The documents in the possession of the Hoover Institution and the IMF present another complicated, if not unprecedented, situation. The taking of the documents and their removal from Iraq occurred with multiple authorizations from the CPA and the Iraqi executive branch. At the time of their taking, the IMF was serving as a civilian contractor (nonstate actor) working for the Pentagon to collect materials documenting Ba'ath Party atrocities. As such, the cultural property conventions of war and peace that outlaw the looting of cultural materials carry little relevance in this case. It is not clear why the CPA initially gave the IMF approval to take custody of the Ba'ath Party records instead of securing immediate control of them for intelligence and possible judicial human rights prosecutions of senior Ba'athist officials. Nonetheless, perhaps never before have a private, expatriate, nongovernmental organization and a private U.S. university institution been involved in taking and controlling a significant part of the original intelligence and historical patrimony of another nation-state during armed hostilities. There is no evidence to suggest that either institution has been anything but a serious steward and protector of these materials; if left in Baghdad, the materials could have been the target of Ba'athist operatives seeking to destroy incriminating evidence. After all, Ba'athist agents allegedly twice torched the Iraq National Library and Archives to eliminate Ba'ath Party documents. Neither institution has claimed ownership of the materials; both have acknowledged that the documents belong to Iraq and must be returned at some point in the future. In other words, the timing of their return will be governed by private negotiations among Hoover, IMF, and Iraq.

Further, it may be that Hoover and the IMF will follow the lead of the U.S. State Department in assessing and determining when all or some of these materials will be returned; that is, when the United States decides to repatriate its share of the documents, Hoover and the IMF may follow suit. International law is silent on the nature of such private arrangements.

More generally, the dual nature of records as sources of military intelligence and valuable historical and cultural information provides a useful concept for repatriating captured wartime documents. When documents no longer possess intelligence value or provide strategic or diplomatic advantage, captured records can be seen as having become the cultural property of the former enemy state and should be returned. This concept has obvious limitations; the state that has won the conflict, for example, may keep enemy records out of national security interests and other concerns. As already noted, in the Iraqi situation, American authorities might withhold secret police records that could be reactivated against population groups and worsen sectarian conflict. The return of these kinds of politically charged records could undermine American interests in promoting political stability and the rule of law in Iraq. Such records perhaps should be returned when they can do no harm. In the end, however, the history of warfare and diplomacy indicates that the victorious power ultimately determines when wartime intelligence may mature into cultural property, and when and under what conditions some or all of the seized records will be returned to the country of provenance, if at all.