

Counterpoint

Returning Evidence to the Scene of the Crime: Why the Anfal Files Should be Repatriated to Iraqi Kurdistan



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RÉSUMÉ Le 22 avril 2008, cinq ans après l'invasion américaine de l'Iraq, la Society of American Archivists (SAA) et l'Association of Canadian Archivists (ACA) ont émis une déclaration commune demandant aux autorités américaines de rapatrier les millions de documents du renseignement saisis et d'intervenir auprès du « gouvernement du Kurdistan » afin de retourner les dossiers de l'Anfal iraquien à la Iraq National Library and Archive, à Bagdad. Les dossiers de l'Anfal, qui documentent le génocide iraquien des Kurdes durant la deuxième moitié des années 1980, avaient été saisis par les peshmergas kurdes pendant les insurrections de mars 1991 suite à la première guerre du Golfe. Ils ont été transférés aux États-Unis pour entreposage sécuritaire et pour les analyses dans l'optique des crimes contre l'humanité, tout en demeurant propriété kurde. La SAA et l'ACA ont basé leur déclaration sur le principe archivistique de l'inaliénabilité des documents nationaux, concept qui affirme que l'aliénation des documents nationaux ne peut se faire que par un acte législatif de l'État. Ce principe de l'inaliénabilité, cependant, est incompatible avec les lois de la guerre qui permettent la saisie de documents d'État pendant les hostilités; il entre en conflit avec le régime légal international en matière de droits humains au sujet de la restitution des dossiers de sécurité d'État à un régime répressif qui pourrait s'en servir à nouveau; et il contredit l'entente d'origine entre les autorités américaines et kurdes au sujet du droit de propriété des dossiers de l'Anfal. En effet, étant donné l'apparence montée d'un nouveau régime répressif en Iraq – avec une faction qui gouverne au détriment des autres – il y a un danger considérable de rapatrier les dossiers de l'Anfal et les archives des atrocités d'Hussein aux théocrates au pouvoir en Iraq avant qu'aucune réconciliation politique n'ait pu s'enraciner. Les notions de patrimoine historique et de provenance encouragent aussi le retour des documents de l'Anfal au Kurdistan iraquien.

ABSTRACT On 22 April 2008, five years after the American invasion of Iraq, the Society of American Archivists (SAA) and the Association of Canadian Archivists (ACA) issued a joint statement calling for American authorities to repatriate millions of captured intelligence documents and intervene with the “government of Kurdistan” to return the Iraqi Anfal files to the Iraq National Library and Archive in Baghdad. The Anfal files, which chronicle Iraq's genocide against the Kurds during the mid- to late-1980s, were captured by Kurdish *peshmerga* in the March 1991 uprisings following the first Gulf War. They were transferred to the United States for safe storage

and analysis for human rights crimes with the understanding that the documents were Kurdish property. The SAA and ACA based their statement on the archival principle of the inalienability of national records, a concept that claims that the alienation of national records can only occur through a legislative act of the state. This principle of inalienability, however, is incompatible with the laws of war that allow for the capture of state records during hostilities, conflicts with the international legal regime of human rights regarding the restitution of state security files to a repressive regime that may reuse them, and contradicts the original agreement between American and Kurdish authorities governing ownership of the Anfal files. Indeed, with the growing appearance of a new Iraqi repressive regime – with one faction ruling at the expense of the others – there is considerable danger in repatriating the Anfal files and Hussein’s archive of atrocity to the ruling theocrats in Baghdad before political reconciliation takes root. Reasons of historical patrimony and provenance also argue for the return of the Anfal documents to Iraqi Kurdistan.

Introduction

In 2001, I wrote in these pages that should Iraq ever become a functioning democracy, it would be an interesting question as to which Iraqi party could legitimately claim ownership of the eighteen metric tons of secret police files that were seized by the Kurdish *peshmerga* (armed Kurdish fighters) in the March 1991 uprisings that took place in northern Iraq.¹ The files, which contained evidence documenting the Anfal genocide in Iraqi Kurdistan during the mid- to late-1980s, eventually made their way to the Archives at the University of Colorado at Boulder in 1998 where they were made available to the world community. At the time that I posed this hypothetical question in the fall of 2001, the prospect of Saddam Hussein’s removal from power seemed remote; few outside the Pentagon could have predicted that the Iraqi dictator and his Baathist regime would be deposed just two years later. It seemed that the files would remain at the University of Colorado indefinitely.

But two years after Saddam Hussein and his Baath regime were swept from power in the 2003 American invasion of Iraq, an agreement was struck to turn over the documents to American authorities with the understanding that they would be used in the trials of Hussein and members of his senior leadership, and then returned to Iraqi Kurdistan. At this writing, however, it is unclear whether the documents have, in fact, been returned to Kurdish officials as intended, or whether they are now awaiting final disposition somewhere in the Middle East. If it is the latter, the records should be repatriated to Iraqi Kurdistan in keeping with the original agreement between Kurdish political leaders and the United States, which provided for their transfer to American soil for security

1 Bruce P. Montgomery, “The Iraqi Secret Police Files: A Documentary Record of the Anfal Genocide,” *Archivaria* 52 (Fall 2001), pp. 81–82.

reasons, analysis, and use to prosecute Saddam Hussein and his henchmen; history, provenance, honouring prior agreements, the possible misuse of the files by Arab parties against Kurdish political opponents, and what the documents reveal about the Anfal genocide also argue for their return to Kurdish authorities.

It was perhaps inevitable that the question of who should have custody of the Anfal files would be raised following Saddam Hussein's removal from power. The issue indeed surfaced in a joint statement issued on 22 April 2008, by the Society of American Archivists (SAA) and the Association of Canadian Archivists (ACA). The associations called for American authorities to intervene with the "government of Kurdistan" to return the materials to the Iraq National Library and Archive (INLA) in Baghdad. This appeal constituted part of their wider concern about the "ultimate fate of records captured or otherwise obtained by the US, and those removed by private parties, during the first and second Gulf Wars." The associations called on the US government to repatriate documents under its direct control in accord with both international agreements and its own past practices, and to intercede in ensuring the return of other Iraqi records removed by private parties during the two Gulf Wars to the lawfully established government of Iraq.²

It would be difficult to contest the legitimacy of some of these concerns. The 2003 invasion wrought devastating repercussions on Iraq's cultural patrimony; thousands of antiquities were looted from the National Museum and archaeological sites in a nation with eleven centuries of history. In the chaos immediately following the invasion, looters and professional thieves also plundered the Iraqi National Library and Archive, which reportedly lost sixty percent of its documents, twenty-five percent of its books, and more than ninety-five percent of its rare books. Various motives were behind the seizure of these records. While some parties sought to exploit the documents to smear political opponents or single out suspected collaborators for murder, other Iraqis hoped to learn the fate of their missing relatives or sell the documents for profit. Within a three-day period, Baathist operatives twice torched the institution and its Saddam-era records to destroy incriminating evidence. In combat operations, the American military seized the greatest share of materials for intelligence – an estimated one hundred million pages of documents, and thousands of audio- and videotapes from Iraq's intelligence and secret police archives, a treasure trove of information detailing the operations and inner workings of Saddam Hussein's secret police state.³

2 See Society of American Archivists (SAA) and Association of Canadian Archivists (ACA), "Joint Statement on Iraqi Records," 22 April 2008, available at <http://www.archivists.org/statements/iraqirecords.asp> (accessed on 17 November 2009).

3 See Saad Eskander, "Records and Archives Recovery in Iraq: Past, Present and Future," Iraq National Library and Archive website, <http://www.iraqnla.org/fp/art/art1.htm> (accessed

Another cache of some seven million pages of Baath Party records has ignited a bitter and public dispute. Kanan Makiya, a long-time Iraqi dissident and head of the Iraqi Memory Foundation (IMF), found the documents shortly after the fall of Baghdad. Despite protests from the general director of the Iraq National Library and Archive, the IMF shipped the documents to the United States in 2006; the records were subsequently digitized by government contractors and deposited at the Hoover Institution at Stanford University under a temporary arrangement. Saad Eskander, INLA's director, has accused Makiya of unlawfully seizing the files and has demanded their return. The files contain politically explosive material, revealing who collaborated with Saddam Hussein's regime. This dispute deserves extended comment because it has been the impetus for the joint SAA/ACA statement, which also called for the return of the original Anfal files to Baghdad. Like the Baath Party documents under the control of the IMF and Hoover, the SAA and ACA – representing a significant segment of the international archival community – consider the Anfal documents to be outside the legitimate and lawful control of Iraq's national government and its national library and archive. Both collections have a direct link to Makiya who also played a role in the transfer of the Anfal files to the US for safe storage and analysis after they were seized in the 1991 Kurdish uprisings.

Controlling Saddam Hussein's Legacy

Although Makiya intervened on behalf of the Anfal files following a war with international support, ten years later he assumed custody of the Baath Party documents amid an unpopular invasion and occupation that drew worldwide condemnation. The legitimacy of these two wars in the eyes of the international

on 17 November 2009); Jean-Marie Arnoult, "Assessment of Iraqi Cultural Heritage: Libraries and Archives," UNESCO (27 June–6 July 2003), available at <http://archive.ifla.org/VI4/admin/iraq2207.pdf> (accessed on 1 December 2009). Also see Sudarsan Raghavan, "An Archive of Despair," *Washington Post* (7 April 2007), available at <http://www.washingtonpost.com/wp-yn/content/article/2007/04/06/AR2007040602196.html?nav=emailpage> (accessed on 2 April 2009); Patricia Cohen, "Baghdad Day to Day: Librarian's Journal," *New York Times* (7 February 2007), available at <http://www.nytimes.com/2007/02/07/books/07libe.html> (accessed on 2 April 2009); Sandy English, "Iraqi Archivist Demands U.S. Return Seized Documents," World Wide Socialist website, available at <http://www.wsws.org> (accessed on 14 August 2008); Hugh Eakin, "The Devastation of Iraq's Past," *New York Review of Books*, vol. LV, no. 13 (14 August 2008), pp. 37–40; John Gravois, "Disputed Iraqi Archives Find a Home at the Hoover Institution," *Chronicle of Higher Education* (23 January 2008), available at <http://chronicle.com/article/Disputed-Iraqi-Records-Find-a/21469/> (accessed on 2 April 2009). Although the repatriation of state documents is customary, it may be fraught with complications. It is doubtful, for example, that American authorities will agree to return documents detailing Saddam Hussein's nuclear program and other efforts aimed at developing weapons of mass destruction; for example, it took many years before the United States and Britain repatriated documents to the German and Japanese governments following World War II.

community seems to have coloured the debate among critics. The seizure and shipment of the Anfal documents to the United States in 1992 and 1993 was seen as an act of liberation, but more than a decade later, the SAA and ACA denounced Makiya's movement of the Baath Party records for similar reasons – safe storage and analysis – as an “act of pillage.”⁴

Makiya founded the IMF as a non-profit organization in 2003, with offices in Washington, London, and Baghdad; the group's goal was to preserve Saddam Hussein's legacy of atrocity. The foundation's small staff scoured Baath Party offices and other locations in Baghdad, amassing a collection of millions of pages of records, and also began filming interviews with the regime's victims.⁵ Makiya's initial aim was to preserve Saddam's archives in a memorial resource centre, which he believed should operate much like Germany's vast archive of records from the Stasi, the former East German Secret police. “This won't just be a resource for scholars, or a record which will help to shape the minds of future generations of Iraqis,” he said in December 2003. “Ordinary Iraqis will be able to come to discover exactly what happened to their father, sister or brother, and using a user-friendly computer terminal get access to all the relevant files.”⁶

One of his most dramatic finds came in early April 2003, one month after the American invasion, when he and others from the foundation unearthed a trove of documents in a network of rooms under the Baath Party's headquarters in Baghdad. The records documented Saddam Hussein's extensive web of collaborators during his final years in power. With permission from the Coalition Provisional Authority then in power, Makiya moved the documents to his parents' home situated within the protective green zone in Baghdad. In February 2005, he reached an agreement with the American military to move the documents to the United States where government contractors could digitize the documents and the Pentagon could analyze them for intelligence. In September, following the digitizing process, Makiya's foundation struck a five-year deal with the Hoover Institution at Stanford University to provide safe storage; the documents arrived at Hoover in mid-June 2008. Under the agreement, at the end of the five-year period, the possibility of returning the documents to Iraq would be explored if conditions permitted. The terms of the agreement implied that Makiya would largely control when and under what conditions the archive would be returned to Iraq.⁷

4 See SAA and ACA “Joint Statement on Iraqi Records.”

5 David Rose, “Secret Files Tell Story of Iraq's Disappeared,” *The Observer* (21 December 2003), available at <http://www.guardian.co.uk/world/2003/dec/21/iraq> (accessed on 2 April 2009).

6 Ibid.

7 See Gravois, “Disputed Iraqi Archives find a Home at the Hoover Institution”; and Raghavan, “An Archive of Despair.”

Nonetheless, Saad Eskander (now National Archivist of Iraq), who has faced down looting and gunfire, has been carrying out a crusade of sorts to retrieve the records of Saddam's regime, including those captured by the Pentagon during combat operations, and other records that have been shipped to the United States and that are now under the custodianship of the Hoover Institution. Eskander has accused the IMF of illegally taking the Baath Party files out of the country and has demanded their immediate return. In a 21 June 2008 open letter to the Hoover Institution, Eskander wrote that the "Baath documents are the property of the Iraqis and the institutions that represent them, and so it is arrogant and unethical for one person (an émigré) to decide the destiny of millions of sensitive official documents that have had and will continue to have considerable impact on the private lives of millions of Iraqi citizens."⁸ The SAA and ACA have sided with Eskander's position that INLA – a state institution entrusted with historical records – is the rightful place for these and other documents not presently in Baghdad's control (including the Anfal files), although they have expressed no concern for the possible misuse of these files amid the continuing sectarian strife. Neither the Iraqi Memory Foundation nor the Hoover Institution has asserted ownership of the files; both agree that the documents must be repatriated to Iraq at some point in the future. The question for both institutions is when and under what conditions, a determination that Eksander argues they have no right to make.

The dispute has been complicated by Iraqi officials, who have spoken with contradictory voices. While some Iraqi officials have supported the IMF's activities at varying times, others have voiced strong objection.⁹ If nothing else, these contradictory statements have indicated a lack of communication among Iraqi officials about what to do with all of the files not presently under Iraq's control. Understandably, this issue may not be high on the Iraqi government's agenda given the daunting security, economic, and political matters that must be addressed in the still fractured country. Makiya and Eskander do, however, agree on the return of all documents to the country; they agree that these files have singular importance for informing Iraqis of the realities of their recent past. And both agree on the need for legislation governing the records of Saddam Hussein's regime. They disagree on when the files should be returned and under

8 See Saad Eskander, "An Open Letter to the Hoover Institution," *History News Network*, available at <http://hnn.us/roundup/entries/51649.html> (accessed on 21 September 2008).

9 Gravois, "Disputed Iraqi Archives Find a Home at the Hoover Institution"; *History News Network*, "Fight Breaks Out Among Archivists and Historians about Decision to Turn over Iraqi Archives to Hoover Institution" (29 January 2008), available at <http://hnn.us/roundup/entries/46897.html> (accessed on 17 November 2009); Hugh Eakin, "Iraqi Files in U.S.: Plunder or Rescue?" *New York Times* (1 July 2008), available at <http://www.nytimes.com/2008/07/01/books/01hoov.html> (accessed on 2 July 2008); and "Grim Treasure," *Stanford Magazine* (November/December 2008), available at <http://www.stanfordalumni.org/news/magazine/2008/novdec/farm/news/hoover.html> (accessed on 17 November 2009).

what conditions. They have competing visions about what to do with them. As noted earlier, Makiya has envisioned creating a new institution similar to those set up in Germany and Cambodia, governed by special legislation to deal with the records. He has argued that in the absence of such a law, it would be too dangerous to house the Baath Party records and other sensitive files relating to Saddam Hussein's regime in a general archive. Eskander foresees entrusting the records to a national archival committee comprising members of the three branches of government (executive, legislative, and judicial). This committee would draft legislation governing all the records of the former regime, but would place the documents under the control of his library and archive.¹⁰

Eskander has said he is not naïve. "We know how to handle this material." But Makiya has argued that Baghdad is "just not ready for it" and that the files could be put to considerable misuse. Both Makiya and Eskander have separately presented their plans to Iraqi officials.¹¹ Ultimately, the dispute is about who should control Saddam Hussein's legacy and whose vision should be implemented. Nonetheless, Eskander's crusade to retrieve the documents and his dispute with Makiya, which has attracted international press, has prompted the SAA and ACA to also call for the return of the Anfal documents to INLA; "return," however, may be the wrong word since the documents did not come from Iraq's national library in the first place.

The Anfal Files

The call for the return of the Anfal documents to INLA is predicated on the supposition that the files are alienated cultural property in the possession of the "government of Kurdistan." It equates the Kurdish seizure and possession of these files with the IMF's confiscation of the Baath Party documents and the millions of intelligence files seized by the American military during combat operations in the second Gulf War. In so doing, it ignores the provenance and nature of the files, the tumultuous conditions under which they were seized, how they were used by the international community, the prior agreements governing the documents between the United States and Kurdish authorities, the substantial risks of returning the documents to the current Shiite-led government amid continuing sectarian conflict, and the Kurds' convincing historical claim over the files (given that they contain evidence of mass atrocities carried out against them by Saddam Hussein's regime).

The Anfal files were seized in 1991 under considerably different circumstances than the Iraqi documents confiscated after the 2003 American invasion. During the March 1991 uprisings, Kurdish fighters secured an estimated eight-

10 Eskander, "An Open Letter to the Hoover Institution."

11 Eakin, "Iraqi Files in U.S."; and *Stanford Magazine*, "Grim Treasure."

een tons of Iraqi state documents from secret police stations and torture centres throughout Iraqi Kurdistan. It became apparent that the files might establish Iraqi government culpability for the Anfal genocide against the Kurds in the mid- to late-1980s.¹² Human rights researchers immediately saw the files not as looted property, but as an unprecedented windfall in the investigation of Iraqi atrocities under the Anfal campaign. Following the first Gulf War, the allies established a safe haven in Iraqi Kurdistan, thereby allowing human rights investigators unprecedented access to northern Iraq; the opportunity to exhume mass graves, interview survivors, and – in the Iraqi government’s own words – read the official account of what had transpired, while the “regime that had carried out the outrages was still in power, was unique in the annals of human rights research.”¹³ The documents assumed critical importance under international law; together with other evidence, they corroborated what the Kurds had been saying to the world for a long time, but was ignored. In 1992, Peter Galbraith, then with the US Senate Foreign Relations Committee, lamented that while many of the Iraqi abuses were known before, there had been a lot of denial about the atrocities against the Kurds. For strategic reasons the Anfal campaign was dismissed as partisan propaganda during a time when the Kurds had formed a wartime alliance with Iran against Western interests. In 1993, Joost Hilterman, a Dutch researcher for Human Rights Watch who investigated the crimes in northern Iraq, estimated that during the Anfal campaign, tens of thousands of people disappeared; of those, thousands were shot and buried in mass graves in a prison in the desert. Moreover, Iraqi forces indiscriminately used chemical weapons against Kurdish civilians, resulting in the death of thousands. In March 1988, for example, Iraqi armed forces attacked Halabja with poison gas, killing up to five thousand civilians. The Iraqi Anfal documents represented an important piece in the evidentiary trail of the Anfal genocide. Galbraith, together with Kanan Makiya and Human Rights Watch, arranged with Kurdish political parties to transfer the files to the United States for safe storage and analysis with the understanding that the files were Kurdish property and would be returned at their request.¹⁴

12 Human Rights Watch, *Iraq’s Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven and London, 1995), p. xx.

13 *Ibid.*, pp. xvii–xx. Also see Joost Hilterman, *A Poisonous Affair: America, Iraq, and the Gassing of Halabja* (New York and Cambridge, 2007); Joost Hilterman, “Case Study: The 1988 Anfal Campaign in Iraqi Kurdistan,” available at http://www.massviolence.org/The-1988-Anfal-Campaign-in-Iraqi-Kurdistan?id_mot=43 (accessed on 14 June 2009); Judith Miller, “Iraq Accused,” *New York Times Magazine* (3 January 1993), Section 6, p. 15; and Physicians for Human Rights Collection, Archives at the University of Colorado at Boulder.

14 See Shirley Horn, “Documents Give Evidence of Atrocities against Iraqi Kurds,” *Christian Science Monitor* (10 June 1992), available at <http://www.csmonitor.com/1992/0610/10011.html> (accessed on 14 May 2009); Hilterman, “Case Study”; and Judith Miller, “Iraq Accused.”

Once on American soil, however, the Anfal documents became the reason for an unusual partnership between the Defense Intelligence Agency (DIA) and the Middle East division of Human Rights Watch. While the DIA digitized the files for intelligence purposes, the human rights group gained exclusive access to analyze the documents for human rights crimes. The hope was that the documents would prove useful in preparing a case against Iraq under the 1948 United Nations *Convention on Genocide*.¹⁵ 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 Galbraith explained at the time, consideration was given to bringing Iraq before the International Court of Justice (ICJ) under the genocide convention, or having the United Nations 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.¹⁶ In the interim, in 1997, the Anfal documents were transferred to the Archives at the University of Colorado at Boulder. The letter of agreement with the Senate Foreign Relations Committee providing for that transfer, restated that ownership resided with the Kurds and that any request by them for their return must be honoured.¹⁷

As American and international officials deliberated about how to use the documents and proceed against the Iraqi regime under international law, few, if any, in the human rights or global community, much less the archival profession, challenged or questioned the legitimacy and legality of the Kurdish seizure of the documents and transport to the United States for safe storage and analysis. Few, if any, argued that Iraq’s cultural patrimony had been plundered, or that the documents had been unlawfully confiscated, or demanded their return to the Iraqi central government. Few, if any, considered the seizure and removal of the Anfal documents as a violation of the international conventions and protocols that protect cultural property during times of invasion, occupation, or upheaval. A review of the current deficiencies of the conventions and protocols governing the capture of state records during wartime, and the failure of the international order to create new norms regarding the restitution of archival patrimony help to illustrate why.

15 United Nations, *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by Resolution 260 (III) A of the UN General Assembly on 9 December 1948, entered into force 12 January 1951, available at <http://www.preventgenocide.org/law/convention/text.htm> (accessed on 14 May 2009).

16 See transcript interview with Peter W. Galbraith, “Saddam’s Documents Show Kurd Genocide,” *Weekend All Things Considered*, National Public Radio (24 May 1992).

17 Letter to Bruce P. Montgomery from Senators Jessie Helms and Joseph Biden, US Senate Foreign Relations Committee, June 1997.

Multilateral Treaties Governing Warfare and the Capture of Public Records

The international legal system governing the capture and removal of documents during wartime makes a distinction between current public records and historical archives. The 1907 *Hague Convention Respecting the Laws and Customs of War on Land* permitted invading and occupying powers to seize records for military intelligence and administrative operations, while providing protection for cultural property except in cases of imperative military necessity, or when defending forces were exploiting protected cultural buildings and other sites for impermissible military purposes. It authorized an occupying army to seize, “generally, all moveable property belonging to the State which may be used for military operations.” But it prohibited the seizure, destruction, or wilful damage to cultural institutions, historic monuments, works of art and science, and made such acts subject to legal action. It also forbade pillage of private property during hostilities.¹⁸ The convention, however, did not include any provision for the return of captured documents to the country of origin after their intelligence utility had been exhausted and after the cessation of hostilities. As a signatory to the convention, the United States codified these provisions in its *Field Army Manual*, prohibiting pillage and providing protection for “historic monuments, museums, scientific, artistic, educational, and cultural institutions.”¹⁹ While not addressing archives specifically, the convention and the army field manual nevertheless implied a distinction between archives maintained by cultural institutions, which are provided protected status, and government records of the state, which may be captured and exploited for intelligence.

Following the vast looting and destruction of artifacts and cultural property during World War II, nations adopted the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*. The convention, which marked the most sweeping effort to protect cultural property during times of armed conflict and occupation, obligated warring and occupying armies to prohibit the destruction, theft, pillage, or misappropriation of cultural property. The convention specifically mentioned and provided for the protection of historical manuscripts and archives during wartime, but not for current public records. As such, the *Hague Convention* also made the distinction between historical archives as protected moveable cultural property, and non-protected current records of the state. In addition, the convention applied

18 *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.

19 Department of the Army, *The Law of Land Warfare* (FM27-10), 1956, available at http://www.aschq.army.mil/supportingdocs/Fm27_10.pdf (accessed on 17 November 2009).

to armed conflicts within nation states, asserting that in the “event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present convention which relate to respect for cultural property.” It also provided that cultural property could only be attacked in cases of “imperative military necessity” without defining this exception.²⁰

While these international agreements governing warfare drew a distinction between historical archives and state records, they also allowed armed forces considerable latitude in seizing enemy public moveable property, including government records. Determining archives from current public documents in wartime may be anything but clear, especially when the battlefield is in a foreign land where soldiers do not know the language. In such circumstances, virtually any document may be confiscated for its potential intelligence value. Armies have never heeded the concerns expressed by German-American archivist Ernst Posner, who wrote in 1942 that archival amputations must be avoided, and that records must be preserved in their original form and their place of origin. After all, he said, “those records that are torn from the body of which they are an organic part lose in value and meaning.”²¹ Posner wrote these words after witnessing the mass dislocation of archives during both World War I and the greater conflict of World War II. In one sense, he anticipated the 1954 *Hague Convention* and its protocols governing the protection of moveable cultural property. At the same time, he was perhaps naïve in believing that archives could wholly retain their integrity during the chaos and destruction of war. Indeed, the 1907 convention made it clear that the seizure of all enemy public moveable property during hostilities became the property of the capturing state. And the low threshold of the *Hague Convention* allowed for just about any record to be seized anywhere, including from museums and libraries, if said record served the purpose of military intelligence. Further, neither of the conventions (1907 or 1954) provided any guidance on the repatriation of captured records after the cessation of hostilities. Such issues of archival patrimony have been left mostly to international organizations in the political and cultural realm whose actions carry no force in international law.

20 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 249, N.T.S. 215, adopted at The Hague, 14 May 1954, as published in *Conventions and Recommendations of UNESCO Concerning the Protection of the Cultural Heritage* (Paris, 1983), pp. 13–49.

21 See Ernst Posner, “The Effect of Changes of Sovereignty on Archives,” *American Archivist*, vol. 5, no. 3 (July 1942), pp. 141–55.

Repatriation of Archival Patrimony: The Failure of the International Order

Although the custom of restitution dates to at least the fourteenth century when the devolution of public archives began to appear in treaties on territorial annexations, it was not until after World War II that various international bodies sought to formalize this principle in international law and practice. Unprecedented plundering and capturing of state archives took place during World War II, first by the German Wehrmacht, then by the victorious allies. The Germans seized millions of cultural treasures from museums and libraries, along with vast stores of diplomatic, military, and intelligence documents, as well as the private archives of Jewish, Masonic, and political groups, hiding most of this loot in remote castles, mines, and monasteries throughout the Reich. Many of these cultural treasures and archives were retaken with the advance of the Allied armies, while others were dispersed throughout the world. In the war's immediate aftermath, there was no agreement on repatriating cultural heritages among the allies. Each of the occupying powers of Germany and Austria, including the United States, Great Britain, France, and the Soviet Union, treated restitution in their respective occupation zones as they so chose.²²

Fifty years after the war, archival restitution had only been partially resolved. The United States and Great Britain repatriated large caches of captured Nazi archives to Germany once the files had been examined for intelligence, microfilmed, and declassified. The archives of destroyed and extinct Jewish communities were transferred to Israel. As well, limited transfers of archives took place among Germany, Poland, and the Soviet Union. Nevertheless, Soviet authorities – in the name of “compensatory restitution” – pillaged and transported vast storehouses of cultural treasures from Germany and Eastern Europe to the USSR, including state and private archives previously looted by the Nazis. The ensuing politics of the Cold War obviated any chance for meaningful negotiations aimed at returning this property to the countries of origin; only in the final years before the 1991 collapse of the Soviet Union did information arise about the secret depositories of plundered art and the massive collections of state archives from across Eastern Europe that had been held since the war in a top secret archive. The issue of restitution became further complicated and politicized after the fall of the Soviet Union. In the 1990s, with European countries demanding the return of their cultural heritage, Russian

22 Patricia Kennedy Grimsted, “Spoils of War Returned: U.S. Restitution of Nazi-looted Cultural Treasures to the USSR, 1945–1959, Part I, *Prologue*, vol. 34, no. 3 (Fall 2002), available at <http://www.archives.gov/publications/prologue/2002/spring/spoils-of-war-1.html> (accessed on 13 September 2009); and Charles Kecskemeti, “Displaced European Archives: Is it Time for a Post-War Settlement?” *American Archivist*, vol. 55 (Winter 1992), pp. 136–37.

legislators first moved to block restitution, nationalizing the cultural treasures in their possession, and then later established an Interagency Council on Restitution with complicated procedures for restitution claims.²³

The plundering that took place during World War II also led to the adoption of a separate protocol to the 1954 *Hague Convention*, signed on the same day, addressing the question of restitution, which was absent in the text of the convention itself. Several governments had opposed the adoption of provisions of the restitution of property. It was, therefore, decided to separate the provisions from the convention and to adopt them in the form of a separate protocol. The protocol prohibited occupying authorities from importing displaced cultural property from occupied territories and requiring the return of any cultural spoils in their custody to authorities in the countries of origin. Neither the convention nor its protocols expressly provided for retroactive restitution of displaced cultural property from previous wars or conflicts. The dearth of any such retroactive provision and the initial absence of many nations to adopt the convention, including the United States, at least for a time, undermined its international force.²⁴ Moreover, the 1954 *Hague Convention* was silent on the transfer of cultural property concerning the emergence of new successor states, the ceding of territory, or the union and breakup of nation states. The international community adopted a second protocol to the 1954 *Hague Convention* in 1999, strengthening the language of restitution, providing enhanced protections for cultural property in occupied territory, and reaffirming the extension of the convention's provisions to internal or "non-international" conflicts. The restitution provisions particularly seemed to single out art market professionals, and wartime attacks on cultural property were considered a crime.²⁵

The convention and its two protocols, however, failed to give any guidance

23 Kennedy Grimsted, "Spoils of War Returned"; and Kecskemeti, "Displaced European Archives."

24 See *Convention for the Protection of Cultural Property*, pp. 13–49; "Protocol to the Convention and the Conference Resolutions, and "State of Ratifications and Accessions as at 31 July 1982." Also see Patricia Kennedy Grimsted, *Trophies of War and Empire: The Archival Heritage of Ukraine, World War II and the International Politics of Restitution* (Cambridge, MA, 2001), pp. 113–14. The American refusal to adopt the 1954 *Hague Convention* largely stemmed from Cold War military calculations. The Pentagon feared that the convention's cultural property protections would be an unacceptable restraint on its ability to wage nuclear war with its Soviet adversary. See George Mackenzie, "From Solferino to Sarajavo: Armed Conflict, International Law, and Archives," in *Political Pressure and the Archival Record*, eds. Margaret Procter, Michael Cook, and Caroline Williams (Chicago, 2005), pp. 239–58.

25 Jean-Marie Schmitt, "UNESCO Attacks on Cultural Property Criminalised. A New Protocol Allows for Prosecutions of Organisations and Individuals, Putting Pressure on Art Market Professionals," *The Art Newspaper* 93 (June 1999), p. 6; UNESCO, *Records of the General Conference, 16th Session, Vol. 1: Resolutions*, pp. 135–41; Kennedy Grimsted, *Trophies of War*, pp. 114–15.

on what happens to captured state documents following hostilities. All three are silent on the subject of when captured public documents cease being war-time intelligence and become cultural archival materials, and at what point they should be repatriated to the state of origin, if at all. The United States finally became a signatory to the *Hague Convention* in March 2009, six years after the invasion of Iraq, and more than fifteen years after the capture and transfer of the Anfal files and the American-Kurdish agreement recognizing Kurdish claims over the documents. The United States was not a signatory to the 1954 *Hague Convention* at the time of the capture and removal of the documents. Even if it were, the convention would not have applied because, although the 1954 *Hague Convention* is the only agreement that specifies “archives” as cultural property to be protected from seizure, it is consistent with the 1907 version of the *Hague Convention*, which excludes any protection for current working or administrative documents, which is what the Anfal files were at the time of their capture.

The inadequacies of these multilateral treaties in addressing the repatriation of captured public documents left this issue to the province of international bodies that arose after World War II, notably the United Nations (UN), the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the International Council of Archives (ICA). From the beginning, however, their efforts to create and advance new international norms governing archival repatriation have failed to make significant progress against the shadowy world of international politics. After all, their recommendations and resolutions carry no force or obligation under international law, allowing governments to flaunt or ignore them at will. At best, these organizations can only aim to mobilize enough international pressure to prompt nations to adopt new global norms of conduct, however futile. Indeed, many of the archival patrimony claims stemming from World War II, decolonization, and the collapse of the former Soviet Union remain unresolved today. Nonetheless, it has not been for want of trying that these international organizations have failed to make progress in resolving archival patrimony claims. Part of the problem has been that repatriation efforts have focused primarily on recovering museum objects and antiquities at the expense of displaced archival cultural heritage.

For example, the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* referenced archives as historical documents, but did not address cultural property or archives in wartime.²⁶ In 1972, the UN General Assembly and UNESCO started adopting numerous resolutions and recommendations aimed at resolving the long-standing problems of the repatriation of cultural

26 *Convention on 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.

treasures, including archives and manuscripts. In 1976, the Fifth Conference of Heads of State or Government of Non-Aligned Countries reaffirmed these earlier resolutions and “urgently” requested that, “all states in possession of works of art and manuscripts to restore them promptly to their countries of origin.”²⁷ The failure of the international community to resolve these repatriation issues led the UN General Assembly in 1980 to urge UNESCO to “intensify its efforts to help the countries concerned to find suitable solutions to the problems relating to the return or restitution of cultural property ...”²⁸ The UN General Assembly adopted additional resolutions in 1993, 1995, and 1997 to spur international action in the face of inaction, but like the earlier resolutions, these have been given little force or attention in the international arena.²⁹

UNESCO also sought to address the repatriation problem in 1978 by setting up an intergovernmental committee for dealing with negotiations for the return of cultural property arising from colonial or foreign occupation.³⁰ Although the UNESCO committee focused primarily on museum objects, it nevertheless recognized that certain archival materials could be considered museum objects because of their historical and cultural significance....” The committee, together with the International Council of Museums, issued guidelines and principles addressing the return of dispersed cultural property with the aim of promoting bilateral negotiations. Because of the possible difficulties in applying both the 1954 *Hague Convention* and the 1970 UNESCO Convention to

27 *Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries*, Annex IV, Resolutions nos. 17 and 24 (A/31/197), pp. 136, 148.

28 Quotation in “Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries,” *International Law Commission*, vol. II, part II, 1981, pp. 65–66. See also “Return or Restitution of Cultural Property to the Countries of Origin,” Resolution no. 3026A (XXVII), 18 December 1972; no. 3148 (XXVIII), 14 December 1973; no. 3187 (XXVIII), 18 December 1973; no. 3391 (XXX), 19 November 1975; (31/40), 30 December 1976; (32/18), 11 November 1977; (33/50), 14 December 1978; (34/64), 29 November 1979; (35/127 and 35/128), 11 December 1980; (36/64), 27 November 1981; (38/34), 25 November 1983; (40/19), 21 November 1985; (42/7), 22 October 1987, and (44/18), 6 November 1989. (These are printed in the *UN General Assembly Official Records*.)

29 See “Return or Restitution of Cultural Property to the Country of Origin,” 2 November 1993 (A/RES/48/15), *UN General Assembly Official Records, Forty-Seventh Plenary Meeting* (2 November 1993), Supplement no. 49 (A/50/49); 11 December 1995 (A/RES/50/56), *UN General Assembly Official Records: Fiftieth Session*, Supplement no. 49 (A/50/49); and 25 November 1997 (A/RES/52/24), *UN General Assembly Official Records: Fifty-Second Session*, Supplement no. 49 (A/52/49).

30 “Proposals of the Director-General with a view to the establishment of an intergovernmental committee entrusted with the task of seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to the countries having lost such property as a result of colonial or foreign occupation.” *UNESCO General Conference Twentieth Session*, Paris, 1978 (20C/86, annex II), 29 September 1978. Also see the UNESCO journal *Museum* 31, vol. 1, 1979, which recounts the committee’s establishment and the matters of restitution of cultural property.

address retroactive restitution cases, the committee also offered a means for mediation in a neutral forum.³¹ Even so, neither the intergovernmental committee nor its guidelines have played any significant role in prompting negotiations leading to the restitution of state archives.

There seemed to be considerable promise in advancing archival restitution in 1983 when a UN conference involving delegates from ninety nations adopted the *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, which sought to codify and broaden international norms affirmed in earlier treaties. The convention stemmed from various working sessions in the 1970s of the UN's International Law Commission (ILC), which aimed to address displaced national heritages, including the repatriation of state archives. The ILC produced a report analyzing international treaty precedents dating back centuries that dealt with archival transfers arising from the dissolution and emergence of nation states and the ceding of territory to foreign powers.³² The *Vienna Convention* was never ratified and the effort to produce a legal instrument that would serve as an international norm failed to take hold.³³ An ICA working group later criticized the convention for muddying archival restitution issues with the assumption of state debts by successor states. More important, the working group believed that any restitution process needed a legal instrument approved by the authorities of the states concerned, and a precise listing of all record and archival groups to be returned to the countries of origin.³⁴ The *Unidroit Convention* adopted on 4 June 1995, covering stolen or illegally exported cultural objects, including archives, similarly presented problems with restoring archival patrimony. According to a 1995 ICA analysis, the convention was designed more for displaced art and other cultural objects and was not intended to address disputes over the removal of archives during times of war, or archival matters regarding successor governments, or changes in sovereignty.³⁵

The UNESCO Committee on Restitution later caught the attention of Austrian archivist, Leopold Auer, who in 1996 proposed creating an international committee on displaced archives at a Conference of the ICA Roundtable

31 Kennedy Grimsted, *Trophies of War*, pp. 119–25.

32 See “Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries,” *Year of the International Law Commission*, vol. II, part two, 1981, p. 48.

33 “Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,” *United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, Vienna, 1 March–8 April 1983 (A/Conf.117/14). Also see the “Final Act of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts” (A/Conf.117/15).

34 Kennedy Grimsted, *Trophies of War*, p. 99.

35 “Opinion of the International Council on Archives Relating to the Unidroit Draft Convention,” 20 April 1995, published as an appendix in *CITRA 1992–1995*, pp. 206–207.

(CITRA) meeting in Washington DC.³⁶ The idea was later endorsed by Patricia Kennedy Grimsted in her 2001 book *Trophies of War*; she noted that such a commission had become urgent “within the context of current developments in Eastern Europe and the vast quantities of displaced archives awaiting return or restitution on the Eastern Front.” Kennedy Grimsted asserted that the extent and complexity of unresolved archival claims, the international dimensions of the cases, and failure to reach solutions had demonstrated that these issues could not be resolved solely through bilateral negotiations. This applied not only to displaced archives issues arising during and immediately following World War II, but also to those instances involving the newly independent republics of the former Soviet Union, some of which have suffered the additional complexities of inadequate legal traditions and precedents, and increasingly adversarial relations with Russia. Skeptical of bilateral negotiations used to resolve issues of displaced archives, Kennedy Grimsted saw distinct advantages to Auer’s idea of an international committee on displaced archives that could serve in an advisory role or arbitrate the resolution of claims.³⁷ But like the UNESCO Committee on Restitution, it is doubtful that such an international committee on displaced archives would ever be heeded by major powers regarding matters that they consider to be their exclusive sovereignty.

Auer’s activities on behalf of displaced archives reflected the long-time concern of the ICA itself. In 1961, for example, CITRA met in Warsaw and called on archival institutions from each corner of the globe to “take the suitable measures for returning to their rightful owners archives groups and documents which have been displaced during World War II.” CITRA reaffirmed this statement in 1977, proclaiming “the right of each State to recover archives which are part of its heritage of archives and which are currently kept outside its territory...” CITRA again considered the issue in 1994 in Thessalonica, Greece, where the conference expressed urgency that “solutions be found to disputed claims arising from the displacement of archives as a result of the Second World War and of the process of decolonization.” The conference passed a resolution recalling “the accepted archival practice that archives are inalienable and imprescriptible, and should not be regarded as ‘trophies’ or as objects of exchange...”³⁸ This same concept of the inalienability of national records would later be used by the SAA and ACA in their statement calling for the repatriation of intelligence files to Iraq.

But it was not until 1997 that the ICA finally addressed the imperative of preserving state secret police and intelligence records of former repressive

36 Leopold Auer, “Restitution of Removed Records Following War,” XXXI CITRA, Washington, D.C., in *CITRA 1993–1995*, pp. 172–78.

37 Kennedy Grimsted, *Trophies of War*, pp. 125–27.

38 XXX CITRA, Thessalonica, Greece, 12–15 October 1994, resolution 1; and Kennedy Grimsted, *Trophies of War*, pp. 88–89.

regimes. The organization prepared a report for UNESCO with the aim “not to offer a set of rules applicable in all cases . . . but to provide archivists of countries in the process of democratization, with information on the range of problems they have to face.” The report emphasized the importance of such documentary sources for people affected by former repressive regimes, “whether as direct or indirect victims.” It stressed the significance of these archives as integral to transitioning to a post-authoritarian and democratic government, and establishing fundamental rights of citizens, including the right to study the past and know the fate of missing relatives. It also asserted that records “accumulated by former regime bodies must be placed under the control of the new democratic authorities at the earliest opportunity.”³⁹ As such, the report only dealt with the transfer of secret police documents as part of a peaceful transition of power to a successor democratic government, not the transfer of security records from one repressive regime to another as may be the case in Iraq.

In the end, all of these UN, UNESCO, and ICA resolutions and recommendations accomplished little in resolving disputes over archival claims or in creating new international norms governing the repatriation of state archives. In 2001, Kennedy Grimsted observed that despite the many efforts to promote the restitution of displaced archival heritage, “adequately detailed working international norms and guidelines have never been agreed upon.”⁴⁰ The reasons why were articulated earlier in 1998 by Auer who complained that neither “the issue of restitution nor of state succession with relation to archives has been brought under normative acts in international law; perhaps due to the lack of interest by the states involved and to the fear of the effect upon the rights of sovereignty.”⁴¹ Indeed, there has been insufficient political will among nations to hold each other accountable for restoring archival patrimony to the countries of origin. More than ten years later, Auer’s observation still stands. There is no international clamour, for example, for Russia to return the storerooms of treasures it stole from Germany and Eastern Europe at the end of the war. In terms of repatriating the Anfal documents, the international legal warfare regime, which includes the multilateral treaties, is also woefully deficient in providing much guidance; it is mute on the seizure and removal of secret police and intelligence files to expose and prosecute human rights crimes. It is also silent on returning intelligence documents to a successor state government that may exploit them against dissidents, or entire populations, or religious groups. While the many efforts to strengthen restitution have focused on restoring national patrimony

39 See Antonio Gonzales Quintana, *Archives of the Security Services of Former Repressive Regimes*, report prepared for UNESCO on behalf of the International Council of Archives (Paris, 1997).

40 Kennedy Grimstead, *Trophies of War*, p. 115.

41 Leopold Auer, *Disputed Archival Claims. Analysis of an International Survey: A RAMP Study* (Paris, 1998), p.1.

and identity, they have not dealt with repatriating the records of a predecessor, outlaw regime to a successor government that may misuse them.

The failed efforts to strengthen restitution under international law and the disregard of the international order to heed such calls have meant that efforts to restore archival patrimony continue to be left to bilateral negotiations between nation states. As for Iraq's archival patrimony, American and Iraqi diplomats will decide the return of the Anfal documents and other intelligence files in the possession of the Pentagon. Authorities will find little help or guidance in the international legal regime, or in the cultural realm beyond the United States' own history and past practice of restoring documents to a country of origin once the records' intelligence value has been exhausted and the documents have become historical archives or cultural property. This process is likely to be considerably complicated by certain sensitive files outlining Hussein's nuclear weapons programs and other weapons of mass destruction efforts. It is unlikely that American officials will want to return these sorts of documents to Iraq's successor government. Repatriation may also depend on whether or not the documents would be misused by Iraqi authorities for the purposes of revenge against former Baathists and Kurdish opponents. With regard to the Anfal documents, American authorities will also have to decide whether to honour their previous agreements with the Kurds. The repatriation of most of the intelligence documents may depend on whether or not Iraqi society has reconciled its political and sectarian differences – if this is at all possible.

The Archival Inalienability Doctrine

The joint statement issued by the SAA and ACA refers to past international agreements, even though these same agreements have little to say on restitution of archival patrimony. It also mentions the inalienability of national records. "We believe strongly," the statement asserts, "in the inalienable character of national records and the importance that these records can play in the reconstruction, administration, and cultural stability in Iraq." The principle of inalienability alludes to a 1995 position paper adopted by the ICA with regard to settling disputed archival claims. The paper asserts that there needed to be "specific instruments for the devolution of archives" and that the time had come "to put an end to the exceptional conditions which have lasted fifty years and to begin getting rid of disputed archival claims arising from the Second World War, decolonization and the breakup of federations following the events of 1989."⁴²

42 International Council on Archives (ICA), "The View of the Archival Committee on the Settling of Disputed Claims," Position Paper adopted by ICA Executive Committee at its meeting in Guangzhou, 10–13 April 1995.

There are a number of problems, however, with the arguments contained in the ICA's position paper upon which the SAA and ACA have based their call for the immediate return of the Anfal and other intelligence documents to the authorities in Iraq. For example, the position paper argues that, "[n]ational laws agree in conferring the status of inalienable and imprescriptible public property on public records. The alienation of public archives can therefore only occur through a legislative act of the state which created them."⁴³ Based on this reasoning, the SAA and ACA claim that the successor government of Iraq is the rightful owner of all the documents from Saddam Hussein's outlaw regime. This principle, however, explicitly conflicts with the 1907 *Hague Convention* that all enemy public moveable property seized during hostilities "becomes the property of the capturing state." It is also incompatible with the circumstances surrounding the capture and removal of the Anfal documents from Iraq. The archival principle of inalienability anticipates a dynamic transition in status from current records to historical archives at some point in the future, but does not define when this takes place. The Anfal documents were current administrative and secret police files when they were captured, not cultural property or historical archives as defined under the 1954 *Hague Convention*. They were seized not from museums or other cultural institutions, but from secret police facilities and torture centres. The documents were used for intelligence purposes and as evidence in the international campaign to indict Hussein and his senior leadership for human rights crimes. They were also used in Saddam Hussein's Anfal trial in Baghdad before these proceedings were interrupted by Prime Minister Nouri al-Maliki in order to hang him for another crime.

Under the inalienability doctrine, it is not clear at what point, if at all, the Anfal files have become cultural property to be returned to Hussein's successor government as called for by the SAA and ACA, rather than to Kurdish authorities under the original agreements that acknowledged Kurdish claims over the documents. Indeed, the SAA and ACA make no case that either the Anfal documents or the other records captured on the battlefield by the American military under international laws of war have transitioned into historical archives or cultural property to be repatriated to Iraq. It could be argued that the primary utility of the Anfal documents expired once Hussein met his fate on the gallows, thus transforming them into cultural property; the documents had already been examined for intelligence long ago by the Pentagon and they had served their purpose as evidence in Hussein's trial for the Anfal genocide. It could also be argued that the documents could once again become active secret police or intelligence files were they to be turned over to authorities in Baghdad who sought to use them against their Kurdish adversaries. Further, there is an irreconcilable conflict between agreements forged between the US Senate For-

43 Ibid.

eign Relations Committee and Kurdish political parties, which explicitly recognized Kurdish ownership claims, and the archival principle of inalienability, which has no currency in international law.

Moreover, the archival inalienability doctrine, if actually applied during times of conflict, would lead to absurdly problematic circumstances. Under this doctrine, for example, the capture of German and Japanese records during World War II would have been illegitimate without the approval of those governments. American forces would have needed Saddam Hussein's regime to pass a law allowing them to capture tens of millions of intelligence documents during the March 2003 invasion. In other words, the archival doctrine of inalienability is neither compatible with international laws of war that allow for the capture of public enemy documents, nor is it grounded in political reality or the necessities of war. According to this archival doctrine, however, the Kurds could be said to have acted illegitimately in confiscating and removing the Anfal documents from Iraq without legislative approval from Saddam Hussein's regime, which created the records in the course of carrying out its murderous campaign against the Kurds. Further, the inalienability doctrine indicts the human rights community for supporting the removal of the documents from Iraq in order to analyze them for a genocide case under international law against the Hussein regime. This places the inalienability doctrine in an unsettling position and in conflict with the international effort to use the files to bring Hussein and members of his regime to justice.

By citing this archival doctrine, the SAA and ACA have called for American diplomatic intervention to ensure the return of the Anfal files to the Iraq National Library and Archive, assuming that the documents are now under the illicit control of the Kurds – a position that would commit the American government to renege on its previous agreements with Kurdish authorities. While most would agree with the SAA and ACA that the repatriation of national records are critical to the “reconstruction, administration, and cultural stability” of a country, it should be recognized that they may also be misused by a successor-state government whose authorities may wish to find evidence against their political enemies, fostering retribution and instability. There is certainly no normative act in international law that requires the transfer of intelligence files to a successor state government that may reuse them against population groups in violation of fundamental human rights.

In such cases, there is an inherent conflict between restitution and the international human rights legal regime. For example, the *Universal Declaration for Human Rights*, which sets out the fundamental principles upon which human rights activities of the United Nations are based, proclaims the rights of individuals “to life, liberty, and the security of the person.” The *Convention on the Prevention of and Punishment of the Crime of Genocide* provides for the punishment of those found guilty of this crime, whether they are constitutionally responsible rulers, public officials, or private citizens. The *International Con-*

vention on the Elimination of All Forms of Racial Discrimination also affirms 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.” The *International Covenant on Civil and Political Rights* states that, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” while again affirming that everyone “has the right to ... security of person.” It also states that no one should be “subjected to arbitrary arrest or detention.” And the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* requires governments to take effective measures to prevent torture within their borders.⁴⁴

This UN treaty system spells out the obligations of signatory nations for the protection of human rights, and makes governments accountable to international authorities for domestic acts that violate the conventions. As such, they create a dilemma for a signatory nation in cases involving the repatriation of captured state security records to a successor authoritarian government that could exploit the documents, thereby violating these international treaties. The ICA’s report on the state security archives of repressive regimes briefly acknowledges the danger of transferring secret police records to a successor authoritarian government. The report asserts that, “there remains an important doubt concerning the possible re-use of the [intelligence] documents for repressive ends.” It states that when “there is no certainty that the documents have been destroyed or passed to authorities clearly distinct from those of the former regime, it has to be accepted that they could again be used against human rights.” This is a critical point, but the report does not explore it further. It nevertheless concludes that in “all cases, it is best that documents are placed by law within the framework of a democratic state...”⁴⁵

But what happens, as is the case with Iraq, when there is considerable doubt whether the country will become a democratic state or move to forge meaningful reconciliation? Or what happens when one repressive, ruling sectarian faction is replaced by another, or more generally, when the successor government is not democratic but becomes another repressive regime? If the United States, for example, were to return Hussein’s secret police records to Iraq’s new ruling theocrats before sectarian reconciliation took root (if this happens at all), it is probable that they would be used not to strengthen individual rights

44 See *Universal Declaration for Human Rights*, available at <http://www.un.org/en/documents/udhr> (accessed on 10 September 2009); and *Convention on the Prevention of and Punishment of the Crime of Genocide*. Also see *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5; *International Covenant on Civil and Political Rights*, art. 7 and 9; and *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (these may be accessed at <http://www.bayefsky.com/introduction.php/pfriendly/1>) (accessed on 10 September 2009).

45 Gonzales Qunitana, “Archives of the Security Services of Former Repressive Regimes.”

or indemnify victims of repression, but to carry out extralegal executions, arbitrary detentions, torture, and other deprivations. American authorities would bear some culpability for these acts. Indeed, as long as Iraqi sectarian strife exists – with one faction ruling at the expense of the others – the secret police files of Hussein’s regime pose a substantial risk of misuse. It would, therefore, seem that the obligation of the United States would be to first heed its human rights responsibilities under these treaties to avoid endangering the life, liberty, and security of the person before it repatriated the secret police and intelligence documents to a country that has yet to reconcile its sectarian differences. If there is to be a confrontation between the international legal regime of human rights and the undefined principle of restitution, human rights should prevail until such documents no longer pose a risk of substantial harm.

The archival principle of inalienability is an interesting concept when contemplating a dynamic process of transition from current records to cultural documents or archives at some undetermined future time. The principle, however, should acknowledge the complex realities and laws of warfare and politics. If nothing else, the ICA should revisit and rewrite this principle to take into account the rules of war and the political realities that often complicate the repatriation of documents. It should also be rewritten to account for human rights obligations and concerns, and when state security or intelligence documents, which are distinct from other government administrative files, may transition into historical materials that could be repatriated to the country of origin under democratic governance. As it stands now, this transition from intelligence and secret police documents to historical archive is neither acknowledged by the international legal system nor the archival principle of inalienability.

Political Realities

Indeed, despite the SAA/ACA’s call for the immediate return of the Anfal documents, the current political realities in Iraq pose substantial risks for sending the records to the Shiite-led government, which not only may use them against their Kurdish adversaries, but also may destroy them to erase evidence of Arab crimes in Iraqi Kurdistan. Neither the Shiite-majority government nor the Sunnis have any reason to acknowledge the mass atrocities in the north. There have been increased tensions over land, oil, and political autonomy between the Kurds and the other two factions. With both current and historic political developments, it is unlikely that any full accounting of Hussein’s crimes in Iraqi Kurdistan will ever occur, even less so if the Anfal documents were to go to the majority Shiite government in Baghdad. Despite the decline in violence since 2006, deep and abiding sectarian distrust endures; al-Maliki and his allies have moved to consolidate power and marginalize their political enemies, rather than advance political transition and national reconciliation. Sectarian tension continues between Sunni and Shia, Arab and Kurd, and Kurd

and Shia. Serious fault lines also exist within secular groups, and between religious and secular factions. Shiite religious parties, which control Iraq's central government, view the Sunni militia, known as the Awakening – formerly armed and financed by the Americans to fight al-Qaeda – as a mortal enemy and threat to the Shiite government. As many as half of the 100,000 members of the Awakening have been former insurgents or have insurgent sympathies. Al-Maliki's government has repeatedly reneged on promises to integrate the Sunni militia into Iraq's armed forces and government, despite American pressure to do so.⁴⁶

The Shiite-Kurdish alliance that once brought some stability to parts of Iraq is also disintegrating. In early September 2008, an armed clash between an Iraqi armed unit and *peshmerga* fighters was narrowly averted in the Kurdish-controlled town of Khanaqin, a dusty town on the Iranian border northeast of Baghdad, perhaps a harbinger of worse things to come after the Americans leave. By dispatching Arab troops to Khanaqin, al-Maliki deliberately provoked a fight with the Kurds who have been the Shiites's main partner in governing Iraq since shortly after the American invasion. Equally alarming, the Kurds received a secret shipment of large quantities of weapons and ammunition from Bulgaria in that same month, intensifying concerns of an armed confrontation between Iraqi Kurds and al-Maliki's Shiite-led government. The shipment came amid continuing Kurdish suspicions that al-Maliki is trying to take away rights and land, including the strategic city of Kirkuk that the Kurds are claiming as part of their territory.⁴⁷ In the Shiite's view, the Kurds are simply too secular and pro-Western to share power with them. In return, the Kurds have nothing but mistrust for the central government; given the history of their past persecution, they would rather be free of Iraq altogether, a prospect opposed by neighbouring countries with large Kurdish minorities, including Turkey and Iran. Kurdish disputes with al-Maliki's government have also involved independent oil deals that the Kurds have signed with international oil companies. "We got rid of the dictator and nightmare Saddam Hussein only to get this new dictator wearing the uniform of democracy," Waleed Salih Sherka, a parliament member with

46 Peter W. Galbraith, "Is This Victory?" *New York Review of Books*, vol. LV, no. 16 (23 October 2008), pp. 74–75; Brian Katulis, Marc Lynch, and Peter Juul, "Iraq's Political Transition after the Surge," Center for American Progress (September 2008), available at <http://www.americanprogress.org> (accessed on 2 April 2009); Richard Opel Jr., "Iraq Takes Aim at U.S.-tied Sunni Leaders," *New York Times* (22 August 2008), available at <http://www.nytimes.com/2008/08/22/world/middleeast/22sunni.html> (accessed on 2 April 2009); Ned Parker, "Iraq Seeks Breakup of U.S.-funded Sunni Fighters," *Los Angeles Times* (23 August 2008), available at <http://fairuse.100webcustomers.com/sf/latimes243htm> (accessed on 2 April 2009); and Leila Fadel, "Petraeus: Iraq Slows Hiring of Former Insurgents," *McClatchy News* (21 August 2008), available at <http://www.mcclatchydc.com/iraq/story/49789.html> (accessed on 2 April 2009).

47 See Galbraith, "Is This Victory?" pp. 74–75.

the Kurdish bloc, recently said of al-Maliki.⁴⁸

These developments have transpired as Iraq's diverse factions have been at odds over a larger program of national reconciliation. They have been unable to agree on revisions to both a law excluding Baathists from government service and one governing the equitable sharing of oil revenue, or on revisions to the Iraqi constitution to strengthen the central government. With this list of serious differences, it is questionable whether the Shiite-led government would have any motivation in preserving or making the Anfal files available to the Kurds or anyone else for them to study. It also seems questionable whether the various factions could agree on a law governing the poisonous records of Hussein's regime.⁴⁹ It is hard to know what the next phase will be, but currently sectarianism rules. Some observers have proclaimed that the new Shiite government is "among the most corrupt in the world" and that "it is beginning to resemble its Baathist predecessor in its authoritarianism and brutality."⁵⁰ Once the United States withdraws from Iraq, the sectarian differences and bloodletting may intensify, or the central government may become even more authoritarian as it consolidates power. After all, al-Maliki and his allies want the Americans out of Iraq, seeing the United States' arming of the Sunnis as dangerous. "Should Sunni forces prove too powerful," writes Peter Galbraith, "Iran is always available to help."⁵¹ These conditions are not conducive to turning over Hussein's intelligence files to al-Maliki's government, unless there is meaningful reconciliation.

With Iraq's sectarian divisions and the manoeuvring among the factions for advantage in the post-occupation era, it would seem implausible that what Makiya or Eskander have envisioned for Saddam Hussein's records will be realized in the near term – or perhaps for the foreseeable future. The hatreds and suspicions may run too deep for a unified approach about what to do with all the documents dealing with Hussein's legacy of atrocity. Both Makiya and Eskander have looked to the defunct East-German state (where former citizens could view secret police files to see what the former regime did to spy on them), and to the South Africa-style truth commission (where functionaries of Hussein's regime could confess their crimes without fear of prosecution) for examples of document repatriation. But South Africa and Germany have been exceptions to the rule that revolutions or major political upheavals involving varying ethnic and

48 Amit R. Paley, "In Iraq's Provincial Elections, Main Issue is Maliki Himself," *Washington Post* (17 January 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/16/AR2009011604967.html> (accessed on 2 April 2009).

49 Galbraith, "Is This Victory?" p. 74; and Katulis, Lynch, and Juul, "Iraq's Political Transition after the Surge."

50 Nir Rosen, "An Ugly Peace," *Boston Review* (November/December 2009), available at <http://bostonreview.net/BR34.6/rosen.php> (accessed on 30 November 2009).

51 Galbraith, "Is This Victory?" p. 74.

religious sects are bloody affairs; it may be more appropriate to compare Iraq to the descent into chaos and violence of the former Yugoslavia.

The *ICA Report on the Archives of the Security Services of Former Repressive Regimes* supports the transfer of such documents of repression to successor governments as part of the political process of reconciliation and transition to democracy. Secret police and intelligence records have nonetheless faced destruction in post-authoritarian countries such as Chile, Greece, Poland, Hungary, and the former Czechoslovakia.⁵² If these experiences are any indication, they provide little confidence in how the Hussein regime's archives would ultimately be handled. Few other post-authoritarian governments have experienced the depths of Iraqi sectarianism. In March 2008, Makiya himself admitted that his "biggest political sin in spite of nearly a quarter century of writing about the abuses of the Baath Party" was "grossly" underestimating the deleterious consequences of thirty years of extreme dictatorship on reconstruction, identity-formation, and nation building. He and many others in the Iraqi exile community and elsewhere, underestimated the tremendous sectarianism that would ravage a supposedly liberated Iraq.⁵³ Without political reconciliation or the full integration of Sunnis into the political system, it is highly questionable whether Iraq can become a functioning democracy. Under these circumstances, it is also doubtful that the Sunnis would want to see a resource centre or monument to the crimes of Hussein and his Baathist regime, where politically explosive documents could be made available for public viewing. To the Sunnis, it might resemble more a memorial of indictment. There is also the possibility that the central government's intelligence services, or political or religious parties could use the documents to single out individuals for retributive violence or even revenge killings. Since Hussein's security archives could be used to identify tens of thousands of former security agents and collaborators, former Baathists would have considerable motivation to destroy them. In 2003, Baathist operatives attempted to torch Saddam-era records in the Iraq National Library and Archive to eliminate incriminating evidence. They would have strong motive to do so again unless efforts to reach political reconciliation proved successful, perhaps an implausible scenario for years to come.

Returning the Anfal Files to Iraqi Kurdistan

It is also unlikely that the Kurds would want to see the Anfal files, which also include incriminating files, turned over to Baghdad instead of Iraqi Kurdistan.

52 Gonzales Quintana, *Archives of the Security Services of Former Repressive Regimes*; and Elena Danielson, "Privacy Rights and the Rights of Political Victims: Implications of the German Experience," *American Archivist* 67 (2004), pp. 176–77.

53 See Kanan Makiya, "How Did I Get Iraq Wrong?" *Slate* (17 March 2008), available at <http://www.slate.com/id/2186763/> (accessed on 2 April 2009).

The Anfal documents would be better left in Kurdish hands; they could initiate their own full accounting of what transpired in the north, using all the other evidence generated by outside groups as well. To commemorate the massacres of Halabja, Anfal, and other events, the Kurds have already constructed a torture museum in the old security headquarters in Suleimaniyeh, as well as two memorials to Halabja in remembrance of the victims of the chemical attack. One is located outside Halabja on the road to the Arab resettlement camp, where many Kurds vanished at the hands of Iraqi forces; another stands at the entrance to Halabja from Suleimaniyeh. In September 2003, Secretary of State Colin Powell and Paul Bremer, the US envoy to Iraq, and two Kurdish leaders, Jalal Talabani and Masoud Barzani, inaugurated the latter memorial. With funding from the US Agency for International Development, visitors receive booklets, posters, and postcards with photographs of the poison gas attack and its victims. Iraqi Kurds have paid homage to the dead by holding an annual commemoration on 16 March, the date of the Halabja gas attacks.⁵⁴ The yearly commemoration has attracted not only Kurdish dignitaries and townspeople, but also foreign delegations.

The return of the Anfal documents to Iraqi Kurdistan would further Kurdish understanding and commemoration of the events surrounding the efforts to annihilate them. It would honour the original agreements forged with Kurdish leaders that allowed the documents to be shipped to the US for safe storage, analysis, and use by the international community in efforts to bring Hussein and others to trial. Those agreements acknowledged Kurdish claims over the records; they were placed in the trust of the American government and then the University of Colorado with the understanding that the Kurds owned the documents. To return the documents to authorities in Baghdad rather than to Kurdistan would be to break faith with these agreements and once again cheat the Kurds of their desire for accountability. It would place an important body of materials relating to their history beyond their grasp. After all, the outrages were perpetrated against them; they have a right to know what transpired, who committed these acts, how they were carried out, and the reasons why. They have a right to this recorded history of their persecution. Because the documents arose out of Hussein's machinery of repression and mass execution in northern Iraq, they should now be considered part of Iraqi Kurdistan's historical patrimony. Moreover, given the disintegrating Shiite-Kurdish alliance, there would be no guarantee that the documents would be open to the Kurds for inspection were they transferred to Baghdad. Perhaps no act more symbolized the Shiite-led government's indifference to the crimes of the Anfal than al-Maliki's pre-emption of Hussein's trial for the Kurdish genocide to rush him to the gallows for the 1982 Dejal massacre.

54 Hilterman, "Case Study: The 1988 Anfal Campaign in Iraqi Kurdistan."

The *Accountability and Justice Law* ostensibly aimed at rehiring thousands of former members of Saddam Hussein's Baath party and establishing a permanent archive for the records of Saddam Hussein, has become bogged down by fierce political infighting. It is uncertain whether the various factions will agree on amendments to the law or whether it will even be fully implemented, allowing Iraq to take a step forward at reconciliation, including creating the archive. Passed in January 2008, the law was supposed to replace the punitive de-Baathification law, under which tens of thousands of former Baathists, mostly Sunni Arabs, were purged from government and security posts following the American-led invasion in 2003. The new measure, however, bans the rehiring of Baathists who worked in Hussein's security services and other influential agencies, such as the Interior Ministry, Defense Ministry, and Foreign Ministry. Among many Sunnis, the law institutionalizes sectarian revenge, raising fears of a new purge of members of the current Iraqi government. After the law's passage, the International Center for Transitional Justice (ICTJ) observed in its analysis that the "new law is not the major change that reformers had hoped. It essentially preserves the previous de-Baathification system and extends its reach to a number of organizations not previously affected, including the Iraqi judiciary."⁵⁵ Izzat Shabender, a Shiite who served on the de-Baathification Committee in parliament, put it in blunter terms: the law has "got nothing to do with reconciliation," he said. "The culture of reconciliation does not exist in the heads of Iraqi leaders."⁵⁶

These circumstances have worrisome implications for the law's provisions in creating an archive for the records of Saddam Hussein. The law calls for "serving historical memory by documenting the atrocities and suffering" during Hussein's regime with the aim of protecting "the coming generations from falling again in the clutches of tyranny and oppression and to disseminate the spirit of co-existence, reconciliation, civic peace, justice, equality and responsible citizenship among Iraqis."⁵⁷ The law is woefully short on how it would accomplish these aims. And given the punitive nature of the law and enduring sectarian divisions, it is hard to imagine how the spirit of co-existence and reconciliation

55 See Miranda Sissons, "Briefing Paper: Iraq's New Accountability and Justice Law," International Center for Transitional Justice (ICTJ) (22 January 2008), available at <http://www.ictj.org/images/content/7/6/764.pdf> (accessed on 2 April 2009); and Kenneth Katzman, "Iraq: Politics, Elections, and Benchmarks," Congressional Research Service Report to Congress (22 October 2008), p. 5.

56 Joshua Partlow and Michael Abramowitz, "Iraq Passes Bill on Baathists," *Washington Post* (13 January 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/12/AR2008011201122.html> (accessed on 2 April 2009).

57 *Law of the Supreme National Commission for Accountability and Justice*, chap. 3, art. 4-b, P. 5. Also see Sissons, "Briefing Paper, Iraq's New Accountability and Justice Law"; Ahmed Rasheed, "Iraq Law on Baathists Not Being Implemented," *Reuters* (17 June 2008), available at <http://www.reuters.com/article/idusyat251579> (accessed on 2 April 2009).

might be embodied in a central archive of Saddam's atrocities. Unless the law is dramatically improved and implemented to encourage genuine reconciliation, the archives may likely serve as an instrument of revenge or score settling, allowing the ruling theocrats to find evidence against their political enemies or foster revenge killings against collaborators and others named in the files.

Conclusion

The unraveling Shiite-Kurdish alliance forecasts the same fate for the Anfal files if they are returned to the control of the Shiite-led government. It would seem problematic to return these files to Baghdad under a law that institutes vengeance or furthers the consolidation of power of a possible new repressive regime. It would be a cruel irony indeed to send the Anfal files back to Baghdad only to have the new regime use them to re-victimize the Kurds, or destroy them altogether to eliminate any trace of Arab crimes. It would be far better to honour the original understandings surrounding the removal of the Anfal documents to the United States – reached between Kurdish political parties and the US Senate Foreign Relations Committee – by returning them to Iraqi Kurdistan and leaving their final disposition up to negotiation between authorities in Kurdistan and Baghdad. In this way, American authorities would respect the United States's original commitments to the Kurds, pay homage to past Kurdish suffering, and repatriate the documents to the country of origin.