

# Rescue or Return: The Fate of the Iraqi Jewish Archive

Bruce P. Montgomery\*

**Abstract:** Shortly following the 2003 invasion of Iraq, an American mobile exploitation team was diverted from its mission in hunting for weapons for mass destruction to search for an ancient Talmud in the basement of Saddam Hussein's secret police (Mukhabarat) headquarters in Baghdad. Instead of finding the ancient holy book, the soldiers rescued from the basement flooded with several feet of fetid water an invaluable archive of disparate individual and communal documents and books relating to one of the most ancient Jewish communities in the world. The seizure of Jewish cultural materials by the Mukhabarat recalled similar looting by the Nazis during World War II. The materials were spirited out of Iraq to the United States with a vague assurance of their return after being restored. Several years after their arrival in the United States for conservation, the Iraqi Jewish archive has become contested cultural property between Jewish groups and the Iraqi Jewish diaspora on the one hand and Iraqi cultural officials on the other. This article argues that the archive comprises the cultural property and heritage of the Iraqi Jewish diaspora.

## I. INTRODUCTION

In early May 2003, a U.S. mobile exploitation team (MET) was diverted from its mission in hunting for weapons of mass destruction to rescue an ancient Talmud, a Jewish holy book, in the basement of the Mukhabarat, Saddam Hussein's secret police headquarters. At the Mukhabarat, the soldiers found the basement flooded with three or four feet of fetid water littered with debris, the result of broken pipes from U.S. bombing. Instead of finding the Talmud, the soldiers

---

\*Professor/Faculty Director of Archives and Special Collections, Archives, Campus Box 184, University of Colorado at Boulder, Boulder, CO 80309, Email: [bruce.montgomery@colorado.edu](mailto:bruce.montgomery@colorado.edu).

discovered and rescued an invaluable archive of individual and communal historic documents and books relating to a once vibrant but now extinct Jewish community, one of the oldest Jewish communities in the world. Among the materials were a treasure trove of Torahs and Haggadahs, centuries old. In August 2003, the materials were spirited out of the country with assistance from then-vice president Richard B. Cheney's office and with a vague promise of their return after they had been restored. Their removal, which received the blessing of what was left of the Iraqi Ministry of Culture, was executed under the Immunities from Seizure Act, a law that provided the statutory means to bring the archive to the United States. The Act allowed the United States to undertake conservation measures while protecting it from possible seizure by claimants to both Iraqi assets and Jewish heritage.

Several years after its importation, the Iraqi Jewish archive has become contested cultural property; Jewish groups and the Iraqi Jewish diaspora on one hand and Iraqi government officials on the other have staked opposing claims to it. The U.S. State Department has said that when the Coalition Provisional Authority (CPA) transferred sovereignty to Iraq in June 2004, it gave the Ministry of Culture the right to demand the documents upon written request. Indeed, Iraqi cultural officials argue that the archive comprises an indisputable part of Iraq's cultural heritage and have demanded its return. The State Department has given assurances that it has every intention of returning it once the materials have received conservation treatment. This article argues, however, that the archive does not belong to the state of Iraq, but constitutes the distinct cultural heritage of the Iraqi Jewish diaspora. In so doing, Part I explores the factual background and controversy surrounding this case; the process by which the archive came to the United States, the premise that it comprises Iraqi, not Jewish, cultural heritage, the use of the immunities seizure law to expedite its transfer to U.S. soil, and the competing claims to the archive. Part II examines the unique character of Jewish cultural property and heritage and the concept of cultural property under the laws of war, which govern the protection and restitution of cultural property during war and occupation. Part III recounts the history of persecution, dispossession, and expulsion of Jews following Iraqi independence; it demonstrates that the Iraqi State considered it imperative to expunge the presence of Jews and their culture as an alien and enemy presence. Part IV analyzes the concept of the cultural heritage of distinct ethnic and religious "peoples" under international humanitarian law; it reasons that a people have the right to cultural self-determination and ownership over their cultural and religious expression and representation. Finally, Part V examines how the United States handled the disposition of the heirless Jewish cultural property after World War II as a way of resolving the fate of the Iraqi Jewish archive. It draws a historic parallel between Iraq and Nazi Germany concerning the looting of Jewish property and argues that the archive should be relocated where they may be universally accessible to the Iraqi Jewish diaspora and others.

## II. BACKGROUND EVENTS

In May 2003, the discovery and rescue of the Iraqi Jewish archive began when 16 members from MET Alpha, a mobile exploitation team formed to hunt for weapons of mass destruction (WMD), teamed up with members of the Iraqi National Congress (INC), a leading opposition group headed by Ahmed Chalabi, to search for one of the most ancient copies of the Talmud in existence, dating from the seventh century. The Talmud comprises a book of oral law with rabbinical commentaries and interpretations. A former senior official and head of the Mukhabarat's Israel-Palestinian section had tipped off the opposition group that he had hidden the holy book in the basement of Hussein's secret police headquarters, which had been damaged by coalition bombing. When the former Iraqi intelligence official, who was now working for the INC, offered to lead a group to recover it, MET Alpha decided to temporarily divert its mission in searching for WMD to rescue the ancient Talmud.<sup>1</sup>

Accompanying MET Alpha to the Mukhabarat's headquarters were members of the INC and *New York Times* reporter, Judith Miller, who enlisted the help of Harold Rhode, an orthodox Jew. Rhode came to Baghdad as part of the Office of Reconstruction and Humanitarian Assistance, an agency set up under the auspices of the Pentagon following the U.S.-led military campaign to depose Saddam Hussein. Rhode was uniquely qualified to lend assistance; he spoke Arabic and Hebrew, was knowledgeable about Islam and Judaism, and was a protégé of Bernard Lewis, a leading Middle East scholar who dedicated his book, *The Crisis of Islam*, to Rhode.<sup>2</sup>

When the WMD team, Miller, Rhode, and the Mukhabarat's section head arrived at the Mukhabarat's headquarters, they found the basement flooded with three or four feet of putrid water, the result of broken pipes from U.S. bombing. The bowels of the Mukhabarat's headquarters housed the Israel and "Jew" departments. A search of the Israel section uncovered maps pinpointing the location of terrorist strikes against Israel dating to 1991 and where Iraqi Scud missiles hit Israel in the first Persian Gulf War. Also found were near perfect mock-ups of official Israeli buildings, including the Knesset, the Israeli parliament, and a satellite picture of Dimona, Israel's nuclear complex. Across the hall was the "Jew" section. Wading through the watery sewage, the search team failed to locate the ancient Torah, but instead found thousands of Jewish holy books, Torah scrolls, and many other water-damaged documents and materials—an invaluable archive of a now dead Jewish community.<sup>3</sup>

After this discovery, Rhode led the effort to rescue the materials. He sought help from Chalabi, a long-time acquaintance, who once was championed by the U.S. government before his turn toward Tehran. Chalabi provided small pumps to begin draining the Mukhabarat basement as well as bins and other help. Rhode initially met difficulty getting U.S. officials interested in saving the materials, but managed to enlist the financial assistance of Lehman investment banker and philanthropist

Harvey Krueger to continue the rescue effort. When Rhode told former Soviet dissident and long-time friend Natan Sharansky about the archive, Sharansky called Vice President Richard B. Cheney. The matter also reached Secretary of Defense Donald Rumsfeld who asked Steven A. Cambone, secretary of defense for intelligence, to look into it. Rumsfeld instructed Cambone to report back “about what the situation is and what we are doing about it, if anything.”<sup>4</sup>

The U.S. government “all of a sudden got very interested,” recalled Rhode. Large pumps were brought in to drain the remaining water.<sup>5</sup> The materials were then placed in 27 aluminum trunks and transferred to a refrigerator truck running 24 hours a day to stabilize their condition and eliminate the spread of mold. At the CPA’s request, conservators from the U.S. National Archives and Records Administration (NARA) were flown to Baghdad for a brief two days in June 2003 to assess the condition of the materials. Their October 2003 report noted an eclectic mix of Hebraic and Arabic materials: Torah scrolls, prayer books, Bibles and commentaries, books on Jewish law, children’s Hebrew language and Bible primers, and other materials. The printed books, dating from the late nineteenth and early twentieth centuries, originated from a variety of places, including Baghdad, Warsaw, Livorno, and Venice. Among the rare works was a bible published in Venice by Giovanni di Gara in 1568 and what appeared to be Abraham Brudo’s *Birkat Avraham*, which was published in Venice in 1696. The Arabic materials included both handwritten and printed items relating to the Jewish community in Iraq, some produced by the Iraqi Jewish community and others from official Iraqi government sources.<sup>6</sup>

Reporting on the poor condition of the materials, the conservators recommended transferring them to the United States for expeditious preservation. After rescuing the Judaica items from the watery mire, they were exposed to the hot Iraqi sun to dry them out, causing serious problems with mold. While Iraq had no facilities or resources to conserve the archive, NARA operated one of the world’s leading conservation laboratories.<sup>7</sup> The conservators recommended that after mold remediation, the items should be evaluated, conserved, and housed for long-term storage. They estimated the cost of the preservation project would run between \$1,525,000 and \$3,000,000.<sup>8</sup> With the evident blessing of the Iraqi State Board of Antiquities and Heritage (SBAH), the materials were flown by the U.S. military to NARA’s southwest regional facility near Fort Worth, Texas, to be freeze-dried; after this remediation process, they were transferred to NARA’s operation in College Park, Maryland, for preservation and restoration.<sup>9</sup> The CPA-SBAH memorandum of understanding allowed for a two-year loan of the materials.<sup>10</sup> In 2010, the State Department stated that when transferring sovereignty to Iraq in June 2004, the CPA gave the Ministry of Culture the prerogative to demand the return of the archive upon written request.<sup>11</sup> Like the initial CPA-SBAH memorandum of understanding, this agreement presumed Iraq as the rightful owner of the archive. The same presumption governed the import of the archive to the United States under the Immunity from Seizure Act (IFSA).

This statute deserves extended comment given how U.S. officials premised its use on defining the materials as Iraqi cultural heritage and stretched the parameters of the law beyond its original intent. Congress passed IFSA in 1965 to facilitate cultural exchange and exhibits among the world's cultural and educational institutions. For the most part, it immunizes owners of such cultural materials from efforts to seize them in U.S. courts. The law protects any work of art or other significant cultural object borrowed from outside the United States, either privately or publicly owned. By enacting the immunity law, Congress aimed to strengthen international cooperation and enrich public appreciation and education of other cultures. Under IFSA, nonprofit cultural and educational institutions may seek a determination from the president or the president's designee that foreign cultural materials sought for exhibition are culturally significant and that the exhibition is deemed to be in the U.S. national interest. If this determination is granted by the State Department, which is delegated responsibility for administering the act, it must be published in the *Federal Register*. An affirmative determination is supposed to immunize the cultural property from court proceedings; no state or federal court "may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving" foreign custodial or ownership institutions or individuals of custody or control of these cultural objects or materials. The attorney general's office is responsible for enforcing the immunity law.<sup>12</sup>

IFSA offered a twofold solution to importing the Iraqi Jewish archive to the United States. First, in addition to the CPA/Iraqi memorandum of understanding, it provided further legitimacy and a legal process for overcoming the war time prohibitions against the import of Iraqi property. This ban stemmed from the first Gulf War. In August 1990, as the United States mobilized an international force to oust Iraqi forces from Kuwait, President George H. W. Bush issued two executive orders within days of each other—executive orders 12722 and 12724—banning the importation of Iraqi goods into the United States without a license.<sup>13</sup> In accord with the national emergency declared in executive order 12722, executive order 12724 stated that, "Except to the extent provided in regulations that may hereafter be issued pursuant to this order, all property and interests in property of the Government of Iraq that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession of the United States . . . are hereby blocked."<sup>14</sup> Section (c) of the order, moreover, banned any "dealing by a U.S. person related to property of Iraqi origin exported from Iraq after 6 August 1990, or property intended for exportation from Iraq to any country . . ." These executive orders accorded with United Nations Security Council Resolution 661, also adopted in August 1990, calling on member states to prevent the transshipment of "commodities and products" from Iraq. Executive order 12724, however, permitted administrative promulgation of rules, regulations, licenses, and other actions taken under executive order 12722. If not administratively revoked, these actions regarding Iraqi property were to remain in effect under the order until "amended, modified, or terminated by proper authority."<sup>15</sup> The United States lifted

many of its Iraq sanctions in May 2003, but it continued to prohibit the import of Iraqi cultural property.<sup>16</sup> On 29 July 2004, approximately one month after the CPA ended the occupation and turned over sovereignty to the Iraqi interim government, President George W. Bush issued presidential order 13350 terminating the national emergency and revoking executive orders 12722 and 12724. Nonetheless, the presidential order maintained the “prohibitions with regard to transactions involving property pursuant to Executive Order 12722 or 12724.”<sup>17</sup> These restrictions imposed since August 1990 presented problems for bringing the Iraqi Jewish archive to U.S. soil. The immunity statute, however, permitted bringing the archive to the United States under a State Department determination on behalf of the president. In other words, it provided the federal government with the necessary license to overcome the prohibition consistent with U.S. law.

Second, the statute largely immunized the archive from possible outside claims, especially from efforts to assert ownership over the materials or seek judgments against the Iraqi government. There was perhaps reason for concern. The overthrow of Saddam Hussein ignited a rush among Jewish groups seeking reparations for Jewish refugees from Iraq and other Arab countries. At stake were potentially billions of dollars from communal and individual claims. The World Jewish Congress (WJC), the American Sephardi Federation, and the World Organization of Jews from Arab Countries, for example, had been focusing attention on the claims of displaced Jews involved in what the WJC termed the “forgotten exodus” after 1948. As U.S. authorities were discussing whether to bring the archive to the United States, the American Committee for Rescue and Resettlement of Iraqi Jews was planning on filing a class action suit against whatever Iraqi government emerged from the war against Saddam Hussein’s regime.<sup>18</sup> Moreover, in March 2003, Israel’s Justice Ministry was nearing the completion of registering Jewish property that remained in Iraq after the Jewish exodus. The Israeli government intended to use this information to file a compensation claim against Iraq for this lost property on behalf of the 123,000 Jews who were expelled following the 1948 founding of Israel.<sup>19</sup> Regardless of whether claims against Iraqi assets would actually be filed in U.S. courts, it was conceivable that claims also would be made over the archive.

Employing IFSA seemed a deft maneuver in circumventing federal prohibition on importing Iraqi cultural goods while expediting the archive’s entry into the United States for conservation and protecting it from claims in U.S. courts. It arguably subverted IFSA’s purpose, which aimed to promote international cultural exhibitions and exchange, not conservation of foreign archival materials. The State Department’s determination notice published 21 August 2003 in the *Federal Register* mentioned only that the archive would be brought to the United States for exhibition after conservation treatment and noted that it was in the “national interest.”<sup>20</sup> Although this determination was seemingly enough to immunize the materials under the law, it lacked the usual details of other applications, including lists of places and dates of exhibition. After all, there was no telling when the materials would undergo full conservation treatment and evidently there was no prior



planning on when or where the archive would be displayed. In other words, the government expanded the parameters of the statute or invented a new use for it to suit the specifics of the case.<sup>21</sup>

The benefit of doing so resulted in rescuing the archive from probable destruction; without U.S. intervention, it would have been irretrievably lost to water damage and mold. At the same time, applying the immunity statute to protect the State of Iraq from outside claims was questionable given that it involved looted private and communal cultural property. In other words, the entire premise of importing the archive to the United States for conservation was problematic; how could the United State consider these stolen materials the cultural property of Iraq whose agents had pillaged them from Iraqi Jews? By June 2012, however, the State Department stated that after the conservation and digitization of the materials, they would be the subject of an educational exhibit in the United States and Iraq, thus satisfying the core purpose of IFSA.<sup>22</sup>

Even so, the IFSA does not provide ironclad immunity to judicial claims in U.S. courts. In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA), granting U.S. courts jurisdiction over civil nonjury claims filed against foreign states or sovereigns—even when immunity has been granted under IFSA.<sup>23</sup> As such, FSIA represents an interesting element in the case surrounding the Iraqi Jewish archive because it presents the possibility of overriding IFSA in the federal courts. FSIA defines limited exceptions that may be used to deny foreign sovereign immunity. The statute restricts immunity primarily to “acts of a foreign sovereign and their agents, which are sovereign or governmental in nature.”<sup>24</sup> This may include state-supported museums, galleries, or presumably other kinds of cultural institutions. One of the key exceptions to receiving FSIA immunity involves the commercial activity clause, which the federal courts have interpreted broadly to include promotional and educational activities related to foreign exhibits in addition to loans of artwork or cultural heritage materials on U.S. soil. Indeed, the U.S. courts have recently applied the commercial activity clause to strip foreign state-sponsored museums and galleries of their immunity against suits to reclaim cultural property.<sup>25</sup>

Two recent cases involving Nazi-looted artwork—*Altmann v. Republic of Austria* and *Malewicz v. City of Amsterdam*—illustrate how the federal courts have interpreted FSIA to pierce IFSA’s immunity protections.<sup>26</sup> The *Altmann* case involved a dispute over six Gustav Klimt paintings looted by the Nazis and housed in the state run Austrian Gallery. In considering the case, the U.S. Supreme Court found that FSIA could be applied retroactively to events before the law’s 1976 enactment. The Court analyzed FSIA’s expropriation exception according to three fundamental requirements: (1) the property in question must have been taken or expropriated in violation of international law; (2) the property must be owned or under the care of an agency of a foreign state; and (3) the agency of the foreign state must be involved in commercial activity in the United States. According to the Court, the case surrounding the Klimt paintings satisfied these three requirements; moreover, the Court determined that FSIA’s commercial activity clause al-

lowed the federal courts jurisdiction over the case. The Court defined commercial activity as encompassing promotional and advertising pursuits in the United States relating to the Austrian Gallery's exhibition of the paintings in Austria. Although the contested property remained in Austria, the Court found that these promotional and advertising pursuits on American soil comprised commercial activity.<sup>27</sup>

The ramifications of this case mean that U.S. courts may now exercise jurisdiction over World War II-era looting cases and other past acts of pillage.<sup>28</sup> Indeed, *Altmann* eroded IFSA by allowing the federal courts to hear claims against foreign governments or state-run cultural institutions that engage in promotional activities in the United States. The ruling opened the way for the courts to strip foreign entities of their custody and control over cultural materials, even after receiving IFSA immunity. The *Malewicz* case further diminished IFSA by expanding FSIA's commercial activity clause to cover foreign museum loans. In 2004, the surviving heirs of Kazimir Malewicz, a Russian artist and pioneer of geometric abstractionism whose paintings were looted by the Nazis, sued the City of Amsterdam under FSIA to recover the works on loan to U.S. museums; alternatively, the heirs demanded \$150 million in compensatory damages. The U.S. district court ruled that the paintings' immunity from seizure did not protect the city from the jurisdiction of U.S. courts. The court looked to *Altmann* in finding that the city engaged in commercial activity by loaning the works to the Guggenheim in New York and the Menil Collection in Houston, Texas. Despite Amsterdam's claims of sovereign immunity, the court argued that the United States could exercise jurisdiction as the works were on loan in the United States when the lawsuit was filed.<sup>29</sup>

These cases arguably have relevance concerning the contested Iraqi Jewish archive, which Iraq's State Board of Antiquities and Heritage loaned to the United States, including plans for its exhibition. Moreover, the archive's provenance and status seemingly fit the *Altmann* court's three requirements for a claim against a foreign sovereign: (1) a case can be made that the archive was looted or expropriated by Iraqi secret police authorities in violation of international law; (2) the contested archive was under the control of SBAH, an official agency of Iraq; and (3) SBAH agreed to loan and exhibit the archive (commercial activity) in the United States, although Iraqi cultural officials now demand its return. Although using IFSA may have been the most expedient way for bringing the archive to the United States and immunizing it from outside claims, the materials may be vulnerable to lawsuits under FSIA either by heirs or living members of the Iraqi Jewish diaspora. Additionally, it is conceivable that suits could be filed to reclaim the looted archive on behalf of the collective Iraqi Jewish diaspora.

As a government agency with a definitive mandate, NARA could expend funds to cover overhead costs for administrative operations, laboratory use, and storage as an in-kind contribution to the project, but it could not direct funds to preserve, catalog, and digitize a non-U.S. government collection. Accordingly, private funding had to be raised to support the conservation of the materials. To address this problem, NARA partnered with the New York-based Center for Jewish History,



which received a \$94,000 National Endowment for Humanities grant to begin the painstaking work of conserving what was discovered to be more than 3000 items. This grant was barely enough to get started with a project that required millions to fully conserve, catalog, and scan the thousands of severely damaged texts. Moreover, the archive's uncertain fate made private fundraising difficult. Those who might contribute funds to conserve the materials wanted to see the archive reside in New York or Israel, not returned to Iraq.<sup>30</sup> By January 2011, basic cataloging had been done, but more extensive item preservation and digitization still awaited funding.<sup>31</sup> These circumstances largely left the conservation effort in limbo, bereft of private funds, as the initial two-year loan period neared expiration.

As early as May 2005, National Public Radio reported that shortage of funds was stalling conservation efforts.<sup>32</sup> Given these circumstances, Dr. Donny George, an internationally esteemed Iraqi archaeologist and SBAH director, stated "that there was no problem allowing the Iraqi Jewish archives to remain in the United States for restoration beyond the time period agreed to in the initial memorandum of understanding."<sup>33</sup> George also met in Berlin with a NARA representative to discuss the matter; they agreed that at least two Iraqi conservators would travel to the United States to participate in the restoration. Further, the U.S. embassy responded to a diplomatic note from the Iraqi government, "confirming that NARA was continuing to protect the Archives, from both security and climate control perspectives, until such time as the planned restoration efforts can actually begin."<sup>34</sup> These developments evinced an especially acute interest by the Iraqi government in maintaining control over materials belonging to the Iraqi Jewish diaspora.

From the beginning, the premise of the archive belonging to Iraq came into question. In a May 2003 memorandum, Secretary of Defense Rumsfeld wrote, "I am told that Hebrew University has offered to take possession of them, restore them, and make them available in some appropriate way."<sup>35</sup> In July of that same year, the *New York Times* reported that the Jewish Agency for Israel was "working with the Americans to obtain Jewish archives that were seized by the Iraqi government."<sup>36</sup> In 2010, Eric Fusfield of the B'nai B'rith International Jewish organization wrote to Secretary of State Hilary Rodham Clinton calling for an immediate ban on the return of the materials.<sup>37</sup> Moreover, in a 2010 *Jerusalem Post* interview, Rhode said that "The problem here is who owns it. By international law you may not take the treasures of one country and take them to another country. But this case is outside of the norm because it belonged to the Jewish community." But the Jewish community of Iraq, Rhode said, is "no more than 23 Jews." Rhode opposed the materials going back to Iraq, "because if it is the patrimony of the Jewish community of Iraq, then wherever they are, it's theirs." Iraqi Jews would have taken the materials with them if they had been able to, he said. "You don't abandon Torahs."<sup>38</sup> Fusfield expressed a similar sentiment: "These are Jewish communal properties first and foremost."<sup>39</sup> Another scholar questioned why a "society that barely tolerated and then expelled its Jews, and that loathes and forbids the presence of Jews now, should be given 27 cases of Jewish documents and books."<sup>40</sup> Moreover, Mordechai Ben-Porat, who assisted in

orchestrating the mass airlift of Iraqi Jews to Israel after 1948, asserted that the archive should reside in the museum devoted to Iraqi Jews, which he runs in Israel, where Jewish scholars could make use of them—a highly unlikely prospect if the archive were to be returned to Iraq.<sup>41</sup> As well, the World Organization of Jews from Iraq, which formed in 2010 to protect, preserve, and promote Iraqi Jewish heritage, also has sought to lay claim to the archive.<sup>42</sup>

While representatives of the Iraqi Jewish community have staked a claim to the materials, so have Iraqi cultural officials. Iraq's new minister of Tourism and Antiquities has proclaimed the return of the archive as a top priority.<sup>43</sup> In June 2010, frustrated over the slow progress in conserving the materials and whether the U.S. government intended to return it, Iraqi cultural officials began a campaign to retrieve the Jewish archive. An Iraqi delegation met with U.S. officials, asking for its return along with tens of millions of documents that were seized by the U.S. military during and after the 2003 invasion. The meeting yielded a plan for the immediate return of half the archive; the other half would be restored and displayed before going back to Iraq. Following the delegation's visit, Iraqi Deputy Culture Minister Taher Hamud announced at a news conference that the United States agreed to return millions of documents to Iraq, "including Baghdad's Jewish archive." The Jewish archives "are important to us," he claimed. "It is part of our culture and sheds light on the lives of the Jewish community." Saad Eskander, director of the Iraqi National Library and Archives agreed: "It is vital that Iraqis know their history and that they be made aware that Jews were once part of this country." One year later (2011), Hamud accused the Americans of delay and deception and threatened to sue in U.S. court.<sup>44</sup> U.S. officials denied the allegations, stating that they only recently received the roughly \$3 million to conserve the materials. Nonetheless, the 2010 plan reached between U.S. and Iraqi officials collapsed.<sup>45</sup> Iraqi government officials also have spoken on the issue with dual voices; the deputy foreign minister, Labid Abawi, whose ministry is Kurdish-run and has close ties to the U.S. government, prefers that the materials stay in the United States for restoration work on grounds that Iraq lacks the capability. Perhaps concerned that this matter not detract from broader U.S. interests in Iraq, Philip Frayne, spokesman for the State Department Bureau of Near Eastern Affairs, stated in 2011 that the United States has "every intention of returning" the archive.<sup>46</sup> In June 2012, the Kurdistan news agency reported that the Iraqi Ministry of Tourism and Antiquities had stopped dealing with U.S. archeology and exploration teams "because the U.S. administration has failed to fulfill its promises to return Iraqi antiquities that were transported to the United States by U.S. forces in 2003." Among the cultural artifacts cited was the Jewish archive discovered in the basement of the Iraqi intelligence services in Baghdad. The Iraqi minister of Tourism and Antiquities accused the United States of moving the archive to Israel and stated that Israel was claiming it as Jewish heritage. "But that is Iraqi heritage," he said. "Therefore we have stopped dealing with the U.S. exploration teams in Thiqrar and Duhok provinces."<sup>47</sup>

### III. CONCEPT OF CULTURAL HERITAGE

As contested cultural property, the central question is to whom does the archive belong? Whose cultural heritage is it? Does it belong to Iraq, the country of origin, or to the Iraqi Jewish diaspora, the culture of provenance? This question involves several issues, including the concept of Jewish cultural property, the notion of cultural heritage regarding minority ethnic and religious communities under international humanitarian law, including the conventions of war, and the history of persecution and dispossession of Jews in Iraq.

The term “Jewish cultural property” refers to the works and artifacts representing the cultural heritage of Jewish people throughout history, not property merely owned. In other words, the artistic works of Renoir or Matisse that were once owned by French Jews and looted by the Nazis do not qualify under this definition as “Jewish cultural property,” albeit such property should be unquestionably returned to its rightful owners or heirs whenever they can be located. As Yehuda Z. Blum noted, due “to well-known historical circumstances and the unique course of Jewish history, the works and artifacts constituting the cultural heritage of the Jewish people are mainly of a religious character”—theological and philosophical works and manuscripts, including the Bible and its commentaries; editions of the Babylonian Talmud and the literature based on it; books, manuscripts, and archives regarding various aspects of the history and life of Jewish communities; Torah scrolls, illustrated prayer books, and Passover Haggadot, as well as a variety of religious artifacts.<sup>48</sup> In other words, these works of religious expression and identity comprise a cultural heritage that exists independently from the sovereign state in which they were produced.

This concept of cultural heritage differs from its general articulation in the laws of war, which govern the protection and restitution of cultural materials in war and occupation. Because the archive was removed from Iraq during occupation, the laws of armed conflict seemingly comprise the relevant legal regime in this case aside from the memorandum of understanding between the CPA and SBAH. Following the vast plundering of World War II, the international community adopted a series of treaties that defined a cultural artifact as constituting the cultural patrimony of its country of origin. This concept of cultural property derived most immediately from the cultural property protections in the 1907 Hague Regulations Concerning the Laws and Customs of War on Land. The convention was drafted by diplomats of the European imperial powers before they withdrew from their colonial empires. As such, it represents a treaty of its time. The 1907 convention prohibits the seizure, pillage, and destruction of the property of municipalities and institutions dedicated to religion, charity and education, and the arts and sciences even when state property, as well as historic monuments and works of art and science. Although the convention does not provide for restitution of plundered cultural property, it does state that the seizure, destruction, or willful damage of cultural heritage should be made the subject of legal proceedings.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict includes a more expansive definition of cultural property. Its preamble asserts that “damage done to cultural property belonging to any people whatsoever means damage done to the cultural heritage of all mankind . . .” and that “the preservation of the cultural heritage is of great importance for all peoples of the world and . . . should receive international protection.” Article 1(a) of the convention defines cultural property regardless of origin of ownership as “moveable and immovable property of great importance to the cultural heritage of every people,” including works of art, manuscripts, books, and other objects of artistic, historic, or archaeological interest, as well as scientific collections and important collections of books or archives . . .” Under the convention, belligerents are forbidden to attack, damage, destroy, or pillage the cultural property of their adversary and have an affirmative obligation to prevent such acts. The first protocol to the 1954 Hague Convention forbids belligerents or occupying forces from exporting cultural spoils from occupied territory during armed conflict and mandates the return of plundered property to the country of provenance at the end of hostilities. 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>49</sup> In 1999, the international community adopted a second protocol to the 1954 Hague Convention, which strengthened the language of restitution to the country of origin. Article 9 of the protocol also prohibits occupying powers from exporting, transferring ownership of, or removing cultural property.<sup>50</sup>

The 1954 Hague Convention and its protocols assume that any cultural property removed from a nation state under attack or occupation constitutes the cultural heritage of the people of that country. In other words, if a piece of cultural property has been removed country X, it may be assumed that it represents the cultural heritage of the people of country X and should be rightfully returned to the State of origin. This represents the premise on which Iraqi cultural authorities claim the Iraqi Jewish archives as part of Iraq’s exclusive cultural heritage. It also seems to represent the basis on which U.S. officials imported the archive into the United States.

#### IV. CULTURAL HERITAGE AND DISPOSSESSION

Nonetheless, the Hague Conventions do not specifically address situations in which cultural property belonging to a particular ethnic or religious group within a country under occupation has been looted by previous national authorities and removed by a foreign occupying power for restoration. Indeed, the concept of cultural heritage and restitution embodied in the conventions of war carry little legitimacy in this case. The United States was not a party to the 1954 Hague Convention during the invasion and occupation when the archive was transferred to U.S. soil. But it is arguable that even if the United States had been a signatory, U.S. author-

ities would not be bound to respect its restitution provisions given the nature of the archive as looted private and communal property. To return the archive to Iraq, the country of provenance, would presume that it constitutes Iraqi, not Jewish, cultural heritage.

This presumption is problematic given the history of Jewish persecution, disenfranchisement, expulsion, and dispossession by the Iraqi state. The grim history surrounding the destruction of the Iraqi Jewish community and its culture has relevance on whether the Iraqi state has a legitimate and sovereign claim over the archive. Indeed, over the course of much of the twentieth century, successive Iraqi regimes considered Jews and their culture an alien and enemy presence worthy of eradication. The Jews in what is now Iraq is of ancient lineage, older than any other outside the Holy Land. The community traces its origins to the sixth century BCE, when Nebuchadnezzar conquered Judea and sent most of its population into exile in Babylonia. For more than 2500 years they resided along the banks of the Tigris and Euphrates as an integral minority people accommodating themselves to an ever-changing series of new rulers and empires.<sup>51</sup> The British conquest of the territory in 1917 enabled Jews to prosper economically, and many were elected to government posts.

This progress came to an abrupt halt after the new state of Iraq won independence in 1932. Arab nationalism together with resentment of Jewish government employment during the global depression of the 1930s and the influence of Nazism and anti-Semitism augured the eventual destruction of the Jewish community.<sup>52</sup> The dismissal of Jews from government posts in 1934 and 1936 was accompanied by bombings of Jewish establishments in 1936 and 1938.<sup>53</sup> In June 1941, the Mufti-inspired, pro-Nazi coup of Rashid Ali ignited rioting, a brutal pogrom in Baghdad, and a declaration of war against Great Britain. The British quickly deposed Ali, but not before armed Iraqi mobs with the complicity of the army and police murdered 180 Jews, wounded 1000 more, and destroyed Jewish property in a two-day rampage. Starting in 1947, anti-Jewish riots became common, and by 1948, the year of Israel's founding, the number of Iraqi Jews had dwindled to between 120,000 and 130,000, the lowest point in their 2500 year history.<sup>54</sup> Although emigration was prohibited, many Jews fled via an underground movement. Iraq joined other Arab armies in attacking the new Jewish state and ushered in an era of severe repression against its Jewish population. The Iraqi state pronounced Zionism a capital crime, excluded Jews from civil society, subjected them to random searches and interrogations, extorted their possessions, dismissed them from jobs, prohibited them from higher education, and restricted their travel abroad.<sup>55</sup> One year after Israel's creation, Prime Minister Nuri as-Said informed foreign diplomats of a plan to expel Iraq's Jews.<sup>56</sup>

In 1951, the government passed a series of anti-Jewish deprivation laws requiring emigrating Jews to register with the State, revoking their citizenship, and freezing their property and assets.<sup>57</sup> After the bombing of Baghdad's Masuda Shemtob synagogue in January 1951 as well as continuing harassment and attacks by police

and Iraqi mobs, tens of thousands of Jews began registering to leave for Israel. By the end of the year, some 20,000 Jews fled Iraq illegally, while about 110,000 left under the deprivation laws. Those fleeing Iraq were limited to taking 50 pounds of clothing; they were forbidden to take photographs, books, family heirlooms, and other property and assets.<sup>58</sup> A joint U.S.-Israeli airlift—Operation Ezra and Nehemiah—resulted in one of the largest population resettlements in history. The resettlement effort and illegal emigration left only 5000 to 6000 Jews remaining in Iraq.<sup>59</sup>

After the 1958 revolution, the coup of 1963, and the Baathist takeover of 1968, the trauma of the Jewish minority population continued with additional repressive measures. The Iraqi state prohibited Jews from selling property and forced them to carry yellow identity cards. Following Israel's 1967 victory in the Six Day War, the Baath party dictatorship persecuted the remaining 2000 to 3500 Jews into penury. The regime dismissed them from jobs, expropriated property, froze bank accounts, and disconnected telephones. They were forced from public and civic life, put under house arrest for extended periods, restricted to cities, and placed under constant surveillance.<sup>60</sup> On 27 January 1969, after Saddam Hussein's Baath party took power, the regime declared a national holiday and hanged nine Jews in the public squares in Baghdad on trumped up charges of spying for Israel. Baghdad radio invited Iraqis to "come and enjoy the feast," attracting a crowd of some 500,000 to see the hanged Jews swinging from the scaffolds. Another two Jews were hanged later that year. Jews continued to flee the country illegally before international pressure in 1972 forced Iraq to allow them to emigrate.<sup>61</sup> By the time of the 2003 U.S. invasion, only about two to three dozen Jews still lived in Iraq, almost all of them old, in frail health, and living in a single Baghdad neighborhood, near a synagogue that rarely opened.<sup>62</sup>

During this period of persecution and dispossession, the Iraqi state considered Jews and their culture an alien presence worthy of contempt, derision, and expulsion. Their cultural creations received similar treatment; books, documents, and archives were confiscated, and scholarly works and places of worship were bombed and desecrated. As Iraqi Jews fled the country, they were forced to leave their possessions behind and some of their cultural materials were seized and sequestered in the bowels of the Mukbarat's Baghdad headquarters, reminiscent of the Nazi plan to establish a museum of an extinct race in Prague after the Reich's triumph. The erasure of Jews from Iraq reportedly extended to archaeology in which archaeological sites were allowed to be flooded or bulldozed if they were found to contain Jewish remains.<sup>63</sup>

In other words, as the host nation, the Iraqi state demonstrated a vicious animas against Jewish culture—considered a manifestation of a foreign and enemy element not part of Iraq's own cultural heritage—and pursued official policies to extinguish its flame from Iraqi society, if not from its archaeological past. It is certainly ironic that Iraqi officials now consider the Iraqi Jewish archive as part of Iraqi cultural heritage only after the State expunged its Jewish population. But



this belated realization, if not aggressive and archaic assertion of political and cultural sovereignty, cannot serve as justification for Iraq expropriating the cultural heritage of a people that it despised and purged from the country just because they once resided within its territorial borders. The incontrovertible fact remains that if the Jewish people and their culture managed to thrive during ancient and modern periods of Iraqi history, this occurred despite the majority culture's hostility toward them and its attempts to repress and obliterate their cultural heritage. It would be a cruel irony of history if the Iraqi State that persecuted and effectively expelled its Jewish minority and obstructed its cultural development now became the guardian of an important archive representing the patrimony of that culture.

## V. CULTURAL HERITAGE OF "PEOPLES" AND INTERNATIONAL HUMANITARIAN LAW

Returning the archive to the land that purposefully destroyed its Jewish community and dispossessed it of its cultural property would not meet the elemental principles of justice. Even if the materials had not been removed to the United States for conservation, the materials would still constitute the cultural heritage of the Iraqi Jewish diaspora and not the State of Iraq where it was originally located or produced. Certainly, the hostility displayed by successive Iraqi regimes toward Iraqi Jews and their culture transgressed the march of human rights law over the course of the twentieth century. Before World War II, states were largely considered sovereign, autonomous, and free from outside interference. In the post-World War II era, this concept in international law has undergone dramatic change. The state-centric system of sovereignty, noninterference, and territorial integrity has succumbed to respect for individual human rights, some group rights, and direct challenges to the absolutism of state dominion. The once accepted view in international law that the sovereign State held absolute dominion over the cultural heritage of distinct ethnic and religious peoples—apart from the majority society—within its borders or in its colonial lands no longer has validity.

In this regard, the 1954 Hague Convention and protocols have relevance in referring to the cultural property of "peoples," not of states or territories. This notion is expanded upon in Geneva Additional Protocols I and II, which also provide substantial protections to cultural property in times of armed conflict. Protocol II prohibits any "acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."<sup>64</sup> The protocols define cultural property not simply as the heritage of the world or of a nation-state, but of a particular group of "peoples." This definition extends beyond earlier notions of cultural property to imply that national governments may not always be trusted to protect the cultural property of disparate ethnic and religious groups within their borders. In some cases govern-

ments may intentionally destroy or place in harm's way the cultural property of its ethnic and minority "peoples," as occurred in the Balkan wars of the 1990s. As governments are largely seen as caretakers of cultural property, attacking and occupying forces have affirmative responsibilities to "protect the cultural property of the peoples and communities within nation states."<sup>65</sup>

The right of self-determination of peoples regarding their cultural development, heritage, and identity is now firmly acknowledged as a principle of international law; it is enshrined in such United Nations instruments as the United Nations charter, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Declaration on the Rights of Indigenous Peoples.<sup>66</sup> The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which the United States took a lead role in drafting, also embraces the concept of "peoples." It expresses deep concern over the illicit trade of cultural materials and its damage to "the cultural heritage of national, tribal, indigenous, and other communities, and also to the heritage of all peoples."<sup>67</sup> This normative concept, moreover, is articulated in Article 2(3) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression: "The protection and promotion of the diversity of cultural expression presupposes the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minority and indigenous peoples."<sup>68</sup> Consequently, "peoples" has come to be regarded as subjects of international law endowed with certain irrefutable rights. One of the imperative rights of self-determination relating to cultural development and identity is that a people have a right to their own cultural heritage. It would be absurd to argue that a people have the right of cultural self-determination, but not the right of ownership over their cultural property. Or, as Blum asserts, a people is "entitled, as an integrated part of its right of self-determination, to the ownership of its cultural property which constitutes the expression of its unique cultural heritage."<sup>69</sup> In other words, the right of a people to its cultural heritage is not extinguished upon expulsion and dispossession by the home state of origin. The legitimacy of this principle stands beyond and apart from the territorial integrity of the sovereign state. As the United States is a signatory to both the United Nations Charter and UNIDROIT Convention and ratified the Hague Convention in 2008, it would seem to subscribe to this general view.

## VI. DISPOSITION OF THE IRAQI JEWISH ARCHIVE: WHERE SHOULD IT RESIDE?

For most of the twentieth century, Iraqi Jews were a persecuted people and could scarcely consider Iraq their homeland. The question is where the remnants of their looted cultural heritage should reside. Here, there is precedent to follow by look-

ing at how the United States handled the disposition of pillaged Jewish cultural property of destroyed communities after World War II. Indeed, there is a historic parallel between the looting of Jewish cultural property in Iraq and the more extreme case of Nazi Germany. Throughout occupied Europe in the Second World War, Reichsleiter Alfred Rosenberg's Einsatzstab plundered vast amounts of Jewish cultural materials—book collections, archives, documents, manuscripts, incunabula, and historical objects—from Jewish libraries, archives, private collections, societies, bookstores, universities, synagogues, and other cultural sites to establish a series of research institutes for the study of the “Jewish problem.” Among these, the largest and best known was the Institute for the Exploration of the Jewish Question in Frankfurt am Main. Another research institute, fortified by pillaged Jewish libraries and archives, was set up in Munich to buttress the pursuit of scientific anti-Semitism by Nazi scholars. Large collections of anti-Semitic material were established in other cities, including Nuremburg under the direction of Julius Streicher. The grand ambitions of the Frankfurt/Main institute and library involved serving the research and educational imperatives of the German people; it aimed to “represent the center of the nationalist-socialist doctrine and education” by promoting a pseudo-scientific basis for a virulent anti-Semitic propaganda that comprised one of the major political weapons of the Nazi party.<sup>70</sup> A Nazi report on Rosenberg's activities noted that the library for the research of the Jewish question was to assume a “high position in the realm of German libraries.” In the “New Order of Europe,” the library in Frankfurt/Main not only was to serve Germans, but all of Europe and the world.<sup>71</sup> Ironically, at the same time that the Nazis were exterminating the Jews of Europe they were carefully and methodically collecting and preserving Jewish religious and cultural materials as a means to Jewish annihilation. It is hard to imagine that the Nazi pillage of Jewish cultural property during the Hitler years did not inspire the Iraqi state to do the same, animated as it was by German national-socialism and anti-Semitism in the war years and its aftermath.

Following the ravages of World War II, the Western Allies endeavored to return the vast holdings of plundered property to the home countries of origin. The problem of cultural property belonging to heirless and destroyed Jewish communities throughout Europe presented a unique problem. Normally, unclaimed cultural property went back to the state of origin or was distributed among museums and libraries.<sup>72</sup> Few countenanced this solution for nations where entire populations had been exterminated or forced to flee. In the U.S. zone of occupation, the United States amended Military Government Law 59 to allow a nongovernmental group to act as a successor organization to claim heirless Jewish property in lieu of an individual state. This new regulation enabled the New York-based Jewish Restitution Successor Organization (JRSO), founded in 1947, to assume this responsibility, representing Jewish groups throughout Europe and Palestine. The JRSO found assistance from the Commission on European Jewish Cultural Reconstruction (JCRC) in distributing religious and cultural items to other Jewish organizations worldwide.<sup>73</sup>

This solution proved eminently pragmatic in relying on knowledgeable Jewish groups to accomplish the difficult task of distributing heirless religious and cultural materials. Equally important, it acknowledged that these items represented the cultural and religious heritage of surviving European Jewry which could no longer be considered part of their countries of origin. The JCR believed that returning the materials to the countries of provenance posed the grave danger of once again subjecting them to misuse in promoting virulent anti-Semitism. Moreover, according to the JCR, the materials needed to be so disposed of as to serve the spiritual and religious needs of European Jews and the Jewish people as a whole. The materials had to be extricated from Europe for two principle reasons, which resonate in the case regarding the fate of the Iraqi Jewish archive. First, in no way could the religious and cultural materials be made to serve the needs of all surviving Polish, German, and Austrian Jews. The flight from the Nazi terror resulted in many more Jews living abroad than in Europe, the theatre of their destruction. Obviously, argued the JCR, "they cannot enjoy the religious and cultural treasures of the Jewries of their native lands, even vicariously, unless they, their religious leaders, scholars and educators, can have access to them." Accordingly, any disposition of these materials which did not give full recognition to their interest in them would be inequitable.<sup>74</sup>

Second, in no other way could the materials serve the religious and cultural needs of the Jewish people. Because of the annihilation of much of European Jewry and the dispersion of most of its survivors, "Europe is no longer, and it is very unlikely that it can again become, a center of Jewish spiritual and cultural activity." The centers for Jewish learning were now elsewhere in Palestine and the United States, where so many surviving European Jews had found refuge. Consequently, it was argued that Jewish religious and cultural materials not only must be removed from Europe, but "they must also be so distributed among Jewish communities throughout the world as best to serve the spiritual and cultural needs of the Jewish people as a whole." The JCR stated that restitution cannot and should not be constrained by narrow legalistic conceptions of title. Such conceptions would be entirely appropriate in cases in which property had only economic value, but not in cases in which cultural and religious materials held edifying and spiritual importance.<sup>75</sup>

Although the majority of materials went to Israel or the United States, the distribution process encountered numerous conflicts. Distribution efforts met objections from the few remaining Jews in Germany, who opposed cultural materials of their exterminated communities from going abroad, albeit many of their people were in the receiving countries. At the same time, German gentile communities did not "always give up valuable Jewish manuscripts and archives with grace."<sup>76</sup> These disputes continued for many years and became entangled in the final settlement efforts between Germany and the state of Israel.<sup>77</sup> Nonetheless, there was broad recognition, especially by the United States, that heirless Jewish cultural property comprised the distinct and unquestionable heritage of the Jewish people.

Unlike heirless Jewish materials recovered and redistributed after World War II, however, the fate of the Iraqi Jewish archive is complicated by the memorandum of understanding (MOU)/diplomatic agreement governing its return to Iraq. The United States would have to renege on this agreement and its apparent diplomatic representations to Iraq in order to place it in a new home accessible to the Iraqi Jewish diaspora. In the chaos of war and occupation, the CPA evidently failed to consider the archive's provenance as looted private and communal property of a persecuted and expelled minority people in forging the agreement. In other words, the CPA signed the agreement under erroneous pretenses without due consideration of the archive's private and communal origins, the fact of it being robbed by the Iraqi secret police, and the broader historical dispossession and expulsion of the Iraqi Jewish community. On the one hand, it is understandable that respecting the terms of the MOU would promote U.S. diplomatic relations with Iraq; on the other, to do so would legitimate the past looting of the materials by the Iraqi secret police and disinherit the Iraqi Jewish diaspora a second time over. It would set the precedent of expediently and selectively ignoring, if not legitimizing, the past crimes of authoritarian regimes in plundering the cultural heritage of ethnic, religious, or indigenous minority communities within their own territorial borders. After all, before their expulsion, Iraqi Jews represented a religious and indigenous minority community, predating the arrival of Islam by more than a thousand years. While diplomacy often involves the art of nuance and expediency, it also involves humanitarian considerations enshrined in international human rights law.

A critical consideration of this case involves weighing two competing factors: (1) honoring a diplomatic agreement that defines the materials as Iraqi cultural heritage, and by doing so, implicitly legitimizes the Iraqi Mukhabarat's past outrages of dispossession and persecution, as well as assures its perpetual unavailability to the Iraqi Jewish diaspora; or (2) restoring this private and communal cultural property to the religious and cultural community from which it came—the rightful owners and their descendants—or otherwise placing the archive under circumstances outside Iraq in which it may be accessible to the Iraqi Jewish diaspora and others. It is perhaps understandable that the CPA, overwhelmed as it was with the occupation and urgent security considerations, overlooked the archive's provenance, even if Harold Rhode raised this issue almost from the beginning. The United States has a choice of whether to follow diplomatic convenience in honoring a flawed agreement, or to pursue restorative cultural justice. The former choice might serve diplomatic convenience by easing tensions with Iraqi officials, but it would sanction Iraq's state sponsored looting of the cultural and religious heritage of a dispossessed and banished minority population.

This case differs from that of the Iraqi Anfal files seized by Kurdish dissident forces and transported to U.S. soil for analysis immediately after the First Gulf War. In that case, 18 metric tons of secret police documents were spirited out of Iraq by U.S. military transport with the explicit understanding that they were Kurd-

ish property, not the property of the central government. Unlike the private and communal nature of the Iraqi Jewish archive, these comprised state documents produced by Hussein's security forces. The documents were created in the course of prosecuting a genocidal campaign against the Kurds for their alliance with the Iranians in the Iran-Iraq war. Following their capture, they were disowned by Saddam Hussein's government as forgeries and claimed by Kurdish rebels who sought to exploit them to uncover informants in their midst before permitting their wider use as evidence for U.S. intelligence and international efforts to indict the Hussein regime under the 1948 genocide convention. Under the U.S.-Kurdish agreement, the United States agreed to return the documents to Iraqi Kurdistan upon Kurdish request.

In 2005, the Anfal documents were turned over to the State Department's Crimes Liaison Task Force for the trials of Saddam Hussein and his senior leadership for the Anfal crimes. It is currently unclear whether the U.S. government has returned the documents to Iraqi Kurdistan under the original agreement, or whether the Anfal files reside in the U.S. media processing center in Qatar with the millions of seized Hussein government records from the 2003 Iraq war. There are currently several major caches of Iraqi documents that were taken and removed from Iraq as a result of internal upheaval, war, and occupation; the vast majority of the documents remain at the media processing center in Qatar. Others reside at the Hoover Institute at Stanford University under an arrangement with the Iraqi government. But these various stores of documents, comprising tens of millions of pages of files, compose official state records, not looted private and communal cultural property of a once thriving but now extinct minority religious community.

## VII. CONCLUSION

The U.S. State Department should acknowledge that the Iraqi Jewish archive comprises the distinct cultural heritage of the Iraqi Jewish diaspora and act accordingly. It should follow the example established by the United States after World War II regarding the disposition of heirless cultural property of destroyed Jewish communities. The State Department should acknowledge that importing the archive to the United States under the immunity seizure law was based on the erroneous premise that it constituted Iraqi cultural property. It should now rely on the advice of international Jewish groups to find an appropriate home for the cultural materials where they may be made freely accessible to the Iraqi Jewish diaspora and other researchers. If such cultural property is considered part of the heritage of "all mankind" or "every people" as asserted broadly under international humanitarian law, it follows that it must be made universally available. Ironically, if the materials were to be returned to Iraq, as the U.S. State Department has said it intends to do, its availability would be denied to the very people whose culture



and religion it represents. Moreover, such denial would be animated by the same chauvinism and anti-Semitism that resulted in the destruction of the Iraqi Jewish community and the official looting of their cultural property in the first place.

To return the original materials to Iraq would compound and legitimate the Mukhabarat's historic outrages in plundering them, if not condone the Iraqi state's current efforts to appropriate the private and communal property of a community that it eradicated as a matter of state policy. The United States should not be party to legitimating these acts of plunder and persecution. It is difficult to ignore the historic parallels between the Mukhabarat's plunder and the Nazi's more extreme pillage of Jewish cultural materials for the Reich's study of the Jewish question. Just as the United States relied on Jewish groups to distribute heirless cultural property after the Second World War, so should the U.S. State Department request the assistance of Jewish organizations to find a new home for the Iraqi Jewish archive. International humanitarian law acknowledges the right of ownership and self-determination of cultural expression and heritage by distinct ethnic and religious peoples. It also requires the protection of cultural expression and provides recognition of equal dignity and respect for all cultures, including those belonging to distinct minority communities. The United States should respect these principles and place the archive where the cultural materials will be received with dignity and respect and where the Iraqi Jewish diaspora and its descendants may have free and unfettered access to its cultural and religious past. At the same time, as a diplomatic gesture to Iraq, the United States should consider providing a digital copy of the archive to Iraq. This courtesy would conceptually fulfill the CPA/SBAH agreement while assuring the original archive's placement at an appropriate research institution accessible to the world community.

## ENDNOTES

1. Judith Miller, "Iraqi Documents on Israel Surface on a Cultural Hunt," *New York Times*, 7 May 2003, <http://nytimes.com/2003/05/07/international/worldspecial/07FI> (accessed 29 April 2011), and Evyatar, "From the Pentagon's Think Tank."

2. Miller, "Iraqi Documents on Israel Surface," and Evyatar, "From the Pentagon's Think Tank."

3. Miller, "Iraqi Documents on Israel Surface"; Evyatar, "From the Pentagon's Think Tank"; "Saddam's Secret Jewish Archives."

4. Memorandum from Donald Rumsfeld to Steve Cambone, 31 May 2003, <http://library.rumsfeld.com/doclib/sp/1808/2003-05-31%20Steve%20Cambone%20re%20Documents.pdf> (accessed 14 August 2012).

5. Evyatar, "From the Pentagon's Think Tank."

6. National Archives and Records Administration, *Iraqi Jewish Archive Preservation Report*.

7. Ledger, "Remembrance of Things Past."

8. National Archives and Records Administration, *Iraqi Jewish Archive Preservation Report*.

9. Glenn Kessler, "Iraq Seeks Return of Its Jewish Archive; Ownership Claim, Condition of Materials among Issues at Play," *Washington Post*, 30 April 2010, <http://www.proquest.umi.com/pqdweb?index=1&sid=1&srchmode=2&vins> (accessed 29 April 2011).

10. WikiLeaks, "Iraq's State Board of Antiquities and Heritage."

11. Kessler, "Iraq Seeks Return of Its Jewish Archive."

12. H.R. Rep. No. 89-1070 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3576.
13. Executive Order No. 12722 (3 August 1990), 55 FR 31803, "Blocking Iraqi Government Property and Prohibiting Transactions with Iraq," <http://www.treasury.gov/resource-center/sanctions/Documents/12722.pdf> (accessed 25 November 2012) and Executive Order No. 12724 (13 August 1990), 55 FR 33089, <http://www.treasury.gov/resource-center/sanctions/Documents/12724.pdf> (accessed 25 November 2012).
14. Exec. Order No. 12724.
15. Exec. Order No. 12724, Sec. 6.
16. 31 C.F.R. 575.533(b)(4) (2004), enacted pursuant to S.C. Res. 1483, U.N. SCOR, 4761st mtg., U.N. Doc. S/Res/1483 (2003); and U.S. Department of the Treasurer: Office of Foreign Assets Control, Recent OFAC Actions (2003), <http://www.treas.gov/offices/eotffc/ofac/actions/20030523.html> (accessed 22 August 2011); U.S. State Department: Bureau of Public Affairs, "UN Security Council Resolution Lifts Sanctions on Iraq."
17. Executive Order No. 13350 (29 July 2004), "Termination of Emergency Declared in Executive Order 12722 with Respect to Iraq and Modification of Executive Order 13290, Executive Order 13303, and Executive Order 13315," <http://www.treasury.gov/resource-center/sanctions/Documents/13350.pdf> (accessed 1 April 2013).
18. Ain, "Iraqi Jews Seeking Claims."
19. IsraelForum.com, "Israel Prepares to Claim Jewish Property in Iraq," and Neill Lochery, "It's Time to Tell the World about the Other 1948 Refugees," *Jerusalem Post*, 16 July 2003, <http://pqasb.pqarchiver.com/jpost/access/368644441.html?dids=368644441:368644441&FMT=ABS&FMTS=ABS:FT&date=Jul+16%2C+2003&author=NEILL+LOCHERY&pub=Jerusalem+Post&edition=&startpage=07&desc=It%27s+time+to+tell+the+world+about+the+other+1948++refugees> (accessed 11 May 2012).
20. Public Notice, 68 Fed. Reg. 50570 (21 August 2003), <http://www.gpo.gov/fdsys/pkg/FR-2003-08-21/pdf/03-21573.pdf> (accessed 3 November 2012).
21. Ledger, "Remembrance of Things Past," 823–24.
22. Dawn.com, "Iraq Will Use All Means to Get Archaeological Archives Back from U.S."
23. 28 U.S.C., 10, <http://www.law.cornell.edu/uscode/text/28/1610> (accessed 21 April 2013). See also Caprio, "Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act," 285–86.
24. Caprio, 286.
25. Caprio, 288.
26. *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal.2001); *aff'd* and remanded by 317 F.3d 954 (9th Cir. 2002); amended by 327 F.3d 1246 (9th Cir. 2003); cert. granted in part by 539 U.S. 987 (2003); *aff'd* on other grounds by 541 U.S. 677 (2004); remanded to *Altmann v. Republic of Austria*, 355 F. Supp. 2d 1066 (C.D. Cal. 2004). Also see *Malewicz v. City of Amsterdam*, 362 F.Supp.2d 298 (D.D.C. 2005), motion to dismiss granted, No. 05-5145, 2006 U.S. App. Lexis 615 (D.C.Cir.2006) dismissing the case for lack of appellate Jurisdiction, motion to dismiss on different grounds denied, 517 F.Supp.2d 322 (D.D.C. 2007), [http://www.ifar.org/case\\_summary.php?docid=1184618872](http://www.ifar.org/case_summary.php?docid=1184618872) (accessed 21 December 2012).
27. Caprio, 289–91.
28. Caprio, 286.
29. See International Foundation for Art Research, Case Summary, *Malewicz v. City of Amsterdam*, available at [http://www.ifar.org/case\\_summary.php?docid=1184618872](http://www.ifar.org/case_summary.php?docid=1184618872) (accessed 21 December 2012). Also see *Malewicz*, note 26.
30. Spurr, "Contested Patrimony," 8.
31. Joffe, "The Iraqi Jewish Archive."
32. National Public Radio, "Funds Lacking to Restore Iraqi Jewish Archive."
33. WikiLeaks, "Iraq State Board of Antiquities and Heritage."
34. WikiLeaks, "Iraq State Board of Antiquities and Heritage."
35. Rumsfeld Memorandum to Steve Cambone.
36. Greg Myre, "52-Year Separation Ends as Iraqi Jews Arrive in Israel," *New York Times*, 28 July 2003, <http://www.nytimes.com/2003/07/28/international/middleeast/28ISRA.html> (accessed 2 June 2012).

37. Alice Fordham, "Iraqi Jewish Documents Remain in Limbo," *Los Angeles Times*, 31 October 2010, <http://articles.latimes.com/2010/oct/31/world/la-fg-iraq-museum-20101031> (accessed 28 April 2011).
38. Evyatar, "From the Pentagon's Think Tank."
39. Fordham, "Iraqi Jewish Documents Remain in Limbo."
40. Joff, "The Iraqi Jewish Archive."
41. Associated Press, "Baghdad Reclaims a Jewish History it Once Shunned," *Jerusalem Post*, 28 April 2011, <http://www.jpost.com/landedpages/printarticle.aspx?id=166131> (accessed 28 April 2011).
42. Fischbach, "Claiming Jewish Communal Property in Iraq."
43. Joffe, "The Iraqi Jewish Archive."
44. al-Tayyeb, "Culture Ministry Threatens to go to U.S. Court" and Associated Press, "Tug-of-War."
45. Associated Press, "Tug-of-War."
46. Associated Press, "Tug-of-War."
47. Aswad, "Iraq Stops Dealing with U.S. Archaeological Teams."
48. Blum, "Restitution of Jewish Cultural Property Looted in World War II."
49. ICRC, "Protocol for the Protection of Cultural Property in the Event of Armed Conflict" (Protocol I); Boyle, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*; and O'Keefe, "The First Protocol to the Hague Convention."
50. ICRC, "Protocol for the Protection of Cultural Property in the Event of Armed Conflict," Art. 9.
51. Joffe, "The Iraqi Jewish Archive."
52. Levin, *Locked Doors*, 4.
53. Levin, *Locked Doors*, 4–5, and Joffe, "The Iraqi Jewish Archive."
54. Ledger, 809.
55. Ledger, 809–10.
56. Joffe, "The Iraqi Jewish Archive."
57. Levin, *Locked Doors*, 49–51.
58. National Public Radio, "Fund Lacking to Restore Iraqi Jewish Archive."
59. Levin, *Locked Doors*, 29.
60. Middle East Facts, "History of Jews in Arab Countries."
61. Ledger, 812–14, and Middle East Facts, "History of Jews in Arab Countries."
62. Myre, "52-Year Separation Ends."
63. Joffe, "Joffe Critiques Justifications for Iraqi Rights to Holy Books of Persecuted Jews."
64. ICRC, "Protocol Additional to the Geneva Conventions (Protocol II)," Art. 53.
65. Thurlow, "Protecting Cultural Property in Iraq," 163.
66. Thurer, "Self-Determination," 470–76; Blum, "Restitution of Jewish Cultural Property"; Vrdoljak, "Self-Determination and Cultural Rights," 41–78; International Covenant on Civil and Political Rights, entry into force 23 March 1976, <http://www2ohchr.org/english/law/ccpr.htm> (accessed 4 May 2012); International Covenant on Economic, Social and Cultural Rights, entry into force 3 January 1976, available at <http://www2.ohchr.org/english/law/cescr.htm> (accessed 4 May 2012); and Declaration on the Rights of Indigenous Peoples, available at [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf) (accessed 4 May 2012).
67. UNESCO, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*.
68. UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Art. 3(2).
69. See Blum, "Restitution of Jewish Cultural Property Looted in World War II."
70. USGPO, Translation of Document 171-PS.
71. USGPO, Translation of Document 171-PS.
72. Nicholas, *The Rape of Europa*, 433.
73. Nicholas, *The Rape of Europa*, 433–44.
74. Letter from Jerome Michael to General J. H. Hildring.
75. Letter, Michael to Hildring.
76. Nicholas, *Rape of Europa*, 434.
77. Nicholas, *Rape of Europa*, 434.

## BIBLIOGRAPHY

Ain, Stuart. "Iraqi Jews Seeking Claims." *Jewish Week*. <http://www.thejewishweek.com/print/830> (23 May 2003; accessed 29 March 2012).

al-Tayyeb, Mouhammed. "Culture Ministry Threatens to Go to U.S. Court over Iraq Jewish Archive." *Kurdistan News Agency*. <http://www.aknews.com/en/aknews/1/268227/> (20 October 2011; accessed 23 March 2012).

Associated Press. "Tug-of-War over Iraqi Trove in U.S. Hands." *Fox News*. <http://www.foxnews.com/world/2011/07/10/tug-war-over-iraqi-jewish-trove-in-us-hands/> (10 July 2011; accessed 23 March 2012).

Aswad, Woshyar. "Iraq Stops Dealing with U.S. Archeological Teams." *Kurdistan News Agency*. <http://www.aknews.com/en/aknews/1/311633/?tpl=print.tpl> (10 June 2012; accessed 12 June 2012).

Blum, Yehuda Z. "Restitution of Jewish Cultural Property Looted in World War II: To Whom?" *Leiden Journal of International Law* 11 (1998): 257–64.

Boyle, Patrick J. *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).

Caprio, Charlene A. "Artwork, Cultural Heritage Property, and the Foreign Sovereign Immunities Act." *International Journal of Cultural Property* 13 (2006): 285–309.

Dawn.com. "Iraq Will Use All Means to Get Archaeological Archives Back from U.S." <http://dawn.com/2012/06/25/iraq-will-use-all-means-to-get-archaeological-archives-back-from-us/> (25 June 2012; accessed 27 June 2012).

Evyatar, Ilan. "From the Pentagon's Think Tank." *Jerusalem Post Magazine*. <http://www.jpost.com/Magazine/Features/Article.aspx?id=172653> (9 April 2010; accessed March 11, 2012).

Fischbach, Michael R. "Claiming Jewish Communal Property in Iraq." *Middle East Research and Information Project*. [www.merip.org/mer/mer248/claiming-jewish-communal-property-iraq](http://www.merip.org/mer/mer248/claiming-jewish-communal-property-iraq) (7 October 2010; accessed 28 April 2011).

ICRC. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977." *International Humanitarian Law—Treaties and Documents*. <http://www.icrc.org/ihl.nsf/full/475?opendocument> (accessed 23 March 2012).

———. "Protocol for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 14 May 1954." *International Humanitarian Law—Treaties and Documents* <http://www.icrc.org/ihl.nsf/full/410?OpenDocument> (accessed 19 May 2010).

IsraelForum.com. "Israel Prepares to Claim Jewish Property in Iraq." <http://www.Israelforum.com/board/showthread.php?2839-Israel-prepares-to-claim-jewish-property-in-iraq> (13 March 2003; accessed 29 March 2012).

Joffe, Alex. "Joffe Critiques Justifications for Iraqi Rights to Holy Books of Persecuted Jews." *Cultural Property Observer*. <http://culturalpropertyobserver.blogspot.com/search?q=Joffe+Critiques+Justifications+for+Iraqi+Rights+to+Holy+Books+of+Persecuted+Jews> (2 July 2008; accessed 5 March 2012).

———. "The Iraqi Jewish Archive." *Jewish Ideas Daily*. <http://www.jewishideasdaily.com/806/features/the-iraqi-jewish-archive/> (24 January 2011; accessed 30 March 2012).

Ledger, Dana. "Remembrance of Things Past: The Iraqi Jewish Archive and the Legacy of the Iraqi Jewish Community." *George Washington International Law Review* 37 (2005): 795–826.

Levin, Itamar. *Locked Doors: The Seizure of Jewish Property in Arab Countries*, translated by Rachel Neiman. Westport, CT: Praeger, 2001.

Michael, Jerome. "Acting Chairman, the Commission on European Jewish Cultural Reconstruction to General J. H. Hildring, Assistant Secretary of State, 5 June 1946." National Archives and Records Administration, Documents AGAR-S Nos. 318 and 3506 and Document AGAR-S No. 1454, Pomerenze Collection, Record Group 242, Enemy Records, 1942–1947.

Middle East Facts. "History of Jews in Arab Countries: Before and After 1948." <http://middleeastfacts.com/articles/history-of-jews-in-arab-countries.php> (accessed 16 May 2011).

National Archives and Records Administration. Documents AGAR-S Nos. 318 and 3506 and Document AGAR-S No. 1454, Pomerenze Collection, Record Group 242, Enemy Records, 1942–1947.

National Archives and Records Administration. "The Iraqi Jewish Archive Preservation Report." <http://oi.uchicago.edu/OI/IRAQ/mela/IraqiJewishArchiveReport.htm> (2 October 2003; accessed 28 August 2008).

National Public Radio. "Funds Lacking to Restore Iraqi Jewish Archives." <http://npr.org/templates/story/story.php?storyId=4645146> (9 May 2005; accessed 11 April 2012).

Nicholas, Lynn H. *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War*. New York: Alfred A. Knopf, 1994.

Office of the United States Chief Counsel for Prosecution of Axis Criminality (USGPO). Translation of Document 071-PS, Source: Nazi Conspiracy and Aggression. Vol. III. Washington, DC: U.S. Government Printing Office. <http://avalon.law.yale.edu/imt/071-ps.asp> (1946; accessed 11 May 2011).

———. Translation of Document 171-PS, Source: Nazi Conspiracy and Aggression, "Updated Report on Library for Exploration of the Jewish Question 'Hohe Schule,'" District Office, Frankfurt/Main, Vol. III. Washington, DC: U.S. Government Printing Office. <http://www.ess.uwe.ac.uk/genocide/rosenberg6.htm> (1946; accessed May 11, 2011).

O'Keefe, Patrick J. "The First Protocol to the Hague Convention Fifty Years On." *Art, Antiquity and Law* 9, no. 2 (June 2004): 99–116.

"Saddam's Secret Jewish Archives." *The Scribe*, no. 76. <http://www.dangoor.com/issue76/articles/76089.htm> (Spring 2003; accessed 29 April 2011).

Spurr, Jeff. "Contested Patrimony: The Iraqi Jewish Archive." <http://www.savingantiquities.org/wp-content/pdf/jeffspurr.pdf> (2 April 2008; accessed 14 June 2012).

Thurer, Daniel. "Self Determination," in Rudolf Bernhardt (ed). *Encyclopedia of Public International Law*, Vol. 8, Amsterdam: North Holland publishing Co., 1985, pp. 470–476.

Thurlow, Mathew D. "Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law." *Yale Human Rights & Development Law Journal*. <http://www.law.yale.edu/documents/pdf/LawJournals/thurlow.pdf> (2005; accessed 20 June 2012).

UNESCO. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2005. [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 4 May 2012).

———. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*. <http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/1995-unidroit-convention/> (24 June 1995; accessed 4 May 2012).

United States Department of State, Bureau of Public Affairs, “UN Security Council 1483 Lifts Sanctions on Iraq,” May 22, 2003, <http://2001-2009.state.gov/r/pa/ei/rls/20911.htm> (accessed 21 August 2011).

Vrdoljak, Anna Filipa. “Self-Determination and Cultural Rights.” In *Cultural Human Rights*, edited by F. Francioni and M. Scheinin, 41–79. Leiden, The Netherlands: Koninklike Brill, 2008.

WikiLeaks. Cable communication, Embassy Baghdad, “Iraq’s State Board of Antiquities and Heritage (SBAH) and the Iraqi Museum Actively Engaged with Donors but the Security Situation Still Impedes Progress.” <http://www.cablegatesearch.net/cable.php?id=05BAGHDAD4968> (13 December 2005; accessed 4 April 2012).