

# Immortality in the Secret Police Files: The Iraq Memory Foundation and the Baath Party Archive

Bruce P. Montgomery\*

**Abstract:** Shortly after the 2003 American invasion of Iraq, Kanan Makiya, a long time Iraqi dissident and professor of Middle East studies at Brandeis University, uncovered a major trove of documents belonging to Saddam Hussein's Baath Party and his security forces. The documents proved highly important in reflecting the inner workings of the Baath Party system in his final years in power. Soon after the discovery of the documents, the Iraq Memory Foundation (IMF), a private Washington, D.C.-based group founded by Makiya, took custody of the records, later depositing them with the Hoover Institution at Stanford University to provide a safe haven for them. The deal ignited immediate international controversy and charges of pillage from some Iraqi officials, archival organizations, scholars, and others who also demanded their immediate return to the Iraq National Library and Archive in Baghdad. On the surface, these charges of theft and plunder appear plausible enough, but on examination, a different and complicated narrative emerges in light of the conventions of war, U.S. law, and the Iraqi penal code, as well as the chain of events surrounding their taking and removal by nonstate actors in the Iraqi theatre of war and occupation.

## INTRODUCTION

In the early days after the 2003 American invasion of Iraq, Kanan Makiya, a long-time Iraqi exile and professor of Middle East studies at Brandeis University, uncovered a major trove of documents belonging to Saddam Hussein's Baath Party and his security forces. The documents proved highly significant in reflecting the inner workings of the Baath Party and the web of loyalty among some two million

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\*University of Colorado at Boulder. Email: Bruce.Montgomery@Colorado.edu

Iraqis to Hussein's regime during his final years in power. As a scholar who had been writing about Hussein's brutalities for many years, Makiya recognized the value of the archive not only for Iraq's cultural memory, but also for its potential for misuse during the chaotic days of Iraq's transition. Soon after the discovery of the documents, the Iraqi Memory Foundation (IMF), a private Washington, DC-based group founded by Makiya, took custody of the records, later depositing them under a five-year deal at the Hoover Institution at Stanford University to provide a safe haven for them.

The IMF-Hoover agreement attracted immediate international controversy as some Iraqi officials as well as American and Canadian archivists and historians denounced it as a case of plunder. Saad Eskander, the director of the Iraq National Library and Archive (INLA) in Baghdad, and Akram al-Hakim, then Iraq's acting minister of culture, denounced the "illegality" of the documents' removal and deposit at the Hoover Institution, demanding their immediate return.<sup>1</sup> In 2008 the Society of American Archivists and the Association of Canadian Archivists—representing a significant segment of the international archival community—issued a joint statement also calling for the immediate repatriation of the records to the INLA and declared that their taking by Makiya and IMF may have constituted "an act of pillage" under the conventions of war.<sup>2</sup> As well, in an August 2008 editorial in the *Los Angeles Times*, a professor of history at the University of California at Irvine condemned the IMF-Hoover deal, stating that if "the Hoover Institution continues to refuse the Iraqi government's demand for return of the archives, the U.S. government, which improperly gave Makiya permission to collect and remove the documents, ought to insist that those records belong to the Iraqi people and the Iraqi government."<sup>3</sup>

At first glance, the allegations of illegality and plunder seem plausible enough given the involvement of a private group in the taking of the Baath Party documents and arranging for their removal to the United States. On closer examination, however, a different, if tangled, narrative emerges; the allegations appear questionable in light of the limitations of the conventions of war, U.S. law, the Iraqi penal code, as well as the convoluted chain of events surrounding their taking by nonstate actors in the Iraqi theatre of war and occupation. The IMF's custody and removal of the documents occurred amid much confusion and chaos following the invasion, including Iraq's descent into sectarianism. Nonetheless, the IMF's actions were made possible by Makiya leveraging his personal connections and influence with key government officials in Iraq, the United States, and the Coalition Provisional Authority (CPA). In so doing, Makiya adroitly defined the documents as either cultural material or wartime intelligence according to his audience to keep custody of them. If nothing else, this matter represents one of the more unusual, if not unprecedented, cases regarding the fate of state records during wartime, military occupation, and its aftermath. Even so, the IMF's efforts to rescue or control the documents do not seem to meet the definition of pillage, theft, or the misappropriation of cultural property under international, American,

or Iraqi law at the time of their taking and removal. Because of various factors, the IMF's actions seem to have slipped through the cracks of these various legal systems regarding the protection of cultural property and state records.

## BACKGROUND EVENTS

Makiya was an influential advocate of the humanitarian argument for the Iraq war. He first made his mark among Iraqi exiles and American foreign policymakers after publishing his 1989 book, *Republic of Fear* under the pseudonym Samir Al-Kalil. After Iraq's August 1990 invasion of Kuwait, the book quickly became acclaimed as a seminal work on the murderous regime of Saddam Hussein. Following the war, Makiya revealed himself as the author, becoming an immediate public figure. The March 1991 Kurdish uprising in Iraqi Kurdistan that resulted in the capture of millions of documents relating to the Anfal genocide, a military campaign against the Kurds in the mid to late 1980s, launched Makiya on a new path. After visiting the remains of destroyed villages and talking to Kurdish leaders, who had seized the tons of Iraqi security documents, he decided to devote himself solely to documenting Iraq's Baath Party system. He set up the Iraq Documentation and Research Center, a precursor of the Iraq Memory Foundation, at Harvard University, collecting troves of fugitive documents throughout the 1990s that were making their way out of Iraqi Kurdistan. When the George W. Bush administration again focused attention on Iraq after the terrorist attacks of 11 September 2001 Makiya became the "conscience of the war effort"; he predicted that Iraq's liberation from Hussein's tyranny would at long last offer the unique opportunity to establish a secular democracy in the heart of the Arab world. Following the collapse of the Hussein regime, he formed the Iraq Memory Foundation, registered the group as a private American contractor, and entered Iraq to rescue Saddam Hussein's documentary legacy of atrocity.<sup>4</sup>

In April 2003, one month after the invasion, Makiya was led by an American soldier to a major cache of Baath Party records in a network of rooms under the Baath Party's headquarters in Baghdad. Makiya took custody of the records with the aim of safeguarding them and collecting other documents of atrocity to create a national memorial center in Baghdad's Green Zone on the site of the Victory Arch, the memorial commissioned by Hussein to commemorate Iraq's so-called triumph in the Iran-Iraq War. Makiya assumed custody of the Baath Party records with the permission of the Administrator of the Coalition Provisional Authority, L. Paul Bremer II, who was appointed Iraq's civilian administrator from 13 May 2003 until his departure on 28 June 2004.<sup>5</sup> Bremer arrived in Baghdad with a broad mandate and plenary powers, including not only governing Iraq, but also advancing the development of a functioning democracy. Bremer's powers extended to governing all Iraqi State assets and exercising full authority over Iraq's civil institutions and laws, albeit he had no direct authority over American personnel who

were under military command.<sup>6</sup> Makiya also received permission to build his memorial museum and center, which he hoped would scan and catalog Saddam Hussein's atrocities for all Iraqis to see. He believed that this resource center should operate much like Germany's vast archive of records from the Stasi, the former East German Secret Police.<sup>7</sup> As such, the Ba'ath Party records could not be construed as "captured records" or intelligence when Makiya took possession of them; they were merely under his custody by the CPA's authorization to establish a cultural memorial center in the center of Baghdad. In this respect, Makiya initially defined the records as cultural material that would advance the Iraqi people's understanding of their authoritarian past.

The IMF worked as one of numerous civilian defense contractors that came to outnumber the U.S. military presence in the most privatized war in American history. It served in this capacity from 2003 until 2009, although it is unclear precisely what defense-related services it provided in Iraq. Contractors in Iraq performed an enormous variety of tasks, from the banal in preparing meals and operating supply trucks, to the dangerous in conducting armed raids and providing security to government officials, to the sensitive in interrogating prisoners. The rapid growth in private military contractors occurred with the significant downsizing of national armies after the Cold War. These force reductions meant that major powers might have to considerably augment their troop strength and skilled personnel when rapidly mobilizing for war. The growth of contractors also was fueled by the trends of privatization and outsourcing, leading the U.S. military to outsource large parts of its operational roles to a variety of private military or defense related firms. In the Iraq war, civilian contractors functioned as a rapid and effective force multiplier, freeing up more soldiers to fight or providing technical expertise to U.S. forces in waging war or enforcing peace.<sup>8</sup>

Contractors became essential to numerous military operations in Iraq, even if their legal status was highly ambiguous. Although the IMF's services were not critical to the U.S. presence in Iraq, it nevertheless became part of a large shadow army—one which went largely unpoliced and operated beyond the reach of the law. Contractors operated largely as unregulated entities; their actions fell through the cracks of legal codes, which distinguish civilians from soldiers. They were not exactly civilians, given that they fulfilled many critical military roles, but not soldiers either subject to the apparatus and oversight of the state or a chain of command.<sup>9</sup> Nor could they be classified as mercenaries given the precise meaning of that word under international humanitarian law. Many of these were *active* firms whose employees were armed and in combat areas; neither civilian nor soldier, they comprised a third class of people on the battlefield. Others simply provided logistical support, such as food service, repair work, or warehouse administration.<sup>10</sup>

Contractors came from at least 30 different countries, encompassing local Iraqi nationals and Americans, to Guatemalans and Ugandans. They essentially worked as civilian employees of private contracting firms, not as state actors per se, even though in many cases they were performing inherently governmental functions

regarding armed operations. In other words, they were more accountable to their companies than to the U.S. government. A number of laws ostensibly regulated contractor conduct, ranging from extraterritorial application of civilian law (the Military Extra-territorial Jurisdiction Act or MEJA), to “the Uniform Code of Military Justice (with the definition of civilians falling under the jurisdiction of military law expanded from times of declared war to contingency operations in Fall 2006).”<sup>11</sup> Nonetheless, these laws were rarely, if ever, used to impose accountability or prosecute wrongdoing. The lack of accountability of private contractors became exacerbated when the CPA issued Order 17, just two days before it disbanded and transferred sovereignty to the Iraqis on 28 June 2004. The directive granted blanket immunity to contractors from all Iraqi laws, making them subject to the never enforced MEJA.<sup>12</sup>

The controversy surrounding the killing of 17 unarmed Iraqi civilians in 2007 by the private security firm, Blackwater Worldwide, exposed the lack of a systematic policy of overseeing private contractors during hostilities. This incident prompted the U.S. Congress to mandate increased agency oversight over contractors in Iraq and Afghanistan. In response, agencies endeavored to define their responsibility for contractor oversight, strengthened their coordination over contractors, and devised common principles regulating contractor conduct.<sup>13</sup> Nonetheless, many oversight and accountability gaps persist, and private contractors continue to serve as private entities in a contractual relationship with the U.S. government as the hiring state. Like many other contractors and subcontractors in Iraq, the IMF operated not as direct state actor, but served in a largely gray and unregulated area as a private entity. Because its employees did not participate in direct hostilities, they fell within the category of civilians under international humanitarian law—specifically the Fourth Geneva Convention and its Additional Protocols of 1977.<sup>14</sup>

In the invasion’s immediate aftermath, the IMF faced considerable competition from other Iraqi political and religious groups, local nongovernmental organizations (NGOs), as well as thieves and opportunists who were sweeping up millions of state security documents from Hussein’s various bureaucracies of repression throughout Iraq.<sup>15</sup> The IMF also found itself competing with the rise of a thriving trade in the sale and purchase of Hussein documents that had been looted or collected after the invasion. The IMF pursued buying documents on the black market to collect and preserve them, but it is unclear how many it purchased. Its chief competitors were the CPA itself and especially the Pentagon, which confiscated the vast majority of documents in the invasion. Not long after, Makiya called for the American military to turn over these captured records to his own Memory Foundation with the aim of making them part of his memorial center.<sup>16</sup>

From the early days of the occupation in 2003, the IMF appealed repeatedly to U.S. and CPA officials for funding to support its collecting and scanning work; it also offered to put its specialists to work in helping with the search for weapons of mass destruction. In August 2003, the IMF proposed the creation of a document task force in collaboration with the CPA to establish uniform procedures for document pro-

cessing, centralization, and scanning efforts. Despite initial expressions of interest, no financial support came through. By February 2004, the IMF, after holding the documents for several months, accomplished little work on them owing to lack of resources.<sup>17</sup> The IMF further offered the CPA its management services and the sharing of its expertise.<sup>18</sup> The CPA declined this offer, instead issuing an order on 28 April 2004 to establish an alternative institution, the Iraqi National Foundation for Remembrance, based on a concept remarkably similar to Makiya's—to "document, study, and present publicly the history of atrocities suffered under the previous regime."<sup>19</sup>

Although the IMF intended to create a memorial center devoted to preserving Hussein's legacy of atrocity, the CPA devised its own plans. On 25 March 2003, Secretary of Defense Donald Rumsfeld appointed the secretary of the Army to oversee the investigation of war crimes and collect and preserve evidence of atrocities. Following its establishment in May 2003, the CPA's primary role in this effort involved assisting in developing an evidentiary record of atrocities committed by the Hussein regime, creating an Iraqi-run National Archive, and providing access to documents for criminal investigations.<sup>20</sup> At the same time, the CPA began laying plans on establishing a Bureau of Missing Persons to establish a database of missing individuals from evidence received from a variety of sources, including from Iraqi state archives. Other plans involved setting up a central evidence warehouse to house documentary and physical evidence regarding past atrocities. The CPA, moreover, held discussions in 2003 with the Iraqi Governing Council regarding the creation of a National Archive that would store the Hussein-era documents along with the establishment of a consortium of local NGOs and foundations to manage it.<sup>21</sup>

In the meantime, in November 2003, Saad Eskander returned to Iraq from his own years in exile and assumed the post of director-general of the INLA, which he found in ruins; torched, he believed, by former Baathists trying to destroy incriminating Hussein-era archives.<sup>22</sup> Evidently, Eskander later learned that Saddam Hussein had ordered the burning of the INLA to destroy the records of judicial proceedings against the Baathist regime's opponents.<sup>23</sup> In the chaos immediately following the invasion, looters and professional thieves also plundered the INLA, which reportedly lost 60% of its documents, 25% of its books, and more than 95% of its rare books.<sup>24</sup> Others, including racketeers and opportunists, also rushed to seize Baath Party documents to use them for blackmail or to exact revenge.<sup>25</sup> After painstakingly rebuilding the INLA with the assistance of other countries and nongovernmental organizations, Eskander soon began campaigning to retrieve all of Hussein's documents in American and private hands to his national library in Baghdad, particularly targeting and denouncing Makiya's deal with the Hoover Institution. Driven by conviction that the documents comprised an indivisible part of Iraq's cultural patrimony, he demanded their immediate return with the aim of restoring his country's collective historical memory.<sup>26</sup>

By February 2004, the CPA achieved only limited success in implementing its various plans. The CPA found a warehouse to hold the documentary and physi-

cian evidence for the Bureau of Missing Persons with the Iraqi Ministry of Human Rights, but funding became a problem.<sup>27</sup> The effort to create a National Archive made no progress, despite the existence of the INLA, albeit in ruins.<sup>28</sup> In perhaps an alarming development for the IMF, the CPA moved to regain control over all of the Iraqi state documents that were in private hands. It gave this responsibility to the Iraqi Human Rights Minister, Aabd al-Baset Turki Sa'id, who called for centralizing all of the state archives within a legal framework in his own ministry. He requested the Iraqi Governing Council to enact an order requiring the various groups in possession of state records to hand them over to his ministry or face criminal penalties for noncompliance.<sup>29</sup> While many of the political groups and NGOs protested the choice of the human rights ministry as a central repository for the records, others ignored the call for returning the documents altogether, deciding to wait for the election of a sovereign Iraqi government. The CPA decided to keep pushing for a law that would regulate the possession of Iraqi State documents, including criminal penalties for noncompliance, but legislation was never enacted.<sup>30</sup> Security concerns soon overwhelmed all other issues, including criminal justice matters and efforts to gain control of the Iraqi state documents.

Sometime after February 2004, the IMF won the first of several Defense Department contracts for \$2,100,000.<sup>31</sup> It is unclear what this contract involved, although presumably it included scanning, preserving, and cataloging Baath Party documents. If so, Makiya seems to have redefined the documents from cultural material to potential intelligence to obtain funding from the Pentagon. It is uncertain whether the IMF received this contract before or after the CPA transferred sovereignty to the Iraqis in late June 2004. By August the IMF won reauthorization, but no funding, from the prime minister's office of the first postinvasion Iraqi government to gather documents of the former regime and preserve them in a national institution that it would help establish in Baghdad.<sup>32</sup> Winning this approval again proved necessary for the IMF to keep custody of the records after the CPA disbanded and rescinded its order governing Baath Party property and assets upon the transfer of power to the Iraqis.<sup>33</sup> In other words, while the IMF defined the documents as cultural material to the Iraqi prime minister's office to keep custody of them, it evidently defined them as potential intelligence to the Pentagon to receive funding in support of its scanning and cataloging work.

This dual characterization proved expedient enough until Makiya's dream of establishing his memorial center in Baghdad quickly faded with the rise of insurgent resistance to the coalition occupation and sectarian bloodletting. In February 2005, amid the deteriorating security situation, the IMF appealed to the Pentagon to transfer the records to safety on American soil based strictly on their probable intelligence value—that the Baath Party structure depicted in the files mirrored that of the insurgency. This deal comprised a special arrangement. Unlike other documents captured by U.S. forces and transported to the media processing center in Qatar for scanning and analysis, Makiya's agreement provided for transferring the Baath Party records to the United States where government contractors

could scan them for intelligence. Following this scanning work, the originals would then be turned over to the IMF in evident acknowledgment of its custody deal with the Iraqi prime minister's office. However temporary, the documents were defined and treated as captured wartime intelligence, even though Iraq was no longer under formal American occupation. U.S. forces still exercised primary responsibility for the country's security, however, including battling the growing Sunni insurgency. As such, the deal with the Pentagon proved a deft maneuver amid the worsening civil strife in rescuing the documents or providing cover for their transfer out of Iraq. According to Eskander, Makiya exploited the "ignorance" of newly appointed Iraqi officials in the prime minister's office in order to secure approval to ship the documents.<sup>34</sup>

Under the IMF-Pentagon arrangement, the records were transferred to a U.S. naval facility in West Virginia where government contractors digitized them for the American intelligence community. The Pentagon then turned over custody of the originals and a copy of the database to the IMF. With the scanning project completed in September 2005, Makiya needed to find a place to store the physical documents. Rather than returning them to Iraq's uncertain security situation, he pursued negotiations with Harvard University. These negotiations came after Makiya and Hassam Mneimneh, IMF executive director, held discussions with Harvard in 2004 to provide a mirror site for their scanned documents. In consideration of this request, a meeting of the Harvard Committee on Iraqi Libraries was arranged with them, as well as another formal meeting with additional parties. In November 2005, Makiya and Mneimneh dramatically changed the nature of the discussions by revealing the removal of the Baath Party documents to American soil and asking Harvard to house them.<sup>35</sup> The discussions collapsed over complications surrounding the documents' sensitivity and provenance, as well as questions regarding their international legal status. At this point, the records seemed to have assumed an uncertain status—too politically explosive to be considered cultural material, but no longer needed by the Americans for intelligence.

Makiya nevertheless managed to strike a five-year deal with the Hoover Institution at Stanford University to house and digitize the original records, which arrived at Hoover in June 2008.<sup>36</sup> The Hoover agreement provided that after five years, the possibility of returning the documents to Iraq would be explored if conditions permitted. The terms of the agreement implied that Makiya and IMF, private nonstate actors, would continue to exert stewardship over the files. Even though the IMF and Hoover claimed that the documents remained the property of the Iraqi people, the agreement all but cast the IMF in the position of a sovereign government that could negotiate with the Iraqi government when and under what conditions the archive would be repatriated.<sup>37</sup>

To carry out the Hoover deal, Makiya used his personal contacts in the Iraqi government to secure letters of permission from the Iraqi prime minister's office and from the deputy prime minister himself, Bharham Salih, a former Kurdish

rebel who had once bestowed on Makiya the flower-bedecked “Register of Eliminated Villages.”<sup>38</sup> The Makiya-Hoover deal, however, ignited immediate controversy. On 22 April 2008, the Society of American Archivists and Association of Canadian Archivists issued a joint statement condemning the deal as an “act of pillage” prohibited under the rules of war and calling for the immediate return of the records to the Iraq National Library and Archives.<sup>39</sup> The IMF responded with a 27 April 2008, letter from the Senior Deputy Ministry of Culture, Jaber al-Jaberi, declaring unequivocally that the “Iraqi government has approved the interim deposit agreement by the Iraq Memory Foundation and the Hoover Institution.”<sup>40</sup> The letter further asserted that an archive to house the documents was provided for under Iraq’s new Accountability and Justice Law, but that the Iraq National Library and Archive had yet to be considered the final repository for the records.<sup>41</sup>

In response, on 21 June, Eskander wrote an open letter to the director of the Hoover Institution calling the records “illegally seized documents of the former Iraqi state and the archive of the Ba’ath Party.” He asserted that the records were the property of the Iraqi people and demanded their immediate return to Iraq’s national library and archives. The letter, which had considerable emotional appeal, asserted that the IMF’s actions were “incontrovertibly illegal,” according to a 1969 law that imposes severe punishment on anyone who destroys, hides, steals, forges, publishes, or removes official Iraqi documents.<sup>42</sup> The law states that individuals who collaborate with and provide foreign states with Iraqi records are subject to 10 years in prison. Eskander also argued that under Iraq’s new accountability and justice law, the IMF had no right to retain control of the documents. On 23 June Iraq’s acting cultural minister, Akram M. Hadi followed up with a statement attacking Jaber al-Jaberi’s letter as neither reflecting Iraqi government policy nor expressing the views of the Ministry of Culture; he declared the Iraqi government’s “absolute rejection” of the IMF’s deal and emphasized that the INLA was the official repository of all Iraqi records.<sup>43</sup> Given these conflicting statements, in the fall of 2008, the *Stanford Magazine*, which was researching an article on Hoover’s possession of the Baath Party records for publication, sought clarification from the Iraqi government. In response, an assistant to Iraqi spokesman, Ali al-Dabbagh, wrote that the entire deal was “done in coordination with the Prime Minister’s Office and through official letters.” He asserted that there was “currently no Iraqi Institute concerned with storing these documents, and the Accountability and Justice Law in chapter 3, article 4-b states that a permanent archive is to be established to store these documents. Therefore, the Government has agreed to the above operation with the Hoover Institute.”<sup>44</sup>

In May 2010, a three-member Iraqi delegation headed by the Under Secretary of the Ministry of Culture visited Stanford University and formally asked Hoover to return the Baath Party records. The nature of the discussion was outlined in a preliminary report by Eskander, who was a member of the Iraqi delegation. Eskander first sent his report to supporter Jeffrey B. Spurr, former Islamic and Middle East specialist at Harvard’s Fine Arts Library, to adapt it for public disclosure.

Accordingly, the report noted a constructive meeting with both sides agreeing on several pivotal issues, including the following:

1. The Baath Party archive was the property of the Iraqi people.
2. The elected government of Iraq represents the Iraqi people.
3. Hoover and the INLA would undertake to preserve the archive for future generations.
4. Hoover would seek the advice and involvement of the State Department in future negotiations with the Iraqi side, given that the Baath Party documents were part of the greater issue surrounding the seized records by the Pentagon.
5. The return of the seized records were vital for national reconciliation, democratization, and justice and the rule of law in Iraq.
6. Hoover and the INLA could work together to conserve, digitize, and create a database for the Iraqi records.

In other words, there was no agreement on the immediate return of the documents to Iraq. The Iraqi delegation also met with representatives of the Departments of State and Defense, which control millions of Iraqi records seized during the invasion; another meeting involved officials at the National Archives and Records Administration regarding the return of the Iraqi Jewish archives that were removed from Iraq for preservation. According to Eskander, these meetings were the “first time that Iraq presented an official demand to retrieve all the documents.”<sup>45</sup>

The *Stanford Daily* subsequently ran a 25 May 2010 story on the Iraqi demand for Hoover to return the Baath Party archive. The article noted Hoover’s resistance to this demand on grounds that Baghdad continued to be insufficiently safe to ensure the documents’ security.<sup>46</sup> It cited Makiya’s claim that there was a “deep rift” within the Iraqi Ministry of Culture regarding whether the documents should now be returned. He asserted that a deputy minister of culture, senior to Eskander, supported “enthusiastically the IMF and Hoover role.”<sup>47</sup> In response to this article, Eskander accused the IMF of fleeing Iraq and shipping the records to the United States after failing to profit from them and after finding that “no Iraqi was willing to cooperate or fund its operations, because of its close association with the occupiers.” He accused the group of exploiting the “chaotic situation at the top and the ignorance of some of the newly appointed Iraqi officials to get approval for the shipment of the records to the U.S.” He argued that the prime minister’s approval violated Iraqi law, that only the Iraqi Parliament could extend permission through enacting new legislation, and that Iraqis and their institutions had the right to use the records “in service of transitional justice, national reconciliation, and democratization.”<sup>48</sup>

Neither the Hoover Institution nor the IMF has asserted ownership over the files; both agree that the documents must be repatriated to Iraq at some point in the future. The question for both institutions has been when and under what conditions, a determination that Eskander argues they have no right to make. None-

theless, Makiya and Eskander do agree on the return of all documents to Iraq; they agree that these documents have singular importance of 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. Yet they disagree on when the records should be returned and under what conditions. They have put forward competing visions about what to do with them. While Makiya has envisioned creating a new institution similar to that set up in Germany regarding the Stasi files, Eskander foresees housing the documents in the INLA. Mneimneh, the IMF's executive director, has characterized Eskander's campaign as a battle raised against the wrong enemy. "The enemy," he has said, "is ignorance that leads to documents' being destroyed, or malice that leads to documents' being misused. These are your enemies, not an organization that is taking its custodianship seriously." 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."<sup>49</sup>

Besides this personal feud between Eskander and Makiya about who should control Saddam Hussein's legacy of atrocity, the case concerns a much larger issue involving the nature and reach, if not shortcomings, of the international legal regime regarding the taking of state security records by nonstate actors in the theatre of war and occupation. An ally of Eskander's, Trudy Huskamp Peterson, a former acting archivist of the United States and an archival consultant, has argued that the basic legal issue is simple—that state records, which constitute public property, can only be divested through an act of the Iraqi parliament, not through letters from executive officials, which the IMF repeatedly procured.<sup>50</sup> Indeed, when previous totalitarian states have fallen, successor governments have inherited, preserved, and treated the records of previous regimes as official state records. One might recall William Shirer's observation on the swift collapse of the Third Reich in the spring of 1945 when the confidential archives of the German government and all its branches, including Heinrich Himmler's secret police, fell into Allied hands: "Hitherto," Shirer wrote, "the archives of a great state, even when it was defeated in war or overthrown by revolution, as happened to Germany and Russia in 1918, were preserved by it . . ." <sup>51</sup> But what Peterson considers a fundamental rule requiring parliamentary divestiture of state documents to a private, nonstate entity, is, after all, not so simple given the chain of events surrounding this case in Iraq.<sup>52</sup>

## PILLAGE UNDER THE INTERNATIONAL LAWS OF WAR

Despite charges of illegality and plunder, it is not clear that the IMF acted unlawfully; in fact, its actions seem to have evaded international law as well as U.S. law and Iraq's domestic legal system. Because of various factors, the allegation by the Society of American Archivists, the Association of Canadian Archivists, and others that the IMF's taking of the Baath Party records constituted "pillage" under the

1907 and 1954 Hague Conventions—the international rules of war—does not seem to hold up under scrutiny. The international community adopted both Hague conventions, as well as the Fourth Geneva Convention and its two Additional Protocols of 1977, to set the permissible parameters of wartime conduct by military and occupying forces; they neither mention nor impose any obligation on non-state actors in the theatre of war and occupation. As such, they have little relevance to the IMF's actions in taking and depositing the Baath Party records at the Hoover Institution at Stanford University. Nor would they have prohibited Mak-*iya's* agreement with the Pentagon in removing the documents to the United States where they could be scanned for military intelligence.

The 1907 Hague Convention governing land warfare, which is now considered customary law and binding on all nations regardless of ratification, includes provisions governing wartime conduct regarding matters of enemy property and cultural heritage. It permits invading and occupying powers to capture enemy moveable property, including adversary records of the state, for military purposes and occupation; the convention proclaims that an occupying power can rightfully take possession of “all moveable property belonging to the State which may be used for military operations.”<sup>53</sup> Under Article 53, moveable government property, which may be used for military operations, is considered spoils of war; “it can be freely requisitioned by the occupying power and becomes its property without compensation.”<sup>54</sup> It prohibits, however, the pillage, damaging, and destruction of artistic, cultural, and educational institutions, historical monuments, and works of art and science belonging to individuals, private entities, as well as to the state.

Although the convention does not mention public records and archives, it implies that those records that carry cultural value must be protected from pillage and destruction. It forbids armed forces from seizing property devoted to municipalities, arts and sciences, religious, charitable, educational, or cultural institutions, which would seem to cover archives, and by extension, other forms of private or civilian property. Article 43 of the 1907 Hague convention, however, requires the occupying power to take all measures “to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>55</sup> This provision implies that the foreign occupying power is not only responsible for discipline among its own military forces, but also—as far as possible and unless absolutely prevented—for maintaining order among the civilian population and other nonstate actors according to the laws of the occupied country. Presumably, this obligation extends to preventing theft or plunder of cultural property by foreign or local private entities and individuals. The phrasing “as far as possible” and “unless absolutely prevented” stand as qualifying factors that recognize that public order may not be so easily established amid the exigencies of military action or the chaos of war and occupation.

In 1949 the international community adopted the Fourth Geneva Convention following the vast losses in cultural property during World War II. The drafters of the

convention aimed to clarify the duties and responsibilities of soldiers and governments during times of war and prevent inhumane actions that were characteristic of the Second World War. The Geneva Convention forbids “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>56</sup> As such, the convention failed to provide for broader protections than those found in the 1907 Hague Convention, albeit it required contracting parties to teach soldiers its text.<sup>57</sup> Geneva Additional Protocols I and II were passed in 1977 after the Vietnam War. Additional Protocol I addresses international conflicts while Additional Protocol II applies to noninternational or domestic armed conflicts. The protocols prohibit pillage or any acts of hostility directed against cultural property. Under Article 52(2) of Additional Protocol I, attacks are limited to military objectives, or those “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage.”<sup>58</sup> Presumably, the capture of public enemy documents for military advantage is permitted under this clause. Although Additional Protocol II does not include a similar provision, it nevertheless prohibits reprisals against “historic monuments, works of art or places of worship which constitute the cultural heritage of peoples . . . .”<sup>59</sup> Neither the Fourth Geneva Convention nor Additional Protocols I and II apply to nonstate actors; Additional Protocol II pertains exclusively to internal combatants involved in armed conflict.

The provisions of the 1954 Hague Convention and its two protocols also apply to state actors; they considerably expand the protections for cultural property during war and occupation. The vast plundering that occurred during World War II led to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which prohibits the pillage, destruction, theft, or misappropriation of cultural heritage by invading and occupying forces.<sup>60</sup> At the time of its adoption, it represented the most sweeping international convention to address the wartime protection of cultural property.<sup>61</sup> Article 1 of the convention defines cultural heritage as “moveable or immovable property of great importance to the culture of every people.” It provides a representative list of cultural property that must be protected, including

monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books. . . .

The 1954 Convention also mentions and provides for the protection of archives as cultural moveable property. The convention does not define what is meant by archives, but the general definition relates to noncurrent public or private institutional records that have enduring historical, legal, or administrative value. The convention also specifically lists repositories of cultural items, including museums, libraries, and depositories of archives, as examples of cultural property that

warrant immunity in times of war and occupation. Together with the 1907 Hague Convention, it draws a bright line between historical and cultural documents housed in cultural repositories, which are given protective status and public enemy records of the state, which may be seized for military intelligence and occupation and warrants no obligation of return.

Besides obligating countries to take measures to protect their own cultural heritage from “the foreseeable effects of an armed conflict,” the convention requires belligerent nations not to carry out acts of reprisal against the cultural heritage of adversary countries.<sup>62</sup> Article 4(3) obligates nations to “prohibit and, if necessary, put a stop to any form of theft, pillage, misappropriation of, and any acts of vandalism directed against, cultural property. . . .” This provision covers any form of theft and seems to require the occupying power to prevent not only such violations by its own forces, but also, in the absence of national authorities and only as far as possible, by nonstate actors as well. It reinforces Article 43 of the 1907 Hague Convention, obligating foreign occupying forces to restore public order while respecting the laws of the occupied country. Article 5, however, emphasizes that the securing of cultural property lies primarily with the national authorities of the occupied country. The occupying power is obligated to support these national authorities as far as possible, but its responsibility for preserving cultural property is limited. The occupying power must assume this responsibility only when the national authorities are unable to do so, only when cultural property has been damaged by military operations, and only “as far as possible.”<sup>63</sup> In other words, it is left to the discretion of occupation authorities to decide what “as far as possible” means in protecting cultural property, if at all, given military exigencies. In the final analysis, the convention imposes wartime and occupation obligations only on state actors; it does not specifically regulate the conduct of nonstate actors, such as individuals, political and religious groups, or NGOs. Their activities are governed by the laws and officials of the occupied country, or, if necessary and as far as possible, by the occupying power.

On the same day as the signing of the 1954 Convention, the community of nations adopted a separate protocol addressing specifically the issue of restitution of moveable cultural objects. The protocol was adopted separately from the main convention primarily because of U.S. objections.<sup>64</sup> The protocol forbids occupying forces and authorities from exporting cultural spoils from occupied territories and mandates the return of any illegally removed cultural property to the countries of origin. It also requires that any cultural property removed from enemy territory during armed conflict for safekeeping must be returned after the end of hostilities.<sup>65</sup> These provisions, however, do not apply to public enemy documents that are seized during hostilities for military operations. The conventions and protocols impose no obligations on when such documents should be returned to the country of provenance, leaving this matter to the province of diplomacy following hostilities. In 1999 the international community adopted a second protocol to the 1954 Convention after the targeted destruction of cultural sites during the Balkan Wars of the 1990s. The Second Protocol strengthened the language of restitution

and provided for additional protections for cultural property in territories occupied by foreign armies. The two protocols can be assumed to cover archives as cultural property because of their direct association to the main 1954 Hague Convention. The Second Protocol, however, holds little relevance regarding the American invasion and occupation of Iraq; it went into effect in March 2004, just months before the transfer of power to Iraqi officials.

These basic obligations under the laws of war apply only during times of war and occupation, which in Iraq's case, occurred from 13 May 2003 through 30 June 2004. But it should be emphasized that the 1954 Hague Convention was not formally applicable during the Iraqi conflict because two of the leading protagonists, the United States and United Kingdom, were not signatories to it. Although the United States signed the convention in 1954, the executive branch decided not to transmit the treaty to the Senate for ratification because of military concerns that it was too restrictive. Following the Cold War, the Pentagon withdrew its objections and in 1999 President Bill Clinton transmitted the convention and a part of the First Protocol to the U.S. Senate for ratification, which occurred on 25 September 2008.<sup>66</sup> Nor was the United States a signatory to Geneva Additional Protocol I governing international armed conflict. Nonetheless, the United States has adhered to many of the provisions of the Hague Convention and Geneva Protocol I in practice, even though it has reserved "the right to depart from un-ratified, international conventions when American interests collide with international, national, community, or private interests in cultural property."<sup>67</sup>

Given these circumstances, the IMF's actions cannot be considered theft or pillage under those rules of war that govern the protection of cultural property. As already noted, the 1954 Hague Convention and its protocols as well as Additional Geneva Protocol I were not in effect during the Iraq conflict, but even if they were, they would not have applied. After all, the IMF first took custody of the Baath Party documents with the approval of United States occupation authorities. As the civilian proconsul—or state actor—in charge of the occupation, including the disposition of Iraqi assets, CPA Bremer had the authority to execute this transfer to a private entity that aimed to build a memorial center in Baghdad and advance the Iraqi people's understanding of their authoritarian past. As such, the purpose of this initial transfer does not rise to the definition of theft, pillage, or misappropriation of cultural property under the international conventions of war. The IMF assumed only authorized physical custody, not ownership, of the documents, and has never claimed these files as its property. Moreover, after the United States transferred sovereignty to the Iraqis, the responsibility for governing the country, including protecting cultural institutions and property, fell solely to the Iraqi government, whose prime minister's office reauthorized the IMF's custody of the documents. While critics may fault American and Iraqi authorities for turning over the Baath Party records to a private group to construct a memorial center or for safekeeping, the issue surrounding the disposition of the files became exclusively an Iraqi internal affair.

These circumstances perhaps explain why the U.S. State Department considers this controversy a private matter to be resolved among the key parties involved. Regarding the IMF-Hoover controversy, Philip Frayne, a spokesman for the U.S. Embassy in Baghdad, stated, "This [issue] should be a subject of discussion between Hoover and the Iraqi Memory Foundation and the Iraq government. In other words, they are in the custody of the Hoover Institution right now, not in the custody of the U.S. government."<sup>68</sup> Indeed, the U.S. government initially took an interest in scanning and exploiting the documents for intelligence during the George W. Bush administration, but now has taken a hands-off approach. Once the Pentagon completed the digital scans and handed the original records back to the IMF, they were no longer considered a U.S. government matter. Frayne's statement carries importance in the dispute over whether the documents should be construed as plundered cultural property. His comments indicate that in the view of the U.S. State Department, the question of when the documents should be considered having transitioned from wartime intelligence to cultural property and when they should be returned to Iraq is exclusively a private matter.

The question of whether the documents have matured into or otherwise should be considered cultural property is an interesting issue. Certainly, Makiya and IMF took custody of the records with the intent of using them as the foundation for a cultural and historical memorial center that would preserve, catalog, and reveal the atrocities of the Saddam Hussein regime. Nonetheless, they took control of the documents not from a library, museum, archival depository, or any other cultural institution, but from the political ministry of the Baath Party headquarters in Baghdad. The records were not archives or cultural property per se, but the active administrative and security records of the Baath Party system. Moreover, the Pentagon, with help of the CPA, was engaged in securing similar active documents from ministries and bureaucracies throughout Iraq with the aim of exploiting or using them in the search for weapons of mass destruction and in future judicial proceedings against senior Baath Party officials.

The Pentagon agreed to transport the Baath Party records in the IMF's possession to American soil for their intelligence, not cultural, value. After government contractors finished scanning them, the Defense Department turned the documents back over to the IMF. Although the IMF then deposited the records at the Hoover Institution library and archives, a private academic repository of historical records, it is unclear whether this represented their transition of sorts into cultural property. After all, the IMF needed to find a place to store the large cache of politically charged documents at minimum cost; the Hoover Institution agreed to serve as the depository for the records in exchange for the right to digitize them for its own collections. The tradeoff benefited both institutions. Nevertheless, an important question is whether the documents, if returned to Iraq, would be treated as cultural material, or would be misused by the ruling Shiite government for sectarian purposes. If made widely available to the Iraqi public, the documents could ignite social chaos given what they reveal of the

extensive web of Hussein's Baath Party informers, agents, and others named in the files. The documents might also be targeted for destruction by former Sunni Baathists to destroy incriminating evidence. The Iraq National Library and Archives was torched twice for precisely this reason soon after the 2003 invasion. Given that Iraq is still more at war than at peace with itself, there is no reason to expect that this would not happen again. Whether at this point such documents can be considered benign cultural property rather than potentially destabilizing and malevolent intelligence for the new cadre of Iraqi secret police under Shiite rule remains an open question.

Nevertheless, beyond those whom have called for the return of the *illegally* removed or *pillaged* records, neither the Iraqi executive branch nor the American government has considered them to be plundered cultural property unlawfully removed from Iraq. One of the many curiosities of this controversy, however, is why Bremer, the CPA administrator, did not immediately assert control over the records when they were uncovered in Baghdad in the first place, instead of letting Makiya and the IMF, a private and registered U.S. government contractor, take custody of them. The documents held clear potential military intelligence and judicial value and should have been turned over to the Pentagon or the CPA's Office of Human Rights and Transitional Justice, which was responsible for securing evidence against the Hussein regime for prosecution.

## PEACETIME UN CONVENTIONS GOVERNING CULTURAL PROPERTY

Beyond the cultural property protections in the conventions of war, the actions taken by Makiya and IMF also do not appear to be covered by any of the peacetime UN conventions that safeguard cultural heritage. The international community's adoption of these conventions has derived from recognition that the endangerment of cultural heritage has often occurred outside times of war or internal rebellion.<sup>69</sup> In 1970, the community of nations adopted the UNESCO Convention on the illicit traffic in cultural property. The convention, which the United States ratified in 1983, prohibits cultural institutions from acquiring illegally exported items, forbids nations from importing stolen cultural property, and mandates governments to recover and return stolen cultural property to the home country of provenance.<sup>70</sup> These obligations are meant to be consistent with national laws with the aim of better regulating and documenting traffic in cultural property. In 1972, UNESCO adopted a separate "Convention Concerning Protection of the World Cultural and Natural Heritage."<sup>71</sup> The 1972 UNESCO Convention established new international entities, including the World Heritage Committee and the World Heritage Fund, to curb illicit trafficking of cultural heritage. The United States ratified the 1972 Convention in 1973.

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was adopted in 1995 with the aim of refining legal standards governing the trade

and protection of cultural property; it established “minimum legal rules for the restitution and return of cultural objects between Contracting states.”<sup>72</sup> The convention was designed to create a right of restitution regarding stolen property for individuals and states. It allows for restitution claims by private individuals, includes specific procedural requirements for claims of restitution, and imposes statutes of limitation on those claims.<sup>73</sup>

Regarding Iraq, the UN Security Council passed Resolution 1483, obligating UN members to establish a “prohibition on trade in or transfer of cultural property” illegally removed from Iraqi institutions.<sup>74</sup> It further requires that member states facilitate the return of Iraqi cultural property of archaeological, historical, cultural, scientific, and religious importance.<sup>75</sup> The international ban on importing Iraqi cultural goods stemmed from the general trade sanctions that were imposed since August 1990, when Iraq invaded Kuwait. There’s no evidence, however, that Makiya or the IMF were engaged in the trade of cultural materials for profit (although they purchased documents on the Iraqi black market) or in illegally removing documents from Iraq. These specific conventions and resolutions, moreover, were drafted primarily to protect the illicit trade of cultural objects. They neither cover captured wartime documents, nor apply to the circumstances surrounding the IMF’s custody of the Iraqi state documents, authorized first by coalition occupying authorities and then by the Iraqi prime minister’s office. Under these conventions, the Pentagon’s removal of the Baath Party records for wartime intelligence does not meet the definition of illicit trafficking of stolen cultural property.

## UNITED STATES LAW ON INTERNATIONAL CULTURAL PROPERTY

There are also several U.S. laws that govern the protection of cultural heritage and act in concert with the international conventions on cultural property. For similar reasons already mentioned, they have little relevance to the removal of the Baath Party records from Iraq and their deposit at the Hoover Institution. The 1934 National Stolen Property Act (NSPA), for example, allows the U.S. government to prosecute offenders on behalf of foreign governments whose cultural heritage has been looted. The NSPA criminalizes both the illicit trade and possession of stolen antiquities or any items known to have been looted, whether or not the United States has an agreement with the claimant nation. The NPSA, however, requires a high level of proof; each element of the crime must be proved beyond a reasonable doubt.<sup>76</sup>

In 1983, the U.S. Congress also passed the Cultural Property Implementation Act (CPIA) with the aim of fulfilling its obligations under the 1970 UNESCO Convention.<sup>77</sup> In adopting the legislation, a Senate report noted the rising and illicit trade and destruction of looted antiquities, as well as the deleterious consequences for world memory and knowledge.<sup>78</sup> The CPIA distinguishes between looted property and property that has been exported in violation of the laws of the country of provenance. The act prohibits the import of any cultural property that has been

stolen from a museum, religions or secular public monument, or any other such cultural institution.

Following the mass pillage of Iraqi antiquities in the 2003 invasion, President Bush signed into law the Emergency Protection for Iraqi Cultural Antiquities Act of 2004. The legislation granted the president the authority to impose import restrictions on any cultural materials illegally removed from Iraq, which continued a restriction on the import of such items that had been in place since August 1990. The law works in concert with the Cultural Property Implementation Act; it does not require Iraq to bring a formal request for import restrictions and broadly defines protected materials as anything of “archaeological, historical, cultural, rare scientific or religious importance.”<sup>79</sup> The law also tracks UN Security Council Resolution 1483, prohibiting trade in cultural heritage materials illegally removed from museums and other locations in Iraq. Again, however, the Baath Party documents were removed with the authorization of Iraqi and American authorities, and the U.S. State Department has expressed little interest in intervening in the dispute over the IMF-Hoover agreement, considering it a private matter among the IMF, the Hoover Institution, and the Iraqi government.

## IRAQI LAW

But what of Eskander’s charge in his open letter that Makiya’s actions violated the 1969 law of the Iraqi Penal Code? If so, Makiya and the IMF also would seem to be in breach of U.S. law, specifically the Culture Property Implementation Act, which prohibits the illegal export of cultural property in violation of the laws of the country of provenance. As originally drafted, Iraqi legislation no. 111 prescribed harsh penalties for “offenses against the external security of the state.” It prescribes the death penalty for any “person who willfully destroys, conceals, steals, or forges documents knowing them to be instrumental in upholding the rights of Iraq in the face of a foreign country or knowing them to relate to the external security of the state or to some other national interest.”<sup>80</sup> The law prescribed imprisonment and fine for any person who “publishes or broadcasts in any way or form or by any means intelligence, information, correspondence, documents” or similar material regarding government departments or agencies.<sup>81</sup> A ten-year imprisonment was recommended for those who gave such material to a foreign country or agent working on its behalf.<sup>82</sup> Based on the wording of this law, Eskander alleges that the IMF’s confiscation, purchases, declassification, and publication of the Baath Party records have explicitly violated Iraqi law.<sup>83</sup>

There are several problems with Eskander’s argument. As noted, Makiya and the IMF took custody of the Baath Party documents with the approval of the CPA Paul Bremer, who was appointed by President George W. Bush as his envoy to serve as the civilian administrator of Iraq.<sup>84</sup> As CPA administrator, Bremer was vested with all executive, legislative, and judicial authority necessary to achieve the coalition’s ob-

jectives. This authority included power over all of Iraq's civil institutions and laws.<sup>85</sup> UN Security Council Resolution 1488 bolstered the CPA's legitimacy by calling on the United States and the United Kingdom, under unified command, to promote the welfare of the Iraqi people through the effective administration of the territory of Iraq.<sup>86</sup> As such, Iraq's Penal Code and judicial system were subject to Bremer's authority and revision. Under Baathist rule, the Iraqi judiciary system had been both complicit in the crimes of the state and exploited to consolidate Baath Party authority. The CPA considered it imperative to reform the judicial system to institute the concept of the rule of law. On 10 June 2003, Bremer issued an order reinstating Iraq's 1969 Penal Code after suspending and changing a number of its criminal penalties. The order specified that under certain sections of the Penal Code, including those involving offenses against the security of the state, legal proceedings may occur "only with the written permission of the Administrator of the CPA."<sup>87</sup> Any transgression committed by Makiya would have been at the discretion of Bremer, who authorized his taking custody of the documents in the first place.

Moreover, in June 2003, the CPA granted blanket immunity from Iraqi law to all foreign military forces, civilian government officials, and private contractors. This immunity would have covered the IMF, which operated as a registered U.S. government defense contractor from June 2003 to September 2009.<sup>88</sup> The immunity for private contractors continued after sovereignty passed to the Iraqis until it lapsed in 2009 when the Iraqi government ratified an agreement that set new terms for a continued American presence in Iraq. The Iraqi government's insistence on an end to legal immunity for contractors stemmed largely from outrage over the 2007 shootings of Iraqi citizens by security guards working for the private security firm, Blackwater Worldwide, in which 17 Iraqis were killed in Baghdad.<sup>89</sup>

Nevertheless, the Accountability and Justice Law, passed on 14 January 2008, called for establishing a permanent archive to house Hussein's documents of atrocity. The law asserted that all "files of the dissolved Baath Party shall be transferred to the Government in order to be kept until a permanent Iraqi archive is established pursuant to the law." Yet, Makiya's deal with the Pentagon as well as his agreement with the prime minister's office that authorized the IMF to store the documents at the Hoover Institution also put the records beyond the law's reach. At the very least, it appeared to set up a contradictory situation involving authorization from the Iraqi prime minister's office in support of the IMF-Hoover deal, while the Iraqi parliament called for the transfer of all the Baath Party records in private hands to the government. This disconnect, if not lack of communication and coordination, between the Iraqi executive and legislative branches of government continued to create confusion surrounding the fate of the Baath Party documents. Even so, the parliament failed to protest the office of the prime minister's authorization or raise an objection to the IMF-Hoover arrangement after passage of the Accountability and Justice Law, leaving Eskander and his allies in the Ministry of Culture out in the wilderness in calling for the documents' immediate return. In their ongoing feud and jockeying for influence among Iraqi officials,

Makiya and the IMF seemed to have outmaneuvered Eskander in order to control millions of pages of Saddam Hussein's Baath Party records.

## CONCLUSION

This highly unusual case reveals the deficiency of the international legal regime in regulating the taking of public records by nonstate actors in the theatre of war and occupation. Although the IMF may have acted with the best of interests to rescue the Baath Party records from misuse or destruction, its detractors accuse the group of theft and pillage of Iraq's cultural property. These allegations, however, do not hold up under scrutiny. The IMF's actions do not meet the definition of theft, pillage, or misappropriation of cultural property under international law, U.S. law, or the Iraqi legal system at the time when it assumed custody of the documents. There is also no evidence to suggest that Makiya and the IMF have been anything but serious and responsible stewards of the records. In fact, a case can be made that they have served to ensure their long-term preservation and protection from destruction and misuse. The IMF's custody of the documents benefited not only from Makiya's personal connections with key officials in the CPA and the Iraqi prime minister's office, but also from the confusion surrounding the invasion and Iraq's later descent into sectarian chaos, which eclipsed all other concerns among CPA occupation authorities.

In the end, the motives of Makiya and IMF are far less relevant than the issue of whether CPA authorities should have granted custody of adversary state security and political documents to a private entity, even though it was operating as a registered U.S. defense contractor. With Iraq in chaos after the invasion and the dissolution of the Baath Party civil structure and security system by order of coalition authorities, either the Pentagon or CPA should have asserted immediate control of the documents as soon as they were uncovered at the Baath Party headquarters in Baghdad. The records should have been treated as captured wartime intelligence under the applicable rules of war, or in this case, also as potential judicial evidence in the trials of Saddam Hussein and his senior leadership. It is not clear why the CPA abdicated its responsibility in governing Iraq's property and assets on behalf of the Iraqi people and authorized the IMF to assume private custody of the politically charged documents to build a memorial center.

In future conflicts, military and civilian occupation authorities should assert custody and keep control of captured or uncovered political and security documents, rather than divesting them to private groups or individuals. In other words, all records and assets that may be permissibly seized for military operations and occupation should be retained and treated according to the rules outlined in the conventions of war. Following military conflicts, the American custom has been eventually to engage in diplomacy with its former war time adversary to repatriate records that were seized during war, with the exception of those documents that

pose risks to national security and other interests. The United States is currently carrying out such negotiations with the Iraqi government. The Baath Party archive should have been under coalition or military control from the beginning and, as a result, should now be part of these negotiations.

As with other American conflicts, it may take years before the U.S. intelligence community sifts through all of the documents to determine what should be returned to Iraq and withheld for national security reasons. If the May 2010 points of agreement between the Hoover Institution and the Iraqi delegation can be taken at face value, Hoover may end up holding the Baath Party archive well beyond its five-year arrangement with the IMF. After all, Hoover and the Iraqi delegation agreed that Hoover would seek the involvement of the State Department in any future negotiations for the return of the records, given that they are part of the greater share of documents seized by the Pentagon during the invasion. Any decision by the State Department on returning these estimated 100 million pages of documents captured in the war by U.S. military forces will likely depend on the determination of the Pentagon and the American intelligence community, which have direct responsibility for them. In other words, it would appear that the Hoover Institution will follow the lead of the State Department, which, in turn, will rely on the Pentagon and U.S. intelligence community regarding the restitution of the captured wartime records of Saddam Hussein's regime. Although nonstate entities are carrying out separate but parallel discussions with Iraqi authorities, it seems that the U.S. government may also ultimately decide when the Baath Party documents in Hoover's possession will be repatriated to Iraq, if only indirectly.

## ENDNOTES

1. Eskander, "An Open Letter to the Hoover Institution"; and Hugh Eakin, "Iraqi Files in U.S.: Plunder or Rescue?" *New York Times*, 1 July 2008, (<http://www.nytimes.com/2008/07/01/books/01hoov.html?pagewanted>) accessed 21 October 2010.

2. See "SAA/ACA Joint Statement on Iraqi Records," *The Society of American Archivists*.

3. Jon Wiener, "Pillaging Iraqi History," *Los Angeles Times*, 8 August 2008 (<http://www.articles.latimes.com/2008/aug/0>) accessed 9 September 2010.

4. See Gravois, "Disputed Iraqi Records Find a Home," and "A Tug of War"; and Eakin, "Iraqi Files in U.S."

5. Joel Brinkley, "A Region Inflamed: The Past; A Paper Trail Follows Iraqi Merchants of Tyranny," *New York Times*, 24 November 2003. Also see Remarks Following a Meeting with Secretary of Defense, 549.

6. Coalition Provisional Authority Regulation 1 (16 May 2003), (<http://www.iraqcoalition.org/regulations/>) accessed 3 May 2011. Bremer also had the authority to dispose of all Iraqi assets and direct all Iraqi government officials. See Dobbins et al., *Occupying Iraq: A History*, xiii.

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

8. See Keefe, "Iraq: America's Private Armies," and Singer, *Corporate Warriors*.

9. Singer, "Can't Win With 'Em," 11.

10. Keefe, "Iraq: America's Private Armies."

11. Singer, "Can't Win With 'Em," 11.

12. Singer, "Can't Win With 'Em," 11–12.

13. Human Rights First, "3 Years after Blackwater Massacre," 1.

14. Faite, "Involvement of Private Contractors"; "Contemporary Challenges to IHL" and "International Humanitarian Law" International Committee of the Red Cross.

15. Besides the IMF, many other political groups and NGOs seized Hussein-related records, including the Iraqi National Congress, the Kurdistan Democratic Party, the Patriotic Union of Kurdistan, the Supreme Council of the Islamic Revolution in Iraq, the Iraqi National Accord, the Iraqi Communist Party, and the Association of Free Prisoners, which assumed custody over the largest share of documents, approximately 18 million documents mostly from the former General Security Directorate in Baghdad; others from a branch of the former military intelligence. See Mufti, *Iraq: State of Evidence*, 9–13.

16. Gravois, "A Tug of War for Iraq's Memory."

17. Mufti, *Iraq: State of Evidence*, 17.

18. Mufti, *Iraq: State of Evidence*, 16–17.

19. Coalition Provisional Authority Order Number 82: Iraqi National Foundation for Remembrance, signed into force by Paul Bremer on 28 April 2004. Section 1 of the order states that the mission of the Foundation is to take steps:

to ensure that the atrocities of the previous regime are memorialized so that current and future generations of Iraqis will understand and remember this dark period of Iraqi history and take those steps necessary to presence an open and democratic government which protects human rights, fundamental freedoms and dignity.

The foundation was assigned the responsibility of seeking and considering proposals for appropriate memorials, in addition to raising funds for the creation of a national memorial museum in Baghdad, which "will document, study and present publicly the history of atrocities suffered under the previous regime" (see Section 2 [4]). The CPA allocated a sum of \$10 million for the creation of the Remembrance Foundation. Also see Anne Applebaum, "Writing Iraq's Secret History," 17 December 2003 (<http://www.washingtonposts.com/wp-dyn/articles/A6557-2003Dec16.html/>) accessed 5 May 2011.

20. See Dobbins et al., *Occupying Iraq: A History*, 159.

21. Mufti, *Iraq: State of Evidence*, 18.

22. Gravois, "A Tug of War for Iraq's Memory."

23. Spurr, "Devastation and Controversy."

24. See Eskander, "Records and Archives."

25. Editorial, *Kathmandu Post*, "Writing Iraq's Secret History."

26. See Eskander, "Open Letter to the Hoover Institute" and "Minerva Research Initiative."

27. Mufti, *Iraq: State of Evidence*, 18–19.

28. Mufti, *Iraq: State of Evidence*, 19.

29. The Iraqi Governing Council comprised 25 Iraqi nationals selected by the United States. It was vested with limited responsibility for operating ministries, appointing diplomats, and laying the groundwork for drafting a new constitution. The council included thirteen Shiites, five Kurds, five Sunnis, one Christian, and one Turk. See Rajiv Chandrasekaran, "Appointed Iraqi Council Assumes Limited Role," *Washington Post*, 14 July 2003; and Mufti, *Iraq: State of Evidence*, 20–20.

30. Mufti, *Iraq: State of Evidence*, 19–20.

31. See Defense Contract List, Iraqi Memory Foundation ([http://www.governmentcontractswon.com/department/defense/iraq\\_memory\\_foundation\\_the\\_147962216.asp?yr=10](http://www.governmentcontractswon.com/department/defense/iraq_memory_foundation_the_147962216.asp?yr=10)). accessed 8 July 2011. The data shows that the organization won the following contracts from the U.S. Defense Department: 2004, \$2,100,000; 2005, \$1,122,968; 2006, \$1,77,620, and 2007, \$1,235,752

32. See Eakin, "Iraqi Files in U.S.;" and Swartz, "Iraq Records Spark Controversy," 13.

33. See Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, Coalition Provisional Authority Order No. 100, 28 June 2004.

34. Eskander, (blog), *Stanford Daily*, 25 May 2010, and *Stanford Daily*, 27 May 2010, in response to Devin Banerjee, "Iraq asks Hoover to Return Records," *The Stanford Daily*, 25 May 2010 (<http://www.stanforddaily.com/2010/05/25/iraq-asks-hoover-to-return.>) accessed 2 June 2011.

35. Spurr, "Report on the Activities."
36. Gravois, "A Tug of War for Iraq's Memory."
37. Gravois, "Disputed Iraqi Archives," and Sundarsan Raghavan, "An Archive of Despair," *Washington Post*, 7 April 2007 (<http://www.washingtonpost.com/wp-yn/content/article/2007/04/06/AR2007040602196.html?nay=emailpage>) accessed 2 April 2009.
38. Gravois, "A Tug of War for Iraq's Memory."
39. Society of American Archivists & Association of Canadian Archivists, Joint statement on Iraqi Records, 22 April 2008 (<http://www.archivists.org/statements/IraqiRecords.asp>) accessed 9 June 2010.
40. Sargent, "Stanford's Captured Documents."
41. Eskander, "An Open Letter to the Hoover Institution."
42. Eskander, "An Open Letter to the Hoover Institution."
43. Weiner, "Pillaging Iraqi History."
44. Email from Ahmed Shames, Assistant to Iraqi Government Spokesperson Ali al-Dabbagh, to *Stanford Magazine*. See "Grim Treasures," *Stanford Magazine* (November/December 2008), (<http://www.stanfordalumni.org/news/magazine/2008/novdec/farm/news/hoover.html>) accessed 17 November 2009.
45. Email from Ahmed Shames, Assistant to Iraqi Government Spokesperson Ali al-Dabbagh, to *Stanford Magazine*. See "Grim Treasures," *Stanford Magazine* (November/December 2008), <http://www.stanfordalumni.org/news/magazine/2008/novdec/farm/news/hoover.html> (accessed on 17 November 2009).
46. Banerjee, "Iraq asks Hoover to Return Records."
47. Banerjee, "Iraq asks Hoover to Return Records."
48. Eskander, blog posts to *Stanford Daily* web site, May 25 and 27, 2010, in response to Devin Banerjee, "Iraq asks Hoover to Return Records."
49. See Gravois, "Disputed Iraqi Archives"; Raghavan, "An Archive of Despair"; Eakin, "Iraqi Files in U.S.: Rescue or Plunder?"; *History News Network*, "Fight Breaks Out"; and Gravois, "A Tug of War for Iraq's Memory."
50. Gravois, "A Tug of War for Iraq's Memory."
51. See Shirer, *The Rise and Fall*, ix.
52. As a general observation, the argument that public records can only be divested with the approval of the legislature conflicts with the 1907 Hague Convention, which provides that public enemy documents may be seized by enemy armed forces and that seized documents become the property of the capturing state. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Stat. 2277 TS539.
53. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Annex I ("Hague Regulations") article 53 stat. 2277, TS 539. Also see Elsea and Garcia, "Cultural Property: International Conventions." The 1907 Convention was preceded by the 1899 Convention on the Laws and Customs of War on Land. Most European countries ratified either the 1899 or the 1907 Convention. See International Humanitarian Law (<http://www.icrc.org/ihl.nsf/intro?openreview>) (2005) accessed 23 April 2010.
54. See Fleck, *The Handbook of International Humanitarian Law*, 292.
55. 1907 Hague Convention (IV), articles 27, 28, 43, 46, 53, 56.
56. Geneva Convention, articles 147, 75 U.N.T.S., 388.
57. Thurlow, "Protecting Cultural Property in Iraq," 159.
58. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
59. Protocols Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International and Non-international Armed Conflicts, entered into force 7 December 1978.
60. Convention for the Protection of Cultural Property in the Event of armed Conflict, 294, N.T.S. 215, adopted at The Hague, 14 May 1954.
61. For a full discussion of this topic, see O'Keefe, *The Protection of Cultural Property*, Chamberlain, *War and Cultural Heritage*, and Toman, *The Protection of Cultural Property*.

62. 1954 Hague Convention, articles 3 and 4.

63. 1954 Hague Convention, article 5 and Gerstenblith, "Protecting Cultural Heritage in Armed Conflict," 687.

64. Gerstenblith, "Protecting Cultural Heritage," 687–88, 702. According to a letter of transmittal, the

United States did not sign the Hague Protocol in 1954 because of certain objections to both the drafting and substantive provisions of Section I of the Hague Protocol, particularly the provision requiring indemnification by an occupying Party to holders in good faith of cultural property exported from territory occupied by it. . . . The main substantive provision of concern dealt with the obligation of indemnification. With respect to this indemnification obligation, concern centered on the complexities and burdens of implementation under both U.S. and other legal systems.

65. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954. Also see Boyle, *Review of the Convention*, and O'Keefe, "The First Protocol to the Hague Convention Fifty Years On," 9 *Art, Antiquity and Law* (2004) 100–03.

66. See U.S. Committee of the Blue Cross, "1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict" (<http://www.uscbs.org/resources.htm>) (18 April 2010) accessed 15 June 2011; and UNESCO 2005, "Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Two 1954 and 1999 Protocols: Report on the Activities From 1995 to 2004," CLT-2005/WS/6.

67. Thurlow, "Protecting Cultural Property," 165.

68. Kenyon, "Saddam's Spy Files."

69. Elsea and Garcia, "Cultural Property: International Conventions," 3.

70. Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 U.N.T.S.231.

71. Convention on the Protection of World Cultural and Natural Heritage, ratified 7 December 1973, entered into force 27 U.S.T. 37.

72. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (<http://www.unidroit.org/English/conventions/1995culturalproperty/main.htm>) (24 June 1995) accessed 20 July 2009.

73. See UNIDROIT Convention article 55 (defining what constitutes illegal export and impairment, and imposing a three year limit on any return claim).

74. See United Nations Security Council Resolution 1483, paragraph 7. Doc. S/RES/1483 (<http://daccessdds.un.org/doc/UNDOC/GEN/N03?368?53?PDF/NO336853.pdf?OpenElement>) (22 May 2003) accessed 15 April 2011. Paragraph 7 states that the Security Council decides that all

Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraqi National Museum, the Iraqi Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organizations, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.

75. UN Security Council Resolution 1483 ([http://www.un.org/docs/sc/unsc\\_resolutions03.html](http://www.un.org/docs/sc/unsc_resolutions03.html)) (22 May 2003) accessed 3 November 2010.

76. National Stolen Property Act, U.S. Code Title 18, Sections 2314 and 2315, 1934 (<http://eca.state.gov/icpp/18-2314.html>) The statute notes that the claimant nation may negotiate with the U.S. government for restitution. See Elsea and Garcia, "Cultural Property: International Conventions," 5.

77. Pub. L. 97-446, title 3, 96 Stat.2350, codified at 19 U.S.C. at 2601.
78. See S. Rep. No. 97-564 (1982).
79. See Archaeological Institute of America, "President Signs Emergency Protection for Iraqi Antiquities Act," press release, 7 December 2004.
80. See Iraqi Penal Code No. 111 of 1969, with amendments (Iraq) paragraph 164(2) (<http://www.niqash.org/content.php?contentTypeID=227&id=2052&lang=0>) (2007) accessed 8 June 2009.
81. Iraqi Penal Code No. 111 of 1969, paragraph 182(1).
82. Iraqi Penal Code No. 111 of 1969, paragraph 182(2).
83. See Eskander, Open Letter to the Hoover Institution.
84. Remarks following a Meeting with Secretary of Defense.
85. Coalition Provisional Authority Regulation 1 (16 May 2003). For analysis of legal basis for CPA, see Congressional Research Service, "The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities" (CRS Order Code RL32370, 2004) (<http://www.fas.org/man/crs/RL32370.pdf>) (29 April 2004) accessed 24 April 2011.
86. *United Nations Security Council Res.1483*, 22 May 2003.
87. Coalition Provisional Authority, Order Number Seven; Penal Code, 10 June 2003.
88. See Government Contracts Won, Iraqi Memory Foundation, ([http://www.governmentcontractswon.com/department/defense/iraq\\_memory\\_foundation\\_the\\_147962216.asp?yr=10](http://www.governmentcontractswon.com/department/defense/iraq_memory_foundation_the_147962216.asp?yr=10)) accessed 8 July 2011.
89. See Risen, "End of Immunity Worries U.S. Contractors in Iraq," *New York Times*, 1 December 2008 (<http://www.nytimes.com/2008/12/01/world/middleeast/01contractors.html>) accessed 16 June 2011.

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