

## **IRAQ: STATE OF THE EVIDENCE**

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## I. Summary and Introduction

After more than thirty-five years of Ba`thist rule, Saddam Hussein and a number of other former Iraqi government officials responsible for perpetrating the most heinous crimes under international law – crimes against humanity, genocide, and war crimes – are about to be tried for their alleged crimes. This is the moment that Iraqis across the country, as well as many living abroad, have been waiting for and never thought they would see.

For far too many victims, it is of course too late. For other victims and family members, the trials will be the only formal recognition and acknowledgement they are likely to get of the grave injustices and loss that they suffered. The sheer scale of the crimes perpetrated by the Ba`th government is unimaginable: there are too many mass graves and too many killed or “disappeared” to ever entertain the hope that each and every victim will be accounted for. Those for whom the fate of their “disappeared” loved ones will never be resolved will be looking to the trials of the alleged perpetrators for justice and for closure.

The term “disappeared” refers to cases in which state agents or their associates take persons into custody but do not acknowledge holding those persons or do not disclose their location, thereby placing them outside the protection of the law. A widespread or systematic pattern of enforced “disappearances” constitutes a crime against humanity. Because the fate of the “disappeared” person remains unknown, international law regards it as a continuing offense, exempt from any statute of limitations.<sup>1</sup> “Disappearance” constitutes a serious ongoing violation that causes continued suffering for surviving family members, making it essential that the Iraqi authorities, with the assistance of the international community, facilitate the identification of as many remains of victims as possible, and assist surviving family members and communities with appropriate ways of commemorating the deaths and according respect and dignity to the victims. The crime of “disappearing” someone is continuous until the fate or whereabouts of the “disappeared” person becomes known.

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<sup>1</sup> The components of the crime of “disappearance” (such as the prohibitions of arbitrary detention and cruel, inhuman or degrading treatment) are expressly prohibited under international human rights law and many violate customary international law. The most detailed exposition of the pertinent legal principles are found in the U.N. General Assembly’s Declaration on the Protection of all Persons from Enforced Disappearance (General Assembly Resolution 47/133, December 18, 1992. A/RES/47/133. <http://www.un.org/documents/ga/res/47/a47r133.htm>.

A key to the success of any trials will be the availability of solid documentary and forensic evidence. Since the overthrow of the Iraqi government in April 2003 by the U.S.-led coalition forces, over 250 mass graves have been located across Iraq. Some are believed to contain the remains of thousands of victims, including entire families. As Ba`thist officials fled their posts in the run up to and during the war in March and April 2003, they left behind stack upon stack of official documents, describing with disturbing detail the crimes they had committed over the years. Survivors of these crimes, families of those who were killed or “disappeared,” eyewitness, and others have since come forward to describe the nightmare in which they had been living. Even some of those who were complicit in these crimes have provided information about aspects of these crimes, including the locations of mass graves. Scores of the alleged key perpetrators are today behind bars awaiting indictment and trial, including most of the so-called “deck of 55.”

Witness testimonies are usually the ballast of a prosecutor’s case involving mass murder. But such testimonies hold greatest weight if they are supported by physical and documentary evidence. When trying high-level perpetrators for serious crimes, there are two components: 1) establishing that the crimes occurred, for which witness and forensic evidence are crucial; and 2) linking perpetrators who often were far away from the crime scene with responsibility for the crimes, for which witness testimony, especially from insider witnesses, and documentary evidence, are key.

This report provides an in-depth account of what has happened to key archival and forensic evidence since the ouster of Saddam Hussein in April 2003. The study is based on research conducted in Baghdad and the four northern governorates of Kirkuk, Mosul, Arbil, and Sulaimaniyya in February 2004, as well as earlier research conducted between April and June 2003 on mass graves in the governorates of Basra, Diyala, al-Hilla, al-Diwaniyya (al-Qadissiyya), al-`Anbar, Karbala’, and al-Najaf.

The report focuses on two major sources of that evidence, documentary and forensic. It surveys what’s been done—and not done—by the U.S.-led Coalition Provisional Authority and the interim Iraqi authorities since the invasion of March-April 2003 to preserve the evidence, and assess the implications for justice for Ba`thist era abuses and for some resolution regarding the fate of victims whose families live with uncertainty.

In the case of both documents and mass graves, U.S.-led coalition forces failed to secure the relevant sites at the time of the overthrow of the former government. They subsequently failed to put in place the professional expertise and assistance necessary to ensure proper classification and exhumation procedures, with the result that key

evidentiary materials have been lost or tainted. In the case of mass graves, these failures also have frustrated the goal of enabling families to know the fate of missing relatives. The findings of the report are all the more disturbing against the backdrop of a tribunal established to bring justice for serious past crimes, the Iraqi Special Tribunal. Human Rights Watch has serious concerns that the tribunal is fundamentally flawed and may be incapable of delivering justice.

The extent of the negligence with which key documentary and forensic evidence has been treated to date is surprising, given that the U.S.-led coalition and Iraqi authorities alike knew that trials of Hussein and key Ba`th government officials would be important landmarks in Iraq's political recovery, that successful trials require solid evidence, and that, as international experience has shown, preserving such trial-ready evidence is a difficult task. Some of the evidence has been destroyed, but it is not too late to assume custody of millions of additional pieces of evidence. Some of this material, if it is given the urgent attention it needs and deserves, may prove critical in the proceedings of the upcoming trials. It will also play an important role as Iraqis attempt to construct an accurate historical record of their traumatic experiences under Ba`th Party rule.

Human Rights Watch strongly urges the Interim Government of Iraq to set up a Commission for Missing Persons, comprised of international as well as Iraqi experts, to establish effective procedures for protecting mass graves and conducting exhumations, and to oversee implementation of such a system. The government should similarly appoint a committee, again utilizing international as well as Iraqi expertise, to set standards for and oversee the handling of documents of the former government.

## **II. Recommendations**

### ***To the Interim Government of Iraq***

- Establish as an urgent matter a Commission for Missing Persons that initially engages international as well as Iraqi expertise and administration. The Commission should establish a system for protecting and preserving mass graves, create protocols for exhumations of gravesites, and set and oversee implementation of priorities for exhumations of mass gravesites that balance the needs of families to identify victims alongside the evidentiary needs of criminal proceedings against the alleged perpetrators. Wherever possible, exhumations should be commemorative events, part of a process of social reconstruction in which families and communities can re-bury the victims with dignity, and pay them the respect that they had been denied by political violence.

- Promulgate a system, in conjunction with this exhumation and documentation effort, for issuing death certificates, which are required by the government for surviving family members to assert rights such as inheritance and remarriage.
- Appoint a body of Iraqi and international experts to recommend standards and best practices for the handling of confiscated documents of the former government, including for the following purposes: 1) establishing a chain of custody in order to assure authenticity; 2) facilitating the archiving of documents in a manner that addresses both the evidentiary needs of criminal judicial proceedings against former high officials as well as the humanitarian needs of victims' families of the former government to resolve the fate of missing loved ones; and 3) working with Iraqi nongovernmental organizations and political parties to secure, to the extent possible, the return to a national archive of originals of state documents currently in their possession.

***To the government of the United States and other coalition governments***

- Establish a process for returning to Iraqi government custody the originals of all documents seized by U.S. and coalition forces since the overthrow of the former government.
- Ensure that officials of the Iraqi Special Tribunal or the Iraqi criminal court have access to all confiscated documents to determine whether they represent potential evidence in future criminal proceedings.

***To the international donor community***

- Ensure that resources are made available for the forensic and documentary evidence preservation priorities identified in this report, including for documentation, humanitarian, and truth-telling purposes separate from any trials for serious past crimes.

**III. The Documentary Evidence**

***Looting and Destruction of Documents***

In the chaos that ensued with the fall of Baghdad on April 9, 2003, U.S.-led coalition forces, Iraqi opposition groups, and individuals seized hundreds of thousands of Iraqi state documents from government buildings, Ba`th Party headquarters, offices of the former intelligence and security apparatuses, military garrisons and other premises across

Baghdad. Sensitive documents were later found in public buildings such as schools, as well as in private homes, apparently having been removed by officials of the former government, ostensibly for safe keeping, and then abandoned as military defeat became imminent. Similar scenes were witnessed in other cities and towns across the country. Former Iraqi government officials shredded, burned, or otherwise destroyed many documents during the preceding weeks, while countless others were destroyed as a result of the wartime aerial bombing campaign. The widespread looting and wanton destruction of government property by Iraqis in the days and weeks after the war led to further destruction of documents that had survived the war itself.



Documents strewn on desk and floor in security prison in Kirkuk, April 2003, the day after the city fell to Kurdish and U.S forces. © 2003 Eric Stover/Human Rights Watch

Hundreds of thousands of documents nevertheless remained intact as sources of information about the practices of the Saddam Hussein government. It was an established practice of that government to record the brutal repression of the Iraqi population by its security and intelligence apparatuses in minute detail. Human Rights Watch's own work on the study and analysis of some eighteen metric tons of Iraqi state documents seized in northern Iraq by Kurdish political parties during the 1991 uprising demonstrated that those records, which detailed state policy involving mass executions, large-scale "disappearances," targeted assassinations, torture, forced expulsion or deportation of civilians, and other egregious abuses, were largely accurate. Its assessment of those documents over a two-year period between 1992 and 1994, together with its findings from several missions to Iraqi Kurdistan in search of corroborating forensic and testimonial evidence, enabled Human Rights Watch to argue that the 1988 Anfal campaign against the Kurds constituted genocide.<sup>2</sup>

Despite the potential value of Iraqi state documents in yielding information that could assist in bringing to justice perpetrators of serious past crimes, U.S. and coalition authorities apparently put no effective plan in place to secure them in the immediate aftermath of the collapse of the Hussein government. While U.S.-led coalition forces claimed to have since seized very large numbers of documents, many others were pilfered, looted, or otherwise destroyed needlessly, resulting in the loss of potentially vital information. Some of this destruction took place in the context of the widespread general looting in Baghdad and elsewhere. In many cases, the looting was carried out within sight of coalition military forces, which had apparently received no instructions about securing government documents or protecting the premises in which they were found. Additionally, other documents that survived or were not subjected to looting in a number of locations lay strewn about for days and sometimes weeks without being taken into coalition custody.

Human Rights Watch researchers witnessed such scenes in the cities of Kirkuk and Mosul in April 2003. When they visited government locations including former security and intelligence offices, some of which had been targeted during the aerial bombing campaign, they found thousands of files still intact in filing cabinets or on shelving units.

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<sup>2</sup> See Human Rights Watch/Middle East, *Iraq's Crime of Genocide: The Anfal Campaign Against The Kurds*, Yale University Press, New Haven and London, 1995. This book was first published in slightly different form by Human Rights Watch in July 1993. The eighteen metric tons of documents, estimated at some four million pages, were largely those captured by the PUK and the KDP which, in May 1992 and August 1993 respectively, agreed to hand them over under a tripartite arrangement with Human Rights Watch/Middle East and the U.S. Senate Foreign Relations Committee. Under the terms of the agreement, the Foreign Relations Committee made the documents official records of the U.S. Congress and stored them in facilities of the U.S. National Archives. Human Rights Watch/Middle East's role was to lead the research of the documents for human rights purposes and to prepare the case of genocide against Iraq before the International Court of Justice.

Human Rights Watch researchers witnessed Iraqis walking into government buildings. Their motives appear to vary from curiosity to a desire to find documents that would answer their questions regarding “disappeared” relatives. At a girls’ secondary school in the al-Qadisiyya II neighborhood of Kirkuk, Human Rights Watch came across some ten large canvas sacks full of documents stacked in one of the classrooms. The guard working at the school told Human Rights Watch that Ba`th Party officials had brought the documents several days before the start of the aerial campaign, and as such he presumed them to be valuable. He said no one had been sent to protect them or take them away for safekeeping, adding that he could not guarantee their safety for much longer.<sup>3</sup>

In Kirkuk in mid-April 2003, Human Rights Watch visited a former security forces detention center and found an even larger number of documents, including hundreds of individual files on Iraqis who had apparently been held there in the past or had been kept under surveillance. Most were piled up on the floor in a state of disarray and were quickly coming apart as more and more people walked over them. Others had been thrown out into the garden and exposed to the elements. A guard at the premises told Human Rights Watch that Kurdish political parties had already been to the site on April 10, the day Kirkuk fell, and had taken whatever documents they were interested in. In the courtyard there were sacks full of other documents which had been readied for collection by KDP officials, the guard said. Human Rights Watch also talked to several Kurds who had wandered into the courtyard, one of whom said he had found several CD-Roms on the premises purportedly showing the systematic rape of female detainees. He said he had taken them to his home for “safekeeping,” but had not reported his find to any officials and appeared reluctant to give them up.

Such scenes were repeated in many other locations across Iraq, and the consequent loss of vital evidence for future prosecutions is incalculable. As Human Rights Watch

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<sup>3</sup> Human Rights Watch interview with Latif Sattar Mustafa, al-Bayda’ Secondary School for Girls, Kirkuk, April 13, 2003. In another classroom at the school, Human Rights Watch also found stacks of boxes of ammunition, including 40mm Katyusha rockets, 82mm and 100mm mortar shells and 12mm machine gun bullets. Mustafa said the ammunition had been brought by the Iraqi military at the same time as the documents. One soldier was stationed in the classroom to guard the ammunition, while other soldiers and officers set up base at an adjoining school, al-Jamahir Primary School for Boys. Students in both schools were obliged to attend their classes under these conditions. In the absence of significant numbers of coalition forces in Kirkuk on April 13, Human Rights Watch reported the location of both the documents and the ammunition to officials of the PUK, whose forces were at the time in control of the city. The then PUK Interior Minister and representative in Kirkuk, Feridun ‘Abdul-Qader, told Human Rights Watch that despite their overstretched resources, he would ensure that guards would be sent to the school. The organization did not have the opportunity to verify whether this was in fact done.

warned U.S. and U.K. officials at the time,<sup>4</sup> the failure to protect security archives from looting and destruction also had the potential of contributing to retaliatory violence and vengeance killings, since the archives could identify tens of thousands of security agents and informers by name. Yet in Basra, for example, British officials publicly stated that they allowed the looting of Ba`th Party buildings, which housed important archives, as a means of showing the population that the party had lost control of the city.<sup>5</sup> The ease with which Human Rights Watch was able to enter government buildings demonstrates how lax coalition security was in the immediate aftermath of the fall of the Hussein government.

The preservation of state documents are additionally vital for the survivors of over twenty-five years of state atrocities, since they can very likely yield information that could establish the fate of many of their missing relatives. They are also important for the hundreds of thousands of Iraqis who were forcibly expelled from their homes and became internally displaced, or were deported to neighboring Iran, in implementation of state policy. In the majority of such cases, documents in their possession – including citizenship and nationality documents, ration cards, property deeds and the expulsion or deportation orders themselves – were systematically destroyed or confiscated by Ba`thist officials, leaving the victims unable to establish their identities, place of birth, ethnicity or ownership of property. For many such people, official government records would be all they have to establish both their identities and those of their children, and to have the possibility of submitting claims in the future for restitution of property and other rights.<sup>6</sup>

In Baghdad and other major cities, the main caches of seized documents included archives of the Ba`th Party, its Regional Command and various associated organizations; archives of the former security and intelligence agencies, including the General Security Directorate (*Mudiriyyat al-Amm al-'Amma*), General Intelligence Directorate (*Mudiriyyat al-Mukhabarat al-'Amma*), Military Intelligence (*al-Istikbbarat al-'Askariyya*) and other affiliated apparatuses; archives of government ministries and their sub-departments, including census departments located in major cities; and archives of the armed forces and various paramilitary groups. Little is known about the work undertaken on the millions of pages of documents which U.S. authorities said coalition authorities had taken into custody– particularly those documents which were flown out to Qatar for

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<sup>4</sup> See Human Rights Watch, "Iraq: Protect Government Archives from Looting" (press release), April 10, 2003, and letters dated April 9, 2003, addressed to U.S. Secretary of State Colin L. Powell and Secretary of Defense Donald H. Rumsfeld.

<sup>5</sup> See Human Rights Watch, *Basra: Crime and Insecurity Under British Occupation*, Vol. 15, No. 6 (E), June 2003, p.8.

<sup>6</sup> See Human Rights Watch, *Iraq: Forced Expulsion of Ethnic Minorities*, Vol. 15, No. 3 (E), March 2003.

study and analysis by the Iraq Survey Group (ISG) and other U.S. agencies.<sup>7</sup> Requests by Human Rights Watch to make contact with ISG representatives, said to include U.K. and Australian experts, were not granted. U.S. Justice Department officials would only say that the ISG's priority in going through and analyzing Iraqi state documents were war crimes, and that the work they had carried out thus far was "impressive." "Good work is being done but it is classified," they told Human Rights Watch.<sup>8</sup> Some Iraqis associated with the Iraq Special Tribunal are said to be concerned that the ISG was entering the documents in its custody into a classified database in a manner that might make it difficult for the Tribunal prosecutors to access later.

### ***Documents Held by Iraqi Political Groups and NGOs***

Sizeable archival collections were also seized by Iraqi political groups. In some cases they had planned to seize the documents ahead of the war and were therefore able to keep them relatively intact. Among the principal groups are the Iraqi National Congress (INC), the Kurdistan Democratic Party (KDP), the Patriotic Union of Kurdistan (PUK), the Supreme Council of the Islamic Revolution in Iraq (SCIRI), the Iraqi National Accord (INA), and the Iraqi Communist Party (ICP). One priority of all such groups has been to search through relevant documents in an effort to verify or uncover information about their members and their relatives arrested by the former Iraqi government's security and intelligence apparatuses and, in many cases, clues as to where the victims had been buried. In some instances the documents yielded precise and accurate information about the location of mass graves where victims who were arrested and subsequently "disappeared" in custody were buried. One of the more well-known cases, for example, was that of an estimated 5,000-8,000 Barzani Kurds who were rounded up by the Iraqi military from so-called resettlement camps in the vicinity of Arbil in 1983 and were never seen again.<sup>9</sup> The victims, all males aged twelve or over, were believed to have been held prisoner for several months and then killed. During political negotiations with Iraqi government officials over the years, Kurdish leaders asked for information on the fate and whereabouts of the missing Barzanis, but Iraqi government officials consistently refused to give an answer. In June 2003 KDP leader Mas`ud Barzani told Human Rights Watch that official documents seized after the 2003 war had indicated the precise locations of two mass graves, located in Iraq's southern desert, where some 2,500 of the victims were said to be buried. For fear of the graves being tampered with before forensic exhumations could be carried out, the precise

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<sup>7</sup> According to the Iraq Memory Foundation's estimate, the ISG possesses some 30-50 million pages of Iraqi state documents recovered since the 2003 war.

<sup>8</sup> Human Rights Watch discussion with U.S. Justice Department officials, Washington, D.C., March 26, 2004.

<sup>9</sup> Human Rights Watch, *Iraq's Crime of Genocide*, p. 4.

locations of the two sites remain confidential, but Barzani said initial forensic assessments indicated that the information in the documents was accurate.<sup>10</sup>



Kurds examine documents in a Ba'th Party building in Kirkuk the day after the city fell to Kurdish and U.S. forces. © 2003 Eric Stover/Human Rights Watch

Other political parties told Human Rights Watch that they had significant numbers of documents in their possession, but Human Rights Watch was not able to gain access to

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<sup>10</sup> Human Rights Watch discussion with KDP leader Mas'ud Barzani, Salahuddin, Arbil Governorate, June 28, 2003.

those documents and therefore cannot verify what it was told. One such group was the Islamic Da`wa Party (*Hizb al-Da`wa al-Islamiyya*), which did not clarify the number of documents in its custody. A member of the party's Political Bureau said most the documents in question had been seized in April and May 2003 from different locations around Baghdad, principally Ba`th Party offices, including one building previously used by the Ba`th Party's Military Bureau. He told Human Rights Watch that some of the documents pertained to Ba`th Party organizations, but that the majority consisted of archival material of the former General Security Directorate in Baghdad, including material relating to executions dating back to the early 1970s.<sup>11</sup>

The Iraqi Communist Party (ICP) said that it too had a large number of documents in its possession but again without specifying the quantity. Members of the ICP's Martyrs and Missing Persons Commission said most documents in their custody related to the General Security Directorate and the General Intelligence Directorate in Baghdad. They were apparently acquired during the looting frenzy that took place in the weeks following the fall of Baghdad. Human Rights Watch was told that ICP members did not enter the designated buildings thought to house these documents; rather, they paid looters sums of money to bring out the documents for them. Their principal interest was in acquiring archives relating to the former Iraqi government's campaign against ICP members since the early 1960s.<sup>12</sup>

A third political party, the Patriotic Union of Kurdistan (PUK), gave Human Rights Watch detailed information about the state archives in its custody (amount, provenance, method of acquisition, and information on the contents of key files pertaining to former security, intelligence and military institutions). However, the then head of the PUK's intelligence apparatus, 'Umar Fattah, requested that such information be kept confidential.<sup>13</sup> Human Rights Watch was not given access to the main stack of PUK documents, and was therefore not in a position to verify what it had been told, but it was able to examine some original documents being processed at the time by staff of the PUK's human rights ministry in Sulaimaniyya (see below).

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<sup>11</sup> Human Rights Watch discussion with 'Abd al-Karim al-'Inzi, Political Bureau member, Islamic Da'wa Party, Baghdad, March 18, 2004.

<sup>12</sup> Human Rights Watch discussion with Najat Ibrahim Hassan, Fadhil Jabbar and Hamid Karkosh, members of the ICP's Martyrs and Missing Persons Commission, Baghdad, March 24, 2004. On relations between the Ba`th Party government and the ICP, see Middle East Watch [Human Rights Watch/Middle East], *Human Rights in Iraq* (New Haven and London: Yale University Press, 1990), and Marion Farouk-Sluglett and Peter Sluglett, *Iraq Since 1958: From Revolution to Dictatorship* (London: Routledge & Kegan Paul, 1987).

<sup>13</sup> Human Rights Watch discussion with 'Umar Fattah, former head of PUK's intelligence apparatus, Qala Cholan, Sulaimaniyya governorate, February 17, 2004.

NGOs and other groups also have in their possession Iraqi state archives, mostly seized in the early days after the fall of the former government. Of the NGOs, by far the largest cache is in the hands of the Association of Free Prisoners (*Jam'iyyat al-Sujana' al-Abrar* - AFP),<sup>14</sup> which claims to have some eighteen million documents. One of the AFP's co-founders told Human Rights Watch that the majority of these documents pertained to the archives of the former General Security Directorate in Baghdad, which he and his colleagues found soon after the fall of Baghdad following a tip-off as to their whereabouts. A smaller number of documents in the AFP's collection were said to have come from a branch of the former Military Intelligence.<sup>15</sup> Initially, the AFP gave priority to scouring the many pages of documents searching for lists names of Iraqis who had been executed over the years by the Saddam Hussein government.<sup>16</sup> When Human Rights Watch visited the AFP's premises on various occasions in May and June 2003, it found scores of people with relatives missing – and presumed dead – who had come looking for confirmation of their worst fears. The fact very few political prisoners emerged alive after the fall of the government had compounded those fears. Lists of executed persons were pinned onto the walls of the AFP building, together with photographs found in the files of persons said to have been executed, in the hope that enquiring relatives could identify them. By the end of July 2003, the AFP was claiming that it had been able to confirm – largely through information extracted from the General Security Directorate archives – the execution of some 300,000 people.<sup>17</sup> At this writing, there was no independent verification of this figure.

Several other NGOs, all but one established since the 2003 war, reportedly had smaller caches of documents in their possession.<sup>18</sup> Human Rights Watch visited several of the

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<sup>14</sup> The Association of Free Prisoners comprises a group of former political detainees, Shi'a Muslims in the main, who announced their establishment as an NGO on April 11, 2004, the day after Baghdad fell to coalition forces. According to its founders, the decision for establishing the AFP and laying down their plan of action, including for the seizure of Iraqi state documents, was taken soon after the war against Iraq became imminent. In July 2003, the AFP said it had eighteen branches across Iraq, covering each of the country's governorates, together with some seventy-five members (Human Rights Watch interview with Ibrahim Ra'uf al-Idrisi, head of the Association of Free Prisoners, Baghdad, July 28, 2003).

<sup>15</sup> Human Rights Watch interview with Fattah al-Idrisi, co-founder, Association of Free Prisoners, Baghdad, February 24, 2004.

<sup>16</sup> In July 2003, the AFP had a group of some thirty volunteers working shifts to extract the lists of executed persons from the stack of documents in their possession.

<sup>17</sup> Human Rights Watch interview with Ibrahim Ra'uf al-Idrisi, July 28, 2003. The period over which these executions were said to have taken place was unclear, but is presumed to cover the 1980s and 1990s.

<sup>18</sup> According to the CPA team responsible for outreach work with local NGOs, there were some eight groups other than the AFP claiming to have varying amounts of original state archives in their possession. The majority are Baghdad-based: the Iraqi Human Rights Association; the Union of Political Prisoners; the Association for Victims of Saddam's Regime; the League of Iraqi Political Prisoners; the Independent Political Prisoners' Association; Karbala' Human Rights Watch (not related to the international organization Human Rights Watch, the publisher of this report); the Iraqi Institute of Human Rights (Kirkuk-based); and the Iraqi Prisoners of War

Baghdad-based groups during February and March 2004, and found in the main that the documents in question were either copies of originals, or had been provided them by families of missing or executed persons (such as official death certificates attesting to the execution of the persons in question). One group, the League of Iraqi Political Prisoners (*Rabitat al-Sujana' al-Siyasiyyin al-Iraqiyyin*), showed Human Rights Watch samples of what appeared to be original documents, but it was unclear what the total number of such documents was. According to the group's director, most of the documents were seized from a building used by the former Iraqi Air Force Intelligence in Baghdad.<sup>19</sup> One other NGO is known to possess significant archives, the Iraq Memory Foundation (*Mu'assasat al-Dhakira al-Iraqiyya* - IMF), a Baghdad-based group founded by Kan'an Makiya.<sup>20</sup> It currently has in its custody archives of the Ba'th Party's Regional Command, an estimated 2.5 million pages of documents, in addition to other materials.

By and large, access to Iraqi state archives in the hands of political parties and NGOs alike has remained relatively restricted – their representatives say their collections were being kept in “secure locations” elsewhere. As such, it was difficult to assess the number and type of documents, their provenance, the extent to which the chain of custody had been preserved, the conditions in which they have been kept, and the manner in which they have been handled, organized and classified. What Human Rights Watch did see and learn, however, gave rise to serious concern about the integrity of many of these documents in terms of their potential evidentiary value in trial proceedings. The complete failure to take any steps to prevent or minimize the extensive looting and wanton destruction of government buildings in those crucial early

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Association (Ba'quba-based) (Human Rights Watch discussion with Ester Luferova and Dustin Langan, CPA headquarters, Baghdad, January 12, 2004).

<sup>19</sup> Human Rights Watch discussion with Hamid Faraj Hafez, head of the League of Iraqi Political Prisoners, Baghdad, February 11, 2004. The League was established on April 30, 2003, and like the AFP, comprises a group of former political prisoners. At the time of Human Rights Watch's visit, the main activities of the group centered around giving humanitarian and other assistance to Iraqi families who could establish that their relatives had been executed by the former Iraqi government.

<sup>20</sup> The Iraq Memory Foundation has its origins in the Iraq Research and Documentation Project (IRDP), initially based at Harvard's Center of Middle Eastern Studies and, since 1999, at the Iraq Foundation in Washington, D.C. IRDP staff acquired considerable experience and expertise through their work on two major sets of Iraqi state documents: 1) the Northern Iraq Data Set, comprising some 2.4 million pages of official documents seized by Kurds during the 1991 uprising primarily from locations in the three governorates of Arbil, Duhok and Sulaimaniyya. The documents pertain to former security, intelligence, military, Ba'th Party and other state agencies, covering the activities of these agencies during the 1980s decade; and 2) the Kuwait Data Set, comprising some 800,000 pages of official documents pertaining to Iraq's 1990-1991 occupation of Kuwait and the activities of its various political and military agencies during that period. According to IRDP, it is “undertaking a detailed processing of the [documents] aimed at categorizing and organizing the wealth of materials available, making them better accessible for academic researchers and others.” The database “can be searched for keywords, personal names, and place names as they appear of screening sheets generated during the initial survey of documents.” The IRDP data collection also includes maps, photographs and audio and video materials. Much of this material is available on IRDP's website (<http://www.fas.harvard.edu/~irdp>).

days in April 2003 led to the widespread removal of state archives from government buildings by unknown individuals or groups, and which are now virtually impossible to trace. Foreign journalists covering the unfolding events in Iraq, who were frequently among the first at the scene, reportedly removed samples of documents which were then taken out of the country.<sup>21</sup>

Realization of the potential value of the archives itself gave rise to a thriving trade in the sale and purchase of documents early on, a practice which reportedly still continues. The representatives of three Iraqi political parties admitted to Human Rights Watch that they had purchased documents—in some cases on the open market, in other cases when approached by individuals hoping to make a quick sale.<sup>22</sup> One estimated that the number of documents bought through individual sales accounted for as much as forty percent of his party's total collection. Under these conditions, the likelihood of faked or forged material being injected into the documentation pool becomes very high. None of the political party representatives involved in the purchase of documents had an adequate response when asked about methods they employed to check the authenticity of documents they acquired in this manner. Hassan Mneimneh, the IMF's Documentation Director, told Human Rights Watch that "it was essentially the unvetted sale of documents, and what you got was purely a question of pot luck. In July last year the going rate was \$100 per kilo, but nowadays you could pay up to \$1,500 to \$2,500 for a few pages of documents."<sup>23</sup> He warned that as long as stocks of documents remained accessible, accompanied by market demand, the trade would continue and thereby further affecting the integrity of the state archives in terms of provenance, authenticity and chain of custody.<sup>24</sup>

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<sup>21</sup> In one case, Western journalists gave Human Rights Watch researchers in Baghdad a stack of original documents which they said they had removed from a government building in the city, prior to their departure from Iraq in June 2003.

<sup>22</sup> One ICP representative told Human Rights Watch that in the early days after the fall of the former government, his party had paid some 500,000 Iraqi dinars (about U.S.\$350 at the time) for certain files containing information about the execution of ICP members, and that as of late March 2004 the ICP was still being approached by individuals offering documents for sale.

<sup>23</sup> Human Rights Watch discussion with Hassan Mneimneh, Documentation Director, Iraq Memory Foundation, Baghdad, February 11, 2004.

<sup>24</sup> Other types of "sales" were also reported, some allegedly involving NGOs. In January 2004, an Iraqi official told Human Rights Watch that in an effort to trace information about the case of a missing person raised with him by family members, he approached the Association of Free Prisoners to carry out a search through their collection of documents. The required information was apparently found, for which the official said he was asked to pay \$1,000. When asked about this by Human Rights Watch, the AFP denied they had been involved in such transactions. In other cases, apparently original documents produced by relatives of missing or executed persons were purchased by political parties, in exchange for which they were issued with identity cards declaring them "relatives of martyrs" – with the promise of having their cases "followed up" and perhaps qualifying for material assistance. ICP representatives told Human Rights Watch in March 2004 that they had been involved in such cases.

## **Handling of Documents**

Of equal concern has been the way in which many documents have been handled. Neither political parties nor NGOs have had the requisite expertise, and in many cases the resources and tools, to handle documents in the manner most likely to ensure their evidentiary value for future trials. According to Mneimneh, documents have been wrongfully processed, reshuffled, written on, and inadvertently destroyed (such as through fire) simply because those handling them have not followed correct procedures.<sup>25</sup>

During its visit to the offices of the Association of Free Prisoners in August 2003, Human Rights Watch was shown into a garage space where thousands upon thousands of documents were piled up on top of each other in haphazard fashion, mountain-like, reaching almost to the ceiling. The floor was strewn with other documents such that anyone walking into the room would necessarily step over them. Papers from individual files had come become loose, others were torn or otherwise destroyed, and photographic materials had also become detached from their original files. The director of the League of Iraqi Political Prisoners told Human Rights Watch that “at the beginning we were naïve because we used to give original files to individuals or families who came to ask for information on missing relatives, then we realized that we were absolutely wrong and stopped giving out files. On the contrary, our policy now is trying to obtain as many documents from the families themselves.”<sup>26</sup>

At the human rights ministry in Sulaimaniyya, Human Rights Watch observed the team of workers who were in the process of sorting and categorizing documents pertaining to the former Iraqi government’s Arabization policy. Though it was a well-intentioned effort to extract relevant information from them, original files were being dismantled without having been scanned, and certain papers extracted from them and re-filed under separate categories devised by the documentation team. The original files containing these documents were discarded. Ministry staff assured Human Rights Watch that there was method to their system, and that they kept detailed records of what papers had been removed from the files, enabling them to reinsert them at a later date.<sup>27</sup> The lack of

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<sup>25</sup> Human Rights Watch discussion with Hassan Mneimneh, February 11, 2004.

<sup>26</sup> Human Rights Watch discussion with Hamid Faraj Hafez, director of the League of Iraqi Political Prisoners, Baghdad, February 11, 2004.

<sup>27</sup> Human Rights Watch discussion with Saber ‘Abdullah Karim, Documents Supervisor, Human Rights Ministry, Sulaimaniyya, February 16, 2004. Karim told Human Rights Watch that documents in PUK custody pertaining to Arabization had been seized in Kirkuk, including from the crucial Census Department (*Da’irat al-Nufus*) and the Housing Department (*Da’irat al-Iskan*). He said he was totally confident as to their authenticity because they had been taken into PUK custody immediately after the fall of Kirkuk on April 10, 2003, by PUK police brought in from Sulaimaniyya for this purpose. His account was consistent with what Human Rights Watch had already been told ten months earlier upon visiting the Census Department on April 12, 2003, to find out what

necessary expertise in the processing of documents was nevertheless acknowledged. Salah Rashid, the PUK's human rights minister, told Human Rights Watch: "The problem is that we are not a scientific institution capable of the study and analysis of documents. I have spoken to the German foreign ministry about assistance in this regard, but they said they were not prepared to work with the Americans. The solution is for us to send Kurds to Germany for training there."<sup>28</sup>

During discussions held with representatives of political parties as to how documents in their custody were being managed, Human Rights Watch was also told that there was a certain amount of "exchange" of files taking place between them. This applied in particular to documents containing information about arrests and executions of political activists belonging to the various political parties. The extent to which there was method to those types of exchanges, including the supervision of the document transfers and the keeping of detailed records in order to preserve the chain of custody, remains unclear.



Documents held by the Iraq Memorial Foundation in Baghdad. © 2003 Eric Stover/Human Rights Watch

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had happened to the archives being kept there. Department employees had said that PUK personnel had already been there and had removed all post-1957 files relating to Sulaimaniyya governorate.

<sup>28</sup> Human Rights Watch discussion with Salah Rashid, Minister of Human Rights, IDPs and the Anfal, Sulaimaniyya, January 22, 2004.

Among the groups holding significant state archives in their custody, only the Iraq Memory Foundation appeared to have the requisite experience and expertise for their management, based on its staff's previous work on both Iraqi state archives seized during the 1991 uprising in Iraqi Kurdistan and those relating to Iraq's 1990-1991 occupation of Kuwait. Human Rights Watch visited the site where the IMF's archives were being kept, and was told that all the documents found on the original site had been removed under supervision, kept in their original condition, and filed in the same order in which they had been found. There were strict instructions that their contents remain untouched, the intention being that they would only need to be handled once during the scanning process.<sup>29</sup> By February 2004, the documents had been in IMF custody for some six months, but no work had been done on them due to lack of resources.

The IMF told Human Rights Watch it had repeatedly appealed to both U.S. and CPA officials for funding to support their work, but despite early expressions of interest no such support came through.<sup>30</sup> In August 2003, the IMF publicly called for the formation of a document collection task force in collaboration with the CPA to determine status and agree on approaches, the unification of norms and standards in document processing, and a centralization of document tagging and scanning efforts.<sup>31</sup> It proposed its management services and the sharing of its expertise in this field, particularly as regards the preservation of archives, the establishment of protocols for document selection, and the devising of classification schemes – along lines similar to work already done on the North Iraq Dataset and the Kuwait Dataset. The CPA declined to join forces with the IMF and elected to set up an alternative institution – with functions and goals akin to those of the IMF – to “memorialize” the victims of the former Iraqi government's repressive policies.<sup>32</sup>

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<sup>29</sup> Human Rights Watch discussion with Kan'an Makiya and Hassan Mneimneh, Iraq Memory Foundation, Baghdad, February 11, 2004.

<sup>30</sup> By contrast, the CPA did support groups like the Association of Free Prisoners through funding (via USAID) for the purchase of computer equipment and furnishings for their premises.

<sup>31</sup> The Iraq Memory Foundation, “A Call for a Centralized Approach in the Collection and Classification of Iraqi Official Documents”, August 7, 2003.

<sup>32</sup> Coalition Provisional Authority Order Number 82: Iraqi National Foundation for Remembrance, signed into force by Paul Bremer on April 28, 2004. Section 1 of Order No. 82 states the purpose 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 preserve an open and democratic government which protects human rights, fundamental freedoms and dignity.” The Foundation is tasked with 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” (Section 2(4)). A sum of U.S. \$ 10 million was reportedly allocated by the CPA for the establishment of the Remembrance Foundation.

As with the state archives currently in the custody of the U.S.-led Iraq Survey Group based in Qatar, little is known of the work already undertaken by the CPA, before it was formally dissolved on June 28, 2004, on the processing of documents in its custody in Baghdad. In July 2003, CPA officials told Human Rights Watch of plans to establish a Bureau of Missing Persons that they would initially manage and then hand over to the Iraqis. The function of the Bureau would be to establish a database of missing persons from information received from a wide variety of sources, including state archives and physical evidence.<sup>33</sup> Approaches to the International Commission on Missing Persons (ICMP) to assist in establishing the Bureau was met with a lukewarm response, according to CPA officials, which then requested the International Committee of the Red Cross (ICRC) to play a lead role in this regard.<sup>34</sup> There were also plans to set up a Central Evidence Warehouse that would house both documentary and physical evidence relating to serious past crimes of the Saddam Hussein government.

The following month, in August 2003, the CPA told Human Rights Watch that discussions with the IGC were held regarding the creation of a National Archive where the documents would be housed long-term, with the establishment of a consortium of local NGOs and foundations to take a lead role in managing it. The CPA said they had also proposed seeking the assistance of international experts to assist Iraqis in the process of evidence gathering and analysis, there being “virtually no investigative capacity in the country.”<sup>35</sup>

### ***Role of the CPA***

Six months later, in February 2004, only limited progress had been made on these fronts. The CPA told Human Rights Watch that it was still “working on developing a bureau of missing persons with the [Iraqi] Ministry of Human Rights,” which is now charged with

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<sup>33</sup> Human Rights Watch discussion with Sandy Hodgkinson, CPA, Baghdad, mid-July 2003.

<sup>34</sup> The International Commission on Missing Persons (ICMP), headquartered in Sarajevo, is an intergovernmental organization created in 1996 to address the issue of persons missing as a result of the conflicts in Bosnia and Herzegovina, the Republic of Croatia, and Serbia and Montenegro in the period 1991-1995. It subsequently expanded its operations to include cases of persons missing during the 1999 conflict in Kosovo and the conflict in Macedonia in 2001. The ICMP “endeavors to secure the cooperation of Governments and other authorities in locating and identifying persons missing as a result of armed conflict, other hostilities or violations of human rights and to assist them in doing so,” and “maintains contacts with other countries that have large numbers of missing persons”, including Iraq. The organization’s Forensic Science Department has primary responsibility for “developing, implementing and managing the technical process of assisting governments in exhumations, examinations and identifications of persons missing as a result of violent conflicts,” while its Civil Society Initiatives Department encourages “effective management of family members and other members of civil society, in the representation of their interests and in advocacy activities geared towards achieving more effective resolution of the missing persons’ issue.” Information about the ICMP’s activities can be found on its website (<http://www.ic-mp.org>).

<sup>35</sup> Human Rights Watch discussion with Sandy Hodgkinson, CPA, Baghdad, August 14, 2003.

this responsibility.<sup>36</sup> A warehouse had been found to house the documentary and physical evidence but funding it remained a problem. No further progress had been made regarding the creation of a National Archive. However, in apparent recognition of the potential value of state archives being held in non-U.S. hands, namely Iraqi political parties and local NGOs, the CPA had by this time increased its efforts to ensure that these archives be housed under one roof, and was working towards making the Iraqi human rights ministry act as the central repository.<sup>37</sup> The CPA told Human Rights Watch that the IGC would be issuing a request for the documents, and although “it has not been put in writing, a request has already been made by the human rights minister.”<sup>38</sup>

Human Rights Watch obtained a copy of a letter addressed to the IGC, dated December 30, 2003, and signed by the then Human Rights Minister, ‘Abd al-Baset Turki Sa’id. In it, the minister underscores the importance of gathering state archives “within a legal framework” and requests the IGC to consider the enactment of an order requiring NGOs and other groups known to possess sizeable state archives to hand them over to his ministry or face criminal penalties for non-compliance. A draft Order was attached to the minister’s letter for the IGC’s consideration, Article 3 of which provided for “imprisonment not exceeding seven years and not less than five years, and of fines not exceeding ten million Iraqi dinars and not less than five million Iraqi dinars” for persons who refuse to hand over state archives or who participate in or incite such action, and that the more severe penalty will apply if such actions result in the loss or destruction of the documents.

Copies of this letter were sent out to the relevant NGOs, whose representatives told Human Rights Watch they had either made strong protests about it or had decided to ignore it. Some objected to the choice of the human rights ministry as the central repository, while others did not want to participate in such a scheme under the aegis of the CPA, and preferred to wait until a sovereign Iraqi government was in place. Officials of political parties with their own state archives collections told Human Rights

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<sup>36</sup>Human Rights Watch discussion with Sandy Hodgkinson, CPA, Baghdad, February 12, 2004. Hodgkinson said the CPA had discussed with ICRC the question of access to its data on missing persons in Iraq, but that ICRC only kept such data in connection with those missing from the Iran-Iraq conflict and the Kuwait conflict, and had no data on the “internally disappeared”.

<sup>37</sup> Ibid. In addition to official state documents seized during the 1991 uprising, the CPA told Human Rights Watch it had also received documents and other information already gathered by INDICT, a London-based organization formed in 1996 to campaign for the establishment of an ad hoc international criminal tribunal for Iraq, which had agreed to hand over files and evidence it had collected. The CPA said that similar arrangements were being made with British parliamentarian Baroness Emma Nicholson regarding information gathered on Iraq’s southern marshes region through the organization which she founded, the Amar Appeal.

<sup>38</sup> Ibid.

Watch that they had not received such a letter and were not aware of its contents. The CPA, for its part, acknowledged that this had probably not been the most effective approach to have taken, but that they would continue to push for a law regulating the possession and use of state archives, and which may still provide for criminal penalties for non-compliance.<sup>39</sup> At this writing, no such law had been enacted.

CPA officials closely involved with the preparation of documentary evidence said in February 2004 that despite a series of setbacks further attempts to negotiate access with NGOs and political parties to the state archives in their possession would continue, and that “if we come up with an understanding that they will make the documents available to us then that will be an achievement.”<sup>40</sup> They also confirmed that accessing funds from the Supplemental Budget approved by the U.S. Congress for their projects had contributed to slowing down progress, and that most of the work done up to February 2004 had been funded by USAID.<sup>41</sup> A USAID representative told Human Rights Watch that since September 2003, funds had been provided for the building of a secure facility for the housing of state archives and the hiring of relevant staff.<sup>42</sup> The appropriation from the supplemental funding had enabled a documentation pilot project to begin, involving the setting up of a basic database, and the hiring by January 2004 of an evidence custodian with prior experience working on documentation in the context of both the ICTY and ICTR. Peter Boyles, the evidence custodian, told Human Rights Watch in mid-February 2004 that his aim was to enable the scanning of one million pages of documents per month, and that the state archives would be approached selectively, giving priority to those documents most pertinent to the forthcoming trials. He underscored the importance of the Iraqi Special Tribunal having access to remaining original documents as the earliest possible opportunity, given concerns about issues relating to authenticity and chain of custody.<sup>43</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Human Rights Watch discussion with Philip Trewhitt, formerly U.K. Liaison on Transitional Justice, CPA, Baghdad, February 12, 2004. The CPA held a meeting in mid-February 2004 with representatives of NGOs and political parties for this purpose, aimed at agreeing on a set of recommendations that would be presented to the IGC for consideration. Human Rights Watch was later told by some of those who participated that the meeting failed to result in such agreement. Trewhitt said that the CPA had been trying since August 2003 to secure agreement with NGOs and political parties on the documents but had received little cooperation. Such attempts included the hosting of a conference held in November 2003 under CPA auspices to discuss the documents but, according to Trewhitt, “political parties never showed and the NGOs came and gave their comments and left”.

<sup>41</sup> On November 6, 2003, President George W. Bush signed into law H.R. 3289, the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004. Totalling \$87 billion, the amount earmarked for Iraq’s reconstruction was set at \$20.3 billion, of which \$300 million was requested for “Rule of Law” efforts, elections, and government operations.

<sup>42</sup> Human Rights Watch discussion with Karen Hanrahan, USAID, Baghdad, February 4, 2004.

<sup>43</sup> Human Rights Watch discussion with Peter Boyles, CPA, Baghdad, February 12, 2004. On the processing of documents, Boyles said that lessons had been learned from the ICTY experience, where state documents had

By late March 2004, however, U.S. Justice Department officials were still saying that decisions had yet to be made as to how to approach the processing of Iraqi state documents—in other words, whether to adopt the “ICTY approach” of going through all documentation available, or whether a more “strategic approach” involving heavier reliance on identifying and prioritizing documents that might prove pertinent for prosecutors in building cases against the defendants: “We need to go out and assess the documents with translators, the official said. “We need to be very strategic about new documentation and what we use.”<sup>44</sup> Additionally, information that other governments may possess, such as satellite imagery, still needed to be sought. The officials expressed optimism that the newly created Regime Crimes Liaison Office (RCLO – see below) would begin making real progress on the preparation of documentary and other evidence for trials before the Iraqi Special Tribunal. By mid-June 2004, the document processing site in Baghdad had been set up and a consultant hired by the RCLO to identify various software packages that could be used for the scanning, indexing and case tracking of documents. The labeling of key documents had also begun, and RCLO officials were hopeful that the processing of state documents would begin in earnest by mid-July.

Human Rights Watch understood that the RCLO planned to carry out pre-screening of documents before taking them in its custody, but at that point no language assistants had been hired for either the pre-screening or screening stages. In late July 2004, RCLO Adviser Greg Kehoe told Human Rights Watch that the document scanning process had begun, with a team of some fifteen persons going through the many documents on a daily basis. The “biggest challenge,” he said, remained that of identifying which entities possessed state archives. He said that efforts were being made to meet with the various groups with archives in their possession in an effort to have the documents placed under one roof.<sup>45</sup>

#### **IV. The Forensic Evidence**

Lessons learned from the former Yugoslavia, Rwanda, and other countries which have experienced large-scale atrocities suggest that mass graves investigations can be fraught

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been scanned wholesale without prioritization: “At the beginning ICTY used to scan 25,000 pages a month. Now ICTY scans 75,000 pages a month, but still that means that not more than 60-70% of documents have been indexed until now”.

<sup>44</sup> Human Rights Watch discussion with Department of Justice officials, Washington, D.C., March 26, 2004.

<sup>45</sup> Human Rights Watch discussion with Greg Kehoe, RCLO Adviser, Baghdad, July 22, 2004.

with tremendous logistical, scientific, humanitarian, and legal challenges.<sup>46</sup> Any nationwide program to exhume mass graves in Iraq must satisfy the evidentiary needs of criminal trials and the humanitarian needs of the families of the missing. This is why it is crucial that the Interim Iraqi Government establish a *joint* Iraqi-International Commission for Missing Persons to supervise and coordinate the tracing of missing persons as well as the exhumation of mass graves throughout Iraq. A joint Iraqi-International Commission will be able to attract the necessary funding, scientific expertise, and training needed to carry out this highly complex task. It should also develop a comprehensive strategy aimed at producing court-admissible evidence while responding to the desires of communities that wish to have the remains of their loved ones returned for proper burial.

During the past thirty years, the government of Saddam Hussein engaged in three wars and numerous campaigns to repress the Kurdish, Shi'a, and Marsh Arab populations, resulting in the disappearance—and, most certainly, the deaths—of between 250,000 and 290,000 people.<sup>47</sup> By February 2004, the Combined Forensic Team of the Coalition Provisional Authority (CPA) had collected information on 259 mass graves in Iraq. Of these, U.S. military criminal investigation teams had conducted preliminary assessments of fifty-five sites by February 2004.<sup>48</sup>

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<sup>46</sup> Eric Stover and Rachel Shigekane, "The missing in the aftermath of war: when do the needs of victims' families and international war crimes tribunals clash?" *International Review of the Red Cross*; 2002:848:845-865.

<sup>47</sup> See George Black, *Iraq's Crime of Genocide: the Anfal Campaign against the Kurds* (New Haven, Connecticut: Yale University Press), and Human Rights Watch, *Justice for Iraq: A Human Rights Watch Policy Paper*, December 2002. The estimate of 290,000 "disappeared" and presumed killed includes the following: more than 100,000 Kurds killed during the 1987-88 Anfal campaign and lead-up to it; between 50,000 and 70,000 Shi'a arrested in the 1980s and held indefinitely without charge, who remain unaccounted for today; an estimated 8,000 males of the Barzani clan removed from resettlement camps in Iraqi Kurdistan in 1983; 10,000 or more males separated from Feyli Kurdish families deported to Iran in the 1980s; an estimated 50,000 opposition activists, including Communists and other leftists, Kurds and other minorities, and out-of-favor Ba'athists, arrested and "disappeared" in the 1980s and 1990s; some 30,000 Iraqi Shi'a men rounded up after the abortive March 1991 uprising and not heard from since; hundreds of Shi'a clerics and their students arrested and "disappeared" after 1991; several thousand marsh Arabs who disappeared after being taken into custody during military operations in the southern marshlands; and those executed in detention—in some years several thousand—in so-called "prison cleansing" campaigns.

<sup>48</sup> The CPA Combined Forensic Team consists of a physical anthropologist, forensic archeologist, and archeologist. The CPA has received forensic assistance from several governments and private, nonprofit forensic teams dedicated to investigating violations of human rights and international humanitarian law. Human Rights Watch interview with Jon Sterenberg, Archeologist, Combined Forensic Team, Coalition Provisional Authority, Baghdad, February 24, 2004.



Identity documents of a woman and her two children found in a mass grave near Mosul that is believed to contain the remains of hundreds if not thousands of Kurdish women and children executed by Iraqi forces in September 1988. © 2003 Eric Stover/Human Rights Watch

Mass grave sites in Iraq have been located as far north as Mosul and as far south as Basra, and some sites are believed to contain thousands of victims of extrajudicial executions. Burial sites of individual victims have been located in cemeteries near prisons or on the grounds of security headquarters throughout Iraq. Most of the graves uncovered so far have contained Iraqi victims, but other graves may also hold the remains of Iranian and Kuwaiti soldiers who were executed while in Iraqi custody. For example, in December 1991, a forensic team with Human Rights Watch and Physicians for Human Rights uncovered the graves of nineteen Iranian soldiers on the grounds of the Sardaw military base near Sulaimaniyya.<sup>49</sup> After examining the remains, the forensic experts found several skulls with evidence of single gunshot wounds.

<sup>49</sup> See Eric Stover, *Unquiet Graves: The Search for the Disappeared in Iraqi Kurdistan*, Middle East Watch, a division of Human Rights Watch, and Physicians for Human Rights, March 1992. In spring 1985, two years before the base was built, a group of Kurdish secondary students found the bodies exposed on the slopes of Saywan Hill. Some of them were still in uniform. The students notified local residents, who called the municipality, which, in turn, dispatched a local gravedigger, Sadiq 'Issa, to dispose of the bodies. Essa told the forensic team that many of the bodies had intravenous needles in their forearms. He speculated that they were captured Iranian soldiers who had been hospitalized by the Iraqis and then later executed in retaliation for an Iranian attack, which was a common practice during the Iraq-Iranian War. "I could see some of them had been

## **Secrecy and Witnesses**

The secrecy under which the Iraqi military and police conducted burials in Iraq means it will be impossible for investigators to locate all the graves. When graves are located, it will be difficult in many instances to determine the identity of the victims because Iraqi military and police abducted people in one part of the country and often transferred them to other areas, sometimes up to hundreds of kilometers away, for interrogation and execution. The passage of time and burial conditions have also caused remains to deteriorate and, in some cases, to disintegrate. This situation is further compounded by the fact that documents belonging to the police and security forces were destroyed during the war and subsequent looting (see above). Some of these documents may have contained valuable information about the circumstances surrounding mass burial sites.

What little is known today about the mass graves in Iraq has come from individual Iraqis who miraculously survived mass executions, witnessed killings, or came across freshly dug graves in the course of their daily activities. In September 2003, a shepherd led ‘A’id Rashid ‘Ido, a lieutenant in the Iraqi Civil Defense Corp (ICDC), to two mass graves located in the al-Jazeera desert west of Mosul. The witness was unsure of the exact month, but he recalled discovering the graves sometime in 1988, shortly after he observed Iraqi military and civilian vehicles transporting what appeared to be Kurdish women and children on the road that passes his village. Lt. Rashid ‘Ido took Human Rights Watch researchers to the site on February 24, 2004, where they found toys, children’s clothing, and remnants of clothing traditionally worn by Kurdish women. Several skulls retrieved from the grave revealed single, gunshot wounds to the head. The witness said he believed one of the graves may contain as many as 3,000 victims.<sup>50</sup>

Similarly, Haj Khalid Rasul al-‘Am, the director of the cemetery department of Baghdad governorate, directed Human Rights Watch to a graveyard in a walled-off section of the al-Karkh cemetery, located close to the notorious Abu Ghraib prison compound near Baghdad. According to Khalid Rasul, the burial site contains approximately 1,000 numbered graves of execution victims. He told Human Rights Watch how he secretly began to document cases of execution victims to assist future identification:

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shot in the head,” he said. “And on some of them I found identification papers and even photographs of their families. I placed these things in glass jars and, as I buried them, I placed the jars between their legs.” The International Committee of the Red Cross turned over the remains of the Iranian soldiers to the Iranian authorities in 1992.

<sup>50</sup> HRW examined three of the ID cards recovered from the site; one bore the photograph of a woman, the two others of young children. All three were Kurds from the Dokan region, northeast of Sulaimaniyya. Months prior to the HRW visit, the ICDC and a team with the Criminal Investigation Division of the U.S. Armed Forces Institute of Pathology had made separate incursions into one of the graves. Among the objects recovered were toys, remnants of clothing typically worn by Kurdish women and children, and several Iraqi identification cards.

I started work on January 1, 1987. At the beginning, I was surprised when [the security organizations] brought a group of hanged prisoners from Abu Ghraib [prison]. They buried them in a bad way, without tradition, just throwing them in a grave. ...I felt guilty because we were burying those people without the knowledge of the families. I started taking the ribbons off their arms and numbering the graves, and put the [grave] numbers on their death certificates. I was hoping that one day the families would come asking for their bodies and I could give them the death certificate with the grave numbers.<sup>51</sup>

Between 1987 and 2003, the cemetery director registered 993 execution victims buried at al-Karkh. He estimated that the vast majority of the deceased were victims of political persecution. One of the bodies located in the graveyard was that of a brother of Human Rights Watch's translator. The brother had been a military officer and was executed for his alleged involvement in a coup attempt against the government.

In May 2003, Iraqis began exhuming graves that they believed to hold the bodies of those who had disappeared during the rule of Saddam Hussein. This chaotic process took place in over a dozen communities throughout Iraq, and was often observed by U.S. and U.K. forces that chose not to intervene to halt the diggings because they feared it would cause disturbances.<sup>52</sup> "We didn't want U.S. soldiers stopping grieving mothers from getting access to the graves of their children," CPA senior human rights adviser Sandy Hodgkinson told Human Rights Watch. "It would not have been a good image of U.S. occupiers or for the healing process."<sup>53</sup>

In fact, very few Iraqis found the graves of their children, in significant part because of the failure of the U.S.-led coalition to secure the sites and provide assistance with exhumations. At two sites located near the al-Mahawil military base just north of the southern city of al-Hilla, U.S. soldiers watched for several days in May 2003 as villagers used a backhoe to dig up the remains of more than 2,000 bodies, gouging and commingling countless skeletons in the process, while some families used their hands to dig for bones and shards of clothing and carted them away in wheelbarrows and buckets. The unprofessional manner in which the graves were unearthed made it impossible for many relatives of the missing to identify many of the remains, or even to keep the

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<sup>51</sup> Human Rights Watch interview with Haj Khalid Rasul al-'Am, Baghdad, June 16, 2003.

<sup>52</sup> Human Rights Watch, *The Mass Graves of Al-Mahawil: The Truth Uncovered*, Vol. 15, No. 5 (E), May 2003.

<sup>53</sup> Human Rights Watch interview with Sandy Hodgkinson, Senior Adviser on Human Rights, Coalition Provisional Authority, Baghdad, February 12, 2004.

remains intact and separate. At the end of the process, more than one thousand remains were again reburied without being identified. In the absence of forensic experts, crucial evidence necessary for future trials was never collected, and may have been irreparably destroyed.<sup>54</sup>

A similar incident took place on May 7, 2003, when a twenty-year-old shepherd took local residents to an open clearing known as al-Birjisiyya, thirty miles south of Basra, where he said Ba`th Party members had executed dozens of men during the al-Sadr uprising of 1999.<sup>55</sup> Using a backhoe, residents unearthed thirty-four bodies from the site and took them to the al-Jumhuriyya mosque. When Human Rights Watch researchers visited the mosque on May 13, some of the remains were commingled and incomplete. Relatives claimed to have identified twenty-nine sets of remains based on identification cards found in the grave or by relying on clothing, jewelry, or a favorite brand of cigarettes. Forensic scientists refer to this type of identification as “presumptive identification.” Because such items as clothing and jewelry can be exchanged or misplaced by those taken into custody, this mode of identification is given less credence than scientific methods that search for unique biological characteristics on the skeleton that can be compared to an individual’s medical and dental records or subjected to DNA analysis. It is likely that some families may have misidentified remains because they were convinced their relatives were buried at the al-Birgisia site.

In some instances, Iraqis have called on the Iraqi Red Crescent to exhume graves. In April and May 2003, the Iraqi Red Crescent in Kirkuk exhumed two mass graves allegedly containing the victims from the 1991 Kurdish uprising. In all, the Red Crescent workers recovered eighty-one bags of remains from the two sites and transported them to the morgue at the Azadi hospital in Kirkuk. Morgue officials told Human Rights Watch that thirty-six individuals had been identified by families based on identification cards and clothing found in the graves. On February 2004, Human Rights Watch researchers examined the unclaimed bags of remains in a back room of the morgue. Many of the bags contained the remains of one or more skeletons and several had fallen on their side, strewing bones across the concrete floor.

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<sup>54</sup> Human Rights Watch, *The Mass Graves of Al-Mahawil: The Truth Uncovered*, Vol. 15, No. 5 (E), May 2003.

<sup>55</sup> Marc Santora, “Mass Grave is Unearthed Near Basra,” *New York Times*, March 11, 2003.



Skull of a woman with a single gunshot wound, mass grave near Hadhar, south of Mosul. © 2003 Eric Stover/Human Rights Watch

Experience in Iraq has shown that when families of the missing, and even whole communities, are informed that a more professional and orderly manner of exhuming graves will result in a higher number of positive identifications, they generally have been willing to stop their own exhumations and wait for outside forensic assistance. Residents of al-Najaf stopped exhuming a mass grave in June 2003 after a representative of the International Committee of the Red Cross (ICRC) visited the site with a group of religious leaders. Three weeks later, the ICRC sent the religious authorities a report containing a list of steps the community could take to preserve the over 200 remains already exhumed. It also pledged to supply the community with materials and equipment to complete the exhumation process. However, after the bombing of ICRC headquarters in Baghdad on October 27, 2003, the organization pulled its international staff out of the country and suspended its initiative to support community capacity building to exhume mass graves in Iraq.<sup>56</sup>

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<sup>56</sup> Radio Free Europe, "Iraq: 34 Reported Killed in Baghdad Bombings," October 27, 2003.

In Kurdish areas of northern Iraq, officials with local government committees dedicated to mass graves investigations told Human Rights Watch in February 2004 that, as a matter of policy, they have restrained bereaved relatives from digging up suspected graves of the missing.<sup>57</sup> However, they also added that they had grown impatient with the CPA and nongovernmental organizations for having not fulfilled their promises made soon after the end of the war to provide forensic assistance and long-term training.<sup>58</sup> If assistance was not forthcoming, the officials said, they would proceed with their own exhumations.

### **Forensic Investigations**

Why exhume the mass graves in Iraq? First, forensic exhumations can assist prosecutors in bringing those responsible for these crimes to justice. Second, as disappearances are an ongoing crime, the government has an obligation to investigate and inform families of the fate or whereabouts of the “disappeared.” Finally, from a humanitarian perspective, at least some of the families will know the fate of their loved ones and be able to give them a proper burial. Forensic exhumations can help reconfirm the dignity of the victims and the value of human life, which in turn can help the families and their communities restore a sense of personal and social well-being.<sup>59</sup> Third, the process of investigation and documentation can help create a historical record of past crimes.

In the context of mass graves investigations, physical evidence encompasses the bodies of the murder victims, the *corpus delicti*, and any artifacts, such as projectiles, that may be recovered in or around the grave. In essence, forensic experts corroborate witness and documentary evidence by identifying victims—this may be a general identification, e.g. Kurdish, or a specific identification, e.g. John Doe—of mass killings and determining the cause and manner of death. If the charges entail genocide and crimes against humanity, they also look for patterns in the mayhem: Did the victims belong to a particular ethnic or religious group? What methods did the killers use to dispatch their

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<sup>57</sup> Human Rights Watch interview with Mansour Hama Karim, Director, PUK Commission of Southern Area Mass Graves, February 17, 2004 and Nermine Qaradaghi, KDP Deputy Minister of Human Rights on February 19, 2004. Kurdish officials have visited numerous suspected mass graves sites since May 2003. These teams usually probed a site with shovels and picks to determine if it contains human remains, but, by and large, they left it intact.

<sup>58</sup> The CPA Combined Forensic Team has given two training sessions since May 2003, lasting no more than three days. Several participants who attended the first training session in November 2003 said it was useful as a general introduction to forensic archaeology and anthropology but provided little practical knowledge on how to exhume graves and identify skeletal remains.

<sup>59</sup> William D. Haglund, “Recent Mass Graves, An Introduction,” in William D. Haglund and Marcella H. Sorg (eds.), *Advances in Forensic Taphonomy: Methods, Theory, and Archaeological Perspectives* (Boca Raton, Florida: CRC Press, 2002), p. 245.

victims? Were the methods similar at different execution sites? Did the killers make an effort to cover their tracks?

Past experience in several countries suggests that evidence from mass graves can fulfill several evidentiary needs in proving serious international human rights or humanitarian law crimes. First, forensic investigations can help locate and identify missing enemy combatants (in the case of Iraq, this would primarily involve Iranian and Kuwaiti combatants) and determine whether they died in battle or were the victims of war crimes. Second, forensic investigations of mass graves can help uphold a charge of genocide, which requires that the prosecution prove that the alleged perpetrators committed acts with the intent “to destroy, in whole or in part, a national, ethnic, racial or religious group.”<sup>60</sup> As such, particular persons became victims because of how they were perceived by the perpetrators. A forensic investigation will then focus on ascertaining the “categorical identification” of the dead, such as the victims’ ethnicity, religion or race, and the cause and manner of death.

This approach was applied successfully in the ICTY’s prosecution of Radislav Krstic, the Bosnian Serb commander of the Drina Corps who was convicted in 2001 of genocide against the Bosnian Muslim population during the siege of the eastern Bosnian town of Srebrenica six years earlier.<sup>61</sup> During the pre-trial investigation, forensic experts exhumed a series of mass grave in the hills surrounding Srebrenica and found they contained the remains of hundreds of Bosnian Muslim men, many of whom bore blindfolds and ligatures and wounding patterns consistent with execution-style killings.

Finally, forensic scientists can help prosecutors determine if a series of mass killings constitutes a “crime against humanity,” which encompasses a wide range of acts—mass murder, extermination, enslavement, deportation, rape, torture—committed against civilians on a large scale.<sup>62</sup> Forensic exhumations and postmortem examinations can corroborate witness testimony and documentary evidence by determining if the victims of mass killings were civilians, determining how they had died, and, if the accused is a high ranking military or civilian official, by demonstrating, for example, that the

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<sup>60</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277, adopted Resolution 2670 (III) A of the General Assembly of the United Nations on 9 December 1948, Article 2, entered into force on 12 January 1951.

<sup>61</sup> See *The Prosecutor v. Radislav Krstic: Judgment and Sentence*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-98-33, August 2, 2001.

<sup>62</sup> The term originated in the Preamble to the 1907 Hague Convention, which codified the customary law of armed conflict. In 1945, the United States and its Allies incorporated it in the Nuremberg Charter. See *The Charter of the International Military Tribunal*, annexed to *The London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, of August 8, 1945, Article 6.

systematic and widespread nature of the killings suggested they had been planned in high places. In such cases, prosecutors do not need to prove every single murder, or every single massacre, but they do need to confirm a pattern of killing and destruction directed against civilians or those otherwise protected under the Geneva conventions.

Investigation of the graves of the missing in Iraq will be a formidable undertaking, fraught with logistical, humanitarian, and legal challenges. These complex investigations require multi-disciplinary teams, long-term planning, and substantial financial and logistical support. To exhume even a few mass graves will require millions of U.S. dollars and possibly tens of millions if a comprehensive DNA-led strategy is pursued. In this regard, experiences in the former Yugoslavia and Rwanda are instructive.

Since the establishment of two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda in the 1990s, only a small fraction of the remains of the missing have been identified and returned to families for proper burial. By 1999, dozens of forensic scientists from twenty countries had traveled to the former Yugoslavia republic to investigate the whereabouts of the missing on behalf of the International Criminal Tribunal for the former Yugoslavia (ICTY) and to train local scientists in the procedures of unearthing mass graves.<sup>63</sup> While these investigations produced significant court-admissible evidence, they were less successful in identifying the dead. When peace came to Bosnia in 1995, 30,000 people were missing. By June 2003, after eight years' work by dozens of full-time forensic specialists, about 15,000 bodies had been exhumed and around 9,000 (thirty percent) identified. DNA analysis has contributed to about 3,000 of these identifications.<sup>64</sup>

In Rwanda, the sheer number of dead (estimated between 500,000 and 800,000) has made it virtually impossible for the country's government or the International Criminal Tribunal for Rwanda (ICTR) to undertake large-scale forensic investigations.<sup>65</sup> Indeed, out of nearly 500 individuals examined from exhumations in the eastern town of Kibuye in 1995, only seventeen were identified. Six carried identifying documents and eleven more had clothing or personal effects recognizable to acquaintances. None had hospital X-rays or dental records. For only two of the victims could surviving blood relatives be

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<sup>63</sup> Eric Stover and Rachel Shigekane, "The missing in the aftermath of war: when do the needs of victims' families and international war crimes tribunals clash?" *International Review of the Red Cross* (2002) 848:845-865.

<sup>64</sup> Stephen Cordner and Robin Coupland, "Missing people and mass graves in Iraq," *The Lancet* (2003) 362:1325-1326.

<sup>65</sup> See the *Prosecutor v. Jean Kambanda: Judgment and Sentence*, International Criminal Tribunal for Rwanda, Case No. ICTR 97-23-S, September 4, 1998.

located. Soon after the Kibuye exhumation, the Rwanda tribunal ended its forensic program.<sup>66</sup>

The experience of the international tribunals points to a tension between the identification by category needed for criminal prosecution and the personal identification desired by families and loved ones, a tension that is exacerbated by the much greater resources required for the latter. The absence of identifiable physical remains greatly impedes the ability of families to accept and to commemorate properly the death of missing relatives. For this reason, the Iraqi authorities and the international community need to make resources available to ensure that at the very least exhumations are conducted in a commemorative manner, as a key dimension of social reconstruction in the aftermath of the trauma of mass killings. The authorities need to work with community leaders and families to help them address their loss in a way that accords them and their missing loved ones status and dignity.

### ***Security and Limited Resources***

War and subsequent looting of Iraq's medical facilities has left its medicolegal system in shambles.<sup>67</sup> The forensic facility in southern city of Basra, for instance, was completely looted following the war, leaving it without plumbing and electricity. While Iraq has well-trained and dedicated forensic pathologists, it has no forensic anthropologists. Similarly, while Iraqi archeologists, numbering around 160, are skilled at historical excavations involving mainly artifacts, they have no forensic experience.<sup>68</sup> Iraqi medical professionals and forensic scientists have traditionally identified the dead through circumstantial evidence, including visual recognition of the body or presence of identity documents in the clothing of the deceased. As a result, Iraq has no procedure in place for collecting and preserving antemortem dental documentation or medical radiographs that are often vital for identification of skeletal remains.<sup>69</sup> Iraq also does not have the capacity to conduct DNA analysis of bone and teeth, which, when compared with blood samples collected from relatives of victims, can lead to positive identifications. It is

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<sup>66</sup> See Eric Stover and Molly Ryan, "Breaking Bread with the Dead," *Historical Archeology* (2001) 35:7-25.

<sup>67</sup> The Medico-Legal Institute in Baghdad oversees the work of provincial morgues throughout the country. By and large, these institutions confine their work to autopsies on bodies brought to them by the police and thus have little, if any, experience in crime scene investigation. The Baghdad Medico-Legal Institute has not received new equipment since the late 1980s. Since the end of the war, the institute has had to deal with an upsurge of firearm-related deaths. In the six months before the war, the institute documented approximately ninety-six such deaths. By August 2004, the number had risen to 518 per month (Human Rights Watch discussion with Dr. Fa'eq Amin Bakr, Director, Medico-Legal Institute, Baghdad, February 23, 2004.)

<sup>68</sup> Human Rights Watch interview with 'Abd al-Rahman Muhammad 'Ali, Director of Archeological Investigations, Archeology Directorate, Baghdad, February 4, 2004.

<sup>69</sup> Eric Stover and Molly Ryan, "Breaking Bread with the Dead," *Historical Archeology*, 2001;35:7-25.

unlikely, based on experience in Bosnia and elsewhere, that even one-fourth of the missing persons exhumed from Iraq's mass graves will be positively identified using forensic techniques including DNA analysis.

Iraq's capacity to investigate suspected mass graves has also been undermined by the ICRC's withdrawal from the country in October 2003.<sup>70</sup> Prior to its departure, the ICRC and the Medico-Legal Institute in Baghdad were working on a training program in forensic anthropology for Iraqi pathologists and physicians. The ICRC had also developed a plan to assist local Iraqi communities conduct basic, community-led exhumations.<sup>71</sup> The ICRC intends to re-instate these programs once the security situation allows the organization to return international staff to Iraq.

In the summer of 2003, the CPA's three-person forensic unit developed a five-step "Mass Graves Action Plan." Step One focused on raising public awareness about the necessity of preserving graves so that they could be exhumed in an orderly and professional manner. Step Two entailed the dispatching of international forensic teams to conduct preliminary assessments of graves. Step Three sought to secure several mass graves for full-scale forensic investigations, although by February 2004 only a few of these sites were under twenty-four-hour guard. Step Four envisioned the training of local archeologists and health professionals to conduct exhumations and cursory post-mortem examinations. In November 2003, the CPA forensic unit conducted a three-day training seminar in Baghdad for representatives of nongovernmental organizations and university scientists and archeologists on the forensic investigation of mass graves. The forensic unit held a follow-up seminar in Sulaimaniyya in April 2004. Step Four entailed working with the International Committee of the Red Cross (ICRC) to establish a national Iraqi Bureau of Missing Persons. Step Five envisioned a period of transition whereby the CPA would turn over responsibility for forensic investigations of past crimes to a new Iraqi government with assistance from the international community, as requested.

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<sup>70</sup> After the bombing of the ICRC, the ICRC donated furniture and computers to the Medico-Legal Institute in Baghdad. It also pledged some 200,000 to 300,000 Swiss Francs to purchase equipment for the institute.

<sup>71</sup> Personal communication, Morris Tidball Binz, Forensic Coordinator, International Committee of the Red Cross, March 31, 2004.

The ICRC notes that human remains are usually "examined and identified by means of a team effort. However, the process should be under the overall responsibility of a professional: (a) who has the qualifications, skills, experience needed to make conclusions about the deceased's identity, the pathology (including injuries) present in the deceased and the cause and manner of death; (b) who practices his/her profession with an organized ethical framework; and (c) who can be held accountable for errors or unethical practices....It is therefore preferable that this person be a forensic pathologist, as this reflects legal arrangements in most parts of the world." International Committee of the Red Cross, *ICRC Report: The Missing and Their Families*, ICRC/TheMissing/o1.2003/EN/10, Geneva, Switzerland, 2003, p. 72.

As of the end of June 2004, no such bureau had been established; nor have the Iraqi authorities established one in the months since. CPA initiatives to help Iraqis develop a comprehensive plan to carry out both criminal and humanitarian exhumations of mass graves throughout the country also have not materialized. Human Rights Watch believes that the responsibility for developing and implementing such a comprehensive plan should be assumed initially by a joint Iraqi and international commission which would eventually be run by Iraqis alone.

The CPA action plan divided gravesites into three levels. Level 1 sites were to be investigated by international forensic teams to collect evidence for future trials. These sites, estimated between ten and twenty, must be representative of five major periods of repression, including the 1988 Anfal campaign against the Kurds and the 1991 killings of Shi'a Muslims and Kurds after the mass uprising at the end of the Gulf War. The CPA estimated that each Level 1 exhumation will take six to eight weeks to complete. Level 2 sites, which may number between forty and sixty, were to be investigated by Iraqi-trained teams for historical purposes, namely, to document sites associated with major periods of repression throughout Iraq. Level 3 sites were those that would be turned over to local communities for exhumation and reburial.<sup>72</sup>

By the time the CPA was formally dissolved on June 28, 2004, no program had been designed to apply DNA analysis to the identification of the remains of the missing in Iraq.<sup>73</sup> According to CPA officials, this was for several reasons.<sup>74</sup> First, the CPA believed that DNA analysis would be too costly and time consuming given the number of dead and the logistics involved in gathering and preserving bone and teeth samples from graves. A nationwide DNA collection program would have required the formation of an overall coordinating body responsible for the collection, storage, transport, and chain of custody of DNA samples, as well as the selection and accreditation of laboratories to conduct the analysis. This body would also have needed to set strict standards to ensure that DNA data was not used, disclosed, or transferred for purposes

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<sup>72</sup> Human Rights Watch interview with Jon Sterenberg, Archeologist, Combined Forensic Team, Coalition Provisional Authority, Baghdad, February 24, 2004.

<sup>73</sup> DNA analysis of skeletal remains usually involves the comparison of the genetic composition of a piece of bone or tooth of the deceased to a sample of blood, saliva, or hair from a potential biological relative. See Michele Harvey and Mary-Claire King, "The Use of DNA in the Identification of Postmortem Remains," in William D. Haglund and Marcella H. Sorg (eds.) in *Advances in Forensic Taphonomy: Method, Theory, and Archeological Perspectives* (Boca Raton, Florida: CRC Press, 2002), pp. 473-486.

<sup>74</sup> Human Rights Watch interview with Jon Sterenberg, Archeologist, Combined Forensic Team, Coalition Provisional Authority, Baghdad, February 24, 2004.

other than for identification purposes without the consent of the donor.<sup>75</sup> Second, as it was likely that local residents with little or no forensic supervision would exhume many of the graves in Iraq, a considerable risk existed that bone and teeth samples could become contaminated or mislabeled which would complicate the identification process. Finally, there was always the danger that the use of DNA analysis could raise unrealistic or false expectation on the part of the families of the missing.<sup>76</sup>

The CPA had relied on governments to donate forensic teams and equipment, but few were forthcoming because of security concerns and the high cost of such operations.<sup>77</sup> Human Rights Watch understood that some European forensic teams were also concerned about the use of forensic evidence resulting from their work being used in future trials that could lead to death sentences being passed by the Iraq Special Tribunal. In March 2004, the Dutch government decided not to send a forensic team to work on a Site 1 investigation and, earlier in the month, the Finnish government withdrew a team from Iraq earlier following an attack on Finnish businessmen in Baghdad.<sup>78</sup> Meanwhile, in February 2004, insurgents detonated a daisy-chain bomb on a remote road in southern Iraq injuring several Kuwaiti forensic scientists en route to exhume a mass grave believed to contain the remains of Kuwaiti prisoners of war executed by Iraq forces during the 1991 Gulf War.<sup>79</sup>

In discussions with U.S. Department of Justice officials in March 2004, Human Rights Watch expressed concern about mounting media speculation that indictments against the first group of defendants may be issued within the coming months without the availability of forensic evidence. DOJ officials said that trials would not proceed without the forensic evidence, but added: “We cannot spend eight weeks at a grave site in a secure environment to get at the evidence. We need to carry out surgical visits to gravesites, to estimate the size and age of the site and the identities and origin of the

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<sup>75</sup> See “Protection and Management of Personal Data” in International Committee of the Red Cross, *ICRC Report: The Missing and Their Families*, ICRC/TheMissing/o1.2003/EN/10, Geneva, Switzerland, 2003, pp. 34-35.

<sup>76</sup> The ICRC notes that “it is the responsibility of the head of the forensic team to ensure that relatives, and the community are informed about the limitations of the methods chosen to identify human remains so as not to raise unrealistic and false expectations.” International Committee of the Red Cross, *ICRC Report: The Missing and Their Families*, ICRC/TheMissing/o1.2003/EN/10, Geneva, Switzerland, 2003, p. 72.

<sup>77</sup> In June 2003, the U.S. government dispatched a forensic team to assess possible mass graves sites in northern Iraq, and in October 2003, the Danish government sent a forensic team to assess sites in southern Iraq. Similarly, a British based nongovernmental organization, the International Forensic Center of Excellence for the Investigation of Genocide, sent a team of eight forensic scientists to Baghdad to begin drafting medicolegal protocols for future exhumations.

<sup>78</sup> Personal communication, Jon Sterenberg, March 29, 2003.

<sup>79</sup> “Attack on Kuwaiti team probing mass graves in Iraq,” BBC Monitoring Middle East, February 17, 2004, quoting Kuwait News Agency (KUNA) website.

victims” by exhuming a section of each chosen site. They stressed that this should be done as speedily as possible: “We need forensic testimony for the process. We know we have to get to the gravesites as soon as possible for any trials or indictments.” Given the high costs of such operations, and the recognition that “the U.S. army cannot protect us,” it was felt that the “short-term sampling” approach, involving “multiple teams covering a short period of four to five weeks” would be more realistic. Officials expressed the hope that such teams could be deployed on the ground “by June or July at the latest.”<sup>80</sup> In April 2003, however, with continuing deteriorating conditions in Iraq and the outbreak of a spate of abductions, and in some cases killings, of foreigners in Iraq, the CPA’s forensic team was withdrawn from Iraq as a precautionary measure.



Relatives with remains of loved ones recovered at mass grave. Taxis in background are on hand to take the families home once they are ready to leave. © 2003 Peter Bouckaert/Human Rights Watch

In late July 2004 RCLC Adviser Greg Kehoe told Human Rights Watch that efforts to begin exhumations for evidentiary purposes were ongoing since April, but that the issue of security remained a major concern and plans had been put on hold for that reason. However, he added that “exhumations have now begun and will continue for the

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<sup>80</sup> Human Rights Watch discussion with Department of Justice officials, Washington, D.C., March 26, 2004.

foreseeable future,” using the short-term sampling approach. The aim was to spend some six weeks on each selected site, undertaking “typical crime scene forensic work” with a view to documenting what executions did take place, the manner of the executions, and the religious, ethnic and other affiliations of the victims. DNA analysis was being ruled out on grounds of cost and for practical considerations, principally the ability to obtain DNA samples from living relatives for comparison. If any identity cards or other artifacts are found in the course of exhumations that would help identify individual victims, that would be a “bonus,” he said.<sup>81</sup>

By mid-October 2004, only two forensic exhumations of mass graves had begun in Iraq, despite the CPA’s plan to have several sites completed by the turn over of power to the Iraqis at the end of June 2004. In August 2004, a U.S. team of archaeologists and engineers began examining a series of mass graves located about seventy kilometers (forty-two miles) south of Mosul, near the village of Hadhar.<sup>82</sup> Human Rights Watch researchers visited the Hadhar graves in February 2004. As of mid-October, approximately 300 sets of human remains, mostly of Kurdish women and children, have been discovered in the Hadhar graves. Of these, between 15 and 20 percent bear identifying documents. It appears that the remains are those of victims of the Anfal campaign who were buried at the site in 1988. Many of the victims reportedly bear single gunshot wounds to the head.

As of October 2004, the greatest constraint on the forensic investigation of mass graves in Iraq remained the lack of security. Security at gravesites is paramount. Twenty-four hour site security is essential once forensic work has commenced. This not only insures the integrity of the crime scene and the safety of personnel, but also the security of supplies and equipment left at the site when forensic personnel are absent. A CPA official told Human Rights Watch in February 2004 that coalition military commanders were reluctant to provide *in situ* protection of forensic teams working at mass grave sites because of other competing demands.<sup>83</sup> This was especially true in the southern areas of Iraq. RCLO Advisor Greg Kehoe told Human Rights Watch that the U.S.-led Multinational Force had agreed to provide security, which would represent a departure from the stance under the CPA. Equally important is the need to have an overall plan in place that will keep communities informed of exhumations and enable forensic teams to work safely and effectively. Until a plan is in place and the security situation improves, it

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<sup>81</sup> Human Rights Watch discussion with Greg Kehoe, RCLO Adviser, Baghdad, July 22, 2004.

<sup>82</sup> Philip O’Connor, “St. Louisans help uncover Iraqi massacres,” *St. Louis Post-Dispatch*, October 3, 2004. Although the name of the site is not identified in this account, most subsequent press accounts have referred to adhar as “Hatra.”

<sup>83</sup> Human Rights Watch interview with Sandy Hodgkinson, Senior Human Rights Adviser, Coalition Provisional Authority, Baghdad, on February 12, 2004.

is unlikely that any full-scale effort to conduct multiple forensic investigations or exhumations of Level One gravesites will commence in the near future.

### ***Humanitarian Needs***

In criminal cases involving genocide and crimes against humanity, the ad hoc international tribunals have placed greater emphasis on “categorical identification” as opposed to “personal identification” of victims. This approach has created a tension between the humanitarian needs of families of the missing and the evidentiary needs and mandate of international war crimes tribunals. On the one side are the families who wish to know the fate of their missing relatives and, if they have died, to receive their remains. On the other side are the ad hoc tribunals that have lacked the resources to undertake forensic investigations aimed at identifying all of the dead. The Iraqi authorities would do well to heed this dilemma and initiate a program that helps communities recover the dead in a dignified manner for anonymous burial at memorial sites.

Only a small number of the remains of the hundreds of thousands who disappeared during Ba`thist rule in Iraq will ever be identified and returned to families for proper burial. Hundreds, perhaps thousands, of remains have already been condemned to unidentifiable status due to substandard exhumations and identifications. There has been no coordinated documentation of where the remains claimed from the mass graves were reburied.

This situation stands in stark contrast to the expectations of many Iraqis who believe graves will be located and that remains will be exhumed, identified, and returned to families for reburial. Forensic anthropologist William D. Haglund, who has accompanied Human Rights Watch researchers to several mass graves in Iraq, believes that the presence of well-equipped foreign military forces may have raised Iraqi expectations:

One dynamic that may inspire Iraqis...is that they see an occupation force with wonderful logistics, immense resources, and a “can do” attitude. To the observing Iraqis, there is a perceived promise that these resources will be brought to bear in a major way on grave exhumations and identification of the dead. This perception was certainly bolstered at

one of the missing persons centers because of the promises they believe CPA representatives have given them.<sup>84</sup>

The reality is that for many families resolving the fate of missing relatives will be realized not by exhumations but by discovering their names on an execution list or a list of those arrested and detained by Iraqi security forces or through the knowledge that relatives went to war or were arrested and were never heard from again. Still, for other families, the fate of missing relatives will only be resolved by having their remains identified. Without bodies and funerals, relatives of the missing often are unable to visualize the death of their loved ones and accept it as real, and are unable to fulfill their religious and communal obligations to the dead.<sup>85</sup> Without the remains of loved ones, many Iraqis families are experiencing “ambiguous loss,” a condition in which no tangible evidence exists that a missing person is alive or dead.<sup>86</sup> The absence of bodies has also robbed families of the visual cues that would help them to acknowledge the death of their loved ones and to pass through the stages of mourning and grief. Moreover, their experience remains unverified by the community around them, so that there is little validation of what they are experiencing and feeling. Because ambiguous loss is a loss that goes on and on, those who experience it often become physically and emotionally exhausted from the relentless uncertainty.<sup>87</sup>

Mass violence and its aftermath must also be understood as a *collective* experience. Individuals lose family members and communities are decimated, as was the case in northern Iraq when Iraqi troops destroyed more than 2,000 Kurdish villages in the 1987-89 period alone.<sup>88</sup> In Iraq, many families are dealing with the ambiguous loss of relatives as well as the loss of their homes and communities. Iraqis of all faiths view bereavement

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<sup>84</sup> Personal communication, William D. Haglund, Director of International Forensic Programs, Physicians for Human Rights, March 29, 2004.

<sup>85</sup> Eric Stover and Gilles Peress, *The Graves: Srebrenica and Vukovar* (Zurich, Switzerland: Scalo, 1998).

<sup>86</sup> Pauline Boss, *Ambiguous Loss: Learning to Live With Unresolved Grief* (Cambridge, Massachusetts: Harvard University Press, 1999). Boss writes: “Ambiguous loss is always stressful and often tormenting. ...Not only is there a lack of information regarding the person’s whereabouts, there is no official or community verification that anything is lost—no death certificate, no wake or sitting shiva, no funeral, no body, nothing to bury. The uncertainty makes ambiguous loss the most distressful of all losses, leading to symptoms that are not only painful but often missed or misdiagnosed (pp. 5-6).”

<sup>87</sup> Mental health care providers have found that unresolved grief is often a primary contributor to the distress of patients requesting mental health services. See A. Lazare, “The difference between sadness and depression,” *Medical Insight*, 2 (1970):23-31; A. Lazare, *Outpatient Psychiatry: Diagnosis and Treatment*, 2<sup>nd</sup> ed. (Baltimore, Maryland: Williams & Williams, 1989), pp. 381-397. See also K.J. Doka (ed.), *Disenfranchised Grief* (New York: Lexington Books, 1989).

<sup>88</sup> George Black, *Iraq’s Crime of Genocide: The Anfal Campaign Against the Kurds* (New Haven: Connecticut: Yale University Press, 1995), p.2. This figure covers only the period of the Anfal campaign; the total number of destroyed Kurdish villages under Ba’th Party rule is probably at least twice that number.

as an experience to be shared, strengthening the solidarity of family and community. In this context, an important source of resilience for families of the missing will be the communal involvement in efforts to locate; exhume; rebury; memorialize; and, to the extent possible, identify the dead.

Whenever possible, exhumations in Iraq should thus be commemorative events designed to help individual mourners and communities receive acknowledgement of their loss and move forward in the grieving process. Exhumations should be viewed as part of a process of social reconstruction, one that gives families and communities the possibility and means of disinterring and re-burying the dead in a respectful manner, of paying homage to them, and of giving them the status and dignity of which they were deprived by war and political violence.

The problem of the missing in Iraq will only be solved through a comprehensive program that satisfies both the evidentiary needs of criminal trials and the humanitarian needs of the families of the missing and their communities. The Iraqi authorities, in consultation with the United Nations and the International Committee of the Red Cross, should establish a joint Commission on the Missing that is Iraqi and international in composition to oversee the grave exhumation process. This body should seek the advice and participation of local and international organizations, including representatives from family and local religious groups, the International Commission of Missing Persons, and forensic teams sent to Iraq by governments and other entities. The Commission should oversee the training of local forensic scientists, archeologists, and health professionals in the recovery and analysis and in the assessment and treatment of the mental health of the surviving families of the missing. Participation of international members on the commission will help facilitate the procurement of funds and personnel and the passing on of “lessons learned” from forensic investigations in other countries. Over time, the commission could be transformed into an all-Iraqi commission.

Whenever a mass grave is located, the joint Iraqi-international Commission on the Missing, working in collaboration with local authorities, should secure the site and consult communities about the best approach and timetable for exhuming it. Suitable local people (e.g. medical doctors or others with formal training either in archaeology or anatomy) will need to be identified and trained in the basic methods and procedures of excavation and forensic anthropology. Other suitable people will need to be trained to assist with the more manual aspects of excavation, recording of findings in writing, securing clothing and other artifacts and labeling these and the remains accurately, and taking photographs.

The joint Commission should also have a plan in place for dealing with both identified and unidentified remains retrieved during community-lead exhumations. This plan should be nationwide in scope, but flexible enough to deal with the particular wishes of families and their communities. Some families, for example, may wish to receive identified remains for burial in their local cemetery, while others may be willing to have them buried in a regional or national memorial cemetery. Plans are already underway to establish a memorial museum and cemetery for Kurdish victims near the northern city of Kirkuk. Other locations may choose to follow a similar path and the joint Commission should facilitate such an approach.

## Acknowledgments

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