

ARCHIVES AND RECORDS IN ARMED CONFLICT: INTERNATIONAL LAW AND THE CURRENT DEBATE OVER IRAQI RECORDS AND ARCHIVES

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I. INTRODUCTION

Controversies over the fate of the records and archives of the Iraqi Ba'ath party in the aftermath of the Second Gulf War and debates over the role of international law in their protection have become increasingly fierce. In April 2008, the Society of American Archivists alleged that a United States-based organization seized certain Ba'ath party records, now in the custody of the Hoover Institution at Stanford University, through acts of "pillaging" in violation of international law and demanded their return to Iraq.¹ In October 2008, the Director General of the Iraqi National Archives, Saad Eskander, condemned the United States as "the hungriest scavenger" of other nations' records and demanded the "repatriation of the Iraqi records illegally seized by [U.S.] military and intelligence agencies."²

The U.S. government fanned the flames by offering access to selected researchers to the "vast number of documents" obtained during the war in Iraq for the purpose of conducting "political, social, and cultural" research on the former Ba'ath regime and Iraqi society.³ Meanwhile, on March 13, 2009, the United States became a party to the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, which seeks to protect cultural property—defined to include "archives"—during war subject to the demands of imperative military necessity.⁴ As a result of U.S. ratification,

1. See Soc'y of Am. Archivists & Ass'n of Canadian Archivists, SAA/ACA Joint Statement on Iraqi Records (Apr. 22, 2008), <http://www.archivists.org/statements/IraqiRecords.asp>; see also Hugh Eakin, *Iraqi Files in U.S.: Plunder or Rescue?*, N.Y. TIMES, July 1, 2008, at E1 (describing the ongoing debate concerning the location of the Ba'ath party archives); Jon Wiener, *Over Pages, War Rages*, L.A. TIMES, Aug. 8, 2008, at A19 (arguing for the return of the Ba'ath party archives to Iraq).

2. Saad Eskander, *Minerva Research Initiative: Searching for the Truth or Denying the Iraqis the Rights to Know the Truth?* SOC. SCI. RESEARCH COUNCIL, Oct. 29, 2008, <http://essays.ssrc.org/minerva/2008/10/29/eskander/> [hereinafter Eskander, *Minerva Research Initiative*].

3. DEP'T OF DEFENSE, U.S. ARMY RESEARCH OFFICE, BROAD AGENCY ANNOUNCEMENT NO. W911NF-08-R-0007, IRAQI PERSPECTIVES PROJECT 19 (2008) [hereinafter IRAQI PERSPECTIVES PROJECT].

4. U.N. Educ., Sci. & Cultural Org. [UNESCO], *Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954) – Deposit of an Instrument of Ratification by the United States of America*, U.N. Doc. LA/DEP/2009/018 [hereinafter *Deposit of Ratification*]; *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, May 14, 1954, art. 1–2, S. TREATY DOC. NO. 106-1, 249 U.N.T.S. 240 [hereinafter 1954 *Hague Convention*]. The Senate gave its advice and consent, subject to four understandings

Director General Eskander claims that the United States is required “to return all current and non-current records of the occupied Iraq, including the archive of the Ba’ath party.”⁵

Such controversies betray widespread confusion about the legal status of records and archives in war, an issue that marks the intersection of three historically ambiguous concepts: “archives,” “cultural property,” and “military necessity.” For example, “archives” can encompass records of considerable cultural and historical value, on the one hand; documents of significant military, political, or intelligence value, on the other; and files, such as those of the Ba’ath party, that may fall into both categories.⁶ This breadth complicates the determination of whether records and archives are entitled to the protected legal status of “cultural property” as well as the definition of the circumstances under which military necessity may justify their destruction or seizure. The resulting uncertainty may invite reliance on international legal protections for records and archives in war where none may exist. This may fuel, rather than resolve, controversies over the capture of these records and archives during war and the obligation, if any, to return them in peace.

This Article seeks to clarify the legal status of records and archives in war on the basis that resolving controversies, such as those related to the Ba’ath party records, requires a realistic assessment of the limitations of international law. The need for greater clarity is further highlighted by the exponential growth in the importance of documents, records, and archives in a modern state and the corresponding expansion in their use for military, intelligence, legal, and political purposes. For example, in the Revolutionary War, the United States captured hundreds of documents;⁷ in World War I, United States forces seized more than fifty linear feet of enemy records;⁸ in World War II, the United States captured “[b]ushels, tons, and truckloads of documents”;⁹

and one declaration, on September 28, 2008. S. EXEC. REP. No. 110-26 (2008). For background on the 1954 Hague Convention see ROGER O’KEEFE, *THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT* *passim* (2006); JIŘÍ TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* *passim* (1996); and UNESCO, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* U.N. DOC. CLT-93/WS/12 (1993) (prepared by Patrick J. Boylan) [hereinafter *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*]. For a discussion of the effect of armed conflict on archives, see George Mackenzie, *From Solferino to Sarajevo: Armed Conflict, International Law, and Archives*, in *POLITICAL PRESSURE AND THE ARCHIVAL RECORD* 239 (Margaret Procter et al. eds., 2005).

5. Eskander, *Minerva Research Initiative*, *supra* note 2.

6. See *infra* Part II.A.

7. Philip P. Brower, *The U.S. Army’s Seizure and Administration of Enemy Records Up to World War II*, 26 AM. ARCHIVIST 191, 195 (1963).

8. *Id.* at 206.

9. Dagmar Horna Perman, *Microfilming of German Records in the National Archives*, 22 AM. ARCHIVIST 433, 433 (1959).

and in the Second Gulf War, the United States captured documents and records from Iraq that were measured in both “miles” and “terabytes.”¹⁰

Part I of this Article describes the various, and sometimes conflicting, values that records and archives represent and the resulting challenges for meaningful legal protection. Part II briefly outlines international law relevant to records and archives, including laws that govern cultural property and the often severe laws of war that may not only allow the seizure of enemy records pursuant to military necessity, but also may convert them into the property of the capturing state. Part III analyzes the ongoing controversies surrounding three different groups of Ba’ath party records and archives, which illustrate the operation and limitations of international law. Part IV concludes that, although the nature of records and archives may prevent international legal standards that are both robust and enforceable, international law nevertheless has an important role to play in supporting realistic and feasible measures for their preservation.

II. THE NATURE OF RECORDS AND ARCHIVES IN WAR

A. Archives, Records, and Documents

The distinction between archives, records, and documents has always been difficult to define. During World War II, for example, special Monuments, Fine Arts, and Archives (MFA&A) units within the United States Armed Forces experienced difficulties accomplishing their mission to protect “archives” after initially defining the term expansively to include all types of documents, regardless of their age or whether they were public or private.¹¹ Similarly, early drafts of the 1954 Hague Convention were complicated by the acknowledgment that “‘archives’ is interpreted in very different ways, from country to country.”¹² Generally, “records” are documents (a much broader term) that evidence the official activities of a public or private institution, agency, or government.¹³ “Archives,” in turn, are those records that are

10. See Kathleen T. Rhem, *Bush: A Free Iraq Will Lead to a More Secure United States*, AM. FORCES PRESS SERV., July 30, 2003, <http://www.defense.gov/News/NewsArticle.aspx?ID=28652> (reporting President Bush’s discussion on the need to analyze “literally the miles of documents that we have uncovered”); Transcript of Department of Defense Bloggers Roundtable, FED. NEWS SERV. (Oct. 10, 2007), http://www.defense.gov/Blog_files/Blog_assets/MG_HOGG.pdf (reporting Brigadier General Kevin Bergner’s statements regarding document exploitation of “literally terabytes of electronic files” captured in Iraq).

11. AM. COMM’N FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS 104 (1946).

12. UNESCO, RECORDS OF THE CONFERENCE CONVENED BY UNESCO HELD AT THE HAGUE FROM 21 APRIL TO 14 MAY 1954 308 (1961) [hereinafter RECORDS OF THE 1954 HAGUE CONVENTION].

13. 44 U.S.C. § 3301 (2006) (defining federal “records” as including “all books, papers, maps, photographs . . . or other documentary materials . . . made or received by an agency of the United States Government . . . in connection with the transaction of public business and preserved

selected, usually when no longer in current use, for long-term preservation because of their lasting historical value.¹⁴ Thus, land titles, property registers, and tax rolls; official documents of agencies, ministries, courts, and political parties; diplomatic correspondence and military plans and orders; and the formal documents of birth, citizenship, marriage, and death are all examples of documents that begin as records and are preserved as archives.

B. *The Value of Archives and Records in War*

Special attributes of records and archives heighten both their value and exposure to risk during armed conflict. First, they are often unique, original documents for which copies may not exist, and are therefore irreplaceable.¹⁵ Second, their meaning and importance often rely on the context that their organization and other documents provide.¹⁶ Thus, the loss of some records may significantly impact the meaning and value of those that survive.¹⁷ Third, the continuity and integrity of custody over records and archives can enhance, or alternatively compromise, their legitimacy and perceived authenticity.¹⁸ A record's displacement, for example, can affect its later admissibility as evidence in a court proceeding.¹⁹ Finally, the different values, including

... by that agency ... as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government”).

14. 44 U.S.C. § 2107 (2006). “Archives” can describe both the selected records as well as the depository in which they are housed. *See id.* (authorizing the National Archives to “accept for deposit” records determined “to have sufficient historical or other value to warrant their continued preservation by the United States Government”).

15. *See* UNESCO, *Memory of the World: Lost Memory—Libraries and Archives Destroyed in the Twentieth Century*, 20, U.N. Doc. CII-96/WS/1 (Mar. 1996) (prepared by Hans van der Hoeven & Joan van Albada) (stating that archives are, “[b]y their very nature,” unique, and “[l]ost archives are irreplaceable, any loss is final”).

16. *Id.* (“By their very nature archives are unique both as individual documents and as documents in context.”).

17. *Id.* (noting that the partial loss of an archival record group “devalues [the] legal and informational worth of the remainder”). Archives are in this way similar to archeological sites, in which stolen artifacts result not only in the loss of objects, but also in the “historical and scientific data retrievable from their contexts” being “forever destroyed.” Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 GEO. J. INT’L L. 245, 295 (2006).

18. *See, e.g.,* United States v. Stelmokas, 100 F.3d 302, 311–12 (3d Cir. 1996) (discussing the defendant’s argument that certain documents’ authenticity was questionable because “it is unclear how [the documents] were moved to the Vilnius archives” by the Germans who seized them and “because the Germans destroyed many documents demonstrating their criminal conduct, but ‘preserve[d] evidence of Lithuanian misconduct’” (alteration in original) (internal citation omitted)).

19. *Id.* at 312 (upholding the district court’s admission of documents obtained from Lithuanian archives and certified by archival professionals under the “ancient documents” exception to hearsay). Under the “ancient documents” exception to the hearsay rule, FED. R. EVID. 803(16), authentication requires that a document be “in such condition as to create no suspicion concerning its authenticity” and located “in a place, where it, if authentic, would likely

military, legal, and cultural, that attach to records and archives create inherent dangers of seizure or destruction in war, explain the post-war reluctance to return them, and illustrate the imperatives of protection.²⁰

1. *Intelligence, Military, and Political Value*

The potential intelligence, military, and political value of records and archives has always been a central factor in their fate.²¹ As archivist Ernst Posner explained, to the militaries “of the seventeenth and eighteenth centuries the archives of the enemy were the *arcanum arcanorum* that contained information on his secret policies, his resources, and his administrative techniques; hence, getting hold of them, especially the archives of the foreign office, was the urgent desire of the invader.”²² More recently, a 2005 U.S. Army Civil Affairs guide resurrected the spirit of the World War II MFA&A units by highlighting the importance of protecting cultural property (including archives), while also stressing that “[e]nemy archives can have an additional value” that is “derived from archived information that can be used for intelligence purposes or can be exploited.”²³

Further, the continuing intelligence, military, and political value of seized records and archives may determine whether, and when, they will ultimately be returned. For example, almost a decade after World War II, the decision to return captured German records and archives in United States’ custody depended upon a lengthy declassification process that determined which records and archives would be returned and which would not.²⁴ Finally, one of the greatest risks of intentional destruction of records and archives in war derives from “defending” governments that would rather destroy them than

be.” FED. R. EVID. 901(b)(8); see Cyrus B. King, *The Archivist and “Ancient Documents” as Evidence*, 26 AM. ARCHIVIST 487, 487–89 (1963).

20. See *infra* Part II.B–C.

21. See Trudy Huskamp Peterson, *Archives in Service to the State*, in POLITICAL PRESSURE AND THE ARCHIVAL RECORD, *supra* note 4, at 259, 261 (stating that armed forces seize documents for information on their “opponents (military information); to understand the organization of the opposing government (political information); to protect the records from destruction by the opposing state; to deny the opposition the information in the records; and to obtain documents to make public, thereby exposing the workings of the opposing state”).

22. Ernst Posner, *Public Records Under Military Occupation*, 49 AM. HIST. REV. 213, 217 (1944) [hereinafter Posner, *Public Records Under Military Occupation*]; see Mohammed Bedjaoui, *Eleventh Report on Succession of States in Respect of Matters Other than Treaties - Draft Articles on Succession in Respect of State Archives*, 2 Y.B. INT’L L. COMM’N 67, 75, U.N. Doc. A/CN.4/322 (“Espionage is often nothing but a ‘paper war’ which enables the more successful to obtain the enemy’s—or even the ally’s—plans, designs, documents, secret treaties, and so forth.”).

23. DEP’T OF THE ARMY, GTA 41-01-002, CIVIL AFFAIRS ARTS, MONUMENTS, AND ARCHIVES GUIDE 19 (2005).

24. See Seymour J. Pomrenze, *Policies and Procedures for the Protection, Use, and Return of Captured German Records*, in CAPTURED GERMAN AND RELATED RECORDS 5, 28 (Robert Wolfe ed., 1968).

risk letting their intelligence fall into the hands of the enemy.²⁵ The traditional example is the emergency destruction of an embassy's diplomatic archives when it is being overrun by enemy troops.²⁶

2. Legal and Administrative Value

The legal and administrative value of records and archives is another primary reason they are seized or destroyed in armed conflict. In earlier wars, for example, conquering powers appropriated archives to support legal title over the territories they had defeated.²⁷ King Louis XIV took this one step further by searching the archives of the vanquished for additional land titles to assert claims on other territories, a process he called "discovering new countries."²⁸ The same values have, at times, made records and archives targets of destruction as a symbol of a regime's oppressive legal and property structures, as in the immediate aftermath of the French Revolution when records of the toppled government were burned with public "rejoicing."²⁹

Further, the administrative value of records and archives may make them necessary for the continued administration of an occupied country.³⁰ The U.S.

25. See Markkū Jarvinen, *Convention of The Hague of 1954: Convention for the Protection of Cultural Property in the Event of Armed Conflict*, in INTERNATIONAL COUNCIL ON ARCHIVES, INTERDEPENDENCE OF ARCHIVES: PROCEEDINGS OF THE TWENTY-NINTH, THIRTIETH AND THIRTY FIRST INTERNATIONAL CONFERENCE OF THE ROUND TABLE ON ARCHIVES 147, 153 (1995) [hereinafter INTERDEPENDENCE OF ARCHIVES] (noting that in war, "especially recent documents are in danger of destruction by their holders" in order "to avoid their falling into the hands of the enemy, who usually tries to seize archives and especially recent records, which have value as information on intentions of the enemy and also as material for war propaganda").

26. See Peterson, *supra* note 21, at 269 n.17 (noting "a staple of war photography is a picture of embassy staff, often in the backyard of the embassy, hastily burning records as troops advance, clearly fearful of seizure"). In principle, the Convention on Consular Relations provides protection to "consular archives" and diplomatic records "even in [the] case of armed conflict." Vienna Convention on Consular Relations, art. 27(1)(a), *opened for signature* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

27. See Bedjaoui, *supra* note 22, at 100 (noting that "[u]nder the feudal system, archives represented a legal title to a right" and therefore, "the victorious side in a war made a point of removing the archives relating to their acquisitions, taking them from the vanquished enemy by force if necessary; their right to the lands was guaranteed only by the possession of the 'terriers'"); see also Charles Kecskeméti, *Displaced European Archives: Is It Time for a Post-War Settlement?*, 55 AM. ARCHIVIST 132, 134 (1992) [hereinafter Kecskeméti, *Displaced European Archives*] (noting that "[s]overeigns in Ancien Régime Europe believed in the value of records as titles that were instrumental in supporting territorial gains" and thus sought to "concentrate archives and exploit them").

28. Ernst Posner, *Effects of Changes of Sovereignty on Archives*, 5 AM. ARCHIVIST 141, 143 (1942) [hereinafter Posner, *Effects of Changes*].

29. See Michel Duchein, *The History of European Archives and the Development of the Archival Profession in Europe*, 55 AM. ARCHIVIST 14, 17-18 (1992).

30. Jarvinen, *supra* note 25, at 153 (stating that "archive records are indispensable as information for administrative purposes"); Posner, *Public Records Under Military Occupation*, *supra* note 22, at 219 (noting that, in some circumstances, "public records must become the continuous source of information for the regime of occupation").

military underscored this during World War II, noting that “[e]xperience in other theaters of war has proved the necessity for safeguarding archives, and this will be particularly true in Germany where the effective imposition of Military Government may depend largely upon how successful we are in this task.”³¹ On the other hand, those seeking to destabilize an occupation may attempt to destroy or displace such records. In the Netherlands, for example, citizens, disguised as police, destroyed “population registers and other records of the greatest importance” in Amsterdam’s Bureau of Vital Statistics in an effort to undermine the German occupation.³² Lastly, the role of records and archives as potential evidence of past human rights abuses or other crimes creates similar incentives for invading or occupying forces to seize those records and archives, and for invaded regimes to destroy them.³³

3. Cultural and Historical Value

These political, legal, and administrative attributes help to establish the cultural and historical value of records and archives, which are arguably one of the most important forms of cultural property, given that they can be, quite literally, the primary documents of history. Records and archives are increasingly seen as an indispensable form of societal “memory,” national patrimony, and state identity.³⁴ The United Nations Educational, Scientific and Cultural Organization (UNESCO) has similarly described archives as “an essential part of the heritage of any national community,” because they “document the historical, cultural and economic development of a country and provide a basis for a national identity.”³⁵

These same qualities, however, can create incentives to shape national identity by distorting, manipulating, and sanitizing records and archives. That the birth of modern archives and the birth of modern nationalism were roughly contemporaneous is no coincidence.³⁶ Not all archives are positive repositories

31. T.J. Davis, *Foreword* to ALLIED FORCES, SUPREME HEADQUARTERS, U.S. ADJUTANT-GEN.’S OFFICE, GENERAL LIST OF ARCHIVES IN WESTERN GERMANY 1, 1 (1945).

32. Posner, *Public Records Under Military Occupation*, *supra* note 22, at 222.

33. See, e.g., ITALIAN ARCHIVES DURING THE WAR AND AT ITS CLOSE 18 (Hilary Jenkinson & H.E. Bell eds., 1947) (noting destruction of archives in Italy as “a result of the deliberate desire to suppress evidence,” including in “the offices of the Republican Ministries, where the last act of the Fascists was to attempt to cover their tracks”).

34. See JEANNETTE ALLIS BASTIAN, OWNING MEMORY: HOW A CARIBBEAN COMMUNITY LOST ITS ARCHIVES AND FOUND ITS HISTORY 1–2, 5–6 (2003); Erik Ketelaar, *Muniments and Monuments: The Dawn of Archives as Cultural Patrimony*, 7 ARCHIVAL SCI. 343, 343–44 (2007).

35. UNESCO, *Consultation Group to Prepare a Report on the Possibility of Transferring Documents from Archives Constituted Within the Territory of Other Countries*, § 4.1, U.N. Doc. CC.76/WS/9 (Apr. 1, 1976) [hereinafter UNESCO Consultation Group].

36. See Trudy Huskamp Peterson, Archivist, Keynote Address III at the Fifth General Conference at EASTICA: The Nasty Truth About Nationalism and National Archives (Sept. 19, 2001) in EAST ASIAN ARCHIVES: THE FIFTH GENERAL CONFERENCE OF EASTICA 66, 66 (2002) (explaining that it is “no accident” that the late “nineteenth century saw the idea of nationalism dominate political thinking in Europe” and “the founding of the modern national archives and the

of “memory.” The early growth of the Nazi movement, for example, “required not only the mobilization of existing records for political ends but the creation of new records that would recognize the biological categories the Nazis held to be so consequential.”³⁷ “There is no racial politics,” the head of archival administration in Bavaria stated in 1936, “without archives, without archivists.”³⁸ Archives can thus enhance the same nationalistic tendencies that, in turn, constitute one of the most invidious threats of intentional destruction to *other* nations’ archives as part of a larger plan of ethnic cleansing, as was graphically illustrated in the former Yugoslavia.³⁹ Finally, the view of archives as irreplaceable national identity intensifies debates over their “repatriation” and complicates the resolution of such disputes. The cultural and historical nature of archives can thus be both among their most valuable attributes and the source of their greatest vulnerability to seizure and destruction.

C. The Challenge of Legal Protection

The central challenge for determining what the legal status of records and archives is (or should be) in war is that their many differing values are not mutually exclusive. Both cultural and military value can be found in the same archival depository, the same record group, and even the same document. Consequently, the protection of archives in war is always marked with an asterisk. Armies, as one treatise states, should never seize property such as “crown jewels, art collections, and archives (*except for papers of importance in connection with the war*).”⁴⁰ There are undoubtedly current records of an exclusively military character that most would accept as legitimate targets of enemy action; there are also ancient records of an exclusively cultural nature that most would accept as immune. The area between these two, however, is vast and difficult to classify or delineate.

archival profession”); Miriam Valencia, *Libraries, Nationalism, and Armed Conflict in the Twentieth Century*, 52 LIBRI 1, 3–4 (2002) (discussing how library collections, at times, have helped build nationalism).

37. Peter Fritzsche, *The Archive*, 17 HIST. & MEMORY 15, 26 (2005).

38. See Wolfgang Ernst, *Archival Action: The Archive as ROM and Its Political Instrumentalization Under National Socialism*, 12 HIST. OF THE HUMAN SCI. 13, 26 (1999).

39. See Andras J. Riedlmayer, *Crimes of War, Crimes of Peace: Destruction of Libraries During and After the Balkan Wars of the 1990s*, 56 LIBR. TRENDS 107, 110–12 (2007). The intentional destruction of the Bosnian National and University Library, which included “rare books and manuscripts” and “unique archives” has been called the “largest single incident of deliberate book-burning in modern history.” *Id.* at 110; see also Soc’y of Am. Archivists, *Resolution on the Systematic Destruction of Archives in Kosovo and War-Caused Devastation of Archives Throughout Yugoslavia* (Apr. 14, 1999), http://www.archivists.org/statements/kosovo_resolution.asp.

40. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 292 (1959) (emphasis added).

A distinction between newer records and older archives is a tempting but often illusory one. Age is not necessarily determinative of cultural or historical value. “That the Office Papers of to-day are the Archives of to-morrow,” archivist Hilary Jenkinson noted in 1947, “is a fact still very little reali[z]ed except by Archivists.”⁴¹ Similarly, that archives may be older records of historical value does not mean they have no significant military value to an adversary; past experience has shown the value of older records in waging new wars.⁴²

Further, any legal distinctions effectively requiring rapid assessments of individual records are most likely impractical. Troops on the ground often seize documents in languages they do not speak in urgent and uncertain circumstances and are therefore unable to appropriately assess the value of these documents.⁴³ Military authorities, therefore, are likely to advise their troops, as they did in Allied-controlled Germany, to view all records and archives as important regardless of their location.⁴⁴ For all of these reasons, the uncertain, and sometimes conflicting, values of records and archives are exceedingly difficult to negotiate legally as well as practically.

III. RECORDS AND ARCHIVES IN INTERNATIONAL LAW

The 1954 Hague Convention, recently ratified by the United States, joins a short list of binding international instruments relevant to records and archives in war.⁴⁵ This list principally includes the 1907 Hague Convention and its annexed Regulations on the law of land warfare,⁴⁶ the Geneva Conventions of 1949 (primarily the Third and Fourth Conventions), which arose in the aftermath of the widespread destruction and pillage of World War II and were

41. ITALIAN ARCHIVES DURING THE WAR AND AT ITS CLOSE, *supra* note 33, at 17; see JAMES M. O'TOOLE & RICHARD J. COX, UNDERSTANDING ARCHIVES & MANUSCRIPTS xii (2006) (noting that archives can be “valuable records of the very recent past” and that what “makes these records ‘archives’ is neither age nor appearance, but rather content, meaning, and enduring usefulness”).

42. See E.G. Campbell, *Old Records in a New War*, 5 AM. ARCHIVIST 156, 156, 163 (1942) (describing the use of World War I archives in planning World War II); Anne Bruner Eales, *Fort Archives: The National Archives Goes to War*, 35 PROLOGUE 28, 37 (2003) (describing the use of archived maps and weather data in military planning).

43. See Peterson, *supra* note 21, at 273 (stating that troops are likely to be “unfamiliar with basic recordkeeping operations and cannot easily judge what is a record that should be seized for military needs,” and noting “the language problems of soldiers unable to read records they are encountering”).

44. Pomrenze, *supra* note 24, at 10.

45. See generally U.S. DEP'T OF STATE, TREATIES IN FORCE (2010), available at <http://www.state.gov/documents/organization/123747.pdf>; see also Deposit of Ratification, *supra* note 4.

46. See generally Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter 1907 Hague Regulations].

designed to ameliorate the effects of war on civilians and combatants;⁴⁷ and the 1970 UNESCO Convention, which prohibits the illicit import and export of cultural property and contains certain provisions related to armed conflict.⁴⁸ Added to this list are rules the United States accepts as customary international law, such as certain provisions of the 1977 Protocols to the Geneva Conventions and, prior to U.S. ratification, elements of the 1954 Hague Convention.⁴⁹ Such instruments, however, largely fail to address the unique characteristics of records and archives, which are left to occupy an uncertain legal status somewhere between enemy moveable property and cultural property.⁵⁰

In the broadest terms, the law of armed conflict provides that the lawfulness of destruction or seizure of property in war depends upon the presence of military necessity, traditionally defined expansively to include actions “indispensable for securing the complete submission of the enemy as soon as

47. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third 1949 Geneva Convention]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 1, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth 1949 Geneva Convention].

48. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter 1970 UNESCO Convention]. The United States implemented the 1970 UNESCO Convention through the Convention on Cultural Property Implementation Act. Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified as amended at 19 U.S.C. §§ 2601–2613 (2006)).

49. See DEP’T OF DEFENSE, DIRECTIVE 2311.01E, DoD LAW OF WAR PROGRAM 2 (2006) (stating that the laws of war binding on the United States include “treaties and international agreements to which the United States is a party, and applicable customary international law”); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I]. The United States has not ratified Geneva Protocol I, but accepts those provisions that “reflect customary international law.” See Michael J. Matheson, Deputy Legal Adviser, U.S. Dep’t of State, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks to the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (Jan. 22, 1987), in 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987). For the U.S. perspective of the 1954 Hague Convention as customary international law, see Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. TRANSNAT’L L. 185, 223–37 (2005) and *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 4, at 103–06.

50. Bess Glenn, *Private Records Seized by the United States in Wartime—Their Legal Status*, 25 AM. ARCHIVIST 399, 400, 405 (1962) (noting that there “is no question of course, but that records are property, albeit a special kind of property” and that the multiple characteristics of records create “a sort of archival platypus”); see Peterson, *supra* note 21, at 270 (“[A]rchives are both cultural and administrative property and fit somewhat awkwardly into a purely cultural definition.”).

possible,”⁵¹ and the determination that such property constitutes a “military objective.”⁵² For records and archives, these rules have two central and significant consequences. First, records or archives that have military or intelligence value are likely “military objectives” and will be subject to seizure pursuant to military necessity, even if such records may simultaneously have historical or cultural value. Second, the often-unaddressed *effect* of capture is that enemy property lawfully seized during war generally becomes the property of the capturing state; such property can lawfully constitute “war booty” or “spoils of war.”⁵³ The application of such rules, therefore, may be dispositive of controversies over the legal obligation, if any, to return captured records or archives following war. At the same time, international practices and the nature of certain records and archives may entitle them to enhanced protection as cultural property that may avoid such harsh results.⁵⁴

A. Records and Archives as Cultural Property

“Under a former rule of International Law,” *Oppenheim’s International Law* states, “belligerents could appropriate *all* public and private enemy property which they found on enemy territory.”⁵⁵ The status of records and archives under such a regime was therefore straightforward. If not destroyed through bombardment, fire, or flood, enemy records and archives were subject to seizure.⁵⁶ A legal requirement to return them, if any, was created by a peace treaty that was either negotiated by the parties or, given the unequal bargaining powers of many post-war belligerents, forced upon the vanquished.⁵⁷ Napoleon, for example, famously seized archives from the Vatican, Austria, and Spain pursuant to such coercion and transported them to Paris as part of an

51. DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 3, at 3–4 (1956) [hereinafter U.S. ARMY FIELD MANUAL]; see 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE: DISPUTES, WAR AND NEUTRALITY § 150, at 413 (H. Lauterpacht ed., 7th ed. 1952) (“All destruction of, and damage to, enemy property for the purpose of offen[s]e and defen[s]e is *necessary* destruction and damage, and therefore lawful.”).

52. Geneva Protocol I, *supra* note 49, art. 52 (defining military objectives as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”).

53. See 50 U.S.C. § 2204(4) (2006) (defining “spoils of war” as “enemy movable property lawfully captured, seized, confiscated, or found which has become United States property in accordance with the laws of war”); U.S. ARMY FIELD MANUAL, *supra* note 51, para. 396, at 150 (stating that “[p]ublic property captured or seized from the enemy” is “property of the United States”); see also *infra* notes 103–05 and accompanying text.

54. See TOMAN, *supra* note 4, at 45.

55. See OPPENHEIM, *supra* note 51, § 133, at 397 (emphasis added). Oppenheim notes that this rule “is now obsolete.” *Id.*

56. See Bedjaoui, *supra* note 22, at 75.

57. See *id.* (noting that almost all “annexation treaties in Europe since the Middle Ages have required the conquered to restore the archives belonging to or concerning the ceded territor[ies]”).

“extraordinary archival project.”⁵⁸ Upon Napoleon’s defeat, the Treaty of Paris required France to return the archives to the victorious allies.⁵⁹

The development of special rules for cultural property during time of war is generally traced back to General Orders Number 100 of the Union Army, the so-called *Lieber Code*, which Francis Lieber drafted in 1863.⁶⁰ The *Lieber Code* provided special forms of protection to “[c]lassical works of art, libraries, [and] scientific collections.”⁶¹ Although some have suggested that “records and archives were presumably classed” with libraries in 1863, the coverage Lieber intended for such property is unclear.⁶² In an earlier work, for example, Lieber referenced the “[c]arrying off” of archives and works of art in war and stated that he was unaware of any legal impediment to this action.⁶³ He noted, however, that such an action “galls the conquered nation, *beyond* the time of war” and that if such property were truly “connected with the history and feelings of a nation, and were carried off for vain-glorious exhibition, it would be cruel.”⁶⁴

In 1874, the nonbinding Brussels Declaration (Declaration), which the *Lieber Code* directly influenced, contained special provisions for the protection of property of “parishes (communes), or establishments devoted to religion, charity, education, arts and sciences.”⁶⁵ The Declaration fails to mention records or archives, which, because the drafters expressly debated including them in the Declaration, reflects an inability to agree on the status of records and archives and the extent to which they should be protected.⁶⁶ In 1880, a

58. Kecskeméti, *Displaced European Archives*, *supra* note 27, at 133–35.

59. *Id.* at 135; see Bedjaoui, *supra* note 22, at 100 (discussing the historic practice through which states that prevailed in war acquired title to conquered states’ archives); Mackenzie, *supra* note 4, at 244.

60. KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 47 (1994) (describing the *Lieber Code* as the “first military handbook in the world to attempt to limit the conduct of belligerents in relation to cultural heritage”); see Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (1898), reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 158 (Leon Friedman ed., 1972) [hereinafter *Lieber Code*].

61. *Lieber Code*, *supra* note 60, art. 35.

62. Brower, *supra* note 7, at 194.

63. FRANCIS LIEBER, MANUAL OF POLITICAL ETHICS 663 (1838).

64. *Id.* As to the application of the *Lieber Code* to records and archives during the Civil War, it is worth noting that in 1865, as the war was ending, the individual appointed to lead the “collection, safe-keeping, and publication of the rebel archives” seized by the Union Army from the Confederacy was none other than Francis Lieber. Adjutant Gen.’s Office, U.S. War Dep’t, Gen. Orders No. 127, in RICHARD SHELLEY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 146 (1983); see Carl L. Lokke, *The Captured Confederate Records Under Francis Lieber*, 9 AM. ARCHIVIST 277, 277 (1946).

65. Declaration of Brussels Concerning the Laws and Customs of War Adopted by the Conference of Brussels, Aug. 27, 1874, reprinted in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 194 (Leon Friedman ed., 1972) [hereinafter Declaration of Brussels]. The Declaration arose out of a conference organized by Russia. *Id.* at 152.

66. See generally *id.* An Italian delegate suggested adding a reference to public archives and civil records, to which a Belgian delegate replied that the language already covered such

meeting of international law experts produced the influential, but likewise nonbinding, *Oxford Manual*, which included a similar provision; however, the *Oxford Manual* expressly encompassed “historic monuments, *archives*, works of art, or science.”⁶⁷

These early developments led directly to the 1907 Hague Regulations (Regulations) on the law of land warfare, which provide special protection for “buildings dedicated to religion, art, science, or charitable purposes” as well as “[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences.”⁶⁸ The Regulations adopted much of this language, with only minor modifications, directly from the 1874 Declaration, which created the same uncertainty regarding whether such provisions encompass records and archives. Despite this, some commentators have interpreted the text of the Regulations to cover “at least certain sorts of archives.”⁶⁹

The 1954 Hague Convention introduced the phrase “cultural property” and defined it in expansive terms.⁷⁰ Although the Convention’s inclusion of archives is express, the parameters of “archives” are uncertain.⁷¹ The

material and an enumerated list would invariably be incomplete. William M. Franklin, *Municipal Property Under Belligerent Occupation*, 38 AM. J. INT’L L. 383, 390 (1944). The German delegation also opposed the Italian Delegate’s suggestion, arguing that the reference would not prevent a belligerent “from using such public records as he might need” or from “seiz[ing] all plans, documents or records of military value.” *Id.* Because the delegates could not reach an agreement on this point, “the Conference moved on to more fruitful fields for discussion.” *Id.*; see TOMAN, *supra* note 4, at 47 (stating that the Brussels Conference “concluded that the occupying power had the right to seize archives”).

67. Inst. of Int’l Law, *The Laws of War on Land* (Oxford Manual), art. 53 (1880), *reprinted in* THE LAWS OF ARMED CONFLICT 35, 44 (DIETRICH SCHINDLER & JIRÍ TOMAN eds., 1988) (emphasis added).

68. 1907 Hague Regulations, *supra* note 46, art. 56.

69. O’KEEFE, *supra* note 4, at 29 (noting that the use of “*les sciences*” in the official French version has a broader meaning—encompassing “all manifestations of research and learning”—than the English “science” and that the provision would thus cover “at least certain sorts of archives”); see YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 220 (2009) [hereinafter DINSTEIN, *BELLIGERENT OCCUPATION*] (stating that “property of municipalities” includes “communal property dedicated to public purposes—such as archives, public records”).

70. 1954 Hague Convention, *supra* note 4, art. 1; see Stanislaw E. Nahlik, *International Law and the Protection of Cultural Property in Armed Conflicts*, 27 HASTINGS L.J. 1069, 1078 (1976). The 1954 Hague Convention has two protocols; neither the First Protocol, which was drafted alongside the original Convention in 1954, nor the Second Protocol of 1999, however, modify the definition of cultural property. Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 358 [hereinafter First Protocol to the 1954 Hague Convention]; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, 2253 U.N.T.S. 172 [hereinafter Second Protocol to the 1954 Hague Convention]. The United States signed, but never ratified, the First Protocol and neither signed nor ratified the Second Protocol.

71. Roger O’Keefe, *The Meaning of “Cultural Property” Under the 1954 Hague Convention*, 46 NETH. INT’L L. REV. 26, 27 (1999). Despite the extended definition, there is “a

Convention defines cultural property as property “of great importance to the cultural heritage of every people” and includes “manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives.”⁷² The definition also includes buildings that house this type of property, such as “large libraries and depositaries of archives.”⁷³

Whether specific property constitutes “cultural property” under the 1954 Hague Convention is not, however, simply an objective test. Rather, each party has the “discretionary competence” to determine whether specific property within its territory is significant to its national identity and, therefore, whether the Convention encompasses that property “within the limits imposed by the ordinary meaning of the words” and the “requirement of good faith.”⁷⁴ Periodic reports that parties to the Convention filed with UNESCO give some flavor to the coverage of archives, especially historical archives, which are mentioned with some regularity.⁷⁵

The 1970 UNESCO Convention, primarily concerned with peacetime trade restrictions,⁷⁶ defines cultural property in yet another way, but expressly includes “archives.”⁷⁷ Under this definition, cultural property includes “rare manuscripts and incunabula, old books, documents and publications of special

seemingly widespread though rarely confessed confusion over the nature and extent of the ‘cultural property’ to which [the 1954 Hague Convention] applies.” *Id.*

72. 1954 Hague Convention, *supra* note 4, art. 1.

73. *Id.* An early draft of the Convention used the even broader phrases “documents and other objects of historical or archeological value” and “collections—of documents or objects—of scientific value.” RECORDS OF THE 1954 HAGUE CONVENTION, *supra* note 12, at 372. The U.S. delegate was among those who supported including the term “archives.” *Id.* at 118.

74. O’KEEFE, *supra* note 4, at 105–06; see TOMAN, *supra* note 4, at 49 (noting that the decision to extend protection “depends entirely on the authorities of the country on whose territory the property is located”); O’Keefe, *supra* note 71, at 36 (“[T]he Convention applies to all movable and immovable property considered by each respective state to form part of its national cultural heritage.”).

75. See, e.g., UNESCO, *Information on the Implementation of the Convention for the Protection of Cultural Property in Case of Armed Conflict, the Hague 1945*, 26–27, U.N. Doc. CLT/MD/3 (Dec. 1984) (discussing repositories of French national archives); UNESCO, *Information on the Implementation of the Convention for the Protection of Cultural Property in Case of Armed Conflict, the Hague 1954*, 14–18, U.N. Doc. SHC/MD/6 (Apr. 30, 1970) (discussing archives in Germany and the Netherlands and state archives in Luxembourg). An attempt to extend “cultural property” or “archives” under the 1954 Hague Convention to more current records, despite their actual, or potential, historical and cultural importance is questionable. See Peterson, *supra* note 21, at 270–71. In 2005, the United Kingdom, considering possible ratification of the 1954 Hague Convention, proposed that its National Record Offices should constitute cultural property under the Convention. DEP’T FOR CULTURE, MEDIA AND SPORT, CULTURAL PROP. UNIT, CONSULTATION PAPER ON: THE 1954 HAGUE CONVENTION ON THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS TWO PROTOCOLS OF 1954 AND 1999 13 (2005); see O’KEEFE, *supra* note 4, at 107–08.

76. See 1970 UNESCO Convention, *supra* note 48, art. 1.

77. *Id.* art. 1(h).

interest (historical, artistic, scientific, literary, etc.)” as well as “archives,” more broadly denoted as including “sound, photographic and cinematographic archives.”⁷⁸ A subsequent UNESCO report points to this Convention as evidence that the “inclusion of archives within the broad definition of cultural property is fully recognized.”⁷⁹

The development of these standards illustrates that “archives,” whatever the parameters of that term, are increasingly viewed under international law as a form of “cultural property.” Defining the status of records and archives in armed conflict, however, is further complicated by the intersection of the uncertainty of “archives” and “cultural property” with the interminably ambiguous phrase “military necessity.” The current legal regime relevant to records and archives during times of war is outlined below.

B. The Legal Regime for Records and Archives in War

1. Obligations Prior to Armed Conflict

The responsibility under international law to protect property is triggered prior to war and is shared by both “defending” and “attacking” forces. With regard to cultural property, for example, the 1954 Hague Convention requires parties “to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict.”⁸⁰ The 1907 Hague Regulations provide that it is “the duty of the besieged” to mark specially protected property with “distinctive and visible signs, which shall be notified to the enemy beforehand.”⁸¹ Similarly, the 1954 Hague Convention creates a special Blue Shield emblem (the cultural equivalent of the Red Cross) that may be affixed to cultural property “so as to facilitate its recognition.”⁸²

More generally, Geneva Protocol I requires all parties to take reasonable precautions to protect civilian objects under each respective party’s control from the effects of an attack and, to the extent feasible, make a distinction between civilian objects and military objectives.⁸³ Defending forces that place

78. *Id.* art. 1(j).

79. The Director-General, *Report of the Director-General on the Study Regarding Problems Involved in the Transfer of Documents from Archives in the Territory of Certain Countries to the Country of Their Origin* ¶ 8, delivered to UNESCO General Conference, U.N. Doc. 20 C/102 (Aug. 25, 1978).

80. 1954 Hague Convention, *supra* note 4, art. 4.

81. 1907 Hague Regulations, *supra* note 46, art. 27.

82. 1954 Hague Convention, *supra* note 4, arts. 6, 16. Following the experience of the MFA&A units during WWII, the 1954 Hague Convention further provides that parties will undertake to “establish in peace-time, [w]ithin their armed forces, services or specialist personnel” to assist in protecting cultural property. *Id.* art. 7(2).

83. See Geneva Protocol I, *supra* note 49, art. 58. “Civilian objects” are simply those that are not “military objectives.” *Id.* art. 52.

troops or military targets near, for example, a building that houses archives in anticipation of bombardment share the responsibility for the archives' subsequent destruction by attacking forces.⁸⁴

2. *Rights and Responsibilities During Hostilities*

The 1907 Hague Regulations provide the basic rule applicable to enemy property in war: during hostilities, forces are “especially forbidden” to “destroy or seize the enemy’s property, unless such destruction or seizure [is] imperatively demanded by the necessities of war.”⁸⁵ This formulation presents the rule as a shield; when reversed, it operates as a sword and military necessity permits the destruction and seizure of enemy property. A traditionally expansive understanding of military necessity further enhances this power.

Separate provisions relate to cultural property. The 1907 Hague Regulations, for example, state that during “sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science [and] historic monuments” provided that “they are not being used at the time for military purposes.”⁸⁶ Article 4(1) of the 1954 Hague Convention requires parties during hostilities to “respect cultural property situated within their own territory as well as within the territory” of other parties by “refraining from any use of the property and its immediate surroundings . . . for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.”⁸⁷ Under Article 4(2), however, a party can waive these obligations when military necessity “imperatively requires such a waiver.”⁸⁸ Finally, the Convention requires parties to prohibit and put a stop to theft, pillage, misappropriation, and vandalism of cultural property, and to refrain from requisitioning cultural property.⁸⁹

84. 1954 Hague Convention, *supra* note 4, art. 4. At the time of Senate ratification, the United States included its understanding that, as with “all civilian objects, the primary responsibility for the protection of cultural objects rests with the Party controlling the property, to ensure that it is properly identified and that it is not used for an unlawful purpose.” S. EXEC. DOC. NO. 110-26, at 10 (2008).

85. 1907 Hague Regulations, *supra* note 46, art. 23(g).

86. *Id.* art. 27.

87. 1954 Hague Convention, *supra* note 4, art. 4(1).

88. *Id.* art. 4(2). Professor Eric Posner has thoughtfully questioned the importance of these “special” provisions for cultural property because they are not significantly different from the more general prohibition against the destruction of property in the absence of military necessity. Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT’L L. 213, 226–27 (2007).

89. 1954 Hague Convention, *supra* note 4, art. 4(1).

3. Rights and Responsibilities During Occupation

The presence of records and archives during military occupation implicates both the responsibilities of occupying powers to protect them and the corresponding rights of occupying powers to use or seize them. As to the former, the 1907 Hague Regulations place an affirmative, although general, duty on an occupying power to “take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁹⁰ In addition, the 1954 Hague Convention requires an occupying power to support national authorities in safeguarding cultural property and, if necessary, to take affirmative steps to preserve property “damaged by military operations.”⁹¹ Under the 1970 UNESCO Convention, parties must undertake to prevent the “illicit” export or import of cultural property.⁹² The Convention provides that the export of cultural property “under compulsion” arising from an occupation “by a foreign power shall be regarded as illicit.”⁹³ More broadly, the First Protocol to the 1954 Hague Convention seeks to prevent the export of cultural property “from a territory occupied by it during an armed conflict.”⁹⁴

Accordingly, the rights and powers of occupying forces to use and seize the property of the occupied state must be at least as broad as is necessary to accomplish the considerable tasks of restoring public order and safety and administering a territory under occupation. Regarding the seizure of property, the 1907 Hague Regulations provide that an “army of occupation” can take possession of “all movable property belonging to the State which may be used for military operations.”⁹⁵ The 1949 Fourth Geneva Convention prohibits an occupying power from destroying public or private property, “except where such destruction is rendered absolutely necessary by military operations.”⁹⁶

The right to seize records and archives during occupation thus depends on several factors. First, Article 53 of the 1907 Hague Regulations excludes public records and archives not susceptible to military use from seizure.⁹⁷

90. 1907 Hague Regulations, *supra* note 46, art. 43.

91. 1954 Hague Convention, *supra* note 4, art. 5. Further, if local authorities are unable to take such steps, the occupying power shall “take the most necessary measures of preservation.” *Id.*

92. 1970 UNESCO Convention, *supra* note 48, art. 2.

93. *Id.* art. 11.

94. First Protocol to the 1954 Hague Convention, *supra* note 70, at 358. The United States has signed, but not ratified, the First Protocol. *See generally id.*

95. 1907 Hague Regulations, *supra* note 46, art. 53.

96. Fourth 1949 Geneva Convention, *supra* note 47, art. 53.

97. *See* 1907 Hague Regulations, *supra* note 46, art. 53. With respect to the breadth of this exclusion, the Army Field Manual notes that “[u]nder modern conditions of warfare, a large proportion of State property may be regarded as capable of being used for military purposes.” U.S. ARMY FIELD MANUAL, *supra* note 51, para. 404, at 151–52. Other military guidance concurs that property not susceptible to military use is “a very limited class,” but includes in this class “court, property banking and other valuable records” as well as “cultural property” as it has

Second, Article 56 of the 1907 Hague Regulations provides that, during occupation

[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.⁹⁸

The extent to which the drafters intended this provision to encompass records or archives is unclear from the text of the original draft.⁹⁹

Further, the application of this provision to records and archives related to war or of military value creates two possible scenarios under the Regulations. First, Article 56 could exclude certain records and archives from its protections altogether. Interpreting this article, *Oppenheim's International Law* states that archives “are no doubt of scientific value, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war.”¹⁰⁰ Second, in contrast, if Article 56 applies and records are treated as *private* property, the 1907 Hague Regulations separately provide that “private property cannot be confiscated.”¹⁰¹ However, the occupying power may still utilize certain property susceptible to military use “even if [it] belong[s] to private individuals.”¹⁰² Although both of these paths come to the same initial result—namely, an occupying power may take

“no possible military use” and, therefore, there is “no reason to confiscate or seize it.” DEP’T OF THE ARMY, *supra* note 23, at 18 fig.4.

98. 1907 Hague Regulations, *supra* note 46, art. 56.

99. *See id.* The provision was derived from similar language in the 1874 Brussels Declaration. *See* Franklin, *supra* note 66, at 385; *see also supra* note 66 and accompanying text.

100. OPPENHEIM, *supra* note 51, § 138. Likewise, a 1949 U.S. government report concluded that German records seized in World War II were not protected under Article 56 of the 1907 Hague Regulations. ERNST POSNER, REPORT ON THE PUBLIC ARCHIVES OF GERMANY 51–52 (1949) (on file with author).

101. 1907 Hague Regulations, *supra* note 46, art. 46.

102. *Id.* art. 53. The *U.S. Army Field Manual* specifically lists “documents connected with the war” as “private property susceptible of direct military use.” U.S. ARMY FIELD MANUAL, *supra* note 51, para. 410, at 153. On the status of private foreign records seized within the United States during war, *see generally* Glenn, *supra* note 50. Similarly, under both the 1907 Hague Regulations and the Third 1949 Geneva Convention, personal possessions generally remain the property of a prisoner of war, with an exception for “military documents.” 1907 Hague Regulations, *supra* note 46, art. 4 (stating that all “personable belongings” of prisoners of war remain their property “except arms, horses, and military papers”); Third 1949 Geneva Convention, *supra* note 47, art. 18 (“All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war.”). The International Committee of the Red Cross interprets “military documents” to include “maps, regulations, written orders, plans, individual military records, etc.” Int’l Comm. of the Red Cross, Commentary on Article 18 of Geneva Convention III Relative to the Treatment of Prisoners of War, para. 1 n.4, available at <http://www.icrc.org/ihl.nsf/COM/375-590023?OpenDocument>.

custody of records or archives of military value—the legal *effect* of such seizures and the long-term status of such property varies greatly.

4. *Wartime Capture and Post-War Obligations of Return*

The obligation under international law of a belligerent to return records and archives seized during times of war depends primarily upon the circumstances of capture. Under the law of armed conflict, public moveable property lawfully seized during hostilities pursuant to military necessity generally becomes the property of the capturing state; in other words, it becomes war booty.¹⁰³ Likewise, during occupation, an enemy's seized public moveable property susceptible to military use and necessary for military operations also becomes the property of the seizing state.¹⁰⁴ The *U.S. Army Field Manual* summarizes: "[p]ublic property captured or seized from the enemy, as well as private property validly captured on the battlefield and abandoned property, is the property of the United States."¹⁰⁵ The operation of these rules may therefore preclude any legal obligation to return seized records and archives.

The status of records and archives as cultural property, however, may alter this result. First, to the extent that Article 56 of the 1907 Hague Regulations requires parties to treat certain records or archives as *private* property (either as "municipal" property or property devoted to "arts and sciences"), their seizure and use does not convert them into the property of the occupying power; instead they "must be restored and compensation fixed when peace is made."¹⁰⁶ Second, the 1954 Hague Convention requires that parties prevent or

103. GREENSPAN, *supra* note 40, at 281–82 (noting that "[a]ll booty of war becomes the property of the government of the captors"); see 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 173 (2005) [hereinafter ICRC STUDY] (discussing the status of "military equipment belonging to an adverse party as war booty" under customary international humanitarian law).

104. See DINSTEIN, *BELLIGERENT OCCUPATION*, *supra* note 69, at 219 ("When an Occupying Power takes possession of State movables—in conformity with Hague Regulation 53 . . .—it acquires title in them."); GREENSPAN, *supra* note 40, at 290–91 (noting that an "occupant may take absolute possession" of "all movable property belonging to the enemy state which may be used for military operations" as "booty of war"); OPPENHEIM, *supra* note 51, § 137 (noting that under Article 53 of the 1907 Hague Regulations, "[m]ovable public enemy property may certainly be appropriated by a belligerent, provided that it can directly or indirectly be useful for military operations").

105. U.S. ARMY FIELD MANUAL, *supra* note 51, at 150. The definition of abandoned property is broader during war time than it is in times of peace; this broader definition includes "property that was left behind or cast aside in situations where the right to possession was not voluntarily surrendered." *Morrison v. United States*, 492 F.2d 1219, 1226–27 (Ct. Cl. 1974) (finding that U.S. ownership over seized enemy currency found in Vietnam during the war was abandoned property and, thus, "public property" under the laws of war).

106. 1907 Hague Regulations, *supra* note 46, art. 53. This is consistent with the debate among the drafters of the 1874 Brussels Declaration, the document on which Article 56 of the 1907 Hague Regulations is based. Franklin, *supra* note 66, at 390. Although arguing that such a provision could not prevent an occupant from using records or archives of military value, the

stop “misappropriation” of cultural property and that parties “refrain from requisitioning moveable cultural property.”¹⁰⁷ Finally, the Convention provides “[i]mmunity from seizure, capture and prize” for cultural property being transported subject to special conditions.¹⁰⁸

The analysis of the international archival community, represented most prominently by the International Council on Archives (ICA), is also relevant. Based on a review of historical peace treaties that date back to the 1600s, the ICA identifies an international practice “progressively established from the time of the Treaty of Westphalia onwards” and “implicitly respected” that “archives captured and displaced during hostilities were returned once peace was concluded.”¹⁰⁹ The ICA links this practice to the “inalienability” of public archives under national laws.¹¹⁰ Archivist Charles Kecskeméti describes this view as follows:

No matter what vicissitudes they have gone through, public archives remain inalienable other than by an enactment of a legislative body, or by decision of equal legal value, of the state which had created them. The right of property in public archives does not fluctuate in accordance with events. It follows that any decision to appropriate archives, seized during military campaigns or times of occupation, taken by the state holding them, has, in fact, no legal value.¹¹¹

German delegation stated that the occupant could seize the records and archives “provided, of course, that he gave a receipt for same.” *Id.*

107. 1954 Hague Convention, *supra* note 4, art. 4(3).

108. See *id.* art. 14. Jiří Toman interprets “capture” as used in this provision of the Hague Convention “as a synonym for the right to booty” that “results in the acquiring of ownership with no obligation in regard to restitution or compensation.” TOMAN, *supra* note 4, at 170. This protection only applies during the movement of cultural property if certain requirements are satisfied and is further qualified because the Article cannot be read to “limit the right of visit and search.” 1954 Hague Convention, *supra* note 4, art. 14. Toman notes the possibility that “the resistance or intelligence agents” could “transmit information of vital importance from the military standpoint” led to “the additional sentence regarding the right of the opposing Party to visit and search . . . in order to ensure there were no military intelligence leaks.” TOMAN, *supra* note 4, at 171.

109. See Int’l Council on Archives [ICA], “*The View of the Archival Community on the Settling of Disputed Claims*”: *Position Paper Adopted by the Executive Committee of the International Council on Archives at Its Meeting in Guangzhou*, para. 1 (1995), reprinted in PATRICIA KENNEDY GRIMSTED, *TROPHIES OF WAR AND EMPIRE* app. VII, at 558 (2001) [hereinafter ICA Position Paper]. For a list of the historical treaties and a description of their relevant provisions, see generally U.N. Int’l Law Comm’n, *Non-Exhaustive Table of Treaties Containing Provisions Relating to the Transfer of Archives in Cases of Succession of States*, reprinted in GRIMSTED, *supra*, at app. II [hereinafter *Non-Exhaustive Table of Treaties*].

110. See ICA Position Paper, *supra* note 109, para. 4 (“National laws agree in conferring the status of inalienable and imprescriptible public property on public records.”).

111. Charles Kecskeméti, *Activities of UNESCO and ICA Since 1976: Part Two, in INTERDEPENDENCE OF ARCHIVES*, *supra* note 25, at 79, 84 [hereinafter Kecskeméti, *Activities of UNESCO and ICA Since 1976*]; see UNESCO Consultation Group, *supra* note 35, para. 6.1.1

Whether the principle of “inalienability” of public archives represents a custom binding under international law during armed conflict is, however, questionable. Although national laws may treat state records and archives as inalienable state property, this treatment does not trump the operation of the law of armed conflict under which belligerents may permanently appropriate public property pursuant to military necessity.¹¹² Moreover, according to the ICA, since 1945 the international community has largely abandoned the practice of returning seized archives following war pursuant to negotiated peace treaties.¹¹³ Further, the historical treaties requiring the return of archives on which the principle of archival inalienability relies, which were neither uniform nor unanimous,¹¹⁴ may also reflect unequal negotiating positions and victors imposing terms on defeated foes.¹¹⁵ Although the eventual return of records and archives seized during war may be a common international practice, the primary basis for such transfers would more often appear to be diplomatic policy and discretion rather than a binding custom of international law.

Similarly, the United States has generally followed a practice of returning originals of records and archives that it seized during war or occupation, usually after making microfilm copies.¹¹⁶ Such transfers have often occurred,

(“Military and colonial occupation should grant no particular right to retain records acquired by virtue of such occupation.”). Thus, unlike provisions such as Article 56 of the 1907 Hague Regulations, that seek to protect certain forms of public property by requiring that they be treated as private property, this view proffers that it is precisely the public nature of state archives that should render them “inalienable.” See Mackenzie, *supra* note 4, at 246 (noting that protecting cultural property by treating it as private property “create[s] a distinction that would not fit comfortably” with “the modern concept of inalienability of public records displaced by war”).

112. Kecskeméti acknowledges the right of belligerents in “the exploitation of ‘captured’ archives for military, political, scientific or administrative objectives,” but argues that the “capture of archives in the course of war” gives the “new holder” no rights beyond that. Kecskeméti, *Activities of UNESCO and ICA Since 1976*, *supra* note 111, at 84.

113. ICA Position Paper, *supra* note 109, para. 2.

114. See *Non-Exhaustive Table of Treaties*, *supra* note 109, at 511-30. Many of the historical peace treaties required the return of removed archives, some did not, and still others distinguished between historical archives and administrative ones. See generally *id.*; see also Kecskeméti, *Displaced European Archives*, *supra* note 27, at 132 (“The Münster peace treaty of 1648 prescribed neither the transfer nor the restitution of records. It simply legalized the archival situation as it was shaped by the Thirty Years War (1618-1648).”).

115. See, e.g., Bedjaoui, *supra* note 22, at 75 (noting that such treaties “required the conquered to restore the archives belonging to or concerning the ceded territory” (emphasis added)); Posner, *Effects of Changes*, *supra* note 28, at 152 (explaining that, in one negotiation, “Austria’s bargaining position was extremely weak,” and thus “she had to sacrifice archives, without which people can live, to get bread and other food, without which they cannot live”).

116. Brower, *supra* note 7, at 202 (describing the history of U.S. seizures and the disposition of foreign records prior to World War II, including the practice of “selective microfilming”); see Geraldine N. Phillips, *Duplication Before Restitution: Costs and Benefits—the U.S. Experience, in INTERDEPENDENCE OF ARCHIVES*, *supra* note 25, at 167, 168 (discussing the microfiche reproduction of documents that the United States seized from Grenada in 1983).

however, many years after the relevant war has ended, when the intelligence value of the records' content has been exhausted and the security and diplomatic advantage of withholding them has passed.¹¹⁷ Further, the United States has often made clear that such transfers were voluntary and not legally compelled. In 1953, for example, German records seized during World War II were "donated" to Germany based on the determination that legal title to the records had passed to the United States.¹¹⁸ In fact, the United States treated the captured German records as U.S. federal records and obtained congressional approval for their "donation" to Germany pursuant to the Records Disposal Act of 1943.¹¹⁹ Such approval was obtained based on the fiction, asserted by the Archivist of the United States, that the records did not have "sufficient

During the 20th century the United States seized records during four conflicts: World War II, Korea, Vietnam, and Grenada. In all of these previous instances, U.S. practice has been to repatriate the records after their primary utility was exhausted and after copies were made for historical purposes and broad public access.

Soc'y of Am. Archivists & Ass'n of Canadian Archivists, *supra* note 1; see Peterson, *supra* note 21, at 262–64 (describing U.S. seizures of foreign records).

117. See, e.g., U.S. Dep't of State, Media Note, Return of Smolensk Archive (Dec. 13, 2002), <http://www.america.gov/st/washfile-english/2002/December/20021213162451jthomas@pd.state.gov/0.1011011.html>. (explaining that a particularly controversial set of archives the Germans seized from Smolensk, Russia, in World War II that "came into the possession of U.S. Forces at the end of the war" was used as a source of intelligence during the Cold War and was later returned to Russia in late 2002); see also PATRICIA KENNEDY GRIMSTED, *THE ODYSSEY OF THE SMOLENSK ARCHIVE: PLUNDERED COMMUNIST RECORDS FOR THE SERVICE OF ANTI-COMMUNISM* (1995) [hereinafter GRIMSTED, *ODYSSEY*]. Records captured by U.S. forces in Grenada in 1983 as the New Jewel Movement was controlling the country were returned comparatively quickly in 1984 at the request of the new government. See Phillips, *supra* note 116, at 168.

118. U.S. NAT'L ARCHIVES & RECORDS ADMIN., GENERAL RECORDS SCHEDULE, SEIZED GERMAN RECORDS, JOB NO. II-NNA-777 (Aug. 1, 1953), U.S. National Archives, Record Group 242, AGAR-S No. 3144 (on file with author) [hereinafter U.S. ARCHIVES, SEIZED GERMAN RECORDS]; cf. Act of July 3, 1957, Pub. L. No. 85-81, § 1, 71 Stat. 276, 276 (1957) (authorizing the Administrator of General Services to "donate" to the Philippines "the records captured by United States forces from the Philippine insurgents during the period 1899-1903"); Brower, *supra* note 7, at 202 (discussing the transfer of records to the Philippines).

119. See Act of July 7, 1943, ch. 192, 57 Stat. 380 (codified as amended at 44 U.S.C. §§ 3301–3324 (2006)). Under current U.S. statutes and regulations governing federal records, the question of whether seized foreign records become U.S. records is not answered with any clarity. "Records" is defined to include documents that have been "received" by a federal agency. 44 U.S.C. § 3301 (2006). National Archives and Records Administration regulations purport to clarify the term "received" by stating that it "may or may not refer to . . . seized materials depending on the conditions under which such materials came into agency custody or were used by the agency" and advise simply that "legal counsel should be sought regarding the 'record' status of . . . seized materials." 36 C.F.R. § 1222.10(b)(4) (2010). Concluding that seized foreign records have not become U.S. federal records, however, is not necessarily dispositive of the related, but separate, question of whether title to seized records has passed to the United States.

administrative, legal, research, or other value to warrant their further preservation by the United States Government.”¹²⁰

U.S. policy has not, however, been clear or consistent.¹²¹ A year earlier in 1952, for example, the U.S. government internally debated whether title to certain records seized during the occupation of Japan had passed to the United States, or whether, under international law, seizure of the records gave the United States only “the right to custody and use.”¹²² Ultimately, in 1956, the United States approved the return of a significant number of Japanese records pursuant to congressional authority on the same basis as the German records.¹²³

The National Archives and Records Administration notes that, since World War II, determining the “legal status” of foreign records obtained during armed conflict has remained an “evolving process.”¹²⁴ The U.S. government was apparently divided, for example, over whether title to records seized in Haiti in 1994 had passed to the United States.¹²⁵ The Department of Defense (DoD) reportedly insisted that the documents “became American property when United States troops seized them,” although Representative John Conyers claimed to have obtained an opinion from the American Law Division of the Congressional Research Service concluding that the documents remained the property of Haiti.¹²⁶ While a thorough examination of U.S. practice has yet to

120. U.S. ARCHIVES, SEIZED GERMAN RECORDS, *supra* note 118; Pomrenze, *supra* note 24, at 28.

121. Glenn, *supra* note 50, at 400, 405 (stating that U.S. policies on records seized in war “has followed a meandering course” and has generally “followed a policy of self-interest, of expediency, rather than a consistent principle of law” and has made only a “feeble and inconclusive effort to achieve a solution of the question as to the legal status of the seized records”).

122. Greg Bradsher, *A “Constantly Recurring Irritant”: Returning Captured and Seized Japanese Records, 1946-1961*, in NAZI WAR CRIMES AND JAPANESE IMPERIAL GOVERNMENT RECORDS INTERAGENCY WORKING GROUP, RESEARCHING JAPANESE WAR CRIMES: INTRODUCTORY ESSAYS 169, 175 (2006).

123. U.S. NAT’L ARCHIVES & RECORDS ADMIN., GENERAL RECORDS SCHEDULE, SEIZED JAPANESE RECORDS, JOB NO. II-NNA-2082 (Mar. 23, 1956), U.S. National Archives, Record Group 242, AGAR-S No. 3145 (on file with author) [hereinafter U.S. ARCHIVES SEIZED JAPANESE RECORDS]; *see* U.S. ARCHIVES, SEIZED GERMAN RECORDS, *supra* note 118 (laying out the basis for returning German records); *see also* Bradsher, *supra* note 122, at 179–80; Pomrenze, *supra* note 24, at 28–30.

124. *See generally* Letter from John W. Carlin, Archivist of the U.S., to Donald H. Rumsfeld, U.S. Sec’y of Def. (Apr. 17, 2003) (on file with author).

125. Larry Rohter, *Haiti Accuses U.S. of Holding Data Recovered by G.I.’s*, N.Y. TIMES, Nov. 28, 1995, at A1.

126. *Id.*; 142 CONG. REC. 12,514 n.1 (1996) (statement of Rep. Conyers) (stating that the American Law Division “determined that according to the Foreign Relations Law of the United States and international law as interpreted by the United States, the seized documents clearly belong to the legitimate government of Haiti” and that the “opinion also noted that their seizure and retention is a departure from these norms”). A written request by the author to the office of Rep. Conyers for a copy of this opinion was not answered.

be written,¹²⁷ diplomacy, more often than law, appears to drive the ultimate disposition of captured foreign records in U.S. custody.¹²⁸

IV. BA'ATH PARTY DOCUMENTS IN THE IRAQ WAR

The unique characteristics of records and archives and the limitations of international law in defining their status are plainly illustrated by the ongoing controversies over the fate of Ba'ath party records in the Second Gulf War. Ba'ath party documents represent all of the conflicting values of records and archives. As U.S. and coalition forces entered Iraq on March 20, 2003, the records of the Ba'ath party, which ruled the enemy government and military, had significant military and intelligence value.¹²⁹ To Iraqis, such records presented the possibility of obtaining information on the fate of missing relatives or proof of legal rights for those whose property deeds and identification documents had been confiscated or destroyed by Ba'ath party officials.¹³⁰ Such records also potentially constituted evidence that the regime committed human rights abuses and, if preserved as archives, would be part of "modern Iraq's historical memory."¹³¹

Unsurprisingly, the fate of Ba'ath party records quickly became controversial. In early April 2003, Human Rights Watch complained that "U.S. and coalition forces [had] done little to stop" the looting of government offices and Ba'ath party records that occurred "in many Iraqi cities as the government collapse[d]."¹³² The Society of American Archivists similarly expressed concern over reports of destruction and looting of "contemporary and historical records" and acknowledged their value, stating that "[w]ithout records, Iraqi officials cannot be held accountable. Without records, citizens cannot exercise their rights. Without records, a stable economic environment

127. For the period prior to World War II, see generally Brower, *supra* note 7.

128. See U.S. ARCHIVES, SEIZED GERMAN RECORDS, *supra* note 118. With regard to captured German records, the "stated policy of the Department of State" was that, "in order to promote friendly relations with the Federal Republic of Germany on a normal basis, bring about effective participation by the Federal Republic in the European Defense Community on a basis of equality, and remove unnecessary obstacle to the attainment of these objectives, the seized German documents should be returned to the Federal Republic." *Id.* Similarly, records captured in Grenada in 1983 were returned to the new government based on "diplomatic need." See Phillips, *supra* note 116, at 168.

129. See *The Iraqi Documents: A Glimpse into the Regime of Sadaam Hussein: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on International Relations*, 109th Cong. 34 (2006) (statement of Daniel Butler, Senior Advisor to the Assistant Deputy Director of National Intelligence of Open Source, Open Source Center, Office of Director of National Intelligence) [hereinafter *Iraqi Documents*] (describing the intelligence vetting procedure for the Iraqi documents).

130. HUMAN RIGHTS WATCH, IRAQ: STATE OF THE EVIDENCE 8 (2004).

131. Saad Eskander, *The Tale of Iraq's "Cemetery of Books"*, INFORMATION TODAY, Dec. 2004, 1, 50 [hereinafter Eskander, *Cemetery of Books*].

132. Human Rights Watch, Iraq: Protect Government Archives from Looting (Apr. 9, 2003), <http://www.hrw.org/en/news/2003/04/09/iraq-protect-government-archives-looting>.

cannot emerge. And without records, the Iraqi people as well as the citizens of the world lose an important part of our shared cultural heritage.”¹³³

Similar sentiments were raised within the government by the National Archives and Records Administration, which offered its assistance to the DoD “in dealing with the documents that Coalition forces [were] securing from the Iraqi Government,” noting that “these documents [would] be essential in rebuilding and maintaining the country’s infrastructure, protecting property rights, and providing evidence in judicial proceedings.”¹³⁴

On April 16, 2003, General Tommy Franks, Commander of Coalition Forces, in a document entitled “Freedom to the Iraqi People,” proclaimed that the Ba’ath party “is hereby disestablished,” that “[p]roperty of the Ba’ath party should be turned over [sic] the Coalition Provisional Authority,” and that “Saddam Hussein’s intelligence and security apparatus” is “hereby deprived of all powers and authority.”¹³⁵ General Franks specifically called upon Iraqis “to inform Coalition Forces regarding the location of: foreign fighters and terrorists; members of the regime’s security apparatus; and individuals who have perpetrated crimes against humanity or war crimes. *All records concerning these activities should be preserved.*”¹³⁶ On May 25, 2003, Coalition Provisional Authority (CPA) Order Number 4 announced that all “property and assets,” expressly defined to include “records and data,” of the Ba’ath party were “subject to seizure by the CPA,” an order that remained in effect until the CPA transferred sovereignty to the new Iraqi government on June 28, 2004.¹³⁷

During this period, the fate of three separate groups of Ba’ath party records and archives created controversies that continue to the present. One group was housed in the Iraqi National Library and Archives in Baghdad, and many of the documents were destroyed in early April 2003 when the building was burned and looted.¹³⁸ As with the highly publicized looting of the Iraqi National Museum, many authorities have alleged that international law required the

133. Soc’y of Am. Archivists, Statement on Iraqi Archives (Apr. 2003), http://www.archivists.org/statements/iraqi_archives.asp.

134. Letter from John W. Carlin to Donald H. Rumsfeld, *supra* note 124.

135. Gen. Tommy R. Franks, Freedom to the Iraqi People, in L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE LIBRARY OF CONG., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES app. at 47 (2006).

136. *Id.* at 48 (emphasis added).

137. Coal. Provisional Auth. [CPA], *Coalition Provisional Authority Order No. 4: Management of Property and Assets of the Iraqi Baath Party*, §§ 1, 4 CPA Doc. CPA/ORD/25 May 2004/04 (May 25, 2003) [hereinafter CPA Order No. 4]; CPA, *CPA Order Number 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority*, § 4(1), CPA Doc. CPA/ORD/29 June 2004/100 (June 28, 2004) [hereinafter CPA Order No. 100] (rescinding CPA Order No. 4).

138. Nabil Al-Tikriti, “Stuff Happens”: A Brief Overview of the 2003 Destruction of Iraqi Manuscript Collections, Archives, and Libraries, 55 LIBRARY TRENDS 730, 732–33 (2007).

United States and coalition forces to prevent the destruction of these archives.¹³⁹

Controversies also surround two different sets of Ba'ath party records that were seized and removed from Iraq. These include Ba'ath party records U.S. personnel seized throughout Iraq during and after the war that were transferred out of Iraq to an undisclosed location and used for U.S. intelligence purposes.¹⁴⁰ A U.S. non-governmental organization, the Iraq Memory Foundation, removed others from Ba'ath party headquarters in Baghdad and ultimately transported them to the United States where they are currently on deposit at the Hoover Institution at Stanford University.¹⁴¹ Each of these controversies, discussed in detail below, illustrates the complexity and inadequacy of international law in addressing the status of records and archives in war.

A. *The Fall of Baghdad and the Iraqi National Archives*

When the war began in 2003, the Iraqi National Library and Archives in Baghdad contained an extensive archival collection that included Ottoman government documents, files from the British Occupation, as well as certain Ba'ath party records.¹⁴² Leading up to the war, the librarians and archivists undertook preventative actions, including the evacuation of the Ottoman records to the basement of the Board of Tourism located elsewhere in the city.¹⁴³ The current Director General of the National Archives, Saad Eskander, states that one motivation for this relocation was the proximity of the National Archives to the Ministry of Defense, which “was clearly a military target, if war broke out.”¹⁴⁴ On April 10, 2003, the day after Saddam Hussein's statue was famously pulled down as Baghdad fell, U.S. forces reportedly entered the

139. See *id.* at 731–32 (stating that “primary liability appears to lie with occupation forces” and “those in command of U.S. forces may have knowingly neglected their legal duty under international humanitarian law”); Eskander, *Cemetery of Books*, *supra* note 131 (“It is true that the Americans, as occupiers and according to international laws, neglected their duties to safeguard Iraq's cultural heritage and must accept responsibility for what happened.”).

140. Editorial, *Iraq's Archives*, WASH. POST, Jan. 30, 2004, at A20.

141. Adam Gorlick, *Saddam Hussein's Papers, Along with Controversy, Find a Temporary Home with the Hoover Institution*, STAN. UNIV. NEWS, June 18, 2008, available at <http://news-service.stanford.edu/news/2008/june18/iraq-061808.html>.

142. Al-Tikriti, *supra* note 138, at 733; Saad Eskander, *Records and Archives Recovery in Iraq: Past, Present and Future*, IRAQI NAT'L LIBRARY & ARCHIVES, July 17, 2006, <http://www.iraqnla.org/fp/art/art1.htm> [hereinafter Eskander, *Records and Archives Recovery in Iraq*].

143. See Al-Tikriti, *supra* note 138, at 733. The basement of the Board of Tourism later flooded, causing significant damage to the archives stored there. See *id.* Although suffering from inadequate funds and neglect, a preservation program attempted to reproduce historical documents on microfilm and microfiche and establish an emergency plan to protect the collections “under war conditions.” See Eskander, *Records and Archives Recovery in Iraq*, *supra* note 142.

144. Eskander, *Records and Archives Recovery in Iraq*, *supra* note 142.

grounds of the National Library and Archives building in Iraq, where they tore down another statue of Saddam Hussein located near the entrance.¹⁴⁵ Following this, looting and destruction began.¹⁴⁶

The events at the Iraqi National Library and Archives, however, were more complex than random looting and destruction. A delegation from the U.S. Library of Congress that visited in late 2003 to assess the damage learned of two fires, the first on April 10 and the second on April 14, 2003, affecting certain archives, but not others.¹⁴⁷ The delegation reported that “[a]fter questioning the librarians repeatedly, it became clear that the archives that were burnt were those that covered . . . the Republican era, which according to them included the archives from 1977 to the present.”¹⁴⁸ The delegation further noted that “some kind of highly incendiary device had been used that would not likely have been found in the hands of random looters.”¹⁴⁹ Additionally, Eskander has described the destroyed records as encompassing “the history of the Ba’ath Party since it seized power in 1963” and “contain[ing] the transcripts of all court-martials set up by the Ba’ath regime for the trial of its opponents.”¹⁵⁰ Eskander agrees that the destruction was “well-organized” and believes that Ba’athists “loyal to the old regime” were responsible.¹⁵¹

The destruction at the National Archives has been considered alongside the more highly publicized, and roughly simultaneous, looting of the Iraqi National Museum, and the analysis has focused primarily upon whether international law required the United States to prevent such destruction on two primary bases.¹⁵² The first is Article 4(3) of the 1954 Hague Convention, which requires parties to “undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of

145. Eskander, *Cemetery of Books*, *supra* note 131, at 50.

146. *Id.*

147. THE LIBRARY OF CONGRESS AND THE U.S. DEPARTMENT OF STATE MISSION TO BAGHDAD: REPORT ON THE NATIONAL LIBRARY AND THE HOUSE OF MANUSCRIPTS (2003), <http://www.loc.gov/rr/amed/iraqreport/iraqreport.html> [hereinafter MISSION TO BAGHDAD REPORT]. The current Director General has indicated his belief that the second fire occurred on April 12, not April 14. Eskander, *Cemetery of Books*, *supra* note 131.

148. MISSION TO BAGHDAD REPORT, *supra* note 147 (“Other archives, such as those . . . from the Ministry of Interior . . . covering the period 1920 to 1977, lay unharmed in rice bags in rooms close to those in which the republican archives had been burnt to ashes.”).

149. *Id.* A small portion of the targeted archives were preserved through timely evacuation by local clerics who “haphazardly” collected some of these archival documents and stored them for safekeeping. *Id.*

150. Eskander, *Cemetery of Books*, *supra* note 131, at 51.

151. *Id.*

152. See Al-Tikriti, *supra* note 138, at 731–32; Gerstenblith, *supra* note 17, at 308–09 (discussing the looting and vandalism of the Iraq Museum “and other cultural institutions, such as archives and libraries”).

vandalism directed against, cultural property.”¹⁵³ Previous debate has centered on whether this provision represented customary international law, and was therefore binding on the United States at the time, and the unresolved issue of whether this provision is limited to requiring a nation to control the actions of its *own* forces, or whether the obligation extends to preventing the acts of local enemy civilians such as those that looted the Iraqi National Museum.¹⁵⁴ The second basis is the 1907 Hague Regulations, which places affirmative duties on an occupant to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety.”¹⁵⁵ This specific provision implicates the often debated, and perhaps irresolvable, question of when the occupation of Baghdad began, a date usually placed somewhere between April 9, 2003, when “[t]he regime in Baghdad effectively ceased to function,”¹⁵⁶ and May 22, 2003, when United Nations Security Council Resolution 1483 formally recognized the United States and the United Kingdom “as occupying powers under unified command.”¹⁵⁷ Although these contentious issues are also relevant to the events surrounding the Ba’ath party records stored at the National Archives, the nature of these records and the apparent identity and possible authority of

153. 1954 Hague Convention, *supra* note 4, art. 4(3). As discussed earlier, although the United States was not yet a party to the 1954 Hague Convention, it had signed and accepted at least certain provisions as customary international law. See *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 4, at 103–06; Sandholtz, *supra* note 49, at 223–40.

154. Compare O’KEEFE, *supra* note 4, at 133 (stating that article 4(3) “is not limited to the commission of such acts by a Party’s own armed forces but extends to commission by the local populace”), and Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, in 80 INTERNATIONAL LAW STUDIES, ISSUES IN INTERNATIONAL LAW AND MILITARY OPERATIONS 43, 50 (Richard B. Jacques ed., 2006) (stating that “[s]urely, [Article 4(3)] covers all types of looting, including that carried out by local inhabitants against their own Government, institutions and co-nationals”), with Gerstenblith, *supra* note 17, at 310 (concluding that Article 4(3) of the 1954 Hague Convention is “intended to require nations to restrain only their own military forces from engaging in acts of vandalism, looting, and pillage directed against the territory of an opposing nation”).

155. 1907 Hague Regulations, *supra* note 46, art. 43.

156. ANTHONY H. CORDESMAN, *THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS* 112 (2003). Further, on April 9, 2003, Iraq’s Ambassador to the United Nations stated that “the government of Iraq had been defeated.” *Contemporary Practice of the United States Relating to International Law: Use of Military Force to Disarm Iraq*, 97 AM. J. INT’L L. 419, 427 (Stephen D. Murphy ed., 2003).

157. S.C. Res. 1483, at 2, U.N. Doc. S/RES/1483 (May 22, 2003); see Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 201–02 (2005) (examining the timeline between the U.S. and Britain’s initial entry and the U.N Security Council’s recognition of their occupation); Gerstenblith, *supra* note 17, at 309 n.289 (“Although the United States should be regarded as the occupier of Iraq after May 22, 2003, most of the looting of cultural institutions took place during April in a period of active hostilities rather than occupation.”); John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190 MIL. L. REV. 111, 149 (2006–2007) (“It is probably impossible to determine at what point, if any, the United States occupied Bagdad, or at least the vicinity of the Iraqi National Museum, between 9 and 16 April 2003.”).

those who destroyed them present a far more complex and ambiguous factual and legal situation than the looting at the National Museum; they also alter the application of international law.

1. *Iraqi National Archives as Cultural Property*

Unlike the looted art and archeological collections of the Iraqi National Museum, it is unclear whether Ba'ath party records in the Iraqi National Archives constitute protected cultural property. Under the 1954 Hague Convention, the Iraqi National Archives would likely fall within the "large libraries and depositaries of archives" language of Article 1(b),¹⁵⁸ its primary contents also would appear to constitute "important collections of books or archives" under Article 1(a).¹⁵⁹ Additionally, that these records were in the National Archives suggests their importance and lasting historical value, as well as the intent to treat and preserve them as *cultural property*. Ba'ath party records, however, present a concrete example of the difficulty of treating records that may be politically valuable as cultural property. As their apparent intentional destruction suggests, these records were not *solely* of historical value, but also may have possessed political and intelligence value.¹⁶⁰ Current Director General Eskander notes this dual nature of the destroyed Ba'ath party archives by describing them as being "of great value politically as well as historically."¹⁶¹

In essence, all national archives present a similar problem. Their purpose is to house, in the words of the 1954 Hague Convention, material "of great importance to the cultural heritage" of the nation,¹⁶² and there may likewise be buildings devoted to "arts and sciences" under the 1907 Hague Regulations,¹⁶³ yet the archives are not always neutral. Archivist Ernst Posner describes, for example, that the director of the Belgian State Archives at Antwerp bravely, but unsuccessfully, attempted to protect the Belgian archives by "point[ing] out to requisitioning German soldiers that [its] archives '*se trouvaient sous la protection de la Convention de la Haye*,'" that is, the archives were under the protection of the 1907 Hague Convention.¹⁶⁴ Posner challenges the director's assertion on the ground that "[a]rchival establishments of a state . . . are in the

158. 1954 Hague Convention, *supra* note 4, art. 1(b).

159. *Id.* art. 1(a). The Iraqi National Library, collocated with the National Archives, was expressly mentioned in U.N. Security Council Resolution 1483 in May 2003, which required U.N. Member States "to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraqi National Museum, *the National Library*, and other locations in Iraq." S.C. Res. 1483, *supra* note 157, para. 7 (emphasis added).

160. See *supra* note 137 and accompanying text.

161. Eskander, *Cemetery of Books*, *supra* note 131.

162. 1954 Hague Convention, *supra* note 4, preamble.

163. 1907 Hague Regulations, *supra* note 46, art. 27.

164. Posner, *Public Records Under Military Occupation*, *supra* note 22, at 214 n.2 (internal quotations and citations omitted).

first place service agencies of the government and only secondarily institutions of a scientific character.”¹⁶⁵ Similarly, the U.S. National Archives contains a significant number of older records of considerable historical value that nevertheless remain classified because their disclosure would, by definition, be “reasonably expected” to cause damage to national security and could therefore be of value to an adversary.¹⁶⁶

The Iraqi National Archives are not, in principle, excluded from protection as cultural property simply because of their potential intelligence or military value any more than the 1,200-year-old minaret at the mosque in Samarra was denied protection as cultural property despite the potential military advantage its 180-foot height could provide to a military sniper.¹⁶⁷ The central question in each case is how the dual nature, function, or potential use of such property affects the obligations of combatants to protect it, and whether, for example, imperative military necessity allows combatants to use, destroy, or seize such property.¹⁶⁸

Lastly, even if the Ba’ath party records within the National Archives constituted cultural property, the possible ideological identity of such records as symbols of the Ba’ath party might arguably affect their status in the same manner as forms of German art, classified as Nazi property, during the post-war “De-Nazification” of Germany.¹⁶⁹ Some have questioned, for example,

165. *Id.*

166. See Exec. Order No. 13,526, 75 Fed. Reg. 707, 714 (Dec. 29, 2009).

167. See O’KEEFE, *supra* note 4, at 109 (noting that “there is no reason in principle why the Convention should not apply to strategically significant immovable cultural property if the latter genuinely satisfies the definition laid down in article 1” of the 1954 Hague Convention). For a legal analysis of the incident at Samarra, see Geoffrey S. Corn, “Snipers in the Minaret—What Is the Rule?”: *The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28, 34–40.

168. The decision not to submit the 1954 Hague Convention to the Senate for ratification promptly after the United States became a signatory in 1954 arose in part from concerns at the Department of Defense that the Soviet Union would attempt to use the Convention to immunize the Kremlin from attack. *Review of the Convention for the Protection of the Cultural Property in the Event of Armed Conflict*, *supra* note 4, at 103–04. The issue was the “possible conflict between the outstanding historic interest versus the politico-military use of the extremely important architectural complex of the Moscow Kremlin.” *Id.* at 104. Boylan notes that this was a “serious misunderstanding” of the 1954 Hague Convention, under which the Kremlin could not be immune from attack “unless all of its politico-military functions use had been totally neutrali[z]ed or transferred elsewhere in advance of the hostilities.” *Id.* In transmitting the Convention to the Senate in 1999, the government noted that “[n]o concern remains in this regard today” and acknowledged that the Convention “would not have prevented [an attack on the Kremlin] in any case.” Section-by-Section Analysis of the Hague Convention and the Hague Protocol, S. TREATY DOC. NO. 106-1, at 6 (1999) [hereinafter Section-by-Section Analysis].

169. See Jonathan Drimmer, *Hate Property: A Substantive Limitation for America’s Cultural Property Laws*, 65 TENN. L. REV. 691, 694–95, 696 (1998) (discussing the confiscation of Nazi art in World War II and stating that the U.S. government has “implicitly taken the position . . . that the broad and growing international legal consensus favoring protection and repatriation of cultural property is subject to an exception for art that helps to reinforce and instill the dominant

whether the destruction of statues of Saddam Hussein throughout Iraq could be considered violations against cultural property.¹⁷⁰ The apparent justification is that such statues represented ideological symbols of the Ba'ath regime, that their public destruction was a legitimate method of convincing Iraqis that the Ba'ath regime was defeated, and that the destruction prevented the regime's resurgence.¹⁷¹ CPA Order Number 1, for example, described the "grave" threat to "Iraqi society . . . posed by the continuation of Ba'ath Party networks and personnel in the administration of Iraq, and the intimidation of the people of Iraq by Ba'ath Party officials," and expressly prohibited "[d]isplays in government buildings or public spaces the image or likeness of Saddam Hussein" as well as "symbols of the Baath Party."¹⁷² In relation to Ba'ath party records and archives specifically, Human Rights Watch noted in early April 2003 that in Basra, "British officials have publicly stated that they allowed the looting of Ba'ath party buildings, which house important archives, as a means of showing the population that the party had lost control of the

tenets of a genocidal culture"); see also Duane Michael Thompson, *Boots to Booty: The Overarching Restraints Imposed by Jus ad Bellum Justifications on Property Acquisition in War* 94–100 (May 23, 2004) (unpublished L.L.M. thesis, George Washington University Law School), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA423834&Location=U2&doc=GetTRDoc.pdf> (discussing the status of "ideological cultural property"); see generally William E. Griffith, *Denazification in the United States Zone of Germany*, 267 ANNALS AM. ACAD. POL. SOC. SCI. 68 (1950) (discussing, in general, the de-Nazification process following World War II).

170. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 825 (2005) (stating that toppling Saddam's statue "constituted a belligerent attack on a foreign nation's cultural property in the absence of any military necessity" and that it therefore "seems likely that the statue's destruction violated international law"). Strahilevitz argues that if, in contrast, the Iraqi government had destroyed the statue it "would be a liberating act and few would begrudge an Iraqi government's decision to destroy public property in order to send a particular message" because, although the statute had "significant historical value in memorializing a deposed regime," such value "would be outweighed by the expressive and symbolic value associated with this destruction." *Id.*

171. See *id.* at 824–35 (discussing, in general, the "expressive" value of destruction). By comparison, certain forms of Nazi art were seized and permanently retained "out of a fear that allowing the German people access to them could help revive the violent eliminationism that became manifest in Nazi Germany and even potentially contribute to the rise of a Fourth Reich." Drimmer, *supra* note 169, at 695. The long-term de-Nazification of Germany also involved the de-Nazification of German archivists. See Astrid M. Eckert, *Managing Their Own Past: German Archivists Between National Socialism and Democracy*, 7 ARCHIVAL SCI. 223, 229 (2007) (explaining the effect of incorporating archivists into the de-Nazification effort).

172. CPA, *Coalition [sic] Provisional Authority Number 1: De-Ba'athification of Iraqi Society*, CPA Doc. CPA/OED/16 May 2003/01 (May 16, 2003) [hereinafter CPA Order No. 1]. For a discussion of whether coalition reforms such as de-Ba'athification comported with, or exceeded, the proper authority of an occupying power, see Fox, *supra* note 157, at 208 (stating that "it is no exaggeration to describe the CPA as having engaged in a social engineering project in Iraq"); see also Posner, *Public Records Under Military Occupation*, *supra* note 22, at 220 (noting that, although an occupying power could replace the existing administrative structures, "[i]n practice . . . the invader will not consider this to his advantage, since it involves him in administrative and judicial detail with which the native officials are much better equipped to cope").

city.”¹⁷³ Although nothing indicates that the coalition forces intentionally left the Iraqi National Archives unguarded on this basis,¹⁷⁴ the potential ideological nature of the Ba’ath party records and archives further complicates their entitlement to protection.

2. Ba’ath Party Actors and Occupation

Even assuming such Ba’ath party records at the National Archives constituted cultural property, their destruction can be distinguished from the looting at the National Museum by the identity, motive, and possible authority of the actors involved. In addition to the findings of the Library of Congress delegation and others that the destruction was not the work of random looters, but well-organized individuals associated with the Ba’ath party, more specific evidence indicates that “three days prior to the invasion staff members [of the library] were instructed to destroy all archival material related to Ba’athist rule.”¹⁷⁵ Indeed, the possible content and value of these records provides both a reason and justification for such orders.

The potential authority of the actors and the timing of the destruction in early April 2003 further illustrate the complexity of the division between active hostilities and occupation, and the corresponding legal rights and obligations of the belligerents. Until the end of hostilities, for example, the destruction of government records by retreating government officials, or by individuals acting under official orders, in an attempt to deny the advancing enemy access to the records is typical, rational, and, in the absence of some overriding obligation to preserve, legitimate.¹⁷⁶ It is a last defensive act to limit the

173. Human Rights Watch, Iraq: Protect Government Archives from Looting (Apr. 9, 2003), <http://www.hrw.org/en/news/2003/04/09/iraq-protect-government-archives-looting>.

174. If Article 4(3) of the 1954 Hague Convention obligates parties to prevent vandalism and looting by local enemy civilians, it might also prohibit inaction where a military justification is present because Article 4(3) is usually understood as excepted from waivers of military necessity. See Sandholtz, *supra* note 49, at 230 (stating that the military necessity clause does not apply to Article 4(3) and the United States did not insist on such a qualification during the drafting of the 1954 Hague Convention); see also O’KEEFE, *supra* note 4, at 133 (“Neither limb [of article 4(3)] is subject to article 4(2)’s waiver in respect of military necessity.”).

175. Al-Tikriti, *supra* note 138, at 733. More generally, a document purporting to be a top-secret order from the Iraqi Secret Service, dated January 2003 and later published in the London-based newspaper *Al Hayat*, mandated that, in “the event of the downfall of the Iraqi leadership in the hands of the American, British, and Zionist forces,” there should be “burning of all state agencies connected with our directorates.” *A Top Secret Document Dated January 23, 2003 from Iraqi Intelligence: A Plan for Action in the Event of a Regime Downfall*, MIDDLE EAST MEDIA RESEARCH INST., July 17, 2003, <http://www.memri.org/report/en/0/0/0/0/0/909.htm>. The authenticity of this document, however, is questionable. See HUMAN RIGHTS WATCH, *supra* note 130, at 5 (noting that “[f]ormer Iraqi government officials shredded, burned, or otherwise destroyed many documents” in the weeks before the invasion).

176. Under U.S. law, for example, the destruction of federal records located outside the United States is permitted during war or “when hostile action by a foreign power appears imminent.” 44 U.S.C. § 3311 (2006); see DEP’T OF ARMY, AR 380-5, INFORMATION SECURITY

damage of losing a city or territory.¹⁷⁷ The uncertain line between hostilities and occupation thus creates a legal teeter-totter: at some point, a nascent occupier potentially may have a legal obligation under the 1907 Hague Regulations to prevent the same type of destruction of state property that the waning government arguably has the right to undertake in its final defense.

Accordingly, the identity and possible authority of those who destroyed the Ba'ath party records, combined with the unresolved uncertainty about the exact time when occupation began impacts the relevant international legal obligations in several ways.

First, the residual authority of the Ba'ath party that the destruction evidenced calls into question whether the United States occupied Baghdad between April 10 and April 14 and, therefore, whether the general duties of the occupying power to restore order under Article 43 of the 1907 Hague Regulations were triggered.

Second, even if the provision in Article 4(3) of the 1954 Hague Convention that requires parties to prevent "vandalism" to cultural property properly applies to the actions of enemy civilians, the provision may still be inapplicable to destruction undertaken pursuant to potentially lawful orders.¹⁷⁸ Such acts would arguably not constitute "vandalism," which, like "pillage" and "theft," generally involve actions taken without authority or justification.¹⁷⁹

Third, if these records were, in fact, cultural property, their destruction would potentially implicate Iraq's *own* obligations under Article 4(1) of the 1954 Hague Convention, which prohibits "any act of hostility directed against" cultural property.¹⁸⁰ Although this provision is most often cited as a restriction on the actions of the "attacking" party, it applies equally to the "defending" government. That is, in principle at least, this provision forbids a nation from destroying its *own* cultural property.¹⁸¹ This distinction is particularly important with respect to records and archives given that, as discussed earlier,

PROGRAM 18–20 (2000) [hereinafter DEP'T OF ARMY 380-5] (discussing destruction of classified military documents in the event of emergency).

177. See DEP'T OF ARMY 380-5, *supra* note 176, at 18–20; CORDESMAN, *supra* note 156, at 114 (noting that Iraqi Republican Guard forces were "digging in the area of Tikrit" after "coalition forces had effectively defeated organized resistance in Baghdad").

178. See 1954 Hague Convention, *supra* note 4, art. 4(3).

179. *Id.* Further, if Article 4(3) of the 1954 Hague Convention does not require a party to prevent "vandalism" by local civilians, as some have argued, *a fortiori* it should not require a party to prevent individuals, whether military or civilian, acting pursuant to (possibly) lawful orders of the retreating government. See Gerstenblith, *supra* note 17, at 330–31. *But see* O'KEEFE, *supra* note 4, at 133 (arguing that Article 4(3) requires a party to prevent acts committed "by remnants of the opposing armed forces").

180. 1954 Hague Convention, *supra* note 4, art. 4(1).

181. *Id.* UNESCO, for example, cited the principles of the 1954 Hague Convention in its condemnation of the Taliban's destruction of the Bamiyan Buddhas in Afghanistan, despite the fact the Taliban were effectively the ruling government. UNESCO, Declaration Concerning the Intentional Destruction of Cultural Heritage, Oct. 17, 2003. *But see* O'KEEFE, *supra* note 4, at 98 (contesting UNESCO's analysis of the status of the Taliban).

“defending” nations constitute one of the most significant threats of destruction.¹⁸² This prohibition, however, is subject to the same Article 4(2) waiver for imperative military necessity that is available to the “attacking” party.¹⁸³ Given the potential value of Ba’ath party records at issue, the legitimacy of a military-necessity waiver for the actions of Ba’ath party actors cannot be excluded.

Finally, although there may be an international legal responsibility to prevent the destruction of records and archives, the potential intelligence and political value of these records may decrease the need for such affirmative legal obligations. For example, the United States should have had a practical incentive to secure these records and archives based on their potential importance both to coalition intelligence operations and to the subsequent administration of the occupation.¹⁸⁴ In fact, on April 14, 2003, the same day these records may have been destroyed, Donald Rumsfeld, United States Secretary of Defense, stated that “[w]e are looking for people . . . who can help us find records, for example, of Baath Party members and the like.”¹⁸⁵

The loss of government records also affected the early plan for governance because the United States intended to rely on the existing bureaucratic structures.¹⁸⁶ Such plans quickly “became untenable when those structures dissolved” and “[l]ooters gutted seventeen of twenty-three ministries, stealing or destroying their records.”¹⁸⁷ Thus, even in the absence of any international legal obligation to prevent destruction, practical reasons may have justified readying additional resources for securing the National Archives and protecting its collections to serve the political and intelligence interests of the U.S. government.

B. Ba’ath Party Records Seized by U.S. Personnel

A second set of Ba’ath party records are those included among 48,000 boxes of documents the United States or coalition forces seized during the war and its aftermath. Although the exact content of these records is not publicly known, a 2004 Washington Post editorial estimated that when “coalition forces

182. See *supra* note 175 and accompanying text.

183. See 1954 Hague Convention, *supra* note 4, art. 4(2).

184. Indeed, the likelihood that these records could have been useful to the invading U.S. forces is only enhanced by the Ba’ath party’s efforts to destroy them.

185. Don Van Natta Jr. & David Johnston, *U.S. Search for Illegal Arms Narrowed to About 36 Sites*, N.Y. TIMES, Apr. 14, 2003, at B4.

186. CELESTE J. WARD, U.S. INST. OF PEACE, SPECIAL REPORT: THE COALITION PROVISIONAL AUTHORITY’S EXPERIENCE WITH GOVERNANCE IN IRAQ 3–4 (2005) (explaining that the initial plan for the war and a new government in the postwar period was to remove Saddam and the highest levels of leadership, but keep “broad structures of the bureaucracy . . . in place” to administer the country, or, more succinctly, “[t]he coalition would cut off the head of the snake but leave the body”).

187. *Id.* at 2.

captured Baghdad, they took control of some 80 percent of the former Iraqi regime's documents—hundreds of millions of pieces of paper—and moved them to an undisclosed location outside Iraq,” which has subsequently been revealed as Doha, Qatar.¹⁸⁸ According to congressional testimony, “at the point of capture” these documents were “immediately triaged for any tactical value” and eventually “sent back to the rear to Doha to be catalogued, indexed, scanned, and triaged by a team of linguists.”¹⁸⁹ The documents were then entered into a database called “Harmony,” which made them “available to the entire intelligence community to query against.”¹⁹⁰

The primary controversies surrounding these records concern allegations regarding the legality of their initial seizure and recent and repeated calls for their return to the control of the Iraqi government. In April 2008, for example, the Society of American Archivists stated that for “records of the Iraqi government, including the Baath Party records as an arm of the state, the archival principle of inalienability requires that they be returned to the national government of Iraq for preservation in the national archives.”¹⁹¹ In considerably stronger terms, in late 2008, the current Director General of the Iraqi National Library and Archives, Saad Eskander, condemned the “continuing refusal of the U.S. to pay serious attention to Iraqi calls for the repatriation of the Iraqi records illegally seized by its military and intelligence agencies.”¹⁹²

1. *The Initial Seizure of Ba'ath Party Records*

Under the law of armed conflict, the legality of U.S. and coalition seizures of Ba'ath party records depends upon the nature of these records, the circumstances of their capture, and the presence or absence of military necessity. Regarding the nature of Ba'ath party records, because the Ba'ath party was the sole ruling party in Iraq from 1968 to 2003, the prevailing view is that these records constituted state property.¹⁹³ Relevant provisions of the law of armed conflict therefore include those provisions governing the

188. Editorial, *Iraq's Archives*, *supra* note 140.

189. *Iraqi Documents*, *supra* note 129, at 34.

190. *Id.*

191. Soc'y of Am. Archivists & Ass'n of Canadian Archivists, *supra* note 1.

192. Eskander, *Minerva Research Initiative*, *supra* note 2.

193. See CPA Order No. 4, *supra* note 137, at 1 (“[P]roperty of the Iraqi Ba'ath Party constitute[s] State assets, the Iraqi government having been a one party State under the rule of the Ba'athists from the years 1968 to 2003.”). Similarly, the Society of American Archivists states that the records of the Ba'ath party, “as an arm of the state,” constitute Iraqi government records. Soc'y of Am. Archivists & Ass'n of Canadian Archivists, *supra* note 1. Cf. H.A. Smith, *Booty of War*, 23 BRIT. Y.B. INT'L L. 227, 229 (1946) (“In the late war all property belonging to the Nazi or to the Fascist parties or to their affiliated organizations has been treated as state property, a decision which followed logically from the complete identification of state and party under totalitarian systems of government.”).

treatment of enemy moveable public property during war and belligerent occupation.

Further, Ba'ath party records seized in active or recently active government offices most likely do not constitute cultural property. As the former Acting Archivist of the United States, Trudy Huskamp Peterson, has noted, although one could describe, for example, current "records of the secret police" as "archives" in a broader sense, these records probably do not constitute archival cultural property under the 1954 Hague Convention because the Convention's protections are primarily understood to extend to "noncurrent historical materials, particularly those housed in a facility designated as an historical archive."¹⁹⁴ Most crucially, the intent to treat these records as cultural property, which is manifest with respect to the Ba'ath records contained within the Iraqi National Archives, is notably absent with respect to those records seized by U.S. forces elsewhere in Iraq. In fact, the Director General of the Iraqi National Archives, although condemning the United States as the world's "hungriest scavenger" of foreign records and characterizing its seizure of Iraqi records as "illegal," nevertheless states

[i]f one divides the looted and destroyed Iraqi records into different categories—e.g. political, military-security, administrative, and cultural—one will find that the Americans were not interested in cultural records whatsoever. (By cultural records I mean the ones that are stored in national archives or libraries). The Americans were however extremely interested in seizing current records of a political and security-military nature.¹⁹⁵

Relevant standards during hostilities, therefore, include the 1907 Hague Regulations, which forbid the seizure of enemy property unless such seizure is "imperatively demanded by the necessities of war."¹⁹⁶ U.S. Central Command orders in force at the time of the U.S. invasion of Iraq reiterated this general principle mandating that "public property may be seized during exercises or operations only on order of the Commander, when based on military necessity."¹⁹⁷ Further, under the 1907 Hague Regulations, the occupying army may take possession of "all movable property belonging to the State which may be used for military operations."¹⁹⁸

The argument that seizing Ba'ath party documents was a military necessity and that such records properly constituted military objectives appears

194. See Peterson, *supra* note 21, at 271.

195. Eskander, *Minerva Research Initiative*, *supra* note 2.

196. 1907 Hague Regulations, *supra* note 46, art. 23(g).

197. U.S. CENT. COMMAND, GO-1A PROHIBITED ACTIVITIES FOR U.S. DEPARTMENT OF DEFENSE PERSONNEL PRESENT WITHIN THE UNITED STATES CENTRAL COMMAND (USCENTCOM) AOR (2000), *reprinted in* 1 CTR. FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ app. G-1 at 76–77 (2004).

198. 1907 Hague Regulations, *supra* note 46, art. 53.

compelling.¹⁹⁹ First, during initial hostilities, Ba'ath party records constituted documents of the enemy military and government. Second, regardless of when the period of belligerent occupation formally commenced, the United States continued to undertake significant combat operations, some of which were directly targeted at former Ba'ath party elements.²⁰⁰ As a general matter, the rules governing enemy property during hostilities continue to apply to combat military operations even if they occur in a territory under occupation.²⁰¹ Additionally, the seizure of the Ba'ath party documents was important for maintaining security.²⁰²

At the same time, the breadth and extent of the captured records raises legitimate concerns over the necessity and proportionality of such seizures. Enemy government offices and the documents contained within them, for example, are not necessarily "military objectives."²⁰³ Further, given the often-noted lack of Arabic speakers in the U.S. military, the "impulse to sweep up all documents and sort them out later" was likely "well near irresistible" for U.S. troops finding stashes of documents in Iraqi government offices.²⁰⁴

199. Indeed, this argument includes both many of the same reasons that would have justified securing the even older, less current Ba'ath party records in the Iraqi National Archives which were of interest to U.S. forces (that is, those having potential military, intelligence, and administrative value) and the same reasons the United States was criticized for failing to secure more governmental records throughout Iraq. *See supra* notes 184–87 and accompanying text.

200. *See* 2 CTR. FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 10–13 (2004) (describing "Continuing Combat Operations" during the occupation, including Operation DESERT SCORPION in June 2003 designed "to identify and defeat selected Ba'ath party loyalists"; Operation SODA MOUNTAIN in July 2003, a "major operation" resulting in the capture of "62 former regime leaders"; as well as attempts by coalition forces to quell a rebellion of "loyalists of Saddam Hussein" in April 2004); *see also* CPA Order No. 1, *supra* note 172, at 1 (noting "the continuing threat to the security of the Coalition Forces posed by the Iraqi Ba'ath Party").

201. *See* DINSTEIN, BELLIGERENT OCCUPATION, *supra* note 69, at 99–100 (describing the "duality of hostilities and occupation" and stating that "actual combat conducted against the Occupying Power either by enemy regular troops . . . or by locally organized insurgents" is "governed by the standard norms of [the law of international armed conflict]"); O'KEEFE, *supra* note 4, at 31 ("Crucially, if the military forces of an Occupying Power are involved in military operations during belligerent occupation, whether to quell armed resistance to the occupation, to defend against the enemy's attempt to recapture the territory or to cover a retreat from it, the provisions on hostilities apply.").

202. *Iraqi Documents*, *supra* note 129 (stressing the need for careful review so that captured "documents that might hurt an innocent Iraqi who could be the victim of retribution, for example, are not inadvertently released to the public").

203. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 94, 98 (2004) [hereinafter DINSTEIN, CONDUCT OF HOSTILITIES] (noting that "[g]overnment offices can be considered legitimate targets for attack only when used in pursuance or support of military functions").

204. Peterson, *supra* note 21, at 273. Further, the exhaustive search for evidence of weapons of mass destruction, for example, by the Iraq Survey Group included particularly intensive seizures of documents for exploitation. *See* CHARLES DUELFER, HIDE AND SEEK: THE SEARCH FOR TRUTH IN IRAQ 339–41 (2009).

Unfortunately, the dearth of information regarding the content of seized records prevents a more detailed assessment. In 2006, for example, three years after the war began, less than fifteen percent of seized documents had been fully translated.²⁰⁵ Further, public descriptions of the circumstances of capture are exceedingly vague, such as the DoD's statement that the documents "came into the possession of" the United States.²⁰⁶ The public release of a selected number of documents, along with cover sheets from the "Harmony" database indicating some "capture information," provides limited, but selective, details.²⁰⁷ Although such publicly released records are not necessarily a representative sample, they nevertheless generally appear to be of a military character.²⁰⁸

2. The Current Status of Seized Ba'ath Party Records

The more significant issues under international law are the *effect* of seizures; the legal status of Ba'ath party records now, over seven years later; and the uncertain ownership and proper location of the records. The central legal issue, which largely has been ignored, is whether legal title to Ba'ath party records U.S. forces lawfully seized pursuant to military necessity may have passed to the U.S. government.²⁰⁹

205. INST. FOR DEF. ANALYSES, IRAQ PERSPECTIVES PROJECT: SADDAM AND TERRORISM: EMERGING INSIGHTS FROM CAPTURED IRAQI DOCUMENTS v (2007) [hereinafter INST. FOR DEF. ANALYSES], available at <http://www.fas.org/irp/eprint/iraqi/index.html>. In March 2006, the government took the unprecedented step of uploading untranslated captured Iraqi documents onto a public website in order to, in the words of one Congressman, "unleash the power of the Net" to do translation and analysis that might take the government decades." Scott Shane, *Iraqi Documents Are Put on Web, and Search Is on*, N.Y. TIMES, Mar. 28, 2006, at A1. The project was subsequently halted and the documents removed following concerns from arms-control officials that certain documents included details about nuclear weapons. William J. Broad, *U.S. Web Archive is Said to Reveal Nuclear Primer*, N.Y. TIMES, Nov. 3, 2008, at A1. In 2008 the DoD, while soliciting civilian research proposals on the records, stated a preference for "studies that exploit materials that have not been previously translated." IRAQI PERSPECTIVES PROJECT, *supra* note 3, at 19.

206. IRAQI PERSPECTIVES PROJECT, *supra* note 3, at 19; see DUELFER, *supra* note 204, at 339 (describing "heaps of documents" in April 2003 "left exposed to the elements" at the Baghdad airport that "were eventually put in garbage bags" and that documents "sometimes had some data describing where they were collected, but often did not").

207. See generally INST. FOR DEF. ANALYSES, *supra* note 205; see also *Iraqi Documents*, *supra* note 129 (stating that the documents were carefully evaluated "to ensure that documents that would perhaps harm United States interests are not released inadvertently to the public").

208. See generally INST. FOR DEF. ANALYSES, *supra* note 205 (including translations of a number of the seized Iraqi records); see also DUELFER, *supra* note 204, at 340 (describing the "range of fascinating documents" captured by U.S. forces).

209. See Exec. Order No. 13,290, 3 C.F.R. 192 (2003), reprinted as amended in 50 U.S.C. § 1702 (2006) (determining that the "United States and Iraq are engaged in armed hostilities" and vesting in the Department of Treasury "all right, title, and interest" of certain financial property of the Government of Iraq and announcing the intention "that such vested property should be used to assist the Iraqi people and to assist in the reconstruction of Iraq").

U.S. Central Command orders reiterated the general principle that “[p]ublic property seized by the U.S. Armed Forces is the property of the United States.”²¹⁰ This would arguably be the result for Ba’ath party records seized during the initial period of hostilities and during subsequent active combat operations, even if the seizure occurred during the period of belligerent occupation. Under the law of both armed conflict and also the United States, such Ba’ath party records may constitute war booty or “spoils of war.”²¹¹ The status of other Ba’ath party records seized during the occupation depends upon whether they were susceptible to military use and whether seizure was necessary for “military operations” pursuant to Article 53 of the 1907 Hague Regulations.²¹²

In an April 2003 letter to Secretary Rumsfeld, however, the Archivist of the United States urged, on the basis of “established international norms” that “original Iraqi records secured by Coalition forces will and should eventually be the legal property of a new Iraqi Government.”²¹³ The Archivist stated that this “approach” had been used by the DoD and endorsed by the National Archives for records seized in 1989 during Operation “Just Cause” in Panama.²¹⁴ He noted that scanning seized records would “allow American forces to obtain copies of virtually any type of record that will be necessary for military and intelligence purposes.”²¹⁵

Moreover, the strict application of the law of armed conflict and the treatment of Ba’ath party records as U.S. property appears to be in some conflict with public statements of the United States and the CPA that suggest different intentions for Ba’ath party property. The April 16, 2003, “Freedom to the Iraqi People” message from General Franks, for example, began by stating that “Iraq and its property belong to the Iraqi people and the Coalition makes no claim of ownership by force of arms.”²¹⁶ On May 14, 2003, a representative from the DoD testified before Congress that DoD policy would specify “that seized state- and regime-owned property shall be held on behalf and for the benefit of the Iraqi people and shall only be used to assist the Iraqi people in support of reconstruction of Iraq.”²¹⁷ Further, in late May 2003, CPA Order Number 4, although mandating that all Ba’ath party property was

210. U.S. CENT. COMMAND, *supra* note 197, at 378.

211. See *supra* notes 103–05 and accompanying text.

212. See 1907 Hague Regulations, *supra* note 46, art. 53; ICRC STUDY, *supra* note 103, at 178 (stating that under international law “[i]n occupied territory . . . movable public property that can be used for military operations may be confiscated”).

213. Letter from John W. Carlin to Donald H. Rumsfeld, *supra* note 124, at 1.

214. *Id.* at 1–2.

215. *Id.*

216. Franks, *supra* note 135, at 47.

217. *Divesting Saddam: Freezing, Seizing, and Repatriating Saddam’s Money to the Iraqis: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 10 (2003) (statement of Lawrence Lanzillotta, Principal Deputy and Deputy Under-Secretary of Defense for Mgmt. Reform, Dep’t of Def.).

subject to seizure, stated that the CPA would “hold in trust and for the use and benefit of the people of Iraq all the said property and assets of the Ba’ath Party.”²¹⁸

Such statements potentially may be explained away on the basis that General Franks was simply clarifying the intent of coalition forces to temporarily occupy, rather than permanently subjugate, Iraq. One could also argue that the DoD was referring to *financial* assets of Iraq, or that such statements reflect general policies rather than any surrender of the legal rights of the United States to such property. Yet the essence of the current controversy over Ba’ath party records seized by U.S. forces is the perceived disconnect between the sentiment of these statements and the actual use and treatment of these records, and the inadequacy of international law in bridging the gap.

That Ba’ath party records may have constituted military objectives and likely were not protected as cultural property *at the time* that the United States seized them says nothing about the actual historical value of their content, which, given the heated and continual debate over their custody, appears considerable.²¹⁹ Years later, the DoD expressly acknowledged the records’ historical and cultural value in its controversial “Iraq Perspectives Project.”²²⁰ In June 2008, as part of a larger social science program called the Minerva Research Initiative, the DoD solicited research proposals from U.S. universities to study the “vast number of documents and other media” the DoD obtained during Operation Iraqi Freedom that form part of a “growing declassified archive.”²²¹ The stated goal of the project is to “explore the political, social, and cultural workings and changes within Iraq during the years Saddam Hussein was in power.”²²² The current Director General of the Iraqi National Archives, Saad Eskander, complains that the United States is providing U.S. universities access to crucial documents of Iraqi history in order to conduct academic studies while denying Iraqis, to whom that history is the most critical, the same access and opportunity.²²³

218. CPA Order No. 4, *supra* note 137, § 3(4).

219. Similarly, a World War II Memorandum for U.S. Forces noted that “[t]he administrative records of today are the research materials of tomorrow that will be indispensable to the historian, to the sociologist, and to the economist. They should receive the same care as cultural objects.” U.S. NAT’L ARCHIVES & RECORDS ADMIN., AUTH. NO. 790029, MEMORANDUM CONCERNING THE PROTECTION AND SALVAGE OF CULTURAL OBJECTS AND RECORDS IN WAR AREAS 2–3 (on file with author).

220. See IRAQI PERSPECTIVES PROJECT, *supra* note 3, at 19.

221. *Id.*

222. *Id.* Suggested examples of “appropriate research might be studies of leadership dynamics; social psychological studies of national identity and political unity; and Iraqi perceptions of international relations and systems.” *Id.* The DoD further noted that it sought “research that fosters scholarship in the area of cross-cultural awareness, cross-cultural competence and cultural intelligence.” *Id.*

223. Eskander, *Minerva Research Initiative*, *supra* note 2. Eskander, however, couches his criticism in international law by alleging that the Iraqi Perspectives Project “constitutes an

If the content of these records and the circumstances of their seizure were more precisely known, an evaluation of their status under international law could lead to conclusions similar to those concerning the captured German records the United States held after World War II:

While considerable quantities of these records may still be needed for purposes of intelligence, for research in the history of the prewar and war periods . . . and while others may be considered *bona fide* war booty that may be retained indefinitely, it would seem that those portions of the records that pertain to the internal history during the recent period, can and should be restituted after an appropriate repository for the administration of such material has been set up.²²⁴

A law passed by the Iraqi Parliament in January 2008 may have begun the process of identifying such an “appropriate repository” by mandating that “[a]ll files of the Dissolved Ba’ath Party . . . be transferred to the Government in order to be kept until a permanent Iraqi archive is established pursuant to the law.”²²⁵ Further, in early 2010, an Iraqi delegation to the United States, which included Director General Saad Eskander, reportedly met with State Department officials to begin negotiations for the possible return of the records.²²⁶

escalation in [the U.S.’s] violation of international conventions on the safeguarding of cultural heritage of occupied territories.” *Id.* Neither the First Protocol of 1954 Hague Convention, nor the 1970 UNESCO Convention, both of which contain prohibitions on the removal of cultural property from occupied territory, however, reasonably could be read to prohibit the removal of recently captured, current records of the enemy government, which may have become U.S. property. *See supra* notes 92–94, 103–05 and accompanying text. More simply, such records were not, at the time of capture or transfer, cultural property. Even if the 48,000 boxes of captured records sitting in a military warehouse in Qatar arguably could have later matured into “archives” constituting cultural property, such instruments would not provide retroactive legal effect, although they could provide a prospective one. Consider, for example, whether any future obligations under the 1954 Hague Convention would extend to Qatar, which has been a party to the main 1954 Hague Convention since 1973 and a party to the Second Protocol since 1999, and in whose territory the records are located. *See* UNESCO, Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Prop. 8, 28 (2005).

224. Pomrenze, *supra* note 24, at 25 (quoting ERNST POSNER, AGAR-S DOC. NO. 301, REPORT ON PUBLIC ARCHIVES OF GERMANY 58 (1949)).

225. Law of the Supreme National Commission for Accountability [sic] and Justice, Art. 4(b), (Jan. 17, 2008) (enacted), *available at* <http://www.ictj.org/images/content/7/6/766.pdf>. This is an unofficial translation provided by the International Center for Transitional Justice. *Id.*

226. *See* Aseel Kami, *Iraq Asks U.S. to Return Millions of Archive Documents*, ARABNEWS.COM, May 20, 2010, <http://arabnews.com/middleeast/article55519.ece> (stating that U.S. and Iraqi officials were in negotiations regarding the documents); *see also* Posting of Jeff Spurr, jbspurr@gmail.com, to Iraq Crisis List, iraqcrisis@lists.uchicago.edu (May 19, 2010) [hereinafter *Eskander Report*], *available at* <https://lists.uchicago.edu/web/arc/iraqcrisis/2010-05/msg00008.html> (including a report of the negotiations reportedly prepared by Saad Eskander). Several news reports erroneously stated that the United States and Iraq had come to an agreement on the return of the records. *See e.g.*, *Iraq Strikes Deal with US for Return of Archives*, AFP, May 13, 2010, <http://www.google.com/hostednews/afp/article/ALeqM5gF1oPz1OBsZo0ZiEuFgIET5Tvc3w> (stating that the United States “has agreed to return millions of documents to Iraq”).

In considering the possible transfer of Ba'ath party records to Iraq, the United States will face issues similar to those surrounding the return of captured German records following World War II. In 1953 when the United States "donated" captured German records to Germany, it expressly excluded from those returned records both "military, intelligence . . . documents, that would, if returned, jeopardize the national security interests of the United States or its Allies" and any "[d]ocuments tending to glorify the Nazi regime, or which are of inherent propaganda character, or *which deal with the organization, personnel, and operation of Nazi Party institutions*, except where such transfer would not jeopardize the democratic way of life in the Federal Republic."²²⁷ Given similarities between de-Nazification and de-Ba'athification, ongoing political violence in Iraq, the continuing presence of U.S. troops, and the fact that certain documents reportedly contain information on nuclear technology, the United States may wish to retain exclusive custody of at least a portion of the documents for a significant period of time, if not indefinitely.²²⁸

The final outcome, as with earlier dispositions of records captured by U.S. forces, will likely come about as a matter of diplomacy rather than law, although the two are interrelated. If the U.S. government, for example, has adopted the position advocated by the U.S. Archivist, that the original records remain Iraqi property²²⁹ and their return would be characterized more as repatriation than voluntary donation,²³⁰ the long-term exclusion of the Iraqi government from a portion of its own property may appear suspect both legally and diplomatically.²³¹

227. U.S. ARCHIVES, SEIZED GERMAN RECORDS, *supra* note 118 (emphasis added).

228. See *Iraqi Documents*, *supra* note 129 (noting that seized documents could present dangers to Iraqis who could become "victim[s] of retribution"); Broad, *supra* note 205 (stating that captured Iraqi records contain information on nuclear weapons).

229. Although the U.S. government has not taken an official public position on the precise legal status of these records, correspondence between the Defense Intelligence Agency (DIA) and the National Archives and Records Administration (NARA) appear to suggest that the DIA intended to treat scanned copies of these records, rather than the originals, as records of the U.S. government. See Letter from Paul M. Wester Jr., Director, Life Cycle Management Division, NARA, to Jack Tartella, Chief, Public Assess and Distribution Division, DIA (Sept. 8, 2004) (on file with author) (requesting DIA's plans for treating as federal records "the scanned copies of captured records and related processing records handled by the Combined Media Processing Center (CMPC) in Qatar"); see also Letter from Jack Tartella, Chief, Public Access and Distribution Division, DIA, to Paul M. Wester Jr., director, Life Cycle Management Division, NARA (undated) (on file with author) (responding that the DIA intends to create a new records disposition schedule to cover "all scanned copies of captured records" in Qatar). Whether the government also has determined, however, that the original seized records remain Iraqi property is unclear.

230. Letter from John W. Carlin to Donald H. Rumsfeld, *supra* note 124.

231. A similar issue arose in relation to the documents seized from Haiti during the 1994 U.S. invasion. The government of Haiti demanded the return of the documents and forty members of Congress, in a letter to President Clinton, stated that "[t]here is absolutely no justification why these materials should be in the hands of our government now that the legitimate

C. Ba'ath Party Records in Party Headquarters

While the Ba'ath party archives at the Iraqi National Archives were in flames and U.S. forces were seizing others throughout Iraq, a third tranche of Ba'ath party documents sat in the basement of Ba'ath party headquarters in Baghdad.²³² Over seven years later, these records are now located at the Hoover Institution at Stanford University.²³³ The records' journey and the corresponding facts are not authoritatively documented and can only be cobbled together from news articles and interviews that are not always consistent.

After the fall of Baghdad, perhaps in the summer of 2003, Kenan Makiya, the head of a non-governmental organization called the Iraq Memory Foundation (IMF), entered Ba'ath party headquarters in Baghdad where a U.S. soldier "pointed out a trap door at the tomb of one of its founders. Below it were rooms full of records that had escaped the looting: membership files, reports from informants and huge ledgers containing notes on every male student in the country."²³⁴ The CPA reportedly gave Makiya permission to take custody of the records, and he transported them to a house belonging to his family located in the Baghdad Green Zone.²³⁵

In August 2004, after sovereignty was transferred to the interim Iraqi government, the Iraqi prime minister's office reportedly authorized the IMF "to collect 'documents pertaining to harm committed by the former regime'" for the purposes of establishing a "national institution" in Baghdad.²³⁶ The plan, however, was abandoned, at least temporarily, because of the security situation in Iraq.²³⁷ At some point thereafter, the IMF reportedly entered into an agreement with the United States and, as a result, shipped the records to Virginia where the U.S. government scanned them.²³⁸ In 2005, the IMF

government of Haiti has been restored." Letter from Representative John Conyers et al. to President Clinton (Dec. 1, 1995), *reprinted in* 142 CONG. REC. 12,513 (1996). The United States, however, wanted to retain control of the records for national security purposes. See Rohter, *supra* note 125, at A18 (stating that an "American official said 'there may be legitimate national security reasons for withholding' the documents and expressed concern that their release could 'encourage violence' in Haiti"). After returning "about half" of the documents, the United States wanted to negotiate guarantees from Haiti about how the remaining documents would be used if returned. All Things Considered (NPR broadcast Feb. 6, 1996). An attorney for the Haitian government compared the U.S. position to a burglar stealing property and then offering to negotiate about which part will be returned. *Id.*

232. Alexandra Zavis, *Millions of Pages of Iraqi Pain*, L.A. TIMES, Sept. 17, 2007, at A1.

233. Kamil Dada, *Hoover Archives Ba'ath Party Records*, STAN. DAILY, Feb. 27, 2008, at 1.

234. Zavis, *supra* note 232.

235. Eakin, *supra* note 1; see Lale Kuyumcu, *Kanan Makiya Presses for Museum, Archive Center on Iraq's Baathist Regime*, America.gov, Dec. 31, 2003, <http://www.america.gov/st/washfile-english/2003/December/20031231172155xlucmuyuk0.3884546.html>.

236. Eakin, *supra* note 1.

237. *Id.*

238. *Id.*

apparently undertook unsuccessful negotiations with Harvard University about housing the records there.²³⁹ In January 2008, the Hoover Institution agreed to take custody of the archives, which amounted to between five and seven million records, for five years.²⁴⁰

The controversy grew after news of the agreement between the IMF and the Hoover Institution became public. In April 2008, the Society of American Archivists alleged that, under the “laws of war,” the actions of the IMF “may be considered an act of pillage, which is specifically forbidden by the 1907 Hague Convention.”²⁴¹ It further claimed that the “records of the government bodies and the Baath Party should be returned to the government of Iraq to be maintained as part of the official records in the National Library and Archives.”²⁴² The Hoover Institution responded that the archivists made these allegations “without knowledge of the participation and support the Iraqi government” had given to the “project” and clarified that the agreement was “a *deposit agreement*, which stipulates that the documents will be returned to Iraq when a suitable archival depository there has been identified. . . .”²⁴³ The Hoover Institution’s response also enclosed correspondence from the “Senior Deputy of the Ministry of Culture,” which stated that “the Iraqi government has approved the interim deposit agreement signed by the [IMF] and the Hoover Institution.”²⁴⁴

The growing feud continued in June 2008 when the Director General of the Iraqi Archives posted an “Open Letter to the Hoover Institution” stating that the records had been “illegally seized” and that other sectors of the Iraqi government supported the Iraqi National Archives’ claim to these records.²⁴⁵ Two days later, a second letter from the Iraqi Ministry of Culture surfaced, this time from the Acting Minister, that disclaimed the Hoover Institution’s previous letter, contending that it reflected neither “Iraqi government policies nor express[ed] opinions of [its] ministry,” but rather, that the Ministry’s policy was “to work on regaining those records as they are part of [sic] national heritage of Iraq.”²⁴⁶ The letter ended with an “absolute rejection” of

239. Dada, *supra* note 233.

240. Eakin, *supra* note 1 (stating that the archives handed over to the Hoover Institution consist of over five million pages); Gorlick, *supra* note 141 (stating that the Hoover Institution took custody of seven million records).

241. Soc’y of Am. Archivists & Ass’n of Canadian Archivists, *supra* note 1.

242. *Id.*

243. Letter from Richard Sousa, Senior Assoc. Dir. Hoover Inst., to Mark A. Green, President, Soc’y of Am. Archivists (June 6, 2008) [hereinafter Letter from Richard Sousa], available at http://www.archivists.org/statements/Iraqi%20Records_HooverLetter.pdf.

244. Memorandum from Jaber al-Jaberi, Senior Deputy of the Ministry of Culture (Apr. 27, 2008), available at http://www.archivists.org/statements/Iraqi%20Records_HooverLetter.pdf.

245. Letter from Saad Eskander, Dir.-Gen., Iraq Nat’l Library & Archives, to the Dir. of the Hoover Inst. (June 21, 2008), available at <http://libraryjuicepress.com/blog/?p=439>.

246. Letter from Akram M. Hadi, Acting Minister of Culture, Republic of Iraq, to Mark A. Green, President, Soc’y of Am. Archivists (June 23, 2008), available at

the statement that the agreement between the IMF and the Hoover Institution was approved by the Iraqi government, alleging that those organizations had “violated Iraqi legislations” and “worked against” the interests of the Iraqi people.²⁴⁷

As of mid-2010, the Hoover Institution and an Iraqi delegation were in negotiations concerning the status and possible return of the Ba’ath party records. According to a report of the negotiations, allegedly written by Saad Eskander, the Iraqi delegation and representatives of the Hoover Institution are now in agreement, at least among themselves, that the “Ba’ath Party archive is the property of the Iraqi people” and that the “elected government of Iraq represents the Iraqi people.”²⁴⁸ The debate over the possible return of the records to Iraq, however, continues.²⁴⁹

1. *The Legal Status of the IMF Ba’ath Party Records*

Missing and contradictory information and the ongoing factual disputes over authority complicate any attempt to determine the precise legal status of the Ba’ath party records at the Hoover Institution under international law. Even the Director of the Hoover Institution’s Archives claims not to know who “technically owns the documents.”²⁵⁰ Nevertheless, the available facts and chain of events provide some relevant guidance. At the beginning of the war in 2003, the IMF documents, like records captured by U.S. and coalition forces elsewhere in Iraq, may have constituted enemy public property and, given that there is little indication to suggest that the previous regime treated them as historical documents, they likely did not qualify as cultural property under the 1954 Hague Convention.²⁵¹

At some point prior to the involvement of Makiya and the IMF, U.S. forces secured the Ba’ath party building.²⁵² This raises the question of whether the United States had “seized” these documents *in situ* either as enemy property on

https://lists.uchicago.edu/web/arc/iraqcrisis/2008-06/msg00014/MoC_s_Letter_to_Mr_Greene.jpg. Eskander also alleged that the memorandum signed by al-Jaberi was actually written by an IMF director who deceived al-Jaberi into signing it. See Letter from Saad Eskander to the Dir. of the Hoover Inst., *supra* note 245.

247. Letter from Akram M. Hadi to Mark A. Green, *supra* note 246.

248. Eskander Report, *supra* note 226.

249. See Devin Banerjee, *Iraq Asks Hoover to Return Records*, STANFORD DAILY, May 25, 2010, <http://www.stanforddaily.com/2010/05/25/iraq-asks-hoover-to-return-records/> (noting that Iraq had requested the return of Ba’ath party records, but that “Hoover is resisting because it doesn’t deem security in Baghdad sufficient to ensure the documents’ security”).

250. Gorlick, *supra* note 141. Following the 2010 negotiations, Sousa stated that these “papers belong to the Iraqi people.” Banerjee, *supra* note 249.

251. See *supra* text accompanying notes 70–75. Arguably, the placement of the records under a “trapdoor at the tomb” of a party founder suggests that the former Iraqi government treated these as “archives” of the Ba’ath party; however, no additional evidence appears to support this. Zavis, *supra* note 232.

252. Zavis, *supra* note 232.

the battlefield or as abandoned property. An answer depends on details regarding the intent and actions of U.S. forces. “Valid capture or seizure of property,” states the *U.S. Army Field Manual*, “requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.”²⁵³ On the available facts, therefore, it appears that the United States may not have formally seized such documents, although additional facts could alter that analysis.

By the time Kenan Makiya arrived at the headquarters in the summer of 2003, the legal status of the Ba’ath party and the occupation was clearer. The message of General Franks on April 16, 2003, for example, had “disestablished” the Ba’ath party.²⁵⁴ The CPA supplemented General Frank’s mandate with Order Number 4, which required all Ba’ath party property to be turned over “immediately” to the CPA.²⁵⁵ Further, although the 1907 Hague Regulations require an occupying power to respect, “unless absolutely prevented, the laws in force in the country,” the specificity of the CPA’s Order regarding Ba’ath party property would have overridden any inconsistent local Iraqi laws at that time.²⁵⁶ Accordingly, the CPA as the acting administrator of the occupation in Iraq would have had the power to authorize the IMF to take temporary custody of these records; reportedly, the CPA not only gave such authorization, but also provided personnel to assist in the move.²⁵⁷ On these facts, the initial actions of the IMF in removing the records from party headquarters and sequestering them would not appear to be a criminal taking, much less “pillaging” under the 1907 Hague Convention.²⁵⁸ The CPA, however, later rescinded its order governing Ba’ath party property when it transferred

253. U.S. ARMY FIELD MANUAL, *supra* note 51, at 150. If the United States did properly confiscate these records, the spoils of war provision in the U.S. Code would technically permit the United States to transfer ownership to a third party, including an organization such as the IMF. See 50 U.S.C. § 2201(a) (2006).

254. Franks, *supra* note 135, at 47.

255. CPA Order No. 4, *supra* note 137, § 3(3).

256. See 1907 Hague Regulations, *supra* note 46, 36 Stat. at 2306, 1 Bevans at 651; CPA, Coalition Provisional Authority Regulation Number 1, § 2, CPA Doc. CPA/REG/16 May 2003/01 (May 16, 2003) [hereinafter CPA Regulation No. 1] (stating that the laws of Iraq “continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order issued by the CPA”) see also CPA, CPA Doc. CPA/ORD/9 June 2003/07, §2(1) (2003) [hereinafter CPA Order No. 7] (suspending certain provisions of the 1969 Iraqi Penal Code).

257. See Kuyumcu, *supra* note 235 (stating that the CPA provided “10 trucks and 30 workers” to assist the IMF with the movement of the records).

258. Cf. 1907 Hague Regulations, *supra* note 46, art. 28. The rationale and advisability of the CPA authorization, of course, could remain open to criticism. Further, the issue of whether the actions of the CPA exceeded the powers of an occupier have been considered elsewhere. See Fox, *supra* note 157, at 228–32 (describing the evolution of occupational law and its consequences).

sovereignty to the interim Iraqi Government.²⁵⁹ Therefore, the subsequent authority of the IMF to continue to hold the records and transport them to the United States would be coextensive with the consent of the Iraqi government, the details of which remain in some dispute.

A more difficult issue is whether moving these records to a basement in the Green Zone to preserve them for historical or cultural purposes began transforming them into cultural property. The intent of the IMF in moving the records was to establish “a memorial documentation center similar to Germany’s archive of Stasi secret-police files,” and the IMF apparently had Iraqi governmental approval to create such a “national institution.”²⁶⁰ If such records did “ripen” into cultural property, their later removal from Iraq could arguably implicate various legal restrictions on the transfer of cultural property; given the apparent consent of the Iraqi government, however, such restrictions would likely be inapplicable.²⁶¹ Further, upon their transfer to the United States, the U.S. government did not undertake protective measures typical for the import of foreign cultural property.²⁶² The Federal Register does not disclose, for example, any State Department filings under the *Immunity from Seizure Act* to protect the Ba’ath party records, which could be of considerable monetary value, from judicial seizure.²⁶³ In contrast, in 2003,

259. CPA Order No. 100, *supra* note 137, § 4(1); *see supra* note 137 and accompanying text.

260. John Gravois, *Disputed Iraqi Records Find a Home at the Hoover Institution*, CHRON. OF HIGHER EDUC., Feb. 1, 2008, at A1; Eakin, *supra* note 1.

261. For example, the U.S. implementation of the 1970 UNESCO Convention incorporates the Convention’s definition of “cultural property,” which expressly includes “archives.” *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, § 302(6), 96 Stat. 2350, 2351 (1983) (codified as amended at 19 U.S.C. § 2601(6) (2006)); 1970 UNESCO Convention, *supra* note 48, art. 18. In turn, the U.S. Code forbids the import of “cultural property documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution.” 19 U.S.C. § 2607 (2006). Further, in 2004, in lifting sanctions imposed on Iraq in the lead-up to the 1990 war, the United States left in place restrictions on “any transactions with respect to Iraqi cultural property or other items of archeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since August 6, 1990.” 31 C.F.R. § 575.533(b)(5) (2009). Similarly, the Emergency Protection for Iraqi Cultural Antiquities Act of 2004 ultimately resulted in import restrictions on “archeological and ethnological material,” defined as effectively identical to that covered by the remaining U.S. sanctions on Iraq mentioned above. *See* Emergency Prot. for Iraqi Cultural Antiquities Act of 2004, Pub. L. No. 108-429, § 3002, 118 Stat. 2599, 2599; 19 C.F.R. § 12.104j(b) (2009); *see also* Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 Fed. Reg. 23334, 23335–41 (Apr. 30, 2008) (listing the types of material to which the import restrictions apply). Therefore, even assuming that such provisions could encompass Ba’ath party records obtained by the IMF, these restrictions would only apply if the records had been illegally removed or stolen, which is unlikely given the apparent consent of the CPA and the Iraqi government.

262. For a discussion of typical measures, *see infra* text accompanying notes 263–65.

263. *See* Import Restrictions Imposed on Archaeological and Ethnological Material of Iraq, 73 Fed. Reg. at 23334–42. The Immunity from Seizure Act allows the Department of State to shield foreign cultural property from judicial seizure by publishing in the Federal Register a

the State Department took such protective measures for Iraqi Jewish archives suffering mold damage that were brought into the United States to be treated by conservators under the supervision of the U.S. National Archives.²⁶⁴ If the Ba'ath party records constitute property of the Iraqi government, the United States' failure to take this step is puzzling, given the pending suits and default judgments against the Government of Iraq at the time.²⁶⁵

Finally, the records' deposit among the established historical archives of the Hoover Institution further suggests that if they were not initially classified as cultural property, then they have become cultural property now—a fact that arguably creates prospective obligations, such as a duty to safeguard them under the 1954 Hague Convention as a result of their physically being on U.S. territory.²⁶⁶

2. *Cultural Nationalism, Internationalism, and Archives*

More broadly, the controversy over Ba'ath party records at the Hoover Institution reflects a now familiar debate over the repatriation of cultural property to the countries whose “national culture” they represent. The distinction between the competing philosophies of “cultural internationalism” and “cultural nationalism,” described most notably in the work of John Henry Merryman, captures the essence of the debate.²⁶⁷ “Cultural internationalism” views collections of cultural property as a part of “common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”²⁶⁸ In Merryman's view, the 1954 Hague

determination that property brought into the United States for temporary exhibition at a museum, for example, is both culturally significant and in the national interest. 22 U.S.C. § 2459(a) (2006).

264. Culturally Significant Objects Imported for Exhibition Determinations: Cultural Artifacts from Iraq, 68 Fed. Reg. 50570 (Aug. 21, 2003) (determining that “the historic and modern books, documents, parchment scrolls, and other items discovered in early May 2003 in the basement of the Mukhabahrat in Baghdad, most of which pertain to the Jewish community” are “of cultural significance” and their importation is “in the national interest”); see Dana Ledger, Note, *Remembrance of Things Past: The Iraqi Jewish Archive and the Legacy of the Iraqi Jewish Community*, 37 GEO. WASH. INT'L L. REV. 795, 820–23 (2005) (discussing the application of the Immunity from Seizure Act to the Iraqi Jewish archives); René Teijgeler, *Preserving Cultural Heritage in Times of Conflict*, in PRESERVATION MANAGEMENT FOR LIBRARIES, ARCHIVES AND MUSEUMS 133, 149 (G.E. Gorman & Sydney J. Shep eds., 2006) (describing a Memorandum of Understanding between Iraqi and U.S. officials in relation to the Iraqi Jewish Archive).

265. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 32–39 (2008) (discussing the status of lawsuits against Iraq that involve acts of the Saddam Hussein regime). The risk that a plaintiff against the Government of Iraq would attempt to seize the Ba'ath party records, which may have been remote to begin with, became more unlikely when the U.S. Supreme Court held in *Iraq v. Beatty* that post-Saddam Iraq is immune from civil suits in U.S. federal courts. *Iraq v. Beatty*, 129 S. Ct. 2183, 2195 (2009).

266. See Eskander, *Minerva Research Initiative*, *supra* note 2.

267. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 846–52 (1986).

268. *Id.* at 831–32.

Convention's preamble exemplifies this by declaring that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind."²⁶⁹ In contrast, "cultural nationalism" stresses the national "ownership" of cultural property as part of a specific nation's cultural heritage.²⁷⁰ The 1970 UNESCO Convention represents this trend, which effectively results in controls on exports and drives the growing "demands for the 'repatriation' of cultural property."²⁷¹

In the case of Ba'ath party records and archives, the tension between these two views is palpable and acute. On the one hand, there are particularly strong arguments for keeping Ba'ath party archives in Iraq. First, the relationship between archives and the nation that created them is more direct than other forms of cultural property. Records and archives are not simply symbols of cultural heritage, but are also an integral part of a nation's administration, culture, and history.²⁷² Second, the function of such records requires a perception of legitimacy and authenticity, important components of their value, which can be undermined when the records are not in official custody.²⁷³ Non-official custody can raise fears—justified or conspiratorial—of forgeries and fabrications. Third, an unresolved issue is the extent to which the Iraqi government has ceded power over decisions of access to these records, an important right and responsibility of any government.²⁷⁴ Finally, although

269. *Id.* at 836 (quoting 1954 Hague Convention, *supra* note 4, preamble).

270. *Id.* at 832.

271. *Id.* Merryman uses Greece's demand that England return the Elgin marbles as an example. *Id.* For cultural nationalism, Merryman states that the case is a simple one because "the marbles are Greek, belong in Greece and should be returned to Greece." *Id.* at 846. For cultural internationalism, however, "people who are not Greek or British have an interest in their preservation, integrity and availability for enjoyment and study"; the "repatriation" of the Elgin marbles to Greece becomes more complicated as "the smog of Athens eats away the marble fabric of the Parthenon," which results in "all of mankind los[ing] something irreplaceable." *Id.* at 837.

272. See GRIMSTED, *supra* note 109, at 493–94. The case for restitution of "archives is even stronger than for art." *Id.* (explaining that "[p]aintings or sculpture may appropriately serve as cultural ambassadors in museums throughout the world, but archives always deserve restitution to the countries where they belong as the official record, and the inalienable heritage of nations that created them").

273. Some would argue that the Iraqi records are not in official custody; for example, Director General Eskander contends that the IMF is not a neutral keeper of the records, but that "[it] came into being within the framework of the American occupation of Iraq, and thus was an integral part of a grand imperial vision for the New Iraq." Letter from Saad Eskander to the Dir. of the Hoover Inst., *supra* note 245. IMF founder Kenan Makiya had close ties, for example, to the Bush Administration and was reportedly in the Oval Office with the President when Saddam's statue was torn down on April 9, 2003. Lawrence F. Kaplan, *In Iraq, Silencing Memory*, WASH. POST, July 11, 2004, at B7.

274. See Eakin, *supra* note 1 (claiming that at least some Iraqi officials supported the Iraqi records being handed over to the Hoover Institution). Makiya notes, for example, that these records contain sensitive information that could be political "dynamite." *Id.* By allowing the IMF to maintain control of the records, providing a copy of the records to the U.S. government, and entrusting the originals to the Hoover Institution, the Iraqi government may have limited its

records and archives are not *simply* symbols, their role *as* symbols of the nation is nevertheless crucial.²⁷⁵

On the other hand, arguments inspired by cultural internationalism may be just as strong. As the Society of American Archivists, echoing the 1954 Hague Convention, stated at the beginning of the war in 2003, “[w]e all share Iraq’s culture and history,” and if records and archives are lost, “the Iraqi people as well as the citizens of the world lose an important part of our shared cultural heritage.”²⁷⁶ The IMF’s acts of “pillaging” may have also been acts of preservation; for example, had the IMF not removed the records from the basement of Ba’ath party headquarters, they could have been destroyed during subsequent periods of heightened violence and unrest in Baghdad.²⁷⁷ Further, the Hoover Institution stresses that its purpose in holding the archives is to “preserve *and protect* them from deterioration and loss” and to provide access to them; however, “[g]iven the current conditions in Iraq, one wonders if either of these goals of preservation or access could be accomplished in Iraq.”²⁷⁸ Finally, given the highly charged political nature of some of these records, Baghdad may continue to be an unsafe place for them. There are not only tangible threats to the records, but the extensive publicity about their highly charged content created by this controversy has made their presence in Iraq potentially destabilizing to the nation’s security.²⁷⁹ The Iraqi government’s apparent agreement with the Hoover Institution to physically and symbolically keep these records on the other side of the world could have been the result of a principled decision that, after years of internal violence, the other side of the world may be where they belong. New negotiations in 2010 may determine whether the time is yet right for their return.²⁸⁰

ability to control access to the materials and to control the purpose for which those materials are used.

275. UNESCO Consultation Group, *supra* note 35 (stating that archives “provide a basis for national identity”).

276. Soc’y of Am. Archivists, *supra* note 133.

277. See Eakin, *supra* note 1. In fact, as recent as 2007, there were urgent international calls for assistance in protecting the collections after Iraqi National Guard troops “illegally and unnecessarily occupied the Iraq National Library and Archives.” Soc’y of Am. Archivists, *Iraq National Library and Archives in Jeopardy* (Aug. 8, 2007), http://www.archivists.org/news/iraqi_archives-07.asp.

278. Letter from Richard Sousa to Mark A. Green, *supra* note 243, at 1. The access issue may be successfully argued in both ways, reflecting the multiple stakeholders in government information. For example, the Iraqi government has a legitimate interest in its own national security; others, including Iraqi citizens, may have an interest in the information contained in those records that the Iraqi government might seek to conceal for security purposes. *Id.* (noting that, although the documents must be protected, limited access to the records would impede a general understanding of the regime’s history).

279. See Eakin, *supra* note 1 (discussing Makiya’s recognition of the value and potentially destructive contents of the records in dispute).

280. See Banerjee, *supra* note 249.

V. THE FUTURE OF RECORDS AND ARCHIVES IN WAR

The limitations of international law in dealing with records and archives in armed conflict are not easily remedied. Significant efforts have been undertaken to provide further protection for cultural property by narrowing, or eliminating altogether, the standard for “military necessity.”²⁸¹ Such efforts, however, even if successful in altering relevant provisions, are restricted in their practical effect. This would be especially true in regards to records and archives because of their potential military and intelligence value. As former acting Archivist of the United States, Trudy Huskamp Peterson, notes, “Armies seize every type of document they encounter, and they are likely to continue to do so, irrespective of what the Conventions say.”²⁸²

A more modest ambition for the development of international law would be to directly acknowledge the unique, and sometimes conflicting, nature of records and archives and to focus on clarifying their long-term status. Patricia Kennedy Grimsted, for example, characterizes captured archives displaced during World War II that were never returned as “prisoners of war.”²⁸³ Treating captured records and archives as prisoners of war would, in fact, be a significant step forward.²⁸⁴ To do so would effectively legalize the principle of archival inalienability for which the international archival community

281. The 1999 Second Protocol to the 1954 Hague Convention, for example, allows a waiver for imperative military necessity only where cultural property “has, by its function, been made into a military objective.” Second Protocol to the 1954 Hague Convention, *supra* note 70, art. 6(a)(i). This is more restrictive than the “military objective” standard in Geneva Protocol I. *See* Geneva Protocol I, *supra* note 49, art. 52 (stating that military objectives are “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage”).

282. Peterson, *supra* note 21, at 273–74. Similarly, in his review of the 1954 Hague Convention, Patrick Boylan notes, with regard to its First Protocol, that “[u]nfortunately[,] all the evidence suggests that the provisions are almost totally ineffective in practice.” *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict*, *supra* note 4, at 100; *see* Leopold Auer, *Restitution of Removed Records Following War*, in INTERDEPENDENCE OF ARCHIVES, *supra* note 25, at 172, 174 (“National pride, national interest, mass media campaigns or even . . . the reluctance of custodial institutions to return seized archives may be sometimes a greater obstacle to overcome than legal questions. Practice does not always obey principles.”). Further, the only international convention that has attempted to deal with archives in detail and at length, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Mar. 1–Apr. 8, 1983, U.N. Doc. A/CONF.117/4 (Apr. 8, 1983), has never entered into force and is an unqualified failure. *See* GRIMSTED, ODYSSEY, *supra* note 117, at 96–97.

283. GRIMSTED, *supra* note 109, at 495 (“Archives deserve to be liberated from the status of trophies of empire or prisoners of war.”).

284. Interestingly, the U.S. Army requires that troops attach “a DD Form 2745 (Enemy Prisoner of War Capture Tag)” to each captured enemy-document for purposes of accountability. DEP’T OF THE ARMY, FM 2-22.3 (FM 34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS app. I, art I-14 (2006) [hereinafter DEP’T OF THE ARMY, FM 2-22.3].

advocates.²⁸⁵ International law could treat records and archives that are not entirely of a civilian character like enemy combatants, who may be killed or captured when military necessity requires, but who are only detained temporarily and must be repatriated “without delay after the cessation of active hostilities.”²⁸⁶

A still more modest advance would be simply to enhance both the long-term access to seized records and the protection that foreign custody provides them. Archivist Leopold Auer advocates, for example, for rules requiring “unrestricted access to displaced archives for the sake of scholarly research and in the interest of individuals who may be concerned,” as well as for “a binding rule that every occupying power exploiting captured archives be obligated to maintain archival and file integrity by leaving all documents in their existing file context.”²⁸⁷

In many ways, international law already provides practical guidance. The core principles of the 1954 Hague Convention, for example, are guideposts for realistic and feasible measures to protect historical records. This guidance includes the importance of planning in peace for protection in war; the imposition of responsibilities on both the defending population as well as the attacking forces; and the acknowledgement of the reality and inevitability of assertions of military necessity, legitimate or otherwise.²⁸⁸ The Second Protocol to the 1954 Hague Convention builds on these principles in uncontroversial provisions that encourage the use of preservation techniques such as “the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection.”²⁸⁹ Patty Gerstenblith has suggested an additional protocol

285. See *supra* notes 109–15 and accompanying text.

286. Third 1949 Geneva Convention, *supra* note 47, art. 118; see Peterson, *supra* note 21, at 274 (arguing that, after analysis, the capturing state should “return all documents not required for military or intelligence needs, either to the individual, the institution, or the successor state”).

287. Auer, *supra* note 282, at 177. Archivist Trudy Huskamp Peterson argues for the basic and reasonable proposition that simplifying the rules regarding captured records would be an effective improvement. Peterson, *supra* note 21, at 274.

288. See generally Section-by-Section Analysis, *supra* note 168, at 2–10. In daily practice, archivists almost never rely on legal compliance as a preservation strategy. Despite laws against theft, for example, archives impose strict protective measures, requiring that all visitors, including the most well-respected, leave bags and jackets at the door, because even former government officials with the highest security clearances can present a potential threat to government documents. See, e.g., Eric Lichtblau, *Ex-Clinton Advisor to Admit Taking Classified Papers*, N.Y. TIMES, Apr. 1, 2005, at A14.

289. Second Protocol to the 1954 Hague Convention, *supra* note 70, art. 5; see Teiggeler, *supra* note 264, at 141–42 (discussing the practical measures for the preservation of archives). Microfilm presents a particularly useful strategy for the preservation of records and archives. See, e.g., Hartmut Weber, *How to Survive a War*, INFORM, June 1990, at 44. Beginning in 1961, for example, then-West Germany initiated a “Security Microfilming Program” in which it made microfilm copies of records and archives throughout the country and stored them in a refuge

that incorporates modern cultural resource management principles.²⁹⁰

Further, by accepting the reality that records and archives that have potential value to an adversary will always be at risk of capture or destruction, the interests of an archivist and the aims of opposing forces are aligned in many ways.²⁹¹ The preservation of record and archival collections, including the integrity of their organization and context, is also important for military intelligence analysis as well as counterinsurgency and stability operations.²⁹² During World War II, the Supreme Commander for allied forces issued guidance to military commanders noting “the importance of archives not only as individual documents but as related series which might be ruined by the displacement of a few documents.”²⁹³ In order to protect archives from this danger, he directed that “all buildings in which they were housed were to be, whenever practicable, placed ‘off limits,’ to all troops.”²⁹⁴ However, this instruction was not designed simply to protect cultural heritage; preserving context was also important to exploit accurately the political and intelligence value of those “archives” or record centers for the advancing Allied forces.²⁹⁵

inside of a Freiburg mine in order to create a “high-quality duplicate heritage.” *Id.* For a discussion of international microfilming efforts, see Anthony Farrington, *The ICA’s International Microfilming Project, Is There a Future?*, in INTERDEPENDENCE OF ARCHIVES, *supra* note 25, at 120.

290. Gerstenblith, *supra* note 17, at 346–49.

291. These shared interests obviously have limitations. See, e.g., ITALIAN ARCHIVES DURING THE WAR AND AT ITS CLOSE, *supra* note 33 (describing the dangers to records and archives in Italy in World War II from the “indiscreet zeal in exploitation” for intelligence purposes); Eric Ketelaar, *Archivists in War*, in INTERDEPENDENCE OF ARCHIVES, *supra* note 25, at 159, 162 (noting that in World War II “the aims of officers collecting records for intelligence purposes and those engaged in protecting archives were often incompatible, which led to difficulties over competencies within the army, comparable to the battles which raged outside the army: between the civilian and the military”).

292. See Dick Jackson, *Cultural Property Protection in Stability Operations*, THE ARMY LAW. 47, 47 (2008) (arguing that the “protection of cultural property should serve as a key focal point in stability operations and counter-insurgency efforts by the U.S. military, even if such protection is not required as a matter of law”); DEP’T OF THE ARMY, FM 3-24, COUNTERINSURGENCY § 3-153, at 3-29 (2006) (noting the use of census and property records in determining “who should or should not be living in a specific area” in order to “secure the populace”).

293. AM. COMM’N FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, *supra* note 11.

294. *Id.*

295. See ITALIAN ARCHIVES DURING THE WAR AND AT ITS CLOSE, *supra* note 33, at 21. Notably, in Italy,

[i]ntelligence Officers were liable to carry off whole files, to remove single papers from their related documents, to disturb the order of papers, and so on, without realizing that, by doing so, they were not only impairing the historical value of the collection but also impeding the work of other Agencies that might follow them.

Id.; see Ketelaar, *supra* note 291, at 162 (noting that “exploitation and protection, should in reality not be so opposed” and that “[m]uch better intelligence results could be obtained from

Finally, the impact of war and military capture is not necessarily negative. Wars can liberate the records of a regime that would otherwise never see the light of day.²⁹⁶ Public disclosure of captured classified documents sometimes can have an effect similar to the *New York Times* publishing the *Pentagon Papers*—a kind of emancipation of historical records.²⁹⁷ Wartime intelligence operations can have ancillary preservation benefits as well. During World War II, for example, the Office of Strategic Services, a precursor to the Central Intelligence Agency, microfilmed a broad range of foreign materials for intelligence purposes.²⁹⁸ Historian Kathy Peiss states that this “massive microfilming effort itself preserved many publications that would otherwise have disappeared from the human record, including obscure journals with small print runs, underground newspapers, and resistance pamphlets.”²⁹⁹ She further notes that, in “a classic case of unintended consequences, the government’s need for intelligence had a greater impact on the fate of books than did the organizations whose mandate was cultural protection.”³⁰⁰

VI. CONCLUSION

The ongoing controversies over the fate of Ba’ath party documents betray an understandable uncertainty about the legal status of records and archives in armed conflict. The unique characteristics of records create a hybrid of enemy property and cultural property that international law has thus far been unable to address adequately. Any attempt to provide enhanced protection to archives in war or resolve debates over their long-term fate must acknowledge the inadequacies of international law and should focus on modest and realistic measures that build upon the common goals of combatants and archivists. As Jenkinson and Bell noted in World War II

material not ransacked chaotically”). The updated U.S. Army manual on interrogations, for example, contains an entire appendix entitled “Document Exploitation and Handling,” which includes requirements about documenting custody and details of capture and organization. DEP’T OF THE ARMY, FM 2-22.3, *supra* note 284, at app. I.

296. Archivists viewed German records seized during World War II as a “great historic treasure.” Francis L. Loewenheim, *Guides to Microfilmed German Records: A Review*, 22 AM. ARCHIVIST 445, 445 (1959); *see* Perman, *supra* note 9 (discussing the “opportunity now afforded to historians” to “have available documents of the Hitler era in Germany reflecting its origins, causes, administrative system, philosophy, policies, military system, propaganda, and almost every other imaginable feature of significance”).

297. In upholding the right of the *New York Times* to publish the *Pentagon Papers*, classified government documents about the Vietnam War, former Justice Hugo Black explained that the press was constitutionally protected “so that it could bare the secrets of government and inform the people.” *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (*per curiam*) (Black, J., concurring).

298. Kathy Peiss, *Cultural Property in a Time of War: The American Response to Endangered Books in World War II*, 55 LIBR. TRENDS 370, 377–78 (2007).

299. *Id.*

300. *Id.*

Whatever may be the position in International Law of the Archives of a State that is fought over . . . no modern State can, in fact, afford to countenance their wholesale destruction. Protective measures may be undertaken with very different motives, good or bad; but some form of protection there is bound to be.³⁰¹

Realistic protection of records and archives by international law will only come by approaching their dual nature as an opportunity rather than an obstacle.

301. ITALIAN ARCHIVES DURING THE WAR AND AT ITS CLOSE, *supra* note 33, at 3.