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# National Archives and International Conflicts: The Society of American Archivists and War

Douglas Cox

## Abstract

The prominent role of the SAA in the recent controversy over the fate of Iraqi records and archives highlights crucial questions about the tension between national and international interests in archives and the role of archives and archivists during armed conflict. This article seeks to frame these questions and fill gaps in the debate within the archival community about wartime preservation, controversies over the postwar return of archives, and the role of archivists in war. Archivists will undoubtedly face such issues, which have never been more complex or more relevant, again in the future; this article seeks to promote renewed, vigorous, and respectful debate.

As U.S. forces approached Baghdad in April 2003, Iraqi government officials reportedly ordered the staff of the Iraqi National Archives to destroy archival materials of the Ba'ath regime to prevent them from falling into the hands of the invading forces.<sup>1</sup> The destruction order confronted the archival staff with a dilemma that illustrates, in its most extreme form, the tension between international and national interests in archives and records.

From an international viewpoint, a refusal to destroy such records might have been a heroic act that attempted, at great personal risk, to protect the integrity of the historical, cultural, and administrative record of Iraq for both Iraqi citizens and the world and to preserve potential evidence of human rights abuses. Alternatively, from a national viewpoint, a refusal to destroy records of

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<sup>1</sup> Nabil Al-Tikriti, "‘Stuff Happens’: A Brief Overview of the 2003 Destruction of Iraqi Manuscript Collections, Archives, and Libraries," *Library Trends* 55 (2007): 732–33.

potential use to an advancing enemy might have been an unethical, and perhaps even an illegal or treasonous, act that undermined the “inalienable” legal authority of the Iraqi government over its own records, endangered the national security of a sovereign nation in a time of war, and risked subsequent exposure of confidential information about Iraqi citizens by invading forces.

In the end, the staff did not execute the order. This brave decision, however, was quickly robbed of its effect when other individuals, reportedly associated with the Ba’ath Party, entered the Iraqi National Archives and destroyed the records, which included “the history of the Ba’ath Party since it seized power in 1963,” during the chaos that followed the fall of Baghdad.<sup>2</sup>

The response of the Society of American Archivists (SAA) to the fate of records and archives in Iraq was quick and decisive. In its “Statement on Iraqi Archives” in April 2003, the SAA cited reports of “deliberate attempts to destroy the records of oppression in order to hide evidence of past crimes” and stressed the international value of such records. The SAA urged that “archives relating to the Iraqi state, its security forces, the daily operation of the government, and the history of the nation” should be preserved in “secure custody” on the basis that “[w]e all share Iraq’s culture and history” and that the “loss of this heritage would not only hurt the Iraqi people; it would also make it harder for Americans to understand our culture and values.” “Without records,” the statement continued, “the Iraqi people as well as the citizens of the world lose an important part of our shared cultural heritage.”<sup>3</sup>

While the Iraqi National Archives smoldered, U.S. forces and private individuals and organizations seized other Iraqi government records and archives throughout the country. In the end, some forty-eight thousand boxes of Iraqi records ended up in a U.S. military warehouse in Qatar, and another seven million records went to the Hoover Institution at Stanford University. The SAA’s response to the fate of these Iraqi records, reflected in a joint statement with the Association of Canadian Archivists (ACA) in 2008, stressed national rights and national ownership over government archives. The SAA called on the United States “to return to the lawfully established government of Iraq—with all deliberate speed—Iraqi records now in its possession.” The SAA argued that for seized Iraqi records, “the archival principle of inalienability requires that they be returned to the national government of Iraq for preservation in the national archives.”<sup>4</sup>

While both SAA statements appear to enjoy widespread acceptance and support within the archival community, the statements do not necessarily

<sup>2</sup> Saad Eskander, “The Tale of Iraq’s ‘Cemetery of Books,’” *Information Today* (December 2004): 1, 50.

<sup>3</sup> Society of American Archivists, “Statement on Iraqi Archives,” April 2003.

<sup>4</sup> Society of American Archivists and Association of Canadian Archivists, “SAA/ACA Joint Statement on Iraqi Records,” 22 April 2008.

complement one another. They arguably reflect the same tension that confronted the staff of the Iraqi National Archives between pursuing international goals of maximum protection for archives to maximize future access and respecting national rights of ownership.

The controversies surrounding the Iraqi records are just the newest chapter in the long and troubled history of archives in war. Historically, SAA members and officers have made unique and significant contributions to the debate. And past articles in this journal—from Ernst Posner’s discussion of the effects of changes of sovereignty on the status of archives in volume 5, to Philip P. Brower’s review of the history of U.S. seizure and administration of “enemy records” prior to World War II in volume 26, to Charles Kecskemeti’s piece on a post-World War II settlement for “displaced European archives” in volume 55, to Michelle Caswell’s powerful argument for the return of Ba’ath Party records earlier this year—provide rich details of the history of such controversies.<sup>5</sup>

Archivists will undoubtedly continue to face these issues in the future. This article therefore seeks both to encourage and provoke renewed debate within the SAA and the archival community more generally about the proper balancing of competing interests in national archives in war and peace. It frames the issues by exploring the legal and practical complexities of wartime preservation, the controversial debates over the postwar return of archives, and the conflicted role of the archivist. In particular, this article seeks to challenge assumptions within the archival community that international law or “archival inalienability” necessarily compels or prohibits certain results to encourage debate on more flexible strategies for balancing national and international interests. The treatment of such broad topics here must be brief, but discussing them together is necessary to view these related issues in context rather than in distorted isolation.

### **Archival Internationalism and Nationalism**

The archival literature and larger international debates over cultural property both reflect the conflict between international and national interests in archives. A compelling case for internationalism is found in Solon Buck’s 1946 address, made while he was both Archivist of the United States and president of the SAA, entitled “The Archivist’s ‘One World.’” “Scholarship that feeds upon the archival resources of a single country,” Buck argued, “cannot be otherwise than one-sided and nationalistic. The only antidotes are freedom of access to

<sup>5</sup> Ernst Posner, “Effects of Changes of Sovereignty on Archives,” *American Archivist* 5 (1942): 141–55; Philip P. Brower, “The U.S. Army’s Seizure and Administration of Enemy Records up to World War II,” *American Archivist* 26 (1963): 191–207; Charles Kecskemeti, “Displaced European Archives: Is It Time for a Post-War Settlement?,” *American Archivist* 55 (1992): 132–40; Michelle Caswell, “‘Thank You Very Much, Now Give Them Back’: Cultural Property and the Fight over the Iraqi Baath Party Records,” *American Archivist* 74 (Spring/Summer 2011): 211–40.

the originals in whatever country they may happen to be and the making and exchange of photographic facsimiles.” The international value of national archives, Buck further noted, necessitates within each country “the preservation and efficient administration of the separate parts that compose the archival whole” because the “loss of an important body of records in any country is a loss to all countries.”<sup>6</sup>

Buck’s advocacy finds a parallel in the concept, familiar in broader debates over cultural property, of “cultural internationalism,” which views collections of cultural property as part of “common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”<sup>7</sup> The concept finds its most famous expression in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which expressly extends protections to “archives” and declares in its preamble that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”<sup>8</sup> The SAA echoes the same sentiment in its 2003 statement on Iraqi archives, as well as in its 1999 resolution on the destruction of archives in the former Yugoslavia, which states that “the loss of archives anywhere in the world is an irreplaceable tragedy for all mankind” and warns that “[o]nce destroyed, archives cannot be re-created, and the cultural patrimony of the world is permanently diminished.”<sup>9</sup>

Cultural internationalism contrasts sharply with “cultural nationalism,” which focuses on cultural property as inalienable national property that is part of a specific nation’s cultural heritage. This concept is exemplified by the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which also extends protections to “archives” but focuses primarily on peacetime export and import restrictions on cultural property.<sup>10</sup> Cultural nationalism drives the growing and highly charged “demands for the ‘repatriation’ of cultural property.”<sup>11</sup>

What might be called “archival nationalism” is most easily recognizable in the often-fierce debates over the return of records and archives seized during

<sup>6</sup> Solon J. Buck, “The Archivist’s ‘One World,’” *American Archivist* 10 (1947): 17.

<sup>7</sup> John Henry Merryman, “Two Ways of Thinking about Cultural Property,” *American Journal of International Law* 80 (1986): 831–53.

<sup>8</sup> The Hague, Convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble, 14 May 1954, UNESCO, [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html), accessed 30 June 2011.

<sup>9</sup> Society of American Archivists, “Resolution on the Systematic Destruction of Archives in Kosovo and War-Caused Devastation of Archives throughout Yugoslavia,” 14 April 1999.

<sup>10</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, UNESCO, [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html), accessed 30 June 2011.

<sup>11</sup> Merryman, “Two Ways of Thinking about Cultural Property,” 832.

war and the concept of “archival inalienability.” The decades-long controversy over the return of archives from Smolensk, Russia, which the United States obtained at the end of World War II and ultimately returned to Russia in 2002, provides a well-documented example.<sup>12</sup> Similarly, resolutions of the International Council on Archives assert the “inalienability and imprescriptibility” of public records as state property and invoke a historical international practice that “archives captured and displaced during hostilities were returned once peace was concluded.”<sup>13</sup> The 2008 joint SAA/ACA statement urging that records seized in Iraq “be returned to the national government of Iraq for preservation in the national archives” expressly relies upon a similar assertion of the “inalienable character of national records.”

The internationalist emphasis on preservation and access and the nationalist focus on national rights over archives do not always operate at cross-purposes.<sup>14</sup> Whether in conflict or aligned, however, the distinction is a useful one in clarifying the unique complexities inherent in the role of national archives and archivists in war.

### Archives at War

The issue of archives in war is often approached on the assumption that archives should be immune from attack or seizure and that international law should provide to archives the same protection it extends to works of art, museums, and other cultural property. For some archives, such as those of an exclusively cultural or historical nature, such assumptions may be accurate. For these archives, international and national interests in their preservation are theoretically aligned and efforts to protect them from bombardment and the dangers of combat, while not always effective, ought to be largely uncontroversial.

For national and governmental archives, however, the situation is far more complex as international goals of protection and access may directly conflict with the competing national security interests of the combatants. The crucial characteristic of such archives in war is that, although they may properly be considered a form of cultural property, they are not necessarily purely so. As

<sup>12</sup> See Patricia Kennedy Grimsted, *The Odyssey of the Smolensk Archive: Plundered Communist Records for the Service of Anti-Communism* (Pittsburgh, Penn.: Center for Russian and East European Studies, 1995).

<sup>13</sup> “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, China, 10–13 April 1995. Similarly, UNESCO has stated “public archives constitute the inalienable and inalienable property of the national community which is represented by the State.” UNESCO, Consultation Group to Prepare a Report on the Possibility of Transferring Documents from Archives Constituted within the Territory of Other Countries, *Final Report* (April 1976), CC.76/WS/9: § 5.2.

<sup>14</sup> As Michelle Caswell persuasively warns, the distinction should not be used to oversimplify the complexities of individual situations and there are other ways in which these issues can be viewed and approached. Caswell, “‘Thank You Very Much, Now Give Them Back,’” 237–40.

former SAA president and former acting archivist of the United States Trudy Huskamp Peterson notes, “archives are both cultural and administrative property and fit somewhat awkwardly into a purely cultural definition.”<sup>15</sup> Unlike a collection of paintings in an art museum, combatants cannot assume that national archives have no military or intelligence value.

Current U.S. military guidance, for example, highlights the importance of protecting “enemy archives” not only as cultural property, but also because “[e]nemy archives can have an additional value . . . derived from archived information that can be used for intelligence purposes or can be exploited.”<sup>16</sup> The current U.S. counterinsurgency manual similarly notes the importance of “historical documents and records” in analyzing insurgent networks.<sup>17</sup> Along the same lines, the potential value of even noncurrent records within our own U.S. National Archives to a foreign adversary can be illustrated simply by the number of such records that remain classified, disclosure of which would, by definition, be “reasonably expected” to cause damage to national security.<sup>18</sup>

These are not new observations. “To the statesmen of the seventeenth and eighteenth centuries,” Ernst Posner notes, “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.”<sup>19</sup> During World War II, U.S. military officers were instructed to “consider all archives valuable, important, and in part vital for intelligence . . . purposes, whether located in ancient archives, large depositories, the most modern archives, or in current office papers.”<sup>20</sup> Similarly, a 1983 national security directive governing the U.S. invasion of Grenada mandated the

<sup>15</sup> Trudy Huskamp Peterson, “Archives in Service to the State,” in *Political Pressure and the Archival Record*, ed. Margaret Procter, Michael Cook, and Caroline Williams (Chicago: Society of American Archivists, 2005), 270. See also Lester K. Born, “International Cooperation to Preserve Historical Source Materials,” *American Archivist* 15 (1952): 219–30, 226 (which notes that the “fault” for the lack of a clear standard for archives under international law “perhaps lies with archives, for these are both a cultural property and an administrative property”).

<sup>16</sup> Department of the Army, *GTA 41-01-002, Civil Affairs, Arts, Monuments and Archives Guide* (Washington, D.C.: Department of the Army, 2005), 19.

<sup>17</sup> Department of the Army, *FM 3-24, Counterinsurgency*, Appendix B, B-15 (Washington, D.C.: Department of the Army, 2006).

<sup>18</sup> Exec. Order No. 13,526, 75 Fed. Reg. 707 (29 December 2009). On the usefulness of records from the National Archives in prosecuting World War II, see E. G. Campbell, “Old Records in a New War,” *American Archivist* 5 (1942): 156–58.

<sup>19</sup> Ernst Posner, “Public Records under Military Occupation,” *American Historical Review* 49 (1944): 217.

<sup>20</sup> Seymour J. Pomerence, “Policies and Procedures for the Protection, Use, and Return of Captured German Records,” in *Captured German and Related Records*, ed. Robert Wolfe (Athens: University of Ohio Press, 1974).

“immediate protection of all documents obtained in Grenada” in order “to ensure serious, dedicated, and well supported exploitation” of this “archive.”<sup>21</sup>

Archives also have legal and administrative value that can make them indispensable to forces administering a military occupation and fulfilling duties such as establishing order, determining legal rights, detaining suspects, and prosecuting crimes. Hilary Jenkinson and H. E. Bell stress the importance of preserving Italian records in World War II to assist with “the reconstitution of Civil Life.”<sup>22</sup> The U.S. counterinsurgency manual notes the value of census and property records for determining “who should or should not be living in a specific area” in order to “secure the populace.” Similarly, a 2006 report by the U.S. Marines concerning operations in Iraq entitled “Intelligence Exploitation of Enemy Material” stresses the importance of securing and properly handling captured documents as potential evidence in criminal cases in Iraqi courts.<sup>23</sup>

The archival community has not only historically acknowledged the value of “enemy” records and archives to military operations, but archivists sometimes led the effort to highlight this fact to government officials. As former SAA president Oliver W. Holmes described in this journal, some of the efforts by the United States to protect foreign archives during World War II can directly be traced to a lunch meeting of archivists on 5 May 1943, during which Ernst Posner delivered his paper “Public Records under Military Occupation.”<sup>24</sup> Posner noted that although an invading force may think that it “need not be greatly concerned about the record of the past as preserved in the archives,” public records in fact “must become the continuous source of information for the regime of occupation.”<sup>25</sup> In attendance at the meeting was Fred W. Shipman, the director of President Roosevelt’s library in Hyde Park, who sent a memorandum the next day to the president advising that “it will be of vital importance for those who are to be responsible for the administration of occupied territory to possess wide knowledge of the role which public and private records of conquered areas can and should play.”<sup>26</sup> Shortly thereafter, President Roosevelt reportedly read

<sup>21</sup> National Security Decision Directive 112, “Processing and Disposition of Documents Acquired by U.S. Forces in Grenada,” 15 November 1983, Federation of American Scientists, <http://www.fas.org/irp/offdocs/nsdd/nsdd-112.htm>, accessed 30 June 2011.

<sup>22</sup> Hilary Jenkinson and H. E. Bell, *Italian Archives during the War and at Its Close* (London: H. M. Stationary Office, 1947), 13.

<sup>23</sup> U.S. Marine Corps, *Intelligence Exploitation of Enemy Material: Lessons and Observations from Operation Iraqi Freedom* (June 2006), <http://file.wikileaks.info/leak/us-intelligence-exploitation-of-enemy-material-2006.pdf>, accessed 30 June 2011.

<sup>24</sup> Oliver W. Holmes, “The National Archives and the Protection of Records in War Areas,” *American Archivist* 9 (1944): 110–11.

<sup>25</sup> Posner, “Public Records under Military Occupation,” 219–20.

<sup>26</sup> Fred W. Shipman, memorandum to President Franklin Roosevelt, 6 May 1943, Franklin D. Roosevelt Presidential Library, Official File 20-D: State Dept.: Office of Foreign Economic Coordination, <http://www.dcofiles.com/fws.pdf>, accessed 30 June 2011. The author thanks Robert Clark, supervisory archivist at the FDR Presidential Library, who located and provided Shipman’s memorandum.



Shipman's memorandum to his cabinet and instructed its members to "issue any necessary orders to see that records in war areas were given the necessary protection."<sup>27</sup>

### **The Limitations of International Law**

Given that government archives can have cultural and historical value on the one hand, and military, intelligence, and political value on the other, determining their status under international law during armed conflict is difficult. This reality affects the applicability, effectiveness, and enforceability of international law. Past and current debates over the fate of archives in war nevertheless almost invariably center on international law, including assertions of "archival inalienability" and invocations of the laws designed to protect cultural property. The basic and simplified narrative of such controversies is that archives were seized—or "captured" or "plundered" or "pillaged" or "stolen"—during armed conflict and that international law requires their return—or "restitution" or "repatriation" or "replevin"—to the state that created them or the state that is otherwise purported to be their rightful owner.

What follows is an attempt to describe briefly the balance international law strikes between national and international interests in archives in both peace and war. The balance is not necessarily correct or appropriate, nor is it always clear. Briefly examining the limitations and inadequacies of international law can, it is hoped, both inform and spur future debate as well as make the rather modest point that assertions that international law unambiguously prohibits or requires something in relation to national archives in war should be approached with some skepticism.

### **National Sovereignty and National Archives in Peace**

During peacetime, national interests dominate. Both national and international laws provide for state sovereignty over state property, including records and archives, during peace. Archives that constitute cultural property, for example, may be subject to both national and international limitations on export and import. National records can be legally inalienable, and any transfer of ownership may well require "a legislative act of the State which created them."<sup>28</sup> This is one aspect of the concept of "archival inalienability" and the principle that

<sup>27</sup> Holmes, "The National Archives and the Protection of Records in War Areas," 111.

<sup>28</sup> International Council on Archives, "The View of the Archival Community on the Settling of Disputed Claims."

allows governments to reclaim, through the legal device of replevin, archival records that may have fallen into private hands.<sup>29</sup>

A state's legal power over its national records in peace also extends to less popular acts such as limiting access to them on national security grounds and determining which records to destroy. Thus, the United States has the sovereign power to determine that less than 3 percent of its federal records are of such value that permanent preservation is necessary and to prosecute those who leak classified government records. The same power allows the government of Hungary to consider de-accessioning its former state security files, which could lead to their destruction, despite the concerns of the SAA, the larger archival community, and international interests in their preservation.<sup>30</sup> While international human rights commitments may prohibit particularly egregious acts, during peace, the national interests of the state are paramount.

#### *The Clash of National Interests during Armed Conflict*

During war, however, a separate regime, the international law of armed conflict, controls, altering the status of state property in a manner that does not necessarily comport with the concept of "archival inalienability." Under the law of armed conflict, for example, state property of the enemy can be seized or destroyed during hostilities if required by "military necessity"—a term traditionally defined very broadly to include those actions "indispensable for securing the complete submission of the enemy as soon as possible."<sup>31</sup> The 1907 Hague Convention's annexed Regulations, which still provide the most widely accepted standards for the law of armed conflict, allow the destruction or seizure of "the enemy's property" during combat when "imperatively demanded by the necessities of war."<sup>32</sup> Similarly, during an occupation, the occupying power can take possession of "all movable property belonging to the State which may be used for military operations."<sup>33</sup> The potential military and intelligence value of certain government archives may often, therefore, provide the requisite military necessity to justify their seizure.

The law of war, however, also provides special protections for artistic, scientific, and historical property under the 1907 Hague Regulations and "cultural

<sup>29</sup> See, for example, Menzi L. Behrnd-Klodt, *Navigating Legal Issues in Archives* (Chicago: Society of American Archivists, 2008), 167–81.

<sup>30</sup> See Helen R. Tibbo, SAA president, letter to Ambassador Gyorgy Szapary, 8 March 2001, [http://www2.archivists.org/sites/all/files/HungarianArchives3811\\_0.pdf](http://www2.archivists.org/sites/all/files/HungarianArchives3811_0.pdf), accessed 8 November 2011.

<sup>31</sup> Department of the Army, *FM 27-10, The Law of Land Warfare* (1956), 3, at 3–4.

<sup>32</sup> Convention (IV), "Respecting the Laws and Customs of War on Land" and its annex, "Regulations Concerning the Laws and Customs of War on Land," 18 October 1907, Art. 23(g), International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/FULL/195>, accessed 30 June 2011.

<sup>33</sup> 1907 Hague Regulations, Art. 53.

property” (including “archives”) under the 1954 Hague Convention, which reflect larger international interests in such property. The central question is the extent to which such protections encompass national archives. Each of these two regimes deserves a brief discussion.

The 1907 Hague Regulations contain two special provisions. Article 27 provides that during hostilities “all necessary steps must be taken to spare, as far as possible, buildings” dedicated to art or science or “historic monuments,” provided that “they are not being used at the time for military purposes.” Article 56 provides that during an occupation, “the property of municipalities,” “historic monuments,” and institutions dedicated to “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.”

Neither Article 27 nor Article 56 of the 1907 Hague Regulations explicitly mentions archives, which has caused uncertainty within the archival community ever since. Ernst Posner opines, for example, that during World War I, “the head of the Belgian State Archives at Antwerp” was “not on secure ground when he pointed out to requisitioning German soldiers that his archives” were protected by the 1907 Hague Regulations. Posner notes that “[a]rchival establishments of a state” are “in the first place service agencies of the government and only secondarily institutions of a scientific character.”<sup>34</sup> During World War II, Hilary Jenkinson and H. E. Bell’s report on Italian archives notes that it was “not clear” to what extent “the Archives of a State that is fought over” derives protection from the 1907 Hague Regulations.<sup>35</sup> Posner’s report on German archives in World War II states more forcefully that German records of military value “do most certainly *not* enjoy the protection of articles 27 and 56” of the 1907 Hague Regulations.<sup>36</sup> More recently, archivist Bruce P. Montgomery has argued that “[w]hile not addressing archives specifically,” the 1907 Hague Regulations “implied a distinction between archives maintained by cultural institutions, which are provided protected status, and government records of the state, which may be captured and exploited.”<sup>37</sup>

A review of the drafting history of the ambiguous language in the 1907 Hague Regulations reveals perhaps the first recorded international debate about the status of public records and archives in war. The relevant language was, in fact, only briefly discussed at the 1907 Hague Conference, but was derived

<sup>34</sup> Posner, “Public Records under Military Occupation,” 214.

<sup>35</sup> Jenkinson and Bell, *Italian Archives during the War and at Its Close*, 3.

<sup>36</sup> Ernst Posner, “Report on the Public Archives of Germany,” National Archives, Record Group 242, Pomeranze Collection, AGAR-S no. 301, 51–52 (emphasis added).

<sup>37</sup> Bruce P. Montgomery, “Returning Evidence to the Scene of the Crime: Why the Anfal Files Should Be Repatriated to Iraqi Kurdistan,” *Archivaria* 69 (2010): 152.

almost word-by-word from the earlier nonbinding 1874 Brussels Declaration, which resulted from a conference organized by Russia.<sup>38</sup>

The negotiating history of the 1874 Brussels Declaration describes that an Italian delegate, Baron Blanc, expressly suggested adding “public archives” to the list of protected property in the text. A Belgian delegate responded that adding the language was unnecessary because “it is not in the interest of any army to destroy the archives and records” of the enemy and therefore respect for them “goes without saying.” Another delegate opined that if “one is mentioning archives, one should say ‘civil records’ because military records will never be treated with respect” and that occupying forces may need certain archives. Baron Blanc therefore amended his proposal to clarify that protection would extend to “public archives and documents establishing the rights of citizens in civil matters.” The German delegate, General Voigts-Rhetz, however, objected that it was “pointless to make a list” of protected documents “as it will be automatically incomplete” but added that “the occupier always has the right to seize military plans that might serve the war aims.” The record of the negotiations then notes that the “Conference shares this opinion” and that Baron Blanc concluded by stating that “it suffices that his proposal be inserted” into the record of the negotiations along “with General Voigts-Rhetz’s explanations.”<sup>39</sup>

Although no language referencing archives was added, the sense of the 1874 debate survives in leading commentators on international law. “As regards archives,” *Oppenheim’s International Law*, interpreting the 1907 Hague Regulations, states, “they are no doubt institutions for science, but a belligerent may nevertheless seize such State papers deposited therein as are of importance to him in connection with the war.”<sup>40</sup>

The 1954 Hague Convention also places duties on state parties to safeguard and protect “cultural property,” which expressly includes the term “archives.” The exact parameters of that term and the protection the Convention intended, however, are similarly difficult to discern with clarity. Trudy Huskamp Peterson states that “the intent of the 1954 Convention is clearly to protect noncurrent historical materials, particularly those housed in a facility designated as an historical archive.”<sup>41</sup> Bruce P. Montgomery similarly interprets the Convention as

<sup>38</sup> See William M. Franklin, “Municipal Property under Belligerent Occupation,” *American Journal of International Law* 38 (1944): 385. A copy of the Brussels Declaration of 1874 is available at International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>, accessed 30 June 2011.

<sup>39</sup> *Actes de la Conférence de Bruxelles* (Brussels: F. Hayez, 1874), 243–44 (translations of quotations by Nicole Efros). See also Franklin, “Municipal Property under Belligerent Occupation,” 390.

<sup>40</sup> Lassa Oppenheim, *International Law: A Treatise: Disputes, War and Neutrality*, ed. H. Lauterpacht, vol. 2, 7th ed. (London: Longmans, Green and Co., 1952), § 138.

<sup>41</sup> Peterson, “Archives in Service to the State,” 271.

providing for the “protection of historical manuscripts and archives during wartime, but not for current public records.”<sup>42</sup> Michelle Caswell notes, however, that this distinction is not explicit in the language of the Convention.<sup>43</sup>

Official commentary on an early draft of the Convention acknowledged the difficulty that “‘archives’ is interpreted in very different ways, from country to country.” For that reason, the initial draft did not use the term and instead used “collections of documents of scientific interest,” which, the commentary noted, “covers historical archives.”<sup>44</sup> During the negotiations, however, both the United States and Spain proposed amendments adding a specific mention of “archives,” and the term was included in the final text.<sup>45</sup>

Resolving the problem of determining exactly which “archives” are protected under the 1954 Hague Convention, however, also turns on two other factors. First, as a technical matter, the determination about whether specific property is “cultural property” to which the protections of the Convention extend is not necessarily an objective test but rather depends upon “the authorities of the country on whose territory the property is located.”<sup>46</sup> That is, each state party to the Convention is empowered to decide which of its property satisfies the definition of cultural property “within the limits imposed by the ordinary meaning of the words” and the “requirement of good faith.”<sup>47</sup> With justification, parties to the Convention may determine that their national archives or other centers holding government records are “of great importance to the cultural heritage” of the nation and that the Convention should protect them as cultural property.<sup>48</sup>

Second, such determinations about cultural property status by state parties are possible because protections provided by the 1954 Hague Convention can

<sup>42</sup> Montgomery, “Returning Evidence to the Scene of the Crime,” 152.

<sup>43</sup> Caswell, “‘Thank You Very Much, Now Give Them Back,’” 222.

<sup>44</sup> UNESCO, *Records of the Conference Convened by UNESCO Held at The Hague from 21 April to 14 May 1954* (The Hague: 1961), 308. The early commentary also stated that it “seems scarcely possible today” to “request the general protection of all scientific and cultural buildings” as the “over-ambitious” definition of the 1907 Hague Regulations had and noted in a passage, perhaps equally relevant to archives, that universities and laboratories “are doubtless scientific and cultural buildings, but it would be aiming too high, with the risk of getting too little, to attempt to extend to them the protection to be accorded cultural property” on the basis that, for example, “the laboratory of a science faculty may sometimes be used for the direct pursuit of hostilities.” UNESCO, *Records*, 307.

<sup>45</sup> UNESCO, *Records*, 118. The proposal to include a specific mention of archives was adopted by the delegates with “35 votes in favour, 0 against and 2 absentions.” UNESCO, *Records*, 132.

<sup>46</sup> Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict* (Brookfield, Vt.: Dartmouth, 1996), 49.

<sup>47</sup> Roger O’Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge: Cambridge University Press, 2006), 105–6.

<sup>48</sup> Periodic reports on the implementation of the 1954 Hague Convention from state parties provide some evidence of the extent to which parties include archives, UNESCO, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=36814&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=36814&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html), accessed 30 June 2011.

be waived “where military necessity imperatively requires such a waiver.”<sup>49</sup> That is, the international protections of the Convention are subject to a significant exception for “military necessity” that defers to the national interests of the combatants. The 1954 Hague Convention cannot be used, therefore, to immunize fully archives that contain records of military value from all military action because such value may trigger the waiver for imperative military necessity.

In the end, the effective standard for archives in the 1954 Hague Convention is arguably not dissimilar to the 1907 Hague Regulations. A succinct and up-to-date explanation of the status of archives in war is found in the current *Manual of the Law of Armed Conflict* of the U.K. Ministry of Defence, which states, “Official documents and papers connected with the armed conflict may be seized, even if they are part of official archives, because they will be of military significance. However, other types of archival documents, as well as crown jewels, pictures, and art collections may not be seized.”<sup>50</sup>

#### **Postwar Restitution and Archival Inalienability**

The more difficult and controversial legal issue is the long-term *effect* of the seizure of records and archives during combat or occupation, which directly implicates the question of whether archives can remain “inalienable” during wartime seizure. Under the laws of war, enemy state property lawfully seized during hostilities pursuant to military necessity generally becomes the property of the capturing state. “Public property captured or seized from the enemy,” summarizes the U.S. Army Field Manual on the *Law of Land Warfare*, “is property of the United States.”<sup>51</sup> Moreover, state property seized during occupation that is necessary for military operations can also become the property of the seizing state.<sup>52</sup>

Under the 1907 Hague Regulations, however, property devoted to “arts and sciences” or “municipal” property encompassed within Article 56 must be treated as private property which can still be used if necessary, but which “must be restored . . . when peace is made.”<sup>53</sup> Similarly, the 1954 Hague Convention provides some protection against “misappropriation,” “requisitioning,” and, for cultural property being transported subject to special conditions, immunity from “seizure, capture, and prize.”<sup>54</sup> As described above, however, the question

<sup>49</sup> 1954 Hague Convention, Art. 4(2).

<sup>50</sup> U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), § 11.89.1.

<sup>51</sup> Department of the Army, *The Law of Land Warfare*, 50.

<sup>52</sup> Oppenheim, *International Law*, § 137.

<sup>53</sup> 1907 Hague Regulations, Art. 53.

<sup>54</sup> 1954 Hague Convention, Arts. 4(3), 14.

remains to what extent such protections encompass archives or records of potential military value, which in practice may be both a legal and factually intensive question.<sup>55</sup>

The concept of “archival inalienability” separately asserts a special status specific to archives. In describing the inalienability of archives, for example, former secretary general of the International Council on Archives Charles Kecskemeti acknowledges the right of combatants in “the exploitation of ‘captured’ archives for military, political, scientific or administrative objectives,” but states that the “capture of archives in the course of war” gives no rights beyond temporary custody and that “any decision to appropriate archives, seized during military campaigns or times of occupation” has “in fact, no legal value.”<sup>56</sup> In support of the special status of archives, the concept of archival inalienability relies in part upon a history of treaties dating at least as far back as the Treaty of Westphalia in 1648 that has, it is argued, “progressively established” a “practice, implicitly respected” that “archives captured or displaced during hostilities were returned once peace was concluded.”<sup>57</sup>

The reliance on such treaties to assert a binding international practice or custom, however, is fraught with difficulty. In evaluating this historical practice, for example, U.N. special rapporteur Mohammed Bedjaoui stresses that one should not lose “sight of the fact that this practice derives above all from peace treaties, which are generally based not so much on equitable decisions as on political solutions reflecting the power relationship of victor and vanquished.”<sup>58</sup> Put another way, treaties negotiated at the end of an armed conflict will almost always reflect unequal bargaining positions. Ernst Posner’s description of the negotiation of the Treaty of St. Germain in 1919, which is among the treaties used to support the state practice, provides a striking example. Posner notes that “Austria’s bargaining position was extremely weak” and that, therefore,

<sup>55</sup> The negotiating history of the 1874 Brussels Declaration does provide some support. The German delegate, General Voigts-Rhetz, stated that “the occupier always has the right to seize military plans that might serve the war aims, but,” he added, “it must provide a receipt.” *Actes de la Conference de Bruxelles*, 244.

<sup>56</sup> Charles Kecskemeti, “Activities of UNESCO and ICA since 1976, Part 2,” 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* (Paris: International Council on Archives, 1993–95), 84. See also Peterson, “Archives in Service to the State,” 276. (“In the end, the documents of a state are inalienable and remain subject to replevin without limitation.”)

<sup>57</sup> International Council on Archives, “The View of the Archival Community on the Settling of Disputed Claims.” A list of these treaties can be found in, among other places, Mohammed Bedjaoui, “Eleventh Report on Succession of States in Respect of Matters Other than Treaties—Draft Articles on Succession in Respect of State Archives,” in *Yearbook of the International Law Commission*, vol. 2 (U.N. Doc. A/CN.4/322, 1979), 82–93.

<sup>58</sup> Bedjaoui, “Eleventh Report on Succession of States in Respect of Matters Other than Treaties—Draft Articles on Succession in Respect of State Archives,” 11, 92.

“she had to sacrifice archives, without which people can live, to get bread and other food, without which they cannot live.”<sup>59</sup>

The complex interaction of wartime capture, historical treaty practice, and the inalienability of state property, which is perhaps best explored by example, is illustrated in a remarkable December 2009 decision by a French administrative tribunal. The decision concerned 297 royal manuscripts seized in Korea in 1866 by French forces and housed in the Bibliothèque Nationale de France. The plaintiff in the case, a South Korean cultural organization, relied upon historical treaties as evidence, citing “clauses for restitution of documents . . . looted during times of war” in the Treaty of Paris in 1814, the Treaty of Vienna in 1864, and the 1866 treaty between Prussia and the Grand Duchy of Hesse in arguing that “an international custom, a general practice accepted as law, prevailed” at the time of the 1866 seizure of the royal records and therefore the court should order their restitution to Korea. The tribunal rejected the argument and held that the Korean manuscripts had in fact become “national treasures” of France notwithstanding their “foreign origin” and that they now constituted inalienable state property *of the French government*. The tribunal held that it could not force the restitution of the records to South Korea absent an act by the French government to “declassify” them as French property.<sup>60</sup>

While the French decision relies in part on the fact that the 1866 seizure occurred prior to both the 1907 and 1954 Hague Conventions, during a time in which seizure did not necessarily require military necessity, the result in the case is not inconsistent with the treatment of captured records in some more modern conflicts. When the United States decided to return seized records to Germany following World War II, for example, it made clear that “legal title” to at least a portion of the seized materials was “held by the United States Government” and that those records would be “donated” to Germany.<sup>61</sup> Ernst Posner’s report on German records similarly notes that some of the seized records “may be considered *bona fide* war booty that may be retained indefinitely.”<sup>62</sup>

The United States treated the seized German records not only as U.S. property, but also as U.S. federal records. Transfers were based on the Archivist’s determination that the original records did not have “sufficient administrative,

<sup>59</sup> Posner, “Effects of Changes of Sovereignty on Archives,” 152.

<sup>60</sup> Tribunal Administratif de Paris, Association for Cultural Action, No. 0701946, 18 December 2009 (on file with author) (quotations translated by Nicole Efron). The manuscripts were subsequently returned to South Korea pursuant to a renewable lease agreement between the French and South Korean governments.

<sup>61</sup> General Records Schedule, “Seized German Records,” 1 August 1953, National Archives, Record Group 242, Pomerenze Collection, AGARS No. 3144, <http://www.dcofiles.com/3144.pdf>, accessed 30 June 2011.

<sup>62</sup> Posner, “Report on the Public Archives of Germany,” 58. See also Pomerenze, “Policies and Procedures for the Protection, Use, and Return of Captured German Records,” 25.



legal research or other value to warrant their further preservation by the United States Government.”<sup>63</sup> Neither is this practice confined to the World War II era. The U.S. Army has a general records schedule, for example, approved by the Archivist in 1983, encompassing documents “captured or confiscated in wartime by international law.”<sup>64</sup> More recently, the original records captured by U.S. forces in Iraq during Desert Storm in 1991 were scheduled as U.S. federal records in 2002 by the Defense Intelligence Agency.<sup>65</sup>

At other times, the United States has treated seized records quite differently. During the Vietnam War, for example, the U.S. military took the position that “enemy documents captured in the Republic of Vietnam are legally the property of the Vietnamese government” and only retained microfilm copies.<sup>66</sup> According to NARA, the Department of Defense (DOD) similarly agreed to treat records captured in Operation Just Cause in Panama in 1989 as the property of Panama.<sup>67</sup> This did not, however, prevent a significant controversy between the United States and Panama over custody and access to the 15,000 boxes of seized documents.<sup>68</sup>

There have been debates within the U.S. government itself about the status of captured foreign records. Archivist Greg Bradsher describes a debate over whether international law provided only the “right to custody and use” of records seized in Japan or whether title had passed.<sup>69</sup> Similarly, there was a public debate within the U.S. government over the legal status of records seized by U.S. forces in Haiti in 1994. The DOD reportedly argued that the documents “became

<sup>63</sup> General Records Schedule, “Seized German Records,” 1.

<sup>64</sup> Request for Records Disposition Authority, SF 115, Job. No. NC1-AU-83-33, approved 4 November 1983, [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/departments-of-the-army/rg-au/nc1-au-83-033\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/departments-of-the-army/rg-au/nc1-au-83-033_sf115.pdf), accessed 30 June 2011.

<sup>65</sup> Request for Records Disposition Authority, SF 115, Job. No. N1-373-02-3, approved 9 August 2002, [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/defense-agencies/rg-0373/n1-373-02-003\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departments-of-defense/defense-agencies/rg-0373/n1-373-02-003_sf115.pdf), accessed 30 June 2011.

<sup>66</sup> U.S. Military Assistance Command Vietnam, *MACV J2 Study of the Exploitation of Captured Enemy Documents in SVN* (San Francisco, Calif.: United States Military Assistance Command Vietnam, 1968), 15.

<sup>67</sup> John W. Carlin, Archivist of the United States, letter to Donald H. Rumsfeld, U.S. secretary of defense, 17 April 2003, 1, <http://www.dcofiles.com/17.pdf>, accessed 30 June 2011.

<sup>68</sup> See, for example, John Otis, “Magistrate Accuses U.S. of Obstructing Justice,” *United Press International*, 13 May 1990 (stating that a “Panamanian magistrate said U.S. officials are obstructing justice by restricting his access to documents he needs to investigate former associates of ousted military ruler Manuel Antonio Noriega”).

<sup>69</sup> Greg Bradsher, “A ‘Constantly Recurring Irritant,’ Returning Captured and Seized Japanese Records, 1946–1961,” in *Researching Japanese War Crimes*, ed. Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group (Washington, D.C.: National Archives and Records Administration, 2006), 175.

American property when United States troops seized them.”<sup>70</sup> A 1995 memorandum prepared by the American Law Division of the Congressional Research Service requested by Representative John Conyers, however, asserts quite forcefully that the DOD’s position “would appear to be mistaken” and that under international law the records belonged “to the Haitian state, and their retention by the U.S. government violates Haiti’s ownership rights.”<sup>71</sup>

NARA acknowledges that since World War II the legal status of captured records has been an “evolving process.”<sup>72</sup> Writing in this journal in 1962, archivist Bess Glenn describes the evolution with some exasperation, stating that U.S. policies on records seized in war have “followed a meandering course” that has generally “followed a policy of self-interest, of expediency, rather than a consistent principle of law” and that the United States has made only a “feeble and inconclusive effort to achieve a solution to the question as to the legal status of the seized records.”<sup>73</sup>

To bring this issue up to the present, the author asked the DOD whether the United States has a formal position on whether the forty-eight thousand boxes seized by U.S. forces in Iraq remained the property of Iraq, as NARA had urged,<sup>74</sup> or whether title had passed to the United States upon capture. The response from a defense official illustrates that the “evolving process”—a mix of law and diplomacy—continues:

The U.S. government will consider requests from the Government of Iraq to return captured Iraqi governmental documents. Neither the law of war nor pertinent Security Council resolutions mandate a particular time frame for the return of property such as these documents, but the needs of the Iraqi government for the return of the documents will be considered.<sup>75</sup>

Finally, having discussed at some length relevant laws of armed conflict and the concept of “archival inalienability,” the reality that must always be faced is

<sup>70</sup> Larry Rohter, “Haiti Accuses U.S. of Holding Data Recovered by G.I.s,” *New York Times*, 28 November 1995, A1. Interestingly, the DOD apparently took this position despite the fact that the U.S. military treated the Haiti operation as a “military operation other than war,” which meant that the law of armed conflict was not triggered and therefore, by its own account, “Haitian public property that fell into the hands of United States soldiers remained Haitian public property.” Center for Law and Military Operations, *Law and Military Operations in Haiti 1994–1995: Lessons Learned for Judge Advocates* (Charlottesville, Va.: Center for Law and Military Operations, 1995), 129.

<sup>71</sup> Harry G. Gourevitch, Congressional Research Service, memorandum, “Seizure of Haitian Documents by the American Military,” to Representative John Conyers, Jr., 12 December 1995, <http://www.dco-files.com/12.pdf>, accessed 30 June 2011. The author thanks Arif Haque from the office of Rep. Conyers for providing a copy of this memorandum.

<sup>72</sup> Carlin to Rumsfeld, 17 April 2003, 1.

<sup>73</sup> Bess Glenn, “Private Records Seized by the United States in Wartime—Their Legal Status,” *American Archivist* 25 (1962): 405.

<sup>74</sup> Carlin to Rumsfeld, 17 April 2003, 1.

<sup>75</sup> Defense Intelligence Agency, email message to author, 8 March 2011.

that the often-ambiguous standards of international law will, in their actual application, be subject to broad interpretations as well as abuse. As SAA president Waldo G. Leland declared in 1941: "Regretfully we have reached the conclusion that international conventions for the protection of historic and artistic treasures are of no avail under the conditions of total warfare."<sup>76</sup> Similarly, 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. Insisting on adherence to complicated rules and fine distinctions will go nowhere."<sup>77</sup>

### Archivists at War and Peace

The tensions between international and national interests in archives and the inadequacy of international law in providing a clear, appropriate, and enforceable balance present both challenges and opportunities for archivists and professional organizations such as the SAA. Future debates about the role of archives and archivists in war should acknowledge the reality that protecting archives in war involves a more complicated calculation than relying on disaster preparedness principles or urging compliance with ambiguous legal protections for cultural property.

The archival community should perhaps consider the implications of the observation of Hilary Jenkinson and H. E. Bell that

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.<sup>78</sup>

Examining the realities of the competing national and international interests provides a useful way of identifying where the policies and goals of the archival community converge or diverge with the interests and incentives both of combatants during hostilities and states during postconflict debates over the return of displaced archives.

<sup>76</sup> Waldo G. Leland, "The Archivist in Times of Emergency," *American Archivist* 4(1941): 3.

<sup>77</sup> Peterson, "Archives in Service to the State," 273.

<sup>78</sup> Jenkinson and Bell, *Italian Archives during the War and at Its Close*, 3.

### ***National Incentives and International Goals during Hostilities***

The same military, intelligence, or administrative uses for national archives that complicate legal issues have practical consequences that affect the tactical balance of national and international interests in their wartime preservation in sometimes counterintuitive ways. In a traditional armed conflict, for example, the value of archives creates a *military* incentive for “attacking” forces to *avoid* damaging or destroying the archives of the “defending” government and to secure them intact.<sup>79</sup>

“Defending” governments, in contrast, often have an incentive to prevent the capture of their records and archives, which may involve evacuation or concealment. In the extreme circumstances of war, however, this can extend to destroying records and archives to prevent their capture by the advancing enemy. As Ernst Posner notes, nations defending against invasion “have discovered that in their fight against the conqueror the destruction of records may be a weapon as powerful as the dynamiting of railroads and the blowing up of bridges.”<sup>80</sup>

In war, therefore, archivists and human rights organizations may at times find their interests, as well as international interests in preservation, partially aligned with the national and military interests of attacking forces and at times in direct conflict with national rights of ownership, self-defense, and sovereignty of the “defending” government.<sup>81</sup>

The issue is far from theoretical. The expertise of archivists and their role in the execution of national policies provide opportunities not simply for advocacy, but for intervention. The archival community might argue, for example, that the preservation of archives ought to trump any national interests and invocations of “military necessity” that might lead to destruction or damage. In doing so, the archival community must also consider the practical and ethical issues that are raised when such professional positions are converted into action.

The order by Iraqi government officials to destroy Ba’ath Party records within the Iraqi National Archives, for example, arguably would have presented an ethical conflict between “national” duties to a government and to national

<sup>79</sup> Of course, these incentives are altered in conflicts in which an attacking force *intends* to destroy, rather than exploit, the national documents of its enemy as part of a larger plan of ethnic cleansing or genocide. See, for example, Society of American Archivists, “Resolution on the Systematic Destruction of Archives in Kosovo and War-Caused Devastation of Archives throughout Yugoslavia,” 14 April 1999.

<sup>80</sup> Ernst Posner, “The Administration of Current Records in Italian Public Agencies,” in *Archives and the Public Interest*, ed. Ken Munden (Chicago: Society of American Archivists, 2006), 98.

<sup>81</sup> As mentioned above, the sovereign’s right of ownership over state property generally includes the power to destroy. See also Lior Jacob Strahilevitz, “The Right to Destroy,” *Yale Law Journal* 114 (2005): 781–854.

law, on the one hand, and what the SAA's *Code of Ethics for Archivists* describes as an archivist's "fundamental obligation" to the preservation of records in his or her care and its mandate that archivists must not "alter, manipulate, or destroy data or records to conceal facts or distort evidence," on the other.<sup>82</sup> Patricia Kennedy Grimsted similarly describes the Soviet "scorched earth" policy in which Ukrainian archivists were ordered to destroy archives they could not evacuate in advance of the Nazi invasion. "In Odesa," Grimsted writes, "archivists protested the destruction order and refused to destroy pre-revolutionary records," but after it became clear no more could be evacuated, the order was fulfilled.<sup>83</sup>

While such extreme circumstances and stark choices may be rare, more common roles for archivists in nations under siege also present ethical and professional complexities that are easy to overlook. In his 1941 address, *Archivists in Times of National Emergency*, for example, SAA president Waldo G. Leland noted that in times of war, the archivist "has public duties of transcendent importance" and that the "[f]irst of such duties is the obligation to take the necessary steps to assure the physical safety of the records in his custody."<sup>84</sup> On Leland's suggestion, the SAA formed special committees that produced a report entitled *The Care of Records in a National Emergency*, which the National Archives published in a bulletin. The report describes the "hazards likely to affect archives," including not only bombardment and fire, but "possible enemy action such as occupation, resulting in seizure" and provides detailed guidance on evacuation.<sup>85</sup>

The evacuation or concealment of purely cultural archives having no military value to protect them from combat dangers is not only appropriate, but highly desirable. The potential military value of national records and archives, however, can alter the character of such protective measures. If such actions are designed, for example, to shield archival records that may have potential military value from the enemy or to delay or frustrate attempts by the enemy to locate them, these may be in the national interest, but they are not neutral acts and may also place other archives at greater risk. The Germans in World War II, for example, concealed records in "at least one thousand" different places,

<sup>82</sup> Society of American Archivists, *Code of Ethics for Archivists*, approved by SAA Council, 5 February 2005.

<sup>83</sup> Patricia Kennedy Grimsted, *Trophies of War and Empire: The Archival Heritage of Ukraine, World War II, and the International Politics of Restitution* (Cambridge, Mass.: Harvard University Press, 2001), 193–94.

<sup>84</sup> Leland, "The Archivist in Times of Emergency," 2. Leland warns that war plans must be made that are "capable of immediate execution" and describes visiting "the cellars of the Bibliothèque Nationale in Paris" which he found "full of evacuation boxes."

<sup>85</sup> National Archives, *The Care of Records in a National Emergency*, bulletin no. 3 (December 1941), 7. For additional information on SAA activities during World War II, see Philip C. Brooks, "Archives in the United States during World War II, 1939–45," *Library Quarterly* 17 (1947): 263–80.

which necessitated at least one Allied “Operation ‘Hidden Documents.’”<sup>86</sup> Such a strategy places all possible hiding places, including other records and archival centers, at increased risk for searches, seizures, and ransacking by troops.

As a practical matter, the process of seizing records during war is always a messy one. While current U.S. Army instructions provide detailed guidance, for example, on “Document Exploitation and Handling” for intelligence purposes (including guidance that seeks to preserve context), the reality of wartime operations is often very different.<sup>87</sup> As Trudy Huskamp Peterson notes, given “the urgency of wartime activity” and “the language problems of soldiers unable to read records they are encountering,” the “impulse to sweep up all documents and sort them out later is well near irresistible.”<sup>88</sup>

The obligation to distinguish between records of military value and those of purely cultural value, however, does not fall solely on “attacking” forces. International law also requires “defending” forces to distinguish between military and civilian objectives by not, for instance, concealing military forces within a civilian population or stationing lawful targets, such as tanks, in close proximity to protected places, such as museums.<sup>89</sup> The problem that should be acknowledged for national archives is that cultural material and material of potential military or intelligence value can be located not only in the same building, but also even in the same record.

If the international goal of preserving archives were paramount, the archivist of a “defending” government’s national archives might consider policies to ensure, to the extent principles such as *respect des fonds* allow, that archives of a purely cultural or historical nature and those of potential military value are not collocated and to clearly identify and differentiate them for invading forces. Moreover, during an invasion, a possible best practice might be not only to surrender control over the archives to the invading enemy as soon as possible, but also to actively assist those forces in the efficient location and utilization of records in his or her care that could be of value, which could potentially discourage displacement and related threats to context. Such an ideal, however, might place the archivist in direct opposition to his or her own government.

<sup>86</sup> Pomeranze, “Policies and Procedures for the Protection, Use, and Return of Captured German Records,” 20.

<sup>87</sup> Department of the Army, *FM 2-22.3, Human Intelligence Collector Operations* (Washington, D.C.: Department of the Army, 2006), Appendix I.

<sup>88</sup> Peterson, “Archives in Service to the State,” 273.

<sup>89</sup> The SAA acknowledged the practical reasons for such rules in a third statement regarding Iraqi archives in 2007, expressing deep concern about Iraqi National Guard troops occupying the Iraqi National Archives and warning that the “placement of troops in or near such institutions has the potential of drawing enemy violence towards the repository.” Society of American Archivists, “Iraq National Library and Archives in Jeopardy,” 8 August 2007. The view of the United States, in fact, is that “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.” U.S. Senate, Executive Document No. 110-26 (2008), 10.

In advancing the goal of protecting national archives, the archival community should also consider the historical relationship between archivists and the work of “attacking” forces. Waldo G. Leland’s second address as SAA president in 1942, for example, describes the active contributions during World War I of archivists and historians.<sup>90</sup> In World War II, archivists were similarly active in the war effort. Leaders in the profession, such as Hilary Jenkinson and Fred W. Shipman, were on the ground actively involved in the protection of foreign archives alongside officers in the Monuments, Fine Arts and Archives (MFA&A) units.<sup>91</sup>

The U.S. National Archives itself was designated a defense agency and shared its office space with the Office of Strategic Services (OSS), the precursor to the Central Intelligence Agency.<sup>92</sup> The National Archives also directly contributed to projects for the War Department and the OSS, “the nature of which,” Oliver W. Holmes stated in 1946, “we are requested still to keep confidential.”<sup>93</sup> Ernst Posner, in coordination with the National Archives, created detailed lists of archival repositories in Europe and Asia, which not only assisted in their protection, but were also used as “reference tools” for military intelligence.<sup>94</sup>

Such efforts sought to capitalize on the alignment of the interests of archivists seeking preservation of foreign records with Allied military interests in exploiting records and archives for military and intelligence purposes. Archivist Lester Born, for example, notes that the goals of protection and the goals of exploitation should not in reality be opposed as “[m]uch better intelligence results could be obtained from material not ransacked chaotically.”<sup>95</sup> During World War II, the U.S. military went so far as to say that “the effective imposition of Military Government” in Germany “may depend largely upon how successful we are” in “safeguarding archives.”<sup>96</sup> More recently, training given to U.S. Marines in Iraq gravely warned that failure to preserve and properly handle seized documents could result in fellow Marines being killed by insurgents who are released due to insufficient evidence to justify their detention.<sup>97</sup>

The possible alignment of archival and military interests can be illustrated as much by failure as by success. Within days of the fire that destroyed the

<sup>90</sup> Waldo G. Leland, “Historians and Archivists in the First World War,” *American Archivist* 5 (1942): 1–17.

<sup>91</sup> See, generally, *Report of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas* (1946).

<sup>92</sup> See Jennifer Davis Heaps, “Clio’s Spies: The National Archives and the Office of Strategic Services in World War II,” *Prologue* 30 (Fall 1998): 194–207.

<sup>93</sup> Holmes, “The National Archives and the Protection of Records in War Areas.” 110–27.

<sup>94</sup> Holmes, “The National Archives and the Protection of Records in War Areas,” 116.

<sup>95</sup> Lester K. Born, “Archives and War,” *Indian Archives* 4 (1950): 159.

<sup>96</sup> T. J. Davis, foreword to Allied Forces, Supreme Headquarters, U.S. Adjutant-General’s Office, *General List of Archives in Western Germany* (1945), 1.

<sup>97</sup> U.S. Marine Corps, *Intelligence Exploitation of Enemy Material*, 6.

archival records of the Ba'ath Party in the Iraqi National Archives, destruction that its staff had earlier refused to undertake, Secretary of Defense Donald Rumsfeld implicitly acknowledged U.S. military and political interests in the records' preservation by including among the "unfinished missions to complete" the need to secure the records of Ba'ath Party members.<sup>98</sup>

Alliances between archivists and the military are far from perfect. Hilary Jenkinson and H. E. Bell, for example, note problems arising while working with British forces in Italy based on the fact that

Intelligence 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.<sup>99</sup>

Others may find any such alliance unholy. The recent and highly publicized debate within the social sciences community, for example, about whether it is ethical for social science researchers, such as anthropologists, to assist military forces might raise interesting, but difficult, questions for the archival profession.<sup>100</sup> Historian Kathy Peiss notes that in many fields the close relationship that existed between cultural leaders and government and military officials in the World War II period became "frayed" in the second half of the last century and that reaching "across the divide now seems impossible for both sides." There is fault on both sides. "Scholars, intellectuals, and cultural figures," Peiss suggests, "often prefer the purist's position as outsider and critic to messy interactions with civilian and military leaders."<sup>101</sup> At the same time, good faith attempts by academic and cultural property professionals to provide guidance to government and military officials have often fallen on deaf ears.<sup>102</sup>

The extensive involvement of NARA archivists within the SAA, however, including even the regular contributions from the Archivist of the United States

<sup>98</sup> Secretary of Defense Donald H. Rumsfeld, news transcript, DoD news briefing, 11 April 2003, U.S. Department of Defense, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2367>, accessed 30 June 2011.

<sup>99</sup> Jenkinson and Bell, *Italian Archives during the War and at Its Close*, 21.

<sup>100</sup> See, for example, American Anthropological Association, "AAA Opposes U.S. Military's Human Terrain System," <http://www.aaanet.org/issues/AAA-Opposes-Human-Terrain-System-Project.cfm>, accessed 30 June 2011.

<sup>101</sup> Kathy Peiss, "Cultural Property in a Time of War: The American Response to Endangered Books in World War II," *Library Trends* 55 (2007): 382.

<sup>102</sup> The looting of the Iraqi Museum in 2003, for example, resulted in the resignation of three members of the President's Advisory Committee on Cultural Property. The chairman of the committee, museum director Martin E. Sullivan, stated in his resignation letter that scholars had provided the State Department with detailed information about locations of archaeological sites and museum collections and that the destruction and looting in Iraq was foreseeable, but "was not prevented, due to our nation's inaction." Carl Hartman, "White House Art Advisers Quit to Protest Looting of Baghdad Museum," *Associated Press*, 17 April 2003.



in *Archival Outlook*, perhaps provides a closer relationship between the professional organization and the government than exists in many other fields. NARA continues to make itself available to the U.S. military in relation to the issue of records seized by U.S. forces. In April 2003, the Archivist offered NARA assistance to the DOD “in dealing with the documents that Coalition forces are securing from the Iraqi Government and other institutions.”<sup>103</sup> The Archivist specifically cited providing “guidance relating to the legal status of the records and protecting their evidential value, and technical assistance relating to preserving original records and in scanning records to obtain copies that your agency may need for business purposes including for future judicial uses.”<sup>104</sup>

Similarly, the SAA maintains an affiliation with the U.S. Committee of the Blue Shield, which coordinates with governmental officials and provides training to military units about the importance of protecting cultural property, including archives.<sup>105</sup> Certain functions of the World War II MFA&A units are also performed by U.S. civil affairs units, which produced, as recently as 2005, an *Arts, Monuments and Archives Guide*.<sup>106</sup>

Finally, any discussion about the advisability of, and any related ethical constraints on, greater engagement by members of the archival community in military operations, should not ignore the possible consequences of complete neutrality. During the Vietnam War, seized documents sent to the Captured Document Exploitation Center in Saigon for analysis arrived “in every conceivable type of container ranging from sandbags and cans to trailer loads.”<sup>107</sup> Similarly, descriptions from Iraq of “heaps of documents,” which were “left exposed to the elements” and “eventually put in garbage bags,” that “sometimes had some data describing where they were collected, but often did not,” provide a compelling argument for the need for more extensive involvement and engagement by those with expertise in preserving context.<sup>108</sup>

#### **Archivists, Postwar Restitution, and International Access**

In postconflict periods, archivists should revisit debates about what principles should guide restitution of, and international access to, seized or

<sup>103</sup> Carlin to Rumsfeld, 17 April 2003, 1.

<sup>104</sup> Carlin to Rumsfeld, 17 April 2003, 1.

<sup>105</sup> U.S. Committee of the Blue Shield website is at [http://www.uscbs.org/about\\_us.htm](http://www.uscbs.org/about_us.htm), accessed 30 June 2011. The “Blue Shield” refers to the symbol created by the 1954 Hague Convention that is meant to clearly identify cultural property to combatants during armed conflict. The Blue Shield operates as the cultural equivalent of the Red Cross or Red Crescent.

<sup>106</sup> Department of the Army, *GTA 41-01-002, Civil Affairs, Arts, Monuments and Archives Guide* (Washington, D.C.: Department of the Army, 2005).

<sup>107</sup> U.S. Military Assistance Command Vietnam, *MACV J2 Study of the Exploitation of Captured Enemy Documents in SVN*, 11.

<sup>108</sup> Charles Duelfer, *Hide and Seek: The Search for Truth in Iraq* (New York: Public Affairs, 2009), 339.

displaced archives. Such debates should not rest on old assumptions and should consider practical solutions that are based on reassessing the balance of national and international interests.

First, consideration and debate about whether, when, and where archives seized during war are returned should be unhindered by the notion that “archival inalienability” or international law inflexibly compels specific results. Moreover, the practical and political reality that, even where assertions of international legal obligations of return are compelling, the nation with custody will not return records that conflict with its own national security interests should also be acknowledged. Indeed, such a nation should perhaps not be encouraged to return records that may raise international security concerns.

In this light, the joint SAA/ACA call for the return of several different groups of records to the Iraqi National Archives—including not only those seized by U.S. forces, but records seized by Kurds in the First Gulf War—appears to reflect a result that seems pre-ordained by the invocation of the “inalienable character of national records.” While return to Iraq may arguably be the appropriate solution for those groups of records, “repatriation” should not become the only acceptable solution to records seized in war. The internationalist vision of Solon Buck’s “The Archivist’s ‘One World,’” for example, in which he proposes an “international” archives that could include “military and similar records of aggressor nations that have been defeated . . . that, although national in origin should not in the interests of world peace be left in the custody of the nation that created them,” should at least have a seat at the table.<sup>109</sup>

Among the records seized by U.S. forces in Iraq, for example, are documents that, according to arms control experts consulted by the *New York Times*, “constitute a basic guide to building an atom bomb.”<sup>110</sup> Bruce P. Montgomery argues that the Anfal files seized by Kurdish fighters in 1991 should be “repatriated to Iraqi Kurdistan” rather than to the Iraqi National Archives in part on the basis of “the possible misuse of the files by Arab parties against Kurdish political opponents.” More broadly, Montgomery notes the dangers of “returning intelligence documents to a successor state government that may exploit them against dissidents, or entire populations, or religious groups.”<sup>111</sup>

The United States made related determinations in earlier wars. It excluded from the return of both German and Japanese records seized in World War II, for example, those documents that would “jeopardize the national security

<sup>109</sup> Buck, “The Archivist’s ‘One World,’” 15.

<sup>110</sup> William J. Broad, “U.S. Web Archive Is Said to Reveal Nuclear Primer,” *New York Times*, 3 November 2008, A1.

<sup>111</sup> Montgomery, “Returning Evidence to the Scene of the Crime,” 145, 160.

interests of the United States or its Allies.”<sup>112</sup> Of particular relevance for Ba’ath Party records, the U.S. government also excluded from the initial return of German records those “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.”<sup>113</sup>

Views can differ on whether such records should be returned. Some may validly view the withholding of *any* seized records in this manner as insufferable paternalism or an affront to national rights. However, any view that such an important debate is unnecessary, based on the belief that international law already unquestionably provides a single answer, begs for reconsideration.

Second are the related issues of access and preservation. The 2008 SAA/ACA statement on Iraqi records, for example, thoughtfully balances the national interests in the demand for return with the international interests in access to seized records by noting that past U.S. practice has been to return seized records “after copies were made for historical purposes and broad public access.” The SAA/ACA expressly calls upon the United States, private parties, and other governments “to find appropriate repositories for copies made from the Iraqi records and to ensure that these repositories make the copies accessible to researchers at the earliest practical date.”<sup>114</sup> Such views are consistent with enthusiastic reactions within this journal to the public availability in the 1950s of the “great historic treasure” of German records seized during World War II.<sup>115</sup> This is also consistent with efforts to include clauses that require granting access to future researchers within agreements for the return of seized records.<sup>116</sup>

The advocacy for such international access to seized records may itself be a departure from the simultaneous invocation of the inalienability of records. That is, respecting a government’s “inalienable” right to its own records arguably should encompass respecting its right to restrict access to them or even to destroy them. That would mean not only returning the original Iraqi records to Iraq, but also not making copies of them accessible and allowing the Iraqi

<sup>112</sup> General Records Schedule, “Seized German Records,” 2. Bradsher, “A ‘Constantly Recurring Irritant,’” 180.

<sup>113</sup> General Records Schedule, “Seized German Records,” 2.

<sup>114</sup> SAA/ACA, “SAA/ACA Joint Statement on Iraqi Records.”

<sup>115</sup> Francis L. Loewenheim, “Guides to Microfilmed German Records: A Review,” *American Archivist* 22 (1959): 445. See also Fritz Epstein, “Washington Research Opportunities in the Period of World War II,” *American Archivist* 17 (1954): 225–36. Researchers were advised in 1959 that this “wealth of documentation will be available on microfilm, which scholars can either use in the National Archives or purchase for reading in the comfort of their own libraries.” Dagmar Horna Perman, “Microfilming of German Records in the National Archives,” *American Archivist* 22 (1959): 433–43.

<sup>116</sup> See Astrid M. Eckert, “. . . And Grant German and Foreign Scholars Access at All Times”: Archival Access in West Germany during the Cold War,” in *Political Pressure and the Archival Record*, 75–91.

government to determine their fate and the nature and extent of domestic and international access.

Records seized by U.S. forces in Grenada in 1983 during Operation Urgent Fury perhaps provide a comparable example. Following the seizure, the SAA approved a resolution noting “with grave concern the fate of Grenadian Government and other cultural records as a consequence of the invasion of Grenada” and urging “their prompt return with decent regard for their provenance and integrity.”<sup>117</sup> The government of Grenada itself not only asked for the return of the documents, but also reportedly requested from the United States “an end to all further publication of the ‘captured documents.’”<sup>118</sup> Instead, after returning the originals to Grenada, microfilmed copies made by the Defense Intelligence Agency (DIA) were made available to researchers at the National Archives.

Strictly honoring national interests by not making accessible copies of records captured in armed conflict would foreclose one of the few ancillary international “benefits” resulting from the evils of war—the emancipation of records of nations that would otherwise be concealed from view. That is, war can sometimes assist in the accomplishment, albeit partial and involuntary, of Solon Buck’s vision of nations exchanging copies of their archival records to advance historical knowledge.<sup>119</sup>

Further, in theory, providing broad international access to copies of seized records, assuming the nation from which they were obtained shares in that access, should also effectively make disputes over the return of the originals less important, if not moot.<sup>120</sup> This does not appear, however, to be the case. As Patricia Kennedy Grimsted noted in 1995, the archives from Smolensk, Russia, that were in U.S. custody and were the subject of a continuing, and at times heated, debate, had “long been available in their entirety for public purchase on microfilm.”<sup>121</sup>

The Grenada records also provide a concrete example of the preservation benefits of retaining copies. While the location and current status of the original

<sup>117</sup> SAA Council Meeting, minutes, 2 September 1984, reprinted in *American Archivist* 48 (1985): 248–49.

<sup>118</sup> “Grenada Wants Files,” *Globe and Mail*, 7 March 1984.

<sup>119</sup> Buck, “The Archivist’s ‘One World,’” 17.

<sup>120</sup> Obviously, original records can sometimes provide information that copies cannot. In 1959, Dagmar Perman, for example, lamented the “unfortunate fact” that some of the information “important to the scholar” contained within captured German records was “lost in the reproduction on microfilm” that the United States retained. “An outstanding example is color. It was generally the habit of many German officials of higher rank to stick generally to one color in their penciled notations. It is easy to identify them by their brilliant greens (Himmler), vermilion (Keitel), browns (Jodl), or purples (Thomas).” Perman, “Microfilming of German Records in the National Archives,” 433–43.

<sup>121</sup> Grimsted, *Smolensk*, 4.

records returned to Grenada appear uncertain,<sup>122</sup> the microfilm copies made by the DIA remain available to researchers in Record Group 242 at the National Archives. The possible fate and long-term accessibility of other seized records are less comforting.

The 160,000 pages of documents seized by U.S. forces in Haiti in 1994, for example, were reportedly initially sent back to the secure custody of DIA headquarters.<sup>123</sup> After several years of controversy surrounding the return of the documents, including letters from dozens of members of Congress urging President Clinton to return them, the original documents were finally returned to Haiti in 2001.<sup>124</sup> The current location and status of the originals are unclear. A human rights attorney who sought access to them after their return to Haiti fears that the documents were likely destroyed during the 2004 coup.<sup>125</sup> Moreover, a defense official has recently confirmed to the author that the DIA has no copies or scans of the returned original documents.<sup>126</sup>

The fate of documents seized during Operation Just Cause in Panama in 1989 is similarly complex. As mentioned earlier, the DOD, with NARA endorsement, treated the original documents as property of Panama. In 1993, however, when the United States offered the originals to Panama, the president of Panama reportedly said he would “not seek to recover” them and the Panamanian government reportedly wanted to destroy some of the files.<sup>127</sup> Copies of seized documents, however, were distributed by the DIA to an “Inter-Agency Panama Document Review Group.” The State Department, one of the participating agencies, submitted a proposed records schedule in relation to its copies, which were determined to be “nonrecord.” The proposed schedule indicates that the DIA possessed the “master copy” of the documents.<sup>128</sup> A defense official has confirmed to the author, however, that the DIA no longer has any copies of documents from Panama.<sup>129</sup> While there is hope that copies of the Haitian and

<sup>122</sup> One researcher notes that the returned original Grenadian documents had been rumored to have once been housed at “Police Headquarters,” but that the “location, condition and accession of the original Grenada Documents remains obscured.” See “The Grenada Documents,” <http://www.thegrenadarevolutiononline.com/grenadadocs.html>, accessed 30 June 2011.

<sup>123</sup> Phillipe R. Girard, *Clinton in Haiti: The 1994 Invasion of Haiti* (New York: Palgrave, 2004), 210. Girard, a historian, attempted unsuccessfully to gain access to the records via the Freedom of Information Act.

<sup>124</sup> 142 Cong. Rec. 12,513-14 (1996). Girard, *Clinton in Haiti*, 210.

<sup>125</sup> Brian Concannon, Jr., director, Institute for Justice and Democracy in Haiti, email to author, 26 January 2011. A written request by the author for information from the Embassy of Haiti went unanswered.

<sup>126</sup> Defense Intelligence Agency, email message to author, 3 March 2011.

<sup>127</sup> See Andres Oppenheimer, “Political Hot Potato Sits in Panama Warehouse,” *Miami Herald*, 17 January 1993.

<sup>128</sup> Request for Records Disposition Authority, SF 115, Job. No. N1-59-94-18, 29 March 1994, [http://www.archives.gov/records-mgmt/rcs/schedules/departments/departament-of-state/rg-0059/n1-059-94-018\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/departments/departament-of-state/rg-0059/n1-059-94-018_sf115.pdf), accessed 30 June 2011.

<sup>129</sup> DIA to author, 3 March 2011.

Panamanian<sup>130</sup> documents may exist in the custody of another federal agency or that the original records are safely at rest in archives in their respective countries, their fate appears to be in some doubt.

The fate of the original Iraqi records seized by U.S. forces in Operation Desert Storm during the first Gulf War in 1991 is, however, confirmed. As mentioned above, the DIA submitted a records schedule covering the originals that was approved by the Archivist of the United States in August 2002. The schedule provided, however, that the original records were to be destroyed “upon the approval of this schedule.”<sup>131</sup> NARA’s own copy of the schedule has blacked-out portions, but the *Federal Register*, which provided notice for the proposed schedule, reveals that the original records had become “contaminated with mold.”<sup>132</sup> The DIA does, however, maintain scanned copies of the records.

Such cautionary tales further support the argument for balancing national interests in the return of original records with international interests in long-term preservation. Such situations might also argue for devoting greater efforts—perhaps comparable to those spent advocating for the return of originals—to ensuring that both copies and originals are properly preserved by U.S. federal agencies tasked with administering them, a goal that is modest, attainable, and within the special expertise of the archival community.

Finally, given the importance of the eventual return of captured records for purposes of history, national reconciliation, and human rights, consideration should perhaps be given to exploring whether professional and practical opportunities exist for speeding their return. The return of seized records to Germany, for example, was advanced by “a rather unusual partnership” between the American Historical Association (AHA) and the Department of the Army.<sup>133</sup> The American Committee for the Study of War Documents, which became an AHA committee, worked closely with the National Archives and the military in not only microfilming the captured German records, but organizing and cataloging them.<sup>134</sup> This partnership undoubtedly accelerated the return of records

<sup>130</sup> As this article was in the final stages of editing, a defense official confirmed to the author that the U.S. Army in fact has custody of “a large volume” of at least some of the “documents/records from the Noreiga Regime, which were ‘captured’ during Operation Just Cause” in Panama. U.S. Southern Command, email message to author, 31 August 2011. The author thanks Trudy Huskamp Peterson, Stephen Lucas, Andres Ortegon, LTC Thomas Veale, and Lisa Roberson for their assistance in the lengthy search for the fate of the Panama documents.

<sup>131</sup> Request for Records Disposition Authority, SF 115, Job. No. N1-373-02-3, approved 9 August 2002.

<sup>132</sup> 67 Fed. Reg. 40,343 (12 June 2002). A defense official confirmed to the author that the documents referenced in the schedule “were the originals and were destroyed because of contamination.” DIA to author, 3 March 2011.

<sup>133</sup> Pomerenze, “Policies and Procedures for the Protection, Use, and Return of Captured German Records,” 29.

<sup>134</sup> See Herman G. Goldbeck, “The German Military Documents Section and the Captured Records Section,” in *Captured German and Related Records*, ed. Robert Wolfe, 50–57 (Athens: University of Ohio Press, 1974). See also Perman, “Microfilming of German Records in the National Archives,” 433–43.

to Germany while preserving the captured documents “for the future use of scholarship and military intelligence.”<sup>135</sup>

While records seized from Iraq may have already been digitized within the “Harmony” intelligence database, as of 2006, less than 15 percent of them had even been fully translated.<sup>136</sup> The ill-advised effort by the director of National Intelligence in 2006 to upload untranslated captured records onto the Internet arose, in part, because the “sheer volume of documents” had “overwhelmed the intelligence community.”<sup>137</sup> Likewise, DOD’s Minerva Research Initiative, which included the “Iraqi Perspectives Project,” gave preference to “studies that exploit materials that have not been previously translated.”<sup>138</sup> Although Saad Eskander validly complained about the United States making Iraqi records available to selected university researchers, while denying access to Iraqis, to whom those records are most important, such efforts by the DOD may also be viewed as a cry for help in processing the documents.<sup>139</sup> Recently, the new Conflict Records Research Center at the National Defense University began making a small but growing number of captured records from both Iraq and Afghanistan available to researchers, regardless of citizenship, subject to certain restrictions designed to protect personal information contained in some of the records. The center cites as its “genesis” a speech by Defense Secretary Robert Gates who compared the collection to the Smolensk archives and states, “We cannot realize the full value of these resources unless we find some way of making them widely available.”<sup>140</sup>

The practical reality remains that, just as in the processing of German records in the 1950s, the records will not be “widely available,” and the originals will not be returned absent the U.S. government sufficiently examining their content to protect national interests. Whether the archival, historical, or human rights communities could form a partnership to accelerate that goal for international purposes is uncertain. A defense analyst’s description of visiting a military facility in Qatar where the original Iraqi records at the center of the controversy are housed may provide a final motivation to consider all possibilities: “Upon entering the main warehouse,” he describes,

<sup>135</sup> Goldbeck, “The German Military Documents Section and the Captured Records Section,” 55.

<sup>136</sup> Institute for Defense Analysis, *Iraq Perspectives Project: Saddam and Terrorism: Emerging Insights from Captured Iraqi Documents* (Alexandria, Va.: Institute for Defense Analyses 2007), v.

<sup>137</sup> Broad, “U.S. Web Archive Is Said to Reveal Nuclear Primer,” A1.

<sup>138</sup> Department of Defense, U.S. Army Research Office, “Broad Agency Announcement No. W911NF-08-R-0007,” 19, <http://www.arl.army.mil/www/pages/362/08-R-0007.pdf>, accessed 30 June 2011.

<sup>139</sup> Saad Eskander, “Minerva Research Initiative, Searching for the Truth or Denying the Iraqis the Rights to Know the Truth?,” The Social Science Research Council, “The Minerva Controversy,” <http://essays.src.org/minerva/2008/10/29/eskander/>, accessed 30 June 2011.

<sup>140</sup> Conflict Records Research Center, “Frequently Asked Questions,” Institute for National Strategic Studies at the National Defense University, <http://www.ndu.edu/inss/index.cfm?secID=143&pageID=4&type=section>, accessed 1 June 2011.

the team confronted a scene reminiscent of the end of the Steven Spielberg movie *Indiana Jones and the Raiders of the Lost Ark*. After recovering the lost Ark of the Covenant from the Nazis, the audience watches archivists box it up and slowly wheel it into an anonymous U.S. Government warehouse already filled with similar boxes, presumably only to be lost again.<sup>141</sup>

## Conclusion

Controversies over the fate of archives in war, as both current and past examples abundantly illustrate, can quickly become heated with accusations of malicious intentions and illegality. The passions inspired reflect the importance of the issues, but they do not necessarily advance the cause. The particularly fierce rhetoric in the still-ongoing debate over the Iraqi records—which includes the SAA/ACA's suggestion of “pillage” in relation to the Iraqi records now at the Hoover Institution—has done little to bring a solution and has unnecessarily turned archivists against each other.

As this article attempts to illustrate, archivists in war occupy an unenviable position at the crux of the conflict between national and international interests in archives. They must walk the razor's edge between neutral protectors of cultural property and combatants conscripted by the nature of the records in their care. They face sometimes impossible choices and are forced to take actions that could be alternatively characterized as heroic or treasonous.

The complex issues of archives and archivists in war need a renewed debate within the archival community, one that questions old assumptions and considers new strategies. That debate, however, should be as respectful as it is vigorous and should take the high road the occasion requires.

<sup>141</sup> Kevin M. Woods, et al., *Iraqi Perspectives Project: A View of Operation Iraqi Freedom from Saddam's Senior Leadership*, 184, <http://merln.ndu.edu/archive/DigitalCollections/IraqiPerspectivesProject.pdf>, accessed 1 June 2011.