

“Thank You Very Much, Now Give Them Back”: Cultural Property and the Fight over the Iraqi Baath Party Records

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Abstract

This paper explores the political, legal, and ethical issues at stake in the debate over the custody of the Iraqi Baath Party records. The dispute over the records' past and discussion about their future reveals a larger political struggle over the custody of records seized during wartime. Prevailing international law deems these records cultural property and provides legal guidelines for their treatment and return. Ethical arguments in favor of the seizure highlight the protection of the records as well as their accessibility to international researchers and human rights lawyers, while arguments against the seizure stress the importance of the records to the formation of national identity and nation-building in Iraq. Underlying the political, legal, and ethical arguments surrounding these records are two contrasting views of cultural property: on the one hand, cultural property is seen as an expression of national rights to which members of a nation are entitled, and, on the other hand, access to cultural property is seen as a universal human right to which all people, regardless of national affiliation, are entitled. This paper concludes by suggesting a third, postcolonial approach to cultural property.

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Introduction

In the wake of the 2003 U.S. invasion of Iraq, libraries, archives, museums, and other cultural heritage sites were targets for violence and looting. The Iraqi National Library and Archives was set on fire, the Iraq National Museum was ransacked, and countless collections of cultural property were burned or stolen. In the midst of this widespread destruction, a trove of records from Saddam Hussein's Baath Party wound up in the hands of Kanan Makiya, an Iraqi American exile and the founder of the U.S.-based Iraq Memory Foundation (IMF). The records, an estimated seven million pages in total, included Baath Party membership lists, files from Hussein's secret police, and court-martial documents.¹ Makiya, who had political ties to the Bush administration, temporarily stored the records in his parents' home in Baghdad's Green Zone, and soon shipped them to the United States with the help of the U.S. Army which scanned the records for military purposes and transferred custody back to Makiya. Without facilities to properly preserve and provide access to the records, in 2008 Makiya entered into a deposit agreement with the Hoover Institution (HI) at Stanford University. While the terms of this agreement have not been made public, by most estimates, it outlines a five-year period during which HI will preserve, describe, and provide access to the records, after which, the ultimate fate of the records will be determined by IMF.²

However, not everyone is happy with this agreement. The director of the Iraq National Library and Archives (INLA), Saad Bashir Eskander,³ has called for the immediate repatriation of these records back to Iraq, claiming they are the property of the Iraqi people and an essential building block of the collective memory of the nation, without which Iraqis will not be able to confront their sordid past and face a democratic future. Both the Society of American Archivists (SAA) and the Association of Canadian Archivists (ACA) issued a joint statement echoing Eskander's demands for repatriation, accusing the IMF of possibly pillaging the records from Iraq and citing international legal protocols regarding the treatment of records and other cultural property during wartime.

¹ Estimates of the size of the collection vary; Stanford's publications refer to "7 million documents." See Adam Gorlick, "Saddam Hussein's Papers, Along with Controversy, Find a Temporary Home with the Hoover Institution," *Stanford Report*, 18 June 2008, <http://news.stanford.edu/news/2008/june18/iraq-061808.html>, accessed 21 August 2010.

² Stanford's publications refer to a five-year agreement. See Gorlick, "Saddam Hussein's Papers, Along with Controversy, Find a Temporary Home with the Hoover Institution" and "Grim Treasure: Revealing Iraqi Documents Are Being Stored by the Hoover Institution," *Stanford Magazine*, November/December 2008, <http://www.stanfordalumni.org/news/magazine/2008/novdec/farm/news/hoover.html>, accessed 11 January 2011. Additionally, Bruce Montgomery refers to a five-year agreement, after which "the possibility of returning the documents to Iraq would be explored if conditions permitted," in "Returning Evidence to the Scene of the Crime: Why the Anfal Files Should Be Repatriated to Iraqi Kurdistan," *Archivaria* 69 (Spring 2010).

³ Eskander's first name is spelled three ways in my sources: Saad, Asad, Assaad. I suspect this is a transliteration issue. I use whichever form is used in the particular reference, hence the inconsistencies.

This joint statement sparked an ongoing debate between SAA, ACA, Eskander, IMF, HI, and the Iraqi government.⁴

Against this controversial backdrop, this paper explores the political, legal, and ethical issues that have arisen in the debate over the custody of the Baath Party records, using as its primary source records from the archives of SAA. First, this paper provides a detailed historical account tracing the records' chain of custody from Iraq to HI and recounting the politics of the ensuing controversy. Next, it defines the records as cultural property, outlines the international laws that provide commonly accepted standards for the treatment of records seized during wartime, and discusses the limitations of such laws in this situation. The paper then addresses the ethical issues of the case, including arguments for and against the seizure, essentially pitting the protection of the records in a stable environment against the right of the Iraqi people to own and have access to the records of their own history. Throughout the political, legal, and ethical debates runs the competing rhetoric of cultural property as an expression of either national or universal rights. This paper demonstrates how this dichotomy between national and universal models for ownership of cultural property oversimplifies key issues and concludes by suggesting a third, postcolonial approach to cultural property that has immediate implications for the future of the Baath Party records.

Politics in the Archives

The controversy surrounding the provenance and chain of custody of this particular cache of Baath Party records illustrates how politics can reside at the very core of the archives. First, Makiya's political ties to the Bush administration enabled access to and eventual custody over the records. Likewise, HI's conservative connections made it an obvious choice as a potential repository for the records. Next, SAA and ACA became involved in international politics by issuing a joint statement calling for the repatriation of the records. Underlying all these issues is the politics of memory in Iraq, whereby Makiya and Eskander are pitted against each other in the very political task of determining the future of history in the country.

Politics are central to how Makiya, an Iraqi American professor of Middle Eastern studies at Brandeis University, came to hold the records. In 1989, writing under a pen name, Makiya published *Republic of Fear*, a bestselling account of the brutality of the Hussein regime. The book quickly established Makiya as an expert on Iraqi politics and an advocate for the United States' toppling of the regime. In 1992, Makiya founded the Iraq Memory Foundation, a private

⁴ For a differing view of this controversy, see Montgomery, "Returning Evidence to the Scene of the Crime."

organization, as an extension of the Iraq Research and Documentation Project at the Center of Middle East Studies at Harvard University.⁵ In the years that followed, Makiya forged close ties to the Bush administration, serving as an oft-quoted voice in favor of the U.S. invasion of Iraq based on humanitarian grounds. The *Chronicle of Higher Education* called Makiya both “instrumental in portraying the 2003 invasion as an act of rescue,” and “the war’s democratic visionary.”⁶ Makiya advised President George W. Bush that U.S. troops would be warmly welcomed in Iraq and watched the April 2003 fall of Baghdad on television with President Bush from the Oval Office.⁷

In the summer of 2003, Makiya was in Iraq conducting undisclosed business (he was an official advisor to the Iraq Interim Governing Council) when the Baath Party records first came to his attention. While the *New York Times* said that Makiya “stumbled” upon the records,⁸ *Stanford Magazine* published a more detailed account of Makiya’s story:

Makiya says he was directed to the Baathist records in the summer of 2003 by a U.S. lieutenant at what had been the regional party headquarters in Baghdad. When Makiya arrived there for another reason, he says that officer asked him if a large quantity of documents strewn about a basement had any importance. Makiya says he received permission from U.S. authorities to remove and preserve material—a flashpoint with critics who say it was never a decision anyone from the United States was entitled to make.⁹

Using his political connections, Makiya was able to obtain permission to remove the records,¹⁰ which he took to his parents’ home. In 2005, under an agreement with the U.S. military, the records were shipped to the United States on a navy carrier, digitized by government contractors for American military purposes, and returned to Makiya.¹¹ Makiya, realizing that the preservation and description of the records were beyond the scope of the IMF, began looking for a repository that would take them. At first, Makiya entered into negotiations to deposit the documents at Harvard, but a deal fell through “because the issues

⁵ Iraq Memory Foundation, “History,” http://www.iraqmemory.org/EN/about_history.asp, accessed 21 August 2010.

⁶ John Gravois, “A Tug of War for Iraq’s Memory,” *Chronicle of Higher Education* 54, no. 22 (2008): A7–10.

⁷ Gravois, “A Tug of War for Iraq’s Memory.”

⁸ Hugh Eakin, “Iraqi Files in U.S.: Plunder or Rescue?,” *New York Times*, 1 July 2008, <http://www.nytimes.com/2008/07/01/books/01hoov.html>, accessed 21 August 2010.

⁹ Gorlick, “Grim Treasure.”

¹⁰ To clarify, these particular records in question represent just a small fraction of all Baath Party records that were found; as the *Chronicle of Higher Education* reports, “By all accounts, the largest collection of Baath-era documents resides not with Mr. Eskander or Mr. Makiya, but with the U.S. Department of Defense.” See John Gravois, “Disputed Iraqi Records Find a Home at the Hoover Institution,” *Chronicle of Higher Education* 54, no. 21 (2008): A1–9.

¹¹ Gravois, “Disputed Iraqi Records Find a Home at the Hoover Institution.”

surrounding the documents—their provenance, the sensitivity of their contents—were so complicated.”¹² HI was next on his list.

HI is, by all accounts, a “conservative think tank and library”¹³ housed within Stanford University. Founded in 1919 by Herbert Hoover, HI is based on “the principles of individual, economic, and political freedom; private enterprise; and representative government,” and, “by collecting knowledge, generating ideas, and disseminating both, the Institution seeks to secure and safeguard peace, improve the human condition, and limit government intrusion into the lives of individuals.”¹⁴ Hoover holds an extensive collection of documentary evidence from totalitarian regimes around the world; the Baath Party records clearly fit within the scope of its collection.

While IMF was busy working out an agreement with Hoover, the importance of the now-absent records was not lost on authorities in Iraq. Eskander became increasingly vocal in demanding the return of the records to Iraq, where they could be reunited with similar materials in INLA’s collection. In 2005, Eskander wrote to Jeff Spurr, an Islamic and Middle East specialist at Harvard University’s Fine Arts Library, revealing that his attempts to converse with IMF about the records were rebuffed and that he had requested (unsuccessfully) that the U.S. Embassy in Iraq intervene. Eskander states,

We must know all the details about the IMF collections. They must be classified and cataloged in order to prevent theft and misuse. These documents are highly sensitive from political and human rights perspective, as contain the names of tens of thousands of people [*sic*]. They should not be held by any private group, which can use it for its own interests. If you read Iraqi newspapers, then you will understand how the stolen documents are misused for political and personal reasons.¹⁵

Eskander also describes in this correspondence how the records had become pawns in an elaborate Iraqi political game, to the detriment of Iraqi society. He writes, “It reflects badly on the deplorable condition and fractured character of Iraqi politics and governmental administration at present if any current members of the Iraqi government did indeed personally sanction” the removal of the records.¹⁶ Indeed, Eskander, an Iraqi Kurd and an outspoken advocate for a democratic, secular Iraq, is no stranger to political conflict. After taking the helm of INLA following the invasion, Eskander became a symbol of

¹² Gravois, “A Tug of War for Iraq’s Memory.”

¹³ Gravois, “Disputed Iraqi Records Find a Home at the Hoover Institution.”

¹⁴ Hoover Institution, “Mission Statement,” <http://www.hoover.org/about/mission-statement>, accessed 21 August 2010.

¹⁵ Saad Eskander, email to Jeff Spurr, as recounted in an email from Jeff Spurr to Mark Greene, 27 April 2008.

¹⁶ Eskander to Spurr to Greene, 27 April 2008.

government transparency and, as such, he and his staff have been the targets of countless threats. In the face of such chaos, Eskander expanded the staff of INLA to 425, secured funding from the Iraqi legislature for a new INLA building, and garnered the support and admiration of archivists and scholars across the globe.¹⁷ In November 2007, Eskander undertook a North American speaking tour that raised support for and awareness of INLA's request for the repatriation of the Baath records. By February 2008, several high-profile stories in the *Chronicle of Higher Education* secured Eskander's position as an international spokesman for the repatriation of the records.

In this milieu, SAA and ACA took a political stand by issuing a joint statement on 22 April 2008 calling for the immediate repatriation of five collections of Iraqi records, including the Baath Party records at HI.¹⁸ The discussion surrounding the decision to issue the statement began in a 23 January 2008 email from an SAA Council member to the SAA Council that included the article about the Baath records from the *Chronicle of Higher Education* with the subject line, "I think we have to weigh in here. These should not be going to Hoover."¹⁹ Mark Greene, then president of SAA and director of the American Heritage Center, responded with an email questioning exactly what SAA should do and suggesting that SAA issue a statement referring to international law.²⁰ On 8 February, Greene received an email from Scott Goodine, then president of ACA, revealing ACA's intentions to issue a "subdued" advocacy letter calling for "consensus on the future custody of the records."²¹ On 22 February 2008, Goodine wrote to Greene suggesting a joint statement be issued taking "a position on the broader issue rather than focusing on Hoover," and he stated that "a partnership would convey to the appropriate stakeholders that this is an issue beyond national borders."²² Greene responded favorably to Goodine's suggestion, began work on a draft statement with Goodine, and sent a draft of the joint statement to the SAA Executive Committee on 18 March 2008. The Executive Committee soon approved the letter, as did the full SAA Council, and the final draft was approved on 18 April 2008.²³ The statement read, in part:

¹⁷ As John Gravois details in "A Tug of War for Iraq's Memory," Eskander was named Archivist of the Year by the Scone Foundation and was given an academic freedom award by the Middle East Studies Association.

¹⁸ Society of American Archivists, "SAA/ACA Joint Statement on Iraqi Records," <http://www.archivists.org/statements/IraqiRecords.asp>, accessed 21 August 2010.

¹⁹ As described in an email from Mark Greene to the author, 23 March 2010.

²⁰ Greene to author, 23 March 2010.

²¹ Scott Goodine, email to Mark Greene, 8 February 2008.

²² Scott Goodine, email to Mark Greene, 22 February 2008.

²³ Greene to author, 23 March 2010.

Records obtained by the Iraq Memory Foundation. The Iraq Memory Foundation, a U.S.-based non-governmental organization (NGO), went to Baghdad shortly after the invasion and began gathering as many documents as it could find. Under the laws of war, such actions may be considered an act of pillage, which is specifically forbidden by the 1907 Hague Convention. The Foundation’s website says its main holdings are “a collection of 2.4 million pages of official Iraqi documents captured by Iraqi Kurdish groups during the 1991 uprising;...a collection of 750,000 pages of Iraqi documents captured in Kuwait after its liberation...in 1991;...approximately 3.0 million pages gathered from Baath Party Regional Command Headquarters in Baghdad following the fall of Saddam in 2003.” This is the body of materials that in January 2008 the Hoover Institution at Stanford University agreed to store. *The records of the government bodies and the Baath Party should be returned to the government of Iraq to be maintained as part of the official records in the National Library and Archives.* [emphasis in original]²⁴

The statement also included strong words for the Bush administration, which it urged “to take steps with all deliberate speed to bring the treatment and custody of records seized from Iraq into conformance with laws, customs, and U.S. precedents” and posited, “This is required by a just regard for the government and people of Iraq as well as by the best interests of the U.S. in its role as an ally to the new Iraqi regime.”²⁵ Thus SAA and ACA asserted that, not only was repatriation of the records good for the Iraqi people, it would be good for international politics as well. It would be in the best political interests of the United States to return the records. Furthermore, SAA Council knew its statement might have political consequences both globally and locally; as Greene wrote in a 28 April 2008 email to Spurr, “I’m just glad that the boards of the two organizations had the gumption to approve such a statement despite its political and professional...implications.”²⁶

By issuing the joint statement, SAA and ACA also inserted themselves into an Iraqi political debate. On 28 April 2008, the IMF responded to the SAA/ACA joint statement by saying that the IMF “strongly objects to the erroneous characterization of its positions and activities” and that, “contrary to the claim of the [SAA/ACA press] release, the Iraq Memory Foundation has never claimed the ownership of any record.”²⁷ Instead, the IMF stated that its “position has consistently been that we hold the documents in our custody on a trust basis, and that we derive our mandate for custodianship from the elected government of Iraq,” a mandate that the IMF stated was derived from permission to remove

²⁴ Society of American Archivists, “SAA/ACA Joint Statement on Iraqi Records.”

²⁵ Society of American Archivists, “SAA/ACA Joint Statement on Iraqi Records.”

²⁶ Mark Greene, email to Jeff Spurr, 28 April 2008.

²⁷ Hassan Mneimneh, email to Bryan Corbett, 28 April 2008.

the documents granted by the Interim Government of Iraq in 2004.²⁸ Furthermore, the response questioned the capability of INLA to adequately steward the documents, raising “issues of [its] capacity, priority and mandate.”²⁹ The response also stated that the joint statement was “defamatory,” defended the IMF’s efforts to “safeguard” the records which, it “rescued.”³⁰ For his part, Eskander responded to the SAA/ACA statement the following day, thanking SAA and ACA on behalf of INLA for the joint release and writing, “We highly appreciate the support of the solidarity of our American and Canadian colleagues” and that “the Release has positive impact inside Iraq.”³¹

As Greene and Goodine formulated a response to the IMF, a second message dated 30 April 2008 appeared from the IMF. Enclosed was a letter from Jaber al-Jaberi, senior deputy of the Ministry of Culture, Republic of Iraq, which stated unequivocally, “The Iraqi government has approved the interim deposit agreement signed by the Iraq Memory Foundation and the Hoover Institution.”³² Furthermore, the letter asserted, “the National Library and Archives, over which this Ministry has authority, has not been deemed to be the final repository of the said documents upon their repatriation.”³³ Instead, according to the letter, the Iraqi parliament passed a law whereby a new facility will be created to house the documents, the specifics of which “remain to be determined.”³⁴ At this point, SAA and ACA leaders found themselves engaged in a discussion over the structure of authority in the Iraqi government and firmly embroiled, in the words of Greene, in the “politics about who gets to control what documents.”³⁵

While SAA and ACA leaders regrouped to formulate a response, a letter arrived from Richard Sousa of HI.³⁶ Sousa’s letter asserted that the SAA/ACA statement “was made without complete information on the nature of the deposit and without knowledge of the participation and support the Iraqi government has given the Hoover Institution, Stanford University, and the Iraq Memory Foundation throughout this project.”³⁷ This support, stated Sousa, is well documented in an August 2004 letter from the Iraqi Ministry of Culture.

²⁸ Mneimneh to Corbett, 28 April 2008.

²⁹ Mneimneh to Corbett, 28 April 2008.

³⁰ Mneimneh to Corbett, 28 April 2008.

³¹ Assaad Eskander, email to Mark Greene, 29 April 2008.

³² Jaber al-Jaberi, letter to Mark Greene, 27 April 2008, available at www.archivists.org/IraqiRecords_HooverLetter.pdf, accessed 8 May 2011.

³³ al-Jaberi to Greene, 27 April 2008.

³⁴ al-Jaberi to Greene, 27 April 2008.

³⁵ Mark Greene, email to Scott Goodine, 30 April 2008.

³⁶ Richard Sousa, letter to Mark Greene, 6 June 2008, available at www.archivists.org/IraqiRecords_HooverLetter.pdf, accessed 8 May 2011.

³⁷ Sousa to Greene, 6 June 2008.

Furthermore, Sousa defended the Hoover Institution’s goal “to preserve *and protect*” (emphasis in original) the records and to “serve them to researchers at the Hoover Archives.”³⁸ “Moreover,” Sousa asserted, “this is a *deposit agreement* (emphasis in original), which stipulates that the documents will be returned to Iraq when a suitable archival depository there has been identified—one that provides safety for the documents and equal access to all.”³⁹ It seemed, at least temporarily, that the critics at SAA and ACA were silenced by these responses; after all, who were American and Canadian archivists to tell the Iraqi government where to deposit its own records?⁴⁰

But, by 20 June 2008, a new picture emerged. In a scathing two-page “Open Letter to the Director of the Hoover Institute,” Eskander asserted, “Mr. al-Jaberi does not represent the Ministry of Culture, let alone the current Iraqi government, insofar as the issue of the seized documents is concerned.”⁴¹ He continued, “The statement [al-Jaberi’s letter] is written by Mustafa al-Kadhemi, who is the director of IMF and Mr. Makkiya’s [sic] right-hand man. Al-Kadhemi exploited the good intention of al-Jaberi and persuaded him to sign a statement about a sensitive issue he knows literally nothing about and has no authority to talk about or to deal with.”⁴² Eskander asserted that, according to Iraqi law, the “IMF’s confiscation, purchases, scanning, declassification and publication of the Ba’ath documents are incontrovertibly illegal,” and that the IMF “violated the principle of the rule of law and the priority of state-based institutions.”⁴³ Furthermore, “Iraqis inside and outside the country” consider the IMF’s activities “to be morally wrong and manifest violations of Iraq’s sovereignty.”⁴⁴ Furthermore, Eskander accused the IMF of having purely political motivations, “I would also like to remind you that the IMF came into being within the framework of the American occupation of Iraq, and this was an integral part of a grand imperial vision for the New Iraq. This explains why IMF has not been accountable politically, administratively, legally, financially or morally to any Iraqi authority since its formation.”⁴⁵ The letter concludes with this articulation of the importance of the records to national reconciliation:

³⁸ Sousa to Greene, 6 June 2008.

³⁹ Sousa to Greene, 6 June 2008.

⁴⁰ Some might argue that the Baath Party records, as records of a political party, are not the records of the Iraqi government. However, I contend that, because Iraq under Hussein was a single-party state, the records of that party are indeed equivalent to government records, in the same way that the Nazi Party records are considered to be records of the German government.

⁴¹ Assaad Eskander, email to Mark Greene, 20 June 2008, available at <http://libraryjuicepress.com/blog/?p=439>, accessed 8 May 2011.

⁴² Eskander to Greene, 20 June 2008.

⁴³ Eskander to Greene, 20 June 2008.

⁴⁴ Eskander to Greene, 20 June 2008.

⁴⁵ Eskander to Greene, 20 June 2008.

The Ba'ath documents are the property of the Iraqis and the institutions that represent them, and so it is arrogant and unethical for one person (an *émigré*) to decide the destiny of millions of sensitive official documents that have had and will continue to have considerable impact on the private lives of millions of Iraqi citizens.... The Iraqis desperately want to know and confront the realities of their recent past. They need to recognize the suffering of the victims and to identify those who committed crimes, before bringing them to justice. The Iraqis are well aware that any national reconciliation project cannot be successfully implemented without making the seized documents available for both scholars and the public mediated by a responsible agency representative of them.⁴⁶

Thus, an internal dispute between Makiya and Eskander became a major political issue of potentially grave national and international consequences.

Greene then received a second letter from the Republic of Iraq, Ministry of Culture. Dated 23 June 2008, this letter was signed by Akram M. Hadi, acting minister of culture, and began by thanking Greene for his "role in supporting our efforts to regain the Iraqi records."⁴⁷ The letter continued,

We would like to affirm that the letter written by the senior deputy of the ministry of culture Mr. Jabber Al-Jabiry [*sic*] neither reflect[s] the Iraqi government policies nor express[es] opinions of our ministry, and it reflects his personal views only. Our policy remain [*sic*]... to work on regaining those records as they are part of national heritage of Iraq.... We also express our absolute rejection of MF-Hoover deal..., but the truth remains that those two organizations just has violated Iraqi legislations and world against the Iraqi people interests [*sic*].⁴⁸

Herein, presumably, was the authorized stand of at least one office of the Iraqi government: according to the acting minister of culture, the Iraqi Ministry of Culture did not approve the agreement with the Hoover Institution; and INLA, under the jurisdiction of the Iraqi Ministry of Culture, is the appointed home for these records. At this, SAA and ACA leadership felt vindicated in their joint statement. SAA issued a response to Sousa on 3 July 2008 positing that "we not only stand by our original joint statement, developments since then have heightened our concern" and that, while the situation in Iraq is less stable than that in the United States, "it is not for any non-Iraqi governmental organization (either the Iraqi Memory Foundation or the Hoover Institution) to determine whether the records in question were in danger."⁴⁹ As a result of this letter, representatives of the IMF and HI requested a meeting with SAA leaders at the organization's annual meeting in August 2008 in San Francisco. No further

⁴⁶ Eskander to Greene, 20 June 2008.

⁴⁷ Akram M. Hadi, letter to Mark Greene, 23 June 2008.

⁴⁸ Hadi to Greene, 23 June 2008.

⁴⁹ Mark Greene, letter to Richard Sousa, 3 July 2008.

public statements were made on this topic by SAA, IMF, or HI. The records remain at HI, where they presumably are being described and preserved until the IMF-Hoover Institution agreement is set to expire in 2013.

Clearly, politics, both domestic and international, played a major role in the dispute over these records, and, while such a conclusion is no longer revelatory in our postmodern world, the role of the political does deserve some further attention. Verne Harris's claim that the archive is politics must be taken seriously. He writes, "If power is exercised through the construction of archive, then the locus of participation in the exercise of power is precisely the processes of the archive's construction. And that implies contestation, for society is always an assemblage of competing interests and perspectives."⁵⁰ In the case of the Baath Party records, the fight is not just about the physical custody of the records (as important as that is), but rather, who gets the power to determine what will constitute the national archive of Iraq. It is an exercise of power for IMF to collect the records, an exercise of power (or lack thereof) for INLA to demand their repatriation, an exercise of power for HI to maintain custody of them, and an exercise of power for SAA and ACA to take a stand on the issue. The power at stake here is one of competing authorities. Does IMF get the records by exhibiting allegiance to the military power of the invading U.S. Army? Does INLA get to exert nationalist power by claiming its competency to house the records? Does SAA get to exercise its professional power by publicly chastising HI, a member institution? And does HI have the authority to preserve the documents by virtue of its financial and political power? Behind each of these questions resides competing claims of authority. And underlying them all is Jacques Derrida's assertion (in a famous footnote that launched a subfield), "There is no political power without control of the archive, if not of memory."⁵¹ In other words, no dispute is ever just confined to the archive. He who gets custody of the archive, has the power; the stakes are not just the fate of the Baath Party records, but the future of Iraq.

Legal Issues

Building on this discussion of political issues, this paper now addresses the legal issues at stake. First, this section examines how international law defines cultural property and how archives in general and the Baath Party records specifically are included in this definition. Next, this section examines the proper treatment of records seized during wartime dictated by the 1954 Hague Convention, the 1970 UNESCO Convention, and other international laws, with

⁵⁰ Verne Harris, *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007), 247.

⁵¹ Jacques Derrida, *Archive Fever: A Freudian Impression* (Chicago: University of Chicago Press, 1996), 4.

a particular emphasis on how these laws apply to the Baath Party records. This discussion is complicated by special considerations given to records documenting human rights violations that have the potential to be used in an international criminal court. Given the available information, the Baath Party records might have been collected using means outside those recommended by international law. This paper concludes with a discussion of how international law fails in this particular case.

In an essay entitled, "From Solferino to Sarajevo: Armed Conflict, International Law, and Archives," George Mackenzie traces the history of the definition of cultural property from ancient Greek times to the present.⁵² Although the prevailing custom among the ancients was that when an army sacked a city, the people of the city and their property belonged to the victors, this definition of cultural property (and the laws governing it) changed drastically over time.⁵³ Today, our modern concept of cultural property stems primarily from the Hague Convention of 1954. While archives may contain records of personal, political, financial, or artistic significance, all archives are defined as cultural property according to international law.⁵⁴ The Hague Convention presents a broad, universal notion of cultural property that clearly includes archives:

For the purposes of the present Convention, the term "cultural property" shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;⁵⁵

⁵² George Mackenzie, "From Solferino to Sarajevo: Armed Conflict, International Law, and Archives," in *Political Pressure and the Archival Record*, ed. Margaret Proctor, Michael Cook, and Caroline Williams (Chicago: Society of American Archivists, 2005), 242.

⁵³ Mackenzie, "From Solferino to Sarajevo," 253.

⁵⁴ Bruce P. Montgomery distinguishes between current public records and historical archives and argues that international law treats the seizure of these types of records differently. However, neither the Hague Convention of 1954 nor the UNESCO Convention of 1970 reflects this difference. Furthermore, the word *archives* refers to both current and noncurrent records in many countries. Additionally, the records in question could no longer be described as "current records of the state" (as opposed to archives), as Saddam Hussein was no longer in power at the time of their seizure. For Montgomery's take on this issue, see Montgomery, "Returning Evidence to the Scene of the Crime." Douglas Cox convincingly argues that the Baath Party records are both archives and records of ongoing significant military and political value. See Douglas Cox, "Archives and Records in Armed Conflict: International Law and the Current Debate Over Iraqi Records and Archives," *Catholic University Law Review* 59, no. 4 (2010), 1001–56.

⁵⁵ International Council on Monuments and Sites, "Convention for the Protection of Cultural Property in the Event of Armed Conflict," <http://www.icomos.org/hague/>, accessed 21 August 2010.

While the 1970 UNESCO Convention provides a more nationalist than universal conception of cultural property (as will be more fully examined later), its definition of cultural property also explicitly includes archives. It states:

For the purposes of this Convention, the term “cultural property” means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

... (j) archives, including sound, photographic and cinematographic archives;⁵⁶

By both of these definitions, the Baath Party records are cultural property.

These prevailing legal definitions of cultural property are not without their critics. As Jeanette Greenfield writes, “The term ‘cultural property’ has come to mean all things to all people.”⁵⁷ Many scholars point out that, since the definition of cultural property has shifted dramatically over time, it is not a reliable or objective measure on which to base international law. For example, legal expert John Merryman posits that virtually anything can be deemed cultural property.⁵⁸ Similarly, James Cuno, director of the Art Institute of Chicago, criticizes the very notion of cultural property and its underlying nationalist assumptions, writing, “Cultural property is a political construct.”⁵⁹ Yet while many scholars criticize the idea of cultural property, it is undeniably the prevailing legal framework that governs international codes for the wartime seizure of records.

How do the 1954 Hague Convention and the 1970 UNESCO Convention outline international law for the treatment of cultural property seized during wartime? The Hague Convention begins with a broad statement of the universal importance of cultural property, affirming both that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world” and that “it is important that this heritage should receive international protection.”⁶⁰ Of particular interest to the case of the Baath Party records, the convention provides explicit guidelines for the protection of cultural property in occupied countries:

⁵⁶ UNESCO, “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970,” http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 21 August 2010.

⁵⁷ Jeanette Greenfield, *The Return of Cultural Treasures* (New York: Cambridge University Press, 1995), 255.

⁵⁸ John Henry Merryman, “What Is Cultural Property? An Overview,” in *Who Owns Culture?: Cultural Property and Patrimony Disputes in an Age without Borders* ed. Richard Brilliant, Michael Janeway, and Andras Szanto (New York: National Arts Journalism Program, Columbia University, 2001), 19.

⁵⁹ James Cuno, *Who Owns Antiquity?* (Princeton: Princeton University Press, 2008), 9.

⁶⁰ International Council on Monuments and Sites, “Convention for the Protection of Cultural Property in the Event of Armed Conflict.”

Article 5. Occupation

1. Any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property.

2. Should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.⁶¹

Furthermore, the convention states that cultural property should enjoy “immunity from seizure, placing in prize, or capture.”⁶²

While the Hague Convention focuses on the safeguarding of cultural property during wartime, the 1970 UNESCO Convention is generally geared toward prohibiting the illegal trafficking of cultural property in times of peace. It employs a nationalist (as opposed to a universalist) framework:

Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting,...

Considering that the illicit import, export and transfer of ownership of cultural property is an obstacle to that understanding between nations which it is part of UNESCO's mission to promote by recommending to interested States, international conventions to this end,

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.⁶³

⁶¹ International Council on Monuments and Sites, “Convention for the Protection of Cultural Property in the Event of Armed Conflict.”

⁶² International Council on Monuments and Sites, “Convention for the Protection of Cultural Property in the Event of Armed Conflict.”

⁶³ UNESCO, “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.”

Additionally, the convention states, “The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit.” While the UNESCO Convention governs states during times of peace, it also directly addresses rules for the wartime seizure of cultural property. Article 11 states, “The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”⁶⁴ Thus, given that the Baath Party records are considered archives and therefore cultural property, it might be logical to conclude that the UNESCO Convention would regard the export of the Baath Party records as “illicit,” since it arose under the U.S. occupation of Iraq.⁶⁵

The UNESCO Convention also provides guidelines for the repatriation of illicitly exported cultural property. The states signing on to the Convention agree:

To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned....

[and] at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned....⁶⁶

Central to this notion of the recovery of cultural property is the legal concept of *replevin*, or “how to return or regain (or both) the records armies have seized.”⁶⁷ In an engaging essay on the fate of Iraqi records published in 2005, Trudy Huskamp Peterson notes two dominant and contradictory conceptions of *replevin*, which she attributes to a “conflict between the international law as stated in the Conventions and the law derived from custom.”⁶⁸ While the Conventions clearly prohibit the export of archives during war and outline guidelines for *replevin*, in reality, occupying forces customarily seize and keep

⁶⁴ UNESCO, “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.”

⁶⁵ As Douglas Cox writes, “Missing and contradictory information and the ongoing factual disputes over authority complicate any attempt to determine the precise legal status of the Ba’ath party records at the Hoover Institution under international law.” See Douglas Cox, “Archives and Records in Armed Conflict: International Law and the Current Debate Over Iraqi Records and Archives,” 1046.

⁶⁶ UNESCO, “Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970.”

⁶⁷ Trudy Huskamp Peterson, “Archives in Service to the State,” in *Political Pressure and the Archival Record*, 259–76.

⁶⁸ Peterson, “Archives in Service to the State,” 272.

records for political and humanitarian reasons.⁶⁹ Other scholars have noted how, while legal guidelines for replevin are well established, in reality, these property rights, as applied to cultural property, are rarely enforced on an international level, as the ongoing controversy surrounding the Elgin Marbles attests. In other examples of replevin, such as the records seized from Nazis by Allied forces during World War II, the efforts at repatriation are ongoing, incomplete, and mired in politics.⁷⁰

On the one hand, it could be argued that the IMF took “the most necessary measures of preservation,” as recommended in the Hague Convention. On the other hand, it could be argued that the U.S. Army violated international law by failing to protect the records. Indeed, as some Iraq scholars have noted, the U.S. sent troops to guard the Ministry of Oil while leaving the Iraq National Museum and INLA unprotected from looters. As Nabil Al-Tikriti wrote from Iraq in 2003, “When U.S. soldiers were asked to protect the facilities in question [INLA and the National Museum], the invariable response was either that ‘we are soldiers not policemen,’ or that ‘our orders do not extend to protecting this facility.’”⁷¹ Furthermore, Al-Tikriti writes,

Considering that the U.S. Defense Department was publicly warned of the potential for looting of cultural treasures..., those in command of U.S. forces appear to have knowingly neglected their legal duty under the “international law of belligerent occupation” to “restore and maintain law and order.”... For that reason, a case can be made that the U.S. Government should be held legally responsible for the events described below, and should be obliged to compensate these facilities for their losses.⁷²

Indeed, the losses on the ground due to looting, theft, and violence were staggering, as Eskander voiced:

I truly hope that no country in the world experiences what we experienced following the fall of the dictator. I also hope I can give you an honest and frank explanation of what took place in Baghdad in mid-April 2003, when most cultural institutions were looted and burnt. It was a national disaster beyond imagination. Within the space of three days, Iraq National Library and Archive

⁶⁹ Peterson, “Archives in Service to the State,” 272.

⁷⁰ While a further exploration of the fate of seized records during World War II is beyond the scope of this paper, more information can be found in Astrid M. Eckert’s essay, “‘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*; the essays in *Returned from Russia: Nazi Archival Plunder in Western Europe and Recent Restitution Issues*, ed. Patricia Kennedy Grimstead, F. J. Hoogewoud, and Eric Ketelaar, (Builth Wells, U.K.: Institute of Art and Law, 2007); and Dan Diner and Goothart Wunberg, eds., *Restitution and Memory: Material Restoration in Europe* (New York: Berghahan Books, 2007).

⁷¹ Nabil Al-Tikriti, “Iraq Manuscript Collections, Archives, and Libraries: Situation Report,” Oriental Institute, University of Chicago, 8 June 2003, <http://oi.uchicago.edu/OI/IRAQ/docs/nat.html>, accessed 21 August 2010.

⁷² Al-Tikriti, “Iraq Manuscript Collections, Archives, and Libraries.”

lost a large portion of Iraq's historical memory. Hundreds of thousands of archival documents, historical records, and rare books were lost forever.... As a direct result of the two fires and lootings, the National Archive lost about 60 percent of its archival materials. In one word, it was a national disaster on a large scale. These losses cannot be compensated. They formed modern Iraq's historical memory.⁷³

Such widespread destruction could have easily been prevented had the U.S. Army heeded the Hague and UNESCO Conventions, as well as the advice of a UNESCO delegation and a UN resolution to deploy troops to safeguard cultural property. On 17 April 2003, a group of experts met at UNESCO and issued the following statement:

The meeting deplores and is deeply shocked by the extensive damage to, and looting of the cultural heritage of Iraq caused by the recent conflict. It calls on the coalition forces to observe the principles of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols.

The meeting agreed on the following recommendations to those responsible for civil order in Iraq:

1. That all museums, libraries, archives, monuments and sites in Iraq be guarded and secured immediately by the forces in place
2. That an immediate prohibition be placed on the export of all antiques, antiquities, works of art, books and archives from Iraq
3. That an immediate ban be placed on the international trade in objects of Iraqi cultural heritage
4. That a call be made for the voluntary and immediate return of cultural objects stolen or illicitly exported from Iraq
5. That there be an immediate fact-finding mission under UNESCO coordination to assess the extent of damage and loss to cultural property in Iraq
6. That there be the facilitation of international efforts in assisting cultural institutions in Iraq.⁷⁴

These recommendations were ignored by the United States. Subsequently, the UN Security Council adopted Resolution 1483 on 22 May 2003. Section 7 of the resolution states:

⁷³ Saad Eskander, "The Tale of Iraq's 'Cemetery of Books,'" *Information Today* 21 (December 2004), <http://www.infotoday.com/it/dec04/eskander.shtml>, accessed 21 August 2010.

⁷⁴ UNESCO, "Experts' Meeting at UNESCO Issues Recommendations to Safeguard Iraqi Cultural Heritage," 17 April 2003, http://portal.unesco.org/en/ev.php-URL_ID=11416&URL_DO=DO_TOPIC&URL_SECTION=201.html, accessed 21 August 2010.

...all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph.⁷⁵

Again, the United States ignored the resolution. Indeed, some have suggested that the United States' campaign of "shock and awe" sent a clear message that looting and destruction were sanctioned. Spurr writes, "The disregard inherent in those initial acts of aggression could provide a ready message to those paying attention: we do not respect the infrastructure of the regime, and so you may as well do the same, whatever the long-term consequences."⁷⁶

Although the Conventions deem illicit the seizure of records during war-time without regard to replevin, human rights considerations may complicate these seemingly clear-cut legal issues. In cases in which seized records reveal human rights violations and therefore could potentially be used in international criminal courts, the potential legal benefits of seizing the records may outweigh the initial violations of the Hague and UNESCO Conventions. For example, Bruce Montgomery describes how, in a 1991 revolt against Saddam Hussein, Iraqi Kurds seized troves of Iraqi Secret Police files that documented the planning and execution of the Anfal genocide.⁷⁷ The records were subsequently airlifted out of northern Iraq by the U.S. military, deposited at the U.S. National Archives, and transferred to the University of Colorado at Boulder's Human Rights Initiative, where they were prepared for potential use in an international criminal court. Montgomery argues that the records belong to the Kurds, rather than Iraqis in general, and posits, "The documents should therefore be seen not as stolen property, but as liberated documents by a people under attack by a rogue government bent on their annihilation."⁷⁸ In the case of the Anfal records, the potential legal benefits of the seizure arguably outweighed the costs. Similarly, Trudy Huskamp Peterson notes that Human Rights Watch sent letters

⁷⁵ UN Security Council Resolution 1483, adopted by the Security Council at its 4761st meeting, 22 May 2003, <http://www.globalsecurity.org/wmd/library/news/iraq/un/n0336853.pdf>, accessed 21 August 2010.

⁷⁶ Jeff Spurr, "Iraqi Libraries and Archives in Peril: Survival in a Time of Invasion, Chaos and Civil Conflict, A Report," Oriental Institute, University of Chicago, http://oi.uchicago.edu/OI/IRAQ/mela/update_2007.htm, accessed 21 August 2010, 8.

⁷⁷ Bruce P. Montgomery, "The Iraqi Secret Police Files: A Documentary Record of the Anfal Genocide," *Archivaria* 52 (2001): 69–99.

⁷⁸ Montgomery, "The Iraqi Secret Police Files," 81.

to Colin Powell and Donald Rumsfeld on 10 April 2003 asking them to prevent records from being ransacked so that they could be used in future war crimes trials.⁷⁹ While Saddam Hussein's execution put any hope of a trial in the International Criminal Court to rest, the Baath Party records, had they been seized and properly maintained by the U.S. Army, could have been used to try Hussein's allies. However, the controversy surrounding the IMF seizure of the records, their provenance, and the subsequent agreement with the Hoover Institution might call into question their admissibility as evidence in a human rights trial. Speaking on the “Returning Displaced Archives: Legal and Ethical Perspectives” panel at the 2008 SAA Annual Meeting, attorney Timothy H. Ingram said,

I do not question at all the motives of Stanford's Hoover Institution in acquiring the documents. I think that their motives were pure in terms of trying to save the documents, but the public relations handling has been atrocious. As a JAG officer, I would want to know even before I accepted them, whether or not both the prosecution and defense of the Saddam Hussein trial and those of Baath officials had access to the records. I would want to look at the chain of custody questions which are raised in any set of documents that might be used in either a war prosecution or a criminal prosecution. It's absolutely crucial before you even touch those documents that those issues are soundly reviewed.⁸⁰

Thus, in this case, while one could logically argue for the seizure of the Baath Party records due to their potential to be used as evidence, such arguments would be mitigated by the uncertain circumstances surrounding their seizure and subsequent chain of custody. And yet, even when a seizure based on human rights evidence can be justified, international law dictates that the records ultimately return to their country of origin. As Peterson writes, “In the end, the documents of a state are inalienable and remain subject to replevin without limitation.... And the more we understand about the conditions of seizure in the first place, the more responsible our temporary custody and eventual replevin will be.”⁸¹

While some interpretations of international law may deem that the seizure of the records was illicit and that the United States violated the established Conventions by failing to safeguard Iraqi cultural property, there have been no legal repercussions for the United States. International law has failed because the international community has no power to enforce it. The United States, while a signatory of the 1954 Hague Convention, did not ratify it until 2008,

⁷⁹ Peterson, “Archives in Service to the State,” 272.

⁸⁰ Timothy H. Ingram, “Returning Displaced Archives: Legal and Ethical Perspectives,” paper presented at the Society of American Archivists Annual Meeting, San Francisco, 29 August 2008.

⁸¹ Peterson, “Archives in Service to the State,” 276.

after the U.S. invasion of Iraq. Additionally, the United States withdrew from UNESCO in 1984 and rejoined in 2003. And yet, while the United States was not a signatory to the Hague Convention at the time of the seizure, Iraq was, and “the Convention applies to the territory (the ‘lex situs’ rule under both international and national law) and arguably therefore to everyone within the territory and all actions by them regardless of their nationality.”⁸² Yet, while the Conventions apply, the governing bodies will not contradict the positions of member states. Echoing these concerns, Jeanette Greenfield suggests that it is highly doubtful that cultural property disputes will ever make it to the International Court of Justice in The Hague.⁸³

Ethical Issues

Moving from legal to ethical issues, this section addresses the ethical implications of the seizure and deposit of the records, exploring the pros and cons. Here, this paper draws on the ethical framework presented by Karren J. Warren in which she provides arguments for and against claims for restitution of cultural property by countries of origin.⁸⁴ First, ethical arguments supporting the IMF’s and Hoover’s actions theorize that, without the seizure, the records would have been destroyed in the chaos of Baghdad, that IMF rescued the records from this fate, and that only in the United States would the resources and political will be available to properly preserve and provide access to them. Other arguments in favor of the IMF’s and HI’s actions center around the importance of the records being safely accessible to researchers in the United States, human rights lawyers, and the international community. Ethical arguments against the seizure of the records suggest that they belong to the Iraqi people, that Iraqis can’t access them in the United States, and that the records are essential to nation-building and the formation of collective memory in Iraq. Furthermore, the seizure of the records may be seen by some to constitute imperialist “plundering,” representing the broader one-way flow of cultural property from poor to rich nations. And, finally, providing access to digital copies of the records will not help Iraqis, many of whom don’t have access to the Internet, and it raises a host of privacy issues that the Iraqi people, not archivists at HI, should sort out.

Proponents of the seizure of the records argue that, had the records remained in Baghdad, they would have been destroyed. In this view, Makiya and

⁸² Patrick Boylan, as quoted in Spurr, “Iraqi Libraries and Archives in Peril.”

⁸³ Greenfield, *The Return of Cultural Treasures*, 259.

⁸⁴ Karren J. Warren, “A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues,” in *The Ethics of Collecting Cultural Property*, ed. Phyllis Mauch Messenger (Albuquerque: University of New Mexico Press, 1989), 1–26.

the IMF are rescuers, expending effort to save records that would have been destroyed for political reasons in the chaos that followed the fall of Baghdad. As Merryman notes about the Elgin Marbles, “One who, at great personal cost, is responsible for the preservation of a great cultural treasure has performed a great moral act.”⁸⁵ Likewise, ethicist Kirk Osborne Hanson argues that there is “a strong argument for the preservation and protection” of Iraqi records at HI and that “there are certainly contexts in which you step in and protect” cultural property in another country.⁸⁶ The IMF itself summarized this view succinctly in its 28 April 2008 response to the joint SAA/ACA statement:

At a time when documents were seized, traded, and destroyed by many parties, we endeavored to safeguard collections of documents from potential destruction and abuse in explicit coordination with the authorities and we literally rescued piles of documents from the heaps of garbage where they were discarded.... To equate our efforts with “pillaging” is reflective of a serious lack of comprehension of the situation in Iraq in the aftermath of the fall of the previous regime. It is also dismissive of the risks that our associates have faced in a daunting and sincere task of national significance.⁸⁷

Indeed, by Eskander’s own estimates, the widespread looting in Baghdad in April 2003 constituted “a national disaster beyond imagination” in which “hundreds of thousands of archival documents, historical records, and rare books were lost forever.”⁸⁸ Furthermore, Eskander also acknowledges that former Baath Party members were behind much of the destruction of archival documents. He counters conspiracy theorists who claim that U.S. troops were responsible for the looting, writing, “it was some Iraqis who carried out the destruction and the lootings of NLA and other institutions. Almost all of these saboteurs were loyal to Saddam Hussein.”⁸⁹ Eskander also admits that Hussein loyalists destroyed other Baath Party records. He writes,

some people loyal to the old regime set fire to the Republican Archive.... As a result, the contents of the Republican Archive were turned into ashes. The Republican Archive was of a great value politically as well as historically. Apart from covering the history of the Ba’ath Party since it seized power in 1963, this archive contained the transcripts of all court-martials set up by the Ba’ath regime for the trial of its opponents. I agree with the conclusion made by the

⁸⁵ John Henry Merryman, *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (Boston: Kluwer Law, 2000), 50.

⁸⁶ Kirk Osborne Hanson, “An Ethicist Looks at Archival Restitution,” paper presented at the session “Returning Displaced Archives: Legal and Ethical Perspectives,” Society of American Archivists Annual Meeting, San Francisco, 29 August 2008.

⁸⁷ Mneimneh to Corbett, 28 April 2008.

⁸⁸ Eskander, “The Tale of Iraq’s ‘Cemetery of Books.’”

⁸⁹ Eskander, “The Tale of Iraq’s ‘Cemetery of Books.’”

UNESCO and the Library of Congress teams that the burning of the Republican Archive was well-organized, as evidence of using incendiary materials in the fires was found.⁹⁰

By extension, it is easy to imagine that loyalists to Saddam Hussein could have looted these records so that no incriminating evidence would survive into the new political regime. Without the involvement of Makiya and the IMF, the records might have been lost forever.

Proponents of the seizure also argue that INLA does not have the appropriate resources to preserve the documents and cannot currently secure them from destruction given ongoing political instability and violence in Iraq. Sousa voiced this argument in HI's 6 June 2008 response to the SAA/ACA joint statement, stating that Hoover's goals "are to preserve *and protect* them from deterioration and loss [emphasis in original]" and that "given the current conditions in Iraq, one wonders if either of these goals of preservation or access could be accomplished in Iraq."⁹¹ This reflects a common argument in the ethical debate over cultural property, whereby Western cultural institutions state that countries of origin should not retain items of cultural property because they lack the resources to preserve them, effectively pitting retention against preservation.⁹² In Iraq, the situation is more dire than the possibility of the records slowly deteriorating from lack of preservation. Rather, security conditions are such that bombings still occur daily. Furthermore, corruption, political instability, and violence hamper the ability of even the most dedicated public servants to function. Writing in 2007, Spurr described the situation:

As if in league with this American failure, the various Iraqi governing entities have been mired in turf battles, corruption and ideological struggle. For every committed government functionary there appear[s] to have been many others willing to foil or diminish her efforts. The extreme state of insecurity, and the consequent haemorrhaging of educated and competent individuals out of the country bodes ill for the future of the institutions under discussion, and Iraq as a viable polity.⁹³

The protection group argues that in this unstable financial, political, and security climate, we are ethically obligated to (temporarily) store the records somewhere safe and sound.

Furthermore, as previously discussed, the records, now stored in a secure repository, can be transferred to an international criminal court, where they can be used as evidence in human rights cases. In light of this possibility, the

⁹⁰ Eskander, "The Tale of Iraq's 'Cemetery of Books.'"

⁹¹ Sousa to Greene, 6 June 2008.

⁹² Merryman, *Thinking about the Elgin Marbles*, 27–28.

⁹³ Spurr, "Iraqi Libraries and Archives in Peril," 2.

preservation of these records at the highest possible standard is ethically imperative to administer justice and prevent future abuses.

Additional arguments in favor of the IMF's and HI's actions hinge on the ability of researchers to access the documents in the United States. As Sousa writes, “Limited access to [these documents] would be a major impediment to a complete analysis of the events in the region. We feel that the aims of the society are well served by having these documents housed at Hoover.”⁹⁴ In other words, these documents must be accessible to researchers in the United States so that they may further understand one of the United States' staunch opponents. Additionally, many of the potential users of this collection are Hussein's former opponents, many of whom, like Makiya, are Iraqi dissidents living in the United States who can best access them at HI. Furthermore, given the ongoing instability in Iraq, many of Hussein's former political opponents wouldn't feel safe accessing them in Baghdad for recurring fear of political reprisal and violence. And, finally, HI has both the financial resources and institutional support to undertake the major task of providing access to digital copies of the records. The greater the access, the greater the common good, as the common utilitarian argument goes.

However, despite the merits of the arguments for protection and access, this paper argues that stronger ethical arguments can be made for the immediate return of the records to Iraq. They do, after all, belong to the Iraqi people. This assertion is based both on the concepts of nationalism (despite its many critics), inalienability, and provenance, whereby records rightfully belong within the context in which they were created. It reveals a strong link between cultural property and national identity. Barkan summarizes the nationalist cultural property stance:

The inalienability argument is that cultural patrimony belongs to the nation of origin by its nature, notwithstanding how the objects may have been transferred into alien hands. Since the objects belong to the community, whether they have been sold or given away, the transfer ought to be judged immoral and illegal. The rationale is that the objects embody the group identity, which belongs to future generations, and hence the ownership does not include the right of sale, which is alienation.⁹⁵ Crucial to the formation of a national identity is not just the existence of a national library or archive or the ownership of documents of national import, but access to these documents.⁹⁶

⁹⁴ Sousa to Greene, 6 June 2008.

⁹⁵ Elazar Barkan, “Amending Historical Injustices: The Restitution of Cultural Property—An Overview,” in *Claiming the Stones, Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity*, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002), 33.

⁹⁶ Saad Eskander, as quoted in Sudarsan Raghavan, “An Archive of Despair: Saad Eskander Works to Protect Iraq Library from Bombs and Mold,” *Washington Post*, 7 April 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040602196.html?referrer=emailarticle>, accessed 21 August 2010.

By extension, the ownership rights of the Iraqi people cannot be forfeited without serious ethical consequences, particularly when the cultural property in question consists of records documenting trauma in a post-traumatic society. In fact, archives can be a crucial component to the formation of a national identity in Iraq in the face of diverse sectarian religious, ethnic, and political groups that have historically been pitted against each other. As Eskander eloquently asserts, "What makes a Kurd or a Sunni or a Shia have something in common is a national library. It is where the national identity of a country begins."⁹⁷ Crucial to the formation of a national identity is not just the existence of a national library or archive or the ownership of documents of national import, but access to these documents. Given that the Baath Party records are now at HI, Iraqis cannot access them. Eskander, noting that the IMF has no access points in Iraq, summarizes: "The Iraqis, including the scholars and victims of the former regime, will be given no access to their own documents, while the Americans (the occupiers) will continue to enjoy such a privilege."⁹⁸

What are the consequences when such access is denied? Archivist Jeannette Bastian has most famously addressed this question as it relates to the archival concepts of provenance and access in the colonial Caribbean context. She writes,

...[D]ecisions of record ownership made without full consideration of the access needs of the creating body may pose burdensome and sometimes insurmountable obstacles for these entities as they endeavor to grapple with their past. The existence of these obstacles jeopardizes and calls into question the validity of the entire custodial role. Expanding conventional ideas of archival custody so that access (rather than physical control) plays a central role in fulfilling the custodial obligation would take these postcolonial dilemmas fully into account. It might also hold the colonizer accountable and liable for providing reasonable access. Because the construction of collective memory, and thereby collective identity, by nations, communities, or groups of people depends on their ability to confront and understand their history, access is integral to the custody of historical records.⁹⁹

In effect, without access to important historical documents, nations cannot develop an accurate collective memory, and, without this collective memory, they cannot function well in the present. Access to these records is particularly important in the Iraqi context, given that such disparate groups are, for the

⁹⁷ This paper does not posit that records of human rights abuses universally belong in the custody of national archives. Indeed, the political specifics of some cases may dictate that nongovernmental organizations are best equipped to preserve and provide access to such records.

⁹⁸ Assaad Eskander, An Open Letter to the Director of the Hoover Institute, 20 June 2008, <http://libraryjuicepress.com/blog/?p=439>, accessed 10 January 2011.

⁹⁹ Jeannette Bastian, *Owning Memory: How a Caribbean Community Lost Its Archives and Found Its History* (Westport, Conn.: Libraries Unlimited, 2003), 13–14.

first time, attempting to build a pluralist and democratic nation. Where once a totalitarian dictator held a nation together, a shared common history now must fill this role. And yet, as Bastian writes, “A community without its records is a community under siege, defending itself, its identity, and its version of history without a firm foundation on which to stand.”¹⁰⁰ Eskander himself applies Bastian’s logic to the Iraqi situation, linking control of the records to national reconciliation:

The Iraqis desperately want to know and confront the realities of their recent past. They need to recognize the suffering of the victims and to identify those who committed crimes, before bringing them to justice. The Iraqis are well aware that any national reconciliation project cannot be successfully implemented without making the seized documents available for both scholars and the public mediated by a responsible agency representative of them.¹⁰¹

By cutting the Iraqi people off from the sources of their own histories (albeit on a temporary basis), the current depository agreement between IMF and HI effectively prevents Iraqis from fully understanding, reconciling, and moving beyond their troubled past. While clearly the HI does not intend such dire consequences, some, such as Randall Jimerson, suggest that policies preventing Iraqi people from accessing their nation’s records might be deliberate attempts to deny their sovereignty.¹⁰² The effects of the destruction of or inability to access cultural property are the same, regardless of IMF’s or HI’s intentions.

Furthermore, what is one country’s protection is another country’s pillage. In other words, arguments in favor of the IMF and HI as protectors overlook unequal power distributions. This argument, in its general sense, is perhaps best summarized by the then-minister of culture for Greece, Melina Mercouri, regarding the Elgin Marbles: “The British say they have saved the Marbles. Well, thank you *very* much. Now give them back.”¹⁰³ Similarly, Elazar Barkan contends that “protection means control,” a control that calls into question the sovereignty of source nations.¹⁰⁴ This is not to say that the IMF did not initially protect the records from destruction, which it did, but rather, once the initial act of protection is complete, the records should be repatriated as soon as possible. Failure to do so is a failure to acknowledge the power inequalities inherent in their acquisition. Again, Barkan describes this link between preservation, power, and colonialism:

¹⁰⁰ Bastian, *Owning Memory*, 87.

¹⁰¹ Eskander, An Open Letter to the Director of the Hoover Institute.

¹⁰² Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Chicago: Society of American Archivists, 2009), 228.

¹⁰³ Melina Mercouri, as quoted in Merryman, *Thinking about the Elgin Marbles*, 51.

¹⁰⁴ Barkan, “Amending Historical Injustices,” 25.

The act of preservation was, at best, a by-product of imperialism. Successful conservation is the tip of an iceberg of a dismal record of appropriation and ruin in previously colonized countries. When the argument for preservation is measured against what colonialism destroyed, rather than what it preserved, a polarized picture emerges. Collecting is often the residue of devastation.¹⁰⁵

Several scholars at a 1999 Columbia University Conference entitled *Who Owns Culture?* presaged this argument. For example, John McCarter, then president and CEO of the Field Museum of Natural History in Chicago, described arguments in favor of the Western nations protecting the cultural property of other nations as “paternalistic,” reflecting the belief that “we take care of objects better than other people.”¹⁰⁶ Similarly, Jeanette Greenfield argues that failure to repatriate cultural property reflects a “neo-colonialist policy.”¹⁰⁷ Applying this argument to the Baath Party records, the IMF and HI not only deny Iraqis the right to reconcile and rebuild their nation post-trauma by refusing to repatriate the records immediately, but also literally deny their sovereignty.

The protection argument also fails once we consider that, if we always grant records to those who can protect them, cultural property will flow one-way from poor nations to rich ones. In a welcoming address to the *Who Owns Culture?* conference, Nobel Prize-winning author Derek Walcott stated, “[T]he whole concept of asking ‘Who owns culture?’ is immediately answered by ‘Whoever has the money.’ That is the answer.”¹⁰⁸ James Cuno, for example, advocates a “free market approach” to cultural property, whereby the market (who can afford to purchase what) dictates who gets to own what.¹⁰⁹ Barkan unpacks the impact of this phenomenon, “To let market mechanisms determine the fate of all cultural property would be to allow the rich nations to hoard all objects of value.”¹¹⁰ In the case of Iraq, the free market approach would dictate that the entire collection of INLA should be relocated to American institutions, where we have better resources to preserve them. This is not ethically defensible. If American institutions and the U.S. government want to protect the Baath Party records, then they should invest financial resources into strengthening INLA so that the records may be properly preserved in Iraq.

¹⁰⁵ Barkan, “Amending Historical Injustices,” 37.

¹⁰⁶ John McCarter, “Socratic Panel: Cultural Property—A Two-Way Street,” in *Who Owns Culture?: Cultural Property and Patrimony Disputes in an Age without Borders* (New York: National Arts Journalism Program, Columbia University, 1999), 42.

¹⁰⁷ Greenfield, *The Return of Cultural Treasures*, 106.

¹⁰⁸ Derek Walcott, “Who Owns Culture? What Now an International Conference on Cultural Patrimony?,” in *Who Owns Culture?*, 15.

¹⁰⁹ The “free market approach,” as advocated by Cuno, was so labeled by Elena Danielson, at session 405 “Returning Displaced Archives: Legal and Ethical Perspectives,” Society of American Archivists Annual Meeting, San Francisco, 29 August 2008.

¹¹⁰ Barkan, “Amending Historical Injustices,” 33.

Finally, HI's plans to make accessible digital copies of the Baath Party records raise several major ethical issues. While HI may argue that the digitized records will be better accessible to Iraqis, many Iraqis don't have Internet access. Furthermore, providing access to the records brings to the fore a host of privacy concerns that could have serious political consequences and further destabilize an already war-torn Iraq. SAA's 3 July 2008 letter to HI articulated the complex set of issues raised by digitizing sensitive materials:

We take issue with the assertion by the Hoover that it is appropriate for either the IMF or the Hoover to decide it is appropriate to make these records accessible with “equal access to all.” It is the right of the Iraqi government to decide upon the access protocols to these and any other Iraqi government records. This is particularly important given that the Ba'ath party records are intensely sensitive and access issues must be discussed and debated by the people of Iraq, not decided by the IMF or the Hoover.¹¹¹

If Iraqis are allowed to access the records in their complete, unredacted form, the names of former Hussein loyalists, including neighbors who secretly turned other neighbors in to the Iraqi secret police, could be made public with grave political consequences. As such, it should be up to the Iraqi people, through their government and government-appointed professionals to decide access policies. Greater access is not always for the greater good.

Conclusion: Toward a Postcolonial Approach to Cultural Property

This analysis of the legal and ethical issues around cultural property reveals that current discussions fall into two dominant rhetorical frameworks: nationalism versus universalism. In this rubric, cultural property is seen as either belonging to a nation or to all of humankind. For example, the Hague Convention takes a more universal approach in its assertion that cultural property belongs to everyone, while the UNESCO Convention takes a more nationalist approach in its assertion of the cultural property rights of nations.¹¹² Critics of the nationalist approach argue that, in our globalized world, we cannot rely on the outdated construct of the nation-state to dictate the rules of cultural property.¹¹³ Critics of the universalist approach assert the nation-state as the primary mode of contemporary political discourse. In this nationalist framework, nation-states

¹¹¹ Mark Greene, letter to Richard Sousa, 3 July 2008.

¹¹² Greenfield, *The Return of Cultural Treasures*, 255.

¹¹³ Jaime Litvak King, “Cultural Property and National Sovereignty,” in *The Ethics of Collecting Cultural Property*, 199–200.

retain certain inherent cultural property rights, despite the complexities associated with the constructed nature of nationalism.

This paper suggests that neither of these approaches adequately addresses the complexities of cultural property in the case of the Baath Party records. Instead, it proposes a third, postcolonial¹¹⁴ approach to cultural property that takes into consideration the reality of power relations between colonized and colonizer, asserts the sovereignty of states in spite of outdated nationalist constructs, and yet still acknowledges the universal appeal of cultural property in an increasingly globalized world. However, unlike the universalist and nationalist approaches, the postcolonial approach is not a one-size-fits-all solution that can be applied without significant changes to all disputes over cultural property. Rather, postcolonial approaches to cultural property will differ significantly based on the culture and history of the contexts in which disputes arise, as investigations of cultural difference and historical context are central to postcolonialism.

While definitions of postcolonialism are as diverse as the societies they reflect, many agree with Leela Gandhi's assertion that "postcolonialism can be seen as a theoretical approach to the mystifying amnesia of the colonial aftermath."¹¹⁵ In other words, postcolonialism acknowledges the complex cultural, economic, and political milieu that has both been left behind as a legacy of colonialism and is an integral part of the contemporary transnational landscape. Power, memory, identity construction, and their interconnections are central themes of postcolonial discourse, which not only pays attention to the voices of the colonized, the marginal, and the subaltern, but contextualizes their responses to, engagement with, and resistance of colonialism within the specificities of recent history.

Such a postcolonial approach has much to offer explorations of archives and their role in shaping collective memory, forming identity, and constructing nationhood, as a few recent archival studies scholars have noted. For example, Ricardo L. Punzalan uses postcolonial discourse to explore the ways in which colonial recordkeeping led to the development of the National Archives of the Philippines, which ironically has been a major force in the development of a contemporary postcolonial national identity in the country.¹¹⁶ Similarly, Jeannette Bastian traces the origins of postcolonial inquiry into the archives,

¹¹⁴ By *postcolonial*, I refer less to "a condition of a particular place or society," that is, after colonialism, but more "to a set of theoretical perspectives," as described in Matthew Kurtz, "A Postcolonial Archive? On the Paradox of Practice in a Northwest Alaska Project," *Archivaria* 61 (Spring 2006): 66.

¹¹⁵ Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (New York: Columbia University Press, 1998), 4.

¹¹⁶ Ricardo L. Punzalan, "Archives of the New Possession: Spanish Colonial Records and the American Creation of a 'National' Archives for the Philippines," *Archival Science* 6 (2006): 381–92.

writing, “Post-colonial scholarship while exposing so many of the weaknesses and problems posed by recordkeeping, also offers an opportunity to conceptualize and apply a wider, more generous, and more inclusive archival lens to the relationships between communities and records.”¹¹⁷ More recently, Andrew J. Lau has challenged archivists to move “Toward a Postcolonial Archival Ethics” by replacing the prevailing rhetoric of diversity with one of cultural difference, exploring the archives as a site of subjectivities, stressing the social and cultural conditions that produce the archives, and actively engaging with other disciplines for theoretical insights.¹¹⁸ Punzalan, Bastian, and Lau all use postcolonial discourse as a malleable framework to approach specific archival sites from within their own histories and cultural contexts.

In this vein, postcolonialism is a useful lens through which to view the discussion of Baath Party records as cultural property. The postcolonial approach begins by acknowledging the historical realities of colonialism and its ensuing power dynamics as important factors in the fight over custody of the records. Using the words of Edward Said (who, coincidentally, publicly disputed Makiya about other issues), the archives in question sit at the “nexus of knowledge and power,” in the fight over Iraqi sovereignty. By enabling the seizure of the Baath Party records, the U.S. military sought not only to produce knowledge about the “Oriental other,” but to subjugate that other politically.¹¹⁹ Through this postcolonial lens, a clear picture emerges whereby the seizure and transfer of custody of the Baath Party records are part of the larger U.S. strategy to know and therefore, to have power over, Iraq. By having custody of the records and providing American scholars, military personnel, and government officials access to them at the expense of Iraqi citizens, the United States and American institutions exert their imperial power on a colonial subject. It is militarism writ large on the archive. Until Iraq regains custody of these records, it cannot write its own history and determine its own future. In effect, it cannot become an independent state.¹²⁰

Furthermore, a postcolonial approach investigates the potential role of the Baath Party records in both shaping the collective memory of the Saddam Hussein regime and in constructing a national Iraqi identity out of the country’s

¹¹⁷ Jeannette Allis Bastian, “Reading Colonial Records through an Archival Lens: The Provenance of Place, Space and Creation,” *Archival Science* 6 (2006): 268.

¹¹⁸ Andrew J. Lau, “Marginal Evidence: Towards an Articulation of Postcoloniality in Archival Studies,” unpublished paper delivered at the Archival Education and Research Institute, 24 June 2010, University of Michigan, Ann Arbor.

¹¹⁹ Edward W. Said, *Orientalism* (New York: Random House, 1979), 27.

¹²⁰ It is particularly ironic to speak of a postcolonial approach to this situation when the “post” is still a hope of the future; the United States not only figuratively denies the sovereignty of Iraq through the custody of these records, but literally still occupies the country. These two types of power (power to know, power over) are inextricably linked, as Said suggests.

various religious, ethnic, and political factions. In this way, not only is the physical custody of the records contested, but the archive is a symbolically contested site through which power is exercised, competing narratives of the past and future are voiced, and new political identities are forged. By exploring this dispute through postcolonial theory, a more complicated context emerges than can be provided simply by the universalist or nationalist cultural property frameworks.

On a more practical level, the postcolonial approach dictates that, given the power inequities surrounding the military invasion, the records should be repatriated immediately to the capable offices of INLA, where they, with the consent of the Iraqi people, should make decisions about preservation, access, and digitization. In light of the U.S. Army's failure to protect cultural property in the aftermath of the invasion of Iraq, the inability of international law to adequately punish the United States for this failure, and the massive disparity in financial resources between the United States and Iraq, the United States should actively contribute financial resources to the building of INLA. Finally, the international archival community should continue to raise its voice during times of war to advocate for the protection of cultural property, as the SAA and ACA bravely did in 2008.