ARTICLES

Reconciling the Inalienability Doctrine with the Conventions of War

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ABSTRACT

The archival principle of the inalienability of public documents arose in the 1970s in response to the retreat of colonial powers after World War II. An international jurist initially advanced the concept as an argument to reclaim the archival patrimony of former countries that had been despoiled of their public records during colonial rule. Public records, he argued, are the inseparable and indivisible heritage of the country of origin, which has a perpetual right of return. In 1995, the International Council of Archives (ICA) defined the "inalienability principle" further by claiming that public records without exception can only be divested through a legislative act of the state that created them. This concept was again expanded in 2008 when the Society of American Archivists and the Association of Canadian Archivists cited the principle in jointly calling for the immediate restitution of captured Saddam-era records that had been removed from Iraq in the two Gulf Wars and the upheavals in Iraqi Kurdistan. In so doing, the associations adapted the inalienability principle in opposition to the laws of armed conflict, which permit the wartime seizure of public records and consider captured documents spoils of war. This article proposes an initial framework to reconcile the inalienability principle with international law to give it relevancy in the realm of postconflict restitution of captured records.

KEY WORDS

Inalienability principle, Laws of armed conflict, Captured documents, Restitution, Cultural property, International Council on Archives

In 1995, the International Council on Archives (ICA) adopted a position paper advancing what it called the "inalienability doctrine." This principle claims that public records without exception can only be divested through a legislative act of the state that created them. The ICA advanced the inalienability doctrine in response to the many unresolved and disputed archival claims stemming from World War II, the end of colonial rule, and the 1991 dissolution of the former Soviet Union into separate republics.[1]

In 2008, the Society of American Archivists (SAA) and the Association of Canadian Archivists (ACA) cited this doctrine in their joint statement calling for the immediate restitution of all of Saddam-era documents that had been seized and removed from Iraq during the two Gulf Wars and the 1991 Kurdish uprising.[2] In so doing, the associations extended the doctrine to cover wartime seizures and removals of enemy government documents—a position that conflicts with the international laws of war that permit the capture of adversary state records and considers these materials spoils of war.[3] This bedrock archival doctrine has therefore assumed an irrational position; it implies that in times of war or internal armed conflict, foreign powers or dissident forces must first secure the consent of enemy authorities before seizing and alienating state documents for military advantage. After all, by definition, the doctrine asserts categorically that public state documents can only be alienated through a legislative act of the state; there are no exceptions. According to this view, national laws prohibiting the alienation of public documents trump the international laws of war, rather than the other way around.

Nonetheless, the inalienability doctrine has virtue in the cultural property realm, and, rather than declare it an unreasonable principle, it should be revised in conformity with the international laws of armed conflict to give it relevance. This article proposes an initial conceptual framework to accomplish this aim; it is predicated on the concept that 1) the permissible capture of public enemy documents under the laws of war should be considered the eventual inalienable cultural patrimony of the country of provenance; and 2) that, as such, seized wartime records should be repatriated when they are no longer needed by the capturing state for strategic military operations, intelligence, occupation, or diplomatic advantage at the end of hostilities. This conceptual framework assumes a transitional process from captured wartime intelligence into the archival cultural patrimony of the home country of origin—a concept that is conspicuously absent in the laws of war.

Although the laws of war immunize cultural property from seizure and destruction, these protections have not been historically interpreted to cover wartime intelligence or the capture of public enemy documents for military advantage. Both the 1907 Hague Convention Respecting the Laws and Customs of War on Land and Additional Protocol I to the Geneva Conventions permit the

seizure of enemy public property if it makes an effective contribution to military action or offers a definite military advantage. Beyond this broad stipulation, the treaties do not specifically mention the wartime capture or seizure of adversary records for intelligence and occupation or mandate their return at the end of conflicts. The 1907 Hague Convention allows such seizures of enemy public movable property for military advantage and occupation to be treated, without compensation, as spoils of war. Because captured enemy records often possess considerable current and future historical value, their return should be considered imperative for the preservation of a nation's cultural patrimony. These provisions should not be considered absolute, however; they should acknowledge the reality that the capturing state may withhold records out of grave national security interests or in cases in which state security or secret police documents might be reactivated or misused for repressive ends.

By reconciling the inalienability doctrine with the conventions of armed conflict, the ICA may credibly argue for amending the laws of war to include the mandatory and negotiated return of captured wartime records, with exceptions, at the end of hostilities. Although the ICA has little influence with governments, it can work through other international bodies like UNESCO to advocate for change. In other words, it should be recognized that the inalienability doctrine has become an archaic concept with little credibility that should be reconciled with the international conventions of war.

Inalienability Doctrine

The concept of the "inalienable and imprescriptible" nature of state records seems to have originated with Mohammed Bedjaoui, an international jurist concerned with the rights and problems of newly independent nations whose public records and archives had been alienated from their territorial provenance during colonial rule. In 1976, he noted the significance of public records as an integral component of every organized society. "While one cannot conceive of a state without a navy," he wrote, "it is impossible to imagine one without a currency, without a treasury, without funds, and without archives."[4] In summarizing the value and uses of state archives, he commented on their essential nature for the administration of a community: "They both record the management of State affairs and enable it to be carried on, while at the same time embodying the ins and outs of human history. . . . Secret or public they constitute a heritage and a public property which the State generally makes sure is *inalienable and imprescriptible*."[5]

The international archival community and UNESCO adopted Bedjaoui's concept of the inalienability and imprescriptibility of public records. The doctrine was cited by a group of leading archivists convened by UNESCO in March

1976.[6] It appeared again in a 1979 UNESCO working document on the development of archives and records management programs for nation-states.[7] The International Law Commission cited the inalienability and imprescriptibility of public archives in a 1981 report on displaced archives and successor states.[8] Thereafter, it became a bedrock principle in the archival lexicon, appearing in UNESCO documents, often prepared under contract to the ICA.

In 1985, for example, UNESCO's Division of the General Information Programme issued new guidelines regarding archival and records management legislation and regulations.[9] The document articulated the ICA's view of Bedjaoui's concept; it defined the "inalienability of public documents" as being indivisible and inseparable from the sovereign state; they cannot be removed or abandoned, nor can ownership be transferred contrary to the laws of the country of provenance. It defined "imprescriptibility" as meaning that the sovereign state has the perpetual right of replevin or return over its public documents, which are inalienable. As such, the inalienability and imprescriptibility principles are considered inseparable and indivisible. Bedjaoui advanced this concept out of concern for recovering alienated public records or archives belonging to postcolonial states that were still in the possession of former colonial powers; he was not concerned about the conventions of war, which permit the seizure of public enemy records by foreign forces and impose no obligation of return.

This inalienability concept entered the archival lexis as the ICA and UNESCO were endeavoring to resolve the many archival patrimony disputes stemming from the legacies of World War II and colonial rule. These conflicting claims were the cause of many nonbinding resolutions, declarations, and recommendations adopted by the United Nations, UNESCO, ICA, and other global organizations and conferences of governments that sought to resolve these disputes and create new norms governing repatriation. In 1976, UNESCO declared that "Military and Colonial occupation do not confer any special right to retain archives acquired by virtue of that occupation."[10] In that same year, the Fifth Conference of Heads of State or Government of Non-Aligned Countries urged all countries to repatriate works of art and manuscripts to their countries of origin.[11] The UN General Assembly in 1980 urged UNESCO to intensify efforts to work with countries to resolve the problems surrounding the restitution of cultural property.[12] The General Assembly adopted additional resolutions in 1993, 1995, and 1997, but these efforts failed to advance the cause for restitution.[13] In 1983, the Vienna Conference on Success of States in Respect of State Property and Debts also failed to produce a new international legal norm governing the restitution of cultural heritage, including alienated state archives.[14]

The 1991 revelation of a secret archives in Moscow that housed vast quantities of plundered materials from the Second World War both highlighted and considerably complicated the restitution problem.[15] As early as 1943, the Soviets

formed trophy brigades to lay claim to the cultural heritage first pillaged by German forces as well as to plunder other cultural treasures in the Eastern European territories under their armed occupation. The Soviets justified this theft, especially their massive plunder of German cultural treasures, as compensatory restitution for the vast cultural property losses and destruction they experienced during the war. Already in 1942, the Soviets had formed a special commission to estimate the value of their art seized by the Nazis; the commission also concluded that Soviet losses should be replaced by German cultural treasures of equal value. Ironically, the Soviets planned a mirror image of Nazi intentions in considering the creation of a super museum in Moscow—echoing Hitler's plans for his grand Fuhrermuseum in Linz, Austria—that would house the artistic treasures taken from the defeated Axis powers.[16]

The Soviets recognized that their plundering of archives and artistic treasures would be opposed by the other Allied countries and that it transgressed their own previous efforts to advance international rules against plunder. Under the czars, Russia proposed the key article forbidding plunder of cultural property, which appeared in the 1874 Declaration of Brussels and in the Hague Conventions of 1899 and 1907. After World War I, the Soviet Union advanced provisions regarding the repatriation of cultural property to the home states of origin and formally acknowledged the 1907 Hague Convention.[17] The Soviets never acknowledged their massive looting of Germany and other states on the eastern front until the 1991 revelations.

Following the Soviet Union's dissolution, Russia moved to improve its relations with Europe, including signing a series of bilateral restitution agreements with the Netherlands, Belgium, Liechtenstein, Hungary, France, Norway, Germany, and other governments. Under President Boris Yeltsin, the Russian government began repatriating items to France before the State Duma (the lower house of parliament) intervened to halt further transfers to their rightful owners and passed legislation over Yeltsin's veto to nationalize the cultural plunder brought to Russia after World War II.[18] This parliamentary act, upheld by the Russian constitutional court, violated Russia's bilateral restitution agreements and transgressed its obligations to the Council of Europe, which allowed Russia's entry in 1996 on grounds that it negotiated the return of archives and other cultural treasures belonging to member states.[19] This act by the Russian parliament also violated the antiplunder provisions of the 1954 Hague Convention and its first protocol, which require the return of cultural property at the end of hostilities.

The most difficult dispute regarding World War II–era archival and art plunder involved Germany and Russia, each of which inflicted enormous damage on each other's cultural heritage during the war. The collapse of the Soviet Union and the disclosure of the Soviet's storehouses of looted archives and artistic

treasures opened the way for resolving Russian-German grievances over the fate of their respective cultural property. Russia's initial turn toward the West, lured by the benefits of joining the European Union in which Germany played a central role, led to a rapprochement with Germany. The countries signed two agreements in the early 1990s that promised to establish a process for resolving their disputes. In the 1990 Treaty on Good-Neighborliness, Partnership and Cooperation, the Soviets and Germans agreed "that lost or unlawfully transferred art treasures which are located in their territory will be returned to their owners or their successors." In 1992, Germany and the new Russian Federation reaffirmed that commitment.[20]

As already noted, Yeltsin's efforts to honor the restitution agreements were overturned by the State Duma and the Russian Constitutional Court, which upheld legislation that Russia's cultural property seizures were compensation for its own cultural losses. Under continuing pressure from Yeltsin to honor restitution agreements, in 1997, the Duma adopted legislation that designated any cultural spoils originally brought to the Soviet Union under the banner of "compensatory restitution" as the property of the Russian Federation. Russia would allow, however, restitution of the cultural loot taken from the former Soviet republics of Belorussia, Ukraine, and Moldova, and the Baltic States; cultural materials taken from religious or charitable groups in any country and from individual victims of the Nazis were also subject to restitution claims.[21]

Under President Vladimir Putin, the Russian Duma revised Russia's restitution law in 2000, prohibiting repatriation of cultural plunder to former Axis countries. "The restriction meant that items looted by the Nazis then subsequently taken by Soviet forces would qualify for restitution, but pieces previously owned by Germans and seized by the Soviets would not."[22] Nonetheless, in the following year, Putin declared Russia's intent to resolve the outstanding issue of looted cultural property confiscated from Germany in the Second World War, an issue newspaper accounts termed "Moscow's longest running quarrel with Germany."[23]

Given these political events, it was understandable that the ICA would adopt the inalienability doctrine to address the unresolved archival grievances stemming from World War II and the breakup of the Soviet Union. After all, the Soviet republics and Eastern European bloc countries under Moscow's dominion resembled the former colonial states of Western European powers. The ICA cited the principle within the parameters of Bedjaoui's original meaning in urging the return of archival patrimony to the disinherited colonial territories of origin or the newly established and liberated republics and states of provenance. There also was logic in the ICA referencing the doctrine to advocate for repatriating all archival spoils looted during World War II. In this instance, the principle's meaning comported with the 1954 Hague Convention and Protocol I in calling

for the restitution of cultural property at the end of hostilities, but only insofar as it referenced plundered cultural property in violation of international law, not documents lawfully seized for wartime intelligence or military advantage.

Laws of War: Plunder and Restitution

The modern laws of war governing the protection of cultural heritage emerged from centuries of unrestrained warfare, including the unfettered destruction and plunder of cultural property. A brief review of this history is in order to examine the nature of the conventions of armed conflict relating to cultural property, their silence in defining captured state records and archives as cultural heritage, and why the ICA should reconcile the inalienability principle with international law. Despite the ICA's assertion that this principle is supported by the international practice of voluntary restitution beginning with the seventeenth-century Treaty of Westphalia, the history of despoliation and restitution indicates that the restoration of cultural property has occurred only with great difficulty and primarily through forced terms of peace.

Throughout much of history, the plunder of an enemy state's most prized cultural patrimony has been considered an inherent right of warfare. In ancient Greece, "It was said there were more statues than living beings, lost both with a sense of fatality rather than justice."[24] This sentiment of despoilment could be said of many ancient cultures and more recent civilizations. Perhaps no ancient empire in the Western world revered martial prowess and pillage more than the Romans. The destruction and plunder of enemy territories constituted a regular feature of their military conquests.[25] Carthage was laid to near ruin at the end of the Third Punic War as demanded by Cato the Elder in 146 B.C.[26] The lavish Roman ritual of displaying enemy plunder and captive rulers played a central role in the triumphal processions celebrating their victorious wars. With the advance of its conquering legions and the vast expanse of its empire, the city of Rome under the empire became a museum of pillaged masterpieces from Greece, Egypt, and Asia Minor.[27]

The vicissitudes of war that hastened the Roman Empire's disintegration saw invading German tribes, Norsemen, Mongols, and Turks sweep over its lands, pillaging and causing devastation.[28] The Fourth Crusade's sacking of Constantinople in 1203 involved a rampage of looting of cultural treasures from palaces, churches, monasteries, and libraries—including the famed bronze horses of Lysippus, which were taken from the hippodrome to Venice where they were placed above the doors of the Cathedral of San Marco. Napoleon's armies later confiscated the horses and brought them to Paris to be placed on a triumphal arch in the Tuileries.[29]

The French monarchs, Charles VII and his successor Louis XII, also were relentless despoilers of artistic treasures and libraries in the Italian wars of the late fifteenth and early sixteenth centuries. Self-aggrandizing Renaissance princes coveted artistic and literary treasures, which was reflected in numerous treaties of peace providing for the transfer of tapestries, manuscripts, statues, and paintings to the victors. "The use of treaties to provide a legal framework for the transfer of looted property was a step beyond—though not necessarily an improvement on—a total reliance on brute force and conquest."[30]

Thirty Years War and the Westphalian Settlement

The Thirty Years War also witnessed grievous pillaging of artistic and literary treasures. The wars fought between 1618 and 1648 involved a series of murderous armed conflicts animated by various political, religious, dynastic, territorial, and commercial rivalries. Although the wars engulfed most of Europe, the principal battlefield involved the Holy Roman Empire, which consisted of numerous dukedoms and bishoprics under the ruling Catholic Habsburgs. The warring armies, comprising mostly unpaid mercenaries, ravaged and plundered towns, villages, and farms for supplies and war booty. Rival powers regarded universities and libraries as priceless cultural assets and strategic targets for pillage. The Swedish armies of Queen Christina, who, in her relentless quest for knowledge, despoiled valuable monastic libraries, while Maximilian of Bavaria "coveted the famed Bibliotheca Palatina in Heidelberg that held an astonishing (for the time) 8,800 books and manuscripts including ancient Greek texts and a large collection of Protestant theology."[31]

The 1648 Treaty of Westphalia produced an intricate web of agreements resolving many territorial and other disputes, including limited returns of property to the estates of the Holy Roman Empire. The Westphalian treaties established an understanding of international law as a voluntary contract that transcended secular and religious law; this concept was invoked in subsequent settlements including the 1814–1815 Congress of Vienna that ended the Napoleonic Wars.[32] When it came to restitution of territory and property, it proved difficult to "disentangle the competing claims accumulated over decades of changing ownership."[33] Although Article CXIV of the treaty stated "that the Records, Writings and Documents and other Moveables be also restored," the violence against cultural property in subsequent wars demonstrated the failure of the Westphalia settlement to establish any enduring custom of restitution of archives or cultural spoils in international relations.[34]

The restitution of cultural spoils appeared in other seventeenth-century peace settlements, such as the Treaty of Münster in 1648 between Spain and the Netherlands and the 1659 Treaty of the Pyrenees, which concluded a prolonged

war between France and Spain. This treaty was notable for establishing a joint commission to oversee the restitution of cultural treasures and to resolve future potential disputes, a rare occurrence in the evolution of cultural restitution following armed hostilities.[35] Restitution also appeared in peace treaties between Austria and France (1678); Denmark and Sweden (1679); the Netherlands and France (1697); and again between the Netherlands and France in 1713. Several of these treaties provided for the return of archives to their home countries of origin or to ceded territory, including the Treaty of Oliva (1660), which provided for Swedish restitution of the Polish royal library.[36]

Emergence of the Modern Laws of War

The Napoleonic wars ushered the normative practice of plunder into the modern age. This and the wars that followed in the nineteenth and twentieth centuries amply disabuse the notion that any customary law of restitution arose from the 1648 Treaty of Westphalia. Napoleon's plunder was animated not only by the glory of empire and conquest, but also by ideological zeal. Revolutionary France considered itself the epicenter of enlightened civilization and the liberator of Europe from its feudal past; it was only natural that Europe's artistic and literary heritage be brought back and displayed to France's glory in its magnificent cultural institutions.[37] Napoleon's mass robbery of Rome was ennobled in song: "Rome is no more in Rome/It is all in Paris."[38] Indeed, "[r]evolutionary fervor, nationalist pride, and greed were a formidable combination."[39]

Adopting a practice from the Renaissance, the French cloaked their mass theft behind a legal veneer of armistices and peace treaties forced upon their vanquished foes. Agreements forced on the princes of Parma, Modena, and the Holy See, for example, all ostensibly legitimated the transfer of plundered cultural treasures to France. Article VIII of the July 23, 1796, armistice with the Papal States illustrates the nature of these agreements: the "Pope will give over to the French Republic 100 paintings, busts or statues according to the choice made by the commissioners who will come to Rome, among these objects one should find in particular the bronze bust of Junius Brutus and the marble bust of Marcus Brutus which are now located in the Capitol, additionally 500 manuscripts chosen by these commissioners."[40]

Napoleon's egotistical excesses led to the first major international effort aimed at constructing a legal framework for repatriating cultural heritage.[41] In 1815 at the Congress of Vienna, the victorious European powers compelled France to accept one of the first large-scale restitutions in recorded history. Although the allied victors forced France to forfeit many of its territorial conquests, they decided against exacting onerous war reparations for fear of weakening the position of the counter-revolutionary Bourbons and reviving Bonapartism; in

effect, they enabled France to start anew with a clean balance sheet with the aim of establishing continental security and repose. This remarkable altruism did not extend to Napoleon's seizure of cultural spoils.[42] The allies proceeded largely according to the arguments of English plenipotentiary Viscount Castlereagh who questioned by what principles France might want to keep the artistic spoils of other countries that were inseparable from the countries of origin. The Duke of Wellington also decried Napoleon's plunder as "contrary to the principles of justice and the rules of modern war."[43]

The allies concurred that cultural spoils—"military trophies"—stolen by force or by treaty should be returned to the countries to which they belonged, thus giving expression to the first "international condemnation of looting and the establishment of the principle that all loot should be returned to the country of origin."[44] The Convention of Vienna embraced the moral concept that a nation has the natural and inseparable right to its intellectual and cultural heritage, a doctrine that had been foreshadowed by the writings of Enlightenment thinkers, such as John Locke, George-Frederick Martens, and Quatremere de Quincy. Even so, only about half the loot seized by Napoleon since 1793 was returned to the countries of origin; the French managed to retain storerooms of plunder in the Louvre in Paris through bureaucratic obstruction, deft diplomacy, and claims that works of art and other materials had been lost.[45]

The concept of the inseparability of cultural heritage from the country of origin nevertheless won favor with jurists, as well as French scholars and artists who condemned Napoleon's continental campaign of plunder.[46] This precept of the inherent nature of a country's cultural heritage appeared in several subsequent treaties, including an 1866 treaty compelling the Grand Duchy of Hessen to return a library seized from Cologne in 1794 and the Treaty of Vienna (1866), which involved returning to Venice artistic objects that had been plundered from it a long time before.[47]

By the mid-nineteenth century, the concept of a nation's natural right to its cultural patrimony won wide acceptance. The American Civil War induced the first effort to codify the principles governing the protection of cultural property in war. At the request of President Abraham Lincoln, Francis Lieber, the German-born philosopher, legal scholar, and veteran of the Napoleonic Wars, developed guiding principles for the protection of cultural, educational, and charitable property from pillage and destruction. The code, however, did little to constrain General Sherman's 1864 scorched earth campaign in the Confederate South.

1907 Hague Convention on Land Warfare

The 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land and its annexed regulations followed Lieber's code in including cultural protections and antiplunder provisions; the two conventions, which differ only slightly from one another, protect the property of municipalities and cultural institutions dedicated to religion, charity, education, and the arts and sciences from seizure, destruction, or willful damage. Article 56 of the 1907 convention states that any seizure or destruction of, or intentional damage to, historic monuments, works of art, and science is prohibited and should be prosecuted.[48] The treaty therefore includes no provisions for the restitution of cultural spoils, only that pillage should be the subject of legal proceedings.

Although the 1907 Hague Convention marked a significant advancement in recognizing the innate ethical imperative of preserving cultural heritage, its provisions were qualified. Article 27, for example, provides a waiver of immunity in cases when the enemy uses cultural sites for military purposes. Moreover, the convention permits the seizure of public enemy movable property, including adversary records, imperatively demanded by the necessities of war, but provides no obligation of return. Under Article 53 of the 1907 convention, movable government property, which may be used for military operations, is considered spoils of war; it "can be freely requisitioned by the occupying power and becomes its property without compensation."[49] Thus, an important, if implicit, distinction was drawn between protecting cultural heritage of warring nations while permitting the seizure of adversary government records and documents—movable government property—for military advantage without obligation of return.

Despite these efforts to codify the rules of war and assure the protection of cultural property, the events of World War I proved their utter fragility. The same European powers that signed the Hague Conventions disregarded them when destroying and pillaging the cultural property of their enemies in the war. German forces plundered cultural treasure, and both sides intentionally attacked culturally protected sites. The burning of part of the University of Louvain in Belgium and the bombardment of France's Rheims Cathedral by German forces were some of the more notable cultural casualties of the war. These cultural crimes caused outrage among neutral nations; the Germans consequently established an organization in the occupied territories in Belgium and northern France to safeguard historical monuments and cultural materials.[50]Even so, numerous cultural treasures were transferred to German soil ostensibly for protection, establishing a precedent "zealously imitated in World War II."[51]

The punitive treaties that concluded the Great War once again demonstrated that there was no such thing as customary or voluntary restitution of cultural property. The Hague Conventions regarding compensation for looted

cultural property provided the basis for the Allies to impose harsh measures on their former wartime enemy. By virtue of prevailing by force of arms, the Allies inflicted sweeping restitution provisions on Germany, reaching back to the 1870 Franco-Prussian War. Following France's defeat, Article III of the Treaty of Peace compelled the French government to restore any missing archives, documents, and registers upon "demand of the German Government."

In a reversal of fortune, Article 245 of the Treaty of Versailles, ending World War I, compelled Germany to return all "trophies, archives, historical souvenirs, or works of art carried away from France by the German authorities in the course of the war of 1870–71 and during [the World War]." Article 52 of the Treaty of Versailles further ordered Germany to restore archives and other cultural treasures confiscated from France and other countries of origin, as well as pay reparations for its destruction of cultural property. Under these terms, the French government took the liberty of drawing up a list of items that required return.[52] Article 247 of the Versailles treaty also forced the Germans to provide restitution-in-kind to Belgium for the destruction wreaked upon the University of Louvain; the Germans were induced to "provide the University of Louvain . . . manuscripts, incunabula, printed books, maps, and objects of collection corresponding in value to those destroyed in the burning by Germany of the Library of Louvain."[53]

The transfer of these items for the first time "articulated a requirement" to reintegrate cultural materials into a nation's historical and artistic heritage.[54] At the same time, these transfers established the principle of cultural reparations; the Allies decided that even previously legitimate transactions regarding cultural materials could be voided to confiscate items of approximate nature and value as compensation for their own wartime cultural losses. In other words, the adversary's cultural patrimony was fair game for the taking as a means of compensatory restitution.

The Treaty of St. Germain similarly mandated Austria to return all deeds, documents, art objects, and scientific and bibliographical materials seized from invaded territories, including those items confiscated from Italy dating to 1718.[55] These principles of repatriating materials to the countries of origin, compensating countries for cultural objects destroyed in war, or otherwise replacing lost objects and materials with others of similar nature and value were also reflected in the treaties with Hungary and in the resolution of the Polish-Soviet-Ukrainian conflict.[56] The Poles won restoration not only of cultural materials taken during the first Polish partition in 1772, but of many other notable artworks, tapestries, and other cultural items as well. By reaching as far back as 1772 or 1870 with the aim of righting the cultural wrongs of past conflicts, the Allies also disregarded any concept of a statute of limitations.

The cultural heritage provisions of the 1907 Hague Convention were also scarcely heeded in the greater conflict of World War II. The indiscriminate destruction and plunder by German forces and the abandonment of the principles of military necessity by both Axis and Allied powers led to the annihilation of thousands of cultural sites in Europe. Under the direction of Alfred Rosenberg and the Einsatzstab, the Germans looted paintings, sculptures, archives, and other cultural treasures.[57] Despite the firebombing of German cities and the destruction of Monte Cassino, American forces endeavored to preserve Europe's cultural heritage. Immediately following the war, the United States in particular undertook an unprecedented program of cultural restitution, but the challenges proved enormously complex and the results were imperfect. As a result, numerous competing claims of restitution involving museums, auction houses, and individuals remain unresolved today.

Postwar Development of the Laws of War to Protect Cultural Property

Nearly all of the foregoing examples relate to postconflict settlements between former adversaries when the balance of power favored victor nations demanding restitution of their cultural property confiscated during armed conflict. The new post–World War II order included the adoption of more universal agreements that also advanced the interests of vanquished nations when it came to reclaiming seized cultural property at the end of armed hostilities.[58] These postwar agreements sought exclusively to protect the world's cultural heritage, irrespective of national origin, from the destruction of warfare.

The ravages of World War II resulted in passage of a series of treaties and protocols aimed explicitly at safeguarding cultural property during armed hostilities. These events emanated primarily from the Nuremberg Trials, which represented a critical development in international law by defining for the first time acts of wartime pillage and wanton destruction or desecration of cultural heritage as war crimes.[59] The war crimes indictments handed down by the Nuremberg Tribunal detailed the sweeping crimes of spoliation against cultural patrimony. "In further development of their plan of criminal exploitation," the charges read, "they [Nazis] destroyed industrial cities, cultural monuments, scientific institutions, and property of all types in the occupied territories." Under the Nuremberg indictments, these acts "were contrary to international conventions, particularly Articles 46 to 56 inclusive of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and to Article 6(b) of the Charter."[60]

The Nuremberg Trials inspired adoption of subsequent wartime conventions and protocols in defining the destruction, desecration, or appropriation of cultural property—not justified by military necessity—as crimes against humanity. Following Nuremberg, the international community in 1949 adopted the Fourth Geneva Convention, which forbids "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[61] The international community also adopted the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the first international agreement aimed at protecting cultural property during armed hostilities.

1954 Hague Convention and First Protocol

The 1954 Hague Convention establishes joint obligations of both attackers and defenders for protection of cultural property. It aims to ensure the continued preservation of archaeological sites, historical structures, works of art, scientific collections, and other forms of cultural property. It prohibits the pillage, destruction, theft, or misappropriation of cultural heritage and expressly lists repositories of cultural objects, museums, libraries, and archives as examples of cultural property that must be safeguarded in times of war and occupation.[62] Together with the 1907 Hague Convention, it draws an implicit distinction between manuscripts and archives housed in cultural institutions, which are provided protective status, and public enemy property, including records of the state, which may be seized during hostilities to gain military advantage or, if warranted, by military necessity and occupation.

The convention requires defenders to mark their cultural sites with an internationally recognized shield or otherwise safeguard their cultural property. Those who fail to do so may lose protection under the treaty.[63] The convention defines cultural property beyond a particular nation's heritage, describing it as part of the "cultural heritage of all mankind." The convention states: "[C]ultural property shall cover, irrespective of origin or ownership: (a) moveable or immovable property of great importance to the cultural heritage of every people . . ."[64] The convention also establishes a body of internationally recognized cultural property. It divides cultural property into two categories. The first class is entitled to standard protections provided in prior treaties. A second and narrower class affords greater protection, but requires member states to designate and register specially protected property into an International Register of Cultural Property.[65] The convention's fundamental protection of cultural property can be waived or ignored "in cases where military necessity requires," albeit what constitutes military necessity remains undefined.[66]

At the same time, the international community adopted a protocol separate from the 1954 convention aimed at protecting cultural property during times of occupation. The protocol prohibits occupation authorities from exporting cultural spoils from occupied territories; it requires the return of any illegally removed cultural property to the country of origin. It mandates that cultural items removed from enemy territory during times of conflict for safekeeping must be returned at the end of hostilities.[67] It further states that these materials shall not be retained as war reparations.

Additional Geneva Protocols I and II

Additional Geneva Protocols I and II, adopted in 1977, include further protections of cultural heritage in armed conflict. The first protocol deals with international armed conflict while the second protocol applies to noninternational or civil wars. For purposes of these protocols, cultural property is defined as "civilian property." The protocols forbid the use of such property for military purposes and prohibit pillage or any "acts of hostility" directed against cultural property. Under Article 52(2) of Additional Protocol I, attacks are limited strictly to military objectives, or those "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage."[68] Presumably, the capture of public enemy documents for imperative military advantage is permitted under this clause.

Additional Protocol II makes no mention of captured enemy documents and thus imposes no obligation of return. Interestingly, a similar provision to Article 52(2) cannot be found in Additional Protocol II governing noninternational or civil conflicts. Article 16 of this protocol, however, prohibits reprisals against "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples . . ."[69] Beyond the Hague Conventions, the Geneva protocols represented a significant advancement in the protection of cultural property by placing "obligations on the attacker rather than the attacked." [70]

Second Hague Protocol

The cultural plunder and annihilation of museums, libraries, archives, historical sites, religious places of worship, and other cultural sites in Iraq's 1990 invasion of Kuwait and in the Balkan wars of the 1990s once again demonstrated the fragility of the laws of armed conflict in preventing pillage and destruction of cultural heritage, including the archives of nation-states. These and other armed conflicts led to passage of the Second Protocol to the 1954

Hague Convention. Adopted in 1999, the protocol "harmonized the 1954 Hague Convention with many of the customary international law principles in the Geneva Protocols."[71] It considerably expands the safeguarding of cultural heritage during armed conflict. The protocol provides enhanced protections for cultural property, criminalizes violations of the protocol, simplifies procedures for the granting of enhanced protections for cultural property, provides for greater precision in regard to "military necessity," and extends these provisions to noninternational or domestic armed conflicts.[72] Article 9 of the Second Protocol prohibits occupying powers from exporting, transferring ownership of, or removing cultural property, as well as conducting illicit archaeological excavations and concealing or destroying cultural or historical evidence.[73]

Similarly, the Rome Statute of the International Criminal Court, passed in 1998, prohibits and criminalizes intentionally "directing attacks" against cultural heritage.[74] The treaty also criminalizes the pillaging of a "town or place, even when taken by assault."[75] Nonetheless, the Second Protocol to the 1954 Hague Convention and the Rome Statute exercise no control over the fate of adversary public records seized during armed hostilities or occupation.

Inalienability Doctrine versus Conventions of War

In more than a century and a half of this evolving legal framework, the drafters of these treaties to protect the world's collective cultural heritage failed to include provisions defining seized wartime state records as cultural property. These agreements are silent on the seizure, use, and ultimate fate of captured public enemy documents. Beyond permitting the wartime capture of public enemy property for military advantage and occupation, the treaties do not specifically mention the seizure of enemy records, provide for their custody and use, or regulate their ultimate disposition. Nor do they obligate the capturing state to restore seized public adversary records to the country of origin at the end of hostilities. After all, Article 53 of the 1907 Hague Convention allows movable government property, which may be seized for military purposes, to be treated as spoils of war. Given the importance of a nation's archives to its past, history, and memory, this absence stands as a notable weakness in the conventions of war. As a result, the fate of captured state records continues to be left to postwar diplomacy, just as it has been for centuries.

Whatever the reasons, the absence of guiding principles of restitution of captured enemy records and cultural spoils inevitably complicated the resolution of archival claims immediately following the Second World War. While the Western Allies voluntarily and eventually repatriated most of their share of captured documents to the Federal Republic of Germany, Japan, and Italy, the Soviets withheld storerooms of treasures they stole from Germany and Eastern

Europe during and after the war. The extent of Soviet plunder only became evident after the collapse of the Soviet empire. As already noted, the new Russian republic may have initially moved with good faith to restore these items to their rightful owners, but the memories of the German war of extirpation led the Russian parliament to intercede to halt further transfers of cultural property.[76]

This and other archival legacy disputes led the ICA to adopt a position paper in support of the inalienability and imprescriptibility principles as a means of addressing these claims. The paper, which was adopted in April 1995 by the ICA's executive committee at a meeting in Guanshou, China, asserted that "The International Council of Archives believes the time has come to put an end to the exceptional conditions which have lasted fifty years and to begin getting rid of disputed archival claims arising from the Second World War, decolonization and the breakup of federations following the events of 1989."[77]

The heart of the ICA's 1995 statement avers that "[n]ational laws agree in conferring the status of inalienable and imprescriptible public property on public records. The alienation of public archives can therefore only occur through a legislative act of the State which created them." Historical precedent also supported the restitution of public archives. According to the ICA's position paper, the customary norm of returning captured or displaced archives at the end of hostilities originated with the 1648 Westphalian settlement. It states, for example, that this international practice was "progressively established from the time of the Treaty of Westphalia onwards" and that this customary norm "implicitly respected" that "archives captured and displaced during hostilities were returned once peace was concluded."[78]

The ICA statement gave the inalienability concept new force as a means of attending to international archival disputes. European archivist Charles Kecskemeti illustrated the doctrine's renewed currency when he argued in 1995 that no matter what vicissitudes public archives may be subjected to, they remain "inalienable other than by an enactment of a legislative body, or by decision of equal value, of the state which created them." In Kecskemeti's view, the "right of property in public archives does not fluctuate in accordance with events. It follows that any decision to appropriate archives, seized during military campaigns or times of occupation, taken by the state holding them, has, in fact, no legal value."[79]

The Society of American Archivists and the Association of Canadian Archivists cited the inalienability doctrine in 2008 when jointly calling for the United States to return millions of pages of documents that it seized in the 2003 invasion of Iraq. "For the records of the Iraqi government, including the Baath Party records as an arm of the state, the archival principle of inalienability requires that they be returned to the national government of Iraq for preservation," the societies said.[80] The joint statement marked an expansion of the doctrine beyond its original meaning in contravention of the international laws of armed conflict. In

other words, a concept that originally arose on behalf of efforts to reclaim archival patrimony from disinherited colonial powers was adapted to include matters involving the restitution of lawfully captured wartime records.

Thus, the inalienability principle poses two main problems. First, as already noted, it contradicts the laws of armed conflict and therefore carries no validity, and, second, the underpinning historical justification that an international and voluntary practice of archival restitution arose from the Westphalian settlement onward is largely false. Although the ICA may concur with Kecskemeti's view that any decision by foreign occupiers to appropriate public archives during military campaigns or occupation "has, in fact, no legal value," the prevailing laws of armed conflict say the opposite. Article 53 of the Annex of the 1907 Hague IV Convention permits an army of occupation to "take possession of . . . all moveable property belonging to the State which may be used for military operations." Under this clause, movable public property can be freely requisitioned by the occupying power and becomes its property (or spoils of war) without compensation.[81]

Similarly, Additional Protocol I (Geneva) allows the capture of public enemy property if it makes an effective contribution to military action or offers a definite military advantage. Although these treaties do not specifically mention enemy records, it can be assumed that phrases, such as "all moveable property of the State" and "objects which by their nature . . . make an effective contribution to military action" cover public enemy records. Furthermore, nothing in these treaties prohibits the removal of adversary documents from enemy territory in furtherance of military operations or intelligence; the imperatives of war may require it, especially when the entire country is a battlefield.

The 1907 Hague Convention, however, prohibits pillage, the confiscation of private property, and the seizure of property belonging to municipalities and institutions dedicated to religion, charity, and education, as well as the arts and sciences.[82] These prohibitions would seem to cover archives housed in cultural institutions and, by extension, other forms of private or civilian property. Article I (3) of the first protocol to the 1954 Hague Convention asserts that cultural property taken out of an occupied country must be returned at the close of hostilities.[83] The laws of armed conflict therefore assert a kind of inalienability principle that applies, for example, only to private and cultural property belonging to civilians and cultural institutions, not to public enemy documents that may be taken and exploited for military or occupation-related advantage. Even so, the treaties permit foreign armies wide latitude to seize almost anything, including archives in institutions devoted to religion, charity, education, or the arts and sciences, under the banner of military necessity.

Article 43 of the 1907 IV Convention's Annex also evidently supports the confiscation and exploitation of public adversary records for purposes of occupation.

This provision asserts that the "authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[84]

It may be assumed that this clause—in addition to Article 53 of the 1907 convention and Additional Protocol I of Geneva—allows the occupying power to confiscate public records of the state to govern enemy territory according to the laws of the occupied country. This clause does not prohibit the alienation of public enemy documents, albeit it states that the occupying power should respect the laws of the occupied country. This provision also implies that the occupying power must maintain order among both its own forces and, as far as possible and unless absolutely prevented, the civilian population. The qualifying phrasing "as far as possible" and "unless absolutely prevented" acknowledges that public order and respecting the laws of the occupied state may not be so easily accomplished during war and occupation. In other words, the extent to which an occupying power fulfills these obligations is left largely to its discretion.

Moreover, in cases in which the former government's institutions have collapsed or disappeared, the occupying power may create and impose its own system of laws and institutions that accord with international norms—superseding the laws of the occupied country (including any legislation prohibiting alienation of records). This situation occurred after World War II when the Western Allies carried out a policy of de-Nazification, merged their administrative zones of occupation, and established democratic institutions in the newly created Federal Republic of Germany.[85] The Americans also imposed a new constitution on Japan after its unconditional surrender. As well, in Iraq, the Coalition Provisional Authority, in exercising executive, legislative, and judicial powers over the country, suspended the Iraqi penal code to revise its judicial system.[86]

In either case regarding military necessity or occupation in war, the right of an occupied country to its own public records is not absolute under the laws of war. In effect, the laws of armed conflict prevail over national laws on the inalienability of public documents, consider seized wartime enemy records as spoils of war, do not prohibit or regulate their removal from the country of origin, and impose no obligation of return at the end of hostilities. Such returns continue to be at the discretion of the victorious state or the province of diplomatic negotiations between or among formerly warring states at the end of conflicts.

Neither does historical evidence support the supposition that restitution of captured or public archival spoils arose from customary or international practice dating to Westphalia. Customary law derives from a common practice that becomes norm-creating or uniformly accepted among an international community of nation-states and forms the basis of a general rule of law.[87] As the foregoing discussion on the development of the laws of armed conflict and cultural

property indicates, most previous acts of restitution stemmed from balance of power diplomacy in which the victor nations imposed terms of peace that compelled the return of cultural property. In more than two centuries of European conflicts involving the capture and plundering of public and private records and artistic treasures—from Napoleon to Bismarck, Hitler, and Stalin, to Saddam Hussein—a customary practice regarding the voluntary return of seized wartime documents has been little indicated. Motivated by obsessive egotism, strategic calculations to unify German states, the glory of empire, compensatory restitution, or annexation by conquest, none of these nation-states intended to restore looted archival and other cultural treasures to their rightful owners following the end of armed hostilities.

After all, Napoleon's grand design to establish a continental empire included housing Europe's most prestigious (and looted) archives in a vast imperial repository.[88] Hitler not only pillaged tens of thousands of artistic and other treasures for his planned Furhermuseum in his home town of Linz, Austria, which was to become Europe's cultural center after the Nazi victory, but also intended to create a Museum of an Extinct Race in Prague to exhibit plundered Jewish artifacts.[89] Stalin's armies on the eastern front brought back train loads of archival spoils, hiding them in a massive secret repository in Moscow, even as the Western Allies of their own accord pursued the recovery and restitution of stolen artifacts and archives to the countries of origin.[90]

As well, Saddam Hussein sought to plunder Kuwait's cultural patrimony into oblivion and liquidate its national identity by destroying its cultural and political institutions. Among the many cultural treasures pillaged by Iraqi forces in the First Gulf War were Kuwait's national archives. Although Iraq was compelled under UN supervision and the UN sanctions regime to return the artistic spoils that it stole in the war, it has yet to restore Kuwait's national archives despite repeated UN resolutions demanding that it do so. Post-Saddam Iraqi governments have endeavored to fulfill this obligation, but have been unable to locate and recover the emirate's archives.

Thus, while the argument that public records cannot be legally alienated from the state might be true in times of peace when domestic laws prevail, it is not true in times of war when the laws of armed conflict predominate. As a result, the inalienability doctrine when applied to wartime scenarios is deeply flawed in implying that national laws trump the international conventions of armed conflict.

Framework for Reconciling the Inalienability Doctrine with Laws of War

The inalienability principle's current expression relating to the wartime capture of public records and archives should be brought into conformity with the laws of armed conflict. The ICA should reconcile this doctrine with

international law to establish its credibility when arguing for the restitution of captured records. By asserting a doctrine beyond its original meaning contrary to international law, the archival community has assumed an irrational position detrimental to its standing.

Reconciling this doctrine with the laws of war should perhaps involve the following framework. First, the doctrine should articulate the reality that the laws of war permit the wartime capture and exploitation of public enemy documents for military advantage and occupation. The seizure of enemy records, as well as analog and digital media, comprises a fundamental aspect of warfare in analyzing enemy capabilities and intentions. Such seizures may involve their alienation or removal from the country of origin depending on military and intelligence exigencies. This acknowledgment would accord with both Article 53 of the 1907 Hague Convention, permitting the capture of movable government property for military operations, and Additional Geneva Protocol I, which allows the capture of objects that, by their nature, purpose, or use, provide a definite military advantage. Second, in acknowledging this reality, the doctrine should recognize that the laws of war prevail over national laws regarding the alienation of public enemy records during war and occupation.

Third, the doctrine should argue that captured wartime records should not be considered spoils of war as provided under Article 53 of the 1907 Hague Convention and the *U.S. Army Field Manual*, but defined as the enduring cultural heritage of the country of origin. The consideration of captured wartime records and archives as spoils of war is an archaic concept, a vestige of a bygone imperial era, which fails to recognize their cultural significance to the country from which they were confiscated. For this reason, captured or seized adversary records should be viewed as eventually transitioning into the archival patrimony of the country of origin once they cease making an effective contribution to military action and their intelligence advantage has been exploited. In this respect, both the inalienability doctrine and the laws of armed conflict should be amended to obligate each "High Contracting Party" to negotiate the return of captured enemy records at the end of hostilities. The timing and obligation of return should stem from two primary factors: 1) when the utility of the documents has been exhausted and they are no longer needed by the capturing state for military, intelligence, or occupation-related advantage; and 2) when this occurs, the documents should be considered as having matured into the cultural patrimony of the country of provenance; they should, as far as possible, be returned subject to diplomatic negotiations.

The qualifying phrase "as far as possible" serves to acknowledge realistic circumstances in which the capturing state may assert its national security interests or other grave concerns in withholding records from repatriation, even though they may hold significance for the historical patrimony of the country of origin.

Following World War II, for example, the United States withheld captured German documents that it considered to pose national security risks, to relate to German occupation of other countries, or to glorify the Nazi regime. As well, the United States is likely to withhold records that it captured during the 2003 Iraqi invasion that detail Saddam Hussein's efforts to produce nuclear weapons or that relate to other national security concerns. No matter what the framework, the power dynamic between victor and vanquished would still be at play; the repatriation process would often require complicated diplomacy to settle lingering national security and other geostrategic interests before captured records could be repatriated to their rightful owners, as was the case with Germany and Japan after World War II. The prevailing power would still unalterably be in the position to dictate the terms of return, but at least the inalienability doctrine would represent a possible and credible international norm on which to proceed.

Several archivists and scholars have challenged the feasibility of bilateral negotiations to resolve the lingering archival restitution disputes of World War II and Russia's violation of its European repatriation agreements in the 1990s. In 1996, at a conference of the ICA Roundtable (CITRA) in Washington, D.C., Austrian archivist Leopold Auer proposed creating an international committee on displaced archives to mediate the resolution of claims between nations. Auer based his proposal on UNESCO's 1978 efforts to set up an intergovernmental committee to mediate or arbitrate the resolution of displaced cultural property arising from colonial and foreign occupation. In that year, UNESCO's General Conference unanimously approved the establishment of an Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation. Forming this committee "marked a new stage" since the UNESCO's General Conference first addressed the question of cultural restitution in 1974.[91]

The committee, comprising representatives of twenty states, sought to foster bilateral negotiations for the return of cultural items displaced by colonial or foreign occupation. Despite the UNESCO committee's primary focus on dispossessed museum objects and antiquities, it acknowledged the cultural significance of archives. The committee joined with the International Council of Museums to issue principles and guidelines to foster negotiations on restitution; it also offered a means of mediation in a neutral forum.[92] Even so, prevailing misgivings challenged this effort. One of the most controversial points, for example, involved the legality of claims put forward by the demanding nations for the return of their cultural heritage, which had been contested by the possessing nations that asserted a continuing right of ownership.[93]

Auer's idea received endorsement in 2001 by scholar Patricia Kennedy Grimsted, who questioned the sufficiency of bilateral negotiations in resolving archival restitution claims stemming from World War II and the breakup of the

Soviet Union into separate republics. She observed that despite the many efforts to promote the restitution of archival patrimony, "adequately detailed working international norms and guidelines have never been agreed upon."[94] Auer expressed the reasons in 1998: "Neither the issue of restitution nor of state succession with relation to archives has been brought under normative acts in international law; perhaps due to the lack of interest by the states involved and to the fear of the effect upon the rights of sovereignty."[95] Kennedy Grimsted nevertheless saw advantages to Auer's idea of an international or intergovernmental committee to arbitrate or mediate the resolution of claims. Despite its merits, the idea has proven only theoretical. Not only has it gained no traction in the international political arena, but world powers would likely view such an international committee as an intrusion on matters of their sovereignty and national security.

It would therefore be unrealistic to articulate a time frame for restitution, except to stipulate that when captured public enemy documents no longer hold advantage, they should be considered as having transitioned into the cultural patrimony of the originating country and the diplomatic process of restitution should take place. As stated previously, an exception to this provision should acknowledge the actuality that the capturing state may withhold records in the interest of grave national security, human rights, and other concerns. This provision would leave the capturing state in control of determining when wartime intelligence may mature into cultural property and when it could be repatriated.

There is probably no way to address this problem given that nation-states will continue to assert their national self-interests and are not likely to follow any timetable for restitution of captured wartime records. Although imperfect, the foregoing provisions would explicitly define seized wartime records, with exceptions, as the enduring property of the home country of origin and obligate their negotiated return at the end of conflicts. By doing so, these provisions would reconcile the inalienability concept with the laws of armed conflict.

A possible complicating factor would be how to define what constitutes captured public enemy records and archives for the purpose of repatriation in the digital age. The nature of captured records in the analog era—World War II for example—comprised mostly printed and photographic materials seized both from soldiers on the battlefield and from military installations, state institutions, and other locations. In the digital era, the types of materials that might be seized for intelligence by armed mobile exploitation teams would likely include all manner of flash drives, hard drives, computer peripherals and digital devices, outmoded media of various kinds, mobile phones, and other current and antiquated technological equipment with the potential to yield intelligence on adversary capabilities and intentions.

Nevertheless, for modern armed forces, the seizure and exploitation of adversary materials constitute only part of a much greater effort to capture intelligence.

These efforts, for example, typically involve the collection of human, geospatial, signal, biometric, overhead reconnaissance, and data yielded by other intelligence-gathering methods. On the one hand, this vast assortment of data includes vital historical information, but, on the other, this data would be difficult to sort out to determine precisely what would constitute public state records and archives in need of restitution at the end of conflicts. Perhaps one main determining factor would be geographical—that public records and archives, analog and digital, created by the adversary state and physically seized on its territory would be considered its cultural or historical patrimony. In the end, this matter also would have to be left to negotiations between or among former belligerent nation-states.

If reconciled with international law, the inalienability principle would be a credible way to argue through the auspices of UNESCO to revise the laws with the aim of obligating former belligerent nations to repatriate captured public wartime documents once their military and intelligence utility has been exhausted. The ICA has a long-standing association with UNESCO, which offers the best way forward in advocating for revising the Hague regime to recognize that captured enemy records and archives comprise both the cultural and essential heritage of the country of origin and part of the world's collective historical memory.

Founded in 1946, UNESCO promotes education, social justice, and global peace and cooperation. A significant part of its mission is the preservation of cultural heritage as well as the free flow of ideas and the empowerment of people through access to information and knowledge. With 195 member states, UNESCO has global reach; together with its mission devoted to protecting cultural heritage and the free flow and exchange of ideas, it offers a valuable venue to address this silence in international law.

Nevertheless, this proposal relates to international law governing traditional wars between states, not civil wars. The Hague regime is also woefully out of date regarding the destruction and pillaging of culture and history by nonstate actors. Recent events surrounding the rampage of looting and destruction of ancient manuscripts, archives, libraries, artifacts, sculptures, museums, graveyards, historic monuments and buildings, and religious and archaeological sites in Afghanistan, Iraq, Syria, and other countries by militant religious extremists have again revealed the fragility of the laws of armed conflict in protecting the world's cultural heritage during times of civil conflict. The Second Protocol to the 1954 Hague Convention added protection in civil wars, but Iraq, Syria, and other countries never signed it. Furthermore, United Nations officials concede that the drafters of the agreement never anticipated deliberate destruction by nongovernmental extremist groups.[96]

It has often been the case that after each cataclysmic armed conflict, the international community adopts new treaties to strengthen the prohibitions against destroying, desecrating, or appropriating cultural property at such times.

In light of the evident weaknesses in the current legal regime regarding both state and nonstate actors, this may occur again as international law regarding cultural heritage continues to evolve in response to armed conflict. Whether or not the international community decides to add further protections under the Hague regime, the ICA and UNESCO should nevertheless advocate for defining captured state records as cultural heritage and providing for their negotiated return at the end of international and noninternational armed conflicts.

Conclusion

The archival principles of the inalienability and imprescriptibility of public documents was conceived in response to the retreat of colonial powers following World War II. It was initially advanced to reclaim the archival heritage of countries that had been despoiled of their archival heritage while under colonial rule. Despite attempts to adapt the doctrine to address the restoration of captured wartime records, it conflicts with the laws of war, which permit the seizure of public movable enemy property and require no obligation of return. The doctrine should be revised to accord with the conventions of war, while asserting that captured documents should remain the property of the country of provenance and be returned by way of negotiation at the end of hostilities. In other words, captured wartime public records should be seen as transitioning into the cultural patrimony of the country of origin and repatriated once they no longer hold military, intelligence, diplomatic, or occupation-related advantage. Any revision of the doctrine, however, should acknowledge the reality that the capturing state may assert its national security interests in withholding selected documents.

Reconciling the doctrine in accordance with the laws of armed conflict would imbue the principle with relevancy; it may enable the ICA to work with UNESCO in advancing effective arguments for amending the laws of war to include the mandatory return of captured wartime records once they no longer hold advantage. The exception to this rule should also include the right to withhold security documents that could be reactivated and misused if restored to a repressive regime. Such a revised doctrine would put the ICA in the vanguard of advocating needed change in international law regarding the restoration of archival and cultural patrimony at the end of hostilities.

Notes

[1] See International Council on Archives, *The View of the Archival Community on Settling Disputed Archival Claims*, Guanzhou, China, April 10–13, 1995.

[2] SAA/ACA Joint Statement on Iraqi Records, April 22, 2008, www.archivists.org/statements/IraqiRecords.asp.

[3] See Bruce P. Montgomery, "Counterpoint: Returning Evidence to the Scene of the Crime: Why the Anfal Files Should Be Repatriated to Iraqi Kurdistan," *Archivaria* 69 (Spring 2010): 143–71; and Douglas Cox, "Archives and Records in Armed Conflict: International Law and the Current Debate over Iraq Records and Archives," *Catholic University Law Review* 59 (Summer 2010): 1001–56.

[4] Mohammed Bedjaoui, *Eighth Report on Succession of States in Respect to Matters Other than Treaties. Draft Articles with Commentaries on Succession to State Property*, Special Rapporteur, document A/DN.4/292 (April 8, 1976), 25.

[5] Bedjaoui, *Eighth Report on Succession of States in Respect to Matters Other than Treaties*, 54.

[6] See UNESCO, "Final Report of Consultation Group to Prepare a Report on the Possibility of Transferring Documents from Archives Constituted within the Territory of Other Countries" (CC-76/WS/9), 2. This meeting was held in cooperation with the International Council of Archives.

[7] See UNESCO, *Consultation on Development of Records and Archives Management Programme (RAMP) within the Framework of the General Information Programme* (Paris: Unesco House April 9, 1979), 2.

[8] *Report of the International Law Commission on the Work of Its Thirty-third Session, 1 May–24 July 1981* (A/36?10), 48.

[9] For example, see UNESCO, *Archival and Records Management Legislation and Regulations: A RAMP Study with Guidelines*, Document PGI-85/WS/9, General Information Programme and UNISIST (prepared under contract with International Council of Archives, Paris, 1985), 16.

[10] UNESCO, "Report of the Director-General on the Study on the Possibility of Transferring Documents from Archives Constituted within the Territory of Other Countries or Relating to Their History within the Framework of Bilateral Agreements," 19C/94, 3.I.I. (Nairobi, 1976).

[11] *Documents of the Fifth Conference of Heads of State or Government of Non-Aligned Countries, Annex IV*, Resolution nos. 17 and 24 (A/31/197), 136, 148.

[12] See International Law Commission, "Draft Articles on Succession of States in Respect of State Property, Archives and Debts with Commentaries," vol. 2, part 2 (1981), 65–66.

[13] See UN General Assembly, 47th Plenary Meeting, "Return or Restitution of Cultural Property to the Country of Origin," A/RES/48/15, November 2, 1993; UN General Assembly, 50th Session, "Return or Restitution of Cultural Property to the Countries of Origin," A/RES/50/56, December 11, 1995; and UN General Assembly, 52nd Session, "Return or Restitution of Cultural Property to the Countries of Origin," A/RES/52/24, September 24, 1997.

[14] "Vienna Conference on Succession of States in Respect to State Property, Archives and Debts," United Nations Conference on Succession of States in Respect to State Property, Archives and Debts, Vienna, March 1–April 8, 1983 (A/Conf.117/14). Also see "Final Act of the United Nations Conference on Succession of States in Respect to State Property, Archives and Debts" (A/Conf.117/15).

[15] Patricia Kennedy Grimsted, "Beyond Perestroika: Soviet Area Archives after the August Coup," *The American Archivist* 55, no. 1 (1992): 94–124.

[16] Wayne Sandholtz, *Prohibiting Plunder: How Norms Have Changed* (New York: Oxford University Press, 2007), 158–59; and Konstantin Akinsha and Grigorii Kozlov, "To Return or Not to Return," *ARTnews* 93, no. 8 (1994): 154–59.

[17] Akinsha and Kozlov, "To Return or Not to Return," 154–59.

[18] See Patricia Kennedy Grimsted, "Legalizing Compensation and the Spoils of War: The Russian Law on Displaced Cultural Valuables and the Manipulation of Historical Memory," *International Journal of Cultural Property* 17 (May 2010): 227–32.

[19] Council of Europe Parliamentary Assembly, "On Russia's Request for Membership of the Council of Europe," Opinion No. 193 (1996), adopted January 25, 1996.

[20] See Art. 16, "Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good Neighborliness, Partnership and Cooperation," Bonn, November 9, 1990; and Art. 15, "Agreement between the Government of the Federal Republic of Germany and the Government of the Russian Federation on Cultural Cooperation," Moscow, December 16, 1992.

[21] See Wilfried Fieldler, "Legal Issues Bearing on the Restitution of German Cultural Property in Russia," in *Spoils of War*, ed. Elizabeth Simpson (New York: Harry N. Abrams, Inc., 1997), 175–78; Akinsha and Kozlov, "To Return or Not to Return," 154–59; Sylvia Hochfield, "Yeltzin's Objection Overruled," *ARTnews* 98, no. 9 (1999): 78–80; and Standoltz, *Prohibiting Plunder*, 219.

[22] Standoltz, *Prohibiting Plunder*, 221; and Ian Traynor, "Russia to Return Looted Art, But Not to Germany," *The Guardian*, April 21, 2000, 21.

[23] Standoltz, *Prohibiting Plunder*, 221.

[24] Louis-Jacques Rollet-Andriane, "Precedents," *Museum: Return and Restitution of Cultural Property* 31, no. 1 (1979): 4.

[25] Patrick J. Boyan, "Legal Protection for Cultural Property during Armed Conflict: Past, Present, and Future" (lecture series on Issues in Cultural Property, School of Advanced Study, University of London, February 2, 2005), www.euromedheritage.net/old/rmsu_workshops/amman/ials2005.pps.

[26] Boyan, "Legal Protection for Cultural Property during Armed Conflict."

[27] Wilhelm Treue, *Art Plunder: The Fate of Works of Art in War and Unrest*, trans. Basil Creighton (New York: The John Day Company, 1961), 13.

[28] Michael J. Kurtz, *America and the Return of Nazi Contraband: The Recovery of Europe's Cultural Treasures* (Cambridge: Cambridge University Press, 2006), 4.

[29] Treue, *Art Plunder*, 34–5.

[30] Kurtz, *America and the Return of Nazi Contraband*, 4.

[31] Peter H. Wilson, "The Thirty Years War: Europe's Tragedy (Cambridge, Mass.: Harvard University Press, 2009), 813.

[32] Wilson, *The Thirty Years War*, 752–53.

[33] Wilson, *The Thirty Years War*, 763.

[34] Wojciech Kowalski, "Introduction to International Law of Restitution of Works of Art during Armed Conflicts, Part II," *Spoils of War International Newsletter*, no. 3 (1996): 10. Also see Kurtz, *America and the Return of Nazi Contraband*, 5.

[35] Kurtz, *America and the Return of Nazi Contraband*, 5.

[36] See Rollet-Andriane, "Precedents," 6.

[37] See Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, N.Y.: Oceana Publications, 1978), 7–8.

[38] Bette W. Oliver, *From Royal to National: The Louvre Museum and the Bibliotheque Nationale* (Lanham, Md.: Lexington Books, 2007), 50.

[39] Kurtz, *America and the Return of Nazi Contraband*, 6.

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[41] Kurtz, *America and the Return of Nazi Contraband*, 6.

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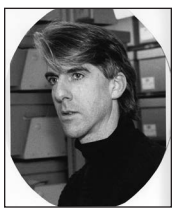

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