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A THEORIZATION ON EQUITY: TRACING CAUSAL RESPONSIBILITY FOR MISSING IRAQI ANTIQUITIES AND PIERCING OFFICIAL IMMUNITY

Robert Bejesky*

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I. INTRODUCTION

Three weeks after the U.S.-led attack on Iraq, looters descended on the artifacts in the Iraq National Museum. Over ten thousand pieces were assumed destroyed or stolen,¹ and the Coalition Provisional Authority estimated the losses at \$12 billion.² The gravity of the privation led the Security Council to include language in Resolution 1483 to restrict countries from trading in Iraq's pillaged antiquities, and the U.S. Congress passed the Emergency Protection of Iraqi Cultural Antiquities Act of 2004 to enforce the measures.³ Several thousand pieces were recovered, but thousands remain missing.⁴ In March 2013, Hussein ash-Shamri, the head of the Iraqi Interior Ministry's Economic Crimes Department, announced that Iraq opened 39 cases against countries to investigate circumstances surrounding the missing archaeological treasures to procure their return.⁵

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¹ PAOLO BRUSASCO, LOOTING THE PAST: SYRIA'S CULTURAL HERITAGE UNDER ATTACK: ANOTHER IRAQ? 28 (2012) (reporting that an estimated 15,000 items were stolen from the museum and 20,000 objects were vandalized); Lindsay E. Willis, *Looting in Ancient Mesopotamia: A Legislation Scheme for the Protection of Iraq's Cultural Heritage*, 34 GA. J. INT'L & COMP. L. 221, 227-28 (2005) (noting that fifteen to seventeen thousand items were looted or destroyed).

² JAMES DOBBINS, SETH G. JONES, BENJAMIN RUNKLE & SIDDHARTH MOHANDAS, OCCUPYING IRAQ: A HISTORY OF THE COALITION PROVISIONAL AUTHORITY 111 (2009).

³ Emergency Protection for Iraqi Cultural Antiquities Act of 2004 Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108- 429, §§ 3001-3003, 118 Stat. 2599 (2004).

⁴ *US Illegally Obtained and Kept Thousands of Iraq's Cultural Treasures*, RT (Apr. 9, 2013, 9:15 AM), <http://rt.com/op-edge/iraq-war-cultural-artifacts-553/>; Mathew Bogdanos, *Fighting for Iraq's Culture*, N.Y. TIMES, Mar. 6, 2007, at A21 (reporting 6,000 pieces recovered).

⁵ Margarita Kislova, *Iraq Files Lawsuits Over Valuables Seized in 2003*, RUSSIAN LEGAL INFORMATION AGENCY (Mar. 13, 2013, 6:13 PM),

This article tenders a suppositional analysis of culpability for the pilferage of the artifacts. Culpability standards are first assessed by using Part II's précis of the substantive international law that safeguards antiquities. Part III provides a factual chronology of the looting to address the responsibility of Iraqis who engaged in looting after law and order collapsed and the obligations of invading/occupying military forces during the stages of *jus ad bellum* and *jus post bellum*. The Iraqi government presumably would prefer an equitable remedy that facilitates the return of missing artifacts if the items are located and identified; this would implicate any state that failed to halt black market trades. However, if items are certified as missing and cannot be located within a reasonable period of time or were destroyed during the looting, should there be a right to recover damages against actors who transgressed substantive law and impelled the sequence of events into motion that led to losses? Considering this prospect, Part IV offers a conjectural analysis of liability. It is hypothetical because the Iraqi government may have divided political will (which might necessitate a *qui tam*-like public interest action), it is novel to pierce the veil of official immunity in the context posed, the analysis extrapolates offenses that have previously eliminated official immunity for war crimes and crimes against humanity in a tort-like derivative civil action, and the inquiry entails pitting factual analyses against heuristics and the presumption that collateral losses can be absolved if ends justifies the means.

II. U.S. OBLIGATIONS AND LAWS ON ANTIQUITIES

A. Recognition of the Problem from Historical Experience

Looting of valuables has a distant history and has served as a method of amassing wealth, compensating soldiers,⁶ extirpating extant society and culture, and subjugating a besieged

http://rapsinews.com/judicial_news/20130313/266703432.html.

⁶ See Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century*, 37 *GEO. J. INT'L L.* 245, 249-50 (2006).

population.⁷ Large-scale looting transferred possession of valuable Egyptian property during the mid-twelfth century B.C. period; such thefts were prevalent through the Roman and Greek eras of domination.⁸ More recent examples include British thefts in colonial India and Egypt, and Napoleon's armies looted treasures in Egypt, Italy, Germany, and Russia.⁹ Napoleon's haul was so copious that the French briefly renamed the Louvre Museum the "Musée Napoleon."¹⁰

The Musée Napoleon became the largest museum in Europe. At the time, France considered the wartime thefts a lawful policy that could transfer legitimate title to the acquisitions.¹¹ The Allies placed considerable responsibility on German plunder during World War II and some of the cultural property was recovered, but restoration of antiquities deriving from earlier heists have not been so successful.¹²

The underlying angst that results when a country of origin losing possession of a valuable antiquity is of profound privation to that state's national identity, culture, history and

⁷ See Margaret M. Miles, *Art as Plunder: The Ancient Origins of Debate About Cultural Property* 39-40 (2008).

⁸ Leonard D. DuBoff, Sherri burr & Michael d. Murray, *Art Law: Cases and Materials* 533 (revised ed. 2010); See generally Miles, *supra* note 7.

⁹ See David Nicholls, *Napoleon: A Biographical Companion* 79 (1999); Cecil Gould, *Trophy of Conquest: The Musee Napoleon and the Creation of the Louvre* 41-43 (1965); John Alan Cohan, *An Examination of Archaeological Ethics and the Reparation Movement Respecting Cultural Property (Part Two)*, 28 *Environ. L. & Pol'y J.* 1, 16-20, 98-99 (2004); See, e.g., Vivek K. Hatti, Note, *India's Right to Reclaim Cultural and Art Treasures from Britain Under International Law*, 32 *Geo. Wash. J. Int'l L. & Econ.* 465 (2000); See also Dorothy Mackay Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 *Am. Hist. Rev.* 437 (1945).

¹⁰ See, e.g., Diana Reid Haig, *Walks Through Napoleon and Josephine's Paris* 123 (2004).

¹¹ See generally Gould, *supra* note 9; Gerstenblith, *supra* note 6, at 251-52; Cohan, *supra* note 9, at 16-17; Stephen Wilske, *International Law and the Spoils of War: To the Victor the Right of Spoils?* 3 *UCLA J. Int'l L. & Foreign Aff.* 223, 227-29 (1998) (Napoleon sought to constitute a colossal museum).

¹² NOAH CHARNEY, *STEALING THE MYSTIC LAMB: THE TRUE STORY OF THE WORLD'S MOST COVETED MASTERPIECE* 100 (2010) (noting one estimate is that about half of Napoleon's thefts were returned to original owners); Cohan, *supra* note 9, at 81, 90, 95-96.

wealth,¹³ which is a menace to the preservation of all cultures and peoples. An item can be stolen, sold on the black market, and yield shocking profits to the thief and subsequent purchasers.¹⁴ It may be a formidable difficulty for the owner to reacquire the item if it is sold in a jurisdiction that will not enforce a foreign judgment that represents a genuine title of ownership,¹⁵ particularly if a *bona fide* purchaser acquired the item.¹⁶ Trade in stolen antiquities is recognized as such a grave problem¹⁷ that sources estimated between eighty and ninety-five percent of antiquities on the market lack sufficient documentation of origin.¹⁸ Moreover, if states remain taciturn, or worse, strive to profit from their nationals' engagement in the private sale of stolen artifacts, the injection of commercialization and wealth motivation may belittle the intrinsic value of archaeological treasures.¹⁹

¹³ JOHN HENRY MERRYMAN, *Thinking About the Elgin Marbles*, in THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 24, 52-59 (2000); Cohan, *supra* note 9, at 4 (stating that "looting destroys not only cultural sites but also the heritage of cultural groups.").

¹⁴ Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 409-11 (1995).

¹⁵ Cohan, *supra* note 9, at 64.

¹⁶ BARBARA T. HOFFMAN, ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 90 (2006); *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1393-94 (S.D. Ind. 1989) (choice of law questions can be complex); *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1153 (2d Cir. 1982) (referencing complex chain of title and origin questions).

¹⁷ Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. INT'L L. 213, 217 (2007); Marion P. Forsyth, *International Cultural Property Trusts: One Response to Burden of Proof Challenges in Stolen Antiquities Litigation*, 8 CHI. J. INT'L L. 197, 197 (2007).

¹⁸ Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crimes and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 620 (2012); Geoff Edgers, *Treasure Hunt: For Antiquities Experts, the Chase is on to Recover the Relics Looted From Iraq's National Museum*, THE BOSTON GLOBE, Apr. 15, 2003, http://www.boston.com/news/packages/iraq/globe_stories/041503_museum.htm.

¹⁹ John Henry Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1, 13 (1998). This belittlement of the intrinsic value could conceivably even be the case when titles are genuine and

B. International Law Protections During Warfare

Given that the mass theft of artifacts historically occurred during combat (as countries under siege are most vulnerable and less capable of safeguarding antiquities), early international law prohibitions on the pilferage and destruction of artifacts developed as components of humanitarian protections in treaties governing warfare.

The U.S. is a party to applicable Conventions²⁰ and the universal acceptance of the Geneva Conventions makes the rules customary international law.²¹ The U.S. had also promulgated many of the safeguards for valuables earlier in the Civil War-era Instruction for the Government of Armies of the United States in the Field (“Lieber Code”). The Lieber Code differentiates works of art, museum property, and educational institution property as effects that should not be destroyed or looted during combat operations.²² The Lieber Code imposes commitments on the aggressor to protect – and not steal – cultural items,²³ and affixes obligations on the invaded country to reasonably secure items and locations.²⁴

Article 27 of the 1907 Convention on Law and Customs of War on Land states “In sieges and bombardments, all neces-

there is systematized international trade in antiquities.

²⁰ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, May 14, 1954, *available at* <http://portal.unesco.org/la/convention.asp?KO=13637&language=E&order=alpha> (listing the U.S. as a party).

²¹ M. CHERIF BASSIOUNI, LIBYA: FROM REPRESSION TO REVOLUTION 297 (2013) (noting that the four Geneva Conventions and their Additional Protocols are customary international law); GIDEON BOAS, PUBLIC INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PERSPECTIVES 34 (2012).

²² INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD GENERAL ORDER NO. 100 (The Lieber Code), arts. 31-36 (Apr. 24, 1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp.

²³ *Id.* at art. 36 (“In no case shall [cultural objects of an adversary] be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated.”).

²⁴ *Id.* at art. 35 (“Classical works of art, libraries, scientific collections, or precious instruments . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.”).

sary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, [and] historic monuments . . . provided they are not being used at the time for military purposes.”²⁵ Article 56 states “All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”²⁶ This rule is affirmed in the U.S. Army Field Manual 27-10,²⁷ with the exception of military necessity, which balances the right to weaken opposing military forces to achieve victory with obligations to strictly sustain humanitarian rights.²⁸

International agreements were not only consummated to govern warfare with provisions that protect cultural heritage, but nations have also adopted international agreements to exclusively protect cultural heritage and artifacts in the event of armed combat.²⁹ In 1954, the United Nations Educational Sci-

²⁵ Convention (IV) Respecting the Law and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T. S. 277 (entered into force Jan. 26, 1910) [hereinafter Convention IV].

²⁶ *Id.* at art. 56.

²⁷ DEPARTMENT OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE, para. 405(a), July 18, 1956 (revised July 15, 1976), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

²⁸ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 6(a)(b), Mar. 26, 1999, 38 I.L.M. 769 (stating that cultural property can be destroyed when “cultural property has, by its function, been made into a military objective” and “there is no feasible alternative available to obtain a similar military advantage.”); Convention IV, *supra* note 25, art. 27 (providing for a military necessity exception). Shortly after the Lieber Code was adopted, the Declarations of St. Petersburg in 1868 articulated that the legitimate objectives of states during warfare are to weaken the military forces of the enemy to the degree necessary. Symposium, *The International Responses to the Environmental Impacts of War*, 17 GEO. INT’L ENVTL. L. REV. 565, 570-71 (2005); Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868.

²⁹ An initial step was taken in 1935 when several countries in the Western Hemisphere, including the US, signed the Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments. Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 (entered into force Aug. 26, 1935). Countries signing the Treaty for the Protection of Artistic and Scientific Institutions

entific and Cultural Organization (UNESCO) sponsored the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which protects cultural property during military conflict and occupation.³⁰ The Convention requires parties to “safeguard” and “prevent destruction or damage [to cultural property] in the event of armed conflict,”³¹ and expresses the universality of the offense by affirming that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.”³² The Convention proscribes the attacker from using, taking, or destroying cultural property unless “military necessity imperatively requires such a waiver,” and requires parties to “prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property.”³³ The defender must also secure cultural property in all forms of military combat, which includes affixing recognizable symbols to mark cultural sites.³⁴

With respect to obstructing the transfer of valuable items,

and Historic Monuments were required “(1) to respect cultural property and the persons engaged in its protection; (2) to adopt a special emblem that guarantees protection; (3) to adopt a special emblem to identify cultural institutions, and the application of such emblems; [and] (4) to register or prepare a list of protected cultural institutions.” KIFLE JOTE, *INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE* 52 (1994).

³⁰ The Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 539 [hereinafter “Convention for the Protection of Cultural Property”] (defining cultural property as “(a) moveable or immovable property of great importance to the cultural heritage of every people . . . (b) buildings whose main and effective purpose is to preserve or exhibit the moveable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives . . . [and] (c) centers containing a large amount of cultural property.”)

³¹ *Id.* at arts. 3, 4.

³² *Id.* at art. 11.

³³ *Id.* at art. 4.

³⁴ *Id.* at arts. 3, 17; Victoria A. Birov, *Prize or Plunder?: The Pillage of Works of Art and the International Law of War*, 30 N.Y.U. J. INT'L L. & POL. 201, 213-14 (1998). When the Hague Convention was adopted, there may have been more uncertainty over the location of cultural locations across the world, but with more information, international cooperation, and the mass media, it is more difficult to assert ignorance with respect to well-known locations of cultural property.

the First Protocol of the 1954 Convention also requires occupiers to prevent the export of cultural property, secure and return any removed cultural property, and compensate the owner and good faith purchasers for an occupier's violation of these fiduciary responsibilities.³⁵ The international community may not have strictly observed or implemented these obligations because over a hundred countries ratified the 1954 Hague Convention's First Protocol without decisively acting to prohibit the trade of cultural objects taken from an occupied territory.³⁶ However, in 2003, Iraq may have been the first manifest challenge to the provisions.³⁷

There are 113 state parties to the 1954 Hague Convention,³⁸ and the U.S. signed but never ratified the Convention.³⁹ Signing without ratifying a treaty still requires the signatory to not defeat the "object and purpose" of the treaty.⁴⁰ Recent U.S.

³⁵ Protocol to the Protection of Cultural Property in the Event of Armed Conflict para. 1(4), May 14, 1954, 249 U.N.T.S. 240.

³⁶ Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677, 688 (2009).

³⁷ See Draft Cultural Property (Armed Conflicts) Bill, 2007-8, H.C. Bill [693] (Gr. Brit.), available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcmds/693/693.pdf> (providing the British Parliament with a draft cultural property bill that criminalized certain offenses in the Hague Convention); See also Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108-429, §§ 3001-3003 (2004) (U.S. law reacting to pilfered antiquities in Iraq). There was no long-term occupation of a country with abundant cultural artifacts and perhaps no comparable large-scale pillage during warfare after 1954 until the invasion of Iraq in 2003, and many countries did take measures to enforce prohibitions on the trade of Iraq's cultural heritage after the 2003 invasion.

³⁸ Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM J. TRANSNAT'L L. 185, 238 (2005).

³⁹ *Id.* at 229, 232; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 182-83 (2005).

⁴⁰ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, ac-

presidents have affirmed intentions to comply with the treaty's requirements⁴¹ and scholars have called the principles that require protection of cultural property customary international law.⁴² Elevated obligations could also exist if a state perpetrates an illegal invasion and destroys or fails to preserve civilian property in violation of *jus in bello* rules.⁴³

C. More Recent Prohibitions on Transfer and Domestic Laws

Members of the international community have adopted conventions to forbid the theft and illegal trade of cultural property in all contexts, and this principle exists in national laws. In 1970, UNESCO implemented the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property.⁴⁴ The Convention bans the illegal trade and wrongful assertion of ownership of cultural property;⁴⁵ it pronounces that cultural property "constitutes one of the basic elements of civilization and national culture," and affirms "its true value can only be appreci-

ceptance or approval, until it shall have made its intention clear not to become a party to the treaty").

⁴¹ Sandholtz, *supra* note 38, at 232-33.

⁴² Gerstenblith, *supra* note 6, at 299-300, 302, 304-05; Birov, *supra* note 34, at 225-26 (noting that "[m]any of the provisions of the 1954 Hague Convention . . . are rapidly achieving the universally binding standard of customary international law"); *See generally* Joshua E. Kastenberg, *The Legal Regime for Protecting Cultural Property During Armed Conflict*, 42 A.F. L. REV. 277 (1997).

⁴³ *See generally* DOCUMENTS ON THE LAWS OF WAR 196 (Adam Roberts & Richard Guelff eds., 3d ed. 2000); *see also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 97 Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (setting terms for the preservation of property taken during internment of civilian populations).

⁴⁴ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289.

⁴⁵ *Id.* at art. 3, 823 U.N.T.S. at 236 (prohibiting the "import, export or transfer of ownership of cultural property"); *Id.* at art. 14, 823 U.N.T.S. at 244 (preventing "illicit export;" requiring that State Parties "provide the national services responsible for the protection of its cultural heritage with an adequate budget . . .").

ated in relation to the fullest possible information regarding its origin, history and traditional setting.”⁴⁶

In 1972, the World Heritage Convention was adopted and its more than 190 members are required “not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage . . . situated on the territory of other States Parties to the Convention.”⁴⁷ In addition, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 is a self-executing treaty that established rules for states to return stolen cultural property.⁴⁸ Shortly thereafter, UNESCO adopted an international code of ethics for professional traders in cultural property.⁴⁹

The importance of preserving archaeological sites with domestic laws garners expansive support.⁵⁰ Many countries, including the U.S. and Iraq, have domestic laws that vest all rights to antiquities and cultural property in their countries and proscribe the extraction of those valuables with criminal penalties.⁵¹ The U.S. enacted the Antiquities Act of 1906 to

⁴⁶ *Id.* at preface, 823 U.N.T.S. at 232.

⁴⁷ Convention Concerning the Protection of the World Cultural and Natural Heritage, arts. 6 & 16, Nov. 18, 1972, 27 U.S.T. 37, T.I.A.S. No. 8226 (1972).

⁴⁸ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects art. 1, June 24, 1995, 34 I.L.M. 1330; Lyndel V. Prott, UNESCO AND UNIDROIT: A PARTNERSHIP AGAINST TRAFFICKING IN CULTURAL OBJECTS (Norman Palmer ed., 1998), available at <http://www.unidroit.org/english/conventions/1995culturalproperty/articles/s70-prott-1996-e.pdf> (providing comparisons with the UNESCO and UNIDROIT protections).

⁴⁹ UNESCO International Code of Ethics for Dealers in Cultural Property art. 1 (1999), available at <http://unesdoc.unesco.org/images/0012/001213/121320M.pdf> (“Professional traders in cultural property will not import, export or transfer the ownership of this property when they have reasonable cause to believe it has been stolen, illegally alienated, clandestinely excavated or illegally exported.”).

⁵⁰ Derek R. Kelly, Note, *Illegal Tender: Antiquities Protection and U.S. Import Restrictions on Cypriot Coinage*, 34 BROOKLYN J. INT’L L. 491, 525 (2009) (noting that a recent Harris Poll discovered that 96% of Americans prefer archaeological sites to be protected with laws).

⁵¹ Willis, *supra* note 1, at 235-36 (offering examples of Greece, China, Iraq, and Mexico).

protect federal land from theft, vandalism, unauthorized excavation, and to impose penalties.⁵² Further, it passed the National Stolen Property Act of 1948, which sanctions prosecuting individuals for transacting in the trade of stolen foreign antiquities.⁵³ In 1979, Congress adopted the Archaeological Resources Protection Act to further fortify the policies underlying the Antiquities Act of 1906.⁵⁴ In 1983, the U.S. became a party to the UNESCO Convention and enacted the Convention on Cultural Property Implementation Act, which requires the U.S. Department of State to collaborate with other countries to restrict the transport and import of stolen artifacts into the U.S.⁵⁵

In addition to existing international law, Iraq has long had comprehensive retention laws that affirm sovereign public rights over all archaeological sites, materials, and artifacts as national property⁵⁶ and those rules were applicable during the 2003 U.S.-led invasion of Iraq. Rules were not heeded and enforced and antiquities disappeared as a result. Relevant actors to the events leading to losses include the U.S., either due to the White House's order of an invasion that displaced domestic security forces or the U.S. military's failure to secure antiquities; the vandals and thieves who destroyed and appropriated cultural property; Iraqi authorities that may not have adequately protected valuables; individuals who may have traded in or possessed stolen antiquities; or states that have obliga-

⁵² The Antiquities Act of 1906, 16 U.S.C. §§ 431-33.

⁵³ National Stolen Property Act of 1948, 18 U.S.C. § 2314.

⁵⁴ Archeological Resource Protection Act, Pub. L. 96-95 *as amended, codified at* 16 U.S.C. §§ 470a-470m. The law has been enforced on offenders. *See, e.g., United States v. Schultz*, 178 F. Supp. 2d 445 (S.D.N.Y. 2002), *aff'd*, 333 F.3d 393 (2d Cir. 2003); *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979).

⁵⁵ Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2329 (1983), *codified at* 19 U.S.C. §§ 2601-13 (2012) (a list of Members of the Convention is available at <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha>).

⁵⁶ Cohan, *supra* note 9, at 51-53, 67-68 (noting that Iraq's laws were adopted in 1936).

tions to obstruct the trade in stolen cultural property. However, unless individual items are identified or an evidence trail is ascertained, obligations of the latter two actors are inconclusive and might still be contingent on the reasonableness of preceding acts that created a black market. Consequently, Part III will concentrate on the former three actors by evaluating the chronology surrounding the looting of the Iraq National Museum.

III. EVENTS IN IRAQ

A. Chronology of Looting Following Invasion

On April 6, 2003, the Pentagon announced that the start of the Baghdad portion of the war plan. U.S. aircraft began 24-hour patrols over the city, U.S. tanks and armored vehicles moved in to control the ground,⁵⁷ and the military began to secure areas in Baghdad over the next three days without resistance.⁵⁸ On April 10, Major General Buford Blount, commander of the Third Infantry Division, announced “Not every area in Baghdad is secure . . . But the central part of the city, the heart of the city, is secure.”⁵⁹

Virtually concomitant with Pentagon announcements that Baghdad was secure, chaos, looting, and arson began.⁶⁰ Prior

⁵⁷ *Battles Rage in Baghdad*, CNN (Apr. 6, 2003) <http://www.cnn.com/2003/WORLD/meast/04/05/sprj.irq.war.main/index.html>.

⁵⁸ Sandholtz, *supra* note 38, at 186.

⁵⁹ Michael Smith, *The Allies' Next Key Objective is to Win the Peace*, THE TELEGRAPH (Apr. 10, 2003), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1427203/The-allies-next-key-objective-is-to-win-the-peace.html>; *Street Celebrations in Some Iraqi Cities*, ABC NEWS (Apr. 9, 2003), <http://www.abc.net.au/news/2003-04-09/street-celebrations-in-some-iraqi-cities/1833402> (reporting that “US tanks have swept into Baghdad with little resistance”).

⁶⁰ *Iraq Timeline: July 16, 1979 to January 31, 2004*, THE GUARDIAN, <http://www.theguardian.com/Iraq/page/0,12438,793802,00.html> (stating that there was purportedly only euphoria from locals); Online Newshour, *Baghdad Report*, PBS (Apr. 10, 2003), http://www.pbs.org/newshour/bb/military-jan-june03-baghdad_4-10/ (referencing John Daniszewski’s reporting from Baghdad: “There’s not any fighting going on” but “[t]here has been . . . wide-

to the war, the National Museum possessed between 150,000 and 200,000 items,⁶¹ but on April 12, looters broke into the museum without being obstructed by U.S. forces⁶² and stole or destroyed over ten thousand relics.⁶³ On April 13, Robert Fisk, an embedded reporter from the *Independent on Sunday*, recounted his perceptions at the scene and stated: “Our feet crunched on the wreckage of 5,000-year old marble plinths and stone statuary and pots that had endured every siege of Baghdad, every invasion throughout history, only to be destroyed when Americans came to ‘liberate’ this city.”⁶⁴

While several thousand antiquities were recovered,⁶⁵ other pieces were sold on the international black market⁶⁶ at high

spread looting” because “there’s no police authority”); *Day 21 of the War*, THE GUARDIAN (Apr. 9, 2003), <http://www.theguardian.com/world/2003/apr/09/iraq2> (reporting that combat in Baghdad was limited but that “Widespread looting breaks out unhindered in Baghdad as government control appears to be on the brink of collapse”). In addition to the chronology of looting in Baghdad, similar behavior occurred in Basra, where the library, university, and other public edifices were trashed. See REBECCA KNUTH, *BURNING BOOKS AND LEVELING LIBRARIES* 195 (2006).

⁶¹ Andrew Lawler, *Ten Millennia of Culture Pilfered Amid Baghdad Chaos*, 300 SCIENCE 402, Apr. 18, 2003, at 402.

⁶² Sandholtz, *supra* note 38, at 236-37; *Could U.S. Have Prevented Iraqi Looting?*, ABC NEWS (Apr. 17, 2003), <http://abcnews.go.com/WNT/story?id=129734> (stating that three members of the White House Cultural Property Advisory Committee officials resigned over the looting because they were “[a]ngered that eh U.S. military didn’t work to prevent the looting”).

⁶³ Donny George, *Foreword*, THE LOOTING OF THE IRAQ MUSEUM, BAGHDAD: THE LOST LEGACY OF ANCIENT MESOPOTAMIA 1-2 (Milbry Polk & Angela M.H. Schuster eds., 2005)(museum curator estimating that 15,000 objects were stolen from the museum); Willis, *supra* note 1, at 227-28 (reporting numbers suggesting that fifteen to seventy thousand pieces were looted or destroyed).

⁶⁴ DILIP HIRO, *SECRETS AND LIES* 288 (2004).

⁶⁵ Roger Atwood, *Stop Thieves! Recovering Iraq’s Looted Treasures*, WASH. POST, Oct. 3, 2004, at B2 (noting that 5,200 pieces were recovered out of 13,000 stolen); Bogdanos, *supra* note 4, at A21 (reporting that 6,000 pieces were recovered).

⁶⁶ See generally Matthew Bogdanos, *Thieves of Baghdad* (2005); Dan Cruickshank & David Vincent, *Under Fire: People, Places and Treasures in Afghanistan, Iraq and Israel* 126-27 (2003); Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the*

prices due to rarity.⁶⁷ The Coalition Provisional Authority estimated the losses from looting at \$12 billion.⁶⁸ Despite Iraqi and international laws affirming that ownership of archaeological items remain the property of the government and the people in the state of origin,⁶⁹ the newfound awareness of how much relics could fetch on the international black market left an estimated 12,000 unguarded archaeological sites vulnerable to illegal diggers who might discover items and sell them without serial numbers or authoritative markings.⁷⁰

In contrast, the U.S. Department of Defense exhibited a disparate level of caretaking when authorities seized and kept irreplaceable original documents of the Iraqi government as part of an “Iraq Perspectives Project” of the former regime and published reports, such as *A View of Operation Iraqi Freedom from Saddam’s Senior Leadership*⁷¹ and *Saddam and Terrorism*,⁷² and requested U.S. universities to submit research pro-

Past, 8 Chi. J. Int’l L. 169, 180-81 (2007); Sandholtz, *supra* note 38, at 187, 202; Sumedha Senanayake, *Iraq: Antiquities Continue to be Pillaged, Destroyed*, Radio Free Europe (Oct. 12, 2006), <http://www.rferl.org/content/article/1071983.html>.

⁶⁷ Karin E. Borke, *Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003*, 13 DEPAUL-LCA J. ART & ENT. L. & POL’Y 381, 387-88 (2003).

⁶⁸ DOBBINS, JONES, RUNKLE & MOHANDAS, *supra* note 2, at 111.

⁶⁹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (affirming that “[i]ndigenous peoples have the right to . . . maintain, protect, and have access to privacy to their religious and cultural sites. . .”); Patty Gerstenblith, *Change in the Legal Regime Protecting Cultural Heritage in the Aftermath of the War in Iraq*, in THE DESTRUCTION OF CULTURAL HERITAGE IN IRAQ 183-89 (Peter G Stone & Joanne Farchakh Bajjaly ed., 2008) (noting Iraq’s laws declare that all discovered antiquities become property of the state).

⁷⁰ Alexandra Zavis, *Ancient Civilization . . . Broken to Pieces*, L.A. TIMES, Jan 22, 2008, <http://www.latimes.com/news/nationworld/world/la-fg-antiquities22jan22,1,4177435.story?page=1>; Willis, *supra* note 1, at 228 (noting that thousands of other Iraqi archaeological sites throughout the country remained vulnerable to damage and looting).

⁷¹ KEVIN M. WOODS, ET. AL., IRAQI PERSPECTIVES PROJECT: A VIEW OF OPERATION IRAQI FREEDOM FROM SADDAM’S SENIOR LEADERSHIP (2006), *available at* <http://www.cbsnews.com/htdocs/iraqreport.pdf>.

⁷² KEVIN M. WOODS & JAMES LACEY, IRAQI PERSPECTIVES PROJECT: SADDAM AND TERRORISM: EMERGING INSIGHTS FROM CAPTURED IRAQI DOCUMENTS, Vol. 1

posals.⁷³ The 1954 Hague Convention prohibits the taking of “archives,” which includes “records” that delineate the activities and procedures of government and non-agencies,⁷⁴ but international law can permit seizing state papers as an interpretation of military necessity when taken in connection to a war.⁷⁵ In this instance, the war was over, no ongoing “military

(Nov. 2007), available at https://www.ida.org/~media/Corporate/Files/Publications/IDA_Documents/JAWD/ida-paper-p-4287-Vol-1.pdf.

⁷³ DEP'T OF DEF., U.S. ARMY RESEARCH OFFICE, BROAD AGENCY ANNOUNCEMENT NO. W911NF-08-R-0007, IRAQI PERSPECTIVES PROJECT 19 (2008) (“[i]n the course of Operation Iraqi Freedom, a vast number of documents and other media came into the possession of the Department of Defense.”); Hugh Eakin, *Iraqi Files in U.S.: Plunder or Rescue?*, N.Y. TIMES, July 1, 2008, at E1 (reporting the Hoover Institution held them for preservation until they could be returned to Iraq; the five million documents were being stored at the Hoover Institution at Stanford University); Letter from Richard Sousa, Senior Assoc. Dir. Hoover Inst., to Mark A. Green, President, Soc’y of Am. Archivists (June 6, 2008), available at http://www.archivists.org/statements/Iraqi%20Records_HooverLetter.pdf (emphasizing that the Iraqi government granted permission to hold the documents and that keeping them at the Hoover Institution was safer than holding them in Iraq).

⁷⁴ Douglas Cox, *Archives and Records in Armed Conflict: International Law and the Current Debate Over Iraqi Records and Archives*, 59 CATH. U.L. REV. 1001, 1004-06, 1008 (2010) (calling the archives “an essential part of the heritage of any national community”).

⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 52, Dec. 12, 1977, 1125 U.N.T.S. 3 (“military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 23(g), 36 Stat. 2277. (“it is especially forbidden to destroy or seize the enemy’s property, unless such destruction or seizure [is] imperatively demanded by the necessities of war.”); Soc’y of Am. Archivists & Ass’n of Canadian Archivists, SAA/ACA Joint Statement on Iraqi Records (Apr. 22, 2008), <https://www.archivists.org/statements/IraqiRecords.asp> (emphasizing that “the 1907 Hague IV Convention respecting the Laws and Customs of War on Land . . . narrowly restricts the purposes for which a combatant can seize enemy records and forbids confiscation of private property, and . . . the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict . . . states: ‘Each High Contracting Party undertakes to re-

necessity” existed, and the Society of American Archivists expressed concern about the return of the documents.⁷⁶

B. Explanations for the Cause of Looting

The first causal event that led to the looting was the Bush Administration’s decision to attack Iraq without United Nations Security Council assent. From the vista of an undertaking that initiates a chain of events, a primary cause of the antiquity losses can be assessed with bald logic: “If Country A had not invaded or destabilized Country B, then no threat to Country B’s cultural property would have emerged.”⁷⁷ While Bush Administration officials alleged that the United Nations was ineffective in disarming Iraq of prohibited weapons, those weapons ultimately did not exist.⁷⁸ If a war is illegal, the violator can owe compensatory damages flowing from the armed combat.⁷⁹ UN Charter rules prohibit wars without Security

turn, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property [including “manuscripts . . . and important collections of books or archives”] which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph.”).

⁷⁶ See Soc’y of Am. Archivists & Ass’n of Canadian Archivists, *supra* note 75 (stating that the U.S. military seized millions of pages of state documents and that the records should be returned to Iraq).

⁷⁷ Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J. 153, 162 (2005); Barbara Lee, *Essays From the Role of Law & Policy: Africa, the Caribbean, and the United States: Preempting Democracy: The Bush Administration vs. the World*, 7 AFR.-AM. L. & POL’Y REP. 29, 33 (2005) (stating that with the Bush Administration’s decision to topple the Iraqi government, it “unleash[ed] waves of looting and destruction for which it apparently failed to plan”).

⁷⁸ Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875-82 (2011) [hereinafter Bejesky, *Intelligence Information*]; see generally Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT’L L. & COM. 295 (2011) [hereinafter Bejesky, *Weapon Inspections*].

⁷⁹ Rep. of the Int’l Law Comm’n, 53d Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) (stating that “every internationally wrongful act of a state entails the international

Council assent or an acceptable justification.⁸⁰ Even if a war is legal, the attacking state is obliged to not actively despoil cultural property unless there is a compelling military necessity, such as if a military is engaged in combat operations with enemy forces and combat gravitates into a vicinity in which cultural property can become collateral damage. Forces need not guard, protect, or prevent the destruction of cultural property if doing so requires troops to assume the risk of suffering lethal force.

Invading forces did not destroy cultural property at the Iraq National Museum and valuables were not deemed collateral damage, but invading forces might have been obligated to devise reasonable efforts to obstruct others from looting or damaging cultural property.⁸¹ This possibility invokes questions over the “but for” cause of loss, based on the gamut of legal obligations at the time. The more effective control U.S. military forces held over Baghdad, the greater the obligation that

responsibility of that state.”); 3 HUGO GROTIUS, *DE JURE BELLI ET PACIS LIBRI TRES* 192-94 (W. Wherwell trans., Cambridge ed. 1853) (1646) (“If the reason for the war is unjust, all activities resulting from this war are unjust because of their intrinsic injustice . . . The obligation of restitution lies with the persons who perpetrated the war, either by starting it, being rulers themselves, or by giving advice to rulers. This obligation extends to all wrongdoings that result from war.”); Bartram S. Brown, *Intervention, Self-Determination, Democracy and the Residual Responsibilities of the Occupying Power in Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y 23, 59 (2004) (noting that if an invasion is illegal, liability of intervening powers can extend to the indirect harms caused as a result); Jeff McMahan, *The Ethics of Killing in War*, 114 ETHICS 693, 714 (2004) (stating that a state acting in violation of *jus ad bellum* “cannot satisfy the proportionality requirement, and satisfaction of this requirement is a necessary condition of permissible conduct in war.”). Following the Gulf War, the Security Council established a tribunal with tort law personal injury categories based on the gravity of injury and individuals and entities filed 2.68 million claims seeking more than \$350 billion in compensation against Iraq. John J. Chung, *The United Nations Compensation Commission and the Balance of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA J. INT'L L. & FOREIGN AFF. 141, 147-50 (2005); Kevin H. Anderson, *International Law and State Succession: A Solution to the Iraqi Debt Crisis?*, 2005 UTAH L. REV. 401, 433 (2005).

⁸⁰ U.N. CHARTER art. 2, para. (4).

⁸¹ Birov, *supra* note 34, at 223 (noting that guarding objects during a war is a point of contention).

existed to protect locals and their property.⁸² Alternatively, if international law required U.S. military forces to confront lethal security threats, the military may not have held effective control over Baghdad, and security-related imperatives could still take priority over thwarting the ruin of cultural property.⁸³ This was the position of General Richard Myers, Chairman of the Joint Chiefs of Staff, who affirmed that the military combat operations took precedence over guarding the museum.⁸⁴ At the time of the looting, an estimated forty thousand U.S. soldiers occupied Baghdad, but according to the U.S. Central Command in the Arabian Gulf, the U.S. “didn’t yet have enough troops in Baghdad to ‘secure key tactical objectives’—traffic circles, bridges, power plants, banks, and munitions dumps—and also patrol streets.”⁸⁵ Likewise, just three days after the looting, Brigadier General Vincent Brooks announced that “forces entering Baghdad were involved in ‘very intense combat,’” and the museum suffered as a result.⁸⁶ Warfare ex-

⁸² Convention for the Protection of Cultural Property, *supra* note 30, art. 5 (an occupier “shall as far as possible support the competent national authorities . . . in safeguarding and preserving its cultural property.”); see Gerstenblith, *supra* note 6, at 263-64.

⁸³ Craig J.S. Forest, *The Doctrine of Military Necessity And the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT’L L. J. 177, 178 (2007).

⁸⁴ LAWRENCE ROTHFIELD, *ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR* 20 (2008); Douglas Jehl and Elizabeth Becker, *A NATION AT WAR: THE LOOTING; Experts’ Pleas to Pentagon Didn’t Save Museum*, N.Y. TIMES, Apr. 16, 2003, at B5 (reporting that Professor McGuire Gibson expressed that he thought there was an understanding that the military would safeguard the museum and that it would not stand by and watch it be looted, and a senior Pentagon official retorted that the “military had never promised the buildings would be safeguarded”).

⁸⁵ L. PAUL BREMER III, *MY YEAR IN IRAQ: THE STRUGGLE TO BUILD A FUTURE OF HOPE* 14 (2006); John F. Burns, *Pillagers Strip Iraqi Museum of Its Treasure*, N.Y. TIMES, Apr. 12, 2003, at A1 (noting that there were not enough available soldiers because there were battles across Baghdad). From the bombing stage and up through the first few weeks of the war, locals ransacked buildings and up to 158 buildings were destroyed. HIRO, *supra* note 64, at 274.

⁸⁶ Elise Labott and Jim Clancy, *U.S.: We Didn’t Anticipate Looting*, CNN (Apr. 15, 2003), <http://edition.cnn.com/2003/WORLD/meast/04/15/sprj.irq.museum.looting/>.

isted because throughout the entire country and during the first six weeks following the invasion, 139 U.S. troops and between 7,600 and 10,800 Iraqis were killed.⁸⁷

U.S. military officials maintained that obstructing looting should not reasonably be recognized as an obligation inherent to military planning,⁸⁸ and that the duty to secure as a police force was an Iraqi responsibility.⁸⁹ However, acting as a police force could be compulsory as soon as an invading force establishes effective authority and control over the territory, which is an event that signifies a legal occupation⁹⁰ and imposes obligations ancillary to that occupation. U.S. Army Field Manual 27-10 calls the start of military occupation “a question of fact”

⁸⁷ See *The Toll of War in Iraq: U.S. Casualties and Civilian Deaths*, NPR, <http://www.npr.org/news/specials/tollofwar/tollofwarmain.html> (last updated Aug. 4, 2009) (placing U.S. troop fatalities in March 2003 at 65 and in April 2003 at 74); SPENCER C. TUCKER, *THE ENCYCLOPEDIA OF MIDDLE EAST WARS: THE UNITED STATES IN THE PERSIAN GULF, AFGHANISTAN, AND IRAQ CONFLICTS* 266 (2010) (referencing several sources of credible Iraqi death toll figures for the first phase of operations, which was from Mar. 19, 2003 to Apr. 30, 2003).

⁸⁸ Jehl & Becker, *supra* note 84, at B5 (Secretary of Defense Rumsfeld remarking “To try to pass off the fact of that unfortunate activity [of looting] to a deficit in the war plan strikes me as a stretch.”).

⁸⁹ Edmund L. Andrews, *Iraqi Officials Say Looting of Ancient Sites Continues Despite Pleas to U.S. Troops for Help*, N.Y. TIMES, May 27, 2003, at A14 (Lt. Col. Daniel O'Donoahue remarked “We don't have anywhere enough marines to police every fixed site in the country . . . Our view is that if it's a fixed site, it's primarily an Iraqi responsibility.”). Brig. Gen. Vincent Brooks stated “At no time do we really see becoming a police force.” *US Shows Off New Card Trick*, THE GUARDIAN (Apr. 11, 200), <http://www.theguardian.com/world/2003/apr/11/iraq3>.

⁹⁰ Convention IV, *supra* note 25, art. 42 (“[T]erritory is considered occupied when it is . . . placed under the authority of the hostile army.”); DEPARTMENT OF THE ARMY, *supra* note 27, ¶ 351 (reiterating art. 42 of the 1907 Convention and stating that legal occupation exists in regions where “authority has been established and can be exercised.”); Naomi Burke, *A Change in Perspective: Looking at Occupation Through the Lens of the Law of Treaties*, 41 N.Y.U. J. INT'L L. & POL. 103, 125-28 (2008) (noting the extension of treaty occupations to “occupied” territories); Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT'L REV RED CROSS 737, 740 (2005) (emphasizing that international conventions have defined “occupation” in terms of whether there is an effective authority and control over a territory).

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and affirms that “no proclamation of military occupation is necessary.”⁹¹

It does not appear that massive looting occurred *before* U.S. officials claimed Baghdad was secure, but rather ensued after a heavily armed foreign military force effectively disbanded the domestic military and police security that presumably would have otherwise prevented the lawlessness. This demobilization became an official and legal result one month later when all government employees associated with the former regime were banned from government service pursuant to Coalition Provisional Authority Order No. 1.⁹² However, pandemonium began at the time of the looting, according to Professor Asli Ü. Bali, because “it became apparent to the Iraqi people that law and order had dissolved and that no one exercised effective control, [which led to the] the emergence of self-help and self-defense systems.”⁹³ Others believed that a duty to protect

⁹¹ DEPARTMENT OF THE ARMY, *supra* note 27, ¶¶ 355, 357.

⁹² Coalition Provisional Authority, Order No. 1, De-Ba'athification of Iraqi Society, CPA/ORD/1, May 16, 2003, available at http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf. Order 1 removed 15,000 to 30,000 members from government positions. *Purge of Saddam Loyalists*, BBC, May 16, 2003, http://news.bbc.co.uk/2/hi/middle_east/3033919.stm; Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L., 580, 614 (2006)(calling Order 1 much criticized). Bremer's CPA Order 1 ultimately pushed 140,000 Iraqis out of their jobs, but it was reversed years later. Amit R. Paley & Joshua Partlow, *Iraq's New Law on Ex-Baathists Could Bring Another Purge*, WASH. POST, Jan. 23, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012203538_pf.html.

⁹³ Asli Ü. Bâli, Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq, 30 YALE J. INT'L L. 431, 452 (2005); Kristin E. Petersen, Cultural Apocalypse Now: The Loss of the Iraq Museum and a New Proposal for the Wartime Protection of Museums, 16 MINN. J. INT'L L. 163, 183 (2007). As for providing security after police and military were disbanded, armed gangs roamed the streets searching for bounty. HIRO, *supra* note 64, at 314. By some accounts, lawlessness was more serious a year into the occupation. IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND 62 (Jeremy Brecher, Jill Cutler, Brendan Smith, eds., 2005); Richard Norton-Taylor, Violence Blamed on US Decision to Disband Iraq Army, GUARDIAN, Apr. 7, 2004, <http://www.theguardian.com/world/2004/apr/07/iraq.usa2> (noting that further

the museum existed because the military unquestionably held control over Baghdad on April 9, 2003, with most of the looting occurring over the next two days.⁹⁴ Secretary of Defense Rumsfeld might agree with this assessment because locals were effectively free of the previous regime. On April 12, 2003, after the looting and vandalism appeared in global new sources, Rumsfeld explained “Freedom’s untidy, and free people are free to make mistakes and commit crimes and do bad things . . . Stuff happens.”⁹⁵

There was also an assortment of news reports contending that U.S. troops were available in varying capacities. Many Iraqis denounced U.S. troops for not securing the museum⁹⁶

violence broke “when the US decided to disband the Iraqi army” and that this decision was in opposition to the British proposal to negotiate with the military and allow them to maintain law and order); Food and Agriculture Organization, Crop, Food Supply, and Nutrition Assessment Mission to Iraq (Sept. 23, 2003), <http://www.fao.org/docrep/005/j0465e/j0465e00.HTM#33> (noting the high level of food insecurity). If occupying forces cannot be counted on for protection, locals will likely continue to take advantage of the situation. JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 147, 157-58 (Cambridge: Cambridge University Press 2006).

⁹⁴ Amy E. Miller, *The Looting of Iraqi Art: Occupiers and Collectors Turn away Leisurely from the Disaster*, 37 CASE W. RES. J. INT'L L. 49, 70 (2005) (noting that there was definitely military control and also stating that the “bulk of the looting and destruction of the National Museum and Library of Iraq occurred on Thursday, April 10, 2003, and Friday, April 11, 2003.”); See *Contra* Dick Jackson, *Cultural Property Protection in Stability operations*, 2008 ARMY L. 47, 51 (2008) (Colonel writing that “there is still considerable controversy to this day about when U.S. forces established effective control over the area of Baghdad near the museum which would trigger the protection of an occupying force”).

⁹⁵ Sean Loughlin, *Rumsfeld on Looting in Iraq: ‘Stuff Happens,’* CNN, Apr. 12, 2003, <http://www.cnn.com/2003/US/04/11/sprj.irq.pentagon/>; See also Mary Ellen O’Connell, *Beyond Wealth: Stories of Art, War, and Greed*, 59 ALA. L. REV. 1075, 1100 (2008); Sandholtz, *supra* note 38, at 195-96.

⁹⁶ Sandholtz, *supra* note 38, at 190; Sasha P. Paroff, *Another Victim of the War in Iraq: The Looting of the National Museum in Baghdad and the Inadequacies of International Protection of Cultural Property*, 53 EMORY L.J. 2021, 2046 (2004) (stating that the museum’s deputy director explained that “the Americans were supposed to protect the museum. If they had just one tank and two soldiers nothing like this would have happened.”); HUMAN RIGHTS WATCH, *Coalition Forces Must Stop Iraqi Looting*, Apr. 12, 2003 available at <http://www.hrw.org/fr/news/2003/04/11/coalition-forces-must->

especially after locals requested troops to prevent future looting.⁹⁷ The U.S. military could have issued an order to guard the museum. By some accounts, the U.S. actually did issue that directive,⁹⁸ but what precisely was directed is not conspicuous.⁹⁹ One account reported that a tank and five marines were present at the National Museum on Thursday, April 10, and after U.S. forces fired a few shots, potential vandals departed,¹⁰⁰ but looters later returned and broke into the museum.¹⁰¹ An-

stop-iraqi-looting (“International law requires that occupying powers must ensure the safety of the civilian population in areas under their control.”); UNITED NATIONS, REPORT OF THE INDEPENDENT PANEL ON THE SAFETY AND SECURITY OF UN PERSONNEL IN IRAQ 5-6 (Oct. 20, 2003), <http://www.un.org/News/dh/iraq/safety-security-un-personnel-iraq.pdf> (noting that well after there was an obligation to provide security, the U.N. headquarters was bombed in Iraq and the US military did not provide security to the headquarters either even though they were obligation to do so).

⁹⁷ See Burns, *supra* note 85, at A1 (reporting that Iraqi Archaeologist Raid Abdul Ridhar Muhammad “asked them [U.S. military troops] to bring their tank inside the museum grounds . . . [b]ut they refused and left.”); See also Sandholtz, *supra* note 38, at 236-37; See Fiachra Gibbons, *Experts Mourn the Lion of Nimrud, Looted as Troops Stood By*, THE GUARDIAN, Apr. 30, 2003, <http://www.theguardian.com/world/2003/apr/30/internationaleducationnews.arts> (explaining that Dr Donny George, a curator at the Baghdad museum, expressed: “One of our staff who lived in the museum compound went to an American tank and pleaded with them, begged in fact, for them to come in front of the museum to keep it safe . . . But he was told they had no orders to do so.”); Naomi Klein, *Baghdad Year Zero: Pillaging Iraq in Pursuit of a Neocon Utopia*, HARPERS, Sept. 2004 (noting that Sabah Asaad, managing director of a refrigerator factory near Baghdad, remarked that he went to Army soldiers for help to remove looters and the officer remarked: “Sorry, we can’t do anything, we need an order from President Bush.”).

⁹⁸ ROTHFIELD, *supra* note 84, at 20 (reporting that Secretary of State Powell stated that CENTCOM did instruct troops to protect museums); Sandholtz, *supra* note 38, at 236-37 (stating that the U.S. military was told to protect the looted museum). In July 2003, Pentagon Attorney Major Enge explained: “Once it becomes evident that cultural sites or museums are being targeted by looters, a Ground Forces Component Commander may issue order to protect these sites.” Thurlow, *supra* note 77, at 174.

⁹⁹ Burns, *supra* note 85, at A1 (reporting that Mohsen Hassan, the deputy curator, had received mixed signals from the US military command about the degree of protection that would be provided).

¹⁰⁰ *Id.*; see also Thurlow, *supra* note 77, at 176-77.

¹⁰¹ Thurlow, *supra* note 77, at 177.

other report stated that a U.S. tank accidentally blew a hole in a portion of the museum and marauders emerged.¹⁰² There were also contradictory reports of whether U.S. military personnel encouraged vandalism or engaged in misconduct related to the looting.¹⁰³

Irrespective of questions over the immediate cause of the destruction and whether it would have been sensible to initiate efforts to protect the museum, perhaps what is most distressing is the fact that for five thousand years and with numerous governing factions, these artifacts remained intact; Iraqis did not have such disrespect for their own country or history. Keeping these artifacts for thousands of years suggests that the Iraqi people (and even Hussein's regime) provided exemplary protection for their cultural heritage.¹⁰⁴ But, concomitant

¹⁰² *Iraq's Insurgency, Funded by Treasure*, ABC NEWS, Apr. 11, 2006, <http://abcnews.go.com/Nightline/IraqCoverage/story?id=1832620&page=1>.

¹⁰³ Col. Dick Jackson explained that "[t]here are no allegations that U.S. Armed Forces participated in looting," and "General Order Number 1 specifically prohibits such conduct." Jackson, *supra* note 94, at 51. Some media reports contended that US military troops encouraged and actively vandalized and destroyed artifacts and ancient ruins. Ed Vulliamy, *Troops 'Vandalize' Ancient City of Ur*, THE GUARDIAN, May 18, 2003, <http://www.theguardian.com/world/2003/may/18/internationaleducationnews.iraq>. An Iraqi doctor explained: "I saw American soldiers standing by, taking photographs, cheering them on." Patrick Cockburn, *The Path to Peace: Allies Face a Tough Battle to Bring Normality*, THE INDEPENDENT, June 25, 2003, available at <http://www.globalpolicy.org/component/content/article/168-general/36815.html?tmpl=component>. As the looting erupted, isolated mainstream media reports began documenting that the looting and chaos was being encouraged by the US military, as vandals gutted "every important public institution in the city," including schools, libraries, hospitals, museums and electric plants. IN THE NAME OF DEMOCRACY, *supra* note 93, at 60-61; See also HIRO, *supra* note 64, at 258; Daniel Bodanky, *Establishing the Rule of Law*, 33 GA. J. INT'L. & COMP. L. 119, 121 (2004). Whether they were taken at the time of the looting or acquired at some time during the occupation, U.S. military personnel smuggled artifacts into the U.S. U.S. Dept. of Homeland Security, *ICE Returns Saddam Hussein Ceremonial Sword to Republic of Iraq*, July 29, 2013, <http://www.ice.gov/news/releases/1307/130729washingtondc2.htm> (noting a sword that was sold by the Amoskeag Auction Company in Manchester, N.H., on January 7, 2012 for \$15,000).

¹⁰⁴ Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural Heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14

with military announcements of Baghdad being secure, public facilities, including the National Museum, began to be destroyed. Even if there were no bombings of the enumerated historical, cultural, or archaeological sites that would violate international law,¹⁰⁵ the military occupation's indifference to the looting of the museum in Baghdad precipitated a similar outcome to historical wars in which invading forces destroyed cultural heritage.¹⁰⁶ The Bush Administration received criticism throughout the world for failing to secure the museum,¹⁰⁷ with Professor O'Connell writing that "U.S. negligence in Iraq has truly resulted in a crisis surrounding Iraqi cultural property. Only a few of the high-value, high-quality pieces looted from Iraq had been recovered five years after the invasion."¹⁰⁸

C. Warnings Made Looting More Foreseeable

A routine examination of the duty of care in tort law frequently considers the foreseeability of acts that can cause harm. In the case of a possible duty to protect during an effective occupation, this inquiry might probe the reasonable expect-

DEPAUL-LCA J. ART & ENT. L. 73, 75-77 (2004); Miller, *supra* note 94, at 64 (Hussein placed restrict regulations on protecting Iraq's artifacts).

¹⁰⁵ Gerstenblith, *supra* note 6, at 305-06.

¹⁰⁶ KNUTH, *supra* note 60, at 201-20.

¹⁰⁷ Gerstenblith, *supra* note 36, at 692 (noting that the U.S. "failure to protect and to plan to protect these cultural institutions was widely condemned."); Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi "Freedom,"* 95 CALIF. L. REV. 2295, 2297-98 (2007) (stating that many experts placed responsibility for failing to prevent looting and impeding humanitarian assistance directly on Coalition Forces); *See also* Sandholtz, *supra* note 38, at 189-93; Thurlow, *supra* note 77, at 177-78; Joshua M. Zelig, *Recovering Iraq's Cultural Property: What Can Be Done to Prevent Illicit Trafficking,* 31 BROOKLYN J. INT'L L. 289, 311 (2005) (reporting that *The China Daily* opined: "It is immoral for the United States to destroy Iraq's culture while trying to rebuild the country economically and politically. The self-proclaimed liberators' cannot escape worldwide criticism at a time when UNESCO is launching a strong campaign across the world to protect endangered cultural heritages."); Cohan, *supra* note 9, at 63 ("The entire international community has a common interest in protecting cultural property."); Jehl & Becker, *supra* note 84, at B5.

¹⁰⁸ O'Connell, *supra* note 95, at 1101.

tations of those directing war efforts by raising the foreseeability of Iraqi actions under the circumstances. The looting of relics may be a foreseeable event following an invasion of another country because destruction of edifices and infrastructure can make valuable items easier to pilfer. Moreover, displacement of the former regime (that imposed law and order) might reduce the thief's perceived risk of anticipated penalty for engaging in criminal activity. Common knowledge of the elevated importance of Iraq's ancient history,¹⁰⁹ the expectation of looting based on the value of the treasures,¹¹⁰ recent regional examples of pilferage during warfare,¹¹¹ and vulnerable antecedent conditions¹¹² also generated specific, foreseeable warnings.

In January 2003, Nancy C. Wilkie, president of the Archaeological Institute of America (AIA), punctuated the menace that war can inflict on cultural institutions, such as the Iraq National Museum, and explained that "AIA members and colleagues are already petitioning the U.S. government to exercise caution and providing adequate information about the location

¹⁰⁹ Gerstenblith, *supra* note 6, at 273-75.

¹¹⁰ See Priscilla Singer, Note, *The New American Approach to Cultural Heritage Protection: Granting Foreign Aid for Iraqi Cultural Heritage*, 11 CHI.-KENT J. INT'L & COMP. 1, at 16 (2011) (The National Museum staff recognized threats and took measures to safeguard the museum, including by having teams available to defend the museum and by moving thousands of items that could easily be stolen into storage areas). Convention for the Protection of Cultural Property, *supra* note 30, art. 4. (These were arguably reasonable measures to adhere to obligations under the Hague Convention "to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict.")

¹¹¹ Recent regional examples that should have heightened the expectation of pilferage during warfare include thefts at the Kabul Museum during the Soviet-U.S. proxy war in Afghanistan during the 1980s, looting and destruction during the Iran-Iraq War during the 1980s, and pillaging surrounding the Gulf War in 1991. See Cohan, *supra* note 9, at 40-41; see also Jehl & Becker, *supra* note 84, at B5.

¹¹² U.S. officials might have cognized that it was more difficult for Iraqi authorities to safeguard cultural heritage, because of the destruction caused during the 1991 Gulf War and the post-war sanction regime shorn funding for archaeological operations and preservation programs. see Forsyth, *supra* note 104, at 78-80.

of ancient sites to help protect them should a conflict occur.”¹¹³ Archaeologists provided the U.S. government with coordinates of crucial locations that needed to be secured due to the prospect of looting, and the Iraq National Museum was at the top of the list.¹¹⁴ A Pentagon memo, dated March 26, 2003, one week into the invasion and two weeks prior to the looting, recognized that a plan was required to “prevent further damage, destruction, and/or pilferage [of Baghdad’s museum, which is] . . . one of the largest archaeological museums in the world.”¹¹⁵ Concerned experts also imparted immediate notifications.

On April 9, three days prior to the start of the looting, the AIA provided warning letters to the White House, the Department of Defense, and Department of State, urging “upon the Coalition forces to provide immediate security, where necessary, for museums and major archaeological sites; to make public statements condemning the looting of sites and museums and warning that cultural objects removed from Iraq are stolen property; and, where necessary, to make appropriate shows of

¹¹³ Nancy C. Wilkie, *From the President: In the Shadow of War*, 56 ARCHAEOLOGY ARCHIVE 1, 2003.

¹¹⁴ See Gerstenblith, *supra* note 6, at 286-287 (The U.S. Department of State received warnings of the damage that could be inflicted on the Iraq National Museum and was apprised that it was the paramount archaeological site in the country.); Alfred Lubrano, *U.S., Scholars Spar on Looting of Artifacts*, PHILA. INQUIRER, Apr. 17, 2003, at A01 (An archaeologist at the University of Pennsylvania explained that if it were possible to “simultaneously explode the National Gallery, the Library of Congress, the cultural institutions of Philadelphia, Boston, and New York, then add the Louvre and the British Museum, that might describe the magnitude of loss to world culture and ancient scholarship that the looting wrought.”), available at http://articles.philly.com/2003-04-17/news/25476784_1_baghdad-museum-looting-pentagon; Convention Respecting the Laws and Customs of War on Land, *supra* note 75, art. 27 (The 1907 Hague Regulations mandate that the defending state designate the cultural location with “distinctive and visible signs.”); In this case, it would seem less necessary to mark the location and more unreasonable to remove cultural treasures from their routine location because the situs was known around the world. Andrew Lawler, *Saving Iraq’s Treasures*, SMITHSONIAN MAG., (June 2003), <http://www.smithsonianmag.com/people-places/saving-iraqs-treasures-83214090/?no-ist> (noting that for over eighty years these items were held in the National Museum in Baghdad).

¹¹⁵ Willis, *supra* note 1, at 225.

force to stop looting.”¹¹⁶ However, when members of the press queried Secretary of Defense Rumsfeld over whether scholars notified of potential peril to the museum, his reply was, “not to my knowledge.”¹¹⁷ Alternatively, General Meyers did have a recollection and remarked: “We did get advice on archaeological sites around Baghdad and in fact I think it was the Archaeological—American Archaeological Association—I believe that’s the correct title—wrote the Secretary some concerns.”¹¹⁸ While the rest of the world reacted to the loss of the archeological treasures amid pictures of the rubble, a bewildered Secretary of Defense Rumsfeld postulated: “My goodness, were there that many vases? Is it possible that there were that many vases in

¹¹⁶ Letter from Jane Waldbaum, President, Archaeological Institute of America, to Officials in the Department of State, the Department of Defense, the White House, and the military, (Apr. 9, 2003), (on file at <http://www.archaeological.org/pdfs/home/Letter04-09.pdf>); see Jehl & Becker, *supra* note 84, at B5 (reporting that “[r]epresentatives of the American Council for Cultural Policy . . . met with Defense and State Department officials in the months before the war” and that e-mail messages were also sent in the days prior to the attack).

¹¹⁷ Sandholtz, *supra* note 38, at 196-97.

¹¹⁸ *Id.* at 197-98 (“Ashton Hawkins, president of the non-profit American Council for Cultural Policy, wrote to Secretary Rumsfeld, Secretary Powell, and National Security Advisor Condoleezza Rice, and officials in other agencies . . . [and] asked what measures the U.S. invading forces would take to protect Iraq’s antiquities from damage or destruction. He received no response.” Hawkins and Maxwell L. Anderson, president of the American Association of Museum Directors, also informed of the issue in a *Washington Post* article on November 29, 2002. Hawkins and others met with Pentagon officials on January 29, 2003 and informed of important locations to protect and the Pentagon’s own Office of Reconstruction and Humanitarian Assistance apparently identified the Iraqi National Museum and the national bank as the top two targets for looters); see also *Open Declaration on Cultural Heritage at Risk in Iraq*, AIA NEWS, Mar. 19, 2003, available at <http://www.archaeological.org/news/advocacy/134> (stating the U.N. and international authorities warning that cultural heritage was in danger “The extraordinary global significance of the monuments, museums, and archaeological sites of Iraq (ancient Mesopotamia) imposes an obligation on all peoples and governments to protect them. In any military conflict that heritage is put at risk, and it appears now to be in grave danger.”); Terry Frieden, *Iraqi Antiquity Seized at U.S. Airport*, CNN (Apr. 20, 2003), <http://www.cnn.com/2003/LAW/04/23/sprj.nilaw.antiquities/index.html?iref=mpstoryview>; *Interpol Hunts Stolen Iraqi Art*, CNN (Apr. 18, 2003), <http://www.cnn.com/2003/WORLD/europe/04/18/sprj.nilaw.artifacts.interpol/>.

the whole country?”¹¹⁹

In terms of tort law causation, one can argue that Iraqi looters were the direct intervening cause of the damage to the museum.¹²⁰ Therefore, if U.S. authorities unreasonably neglected to heed warnings and failed to secure the museum, perhaps these inadequacies were of secondary significance. However, it might have been logical to forecast that the average Iraqi citizen would be needy in a country with a low per capita income and may not have had a viable means of earning money.¹²¹ This would particularly be the case after cities were bombed, infrastructure became decrepit, normal daily schedules and commercial activities halted, and futures made indeterminate with an occupying military force in the country. Perhaps Pentagon announcements that the city was secured effectively signaled that there was no competing authority capable of wielding force and no domestic government facilities to distribute humanitarian assistance to the people. The adversity and economic catastrophe was globally observed as the media displayed American troops making goodwill deliveries of bulk quantities of food.¹²² In addition, two weeks before the

¹¹⁹ O’Connell, *supra* note 95, at 1100 (citing comment of Apr. 12, 2003).

¹²⁰ See Frank Rich, *And Now, ‘Operation Iraqil Looting,’* N.Y. TIMES, Apr. 27, 2003 (reporting that an U.S. official stated, “I don’t think that anyone anticipated that the riches of Iraq would be looted by the Iraqi people” and that Press Secretary Ari Fleischer called the looting “a reaction to oppression.”); *U.S.: We Didn’t Anticipate Looting*, *supra* note 86 (U.S. military officials explaining that they failed “to anticipate Iraq’s cultural riches would be looted by its own people.”); Robert Fisk, *A Civilization Torn to Pieces*, THE INDEPENDENT Apr. 13, 2003, available at <https://www.commondreams.org/views03/0413-06.htm> (“The Iraqis did it. They did it to their own history.”).

¹²¹ Cohan, *supra* note 9, at 8, 10.

¹²² David Glazier, *Introduction*, 31 LOY. L.A. INT’L & COMP. L. REV. 1, 1-2 (2009) (pointing out that two days before the invasion Bush addressed the nation and stated that a U.S. attack “will deliver the food and medicine you need” and liberate the country to be “prosperous and free,” but instead “it has been the Iraqi people who have largely borne the costs” of the Bush Administration’s war); *Survey Shows High Prevalence of Food Insecurity in Iraq*, WORLD FOOD PROGRAMME (Sept. 28, 2004), <http://www.wfp.org/news/news-release/survey-shows-high-prevalence-food-insecurity-iraq> (noting that in September 2004, the United Nations World Food Program undertook an in-

looting, the Security Council adopted Resolution 1472 to summon the international community to assist in resolving the humanitarian crisis.¹²³ Comparatively, John Cohan points out that “[d]uring the Great Depression in the United States, there was widespread subsistence looting of prehistoric sites” and looters were selling the items to buy food.¹²⁴ It is unlikely that starving Americans perpetrated the thefts because they were bent on desolating public property, but so acted with an ostensible motive of heedfulness for survival. Perhaps the impetus for action was similar for Iraqis.

IV. SOVEREIGN AND OFFICIAL IMMUNITIES

A. *The Scenario*

With the aforementioned events surrounding the looting and the fact that Iraq does have a right to reacquire pilfered

vestigation and found that 6.5 million Iraqis, or 25% of the population, “remain highly dependent on [government] food rations.”)

¹²³ S.C. Res. 1472, para. 2, U.N. Doc. S/RES/1472 (Mar. 28, 2003); HIRO, *supra* note 64, at 192-94. (*Al Jazeera* and a dozen other channels “provided straight news that in many ways gave their viewers a more rounded picture—from the inside—than the Anglo-American networks did. While the Anglo-American networks tended to show Allied medics treating injured Iraqi civilians tenderly while their armed colleagues handed out drinking-water cans to thirsty Iraqi POWs, the Arab media, while airing the briefings and sound bites coming from London, Washington, and Doha . . . also showed the . . . charred Iraqi bodies, [corpses, blood-soaked pavements, blown-out brains, screaming infants and wailing women] . . . grievously wounded civilians . . . [children wounded by US cluster bombs,] dead Allied troops and injured Iraqi soldiers, hospitals choked with wounded and burnt Iraqis. Away from the battle zone, the Arab networks showed Iraqi suffering, humiliation, and panic – distraught families held up at Anglo-American military checkpoints, hooded Iraqi POWs, thousands of fleeing the capital, and civilians, deprived of food and water, driven to begging or looting.”).

¹²⁴ See Cohan, *supra* note 9, at 8. The poverty continued in the following weeks. See also Stan Crock, *Commentary: How the U.S. Can Keep Iraq from Unraveling*, BUS. WK., June 2, 2003, at 28 (“Peace is turning out to be hell for average Iraqis. Electricity is still out in many parts of Baghdad. Looting is rampant, as thieves fill trucks with everything from scrap wood to crates of weapons. The threat of carjacking and kidnapping keeps people locked inside their houses. Drinking water is dicey. Many can’t return to work, while children can’t attend school.”).

antiquities under international and domestic law, the Iraqi Interior Ministry's Economic Crimes Department's investigation into the acts of 39 countries to facilitate the return of stolen artifacts¹²⁵ is a prudent step. If items have not been discovered or were desecrated, however, an alternative query is whether damage remedies could be available against states or officials whose malfeasance or misfeasance led to the looting and destruction. Both the compulsion of a reluctant state to procure the return of an item and the attainment of damage remedies would likely require an assessment of sovereign and official immunities.

Pursuant to the comity-based act of state doctrine, the courts in one state will not question another state's public acts.¹²⁶ However, exceptions have developed. In the U.S., the 1976 Foreign Sovereign Immunities Act (FSIA) permitted the revocation of sovereign immunity from federal and state court jurisdiction when "rights in property taken in violation of international law are in issue."¹²⁷ In *Republic of Austria et al. v. Altmann*, the U.S. Supreme Court addressed whether Altmann could sue Austria in federal court under section 2 of the FSIA, which permits federal civil "claim[s] for relief in personam with respect to which the foreign state is not entitled to immunity."¹²⁸ Altmann sought to recover paintings that were expropriated from her uncle in 1938 during World War II and were

¹²⁵ See Kislova, *supra* note 5. International treaty obligations (as considered in Part II) suggest that equitable remedies are warranted to procure the return of identified items located in a foreign jurisdiction.

¹²⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory"); See also *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987) ("Under international law, a state or state instrumentality is immune from the jurisdiction of the courts of another state, except with respect to claims arising out of activities of the kind that may be carried out by private persons.").

¹²⁷ 28 U.S.C. § 1605(a)(3) (2012). If sovereign immunity applies, the typical procedure involves the state-defendant making a special appearance in U.S. courts and dismissing the case. See also RESTATEMENT, *supra* note 126.

¹²⁸ *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

presently held and displayed at the Austrian National Gallery.¹²⁹ Austria purchased the paintings in 1941, but in 1948, museum authorities falsely represented that the museum received valid title to the paintings through bequeath. Premised on these facts, the U.S. Supreme Court decided it was the judiciary's role to determine whether sovereign immunity should apply to Austria in U.S. courts and whether the 1976 FSIA would apply retroactively.¹³⁰ The Supreme Court affirmed the lower court's decision that pierced sovereign immunity and allowed the case to proceed in U.S. courts.¹³¹ The Supreme Court's decision led both parties to assent to arbitration in Austria. In January 2006, the arbitration panel awarded Altmann with ownership of five paintings that were stolen in 1938.¹³²

Based on the Supreme Court's decision to pierce sovereign immunity and the arbitration panel's decision to order Austria to return the paintings, it could be reasonable to extrapolate

¹²⁹ *Id.*

¹³⁰ *Id.* at 677, 679, 682, 702; 28 U.S.C. § 1602 (2012) ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."); See also Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984-85 (1952) (noting also that the "restrictive theory" of sovereign immunity started in 1952 and granted sovereign immunity to all public acts, but not private acts). With respect to the choice of a national forum, one might presume that the locus of the property and the situs of the wrong would provide a more appropriate forum. The respondent did initially seek, but was effectively hindered from attaining a remedy in Austrian courts. See *Altmann*, *supra* note 128, at 684-85, (noting that respondent sought to recover the paintings in Austrian courts but costs to proceed were specially set at \$350,000, but the Austrian Government appealed the partial waiver, and respondent dismissed the suit); *Republic of Austria v. Altmann*, 541 U.S. at 706 (Breyer, J., concurring) (The lower federal court did not address "any legal determination about the merits of Austrian legal procedures" but the sole issue before the U.S. Supreme Court was retroactivity of the FSIA's "expropriation exception.").

¹³¹ *Altmann v. Republic of Austria*, 317 F.3d 954, 965, 974 (9th Cir. 2002); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1201 (C.D. Cal. 2001).

¹³² William Grimes, *Maria Altmann, Pursuer of Family's Stolen Paintings*, *Dies at 94*, N.Y. TIMES, Feb. 9, 2011, at B19.

the circumstance to a hypothetical damage remedy.¹³³ The tribunal found that Altmann did have a legal right to the paintings because of the previous private ownership, just as, via domestic and international laws, the Iraqi public is the legal owner of artifacts that went missing during the 2003 war and occupation. The question is how a state, or perhaps even government officials, could be liable for potentially wrongful acts that set the looting in motion or permitted the thefts and destruction to transpire.

The legal deduction espoused requires assessing the pertinent factual chronology leading to the 2003 invasion and immunities at the international level (section B) and the domestic level (section C). Head of state immunity is distinguishable from sovereign immunity, but both are often treated in conjunction because of the assumption that the top official's state acts are immune from actions brought by other states.¹³⁴ There is, however, a separation in the case of war crimes tribunals and crimes against humanity because leaders can be held responsible for illicit acts regarding official immunity. This assumption is also employed in the case at hand: Section B considers how official immunity is pierced at the international level for grave crimes against humanity and war crimes and

¹³³ For example, if the Austrian National Gallery certifiably possessed the paintings under the same circumstances and those paintings later went missing, perhaps a damage claim could have been available for the market value of the paintings. If a damage claim would have been available against Austria, then Austria's recourse, based on the original transaction (rather than the cause of the later uncanny disappearance), would have been against the thieves who stole the art during World War II, intermediaries who sold the art to Austria, or Austrian officials who might have knowingly been involved in an illegal transaction or representation of fraud in title; all of whom would have been unavailable or without adequate funds, which means that without traceability of proceeds the Austrian taxpayer would assume the loss. However, even under the facts as presented, if Austrian funds were used to purchase the paintings and the Austrian National Gallery lost title and possession of the paintings, this prohibits the ability to display or sell the paintings and the Austrian taxpayer loses value.

¹³⁴ Joseph W. Dellapenna, *Head-of-State Immunity—Foreign Sovereign Immunities Act—Suggestion by the Department of State*, 88 AM. J. INT'L L. 528, 529-30 (1994).

extrapolates how immunity might be pierced for civil losses that flow from these wrongs.

B. The Substantive Claim Under International Level

1. Crimes Against Humanity

After the Cold War ended, the international community developed institutions that elevated human rights and enforced rules that criminalized state-sponsored wrongs.¹³⁵ The developments pierced official immunities, held a significant number of top officials criminally responsible, and placed many other leaders under threat of prosecution.¹³⁶ However, the International Court of Justice (ICJ) also articulated principles that upheld sovereign prerogative and official immunity at the domestic level.

In the ICJ *Arrest Warrant* case, Belgium, pursuant to its incorporation of Geneva Convention offenses and crimes against humanity into domestic law, issued an arrest warrant in April 2000 against an incumbent minister of the Democratic Republic of the Congo (DRC) for inciting racial hatred in speeches in the DRC in 1998.¹³⁷ The ICJ ruled that a state issuing a criminal arrest warrant against a foreign minister for official acts violates international law because it does not respect the international law doctrine of inviolability of the public minister.¹³⁸ The decision articulates that this immunity

¹³⁵ LOUIS HENKIN, *THE AGE OF RIGHTS* 1 (1990); Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 *WIDENER L. REV.* 265, 267 (2007).

¹³⁶ More leaders are under the shadow of prosecution than ever before. See generally Rutei Teitel, *Perspectives on Transnational Justice: Collective Memory, Command Responsibility, and the Political Psychology of Leadership: The Law and Politics of Contemporary Transitional Justice*, 38 *CORNELL INT'L L.J.* 837, 837 (2005); see also Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 *HARV. INT'L L.J.* 295, 295-96 (2005).

¹³⁷ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. ¶¶ 48, 54 (Feb. 14) [hereinafter *Congo v. Belgium*].

¹³⁸ *Id.* ¶¶ 48, 54 ("the issue against Mr. Abdulaye Yerodia Ndombasi of

from civil and criminal jurisdiction applies to top government officials, such as the “Head of Government and Minister of Foreign Affairs,” for acts committed while in office as a principle of customary international law.¹³⁹ In addition to the fact that this was a contentious dispute (rather than an advisory opinion),¹⁴⁰ Congo acknowledged that the immunity was limited to foreign unilateral assertions of jurisdiction.¹⁴¹ Indeed, if collective assent exists among states to establish an international tribunal, the international tribunal could pierce the official immunity of the heads of state.¹⁴²

For example, the International Criminal Court (ICC) is a

the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law”).

¹³⁹ *Id.* ¶¶ 51, 54. The Court emphasized that the decision was rendered on the issue of immunity from criminal process for acts perpetrated by an incumbent minister while in office. *Id.* ¶¶ 11-12, 21. The facts in contention did not involve civil liability for grave crimes against humanity perpetrated outside the leader’s home sovereign jurisdiction. The ICJ also recognized that the head of state immunity applied to restrict the civil and criminal jurisdiction of other states as a principle of customary international law. *Id.* ¶¶ 51, 54; *See also* ROGER O’KEEFE, CHRISTIAN J. TAMS & ANTONIOS TZANAKOPOULOS, THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES 88 (2013) (distinguishing the ICJ decision in the *Arrest Warrant* case and stating that “it is difficult to see how the rationale for and resultant nature of the immunity of the relevant State officers from foreign civil proceedings could be any different.”).

¹⁴⁰ *Congo v. Belgium*, 2002 I.C.J. ¶¶ 24, 27 (noting that both parties agreed that there was a contentious case when Congo filed the request to the ICJ and that the case was covered by their agreement to accept the compulsory jurisdiction of the ICJ statute). In a contentious dispute, the decision is effectively limited to the facts of the case.

¹⁴¹ *Id.* ¶ 48 (Congo admitting that “immunity does not mean impunity” because even if immunity barred “prosecution before a specific court or over a specific period [that] does not mean that the same prosecution cannot be brought, if appropriate, before another court which is not bound by that immunity, or at another time when the immunity need no longer be taken into account.”).

¹⁴² *Id.* ¶ 61 (recognizing that international criminal tribunals can assert jurisdiction over heads of state for crimes against humanity).

permanent international tribunal with a mission to “guarantee lasting respect for . . . the enforcement of international justice” by asserting jurisdiction over only “the most serious crimes of concern to the international community as a whole.”¹⁴³ Over the past several years, the ICC has instituted investigations and criminal proceedings against several African leaders.¹⁴⁴ The most recent controversy unfolded in December 2013 when the ICC issued an arrest warrant for incumbent Sudanese President Omar Al-Bashir.¹⁴⁵ Al-Bashir would not leave Sudan so to avoid possible execution of that warrant.¹⁴⁶ Kenya also issued an arrest warrant for Al-Bashir, but the warrant was reportedly issued on behalf of the African Union. The African Union opposed the ICC’s arrest warrant and views the ICC’s Western state membership as a form of neo-colonialism.¹⁴⁷ This contention of neo-colonialism invokes a common complaint about international tribunals, which is that state power can politicize decisions and pierce official immunity to prosecute select leaders, while leaders in strong states (that impel the prosecutions) could be immune from liability for similar injustices.¹⁴⁸

¹⁴³ Rome Statute of the International Criminal Court, pmbl, art. 5, July 17, 1998, 37 I.L.M. 1002, 1003 (entered into force July 1, 2002), *available at* [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)

¹⁴⁴ International Criminal Court, Situations and Cases, [No date], http://www.icc-cpi.int/EN_MENU/ICC/SITUATIONS%20AND%20CASES/Pages/situations%20and%20cases.aspx.

¹⁴⁵ Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan’s Leader*, N.Y. TIMES, Mar. 4, 2009, http://www.nytimes.com/2009/03/05/world/africa/05court.html?ref=omarhassanalbashir&_r=0.

¹⁴⁶ *Sudanese President to Skip Mandela Funeral Amid ICC Arrest Fears: Report*, SUDAN TRIB., Dec. 9, 2013, <http://www.sudantribune.com/spip.php?article49129>; *see also* Sudan’s President, Wanted by International Court, Cancels Visit to U.N., N.Y. Times, Sept. 25, 2013, <http://www.nytimes.com/2013/09/26/world/africa/sudans-president-wanted-by-international-court-cancels-visit-to-un.html?ref=omarhassanalbashir>.

¹⁴⁷ *Kenya to Challenge High Court Judge’s Arrest Warrant for Sudanese President*, CNN, Nov. 30, 2011, <http://www.cnn.com/2011/11/30/world/africa/kenya-sudan-spat/>.

¹⁴⁸ Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Politi-*

There have also been “ad hoc” international tribunals that were constituted outside the country where wrongs occurred and were presided over by international judges who applied international law.¹⁴⁹ Through these tribunals, the collective will to impose criminal liability for crimes against humanity and war crimes prevailed over official immunity.¹⁵⁰ By Security Council resolution, the International Criminal Tribunal (ICTY) was established, pierced official immunity, and extended jurisdiction over all “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”¹⁵¹ The ICTY prosecuted President Slobodan Milosevic¹⁵² and other top government lead-

cal Branches and the Transnational Prosecution of International Crimes, 105 A.J.I.L. 1, 2 (2011)(noting that even in European countries, such as Germany, England, France, Belgium, and Spain, which all have adopted universal jurisdiction statutes, “states have acted differently regarding similar complaints”); See Also Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 541-42, 550, 588 (2005) (“Choices of which atrocity to judicialize and which individuals to prosecute are so deeply politicized that it is problematic to pretend that they are in any way neutral or impartial,” thus resulting in the failure to apportion blame concomitant with responsibility with powerful states being absolved of responsibility); Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 899 (2005) (stating that the “failure to indict officials from the strong states, while relying on an increasingly moralistic body of law to impose punishments on a steady parade of officials from failed states or states defeated militarily by the United States and NATO, will undermine significantly the legitimacy of the ICC”).

¹⁴⁹ John Dermody, Note, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT’L & COMP. L. REV. 77, 81 (2006).

¹⁵⁰ *Prosecutor v. Taylor*, Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, ¶¶ 45-60 (Special Ct. for Sierra Leone May 31, 2004) (noting that this balance between immunity and imposing punishment is found in the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Nuremberg Charter).

¹⁵¹ S.C. Res. 827, art. 1, U.N. Doc. S/RES/827 (May 25, 1993), as amended by S.C. Res. 1166 U.N. Doc. S/RES/1166 (May 13, 1998) (establishing ICTY).

¹⁵² M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 805 (2008); David Tolbert, *The Evolving Architecture of International Law: The International Criminal Tribunal for the Former Yu-*

ers.¹⁵³ Shortly after the ICTY was established and also deriving from authority found in a Security Council resolution, official immunity was denied to Rwandan Prime Minister Jean Kambanda in the International Criminal Tribunal for Rwanda.¹⁵⁴

Based on the principle that the national criminal jurisdiction where war crimes and crimes against humanity were perpetrated is an optimal forum,¹⁵⁵ domestic and international authorities established hybrid domestic tribunals to hold former leaders responsible under international human rights law in East Timor, Cambodia, and Sierra Leone.¹⁵⁶ The Special Court

goslavia: Unforeseen Successes and Foreseeable Shortcomings, 26 FLETCHER FOREIGN WORLD AFF. 7, 7 (2002).

¹⁵³ Kenneth Roth, *ICTY: A Tribunal's Legal Stumble*, N.Y. TIMES, July 9, 2013, available at <http://www.hrw.org/news/2013/07/09/icty-tribunal-s-legal-stumble> (reporting that there have been 69 convictions of people involved in ethnic cleansing in the 1990s Balkan wars).

¹⁵⁴ *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, (Sept. 4, 1998) available at http://www1.umn.edu/humanrts/instree/ICTR/KAMBANDA_ICTR-97-23/KAMBANDA_ICTR-97-23-S.html; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing ICTR).

¹⁵⁵ Karim Khan & Rodney Dixon, Archbold: International Criminal Courts: Practice, Procedure & Evidence, vii (2d ed. 2005) (stating that “[t]he primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions.”); Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 143 (2003) (noting that hybrid court/truth commission systems were supported by the UN).

¹⁵⁶ *International Criminal Courts and Tribunals: Are They Necessary?*, in *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Cesare P.R. Romano et al. eds. 2004); Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 280, 297-98 (2007) (stating that hybrid tribunals first emerged in the late 1990s and have since included criminal trials in Bosnia, East Timor, Kosovo, and Sierra Leone). At the UN General Assembly's request, in 1998, the Secretary-General appointed the Group of Experts for Cambodia to produce a brief report on atrocities committed by the Khmer Rouge regime but it was not a significant fact-finding mission. Group of Experts, *The Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, at 6, U.N. Doc.

for Sierra Leone implemented a jurisdictional mandate to “prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.”¹⁵⁷ Likewise, with US guidance, training of judges, and evidence gathering, Saddam Hussein was convicted under Iraqi law in its special domestic tribunal.¹⁵⁸ Other countries have adopted the less punitive method of constituting truth commissions to address past wrongs.¹⁵⁹ As distinguished from the *Arrest Warrant* case, when the home sovereign jurisdiction does control or participate in proceedings to render justice or conducts investigations to redress for past crimes that occurred within its own jurisdiction, concerns over intrusion on judging sovereign head of state actions are attenuated.

2. Ambiguity within the Contentious Case Precedent

In rendering its decision on the balance between enforcing

S/1999/231, A/53/850 (Mar. 16, 1999); Stromseth, *supra*, at 286-89, 296 (noting that East Timor’s hybrid tribunal had only marginal success and tried only mid- and low-level suspects).

¹⁵⁷ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone P 1, U.N.-Sierra Leone, Jan. 16, 2002, <http://www.sc-sl.org/scsl-agreement.html>

¹⁵⁸ Zakia Afrin, *Post-Conflict Justice in Iraq*, 14 ANN. SURV. INT’L & COMP. L. 23, 26-29 (2008).

¹⁵⁹ O-Gon Kwon, *Procedural Challenges Faced by International Criminal Tribunals and the Value of Codification in International Criminal Procedure: Rules and Principles* 1415-18 (Goran Sluiter, Hakan Friman, Suzannah Linton, Salvatore Zappala & Sergehy Vasiliev, eds. 2013) (noting that due to the potential populace division over the acts of former leaders, domestic forums can face significant political challenges). Domestic political division may have been a reason for the substantial growth in the number of truth commissions. Dana Michael Hollywood, *The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq*, 33 BROOK. J. INT’L L. 59, 70-71 (2007) (noting that the number of truth commissions grew from six during the 1970s and 1980s to fourteen during the 1990s); Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 153, 157 n.15 (2005) (twenty-three truth commissions have conducted investigations); *See generally* Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* 14-15 (2001).

universal jurisdiction crimes, such as war crimes and crimes against humanity, and the customary law of official immunity, the ICJ referenced that it did not find cases in which heads of state and foreign ministers were subject to the criminal jurisdiction of national courts.¹⁶⁰ This issue festered in the high-profile case of former Chilean President Augusto Pinochet in 1998.

In 1985, Spain adopted a provision for criminal jurisdiction over universal offenses¹⁶¹ and issued an arrest warrant for Pinochet for torture, murder, and other crimes against humanity committed against the Chilean people after the 1973 coup.¹⁶² Spain sought jurisdiction over Pinochet when he was seeking medical treatment in Britain. The British House of Lords assessed the legitimacy of Spain's arrest warrant and extradition request on virtually all charges and ultimately held that Pinochet could be extradited to Spain because torture and other crimes against humanity are universal crimes that are not likely official functions.¹⁶³ However, Pinochet was not extradited to Spain because of his inability to stand trial due to health reasons; the grounds were unrelated to the validity of an arrest warrant issued by a national court.¹⁶⁴ Spain did convict a lower level military official and has pursued several other military officials in its courts for crimes against humanity committed

¹⁶⁰ Case Concerning the Arrest Warrant, *supra* note 137 at ¶¶ 58-61.

¹⁶¹ Ley Orgánica del Poder Judicial [Organic Law of the Judicial Power] art. 23(4) (B.O.E. 1985, 157 (Spain)).

¹⁶² *R. v. Bow St. Metrop. Stipendiary Magistrate (Ex parte Pinochet Ugarte)* (No.3), [2000] 1 A.C. 147 (H.L.) 190-93, 205 (appealed from Divisional Court of the Queen's Bench). The Pinochet dictatorship murdered or caused the disappearance of over 2,000 individuals and tortured an estimated 27,000 people. Van Dyke, *supra* note 159, at 157-58.

¹⁶³ *R. v. Bow St. Metrop. Stipendiary Magistrate* (2000), 1 A.C. 147 at 190-93, 205 (Ex parte Pinochet Ugarte).

¹⁶⁴ *Homecoming for General Pinochet*, N.Y. TIMES, Mar. 4, 2000, <http://www.nytimes.com/2000/03/04/opinion/homecoming-for-general-pinochet.html> (remarking that the extradition to Chile was based on a secret medical examination and that Home Secretary Jack Straw believed justice would not be served when Pinochet was so "enfeebled and mentally incompetent" but that courts in Belgium, Britain, France, Spain, and Switzerland objected).

during Argentina's Dirty Wars in the late 1970s and early 1980s. Argentina has recently sought the extradition of Spanish officials serving under the Francisco Franco dictatorship in Spain.¹⁶⁵

Two months after the ICJ handed down the *Arrest Warrant* decision, Germany enacted the German Code of Crimes Against International Law to permit its courts to assert criminal jurisdiction over war crimes, crimes against humanity, and genocide.¹⁶⁶ Consequently, Germany investigated Secretary of Defense Rumsfeld and CIA Director George Tenet for the Bush Administration's interrogation practices that were alleged to be torture, but the court dismissed the case because it believed the U.S. would be the more appropriate forum.¹⁶⁷ Germany's first indictment under the German Code of Crimes Against International Law occurred in 2011 against Rwandan rebel leaders for crimes against humanity.¹⁶⁸ None of these proceedings were brought against heads of state.

A home state can also waive immunity to permit another state to exercise jurisdiction over the head of state.¹⁶⁹ Whether a waiver is granted is less likely to depend on the gravity of the alleged offenses in question and more likely to hinge on the succeeding government's political willingness to waive jurisdiction. For example, when Spain petitioned Britain to extradite Pinochet to Spain, the Chilean government supported Pinochet,

¹⁶⁵ Raphael Minder, *Argentine Judge Seeks to Put Franco Officials on Trial*, N.Y. TIMES, Sept. 30, 2013, http://www.nytimes.com/2013/10/01/world/europe/argentine-judge-seeks-to-put-franco-officials-on-trial.html?_r=0.

¹⁶⁶ Act to Introduce the Code of Crimes Against International Law [of 26 June 2002 (trans. by Brian Duffett), <http://www.iuscomp.org/gla/statutes/VoeStGB.pdf>.

¹⁶⁷ IN THE NAME OF DEMOCRACY, supra note 93, at 79, 119-25, 206; Sandra Coliver, Jennie Green, & Paul Hoffman, Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies, 19 EMORY INT'L L. REV. 169, 206 (2005).

¹⁶⁸ Diana Magnay, *2 Alleged Rwandan Rebel Leaders Face War Crime Charges in Germany*, CNN, May 4, 2011, <http://www.cnn.com/2011/CRIME/05/04/germany.rwanda.war.crimes/>.

¹⁶⁹ *Congo v. Belgium*, 2002 I.C.J. ¶ 61; *Paul v. Avril*, 812 F. Supp. 207, 209-11 (S.D. Fl. 1993); *United States v. Noriega*, 746 F. Supp. 1506, 1518-19 (S.D. Fl. 1990); *In re Doe*, 860 F.2d 40, 46 (2d Cir. 1988).

did not waive immunity, fought extradition, and threatened to summon Spain to the ICJ for a violation of international law.¹⁷⁰ Yet this might not have been the position of the Chilean people at the time because polls revealed that Chileans believed Pinochet should have been brought to justice.¹⁷¹

3. Extraterritoriality and Wars of Aggression

In all of the cases previously addressed, government leaders perpetrated atrocities inside their home sovereign jurisdiction, but wrongs were so grave that international actors advanced a significant interest in transnational protection of human rights. This can be distinguished from the circumstance in which leaders promulgate orders for extraterritorial acts, such as by directing an illegal war and by issuing directives that may be war crimes in a foreign war zone, which may have direct reverberating effects on the international community. A war of aggression has been called the “supreme” form of crime¹⁷² and the act of state doctrine refers to the premise

¹⁷⁰ *Chile: Life Without Pinochet*, THE ECONOMIST, Oct. 14, 1999, <http://www.economist.com/node/325551> (also stating that “[s]ince Chile returned to democracy in 1990, its conservative opposition has held a veto over change”).

¹⁷¹ Transnational Institute, *Chile and the End of Pinochet*, Nov. 17, 2005, <http://www.tni.org/es/archives/act/4095> (stating that “Chilean opinion polls have consistently shown clear national majorities in favor of holding Pinochet and the military accountable for the crimes of the dictatorship”); Rosalba O’Brien, *Forty Years After Coup, Pinochet Again Divides Chile*, REUTERS, Sept. 8, 2013, <http://www.reuters.com/article/2013/09/08/us-chile-pinochet-idUSBRE98705J20130908> (reporting that 55% of Chileans viewed Pinochet’s regime as “all bad” and only 9% viewed it as “all good.”). Over forty cases were filed in Chile against Pinochet personally. *Chile: Life Without Pinochet*, *supra* note 170. Chilean courts stripped Pinochet of immunity several times since 2000, but health concerns prevented criminal trials for human rights crimes prior to his death in 2006. *Chile Timeline*, BBC, (last updated Aug. 14, 2012), http://news.bbc.co.uk/2/hi/americas/country_profiles/1222905.stm.

¹⁷² ROBERTO BELLELLI, INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 580 (2010); William A. Schabas, *The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They are Forever Banned?*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 123-26 (Dominic McGoldrick et al. eds., 2004).

that “the courts of one country will not sit in judgment on the acts of the government of another, done *within its own territory*.”¹⁷³

ICJ President Guillaume pointed out that there is universal jurisdiction for certain criminal acts occurring extraterritorially, such as piracy,¹⁷⁴ and an argument can be made that treaties and customary international law mandate states to affirmatively act to punish for the most serious crimes against humanity and war crimes.¹⁷⁵ In *The Princeton Principles on Universal Jurisdiction*, the professors wrote “[t]he principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the per-

¹⁷³ *Underhill*, 168 U.S. at 252. (Italics added).

¹⁷⁴ *Congo v. Belgium*, 2002 I.C.J. ¶¶ 12, 16 (separate opinion of Court President Guillaume); David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM AND MARY L. REV. 957, 967-68 (2009) (referencing that treaties have made terrorism a crime subject to universal jurisdiction).

¹⁷⁵ Non-derogative rules are those offenses for which no exception is permitted. Non-derogation is inherent to the concept of “jus cogens,” which the Vienna Convention defines as a “peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention on the Law of Treaties, art. 53, May. 23, 1969, 1155 U.N.T.S.; Amnesty International, *Denounce Torture: Torture and the Law* (Nov. 2001), <http://www.kintera.org/site/pp.asp?c=fnKNKUOyHqE&b=1196455> (calling the prohibition on torture a “peremptory norm” that prevails over all inconsistent customary laws); Jordan J. Paust, *Civil Liability of Bush, Cheney, et al. for Torture, Cruel, Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L. 359, 359 (2009) (noting that the Bush Administration’s 2001 to 2009 sanctions to use secret detention, forced disappearances, and coercive interrogations involved “serial criminality,” war crimes, torture, and cruel, inhumane, and degrading treatment that “implicat[es] universal jurisdiction and a universal responsibility.”); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 727 (1999) (stating that customary international law suggests “accountability is legally required”); See contra John Dugard, *Is the Truth and Reconciliation Process Compatible with International law ? An Unanswered Question*, 13 S. AFR. J. HUM. RTS. 258, 267 (1997) (human rights treaties do not seem to per se obligate prosecution)

petrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.”¹⁷⁶

With respect to prosecuting criminal acts deriving from a war of aggression, in 1919, the Allies composed a commission to investigate war crimes violations committed during World War I and compiled a list of twenty thousand German perpetrators.¹⁷⁷ This finding was incorporated into the 1919 Treaty of Versailles, which directed Germany to prosecute over eight hundred of the selected war criminals in domestic courts.¹⁷⁸

The Allied victory in World War II gave the US, UK, France, and the Soviet Union the ability to impose justice over occupied Germany and Japan. In 1945 the International Military Tribunal (IMT) was constituted to try German war criminals under a newly-created charter to punish crimes against peace, war crimes, and crimes against humanity.¹⁷⁹ The Nuremberg Charter stripped defendants of official immunity and the defense of acting pursuant to superior orders¹⁸⁰ and the IMT acquitted three defendants and convicted nineteen, with twelve sentenced to death.¹⁸¹

¹⁷⁶ Stephen Macedo, et al., *The Princeton Principles on Universal Jurisdiction* 16 (2001).

¹⁷⁷ M. Cherif Bassiouni, *World War I: “The War to End all Wars,” and the Birth of a Handicapped International Criminal Justice System*, 30 *DENV. J. INT’L L. & POL’Y* 244, 281 (2002).

¹⁷⁸ M. Cherif Bassiouni & Michael Wahid Hanna, *Ceding the High Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein*, 39 *CASE W. RES. J. INT’L L.* 21, 91-92 (2006/2007) (reporting that the local Prosecutor General only considered forty-five cases and indicted twenty-two individuals).

¹⁷⁹ Charter of the International Military Tribunal, arts. 6, 27, Aug. 8, 1945, 59 *Stat.* 1544, 82 *U.N.T.S.* 279 (articulating open-ended sentencing guidelines of “the right to impose. . . death or such other punishment as shall be determined. . . to be just” on conviction); *See also* Bernard Meltzer, *Remembering Nuremberg*, in *WAR CRIMES: THE LEGACY OF NUREMBERG 20* (Belinda Cooper ed., 1999); KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 28-29 (2006).

¹⁸⁰ Charter of the International Military Tribunal, *supra* note 179, arts. 7-8.

¹⁸¹ Office of U.S. Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression: Opinion and Judgment* 166, 189-90 (1947) (proceedings were conducted for 315 days).

After the Japanese surrender during World War II, the Instrument of Surrender stated that “the Supreme Commander for the Allied Powers. . . will take such steps as he deems proper to effectuate these terms of surrender,” which included bringing war criminals to justice.¹⁸² In January 1946, General Douglas MacArthur unilaterally established the tribunal by special proclamation¹⁸³ and the IMT for the Far East found seventy-eight defendants guilty, imposed seven death sentences, and imposed sentences that ranged from seven years to life on the remaining convictees.¹⁸⁴

The offenses that were prosecuted by World War II IMTs formed the bedrock of the UN Charter.¹⁸⁵ On October 23, 1946, President Harry Truman addressed the United Nations General Assembly and recommended that the Nuremberg Principles be codified into international law¹⁸⁶ and less than two months later the General Assembly affirmed the condemnation of wars of aggression in Resolution 95.¹⁸⁷ Later resolutions recognized that wars of aggression are proscribed as customary international law.¹⁸⁸

¹⁸² Instrument of Surrender, at 8, Sept. 2, 1945, 59 Stat. 1733, 139 U.N.T.S. 387; Proclamation Defining Terms for Japanese Surrender, at 10, July 26, 1945.

¹⁸³ See Special Proclamation: Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

¹⁸⁴ Zhang Wanhong, *From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial*, 27 CARDOZO L. REV. 1673, 1675 (2006).

¹⁸⁵ U.N. Charter art. 2(3) (“All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”); *Id.* art. 2(4) (requiring states to “refrain. . . from the threat or use of force against the territorial integrity or political independence of any state.”); *Id.*, at Ch. VII (authorizing the Security Council to assess and act on threats to international peace and security).

¹⁸⁶ U.N. Int’l L. Comm’n, *The Charter and Judgment of the Nurnberg Tribunal: History and Analysis*, at 11, U.N. Doc. A/CN.4/5, U.N. Sales No. 1949.V.7 (1949).

¹⁸⁷ G.A. Res. 95 (I), at 188, U.N. Doc. A/64/Add.2 (Dec. 11, 1946) (affirming the international law principles “recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal”).

¹⁸⁸ Report of the Special Committee on the Question of Defining Aggression, at 11, U.N. GAOR, 29th Sess., Supp. No. 19, U.N. Doc. A/9619 (Mar. 11-Apr. 12, 1974); *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986

The legality for the use of force and actions *jus in bello* and *jus post bellum* determine whether an invading and occupying force may owe damages for wrongs.¹⁸⁹ Following the Gulf War, Security Council Resolution 687 stated: "Iraq . . . is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."¹⁹⁰ The Security Council established a subsidiary organ to receive damage claims and the organ utilized inquisitorial investigative standards to determine "direct losses, damages, and injuries caused by Iraq's 1990 invasion of Kuwait."¹⁹¹

I.C.J. 14, 102-04 (June 27).

¹⁸⁹ Military and Paramilitary Activities (Nicaragua v. U.S.), 1986 I.C.J. 14, 102-04 (June 27); GROTIUS, *supra* note 79, at 192-94 (affirming that restitution is required for illegal wars); Yael Rouen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201, 201, 244 (2008) (noting that an occupation is "illegal if it involves the violation of a peremptory norm of international law," such as through a "violation on the use of force, or maintained in violation in the right to self-determination."); *See e.g.* Lene Bomann-Larsen, *License to Kill? The Question of Just v. Unjust Combatants*, 3 J. MIL. ETHICS 142, 148 (2004) ("If U.S. troops had no warrant to be in Vietnam in the first place, how can any killing and destruction in the pursuit of their unjust cause be morally justified?").

Legality of actions under *jus post bellum* might depend on whether the initial use of military force was legal. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION 25 (2009) (emphasizing that the "UN General Assembly implied that occupations resulting from illegal wars, that is, wars neither of self-defense nor ordered by the UN Security Council according to chapter VII, were themselves illegal."); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 438-39 (H. Lauterpacht ed., 7th ed. 1952) (noting that with violations of the laws of war, it is unclear that international law mandates the occupied population to be obedient to the occupier); JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 6-7 (G.D.H. Cole trans., 1950) (expressing that if an occupation is unlawful then it is impossible to have a legal obligation of obedience within the populace that is occupied); Brown, *supra* note 79, at 26 (stating that an occupier still "bears continuing post-war responsibility").

¹⁹⁰ S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991), para. 16.

¹⁹¹ Chung, *supra* note 79, at 145; *Id.* at 153-55, 162-63 (noting that damage claims were tendered, but Iraq had marginal ability to refute plaintiffs that frequently lacked records and evidence to substantiate the merits of the wrongs and harm). Moreover, Hussein's teetering and internationally ostracized regime would seem uninterested in the state's future financial ac-

Individuals and entities filed 2.68 million claims seeking more than \$350 billion in compensation,¹⁹² which was eight times the country's entire annual gross domestic product.¹⁹³ The country was apparently not excessively devastated because Kuwait's GDP rose to \$37.57 billion the year after Iraq was expelled in 1992 and to an all-time high of \$51.4 billion in 1993.¹⁹⁴

The mass tort-like liability assessed against Iraq following the Gulf War serves as precedent that international law requires damages to be paid for an illegal invasion¹⁹⁵ and, in conjunction with IMT precedent, possibly even that personal capacity claims could be brought.¹⁹⁶ To parameterize the con-

counts or in responding to abuse accusations.

¹⁹² Chung, *supra* note 79, at 147-50; Anderson, *supra* note 79, at 433; Chung, *supra* note 79, at 149-50 (explaining that the Commission placed claims of individuals into A, B, C, and D Categories that were quite analogous to tort law—"A" Claims assessed damages of \$2,500 to \$8,000 to those required to evacuate, and B, C, and D Claims involved those who "suffered personal injury" or damage as a result of Iraq's invasion and occupation, which may ranged into the hundreds of thousands of dollars).

¹⁹³ From 1985 to 1990, Kuwait's annual Gross Domestic Product (GDP) averaged \$41.3 billion, WORLD BANK, WORLD ECONOMIC OUTLOOK DATABASE, Apr. 2008, available at <http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/weoselgr.aspx> (using "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP" totals to \$248.036 billion over the six-year period).

¹⁹⁴ *Id.* (using "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP,"); CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 58 (Cambridge: Cambridge University Press 2003) (noting that violence in Kuwait had a comparatively small death toll relative to other conflicts).

¹⁹⁵ Tim Taylor & SJ Berwin, War: The Mother of All Mass Torts?, 6 SEDONA CONF. J. 161, 161, 167 (2005) (emphasizing that war might be viewed as a mass tort and that the legality of warfare could be tested in international courts). The 1991 Gulf War Tribunal assessed liability against the state for the government's acts, although Hussein's regime monopolized government revenues while in power.

¹⁹⁶ If a war is illegal and could impose criminal liability on government leaders, pursuant to a "beyond a reasonable doubt" or similarly high-threshold burden of evidence, it seems that civil liability, with a lower threshold burden of "preponderance of the evidence," could also be assessed and would be justified against government leaders who placed illegal actions in motion. Civil actions have been brought against heads of state for human rights abuses in foreign courts. JOANNE FOAKES, THE POSITION OF HEADS OF STATE AND SENIOR OFFICIALS IN INTERNATIONAL LAW 170-72 (2014) (noting

text of civil immunities in *infra* part IV(C), the next section addresses how the Bush Administration pushed for the 2003 invasion of Iraq against the will of the international community and how it sought diplomatic assent from states based on domestically-constituted false allegations.

4. The 2003 Invasion of Iraq

Prior to the 2003 invasion of Iraq, the Bush Administration avowed that secret intelligence information confirmed that Iraq possessed prohibited weapons and programs that posed a security threat to the US, but United Nations inspection teams were unable to uncover those alleged weapons during several months of inspections prior to the war and periodically updated the Security Council of its lack of an incriminating discovery and of generally favorable Iraqi compliance with the process.¹⁹⁷ Most Security Council members opposed the use of force, called an invasion without Council authorization illegal, and wanted to grant inspectors additional time to ensure that there were no proscribed weapon programs, but the Bush administration ordered an attack without an authorization.¹⁹⁸

that some foreign courts have not drawn a distinction between head of state immunity in criminal and civil proceedings, which barred cases, and others have made a distinction between civil and criminal immunity, and emphasizing that this same division has been found in U.S. courts under the Alien Tort Statute jurisprudence). In a diplomatic example involving the recent crisis over Russia's annexation of Crimea, following the populace's ratification to become part of Russia, President Obama civilly sanctioned a list of high-level Russian officials in their individual capacity, but not Russian President Putin. Aamer Madhani, *Obama Imposes Sanctions on 7 Russians After Crimea Vote*, USA TODAY, Mar. 17, 2014, <http://www.usatoday.com/story/news/world/2014/03/17/white-house-sanctions-russia-officials-ukraine/6518417/>.

¹⁹⁷ Bejesky, *Weapon Inspections*, *supra* note 78, at 370-75.

¹⁹⁸ *Id.* at 342-50; Thomas M. Frank, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 A.J.I.L. 88, 97 (2006) (stating that the Bush administration continued to promote myths of connections between al-Qaeda and Iraq and of Iraqi weapons of mass destruction even though there was no evidence, and remarking that they "prefer[red] to live in a bubble of false information, rather than stand exposed as facilitators of what is defined as aggression").

After the invasion, United Nations Secretary-General Kofi Annan remarked that, “from our point of view, [and] from the Charter point of view, it was illegal.”¹⁹⁹ As a response to the invasion of Iraq, the U.N. Secretary-Generals’ High-Level Panel on Threats, Challenges and Change was constituted and concluded that the context of the Iraq invasion would make such a military attack illegal.²⁰⁰ Nelson Mandela, the late former South Africa President and Nobel Laureate, stated of the Bush Administration’s bellicosity that led to the Iraq War: “What I am condemning is . . . one power, with a president who has no foresight, who cannot think properly. . . If there is any country that has committed unspeakable atrocities in the world, it is the United States of America. They don’t care.”²⁰¹ There were 116 Non-Aligned Movement countries and 57 Organization of the Islamic Conference members opposed to the use of force against Iraq.²⁰² One week into the invasion, the 22

¹⁹⁹ *Iraq War Illegal, Says Annan*, BBC, Sept. 16, 2004, available at <http://new.bbc.co.uk/2/hi/3661134/stm>; Felicity Barringer, *Annan Warns of World Crisis*, N.Y. TIMES, July 31, 2003, at A16 (Annan calling the action a threat to the U.N.’s viability that placed the Security Council system in “crisis”); *Malaysian PM Condemns Iraq War*, BBC, Mar. 24, 2003, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/2880519.stm> (reporting that the Malaysian Prime Minister sought to bring criminal charges for the invasion).

²⁰⁰ HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 63, U.N. GAOR, 59th Sess., U.N. Doc. A/59/565 (Dec. 2, 2004), available at https://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (“in a world full of perceived potential threats, the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action”); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004) (explaining that the Bush Administration’s legal theory was “not persuasive”); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT’L L. 607, 608 (2003) (stating that a few Bush Administration lawyers still offered “self-defense” or anteceding collective security authorizations by the Security Council as rationales, but political officials “boldly proclaim[ed] a new policy that openly repudiates the Article 2(4) obligation”).

²⁰¹ Jarrett Murphy, *Mandela Slams Bush on Iraq*, CBS NEWS, Jan. 30, 2003 <http://www.cbsnews.com/stories/2003/01/30/iraq/main538607.shtml>.

²⁰² U.N. SCOR, 58th Sess., 4726th mtg. at 17, 28, U.N. Doc. S/PV.4726 (Mar. 26, 2003) (Brazilian delegation remarked that it “profoundly deplore[s]”

members of the Arab League held an emergency summit in Cairo and adopted a unanimous resolution, with only Kuwait abstaining that, “demanded the immediate and unconditional withdrawal of U.S. and British forces from Iraq” and pronounced that the attack was a “violation of the United Nations Charter and a threat to world peace.”²⁰³ While Spanish Prime Minister Jose Maria Aznar was one of President Bush’s spotlighted coalition members prior to the invasion,²⁰⁴ one year after the war, Jose Luis Rodriguez Zapatero, the new Spanish prime minister referenced Iraq and remarked: “pre-emptive wars, never again; violations of international law, never again.”²⁰⁵ Luis Moreno-Ocampo, the International Criminal Court’s chief prosecutor, stated that President Bush or British Prime Minister Tony Blair might one day have to answer investigations on war crimes charges.²⁰⁶ In September 2012, Nobel Laureate Desmond Tutu “called . . . for Tony Blair and George Bush to face prosecution at the International Criminal Court for their role in the 2003 U.S.-led invasion of Iraq.”²⁰⁷

the initiation of military action and, in particular, the fact that force has been used without the express authorization of the Security Council”).

²⁰³ *Arab States Line Up Behind Iraq*, BBC, Mar. 25, 2003, http://news.bbc.co.uk/2/hi/middle_east/2882851.stm; Final Communiqué of the Thirty-first Session of the Islamic Conference of Foreign Ministers, Istanbul, para. 41 (June 16, 2004), *reprinted in* Report of the Secretary-General on the Work of the Organization, UN Doc. A/58/856-S/2004/582, at 6, 13 (stating that the Conference adamantly rejected “the principle of preemptive military strikes against any country under any pretext whatsoever”).

²⁰⁴ *Full Text: Azores Press Conference*, THE GUARDIAN, Mar. 17, 2005, <http://theguardian.com/world/2003/mar/17/iraq.politics2>.

²⁰⁵ *Iraq Proves Pre-emptive Wars Fail: Spanish PM*, ASSOCIATED PRESS, May 3, 2004; *Debate: “Will Hussein Get a Fair Trial?”*, 37 CASE W. RES. J. INT’L L. 21, 23-24 (2006/2007) (stating that Professor Doebbler noted that during his discussions with international lawyers and political representatives from sixty countries, all called the aggression “illegal” and the only arguments came from U.S. lawyers).

²⁰⁶ Gethin Chamberlain, *Court ‘Can Envisage’ Blair Prosecution*, SUNDAY TELEGRAPH, Mar. 18, 2007, <http://www.telegraph.co.uk/news/uknews/1545876/Court-can-envisage-Blair-prosecution.html>.

²⁰⁷ *Tutu: Bush, Blair Should Face Trial at the Hague*, ASSOCIATED PRESS, Sept. 2, 2012, *available at* <http://usatoday30.usatoday.com/news/world/story/2012-09-02/tutu-bush-iraq/57534404/1>.

For the following chronological detail relating to the inference that the war would be forthcoming irrespective of the veracity of allegations about illicit weapons and security threats and whether there was a legal basis to use force, it is important to underscore that the invasion of Iraq took place on March 19, 2003 and that post-war investigations determined that Iraq had no WMDs or ties to al-Qaeda.²⁰⁸ According to former Treasury Secretary Paul O'Neill's interview on 60 Minutes, the newly-inaugurated president tasked appointees to search for ways to overthrow the Iraqi regime at the first National Security Council meetings in January and February 2001.²⁰⁹ The New York Times sued the Department of Defense in a Freedom of Information Act action and in 2008 finally obtained 8,000 pages of "e-mail messages, transcripts and records describing years of private briefings" and discovered that Bush's appointees in the Office of the Secretary of Defense developed a program that would employ "independent" military analysts who would appear in the national news to persuade an unwilling American populace for an invasion and occupation of Iraq.²¹⁰ The New York Times reported that the program was developed before 9/11, and that the propaganda program was

²⁰⁸ Bejesky, *Intelligence Information*, *supra* note 78, at 817-19, 858-59, 875-77.

²⁰⁹ Based on former Secretary of Treasury Paul O'Neill's startling interview on 60 Minutes in 2004 and from the accounts of other officials, top Bush Administration officials examined methods to depose the Iraqi government at the first White House National Security Council meetings in January and February 2001. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 63-64 (2011) [hereinafter Bejesky, *Politico*]; Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 215-20, 229-31 (2011) [hereinafter Bejesky, *Geopolitics*] (explaining that the White House established a Future of Iraq Project in early 2002, which selected Iraqi defectors to generate several volumes of advisory reports for government and private sector reform during a planned occupation of Iraq, and referencing that those defectors became prominent government officials in Iraq after Hussein's regime was ousted); Eric Schmitt & James Dao, *Iraq is Focal Point as Bush Meets with Joint Chiefs*, N.Y. TIMES, (Jan. 11, 2001), at A20 (noting the focus on Iraq even prior to inauguration).

²¹⁰ David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand: Court-ing Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at A1.

implemented and carried out for several years.²¹¹ Appointees within the Secretary of Defense for Policy established an Office of Special Plans,²¹² which, according to the Senate Select Committee on Intelligence's investigation, was an unofficial and unauthorized intelligence unit within the Office of the Secretary of Defense that created and provided unsubstantiated allegations about threats from Iraq to the White House.²¹³

Iraqi defectors, who desired regime change, held a favorable relationship with the Bush administration and appeared in the media with terrorist and chemical, biological, and nuclear weapon allegations after the initial White House National Security Council meetings and after 9/11.²¹⁴ The Bush Administration commenced a White House-based Future of Iraq Project in early 2002 and staffed the project with defectors who proposed economic, social and government reforms in the event

²¹¹ *Id.*

²¹² Charles Tiefer, *The Iraq Debacle: The Rise and Fall of Procurement-Aided Unilateralism as a Paradigm of Foreign War*, 29 U. PA. J. INT'L L. 1, 33 (2007).

²¹³ DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL, REVIEW OF PRE-IRAQI WAR ACTIVITIES OF THE OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR POLICY, Feb. 9, 2007, available at <http://i.a.cnn.net/cnn/2007/images/02/09/dodig.execsummary.020907.pdf>; SENATE SELECT COMMITTEE ON INTELLIGENCE, INTELLIGENCE ACTIVITIES RELATING TO IRAQ CONDUCTED BY THE POLICY COUNTERTERRORISM EVALUATION GROUP AND THE OFFICE OF SPECIAL PLANS WITHIN THE OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR POLICY 2, S. REP. NO. 108-301, June 5, 2008 (Senator Levin criticizing and proposing to "Review the activities of the Undersecretary of Defense for Policy" in September 2005).

²¹⁴ Robert Bejesky, *Defectors and the Moral Hazard Problem*, 5 WM. & MARY POL'Y REV. (Forthcoming 2014); Bejesky, *Politico*, *supra* note 209, at 62-66. The Administration increased funding to the Iraqi National Congress, the group of defectors assembled by the CIA in the early 1990s, and they sourced information pertaining to military operations, weapons, war crimes, and internal developments inside Iraq. S. REP. 109-330, at 30 (stating that between May and July, "[t]he National Security Council Deputies Committee decided that the [INC] program should be continued"); Martin Kettle, *Bush Funds Iraqi Opposition*, GUARDIAN UK, Feb. 2, 2001, <http://www.guardian.co.uk/world/2001/feb/03/iraq.usa>. In May 2002, the State Department ceased funding the INC, but two months later Bush's National Security Council reapproved INC operations; and in late-October 2002 the Pentagon's Defense Intelligence Agency ("DIA") accepted responsibility for the INC. S. REP. 109-330, at 30-31.

of the overthrow of Hussein's regime.²¹⁵ The Bush White House constituted an Office of Global Communication (OGC) that spearheaded the operations of public relations (PR) firms.²¹⁶ Consequently, PR firms introduced talking points about Iraq for the president and other top officials,²¹⁷ including by using defector accounts²¹⁸ and coached dissidents on strategies to appear cogent in the mass media, while flooding the media with the White House's message.²¹⁹ The Times of London wrote that the OGC earmarked \$200 million for a "PR blitz against Saddam Hussein . . . [to persuade] American and foreign audiences, particularly in Arab nations skeptical of U.S.

²¹⁵ Bejesky, *Geopolitics*, *supra* note 209, at 215-19.

²¹⁶ Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. 967, 992, 1033-34 (2012).

²¹⁷ GREG GRANDIN, *EMPIRE'S WORKSHOP: LATIN AMERICA, THE UNITED STATES, AND THE RISE OF THE NEW IMPERIALISM* 229 (2006); Martha Brant, *West Wing Story: Ladies and Gentlemen . . . the Band*, NEWSWEEK, Sept. 18, 2002, <http://www.newsweek.com/west-wing-story-ladies-and-gentlemen-band-144997> (emphasizing the Bush Administration's depth and expanse of information domination that marketed war); Douglas Quenqua, *U.S. Training Iraqis in Media to Raise Support for Attack*, PR WEEK, Sept. 2, 2002, <http://www.prweekus.com/article/us-training-iraqis-media-raise-support-attack/1233725> (reporting that the "State Department has begun providing media training to a handful of Iraqi dissident who will help make the Bush administration's argument for the removal of Saddam Hussein.").

²¹⁸ See S. REP. 109-330, at 187 (noting that seven of the fifteen SSCI Senators believed that the investigation should have more deeply assessed the false information that the INC directly transmitted to the Bush Administration and U.S. government agencies, which bypassed the Intelligence Community). The Director of the INC's Washington office wrote in a June 26, 2002 memo to the Senate Appropriations Committee that justified its funding: "[d]efectors, reports, and raw intelligence are cultivated and analyzed and the results are reported through the INC newspaper (Al Mutamar), the [A]rabic and western media and to appropriate governmental, non-governmental and international agencies . . . [and to] U.S. Governmental recipients . . . [in] the Department of Defense [and the White House]." *Id.* This memo was delivered while the State Department had responsibility for monitoring INC activities and the memo revealed that the five individuals on the team who analyzed and processed the raw data for Al Mutamar's reports were all inner members of the INC. James Risen, *Data From Iraqi Exiles Under Scrutiny: War Critics Say U.S. Relied Too Much on Dubious Information*, N.Y. TIMES, Feb. 12, 2004, at A16.

²¹⁹ GRANDIN, *supra* note 217, at 229.

policy in the region [and utilized] . . . advertising techniques to persuade crucial target groups that the Iraqi leader must be ousted.”²²⁰

Covert operations were designed for Iraq. In late 2001, Bush approved covert operations for the CIA (called “Anabasis”) that consisted of implementing propaganda operations inside Iraq that would disseminate that the regime was under threat and designing plans for blowing up railroad lines and communication towers and assassinating key officials, all of which could impel retaliation and initiate a war.²²¹ In April 2002, Anabasis involved recruiting Kurds for operations that would have endangered their lives if the Iraqi government had discovered the operations, but to induce Kurds to participate, CIA officials and the Bush Administration guaranteed that there would be a military invasion.²²² Indeed, President Bush tasked military commanders with developing war plans starting in November 2001 and received periodic briefings on sequential iterations of the war plans, while officials publicly denied that there were war plans or diverted the topic when journalists inquired.²²³

All of this preplanning for war began long before Congress and the United Nations Security Council even contemplated the issue of Iraq in September and October of 2002, but the publicity was already convincing the American public of the peril from Iraq’s alleged weapons of mass destruction.²²⁴ What befell at the international level and led to an invasion without Security Council approval was opprobrious, but strife also de-

²²⁰ Shelton Rampton & John Stauber, *Weapons of Mass Deception: The Uses of Propaganda in Bush’s War on Iraq* 38 (2003).

²²¹ Michael Isikoff & David Corn, *Hubris: The Inside Story of Spin, Scandal, and Selling of the Iraq War* 7-8, 10, 153, 155-57 (2006).

²²² *Id.* at 10-12, 47, 82, 156.

²²³ BOB WOODWARD, *PLAN OF ATTACK* 3-4, 30-31, 34-37, 40, 42, 55-59, 75-79, 96-103, 120-25, 129-30, 137, 157-59, 188 (2004). There was an early political agenda to go to war, and by mid-2002, the media announced that there were indeed war plans and that U.S. troops were being deployed to countries contiguous to Iraq. Bejesky, *Politico*, *supra* note 209, at 62-70.

²²⁴ Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348-50, 352-53 (2012).

veloped on constitutional war powers, which calls for an assessment of domestic-level official immunities and an examination of whether equity might gainsay grounds for granting immunity.

C. Domestic Level: Public Policy and Comity

1. Official Immunities and the FTCA/FELRTCA

The extent to which US law affords civil immunity to US government officials can be relevant to equity and comity considerations, to provide a signal for US policy if a US court is requested to enforce a foreign court's judgment, and to indicate whether a foreigner can initiate a civil claim against a US official in American courts. Substantive international law prohibits wars of aggression, U.S. law proscribes war crimes,²²⁵ and potential theories of culpability identify those who can be held liable for transgressing international law, but there are substantial hurdles that prevent U.S. courts from rendering criminal punishment or civil damages on US government officials.

Sovereign immunity has historically bestowed U.S. government officials with plenary immunity for *ex officio* duties, including for tortious conduct,²²⁶ so that political leaders and administrators can exercise reasonable and efficient discretion without presentiment of punishment²²⁷ or the specter of frivo-

²²⁵ Samuel Brenner, "I am a Bit Sickened": Examining Archetypes of Congressional War Crimes Oversight After My Lai and Abu Ghraib, 205 MIL L. REV. 1, 10 (2010); David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U.J. INT'L HUM. RTS., 30, 24 (2009) ("United States remains in large measure a free haven for perpetrators of crimes against humanity [including for] . . . any U.S. citizen who may perpetrate a crime against humanity overseas.").

²²⁶ *Orff v. United States*, 545 U.S. 596, 599-603 (2005) (barring suits against the U.S. under sovereign immunity); 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS* §2.02 (2005).

²²⁷ *Scheuer v. Rhodes*, 416 U.S. 232, 238-40 (1974); Vienna Convention on Diplomatic Relations, pmbl., Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (stating that "the purpose of such privileges and immunities [for diplomatic officials] is . . . to ensure the efficient performance of the functions of diplomatic missions as representing states")

lous lawsuits.²²⁸ Exceptions to permit plaintiff claims are found in the Federal Tort Claims Act (FTCA) and the *Bivens Doctrine*, which is available against individuals.²²⁹

The FTCA can waive sovereign immunity for tort claims committed by U.S. government employees,²³⁰ making the claim available in a manner that would be comparable to a lawsuit against a private individual.²³¹ A plaintiff can initiate the suit against the United States when government officials or employees commit torts while acting within the “scope of employment,” which permits substituting the United States as the defendant.²³² However, the FTCA excludes cases involving military combat activities during wartime and “claim[s] arising in a foreign country.”²³³

Sovereign immunity and the list of FTCA exclusions do not impede plaintiffs from suing government actors in a “personal

²²⁸ Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 723-24 (2006) (stating that official immunity provides protection from money damage suits for claims arising from government actors’ official conduct).

²²⁹ *Carlson v. Groen*, 446 U.S. 14, 20-21 (1980) (“Four additional factors, each suggesting that the Bivens remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respondent to the FTCA action . . . “[T]he Bivens remedy in addition to compensating victims, serves a deterrent purpose. Because the Bivens remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.”). ** (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971))

²³⁰ 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (2013).

²³¹ 28 U.S.C. § 2674 (2013) (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages”).

²³² See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2013); 28 U.S.C. 1346(b) (2013); See also, Elizabeth A. Wilson, *Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL’Y 175, 176 (2008).

²³³ See, e.g., § 2680; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 (2004) (holding that the FTCA’s “exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”); *Koohi v. United States*, 976 F.2d 1328, 1333 n.5 (9th Cir. 1992) (stating that combatant activities are those “activities both necessary to and in direct connection with actual hostilities”).

capacity” suit,²³⁴ which is still generally defended by the Department of Justice.²³⁵ Under *Bivens*, a government agent, sued in personal capacity for a claim for damages, will have qualified immunity if there is no violation of a clearly established constitutional right or if a constitutional deprivation resulted from a government agent’s reasonable mistake.²³⁶ Given that novel *Bivens* challenges have been relatively ineffectual over the past three decades,²³⁷ it is improbable that Iraqis would have U.S. constitutional rights for a deprivation of their public right to antiquities in their country due to the directives of U.S. government agents who executed a war and occupation.²³⁸

²³⁴ Seamon, *supra* note 228, at 722-23.

²³⁵ See, Paul Michael Brown, *Personal Liability Tort Litigation Against Federal Employees: A Primer*, 8 ST. THOMAS L.J. 329, 329 (2011) (reporting that the Department of Justice represents thousands of federal employees each year in personal civil liability suits).

²³⁶ See *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) (holding that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”); See generally, John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1296-97 (2012).

²³⁷ George D. Brown, ‘Counter-Counter-Terrorism Via Lawsuit’ – *The Bivens Impasse*, 82 S. CAL. L. REV. 841, 845 (2009) (stating that since 1983, the Supreme Court has rejected the past seven attempts to apply *Bivens* actions in new factual scenarios, based generally on political question grounds).

²³⁸ Foreigners in a zone of occupation are unlikely to have rights under the U.S. Constitution. See, *e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (holding that it is “well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders”); *Johnson v. Eisentrager*, 339 U.S. 763, 765-66, 778 (1950) (holding that nineteen alien petitioners, who were convicted by a U.S. military commission for taking hostile actions against the U.S. in China and were currently being held in a German prison, were not protected under the Constitution as an American citizen abroad would be protected); *Id.* at 779 (“It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.”); *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948) (*per curiam*) (denying habeas relief under the Supreme Court’s original jurisdiction to Japanese officials who were convicted by the U.S. military tribunal in Japan, despite that the U.S.

Likewise, in *Westfall v. Erwin*, the Court held that absolute immunity is afforded to federal officials under state tort law when acting within the scope of employment, but not when torts were committed outside official duties and when officials acted discretionarily.²³⁹ After the Supreme Court's decision in *Westfall*, Congress quickly enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA) to accord absolute immunity to U.S. government officials in civil suits for claims arising in foreign countries²⁴⁰ and for omissions, negligent, or wrongful acts that those officials commit "while acting within the scope of [their] employment."²⁴¹ How-

occupied and effectively controlled Japan); *Khalid v. Bush*, 355 F. Supp. 2d 311, 320-23 (D.D.C. 2005) (holding that nonresident aliens that are seized and detained outside U.S. borders do not have constitutional rights). *But see*, e.g., *Brig Amy Warwick*, 67 U.S. 635, 698-99 (1862) (stating that only Congress has the authority to "change the country and all its citizens from a state of peace to a state of war," which meant that the President did not have "power to set on foot a blockade under the law of nations, and that the capture of the vessel and cargo in this case, and in all cases before us in which the capture occurred before the 13th of July, 1861, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored."). It is also unlikely that U.S. citizens would have rights of indemnity against the President or other government agents if Iraqis attained remedial relief out of the U.S. Treasury for stolen antiquities.

²³⁹ *See*, *Westfall v. Erwin*, 484 U.S. 292, 297-298 (1988); *See also*, *Doe v. Millan*, 412 U.S. 306 (1973).

²⁴⁰ Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, §2679, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2680k (2012))(noting that exceptions to liability include "[a]ny claim arising in a foreign country")

²⁴¹ 28 U.S.C. § 2679(b)(1) (2012); *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 107-09 (D. D.C. 2007) (noting that qualified immunity is granted to employees and officials accused of torture). FELRTCA eliminated the discretionary prong at the common law and granted absolute immunity to all federal employees irrespective of whether the employee was acting discretionarily and committing a common law tort. *United States v. Smith*, 499 U.S. 160 (1991). Consequently, a plaintiff's typical challenge under the FELRTCA would be to assert that the employees were acting outside the scope of their employment. *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 110, *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762, 765 (D.C. Cir. 2011); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 105, 108 (D. D.C. 2010) (dismissing suit against employees and U.S. government). If they were acting within the scope of their official duties, the FTCA provides the exclusive remedy for

ever, the policy underlying FELRTCA may not have been intended to shelter officials for intentional or criminal wrongs.²⁴²

Similar to the immunity afforded to heads of state at the international level, the US Supreme Court has ruled that the President is absolutely immune for official acts taken while in office because of the possibility that the President could be disrupted from official duties by plaintiffs with civil damage claims.²⁴³ Additionally, courts and Congress defer to executive prerogative when national security is involved,²⁴⁴ top officials may have absolute immunity for civil damages for acts in their “discretionary authority in such sensitive areas as national security or foreign policy,”²⁴⁵ and the Court has been reluctant to examine the scope of the Commander in Chief authority on political questions, standing, ripeness, and mootness grounds after dozens of cases challenged presidential power during the

a federal employee’s common law torts. 28 U.S.C. § 2679(b)(1) (2013). FELRTCA immunity is inapplicable to legal actions against federal employees when they violate the Constitution or federal statutes, in which case qualified immunity applies. 28 U.S.C. § 2679(b)(2) (2013); *See Harlow*, 457 U.S. at 807.

²⁴² The FELRTCA was designed to protect government employees when they act negligently within the scope of their employment, but not to provide shelter for intentional torts or criminal acts. BETH STEPHENS, JUDITH CHOMSKY, JENNIFER GREEN, PAUL HOFFMAN & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURT 291-95 (2d. ed. 2008); *See generally* Brief for United States Representative Barney Frank as Amicus Curiae Supporting Appellant Jennifer K. Harbury at 3-4, *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2007) (No. 06-5282); H.R. REP. NO. 100-700, at 5 (1988) (writing that the FELRTCA was intended to make federal employees immune from suit by making the United States defend the case, unless the government defendant is accused of egregious misconduct). This is consistent with precedent. *See e.g. Wood v. Strickland*, 420 U.S. 308, 322 (1975) (an official would not have qualified immunity if the official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional right of the affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury”).

²⁴³ *See, Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

²⁴⁴ Robert Bejesky, *Cognitive Foreign Policy: Linking Al Qaeda and Iraq*, 56 HOW. L.J. 1, 10-13 (2012) [hereinafter Bejesky, CFP]; Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24 ST. THOMAS L. REV. 399, 402-05 (2012).

²⁴⁵ *See e.g., Harlow*, 457 U.S. at 812.

Vietnam War.²⁴⁶ On the other hand, the Supreme Court has long held “that when the President takes official action, the Court has the authority to determine whether he has acted within the law”²⁴⁷ and held that the President was not even temporarily immune from civil lawsuits unrelated to official functions while holding office.²⁴⁸ The next section provides a synopsis of the questionable constitutional basis of the Iraq war.

²⁴⁶ See *Mitchell v. Laird*, 488 F.2d 611, 613–16 (D.C. Cir. 1973) (refusing to rule on the constitutionality of the Vietnam War based on the political question doctrine); *DaCosta v. Laird*, 471 F.2d 1146, 1147–48 (2d Cir. 1973) (holding that the lawfulness of the President’s directive to mine ports in North Vietnam was a non-justiciable political question); *Massachusetts v. Laird*, 451 F.2d 26, 28–34 (1st Cir. 1971) (“[I]n a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting congressional claim of authority but with steady congressional support, the Constitution has not been breached.”); *Orlando v. Laird*, 443 F.2d 1039, 1042–44 (2d Cir. 1971) (holding that determining the constitutionality of the Vietnam War was beyond the scope of judicial review); Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”* 44 ST. MARY’S L.J. 1, 64–67, 86 (2012) (noting that the Court had regularly granted certiorari on the Congress-Executive division on the implementation of war powers acts for over 150 years). Courts refused to hear cases regarding President Reagan’s actions in Central America after twenty-nine members of Congress challenged the action in federal court. *Lowry v. Reagan*, 676 F. Supp. 333, 334, 339–41 (D.C. Cir. 1987); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208–09 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893, 895, 898–903 (D.C. Cir. 1982). Members of Congress similarly challenged President Clinton’s airstrikes in Kosovo, but once more, the court refused to hear the case. *Campbell v. Clinton*, 203 F.3d 19, 20–24 (D.C. Cir. 2000).

²⁴⁷ *Clinton v. Jones*, 520 U.S. 681, 703 (1997); *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007) (discussing that El-Masri is an alleged kidnapping and torture case) (noting also if the President asserts executive privilege, it is “the [C]ourt, not the Executive that determines whether the state secret privilege has been properly invoked”). Also, the leading immunity case for acts relating to official functions involved President Nixon’s unlawfully firing of a Defense Department analyst over adverse testimony before Congress. *Nixon v. Fitzgerald*, 457 U.S. at 731. This was an important substantive matter but it was not directly an act that would reverberate into war crimes or an unconstitutional foundation for war that impacts the entire country.

²⁴⁸ *Clinton v. Jones*, 520 U.S. at 681.

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2. Execution of Constitutional War Powers in the 2003 Invasion

US law would not likely favor plaintiff claims against US officials for losses deriving from the pillaging of the Iraq National Museum. The possibility of US courts accepting a case against the President without a finding that the Executive was acting outside the scope of presidential authority is remote, which suggests that US policy would also be unlikely to favor enforcing a foreign judgment against the President even if ICJ and customary international law restrictions on head of state immunity could be overcome. Nonetheless, this section presents an overview of domestic level political events to permit the reader to query whether American democracy should accommodate a point at which negligence or misconduct should retard the presumption that the President retains a virtual impervious immunity.²⁴⁹

The domestic constitutional process leading to the Iraq War was highly-problematic as indicated by later debate over censuring President Bush on the false allegations about weapons of mass destruction and statements that Iraq's former regime had connections to al-Qaeda²⁵⁰ and by the 251 to 166 vote in the House of Representatives which referred articles of impeachment against the president to the House of Representa-

²⁴⁹ Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 132 (2009) (speaking generally, “[i]f nations are viewed as unitary entities in the international arena, there must be one governmental entity that can be held accountable for a nation’s actions in foreign affairs, and for the U.S., that can only be the executive branch.”).

²⁵⁰ *Campaign Opens for Censure of Bush*, REUTERS, Mar. 18, 2004, available at <http://articles.latimes.com/2004/mar/18/nation/na-antiwar18> (stating that “[m]ilitary families and antiwar activists urged Congress to censure President Bush for what they called his deception and manipulation of intelligence before the Iraq war.”); New calls for censure emerged after Democrats took control of the House and Senate. Justin Blum, *Bush Should Be Censured by U.S. Congress on Iraq, Senator Says*, BLOOMBERG, July 22, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6RBOFNyGHA> (stating that the proposed censure motion “would criticize Bush for ‘overstating the case’ that Saddam Hussein . . . had weapons of mass destruction [and for] . . . ‘falsely implying’ a relationship between Hussein and the terrorist group al-Qaeda and of having ‘liinks’ to the Sept. 11, 2001, attacks”).

tives Judiciary Committee.²⁵¹ The Senate Select Committee on Intelligence (SSCI) completed its five-year investigation of the conditions leading to the Iraq War and the SSCI Chair stated that, “the Bush Administration led the nation to war under false pretenses.”²⁵²

Congress granted an Authorization for the Use of Force (AUMF) based on the Bush administration allegations of a supposed arsenal of prohibited weapons inside Iraq and did not condition the need to use force on displacing a foreign government.²⁵³ Professors Ackerman and Hathaway emphasize that the AUMF was a limited authorization to use force conditioned on there being an actual imminent threat, which means that when the White House began offering additional rationalizations after the war began, particularly of humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.”²⁵⁴ The detriment to Ameri-

²⁵¹ *Kucinich Effort to Impeach Bush Kicked into Limbo*, CNN, June 11, 2008, <http://www.cnn.com/2008/POLITICS/06/11/kucinich.impeach.vote/> (emphasizing that most of the resolution dealt with manufacturing false claims for the Iraq War); Dennis J. Kucinich, *Articles of Impeachment of President George W. Bush*, arts. I-III (June 10, 2008), available at <http://web.archive.org/web/20080920014632/http://kucinich.house.gov/News/DocumentPrint.aspx?DocumentID=93581> (involving the use of secret propaganda to “manufacture a false case for war against Iraq,” misrepresenting that there was Iraqi complicity in 9/11, and “Misleading the American People and Members of Congress to Believe Iraq Possessed Weapons of Mass Destruction, to Manufacture a False Case for War”).

²⁵² Senate Select Comm. on Intelligence, *Press Release of Intelligence Committee* (June 5, 2008), <http://intelligence.senate.gov/press/record.cfm?id=298775> (quoting SSCI Chairman John D. Rockefeller). The stimulus to action was formulated via propaganda, high level directives, and political initiatives within the Bush administration. See *supra* Part IV(B)(4).

²⁵³ Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3 (2002) [hereinafter AUMF-Iraq]. The President understood that the terms were conditions because he reiterated them verbatim in a letter to Congress two days before the attack to comply with the 48-hour information requirement in § 2(b). Letter from George W. Bush, President of the U.S., to Speaker of the H.R. (Mar. 19, 2003), available at <http://www.cbsnews.com/stories/2003/03/19/iraq/main544604.shtml>.

²⁵⁴ Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 464

cans was ominous as the war and occupation resulted in 4,488 U.S. military deaths and 134,000 Iraqi civilian deaths and cost American taxpayers \$2.2 trillion dollars.²⁵⁵

The White House actuated puissant agenda setting for war.²⁵⁶ A significant percentage of the American public was primed to believe the threat claims ostensibly because of the frequent reiteration of false allegations, but members of Congress opposed a rapid approval for the AUMF and complained that the Bush Administration was pushing the issue up against the November 2002 elections to pressure Democrats to authorize the use of force.²⁵⁷ One of the staunchest opponents was Senator Byrd who observed the evidentiary foundation and ac-

(2011); Bejesky, *Weapon Inspections*, supra note 78, at 350-69.

²⁵⁵ CBS Evening News for Mar. 19, 2013 (news clip on file with author); See generally, JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT* (2008) (estimating even more dire economic costs to \$3 trillion by including derivative expenditures); Bejesky, *Politico*, supra note 209, at 84-91 (addressing a chronology of how the administration avoided discussion of expenses and negative ramifications on the American economy).

²⁵⁶ Charles Lewis & Mark Reading-Smith, *False Pretenses*, CTR. FOR PUB. INTEGRITY, Jan. 23, 2008, <http://www.publicintegrity.org/2008/01/23/5641/false-pretenses> (depicting that administration officials made approximately 300% more false statements about threats from Iraq than in the previous month); See generally supra Part IV(B)(4).

²⁵⁷ SELECT COMM. ON INTELLIGENCE, REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, S. REP. NO. 108-301, at 12, 299 (2004) (noting that several members of Congress objected to authorizing the use of force without having more information, and disapproved of the President speaking publicly about dangers without an NIE); Jeffrey A. Botelho, *Congressional Responsibility in Controlling the War Machine*, 21 ST. THOMAS L. REV. 305 (2008-2009) (reporting that CNN noted that the Executive's advocacy elevated political stakes: "He has democrats in a box . . . It's very hard for them to oppose the president, especially just weeks before the November election."); Editorial, *The Politics of War*, N.Y. TIMES, Sept. 20, 2002, at A26, available at <http://www.nytimes.com/2002/09/20/opinion/the-politics-of-war.html> ("The newly bellicose mood on Capitol Hill materialized almost overnight. Last night, Democrats wanted the Security Council to act first and were calling for measured consideration of the political and military issues involved in going to war. The haste . . . is clearly motivated by campaign politics. Republicans are already running attack ads against Democrats on Iraq").

centuated that the President was using “absurd pressure to act [twenty-seven] days before an election.”²⁵⁸ Byrd further expounded: “And before we put this great nation on the track to war I want to see more evidence, hard evidence, not more Presidential rhetoric.”²⁵⁹

Many Intelligence Community officials and experts acknowledged that intelligence was being crafted around the executive’s policy of invasion.²⁶⁰ Georgetown Professor Paul Pillar, a retired senior CIA analyst, explaining that “intelli-

²⁵⁸ Senator Robert C. Byrd, *Congress Must Resist the Rush to War*, N.Y. TIMES, Oct. 10, 2002, <http://www.nytimes.com/2002/10/10/opinion/congress-must-resist-the-rush-to-war.html> (“Are we too feeble to resist the demands of a president who is determined to bend the collective will of Congress to his will . . . I have searched for that single piece of evidence that would convince me that the president must have in his hands, before the month is out, open-ended Congressional authorization to deliver an unprovoked attack on Iraq. I remain unconvinced”); 148 CONG. REC. 19682 (Oct. 9, 2002) (Senator Patrick Leahy) (stating that “[m]any respected and knowledgeable people—former senior military officers and diplomats among them—have expressed strong reservations about this resolution. . . . But they have not seen that evidence, and neither have I. We have heard a lot of bellicose rhetoric, but what are the facts?”).

²⁵⁹ ROBERT C. BYRD, LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY 233 (2004) (Statement on floor of Senate, Oct. 10, 2002).

²⁶⁰ See generally Robert Bejesky, *The SSCI Investigation of the Iraq War: Part II: Politicization of Intelligence*, 40 S.U. L. REV. 243 (2013). The Bush Administration initiated agenda setting with allegations and demanded a congressional vote and a UN authorization to use force six months before the war actually occurred. Robert Bejesky, *Political Penumbras of Taxes and War Powers for the 2012 Election*, 14 LOY. J. PUB. INT. L. 1, 19-30 (2012); Bejesky, *Weapon Inspections*, *supra* note 78, at 303-15. This agenda setting was prior to the Intelligence Community taking any steps toward the production of the high-flawed and condemned (in process and substance) National Intelligence Estimate. See Robert Bejesky, *The SSCI Investigation of the Iraq War: Part I: A Split Decision*, 40 S.U. L. REV. 1 (2012). Senators requested that an NIE be produced because one had never been produced that was devoted to Iraqi WMD programs. S. REP. NO. 108-301, at 298. The work launched on September 12 at the National Intelligence Office under CIA Director Tenet’s guidance and eleven days later the draft NIE was distributed to agencies, and one week later the final copy was distributed.—*Id.* at 9, 12-13, 52 (noting that agencies received the draft on September 23). Experts estimated that a more reasonable time frame for production for such a complex NIE might reasonably have taken between three to six months. *Id.* at 11.

gence was misused publicly to justify decisions already made” and that the “intelligence community’s own work was politicized.”²⁶¹ The SSCI quoted an analyst who was involved in the production of the notorious NIE and stated “[T]he going-in assumption was we were going to war, so this NIE was to be written with that in mind. We were going to war, which meant American men and women had to be properly given the benefit of the doubt of what they would face. . . That was what was said to us.”²⁶² The account is consistent with all of the later-released revelations about preplanning for war that was emphasized in Part IV(B)(4).

Thus, the justification for the use of force, as specified in diplomacy before the UN and as contained in the AUMF-Iraq several days after the NIE was prepared, exclusively involved possession of weapons that were prohibited by UN Resolution and could pose a security threat.²⁶³ However, the analyst surprisingly asserted that the intelligence community prepared the NIE, which specified the evidence for war pursuant to Congress’s request, under the assumption that the war was inevitable. Ironically, one month after the war, ABC News interviewed Bush Administration officials who stated that they did

²⁶¹ Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOR. AFFAIRS, Mar./Apr. 2006, available at <http://www.foreignaffairs.com/articles/61503/paul-r-pillar/intelligence-policyand-the-war-in-ira>.

²⁶² S. REP. NO. 108-301, at 505; JAMES RISEN, *STATE OF WAR 79-80* (2006) (writing about interviews taken at a CIA meeting, a CIA official remarked that they were told from the senior officials from CIA headquarters to the station chiefs was simple: “The game is on. We are going to war in Iraq. There will be no further debate on the issue. . .”[One official remarked:] “We kept saying that the president has decided we are going to war, and if you don’t like it, quit.”); JAMES BAMFORD, *A PRETEXT FOR WAR 333-37* (2004) (writing about high-level directives that were given at a CIA meeting in January 2003, “[I]f Bush wants to go to war, it’s your job to give him a reason to do so. . .”[One of the attendees interpreted the directive:] “This is something that the American public, if they ever heard, if they ever knew, they would be outraged. . .”[Another CIA officer stated:]It was criminal the way we were implicitly deceiving people”).

²⁶³ AUMF-Iraq, *supra* note 253, § 3; Letter from George W. Bush, *supra* note 253; Ackerman & Hathaway, *supra* note 254, at 464; Bejesky, *Weapon Inspections*, *supra* note 78, at 350-69.

not lie, but that “the administration emphasized the danger of Saddam’s weapons to gain the legal justification for war from the United Nations and to stress the danger at home to Americans.”²⁶⁴ The Bush Administration officials stated that there was a new reason for war, which was to exhibit “a global show of American power and democracy.”²⁶⁵

With respect to the failure to protect antiquities during the war, in September 2004, anonymous government officials “leaked” the contents of two classified reports prepared specifically for President Bush by the National Intelligence Council three months before the war.²⁶⁶ The reports assessed that an invasion “would result in a deeply divided Iraqi society prone to violent internal conflict,”²⁶⁷ which could be a warning that societal unrest and conflict could endanger the Iraq National Museum. Hence, the Bush Administration dismissed intelligence reports that predicted insurgencies and societal violence after an invasion as “just guessing”²⁶⁸ and provided express and im-

²⁶⁴ John Cochran, *Officials: 9/11 Was Main Reason for War*, ABC NEWS, Apr. 26, 2003, <http://abcnews.go.com/Nightline/story?id=128467&page=1>.

²⁶⁵ *Id.*

²⁶⁶ See generally Senate Select Comm. on Intelligence, *Prewar Intelligence Assessments About Postwar Iraq*, S. Rep. No. 110-76 (2007) (reviewing the studies).

²⁶⁷ Douglas Jehl & David E. Sanger, *Prewar Assessment on Iraq Saw Chance of Strong Divisions*, N.Y. TIMES, Sept. 28, 2004, <http://www.nytimes.com/2004/09/28/politics/28intel.html?pagewanted=all> (warning that Hussein supporters and insurgents would possibly wage guerrilla warfare and an “insurgency against the new Iraqi government or American-led forces....”); S. REP. NO. 110-76, at 93-106 (noting that pre-war assessments published by other agencies in the weeks prior to the invasion presumed there would be an invasion of Iraq and public accounts of violent events inside Iraq in many cases did resemble the claims in the reports). The January 2003 National Intelligence Council reports assessed that establishing a viable democracy in Iraq would be a long and turbulent process, that it would be necessary for an outside military to occupy the country because it would be a “deeply divided society,” that oil revenues would make the political and economic restructuring less difficult, that there would be humanitarian and refugee challenges, and that there would be outside malevolent forces undermining American efforts. S. REP. NO. 110-76, at 4 (citing NIC, *PRINCIPAL CHALLENGES IN A POST-SADDAM IRAQ* 5-6, 25-28 (Jan. 2003); NIC, *REGIONAL CONSEQUENCES OF REGIME CHANGE IN IRAQ* 18, 20 (Jan. 2003)).

²⁶⁸ Jehl & Sanger, *supra* note 267. See also Douglas Jehl, *U.S. Intelli-*

PLICIT portrayals to the American public before the war that there would be no post-war conflict (other than from holdovers allegiant to Hussein),²⁶⁹ but considered the allegations in the NIE about threats that led to war so ironclad that the White House spent six months persuading Americans to accept the allegations.²⁷⁰

V. CONCLUDING ANALYSIS

The Iraqi Interior Ministry's Economic Crimes Department's investigations seek to reacquire antiquities that were looted from the Iraq National Museum in April 2003. The ransacking unfolded after domestic law and order dissolved following what many called an illegal war.²⁷¹ International law and Iraqi law provide a substantive basis for a duty to protect the items in the Iraqi National Museum, which suffered losses that would likely not have occurred "but for" the war of aggression

gence Shows Pessimism on Iraq's Future, N.Y. TIMES, Sept. 16, 2004, <http://www.nytimes.com/2004/09/16/politics/16intel.html?pagewanted=print&position=> (White House Press Secretary McClellan remarked: "You know, every step of the way in Iraq there have been pessimists and hand-wringers who said it can't be done. . . And every step of the way, the Iraqi leadership and the Iraqi people have proven them wrong because they are determined to have a free and peaceful future"). The Bush Administration also ignored the advice of the U.S. military commanders who assumed it would be costly to enforce a peacekeeping effort and who recalled how societal chaos can erupt after a powerful leader is deposed, which had just recently occurred in the former Yugoslavia. Elizabeth Rindskopf Parker, *A National Security Agenda Revisited*, 43 SUFFOLK U. L. REV. 829 850-51 (2010).

²⁶⁹ James C. O'Brien, *Lawyers, Guns, and Money: Warlords and Reconstruction After Iraq*, 11 U.C. DAVIS J. INT'L L. & POL'Y99, 102-03 (2004); Department of Defense Budget Priorities for Fiscal Year 2004: Hearing Before the H. Budget Comm., 108th Cong. (Feb. 27, 2003) (statement of Paul Wolfowitz, U.S. Deputy Sec'y of Def.) ("It's hard to conceive that it would take more forces to provide stability to post-Saddam Iraq than it would take to conduct the war itself and secure the surrender of Saddam's security forces and his army. Hard to imagine.").

²⁷⁰ See generally Bejesky, *Cognitive Foreign Policy*, *supra* note 244; Bejesky, CFP, *supra* note 244; Bejesky, *Intelligence Information*, *supra* note 277, at 875-82.

²⁷¹ See *supra* Parts III, IV(B)(4).

or if the invading/occupying force had secured the museum.²⁷² This article presented a hypothetical assessment of a tort law-like damage remedy, with a pivotal procedural question of whether a plaintiff-government (or a non-government actor in a *qui tam* form of action given the political discord at stake)²⁷³ could sue in an Iraqi court against a foreign state, the head of state, or lower-level officials, as a civil defendant. The article also estimated—using the US as an example—what level of sovereign or official immunity might be afforded in the official's home jurisdiction, either as the court system accepting jurisdiction or the forum being requested to enforce the judgment of an Iraqi court, and employed the precedent of criminal immunity as a basis for considering civil immunity and a universal offense as an act that gives rise to tortious damage. The framework was not exhaustive, given the complexities, but the analysis highlighted pivotal inquiries in relation to the chronology of the looting.

With respect to a suit in an Iraqi court, commencing a civil

²⁷² See *supra* Parts II, III, IV(B)(4), IV(C)(2) (explaining the international rules that protect antiquities, string of events that led to an illegal invasion, and a failure to heed the intelligence warnings about a probable result of societal chaos following invasion, including a failure to adequately respond during an effective occupation after Iraqi security forces were disbanded); Robin Wright & Ellen Knickmeyer, *U.S. Lowers Sights on What Can Be Achieved in Iraq*, WASH. POST, Aug. 14, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/13/AR2005081300853.html> (remarking that the Bush “administration says [Hussein] ran down the country. But most damage was from looting” during the invasion and occupation).

²⁷³ In the U.S., individuals can sue on behalf of the U.S. government. Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45, 51 (2004). The public treasury benefits by receiving between 70 and 100 percent of the remedy. 31 U.S.C. § 3730 (2013). There would understandably be collective problems or weak political will to facilitate such an action in Iraq because most of the population presumably favors post-Hussein Iraq to Hussein's rule and there would likely be a dominant perception that a military invasion was necessary to achieve that circumstance, but this should not necessarily preclude recovery. If the Iraqi government would not bring such an action against top Bush Administration officials, Iraq would likely need some form of *qui tam* provision.

case is less of an infringement to official immunity than physically bringing a head of state to another domestic jurisdiction on criminal charges, as was the context in the ICJ *Arrest Warrant* case. That unilateral assertion of criminal jurisdiction would seemingly be restricted on a head of state pursuant to current norms of customary international law, but indictment for universal jurisdiction crimes would not be prohibited of government officials below the head of state and minister of foreign affairs²⁷⁴ or of the head of state when there is a collective of countries, rather than a unilateral state action, willing to impose liability on the head of state.²⁷⁵ Moreover, in the context of indicting a head of state on crimes against humanity in a foreign court, ICJ Judges Higgins, Kooijmans, and Buergenthal provided a minority opinion and believed that universal jurisdiction should be permitted *in absentia*,²⁷⁶ and in 2012, a specially-constituted fact-finding tribunal in Malaysia found George W. Bush and other top officials guilty *in absentia* for crimes against humanity for developing and executing interrogation programs that consisted of torture.²⁷⁷

²⁷⁴ GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 414 (2013) (noting the applicability of the immunity for heads of state only while they are in office and that subordinate top-level state agents have a restrictive immunity for official acts); *See supra* Part IV(B)(2).

²⁷⁵ Violations of international law can lead to liability and war crimes do not only pierce the veil of sovereign immunity, but have also led to personal culpability for political leaders who carried out those acts. *See supra* Parts IV(B)(C). Criminal acts are not clearly official acts of state that should receive sovereign immunity protections, and it may also be reasonable to question whether there should be, first and foremost, a payout for liability from the state's public treasury to the degree that the leader acted *ultra vires* to the principal populace.

²⁷⁶ *Congo v. Belgium*, 2002 I.C.J. ¶ 16 (Judges Higgins, Kooijmans and Buergenthal).

²⁷⁷ Yvonne Ridley, *Bush Convicted of War Crimes in Absentia*, FOR. POLICY J., May 12, 2012 ("In what is the first ever conviction of its kind anywhere in the world, the former US President [Bush] and seven key members of his administration were . . . found guilty of war crimes" in absentia in Malaysia for war crimes arising out of the torture interrogation programs); *See also* Jaclyn Belczyk, *Malaysia Rights Group Finds Bush and Associates Guilty of War Crimes in Symbolic Trial*, JURIST, May 11, 2012.

With respect to a claim being filed in the US, official immunity places limits on plaintiff lawsuits against US officials,²⁷⁸ but there are also substantive policies at stake that could favor granting compensation for the destruction and theft of artifacts.²⁷⁹ Another question is whether US courts would favor equal treatment between foreign and domestic leaders. *The Schooner Exchange* (1812) originated the common law head of state immunity²⁸⁰ and U.S. courts have recently afforded immunity to foreign heads of state in civil suits by deferring

²⁷⁸ See *supra* Part IV(C)(1).

²⁷⁹ International law is well-established as to the right to compensate for destruction of antiquities and artifacts. Frank G. Fechner, *The Fundamental Aims of Cultural Property Law*, 7 INT'L J. OF CULTURAL PROP. 376, 378-80 (1998); David A. Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 387-89 (1993). Scholars have expressed there were violations of international law and requirements to assess liability in the case of the destruction at the Iraq National Museum. Lucille A. Roussin, *Cultural Heritage and Identity*, 11 CARDOZO J. INT'L & COMP. L. 707 (2003); Mary Ellen O'Connell, *Occupational Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property*, OHIO ST. U. PUB. L. & LEGAL THEORY WORKING PAPER SERIES No. 23 (2004); Patty Gerstenblith, *Legal Damage Control for Iraq's Looted Cultural Heritage: The Need for U.S. Import Restrictions*, JURIST (Feb. 23, 2004).

Not only is there an obligation to avoid taking positive action that would destroy property, but there are also obligations to respect and secure cultural property during war and occupation. Convention for the Protection of Cultural Property, *supra* note 30, arts. 2-4; Sabine von Schorlemer, *Legal Changes in the Regime of the Protection of Cultural Property in Armed Conflict*, 9 ART ANTIQUITY & L. 43, 45 (2004); Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285, 295 (2005). US law and policy has favored efforts to promote the recovery of Iraqi antiquities. In October 2008, the U.S. Department of State initiated an Iraq Cultural Heritage Project and granted \$13 million to a non-governmental organization, International Relief and Development" to assist in rebuilding Iraq's lost cultural items. Singer, *supra* note 110, at 1. George Bush gave Matthew Bogdanos, a U.S. Marine Reserve colonel and district attorney in New York, the National Humanities Medal in 2005 for seeking to recover stolen and missing Iraqi antiquities. Brian Baxter, *After Iraq, Lawyers Discuss the Way Forward*, THE AMER. LAWYER, Mar. 27, 2013, available at <http://www.reedsmith.com/files/News/ea8df378-37c3-4f93-8595-dcc54458ccc2/Presentation/NewsAttachment/58711b03-338c-40d1-9f04-e11836367f25/After%20Iraq%20Lawyers%20Discuss%20Way%20Forward.pdf>.

²⁸⁰ *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

first to the US executive's position if the executive spoke on the issue of immunity in cases such as *Lafontant v. Aristide*²⁸¹ and *Tachiona v. Mugabe*,²⁸² and initially in *Estate of Domingo v. Republic of the Philippines*.²⁸³ However, in other cases, U.S. courts have not granted immunity to foreign heads of state in civil cases for wrongful acts taken while serving in the official capacity as a foreign head of state.²⁸⁴ Most recently, the Supreme Court decided *Samatar v. Yousof* (2010) and held that individual foreign government officials and employees do not have FSIA immunity and that U.S. courts might exercise jurisdiction over an individual who had been prime minister and held other cabinet positions while purportedly committing hu-

²⁸¹ *Lafontant v. Aristide*, 844 F. Supp. 128, 130-31, 139-40 (E.D.N.Y. 1994) (noting that the executive position of granting head of state immunity prevails in a case involving a plaintiff suing President Aristide for allegedly ordering the execution of the plaintiff's husband).

²⁸² *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 264-65, 279 (S.D.N.Y. 2001) (with U.S. executive encouragement, dismissing plaintiff's civil case for alleged torture, execution, and other crimes ordered by top officials).

²⁸³ *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1982). The immunity was waived in the later case. *In re Doe*, 860 F.2d at 45. In 1986, President Corazon Aquino granted broad power to investigate the human rights abuses during the 1976-1986 dictatorship of Ferdinand Marcos, but the committee never provided a final report. Van Dyke, *supra* note 159, at 157. Instead 9,531 victims of human rights abuses have been seeking compensation by litigating claims against Marco's Estate. *Id.* at 156. The estate paid \$10 million to thousands of Filipino victims after prevailing in a 2011 class-action judgment in federal court in Hawaii. James C. McKinley Jr., *After Conviction, Focus Turns to Ownership of Marcos Artwork*, N.Y. TIMES, Nov. 22, 2013, <http://www.nytimes.com/2013/11/23/nyregion/after-conviction-focus-turns-to-rightful-ownership-of-marcos-art.html>. It may also be controversial that the US government supported Marcos, the US military had bases in the Philippines when Marcos suspended the constitution and democracy to make himself a dictator, and the military supported the coup. Bejesky, *Politico*, *supra* note 209, at 55-56. Yet US courts had questions about whether the official immunity should be recognized in the US.

²⁸⁴ *Kadic v. Karadžić*, 70 F.3d 232, 248 (2d Cir. 1995) (denying head of state immunity to Radovan Karadžić); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (noting that Noriega was not entitled to immunity because he was not constitutionally elected, Panama did not seek immunity, and personal acts with drug trafficking were at issue); *See also In re Doe*, 860 F.2d at 45. Other than *Kadic v. Karadžić*, these cases might be distinguished from the deeper gravity of harm that coexists with war crimes.

man rights atrocities against the plaintiffs.²⁸⁵ If U.S. courts are open to holding individual foreign heads of state civilly responsible, perhaps it is reasonable to not oppose the domestic or foreign courts from holding a top U.S. government official civilly responsible for universal wrongs.²⁸⁶

²⁸⁵ *Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010); This is a change in the law that addressed a split among the federal circuits. PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS 259-60 (2009) (explaining that there was a split in the federal circuits over whether plaintiffs can attain jurisdiction over individual foreign officials under FSIA).

²⁸⁶ However, a key element has been whether the home jurisdiction of the head of state permits the suit in the foreign court. *Lafontant v. Aristide*, 844 F. Supp. at 130-31, 139-40. Unless a current or future president strips former President Bush of immunity, a civil claim of liability would be less likely to proceed in a foreign court, although the immunity is not so clear with subordinate officials.