

THE ROLE OF ARCHIVES IN STRENGTHENING DEMOCRACY

LA FUNCION DE LOS ARCHIVOS EN EL FORTALECIMIENTO DE LA DEMOCRACIA

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British Army Intelligence officer Andrew Kevil squats, looking at hundreds of passports and identity cards dumped on the ground in front of him, confiscated from Kosovars by Serbian forces.¹ In that brutal spring of 1999, as Kosovars by the tens of thousands fled their homes, at the border crossings into Albania and Macedonia they were stopped and stripped of any documents they carried, even the license plates on their vehicles. Why did the Serbian government order this identity cleansing operation? To deprive the refugees of their citizenship. To frustrate any future efforts to return home and claim property. To make them non-persons. How would someone deprived of documents prove that he existed, was married, was the parent of this infant, owned this apartment, was owed a pension from this factory, was a member of this religious body? By far the easiest way would be to use archives.

In the aftermath of war, revolution, and civic trauma, individuals and institutions must find a path to deal with the tumultuous past. Some demands for information about the past are immediate: what happened to my husband? Other demands emerge more slowly: what really happened to this country? And some demands can be made only after some time has passed: why do so many people who lived downwind from the nuclear test site have cancers?

Some answers may come swiftly, but some may be very delayed: for example, in the winter of 2012, records confirming the death of an airman in World War II and identifying his burial place were finally located, nearly 75 years after the event.² And sometimes, too, there is denial of well-documented public events: in February 2012, an official of the Japanese government questioned whether there was a massacre in Nanjing in 1937.³ Proofs for the past often depend on records, particularly those of governments.⁴

The right to know what information governments hold was a major theme of the last half of the 20th century, as government after government enacted freedom of information laws.⁵ In 1993 the United Nations Commission on Human Rights appointed a Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression who, in his 1997 annual report, called upon governments “to fully promote and protect” not only the right to freedoms of opinion and expressions but also the right “to seek and receive information”

¹ <http://kosova.org/post/Photo-Library-NATO-in-Kosovo-12-June-1999.aspx>

² “World War Two: air ace in an unmarked grave found,” *The Telegraph*, 2012 February 17, <http://www.telegraph.co.uk/history/world-war-two/9086291/World-War-Two-air-ace-in-an-unmarked-grave-found.html>

³ “Chinese City Severs Ties After Japanese Mayor Denies Massacre,” *New York Times*, 2012 February 22, http://www.nytimes.com/2012/02/23/world/asia/chinese-city-severs-ties-after-japanese-mayor-denies-massacre.html?_r=1

⁴ In the United States, records are documents (information that is fixed on a physical base) of an institution or organization that were created in the course of business, and archives are the part of the records that have permanent value. However, in many countries and languages no distinction is made between “records” and “archives,” and in this essay the words are used interchangeably.

⁵ Some authors trace the right to information to Article 19 of the Universal Declaration on Human Rights, but the language of that Article is inchoate. And while Sweden is justly proud of its 1766 Freedom of the Press Act as a precursor of the right to information, modern right to information laws are a post-World War II development.

from governments, which he called a “fundamental prerequisite to ensure public participation.”⁶ During the same years, the Commission also was concerned about the trend that governments, even those more democratic than their predecessors, were enacting amnesty laws giving former government officials immunity for crimes committed while in office. The Commission appointed Louis Joinet, a French jurist, to study and report on the problem of the impunity of perpetrators of human rights violations. Joinet’s report, accepted by the Commission in 1997, included a set of principles against impunity. In the principles, Joinet emphasized that a person has a right to know what happened, a right to the truth, but he also argued that society as a whole has both a right to know and a responsibility to remember. He wrote:

The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember,” which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved.⁷

As part of the measures a State must take to protect the right to know, Joinet wrote, the State “must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.”⁸ In this way, Joinet clearly defined the link between information, archives and human rights.

Meanwhile, in the wake of the extraordinary changes in forms of government that were taking place in the 1980s and 1990s, particularly in South and Central America and Eastern Europe, archivists were facing great quantities of records from the old regimes, including the records of former secret security services. At the annual meeting of the International Council on Archives in Mexico City in 1993, the assembled archivists spontaneously called for guidance on the handling of archives of security services. UNESCO promised to fund a study. The report, written by an international group of archivists led by Antonio Gonzalez Quintana of Spain and published by UNESCO in 1995, was the first serious attempt to discuss the methods for handling these sensitive records.⁹

Thus the connections between the right to know and archives and human rights and the role of archivists as duty-bearers for human rights had been clearly established by the end of the 1990s. But exactly how were the archives to be used, particularly in situations where the state is moving from a more repressive to a less repressive form and a program of transitional justice begins?

⁶ <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G97/104/10/PDF/G9710410.pdf?OpenElement>

⁷ “The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119,” United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/20/Rev.1, 1997-10-02; updated by Diane Orentlicher, E/CN.4/2005/102, 18 February 2005, and E/CN.4/2005/102/Add.1, 8 February 2005.

⁸ *Ibid.*, Principle 5.

⁹ Antonio Gonzalez Quintana, *Archives of the security services of former repressive regimes: report prepared for UNESCO on behalf of the international Council of Archives*. Paris: UNESCO, 1995. Gonzalez Quintana singlehandedly produced a revised report in 2008, which is distributed by the International Council on Archives. <http://www.ica.org/6458/resources/the-management-of-the-archives-of-the-state-security-services-of-former-repressive-regimes.html>

Following the Balkan wars in the 1990s and the peace agreement in Guatemala in 1996, Swisspeace, a non-governmental organization, analyzed the demands that had been made for dealing with the past. It found that they fell into four categories: dealing with perpetrators; ensuring that persons responsible for abuses in the old regime are not in positions of power in the new one; determining the truth of what happened to society as a whole, to groups within the society and to individuals; and obtaining restitution and reparation.¹⁰ Using the Swisspeace model, it is easy to see that similar demands are made in democratic states in the aftermath of state actions that caused civic trauma, such as the U.S. incarceration of its Japanese population during World War II, the brutal suppression of an Algerian demonstration in Paris in October 1961 that left dozens dead, and the above ground nuclear tests conducted by the United States, United Kingdom, France, the USSR and China.

How can archives be used to help society deliver justice and combat impunity, promote a non-recurrence of conflict and oppression, discover the truth about the past, and obtain reparation? Let us look at the types documents held by archives that may be used in all four areas of activity.

Prosecution and the right to justice

The demand for justice under the rule of law is met through prosecutions (with associated witness protection programs) and protected through trial monitoring initiatives. Prosecutions may be in international tribunals or domestic courts or “hybrid” courts that have both national and international elements.¹¹ Prosecutions focus on individual perpetrators, while trial monitoring focuses on the institutional structures in the legal system. Both use records extensively.

Investigations and prosecutions

To prosecute successfully, investigators and prosecutors need to understand three things about the organization whose officials they are prosecuting: the structure of the organization, the functions it performed and the records created as it carried out its functions. This is true whether the accused is a member of a government or an opposition group or a paramilitary body. Understanding the functions and sphere of activity of the entity includes understanding not only the territory in which it is authorized to operate and its relationships to other organizations and powers, but also the history of the entity and the way it carried out its affairs at various periods of its existence. Understanding the structure and functions also helps the prosecutor judge the probable authenticity and reliability of the documents from the organization that have been obtained as evidence. If the records of the organization are already in an archives, the archival description of the records may provide the basic information about the structure and functions on which the prosecutor can build.

Investigations and prosecutions will use whatever documentary materials are pertinent to the matter being investigated: records of government (especially records of the military and the police and security services, overt or covert); records of non-governmental and international

¹⁰ Jonathan Sisson, “A Conceptual framework for Dealing with the Past,” *Politorbis* No. 50, special issue “Dealing with the Past,” 3/2010, www.eda.admin.ch/politorbis.

¹¹ International tribunals are the International Criminal Court, the International Tribunals for the Former Yugoslavia and Rwanda, and the International Court of Justice. Hybrid courts are courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred; they include the UN-established courts in Kosovo and East Timor, the Special War Crimes Chamber in Bosnia, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

organizations; records of churches and businesses, schools and hospitals and morgues; copies of radio and television broadcasts, whether of government-owned media such as Radio Television Libre des Mille Collines in Rwanda or the broadcasts of investigative journalists, domestic or foreign; and personal papers.

If the prosecutors are trying “system” crimes (defined as genocide, crimes against humanity and war crimes if committed on a large scale),¹² understanding the flow of information to or from the leaders, whether generals or presidents or leaders of rebel groups, is crucial. This requires a serious analysis of the records of the highest levels of the institution; here the registers of documents sent and received can be especially useful, as are reports from subordinate units to headquarters. If the entity under investigation used electronic systems, tracking the email sent and received, particularly if the system created a receipt at the time an email is opened, can provide significant information for investigators.

Prosecutors may obtain records from NGOs, international organizations, and church groups who were present in the region when the crimes occurred. Pertinent records created by these institutions may include, for example, regular reports back to the entity’s headquarters, interviews with persons they are assisting, and correspondence with the local authorities as the organizations struggle to get permission to bring in or ship out goods, aid workers, or refugees. Because many of these organizations have substantial experience in working in countries in crisis, their records providing an on-the-scene neutral’s point of view on events may have special probative value.

Prosecutors have had some success in obtaining records from governments that were not part of the conflict. The correspondence between an embassy and its headquarters may contain detailed reports that are useful in establishing the context of crimes; cables from the U.S. Embassy in Lima, Peru, to the State Department in Washington were used in the Fujimori trial in Peru, for example.¹³ And records of satellite over flights have been used in investigations of the movement of bodies from one mass grave to another in Bosnia.

In addition to records of organizations, prosecutors use personal papers. Diaries have been important in various cases. A new source of information is recordings made by individuals, participants or not, with personal recording devices. A sensation in the trial of Slobodan Milosevic at ICTY was the video made by a member of the Scorpions unit showing the July 1995 execution of six Bosniaks from Srebrenica.¹⁴

Finally, prosecutors may use captured records. These were the key pieces of evidence in the post-World War II trials in Germany, for example.

Court monitors

¹² “System” crime as a term comes from the post-World War II tribunal in Tokyo. The assumption is that the scale of the acts is so large that an organized “system,” usually a State security force, is responsible for them. See Rule-of-Law Tools for Post-Conflict States: Prosecution initiatives, HR/PUB/06/04, Geneva: United Nations High Commissioner for Human Rights, 2006, p. 11-17.

¹³ “Archives Expert Testifies in Fujimori Trial,” National Security Archive Update, September 8, 2008, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB256/index.htm>

¹⁴ “Origin of Video Footage of Execution of Six Bosniaks from Srebrenica,” press release, Humanitarian Law Center, 2007-12-17; Case No. IT-02-54-T, Prosecutor v. Slobodan Milosevic, Decision on Application for a Limited Reopening,” <http://www.un.org/icty/cases-e/index-e.htm>.

Court monitoring programs are structured reviews of legal processes and the administration of justice, usually conducted by a team of persons who are independent of the legal system. The monitors need access to records of cases proceeding through the justice system. In addition to the court files per se, they also may seek access to the files that the prosecutor and the police hold on the case, to prison records, and to defense counsel files.

Some court monitors try to establish an historic pattern of trends in handling particular kinds of cases, such as domestic violence. These investigations can require extensive reviews of the older case files or court dockets; they may also use police records to track the way the police handled complaints made by the public.

Institutional reform and the promotion of non-recurrence

Institutional reform includes the rebuilding of the government structures, from justice systems to national archival practices. These structural changes include reviews and amendments of laws, regulatory reform, training to introduce new standards and ethical practices and renovation of physical structures, among others.

Along with these formal structural changes, institutional reform may also involve assessing the conduct of individuals who were in positions of authority in the former regime. This process, known as vetting or lustration, assesses a person's integrity to determine whether he or she is suitable for further public employment. Vetting processes aim to exclude from public service those persons whose employment would impair civic trust in legitimate public institutions.

The first records used in a vetting process are personnel records, particularly those of the government or a political party. Personnel records in a government may be held centrally or may be held in each agency; there may be official personnel records and informal ones held by supervisors. It is likely that the military holds its own personnel records, and the police and other security services may maintain separate personnel files as well. Personnel records usually have an index (in earlier times on file cards, today usually in an electronic system) that leads to a file on the person.¹⁵ Sometimes the card index will contain sufficient information for vetting purposes. While it is useful to be skeptical about the veracity of any information in records of a repressive regime, personnel records, which the organization itself used to control its members, are often reliable. Furthermore, because personnel files relate to the benefits of employees, documenting years of service or recording on-the-job injuries, employees demand that the records be correct. This internal pressure makes personnel records systems operate with a fair degree of accuracy.

Additional sources of information for vetting include police records (including those of secret police); court records; political party records; election registers; reports of bodies such as the United Nations and its agencies, NGOs, and truth commissions; media reports, both domestic and foreign; and independent investigation reports.¹⁶ These are particularly useful if the relevant personnel records are partial or their reliability is suspect.

¹⁵ Governments and political parties maintain lists or indexes of personnel, but so do clandestine structures. For example, when the Colombian government captured a computer belonging to the FARC (Fuerzas Armadas Revolucionarias de Colombia), the computer contained lists of members. Similarly, the capture of a computer belonging to Al-Qaeda in Iraq contained a list of members.

¹⁶ Rule-of-Law Tools for Post-Conflict States: Vetting: An operational framework, HR/PUB/06/05, Geneva: United Nations High Commissioner for Human Rights, 2006, p. 17.

Truth-seeking and the right to know

Truth seeking takes many forms. The most basic is the search for the fate of missing persons. This may be a process of searching through records, interviewing people, exhuming burial sites, and conducting DNA tests.

Just as individuals seek information on loved ones, the wider public seeks an answer to what happened within the society as a whole. During the last quarter of the 20th century, one of the most popular vehicles for seeking societal truths has been the truth commission.

Locating missing persons

Searches for records relating to missing persons, particularly after an armed conflict, must utilize the broadest possible sources of records. Logical imagination is required to think through what records might be relevant. A useful initial research structure is to hypothesize what likely happened before, during, and after the disappearance. If, for example, the assumption is that the government is responsible for the disappearance, the next step is to think about which government structures were probably involved before, during and after the disappearance and what records they created at the time.

For example, in the case of a person who disappeared during a street demonstration, some of the questions to ask about activities before the demonstration might be:

- Were the police or another security body tracking the person in advance?
- Is there an index card on the person in their files?
- Is there a case file on the person?
- Was the person of interest to the military?
- Was the person previously arrested?
- Are there separate files on informers and do they contain copies of informers' reports?
 - Which informers filed reports immediately prior to the demonstration? Did the reports of any informer mention the missing person?

Questions to ask about activities at the time of the demonstration could include:

- What were the orders to the security service on the day of the demonstration?
- What units were involved in containing the demonstration?
- Did the security service make audio recordings or videotapes of the demonstration?
- What reports did those units provide to their superiors after the demonstration?
- Did the superiors in turn make reports to the head of the service or the head of the government?

Finally, some questions to ask about the records of organizations that might have been involved after the demonstration are:

- Where are the records of the initial booking and detention of persons arrested?
- Were the persons arrested photographed and are the photographs maintained in a separate file?
- Were the persons arrested fingerprinted and do the fingerprint files exist separately?
- Are there records of personal property taken from the arrested person?
- Are there records of admittances to the police or military hospital?
- Are there records of the transfer of a prisoner from one unit to another?
- Are there records of secret military courts?

Are there records of transport, including flights over an ocean where bodies may have been dropped?

Is there a set of records of the radio or telex operator in a unit, who retained a copy of everything he sent and received?

Some searches for missing persons include exhumation projects. Forensic teams excavating mass graves may begin work by using oral information provided to them, but the team may also corroborate leads by using the records of military or security units who were assigned to dig the graves or transport bodies. Identification of remains today tends to use DNA testing, but medical and dental records may be helpful in confirming an identity if there is no known DNA from the missing person and no living survivor to provide DNA for comparison.

Truth commissions

Truth commissions are not bound by the formal rules of evidence required by a prosecution, and so they use a broader range of records than any other transitional justice institution. Just as prosecutors need to understand the structure, functions and records of an organization, so do truth commissions. Records of government (especially military, police, security services, civil registries, land records, courts and prosecutor records), records of non-government organizations, radio and television broadcasts, records of international organizations, NGO records, personal papers: all have been used by a truth commission. Many truth commissions have had difficulties obtaining military records; some have been able to use declassified documents obtained from other countries that shed light on military activities. Most truth commissions take extensive oral testimonies, which records can help substantiate, expand upon or disprove.

While most truth commissions have been in Latin America and Africa and have looked at events in the recent past, Canada has just created one—in partial settlement of a class action lawsuit—to look at the practices in the Indian Residential Schools between the late 19th century and the 1970s. In this case, given the date span, archives in the government and churches and educational institutions will be central to the inquiry.

Right to reparation

The aim of reparation activities is to provide redress for harm suffered. They can take many forms. Official apologies, memorials, and commemorations are reparations by society to the victims as a whole. Restitution of property (real estate or personal property), compensation for losses, and rehabilitation are reparations to individuals or their heirs or, in a few cases, to defined groups such as a village or a tribe. The societal forms of reparations often can be made without recourse to records, but records are crucial to reparations to individuals.

In December 2005, the United Nations General Assembly adopted a resolution on “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”¹⁷ It grouped reparations measures into five categories: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Restitution and compensation are particularly dependent on the use of records.

¹⁷ General Assembly Resolution 60/147 of 16 December 2005.

Restitution

Restitution, as defined in the Basic Principles, refers to measures which “restore the victim to the original situation before the gross violations” occurred. The research required in restitution cases relating to the ownership of property is often complex and may require the use of many government and non-government records. The question is, first, proving who owned what, and then, if the person is no longer alive, who are the heirs to that person’s estate. To prove inheritance requires proving that the original owner is dead and then proving familial relationships and the inheritance pattern. Civil registries, church records, hospital and medical records, and court probate files are all important sources in these cases.

If the issue is land restitution and the government made the seizures, the government’s land records are critical archives. If the land was not seized but transferred under duress, notarial records and other local registries and maps may be particularly useful.

If the issue is the restitution of movable personal property or a business, a wide variety of sources must be used, from insurance records to business registrations to notarial records of business transfers and sales. The large investigations into the Nazi seizure of property such as art works have used every imaginable type of records, from museum registrations to insurance files to transport lists and more.

The restoration of citizenship, the restoration of the right to vote, and the restoration of employment requires the use of documents that can prove the person’s prior status, such as a birth register from a hospital, a church record of marriages performed, a voter registration list, a court case file, or a labor record showing the employees at a specific place of work.

Compensation

Compensation is a payment by society for a wrong done in the past.¹⁸ A key question in compensation cases is who falls within the category of persons to be compensated. After the political decision on the parameters of the class of beneficiaries, then individuals must demonstrate that they fall within the boundary. Records here are essential.

For example, in the United States, citizens of Japanese ancestry were interned in prison camps during World War II. Starting in 1988, the government paid each individual a monetary compensation for the time he or she spent in the camp.¹⁹ To help determine eligibility for compensation, the government used the original cards that were maintained on each person sent to a camp. The cards, preserved in the U.S. National Archives, were an early form of computer punch cards that the Archives was able to convert to a computer database. In addition, Japanese-American NGOs had very complete lists of persons who were in the camps. The use of these complementary documentary sources allowed the government to verify the validity of claims and pay compensation.

Preserving the records of transitional justice institutions

Institutions carry out all transitional justice processes. These institutions may be international or national, permanent or temporary. The national institutions may be a special part of an

¹⁸ The Basic Principles state that compensation “should be provided for any economically assessable damage.” General Assembly resolution 60/147, annex paras. 19-23.

¹⁹ In addition, the sites where the internment camps had been located are designated as national historic sites, a form of societal reparation.

existing institution (court, prosecutor) or wholly new temporary bodies (vetting committees, truth commissions, reparation panels). Most of them will be government institutions, with the special exception of court monitoring projects and some truth commissions, such as the truth commission sponsored by the Catholic Church in Guatemala.

Records of transitional justice institutions must be managed competently while the institution is active. Then, when the institution completes its work, its records need to be appraised and the permanently valuable portion transferred directly to an archives.

It is crucial that the state decide what archives will be responsible for the records of the government's transitional justice bodies. At minimum, the records should remain within the national archival system. If, for further government action, a successor body needs a portion of the records (for example, the records of a reparations commission are needed by the government's treasury to pay claims), those records should be copied and provided to the successor body. The original records should not be divided. Only by keeping the records together can the government ensure that an accurate picture of what the body learned and did will be available to future users.

Conclusion

Just as states have the responsibility to protect their citizens, states have a responsibility to preserve the records people require to exercise their full human rights. The impulse to destroy or distort records must be staunchly resisted.

Archivists in all institutions are responsible for some records that impact human rights; these range from basic personnel records to the most sensitive records of secret courts to registers of land ownership. Archivists must recognize the nexus between records and human rights and have the training and authority to select for permanent preservation those records that have significant value as evidence or information for protecting human rights. Archivists must protect these records from harm, accidental or intentional. And then archivists must provide access to the records, first by preparing finding aids and then making them available for use in accordance with legal authorization.

Access to records is the key to combating impunity, to vetting officials, to discovering truth, and to providing reparations. But just as there are pressures to open records there are countervailing pressures to keep them closed. The question of access is fought in the political realm, not the archival, and is particularly contentious when the opening of records is linked to transitional justice processes. Archivists can advise policymakers on the importance and characteristics of good access laws, but ultimately archivists administer whatever law the legislature enacts.

In a transitional period, some people will argue that society should look forward not back, just close the book on the past. But closing the book on the past does not mean closing the records: quite the opposite. As the South African Truth and Reconciliation Commission wisely decided, "It was necessary to turn the page of history but first we needed to read that page."²⁰ In the archives, those pages wait for the readers.

²⁰ Alex Boraine, A Country Unmasked. Oxford: Oxford University Press, 2000, p. 5