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Archiving Memory after Mass Atrocities

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ABSTRACT¹

Archiving and disseminating records of past atrocities is crucial in societies emerging from periods of conflict or repressive rule. It advances victims' "right to the truth" and promotes broader social goals of accountability and historical truth. This working paper explores legal and policy issues that arise when collections of documents pertaining to past atrocities are discovered in societies emerging from civil war, state collapse, or dire misrule. It argues for a *foundational approach* to documentation focused on sound archival methodology and the application of a transparent set of norms as fairly as possible to build a credible base for accountability and accurate historical memory. The paper considers the difficult questions of who should lead such efforts, how the interests of preservation and dissemination can best be advanced, and how to deal with concerns pertaining to privacy and national security. To develop the argument for a foundational approach, the paper draws on examples from a number of cases, including Cambodia, Guatemala, Iraq, Paraguay, Serbia, and others.

KEYWORDS: documentation, archives, human rights, transitional justice, right to the truth, duty to record

RESUMEN

El archivo y difusión de los registros de las atrocidades del pasado es fundamental en las sociedades que emergen de períodos de conflicto o gobierno represivo. Se avanza a las víctimas el "derecho de la verdad" y promueve objetivos sociales de la rendición de cuentas y la verdad histórica. Este ensayo investiga cuestiones jurídicas y políticas que surgen cuando las colecciones de documentos sobre las atrocidades del pasado se descubren en las sociedades que emergen de guerra civil, colapso del estado o desgobierno. Se aboga por un *enfoque fundacional* a la documentación centrado en una metodología sólida de archivo y la aplicación de un conjunto transparente de normas para construir una base creíble por la rendición de cuentas y la memoria histórica precisa. El ensayo considera las preguntas difíciles sobre quién debe dirigir estos esfuerzos, cómo los intereses de preservación y difusión se puede avanzar, y cómo se puede manejar las preocupaciones relativas a la privacidad y la seguridad nacional. Para desarrollar el argumento por un enfoque fundacional, este ensayo se basa en ejemplos de una serie de casos, entre ellos Camboya, Guatemala, Irak, Paraguay, Serbia, entre otros.

PALABRAS CLAVES: Documentación, archivos, derechos humanos, justicia de transición, derecho a la verdad, deber de constancia

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Introduction

In March 2011, a group of angry Egyptian protesters stormed the former headquarters of the Egyptian secret police. Their goal was to seize and preserve documents that told the story of abuses under the Hosni Mubarak regime, which they feared security agents were busily shredding and burning.¹ Days later, protesters began to post the documents on Twitter and a Facebook page called *Amn Dawla* (National Security) Leaks.² In early September, journalists and investigators from Human Rights Watch entered the vacated office of Libya's intelligence agency and found a cache of secret documents. Some of these also became public quickly, including apparent correspondence between Libyan intelligence and its British and American counterparts over the rendition of terror suspects. As the tumult of the Arab spring continues, more discoveries will likely follow. Such documents have immense power to shed light on the workings of deposed regimes, their foreign relations, and the abuses they perpetrated. However, the ultimate disposition of those documents—and thus their potential contribution to contribute to legal accountability and historical truth—remains uncertain.

Documenting mass abuses during and after political transitions raises difficult questions of law and ethics. Who should collect, organize, and disseminate official documentary material? In a world of scarce resources, what balance should be struck between organizing and preserving the documents and disseminating them? How can documents best be used to promote goals such as accountability, truth, and societal reconciliation? And in what ways could those uses conflict?

The answers to these questions are highly context-dependent. Laws provide some guidance, but that guidance is limited—especially during the hazy transitions following war and mass abuses. Politics and the pursuit of partisan interests are always at play, contributing both to what is practically possible and (at least arguably) to what is normatively desirable in societies trying to repair from conflict. Youk Chhang, director of the Documentation Center of Cambodia (DC-Cam), emphasizes that in the aftermath of large-scale abuses, “documentation is a political act.”³ Even when documentation is not politically motivated, it can have a profound political impact. Thus, creating archives focused on human rights abuses is invariably a politically charged process that depends heavily on the correlation of forces in the country in question, as well as the strength and stability of the new governing regime.

Nevertheless, efforts at documentation should be founded on certain basic principles that provide an ethical compass for the actors involved and a means of assessing such efforts from the outside. This paper argues for a foundational approach to documentation in the process of truth-seeking after mass abuses. A “foundational” approach is one guided by the overriding objective of establishing a broad and firm foundation of credible and impartial documentary information. That prescription may appear anodyne on its face, but it carries powerful implications and sometimes butts against other established norms.

First, a foundational approach to documentation suggests that documents should be collected and organized by those with the greatest will and capacity to do so credibly and efficiently. That is not always the national archives, especially during transitional periods.

¹ Liam Stack and Neil Meil MacFarquhar, *Egyptians Get View of Extent of Spying*, N.Y. TIMES, Mar. 9, 2011.

² Amn Dawla Leaks, <<http://www.facebook.com/AmnDawlaLeaksEN?ref=ts&sk=wall>> (last visited Sept. 9, 2011).

³ Interview with Youk Chhang, Phnom Penh, Cambodia, July 11, 2011.

There is thus a need to balance concerns about sovereignty and domestic institutional capacity with the need for expert input and foreign funding. Second, a foundational approach requires an emphasis on rigorous and impartial archival methodology. That process consumes time and resources and tends to frustrate those who understandably seek to plunge into the documents for specific information relevant to human rights abuses. Advances in digital imaging technology have eased but not erased the large administrative burden of organizing and preserving large documentary troves. Third, a foundational approach necessitates delineating and enforcing ethical rules about what types of information can be published and how that information can be challenged. Transparency and disclosure are core goals of documentation, but those goals do not exist in isolation. Once an archive does disseminate its findings, a foundational approach requires an impartial exposition of the truth, which usually means encompassing experiences and perspectives of diverse participants and accepting the inevitable complexities that result.

This approach will not appeal to all audiences and involves important trade-offs. It requires patience that is naturally in short supply in societies where mass abuses have occurred. It also depends on the will of the activists and policymakers involved to see the benefits of an impartial history when their own interests and sensibilities might dictate otherwise. This paper argues that focusing on a strong foundation is the most promising path. It strengthens the credibility of documents used as evidence in a courtroom or truth commissions, and it provides a solid starting point for educational and memory initiatives outside of the formal accountability sphere. Those efforts are vital in moving beyond criminal accountability and officially-sanctioned truth and reconciliation processes toward more expansive and informed societal deliberation about basic rights and the features of a just society.

To develop the argument for a foundational approach, this paper draws on examples from a number of cases, including Cambodia, Guatemala, Iraq, Paraguay, Serbia, and others. Part I examines the legal and normative underpinnings for the movement to connect archival work more closely to human rights protection and promotion. Part II discusses how archives are created and examines the rights and responsibilities of national archives, non-governmental organizations (NGOs), and foreign governments in times of transition. Part III analyzes the importance of sound organizational and preservation strategies for human rights archives and considers some of the trade-offs that may need to be made between a foundational approach and the interest of prompt dissemination. Part IV discusses access procedures and the challenges of balancing the need to disclose information to promote truth and accountability against legitimate interests in upholding privacy and national security.

I. Legal and Normative Underpinnings

The legal and normative justification for promoting and protecting human rights archives rests largely on the concepts of a “right to know” and corresponding “duty to record.” The right to know is based on a mix of deontological and consequentialist claims—that individuals are entitled to the truth about their own suffering and that of loved ones, that a record of a people’s suffering constitute part of its cultural heritage, that archives are essential in the quest for accountability, and that knowledge of the past will help reduce the likelihood of future human rights abuses. The right to know also gives rise to a crucial corollary: the duty to record and preserve information related to human rights abuses and to make it available to courts, commissions, and the public. Although archives detailing the brutality of governments and

rulers stretch back for centuries, the nexus between archives and human rights has garnered significantly more international attention in the past two decades—largely due to the implosion of Communist autocracies in Europe, military dictatorships in Latin American, the Apartheid regime in South Africa, and repressive governments elsewhere.

Norms related to archiving atrocities often have their most concrete expression in national legal systems, but the development of such laws has been closely tied to the international human rights movement. In addition to numerous civil society conferences and working groups on the subject, United Nations bodies including the UN Educational, Scientific and Cultural Organization (UNESCO) and UN Commission for Human Rights (UNCHR) have commissioned several reports specifically dealing with efforts to archive past state abuses. Regional bodies have also issued a number of relevant declarations, and the Inter-American Court for Human Rights has issued a pair of watershed rulings on the subject. These developments, discussed below, have had the effect of strengthening and broadening international norms regarding archival memory of past abuses.

A. The Right to the Truth

The most general and fundamental principle justifying the establishment and preservation of archives after periods of widespread human rights violations is the contention that people have a “right to the truth” about those abuses. This right is closely related to the concept of freedom of information. Neither the Universal Declaration on Human Rights (UDHR) nor the International Covenant on Civil and Political Rights (ICCPR) specifically addresses public archives or archives, but both include broad provisions asserting a “right to seek, receive information” as part of the right to freedom of expression.⁴ The ICCPR includes an important qualification, however:

The exercise of [such] rights... may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.⁵

The norm of a freedom to information (and the related freedom of expression) is thus balanced against other public goods—namely the right to privacy and the interest in preserving security and public order. Importantly, the ICCPR also left unclear the extent of a state’s reciprocal duty

⁴ Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Universal Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948) [hereinafter UDHR], at art. 19. The ICCPR’s article 19 includes a nearly identical provision: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR], at art. 19(2).

⁵ ICCPR, *supra* note 4, art. 19(3).

to retain and produce information. By the time of the ICCPR's entry into force, the U.S. government had enacted the 1966 Freedom of Information Act (FOIA).⁶ Sweden had a preexisting freedom of information (FOI) law, and in the late 1970s and early 1980s, a number of other states followed, including Canada, Mexico, Australia, New Zealand, France, The Netherlands, and Finland. However, state practice on public records and archives varied widely. Many governments continued to invoke security concerns to justify highly restrictive policies on documents relevant to past abuses.

The notion of a right to truth emerged more prominently in the 1980s following waves of enforced disappearances, particularly in Latin America. International groups including the UN Office of the High Commissioner for Human Rights (OHCHR)'s Working Group on Enforced or Involuntary Disappearances and the Inter-American Commission on Human Rights asserted a right to the truth about disappeared persons.⁷ They pointed to article 32 of the 1977 Additional Protocol to the 1949 Geneva Conventions, which identified "the right of families to know the fate of their relatives" in the context of armed conflict.⁸

The right to the truth has gained considerable momentum as a norm since that period. The rise of more democratic governments in many areas of the world resulted in a wealth of archival materials becoming available in states where populations clamored for information about the past. New governments did not always have strong political incentives to satisfy that appetite for information. In many transitional states, members of the old guard continued to occupy important positions in government. In other states, the old guard was removed but retained enough arms or economic ammunition to challenge the security and stability of the reconstituted state.

In that context, advocates for making archival materials available forged international partnerships and worked with UN agencies to develop laws and policies on handling archives from repressive regimes during times of transition. In 1994-95, UNESCO undertook a study on the subject with the International Council on Archives (ICA), a non-governmental body that promotes cooperation among archives.⁹ In 1995, the UN Commission on Human Rights (UNCHR) subcommittee for the Prevention of Discrimination and Protection of Minorities in 1995 commissioned a report from French lawyer Louis Joinet on promoting accountability for human rights violations, including through the use of archives. Joinet submitted that report in 1997 and laid down a number of key principles.¹⁰

⁶ Freedom of Information Act, Public Law 89-554, 80 Stat. 383, *amended* 1996, 2002, 2007.

⁷ See First Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1435, Jan. 26, 1981, ¶ 187; and Annual Reports of the Inter-American commission on Human rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8, rev. 1, p. 205.

⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 32, 8 June 1977.

⁹ Spanish archival expert Antonio González Quintana led an international group of archivists and human rights advocates and produced a joint report. See Antonio Gonzalez Quintana, *Archives of the Security Services of Former Repressive Regimes* (Paris: UNESCO, 1997).

¹⁰ Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission for Human Rights, E/CN.4/Sub.2/1997/20/Rev.1 [hereinafter Joinet Report].

Both the ICA-UNESCO Report and the Joinet Report asserted the existence of an inalienable right to the truth. Joinet asserted that in the wake of widespread abuses:

Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.¹¹

He thus presented the right to the truth as both an individual and collective right and as a right with deontological roots and consequentialist justification.¹² Joinet stressed that such rights exist alongside rights to justice and reparation and advocated the creations of commissions of inquiry to promote both ends, but he emphasized that the right to know exists independently of formal accountability processes:

Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.¹³

He also added that “[a] people’s knowledge of the history of its oppression is part of its heritage.”¹⁴ International lawyer Diane Orentlicher later updated Joinet’s principles and submitted a revised version to the UNCHR in 2005, building on the same core concept of a right to know.¹⁵ Neither the original Joinet Report nor the revised Joinet-Orentlicher Principles constitutes binding law, but they have been influential in shaping discourse at the UNCHR and in other international forums on the relationship between archival work and human rights. The same is true of the revised and expanded UNESCO/ICA Report prepared by Antonio González Quintana in 2009, which deals with many of the same subjects, drawing extensively from the Joinet-Orentlicher Principles and adding further discussion and details.¹⁶

Since the mid-1990s, many more states have recognized enacted FOI laws, acknowledging at least a qualified right to know. More than 85 states now have FOI laws, including many developing countries and states recently emerging from conflict and transition

¹¹ Joinet Report, *supra* note 10, principle 1.

¹² Some archives have mentioned the consequentialist aspect of the right to the truth in justifying their activities. For example, the Slovak Nation’s Memory Institute was established in part to express the conviction that “those who do not know their past are condemned to repeat it.” Act on Disclosure of Documents Regarding the Activity of State Security Authorities in the Period 1939-1989 and on Founding the Nation’s Memory Institute and on Amending Certain Acts (“Nation’s Memory Act”) Aug. 19, 2002 (Slovakia) [hereinafter Nation’s Memory Act of Slovakia], preamble.

¹³ Joinet Report, *supra* note 10, principle 3.

¹⁴ *Id.* at principle 2.

¹⁵ Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Commission for Human Rights, UN Doc. E/CN.4/2005/102/ADD.1, Feb. 8, 2005 [hereinafter Joinet-Orentlicher Principles] (including similar language to the provisions from the Joinet report cited above).

¹⁶ Antonio González Quintana, *Archival Policies in the Protection of Human Rights* (Paris: UNESCO, 2009) [hereinafter 2009 UNESCO-ICA Report].

from highly repressive rule. A number of states have taken specific measures to preserve archives relating to human rights violations and to make them available. Slovakia passed a 2002 law establishing a Nation's Memory Institute recognized a "duty of our State to disclose the activity of repressive authorities" and that "no unlawful act on behalf of the State against its citizens may be protected by secrecy or forgotten."¹⁷ Peru passed a Law of Transparency and Access to Public Information in 2003, stating that "[e]very individual has the right to request and receive information from any branch of Public Administration."¹⁸ In 2003, Hungary passed a law creating the Historical Archives of the Hungarian State Security "to guarantee the right of [survivors] to the information" about state abuses during the Communist era.¹⁹ Argentina set up the National Memory Archives in 2003 by presidential decree to safeguard the right to the truth about abuses committed by that country's military dictatorship.²⁰

At the regional level, the Council of Europe has passed a series of resolutions and declarations on the right of freedom of information and the corresponding state duty to make information available within reasonable limits.²¹ In September 2006, the Inter-American Court of Human Rights issued a landmark legal decision on the principle of a "right to truth." In the case of *Reyes v. Chile*, it held that the American Convention on Human Rights establishes an individual's right of access to information held by the state.²² Article 13 of the American Convention includes the following language:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio

¹⁷ Nation's Memory Act of Slovakia, *supra* note 12, preamble.

¹⁸ Law of Transparency and Access to Public Information, Amendment to Law No. 27808, *promulgated on* Feb. 4, 2003 (Peru) [hereinafter Peruvian FOI Law], art. 7.

¹⁹ Act No. III of 2003, On the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security, 2003 (Hungary) [hereinafter Law on the Hungarian State Security Archives], preamble.

²⁰ Decree No. 1259/2003 (Argentina), Dec. 16, 2003.

²¹ *See, e.g.*, Resolution No. 428 adopted by the Council of Europe Parliamentary Assembly on Jan. 23, 1970 (asserting that states should make information available within reasonable time frames); and Declaration on the Freedom of Expression and Information adopted by the Committee of Ministers, Apr. 29, 1982 (setting a goal of pursuing an open information policy in the public sector).

²² Order of the Inter-American Court of Human Rights, Case of Claude-Reyes et al. v. Chile, Judgment of Sept. 19, 2006 (Merits, Reparations, and Costs) [hereinafter *Reyes v. Chile*].

broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.²³

The court held that the American Convention and other international human rights instruments such as the UDHR and ICCPR, “establish a positive right to seek and receive information”²⁴ and that article 13 specifically “protects the right of all individuals to request access to State-held information,” subject to some restrictions:

In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to “seek” and “receive” “information,” Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.²⁵

In the December 2010 case of *Gomes Lund v. Brazil*, the Inter-American Court for Human Rights ruled that the Brazilian government again upheld the right to truth, holding that the Brazilian government had to provide all relevant public records to the families of a group of militants disappeared by security forces during the 1970s. In a remarkable passage, the court asserted:

[i]n cases of human rights violations, government authorities cannot hide behind mechanisms such as State secrecy or the confidentiality of the information, or for reasons of public interest or national security, in order to avoid providing information required by judicial or administrative authorities charged with a pending investigation or process. In addition, when an investigation concerns a punishable offense, the decision to qualify information as secret and refuse its disclosure must never depend exclusively on the government organ whose members are implicated in the commission of the crime.²⁶

United Nations bodies have also become considerably more forward-leaning and explicit about the right to the truth. In 2005, the UNCHR adopted Resolution 2005/66, recognizing “the

²³ American Convention on Human Rights, art. 13, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). Twenty-four of the 35 members of the Organization of American States (OAS) have ratified the Convention. The United States and Canada have not.

²⁴ *Reyes v. Chile*, *supra* note 22, ¶ 76.

²⁵ *Reyes v. Chile*, *supra* note 22, ¶ 77.

²⁶ Inter-American Court of Human Rights, Case of *Gomes Lund et al v. Brazil*, Judgment of Nov. 24, 2010, ¶ 202.

importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.” Resolution 2005/66 also commissioned a study from the Office of the UN High Commissioner for Human Rights (OHCHR) on “the basis, scope, and content of the right under international law, as well as best practices for effective implementation of this right.”²⁷ The OHCHR produced a report the following year and found that a broad and inalienable right to the truth exists—a right both individual and collective in nature.²⁸ The OHCHR report based its findings on numerous sources, including the Geneva Conventions and ICCPR, national and international case law, legal instruments establishing truth commissions, and myriad resolutions and other instruments emanating from UN human rights bodies and other regional and international institutions.²⁹ After replacing the UNCHR, the UN Human Rights Council passed its own resolution on the right to the truth in 2008, which repeated many of the provisions of Resolution 2005/66.³⁰

In 2010, the International Covenant for the Protection of All Persons from Enforced Disappearance took effect. The Convention affirms “the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person and the freedom to seek, receive, and impart information to this end.”³¹ The latter phrase echoes the language of the UDHR and ICCPR and thus connects the provision to the concept of freedom of information. The Convention also provides a concrete indication of what types of information constitute meaningful truth, requiring states to provide any party with a legitimate interest, such as relatives or legal counsel, with information on who ordered the disappearance, where and when the disappearance occurred, the present location of the disappeared individual, and details of that person’s health, release, and death, if applicable.³² The Convention does allow for exceptions pertaining to privacy and security but tailors those exceptions narrowly in a manner designed primarily to ensure the rights of the disappeared person.³³ The Convention on Enforced Disappearance has more than 90 signatories. It is the most specific treaty-based enunciation of the right to the truth to date.

Official records relevant to human rights abuses remain off-limits in many states, either for a certain period of time due to their classification or as a result of regimes that simply do not

²⁷ UN Commission on Human Rights, Right to the Truth, Human Rights Resolution 2005/66, ¶6, UN Doc. E/CN.4/2005/L.10/Add.17, *adopted without a vote* Apr. 20, 2005.

²⁸ Study on the Right to the Truth, UN Doc. E/CN.4/2006/91, 8 February 2006 [hereinafter 2006 OHCHR report].

²⁹ *Id.*

³⁰ Right to the Truth, Resolution 9/11, UN Doc. A/HRC/Res/9/11 [hereinafter HRC Resolution 9/11]

³¹ International Convention for the Protection of All Persons from Enforced Disappearance, G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), *entered into force* Dec. 23, 2010. [hereinafter Convention on Enforced Disappearance].

³² Convention on Enforced Disappearance, *supra* note 31, art. 18.

³³ The lone reference to national security exceptions is in article 20, which allows a state to restrict information, “on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with applicable international law and with the objectives of this Convention.” Convention on Enforced Disappearance, *supra* note 31, art. 20.

disclose state records at all. It would thus be an exaggeration to assert that the right to the truth has been universally accepted. It has become embedded in international human rights discourse, however, and has spread steadily from Western states to relatively democratic states in Central and Eastern Europe and Latin America. State practice—particularly in the area of FOI laws—and the declarations and decisions of selected regional bodies also point to an emerging right to the truth under customary international law.

B. The Duty to Record

The right to the truth implies that the public should have access to information about state human rights abuses, but to be meaningful, information about past state abuses must be available. It thus implies that states have a reciprocal “duty to record” and maintain archives—including printed documents, films and photos, and other media. The Joinet report and amended Joinet-Orentlicher Principles were influential in building this link. The Principles assert that states have a duty “to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations.”³⁴ The Principles focus both on the power of archives to empower accountability proceedings and to preserve collective memory, thus guarding against “revisionist and negationist arguments.”³⁵

The Joinet-Orentlicher Principles also set out a number of concrete technical recommendations on how to manage archives to advance memory and justice. In a report to the UNCHR the following year, the OHCHR asserted that: “[a]ccess to information and, in particular, to official archives, is crucial to the exercise of the right to the truth.”³⁶ The UN Human Rights Council later requested that the OHCHR prepare a follow-up study on:

best practices for the implementation of [the right to the truth], including, in particular, practices relating to archives and records concerning gross violations of human rights with a view to create guidelines on protecting archives and records concerning gross human rights violations.³⁷

The OHCHR submitted its report in 2009. It emphasized the crucial role of archives in implementing the right to the truth and the need for states to preserve government records at all levels, accept relevant non-official papers, establish laws governing privacy and access, and set up mechanisms to protect and manage documents effectively.³⁸

³⁴ Joinet-Orentlicher Principles, *supra* note 15, principle 3.

³⁵ Joinet-Orentlicher Principles, *supra* note 15, principle 3. The Joinet-Orentlicher Principles assert that with or without a formal accountability process, “[a]ccess to archives shall be facilitated to enable victims and their relatives to claim their rights.” *Id.* at principles 5, 15.

³⁶ 2006 OHCHR Report, *supra* note 28, at ¶ 52. The OHCHR also included a section on the importance of archives as a means for realizing the right to information about human rights abuses in its 2007 report to the UN Human Rights Council on the right to truth. *See* Right to the Truth: Report of the Office of the High Commissioner for Human Rights, UN Doc. A/HRC/5/7, 7 June 2007, ¶¶58-70.

³⁷ HRC Resolution 9/11, *supra* note 30, at ¶ 7.

³⁸ Right to the Truth: Report of the Office of the High Commissioner for Human Rights, UN Doc. A/HRC/12/19, 21 August 2009 [hereinafter 2009 OHCHR Report], ¶2.

In *Reyes v. Chile*, the Inter-American Court on Human Rights pointed to numerous declarations by regional bodies in the Americas, including the 2004 Nueva León Declaration, whereby heads of state attending a Summit of the Americas undertook “to provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens,” recognizing that “[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation...”³⁹

II. Assembling Archives in Transitional States

The emerging norm of a duty to record implies a set of responsibilities for states. Maintaining an effective archive of past abuses requires inventorying, organizing, and preserving documentary materials, as well as developing access rules and guidelines that promote dissemination consistent with legitimate aims of security and privacy. Some of these tasks—particularly the last—are difficult even for wealthy, democratic states to manage effectively. All aspects of archiving human rights abuses present serious challenges in societies transitioning away from repressive rule. Those challenges often begin with the first step: assembling documents related to the atrocities. Outgoing abusive leaders seldom bestow tidy collections of documents to their successors. Indeed, departing officials of repressive regimes often seek to destroy documents when their power ebbs. As the regime loses control over key security facilities, rebels, foreign military forces, journalists, human rights advocates, or others sometimes seize caches of documents. Where should those documents go?

A foundational approach focuses on how best to establish a legitimate, well-organized, secure, and accessible archive on past abuses. Such an archive must be soundly managed from a technical standpoint, but it must also have legitimacy, which stems from public perceptions that it reveals the truth in a fair and impartial manner. The path to that end varies from case to case. The ideal outcome is to hand documents to a well-funded, secure, functioning national archive. That option is not always available, however—especially in societies emerging from mass atrocities. Archival efforts often begin in legal and political gray zones, before an old regime has been ousted or before a legitimate new government has taken shape. In other cases, new governments lack the apparent will or capacity to assemble or preserve archives of past terror. If a state is unable or unwilling to carry out its duty to record, do other actors have the right, or even the responsibility, to step into the breach?

This section argues that the default preference should be to promote state-led archival efforts but that non-state actors are sometimes legally (or at least normatively) justified in taking the lead. Several key variables should be weighed in determining who is best placed to lay an archival foundation for memory—the extent to which a legitimate, democratic government is in power in the state where the abuses occurred; that government’s evident will and capacity to manage an archive responsibly; whether the government has consented to leadership by non-state

³⁹ Declaration of Nueva León, *adopted on* Jan. 13, 2004, Monterrey, Mexico, by the Heads of State and Government of the Americas, <<http://www.summit-americas.org/specialsummit/Declarations/Declaration%20of%20Nuevo%20Leon%20-%20final.pdf>>. Beginning in 2003, the OAS also passed a series of annual declarations emphasizing the importance of public access to state-held information. *See, e.g.*, Resolution AG/RES. 2252 (XXXVI-o/06) of June 6, 2006, on “Access to Public Information: Strengthening Democracy.”

actors; the extent of involvement by local actors; and whether the records at issue were produced by the repressive state or confiscated from private citizens or other sources.

A. The Role of National Archives

The general rule under international law and most national legal systems is that official records belong to the state in which they were produced. The emerging norm of a duty to record has also focused on states' responsibility to maintain archives. In numerous cases, states have indeed taken the lead in developing archives related to past human rights abuses. For example, the Spanish government assembled documents about repression under the Franco regime in the National Historical Archive Civil war section in Salamanca and later merged them into the national Documentary Centre for Historical Memory.⁴⁰ A number of former Communist states in Eastern and Central Europe have also established specific human rights archives. The German government has preserved archives from the *Stasi* (East German secret police) in Berlin. Poland, Hungary, and Slovakia have also passed specialized laws or decrees governing archives of past terror. In Latin America, Argentina and Brazil have done the same.⁴¹

A number of factors enabled states to play central roles in those instances. The governments in question secured physical control over archives maintained by their repressive predecessors—some of which were already reasonably well-organized and preserved. The new governments in those states also had reasonably strong capacity to manage archives. Perhaps even more importantly, they had political incentives to lead the documentation process—both to satisfy public yearning for the truth and to maintain control over what information was released.

State human rights archives can either be deposited in the general national archives or in separate, specialized archives. The 2009 ICA-UNESCO Report recommends creating specialized archives focused on the period of abuses or on documents pertaining to human rights violations. It reasons that managing human rights documents requires special expertise and that the large volume of requests likely to be made require intensive application of human and financial resources that could overwhelm the capacity of general national archives. Later, the report argues, specialized archives can be merged with general archives.

There are numerous benefits to having national archives or other government entities lead the archival process. The 2009 OHCHR report made the case for locating records in national archives as follows:

Maintaining all the government's records in a national archive has three important benefits. First, it helps ensure consistency in applying restrictions and access rules to archival records... Second, by placing sensitive bodies of records there, the national archives build over time a body of precedent in the handling of these

⁴⁰ Royal Decree 697/2007 (Spain), June 1, 2007.

⁴¹ Decree No. 5.584 of 2005 (Brazil), Nov. 18, 2005 (authorizing disclosure of documents pertaining to government investigations conducted by selected security agencies of the military regime that governed Brazil between 1966 and 1985); Decree No 1259/2003 (Argentina), *supra* note 20.

records... Finally, it is less expensive to manage a single national archive than to operate several institutions.⁴²

In addition, state leadership of a credible process signals a break from the practices of the past and importantly communicates local ownership of the processes of promoting memory and accountability. State leadership also contributes to a customary norm of the duty to record. For a practical standpoint, states are sometimes the only entities with sufficient resources to manage large archives in transitional societies. For all of these reasons, a foundational approach suggests that when competent national institutions exist, established and monitored by legitimately elected leaders, they are indeed the logical locus for human rights archives.

B. Documentation by Non-Governmental Groups

Of course, not all states are well-positioned to manage effective archives. NGOs may have the right (or even the responsibility) to act when states lack the will, capacity, or legitimacy to document past abuses effectively. It is clear that NGOs have the legal authority to manage their own records and private records entrusted to them⁴³—provided that such documents are not subject to subpoena or otherwise subject to legitimate seizure by the state. International law says little about the capacity of non-governmental entities to manage state records. It is relatively clear that states may authorize NGOs to manage documentary collections. The situation becomes more complex when states do not authorize such activities or demand that documents be returned to the state.

Cambodia provides an illustration of NGO-led documentation officially authorized by the state. In 1979, invading Vietnamese forces discovered troves of documents containing important information about the Khmer Rouge reign of terror. Certain of those documents—including records and photographs from the infamous Tuol Sleng Prison—later became part of the archives of the state-run Tuol Sleng Genocide Museum. Many more documents were simply locked in a dark room in the Ministry of Interior of the People’s Republic of Kampuchea—the Vietnam-backed government that replaced the Khmers Rouges. DC-Cam, which had been established by Yale University’s Cambodian Genocide Program, obtained those documents from the Ministry of Interior in 1995.⁴⁴

At that time, the Cambodian National Archives were underfunded, lacking in capacity, and in a state of serious disrepair. The documents in question had been essentially untouched since 1979, and nothing was being done to organize or preserve them. Many were documents printed or hand-written on poor-quality paper and had deteriorated considerably since their creation. In that context, engaging an outside actor with the funding and expertise to set up an archive was imperative. The government authorized DC-Cam to establish an archive of Khmer Rouge documents by issuing a letter. In the absence of an archival law, the government’s letter

⁴² 2009 OHCHR Report, *supra* note 38, ¶ 13.

⁴³ 2009 OHCHR Report, *supra* note 38, ¶ 11.

⁴⁴ Yale established DC-Cam with help from U.S. State Department funds. In January 1997, DC-Cam became an independent Cambodian NGO, which it remains today.

of authorization functioned like an administrative decree.⁴⁵ A small number of critics argued that it was illegal for the government to transfer of the documents to a non-governmental entity, but DC-Cam's in-country presence and the government's explicit approval of the arrangement satisfied most concerns.⁴⁶

DC-Cam was thereafter able to develop an extensive archive with support and funding from diverse international partners. The collection remains in Phnom Penh and has been instrumental in a wide range of initiatives aimed at memory and justice—playing a central evidentiary role in the UN-backed Khmer Rouge tribunal and serving as the foundation for an array of other research and education projects, including textbooks, a monthly magazine, museum exhibits, films, radio shows, and public lectures. DC-Cam's political independence has helped lend credibility to the effort and has been attractive donors who had legal or political reasons not to fund the Cambodian government directly.⁴⁷ The Cambodian government has embraced the arrangement as well, working jointly with DC-Cam on a nationwide genocide education program and donating a parcel of land to DC-Cam for the purpose of establishing a permanent documentation center.

The Cambodian example illustrates that specialized archives need not be run by government agencies to have public legitimacy or to receive the blessing and active support of the state. More important to the archive's impact has been its in-country presence, strong local ownership, and rules and regulations that have inspired confidence about the integrity and openness of the collection. The Cambodian model is an appealing bridge while national institutions are still in gestation or while a new government's credibility on human rights issues is still in doubt. It can also be an acceptable longer-term outcome where the government grants consent and the non-governmental entity is able to perform archival functions well.

The same model may also be appropriate elsewhere. In Afghanistan, documents are routinely identified that shed light on abuses throughout that country's tragic modern history. However, the Afghan National Archives have limited capacity, and the government has done little to document past atrocities systematically. Without robust government involvement, foreign donors have turned to non-governmental organizations as key players in the process of documentation.⁴⁸

NGO involvement in archiving public records becomes more complicated when the host government withholds consent. In Belgrade, the Humanitarian Law Centre (HLC) has sought to document atrocities committed during the Balkan wars of the 1990s, including crimes by Serbian

⁴⁵ Cambodia passed an archival law in 2007, but that law left the Khmer Rouge materials in the custody of DC-Cam with the government's support.

⁴⁶ Interview with Youk Chhang, *supra* note **Error! Bookmark not defined.**

⁴⁷ Between 1997 and 2007, the U.S. Congress prohibited direct U.S. aid to the Cambodian government due to the 1997 coup in Cambodia and related contemporary human rights abuses. Thomas Lum, *Cambodia: Background and U.S. Relations* (Washington, DC: Congressional Research Service, 2007), at 10. The existence of an independent archival institution made it possible for the United States to be the leading foreign sponsor of Khmer Rouge documentation efforts through support to DC-Cam.

⁴⁸ In 2008, the U.S. Institute of Peace organized a conference in Phnom Penh to introduce a group of Afghan non-governmental organizations to the documentation practices adopted by DC-Cam and other members of the Documentation Affinity Group. See Scott Worden and Rachel Ray Steele, *Telling the Story: Documentation Lessons for Afghanistan from the Cambodian Experience*, USIPEACE BRIEFING (Dec. 2008).

forces. The Serbian government and media have frequently denounced the HLC and its founder, Natasa Kandic, but foreign support has helped protect the organization and enable it to conduct interviews and obtain government records with incriminating information. The most striking of these was a video of the 1995 Srebrenica massacre of Bosnian Muslims produced by the Skorpions, a unit belonging to Serbia's Ministry of Interior.⁴⁹ The HLC later turned that film over to Serbia's war crimes court and a copy to the International Criminal Tribunal for the former Yugoslavia (ICTY). The HLC possesses some government records, which it has used to promote legal accountability.⁵⁰ An immediate return of such documents to the Serbian government would pose obvious risks. It is quite possible that absent HLC's efforts, many of the documents would simply have been destroyed.⁵¹

Without strong state consent, a human rights archive containing public records is highly vulnerable to legal challenges or even security threats. In an illiberal state that denies past wrongdoing, there is an inevitable trade-off between the interests in respecting state ownership of public records and the creation of archives detailing rights abuses. One possibility is for international tribunals using such documents to keep them under United Nations custody, but sovereignty concerns remain. An intermediate option mitigates the risk that documents will be destroyed; tribunals can make certified copies of such documents abroad—a legitimate form of judicial record-keeping—and return originals to the state demanding them. A better solution (albeit an aspirational one) would be to provide non-state groups with the legal standing to challenge states' claims to such documents in regional or international courts or forums.

a. The Rights of Occupying Military Forces

Human rights documents are not always assembled by archivists and NGOs. Armies are major collectors of public records in the territories they occupy. In Iraq, Afghanistan, Libya, and many other cases, opposing military forces have scoured official facilities and battlefields for documents. They do so for many reasons, such as obtaining intelligence information, learning about enemy strategies and tactics, preparing for future prosecution, and keeping inconvenient facts from being disclosed. Those documents often include references to human rights violations.

Several international treaties include provisions dealing with the seizure of documents. The most important provision pertains to foreign armies' rights to seize official records of the state. Regulations set forth in the annex to the 1907 Hague Convention (IV) respecting the Laws

⁴⁹ Tim Judah and Daniel Sunter, *How video that brought Serbia to dock was brought to light*, THE OBSERVER, June 4, 2005.

⁵⁰ Louis Bickford, Patricia Karam, Hassan Mneimneh, and Patrick Pierce, *Documenting Truth* (New York: International Center for Transitional Justice, 2009), at 6.

⁵¹ Going forward, the ICTY could continue to hold certain copies of the original documents, but most international legal opinion on the subject of archives at international tribunals points to national ownership of such documents except in exceptional circumstances. This paper does not discuss the roles of tribunals in archival work, but a general rule of thumb should be that tribunals are entitled to retain their own official records and copies of materials used in the proceedings. For a similar argument, see 2009 OHCHR Report, *supra* note 38, ¶¶26-31. For further discussion of the issue of archives as cultural property, see *infra* section D.

and Customs of War on Land prohibit seizure or destruction of materials not “imperatively demanded by the necessities of war,”⁵² but the language of the convention suggests that an army may seize a wide range of documentary materials, such as battle plans, organizational documents, official correspondence, and the like. Broad seizures of an opponent’s documents during wartime are so commonplace that it likely reflects customary international law as well.

Once a foreign army becomes an occupying force, the same regulations permit it to “take possession of...all movable property belonging to the State which may be used for military operations.”⁵³ The 1907 Hague Convention also implies that an occupying army may seize documents needed for the administration of the state, since “[t]he authority of the legitimate power [has] in fact passed into the hands of the occupant,” and the occupying power is to “take all the measures in [its] power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁵⁴ The power to administer the state likely encompasses maintenance and upkeep of existing official records and archives, which opens nearly all public documents to the occupying power. Once an occupying power’s administrative authority ends, the Hague Convention language strongly suggests that it must return documents to the state absent consent to the contrary.

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict imposes a duty on signatories to protect cultural property, including “important collections of books or archives” and “depositories of archives.”⁵⁵ That convention clearly bars an occupying force from destroying archival materials but does not prohibit the use of historical archives or more recent official records for purposes of administration. Whether such authority enables the occupying army to remove records from the territory of the state for preservation is doubtful, but the clear language of the convention does not exclude that possibility.⁵⁶

International law imposes stricter norms on the collection of private documents. The 1907 Hague Convention asserts that “[p]rivate property cannot be confiscated”⁵⁷ amid armed conflict. However, other provisions of international law qualify this prohibition by allowing an

⁵² Hague Convention Respecting the Laws and Customs of War on Land [hereinafter 1907 Hague Convention], Oct. 18, 1907, Annex, art. 23. Interestingly, the 1949 Geneva Convention (IV) for the Protection of Civilians in Time of War included similar language, it only applied the principle of military necessity to the destruction of official property, suggesting that an army of occupation may seize materials of the occupied state even if doing so does not meet a strict test of military necessity. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, [hereinafter 1949 Geneva Convention], art. 53, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵³ 1907 Hague Convention, *supra* note 52, Annex, art. 53.

⁵⁴ The regulations direct the army of occupation to “take all the measures in his power to restore, and ensure, as far as possible, public order and safety.” 1907 Hague Convention, *supra* note 52, art. 43. Presumably, this requires referencing state documents.

⁵⁵ Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict [hereinafter 1954 Hague Convention], signed May 14, 1954, entered into force Aug. 7, 1956, 249 U.N.T.S. 240-88.

⁵⁶ Trudy Huskamp Peterson, “Archives in Service to the State,” unpublished paper, <<http://www.trudypeterson.com/downloads/ARCHIVES.pdf>>, circa 2004, p. 5 (arguing that “it is reasonable to assume that such records as needed for governance are to be seized for use, not for removal”).

⁵⁷ 1907 Hague Convention, *supra* note 52, art. 46.

army to remove “military documents” from prisoners of war and by enabling an occupying force to detain individuals suspected of activities hostile to the state, which at times likely results in the acquisition of private documentary material.⁵⁸ Common article 3 of the 1949 Geneva Conventions applies similar standards to non-international armed conflict.

b. Debates over Sovereignty and Patrimony

The involvement of NGOs and foreign governments raises issues of sovereignty and cultural patrimony. These have been salient in the case of Iraq, where a number of different collections of documents have been removed from the country or are being held by non-governmental groups. During the 1990-91 Gulf War, Kurdish rebels seized roughly eighteen tons of state records of Saddam Hussein’s Baathist regime. Further documentary troves were discovered after the U.S.-led overthrow of Saddam in 2003. Even prior to the invasion, human rights groups emphasized the importance of securing documentary evidence of Saddam’s atrocities. In April of that year, Human Rights Watch publicly called on U.S. forces to protect Iraqi government documents from destruction, calling them “critical evidence of twenty-five years of atrocities” in a future prosecution and asserting that “countless families in Iraq will need access to these archives to establish what happened to their missing relatives.”⁵⁹

U.S. military and intelligence personnel indeed discovered millions of pages of documents from the Baathist regime and flew them to the United States for preservation.⁶⁰ A key NGO was also engaged in the documentation effort—the Iraq Memory Foundation (MF), a U.S.-based group led by Iraqis residing in the United States.⁶¹ While the U.S. Coalition Provisional Authority was administering Iraq, the MF obtained a major collection of roughly three million pages of documents from the basement of the Ba’ath Party headquarters in

⁵⁸ This provision may be qualified by an occupying army’s legal authority to detain individuals “under definite suspicion of activity hostile to the security of the Occupying Power.” 1949 Geneva Convention, *supra* note 52, art. 5. An additional provision of the Geneva Conventions allows parties to an armed conflict to remove “military documents” from the possession of prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, art. 18, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Each of these exceptions may result in a small number of documents coming into the hands of an occupying power.

⁵⁹ Human Rights Watch, *Iraq: Protect Government Archives from Looting*, Apr. 9, 2003, <<http://www.hrw.org/news/2003/04/09/iraq-protect-government-archives-looting>>.

⁶⁰ The U.S. army digitized millions of pages of Baathist documents. Gravois, *supra* note 63. In 2005, at the urging of Rep. Pete Hoekstra (R-MI), the U.S. government posted some of the documents online. John Gravois, *Disputed Iraqi Archives Find a Home at the Hoover Institution*, CHRONICLE OF HIGHER EDUCATION, Jan. 23, 2008.

⁶¹ The MF was the successor to the Iraq Research and Documentation Project (IRDP), a project at Harvard’s Center for Middle Eastern Studies led by Iraqi scholar Kanan Makiya. Makiya had worked to document abuses by Saddam Hussein’s Ba’athist regime by visiting northern Iraq and reviewing the documents seized by Kurdish rebels after the first Gulf War. In 2003, the MF gained approval to organize itself as a *jamiyah* (society) in Iraq, which was then under U.S. administration. Iraq Memory Foundation, *The History of the Iraq Memory Foundation*, http://www.iraqmemory.org/en/about_history.asp [hereinafter *History of the MF*].

Baghdad, as well as 2.4 million pages of the documents seized by Kurdish rebels in 1991 and 750,000 pages of documents captured in Kuwait after its liberation in 1991.⁶²

There was little doubt that occupying military forces had the legal authority to seize documents, but the MF's prominent involvement and dispatch of documents to the United States generated controversy. Makiya insisted that he had obtained the documents lawfully—with the blessing of Iraq's deputy prime minister and the prime minister's office—and that the new Iraqi government lacked the capacity to manage the collection. The head of Iraq's National Library and Archives (ILNA), Saad Eskander, argued that MF's possession of the documents was "illegal" and violated Iraqi law and international treaties establishing that public records were part of Iraq's national heritage.⁶³ The MF subsequently signed a deposit agreement with the Hoover Institution at Stanford University, whereby Hoover would maintain the archival materials until a suitable depository in Iraq was identified.

In February 2005, the American Library Association passed a resolution stating that the documents "represent Iraqi social memory" and "condemn[ing] the confiscation of documents ... by the United States... and strongly advocat[ing] the immediate return of all documents."⁶⁴ In 2008, the documents arrived at the Hoover Institution, and the Society of American Archivists and Association of Canadian Archivists issued a public statement calling on the U.S. government to "to bring the treatment and custody of records seized from Iraq into conformance with laws, customs, and U.S. precedents" by returning public records to the INLA as soon as possible.⁶⁵ The Iraqi Ministry of Culture responded by noting that it had "approved the interim deposit agreement" between the MF and Hoover Institution, and Hoover emphasized the consensual and temporary nature of the agreement and its benefits for the preservation of the archives.⁶⁶

Slightly different considerations relate to a trove of antique Torahs and other rare Jewish documents confiscated by the Saddam Hussein regime from private citizens in Iraq. U.S. forces found the collection underwater in the basement of an intelligence facility in Baghdad in 2003 and flew them to the United States with a team from the U.S. National Archives and Records Administration (NARA), who then spent hundreds of thousands of dollars to freeze-dry and conserve them at a facility in Texas with an agreement to return them in 2005. When that agreement lapsed, Eskander argued that the records were Iraqi cultural property and belonged in

⁶² These documents were called the "Ba'ath Regional Command Collection." *History of the MF*, *supra* note 61.

⁶³ Eskander cited 1963 and 1983 Iraqi laws dealing with public records, as well as the Hague and Geneva Conventions. Gravois, *supra* note 60. See also *Iraq accuses neighbors of stealing archives*, AGENCE FRANCE PRESSE, Oct. 18, 2009.

⁶⁴ Sandy English, "Librarians and archivists demand US return of stolen Iraqi documents," World Socialist Web Site, Mar. 1, 2008, <<http://www.wsws.org/articles/2008/mar2008/iraq-m01.shtml>>.

⁶⁵ The Society of American Archivists, *SAA/ACA Joint Statement on Iraqi Records*, Apr. 22, 2008, <www.archivists.org/statements/IraqiRecords.asp>. The statement also urged Iraq to take steps to strengthen the INLA's capacity to preserve the documents and make them accessible.

⁶⁶ Iraqi Ministry of Culture, *Re: Society of American Archivists and Association of Canadian Archivists Statement*, Apr. 27, 2008; Richard Sousa, Letter to Mr. Mark A. Green, President of the Society of American Archivists, June 6, 2008, <http://www.archivists.org/statements/Iraqi%20Records_HooverLetter.pdf>. Iraq's weak bargaining position may vitiate that consent to some degree, but official support for the arrangement does exist.

Iraqi archives, threatening to bring the case to court if diplomatic efforts were unsuccessful. Critics doubt Iraq's capacity to protect and preserve the rare materials and contend that they were property of the abused Jewish community rather than the state.⁶⁷ Here, the nature of the documents makes a difference. They are not public records, and if their seizure by the Saddam Hussein regime was indeed unlawful (as it appears), the current Iraqi state has a somewhat lesser claim on them.⁶⁸

Navigating issues of sovereignty and cultural patrimony often involves trade-offs. Foreign or non-state entities are sometimes better placed to establish and preserve archives, and the U.S. military and experts from the NARA, MF and Hoover Institution have contributed to the preservation of many documents that might have otherwise been lost in the heat of conflict. Nevertheless, secure and well-organized archives are of little value if they do not become accessible to the host country population in a reasonable time frame. The normative issue hinges largely on Iraq's readiness to handle the documents.

The 2009 OHCHR report recommends that except in "extreme cases," keeping documents in their home country is preferable to taking records outside the country to preserve or secure them.⁶⁹ It bases that assertion largely on the notion that the home country needs to build capacity to meet the country's ongoing archival needs. There are also other considerations that could favor or disfavor removal of documents in particular cases. Under some circumstances, removing documents could lead to public impressions that they are being withheld or "sanitized" by the foreign power. Conversely, where a government has low credibility as a guarantor of particular documents, the case for at least temporary removal becomes stronger. In recent years, the INLA has taken numerous measures to strengthen its capacity with help from the British Archives and other international partners. As it does, the argument to return originals of the documents (while keeping copies in the United States) becomes stronger. When a national archive is capable of managing materials effectively, it is usually the best locus for a documentary foundation for the truth.

III. Organizing and Preserving Archival Materials

Regardless of who acquires documents related to past atrocities, their potential to contribute to accountability and historical memory depends on how they are organized and preserved. That means reviewing large number of documents, creating a clear inventory, organizing them appropriately, and protecting them from misappropriation or physical decay. These are often formidable tasks given the numbers of documents involved. Moreover, regimes that perpetrate extensive human rights violations do not always keep their archives neatly. In fact, many of the largest collections of relevant documents discovered in recent decades have been found in large piles on the shelves or floors of run-down or abandoned facilities. The day-to-day business of archiving documents does not catch the public eye as readily as dramatic media or courtroom revelations of key findings, but it lies at the core of a foundational approach to documentation.

⁶⁷ Alice Fordham, *Iraqi Jewish documents remain in limbo*, L.A. TIMES, Oct. 31, 2010.

⁶⁸ Interestingly, the Iraqi government has pushed hardest on the return of the Jewish documents from the NARA, presumably because an agreement existed to return them in 2005.

⁶⁹ 2009 OHCHR report, *supra* note 38, ¶ 14.

A. Provenance, Original Order, and Chains of Custody

Organizing an effective human rights archive begins with establishing its contents through a rigorous inventory-taking process. Just as importantly, an archive needs to be soundly organized—so that documents are navigable by researchers—and a reliable system to track the handling and movement of documents after they are obtained. Otherwise, documents with incriminating information can easily change or “disappear,” either as a result of deliberate destruction or due to careless misfiling. These steps are essential if documents are to be judged authentic in courts or commissions and if they are to carry full weight in historical analyses.

Archivists follow the well-settled principles of provenance and original order. The principle of provenance holds that archives of different institutional origins should not be intermingled; they should be grouped according to the institutions that created, assembled, or maintained them. The related principle of original order holds that documents should be archived in an order that tracks, as closely as possible, their original groupings and order. Original order helps to trace chains of custody. In addition, the specific manner in which state agencies group their records reflect important connections between the documents and aspects of the organizational structure and procedures of the agencies in question.

The 2009 OHCHR report alludes to the importance of provenance and original order when discussing the use of records in transitional justice processes:

The first step in using records for a transitional justice process is to understand how the repressive State worked. Then there is a need to understand three aspects about each entity whose records it is planned to use: its structure, the functions it performed, and the records created as it carried out its functions. This is true whether the records are of a Government department, or an opposition group, or a paramilitary body. Understanding the structure and functions helps to judge the probable authenticity and reliability of documents that may be used as evidence.⁷⁰

Keeping documents in their original order makes it easier to prove that they are authentic, because other materials in their original grouping tend to bear cross-references, similar stamps or initials, and other indicia of authenticity.

Some documentation projects have involved measures to bring relevant materials under the control of national archives that possess the institutional expertise to carry out those organizational tasks. In cases where official archival capacity has been lacking, documentation projects have engaged outside consultants and experts. For example, experts from Yale and the University of New South Wales in Australia helped establish a system for inventorying and cataloguing DC-Cam’s archives in the 1990s.⁷¹

A further key to sound documentation—related to the principles of provenance and original order—is to trace chains of custody of documents. A clear chain of custody boosts the

⁷⁰ 2009 OHCHR Report, *supra* note 38, ¶ 18.

⁷¹ See Susan Cook, *Report of the Cambodian Genocide Program, 1999-2000*, Report to the U.S. State Department, Sept. 2000, <http://www.yale.edu/cgp/report99-00_v3.html>.

weight that they are apt to carry in courtrooms, commissions, and in scholarly works.⁷² Breaks in the chain suggest the possibility of tampering or alteration of evidence.

The project to organize the Guatemalan Police Archives provides a good example of how core archival principles lay a solid foundation for the future deployment of documents in the courtroom. In 2005, Guatemalan human-rights prosecutor Sergio Morales Alvarado responded to a complaint from residents in a Guatemala City neighborhood about explosives being stored at a local police station. The authorities agreed to transfer the weapons, and when Morales arrived to verify their removal, he discovered a vast archive of the Guatemalan National Police—an organization that was centrally involved in the country’s brutal civil war between 1966 and 1996 and that was disbanded shortly thereafter. Morales quickly obtained a judicial order enabling him to search the documents for evidence of human rights abuses, and initial reviews suggested that the archive contained information on many of the highest-profile assassinations and disappearances in Guatemala.⁷³

The documents were in poor condition and were rapidly decomposing; human rights investigator Kate Doyle, who assisted the project, has described the scene vividly:

On every available centimeter of the cement floor there were towers of mildewed paper and file folders, tied in twine and entombed in grit. The paper was decomposing before our eyes—wet paper and rotting paper, charred paper, paper brown with mold, paper becoming compost with small seedlings growing through it... The stench of decay was overpowering; all around us were insect carcasses and bat droppings, feathers, bird shit, and the nibbling of rats... [W]e stepped gingerly over haphazard trash heaps, which on closer inspection included thousands of black-and-white photo I.D.’s. The [prosecutor’s] staff was sweeping them into piles and transferring them into clear plastic bags.⁷⁴

Millions of documents were strewn around the building in that state of decomposition and disarray. The discovery made national news, and victims clamored for information. Local human rights groups offered volunteers, and foreign donations helped the prosecutor hire dozens of staffers. Fearful that the government would close the site or that people eager to bury the past would break in and destroy the documents, the prosecutor’s office put initial priority on searching for human rights abuses. Staffers pulled stacks of documents apart and organizing them chronologically. Guatemalan archivists and a former chief U.S. archivist, Trudy Peterson, had to train the staff over a period of months to understand and follow the principles of

⁷² The ICTY stresses the importance of maintaining clear chains of custody for its documentary materials so that the evidence is accorded due weight at trial. See International Criminal Tribunal for the former Yugoslavia, *ICTY Manual on Developed Practices*, 2009, <http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf>, at 18.

⁷³ Kate Doyle, *The Atrocity Files: Deciphering the archives of Guatemala’s dirty war*, HARPER’S MAGAZINE, Dec. 2007, at 52.

⁷⁴ Doyle, *supra* note 73, at 56. See also Trudy Huskamp Peterson, *The End of the Beginning*, Speech marking completion of phase 1 of the Proyecto de Recuperacion del Archivo Historico de la Policia Nacional, Guatemala, Jan. 18, 2008, at 1-2.

provenance and original order.⁷⁵ The archive also created a “master location register” to inventory and track documents and maintain a clear chain of custody.⁷⁶

Advisors to the Guatemalan Police Archive project took a foundational approach, which has since reaped rewards. In October 2010, two Guatemalan policemen were tried for the 1984 abduction and disappearance of Fernando García, a student labor activist and member of the outlawed Guatemalan Worker’s Party. The García trial was the first in Guatemala to rely primarily on evidence from the National Police Archives.⁷⁷ Doyle appeared as an expert witness to detail what she learned from the archives. She argues that the decision to keep the archives in their original order and groupings from the police files was essential in experts’ ability to deduce the inner workings of the Guatemalan police system. That order is also likely to make the Guatemalan Police Archives highly useful in further legal and historical investigations.

Guatemala’s neighbor, Mexico, offers a somewhat contrasting example. In 2002, President Vicente Fox took a dramatic step toward accountability by compelling the Mexican military, police, and intelligence service to release millions of files—some of which contain information relevant to human rights violations. The UNESCO-ICA Report cites the Mexican law as a model for legislation aimed at the right to the truth.⁷⁸ However, the collections of documents have not been indexed, and rules on access to files have not been made publicly available. In that context, researchers have found it difficult to obtain information that could be useful for human rights investigations.⁷⁹ The Mexican example serves as a reminder that high-level legal directives to disclose information are not enough. Mobilizing documentary materials for accountability requires detailed archival work and implementation of specific rules and regulations that facilitate access.

B. Preservation

Documents also need to be protected from theft or human-inflicted damage, as well as physical degradation, fire, flooding, and other risks. Legal sanctions must be in place to deter theft or deliberate destruction. The Joint-Orentlicher Principles assert that “[t]echnical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of

⁷⁵ Doyle, *supra* note 73, at 59-60; Kirsten Weld, Doctoral dissertation for Yale University, [Oct. 2011], page 112 [citation to be updated].

⁷⁶ Peterson, *supra* note 74, at 2-3. DC-Cam has also established a detailed set of procedures to map the chain of custody of documents. See Procedures for Accessing Documents in the Custody of the Documentation Center of Cambodia, [circa 2009], <<http://www.d.dccam.org/Tribunal/Documents/Access%20Procedures%20in%20English.pdf>>.

⁷⁷ Kate Doyle, “I Wanted Him Back Alive”-An Account of Edgar Fernando García’s Case from Inside “Tribunals Tower,” UNREDACTED, Oct. 26, 2010, <http://nsarchive.wordpress.com/2010/10/26/i-wanted-him-back-alive-%E2%80%9D-an-account-of-edgar-fernando-garcias-case-from-inside-tribunals-tower/>.

⁷⁸ UNESCO-ICA Report, *supra* note 16, at 36.

⁷⁹ *The Dead of Tlatelolco: Using the archives to exhume the past*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 201 (Kate Doyle, ed.), Oct. 1, 2006, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB201/index.htm>>.

violations of human rights and/or humanitarian law.”⁸⁰ Colombia also passed an act establishing measures to prevent the destruction, removal, or falsification of archives.

Archives also need to be physically protected. That usually means relocating them to a facility that has a reliable security presence and putting older materials in files or cabinets that offer protection from the elements. When documents are discovered in a damp or fragile condition, they may need to be freeze-dried or otherwise subjected to special means of protection. Since risks of the documents’ physical destruction cannot be eliminated, various other strategies are normally necessary as well. These include making photocopies, microfilm, and digital images of the documents and storing them in a second location—sometimes abroad, insulating them from domestic political changes.

Archives have undertaken various approaches to protecting their collections. DC-Cam worked with Yale University and other international partners to produce microfilm images of its documents and stored photocopies of its documents overseas. DC-Cam is now attempting to identify a partner to digitize its entire collection and put the documents online. The MF has undertaken a mass-digitization process to store images of its materials.⁸¹ Depositing copies of documents in a safe secondary location is sound policy, including the use of locations abroad when the country in question appears subject to the risk of abrupt political shifts. A strong archival foundation for memory needs to be protected. The 2009 OHCHR report supports this view. Although the report recommends keeping original copies in the home country, it notes that: “[t]aking original records out of the country is an entirely separate issue from depositing a secure copy of records in an external location.”⁸² The report advocates the use of secondary storage, inside the country or out.⁸³

The same digitization efforts that help preserve and disseminate documents can also help in the process of analyzing them. That fact was evident in the Fernando Garcia trial. Daniel Guzmán from Benetech provided expert testimony, presenting a statistical analysis—made possible by the bulk scanning of the documents—that showed a disproportionately high percentage of documents related to the García case had been sent to units responsible for directing and coordinating the National Police. That analysis supported the prosecution’s claim that police leadership was well aware of plans to abduct García.⁸⁴ Thus, digital technology can help unlock documents’ potential even as it preserves them.

C. Preservation vs. Prompt Dissemination

⁸⁰ Joinet-Orentlicher Principles, *supra* note 15, principle 14.

⁸¹ “The Meeting of the Documents, Archives, and Confronting the Past Affinity Group,” Phnom Penh, Cambodia, Mar. 1-5, 2005, <http://www.dccam.org/Projects/Affinity/Report_Cambodia.htm>.

⁸² 2009 OHCHR Report, *supra* note 38, ¶ 15.

⁸³ *Id.* Similarly, the Society of American Archivists, which has advocated sending Iraqi records in the United States back to Baghdad, has also urged the U.S. government and other relevant parties to determine a suitable safe location for copies of the documents overseas. Society of American Archivists, *supra* note 65.

⁸⁴ Daniel Guzmán, *Speaking Stats to Justice: Expert Testimony in a Guatemalan Human Rights Trial Based on Statistical Sampling*, CHANCE, <http://chance.amstat.org/2011/09/guatemala/> (last visited Oct. 5, 2011).

Although technological advances have made the processes of organizing and preserving documents considerably more efficient, they continue to be costly and time-consuming. The money and time required for documentation presents a dilemma early in the process. Focusing on archival organization suggests turning over the collection to trained archivists to review and categorize documents in a methodical and impartial manner. A focus on finding information about particular abuses or individuals can lead to a different approach, as researchers scan documents to identify and pull out a handful of documents of particular relevance.⁸⁵ Human rights advocates, journalists, investigators, victims, and their families tend to be keen to pursue specific information, and they often have very good reasons.

Permitting early access and disclosure has clear appeal. It satisfies real and legitimate needs of victims and sends a signal that the new regime will not shroud the past in secrecy. Early disclosure also reduces the ability of opposing actors—namely members of the old regime whose abuses are detailed—from destroying documents and preventing facts from coming to light. Moreover, allowing early dissemination of some key documents can draw public attention to a collection, which can help in raising the funds needed to finance a suitable archive. Allowing journalists and human rights groups to disseminate key materials relatively early in the process gives them an incentive to search for documents—and diminishes any disincentive they may have for turning over discovered materials to the archivists.

Providing access and facilitating dissemination carries significant risks, however. If done without strict supervision, it runs the danger of allowing documents to disappear. Perhaps more importantly, it opens the process to politicization. A public impression that documents are being used to advance a narrow partisan agenda risks undermining the independent credibility of the collection.

A foundational approach does not imply that documents should never be released early in the process or that the body in charge of documentation should attempt to seal off access to the collection entirely. Doing so would invite the perception that the new system would be closed and secretive like the one that came before it. Rather, a foundational approach implies subjecting early disclosures to careful oversight and review by competent authorities—ideally, but not necessarily, officials of the host government—to ensure that privacy concerns and other legitimate bases for non-disclosure receive due consideration. It also means promoting the transfer of documents obtained by journalists, rights groups, or private citizens to an authorized archival body as soon as possible.

The Paraguayan case provides a good example of a foundational approach in this respect. In December 1992, lawyer Martín Almada and judge José Agustín Fernández found thousands of documents in a police intelligence station in suburban Asunción following a tip-off from a police informant.⁸⁶ It quickly became clear that the documents included information about torture, disappearances, and other atrocities perpetrated by the military regime of General Alfredo Stroessner during “Operation Condor” and at other times. The Paraguayan judiciary seized the

⁸⁵ Parts II and III discuss the problems associated with disclosing documentary materials before a system is put in place to determine rights of access, privacy restrictions and the like. Here the discussion focuses merely on the requirements of organization and physical preservation.

⁸⁶ Almada obtained the documents pursuant to a provision in the country’s 1992 constitution enabling a citizen to access state-held information about themselves by obtaining a writ of habeas data. Andrew R. Nickson, *Paraguay’s Archivo Del Terror*, *LATIN AMERICAN RESEARCH REV.* 30:1 (1995), at 127-129.

documents,⁸⁷ provoking outcries from victims and human rights advocates fearful that corrupt judges would continue to withhold the truth and shroud the past at the behest of the executive branch and perhaps also the United States.

The following year, with support from UNESCO, the Paraguayan Supreme Court established the Center for Documentation and Archives for the Defense of Human Rights (CDyA).⁸⁸ The CDyA developed a database for the “Archives of Terror” and brought in documentation experts to catalogue and inventory the collection. The court also took steps to preserve the documents, catalogued roughly 60,000, digitized some 300,000, and later disseminated information about the files. The documents became part of UNESCO’s Memory of the World Project and contributed crucially to a Commission for Truth and Justice in 2004 and extensive revelations about human rights violations by the Stroessner regime and other governments.⁸⁹

The CDyA has also taken steps to ensure that documents stand up in court as authentic. These steps have included scientific analysis of the documents and maintenance of an inventory that traces documents directly back to the police facility in which they were discovered in 1992.⁹⁰ The legacy of the project is a body of documents built on a solid legal and archival foundation; the Archives of Terror have been securely held at the Supreme Court, have not been challenged in court, and are organized and preserved in a manner that facilitates historical research and future investigations.⁹¹

D. Setting Rules for Access and Dissemination

Archival materials have immense potential to promote collective memory of past abuses. In the public arena, they can serve as the basis for scholarly works, museum exhibits, or reform of school textbooks. Privately, by providing information on specific abuses, they can help answer the questions of utmost concern to victims and their families. The policy interest in disseminating information is therefore strong. However, a foundational approach implies establishing access rules that consider the need for disclosure alongside other legitimate interests—particularly privacy and national security. The need for such rules applies both to archives and to non-governmental groups engaged in the same activities.

⁸⁷ Andrew Nickson, *Paraguay’s Archivo del Terror*, 30 *LAT. AM. RESEARCH REV.* 125 (1995).

⁸⁸ Resolution No. 81 of the Supreme Court of Paraguay, Mar. 26, 1993 (establishing the CDyA for the purpose of “preserving the documents and their content, for their juridical and historical value, through the application of modern procedures of control and management”).

⁸⁹ Argentine Forensic Anthropology Team, *Paraguay*, EAAF 2006 ANNUAL REPORT, at 86.

⁹⁰ Documents from the Archive of Terror have also been introduced and accepted in Argentine and Uruguayan courts.

⁹¹ The database for the archives (hard copies of which remain at the Paraguayan Supreme Court) and 246 images of key documents are available online through a collaborative agreement between the Supreme Court of Paraguay, the Catholic University of Asunción and The National Security Archive, a documentation center at George Washington University. See *No se Registró Novedad Digna de Mencionar: Documentos del Archivo del Terror de Paraguay Desmienten la Fuga de Prisioneros*, NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK NO. 262 (Alfredo Boccia and Carlos Osorio, eds.), Dec. 21, 2008, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB262/index.htm>>.

There are both normative and strategic reasons to balance these sometimes-competing objectives. Normatively, the right to the truth does not exist in isolation. Privacy is also a core human right enshrined in myriad national constitutions and international law; and the provision of national security is widely regarded as legitimate state function—provided that such provision does not itself entail human rights violations. From a strategic standpoint, taking privacy and security concerns seriously helps reduce the likely political resistance to archival efforts.⁹²

E. Privacy Issues

Perhaps the clearest normative constraints on the release of archival information relate to privacy—particularly the privacy of victims of state abuse. In addition to its many domestic formulations, the right to privacy is referenced in a number of international instruments, including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and European Convention on Human Rights.⁹³

Some archives have withheld documents from the public out of concern for privacy. For example, the International Tracing Service was established in London in 1943 and moved to Germany two years later to help the relatives of Nazi victims find information about lost loved ones. That service kept its archives closed to the general public for 61 years, citing concerns about victims' privacy.⁹⁴ The MF has come out against the wholesale release of Iraqi documents to the public, arguing that such release would jeopardize security and risk violating individual rights, including the right to privacy.⁹⁵ In Paraguay, some of the documents in the Archive of Terror have given rise to privacy concerns, particularly those naming government informants and suspected homosexuals. The Peruvian FOI law includes an exemption from the right to

⁹² The recent WikiLeaks scandal shows the danger of failing to take a foundational approach to dissemination. The online release of more than 250,000 unredacted U.S. diplomatic cables drew criticism for jeopardizing privacy and national security,⁹² and it brought about predictable measures by governments to tighten procedures to maintain the secrecy of classified documents. Marc Ambinder, *Obama to Issue "WikiLeaks Order,"* THE ATLANTIC, Oct. 7, 2011. By instilling fear that information will be released haphazardly, WikiLeaks at least temporarily appears to have impeded movement toward a more orderly opening of official records.

⁹³ The UDHR states that: "[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." UDHR, *supra* note 4 at art. 12. Article 17 of the ICCPR features nearly identical language, notably adding that no one shall be subject to "unlawful attacks" against his honor or reputation. ICCPR, *supra* note 4, at art. 17. Under the European Convention, "[e]veryone has the right to respect for his private and family life, his home and his correspondence." European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5, *entered into force* Sept. 3, 1953, art. 8.

⁹⁴ Judy Barsalou and Victoria Baxter, "The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice," *Stabilization and Reconstruction Series No. 5* (U.S. Institute of Peace, Jan. 2007), p. 10.

⁹⁵ Iraq Memory Foundation, "Memorandum: Towards a Mitigated Reasoned Release of Documents from the Saddam Husayn Regime," Feb. 15, 2006, available at <http://www.iraqmemory.org/en/article02.asp>.

information for “[p]ersonal information that constitutes an invasion of personal and family privacy when published,” citing health information in particular and noting that only a judge can authorize release of such information, subject to constitutional limits.⁹⁶

Although it is reasonably well-settled that archives should take privacy considerations into account, there remains significant room for debate regarding what “privacy” entails and the precise measures needed to safeguard the right to privacy, especially when archives have the potential to unlock secrets about human rights abuses. The 2009 OHCHR Report emphasizes the need for a “privacy or data protection law” in connection with archival work but does not recommend specific parameters.⁹⁷ Privacy norms in this context tend to turn on multiple axes: the identity of the individual referred to in a document, the nature of the data to be disclosed, the identity of the party requesting information, and the time elapsed since the document was created.

The first consideration relates to the identity of the individual referenced in a document. Applicable laws and international reports tend to focus on protecting victims of human rights abuses from privacy violations, but officials working for the repressive state apparatus or their collaborators receive no such protection. The Joinet-Orentlicher Principles appear to make this distinction by stating that: “[a]ccess to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy of and security of victims and other individuals.”⁹⁸ If read broadly, this provision could extend protection beyond victims to include alleged perpetrators as well, though a safer reading would focus on “other individuals” who were not in service of the state.⁹⁹ The 2009 UNESCO-ICA Report draws attention to particular groups of victims that should enjoy enhanced privacy protection:

[M]ethods necessary for protecting the rights to privacy of victims of sexual violence and children and adolescents who were victims of armed gangs working at the edge of the law should be taken, in order to avoid provoking additional unnecessary damage to the victim, to witnesses or to other people, and to avoid creating a risk to their security.¹⁰⁰

The Law on the Hungarian State Security Archives makes a similar distinction. It contains detailed privacy rules for its archives but exempts documents already in the public domain, released by the individual’s consent, or which are needed to identify officials, contact, or collaborators of the repressive regime.¹⁰¹

The Nation’s Memory Act of Slovakia also treats ordinary citizens differently than people who were in the service of the repressive government. Its privacy provision states that

⁹⁶ Peruvian FOI Law, *supra* note 18, art. 15B(5).

⁹⁷ 2009 OHCHR Report, *supra* note 38, ¶ 12(a)(iii).

⁹⁸ Joinet-Orentlicher Principles, *supra* note 15, principle 14.

⁹⁹ For a discussion of this topic from the perspective of one expert archivist, See Trudy Huskamp Peterson, *Privacy is Not a Rose*, unpublished paper dated Sept. 23, 2007, www.trudypeterson.com/documents/Privacyisnotaroserev.doc, at 5..

¹⁰⁰ 2009 UNSECO-ICA Report, *supra* note 16, at 94.

¹⁰¹ Law on Hungarian State Security Archives, *supra* note 19, art. 5(4).

the archive shall redact the personal data of individuals mentioned in documents—including “all data on their private and family life, on their criminal activity, health and property condition.”¹⁰² It adds that “[i]f the document being disclosed is a personal (cadre) file of a security authority member, all data on the persons out of the member’s service and public activity shall also be made illegible.”¹⁰³ Thus, under both the Hungarian and Slovak laws, privacy does not shield information needed to understand the official (or quasi-official) activities of individuals working for the repressive state (or collaborating with it). That type of carve-out is justified. Privacy norms are certainly not absolute and cannot be invoked as a shield to necessary human rights investigations.

The second major factor in weighing privacy concerns relates to the identity of the requestor. The Joint-Orentlicher Principles rightly distinguish among various parties who may request documents. Principle 14 reads as follows:

Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights.

Access shall be facilitated, as necessary, for persons implicated, who request it for their defense.

Access to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals...¹⁰⁴

The implication is that those who need records to assert legal rights enjoy a different level of access than historical researchers.¹⁰⁵ The Principles then assert that courts, non-judicial commissions of inquiry, and the investigators who report to them must enjoy access to relevant archives,¹⁰⁶ but documents should be used: “in a manner that respects applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony.”¹⁰⁷

The 2009 UNESCO-ICA Report also identified historical researchers as a particular group of requesting parties. It states that in human rights archives, “[t]he most frequent and thus the most difficult conflict is between the right to privacy and the right to historical research”¹⁰⁸ and adds:

¹⁰² Nation’s Memory Act of Slovakia, *supra* note 12, §23.

¹⁰³ *Id.*

¹⁰⁴ Joint-Orentlicher Principles, *supra* note 15, principle 15. *See also* Peterson, *supra* note 99, at 5.

¹⁰⁵ The right of defendants to access archival materials is crucial. Documents need to be deployed evenhandedly if their effect is to promote the rule of law rather than partisan political objectives. DC-Cam has established dedicated spaces in its archives where teams of defense lawyers and prosecutors separately come to review Khmer Rouge files.

¹⁰⁶ Joint-Orentlicher Principles, *supra* note 15, principle 16.

¹⁰⁷ *Id.* at principle 16.

¹⁰⁸ 2009 UNESCO-ICA Report, *supra* note 16, at 113.

The scientific and historical use of documents will always be governed by the need to protect the privacy of the victims of the repression as well as that of third parties mentioned in the documents.¹⁰⁹

The Hungarian law includes a much more detailed prescription. It allows scientific researchers to obtain health information about individuals in the files 30 years after their death or to obtain demographic and health information in an anonymized form.¹¹⁰ General visitors may access all documents in an anonymized form but may only learn data on individuals' racial, ethnic, national background, ideological or religious persuasion, or habits and sexual preferences until 60 years after the individual's death, even in anonymized form.¹¹¹

The Hungarian law also alludes to the third and fourth major factors: the type of data sought and the passage of time. Generic privacy laws usually detail the types of data that are eligible for protection as part of the right to privacy, but in a post-conflict context, that definition may sometimes need to encompass more than medical and financial details. In some transitional states, membership in dissident organizations or relationships to particular people can also put a person in danger. Over time, these tend to ebb, and thus the issue of what facts to redact is closely connected to time limits. Many FOI laws establish periods for mandatory declassification reviews. International reports and judicial decisions focused on the right to the truth have shed little light on what best practices are with respect to these types of details. Both should depend on the type of information being released and the context of the society in question—since much of the rationale for privacy protection relates to perceived social harms that an individual could face if certain facts are disclosed.

The scope of privacy protection gets most complicated when dealing with requests from researchers—as opposed to actors engaged in a formal legal process—and when considering individuals who were neither clear-cut state agents nor innocent victims. The relevant laws in transitional states offer scant guidance on how to categorize individuals who were not in the official service of the state but were connected in some manner to its activities. This leads to the practical challenge of implementing a privacy-protection scheme. Protecting privacy is not only about choosing to release or withhold specific pieces of information; it also requires a great deal of work and an organized system for making decisions about what types of information needs to be redacted—and for how long.

Thus, privacy concerns dove-tail with some of the issues described in the previous section. Human rights advocates are rightly eager to see information disseminated widely and quickly—and thus to reduce the risk that the government will later re-impose controls. The easiest way to ensure prompt disclosure is to release the information with minimal redaction. Yet human rights archives need to be based on solid a legal and ethical foundation, which normally militates against a simple full-disclosure model.

¹⁰⁹ *Id.* at 66.

¹¹⁰ Law on Hungarian State Security Archives, *supra* note 19, art. 4. If the date of death is unknown, information becomes available 90 years after the individual's birth.

¹¹¹ *Id.* art. 5(1)-(3). An individual referenced in the archives may choose to prohibit the use of his or her data for a period of up to 90 years after death. *Id.* art. 6.

Computer technology adds to the speed with which information can be used—and misused. Out of concern for privacy rights, the 2009 UNESCO-ICA Report recommends against creating detailed organizational logs of documents by the names of people mentioned therein.¹¹² It also notes that digital technology used to describe and organize documents should be managed such that “the information contained in the descriptive tools thus created remain within limits established for the protection of privacy.”¹¹³ This is a crucial point, because the ease with which digital files can be searched may add to the risk that an individual may be subjected to unwanted data searches.

The right to privacy is closely connected to *habeas data* provisions that enable an individual to learn what information exists about him or her in the official records and to challenge that information. The key reports and judicial findings on the right to the truth refer to individuals’ right to know what information exists about them. In some transitional countries, such as Argentina and Brazil, constitutional *habeas data* provisions and general privacy laws also enable citizens to challenge, update, or even delete inaccurate records. The Joint-Orentlicher Principles assert that individuals “shall be entitled to know whether their name appears in State archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply.”¹¹⁴ They suggest a simple mechanism for issuing a challenge: “[t]he challenged document should include a cross-reference to the document challenging its validity and both must be made available together whenever the former is requested.”¹¹⁵

Permitting alleged human rights violators to challenge archival records in some manner is sensible, both because it may lead to more information and because it respects basic rights. Allowing them to do so through letters to an archive is far from ideal. When officials create and preserve public records, they do so under a set of professional obligations to record events accurately. Subsequent letters of protest from former officials would have fewer indicia of credibility. It would be strongly preferable to provide an opportunity to challenge archival information through a formal mechanism such as a permanent truth commission. The spirit of the recommendation is a sound one, however—archives provide the best foundation for the truth when they support basic rights as impartially as possible.

F. National Security Exceptions

Alongside privacy concerns, national security interests are a key rationale advanced for limiting the scope of documentary disclosure. The right of a government to withhold some information is a subject of much debate. Some scholars and human rights advocates have pushed

¹¹² 2009 UNESCO-ICA Report, *supra* note 16, at 108.

¹¹³ *Id.*

¹¹⁴ Joint-Orentlicher Principles, *supra* note 15, principle 17. The Principles rightly consider the possibility that documents need not mention specific names to identify individuals for the purpose of this provision.

¹¹⁵ *Id.* at principle 17. The 2009 UNESCO-ICA Report issues similar guidance, but with an important caveat: “the possibility that an individual can make corrections or clarifications on the information held on them in their personal files if they so wish, should be regulated. Such corrections, clarifications or statements should be incorporated into the files and clearly differentiated from the documents which were kept by the repressive body.” 2009 UNESCO-ICA Report, *supra* note 16, at 81.

for a regime that bars all forms of censorship. Others contend that limited censorship is acceptable, provided that it meets strict criteria. The Jointet-Orentlicher Principles take the later approach. They raise the issue of national security exceptions in the paragraph discussing cooperation between archive departments and the courts and non-judicial commissions of inquiry. They set a very high bar for the justification of refusals, asserting that: “[a]ccess may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review.”¹¹⁶

The Nation’s Memory Law of Slovakia allows for non-disclosure in “exceptional” circumstances. Such non-disclosure requires “a presumption that the disclosure or making public of a document might harm the interests of the Slovak Republic in international terms, its security interests or lead to a serious endangerment of a person’s life.” To reach such a determination, the Slovak Information Service or Ministry of Defense must submit a proposal for exclusion to a special committee appointed by the Slovak parliament, which has 60 days to issue a decision.¹¹⁷ The same committee is tasked with periodic monitoring on disclosure and with annual reports to parliament.¹¹⁸

In Hungary, the law on disclosure of Communist-era documents contains a longer list of exceptions. For example, documents may be withheld if they pertain to individuals who were in the service of the security agencies between 1990 and 2002 (i.e., between the end of the Communist era and passage of the law). They may also be withheld if it can be “thoroughly supposed” that releasing the document would lead to revenge crimes “seriously violating or endangering life, health or the personal freedom” of an individual perpetrator or his family. Other exceptions apply if documents would reveal the identities or means and methods of Hungarian spies or otherwise “overtly or detectably” damage Hungary’s foreign relations, economic interests, or defenses.¹¹⁹

Denying information on national security ground has to be done narrowly, and any time limitations have to be kept short and open to challenge. Otherwise, national security exceptions are an obvious thin end of the wedge toward non-accountability and potential abuse of power. The risk of cover-ups is particularly acute in dealing with human rights archives. For this reason, some national laws have specifically stated that national security cannot be a basis for classifying or withholding documents. Uruguay passed a law in 2009 requiring the mandatory release of documents pertaining to past human rights abuses.¹²⁰ Guatemala passed the Law on Free Access to Public Information in 2008 with an article declaring that: “[i]n no case, can information related to human rights violations or crimes against humanity be classified as confidential or

¹¹⁶ Jointet-Orentlicher Principles, *supra* note 15, principle 16. The 2009 UNESCO-ICA Report quotes this clause in its entirety. 2009 UNESCO-ICA Report, *supra* note 16, at 33.

¹¹⁷ Nation’s Memory Act of Slovakia, *supra* note 12, § 6.

¹¹⁸ *Id.*

¹¹⁹ Law on Hungarian State Security Archives, *supra* note 19, art. 2.

¹²⁰ Law on Access to Public Information, Law 18381 (Uruguay), 2009. The Uruguayan National Archives are subject to the law.

reserved.”¹²¹ The 2002 Mexican Federal law on access to information similarly includes a clause that prohibits the retention of documents describing “grave violations” of human rights and asserts that “[i]nformation may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake.”¹²² The UNSECO-ICA Report arrives at a similar conclusion, urging states to “make laws which would impede the protection of information about violations of human rights [] under the banner of state secrecy.”¹²³

National security exceptions are in a different category than privacy protection and lend themselves somewhat more easily to state abuse. For that reason, they need to be narrowly tailored, and only independent judicial organs should be empowered to make rare exceptions to the emerging norm that human rights information trumps national security prerogatives. In practice, however, states will continue to be in the position to deny either the existence or relevance of documents demanded by human rights investigators. That takes us back to a foundational approach— requiring the state to perform its duty to record and lay out a clear set of archival holdings even if some remain classified. Doing so enables researchers (and victims, and courts) to establish what categories of documents exist inside of a state archive so that they can challenge any inappropriate refusal to disclose.

Conclusion

A foundational approach is designed to establish a firm base from which to launch a wide range of truth-telling and accountability procedures, as well as broader memory initiatives. It can be painstaking, especially in the early phases, but is a key financial and political investment for societies emerging from periods of misrule.

In the wake of mass abuses, archival information can clearly have a powerful impact on accountability proceedings such as criminal trials, truth commissions, and commissions of inquiry. That potential has been clear since Nuremberg, where documents and films played crucial roles in the conviction of Nazi criminals. Justice Robert Jackson, the American prosecutor at the tribunal, favored documents over other kinds of evidence, because he saw them as “harder” and more difficult for the defense to refute.¹²⁴ Archival materials have recently been central in a number of high-profile cases, including the García trial in Guatemala and the trials of Khmer Rouge leaders in Cambodia, where documents from DC-Cam’s archives were crucial to convicting Duch, an infamous member of Pol Pot’s secret security services, for more than 12,500 deaths in the late 1970s.

Archives that rest on a firm foundation can also help societies advance and heal through memory initiatives. For example, DC-Cam has used documents to inform its Genocide

¹²¹ Law on Access to Public Information, Decree No. 57/2008 (Guatemala), 2008, art. 24.

¹²² Kate Doyle, *Mexico’s New Freedom of Information Law*, June 10, 2002, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB68/>>. By 2009, that provision had been cited in four separate appeals ruling in Mexico, including one case that required the release of the close criminal investigation of former President Luis Echeverría. Jesse Franzblau and Emiline Martínez-Morales, *Mexico* [check title], FREEDOMINFO, June 24, 2011.

¹²³ Unesco-ICA Report, *supra* note 16, at 88.

¹²⁴ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995), n. 10.

Education Project with the Ministry of Education, issuing an official history textbook that features excerpts from Khmer Rouge documents and introducing required courses on the subject for high school students throughout the country. The Humanitarian Law Center in Belgrade has used documents to create a comprehensive database called the “Kosovo Memory Book” including details about individual Albanians and Serbs who died during or immediately after the war from 1998 to 2000.¹²⁵ The District Six Museum in Cape Town, Tuol Sleng Genocide Museum in Phnom Penh, Museum of Justice in Paraguay, and many others feature documents as exhibits.

Some archives have hired staff scholars to contribute to “telling the story” of what happened during a period of turmoil and why. Others have merely opened their doors to outside analysts. This is a crucial part of the process of memory creation. Raw documents never present the whole picture. They do not record events completely, sometimes duplicate one another and thus present a skewed appearance of the frequency or importance of particular events, and are not necessarily representative of the body of documents pertaining to the period in question.¹²⁶ Revealing truth requires more than dissemination of specific information about individual victims: it requires comprehensive historical accounts that shed light on the systemic dimensions of the abuses.¹²⁷ Whether an archive prepares in-house histories or welcomes outside guests, a foundational approach requires impartiality. Memory production is a process with profound political implications, and a sense of “democratic truth” cannot be built on a skewed historical narrative.

In closing, a foundational approach has many benefits, but it also entails real trade-offs and difficult value judgments that are tough to generalize across societies. The need for strong, dedicated teams of people to do the work comes back to the nagging problem of resources and capacity. Many of the challenges to taking a foundation approach to documentation come back to this—being careful, well-organized, and sensitive to legal and ethical issues takes time, money, patience, and political support. That is why one of the keys to a foundational approach is to convince stakeholders of the long-term merits of the investment.

¹²⁵ Humanitarian Law Center, *Kosovo Memory Book*, <<http://www.hlc-rdc.org/FHPKosovo/KOSOVO-KNJIGA-PAMCENJA/index.1.en.html>> (last visited Sept. 26, 2011).

¹²⁶ These are the problems of *under-registration* (incomplete recording of events), *overlap* (redundancy), and *selection bias* (a non-representative sample of data). Scott Worden and Rachel Ray Steele, *Telling the Story: Documentation Lessons for Afghanistan from the Cambodian Experience*, USIPEACE BRIEFING (Dec. 2008), p. 6 (quoting Vijaya Tripathi, a Human Rights Program Associate at Benetech). To some degree, software programs can help to identify and filter out these problems if researchers take a systemic approach. A software program at *martus.com* is designed to help filter out these problems. *Id.* at 6.

¹²⁷ Scott Worden and Rachel Ray Steele, *Telling the Story: Documentation Lessons for Afghanistan from the Cambodian Experience*, USIPEACE BRIEFING (Dec. 2008), p. 6.