



Guiding Principles for Safe Havens for Archives at Risk: A Commentary

International Working Group on
Safe Havens for Archives at Risk



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The Commentary to the “Guiding Principles for Safe Havens for Archives at Risk” and the Generic Agreement, which are presented in this publication, have been developed by an ad-hoc international Working Group consisting of representatives of international, governmental and non-governmental institutions.

The Working Group included representatives of the following institutions:

- International institutions: International Council on Archives (ICA), International Committee of the Red Cross (ICRC), United Nations Educational, Scientific and Cultural Organization (UNESCO)
- Governmental institutions: Finnish National Archives, Historical Archive of the National Police of Guatemala, National Center of Historical Memory of Colombia, National Records of Scotland, Swiss Federal Archives, Swiss Federal Department of Foreign Affairs
- Other institutions: International Institute for Social History, UMAM Documentation and Research, University of Texas at Austin
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In September 2019, the Working Group was transformed into an Advisory Committee for Safe Havens for Archives at Risk.



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Introduction

In the following text, each Principle is reproduced in a blue box and the respective Commentary comes after each Principle. Following each commentary, illustrations are provided as examples of situations in which the Principle has been or would have been useful. Where the elements used in the illustrations are not of public knowledge (e.g. citations of press articles), the working group asked the institutions mentioned for their permission prior to the publication of this document. The purpose and goals of the Guiding Principles for Safe Havens for Archives at Risk are outlined in the Preamble.

A Preamble

There is growing consensus among practitioners with regard to the need for a general approach to the protection of archives/records at Risk.

The Guiding Principles for Safe Havens for Archives at Risk, based on a wide range of existing international experience, provide guidance for both sending and hosting institutions for situations in which the safeguarding of originals or security copies through relocation can contribute to Dealing with the Past processes, or to preserving archives/records requiring immediate action to protect them from the effects of natural disasters.

Dealing with the Past refers to the processes addressing the rights of victims and societies as a whole to truth, justice, reparation and guarantees of non-recurrence in the aftermath of grave human rights violations, breaches of international humanitarian law and related grave forms of corruption that facilitated these crimes. Archives/records serve as irreplaceable materials for ongoing and future processes for Dealing with the Past and their preservation thus requires special efforts.

Such archives/records are often at risk of destruction or alteration for a number of reasons, including conscious and unconscious acts, neglect, or storage in inappropriate conditions. Archives/records are also threatened by natural disasters, often due to the effects of climate change, such as the rise in seawater levels, earthquakes and hurricanes. These types of situation, and many others, often require a rapid response to protect the documents concerned in safe havens abroad. The following document seeks to establish a set of principles to enable this protection for Archives at Risk.

The Guiding Principles for Safe Havens for Archives at Risk take into account the Universal Declaration on Archives, the rights of victims and societies as well as

the obligations of States enshrined in international law: namely, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the four Geneva Conventions.

The United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, in Principles 14 to 18, refers to the special attention that archives/records should receive in Dealing with the Past. In the context of these Principles, archives/records consist of any kind of documentary evidence that provides information relevant for Dealing with the Past.

In exceptional circumstances, the risk that such archives/records face is so serious and immediate that their continued existence requires that the archives/records themselves or security copies thereof are sent to a safe haven including, where necessary, in another country. As this type of action raises an array of ethical and practical issues, sending original archives or copies abroad should be considered only as a measure of last resort. In addition, removing original archives to a safe haven should, wherever feasible, be a temporary measure. Given the concerns referred to above, action of this kind should always be based on a set of clearly defined principles.

B Definitions

1 For further information, see <http://conflictsensitivity.org/conflict-sensitivity/do-no-harm-local-capacities-for-peace-project/> (23 November 2019).

2 For further information, see swisspeace, Center for peacebuilding, “Factsheet_ Conflict Sensitivity,” 201, https://www.swisspeace.ch/fileadmin/user_upload/pdf/KOFF/KOFF_Documents/KOFF_Factsheet_Conflictsensitivity.pdf (22 November 2019).

3 For further information, see definition by Society of American Archivists, <https://www2.archivists.org/glossary/terms/c/custody> (22 November 2019).

Archives/records: Materials created or received by a person, family, or organization, public or private, in the conduct of their affairs. Such materials are preserved as archives/records when they contain information of enduring value or evidence of the functions and responsibilities of their creator or receiver.

Do no harm: Do no harm is a concept geared to recognizing that intervention, of any kind, in a (conflict) context becomes part of that context. It aims at minimizing the harm programs and activities may inadvertently cause by simply providing assistance in a conflict situation.¹

Conflict sensitivity: Conflict sensitivity refers to the practice of understanding how activities interact with conflict in a particular context, to mitigate the unintended negative effects of the activities on the context, and to exert a positive influence on the conflict wherever possible.²

Custody: Care and control, especially for security and preservation; guardianship.³ This includes responsibility for the care of documents based on their physical possession. Custody does not per se include legal ownership or the right to control access to records.

Dealing with the Past: Dealing with the Past refers to the processes for addressing the rights of victims and societies as a whole as well as the obligations of States with regard to truth, justice, reparation and guarantees of non-recurrence in the aftermath of grave human rights violations, breaches of international humanitarian law and related grave forms of corruption that facilitated these crimes. Dealing with the Past is also referred to as transitional justice.

Definitions

Hosting institution: The term “hosting institution” refers to a governmental or non-governmental organization/institution interested in or already offering a safe haven solution for archives/records at risk.

Ownership: The right or state of being an owner. An owner is a person, family, or organization, public or private, who has the legal or rightful title to something, one to whom property belongs.

Sending institution: The term “sending institution” refers to a governmental or non-governmental organization/ institution or a person that has found or is looking for a safe haven for its archives/ records.

Safe haven: A safe haven is a secure repository provided by an institution for temporary, fiduciary custody of digital or physical archives/records that are in danger in the country of the owner or the owning institution.⁴

4 In accordance with the Swiss Federal Act on the Protection of Cultural Property in the Event of Armed Conflict, Disaster and Emergency, Article 2, letter c.

Commentary to the definitions

Archives/records: In some languages, a distinction is made between materials in current use, which are called records, and materials that have been designated as having long-term value, which are called archives. In other languages, the word archives means both current and historical materials. This commentary uses archives to mean both the active materials created or received by a person, family or organization, public or private, in the conduct of their affairs and the materials identified as having enduring value. Both types of materials may be at risk.

Do no harm: “The ‘Do No Harm’ methodology is widely used among international and increasingly local

5 <http://conflictsensitivity.org/conflict-sensitivity/do-no-harm-local-capacities-for-peace-project/> (22. November 2019).

6 For further information, see Mary B. Anderson: Do no Harm: Supporting Local Capacities for Peace through Aid. Cambridge MA, Collaborative for Development Action, 1996.

7 Global Conflict Sensitivity Community Hub, <http://conflictsensitivity.org/conflict-sensitivity/do-no-harm-local-capacities-for-peace-project/> (25. November 2019).

8 Global Conflict Sensitivity Community Hub, <http://conflictsensitivity.org/conflict-sensitivity/what-is-conflict-sensitivity/> (23. November 2019).

9 Global Conflict Sensitivity Community Hub <http://conflictsensitivity.org/conflict-sensitivity/what-is-conflict-sensitivity/> (23. November 2019).

humanitarian and development organizations.”⁵ It was developed for the aid sector by Mary B. Anderson as a result of aid provided in conflict contexts sometimes not contributing to de-escalation of the conflict, but rather to escalation.⁶ “It is considered a minimum standard to avoid inadvertent harm.”⁷ As sending institutions of archives at risk which may be relevant for ongoing or future Dealing with the Past processes are normally situated within a conflict context, it is essential for hosting institutions and third parties supporting the interaction or the sending institutions to reflect on this concept and implement it.

Conflict sensitivity: “The concept of conflict sensitivity does not have one agreed definition; different actors adopt definitions tailored for the work they do and the context under which they operate.”⁸ The Conflict Sensitivity Community Hub uses the following definition: “A conflict sensitive approach involves gaining a sound understanding of the two-way interaction activities and context and acting to minimize negative impacts and maximize positive impacts of intervention on conflict, within an organization’s given priorities/objectives (mandate).”⁹ Conflict sensitivity goes beyond do no harm, as it provides actors the necessary framework tools to a) understand the context in which they are operating, b) understand the interaction between the intervention and the context, and c) act upon that understanding, in order to prevent negative impacts and maximize positive impacts on the conflict. As sending institutions of archives at risk which may be relevant for ongoing or future Dealing with the Past processes are normally situated within conflict contexts, it is primordial for hosting institutions and third parties supporting the interaction or the sending institutions to reflect on this concept and implement it.

Custody: Many safe haven agreements presume that the deposit of the original archives or a security copy is for a temporary period, after which the material will be returned to the sending institution or its legal

successor. The institutions normally believe the return will occur when the political or infrastructural situation in the sending institution’s country improves. Therefore, unless the agreement specifically states that the legal ownership of the materials is transferred to and vested in the hosting institution, the legal ownership remains with the sending institution.

Dealing with the Past: “In 1997, the UN Special Rapporteur Louis Joinet presented a set of principles to the UN Human Rights Commission in his report on the question of the impunity of perpetrators of human rights violations. These principles call for efforts in four areas that subsequently became recognized as the main pillars of a holistic approach to Dealing with the Past, also referred to as transitional justice: a) the right to know, b) the right to justice, c) the right to reparations, d) the guarantee of non-recurrence. The Conceptual Framework on Dealing with the Past, developed by swisspeace and the Swiss Federal Department of Foreign Affairs, is based on these principles and subsequent recommendations. It captures the four main areas and mechanisms of a holistic Dealing with the Past approach, indicating that all areas mutually influence and depend on each other. The central focus is on victims and perpetrators and their transformation into citizens with equal rights.”¹⁰ Archives relevant for Dealing with the Past processes are especially those containing evidence of human rights violations and violations of international humanitarian law. However, they may also include documents which provide information on resistance movements, about the life of those oppressed in an armed conflict or by a repressive regime. Depending on a specific context, there is significant overlap between archives useful for Dealing with the Past processes and archives which are considered part of the cultural heritage of a country.

Hosting institution: : Worldwide, many libraries and archives serve as hosting institution for archives or their digital copies. The hosting institutions provide a safe

10 A Conceptual Framework for Dealing with the Past, swisspeace Essential 02/2016, (<https://www.swisspeace.ch/assets/publications/downloads/Essentials/7bdf926517/A-Conceptual-Framework-for-Dealing-with-the-Past-Essential-16-swisspeace.pdf>) (23.November 2019).

11 For further information, see website of the human rights archive of the Colombian National Center for Historical Memory, <http://www.archivodelosddhh.gov.co/> (23 November 2019).

12 For further information, see website of the human rights archive of the Colombian National Center for Historical Memory, <http://www.archivodelosddhh.gov.co/> (23 November 2019).

haven for such records. As an example, the Swiss Federal Archives acts as a hosting institution for security copies of the archives of the Nuclear Claims Tribunal of the Marshall Islands. Similarly, the National Center for Historical Memory in Colombia keeps digital copies of archives of civil society organizations.¹¹

Ownership: In the context of safe havens for archives at risk, where archives are transferred to another country often under time pressure and for temporary purposes, it is essential to clarify ownership questions and to differentiate ownership from custody.

Sending institution: Globally, many organizations, institutions and individuals search for a safe haven and opt to send their original archives or security copies to a partner institution in a different country. As an example, some civil society organizations have provided digital copies as well as original archives to the National Center for Historical Memory in Colombia.¹²

Safe haven: As archives which are relevant for Dealing with the Past processes are often exposed to a variety of risks – including political, environmental, neglect or due to conflict – organizations holding them are often looking for hosting institutions which could provide a safe haven solution by offering to receive and preserve security copies.

C Guiding Principles for Safe Havens for Archives at Risk

General Principles

1. Dealing with the Past Principle

Safe haven solutions should always be implemented if archives/records that contribute to Dealing with the Past are at risk of destruction or alteration.

Commentary on Principle 1

Rationale and Interpretation

Archives are a key, and often irreplaceable, resource for all four pillars of Dealing with the Past processes.¹³ They can shed light on relevant past events and thus contribute to the right to truth; they may contain evidence in relation to serious violations of human rights or humanitarian law and thus contribute to the implementation of the right to justice. They can be relevant for the determination of reparation claims of victims or be useful for memory work in the framework of symbolic reparations and thus contribute to the right to reparations. Finally, they can also provide crucial information for reform efforts designed to prevent any recurrence of atrocity crimes, such as vetting programs and security sector reform subsequent to an armed conflict.¹⁴

The emphasis on archives relevant for Dealing with the Past processes does not exclude that most of the following General Principles (GP) are equally applicable to other types of archives at risk.

Principle 14 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity states that, “the right to know implies that archives should be preserved. Technical measures and penalties shall be applied to prevent any removal, destruction, concealment or falsification of

13 See e.g. Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/2005/102/Add.1); Principles 14 to 18 on Preservation and Access to Archives Bearing Witness to Violations; For detailed explanation of each of these Principles, see Paola Gaeta, Frank Haldemann and Thomas Unger, *The United Nations Principles to Combat Impunity: A Commentary*, Oxford University Press, 2018.

14 For further details and examples, see Atrocity’s Archives: The Role of Archives in Transitional Justice, Guidance Note, swisspeace; Federal Commissioner for the Records of the State Security Service of the Former German Democratic Republic; Leverhulme Trust; Economic & Social Research Council, University of Oxford, https://www.law.ox.ac.uk/sites/files/oxlaw/atrocities_archives_guidance_note-final030818.pdf (23 November 2019).

15 Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/2005/102/Add.1), Principle 14.

16 See the definition of archives in Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/2005/102/Add.1).

17 See the definition of archives in Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/2005/102/Add.1), Principle 6.

archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law”.¹⁵ Archives that contribute to Dealing with the Past processes are defined in that document as “collections of documents pertaining to violations of human rights and humanitarian law from sources including (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.”¹⁶

Where the ownership of the information and rights of the sending institution are contested, the public interest in dealing with the past should prevail.

In times of armed conflicts as well as under repressive regimes, some records are created by institutions that are harming rights, and some records are created by institutions that are trying to document these harms. Both are important for future Dealing with the Past processes. Thus, relevant archives include records of national governmental institutions and judiciary, local institutions, such as police stations, or materials collected by truth commissions and other investigative bodies.¹⁷ In addition to governmental sources, archives held by non-governmental organizations (NGOs), civil society organizations, religious institutions, companies and archives held by private individuals can be equally pertinent. As access to state archives is in practice often not possible during periods of political transitions, non-governmental archives may become even more relevant.

Armed conflict often disrupts all services including archival services. In active hostilities, especially when involving heavy artillery, drones or bombing in urban areas, the risk of having archives destroyed is high. In certain contexts, armed conflict evolves in a way that

allows the relocation of archives in a relatively organized manner based on respective contingency planning. However, in other circumstances the need for relocation may emerge suddenly without leaving time for well-organized measures. The duration of the need for relocation is usually finite: the archives can be returned to the place of origin when the conflict ends and rebuilding begins.

Both in armed conflict and authoritarian regimes, non-government archives, especially those of civil society, humanitarian or civil rights organizations that are relevant for Dealing with the Past processes, are threatened existentially. Non-governmental actors may find their offices or private spaces raided and records seized or destroyed.

In situations of transitions from armed conflicts and repressive regimes towards peace, all kinds of archives containing relevant information related to violations of international humanitarian law and human rights law are at particular risk, because they can become relevant for accountability and truth searching mechanisms.

Generally, the risks faced by these archives include:

- Manmade risks: Civil disorder; armed conflict; military occupation; government action or inaction; change of regime.
- Natural risks: Fire, flooding, earthquake or other natural causes, caused by climate change or other grounds.
- Risks linked to the institutional environment: Inadequate or unstable buildings, bacteria, insects and rodents, mold and humidity, dust, pollution.
- Risks linked to institutional deficiency: Lack of restoration/conservation capacity; neglect; administrative order; unauthorized destruction; theft (also from private persons); damage from use.

18 UNESCO, “The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two (1954 and 1999) Protocols: Basic Texts - UNESCO Digital Library,” 1954, <https://unesdoc.unesco.org/ark:/48223/pf0000187580> (23 November 2019).

Several of the risks identified above derive from shortage of resources, absence of archival expertise, and the absence of awareness about the importance of managing archives for good governance, the protection of human rights, or poor administration in general. Such problems can be resolved locally in many cases. Four threats in particular, however, can require the consideration of archival relocation to a different country: armed conflict; military occupation; repressive actions by government or non-government actors and recurrent, unavoidable natural risks (e.g., sea level rise due to climate change). These are the main circumstances covered by the GP.

Concerning archives at risk due to armed conflict and military occupation, international humanitarian law provides certain guidance. Article 1 of the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict (hereinafter 1954 Hague Convention)¹⁸ prohibits the destruction of “manuscripts ... and important collections of books or archives” and buildings such as “depositories of archives” in situations of armed conflict and occupation. This immunity can only be withdrawn “in exceptional cases of unavoidable military necessity, and only for such time as that necessity continues” (Art. 11). The international protective emblem of the “blue shield” as defined in Art. 6 of the 1954 Hague Convention identifies structures, such as archives, that are not lawful targets in an armed conflict. However, in practice, this is often ignored by the belligerent parties.

Further References

The relevance of archives for Dealing with the Past processes as well as the importance of their protection has been referenced in several UN documents:

- United Nations Updated Set of Principles for the Protection and Promotion of Human Rights

Trough Action to Combat Impunity.¹⁹ These Principles state that “the right to know implies that archives should be preserved. Technical measures and penalties shall be applied to prevent any removal, destruction or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law” (Principle 14).²⁰ See also Principles 15 to 18 on archives.

- A number of additional reports and publications by the Office of the High Commissioner for Human Rights and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and the Guarantees of Non-Recurrence underline the importance of archives as a means to guarantee the truth. Archives have been acknowledged as a tool that can contribute to each of the pillars of Dealing with the Past, and improve prevention of mass atrocities.²¹

19 Joinet, “Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/Sub.2/1997/20/Rev.1).

20 Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity” (E/CN.4/2005/102/Add.1), Principle 11.

21 de Greiff, “Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence” (A/HRC/30/42); Human Rights Council, “Report of the Office of the United Nations High Commissioner for Human Rights on the Seminar on Experiences of Archives as a Means to Guarantee the Right to the Truth” (A/HRC/17/21); and other reports of the Office Of The High Commissioner and the Secretary-General concerning the right to the truth; Rule of Law Toolbox for Post-Conflict States, Archives, https://www.ohchr.org/Documents/Publications/HR_PUB_14_4_Archives_en.pdf (23 November 2019).

Illustration

- As the armed conflict unfolded in Syria, several NGOs safeguarded copies of records of land titles, as well as court documents and civil documentation as they were at risk of destruction. Unclear or contested land tenure is a source of conflict in many countries, particularly in a post-conflict context: In times of armed conflict or repression, many persons are forced to flee their homes and to move to other areas within the same country or abroad. When they return to claim their houses months or years after, other people may have already taken over their property, claiming the house to be theirs. In the absence of records of land titles, it is complicated to settle this type of disputes; therefore, copies of land titles are precious evidence to sort out these claims. Some copies were moved to a host institution in a neutral country for safekeeping.
 - In 2005, the records of the former National Police Archive of Guatemala were “discovered”. Documenting more than a hundred years of police history, they cover the period of internal armed conflict and the time of several dictatorships. Documents of the archives were used in several trials that culminated in guilty verdicts for human rights violations. As the officials responsible for the preservation and digitization of the archives were worried that the documents would be destroyed due to neglect or political pressure, a reference copy was sent abroad.
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2. Last Resort Principle

A safe haven solution abroad should only be implemented when it is deemed impossible to store, protect and preserve the information safely within the country of origin, especially when transferring originals.

Commentary on Principle 2

Rationale and Interpretation

To minimize the risk that important information is lost or destroyed, several options for protection and preservation exist: 1) Securing the archives where they are; 2) moving (digital or physical) copies within the country or abroad to a safe haven; 3) moving the originals within the country or 4) to a safe haven abroad, as a last resort.

Moving archives to another country should be an option of last resort. Solutions should be sought at local or national levels before looking into the possibility of using a safe haven in another country, whether the materials are original physical archives or digital archives (either born digital or a digital copy).

There are a number of reasons why: 1) archives, particularly originals, are ideally preserved in the country of origin to ensure that citizens and institutions have access to the archives produced on the national territory. 2) A return of such archives often turns into a lengthy and complicated process. 3) Lengthy negotiations are required to agree upon a sound safe haven cooperation agreement in line with GP. 4) The transfer abroad itself exposes the archives to the risk of being lost or destroyed.

Generally, producing and disseminating GP presents an opportunity to emphasize that risk assessment and mitigation is an important element of responsible custody for archives at risk, and that it is advisable to take all possible steps to avoid emergencies.

Considerations on Contingency Planning

When an institution holding archives identifies a high risk to the holdings, strategies for the preservation of the archives and contingency plans with different phases should be put in place, if possible before a crisis occurs. Specific actions should be linked to each phase of a contingency plan.

An archival census, survey or registry can be an important element of preventive contingency planning. The first step would be to assess the nature and volume of archives that face a particular risk. As the archives may be located in different geographical areas, some may not be easily accessible for security reasons. Once there is an overview of the existing materials, the institution must decide which of them to save. Often a vast quantity of materials in all physical forms in a number of different archives exist — increasingly in born-digital formats — and making choices about priorities for preservation is essential. When doing such an archival census, assessing the roles of stakeholders within the conflict may help to identify which institutions may hold archives of particular relevance. In addition, analyzing the legal framework and the information exchange between institutions may help to identify essential flow of information between governmental institutions.

Considerations on Moving Physical Archives

The transfer of original physical items requires enough time and a small enough quantity of materials for this to be an effective means of protection. Institutions thinking about this option need to create and maintain a continuously updated list of those crucially important

archives that are essential to evacuate in times of crisis, and the archivists need to know where the archives are that need to be moved first in an emergency. Preparation for moving can be done at a moderate speed initially, but as threats materialize, action becomes urgent. Institutions or individuals creating records that they know are likely to be destroyed or confiscated need to develop a relationship with an external institution that can be trusted to provide secure storage for the materials, since raids on the office or house are unpredictable and hacking attacks on websites occur equally without warning. The duration of the need for external storage will be uncertain and indefinite, but when conditions change in the country, the archives should be returned to form part of the country's documentary heritage.

High priority for relocation of original documents should be given to archives important for asserting or protecting human rights, archives that contain potentially important information for future Dealing with the Past processes. In addition, holdings that have intrinsic value (permanently valuable records that have qualities and characteristics that make the records in their original physical form the only acceptable form for preservation) need to be considered for relocation. These may include documentation of the establishment or continuing legal basis of a country or an agency or institution.

Considerations on Moving Digital Archives

In contrast to original items, a duplicate either of born-digital archives or information in another medium/format that has been digitized can be stored in many parts of the world more easily. Thus, if the archives at risk do not appear to have intrinsic value, copying or digitizing is an option. However, when making the decision to digitize, the institution needs to take into account the requirements of the judicial system that may use these materials as evidence in the future. Depending on the

22 For further information, see Trudy Huskamp Peterson, The Probative Value of Archival Documents, swisspeace Essential 02/2014, http://archivesproject.swisspeace.ch/fileadmin/user_upload/archivesproject/Publications/Essential_2_2014_Probative_Value_1_.pdf (23 November 2019).

procedural law that applies, in some countries only the original document or a specific kind of copy (such as a certified true copy) have probative value. If the original materials are to be digitized, the institution must plan for sufficient time and perhaps legal assistance to make a digital copy that will meet the legal standard.²² Digitizing archives can be a costly and lengthy endeavor and is thus not necessarily possible in situations of armed conflict or political crisis.

A number of technical options allow for the safeguarding of digital archives. Since the developments in this field are rapid and different options mitigate different risks to different degrees, GP do not define technical solutions, but leave it to the sending and hosting institutions to define the solution that suits them best. In particular the socio-technical nature of the risks bearing on archives seeking a safe haven mean a wider range of approaches than would normally be considered appropriate for digital archiving or preservation may bring benefit. Some of the options discussed in the expert group that drafted GP were the following:

- Full scale digital preservation in the hosting institution or in the cloud;
- Web archiving in an existing public (or private) web archive;
- Remote storage only in the cloud;
- Storage only on a local server of the host institution;
- Storage only on duplicated offline media held in secure physical storage.

If a Cloud or Web archiving approach is chosen, the security, jurisdictional, and regulatory issues of these systems must be carefully considered. In the same way that raids on physical premises can be unpredictable in a conflict situation, the hacking of a digital systems can

occur equally without warning and from anywhere in the world. In every case, it is important that both the technical and practical risks introduced by any safe haven approach be balanced alongside the risks that are to be mitigated. The particular circumstances of the archives at risk as well as the sending and hosting institutions must be considered paramount.

Illustration

- South Africa and Zimbabwe: during the Apartheid regime in South Africa, civil society organizations on the side of the South African resistance movement kept their archives in neighboring Zimbabwe for security reasons. However, as Zimbabwe also has a repressive government, Zimbabwean civil society organizations began to transfer their archives to the custody of civil society organizations in South Africa after the free elections in South Africa in 1994. To prepare this, South African organization also helped their Zimbabwean counterparts digitize the records.²³
- The Marshall Islands are affected by the rise of sea level due to climate change.²⁴ This is a worrying development for the records of the Nuclear Claims Tribunal of the Republic of the Marshall Islands. A permanent solution for the records needed to be found. With funding from the Swiss Federal Department of Foreign Affairs, the Tribunal's records were digitized by the Tribunal's staff with the help of two international archivists. Since 2018, the Swiss Federal Archives and Archives of the City of Girona (Spain) officially hold an electronic copy of the records. While the sensitive records are not accessible to the public, other records are made available.²⁵

23 Oral exchange with a South African activist working in the field of documentation and record keeping.

24 "Relocate or elevate" are the two options for the Marshallese according to an article published in November 2018 in National Geographic.

25 "Tribunals Records Preserved," The Marshall Islands Journal, November 13, 2013, http://archivesproject.swisspeace.ch/fileadmin/user_upload/archivesproject/2015-11-19_Marshall_Islands_Journal_11-13-2015_Tribunal_02.pdf (23 November 2019).

3. Transparency Principle

The hosting institution should document all laws, policies, standards, processes and procedures that pertain to the archives/records in question, and make them available to the sending institution.

²⁶ Reference to a case in the U.S.: <https://caselaw.findlaw.com/us-dc-circuit/1183474.html> (18 November 2019).

Commentary on Principle 3

Rationale and Interpretation

The sending institution, which is often under pressure, should take an informed decision when selecting the hosting institution and when negotiating the terms and conditions of a safe haven agreement. To do this, the sending institution needs to know what laws, policies, standards, processes, procedures, and means of verification govern a prospective hosting institution.

This information should include possibilities to exempt the archival material at risk from the application of any or all of the hosting institution's laws, policies, processes, procedures and standards should the sending institution deem them undesirable or unnecessary. In some cases, the safe physical storage may be sufficient to provide the protection that the sending institution requires, thus the archives transferred may be exempted from the preservation standards that the host country applies to its own public records. In other cases, the sending institution may have to find ways to exempt the material from the application of a domestic Freedom of Information Act.²⁶

The Principle does not imply that the hosting institution informs the sending institution of every small juridical and procedural change during the period when

the archives are in its custody. It does, however, recommend that the hosting institution informs the sending institution about major changes that have a significant impact on the archives held in custody.

The sending institution should provide information to the hosting institution on the provenance of the archives and any legal provisions (such as a deed of gift, an institutional regulation) that apply to them. If the archives to be transferred are considered cultural heritage by the sending institution, the hosting institution must acknowledge the need to treat them in accordance with the host country's practices for its own designated cultural heritage materials.

If the archives that need to be secured contain material that is considered to be cultural heritage in the sense of the 1970 United Nations Convention on the Means of Prohibiting and Preventing Illicit Import, Export and Transfer of Ownership of Cultural Property,²⁷ then the international and national legal framework regarding the protection of cultural property needs to be respected.

²⁷ http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html (23.11.2019).

28 Licht auf Jahrzehnte der Grausamkeit in Guatemala, swissinfo <https://www.swissinfo.ch/ger/licht-auf-jahrzehnte-der-grausamkeit-in-guatemala/7439918> (23 November 2019).

Illustration

- After the discovery of the records of the former National Police Archive in Guatemala, the need for the placement of a security copy abroad became evident due to the political context in the country. Therefore, a foreign national archive agreed to receive a security copy of the records of the former National Police Archive in 2008.²⁸ However, as the hosting institution applied the standard digital preservation procedures to these records, this safe haven solution exceeded the requirements of the sending institution. The security copy was subsequently moved to a different location within the foreign administration and is currently stored passively, which is an adequate if less comprehensive service.

4. Legality and Agreement Principle

Any safe haven solution should always be defined in a written bilateral agreement between the sending and the hosting institutions. The agreement shall reflect the mutual understanding of the laws, policies and procedures that will be applied to the materials of the sending institution. It shall include the purpose, roles and responsibilities, liability, as well as legal and non-legal action in the event of disagreement.

Commentary on Principle 4

Rationale and Interpretation

Having written agreements helps avoid misunderstandings and conflict at a later stage. This principle applies to agreements between institutions in the same country or in separate countries.

Form of the Agreement

Any legally binding agreement for a safe haven solution must be confirmed in written form. If the sending and the hosting institutions are government (state) institutions, this bilateral agreement will normally take the form of a treaty. If the sending and the hosting institutions are, respectively, a non-state and a state institution, the hosting institution's law will normally establish the framework for the agreement.

If the legislative text mentions that its existence is limited by a clearly defined period, such as the duration of a truth commission's mandate, the agreement should be tripartite, including the institution that is the legal successor institution of the sending institution after its mandate has ended. This applies also in the exceptional case that the mandate of the hosting institution is limited in time.

It is desirable to have written documentation of the negotiations leading to the agreement.

Content of the Agreement

The Working Group also developed a generic agreement that gives an overview of topics that should be addressed in such an agreement and proposes options for contractual clauses. The applicable laws, policies and procedures in both the country of the sending and of the hosting institution should be referred to in the written agreement. As a minimum, the written agreement should include the purpose and the subject of the agreement, the roles and responsibilities of the contracting parties, possible liability settlements, as well as non-judicial and judicial steps in case of disagreement between the contracting parties. Normally, such disagreements will be solved by applying the law of the country of the hosting institution, given that insecurity in the country of the sending institution is frequently the reason for the relocation. Judicial steps should also include recourse to arbitration.

In case a dispute about the original ownership of the records arises, the laws of the hosting and sending institutions should be interpreted in favor of preservation of the records and in the light of a compelling public interest in Dealing with the Past processes.

A wide variety of agreements are possible and can be adapted to provide greater agility to respond to changing circumstances. For example, a potential hosting institution might receive records for the purpose of taking them out of harm's way under a very limited receipt agreement in time and obligations. This might allow the institution to better assess whether they would be a good host, e.g., if the archives in question contain a lot of audio-visual material that the hosting institution cannot handle. If the agreement exists in more than one language, the agreement must also specify which

version(s) will be the authoritative version for legal matters.

29 See Annex – Generic Agreement

If the safe haven solution agreed upon contains financial commitments for either party to the agreement, the agreement must state such commitments in detail.

Further references:

- The Working Group on safe havens for archives at risk drafted a generic agreement with sample clauses based on good practice. This generic agreement is available as an annex to this publication.²⁹

30 For further information, see the website of the National Centre for Historical Memory, <http://www.archivodelosddhh.gov.co/> (24 November 2019)

Illustration

- During an emergency situation, an NGO from Sub-Saharan Africa handed over a digital copy of sensitive records to an international Human Rights NGO based in Europe. Given the urgency of the situation, the persons responsible at both organizations only made an oral agreement. Years later, when the director of the sending institution reclaimed the copy, the person who was initially involved in the oral agreement for the hosting institution had left the institution. The management of the hosting institution claimed that they were the owner of the records. In the absence of an agreement, it was difficult for the sending institution to reclaim the records.
- In Colombia, the National Centre for Historical Memory (CNMH), a temporary governmental institution whose main mandate is to contribute to official memory, supports civil society organizations to organize and digitize information concerning human rights violations and collective memory, in the framework of the current Dealing with the Past process. These digital archives are accessible online, via the CNMH's web portal. Before any intervention, the CNMH establishes an agreement with the custodian to determine technical, operative and access matters, and informs the custodian about the legal limitations established by Colombian law. Such agreements include a clause informing about the digital archive's transfer, once the CNMH mandate concludes, to the National Museum of Collective Memory.³⁰

5. Main Goal Principle

The goals of the sending institution in seeking a safe haven for archives/records should always be paramount in determining how they are treated by the hosting institution.

Commentary on Principle 5

Rationale and Interpretation

This Principle aims to ensure that the sending institution's needs as to the type of safe haven for its archives guide the service of the hosting institution. The relationship between the hosting and sending institutions is one of service: the sending institution specifies the services it requires and the hosting institution agrees to provide them. For example, the hosting institution may state publicly which safe haven services it offers, but the sending institution will determine which of those it needs. This Principle has to be read in connection with Principle 7 ("Fair Agreement Principle"), as well as Principle 6 ("Ethics Principle").

The sending institution knows what material is in danger and needs to decide, together with the hosting institution, what the safe haven solution should consist of. This includes determining the legal and technical framework, the access rules, the duration of the custody arrangement, and the level of security required.

In cases where certain aspects of an agreement between the sending and the hosting institution are contested, the goals of the sending institution in seeking a safe haven solution shall guide the parties, as well as third parties that interpret the agreement (e.g. a judge). This Principle is closely connected with Principle 13 ("Constituent Spirit Principle").

Illustration

- A digital copy of the records of the Nuclear Claims Tribunal of the Republic of the Marshall Islands has been deposited at the Swiss Federal Archives. The Marshallese wanted some of the records to be accessible immediately and other portions closed off for a period of time. The agreement between the parties integrated the access rules, which may differ from general Swiss access regulations.
-

6. Ethics Principle

The hosting institution should have and adhere to a stated ethical code, transparently embedded into the institution's governance. Given that archives/ records relevant for dealing with the past often contain highly personal and sensitive information on victims and perpetrators of human rights violations, the hosting institution shall be guided by ethics and the ideas of:

- a) Do no harm
- b) Conflict sensitivity
- c) Data protection and right to privacy.

Commentary on Principle 6

Rationale and Interpretation

Some hosting institutions, particularly university libraries, want to give access to the archives they host. This is a legitimate desire, as they will spend money to preserve the materials and want their researchers and other users to gain benefit from it. However, archives relevant for Dealing with the Past processes often contain sensitive information about individuals, including victims and perpetrators, which raises concerns around the right to privacy and data protection. This Principle stresses the importance for hosting institutions to adhere to an ethical code.

Throughout the process of providing a safe haven for archives at risk, the hosting institution should not do harm, should act in a conflict-sensitive matter, and should recall that the main goal is preservation.³¹

Sending institutions expect hosting institutions to uphold a high standard of integrity in all aspects of their work. To meet these expectations, each host institution

³¹ For further information on the origins and understanding behind do no harm and conflict sensitivity, please refer to the sections on definitions above in this document.

- 32 https://www.ica.org/sites/default/files/ICA_1996-09-06_code%20of%20ethics_EN.pdf (24 November 2019).
- 33 http://content.foreningshuset.se/kundmappar/7522/Universal_Declaration_on_Archives.pdf (24 November 2019).
- 34 https://www.ica.org/sites/default/files/ICA_Access-principles_EN.pdf (24 November 2019).
- 35 <https://www.ica.org/en/basic-principles-role-archivists-and-records-managers-support-human-rights> (24 November 2019).
- 36 British Library rejects Taliban archive over terror law, <https://www.bl.uk/press-releases/2015/august/british-library-statement-on-taliban-sources-projectv> (24 November 2019).

should commit to ethical behavior, in accordance with the values underlying the Code of Ethics of the International Council on Archives³², the ICA/UNESCO Universal Declaration on Archives³³, the ICA Principles of Access to Archives³⁴ and the ICA Working Document on Basic Principles on the Role of Archivists and Records Managers in Support of Human Rights³⁵. Staff members of hosting institutions avoid situations and activities that may compromise the security of the archives and strictly observe all the provisions of the agreement between the parties, including the procedures for disclosing information about or from the archives to any third party.

Illustration

- In 2015, Thesigers, a consultancy firm that managed the Taliban Sources Project, asked the British Library whether it would be willing to acquire and give access to its large digitized archives of Taliban-related materials, including maps, press releases and edicts of the group. The U.K. Terrorism Act (2006) “places specific responsibilities on anyone in the UK who might provide access to terrorist publications,” the Library said, and it would not be able to make the material available to the public as the project wished. Realizing that if it agreed to host the material it would be ethically torn between the constraints of the legislation and the sending institution’s wish to make the archives available, the Library declined to host.³⁶

7. Fair Agreement Principle

Safe haven arrangements should always be based on a fair agreement, acknowledging the potential asymmetrical nature of the relationship, including language barriers, mitigating the risks deriving therefrom and not taking advantage of the asymmetry.

Commentary on Principle 7

Rationale and Interpretation

The relationship between the hosting and sending institutions is one of service and should have a fair basis: the sending institution specifies the services it requires and the hosting institution agrees to provide them. For example, the hosting institution may state publicly which safe haven services it offers, but the sending institution will determine which of those it needs. This Principle has to be read in connection with Principle 5 (“Main Goal Principle”), as well as Principle 6 (“Ethics Principle”).

In situations where a sending institution needs a safe haven for their archives at risk, there is usually a certain asymmetry in the relationship between the sending and the hosting institution. The sending institution is asking for help but it is ultimately the potential hosting institution that has the power to decide to host or not. Further, while the hosting institutions are usually well equipped, sending institutions may not be economically sustainable, may have very limited capacity, may use outdated and/or inappropriate standards or techniques, etc. The hosting institution should be aware of this and not take advantage of the counterpart.

Hosting institutions should formally acknowledge the asymmetric nature of the relationship they are going to establish and commit not to take advantage of it. This also includes not taking economic advantage in form of financial profit as stated in Principle 8. The two institutions may not have a common working language, and the hosting institution should take into account the difficulties, which may arise if there are language barriers. This includes the process of negotiation, drafting the agreement and preparing versions of the final text in different languages. If the agreement is drafted in more than one language, the agreement must also specify which language(s) will be authoritative, as stated in the commentary to Principle 4. If deemed necessary, a third party trusted by both institutions should be asked to assist in order to assure that both institutions understand fully the terms of the agreement.

Illustration

- In the summer of 1938, the Republicans faced imminent defeat in the Spanish civil war. One of the leaders of the Federación Anarquista Ibérica (FAI) asked the director of the International Institute of Social History (IISH) in Amsterdam to help find a safe haven for threatened archives. After the fall of Barcelona in January 1939 and the fall of Madrid in March of the same year, the archives of the Confederación Nacional del Trabajo (CNT) and its political arm, the FAI, made their way to Paris via “unlikely avenues” and were kept at the Institute’s Paris branch. A loan agreement was drawn up between the IISH representative in Paris and officials of the CNT and FAI; the latter signed in their private capacity to avoid any possible claims by the Franco regime. In 1939, with the Second World War at hand, the CNT and FAI archives moved from Paris to Oxford, where they survived the war. Both institutions were affected by wars, but the agreement survived both. In 1947, the archives were transferred to Amsterdam. After Franco’s death, the officials’ mandate to sign the contract was disputed by other CNT and FAI officials, and confusion about the status of the archives arose. Despite various subsequent claims, the archives remain at the IISH.³⁷

³⁷ For further information, see <https://iisg.amsterdam/en/collections/browsing/collection-guides/spanish-civil-war> (24 November 2019).

8. No Financial Profit Principle

The hosting institution should not financially profit from providing safe haven for specific archives/records.

Commentary on Principle 8

Rationale and Interpretation

The hosting institution should not profit financially from hosting the archives since it does not own them. There should not be a financial incentive to host archives at risk because this can lead hosting institutions to take advantage of the sending institutions' need to (urgently) find a safe place for their archives.

The costs for providing a safe haven solution depend largely on the complexity of the technical solution, the economic situation of the parties and potential external sources for funding. Reliable and sustainable solutions are expensive and providing the necessary infrastructure can be costly. A fee for holding the sending institution's archives may be agreed upon between the sending and the hosting institution, but it should not exceed the costs the hosting institution incurs for technical and infrastructure expenses required to provide the safe haven. In practice, however, most sending institutions do not have the means to pay for the safe haven.

If the hosting institution requires researchers to pay for certain services, such as making copies, the hosting and sending institutions should agree whether the institutional charges will also apply to the sending institution's materials.

Illustration

- In Colombia, the National Centre for Historical Memory offers to organize, digitize and preserve security copies of civil society archives. It does not charge a fee for this service; the costs are covered by funding from the Colombian government.³⁸

³⁸ For further information, see <http://www.centrodehistoriahistorica.gov.co/en/about-the-national-center-about-the-national-center> (24 November 2019).

Principles on the substance of the agreement

9. Processes in Agreement Principle

The agreement should define the rules and procedures for sending and returning the archives/records, the rules for access to the archives/records at the hosting institution, its publicity and privacy policies, as well as the technical standards it uses for description, handling storage, preservation and migration of the archives/records.

Commentary on Principle 9

Rationale and Interpretation

The agreement or annexes to the agreement should specify all technicalities regarding the transfer (protocols for digital archives; means of transfer/transport) and the preservation of the archives depending on the material to be secured (paper, digital, audio-visual or other) because of different conditions of transfer, preservation, and storage.

To be able to offer the best treatment possible, it is important that the hosting institution has sufficient information in a language that is understandable to it about the archival holdings of the sending institution. Ideally, the sending institution provides a description of the material (at least at a general level). The description must contain the necessary information about ownership and copyright of the material. Further, it should indicate one or more contact persons who can provide additional information, if necessary.

If access to the archives is given, an access policy should be developed, in cooperation with the sending institution.

The publicity and privacy policies of the agreement should be understood without prejudice to those domestic laws and regulations of the jurisdiction of the sending institution and to international treaties, which may recognize a wider right to information or right to privacy.

Illustration

- The audio-visual records of the Nuclear Claims Tribunal of the Marshall Islands were transferred to the City Archives of Girona, Spain, which cleaned and digitized them and sent back the originals and a digital copy, retaining a digital copy for safekeeping. The agreement stated that a protocol with the technical procedures would be prepared by the City Archives and shared with the Marshallese representative, which was done. It kept long technical details out of the agreement but the work that would be undertaken was known to both parties.
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10. Ownership Principle

While the hosting institution becomes the custodian of the archives/records, this does not affect their ownership, including all rights to dispose of them, unless otherwise specified in the agreement. This includes the obligation of the hosting institution to return the records to the country of origin, if so requested by the sending institution.

Commentary on Principle 10

Rationale and Interpretation

This Principle embodies the idea that the ownership of the secured archives remains with the sending institution and is not transferred to the hosting institution. Thus, as a general rule, the sending institution remains the owner of the secured archives. It is therefore the sending institution that makes all relevant decisions regarding the description of, access to, destruction and return of the records/archives. Any deviations from this general rule should be stated clearly in the agreement.

There are situations, for instance in times of armed conflict or political tension, when a sending institution may not be the legal owner of the archives (e.g. situation in which human rights defenders or local NGOs are trying to secure important public archives and hand them over to international organizations). In such contexts, the agreement should clearly foresee the return of the original files once such a return is safe. The agreement could also foresee that the hosting institution keeps a security copy of the records in order to be able to reconstruct ownership rights after the conflict.

If no agreement can be concluded in a time of ongoing conflict, the agreement needs to be concluded retroactively taking into account original ownership and

custody and the importance of Dealing with the Past and post-war reconstruction, as enshrined in the Updated Set of principles against impunity (2005, E/CN.4/2005/102/Add.1).³⁹

Illustration

- Diaries of Chiang Kai-shek and his son Chiang Ching-juo were deposited with the Hoover Institution to be held “pending the creation of a suitable repository on Chinese territory.” Family members specified parts of the diaries that are to remain closed until 2035 and they are redacted from use copies. However, Hoover “received conflicting claims of ownership of the materials,” and the Academia Historica, an agency of the Republic of China, also claimed interest in the deposit. To determine the ownership, the Hoover Institution asked a California court to make a ruling.⁴⁰
- After the completion of its report in early 1993, the Commission on the Truth for El Salvador transferred its archives to the custody of the United Nations Secretary-General; they are housed in the United Nations archives. In its report, the Commission said it held itself “personally responsible for guaranteeing confidentiality before finally handing the archives over to their lawful owners.” However, neither the duration of the deposit nor who was authorized to ask for the archives’ transfer to El Salvador was included in the documentation of the deposit, and twenty-six years later, despite a request for access by the Salvadorian government, the records remain with the United Nations and are closed.

39 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> (24 November 2019).

40 For further information, see <https://www.hoover.org/library-archives/collections/chiang-kai-shek-diaries> (30 November 2019).

11. Duration Principle

When negotiating the terms of the agreement, the parties should take into account the difficulty of planning the duration of the arrangement and include options for extension and closure. Precautions should be taken regarding possible changes of governments in both jurisdictions that could endanger the archives/records.

Commentary on Principle 11

Rationale and Interpretation

In situations when archives are at risk, it is usually difficult or impossible to anticipate when the risk will disappear. The agreement should take this difficulty in planning into account.

The question of the duration of the agreement and particularly the conditions that will trigger the return of the archives are very sensitive. It is difficult to evaluate to what extent records continue to be at risk at a certain point in time and therefore still need to be secured elsewhere. The agreement needs to strike a balance between the safety of the archives and the interests of the sending and the hosting institutions. The agreement, therefore, should include a certain degree of flexibility.

The term “closure” refers to several options, depending on the legal and factual situation of the parties upon termination of the agreement and the details agreed upon therein. Besides the formal expiration of the contractual agreement, it could also include repatriation of the archives or any other solution specified in the agreement.

The parties should agree on the termination modalities of the agreement. Options for the contracting parties include:

- 1) an agreement with a duration that ends at a specific defined date with the fulfilment of all the contractual obligations of the parties (e.g. the return of the records to the sending institution);
- 2) an agreement that is extended automatically year by year unless either party gives the notice of annulment before the end of the contractual period;
- 3) an agreement for an unlimited period of time to be dissolved upon request by one party only.

Options for ending an agreement by the hosting institution are covered in the Commentary on Principle 12. If possible and pertinent, regular situation reports by the sending institution may help to evaluate whether a safe haven solution is still needed.

The agreement should include a clause that allows for immediate termination of the agreement in case of non-compliance, non-execution or breach by one of the parties. Further, if events resulting from force majeure (e.g. armed conflict, political tensions and natural disaster) prevent the execution of an agreement, either of the parties may terminate the agreement from the moment when it becomes impossible to implement it.

Where the ownership of the information and rights of the sending institution are contested, the public interest in dealing with the past should prevail.

Illustration

- After the completion of its report in early 1993, the Commission on the Truth for El Salvador transferred its archives to the custody of the United Nations Secretary-General; they are housed in the United Nations archives. In its report, the Commission said it held itself “personally responsible for guaranteeing confidentiality before finally handing the archives over to their lawful owners.” However, neither the duration of the deposit nor who was authorized to ask for the archives’ transfer to El Salvador was included in the documentation of the deposit, and twenty-six years later, despite of a request for access by the Salvadorian government, the records remain with the United Nations and are closed.
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12. Anticipating Succession Principle

The sending and the hosting institution must agree on what will happen if either the sending or the hosting institution ceases to exist, or is subject to major changes in reporting relationships.

Commentary on Principle 12

Rationale and Interpretation

Archives are often at risk because the sending institution is located in a fragile context. Since such institutions are often under threat themselves, it is not unusual for them to change structures, names, legal status, dissolve, or cease to exist for other reasons. The same can happen to a hosting institution, although it is less likely. This Principle emphasizes the importance of both contracting parties taking into account the possibility of such changes when signing the agreement.

Ideally, a new institution takes over the contractual duties of its predecessor as legal successor, although it may be necessary to adapt some contractual provisions. Such changes will need to be negotiated by the existing contracting party and the new entity that is the successor to the original contractor.

It may also be appropriate to set out conditions and obligations for the situation when a safe haven agreement becomes void. Through the participation of an impartial third party, the intentions and integrity of the original agreement are more likely to be sustained over time.

If the hosting institution ceases to exist or is no longer in a position to act as a safe haven, the parties

must decide whether and under what conditions the archives to be secured will be transferred to another institution. If no transfer to another institution is possible, the person/institution in charge of the hosting institution shall return the archives to the sending institution as defined in the agreement.

In case the sending institution no longer exists, the hosting institution must negotiate with the successor institution of the sending institution what shall happen to the agreement. If no such institution exists, the hosting institution must make sure that the records are preserved for the sake of the society concerned, in view of potential future use for historical memory, dealing with the past and reconciliation.

If the reporting relationship of the hosting institution changes (e.g. a national archives is moved from the ministry of culture to the ministry of the interior), the sending institution shall be notified and the terms of the agreement may be renegotiated. If the hosting institution is absorbed by another institution, e.g. in the case of a research institute becoming part of a university, the sending institution shall be notified and given the opportunity to renegotiate the agreement.

In the case of an inter-governmental agreement, one way to protect the agreement, even if a change of government occurs in the sending country, is to specify that the hosting institution will have the right to keep a security copy for a certain period of time or postpone return in certain circumstances. For example, return may be postponed if returning the archives is likely to risk their destruction, their use for repressive purposes, or will place at risk persons whose actions are reflected in the materials (see Principle 11).

If the archives are deposited by a government and the state of the sending or (less likely) the hosting institution ceases to exist, the extant contracting party may refer the case to an international independent judicial

forum or body. The decision of the international body should be in accordance with the international legal framework that regulates state succession, in particular the 1978 Vienna Convention on Succession of States in Respect of Treaties (VCSST)⁴¹ and the 1983 Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (VCSSP).⁴² If an agreement between the relevant parties cannot be reached, the dispute shall be submitted, with the consent of all parties, to the International Court of Justice or arbitration, unless they have agreed upon a different procedure.

If wished, a copy of any safe haven agreement can be deposited with an impartial third party. In the event that one of the institutions ceases to exist, a deposited agreement may support the integrity of any course of action intended by the surviving institution.

Illustration

- The agreement between a country of a hosting institution and a country of a sending institution on safe havens foresees that the hosting institution keeps two copies and will continue to hold one copy of the archives for five years after the formal termination of the agreement. This clause was included to ensure that a copy will be preserved in case the political situation in the country of the sending institution is prejudicial to the security of the returned materials.
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41 http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf (24 November 2019).

42 For further information, see <https://www.hoover.org/library-archives/collections/chiang-kai-shek-diaries> (30 November 2019).

13. Constituent Spirit Principle

When interpreting the agreement, the parties should be guided by the spirit of the agreement when it was signed.

⁴³ Article 31 on the interpretation of treaties in the Vienna Convention on the Law of Treaties (VCLT) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, (24 November 2019).

Commentary on Principle 13

Rationale and Interpretation

As a general rule in law, when interpreting an agreement, the parties should take the spirit of the agreement at the time of its signing as guidance.⁴³ In case of disagreement between the contracting parties, or in cases where an agreement needs to be amended or interpreted by a successor institution, as outlined above under Principle 12, it is important to take into account the initial purpose and spirit of the agreement for interpretation.

Supporting material, such as minutes of meetings, draft versions of an agreement, explanatory notes to the agreement, etc. should therefore be kept by both the hosting and the sending institutions for later consultation.

Illustration

- When a U.S. Army team found Iraqi Jewish materials in the flooded basement of Iraq's intelligence headquarters in May 2003, Iraq had limited capacity to deal with the damaged documents. On 17 August 2003, the Chairman of Iraq's State Board of Antiquities and Heritage signed a letter to the U.S. Coalition Provisional Authority agreeing "to send the documents to the United States temporarily for the restoration by the National Archives and Records Administration (NARA) on the condition that, following the restoration, the documents are returned to Iraq, in a period not exceeding two years from the day of this approval." Political pressure in the United States developed, urging that the records not be returned. As of September 2019, they were still in U.S. custody.

Principles on the characteristics of hosting institutions

14. Legal Environment Principle

Hosting institutions should be embedded in an institutional framework with a functioning, independent judiciary and respect for the rule of law, which will reasonably prevent inappropriate state interference in the management of the archives/records. They should have support of their organizational hierarchy and their governing body for their safe haven activities.

Commentary on Principle 14

Rationale and Interpretation

In order to guarantee a secure and long-term safe haven solution, it is important that the legal and institutional framework of the hosting institution is stable. This applies to the hosting institution itself, which should be established, have long-term funding, be institutionally anchored and have a strong legal basis (e.g. as a foundation or as a public entity). Furthermore, this applies to the political, legal and institutional context surrounding the hosting institution.

Sending institutions should be aware that the government of the hosting country might be able to obtain a subpoena for the archives for appropriate governmental purposes, such as the identification of alleged war criminals residing in the country, legal aid and evidence exchange or matters relating to national security. The agreement should contain explicit language on the steps that the hosting institution will take, in the event of a subpoena, to notify the sending institution or its successor so that it may raise any defenses that it might choose. This Principle is closely linked to the Principle 16 on physical characteristics of hosting institutions.

Illustration

- A university agreed to the deposit of archives from another country, promising to digitize them prior to their return. The university's administration changed; the new administration withdrew its support for the project and the funds for the promised digitizing were not made available to the holding department. Meanwhile, a subpoena from a government sought access to the unorganized, undigitized archives for purposes of litigation.
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15. Control of Material Principle

For security and access control purposes, all processing, storage, and preservation facilities and capabilities used to manage the hosted archives/ records should always be demonstrably under the direct control of the hosting institution, unless stated otherwise in the agreement.

Commentary on Principle 15

Rationale and Interpretation

Many institutions use external service providers to house physical archives and to provide cloud storage for digital data. A hosting institution may rely on the services of such providers to store data from the sending institutions; however, for security and access control purposes, the hosted archives should always be under the direct control of the hosting institution. Furthermore, the sending institution needs to be informed if an external service provider is involved in storing the data.

If any of the facilities of the hosting institution are outsourced or located beyond the physical control of the hosting institution, there should be clear and transparent (contractual) documentation as to how that direct control is enforced, audited and assured. There must at least be a service agreement that allows for control. This includes transferring storage of digital information to a cloud service, contracting audio-visual preservation services and similar technical support. If preservation services are outsourced after the conclusion of the agreement, the sending institution needs to be informed and the agreement needs to be amended accordingly. It is important that any outsourcing solution is compliant with the agreement, as well as with international standards.

Illustration

- The United Nations Archives hold the records of Guatemala's Commission for Historical Clarification (truth commission). The UN Secretary-General's 1999 bulletin establishing the rules governing the archives said the Secretary-General had to sign an authorization to open any container of records until 1 January 2050. After considerable internal discussion over the prohibited preservation of the materials, it was decided that opening the containers for preservation purposes, not accessing the contents, was permitted. The UN then contracted an external digital preservation vendor to the Commission's audio-visual records and copied the electronic records, among them over 1000 audio micro-cassettes of interviews.
-

16. Physical Characteristics Principle

Hosting institutions should be located in a safe area in a building with the appropriate physical infrastructure, and should be able to fulfil the necessary organizational, legal and financial conditions to provide a long-term safe haven solution.

Commentary on Principle 16

Rationale and Interpretation

Ideally, hosting institutions should be located in geographically secure areas with no foreseeable major geological risks (e.g. earthquakes, recurrent flooding). If such risks exist, the hosting institution must demonstrate to the sending institution that it has taken adequate steps to prevent damage.

Hosting institutions should have a stable legal status (e.g. state, foundation, association), in order to be able to provide durable safe haven solutions. Ideally, they are in a stable financial situation allowing them to host archives at a long term. It is important that hosting institutions have the consent of their management to offer a safe haven for archives at risk.

This Principle is closely linked to Principle 14 “Legal Environment Principle”.

Illustration

- Although the Blinken Open Society Archives in Budapest is the custodian of only a few archival collections deposited as a safe haven (its holdings are predominantly donations), it does hold sensitive archives such as those of Physicians for Human Rights or the UN Expert Commission on Investigating War Crimes in the former Yugoslavia. As the political climate in Hungary (and globally) became increasingly hostile to the protection and promotion of human rights and respect for diversity, democracy and rule of law, such as those embodied in some of the Archives' holdings, the Archives deposited copies of its most sensitive (deposited or donated) materials in an institution in another country.
-

17. Professional Standards Principle

Hosting institutions should work in accordance with internationally recognized professional standards.

⁴⁴ International Standards for Archival Description ISAD(G); International Standard Archival Authority Record for Corporate Bodies, Persons and Families ISAAR(CPF); Dublin Core, metadata standards for digital resources (video, images, web pages, etc.), as well as physical resources such as books or CDs, and objects like artworks.

Commentary on Principle 17

Rationale and Interpretation

The archival profession has international standards for description of archives, storage, access procedures, preservation of electronic records and others.⁴⁴ Hosting institutions should ensure that the staff members who work with the sent archives understand and can apply these standards. The staff members should have experience in handling the format to be transferred and the services required by the agreement between the parties. They also should have experience or have robust training in handling sensitive, non-public materials. The particular risks associated with the security of digital safe haven material may also mean that cybersecurity expertise is required at a much greater level than usual in the hosting institution. The hosting institution should provide accountability and transparency with regards to its work (see also Principle 9 “Processes in Agreement”).

Archives must be preserved in a way that they remain accessible in the long term. This is particularly important when it comes to digital/electronic and audio-visual records where formats may change rapidly and where professional processing using appropriate state of the art technology is crucial for long-term preservation.

Illustration

- A hosting institution with a body of archives that had not been organized was not familiar with the international standard for archival description. Knowing that the archives would be returned to the sending country one day, it decided to use the international description format and had a consultant explain it to the staff members.
-

Principle on rapid response

18. Rapid Response Principle

Even if there is a need for rapid response, the safe haven solution should be guided by the spirit of the Guiding Principles for Safe Haven for Archives at Risk. In exceptional cases of extreme urgency or danger, agreed by all parties, the following principles provide the minimum requirements for a safe haven solution (2, 5, 6, 7, 8, 10⁴⁵). The other principles may be deferred for later implementation.

⁴⁵ Principle 2: Last Resort Principle; Principle 5: Main Goal Principle; Principle 6: Ethics Principle; Principle 7: Fair Agreement Principle; Principle 8: No Financial Profit Principle; Principle 10: Ownership Principle.

Commentary on Principle 18

Rationale and Interpretation

There are cases of emergency where a safe haven solution for archives needs to be rapidly found. Therefore, it is imperative to define what to foresee minimum requirements in situations of rapid response.

The GP and the commentary refer to several potentially immediate risks to archives that require such rapid response, in particular natural risks and situations of armed conflict or political tensions. Depending on the circumstances, some can present serious and immediate threats to the continued existence of archives. Others present less immediate risks, and there is time to conduct risk assessments and plan mitigating actions (which may ultimately include finding a safe haven or taking custody or ownership of the archives).

However, it takes time to find a potential safe haven solution and to negotiate a robust legal agreement. Hence, in a genuine emergency, it may be difficult to apply all GP and to negotiate a detailed agreement. In situations where archives are already in immediate and

substantive risk of alteration and destruction, it may be too late to start this process. In such situations, emergency response measures need to be implemented, perhaps involving rescue and immediate relocation to a temporary safe haven while planning a longer-term solution.

Therefore, it may be necessary to refer in a short, written emergency agreement to the minimum required Principles as stated above and detailed in footnote 45.⁴⁶

In the exceptional case in which a safe haven solution has been agreed upon orally, without any written agreement, the hosting institution should adhere to GP, in particular to the obligation to return the archives to the sending institution or its successor if requested so. After the emergency situation has passed, the parties should conclude a formal written agreement in accordance with GP.

Illustration

- In an emergency situation, an NGO from Sub-Saharan Africa handed over a digital copy of sensitive records to an international Human Rights NGO based in Europe. Given the urgency of the situation, the persons responsible at both organizations only made an oral agreement. Years later, when the director of the sending institution reclaimed the copy, the person who was initially involved in the oral agreement for the hosting institution had left the institution. The management of the hosting institution claimed that they were the owner of the records. In the absence of an agreement, it was difficult for the sending institution to reclaim the records.

⁴⁶ See Annex – Generic Agreement

About swisspeace

swisspeace is a practice-oriented peace research institute. It analyses the causes of violent conflicts and develops strategies for their peaceful transformation. swisspeace aims to contribute to the improvement of conflict prevention and conflict transformation by producing innovative research, shaping discourses on international peace policy, developing and applying new peacebuilding tools and methodologies, supporting and advising other peace actors, as well as by providing and facilitating spaces for analysis, discussion, critical reflection and learning. swisspeace is an associated Institute of the University of Basel and member of the Swiss Academy of Humanities and Social Sciences. Its most important partners and clients are the Swiss Federal Department of Foreign Affairs, the State Secretariat for Education, Research and Innovation, international organizations, think tanks and NGOs.

About the project “Archives and Dealing with the Past”

The project “Archives and Dealing with the Past” is a mandate by the FDFA which swisspeace implements in close coordination with the Swiss Federal Archives. The goal of the project is to make a significant contribution to preserving, securing and making accessible archives and records of past human right violations. The project aims at providing a support to governments, international organizations and NGOs related to the protection and management of archives that document human rights violations. It is conceived as a hub and offers a platform of contact between actors in need of support and experts working in this field.

For more information:

<http://archivesproject.swisspeace.ch>

GENERIC AGREEMENT

BETWEEN

[Sending institution], [place], [country]

AND

[Hosting institution], [place], [country]

On [the content of the agreement, e.g. “temporary deposit and access to archives/records...”]

Purpose of the Generic Agreement

This generic agreement has been developed by an international working group consisting of representatives of international, governmental and non-governmental institutions and individual experts who jointly developed the Guiding Principles for Safe Havens for Archives at Risk . The latter were endorsed by the Executive Board of the International Council on Archives in October 2018 and by the American Association of Archivists in April 2019.

The Guiding Principles for Safe Havens for Archives at Risk have served as a basis to draft this generic agreement. Existing agreements between hosting and sending institutions have further informed this document.

The following generic provisions are to be understood as possible options on the different questions that should be agreed upon by the contracting parties in a safe haven agreement, as deemed useful. Text provided in square brackets in the contractual clauses is intended to serve as a placeholder and illustration, which should be replaced by the contracting parties in accordance with the specific requirements of the safe haven agreement. The text in the grey boxes explains the purpose of the clauses and is not intended to be included in the agreement.

¹ Guiding Principles on Safe Haven for Archives at Risk <https://www.ica.org/en/guiding-principles-for-safe-havens-for-archives-at-risk> (2 December 2019).

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This AGREEMENT is concluded on [date].

BETWEEN

(1) *[The sending institution], [place], [country]*

(2) *[The hosting institution], [place], [country]*

Hereinafter referred to as “the Parties”

Relating to [the content of the agreement, e.g. “preservation and storage of and long-term access to the archives/records”] of [the sending institution] at [the hosting institution] as defined hereinafter

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

Preamble

The parties herewith agree to include the “Guiding Principles on Safe Haven for Archives at Risk”² (hereinafter “the Guiding Principles”) as an integral part of this agreement.

Section 1: Definitions

This section explains the technical terms as defined in international principles or standards or as generally accepted within the international archival community. These definitions shall help parties to have a common understanding of the technical terms. Additional definitions can be found in the Guiding Principles on Safe Havens for Archives at Risk, with further explanations on each definition in its Commentary³.

Access as defined in the ICA Principles of Access to Archives⁴, means the availability of archives/records for consultation as a result of both legal authorization and the existence of finding aids. In addition, for electronic records, it means the physical processes of retrieving information from storage media.

Authenticity refers to the persistence of the original characteristics of the record with respect to context, structure and content over time.⁵

² Guiding Principles on Safe Haven for Archives at Risk <https://www.ica.org/en/guiding-principles-for-safe-havens-for-archives-at-risk> (2 December 2019).

³ Refer to more definitions in page 9.

⁴ https://www.ica.org/sites/default/files/ICA_Access-principles_EN.pdf (10 February 2020).

⁵ Guide for Managing Electronic Records from an Archival Perspective, https://www.ica.org/sites/default/files/ICA%20Study%208%20guide_eng.pdf (10 February 2020).

Format can refer to the layout of a document or, in computing terminology, to a structure used for the interchange, storage, or display of data (examples the USMARC format, HTML, and XML, along with proprietary formats such as Adobe PDF or Microsoft Word).⁶

Migration means the process of moving data from one information system or storage medium to another to ensure continued access to the information as the system or medium becomes obsolete or degrades over time.⁷

Medium means the physical material, in or on which information is recorded⁸, e.g. clay tablets, papyrus, paper, parchment, film, magnetic tapes.

Protocol means a standard that describes the technical processes used to exchange information, especially across a network⁹ or to describe what has happened during a technical process. For example, all steps, which occur during the process of ingesting (bringing in) the digital records (TCP/IP, SMTP, HTTP, and FTP are some of the most common protocols).

Reliability: A reliable archive/record is one whose contents can be trusted as a full and accurate representation of the transactions, activities or facts, to which they attest and can be depended upon in the course of subsequent transactions or activities.¹⁰ For example, reliable records can under certain circumstances serve as evidence in judicial proceedings.

Section 2: Purpose, Nature and Duration of the Agreement

This section describes the purpose, nature and duration of the agreement. It is crucial that all parties involved agree on the underlying purpose of the agreement in order to prevent misunderstandings.

2.1 Nature of the Agreement

Both sending and hosting institutions can be of public, private, mixed or international character. Since different national and international law applies according to the nature of the institutions, the agreement needs to be shaped and drafted in accordance with the applicable legal framework. A variety of options is given in the following sections. However, the detailed wording needs to undergo legal scrutiny in order to be valid in the applicable legal framework.

⁶ Society of American Archivists, Glossary, <https://www2.archivists.org/glossary/terms/f/format> (10 February 2020).

⁷ Society of American Archivists, Glossary, <https://www2.archivists.org/glossary/terms/m/migration> (10 February 2020).

⁸ See also Society of American Archivists, Glossary, <https://www2.archivists.org/glossary/terms/m/medium> (10 February 2020).

⁹ Society of American Archivists, Glossary, <https://www2.archivists.org/glossary/terms/p/protocol> (10 February 2020).

¹⁰ ISO 15489-1.

This is [possible options]:

- An international agreement between two states
- A private agreement between two private entities
- An agreement between a state and a private entity
- An international agreement between a state and an international organization
- [add other options, if pertinent]

2.2 Objective and purpose of the Agreement

It is crucial that both sending and hosting institution agree on the objectives of the agreement in order to avoid future disagreement in particular with regard to use and access to the secured archives/records. Accordingly, Guiding Principle 5 states, “the goals of the sending institution in seeking a safe haven for archives/records should always be paramount in determining how they are treated by the hosting institution”. Also, Guiding Principle 9 states, “the agreement should define the rules and procedures for sending and returning the archives/records, the rules for access to the archives/records at the hosting institution, its publicity and privacy policies, as well as the technical standards it uses for description, handling storage, preservation and migration of the archives/records”. A description of the archives/records needs to be added in this section or in a dedicated annex.

- (1) The purpose of this agreement is to [fill in, e.g. “to preserve, store of and assure long-term access”] to [describe group of archives/records] of [sending institution] as defined in the request [and title of the application] dated [date of the request] by [the hosting institution].
- (2) The parties should also agree on the aspects related to the processes needed, including: [Possible options, depending on the needs]:
 - a) provide for the rules applying to the process of sending the archives/records from [the sending institution] to [name of the hosting institution] in [country of the hosting institution];
 - b) define the rules of access of [the hosting institution] pertaining to the archives/records sent from [the sending institution];
 - c) describe the process of storing, preserving and migrating the archives/records sent from [the sending institution] to [name of the hosting institution] in [country of hosting institution];
 - d) define the process of the definitive return of the archives/records sent from [the sending institution] to [name of the hosting institution] in [country of the hosting institution] back to [the sending institution] in [country of the sending institution] after the termination of this agreement.
 - e) [add other options, if pertinent]

2.3 Duration and termination of the Agreement

In situations where archives/records are at risk, the question of the duration of the agreement and particularly the return of the archives/records is highly sensitive. Guiding Principle 11 states, “when negotiating the terms of the agreement, the parties should take into account the difficulty of planning the duration of the arrangement and include options for extension and closure. Precautions should be taken regarding possible changes of governments in both jurisdictions that could endanger the archives/records”. Further, it is difficult to evaluate to what extent archives/records are still at risk at a certain point in time and therefore need to be secured elsewhere. The agreement needs to strike a balance between the security of the archives/records and the interests of the sending and the hosting institution. An agreement requires therefore a certain degree of flexibility. This is reflected in the options below. Reasons for the termination of an agreement are varied; they can namely include handling of the material by the hosting institution that is not in accordance with the goals of the sending institutions.

(1) Duration of this agreement

Option A: The duration of this agreement will be from [date] for [pre-defined period].

The agreement shall come into force upon its signature by the Parties and end when the defined period of time elapsed and as soon as both Parties have fulfilled all their contractual obligations, most importantly when [the hosting institution] has returned the records to [the sending institution].

Option B: The agreement is concluded for a period of [pre-defined period of time / months/years], after which it will be prolonged automatically year by year unless either party terminates the agreement with a notice period of at least [number of months] months before the end of the current contractual period.

Option C: This agreement is concluded for an unlimited period and can only be dissolved upon request. The Parties agree on the modalities of termination of the agreement.

(2) Termination of this agreement:

Option A: Unilateral termination: each Parties is entitled to terminate this agreement at any time, subject to written notice given [number of months] months in advance.

Option B: Termination due to non-compliance: In the event of non-compliance, non-execution or breach by one of the Parties of the obligations binding upon it, the other Party may terminate, after written notice, the agreement with immediate effect. In case the non-compliance, non-execution or breach is committed by [hosting institution], [sending institution] is entitled to request the immediate return of the archives/records.

Option C: Termination due to force majeure: If events resulting from force majeure (armed conflict or uprisings, natural disaster, etc.) prevent the execution of this agreement, each of the Parties may terminate the agreement from the moment when it becomes impossible to adhere to it.

(3) Other situations:

- a) In case [the sending institution] - or any institution replacing as a successor, or substituting for [the sending institution] requests the return of the archives/records to [country of the sending institution] before the end of the agreement period, the parties will negotiate the terms of the return with the representative.
- b) In cases where [the hosting institution] has reasonable grounds to believe that the secured archives/records would be under threat of destruction in the country of origin, the return of the archive to that country can be refused OR [a security copy of the archive can be kept] [for a defined period of time]. In case of disputes, see sections 9 and 12 of this agreement below.

2.4 Dissolution and/or liquidation of the contracting parties

The Anticipating Succession Principle, Guiding Principle 12, states that “the sending and the hosting institution must agree on what will happen if either the sending or the hosting institution ceases to exist, or is subject to major changes in reporting relationships”. It is thus crucial that the agreement specifies clearly what happens to the secured archive if either:

- a) The hosting institution is dissolved and cannot give custody to the secured archives/records any longer.
- b) The owner of the archives/records (natural person or legal entity, e.g. NGO, does not exist any longer. The crucial point is that in certain cases the archival material secured in the hosting institution must be protected, in particular, if a change of regime occurs in the country where the archives/records originally come from. Therefore, the agreement can specify that the hosting institutions will have the right to keep a security copy for a certain period of time.

- (1) In case [the hosting institution] ceases to exist, [the sending institution] will negotiate with the successor institution of [the hosting institution] what shall happen to the secured archives/records:

Option A: whether the successor institution takes over the archives/records and becomes party to the agreement as legal successor of [the hosting institution] without amendments to the agreement [or: with amendments to the agreement].

Option B: whether the archives/records to be secured will be transferred to another institution, as defined in an Annex to this agreement.

Option C: If no transfer to another institution is possible, the person/institution in charge of the liquidation of [the hosting institution] shall return the archives/records to [the sending institution].

- (2) In the case where [the sending institution] ceases to exist,

Option A: [the hosting institution] will negotiate with the successor institution of [the sending institution] where the archives/records will be transferred to. If no such institution exists, [the hosting institution] shall make sure that the archives/records are preserved for the sake of the society concerned in view of potential future use for historical memory, dealing with the past and reconciliation.

Option B: the archives/records will remain in the custody of [the hosting institution] for the period of [specify the period for the temporal custody].

Section 3: Processes

The agreement or specific Annexes to the agreement should specify the transfer and the custody of the archives/records to secure, depending on the material to be secured (paper, digital archives/records, audio-visual, photo or other) because of different conditions of transfer, preservation, storage.

3.1 Sending the archives/records to [country of the hosting institution]

Option A: [The sending institution] will send the archives/records to [country of the hosting institution] guaranteeing the integrity and safety of the archives/records.

[The hosting institution] is not liable for damage or loss that occurs during transfer.

The archives/records must comply with the respective standards of [the hosting institution].

Option B: [The hosting institution] will be responsible for transporting the archives/records to [country of hosting institution].

Option C: [The hosting institution] and [the sending institution] share the responsibility for transporting the archives/records to [country of the hosting institution].

See Section: Examples of detailed annexes, [Annex A](#).

3.2 Storing the archives/records in [country of the hosting institution]

[The hosting institution] will be responsible for secure storage of the archives/records in [country of the hosting institution].

At the end of each intake process, [the hosting institution] will send a storage protocol with the references of the archives/records to [the sending institution].

See Section: Examples of detailed annexes, [Annex B](#).

3.3 Migrating the archives/records in [country of the hosting institution]

When [the hosting institution] determines that a migration of the archives/records is necessary to preserve their accessibility, [the hosting institution] will select a migration path that will ensure that the migrated archives/records will be authentic and reliable unless the sender gives the responsibility to the receiver.

[The hosting institution] will inform [the sending institution] [number of months] in advance, if a migration of the archives/records is needed.

[The sending institution] will decide if it agrees with the proposed migration. If [the sending institution] does not agree, the archives/records will be sent back to [country of sending institution] or to another predefined place within [number] year(s).

[The hosting institution] will also be permitted to make copies of the records for conservation purposes and availability under the same conditions that apply for the original archives/records.

Section 4: Access

All actions that impact on, or pertain to, access to the material at risk shall be agreed with the sending institution. Further, security and access control, processing, storage, and preservation facilities and capabilities used to deal with or hold all archival material at risk (regardless of format) should be demonstrably under the direct (e.g. physical) control of the hosting institution, unless stated otherwise in the agreement (see Control of Material, Guiding Principle 15). If any of these facilities are outsourced or located beyond the physical control of the hosting institution, there should be clear and transparent (e.g. contractual) documentation as to how that direct control is enforced, audited, and assured.

4.1 Access to the archives/records by the contracting parties

If access is agreed and technically possible
(possible options, depending on the needs):

Option A: [the sending institution] can access the archives/records at any time, within the normal working hours of [the hosting institution].

[Optional: On demand, [the hosting institution] will deliver a digital copy of the archives/records to [the sending institution] within [number of months].

Option B: The legal representatives of [the sending institution] can, after sending a written notification [specify period] in advance, access the archives/records in [country of the hosting institution].

[The hosting institution] can access the archives/records any time to guarantee their preservation and long-term accessibility. The staff members of [the hosting institution] have access the records and are bound by a confidentiality agreement.

See Section: Examples of detailed annexes, [Annex C](#).

4.2 Access to the archives/records by a third party

Option A: [the sending institution] may grant a third party access to the archives/records and material held by [hosting institution] under this agreement, for purposes of scientific research or for other reasons deemed acceptable by [the sending institution].

When [the sending institution] grants third party access, [the sending institution] shall notify [the hosting institution] of such permission [number of months] months in advance of the proposed date of access. [The hosting institution] shall be responsible for determining the secure service procedures to be used to fulfil the request.

Any request made to [hosting institution] for access to the archives/records will be forwarded promptly to [the sending institution] for reply. [The hosting institution] will acknowledge to the requester the receipt of the request and inform him or her of the transfer of the request to [the sending institution].

If [the hosting institution] receives notice of the filing of a lawsuit concerning [the sending institution]'s archives/records, [the hosting institution] provides [the sending institution] with timely notice of the matter. It is [the sending institution]'s obligation to defend the litigation.

Option B: The archives/records will be open to the public with the exception of [to be detailed in an Annex], for which written permission of [the sending institution] is required.

Option C: The archives/records will be open to the public under standard procedures of [the hosting institution].

Option D: [the hosting institution] will be permitted to make the archives/records available to third parties through the reference services, including, but not limited to, reading rooms and websites.

[Optional: specific rules about which parts, which information, e.g. names, personal information, etc.]

Section 5: Responsibilities of each Party

5.1 General responsibilities and due diligence

Each Party hereby undertakes with respect to the other Parties reasonable endeavors to perform and fulfil promptly, actively and on time, all of its obligations under this agreement in due diligence and according to internationally recognized standards.

5.2 Responsibilities of [the sending institution]

The responsibilities of [the sending institution] include:

[Possible options, depending on the needs]:

- (1) Depending on article 3.1: sending the archives/records according to article 3.1 of this agreement and paying/providing the costs of the transport;
- (2) taking the decision on [the hosting institution]'s proposal of data migration according to article 3.3 of this agreement;

- (3) hosting the archives/records after termination of this agreement or making sure that the records are received by another structure/organization;
- (4) reviewing all requests by third parties for access to the archives/records (see article 3.5).

5.3 Responsibilities of [the hosting institution]

The responsibilities of [the hosting institution] include:
[Possible options, depending on the needs]:

- (1) Preserving the archives/records in accordance with the rules established under this agreement.
- (2) Storing the archives/records in compliance with article 3.2 of this agreement.
- (3) Migrating the archives/records to another data format unless [the sending institution] disagrees according to article 3.3 of this agreement.
- (4) Delivering a copy of the archives/records to [the sending institution] (see article 3.4 of this agreement) or to a third party upon written demand (see article 3.5 of this agreement).
- (5) Granting access to the archives/records if needed and requested (see article 3.4).
- (6) Returning the archives/records after termination of this agreement (unless [the hosting institution] has reasonable grounds to believe that the secured archives would be under threat of destruction in the country of origin, see article 2.3).
- (7) Treating all information involved in the process of storing, preserving and migrating the archives/records as strictly confidential and making sure that all staff members handling the archives/records sign a binding and enforceable confidentiality agreement.
- (8) Providing access to the archives/records designated as public by [the sending institution] as provided by the protocol in the Annex [describe in an Annex].

Section 6: Pricing Policy

Guiding Principle 8 states, “the hosting institution should not financially profit from providing safe haven for specific archives/records”. The question whether securing endangered archives/records should cost something or not is essential. It depends on the economic situation of the parties and potential external sources of funding. Reliable and sustainable solutions can be expensive and providing the necessary infrastructure can be costly. There are therefore different options to negotiate:

Option A: [the hosting institution] will not charge [the sending institution] for the costs of preserving the archives/records.

Option B: [the hosting institution] will charge [the sending institution] the amount of [amount currency] for the preservation of the archives/records [or other services, as defined].

Option C: [the hosting institution] charges full costs in accordance with the usual fees levied for such service by [the hosting institution], and for copying archives/records for a Third Party to whom [the sending institution] has given written permission to receive copies of the archives/records. These costs may include delivery charges if the Third Party is to receive the records in a physical location other than the premises of [the hosting institution].

Section 7: Intellectual Property Rights

Guiding Principle 10 states, “while the hosting institution becomes the custodian of the archives/records, this does not affect their ownership, including all rights to dispose of them, unless otherwise specified in the agreement. (...)”

The archives/records belong to [the sending institution].

Optional: [the hosting institution] is not entitled to grant access to the archives/records or make financial profit; except as provided in [specify in an Annex] (see chapter 3.4 and 3.5)

Section 8: Liability

[The hosting institution] is not liable for damage or loss that occurs during transfer, preservation, storage and migration of the archives/records when fulfilling its due diligence according to international archival standards in accordance with Section 4.3.

Section 9: Settlement of Disputes

In case of controversy arising out of or relating to the present agreement, the Parties agree to undertake all efforts to find an adequate settlement before instituting any legal procedures. This does not apply in cases of clear breaches of the agreement, where the applicable law and place of jurisdiction as in Section 12 would be applicable.

Section 10: Anti-Corruption Clause

Within the framework of this agreement, the Parties shall neither directly nor indirectly propose benefits of any nature whatsoever. They shall not accept any such proposals. Any corrupt or illegal behavior signifies a substantial breach of the present agreement and justifies its termination as well as/or the recourse to supplementary corrective measures in accordance with applicable legislation.

Section 11: Languages

This agreement is drawn up in [English] [or another language] [the languages chosen by the Parties]. [If drafted in more than one language: Both/all language versions have the same legal value]. Interpretation has to be done in good faith.

All documents, notices and meetings for the application and/or extension of this agreement and all other related matters shall also be constituted in [same language(s) as above].

Section 12: Applicable Law and Place of Jurisdiction

The law applicable to this agreement shall be [the country of the hosting institution].
The place of jurisdiction shall be [place, country of the hosting institution].

Section 13: Amendments

Amendments or changes to this agreement and its annexes shall be valid only if made in writing and signed by an authorized signatory of each Party.

Signatures

AS WITNESS, the Parties have caused this **agreement** to be duly signed by the undersigned authorized representatives the day and year written above.

Signed in [place], [country] [date]

Authorized to sign on behalf of [the sending institution], according to the annexed document *(e.g. founding statute, or other document that proves that the person is the director or otherwise has the legal powers to sign on behalf the institution)*

[Name]
[Title]

[Name]
[Title]

Authorized to sign on behalf of [the hosting institution], according to the annexed document *(e.g. founding statute, or other document that proves that the person is the director or otherwise has the legal powers to sign on behalf the institution)*

[Name]
[Title]

[Name]
[Title]

Examples of detailed annexes

Annex A

Example: Sending the archives/records to [country of hosting institution]

- (1) Copies of the archives/records must be provided by [the sending institution] in a technically adequate, safe and encrypted format, including an electronic list of the archives/records transfer format.
- (2) [The hosting institution] will check the formats of the archives/records and whether the number of archives/records is the same as indicated on the list. If the check is passed, [the hosting institution] will email a confirmation to [the sending institution].
- (3) If the check fails, [the hosting institution] will return the archives/records to [the sending institution] by [type of transmission, e.g. diplomatic pouch via the Embassies] of [country of hosting institution] and [the country of sending institution].
- (4) [The sending institution] will appoint the person in charge for the sending and communication process with [the hosting institution].
Option: The electronic archives/records will be handed over to the Embassy of [country of hosting institution] by the Embassy of [country of sending institution]. The electronic archives/records will then be sent to [the hosting institution] by diplomatic pouch.
- (5) The parties can mutually agree on other ways of safe transport.
- (6) For the shipment of the electronic archives/records from and to [country of hosting institution], the archives/records must be protected by passwords and encryption and with security keys known only to [the hosting institution] and [the sending institution].

Annex B

Example: Storing the archives/records in [country of hosting institution]

- (1) Two or more copies of the archives/records will be stored at the discretion of the hosting institutions in accordance with its usual procedure.
- (2) After the storage procedure is successfully completed, [the hosting institution] will send electronically to [the sending institution] the storage protocol and a list of the archives/records with the record identification number.
- (3) If requested by [the sending institution], [the hosting institution] will send back the two empty sets of electronic archives/records to [sending institution] by [type of transmission].

Annex C

Example: Access to the archives/records by [the sending institution]

- (1) [The sending institution] can order copies of archives/records at any time, either a complete copy or a specific extract therefrom. The copies will be electronic. The order must be sent to [the hosting institution] electronically with the record identification.
- (2) **Option A:** [for government archives/records] Copies made will be sent by diplomatic pouch to the Embassy of [country of hosting institution] in [the country of sending institution].
- (3) **Option B:** The transfer of the archives/records needs to be negotiated in a separate protocol.