



Note on the draft Basic Principles on the Role of Archivists in Support of Human Rights

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This Note contains the Centre for Law and Democracy's (CLD) comments on the draft Basic Principles on the Role of Archivists in Support of Human Rights (draft Principles). The draft Principles were prepared by the Human Rights Working Group of the International Council on Archives and were distributed for comments in December 2014.¹

General Points

The last paragraph in the preamble, which provides the introduction for the Principles, is somewhat confusing. The substance of the draft Principles as a whole appears to be directed at one or more of five different players, namely governments, archival institutions, professional associations of archivists, educational institutions and archivists themselves. This should be reflected in this preambular paragraph. At the moment, the paragraph calls for the Principles to be “respected and taken into account within the framework of national legislation and practice on the safeguarding and promotion of human rights” and also by archival institutions. This is both too narrow – inasmuch as it only addresses some of the relevant players – and also too broad – inasmuch as the Principles will not be relevant to many pieces of legislation addressing human rights.

¹ The call for comments, along with the draft Principles in English, French and Spanish, is available at: <http://www.ica.org/15999/news-and-events/basic-principles-on-the-role-of-archivists-in-support-of-human-rights-give-your-opinion.html>.

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Finally, the paragraph calls on international officials dealing with human rights to be aware of the Principles, specially singling out the UN Special Rapporteurs for reasons which are not entirely clear, but does not extend this obligation to national players.

A possible alternative formulation for this paragraph could be as follows:

The **Basic Principles on the Role of Archivists in Support of Human Rights**, set forth below, have been formulated to assist governments, archival institutions, professional associations of archivists, educational institutions and archivists in their task of ensuring the proper role of archives in support of human rights. The Principles should be respected and taken into account, as relevant, by governments, archival institutions, professional associations of archivists, educational institutions and archivists. Other players involved in the promotion and protection of human rights, at both the international and national level, should be aware of the importance of the issues covered by the **Basic Principles**.

The preamble is dominated by expressions of what various international statements say, but includes relatively limited material explaining the role of archives in supporting human rights (apart from where this issues is directly reflected in the international statements). It is true that this is also the style of the *Basic Principles on the Role of Lawyers* but that is a bit different because international statements are far more explicit as to the role of lawyers than they are for archivists. For example, the preamble makes it clear that international law establishes a right to information but it does little to explain (or even state) the role of archives in giving effect to that right, leaving this up to the reader to deduce. An exception to this is the tenth paragraph in the preamble, which it would be useful to elaborate on in more depth. The 2004 Joint Declaration of the special rapporteurs, referred to in the preamble, might provide some inspiration for a more explanatory style of preamble.

The draft Principles use the terms “non-government institutions” or just “institutions” repeatedly but it is not clear what these terms refer to and their ambit is potentially extremely broad (i.e. it could include all NGOs). It is assumed that these terms are really intended to refer to archival institutions. If so, this should be made clear. If not, the proper scope of these terms should be clarified.

Most of the actual Principles are cast as statements of fact (“Institutions and archivists maintain recordkeeping regimes ...”) rather than as normative statements (“Institutions and archivists should maintain recordkeeping regimes ...”). This is problematical inasmuch as the statements are obviously not always true (not all institutions and archivists do maintain their recordkeeping regimes in the manner described) and they fail to provide normative direction to readers.

Careful thought needs to be given to the target of each of the principles. In some cases, for example, it would seem that archival institutions should also be included. Specific recommendations on this are in some cases provided below.

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Closely related to the above, care needs to be taken to ensure that it is within the reasonable power of the stated target of each principle actually to deliver that principle. This is a particular issue in relation to principles which call on various players to take actions that may or may not be legal in their jurisdiction. For example, Principle 11 calls on archivists to grant access to the archives in certain circumstances, but in some countries the law places severe constraints on precisely such access. In this case, it might make more sense to call for the law to ensure appropriate access and then for archivists to grant such access (in accordance with the law).

Recommendations:

- Consideration should be given to amending the last paragraph in the preamble along the lines suggested above.
- Consideration should be given to including more explanatory statements in the preamble, rather than focusing mainly on quoting international statements.
- The proper scope of the terms “non-government institutions” and “institutions” should be clarified.
- A normative element – such as ‘should’ or ‘are entitled to’ – should be included in every principle.
- Careful thought should be given to which of the five players should be the target of each of the principles.
- Care should be taken to ensure that principles do not place unrealistic obligations on targeted players.

Preamble

The first paragraph in the preamble is extremely general, basically leaving it up to the imagination of the reader as to how the use of archives might support human rights. This provides a weak introduction and may leave some readers with a sense of scepticism or lack of clarity about the importance of archives for human rights. Setting out at least some general ways in which archives support human rights would help (such as reducing impunity for violations by providing evidence).

The third paragraph in the preamble singles out participation as a benefit of the right to information. While this is undoubtedly a benefit, it is only one of many and it is not clear why it has been listed.

The sixth paragraph in the preamble notes that the Tshwane Principles emphasise the importance of archives, linking this to the idea that governments should not be permitted to withhold information needed by victims of human rights violations. The Tshwane Principles do recognise the importance of archives calling, in Principle 7, for governments to devote adequate resources to them. But they do not in any way link this

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to the second point of that paragraph (i.e. withholding information from victims) and, as a result, the paragraph is to that extent misleading.

The eleventh paragraph in the preamble states that “the archival profession commits to respect the dignity of people in its best practices”. While this is clearly the aim of the ICA and of many, but unfortunately not all, archivists, it somehow seems inappropriate in a preamble, almost immodest and not really contributing to the body of the Principles. It may be noted that there is no similar statement in the *Basic Principles on the Role of Lawyers* (i.e. as to the commitment of lawyers).

Recommendations:

- Consideration should be given to strengthening the first paragraph of the preamble along the lines suggested above.
- Consideration should be given to referring to a wider range of benefits of the right to information in the third paragraph in the preamble.
- The sixth paragraph in the preamble should be amended so as to remove the reference noted above which might mislead readers as to what the Tshwane Principles say about archives.
- Consideration should be given to removing the eleventh paragraph in the preamble.

The Draft Principles

Principles 1 and 2

These are two principles where thought might be given as to whether or not there is a need for legal and institutional arrangements that will support the listed players in achieving the goals. For example, it may not be within the power of archivists to select and retain historically and legally important materials (for example if the power to select documents for preservation lies somewhere else).

Principle 3

It may be excessive to suggest that the possible benefits listed here – whether the record may be needed to support a human rights claim, assist in the identification of perpetrators of human rights abuses and so on – should be considered in each appraisal decision, given that, in many cases it will be obvious that this is not the case. A more realistic approach might be to call for these benefits to be considered, where appropriate.

Principle 4

It is not clear how this principle goes beyond the scope of Principle 3, which already calls for the preservation of human rights records. If there are other ways in which archivists should prevent these records being destroyed, this should be clarified in the principle.

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Principle 5

It is unclear what measures governments are expected to take to ensure that human rights sensitive records are preserved and rendered open for public access (in addition to the specific call for funding and resources being made available to this end). One way might be by putting in place an appropriate legal framework, but there may also be other ways. It would enhance the recommendation if it were to clarify how, specifically, governments should do this.

Principle 7

What is being asked for in this principle may be clear for archivists, but it is not quite as clear as it could be for non-archivists. For example, does the term ‘description of their holdings’ refer to public reference materials regarding the archival holdings (i.e. a guide to the public as to what is in the archives) or something else?

Principle 9

It would seem logical that archival institutions can only provide access to the non-government records they hold, but this recommendation appears to be directed at all non-government records. It is widely recognised in right to information laws, even where they do give a right to access information held by private bodies, which is very rare, that this right should be more limited than the right to access information held by public authorities. There may be a risk, if archival institutes give the same level of access to non-government records, that private bodies will be reluctant to deposit their holdings with archival institutions (or, where private bodies run those institutions, that they will simply refuse to respect this principle).

Principle 11

As noted above, archivists must operate within the parameters of the law and this principle may in some countries go beyond what is allowed by law. It might be necessary, therefore, to add in a reference to the need for legal regimes to protect such access.

Principle 13

This principle calls on archivists to notify authorities for purposes of possible legal action when they discover records that appear to document human rights violations. It might be preferable to call for such notification to take place to serve wider possible uses of such documents, for example for truth purposes, for historical research or for other ends.

Principle 14

It is not immediately apparent to the reader how archivists acquiring materials could undermine the ability of cultural groups to protect their human rights and so it might be useful to somehow indicate this within the principle.

Principle 15

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The various players listed in this principle can only cooperate with their counterparts in other countries upon request and so this qualifier should be added to the principle. It is not clear to non-archivists what 'displaced archives' are. In any case, surely such cooperation should extend to other areas of work, especially where this is likely to support human rights.

Principles 16-18

It would seem that archival institutions could usefully be added as targeted players to all of these principles.

Sections 5 and 6

Section 5 includes a reference to freedom of association in its title but does not address this issue at all, while the provisions on this are in fact found in Section 6.

Principle 19

This principle prohibits archivists from disclosing information they obtain professionally. As stated, it is too broad and would include information which could perfectly reasonably be released, including general information about what is in the archives (which they only know as a result of their professional work). It should be subject to a qualification, for example by being restricted to information which is somehow subject to an obligation of confidentiality (for example by law or pursuant to a commitment to the provider of the information).

Principle 20

This principle establishes a form of whistleblower protection for archivists, but it is limited in scope to their right to report instances of retaliation to an appropriate authority. This should be amended to provide for a primary right not to be subject to sanction for whistleblowing, and the right to report retaliation could be part of the measures to give effect to this right.

Principle 21

This principle calls for the executive bodies of professional associations of archivists to be elected by their members. This seems unduly rigid. It would, for example, be perfectly reasonable for another body, such as a right to information or data protection body, to nominate a member for the executive (if that was provided for in its founding documents). It might be preferable to provide that associations should be controlled by their members or that a majority of the members of the executive should be elected by members.

Principle 23

This principle calls for professional codes of conduct established by archival associations to be 'in harmony' with the ICA *Code of Ethics*. It is not quite clear what 'in harmony' means in this context, but it seems rather directive. A more appropriate rule might be for professional codes not to conflict with the ICA *Code of Ethics*.

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Recommendations:

- Consideration should be given to whether Principles 1 and 2 need to include references to the legal and/or institutional elements which are preconditions for archivists and archival institutions to be able to deliver the goals of these principles.
- Consideration should be given to amending Principle 3 to call on archivists to consider the human rights benefits of records listed there in appropriate cases, rather than in all cases.
- Principle 4 should either make it clear how, beyond selecting them for preservation, archivists are expected to prevent the destruction of human rights sensitive records or be removed.
- Principle 5 should make it clear how, beyond making resources available, governments should ensure that human rights sensitive records are preserved and made available to the public.
- Consideration should be given to amending Principle 7 so as to ensure that it is clear to non-archivists.
- Consideration should be given to whether Principle 9 needs to be amended in light of the comments above.
- A recommendation should be added to Principle 11 aimed at ensuring that legal regimes protect the right of archivists to behave in the way called for in the principle.
- Consideration should be given to referring to a wider set of possible uses of information revealing human rights abuses in Principle 13.
- Principle 14 should make it clear how archivists acquiring materials could undermine the ability of cultural groups to protect their human rights.
- Principle 15 should make it clear that cooperation should be extended upon request and include a definition of ‘displaced archives’, and consideration should be given to providing for cooperation to wider ends than simply handling displaced archives.
- Archival institutions should be added to Principles 16-18 as targeted players.
- The reference to freedom of association should either be removed from the title of Section 5 or the provisions in Section 6 should be moved to Section 5.
- The obligation not to disclose information in Principle 19 should apply only to information which is somehow subject to an obligation of confidentiality.
- Article 20 should provide primary protection for whistleblowing disclosures, along with establishing a right to report any retaliation for such disclosures to an appropriate authority.
- Consideration should be given to relaxing the rule in Principle 21 providing for the executive bodies of professional archival association to be elected exclusively by their members.
- In Principle 23, consideration should be given to calling for

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professional codes not to conflict with the ICA *Code of Ethics*, rather than to be 'in harmony' with it.