

## THE VIEW OF THE ARCHIVAL COMMUNITY ON SETTLING DISPUTED ARCHIVAL CLAIMS

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### **1. The diplomatic routine followed until the Second World War**

Despite the absence of generally applicable legal instruments, a diplomatic routine for settling disputed archival claims was progressively established from 1650.

The following rules were, in practice, implicitly respected

- i/ all treaties relating to changes of sovereignty over a territory included clauses dealing with the surrender or exchange of archives ;
- ii/ lists of archives to be transferred or copied as a result of such treaties were specifically agreed between the two parties ;
- iii/ documents necessary for the conduct of current business and for administrative continuity were in every case handed over by the predecessor state to the successor state either in original form or as copies ;
- iv/ archives captured and displaced during hostilities were returned once peace was concluded ;
- v/ archives of military units of occupation remained the property of occupying powers.

### **2. The break with tradition after the Second World War**

The traditional practice of devolution and restitution of archives was abandoned abruptly in 1945.

No peace treaty was concluded with the main defeated power in 1945, nor was any systematic effort made to repatriate archives captured during the hostilities, and at the global level the emergence of a hundred or so sovereign states through decolonisation occurred without there being specific measures for the devolution of archives.

The abandonment of traditional practice has led to an unprecedented accumulation of unresolved problems concerning the restitution and devolution of archives. The legal vacuum thus created is all the more pernicious as it has been tacitly accepted by all states.

### **3. The international imperative**

The International Council on Archives believes the time has come to put an end to the exceptional conditions which have lasted fifty years and to begin getting rid of disputed archival claims arising from the Second World War, decolonisation and the break-up of federations following the events of 1989.

The experience of the 1983 Vienna Intergovernmental Conference shows that an international convention is useless if it is established without a consensus among states at the price of a contradictory political debate and without regard to how applicable the proposed measures are.

Given the multitude of claims, of different types and origins, which have built up during fifty years of inaction, only a pragmatic approach offers a reasonable chance of breaking the deadlock.

The objective is to resume, as quickly as possible, the traditional practice of dealing with disputed claims by mean of negotiations between the interested parties. In view of the number of cases and the complex interrelations between the problems however, an international consultation seems essential if the situation is to get back to normal.

The consultation would be intended to secure the agreement of states to the objective of settling the claims to establish a typology of cases, to devise a conceptual framework acceptable to all and to draw up principles to be observed during the preparation of bi-lateral agreements.

The consultation could take place within the framework or under the aegis of international and regional inter-governmental organisations with responsibilities in the archival field.

The International Council on Archives is ready to lend its support to co-ordinating initiatives which might be taken by the different organisations.

The consultation would also have to take account of the international regulation of the movement and return of cultural property, which is evolving rapidly. Instruments dealing with the transfer of cultural assets and with the return of cultural assets which were illegally taken, explicitly include archives in their field of competence.

#### **4. Concepts and Principles**

The body of documents relating to the settling of disputed archival claims which UNESCO and ICA produced between 1974 and 1994, provides a sufficient basis to open up the desired consultation.

The consensus that is being sought could be built up from a number of concepts and principles appearing in these documents.

##### **a/ The inalienability and imprescriptibility of public records**

National laws agree in conferring the status of inalienable and imprescriptible public property on public records. The alienation of public archives can therefore only occur through a legislative act of the State which created item.

##### **b/ Provenance and respect for the integrity of archival fonds**

Archives are not groups of documents assembled at the whim of collectors, but instead are accumulated through the operation of their creating institutions. Their definitive place of preservation is determined by the national law of each country.

Archival doctrine, which is founded on the principle of provenance, therefore excludes, on the one hand, the possibility of dismembering fonds, and on the other hand, the acquisition by any archive institution of fonds which do not fall within its jurisdiction.

##### **c/ The right of access and the right of reproduction**

Fonds created by institutions where succession is shared between several states, and which cannot be broken up, should be physically integrated into the archival heritage of one of the states.

A state of permanent litigation can however be avoided if the other states sharing a common history see recognised a right of access to these fonds and a right to copy them.

To give effect to these rights, UNESCO has, since 1979, recommended the introduction of the concept of common heritage.

##### **d/ Equity and international cooperation**

Useful though recourse to the above principles is, it is not sufficient. The settlement of each claim raises particular problems which the parties have to overcome by common agreement in a spirit of fairness and mutual respect.

The International Council on Archives is convinced that a shared willingness to co-operate can, within a reasonable time, set right the abnormal situation which resulted from political constraints in the post-war decades.