Ethical Paths to Archival Disclosure

An Ethical Procedure in Disclosing the Post-War Trial Archives of World War II

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Abstract

This thesis looks at the ethical issues around opening up the Central Archive of Special Jurisdiction (CABR), which holds records from post-World War II trials in the Netherlands. Using Scanlon's theory of contractualism, it explores how to balance privacy, historical research, the needs of families affected by the archives, and the need for collective remembrance of the events of World War II. Following the Scanlonian framework, I propose the following principles that are not reasonably rejectable by any of the stakeholders involved in the disclosure of the archives. First of all, the path to ethical disclosure involves no public access to any records in which a living person is mentioned, unless all living persons grant access to the record (either through individual access or a blanket approval to disclose the record in a digital environment). All other records of deceased persons are accessible except for medical files or psychiatric reports. Medical information of dead people is not accessible because making this information available harms the confidentiality of the patient-doctor relationship of all living healthcare users. Lastly, it is imperative that all verdicts, testimonies and other documents that contain complex juridical terms are provided with sufficient context for a non-expert to understand its content. When this is not taken care of, there is a high risk of misinterpretation of the archive. Misinterpretation is harmful to both the posthumous reputation of the people mentioned in the archive as well as to the people who wish to obtain information from the archive.

This research contains recommendations for the evolving policy around CABR disclosure. Current policy prioritises public access over privacy and focuses on what is allowed under privacy legislation in this situation. This thesis' focus lies in the ethical realm rather than what is juridically allowed and proposes a reasonably non-rejectable agreement for all stakeholders involved in disclosure of the CABR.

Keywords: CABR, Archival ethics, World War II.

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1. Introduction

The period after World War II was marked by the retribution for crimes committed during the war. To prevent the public from taking justice into their own hands, a system of special jurisdiction was organised in the Netherlands. This allowed large numbers of suspects to be prosecuted within the legal framework, a volume the regular judicial system could not handle in such a short period (Belinfante, 1978, p.22).

The special jurisdiction was called 'Bijzondere Rechtspleging,' and for around seven years, this special jurisdiction was upheld until all the cases were settled (Romijn, 1989, p.20). All the files relevant to prosecuting suspects were stored in the CABR archive (Centraal Archief Bijzondere Rechtspleging, in English: Central Archive for Special Jurisdiction). In the years after World War II, the archive contained a lot of sensitive information about living people and was therefore sealed by the Dutch government to limited openness. This means only a limited number of people can physically access a specific part of the archive. The restricted archival access expires in January 2025, around 80 years after the end of World War II. From that moment, the files will be publicly accessible, and a large part will also be put online. Eventually, the idea is that the whole archive can be accessed online, but this will be done in stages between January 2025 and 2027 (Oorlog voor de Rechter, n.d.). On December 6, 2025, the Dutch Minister of education, culture, and science, Eppo Bruins, called off the publication of the CABR and announced that until further notice, there will be no online digital access to the archive per January 2025. The archive will be physically accessible to everyone by January 2025, but the decision to refrain from publishing on the digital platform is very drastic. The decision was made in response to several warnings about sensitive information about living persons that would be released to the public. Due to this illegality, the Minister decided to postpone the online publication of the archive until further notice (De Visser & Geels, 2024). Since January 2, 2025 everyone can make a reservation on the website of the National Archive by searching for the name of a deceased suspect and making an appointment to view the requested record at the location of the National Archive in The Hague. Taking pictures is not allowed.

The last-minute decision by the Minister not to disclose the archives on a digital platform demonstrates the ethical dilemma that the custodians of the archive are facing in disclosing the CABR: do the privacy issues of the few outweigh the right to information of the many?

This thesis is not an evaluation of the current policy, but a stand-alone analysis on whether physical or digital access to the CABR is ethical. However, in Chapter 6 I do compare my results to the current policy.

1.1 The End of a Closed Information Era

The reason for sealing the CABR for almost 80 years, as already mentioned above, is the sensitive personal data that is recorded in the archive. Records of family photos, personal diaries, and medical information are no exception in the archive (Van der Mee, 2024). Statistical research by Bureau Eiffel estimates that 5% of the archives are personal letters (Eiffel, 2022, p.15). Eiffel also looked at the type of personal information in the CABR and found the following highly personal types of information: biometrical data, religion, political and sexual preference, criminal charges, physical characteristics, and ethnicity (Eiffel, 2022, p.16). The archive contains information about suspects and victims, incidents and locations, testimonies and confessions (Oorlog voor de Rechter, 2024, p.4).

1.2 Ethical Concerns in Opening Up the Archives

The archive contains the names of approximately 400,000 suspects, often convicted justly and others unjustly, according to some people (Oorlog voor de Rechter, 2024, p.4). It also holds the names of countless victims, all documented within the context of historical events. For many families, the CABR offers a chance to uncover information about their relatives—details that were previously unknown or deliberately kept hidden. The silence surrounding these stories often stems from the enduring taboo of discussing such matters. Disclosure can have a significant impact on relatives of people named in files. This impact is compounded by the interpretive issues raised by having the Archive opened up. It takes knowledge to understand legal material and put it into context. Sometimes, there are different versions of a case report or documents that contain notes that are difficult to read and interpret (Van der Mee, 2024). Ewoud Kieft from the Dutch Institute for War-, Holocaust- and Genocide Studies says the following regarding the interpretation of archived documents: “You have to be an experienced investigator to make sense of that. If you are lucky, there is a police report in there, but far from always there is also a court ruling.” (Van der Mee, 2024). Publishing the archives online thus means ethical concerns emerge about how any visitor (including visitors with no knowledge of historical research) will interpret the archive and be able to draw the correct conclusions from the documents at their disposal.

Ethical concerns in releasing such sensitive and personal information to the public are important to address. The emotions surrounding the release of the archive alone are reason enough to explore the right course of action in this situation. The ethical dilemma of the release thus lies in creating an archival environment that is justifiable towards both the families of the victims as well as the families of the suspected collaborators.

The ethical dilemma has been acknowledged by the organisation *Oorlog voor de Rechter*. *Oorlog voor de Rechter* is a consortium of the Huygens Institute, the National Archive, WO2NET and NIOD. This organisation is in charge of streamlining the disclosure of the CABR. As they recognise the ethical concerns of disclosing the archives, they have installed an ethical board to analyse and discuss the ethical concerns (Oorlog voor de Rechter, 2024, p.3). This Ethical Deliberation aimed to produce a framework for action in dealing with ethical questions arising from disclosing the war archives. The key message of their Ethical Deliberation is 'diligence': provide enough context with the documents and facilitate a procedure for requests to take sensitive documents offline. However, their recommendations are not grounded in ethical theory. That is how this thesis differs from the Ethical Deliberation that has already been done.

In addition, the starting point of this Ethical Deliberation is that the archives will eventually be made public online. The Deliberation is then concerned with how to go about this online publication in an ethically responsible manner. In my thesis I drop this assumption and leave room for the following: what would be the answer to the ethical questions posed if we start an Ethical Deliberation without assuming the archives will be published online without restrictions?

1.3 Research Question

These ethical concerns lead me to investigate the following research question: '*What is good ethical conduct in disclosing the CABR?*'. To answer the research question, I will take the closed archive as a starting point and then move forward by analysing the value produced by disclosing the archives and the values at stake. On the way I will use Scanlon's theory of contractualism to formulate principles that the stakeholders of disclosure could not reasonably reject. At the end of the research, I compare the principles of this research to the current policy of the National Archive and the government. I will either have provided substantiation for their proposed actions or have come up with additions and/or alternatives to their proposed actions.

In Chapter 2, I elaborate on the ethical framework I use in this research. The first step of the research is to delve into the ethics of archiving, as shown in Chapter 3. Chapter 4 explains what we can find in the CABR and relates the ethics of archiving of Chapter 3 to the archive of the CABR. Chapter 5 follows up on the ethical concerns raised in Chapter 4 and is a formulation of principles from Scanlon's ethical framework that would work as the best solution to the ethical issues in the archive. In Chapter 6, I compare my formulated principles with the current policy set by the National Archive.

2. Method

This thesis consists of thematic, philosophical research. Juridical, historical and ethical issues that arise in releasing (criminal) archives to the public will be addressed using a contractualist theory by Thomas Scanlon. In this chapter, I will elaborate on why this theory is a good fit for the ethical dilemma at hand.

2.1 Social Contract Theory

The ethical dilemma of opening the collaboration archives is a dilemma because several parties have opposing interests in what documents they do or do not want to be revealed (see section 2.3 for elaboration). In this situation, a mutual surrender of rights is necessary to reach an agreement between the parties. Therefore, I look into social contract theory to find an ethical framework for this dilemma.

Social contract theory by Thomas Hobbes (2008) is characterised by self-interest. This contractarianism theory is not a good fit for a situation where parties want the exact opposite. In the case of the CABR, two groups (the relatives of war victims and the relatives of suspected collaborators) can wish to do the exact opposite thing, namely, to keep the archives closed or to disclose them. Based on self-interest, no common social contract can be reached.

A social contract theory where people are challenged to look beyond their own interests is contractualism, as formulated by John Rawls (1971). Rawls places people in a thought experiment behind a veil of ignorance where they do not know most things about themselves or their circumstances, to decide on which principles should govern the basic structure of an ideal society. This framework also does not fit the situation of the disclosure of the CABR because principles formulated for the archive heavily depend on the person that the document is about and the relationship between the stakeholder and the documented person (they could be relatives or enemies). Furthermore, Rawls frames the veil of ignorance within the context of ideal theory, opposed to the non-ideal theory that is required for the CABR release: how should we deal with an imperfect world of suspects, perpetrators, victims, and incomplete and at times unreliable information? For dealing with such a non-ideal situation, Rawls' Theory of Justice is not a good fit.

I argue that an agreement on how to disclose the CABR can only be reached by considering the different circumstances of the stakeholders in formulating the agreement. To this end, contractualism, as formulated by Thomas Scanlon, is particularly well-suited. I will now turn to a detailed description of this theory.

2.2 Scanlonian contractualism

Scanlonian contractualism is a moral theory that covers the realm of 'what we owe one another'. Scanlon formulates his theory in the following way:

"An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement (Scanlon, 1998, p.153)."

A principle is thus accepted as long as no one in the relevant situation can reasonably reject it. When a principle is accepted, any action that goes against this principle is wrong. When multiple parties have conflicting interests, they must develop principles that no one could reasonably reject. These principles then prescribe which actions are allowed or not allowed. Of course, the formulated principles only hold judgements on actions related to the principles and not any action in the entire world.

Let me start with the requirements for drafting the principles. First, the principles must be made in *informed* and *unforced* agreement. The idea of *informed* agreement excludes agreement based on superstition or false beliefs about the consequences of actions (Scanlon, 1982, p.597). So, the people who come to an agreement follow a logical way of thinking. The idea of *unforced* agreement is meant to rule out situations of coercion, as well as situations where someone is forced to accept a principle because of a weak bargaining position. Without this requirement, people with more resources can hold out longer and insist on better terms (Scanlon, 1982, p.597). The second and foremost requirement for a 'Scanlon principle' is 'not reasonably rejectable'. There are two important things to discuss in the formulation 'not reasonably rejectable'; the first is the word '*reasonably',* and the second is that we are talking about *rejection* and not *acceptance*. In the term *'reasonably'*, the difference becomes evident that distinguishes contractualism as Scanlon formulates it from contractarianism as it is theorised by, for example, Thomas Hobbes. In contractarianism, an agreement is made to maximise *rational* self-interest. To *reasonably* reject means to weigh the burdens and benefits for yourself and other parties and decide based on what you think you owe someone else. I will delve into relevant reasons for rejection in section 2.4.

The last aspect of Scanlon's formulation that I will discuss is the choice of rejecting instead of accepting. Scanlon demands that no one can reasonably reject a principle instead of everyone reasonably accepting a principle. Scanlon argues that acceptance can lead to more unnecessary harm than reasonable rejection (1982, p. 597). Imagine a specific principle harms a person and this harm can be prevented for all parties by choosing an alternative. Also, imagine this person who is harmed is willing to make a sacrifice and, therefore, accepts the harm done to him. It would not be unreasonable for this person to *accept* the option

if he figures he is doing it for the greater good of all (Scanlon, 1982, p.598). However, this self-sacrificing person could reasonably *reject* this option where he has to make a sacrifice because there is a better alternative with less harm for everyone. The formulated principle of one self-sacrificing man can reasonably be rejected, and therefore, the principle can be doubted. Thus, the moral argument is based on the reasonableness to reject it instead of the reasonableness to accept it (Scanlon, 1982, p.598).

A final reason for choosing the framework along the lines of Scanlon's contractualism is that formulating multiple principles on how the archive should be opened leaves room for adding more principles and further specifications later, if necessary. The CABR is a closed archive; it is impossible to know everything about all the documents as I am writing this research in December 2024. Therefore, leaving room for future additions is helpful, as new information may surface and be relevant to new principles. Scanlon's contractualism leaves room for just that.

2.3 Stakeholders

Having explained what Scanlonian contractualism entails, I now turn to the different stakeholders that partake in the ethical dilemma of disclosing the CABR.

Scanlon's theory prescribes that after formulating a principle, it must be evaluated for all individuals involved. Involved individuals are everyone who is concerned with general acceptance of the principle. According to Bureau Eiffel (2022) there are five types of people mentioned in the archives: suspects, government officials, witnesses, family members and victims. Logically the stakeholders should be derived from the people that are mentioned in the files. Lastly, I propose historical researchers as an additional stakeholder group. This brings me to the following list:

- (Relatives of) Suspected Collaborators
- (Relatives of) War Victims
- Government Officials
- Witnesses
- Historical Researchers

These five groups can morally mandate if and how the archives should be disclosed. What makes the situation more complicated than just having five stakeholders is that the individuals within the group of stakeholders can differ in their opinion on the matter and, therefore, have different views on the right course of action. Their interests might not be aligned because the files of the archive contain unique stories. This is a potential pitfall in this research. A careful consideration for every stakeholder is necessary to see whether interests could differ within the group. Still, it is helpful to categorise the

different individuals into five stakeholder categories because it brings order to the different interests. The interests of the individuals within one stakeholder group might not be exactly the same, but their interests might be similar for the group. In the following subsections, I will briefly introduce the interests of the different groups.

2.3.1 (Relatives of) Suspected Collaborators

For relatives of suspected collaborators, opening the archives can bring up a lot of trauma. In some families, it is taboo to talk about this family's past and making this information public has a great impact on them. The fact that this information about their family members is now 'out on the street' is a big step for them, as some stories have not even been shared among families yet. Disagreements over a family's 'wrong' past have caused break-ups in some families. In the process, a study by Psychotrauma Centre ARQ (2024) found that in some cases, descendants of collaborators suffered from social exclusion even outside their family circles.

In smaller villages, it is an issue that is sometimes even more sensitive than in larger cities because families there often live in one place for longer. Relatives of suspected collaborators may still live close to relatives of someone betrayed by the collaborator (Oorlog voor de Rechter, 2024, p.11).

2.3.2 (Relatives of) War Victims

For relatives of victims, it has taken 80 years before they can search through archives for the fate of their relatives (Oorlog voor de Rechter, 2024, p.7-8). Inquiring about the fate of their family members is important because it can contribute to coping with grief and trauma, according to Beatrice de Graaff (2012, p. 30).

This group may have difficulty gaining access to the archive because the files are only registered in the name of suspects. Until 2025, access to the archive was only granted under the following conditions: either the main person of the file is demonstrably deceased, the main person of the file has consented to access, or there is a basis for scientific research. Thus, to search the archive, relatives of a war victim would need to know in advance the name of the suspected person who might have had something to do with the victim. In practice, information on war victims is often scattered across multiple files, and thus, the full story cannot be retrieved until the archives are digitised and broadly searchable by the victims' names.

2.3.3 Government Officials

Government officials were either mentioned in records of other suspects or they were investigated themselves, in which case they would fall into the stakeholder group of suspected collaborators. If they are mentioned in the record of another suspect it is often in their professional occupation. Given their public function it was probably obvious to them that their professional decisions would be disclosed at some point. However, for the sake of completeness I will include them as a stakeholder group in the disclosure of the CABR.

2.3.4 Witnesses

These are the people that provided testimonies in the prosecutions. These people were often someone close to the suspect (a colleague, a neighbour or a friend). The interest of this stakeholder group is that their testimonies were often conducted in confidence and the disclosure of these statements can go against these agreements and result in distressing situations if they are still alive. For example, if the suspect and the witness are still alive and they did not tell each other about the testimony, publication can lead to a significant personal conflict.

2.3.5 Historical Researchers

The interests of historical researchers differ from those of the previous four stakeholders in that the interests are more professional than personal. At present, the archive is too large for analogue cross-research. If an investigator wants to conduct research into the behaviour of mayors during the war, this is not possible because the files are sorted by the names of the suspects. Historical research would benefit enormously from the digitisation of the CABR.

Besides digitisation, historical research could also benefit from making the CABR publicly available. Researchers can only access records in the CABR if they can prove a person is no longer alive. This makes some records unavailable for research (because the suspects are still alive) and, above all, slows down the pace of the research.

2.4 Reasons for Objecting

According to Scanlon's theory, the next step is looking for objections that either of the five stakeholders could make for or against the formulated principle (Scanlon, 1982, p.603). The next step then is:

> "to consider the weightiness of the burdens the principle involves, for those on whom they fall, and the importance of the benefits it offers, for those who enjoy them, leaving aside the likelihood of one's actually falling in either of these two classes." (Scanlon, 1998, p.208)

I will explain this step using an example: The Drowning Child Scenario. This is a scenario where you pass by a lake and see a child drowning. I will discuss the simplest version of this scenario where the person beside the lake is capable of swimming, and if he goes in and tries to save the child, he will most likely be successful and only have wet clothes. The principle I will draft for this scenario is: "When you see a child drowning in a lake, you have to save it." If the person beside the lake goes in, the burden on him will be his wet clothes, and the benefit to the child will be that his life is saved. If the person beside the lakes does *not* go in, his benefit is that he stays dry (and does not have to make an effort to swim), whereas the burden on the child is that he will drown. According to Scanlon, the objection that weighs less heavily than the heaviest objection is reasonably rejectable (Scanlon, 1982, p.604). Thus, a principle should be drafted around preventing the heaviest objection from becoming a reality. Determining which objection is the heaviest always contains some subjectivity. In the case of the example, I have to choose which objection weighs heavier: the wet clothes of the person beside the lake or the child drowning in the lake. Here, I argue that wetted clothes are the less heavy objection, and this objection is therefore reasonably rejectable. When not acting is a principle that could be reasonably rejected, which it can be in the case of the drowning child, then not acting is not justified, and it is a moral duty to follow the non-rejectable principle, which is to act and save the child from the water.

However, this leaves the question open about the kinds of considerations that count as reasons for lodging an objection. On this matter, Scanlon argues the following: "impersonal values are not themselves grounds for reasonable rejection" (Scanlon, 1999, p.222). With this, he means that the impersonal goodness or badness of the outcome cannot be an objection to a principle. It has to come from a personal value. Personal values can be your own well-being, autonomy, freedom, fairness, or suffering.

In the coming chapters, I will go into the values of archiving (Chapter 3) and take a deep dive into what information the CABR precisely contains (Chapter 4). Thereafter, in Chapter 5, I will use the theory as explained in this chapter to draft principles for disclosing the CABR to the public.

3. The Ethics of Archiving

3.1 The Value of Archiving and Releasing Archives to the Public

In this chapter, I elaborate on the value of archiving records and the idea behind placing restrictions on the public accessibility of archives. The emphasis is on the ethical grounds for archiving rather than the legal obligations involved. In principle, all government documents are archived. Based on the importance of the information it contains, it is determined how long the record will be kept (National Archives, n.d. -a). I will now specify the value of keeping an archive of governmental documents. Of course, an archive of other documents (arts, personal items, etc.) can be kept, and this will produce a different set of values. Because the CABR is a government archive of criminal records, I will limit the scope of this chapter only to the set of values that is relevant to archiving governmental documents.

The first value I identify behind archiving records is the *preservation of cultural heritage*. For example, an archive record can be a valuable testimony to someone's history or identity. The National Archives (n.d. -b) stresses the importance of allowing some people to better understand their past, and the archive also does justice to what was done to people and/or their families. In the case of the CABR, many families can find out what happened to their relatives because information was stored for so long.

The second value I identify behind archiving records is the *democratic* value of being able to monitor the government. Archiving government documents gives insight into how the government acted and what the reasons were. This 'empowers' ordinary citizens to find evidence if they believe they have been wronged (National Archives, n.d. -b).

I identify a third value when looking into the release of archives to the public: *collective remembrance of historical events* (De Graaff, 2012, p.30). Making archives widely accessible enhances the stories that are written about the archives and thus increases public knowledge about historical events. The value of collective remembrance lies in the potential of learning from history when we know more about it and raising respect for the victims among younger generations.[1]

[1] This implies that the public at large could be seen as a (sixth) stakeholder. I will not include them in my analysis because remembrance of the victims by the public can be placed under a respectful policy towards the victims. War victims' relatives will generally plead for as much disclosure as possible, similar to the interest of collective remembrance by the general public. Therefore, the interests of the war victims (one of the included stakeholders) represent the interests of the public at large and I do not treat the public at large as a separate stakeholder group.

3.2 Reasons to Keep Some Archives Closed

In contrast to the reasons for making archives public and enhancing the above-mentioned values, there are also reasons not to make archives public. For example, it may be that there is sensitive personal information about a living person in the archive and making the archive public will lead to a violation of their privacy. Similarly, there are other reasons that can be given for not disclosing certain records (temporarily) yet, which together ensure that no rights of individuals or organisations are harmed in disclosing sensitive documents. Among the reasons for temporarily barring records from public access, it is important to distinguish between reasons put forward from legal grounds and reasons relevant from an ethical point of view. A legal reason to shield a record is, for example, due to the European privacy law AVG. This law prohibits certain information from being out in the open and obliges institutions to shield relevant information from unauthorised persons (Autoriteit Persoonsgegevens, n.d.). The ethical ground to shield such a privacy-infringing document would be to protect the private life of a person. In this study, I look at ethical reasons for not disclosing records, as in some cases, they may extend beyond what the law currently requires. An example is given by Subotić (2021, p.348): she brings up the example of deceased persons. Archives very often contain information on people who are no longer alive. Subotić (2021, p.348) argues that even if deceased persons have no right to privacy in the legal realm, there could still be ethical considerations to protect a deceased person's dignity. The consortium *Oorlog voor de Rechter* that investigates juridical and ethical implications of the disclosure of the CABR also acknowledges that some documents remain sensitive even after a person has passed away (Joods Welzijn, 2024, p. 7). This could be medical documents or health data.

In the ethical realm, I identify at least three reasons underlying the limited disclosure of archives (National Archives, n.d. -c):

1. Concerns for the *safety* of the state or its allies,
2. Infringement of a person's *private life*,
3. The *disproportionality* of the effects of disclosing the archive.

I will explain how I think these three categories can be deemed unethical if they are not followed. The first concern for *the safety of the state or its allies* is to ensure no classified information is released that could endanger official institutions or individual persons (National Archives, 2015, p.15). If certain documents remain sensitive to the preservation of everyday societal living conditions, it would be unethical to disclose them to the public (and therefore also the enemy's) eye. The second reason for keeping a lock on an archive is *infringement of a person's private life*. In the case of a living person, I argue it is unethical if harmful information about an identifiable individual is made public. Harmful

information is a wide term, as seemingly innocent information can also be used to someone's disadvantage. An example of such information is medical records, which can be used by employers or insurance companies to the individual's disadvantage. Other harmful information could be financial records or testimonies. Then, there is the matter of the privacy of past persons, as mentioned by Subotić (2021), which came up in the previous paragraph. The argument that medical information should not be shared because employers or insurance companies can use it to an individual's disadvantage no longer holds because the individual is dead. It is difficult to attain a right to privacy to past persons because as former human beings they do not have human rights (De Baets, 2016, p.63). Nonetheless, harm is done when medical information of past persons is made public: Robinson and O'Neill (2007, p.634) argue that for living persons the expectation that their private medical information may be released after their death is an infringement on the patient-doctor relationship while they are alive. The knowledge that one's medical information might be shared after death can discourage patients from sharing things with their doctor and this reduces the quality of the healthcare given to the patient. So to protect the interest of the living patients, medical data of deceased patients should in general not be shared. Sade (2007, p.2585) adds to this argument that disclosure is allowed only where there are overriding interests. Overriding interests might be genetic inheritance or financial considerations. For instance, relatives can ask for data from the deceased patient's medical records, if they feel unfairly disadvantaged by a change in a will or if they have an interest in a life insurance payment (KNMG, n.d.). To disclose any kind of medical information, these overriding interests should outweigh the interests of a confidential patient-doctor relationship for all other healthcare consumers. I will discuss the matter of medical information further in upcoming chapters. In Chapter 4 I will dive into the medical content of the CABR and in Chapter 5 I will derive principles for disclosing medical information from the CABR. The third reason for keeping the archive limited to the public is *disproportionality* (National Archives, 2015, p.16). Disproportionality is the disproportionate advantage or disadvantage that is caused by disclosing government documents from a particular archive. In line with Scanlon's principles that no one could reasonably reject, a disproportionate disadvantage to some parties, I consider unethical.

I argue that some of the reasons to keep an archive closed can decay over time. For example, the disproportional advantage or disadvantage may pass. This happens when an organisation ceases to exist, which would have been economically disadvantaged by the disclosure of archives because it would cause them bad publicity. Then, there is no longer a disadvantage to the disclosure of information about the organisation. The decay of a reason to keep an archive closed has to be identified case-by-case.

3.3 The Risk of Archiving

Several scholars have made arguments for the risk of making archives open to the public. According to some scholars (Tames, 2020; Subotić, 2021), there are several ways in which opening an archive can impose certain risks on people because of the way information is presented in an archive. These risks are different from the reasons for declining access to a certain archive because of the reasons presented in section 3.2. The reasons in 3.2 relate more to the person who is accessing the archive and their interpretation of what the documents say. The risks that I describe in the current section relate to how information is presented in the archive.

There are several ways in which the interpretation of an archive can be influenced. I make a distinction between the shape of the archive (i.e. which documents go into an archive) and the content of those documents.

The shape of the archive

There are several factors that weigh in on what eventually ends up in an archive. Firstly, the decision of what cases are investigated determines for a large part what an archive eventually looks like. This is shaped by the manpower that is available to conduct investigations (Tames, 2020, p.304) and political decisions on what cases to pursue and what cases not to pursue (Belinfante, 1978, p.30). Secondly, the decision of what to store and what to discard is a determinant of what the archive will look like (Subotić, 2021, p.350).

Because the conditions of manpower and politics are determinants for an archive, an archive will always be a product of time-dependent factors.

The content of the documents

Besides the shape of the archive, there is also the content of the documents that eventually make it into the archive. In this area, there is a risk of wrong interpretation of the archive. Interpretation of an archive is something historical researchers are trained in, but a layman might have difficulties with it. The risk lies in the layman thinking he knows which facts he can distillate from the documents. Context is necessary to understand how information in archives (such as interrogations and testimonies) can be understood. Archives often contain omissions and conflicting statements (Tames, 2020, p.323), and the judicial jargon in criminal archives also makes it more difficult to understand and interpret. An example of the complexity that archives can contain was given to me in an interview I had with Ewoud Kieft (personal communication, November 25, 2024) from the Dutch Institute for War-, Holocaust- and Genocide Studies: he explained that suspects could be indicted with 20 indictments. If the suspect is found guilty on

one of the 20 charges, the document will be filed under the ‘guilty’ verdict. The layman, unaware of the fact that verdicts are filed that way, might conclude from the ‘guilty’ stamp that this person is guilty on all 20 charges and not just on one of them.

Then, something must be said about the situation of the people who are documented in some archives. The CABR, for example, is a criminal archive that was created after a period of war. Subotić (2021, p.348) mentions that someone’s attributability might be tainted after a period of such an intense conflict. Tames (2020, p.323) argues witness statements are always subject to what is at a certain place and time (un)desirable or (im)possible to say. Subotić (2021, p.348) adds that for written testimonies produced during or after times of war, witnesses might be under unimaginable distress. This makes the truth very hard to distillate from the pieces of paper that we access in our archives. Historical researchers have been trained in reading such time-dependent and subjective documents.

In the next chapter, I will go into the content of one specific archive, namely, the CABR. I will use the value and risks of archiving that have been identified in this chapter to estimate the values and risks in disclosing the CABR.

4. CABR

Having established the importance and some risks of archiving, I can move on to the content of the CABR. In Chapter 5, I will draft ethical principles that weigh the various interests surrounding the information in the archive. Therefore, it is important to know exactly what information can be found in the archive. That is what I will do in section 4.1. In section 4.2, I will relate the ethics of archiving from Chapter 3 to the content of the CABR.

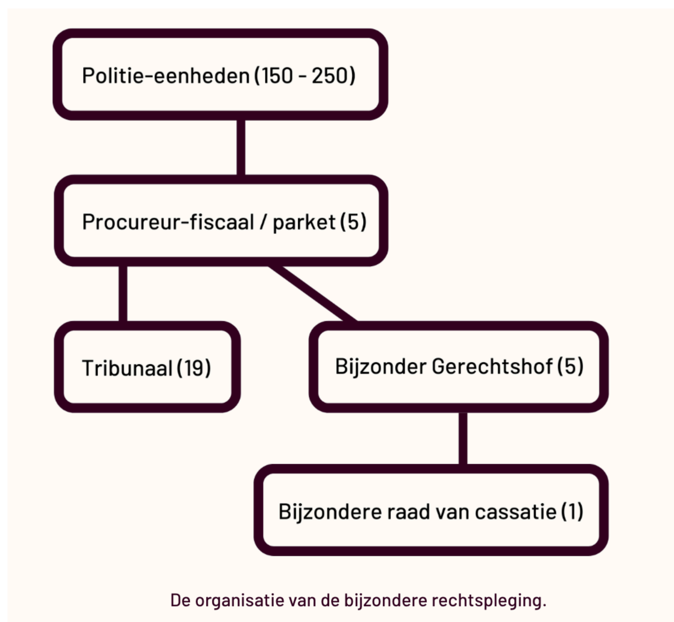
4.1 What is the CABR?

The CABR is a conglomeration of several archives built up after World War II. This archive contains files of people suspected of collaborating with the German occupiers (Oorlog voor de Rechter, n.d.). After World War II ended, it was important that citizens did not take the law into their own hands. To ensure that citizens did not take the trial of 'wrong' Dutch citizens into their own hands, a special judicial process was set up. This was called the Special Jurisdiction (Bijzondere Rechtspleging). This judicial process went outside the regular court because the number of cases to be handled was too large to pass by the regular court, and regular criminal law was not adequate to sanction war crimes (Belinfante, 1978, p.33-34). After the liberation of the Netherlands, anyone who had been a member of National Socialist organisations or had held a leading position in an enemy institution was arrested (Romijn, 1989, p.164). A wide range of collaborations was investigated. For instance, among the political offenders, there were those who had only their self-interest or career in mind and went on the wrong track in that conviction. However, there were also offenders who deliberately endangered the freedom and lives of their fellow human beings (Belinfante, 1978, p.436). Some did this incidentally, others did it systematically (Belinfante, 1978, p.437). Thus, different types of collaborators should be distinguished.

At the bottom tier, the Special Jurisdiction consisted of investigative agencies (in Dutch: politie-eenheden). These were the people who drew up lists of suspects and arrested them. Then there is the Procureur-Fiscaal. This was a special prosecutor who was responsible for prosecuting these suspects. Each Procureur-Fiscaal was attached to one Bijzonder Gerechtshof (Belinfante, 1978, p.30). Judgments could be appealed to at the Bijzondere raad van Cassatie. The 19 Tribunalen were set up to try all the Dutch citizens who had been members of the NSB, but apart from that had done nothing that would have benefited the occupying forces, or that would have endangered fellow Dutch citizens (Kieft, 2024). The Bijzondere Gerechtshoven were for crime and treason. Sentenced persons could challenge their verdict at the 'Bijzondere raad van cassatie'. To speed up the trial process, in the first years after the war, a 'Bijzonder Gerechtshof' could still determine whether a convicted person was granted the right of cassation. A 'Bijzonder Gerechtshof' could thus determine whether a convicted person could appeal or

not (Belinfante, 1978, p.32). In 1947, this regulation was amended, and cassation was always allowed for a sentence of more than six years (Belinfante, 1978, p.32). This example of sustaining the possibility to appeal illustrates the importance of placing documents in an archive in a certain time and context, as I discussed in the previous chapter. It is difficult to compare the gravity of someone's mistakes in the war with others on the basis of their verdicts, as some convicted people were able to appeal their sentence and others were not.

An illustration of the Special Jurisdiction system:



Source: Oorlog voor de Rechter (n.d.)

All these institutions collected documents and built files on suspects. By the late 1940s, hundreds of thousands of files containing sensitive information were scattered throughout the Netherlands (Oorlog voor de Rechter, n.d.). The government wanted to prevent abuse of the information they contained and merged all the files into one archive. This is how the Central Archive on Special Jurisdiction (CABR) was created.

Some suspects were investigated by multiple police units. Thus, there may be several files on one person in the archive. There may have been a file against one suspect for suspicion of political collaboration and a file for suspicion of economic collaboration (Meihuizen, 2003, p.773). Incidentally, according to Meihuizen (2003, p.774), political collaborators made up the vast majority of files: 451,735 files were about political collaborators. Only 32,232 files were about economic collaboration. Of the 483,967 files, 65,750 were heard before the 'Tribunaal' or in the 'Bijzondere Gerechtshof' (Meihuizen, 2003, p.773).

The rest was dismissed or put on ‘buitenvervolgingstelling’. Often, cases were dismissed due to lack of evidence or because the charge was too minor (National Archives, n.d. -d). Prosecution fell into the hands of one office: the Procureur-Fiscaal. Because of the large number of cases that had to be handled in a short time, the Procureur-Fiscaal reviewed the burden of evidence and determined whether to prosecute a suspect. This was done to get more pace in sentencing, and in the process, the decision to prosecute or not fell in the hands of only one office (E. Kieft, personal communication, November 25, 2024). Again, this is an important reason for placing the archive in the context of the times and not assigning an objective value of guilt or innocence to a case that has been put on ‘buitenvervolgingstelling’.

So much for the shape of the CABR. I will now go into the content. I will start by discussing the privacy assessment report by Bureau Eiffel. Then, I will discuss the inventory list on the National Archives (n.d. -d) website. From this inventory list, I can get a grasp of the different types of dossiers in the archive. Access to the archive is still disallowed until January 2025. Therefore, an impression of the archive's inventory can be more than helpful in drawing up principles in Chapter 5.

4.1.1 Privacy Assessment by Bureau Eiffel

It is known that there are five types of people mentioned in the archives: suspects, government officials, witnesses, family members and victims (Eiffel, 2022, p.13). Sensitive information on all types of people involved is stored in the CABR. There are several reasons why there is no definite overview of exactly which people are described in the archive and what information about their lives is stored. This is because the archive is only physically searchable, and it is an archive of immense size (3.8 km long). For this reason, the agency responsible for a privacy assessment in CABR drew its conclusions using a sample of 12,763 records (55,329 documents) (Eiffel, 2022, p.14). Using this sample, Bureau Eiffel tried to determine which documents and information appear in the archive.

The sampling revealed that there are 67 different types of documents in the archive. These are described in Appendix A. They further looked at what information about individuals is described in the documents and in which privacy category they would classify them.

Privacy category	Type of information	Occurrence in 55,329 documents
High	Biometrical data	0.51 %
	Religion	3.94 %
	Health data	1.68 %
	Union membership	5.12 %
	Political preference	16.27 %
	Sexual preference	1.98 %
	Criminally prosecuted	23.28 %
	External features	1.04 %
Middle	Financial data	7.26 %
	Job description	27.37 %
	Gender	15.96 %
Low	Address	40.90 %
	Name	53.48 %

For this research, it is interesting to see what different types of sensitive information come to light if the archives were made public. For example, one could argue that highly sensitive information such as political preference, union membership and being criminally prosecuted is relevant for some relatives to find out what drove a person and for what he was convicted. However, from the other side one could argue that sexual preference or external features would never be relevant to relatives. Granting people access to this type of sensitive information will not help in grieving for your family if you are a relative of a victim, nor will it help in getting closure for relatives of suspects. On the other hand, one particular document might contain both information on one's physique/sexuality and criminal information. Given the great size of the archive, it is impossible to wipe out only the sensitive information that is deemed 'less relevant', as I just argued sexual preference or external features could be. The institution makes a decision to disclose the document as a whole or not at all. Other solutions, such as wiping out parts of a document, are unfortunately practically unfeasible given the size of the archive (Oorlog voor de Rechter, 2024, p.8). Therefore, a weighing has to be made of the inclusion of all information of such a document

(relevant and less relevant) or the exclusion of both types of information. I will get back to this in Chapter 5 by drawing up some principles on this matter.

Then, there is the point of disclosing medical information. In section 3.2 I expanded on the reasons not to disclose medical information of living and past persons. For living persons, a release of their medical files would be an infringement on their private lives and this is a reason not to disclose those files to the public. For past persons I concluded that disclosing their medical information is detrimental to the patient-doctor relationship of all living healthcare users. Overriding interests can be a reason to disclose some patient's medical records after their death, such as genetic inheritance or financial considerations, but these overriding interests have to outweigh the interests of a confidential patient-doctor relationship for all other healthcare consumers. In this section I will make explicit what medical information is included in the CABR.

Firstly, a part of the CABR is a list of records of the internment camp hospitals where all the detainees were treated (National Archives, n.d. -d). These records contain the following information: name, place of birth and address (i.e. identifying a person is possible), religion, visits to the hospital with descriptions of complaints, treatments, operations and medication that was given to the patient (CABR, record number 79055). Secondly, there are psychiatric reports in the CABR that were part of some of the court cases. These assessments were made to claim the culpability of some of the suspects. An important detail to mention here is that, in the case that I studied at the National Archives (CABR, record number 90514), the record contained the complete psychiatric report as well as a verdict with the conclusion of the psychiatric report. This is an important element because it means that people consulting the archive can find out about the culpability of the suspect without having access to the full psychiatric report. In Chapter 5 I will draft a principle for sharing medical information from the CABR.

4.1.2 Inventory of the CABR

On the website of the National Archives (n.d. -d), information on the files in the archive can be found without accessing them. In summary, there are: "documents relating to search and arrest, files on the collection of data (arranged by region and alphabetically) for the investigation and possible trial, official reports, statements and verdicts, mercy registers ('gratieregisters'), dismissals and requests for compensation. There is also a wide variety of material collected by the investigative authorities on National Socialist organisations in the occupied Netherlands: this often concerns membership lists of, for instance, the NSB, Waffen SS, WA, and deployment for labour service in Germany." Besides the investigative reports and court rulings, there are also reports on the detention and internment of political collaborators in places such as Vught, Veenhuizen and Leeuwarden.

4.2 The Ethics of Archiving in the CABR

4.2.1 Reasons to Open the CABR

Now that I have established what types of documents can be found in the CABR, let me look back to Chapter 3.1, where I identified the values on the basis of which records are archived or disposed of. A criminal justice archive has value because it 1) facilitates the preservation of cultural heritage, 2) facilitates a monitoring function of the government, and 3) makes collective remembrance and grief possible. In this subsection, I argue that all three values re-occur in the CABR. Firstly, CABR preserves a part of the cultural heritage of the Netherlands in the sense that it is a memento of the harm that was done to certain ethnic groups. Secondly, with regard to the monitoring function, one can say that the archive makes it possible to see if the course of action during the Special Jurisdiction era was constitutional. For example, the archive contains records from the 'Arrondissementsrechtbank'. These are documents on whether or not to award compensation to political collaborators or their heirs as a result of wrongful detention or pre-trial detention (National Archives, n.d. -d). These papers hold value in the fact that they recognise the harm that was done to certain detainees. Also, people can refer to them nowadays and learn from possible mistakes that were made in the capturing of suspects after WWII. Thirdly, the CABR has a function of making collective remembrance and grief possible. The files might contain answers to unsolved questions as to what happened to family members who disappeared or were harmed otherwise during the war.

4.2.2 Reasons to Keep the CABR closed

In Chapter 3.2, I also identified three values to keep an archive closed. These three values are: 1) state safety, 2) privacy infringements, or 3) disproportionality for some parties. In this subsection, I will argue that the last two values are important to the possible disclosure of the CABR. I argue that state safety is no longer of value because the documents are at least 75 years old and cannot be regarded as topical information anymore. The two values that are still relevant to consideration are privacy infringements and disproportionality to some parties.

Infringements on a person's private life are a reason to keep the archive sealed, which has been in the news a lot recently. An investigation into possible privacy infringements by disclosing the archive concluded that chances are not zero that people who are still alive are mentioned in one of the documents that would be released to the public. As a precaution, the Minister of Education, Culture and Science decided to postpone the online publication of the archive until further notice (Geels, 2024). On top of that, there is the interest of medical privacy for past persons that is necessary to uphold confidentiality in the patient-doctor relationship of current healthcare users.

Disproportionality to some parties is highly relevant in the CABR because releasing files on companies or organisations that collaborated during the war might lead people to turn against this organisation, even when no conclusive evidence was found for a collaboration. There might also be files on persons that do not contain any privacy-infringing information, but their release into society might still harm them. An example of such a document is a testimony of a neighbour on the behaviour of a suspect.

4.2.3 Moral Risks in Opening the CABR

Shape of the CABR

When the war ended the Dutch government wanted to proceed with a swift conviction of people that had done something wrong during the war. The velocity with which this had to happen and the complicated circumstances after the war had a lot of influence on the judicial proceedings and shape of the archive. As a longread on the CABR by the research institute NIOD states, "there was a shortage of just about everything: work space, staff, paper and other supplies for creating files, and last but not least: of judges who had not overly accommodated to the wishes of the Nazi authorities during the occupation" (Kieft, 2024). Big companies were shielded from prosecution as they were important for the rebuilding of the economy (Meihuizen, 2003, p.375-376). This led to class justice; small entrepreneurs were punished harder on their collaboration than large companies. As described earlier in this chapter, other questionable tools were used to speed up the process of convicting suspects. For example, the first year after the war the 'Bijzonder Gerechtshof' could determine whether a convicted person was granted the right of cassation. A possible effect of this rule, which was in place until 1947, is that suspects might have received different punishments for the same crime in the first years after the war compared to a few years later. When not enough evidence was found for a court case, the Procureur-Fiscaal could decide to rest the case and the archive could give very little information on what this suspect did during the war. All these political decisions to get through the heavy caseload in a short period had its influence on what was investigated by the Special Jurisdiction and what not.

Content of the CABR

Moral risks in the content of an archive lie in the interpretability of the archive and the attributability of the witnesses and testimonies.

Moral risks in the interpretability of the CABR are inappropriate language, wrong interpretation of a guilty verdict, and other juridically complex files that make interpretation difficult to a layman.

As far as the attributability goes, the Special Jurisdiction was a very big deal after the war and people would go to great lengths not to be accused of collaboration. This has to be kept in mind when reading testimonies of neighbours, family members and friends on what the accused might have done. These statements are always subjective and might even be framed in such a way that the testifying party would always seem innocent. Besides that, witnesses might still have been distressed from the events during the war and this might have tainted their testimonies.

5. Scanlon's Principles for a Public CABR

There are three options as to what can be done to the files in the archive: they can be digitally and physically accessible (*full access*), digitally closed but physically accessible (*physical access*), or digitally and physically inaccessible (*no access*). For simplicity, I will use the abbreviated descriptions from now on. *Physical access* is a compromise between *full access* and *no access* where documents can only be copied by pencil. The downside of *physical access* is that no context can be given when the documents are only physically available. On the other hand, the risk of giving *full access* to documents is that they can be copied by screenshot and distributed more easily. The National Archive has announced that downloading files from the archive on the internet will not be possible (Alan Moss (National Archives), personal communication, November 26, 2024). However, it is impossible to prevent screenshotting of documents. I will add one more type of access, which is for a *physically* or *fully accessible* document to be *digitally searchable*. This means that names can be entered in the archive engine and a list of the records containing those words will appear. Because records are registered in the name of the suspect, not the victims, this option could contribute a lot to finding out information about victims in the archival documents.

I will now turn to a list of principles and a weighing of objections for different stakeholders: the (relatives of the) suspected collaborators, the (relatives of the) war victims, government officials, witnesses and historical researchers.

5.1 Privacy

[1] **There shall be <u>no access</u> to records registered under the names of suspects that are alive. Only when living suspects decide to give permission, for individual request or a blanket approval, their records will be disclosed to some individuals or the public.**
Explanation: Because records contain photos and personal information on suspects, their records ought to remain closed to protect the privacy of people who are still alive. Whether a suspect has died can be checked through the registry of deceased persons.

Historical researchers might argue that accepting this principle obstructs their freedom in researching World War II. For this, I refer back to the Belmont criteria for ethical research conduct. One of the Belmont criteria is that there is informed consent and people are treated with dignity (Subotić, 2021, p.343). If a living person's record can be used for research freely, these criteria are not met. So according to the Belmont criteria, it is not right for researchers to want access to a living person's record and

conduct research on it if there is no consent. If the researchers get individual consent, they can research a living person. Therefore, there is no reasonable objection to this principle from the historical researchers.

In accepting this principle no reasonable objections from the **witnesses** can be thought of. So witnesses could not reasonably reject this principle.

Government officials' work might be shared through these records. Given their function in the public sphere they could not reasonably object to disclosing their work at some point in history. However, government officials might also not object to *not* giving access to the documents they worked on. When the government official is the suspected collaborator in question, he will have the same interest as the stakeholder group that I will describe next.

As the principle is drafted in the interest of the living suspected collaborators, **the (relatives of the) suspects** might not have much to object to accepting it. If the principle were rejected, the suspected collaborators could object that the privacy of those who are still alive is infringed. The information that will be available through these records can have retributive consequences on their lives. However, it could also be that the grandson of a suspected collaborator does want access to the records, opposed to the suspected collaborator who does not want anyone to know about his record. In this case there would be two different interests in one stakeholder group, where one wants to accept the principle and the other wants to reject it. The privacy wishes of the suspected grandfather outweigh the wishes for information of the grandson. So the greatest interest of this stakeholder group lies in accepting this principle.

The relatives of the war victims might object that this principle is unfair to them, as they can only find answers on what happened to their relatives through the records of these suspects. Because of that I propose another principle [1a] that enables relatives of war victims to find out in which record their family is mentioned and ask individual permission for access.

[1a] **Records of living suspects shall be <u>digitally searchable</u> but people have to request permission individually from the suspects to view the records.**

Being able to digitally search the archive enables relatives of war victims to see in which records their family members were mentioned. Still the relatives of war victims can object that this principle denies them their right to information, as it depends on whether a living suspect grants access to their record.

Conclusion: a conclusion must be drawn whether these principles could be reasonably rejected by any of the stakeholders. Objections to accept principles [1] and [1a] will come from relatives of the war victims. If they cannot obtain permission from living suspects to view their records, they cannot find the answers

on what happened to their relatives. Objections to reject principles [1] and [1a] will come from the living suspects, but I have shown that their privacy objections outweigh the relatives' rights to information. Therefore permission from the living suspects remains required, just as it is today, if their records are to become viewable.

[2] **If a suspect has died, their records shall be fully accessible and digitally searchable. There is no 'opt-out' for descendants of suspected collaborators that want to keep the records of their family members closed.**

Historical researchers have no objections to this principle. They can use the accessible records to conduct research. Digital searchability enables them to do cross research and explore a new academic field.

Relatives of war victims do not have much to object to these principles. They can use the accessible records to find out what happened to their family members. Digital searchability makes sure they can find all records that their family is mentioned in. The most important argument from this stakeholder to demand access to these records is the value of justice. If harm was done to a war victim the suspect is guilty of an injustice and the (family of the) victim has a right to know about this. If no harm was done by the suspect, he is found not guilty and the record will show this. Therefore, from a perspective of justice it would be fair to disclose the records of suspects that have passed away.

For **witnesses** that are still alive I draw up principle [3], other witnesses fall under principle [2]. Witnesses might have made statements under the impression that they would be kept confidential. However, as soon as the witness dies the retributive consequences of these statements take on a different significance. Still the reputation of the witness might be harmed in some cases, but this concerns postmortem reputational harm.

For **government officials** that are still alive I draw up principle [3]. For government officials that have died the biggest reasonable objection is that their work will become public. However, given their public function, it is also reasonable to argue that disclosure is part of the deal in their job.

Relatives of suspected collaborators might object that disclosing records after the passing of suspected collaborators will have retributive consequences on the reputation of the suspect and the relatives thereof. When the suspect dies his highly prioritised rights to privacy, as I have discussed under principle [1], attain a different value. Postmortem privacy is difficult to defend and the right to information by the relatives of war victims starts to outweigh the interest of the relatives of suspected collaborators to protect their family name.

Conclusion: The heaviest objections in this principle are between the collaborator-families that want to keep their privacy and family name honoured and objections from the war victims' families that want to have information from the records. The relatives of war victims can demand justice by having full disclosure of the archives. On the other side the relatives of suspected collaborators' privacy is a secondary privacy as they are not the people mentioned in the archives, but their family name is possibly at risk. The secondary privacy of relatives of suspects weighs less heavily than the value of justice as argued by the relatives of war victims. So principle [2] cannot be reasonably rejected.

[3] **If a living person is mentioned in the record of a deceased suspect (e.g. as a witness or a relative) there shall be <u>no access</u> to this record. There may be several living persons mentioned in one document and only when all of them grant access, for individual request or a blanket approval, then the record may be disclosed to the public.**

Explanation: This principle differs from the proposed policy concerning the CABR. The plan of the Dutch government is to let the public interest of opening the archives outweigh the privacy of the very few living people mentioned in the archives. With this principle I argue that the opposite is ethically desirable. As long as people are alive and their very personal information is in the CABR these documents should not be fully accessible.

The same weighing can be used as for principle [1]. So the objections from the relatives of the suspected collaborators, the war victims and historical researchers will be identical to principle [1]. However, here the **government officials** and **witnesses** are also stakeholders in this principle, because they might be the living people whose information is kept in the records. Their biggest objection lies in rejecting this principle, because that would mean their privacy is harmed.

Another difference with principle [1] is that the suspected collaborator, whose record we are interested in, has passed away. The objections to not disclose records of suspects that have passed away, has already been refuted in principle [2].

[3a] **These records are <u>digitally searchable</u> and individual access can be obtained by asking permission from all living people that are mentioned in the record.**

This principle follows the same weighing of objections as principle [1a] and can be seen as an extension of that same principle. By principle [1a] records of living suspects can be accessed with permission from the suspect. However, if further living subjects are mentioned in the records, they all have to give permission to access the record too.

5.2 Economic Collaboration

[4] **Files on the economic collaboration of individuals who are no longer alive shall be <u>fully accessible</u>, including financial information on their collaboration.**

Explanation: The difference with principle [1] is that some suspects also profited financially from their activities during the war and the question can be raised whether this information should become public. Using Scanlon's contractualism, I argue that people have a right to know how much collaborators benefited from the war.

Historical researchers will comment that the more documents are available, the more research they are able to do. For instance, with these documents, research into stolen Jewish property during the war could be done. In rejecting this principle, this type of research is not possible.

Relatives of suspected collaborators might object that relatives of victims will look for retribution or financial compensation. Besides that, it is important to note that small individuals were more frequently prosecuted for economic collaboration than 'the captains of the industry', as Joggli Meihuizen calls them (2003, p. 377). Because of their economic importance, larger businesses were often overlooked for their missteps during the war. This could lead to a larger portion of backlash for one-man shops than the bigger businesses after the archives are opened. Relatives of (the smaller) suspected collaborators might argue this is unfair.

Relatives of war victims would object to the alternative that no access is given to these files. In the example of the stolen property, the relatives of the victims would be the actual heirs of the property and, therefore, have a right to know who took it from their family.

Conclusion: The biggest objection to rejecting the principle comes from the relatives of the war victims or the historical researchers. The biggest objection to accepting the principle comes from the relatives of the suspected collaborators. I will argue that the objections to rejecting the principle are heavier than the objections to accepting the principle, and thus, the principle is accepted. I argue this because the objections of the relatives of suspected collaborators are based on the argument that larger companies also did 'bad' things. This does not make their own missteps less bad.

Compensatory claims of victims should go through the government because these individuals were already sentenced for their economic collaboration by the government. So, it is right to let the government decide whether an additional compensatory claim is in order.

[5] **Files on the economic collaboration of businesses shall be <u>fully accessible</u>, even when that business is still active.**

Explanation: In addition to individuals who took advantage of the situation during the war, the CABR also mentions businesses. Some of these businesses are still active, and some of the businesses may no longer be.

Historical researchers will comment that the more documents are available, the more research they are able to do.

The relatives of suspected collaborators, in this case, are the people who run the business nowadays if it is still active. To a business that is still active, a record in the CABR can cause reputational harm. They can object that the archives should not be unsealed because of its *disproportionality*. Businesses that have already been punished by the prosecution after WWII will be punished again by the public, and this harm, they could argue, is disproportionate. Besides that, there could be sensitive information in the files that the business would not want to become public. However, I argue that most sensitive information will have lost its relevance 80 years later.

Relatives of war victims might object to keeping the records of businesses sealed as long as they are active, because it means a record could be sealed for eternity. Where we can draw a line for individual persons' files to be released after their death, this line is possibly perpetual for businesses. Businesses could outlive the relatives of the victims for generations to come. Sealing the records of businesses that are still active, therefore, harms the right to information of this stakeholder group. On top of that, I argue there is also the interest of the other people in society, who would want to know about what these businesses did.

Witnesses and **government officials** have no interest in this principle.

Conclusion: The objection to accepting the principle comes from the business owners who still run active businesses and have a record in the CABR. The objections to rejecting the principle come from the relatives of the war victims and historical researchers. Businesses cannot know if they will be retributed for a mention in the CABR and thus I regard the objections of the relatives of war victims and the historical researchers as the heaviest. That is why the principle is to be accepted.

5.3 Medical files

[6] **Medical files shall be completely <u>inaccessible</u> digitally or physically.**

Explanation: Blurring sensitive information within a document is not feasible for an archive as large as the CABR. Thus, by inaccessible I mean that the complete medical file is not disclosed, digitally as well as physically. In Chapter 4.1.1, I discussed the ethics of disclosing medical information after a person passes away. I concluded that to justify disclosure of medical files from the CABR, the value of sharing medical information with descendants should outweigh the value of guarding a confidential patient-doctor relationship for all (current) healthcare consumers.

Witnesses and **government officials** have no interest to gain or lose from this principle.

Relatives of suspected collaborators will argue that any principle that does not forbid medical files from becoming public information, is unacceptable for them. The question can be asked what public interest is served if these medical files are disclosed. The only interest that might be served by providing medical information on a suspect is that it gives background to the psyche that someone was in when they committed an alleged crime. These mental reports often contain language that is not politically correct, such as the psychiatric report on Jacobus Breedveld (CABR, record number 90514). And so relatives of suspected collaborators might object that these descriptions can be a hurtful description of the suspect's mental state. As far as the medical information that was collected in internment camps is concerned, there is no good reason to disclose these documents to the public. Overriding interests of family members to access the medical information is not applicable in this particular case because the medical files are already 80 years old . An online publication of these files is certainly indefensible.

Relatives of war victims would be interested to know if mental conditions contributed to the actions a suspect took. However, it would be enough whether or not there was a mental condition, and it cannot be reasonably argued that it is important to know what mental condition.

Historical researchers might find interest in researching the importance of psychiatric reports in judicial proceedings.

Conclusion: I conclude that a confidential patient-doctor relationship for all living health consumers, and next to that the medical privacy of the deceased suspects outweighs the interest of the relatives of war victims to know more about the mental state of the suspect. Therefore, the principle cannot be reasonably rejected.

5.4 Interpretability

In section 4.2 I discussed the moral risks that could occur when disclosing the CABR to the public. The moral risks were: interpretation of testimonies, interpretation of the guilty verdict, inappropriate language and other juridically complex files that are difficult to understand. Principles [7], [8] and [9] will address these moral risks. For the inappropriate language that was incidentally used in medical files, I have already drawn up principle [6], preventing inappropriate medical statements from becoming public information.

[7] **Testimonies shall be fully accessible under the condition that context is given for every document that contains a testimony.**

Explanation: It is difficult to deduct the intentions of the person who was testifying. Maybe someone was telling the truth, but it could also be that someone was mainly putting his own house in order after the war and protecting his own name (E. Kieft, personal communication, November 25, 2024). Therefore, the reliability of these testimonies could be questioned. The release of these testimonies is only ethical if the context ensures that readers do not assume the given statements are true.

Relatives of the suspected collaborators might be hurt by the harsh statements on their family members, and given that these statements could be subjective or exaggerated, it could be unfair to publish them on the internet.

The **witnesses** are also an important stakeholder in this principle. Witnesses are the neighbours, friends, etc., that testified against the suspects. These people might have diverse interests on the topic of their testimonies becoming public. A witness who made a very damaging statement might object to these documents entering the public domain. These people might object to this principle, where other witnesses do not mind disclosing their testimonies. Under principle [3], a testimony is not made public if the person who testified is still alive. Potential harm can, therefore, only concern *relatives* of witnesses in relation to relatives of suspected collaborators. For example, a relative of a witness might be retributed for the harsh words of their family member.

Government officials have no significant interest in this principle.

Provided that every testimony contains a warning that the reader should not assume the testimonies to be true, **relatives of war victims** can gain quite some answers to their unresolved questions from testimonies. Even though the testimonies should not be used as a source on its own, it could verify information gathered elsewhere. Therefore, relatives of war victims have no objection to accepting this principle, but to rejecting the principle they might object that it obstructs their right to information.

Historical researchers have been trained to place testimonies in their historical context. For them the documents can be informative too.

Conclusion: Objections against this principle might come from the relatives of suspected collaborators and some of the witnesses, who do not want their testimonies to become public. The possible untruthfulness of the testimonies is unfair to relatives of suspected collaborators, as it hurts their family name more than is justified. On the other hand, relatives of war victims might object that any principle in which they are not granted access to the testimonies obstructs their right to information. In conclusion, the objections of the relatives of war victims outweigh the objections of the relatives of suspected collaborators and witnesses, given the absence of an alternative in which both objections are honoured. This is so because the objections of relatives of suspected collaborators weigh less heavily because context is provided with the testimony. For the objections of the witnesses I argue they weigh less heavily because living witnesses will never see their testimonies disclosed, only deceased. Therefore, the potential harm can only reach relatives of witnesses and is not a given. However, the alternative of this principle is that no relatives of war victims ever receive any information through testimonies, which will most likely harm them. So the principle cannot be reasonably rejected.

[8] **Verdicts shall be <u>fully accessible</u> under the condition that context is given for every document that is a verdict.**

Explanation: As explained in section 3.3, it can be difficult to know what to distil from a verdict because some suspects were accused of many crimes but only found guilty on one of them, and still their verdict says ‘guilty’. In section 4.1, I mentioned that the Procureur-Fiscaal was, in many cases, the only person who decided whether or not to prosecute a case. When a suspect is not prosecuted he is neither guilty or innocent. Without sufficient knowledge, a stamp on the verdict that says ‘guilty’ or ‘buitenvervolgingstelling’ can be misinterpreted.

In assessing the principle that verdicts should be accessible, **relatives of suspected collaborators** might argue that these verdicts are a misleading representation of the truth. Under this principle, context is provided along with the verdict, which means that chances of misinterpreting a verdict have been reduced. On the other hand, relatives of suspected collaborators might also be curious to inquire what their family member was prosecuted for. So, they might also object to inaccessible verdicts.

The relatives of war victims can make the argument that verdicts, although it is difficult to read them, are a key element in finding out what happened to their family. Without the verdicts, the relatives of war victims cannot know for sure if the suspect actually committed the crime they were accused of.

Historical researchers advocate context to these complicated documents so that people do not draw premature conclusions. They have been trained in understanding these documents and for them they can be informative too.

Government officials and **witnesses** have no particular interest in this principle.

Conclusion: The relatives of war victims will object to any principle in which they are not granted access to the verdicts, because they are important in reconstructing their family's stories. Historical researchers will also object to any principle that does not give access as long as context is provided. On the other side, there are some relatives of suspected collaborators that are afraid people might misinterpret the verdict of their family members. I argue that with enough context a misinterpretation can be prevented. Therefore, the principle cannot be reasonably rejected.

[9] **Juridical terms shall be provided with context and there shall also be an explanation on the type of document provided in the online sphere of the archive.**

Explanation: This is not a principle about a particular type of document, but a general principle of what context needs to be provided with the archive. Not only the verdict 'guilty' or the term 'buitenvervolgingstelling' needs more clarification. The CABR contains a lot more judicial terms and document types that need some explanation if they are disclosed to the public. A lot of people will not understand what the documents are about if necessary context is not provided.

For this principle I follow the exact same weighing as in principle [8] and conclude that principle [9] is also not reasonably rejectable.

5.5 Summary of the principles

The above analysis results in the following principles for disclosure of the CABR:

1. There shall be no access to records registered under the names of suspects that are alive. Only when living suspects decide to give permission, for individual request or a blanket approval, their records will be disclosed to some individuals or the public.
    a. Records of living suspects shall be digitally searchable but people have to request permission individually from the suspects to view the records.
2. If a suspect has died, their records shall be fully accessible and digitally searchable. There is no 'opt-out' for descendants of suspected collaborators that want to keep the records of their family members closed.
3. If a living person is mentioned in the record of a deceased suspect (e.g. as a witness or a relative) there shall be no access to this record. There may be several living persons mentioned in one document and only when all of them grant access, for individual request or a blanket approval, then the record may be disclosed to the public.
    a. These records are digitally searchable and individual access can be obtained by asking permission from all living people that are mentioned in the record.
4. Files on the economic collaboration of individuals who are no longer alive shall be fully accessible, including financial information on their collaboration.
5. Files on the economic collaboration of businesses shall be fully accessible, even when that business is still active.
6. Medical files shall be completely inaccessible digitally or physically.
7. Testimonies shall be fully accessible under the condition that context is given for every document that contains a testimony.
8. Verdicts shall be fully accessible under the condition that context is given for every document that is a verdict.
9. Juridical terms shall be provided with context and there shall also be an explanation on the type of document provided in the online sphere of the archive.

6. Comparing the Principles with the Current Policy

In the following chapter, I will compare my formulated principles to the current policy of disclosure of the CABR. The following table is an overview of the formulated principles:

	Physical access	Digital access	Digital searchability (ctrl-f)	Permission necessary?
General				
Any record of a living suspect	✗	✗	✓	Accessible through individual permission or blanket approval
Any record containing a living person	✗	✗	✓	Accessible through individual permission or blanket approval
Records that do not mention any living persons	✓	✓	✓	NA
Type of document				
Medical files	✗	✗	✗	
Economic collaboration files	✓	✓	✓	
Testimonies	✓	✓ [with context]	✓	
Verdicts	✓	✓ [with context]	✓	

On December 6, 2024, Dutch Minister Eppo Bruins announced the cancellation of the planned release of the CABR, which was scheduled for January 2, 2025 (Geels, 2024). He intends to draft a law prioritising the public interest over the privacy rights of the individuals named in the CABR. The proposed legislation aims to safeguard the rights of people—particularly descendants of war victims—to uncover historical truths about the war. Later in December it was announced that the CABR would become available physically from January 2, 2025, on an appointment basis where you can reserve pieces online and thereafter view records physically in the National Archives. However, the originally planned digital disclosure of CABR is still off the table until proper legislation is in place.

The current policy where all records can be viewed on appointment physically lacks the possibility to add context to certain documents to enhance the interpretability of the CABR. Especially principles [7], [8] and [9] cannot be followed under the current policy. With digital access to the CABR much more context can be provided than in a physical archive.

Legislation that allows all records to be disclosed, including the ones containing information on people that are still alive, conflicts with the ethical principles of archiving, as explored in detail in Chapter 3. Section 4.2 highlights that it is valuable to keep some parts of the CABR closed as long as there is an infringement on a person's private life or disproportional effects in disclosing the archive (e.g. when a hurtful testimony by a living witness is published). By creating legislation that overrides these ethical considerations, the Minister risks establishing a precedent for future cases where public interest overrides privacy as a justification for unsealing archives.

For example, there was recent controversy in the Dutch government regarding calls to release the minutes of the *Ministerraad* meetings, where certain Ministers allegedly made racist remarks. These minutes are sealed by law for 20 years to safeguard state security and ensure a unified governmental stance. Introducing a precedent for unsealing archives in situations like these—despite the ethical imperatives to keep them sealed—could have far-reaching consequences.

When the digital release of the archive was still planned for January 2025, the National Archive prepared a guideline for handling requests to remove certain documents from online access. Although the digital release has been postponed and the guideline for filing a request to take a document offline was also taken down from the website, the guideline remains relevant because it could resurface with the proposed new legislation.[2]

As can be seen in Appendix B, the guideline draws a clear distinction between personal and legal documents. Legal documents cannot be sealed, as the National Archive is obligated to make governmental legal records publicly accessible. Requests to restrict access can only be submitted for personal files that lead to deeply distressing situations when they are put online. Importantly, even if a request is granted, the document would not be removed from the archive entirely; it would remain physically accessible to those who visit the archive (National Archives, n.d. -e; App. B).

This research builds on principles that propose a more nuanced categorisation of the types of documents found in the archive. Medical files, as I discussed under principle [6], can be part of the legal files.

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[2] The guideline was taken offline after the policy changed in December 2025, but I have included a screenshot of the guideline in Appendix B.

However, I argue this is not a good reason to disclose them. It is crucial to ensure fair treatment of past persons while also respecting the rights of individuals seeking to explore their family history. Binary classification of documents as merely ‘personal’ or ‘legal’ lacks the complexity needed to achieve a justified approach to disclosing the CABR.

7. Conclusion

This thesis examined the ethical challenges of disclosing the Central Archive of Special Jurisdiction (CABR) using Thomas Scanlon's contractualism. The research aimed to determine principles for ethically managing the CABR's disclosure by balancing privacy concerns, the right to information, and historical accountability. Through an analysis of archival ethics, stakeholder interests, and the application of Scanlonian contractualism, the study provided a framework for ethical decision-making in the context of sensitive archives.

The CABR holds invaluable information about post-World War II legal proceedings, including sensitive data about suspects, victims, and collaborators. As its accessibility increased in January 2025, ethical concerns emerged about privacy infringements, potential misinterpretation and the societal impact of revealing historical records. This thesis used Scanlon's framework to evaluate and formulate principles that no relevant stakeholder could reasonably reject. The resulting recommendations addressed issues such as privacy protections for living individuals, the release of deceased suspects' medical records, and measures to solve interpretation issues.

Research Question

The research question was: "*What is good ethical conduct in disclosing the CABR?"*. To address this, the research examined the general value of archiving and applied these values to the CABR's context. Through this method, the research identifies the many aspects of the ethical dilemma that is the disclosure of the CABR and goes deeper into the problem than just weighing transparency against privacy. By systematically evaluating the implications of disclosing versus closing the CABR, the research derived a set of principles in accordance with Scanlon's contractualism. These principles set a guideline that no stakeholder group related to the CABR could reasonably reject.

The principles can be summarised by the following four elements:

1. Protecting the privacy of living individuals while facilitating access to deceased persons' records.
2. Ensuring that medical information, even of past persons, remains sealed to protect the integrity of the patient-doctor relationship.
3. Providing context for enhanced interpretation of testimonies, verdicts, and other complex juridical documents to prevent misuse and misrepresentation.
4. Ensuring that information on economic collaboration of businesses becomes public even when those businesses are still active. Businesses can exist perpetually which is why it is not justifiable towards relatives of war victims to keep those files sealed.

Implications

This research emphasises the ethical dilemmas surrounding CABR disclosure. By embracing the suggested principles, CABR custodians can address the ethical conflicts between transparency and privacy. The study highlights the significance of ethical considerations in formulating policies that honour the dignity of everyone involved.

The findings also have broader implications for archival ethics, i.e. that frameworks like Scanlon's contractualism can be applied to similar archives worldwide. By making agreements based on reasonable rejection, institutions can develop policies that are justifiable to all stakeholders, especially in unsettled debates.

Suggestions for Further Research

The study faced limitations due to restricted access to the CABR. Only two records were examined during a brief access period in January 2025. Future research should include a more extensive exploration of the CABR to uncover additional principles or enhance existing ones. Archival exploration could reveal new ethical dilemmas or validate the recommendations made in this thesis.

Critical Reflection of the Method

Using Scanlon's contractualism as an ethical framework introduced both strengths and challenges. The emphasis on reasonable rejection fostered a nuanced understanding of stakeholder interests and ensured that ethical principles were inclusive. However, the approach has its limitations.

One critique is the theory's reliance on abstract reasoning, which may overlook the lived experiences and emotional responses of stakeholders. Applying this critique to the CABR, it is possible that certain stakeholders' feelings of betrayal were insufficiently captured in the analysis.

Finally, the method's reliance on hypothetical reasoning (e.g., "What would stakeholders reasonably reject?") posed challenges in the absence of comprehensive data about the CABR's contents. Future researchers might consider supplementing contractualism with empirical studies or qualitative interviews to better understand stakeholder perspectives.

Concluding Remarks

The disclosure of the CABR represents a contemporary ethical debate on transparency versus privacy. By proposing an ethical framework grounded in Scanlonian contractualism, this thesis contributes to the ongoing debate about how to handle sensitive archives in a responsible manner. While the findings are

preliminary and contingent on further research, they offer a starting point for policymakers and archivists tasked with managing the CABR's disclosure.

The path forward requires continued ethical guidance. As society struggles with the legacy of its past, frameworks like the one proposed here can help ensure that the pursuit of historical truth remains in balance with respect for human dignity.

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Appendix A

Itemised list of types of documents that can be found in the CABR according to research by Bureau Eiffel.

- Aangifte
- Agenda
- Arbeidsovereenkomst
- Advies
- Bankstorting
- Beschikking
- Besluit (Invrijheidstelling)
- Bevel
- Bijzondere vondst
- Brief
- Buitenvervolgstelling
- Correspondentie privé
- Correspondentie zakelijk
- Dagboek (aantekeningen)
- Dagvaarding dader
- Dagvaarding getuige
- Dienstbewijs
- Document bevolkingsregister
- Document postkantoor
- Documentatielijst dossier
- Factuur
- Foto
- Generaliablad
- Getuigenverhoor
- Geldboete/vervolgstelling
- Gratieverzoek
- Kartotheek
- Kledingbon
- Kennisgeving
- Krant
- Ledenadministratie
- Lidmaatschapsbewijs Jeugdstorm
- Lidmaatschapsbewijs NSB
- Lidmaatschapsbewijs SS
- Medische gegevens
- Oproeping
- Pleitnota
- Proces-verbaal
- Proces-verbaal van zitting
- Rapport
- Restwaarde
- Rolboek
- Staat van inlichtingen
- Telegram
- Transport/vervoerskaart
- Uitreiking
- Uitspraak/vonnis
- Uittreksel handelsregister
- Uittreksel proces-verbaal
- Uittreksel Strafregister
- Vergunningaanvraag
- Verklaring Vermogensvaststelling
- Verslag verhoor
- Verweerschrift
- Verzet/Hoger beroep
- Verzekeringsdocumenten
- Verzoek toesturen documenten
- Verzoek van verdediging
- Verzoekschrift
- Visitekaartje
- Voedselbon
- Volmacht
- Vordering
- Vrijstelling van inlevering

Appendix B

Guidelines National Archives regarding taking personal documents offline.

Ik wil dat specifieke documenten uit het CABR niet online gepubliceerd worden. Wat moet ik doen? -

In een aantal gevallen kunt u een verzoek indienen om documenten of foto's niet online te laten zetten.
Dit kan alleen in de volgende gevallen:

- Er komt een document online met informatie die tot u te herleiden is. Op grond van de Algemene Verordening Gegevensbescherming wordt dit document niet online geplaatst.
- Er komt een foto online waar u op afgebeeld staat. Op grond van het portretrecht wordt deze foto niet online geplaatst.
- Er komt een tekst of foto online waar auteursrechten op rusten, waarvan u de rechthebbende bent. Op grond van de Auteurswet wordt dit document niet online geplaatst.
- U verwacht grote persoonlijke problemen door het online komen van een document of een foto. Uw verzoek wordt alleen in behandeling genomen als het om persoonlijke documenten gaat, zoals een brief of een dagboek. Documenten die gemaakt zijn als onderdeel van de rechtsgang, zoals een proces-verbaal of getuigenverklaring, komen niet in aanmerking. Uw verzoek zal worden voorgelegd aan een onafhankelijke adviescommissie, die een ethische afweging maakt. Op basis van het advies van de commissie neemt het Nationaal Archief een beslissing over het online publiceren van het document of de foto.

Als u een verzoek indient, kunnen we u aanvullende vragen stellen om uw verzoek te controleren.
U ontvangt altijd een bericht over het genomen besluit.

U kunt een verzoek indienen om documenten niet online te publiceren via het CABR-contactformulier. Kies voor de optie "Verzoek niet online publiceren documenten".

CABR-contactformulier