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MEMORY AND TRADITION AS LIMITS TO THE FREE EXPRESSION ABOUT HISTORY

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Abstract — Society has a strong interest in a robust public debate about history and this interest even increases in the case of past public figures, in the case of victims of atrocity crimes, and with the passage of time. From an international human rights perspective, the free expression about history can be restricted only under carefully determined circumstances and narrowly formulated conditions in the service of a few explicit purposes. Memory and tradition are *not* among these purposes. However, memory and tradition can be reframed in terms of permissible purposes with relative ease: "respect for the memory of the dead" can be rephrased as an application of "respect of the rights or reputations of others," and "protection of the tradition of the ancestors" as a form of "public morals." With these reframing options in mind, I balanced the interests of history, memory, and tradition against each other. Within strict limits, "memory" can be seen as a guarantee for reputation and privacy, and "tradition" as a guarantee for morals. If that is the case, memory and tradition act as acceptable checks on how a society deals with its past. Memory and tradition then trump history. In all other cases – the large majority – they are problematic limits: in overprotecting them, memory and tradition distort and censor talk about the past. Memory and tradition then trample history.

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Mes larmes ne la ressusciteront pas. C'est pourquoi je pleure.
(My tears will not bring her back to life. That is why I am crying.)
—Anonymous French epitaph[1]

For those interested in the past, there is one mesmerizing and inescapable triangle: the past is a field situated between memory, tradition, and history. It never tires to observe how these triangle points relate to each other. Memory recasts history and molds tradition. Tradition informs history and expresses memory. History studies tradition and criticizes memory. But what if two of them try to domesticate the third? What happens when memory and tradition attempt to control history?

This scenario in which memory and tradition limit history is under scrutiny here. Few will adhere to the position that the scenario is unthinkable even in those cases where history, memory, and tradition, drawing on the same past, tend to operate in unison. Many will find limits to the free expression of opinions about history in the name of memory and tradition acceptable to a certain degree because they think that opinions about history should respect not only the facts about past events but also, at least to some degree, the opinions and feelings of those who experienced them and the customs of their community. In fact, limits to the free expression about history in the name of memory and tradition, however acceptable in some circumstances, are also deeply problematic if we take the international human rights framework into consideration. Why? Within the human rights framework, free expression can be restricted only for a few selected purposes under carefully determined circumstances and conditions. Memory and tradition are *not* among these purposes.

How should we solve this puzzle? First I will have a close look at the three interests at stake: history, memory, and tradition. "History" is best defined as the systematic study of the past, "memory" as the memory about persons who played a role in the past, and "tradition" as the customs and practices transferred from the past to the present. Therefore, a more precise and testable reformulation of the triangle with its three interests would be: freedom of expression about history, respect for the memory of the dead, and protection of the tradition of the ancestors. Once these interests are introduced, I will balance them against each other and evaluate the outcome of that balancing act.

The first interest: freedom of expression about history

The global standards that regulate the universal freedoms of opinion and expression are set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19.1 describes the *formation* of opinions, Article 19.2 their *expression*, and Article 19.3 their *restriction*.[2]

> *Article 19 ICCPR*
> 1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The United Nations (UN) Human Rights Committee – the body that monitors compliance with the ICCPR – recalled why the freedoms of opinion and expression are so important for individuals, for society, and for the state:

> [They] are indispensable conditions for the full development of the person … They constitute the foundation stone for every free and democratic society … Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.[3]

Article 19.3 of the ICCPR describes the regime of requirements for the legitimate restriction of free expression.[4] These requirements embody the idea that the right to freedom of expression, although universal, is not absolute. Two general rules of interpretation underlie this idea: only states may permissibly restrict free expression and the scope of restrictions is itself restricted and should never undermine the essence of the right to free expression.[5] Based on these rules, a balancing test to assess the appropriateness of restrictions on free expression has been developed. The balancing test is itself based on a set of five principles.[6]

The principles of predictability and transparency prescribe that free-expression restrictions must be provided by law, which should be clear and accessible to everyone. The principles of

necessity and proportionality prescribe that free-expression restrictions must be shown to be "necessary" and be the least restrictive means required to achieve the purported aim. Restrictions that are "unnecessary" or "disproportional" (for example, harsh sanctions) produce chilling effects on free expression.[7] The principle of legitimacy, finally, identifies the two areas of legitimate interests on which free-expression restrictions can be based: a private area ("respecting the rights or reputations of others") and a public area ("protecting national security, public order, public health, and public morals").[8] Significantly, this list is exclusive, which means that other interests are not permissible grounds of restriction. The problem we discuss here is a consequence of this exclusivity: does the fact that memory and tradition are not on the list mean that they are not permissible grounds for restricting the free expression about history?

In applying these five principles to the study of history, courts have often reiterated that the broad right to free expression includes the right of everyone (not just professional historians) to seek the historical truth. Seeking, receiving, and imparting historical information and ideas and participating in free and critical historical debate represent strong personal interests. At the collective level, societies also entertain an interest in such a public exchange and debate because the historical truths that may be their outcome are important in themselves *and* instrumental in achieving other fundamental goals, such as democracy and justice.[9] This view implies that the criminal law is usually a disproportionate legal means to solve memory- and tradition-related conflicts. As a rule, acts of history which are perceived as attacks to memory and tradition should be seen as a tort, not a criminal offense.[10] If the tort is proven and a remedy is deemed necessary, one should think of non-intrusive remedies such as the issuance of an apology, a correction and/or a reply, or the publication of the court judgment that finds a statement about history to be an attack to memory or tradition.[11] Perhaps such remedies could extend to (moderate) damages and in exceptional cases to (temporary) bans, but never to censorship or imprisonment.

Clearly, the rule is that freedom of expression about history is a *normal* application of the general freedom of expression. But three factors make it not a normal, but a *strong* application of the general freedom of expression: two refer to the subjects of history and one to the passage of time. Because history deals so frequently with public figures as subjects, I should recall the widely accepted principle that public figures are required to accept a greater degree of criticism than private citizens:[12] the more prominent people are, the less the protection of their private sphere and the larger the public interest in gathering information about them. Despite this

principle, public figures often tolerate less rather than more criticism of their conduct and sue more rather than less in many corners of the world.[13] Public figures, however, while possessing privacy like everyone else, do so much less than private citizens because by appearing on the public scene they sacrifice a part of their privacy to the public. German-speaking jurisdictions often label public figures as "figures of contemporary history" and further subdivide them into absolute and relative public figures. Absolute public figures are persons "who because of their status or relevance or public function are famous outside a certain context or irrespective of a certain contemporary … event,"[14] for example, monarchs, presidents, politicians exercising official functions, and celebrities. They retain a sphere of intimacy that nobody may intrude because privacy is a universal right applicable to everyone. Relative public figures are those whose "fame" is related to a particular event, often a crime or trial. Private figures are figures unknown to the general public. Absolute public figures have less privacy protection than relative public figures, and the latter less than private ones.[15]

The second factor concerns the victims of atrocity crimes (an umbrella term for genocide, crime against humanity, and war crime). Many crimes are subject to statutes of limitation, meaning that they may not be prosecuted after a certain amount of time has elapsed. In principle, such time bars serve the fair trial principle, inter alia because the collection of evidence becomes more problematic over time. However, in effectively foreclosing prosecution, they often function as de facto amnesties. That is the reason why, according to international law, atrocity crimes are exempted from time bars (they are imprescriptible) and why amnesty laws are sometimes annulled to the effect that cases previously closed can be reopened.[16] A corollary of the duty to investigate atrocity crimes is the right to the truth, the inalienable, non-derogable, and imprescriptible right of victims of human rights violations, their families, and society at large "to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes."[17] In the event of death or disappearance, it includes the right to know the victim's fate.

Finally, courts have repeatedly stated that the passage of time is an important factor to be taken into account when evaluating free-expression limits: the longer ago the historical period under discussion, the less reason there is to limit free expression about it.[18] There exists a presumption – rapidly increasing over time – in favor of free expression.

In sum, the free-expression interest represented by an exchange and debate about history belongs to all and, when balanced against other interests, it is so strong that there is little scope for its restriction.

The second interest: respect for the memory of the dead

The two competing interests, respect for the memory of the dead and protection of the tradition of the ancestors, are potential limitations on this interest in free expression about history. I will first analyze the elusive phrase "respect for the memory of the dead." The concept of "memory" in the phrase "memory of the dead" cannot be the memory *of* the dead themselves, because the dead do not have a memory. Rather, the "memory of the dead" is a certain set of ideas *about* the life of a deceased person that lingers in the mind of the living – the surviving relatives and circle of friends of the deceased in the first place – and usually gives them some peace of mind. If this peace of mind is left untouched, one could say that there is "respect for the memory of the dead." Statements of fact or opinion about the dead person can interfere with this "memory of the dead," however, and they are then perceived as "disrespect for the memory of the dead" which cannot be left unanswered.

A crucial measure to protect "the memory of the dead," therefore, is litigation. The question then is to know what is litigated and who?[19] If we try to define the objectionable conduct (the *what*) we mean written, oral, or visual statements (for example of a medical, sexual, or financial nature) in obituaries and biographies or images and footage showing dead bodies.[20] If we inspect legal codes and cases, we see that there is a multitude of terms – I counted 28 – to describe such objectionable conduct. It is said that the memory of the dead is abused, affronted, attacked, belittled, besmirched, blackened, debased, defamed, demeaned, denigrated, depreciated, desecrated,[21] discredited, dishonored, disparaged, disrespected, held in contempt, infringed, insulted, libeled, offended, outraged, shamed, slandered, tarnished, undermined, vilified, or violated. Almost all of these terms – except perhaps "abused" and "violated" – refer to defamation, which is the intentional impairment of a reputation, that is, a person's good name or fame, the esteem in which one is generally held within a particular community.[22] Memory and reputation are close concepts and so are their counterparts – disrespect for memory and defamation. If we want to study disrespect for the memory of the dead, therefore, we often have to look for defamation of the dead in practice.[23] Both are personality aspects of the dead.[24]

We should also ask ourselves *who* is harmed by the objectionable conduct. Three theories try to answer this question of legal standing.[25] They are not mutually exclusive. The first theory holds that it is the dead themselves who are harmed. The difficulty with this theory is that the dead, as past persons, cannot be harmed anymore: they constitute a particular ontological category, fundamentally different from the living.[26] Many, mostly common-law, jurisdictions therefore apply the Roman maxim "actio personalis moritur cum persona" (personal action dies with the person).[27] Perhaps surprisingly, this is not a general rule. The concepts of disrespect for the memory of the dead and defamation of the dead are incorporated into the criminal or civil codes of dozens of countries to tackle attacks on the memory of the dead, notwithstanding the fact that most of these codes are silent about the dead as legal subjects.[28] Furthermore, two categories of dead persons can be shielded by more specific legislation: heads of state and victims of atrocity crimes. First, some deceased heads of state and government (Atatürk, Khomeini, and the Thai monarchs, for example) have their memory protected by special laws.[29] Second, those who deny that an atrocity crime ever occurred are seen as demeaning the victims that died during that catastrophe and therefore fall within the ambit of genocide denial laws or – if the denial transcends the required threshold of incitement – of hate speech laws.[30]

The second theory holds that those harmed are the surviving relatives.[31] Most judges, not at ease with the first theory and therefore prone to evade the question whether the dead can be defamed, opt for this second theory.[32] The theory is limited to first-degree relatives because in general it is only they who suffer severe emotional distress when the memory of a deceased loved one is disrespected.[33] Distant relatives and the circle of friends of the deceased are generally incapable of feeling the same depth of pain regarding the deceased and are therefore excluded from standing. Among first-degree relatives we count partners, parents, and children. With regard to partners and parents, we can say that the importance of reputation grows with age: the older persons are, the more sensitive they become to the loss of reputation, including their own reputation and those of their deceased family members.[34] In addition, some people, especially elderly persons, actively manage their legacy in order to influence the "verdict of history" about their lives by censoring autobiographical records or writing memoirs. Some leave instructions on how to deal with post-mortem defamation. Their relatives can continue this strategy of protecting the desired image of the deceased against the disclosure of information about them after their deaths.[35] Obviously, also children have legal standing but their case is different from partners and

parents. If they are still very young, a problem arises. A young child may at first be unaware of the pain caused by a statement that defamed its dead parent and only later come to feel the intense disrespect and suffer from it. This delayed pain can be called "transgenerational harm." There is a debate about how this exactly works. It recently even reached the judges of the International Criminal Court.[36]

The third theory holds that it is society as a whole which is affected by the attacks on the dead, for two diverging reasons. First, it can be argued that if society as a whole is to survive, it has an interest in the truth and this core interest is diminished if lies about the dead can spread with impunity. Next, society as a whole has an interest in cultivating respect for its dead because such posthumous respect will provide its citizens with a reasonable expectation of being treated decently after their deaths themselves and thus contribute to norms of civility and to peace.[37] We could call this the Golden Rule for the Dead: *do unto the dead as you would have others do unto you after you die.*

The third interest: protection of the tradition of the ancestors

From respect for our dead to respect for the ancestors is but a tiny step.[38] In 1907, the writer Gilbert Chesterton wrote approvingly: "Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead … We will have the dead at our councils."[39] The formula "tradition of the ancestors" is no less elusive than the formula "memory of the dead." Whereas "memory of the dead" refers to words and images about deceased persons expressed in the present, "tradition of the ancestors" points to practices from selected deceased persons still applied in the present:[40] it can be described tentatively as a set of old customs and practices that are transferred over the generations and repeated in the present.[41] Tradition is generally seen as an expression of collective memory; and like collective memory it is a concept vulnerable to distortion and manipulation. In particular, tradition is often presented as an unchanging and quasi-timeless expression of memory and identity. Determining a tradition is a complex operation with hard questions to answer: who are the dead that are elevated to the rang of ancestors and who are those excluded? Which of their practices are worth the label of traditions and which are excluded? What do these traditions express? How authentic are they? What purposes does they serve? Who has the powers to select, preserve, reactivate, and interpret traditions? How are these powers themselves transmitted from generation to generation? It is

therefore useful to distinguish official from dominant traditions: whereas many governments promote certain customs and practices in the domains of moral beliefs, family life, gender, age, language, dress code, religion, culture, and inheritance and make them "official" traditions, these become dominant only when they are accepted and shared by the majority in a country.

The relationship between tradition and human rights is complicated.[42] "Traditional values" can bolster respect for human rights, mainly if in disputes they reflect norms of customary international law.[43] They can, however, also have opposite effects when they endorse and enhance xenophobic, misogynist, and homophobic prejudices.[44] They may be invoked to attack the most marginal and vulnerable sectors of society and exclude alternative traditions held by minorities or foreigners.[45] Adherents of these alternative traditions are then typically accused of undermining the official or dominant tradition by defending ideas which are "decadent" or "alien to our society." Among the laws typically mobilized to reject alternative traditions are domestic customary law and public morality laws.

We are concerned here not so much with traditions as such but with the ability to speak about them critically. When official traditions cannot be publicly criticized and alternative ones cannot be publicly defended, free expression is violated.[46] In addition, public debates are starved of the pluralism and tolerance that are key to any democracy.[47]

Temporal scope

When the interest in free expression about history is disputed in the name of the memory of the dead and the tradition of the ancestors, we should balance them against each other. A primordial question popping up before any balancing can start is its temporal scope. Bearing in mind the factor of the passage of time explained above, when is balancing relevant and when is it irrelevant? The temporal framework is very wide for history, very small for tradition, and very flexible for memory. Freedom of expression about history, per definition, spans all the centuries from the dawn of time until today. Traditions of ancestors – even very old ones – are practices from the past which are deemed applicable in the present and, therefore, litigation against history defending objectionable traditions usually takes place instantly or with little delay. No special problem of temporal scope arises here. This is different for the memory of the dead because litigation for tradition is often initiated by the state and by lobby groups, while litigation for

memory is usually taken care for by individual relatives of deceased persons. Does it have a time limit? That is a complex question.

A preliminary observation is that dead bodies have a certain basic quality that I call "posthumous dignity" (to distinguish it from human dignity). This posthumous dignity has an eternal quality in itself. Even skeletons from prehistory are treated with respect.[48] But while body-related aspects of the dead evoke quasi-timeless posthumous dignity, and therefore respect and protection, it is very different for personality traits with which we are dealing here.

How long is it allowed to defend the memory of the dead in court? A 2014 study found that most European Union member states did not provide explicit time bars for the offense of defamation of the deceased, but Portugal, for example, allowed a term of fifty years, Denmark a term of twenty years after death.[49] Time bars vary wildly as do estimates of authors writing about them.[50] By and large, these estimates can be grouped into three approaches:

Time bars for litigating disrespect for the memory of the dead

- The time bar is reached at the moment of death (no litigation).
- The time bar is reached after two or three generations following death (ca. 60–90 years).
- The time bar is reached after the mourning period is over (depending on local tradition, one to two years following death), but it can be shorter or longer if special circumstances prevail.

The first approach is untenable.[51] If no time is granted to close relatives of deceased persons to protest at all, their interest in privacy and reputation is not taken seriously. We should grant a period in which disrespect for the memory of the dead is actionable. In contrast to the first approach, the second one has often been defended: the near and dear of the dead have a right to sue as long as they live. But even if only first-degree relatives are allowed standing, this may overly expand the time period. Theoretically, children born in the year of the defamation of their deceased parent may then sue in their nineties, which means that we are talking about a span of almost a century. This would distort the balancing in a direction opposite to the first approach for not taking the free-expression interest in history seriously.[52] We know how strong that interest is and, therefore, the second approach should also be rejected. A shorter period is necessary.

The third approach accepts that a statement that allegedly shows disrespect for the dead is actionable in court for about one or two years after the death of the individual. I shall first discuss the average situation and then the special circumstances. The average situation is one in which a private deceased figure is involved. In such a situation, it is reasonable to define the period in which relatives are particularly sensitive to disparaging remarks about their loved ones as coinciding with the period of mourning, a period lasting one to two years in most cultures. This estimate for the mourning period is based on anthropological and historical research. In 1907, while studying death rituals, the pioneering anthropologist Robert Hertz made the following pregnant observation:

> [N]ormally, the time which elapses between the occurrence of death and the final ceremony corresponds to the time judged necessary for the corpse to reach a skeletal condition ... T]he usual delay is about two years."[53]

A more conservative estimate is the one made more recently, in 1987, by the authors of the five-volume *History of Private Life*. In the words of historian Gérard Vincent:

> Apparently it takes a year for the body to decompose fully, the length of time it usually is assumed to take for the mourner's pain to subside.[54]

The variation in the duration of mourning is explained by such factors as the age of the deceased, the type of death, the mourner's relationship to the deceased, and the cultural variability in mourning customs. In sum, a time limit coinciding with the period of mourning seems to be the most sensible and least arbitrary option. It is also flexible enough to leave opportunities to relatives to get access to a court if they wish. Once the period of mourning is over, the special consideration for grief fades away.[55] To those who object that authors may postpone their offending statements until after the period of mourning in order to avoid liability, it can be answered that this possibility already exists: by delaying statements until after the death of the person concerned.[56]

We have now found a rule for the average situation. Special circumstances may modify this general rule of one or two years, and shorten or expand it.[57] It may shorten considerably when absolute public figures are involved. Here we have some guidance from the European Court of Human Rights. A week after French President François Mitterrand's death in 1996, his private

physician published a book revealing that during his fourteen-year term in office, the president had kept secret that he suffered from cancer. The publisher was reprimanded and the book banned for years. In its consideration of the publisher's protest in 2004, the European Court of Human Rights argued that the book constituted a breach of medical confidentiality and intensified the grief of Mitterrand's heirs during the period of mourning. It also ruled, however, that once the duty of confidentiality had been breached, the passage of time had to be taken into account in order to assess whether a blanket ban of the book was compatible with freedom of expression. After ten months, 40,000 copies of the book had already been sold, it had been published on the internet, and it had been the subject of much comment in the media. And therefore, the Court reasoned, there was no longer a pressing social need to justify continuation of the temporary ban after that period. Given the public profile of the president, and notwithstanding the confidentiality duty of physicians, it calculated posthumous privacy and the grief of the president's heirs in months, not years. In any case, ten months as a time bar was too much for a public figure like Mitterrand.[58] From our perspective, however, there are two mutually incompatible problems with the public-figure principle. On the one hand, many relatives of public figures are not public figures themselves (although this does not hold for Mitterrand's widow in our example) and deserve to be treated with the same consideration as other private figures. On the other hand, private figures always risk becoming relative public figures against their will precisely because they become involved in litigation. Nevertheless, in general, the time limit can be considerably shorter than the general rule in the case of public figures.

Arguably, there is also one special circumstance which may expand the period of one or two years. That is the case of disparaging the dead who became victims of crimes against humanity, including genocide. Although every death is painful, it can be argued that death as a consequence of genocide and similar crimes is not only painful but also deeply traumatic. This is so because the destructive impact of atrocity crimes is experienced not only by the relatives of the victims but also by many other members of a society who have been potential targets of such criminal policies but escaped and survived. It is this collective aspect, usually absent in non-violent deaths, which makes it unique. But there are countervailing factors also. In particular, longer terms to sue can create the impression among those skeptical of official wisdom that the truth about genocide is too fragile for debate and cannot survive without legal protection, even after many years.[59]

Therefore, expanding the litigation period for genocide denial and other blatant defamation of the dead is justified, but it is the particularity of the case which decides the expansion of the period.[60]

Adopting the rule of one to two years as the valid one also enables us to clarify at which point in time we start counting. Indeed, there are six distinct moments that are often confused in our discussion:

Moments in the process of defaming the dead

- x-1: the moment in the life of the subject to which the problematic statements refers.
- x: the moment of death of this subject.
- x+1: the moment of the problematic statement.
- x+2: the moment that relatives are informed of the problematic statement.
- x+3: the moment that relatives decide to sue.
- x+4: the moment of the court judgment.

The only reasonable point of departure for any time limit is the death of the individual concerned ("x") for the very reason that the mourning period starts at that moment. All other points in time clear the way for actions decades after death, which would create chilling consequences for those talking about the past. I see three such chilling effects: the threat of having to live forever under the shadow of a possible lawsuit, the discouragement of further critical discussion, and more practically, the difficulty of retaining evidence long after the fact.[61] Together they disproportionately discourage talking about the past.

The defenses for history

Now that we clarified the temporal scope of history (centuries) and tradition (instantly), and considerably reduced it for memory (one to two years in general), let us look at the arguments that the three interests can muster. In matters of history, a basic distinction, often recalled by courts, is the one between statements of opinion and fact. Facts are susceptible to verification, opinions are not. If the controversial statement is an opinion about history (usually a historical

interpretation or a moral judgment about a past figure), it enjoys strong protection – as long as it is not mere reckless conjecture.[62] As stated by the UN Human Rights Committee:

> Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.[63]

If the controversial statement about history is a fact, it should be possible to demonstrate its veracity in court. This is the defense of truth. This defense is strong in cases of defamation but weak in cases of privacy invasion. The reason is that when true but embarrassing facts are told about deceased persons, those litigating in their names can argue that the privacy of the dead was invaded by the revelation of the embarrassing fact but not that the latter's reputation was harmed since an undeserved good reputation cannot be defended in the first place.[64] Furthermore, the truth defense should succeed if it can be shown that the deceased agreed to publish the controversial fact when alive (for example, by revealing it in a published autobiography or interview). If defendants have other evidence that proves the truth of the disputed fact, they should be given the opportunity to demonstrate it in court.

Sometimes, a defense of truth is impossible because cross-examination is excluded, the evidence is old and scarce,[65] or proof beyond reasonable doubt cannot be achieved. In addition, the impugned fact is sometimes related to the privacy of deceased persons rather than their reputations, and in such cases truth defenses fail or are very limited because true revelations about someone's private life may still be invasions of privacy.[66] In all these circumstances, other defenses such as "public interest," "due care," and "good faith" should be allowed. If the statement can be shown to be made in the public interest, for example as part of a serious historical debate, or if it is made with due care and in good faith, it should be sufficient to show that the author made reasonable efforts to ascertain the truth.[67] In short, the duty for authors to verify facts should not be too cumbersome. In contrast, a statement of fact about a deceased person – either true or false – expressed maliciously or recklessly cannot stay without consequences.[68]

If the defendant is a professional historian, this circumstance may have further consequences. Historians can make mistakes like everybody else, but in contrast to most others, they have a professional duty of accuracy and sincerity, in particular to search honestly and methodically for

the historical truth. In this respect, the duty clause of Article 19.3 of the ICCPR ("The exercise of the rights … carries with it special duties and responsibilities") can come into play. Historians have duties – for example, duties not to express discriminatory views and to exert tolerance and distance when they act as symbols of authority in an educational context.[69] They are required to prove their responsible handling of historical information in a teaching and research context.[70] The Mitterrand case made clear that the medical profession has also its own "special duties" as it is bound by medical confidentiality about patients even after the latter have died.[71]

We see that, in correspondence to the strong protection for the interest in robust historical debate, those uttering statements about the past have – or should have – a series of strong defenses at their disposal. These defenses become weaker or non-existent if the statement is a fact, false or true, about a deceased person uttered maliciously or recklessly, and if those uttering such statements have professional duties to fulfil.

The defenses for memory

The balancing act between history on the one hand and memory and tradition on the other will usually concentrate on three of the five free-expression principles: those of predictability and transparency (what does the law say) and the legitimacy principle (what is the ground for limiting free expression). If one of either tests fails, by implication the tests of the remaining principles (necessity and proportionality) will also fail.

Attacks on the memory of the deceased can deeply hurt the relatives and therefore the latter attract the protection of two general types of laws: defamation laws if they are able to show that their personal reputation is affected by the attack on the deceased person, and privacy laws if they can demonstrate that the attack on the dead was an intrusion into either their family life or their private life.[72] *For that very reason, although it is not on the list of legitimate free-speech restrictions in Article 19.3 of the ICCPR, "respect for the memory of the dead" is most often subsumed under the recognized interest of "respect of the rights or reputations of others."*

From this perspective, relatives of the deceased can mobilize several defenses. One of their recurring arguments is that the dead cannot defend themselves, a circumstance that can cause pain and prompt them to sue. In the strongest case – the case in which false statements of fact about the deceased are uttered maliciously or recklessly – relatives have a strong interest in

setting the record straight and in obtaining so-called declaratory court judgments, that is, judgments that clear the name of the deceased and their own name.[73]

This urge to obtain a declaratory judgment as a form of symbolic reparation is especially pertinent when the defamed deceased have been victims of atrocity crimes. For example, in genocide denial cases, judges usually maintain that deniers harm the reputations of the dead and of surviving genocide victims because saying that a particular genocide did not take place implies that its victims and their relatives lied. In these circumstances, the relatives can convincingly argue that the attack is not solely one of disrespect for the memory of the dead, but even more so one of public safety and public order. Why? Saying or implying that a group of people in its entirety was lying amounts to inciting violence against them. In such cases, genocide denial is punishable hate speech.

The defense for memory is different when true but embarrassing statements about the deceased are revealed. Such embarrassing statements infringe the privacy interest of the relatives if they reveal something to the public which these relatives did not know or were the only ones to know. In such cases, free expression and privacy have to be balanced. If relatives can demonstrate that they suffer directly (rather than remotely) and personally (rather than merely as family members) and that the disputed statement, however true, invaded their privacy or, more generally, inflicted severe emotional distress, they have a strong claim. The claim will even be stronger in those cases where the disrespect for the dead person can be shown to have been a mere means to attack the relatives themselves. This approach is weakened, however, in cases where the only sources of information about the dead and about the emotional distress are the relatives themselves. Only objective indicators of any distress suffered will therefore make the claim stronger.

In short, the more convincingly the relatives can show that countering disrespect for the dead is an issue of "rights and reputations of others," particularly that the record has to be set straight, that they were defamed personally, that their own privacy was intruded, and that their personal safety was threatened, the stronger is their case.

The defenses for tradition

The area of tradition is more complicated but less studied. At the core of any defense for tradition lies the ability to show that a dominant or official tradition does not discriminate against other

traditions. Several human rights authorities have given guidelines on how to interpret the interest of tradition although a comprehensive approach is still lacking.[74] The UN Human Rights Committee developed a principle when it said that "[I]t is not compatible with the Covenant for a restriction [on free expression] to be enshrined in traditional ... law."[75] This is so because traditional law tends to hand over legislative control or discretion to non-legislative actors.[76]

Interestingly, the counterpart of the UN Human Rights Committee – the UN Committee on Economic, Social and Cultural Rights (the body monitoring implementation of the International Covenant on Economic, Social and Cultural Rights) – also gave some guidance, saying that it is "the State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices."[77] Later, in a General Comment on the right of everyone to take part in cultural life, it took a stand against negative cultural practices:

> Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights.[78]

Tradition and public morals have much in common because traditions are customs and practices embodying moral, religious, and cultural values. *Indeed, although tradition is not on the list of legitimate restrictions of Article 19.3 of the ICCPR, it is most often subsumed under the recognized interest of public morals.* Therefore, we should know more precisely what "public morals" or "public morality" means. The Siracusa Principles – an early attempt to clarify the limitation provisions of the ICCPR – defined "public morality" in 1985 as the "maintenance of respect for fundamental values of the community."[79] This definition connects public morals with the "fundamental values of the community" and shows that the relationship between public morals and tradition is close indeed. If we want to gain insight into tradition as a free-expression limit, we should look at the rules governing public morals.

Many think that in a field that is overwhelmingly determined by local factors such as public morals, the state has a certain margin of appreciation in determining whether a given conduct violates these morals. Toby Mendel defined this doctrine of the margin of appreciation as follows:

> The margin of appreciation is a doctrine which recognizes the idea that States should be allocated some degree of latitude in how they choose to restrict freedom of expression, taking into account their culture, history and legal system.[80]

For example, states can claim a broader margin of appreciation in applying limits to free expression than usual when they pass through a period of transition to democracy because such a transition makes for an exceptional historical context.[81] International bodies, however, have differed in their attitude toward the margin of appreciation. In particular, the UN Human Rights Committee has been far more reluctant to recognize such a margin than the European Court of Human Rights.[82] Where it exists at all, principles govern the application of the doctrine. In 1985 the Siracusa Principles stated:

> Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.[83]

Perhaps this formulation leaves too much room for officials tempted to "demonstrate" that a measure was "essential." The classical tension between the historical approach and the natural-law approach of human rights emerges here: while sensitivity to historical factors at play in domestic contexts of states as seen in the doctrine of the margin of appreciation should be welcomed, it can never serve to diminish the state duty mentioned in Article 2 of the ICCPR, namely that each state undertakes to respect and ensure all human rights.[84] At the same time, one cannot be but struck in this discussion by the irony that traditions that are historically flexible pose as timeless while the historically rather inflexible human rights philosophy requires traditions to be flexible and to adapt in order to ensure compliance with human rights standards.

In 1993, the UN Human Rights Committee took a practical step when it observed that:

> [T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations … for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.[85]

We see that the UN Human Rights Committee is concerned that the non-discrimination principle is violated if a single tradition has a monopoly. A limit to free expression in the name of morals, therefore, must be accepted in at least two traditions.

Displaying a similar caution, the Joint Free-Expression Rapporteurs in 2014 drew further conclusions directly relevant to the study of history:

> There is a core of freedom of expression in relation to which States have either no power or extremely limited power to adapt restrictions to take into account local traditions, culture and values, which particularly includes political speech, broadly defined … Certain types of legal restrictions on freedom of expression can never be justified by reference to local traditions, culture and values. Where they exist, such restrictions should be repealed and anyone who has been sanctioned under them should be fully absolved and be afforded adequate redress for the violation of their human rights. These include: … [l]aws which provide for special protection against criticism for officials, institutions, historical figures, or national or religious symbols.[86]

Technically, public morals is not the only legitimate restriction ground under which the tradition interest may emerge. It can also pop up under the interest of "rights of others" – especially if "others" is understood as "children" who are more vulnerable than others when they are exposed to "the denial of traditional family values"[87] or to "alternative traditions." In educational contexts, the protection of children has sometimes been invoked to censor views of the past that appear to defend alternative traditions in history textbooks.[88]

The conclusion must be that the invocation of tradition, whether framed as an issue of public morals or of another legitimate interest, will rarely successfully challenge the expression of opinions about the past if the international human rights framework is applied. Only with strong guarantees for the right to non-discrimination can the invocation of endangered fundamental social values in at least two traditions, successfully serve as a restriction ground.

Conclusion

I tried to find a solution for a difficult problem. From an international human rights perspective, the free expression about history can be restricted only under carefully determined circumstances and narrowly formulated conditions in the service of a few explicit purposes. Memory and tradition are *not* among these purposes and the question arises if they can ever legitimately limit the free expression about history. Some may be tempted to jump to the conclusion that memory

and tradition are unacceptable free-expression limits to history. However, I demonstrated that memory and tradition can be reframed in terms of permissible purposes with relative ease: "respect for the memory of the dead" can be rephrased as an application of "respect of the rights or reputations of others," and "protection of the tradition of the ancestors" as a form of "public morals." Others may be tempted to jump to the conclusion that memory and tradition are therefore acceptable free-expression limits to history. It is not so simple. Given the reframing options, then, under which conditions are memory and tradition acceptable or problematic restrictions for history?

I first noted that society has a strong intrinsic and instrumental interest in a robust public debate about the past in its entirety and that this interest even increases in the case of past public figures, in the case of victims of atrocity crimes, and with the passage of time. I then tried to clarify the temporal scope within which memory and tradition can limit history. The temporal scope is very long for history: its study spans all centuries, it is short for tradition: conflicts around traditions are usually regulated instantly by governments with the laws in vigor. For memory, private parties usually take the decision to litigate on account of respect for the memory of their deceased beloved ones and therefore I reasoned that this type of litigation should not extend beyond the mourning period – one to two years following the death of the person for whom disrespect is shown. It should also be shorter in cases involving absolute public figures and perhaps longer in cases involving victims of atrocity crimes.

Once the temporal scope was clarified for tradition and memory, the outcome of the balancing of the interests – history versus memory and history versus tradition – was discussed. This outcome differed according to whether the statement was a statement of opinion or a statement of fact. Mere controversial opinions about dead persons or traditions enjoy strong protection. If the statement is a controversial historical fact, those expressing it should have a series of defenses at their disposal, including the defense that they told the truth. Moreover, it should not be too burdensome to prove one's good faith. However, they incur liability if they mention facts – false or true – maliciously or recklessly. In addition, if those expressing these facts belong to the historical or medical profession, special duties apply.

If the interest of memory is subsumed under the recognized interest of "respect of the rights or reputations of others," the case is strongest if by "others" close relatives of the deceased are meant and if these can show that the record has to be set straight, that they were defamed

personally, that their own privacy was intruded, and that their personal safety was threatened. If the interest of tradition is framed as the recognized interest of "public morals," the case is strongest if it can be shown that the appeal to endangered fundamental social values rests on a firm non-discrimination principle.

In sum, litigation in the name of memory or tradition is likely to be most acceptable if it can be convincingly demonstrated that a historical statement about a deceased person was made maliciously or recklessly (thus infringing the free-expression restriction ground of "rights and reputations of others") or that the disputed alternative tradition effectively intended to endanger the core values of the wider community (thus infringing the free-expression restriction ground of "public morals"). In both cases success depends on solid proof of intent, and this is usually complicated. If the evidence is convincing, however, "memory" can indeed be seen as a guarantee for reputation and privacy, and "tradition" as a guarantee for morals. Within these strict limits, memory and tradition act as acceptable checks on how a society deals with its past. Memory and tradition then trump history. They embody the Golden Rule for the Dead: *do unto the dead as you would have others do unto you after you die.* In all other cases – the large majority – they are problematic limits: in overprotecting them, memory and tradition distort and censor talk about the past. Memory and tradition then trample history.

Notes

1 Robert Sabatier, *Dictionnaire de la mort* (Paris: Albin Michel, 1967), 276.

2 In addition, Article 20 of the International Covenant on Civil and Political Rights (ICCPR) obligates states to *prohibit* certain types of opinion – war propaganda and hate speech – by law.

3 United Nations Human Rights Committee (UNHRC), *General Comment 34* [Freedoms of opinion and expression] (2011) (UN Doc. CCPR/C/GC/34), §§ 2–3.

4 See for the restriction principles, in particular, UNHRC, *General Comment 34*, §§ 21–36; United Nations (UN) Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (UN Doc. E/CN.4/1985/4, Annex) (1985), part I (hereafter *Siracusa Principles*); *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/HRC/14/23) (2010), §§ 72–87, especially § 79. See also Toby Mendel, *Restricting Freedom of Expression: Standards and Principles* (Halifax: Centre for Law and Democracy, 2011); "Themes and

Issues," in Article 19, ed., *Information, Freedom and Censorship: World Report 1991* (London: Library Association Publishing, 1991), 409–440.

[5] See UNHRC, *General Comment 34*, § 21 ("[W]hen a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.") See also Article 5 of the ICCPR (the prohibition of abuse clause). Another rule is that the right to free expression is applicable at all times, including times of public emergency, although states may then take temporary measures enabling them to derogate from their responsibilities under strict conditions. See also Article 4.1 of the ICCPR (permissible derogations in time of public emergency) and *Siracusa Principles*, part II.

[6] I borrow the names for these principles from a former UN Special Rapporteur, Frank La Rue. See *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/HRC/17/27) (2011), § 24.

[7] See also UNHRC, *General Comment 34*, §§ 34–35.

[8] Regional instruments have similar regimes. The list of restrictions in the 1969 American Convention on Human Rights (Article 13.2) is identical to the list of the ICCPR; the list of the 1950 European Convention of Human Rights (Article 10.2) is slightly longer: "[N]ational security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." The 1981 African Charter on Human and Peoples' Rights (Article 9) does not mention any restriction, but the cognate freedom of assembly is accompanied by the following list: "[N]ational security, the safety, health, ethics and rights and freedoms of others."

[9] See Antoon De Baets, "Democracy and Historical Writing," *Historiografías / Historiographies: The Journal of History and Theory*, no. 9 (June 2015), 31–43. Italian version: Antoon De Baets, "Democrazia e scrittura della storia," *Novecento.org* (2015).

[10] Specifically, memory-related attacks are perhaps best categorized under a tort such as the intentional infliction of emotional distress.

[11] Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (London: Article 19, 2000; revised 2017), principle 18 ("non-pecuniary remedies"). On declaratory judgments, see Lisa Brown, "Dead but Not Forgotten: Proposals for Imposing Liability for Defamation of the Dead," *Texas Law Review*, 68, no. 7 (1988–1989), 1542, 1556–1557, 1562–1567.

[12] See UNHRC, *General Comment 34*, §§ 38, 47; International Mechanisms for Promoting Freedom of Expression, *Joint Declaration: Current Challenges to Media Freedom* (2000), 2; Parliamentary Assembly of the Council of Europe, *Resolution 1165 (1998) – Right to Privacy* (Strasbourg: PACE, 1998), §§ 2–3, 6–9.

[13] Antoon De Baets, *Crimes against History* (London: Routledge, 2019), 41–60 ("Public attacks of political leaders on historians.")

[14] Corinna Coors, "Headwind from Europe: The New Position of the German Courts on Personality Rights after the Judgment of the European Court of Human Rights," *German Law Journal*, 11 no. 5 (2010), 531–532, 537.

[15] See also *Von Hannover v Germany* (ECtHR Application 59320/00) (24 September 2004), §§ 72–74. Also Antoon De Baets, "A Historian's View on the Right to Be Forgotten," *International Review of Law, Computers and Technology*, 30, nos. 1−2 (March-July 2016), 57−66.

[16] UN, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (1968), Preamble and Article 1; *Geneva Conventions* (1949), Common Article 3; International Criminal Court, *Rome Statute* (1998), Article 29; UNHRC, *General Comment 20* [on the (Prohibition of Torture] (1992), §15. See also Antoon De Baets, "Historical Imprescriptibility," *Storia della Storiografia / History of Historiography*, nos. 59–60 (September 2011), 128–149.

[17] UN Commission of Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), Principles 2–5 (quote from Principle 2). See

also UN, *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), Preamble (Recital 8), Articles 8, 24(2).

[18] See also UNHRC, *General Comment 34*, §§ 9, 49; *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/HRC/4/27) (2007), § 54; European Court of Human Rights (ECtHR), *Cultural Rights in the Case-Law of the European Court of Human Rights* (Strasbourg: ECtHR, 2011; update 2017), §§ 85–88 ("Right to seek historical truth."). The following cases before the ECtHR deal with (1) the right to seek historical truth or (2) the right to contribute to a historical debate, or (3) the importance of the passage of time in evaluating free-expression limits: Case of Lehideux and Isorni v. France (Application 55/1997/839/1045) (23 September 1998), §§ 47, 55; Décision sur la recevabilité de la requête no. 56165/00 présentée par Władysław Sobanski contre la France (20 mars 2003), p. 4; Décision sur la recevabilité de la requête no. 65831/01 présentée par Roger Garaudy contre la France (24 June 2003), pp. 28–29; Case of Éditions Plon v. France (Application no. 58148/00) (18 May 2004), §§ 47, 53; Case of Chauvy and Others (Application no. 64915/01) (29 June 2004), § 69; Case of Giniewski v. France (Application no. 64016/00) (30 April 2006), § 51; Case of Mamère v. France (Application no. 12697/03) (7 November 2006), § 24; Case of Monnat v. Switzerland (Application no. 73604/01) (21 December 2006), §§ 57, 64, 68–69; Case of Hachette Filipacchi Associés v. France (Application no. 71111/01) (14 June 2007), § 47; Affaire Orban et autres v. France (Application no. 20985/05) (15 April 2009), §§ 49 , 52; Case of Times Newspapers LTD (Nos. 1 and 2) v. the United Kingdom (Applications nos. 3002/03 and 23676/03) (10 June 2009), §§ 45–48; Case of Kenedi v. Hungary (Application no. 31475/05) (26 August 2009), § 43; Case of Karsai v. Hungary (Application no. 5380/07) (1 December 2009), § 35; Case of Fatullayev v. Azerbaijan (Application no. 40984/07) (22 April 2010), § 87; Affaire Dink c. Turquie (Requêtes nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09) (14 September 2010), § 135; Case of John Anthony Mizzi v. Malta (Application no. 17320/10) (22 November 2011), § 39; Case of Putistin v. Ukraine (Application no. 16882/03) (21 November 2013), §§ 33, 36–41; Decision (Application no. 41123/10) Yevgeniy Yakovlevich Dzhugashvili v. Russia (9 December 2014), §§ 31–33; Case of Perinçek v. Switzerland (Application no. 27510/08) Grand Chamber (15 October 2015), §§ 213–220.

[19] For five examples of litigation, see the cases of (1) the late American President Warren Harding (a case about his extramarital affair) in Francis Russell, *The Shadow of Blooming Groove: Warren G. Harding in His Times* (New York and Toronto: Mc Graw-Hill, 1968), ix, 650–666, 693; Idem, "A Naughty President," *New York Review of Books* (24 June 1982), 30–34; (2) the late French writer and pilot Antoine de Saint-Exupéry (a case about suicide), in Jean-Noël Jeanneney, *Le Passé dans le prétoire: l'historien, le juge et le journaliste* (Paris: Seuil, 1998), 132–133; (3) the late Swiss Hell's Angels leader Martin Schippert (a case about criminal activities), in Schweizerisches Bundesgericht, *Sammlung der Entscheidungen des Schweizerischen Bundesgerichts, Willi Wottreng versus Präsident des Obergerichts des Kantons Zürich* (2001); European Commission for Democracy through Law (Venice Commission), *SUI-2001-3-007 (27-06-2001) 1P.510/2000: Wottreng versus the President of the Zurich Cantonal Court* (Strasbourg 2001); (4) the late Canadian businessman Paul-Hervé Desrosiers (a case about bribery and lobbying): Cour d'appel, Province de Québec, No. 500-09-006404-982 (500-05-023335-969), Pierre Turgeon et autres c. Pierre Michaud Réno-Dépôt et autres: arrêt (15 May 2003); Alexandra Steele, "Once Upon a Time, There Was a Manuscript…" (Montréal: Leger Robic Richard Lawyers, 2003); and (5) the Dutch Holocaust survivor Rosalie Bresser-Dukker (a case about the naming of names on a memorial for the dead); Rechtbank Amsterdam (Court of Amsterdam), *Kort Geding [Summary Proceedings] Uitspraak voorzieningenrechter Particulier vs. Stichting Digitaal Monument Joodse Gemeenschap* (LJN: AN9893) (KG 03/1363) (12 December 2003). The cases are described in Antoon De Baets, "La privacidad póstuma" [Posthumous Privacy], in Joan-Lluís Palos and Fernando Sánchez Costa, eds., *A vueltas con el pasado: historia, memoria y vida* (Barcelona: Publicacions i Edicions de la Universitat de Barcelona, 2013), 217–221.

[20] The custom of temporarily tabooing the names of the dead and of mourners existed in several cultures with the purpose of not disturbing the spirit of the deceased. In 1890 already, anthropologist James

Frazer observed that in some cultures the tabooing of names hampered, and even made impossible, historical knowledge, for "how can history be written without names?" See his *The Golden Bough*, volume 2, *Taboo and the Perils of the Soul* (originally 1890; London: Macmillan, 1914), 138–145 (names of mourners), 349–374 (names of the dead), 363–365 (historical knowledge). For the tabooing of names of the dead and the use of necronyms (names expressing kinship relations between persons and their deceased relatives), see also Claude Lévi-Strauss, *La Pensée sauvage* (Paris: Plon, 1962), 253–265.

[21] Article 19 has criticized the formula "desecration of memory": "Preservation and combating the desecration of the memory of the victims implies that the Soviet victims of the Second World War are entitled to a sacral public memory. By prohibiting the 'desecration' of this memory, the Draft Law turns a religious concept such as desecration into a legal one. At the same time, it does not provide a definition of desecration." See Article 19, *Memorandum on the Russian Draft Federal Law "On Combating the Rehabilitation of Nazism, Nazi Criminals or their Collaborators in the Newly Independent States Created on the Territory of Former Union of Soviet Socialist Republics"* (London: Article 19, 2009), 13.

[22] For the definition of reputation, see Article 19, *Defining Defamation*; Article 19, *Rights vs Reputations: Campaign against the Abuse of Defamation and Insult Laws* (London: Article 19, 2003); Article 19, *Defamation ABC: A Simple Introduction to Key Concepts of Defamation Law* (London: Article 19, 2006); International Federation of Journalists, *Decriminalising Defamation: An IFJ Campaign Resource for Defeating Criminal Defamation* (Brussels: IFJ, 2005).

[23] Sometimes other concepts, in particular the dignity and honor of deceased persons, are used. While dignity and honor are applicable to living persons, it is deeply controversial whether they are applicable to the dead also. To begin with, the dead cannot possess human dignity (because they are not human beings) although we could still maintain that they possess a cognate sort of dignity, namely posthumous dignity. If honor is a person's self-esteem, then the dead are incapable of having honor. In contrast, the dead can have a reputation as long as this is not interpreted as a right of the deceased but rather as a characteristic. The reason why the dead have a reputation (but not honor nor human dignity) is that reputation is attributed to them by others, and these others belong to the living. See also Antoon De Baets, "A Successful Utopia: The Doctrine of Human Dignity," *Historein: A Review of the Past and Other Stories* (Athens), no. 7 (2007), 71–85, and Antoon De Baets, *Responsible History* (New York and Oxford: Berghahn, 2009), 124–126.

[24] As memory and reputation are personality aspects of dead individuals, non-personality aspects such as those related to dead bodies (including their identification, funeral, and disposal) or to the estate of the dead (including last wills and commercial aspects flowing from posthumous copyright and posthumous publicity) fall outside my scope unless there is a clear relationship to the personality aspect. Examples of such a relationship are photographs of corpses shown to illustrate an assassination, or a last will specifying the destruction of the deceased person's papers; these relationships are relevant because they help determine the availability of sources about the past and therefore affect the interest of free expression about the past. See De Baets, *Responsible History*, 121–133 (on pages 134–137, I also provide a list of sixty moral and legal wrongs to the dead). See also Brown, "Dead but Not Forgotten," 1549–1556, 1560–1562 ("compensating pecuniary loss").

[25] See also Venice Commission, *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased* (Strasbourg: Venice Commission, 12–13 December 2014), §§ 26–37.

[26] I developed this point at length (including a discussion of the definition of "the dead"), in De Baets, *Responsible History*, 111–143 ("Duties of the Living to the Dead").

[27] See also John Neuenschwander, *A Guide to Oral History and the Law* (Oxford: Oxford University Press, 2009), 36, 59–60; Raymond Iryami, "Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes," *Fordham Intellectual Property, Media and Entertainment Law Journal*, 9 (Spring 1999), 1097–1099.

[28] (1) Worldwide surveys between 2000 and 2010 (mentioning 24 states in total with provisions for defamation of the dead): Ruth Walden, *Insult Laws: An Insult to Press Freedom* (Reston VA: World Press Freedom Committee, 2000); Marilyn Greene, ed., *It's a Crime: How Insult Laws Stifle Press Freedom* (Reston VA: World Press Freedom Committee, 2006); Carolyn Wendell, *The Right to Offend, Shock or Disturb: A Guide to Evolution of Insult Laws in 2007 and 2008* (Reston VA: World Press Freedom Committee, 2009); Uta Melzer, *Insult Laws: In Contempt of Justice – A Guide to Evolution of Insult Laws in 2009* (Reston VA: World Press Freedom Committee, 2010); Patti McCracken, *Insult Laws: Insulting to Press Freedom – A Guide to Evolution of Insult Laws in 2010* (Washington DC: Freedom House, and Paris: World Press Freedom Committee, 2012). See also Venice Commission, *Amicus Curiae Brief*, §§ 38–50.
(2) Three Council of Europe surveys (mentioning 12 CoE member states in total with provisions for defamation of the dead): Council of Europe, *Defamation and Freedom of Expression: Selected Documents* (Strasbourg: CoE, 2003); Council of Europe, *Examination of the Alignment of the Laws on Defamation with the Relevant Case-Law of the European Court of Human Rights, Including the Issue of Decriminalisation of Defamation* (Strasbourg: CoE, 2006); Council of Europe, *Study on the Alignment of Laws and Practices concerning Defamation with the Relevant Case-Law of the European Court of Human Rights on Freedom of Expression, Particularly with Regard to the Principle of Proportionality* (Strasbourg: CoE, 2012).
(3) A European survey (mentioning 17 European Union member states with provisions for defamation of the dead): International Press Institute, *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom – An Overview for Journalists, Civil Society and Policymakers* (Vienna: IPI, 2014).
(4) A survey of the Organization for Security and Co-operation in Europe (mentioning 30 OSCE member states with provisions for defamation of the dead): Scott Griffen, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (Vienna: OSCE, 2017).
(5) An African survey (mentioning 3 African states with provisions for defamation of the dead): PEN, *Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa* (London: PEN, 2017).
(6) A Pan-American survey (mentioning 5 American states with provisions for defamation of the dead): Committee to Protect Journalists and Thomson Reuters Foundation, *Critics Are not Criminals: Comparative Study of Criminal Defamation Laws in the Americas* (London: Thomson Reuters Foundation, 2016).
(7) A United States survey (mentioning ten states in the USA with provisions for defamation of the dead): Anti-Defamation Legacy Law Advocates, "Criminal Statues Regarding Defamation of the Deceased" (2013).
(8) For in-depth analyses, see, among others, John Gilissen, "La Responsabilité civile et pénale de l'historien," *Revue belge de philologie et d'histoire,* 38 (1960), 295–329 and 1005–1039, here 304, 321–329 ("Respect dû à la mémoire des morts") [for France and Belgium in 1800–1960], and Thomas Hochmann, "Les Limites à la liberté de l'historien en France et en Allemagne," *Droit et Société*, nos. 69–70 (2008), 527–548 [for France and Germany]. For France alone, more in-depth analyses exist.

[29] For analysis, see De Baets, *Crimes against History*, 135–136, 169–171.

[30] Antoon De Baets. "Laws Governing the Historian's Free Expression," in Berber Bevernage and Nico Wouters, eds., *The Palgrave Handbook of State-Sponsored History After 1945* (London: Palgrave-MacMillan, 2018), 56–62 ("Hate speech laws and genocide denial laws."). Spanish: Antoon De Baets, "Leyes que rigen la libertad de expresión del historiador: una visión comparativa en el mundo contemporáneo," *Procesos: Revista Ecuatoriana de Historia*, no. 49 (January–June 2019), 133–170.

[31] In Case of Putistin v. Ukraine, §§ 33, 38, 40, the ECtHR could "accept … that the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity," although in the instant case only indirectly, remotely, and marginally. See also Decision Dzhugashvili v. Russia, §§ 26–37 (taking into account the public figure principle); Decision (Application no. 47318/07) Marta Jelševar and Others against Slovenia (11 March 2014), § 37; Case of Perinçek v. Switzerland, §§ 200−203; see also §§ 155–157.

[32] See, for example, Case of Éditions Plon v. France, § 47: "[T]he legally delicate issue of whether the right to bring an action relating to a prohibition on disclosing information was vested only in the living." Or see United States Supreme Court, National Archives and Records Administration v. Favish, 541 U.S. 157 (2004), Opinion (delivered by Justice Kennedy), quoting Schuyler v. Curtis, 147 N. Y. 434, 447, 42 N. E. 22, 25 (1895): "It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased."

[33] There is, of course, also the other scenario of estranged relatives who disclose unwelcome or embarrassing information about the deceased.

[34] De Baets, *Responsible History*, 80.

[35] Dafna Eylon and Scott Allison, "The 'Frozen in Time' Effect in Evaluations of the Dead," *Personality and Social Psychology Bulletin,* 31 no. 12 (December 2005), 1708–1717; Kenneth Craik, *Reputation: A Network Interpretation* (Oxford: Oxford University Press, 2009), 177. Also, some defamation cases are started when the deceased were still alive and continued afterward by their relatives.

[36] The International Criminal Court has recently discussed the issue of transgenerational harm in The Prosecutor v. Germain Katanga (Trial Chamber II) (No. ICC-01/04-01/07) (24 March 2017), §§ 132–134, 343; The Prosecutor v. Germain Katanga (Appeals Chamber) (No. ICC-01/04-01/07 A3 A4 A5) (8 March 2018), §§ 16, 20, 221–260; The Prosecutor v. Germain Katanga (Trial Chamber II) (No. ICC-01/04-01/07-3804-Red) (19 July 2018) [Public Redacted Version of Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018], §§ 1–144.

[37] For the argument, see Ernest Partridge, "Posthumous Interests and Posthumous Respect," *Ethics*, 91, no. 2 (January 1981), 259–261.

[38] My first attempt to deal with traditions from a human rights perspective can be found in Antoon De Baets, "The United Nations Human Rights Committee's View of the Past," in Uladzislau Belavusau and Aleksandra Gliszczyńska, eds., *Law and Memory: Towards Legal Governance of History* (Cambridge: Cambridge University Press, 2017), 39–40.

[39] Gilbert Chesterton, *Orthodoxy* (London and Beccles: Clowes and Sons, 1908), chapter 4.

[40] See also De Baets, *Responsible History*, 147–150 (discussing the notions of "a debt of gratitude to the ancestors" and "the need to restore the dignity of dead victims.")

[41] Among the literature, see Edward Shils, *Tradition* (London and Boston: Faber & Faber, 1981); Jörn Rüsen, "Tradition: A Principle of Historical Sense-Generation and Its Logic and Effect in Historical Culture," *History and Theory*, 51, no. 4 (December 2012), 45– 59; Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983).

[42] As far as I know, of all the human rights instruments only the 1981 African Charter on Human and Peoples' Rights mentions traditional values (in its Article 17.3): "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

[43] See, for example: "List of Customary Rules of International Humanitarian Law," Annex to Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law," *International Review of the Red Cross*, 87, no. 857 (March 2005), 198–212.

[44] See the campaign against Western values in China: Ethan Kleinberg, "Introduction: The 'Trojan Horse' of Tradition," *History and Theory*, 51, no. 4 (December 2012), 1–5; Chris Buckley, "China Takes Aim at Western Ideas," *New York Times* (19 August 2013); Laura He, "China Probes College Textbooks for 'Western Values'," *Market Watch* (17 March 2015); Linda Yeung, "Campus Crackdown on 'Western Values'," *University World News* (6 February 2015).

[45] UN Human Rights Council, *Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices* (UN Doc. A/HRC/21/L.2) (21 September 2012); UN Human Rights Council, *Study of the Human Rights Council Advisory Committee*

on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind (UN Doc. A/HRC/22/71) (6 December 2012); Office of the UN High Commissioner for Human Rights, *Summary of Information from States Members of the United Nations and Other Relevant Stakeholders on Best Practices in the Application of Traditional Values while Promoting and Protecting Human Rights and Upholding Human Dignity* (UN Doc. A/HRC/24/22) (17 June 2013); Graeme Reid, "'Traditional Values' Code for Human Rights Abuse?" (New York: HRW, 17 October 2012); Graeme Reid, "The Trouble with Tradition: When 'Values' Trample over Rights," in Human Rights Watch, *World Report 2013* (Washington: HRW, 2013), 20–28; Article 19, *Traditional Values? Attempts to Censor Sexuality* (London: Article 19, 2013).

[46] Other human rights such as peaceful assembly, democratic participation, and non-discrimination can also be jeopardized.

[47] Article 19, *Traditional Values?* 8. See also *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. A/HRC/14/23) (2010), § 29: "This freedom [of expression] extends to mass demonstrations of various kinds, including the public expression of spiritual or religious beliefs or of cultural values. It is also a right of different peoples, who, by virtue of the effective exercise of this right, may develop, raise awareness of, and propagate their culture, language, traditions and values."

[48] See the remarks in De Baets, *Responsible History*, 141–143 ("Universality: do the living have duties to all of the dead?").

[49] International Press Institute, *Out of Balance*, 22. Legally, time bars are called statutes of limitation.

[50] See De Baets, "La privacidad póstuma," 226–230 (discussing the duration of posthumous privacy). See for a variety of estimates (some rather confusing): Gilissen, "La Responsabilité," 304, 325; Brown, "Dead but Not Forgotten," 1565; Stephen Lock, "A Question of Confidence: An Editor's View," *British Medical Journal* (14 January 1984), 123–125; Irvine Loudon, "How It Strikes a Historian," *British Medical Journal* (14 January 1984), 125–126; Jean-Denis Bredin, "Le Droit, le juge et l'historien," *Le Débat*, no. 32 (November 1984), 98; Howarth Glennys and Oliver Leaman, eds., *Encyclopedia of Death and Dying* (London: Routledge, 2001), 272–276; Jessica Berg, "Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality," *Connecticut Law Review*, 34, no. 1 (Fall 2001), 110–111; Hannes Rösler, "Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law," *Berkeley Journal of International Law*, 26, no. 1 (2008), 182–183, also 203; Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge: Cambridge University Press, 2008), 41, 84–87, 236–237, 245–246; Craik, *Reputation*, 174, also 179, 184; Kirsten Rabe Smolensky, "Rights of the Dead," *Arizona Legal Studies Discussion Paper No. 06–27* (March 2009), 23; Mary Donnelly and Maeve McDonagh, "Keeping the Secrets of the Dead? An Evaluation of the Statutory Framework for Access to Information about Deceased Persons," *Legal Studies*, 31 no. 1 (2010), 8, 29. See also Bo Zhao, "Legal Cases on Posthumous Reputation and Posthumous Privacy: History Censorship, Law, Politics and Culture," *Syracuse Journal of International Law and Commerce*, 42, no. 1 (Fall 2014), 39–122.

[51] There is some circumstancial support for the view that close relatives should not be granted an opportunity to sue on behalf of their deceased family members. In contrast to its 1995 predecessor, the 2016 General Data Protection Regulation of the European Union explicitly states that it is not applicable to personal data of deceased persons. *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC* (General Data Protection Regulation) (2016), Considerations 27, 158, 160.1. In general we can say that the relevance of personal data of deceased private figures is low with two major exceptions: when they are the subject of a biography and when the evaluation of what is illuminating, typical and exceptional for an epoch or a milieu changes over time. In the latter case, previously trivial details may become gems. And historical scholarship has changed exactly in this sense over the last decades: there has been an explosive interest in the lives of private figures, perceived as groups as well as individually – despite the obvious heuristic difficulties. This is true for deceased private figures, but

not for deceased public figures. In general we can say that the relevance of personal data of deceased public figures remains high, at least in principle.

[52] Also Brown, "Dead but Not Forgotten," 1537–1542.

[53] Robert Hertz, "A Contribution to the Study of the Collective Representation of Death," in Idem, *Death and the Right Hand* (originally French 1907; London: Cohen & West, 1960), 31–32, also 43, 44, 52, 118n18.

[54] Gérard Vincent, "A History of Secrets," in Antoine Prost and Gérard Vincent, eds., *A History of Private Life*, volume 5, *Riddles of Identity in Modern Times* (originally French 1987; Harvard, MA: Harvard University Press, 1991), 265, 267.

[55] For the right to mourn, see the discussion in De Baets, "The United Nations Human Rights Committee's View of the Past," 35–37 ("The right to mourn.")

[56] Brown, "Dead but Not Forgotten," 1542n91.

[57] Clay Calvert, "The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture," *Loyola of Los Angeles Entertainment Law Review*, 26 (2006), 166, and Rösler, "Dignitarian Posthumous Personality Rights," 182, have proposed criteria but without supplying any corroborating evidence.

[58] Case of Éditions Plon v. France, § 53. The *Mephisto* case in Germany was similar. Court decisions between 1963 and 1971 granted an injunction prohibiting publication of Klaus Mann's satirical novel *Mephisto* about the late Gustaf Gründgens (a famous actor and theater director). In 1971, the Bundesverfassungsgericht [Federal Constitutional Court] held that the dignity of the deceased superseded the publisher's right to free expression and society's right to receive a creative work. It made the (remarkable and, in my opinion, contradictory more than once) statement that "It would be inconsistent with … the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and denigrated after his death. Accordingly an individual's death does not put an end to the state's duty … to protect him from assaults on his human dignity … However, the right of personality cannot survive death." According to the Court, however, the duty to respect Gründgens's dignity diminished as the latter's public memory faded. Consequently, when the novel was republished in 1981, no litigation followed. See Federal Constitutional Court, First Division, BVerfGE 30, 173 (24 February 1971). See also Rösler, "Dignitarian Posthumous Personality Rights," 154–155, 175–180.

[59] De Baets. "Laws Governing the Historian's Free Expression," 59–62 ("Genocide denial laws.")

[60] In cases of enforced disappearances, it only becomes gradually clear that (most of) the disappeared have died. The UN Human Rights Committee has called this a *continuing crime* beginning with the kidnapping and ongoing until the kidnapping is resolved, that is, until certainty about reappearance or death is acquired. Although the mourning process often starts before that moment of certainty, the period for litigation should arguably continue for at least two years after it, not the least because investigation into enforced disappearances is often blocked for years as they typically occur in contexts of repression and secrecy.

[61] Article 19, *Defamation ABC*, 19; Scottish Government (Civil Law Division), *Death of a Good Name: Defamation and the Deceased: A Consultation Paper* (Edinburgh: Scottish Government, 2011), § 25.

[62] For the distinction between facts and opinions, see UNHRC, *General Comment 34*, §§ 9, 47; Venice Commission, *Amicus Curiae Brief*, § 24; Article 19, *Defining Defamation*, principles 10 ("proof of substantial truth") and 13 ("expressions of opinion"); Joel Feinberg, "Limits to the Free Expression of Opinion," in Joel Feinberg and Hyman Gross, eds., *Philosophy of Law* (Encino, CA, and Belmont, CA: Dickenson, 1975), 138–139; Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1982), 18, 31–32, 169; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (second edition; Kehl am Rhein, etc.: Engel, 2005), 305–306; Eric Barendt, *Freedom of Speech* (second ed.; Oxford: Oxford University Press, 2005), 216–217, 222–223, Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World* (London: Atlantic Books, 2016), 195, 199–203, and many others.

[63] UNHRC, *General Comment 34*, § 49.

[64] Article 19, *Defining Defamation*, 21.

[65] In France, legal proof for facts older than ten years was excluded from 1881 until 2011 because the legislator wanted to avoid that the events behind "old" facts could be questioned without time limit. This section of Article 35 of the Loi du 29 juillet 1881 sur la liberté de la presse was abolished on 21 May 2011. See for the successive versions of the law: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119&dateTexte=20190306. See also Hochmann, "Les Limites," 535–536.

[66] Schauer, *Free Speech*, 174, 176–177.

[67] *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (UN Doc. E/CN.4/2000/63) (18 January 2000), §§ 51–52.

[68] "Malicious" means "with the aim of deceiving either to harm or obtain an unfair advantage," "reckless" means "with disregard for the truth (without any regard for verifiable information)." Strictly speaking, a "false fact" is not a fact at all but a claim that poses as a fact and, therefore, a contradiction in terms. See also my "Intent-based theory of falsehood," in De Baets, *Crimes against History*, 77–78.

[69] See UNHRC, *Ross v Canada* (736/1997) (2000), § 11.6: "[T]he Committee recalls that the exercise of … freedom of expression carries with it special duties and responsibilities. These … are of particular relevance within the school system, especially with regard to the teaching of young students … [T]he influence exerted by school teachers may justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory." See also ECtHR, Décision sur la recevabilité de la requête no. 57383/00 présentée par Jacques Seurot contre la France (18 May 2004), pp. 8–9; Décision sur la recevabilité de la requête no. 48135/08 présentée par Bruno Gollnisch contre la France (7 June 2011), pp. 12, 14.

[70] De Baets, *Crimes*, 81–82 ("Fake news and genocide denial.")

[71] Respect for medical data of the dead is incorporated in World Medical Association, *Declaration of Geneva* (Geneva: WMA, 1948, 2006). This Declaration is often called the "Modern Hippocratic Oath." The fifth consideration states: "I will respect the secrets that are confided in me, even after the patient has died."

[72] Alongside defamation and privacy laws, there are special laws, such as memory laws, genocide denial laws, and hate speech laws. See De Baets. "Laws Governing the Historian's Free Expression." A special category are insult laws: they are related to defamation laws but protect feelings of honor and dignity rather than reputations. Although widely available, they are problematic because whether someone's honor or dignity has been hurt by a remark cannot be proven by external factors – the only evidence available is the individual's own statement as to his or her feelings. By contrast, it is possible to prove damage to someone's reputation through the test of the "reasonable person" (a hypothetical person who exercises average care) or through external factors (e.g., by showing the loss of friends by producing angry letters from them). Therefore, the legal basis for insult laws is weak. See Article 19, *Defamation ABC*, 5; De Baets. "Laws Governing the Historian's Free Expression," 47–49.

[73] Brown, "Dead but Not Forgotten," 1556–1557, 1562–1566 ("Setting the record straight.")

[74] In article 5.2, the ICCPR itself contains a saving clause which stipulates that domestic customs cannot restrict human rights on the pretext that the ICCPR recognizes them to a lesser extent: in case domestic and international norms conflict, individuals are entitled to rely on the norms most favorable to them. See Nowak, *UN Covenant on Civil and Political Rights*, 117–119.

[75] UNHRC, *General Comment 34*, § 24, also § 32. See also *Joint Declaration on Universality and the Right to Freedom of Expression* (2014), §§ 1b, 1f.

[76] Toby Mendel (Centre for Law and Democracy), personal communication (2017). In addition, many laws that ban alternative traditions fail the principles of predictability and transparency. Article 19, *Traditional Values?* 23–24.

[77] UN Committee on Economic, Social and Cultural Rights, *General Comment 16* [The equal right of men and women] (E/C.12/2005/4) (2005), § 36; see also §§ 5, 31.

[78] UN Committee on Economic, Social and Cultural Rights, *General Comment 21* [Taking part in cultural life] (UN Doc. E/C.12/GC/21) (2009), § 19, also §§ 25, 64 (giving as examples female genital mutilation and allegations of the practice of witchcraft). The right to take part in cultural life is

expressed in Article 15.1 of the International Covenant on Economic, Social and Cultural Rights. See also Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline* (Brussels: EU 2014), Annex I / A, p. 16: "Abusive invocation of public morals, national security or protection of 'national values': International human rights law does not permit placing restrictions on the exercise of freedom of expression, solely in order to protect notions such as religions, cultures, schools of thought, ideologies or political doctrines. Some states invoke public morals in an abusive manner and as a means of curtailing the right to freedom of expression."

[79] *Siracusa Principles*, § 27.

[80] Toby Mendel, *Freedom of Expression for Parliaments and Their Members: Importance and Scope of Protection* (Handbook for Parliamentarians No. 28) (Geneva: Interparliamentary Union, 2018), 38.

[81] Dominic McGoldrick, "A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee," *International and Comparative Law Quarterly*, 65 (January 2016), 25, also 28. See the discussion by the ECtHR: Case of Vajnai v. Hungary (Application no. 33629/06) (8 July 2008), §§ 48–49.

[82] UNHRC, *General Comment 34*, § 36; McGoldrick, "A Defence."

[83] *Siracusa Principles*, §§ 27–28.

[84] See also McGoldrick, "A Defence," 53, and Jean-François Flauss, "L'Histoire dans la jurisprudence de la cour européenne des droits de l'homme," *Revue trimestrielle des droits de l'homme,* no. 65 (2006), 14.

[85] UNHRC, *General Comment 34*, § 32. See also UNHRC, *General Comment 22* [Freedom of thought] (UN Doc. CCPR/C/21/Rev.1/Add.4) (1993), § 8; UNHRC, *General Comment 28* [Equality of rights between men and women] (UN Doc. HRI/GEN/1/Rev.9 [Vol. I]) (2000), § 5.

[86] *Joint Declaration*, 2014, §§ 1e–f. See also Parliamentary Assembly of the Council of Europe, *Recommendation 1897 (2010) – "Respect for Media Freedom*" (Strasbourg: PACE, 2010), § 8: "The reputation of a nation, the military, historic figures or a religion cannot and must not be protected by defamation or insult laws." See also Article 19, *Defining Defamation*, principles 2 and 3.

[87] See, for a Russian example, Amnesty International, *Laws Designed to Silence: The Global Crackdown on Civil Society Organizations* (London: AI, 2019), 30, 37, 42, and Nikolay Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia* (Cambridge: Cambridge University Press, 2018), 279–280.

[88] In Argentina, the junta in 1976 denounced Uruguayan writer Eduardo Galeano's 1971 book *Open Veins of Latin America: Five Centuries of the Pillage of a Continent* on television and in the press as a "corrupter of youth." See De Baets, *Crimes against History*, 44–45.