
The United Nations Human Rights Committee's View of the Past

ANTOON DE BAETS

1 Introduction

The year 2016 marked the fiftieth anniversary of one of world's most important human rights treaties, the International Covenant on Civil and Political Rights.¹ The Covenant was unanimously adopted in 1966 and entered into force in 1976. At the latter occasion, an Optional Protocol regulating a complaints procedure was established: individuals were given the opportunity to submit complaints to the United Nations, on the condition that they were related to one of the human rights stipulated in the Covenant.² As of 2016, this complaint procedure had yielded around 2,500 complaints – an average of fifty a year. Complaints are admissible only if they come from individuals, if all domestic remedies have been exhausted, and if the state against which the complaint is directed has ratified both the Covenant and the Protocol.³

The complaints are brought before the United Nations Human Rights Committee, an international body of eighteen independent human rights experts. Although its views on individual cases are not legally binding, the Committee is the most authoritative interpreter of the Covenant, which itself is legally binding. In addition, it publishes guidelines to interpret the Covenant in the form of *General Comments*, as well as reports on the follow-up that states give to its views. Over the years, the complaints procedure has become one of the most important instruments for human

¹ This chapter was presented as a paper at conferences on truth commissions in Hanover, Germany (2015) and law and memory in Amsterdam, the Netherlands (2016). All websites mentioned in this chapter were last visited on 20 June 2017.

² The *substantial* human rights are Articles 6–27 of the International Covenant on Civil and Political Rights (ICCPR).

³ Technically, complaints are 'communications'; complainants are 'authors'; and the decisions of the Human Rights Committee (HRC) are 'views'. The case citation structure in the notes is: *Author versus country* (number/year of communication) year of adoption of views.

rights protection in the world, and many of the Committee's views have resonated widely.

The complaints archive of the United Nations is publicly accessible in its entirety.⁴ For historians, one subset of the archive is particularly intriguing; namely the grievances that citizens have filed concerning past wrongs. They prompt several questions: What historical issues has the Committee dealt with? How has it handled questions of time, memory, and history? Finally, in handling them, are there any discernable patterns? A specific factor points in the direction of patterns: the Covenant rights and the Protocol rules themselves impose a rather strict logic and unity. But other factors point in the opposite direction. First, it is not part of the Committee's mission to develop a consistent philosophy of time, memory, and history.⁵ When complaints regarding the fate of imprisoned or tortured historians were submitted to the Committee, for example, the fact that the victims were historians was irrelevant; it simply viewed them as citizens who were victims.⁶ Second, the Committee is not expressly bound by any doctrine of precedent. Finally, individual Committee members serve for two years and are allowed to express separate opinions.

One might ask: Does this dispel the hope to discover any such patterns? This is what I attempt to unravel here. I selected the 108 most relevant cases via a keyword search in the complaints archive and studied them, together with the Covenant and the *General Comments*.⁷ I then analysed the various memory and history issues they raised in order to identify the Committee's view of the past. The table on next page provides a compass with which to follow this analysis.

2 View of Time

Before we can analyse the Committee's views of memory and history, we need to investigate the substratum for these views, that is, the way in which

⁴ See tinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=17.

⁵ Compare A. De Baets, 'The Impact of the Universal Declaration of Human Rights on the Study of History', *History and Theory* 48:1 (2009), 21–3 (discussing the Declaration's general view of history).

⁶ Remarkably, all relevant cases came from Uruguay when it was still a dictatorship; the HRC invariably tried to protect these historians: *Landinelli Silva v. Uruguay* (34/1978) 1981; *Martínez Machado v. Uruguay* (83/1981) 1984; *Conteris v. Uruguay* (139/1983) 1990; *Cariboni v. Uruguay* (159/1983) 1990.

⁷ I also consulted numerous HRC *Concluding Observations* based on its consideration of periodic country reports.

The United Nations Human Rights Committee's view of the past (1976–2015)

View of time (as a substratum)	View of memory (as a right)
T1 <i>Time-collapsing factors:</i> Rules of <i>ratione temporis</i> and non-retroactivity; rule of personal, not broad historical, claims; rule not to reassess historical evidence	M1 Right to mourn M2 Right to commemorate M3 Right, no duty, to remember M4 No memory laws banning historical views M5 Tradition not a limit to free expression
T2 <i>Time-expanding factors:</i> Principle of heirs; principle of state succession; principle of continuing violations; principle of imprescriptibility; principle of legality; view of past generations and ancestors; view of past eras	View of history (as a right) H1 Right to the truth about the past H2 Right to information about the past H3 State's duty to investigate past crimes View of history (as a craft) H4 Protection of historical opinions H5 Right to err H6 Principles of objectivity, neutrality, non-discrimination in history education H7 Principle of honesty in historical research

the Committee's work is influenced by its view of time. This is in itself a complex matter as it involves several factors that shrink the time scope of the Committee, and countervailing factors that expand it.

(T1) Although there is no time limit to submit complaints, the Committee's grasp of time is structurally limited by several Protocol rules. The most important is the rule of *ratione temporis* (by reason of time): the complaint must relate to an event that occurred after the relevant state ratified the Protocol. This rule is an application of the fundamental principle of non-retroactivity, which stipulates that laws and treaties cannot be imposed retroactively. It implies, above all, that an act cannot be a crime if no pre-existing law prohibited it (*nullum crimen sine lege*, no crime without

a prior law; Article 15 of the Covenant).⁸ Another rule stipulates that the complaints procedure is designed for individuals claiming themselves to be victims of a violation. This means that an *actio popularis* (a complaint in the public interest) or a challenge of legal provisions deemed to be contrary to the Covenant *in the abstract* is not admissible. It is not allowed, for example, to submit broad historical claims involving Article 1 of the Covenant (the right to self-determination, which is a collective right). The purpose of the complaints procedure is to adjudicate concrete individual violations, not to redress all the injustices of history.⁹ This rule is partly the reason why the Committee's use of historical concepts is rather rare. In one case about indigenous peoples, it adopted a notion of 'historical inequity', but this was exceptional.¹⁰ Bound by the strict Protocol rules, it could not and did not go much further in developing a historical vocabulary. A third rule prescribes that the Committee cannot mount fact-finding operations itself. It depends on the parties (the authors and the state) for its information. As it is not a court of last instance, it does not generally re-assess findings of fact by domestic courts, even when the latter are based on contested historical records.¹¹ These rules have severely restricted the temporal scope of the Committee.

(T2) In other inventive ways, however, the Committee has been capable of enlarging its horizon. To begin with, two readings of the *ratione temporis* rule can push the time limit forward into the future. The first provides that if authors die during a proceeding, their heirs can continue the case.¹² The second applies the principle of state succession, which stipulates that successor governments are held to the obligations of their predecessors. This is justified because human rights belong to the people and compliance with them is not affected by regime change, including dismemberment into more than one state. The Committee applied this principle after the break-up of the USSR and Yugoslavia, for example.¹³ A third principle – crucial for our

⁸ For examples, see *Julian and Drake v. New Zealand* (601/1994) 1997; *Sankara v. Burkina Faso* (1159/2003) 2006.

⁹ For examples, see *AD v. Canada* (78/1980) 1984; *Marshall v. Canada* (205/1986); *EP v. Colombia* (318/1988) 1990; *Gorji-Dinka v. Cameroon* (1134/2002) 2005; *Azouz v. Algeria* (1798/2008) 2013.

¹⁰ *Lubicon Lake Band [Ominayak] v. Canada* (167/1984) 1990.

¹¹ For examples, see *Jonassen v. Norway* (942/2000) 2002; *Howard v. Canada* (879/1999) 2005.

¹² For examples, see *Des Fours Walderode v. Czech Republic* (747/1997) 2001; *Sanlés v. Spain* (1024/2001) 2004; *Anton v. Algeria* (1424/2005) 2006.

¹³ S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 2013), 908–9.

purposes – prescribes that a complaint is admissible when the violation it refers to started before ratification of the Protocol but continued, or had effects which themselves constituted violations, after that date. This is called the ‘principle of continuing violations.’ The Committee defines ‘continuing’ as an affirmation, after the entry into force of the Protocol, by act or by clear implication, of previous violations by the state party. This principle has been of paramount importance in several domains, but perhaps most important in cases of enforced disappearances.¹⁴

Notably, two fundamental time principles with a strong potential to expand the Committee’s temporal perspective have not played a significant role. The first is the imprescriptibility principle, stipulating that international crimes such as genocide, crimes against humanity, war crimes, slavery, torture, and enforced disappearance are exempted from time bars. These crimes are imprescriptible for as long as their perpetrators live, as long as they can be prosecuted, as long as their victims or their immediate descendants survive, and as long as they can be judicially investigated. The scale on which these crimes occur, however, generally exceeds the individual level (except for cases of torture and disappearance), which probably explains why the principle has only played a minor role in a system exclusively focusing on individual complaints. When the Committee has noted it, it has done so implicitly and indirectly. The second principle that is not frequently invoked is the legality principle, according to which (among others), the term ‘pre-existing law’ refers not only to domestic and statutory criminal law, but also to criminal law, which is international and customary. Article 15.2 of the Covenant stipulates that an act or omission is criminal when ‘at the time when it was committed, it was criminal according to the general principles of law recognized by the community of nations.’ This formula reflects the natural law basis of human rights.¹⁵ It highlights the awareness that some acts have long been generally considered criminal and that any national written criminal law to the contrary

¹⁴ For applications of the principle in cases of indigenous peoples, confiscation, and enforced disappearance, see *Lovelace v. Canada* (24/1977) 1981; *SE v. Argentina* (275/1988) 1990; *RAVN v. Argentina* (343/1988, 344/1988, 345/1988) 1990; *Aduayom v. Togo* (422/1990, 423/1990, 424/1990) 1996; *Simunek v. Czech Republic* (516/1992) 1995; *Könye v. Hungary* (520/1992) 1994; *EK and AK v. Hungary* (520/1992) 1994; *Bousroual v. Algeria* (992/2001) 2006; *Yurich v. Chile* (1078/2002) 2005; *Cifuentes v. Chile* (1536/2006) 2009; *Yusupova v. Russia* (2036/2011) 2015.

¹⁵ The natural law conception of the legality principle can be traced back to at least 1789 (the Alien Tort Statute). See A. De Baets, ‘Historical Imprescriptibility’, *Storia della Storiografia* 59–60 (2011), 128–49.

cannot change this. The invocation of Article 15.2, however, has not played an important role before the Committee.¹⁶

Up until this point, I have referred to rules and principles which determine the time framework within which the Committee operates. Yet some complaints have elicited views from the Committee which also laid bare something about its time conception. Once, for example, the Committee paid explicit attention to the concepts of ancestors and past generations in its views.¹⁷ In *Hopu and Bessert v. France* [1997], the term ‘family’ was given an extraordinarily broad interpretation by taking into account tradition when defining it.¹⁸ The authors, two ethnic Polynesian inhabitants of Tahiti (an overseas possession of France), complained in 1993 that a hotel complex had been constructed on the burial grounds of their ancestors. They failed, however, to establish a family or kinship link between the remains found in these burial grounds and themselves. Forensic tests showed only that the remains predated the arrival of Europeans in Polynesia. Nevertheless the Committee demonstrated surprising sensitivity to the intergenerational link, finding as follows:

The Committee considers that the authors’ failure to establish a direct kinship link cannot be held against them . . . where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forebears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors’ ancestral burial grounds did interfere with their right to family and privacy.

It should be noted, however, that four Committee members dissented from the above finding. They argued that the term ‘family’ did not include all members of an ethnic group or ‘all one’s ancestors, going back to time immemorial.’¹⁹ *Hopu and Bessert* has not become a part of acknowledged customary law.²⁰ Nevertheless we can conclude that, in this particular case, the Committee displayed a certain sensitivity to the role of past generations, if not in its conclusions, then at least in its considerations.²¹

¹⁶ For an example, see *Baumgarten v. Germany* (960/2000) 2003.

¹⁷ For an example in which the HRC dealt with the concept of future generations, see *EHP v. Canada* (67/1980) 1982.

¹⁸ *Hopu and Bessert v. France* (549/1993) 1997.

¹⁹ *Ibid.*, para 10.3, dissenting opinion, para 4. Compare *Vakoumé v. France* (822/1998) 2000. See also Salvioli’s discussion of ‘family’ in his opinion in *Benaziza v. Algeria* (1588/2007) 2010.

²⁰ See *Diergaardt v. Namibia* (760/1997) 2000.

²¹ Another type of enduring link between family members – the right to inherit nobility titles over generations – was not embraced by the HRC. See *Hoyos Martínez de Irujo v. Spain* (1008/2001) 2004; *Carrión Barcáiztegui v. Spain* (1019/2001) 2004.

The last feature of the Committee's time conception has revealed itself in the many cases where it had to decide whether the confiscation of property by past regimes and the failure of successor regimes to provide compensation for it were reprehensible under the Covenant's non-discrimination guarantee (Article 26 of the Covenant). In several of these 'discrimination cases', the Committee held that it was reasonable to distinguish between victims of injustice in different historical periods. It held that while a government dealing with the injustices of a previous regime should do so in a non-discriminatory way, it was not discriminatory if it failed to also clean up the remnants of injustices of regimes further back in time.²²

An understanding of the rules under which the Committee is accountable, the principles it holds and has (or has not) applied, and the views of short- and long-term time conceptions it was inspired to give in particular cases are of paramount importance, as they trickle down in its views of memory and history and form the bedrock for assessing them.

3 View of Memory (as a Right)

(MI) Starting from a peculiar time conception in dealing with the past, the Committee has developed a memory regime with special features. The first of these features seems surprising: the Committee has never explicitly defended in its majority views a right to mourn in private for the deceased victims of human rights violations, although this would have been logical in all those cases where the right to life was violated. The reason for this is probably, if not certainly, that the right to mourn is so self-evident that it barely deserves mention. The dignity-based human rights doctrine strongly implies such a right to mourn as an integral part of the rights to privacy and thought (Articles 17–18 of the Covenant). Several statements of individual

²² For examples, see *Drobek v. Slovakia* (643/1995) 1997; *Malik v. Czechoslovakia* (669/1995) 1998; *Schlosser v. Czech Republic* (670/1995) 1998; *X v. Czech Republic* (1961/2010) 2015; *B and C v. Czech Republic* (1967/2010) 2015. See also *Simunek v. Czech Republic* (516/1992) 1995; *Somers v. Hungary* (566/1993) 1996; *Adam v. Czech Republic* (586/1994) 1996; *Des Fours Walderode v. Czech Republic* (747/1997) 2001; *Pezoldova v. Czech Republic* (757/1997) 2002; *Fábryová v. Czech Republic* (765/1997) 2002; *Brokova v. Czech Republic* (774/1997) 2002; *Blazek v. Czech Republic* (857/1999) 2001; *Marik v. Czech Republic* (945/2000) 2005; *Neremberg v. Germany* (991/2001) 2001; *Kříž v. Czech Republic* (1054/2002) 2005; *Blücher von Wahlstatt v. Czech Republic* (1491/2006) 2010; *Sechremelis v. Greece* (1507/2006) 2011; *Ondracka v. Czech Republic* (1533/2006) 2007; *Lange v. Czech Republic* (1586/2007) 2011; *Bergauer v. Czech Republic* (1748/2008) 2010; *BK v. Czech Republic* (1844/2008) 2012; *TW and GM v. Slovakia* (1963/2010) 2014.

Committee members confirm this assumption. In 2009, while considering the disappearance case *Cifuentes v. Chile* [2009], two Committee members observed that:

When the State has been responsible [for a disappearance, *adb*], it is not only ethically but also legally unacceptable for it to fail to provide family members with the answers they need to be able to mourn, as is their right, disappeared persons who have been extrajudicially executed . . . If the person has died, family members must be allowed to exercise their right to mourn the person so that they may try to continue on as best as they can under such tragic circumstances, and the State should guarantee them that right.²³

Sometimes the Committee has implicitly asserted a right to mourn. In *Schedko v. Belarus* [2003], the author of a complaint was not informed of the date, hour, or place of the execution of her son (who was convicted of murder and sentenced to death).²⁴ In addition, the body was not returned for burial and the location of the grave was unknown to her. The Committee commented as follows:

The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of Article 7 of the Covenant [the right not to be subjected to inhuman treatment, *adb*].²⁵

The Committee has regularly insisted that burial places of victims need to be officially recognized and human remains returned to the family.²⁶ It is also noteworthy that while the right to mourn derives from Articles 17–18

²³ *Cifuentes v. Chile* (1536/2006) 2009, dissenting opinion of Keller and Salvioli, paras 12–31, especially 29, 31. For cases about the right to mourn before the ECtHR see: ECtHR *Płoski v. Poland* (Appl. No. 26761/95), Judgment 12 November 2002, paras 35–9; ECtHR *Éditions Plon v. France* (Appl. No. 58148/00), Judgment 18 May 2004, para 47; ECtHR *Hachette Filipacchi Associés v. France* (Appl. No. 71111/01), Judgment 14 June 2007, para 46. See also the Inter-American Commission on Human Rights *Report no. 21/00; Case 12.059: Carmen Aguiar de Lapacó v. Argentina* (1999), paras 2, 15 (a case initiated in the context of the so-called 'truth trials').

²⁴ *Schedko v. Belarus* (886/1999) 2003.

²⁵ *Ibid.*, para 10.2. See also *Staselovich v. Belarus* (887/1999) 2003; *Sultanova v. Uzbekistan* (915/2000) 2006; *Saimijon v. Uzbekistan* (959/2000) 2006; *Khalilova v. Tajikistan* (973/2001) 2005; *Aliboeva v. Tajikistan* (985/2001) 2005; *Shukurova v. Tajikistan* (1044/2002) 2006; *El-Alwani v. Libya* (1295/2004) 2007; *El-Hassy v. Libya* (1422/2005) 2007; *Kovaleva v. Belarus* (2120/2011) 2012.

²⁶ With respect to the official recognition of burial places, see: *Sankara v. Burkina Faso* (1159/2003) 2006, paras 12.2, 14; and for the return of remains, see: *Azouz v. Algeria* (1798/2008) 2013, para 10(d); *Saadoun v. Algeria* (1806/2008) 2013, para 10(d).

of the Covenant, the Committee has called some aspects of its violation a breach of Article 7.

(M2) The right to mourn in private has a natural extension to the right to mourn and commemorate in public, drawing on the rights to free expression and peaceful assembly (Articles 19 and 21 of the Covenant). In *General Comment 31*, the Committee observed that states were obliged to give reparations to individuals whose rights were violated, and that this could include 'measures of satisfaction, such as public apologies [and] public memorials.'²⁷ In addition, it has frequently pronounced itself on the issue of suppression or obstruction of public commemorations organized to honour victims of human rights violations. In a series of Belarusian cases, the Committee systematically upheld the right to organize peaceful commemorative activities. In *Kovalenko v. Belarus* [2013], for example, a peaceful assembly aimed at commemorating the victims of Stalinist repression in the Soviet Union was broken up by the authorities.²⁸ According to the Committee, this was a violation of the rights to free expression and peaceful assembly.²⁹

The right to commemoration further extends to anniversaries of historical events, either with or without victims to remember. In *Laptsevich v. Belarus* [2000], for example, the author distributed leaflets without authorization.³⁰ These leaflets mentioned the anniversary of the proclamation of independence of the People's Republic of Belarus, a short-lived attempt to create an independent Belarusian state between March 1918 and January 1919. According to the authorities, the leaflets contained a distorted version of history and disturbed the public order. The Committee was not convinced: it ruled that Belarus had failed to justify the need for prior authorization of public meetings during which material was disseminated or speeches made, and found a violation of the right to free expression.³¹

²⁷ *General Comment 31* (on general legal obligations) (2004), para 16. See also United Nations (UN), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005), principles 22(e)–(g).

²⁸ *Kovalenko v. Belarus* (1808/2008) 2013.

²⁹ *Ibid.*, para 8.8. See also *Belyazeka v. Belarus* (1772/2008) 2012.

³⁰ *Laptsevich v. Belarus* (780/1997) 2000.

³¹ *Ibid.*, paras 8.1, 8.4–8.5. See also *Velichkin v. Belarus* (1022/2001) 2005; *Gryb v. Belarus* (1316/2004) 2011; *Komarovsky v. Belarus* (1839/2008) 2014; *Protsko v. Belarus* (1919/2009) 2013; *Evrezov. v. Belarus* (1099/2010) 2014; *Aleksandrov. v. Belarus* (1933/2010) 2014; *Bazarov. v. Belarus* (1934/2010) 2014; *Symonik v. Belarus* (1952/2010) 2014; and *Surgan v. Belarus* (1969/2010) 2015.

(M3) Whereas the Committee has robustly endorsed a *right* to memory, as in the above, it has turned its back on any imposition of a *duty* to remember. This can be unambiguously inferred from three of its principles (M3–M5). First, the Committee has attached a high value to Article 18.2 of the Covenant:

No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

This non-coercion principle was reaffirmed in *General Comment 22*, which stipulated that:

[P]olicies or practices that have the same intention or effect as direct coercion . . . are inconsistent with Article 18, paragraph 2.³²

It was once more recalled in *General Comment 34*:

Any form of effort to coerce the holding or not holding of any opinion is prohibited. Freedom to express one's opinion necessarily includes freedom not to express one's opinion.³³

In other words, citizens have a *right* to remember (including a right to mourn and commemorate) as part of their rights to privacy and thought and freedoms of expression and assembly, but they are *not* obliged to comply with a *duty* to remember imposed on them by others or by the state. They cannot be forced to mourn or commemorate against their will.

(M4) A similar reasoning applies to memory laws, i.e. laws that prescribe or proscribe certain views of historical figures, symbols, dates, or events. Scores of countries have adopted such laws. In *Faurisson v. France* [1996], the Committee was very critical of one such memory law – the Gayssot law under which Holocaust denier Robert Faurisson was convicted in France – and similar Holocaust denial laws.³⁴ But at the time it said that it was not its task to evaluate such laws in the abstract, and therefore it did not ask France to repeal it.³⁵ Individual Committee members, however, feared that the Gayssot law suggested:

that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged.³⁶

³² *General Comment 22* (on freedom of thought) (1993), para 5, 8.

³³ *General Comment 34* (on the freedoms of opinion and expression) (2011), para 10. For a full discussion, see: A. De Baets, *Responsible History* (New York and Oxford: Berghahn, 2009), 144–54.

³⁴ *Faurisson v. France* (550/1993) 1996.

³⁵ *Ibid.*, para 9.3.

³⁶ *Ibid.*, concurring opinion of Evatt, Kretzmer, and Klein, para 9.

Fifteen years later, the Committee's opinion had markedly evolved. In its *General Comment 34*, it explicitly rejected memory laws *if they proscribed certain historical views*:

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.

A footnote clarified that these laws were known as 'memory laws', even adding an explicit reference to *Faurisson*.³⁷ Recalling this view in 2012, the United Nations Special Rapporteur on Free Expression, Frank La Rue, called upon states to repeal laws that prohibited discussion of historical events because 'history should always be open to discussion and debate'. He added:

By demanding that writers, journalists and citizens give only a version of events that is approved by the Government, States are enabled to subjugate freedom of expression to official versions of events.³⁸

In 2013, the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order declared that:

Such laws [defamation, blasphemy and memory laws, *adb*] have totalitarian implications and consequences, violate human dignity, the right to open debate, academic freedom, and ultimately lead to intellectual stagnation and self-censorship, which have adverse consequences on the ability of people to participate in decision-making. . . . States should . . . repeal legislation that is incompatible with Articles 18 and 19; in particular . . . memory laws and any laws that hinder open discussion of political and historical events.³⁹

All this means that, in addition to memory laws *proscribing* historical views, those *prescribing* historical views should be rejected *if they are coercive and make the expression of alternative views impossible*.

(M5) Some states also invoke domestic traditions as grounds for restricting free expression about the past. This is not in conformity with

³⁷ *General Comment 34*, para 49: '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. [footnote 116]'. Footnote 116 stipulates: 'So called "memory-laws"; see communication No. 550/93, *Faurisson v. France*. See also the concluding observations on Hungary (CCPR/C/HUN/CO/5) para 19.'

³⁸ UN, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (A/67/357; 2012), para 55.

³⁹ *Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas* (A/HRC/24/38) (2013), para 38, 56(e).

the Covenant. Article 19.3 exhaustively lists the legitimate grounds for restricting free expression: the rights or reputations of others, or the protection of national security, public order, public health or morals. Tradition is not on this list. In *General Comment 34*, the Committee emphasized that:

[I]t is not compatible with the Covenant for a restriction [on free expression] to be enshrined in traditional, religious or other such customary law.⁴⁰

In 2014, La Rue and other rapporteurs jointly declared that:

Certain types of legal restrictions on freedom of expression can never be justified by reference to local traditions, culture and values.⁴¹

One of the legitimate grounds, however, is public morals. The notion of tradition is often surreptitiously introduced under this guise and equated to the notion of morals. In *General Comment 22*, however, the Committee emphatically distinguished the two, observing that:

[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.⁴²

In sum, the Committee has categorically rejected duties to remember imposed by others (coercion in the realm of thought, memory laws, suppression in the name of particular traditions). At the same time, however, persons imposing duties to remember on themselves are merely exercising their right to memory.

4 View of History (as a Right)

(H1) While in memory issues an affective bond with the past prevails, in history issues what is at stake is a cognitive link with the past. The needs of victims and their relatives to be informed about the human rights violations to which they were subjected in the past – most often in an atmosphere of

⁴⁰ *General Comment 34*, para 24, also para 32. See also G. Reid, 'The Trouble with Tradition: When "Values" Trample over Rights', in Human Rights Watch, *World Report 2013* (Washington, DC: Human Rights Watch, 2013), 20–8. The restrictive HRC view of tradition is in line with its restrictive view of a 'margin of appreciation' for states parties: see *General Comment 34*, para 36 and *Länsman v. Finland* (511/1992) 1994, para 9.4. But see *Hertzberg v. Finland* (61/1979) 1985, para 10.3, opinion of Opsahl.

⁴¹ *Joint Declaration on Universality and the Right to Freedom of Expression* (2014), para 1f.

⁴² *General Comment 22*, para 8. See also UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985), paras 27–8.

widespread silence, secrecy, and lies – have been underscored by a new right that has gradually emerged since the 1990s. Called the ‘right to the truth’,⁴³ it holds that everybody has a right to know the truth about past human rights violations: surviving victims and relatives of deceased victims in the first instance, but also the society at large.⁴⁴ This new right is based on a combination of the rights to information, to an effective remedy, and to be free from inhuman treatment (Articles 19, 2.3 and 7 of the Covenant respectively). It is so strong that neither a change of government, nor an amnesty law, nor the passage of time (particularly the deaths of perpetrators and victims) can affect it. In *Quinteros v. Uruguay* [1990], the mother of a woman who had disappeared in 1976 submitted a complaint in 1983.⁴⁵ In the Committee’s view (in 1990), it said it understood:

[t]he anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular of Article 7 [the right not to be subjected to inhuman treatment, *adb*].⁴⁶

In other words, the absence of truth and the lingering uncertainty were seen as forms of inhuman treatment and mental suffering.⁴⁷ And for the first time, the relatives of a direct victim of human rights violations were recognized as victims of a human rights violation themselves. After *Quinteros*, the Committee emphasized time and again that the lack of knowledge of existential facts (i.e. facts about life and death) was

⁴³ For more on the right to truth, see chapter by Patricia Naftali in the present volume.

⁴⁴ Foundational texts (available at www.concernedhistorians.org/content/to.html) are: UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), principles 1–18, 23, 34; UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, principles 22(b), 24; UN, *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), preamble, articles 8, 24(2); UN Working Group on Enforced and Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearance* (2010), in *Report*, 12–17; Resolutions of the UN Human Rights Council (formerly Commission on Human Rights) about the right to the truth in 2005–6, 2008–9 and 2012; and studies on the right to the truth from the Office of the UN High Commissioner for Human Rights (OHCHR) in 2006–7 and 2009–11. For a history of the right to the truth (previously the right to know), see De Baets, *Responsible History*, 154–65.

⁴⁵ *Quinteros v. Uruguay* (107/1981) 1990.

⁴⁶ *Ibid.*, para 14.

⁴⁷ See *Bousroual v. Algeria* (992/2001) 2006; *Cifuentes v. Chile* (1536/2006) 2009; *Benaziza v. Algeria* (1588/2007) 2010; *Saadoun v. Algeria* (1806/2008) 2013; *Mechani v. Algeria* (1807/2008) 2013; *Rizvanović v. Bosnia and Herzegovina* (1997/2010) 2014, etc.

a form of inhuman treatment. In *Rizvanović v. Bosnia and Herzegovina* [2014], to cite a particularly tragic example, it condemned as inhuman the obligation imposed on the family of a disappeared person to have that person declared dead in order to be eligible for compensation.⁴⁸ The right to the truth is also of pivotal importance to historians because, in a certain sense, what is called the ‘right to the truth’ in international law today is nothing less than a crucial (though not the only) component of a ‘right to historical truth’ or a ‘right to history’.

(H2) The right to the truth is supported by two other guarantees. The first is a right to information about the past, which enables individuals to access knowledge in the possession of public bodies, especially information about themselves and their relatives. In *Pezoldova v. Czech Republic* [2002] – a telling case even though not explicitly connected to the right to the truth – the author complained that while seeking restitution for property confiscated by the state, she had been denied access, between 1991 and 2001, to the archival file which could have proved her restitution claim.⁴⁹ In the absence of any satisfactory explanation by the state in this regard, the Committee ruled that the author’s right to an effective remedy was violated.⁵⁰ In its *General Comment 34*, the Committee indicated that:

Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.⁵¹

The formula ‘regardless of . . . the date of production’ is notable because it also refers to laws regulating public archives. The Committee has regularly encouraged states to make public all documents relevant to human rights violations, including military archives, in order to enable individuals to file complaints based on evidence from these archives and to exercise their right to the truth.⁵²

⁴⁸ *Rizvanović v. Bosnia and Herzegovina* (1997/2010) 2014, paras 9.6, 11. See also *Durić v. Bosnia and Herzegovina* (1956/2010) 2014; *Hero v. Bosnia and Herzegovina* (1966/2010) 2014; *Selimović v. Bosnia and Herzegovina* (2003/2010) 2014.

⁴⁹ *Pezoldova v. Czech Republic* (757/1997) 2002.

⁵⁰ *Ibid.* paras 7.1, 11.3, 11.4, 11.6, partly concurring opinions.

⁵¹ *General Comment 34*, para 18.

⁵² See, for example, HRC, *Concluding Observations* for Paraguay, UNDoc. A/50/40, paras 192–223 (1995), paras 201, 216; Brazil CCPR/C/BRA/CO/2 (2005), para 18. See also UN, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank LaRue* (A/HRC/20/17; 4 June 2012), para 91.

(H3) In order to have teeth, the right to the truth should entail a corresponding duty on the part of states to investigate human rights violations themselves. As early as 1982, the Committee emphasized such a state duty to investigate.⁵³ Time and again it has referred to this duty, particularly in cases of international crimes and especially in countries where amnesty laws impeded the investigation of past violations, such as Argentina, Chile, Uruguay, or Algeria.⁵⁴

5 View of History (as a Craft)

(H4) In its *General Comment 34*, the Committee formulated two fundamental principles for those who held and expressed historical opinions. It observed that:

Paragraph 1 of Article 19 requires protection of the right to hold opinions without interference. This is a right to which the Covenant permits no exception or restriction . . . All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.⁵⁵

The above commentary emphasizes the absolute and non-derogable right to hold opinions of a historical nature. Such historical opinions clearly encompass memories, interpretations of past events and explicit moral judgments about the conduct of historical figures.

This principle is reinforced by the non-coercion principle, as formulated in Article 18.2 of the Covenant (and already explained above). Applied to the context of historical research, writing, and teaching, this principle means that

⁵³ *Optional Protocol*, Article 4(2); *General Comment 6* (on the right to life) (1982), para 4; *General Comment 20* (on the prohibition of torture) (1992), paras 14–15; *General Comment 26* (on the continuity of obligations) (1997), para 4; *General Comment 31*, paras 15, 18. The first disappearance case brought before the HRC, *Bleier v. Uruguay* (A/37/40) (1982), paras 13–15, emphasized the duty to investigate.

⁵⁴ For a case, see *Rodríguez v. Uruguay* (322/1988) 1994, paras 12–14. See also *SE v. Argentina* (275/1988) 1990; *RAVN v. Argentina* (343/1988, 344/1988, 345/1988) 1990; *Vargas v. Chile* (718/1996) 1999; *Acuña v. Chile* (717/1996) 1999; *Benaziza v. Algeria* (1588/2007) 2010; *Zarzi v. Algeria* (1780/2008) 2011; *Berzig v. Algeria* (1781/2008) 2012; *Azouz v. Algeria* (1798/2008) 2013; *Saadoun v. Algeria* (1806/2008) 2013; *Djebbar v. Algeria* (1811/2008) 2012; *Sedhai v. Nepal* (1865/2009) 2013; *Khirani v. Algeria* (1905/2009) 2012; *Fedsi v. Algeria* (1964/2010) 2014; *Bousseloub v. Algeria* (1974/2010) 2014; *Bhandari v. Nepal* (2031/2011) 2014; *Basnet v. Nepal* (2051/2011) 2014. See also many of the HRC *Concluding Observations*. In 1988, the Inter-American Court of Human Rights delivered a pioneering judgment in a disappearance case, *Velásquez Rodríguez v. Honduras* (*Judgment of 29 July 1988* [1988], paras 166–81, 184, 194), emphasizing that changes of government did not affect state duties to prevent, investigate, punish, and compensate human rights violations.

⁵⁵ *General Comment 34*, para 9.

historians and others are not obliged to *express* historical opinions or adopt those of others. If they do, however, such opinions merit strong protection.⁵⁶

(H5) The other principle is the right to be wrong. In the words of the Committee:

The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.⁵⁷

This right to err echoes the views of John Stuart Mill, who in 1859 famously argued that erroneous and false opinions are valuable because they challenge disbelievers to refute them in order to come closer to the truth. In the process, some of the supposedly erroneous or false information could turn out to be true after all.⁵⁸

(H6) As the Committee has a vast and worldwide mandate, it should come as no surprise that it offers only a few further general guidelines in the areas of history education and research beyond the aforementioned principles. In the domain of education, the Committee condemned discriminatory views in the school system in *Ross v. Canada* [2000].⁵⁹ Another important case is *Hartikainen v. Finland* [1981], which laid down the principles of objectivity and neutrality.⁶⁰ Hartikainen was a teacher and free thinker, who complained about the fact that Finnish children who did not attend religious instruction courses were obliged to take courses about the history of religions and ethics instead. He argued that this undermined the liberty of parents to ensure the education of their children in conformity with their own convictions (Article 18.4 of the Covenant). The Committee, however, stipulated that this was not the case, on the condition that:

such alternative course of instruction [was] given in a neutral and objective way and respect[ed] the convictions of parents and guardians who do not believe in any religion.⁶¹

⁵⁶ Statements of fact are distinguished from statements of opinion; while facts are susceptible to a truth/falsity proof, opinions are less so. This distinction is an important foundation of legal epistemology. Expressing statements of opinion enjoys stronger protection than expressing statements of fact. See, e.g., *General Comment 34*, para 47: 'Defamation laws . . . should not be applied with regard to those forms of expression that are not, of their nature, subject to verification [by which are meant opinions, *adb*].' Or para 49: 'Laws that penalize the expression of opinions about historical facts.'

⁵⁷ *General Comment 34*, para 49.

⁵⁸ J. S. Mill, *On Liberty* (London: Parker and Sons, 1859), chapter 2.

⁵⁹ *Ross v. Canada* (736/1997) 2000, para 11.5–11.6.

⁶⁰ *Hartikainen v. Finland* (40/1978) 1981.

⁶¹ *Ibid.*, para 10.4; *General Comment 22*, para 6. See also *Waldman v. Canada* (694/1996) 1999, concurring opinion, para 2.

Taken together, *Ross* and *Hartikainen* laid down the principles of non-discrimination, objectivity, and neutrality in history education.

(H7) Finally, the Committee's handling of the *Faurisson* case about Holocaust denial – already mentioned – indirectly sheds light on its view of historical research.⁶² In *Faurisson*, the Committee did not discuss Holocaust denial as a form of hate speech that merited prohibition (Article 20.2 of the Covenant), but as a form of free expression that could be restricted (Article 19.3 of the Covenant). In doing so, it did not concentrate, however, on Holocaust denial as a form of pseudo-history (as historians would do), but rather on Holocaust denial as a vehicle for anti-Semitism. Nonetheless, we learn something about the Committee's perception of responsible history in the process, especially in the individual opinions accompanying the majority view. Three Committee members denounced Faurisson's views because they:

[implied,] under the guise of impartial academic research, that the victims of Nazism were guilty of dishonest fabrication, that the story of their victimization is a myth and that the gas chambers in which so many people were murdered are 'magic'.

And they added:

While there is every reason to maintain protection of *bona fide* historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-Semitic allegations of the sort made by the author, which violate the rights of others in the way described, do not have the same claim to protection against restriction.⁶³

This means that Holocaust denial, and by extension other forms of genocide denial, violate the rights of others, because by suggesting that the victims of genocide lie about what happened and thus falsify history, they maliciously defame the reputation of genocide survivors and harm the memory of those who did not survive it. Such defamation and privacy invasion, in violating the dignity of the victims, do not merit the

⁶² In its *Concluding Observations* for Japan, CCPR/C/JPN/CO/5 (2008), para 22, the HRC also condemned denial of the 'comfort women' system during World War II, lamenting that 'few history textbooks contain[ed] references to the [...] issue'.

⁶³ *Faurisson v. France* (550/1993) 1996, concurring opinion of Evatt, Kretzmer, and Klein, paras 6, 10. For a discussion (in Dutch), see A. De Baets, 'De zaak-Faurisson: De klacht van een holocaustontkenner bij het VN-Mensenrechtencomité' ['The Faurisson Case: The Complaint of a Holocaust Denier before the HRC'], *Ex Tempore* 34:2 (2015), 96–105. For other Holocaust-related cases, see *Ross v. Canada* (736/1997) 2000, *Zündel v. Canada* (953/2000) 2003, and *Zündel v. Canada* (1341/2005) 2006.

protection of free expression. From this judgment, we can clearly infer that the Committee considers intellectual honesty in historical research to be of fundamental importance, echoing the views of Max Weber.⁶⁴

6 Conclusions

This chapter has unpacked the United Nations Human Rights Committee's views of the past by analysing the dimensions of time, memory, and history as they appear in its *General Comments* and in 108 relevant individual complaints brought before it. The analysis first reviewed the rules restricting the Committee's temporal scope and the principles expanding it. Next the Committee's views on the rights to memory and history were discussed, as well as the principles according to which historical teaching and research are required to develop.

The particular set-up of the United Nations complaints procedure imposed a time regime of immediacy on the Human Rights Committee. The rules of *ratione temporis* and non-retroactivity, of personal victimhood (thus excluding broad or abstract historical claims), and of not reassessing historical evidence used by domestic courts all restricted the Committee's temporal scope. Accordingly, the Committee did not develop a historical vocabulary of any significance. Nevertheless, it extended its horizon in several ingenious ways, allowing it sometimes to penetrate deeper into the traumatic pasts of victims: by admitting standing to heirs in cases where complainants die; by requiring successor regimes to fulfil the obligations of their predecessors, and above all through the principle of continuing violations. In selected cases, the Committee has also displayed a certain sensitivity towards the role of past generations and towards differentiation between past regimes. The fundamental time principles of imprescriptibility and legality have been of lesser importance: even though these principles considerably facilitate the widening of the time scope, they normally play a role in large-scale crimes, and except for cases of torture and disappearance, are usually absent at the level of individual violations.

Within this time framework, the Committee has defended a strong memory regime. Paradoxically, this is best reflected in an omission: the Committee has said little about a right to mourn in private, in all probability because this right is universally accepted. The Committee has ruled systematically in favour of peaceful public commemorations, which can often

⁶⁴ M. Weber, *Wissenschaft als Beruf* (originally 1918; Munich: Duncker & Humblodt, 1919), spoke about 'intellektuelle Rechtschaffenheit'.

be seen as a natural extension of mourning. In other words, the Committee has appealed implicitly to states to respect the right to mourn, and explicitly to allow peaceful commemorations. The Committee's strong memory regime is also discernible in its firm rejection of all forms of coercion, be it under the guise of duties to remember imposed on individuals by others, memory laws imposed on individuals by the state, or traditions invoked as grounds for restricting free expression. Likewise, the Committee has helped develop a strong right to history in the shape of an individual and collective right to the truth about the human rights violations of the past, which cannot be affected by regime changes, amnesty laws, or the deaths of victims or perpetrators. This right is supported by the right of citizens to access information held by public bodies, and a corresponding state duty to investigate past crimes.

The Committee has also identified strong basic principles for the exercise of the historian's craft, but understandably it has not set forth detailed principles in this domain. From a human rights perspective, opinions about history – such as memories, interpretations of the past or explicit moral judgments about the conduct of historical figures – are not obligatory, but once uttered, they merit strong protection even if they prove to be wrong in the end. Other principles have been understandably rather general and self-evident: history education should obey the principles of objectivity, neutrality, and non-discrimination, and historical research should observe the principle of honesty.

The mission of the Human Rights Committee has never been to develop a consistent philosophy of time, memory, and history, nor to judge the injustices of the past in the abstract. All in all, the Committee, although tied to many rules, has built an infrastructure of iron principles for the rights to memory and history. Some – such as objectivity or honesty – are mere repetitions of age-old and still cherished maxims. But in applying the continuing violations principle, in helping develop the right to the truth, in stressing the duty of a state to investigate past crimes even after a change of regime, and in devoting explicit attention to memory issues and historical opinions in its recent *General Comment 34*, it has made innovative contributions. As a legal body, the Committee has developed consistent basic principles about the past and how to cope with it. These principles protect our bond with the past and shape our understanding of history to a far larger degree than we may be aware of.