

THE IMPACT OF THE *UNIVERSAL DECLARATION OF HUMAN RIGHTS*
ON THE STUDY OF HISTORY

ANTOON DE BAETS

ABSTRACT

There is perhaps no text with a broader impact on our lives than the 1948 *Universal Declaration of Human Rights (UDHR)*. It is strange, therefore, that historians have paid so little attention to the *UDHR*. I argue that its potential impact on the study of history is profound. After asking whether the *UDHR* contains a general view of history, I address the consequences of the *UDHR* for the rights and duties of historians, and explain how it deals with their subjects of study. I demonstrate that the *UDHR* is a direct source of five important rights for historians: the rights to free expression and information, to meet and found associations, to intellectual property, to academic freedom, and to silence. It is also an indirect source of three duties for historians: the duties to produce expert knowledge about the past, to disseminate it, and to teach about it. I discuss the limits to, and conflicts among, these rights and duties. The *UDHR* also has an impact on historians' subjects of study: I argue that the *UDHR* applies to the living but not to the dead, and that, consequently, it is a compass for studying recent rather than remote historical injustice. Nevertheless, and although it is itself silent about historians' core duties to find and tell the truth, the *UDHR* firmly supports an emerging imprescriptible right to the truth, which in crucial respects is nothing less than a right to history. If the *UDHR* is a "*Magna Carta* of all men everywhere," it surely is one for all historians.

I. INTRODUCTION¹

Sixty years ago, on December 10, 1948, the United Nations (UN) adopted the *Universal Declaration of Human Rights (UDHR)* without dissent. Although the *UDHR* has no legal force, as the single most important statement of ethics, its authority is unparalleled. Many legal experts estimate that it has acquired the status of international customary law. The *UDHR* is the world's most translated document, now in some 360 languages. Two binding treaties, the *International Covenant on Civil and Political Rights (ICCPR)*, and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, are derived from it. Both were adopted in 1966 and entered into force ten years later. Together, these three texts form the *International Bill of Human Rights*. The *Bill* continues a tradition of three centuries of human-rights thinking and more than two millennia of natural law. In its turn, it has inspired dozens of treaties. International courts and the

1. I am grateful to Richard Vann for his encouragement and comments on an earlier version of this paper as chair of a panel at the European Social Sciences History Conference (Lisbon, February 28, 2008).

constitutions of most countries use human rights as a central concept. There is perhaps no text with a broader impact on our lives than the *UDHR*.²

Although many historians are reluctant to talk about “big principles,” it is still strange that they have paid so little attention to the *UDHR*. I shall argue that it is fitting that they do pay attention because the potential impact of the *UDHR* on historical research and the teaching of history is profound, either when historians are perceived as professionals in their own right or as members of a broader scholarly community. After asking whether the *UDHR* contains a general view of history (this section), I shall address the consequences of the *UDHR* for the rights (II.A-C) and duties (II.D-F) of historians, and explain how it deals with the latter’s subjects of study (III.A-C). I shall further demonstrate where the constraints (IV) and opportunities (V) lie—the known and the unexpected.

General view of history

Although the *UDHR* is a statement of principles aimed at a better world in the future, given its importance it is worth asking whether it sketches a general view of history. The preamble is the natural place to look for such a view, as it clarifies the motives for drafting the *UDHR* and thus is part of the context within which it should be interpreted. In effect, the second and third of the seven preamble recitals dedicate a few lines to the past. The second recital carries a *memento*: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” The abuses of the past are condemned in general terms. A previous version of this recital in a June 1948 *UDHR* draft that contained an additional reference to World War II was amended in order to avoid time-constricted aspects. Hence, the *UDHR* frames its references to the past as agelessly as possible. It is evident from the *travaux préparatoires*, however, that the moral outrage about the human-rights violations of World War II, and about the Holocaust in particular, was incessantly on the drafters’ minds, and formed the real catalyst for the *UDHR*.³ Other essential human-rights documents carry a similar general *memento*. Like the *UDHR*, the *Convention on the Prevention and Punishment of the Crime of Genocide*—adopted by the UN General Assembly on December 9, 1948, just one day before the *UDHR*—contains the following: “Recognizing that at all periods of history genocide has inflicted great losses on humanity. . . .” Here, too, a previous version, in this case a May 1948 draft that stated that the world had “been profoundly shocked by many *recent* instances of genocide” [my emphasis] and that referred to the Nuremberg Tribunal, was

2. Please consult both section V and the appendix of the present essay for an overview of history-related concepts in these documents, and for some important relevant quotations from them. Complete versions of most human rights instruments mentioned here are available at <http://www.concernedhistorians.org> (accessed December 10, 2008). For the original *UDHR* text, see UN General Assembly, *A/Res/3/217A* (December 10, 1948).

3. Albert Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l’homme* (Louvain: Warny, 1964), 303, 306, 311-312; Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999), xiv, 12-20, 36-91, 299-300, 329-336; Martti Koskeniemi, “The Preamble of the Universal Declaration of Human Rights,” in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur Alfredsson and Asbjørn Eide (The Hague, Boston, and London: Martinus Nijhoff, 1999), 32-33.

amended.⁴ In contrast, the historical recitals in the preambles of the UN *Charter* (June 1945) and the *Statute* of the International Criminal Court (July 1998) do refer to the twentieth century. The *Charter* preamble begins: “We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind . . . ,” while the *Statute* preamble stipulates: “*Conscious* that all peoples are united . . . , their cultures pieced together in a shared heritage . . . ; *mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. . . .”⁵

The third *UDHR* recital also has historical echoes. In firm language, the UN condemns dictatorship and allows, as a last resort, rebellion against tyranny and oppression. In addition, as a further refutation of dictatorship, the *UDHR* adopts a cautious theory of political democracy in its article 21 (“The will of the people shall be the basis of the authority of government”) and uses the term “democratic society” explicitly in its article 29.⁶ In successive *UDHR* drafts, the call to rebel against tyranny was first inserted in the list of rights itself, but later, and after much discussion, “demoted” to the preamble: some feared that the formula, if stated too explicitly, would be abused for the purposes of subversion and incitement to anarchy. Nevertheless, it powerfully echoed the ideas of many early modern philosophers and of the 1776 *United States Declaration of Independence* and the 1789 French *Declaration of the Rights of Man and of the Citizen*. These historical declarations mentioned the right to rebel as a supreme principle in the contract between the ruler and the governed.

In any case, in 1966, the *ICCPR* and *ICESCR* omitted the two historical recitals of the *UDHR* preamble. As far as the recital about barbarous acts in the past is concerned, it is not clear why (it was, after all, repeated in 1998). As to the recital about the right to rebellion, it was replaced by less radical guarantees in article 2.3 *ICCPR* (the right to an effective remedy, also article 8 *UDHR*). In addition, the first protocol to the *ICCPR* makes operational a right to petition.⁷ The protocol allows individual complaints about alleged human-rights violations by states to be examined.⁸ From this discussion, I conclude that the *UDHR* contains

4. Nehemiah Robinson, *The Genocide Convention: A Commentary* (New York: World Jewish Congress, 1960), 132.

5. For the *Charter: The Charter of the United Nations: A Commentary*, ed. Bruno Simma (Oxford: Oxford University Press, 2002), I, 34-35; for the *Statute: Commentary on the Rome Statute of the International Criminal Court*, ed. Otto Triffterer (Baden-Baden: Nomos, 1999), 8-9. “Shared heritage” replaced the original wording “shared history.”

6. An explicit reference to the principle of democracy in the UN *Charter* preamble was rejected. In article 29 *UDHR*, the term “democratic society” eventually replaced the phrase “democratic state.” The *ICCPR* and *ICESCR* each use the expression “democratic society” three times.

7. This right to petition for redress of human-rights abuses is complementary to the right to rebellion, but it was eventually omitted from the *UDHR* after much debate.

8. The Cold War probably played a role in the decision to omit the historical recitals from the covenants. The *UDHR* was drafted in 1947–1948, when the Cold War had not yet reached its climax. During the discussions about the right to rebellion, the United States and the United Kingdom expressed reservations, while the USSR, perceiving a parallel between the French and Russian Revolutions, supported the idea, although not at once. When eventually put to the vote on December 10, 1948, the historical recitals of the *UDHR* preamble were adopted unanimously. Drafting the *ICCPR* and *ICESCR*, in contrast, took place in 1949–1954. The common preamble of both covenants

a summary and abstract view of history that was omitted later in the covenants but that reappeared in other key texts.

II. THE IMPACT ON HISTORIANS

A. *The rights of historians*

The *UDHR* is of crucial interest to historians for scores of other reasons. As it has universal application, it is a source of rights for all human beings, including historians. Although most of these rights constitute indirect conditions for historians to exercise their profession, five are of direct relevance. Three of them are mentioned explicitly in the *UDHR*; the others can be inferred from a combination of its articles. The first is, of course, the right to freedom of expression and information (article 19 *UDHR*), which protects the freedom of information necessary for historical research, and the freedom of expression necessary for the publication and dissemination of that research and for the teaching of history. In addition, history-teaching in particular is strongly implied in the *UDHR* articles about education and culture (articles 26–27 *UDHR*). Furthermore, free expression presupposes opportunities to meet and exchange views. Therefore, the second right is a natural extension of the first. According to article 20 *UDHR*, historians have the right to organize meetings and form professional associations.

The third right protects the moral and material interests of authors of scientific works (article 27 *UDHR*, article 15.1 *ICESCR*). It provides the basis for an intellectual property and copyright regime for the expression of historical ideas. In interpreting this right, the *Berne Convention for the Protection of Literary and Artistic Works* is applicable. According to article 2 *Berne Convention*, “literary works” cover scientific ones also. This convention explains that copyright contains, first of all, a “moral interest” or “moral right,” by which is meant the right of authors to be recognized as creators of their works, and to object to any defamatory mutilation (like theft, piracy, plagiarism, distortion) of these works by unprincipled editors, publishers, and others.⁹ The intention here was to proclaim the durable link between creators and their creations. By “material interest,” the economic component of copyright is meant. This is not a durable but a transferable right.

itself was adopted in 1952, during the Korean War, a tense international political context. For background, see Verdoodt, *Naissance*, 303-305, 312-313; Morsink, *Universal Declaration*, 12-20, 302-320; and Vratislav Pechota, “The Development of the Covenant on Civil and Political Rights,” in *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin (New York: Columbia University Press, 1981), 32-71.

9. Committee on Economic, Social and Cultural Rights [the body that monitors implementation of the *ICESCR*; hereinafter CESCR], *General Comment 17 [Authorship]* (2005), especially paragraphs 12-14, 39b, 44-45; *Drafting History of the Article 15(1)(c) of the ICESCR* (2000). See also *Berne Convention for the Protection of Literary and Artistic Works* (originally 1886; 1979), article 6^{bis}.1: “Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” For examples of violations of authorship (works published without the author’s name or permission, or published under a rival’s name, or published abroad against the author’s will), see Antoon De Baets, *Censorship of Historical Thought: A World Guide, 1945–2000* (Westport, CT and London: Greenwood Press, 2002), 101, 398, 440, 525, 535; for examples of text mutilation (much censorship can be viewed as such), see De Baets, *Censorship, passim*.

The fourth right, academic freedom, can be safely derived from a combination of articles. Articles 15.3–15.4 *ICESCR* (specifying article 27 *UDHR* about culture, science, and intellectual property) stipulate that states should respect scientific freedom, including the international contacts that facilitate it. When this core idea is combined with (1) freedom of thought and expression and the rights to assembly and association for historians, and (2) the rights to information, education, culture, and science for everyone, it gives a firm basis to the principle of academic freedom, an important tool to protect historians from political and other pressures.¹⁰

B. A right to silence

Almost invisibly, the *UDHR* provides a fifth, particularly strong, right: the right to silence. In order to explain this, I should briefly clarify a basic distinction of legal epistemology: the distinction between facts and opinions. At first sight, this distinction seems absent from the *UDHR*: although it mentions the term “opinion” three times, it does not speak about “facts.” However, the use of these two terms is obscured because they are replaced by other, more or less synonymous, terms. Facts are also called “information”; opinions also “thoughts,” “ideas,” “beliefs,” “comments,” “views,” or “value judgments.”¹¹ Only in this way do the terms “thoughts” and “beliefs” in article 18 *UDHR*, or the distinction between “information” and “ideas” in article 19 *UDHR*, become understandable. Article 18 *UDHR* holds that everyone has the freedom to form and change thoughts. According to article 4.2 *ICCPR*, article 18 *ICCPR* (elaborating article 18 *UDHR*) is non-derogable.¹² Article 18 *ICCPR* includes a clause that nobody shall be coerced to have or adopt beliefs (or opinions) of others—a clause intended as a guarantee against indoctrination. In addition, article 19 *UDHR* states (inter alia) that everyone has the right to hold opinions (and, by strong implication, the right *not* to hold opinions) without interference.

Applied to our discussion, this means that historians are *not* obliged to formulate opinions about the past, that is, they may stop interpreting historical facts at whatever moment they wish. A historian who would merely try to discover historical facts without any weighing of them (if that is possible at all) is a good historian according to the *UDHR*, but most historians, while keenly appreciating

10. CESCR, *General Comment 13 [Education]* (1999), paragraphs 38-40, which refer to the key document, UNESCO’s *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (1997). The latter contains a definition of academic freedom at paragraph 27: “Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.”

11. For legal purposes, thoughts and opinions are intimately related phenomena: thinking is a process, the result of which are called opinions. See, among others, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Strasbourg, and Arlington, VA: Engel, 1993), 339. For the distinction between facts and opinions, see, again among others, Nowak, *U.N. Covenant*, 305-306. The main difference is that facts are susceptible to a truth/falsity proof, while opinions are not.

12. See also Human Rights Committee [the body that monitors implementation of the *ICCPR*; hereinafter CCPR], *General Comment 22 [Freedom of Thought]* (1993).

the difficulties in getting the facts straight, aspire to more. Even these interpretive historians have a right to refrain from expressing a certain difficult class of opinions: value judgments, and moral evaluations in particular. This right to silence, granted by articles 18–19 *UDHR*, means that historians are *not* obliged to form or adopt, let alone express, opinions, including explicit moral evaluations, about the past.¹³ The rest of this section is a commentary on what happens when historians waive their right to silence and embark on evaluating—and evaluating perpetrators of major crimes in the past in particular.

The fact that certain states of affairs studied by historians have been assigned the status of human-rights violations in the *UDHR* and elsewhere influences the latter's moral evaluations. A prime example is genocide. Although the notion of genocide is not mentioned in the *UDHR*—as was said, the *Genocide Convention* was adopted just one day before the *UDHR*—it is contained in articles 6.2–6.3 *ICCPR*. The Holocaust has retroactively been called a genocide since the adoption of the 1948 *Genocide Convention*. Later, the Armenian massacres of 1915–1917 were also called a genocide. And recently, the Ukraine has launched a campaign to have the Holodomor (the famine that, partly as a result of Stalin's farm collectivization program, killed millions of people in 1932–1933) recognized as genocide. For each of these crimes, due to the fact that they are labeled "genocide," acrimonious debates are ongoing about the degree of premeditation by the perpetrators, the outcome of which has considerable consequences for any moral evaluation of them.

Similar problems arise for other labels: a UN convention called apartheid a crime against humanity in 1973; the UN General Assembly called ethnic cleansing a form of genocide in 1992;¹⁴ the International Criminal Court called enslavement a crime against humanity in 1998; a World Conference under UN auspices called slavery and the slave trade crimes against humanity in 2001.¹⁵ Here too, assigning such labels to these events changes their legal and moral status. Certainly, historians retain the right *not* to use these labels, but once these labels exist, historians can only ignore them at the cost of explaining why their alternative label or definition is superior. For recent problems, it may be arrogant to pretend to define the nature of a given human-rights violation better than the UN General Assembly and the international courts do (the latter with their high standards of evidence and huge research departments); for more remote violations, however, historians can and do argue that retroactive labeling is anachronistic.

Originally, the argument from anachronism found support in the non-retroactivity principle of article 11 *UDHR*: no one can be held guilty for acts that were not

13. I deal here only with explicit moral judgments, made after careful historical study, and not with implicit moral judgments, which are often difficult to avoid.

14. In 2007, however, the International Court of Justice (ICJ) declared that "the term 'ethnic cleansing' has no legal significance of its own." See ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Judgment* (2007), paragraph 190.

15. Apartheid: UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973); Ethnic cleansing: *idem*, *The Situation in Bosnia and Herzegovina* (resolution; 1992); Enslavement: International Criminal Court (ICC), *Statute* (1998), articles 7.1(c)–7.2(c); Slavery/slave trade: World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration* (2001), article 13.

criminal at the time they were committed (*nullum crimen, nulla poena sine lege*). Retroactivity is for legal scholars what anachronism is for historians. Applied to our discussion, this means that one should *not* call the crimes committed during, for example, the Crusades a genocide, or crimes against humanity, or war crimes, for these concepts were nonexistent at the time.¹⁶ Therefore, perpetrators of these crimes cannot be judged in these terms. The defense of the argument from anachronism is troubling, however, in two respects. To begin with, it is never absolute: it is not because the concepts did not exist at the time that the realities covered by them did not exist.¹⁷ A further problem arose in 1966, when article 15.2 *ICCPR* formulated a strong exception to the non-retroactivity principle: the principle does not apply to persons who have committed “any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”¹⁸ The crimes intended in the exception were genocide, crimes against humanity, and war crimes. In 1968, the UN explicitly determined that time limits for prosecuting these three capital crimes, *irrespective of the date of their commission*, did not apply.¹⁹ This principle of imprescriptibility of prosecution has slowly become a norm of international criminal law. It disappears, however, after the last perpetrator has died.

Even if the exception fades over time, its impact on moral evaluations is considerable: it suggests that any genocide, crime against humanity, and war crime committed in the course of history, even when it did not carry the name, could and perhaps should, still be called so. Since 1966, judges and historians, in formulating legal or historical judgments, have been forced to take into account the “general principles of law recognized by the community of nations.” On the one hand, this creates better conditions for the exercise of the right to remember the past; on the other, it indeed risks introducing anachronism in judgments made

16. I found first mention of “crimes against humanity” in 1915, of “war crimes” in 1934, and of “genocide” in 1944. “Crimes against humanity” and “war crimes” entered into international criminal law in 1945 (articles 6b-6c *Charter* of the International Military Tribunal [IMT] at Nuremberg); “genocide” did so in 1948 (article 2 *Genocide Convention*). For presently internationally accepted definitions, see ICC, *Statute*, article 6 for genocide (definition identical to article 2 *Genocide Convention*), article 7 for crimes against humanity (definition complete redrafting of IMT text), and article 8 for war crimes (definition based on 1949 *Geneva Conventions* and 1977 *Additional Protocols*).

17. Many concepts are forged long after the realities they cover. The context of origin of these concepts, however important, is different from their context of justification. In addition, many serious crimes of the past, when occurring, often received euphemistic names.

18. This provision (taken from ICJ, *Statute* [1945], article 38(1)(c)) was also part of a June 1948 *UDHR* draft. Both in 1948 (when it was defeated) and in 1966 (when it was accepted), the provision was inserted to retroactively support the legality of the judgments of the Nuremberg and Tokyo tribunals (1946–1948), which were based on the 1945 IMT Charter. See Morsink, *Universal Declaration*, 52–58. Similar ideas have appeared in the international thinking about war since at least the formulation of the so-called *Martens clause* in the preambles of the *Hague Conventions* (1899, 1907), as repeated in the 1949 *Geneva Conventions* and 1977 *Additional Protocols*.

19. UN, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (1968), article 1: “No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: (a) War crimes . . . (b) Crimes against humanity . . . and the crime of genocide.” The motive leading to this convention arose in the 1960s when several countries reached prescription limits for World War II criminals. See Christine Van den Wyngaert and John Dugard, “Non-Applicability of Statute of Limitations,” in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), I, 874.

long after the facts. There is probably only one solution to this problem. If historians waive their right to silence and make moral evaluations, they should find a way to resolve the tension between anachronism and imprescriptibility by clearly distinguishing the values of contemporaries of the epoch studied from their own values and from those embodied in universal human-rights standards.

C. Limits to the rights of historians

With the exception of certain aspects (notably freedom of thought and moral rights), the exercise of these five rights is not absolute. The same *UDHR* that grants historians their rights also grants them to all other human beings, including those studied by historians. Consequently, conflicts inevitably arise among different parties in the exercise of their rights. A classic conflict, for example, is the one between the freedom of expression of historians and the privacy and reputation of those they study. Another is the tension between the copyright of historians and their public's freedom of information and right to access scientific results. How should these conflicts be resolved? Article 29 *UDHR* and various articles of the *ICCPR*, in stating that most universal rights are subject to limitations, propose a balancing procedure to regulate conflicts among the rights of different human beings. Let us look into how the procedure works for the various rights of historians.

According to articles 18.3–19.3 *ICCPR*, any restriction on free expression should conform to a three-step test: (a) the restriction should be prescribed by law; (b) it has to be necessary, which means necessary in a democratic society; (c) and, finally, it should be related to one of six purposes: respect for the rights or reputations of others *or* the protection of national security, public order, public health, or morals. We see, not surprisingly, that the potential clash between free expression and privacy or reputation (two rights described in article 12 *UDHR*)²⁰ is taken into consideration here: the free expression of historians can be restricted if it invades the privacy of their subjects (“rights of others”) or defames them (“reputations of others”).²¹ Among the other purposes of free speech restrictions, national security is a particularly important constraint for historical researchers. It means that the access of historians to official information can be limited for reasons of national security—if it is prescribed by law and can be shown to be necessary in a democratic society.²² Under the right to assembly, historical meetings and associations

20. See CCPR, *General Comment 16 [Privacy/Reputation]* (1988).

21. This raises the case of abusive free expression, such as Holocaust denial. To date, the CCPR has discussed one such case, and, interestingly, it did so under article 19.3 *ICCPR* rather than article 20.2 *ICCPR*. See CCPR, *Communication no. 550/1993: Faurisson versus France* (1996), paragraph 10. The CCPR ruled that France, by restricting Robert Faurisson's free expression, had *not* violated article 19.3 *ICCPR*. See also CCPR, *General Comments 10 [Freedom of Expression]* and *11 [Inciting Hatred]* (1983). From this ruling, it can be inferred that, whereas from a historical viewpoint Holocaust denial is an abuse of history, from a legal viewpoint, it is a human-rights abuse.

22. In the case of complaints by citizens, the CCPR applies the three-step test (as do international courts). Among the steps, the second (“necessary in a democratic society”) is usually the hardest to meet for governments. It is measured with (at least) three complementary and context-dependent tests: (1) the proportionality test: restrictions imposed on free expression must be proportionate to the value (for example, national security) that they want to protect; (2) the subsidiarity test: the least restrictive measure must be chosen from the available set of measures with the same effect; (3) the relevancy test: reasons given by national authorities to justify restrictions should be relevant

can proceed as they see fit, as long as they deploy peaceful activities and organize membership on a voluntary basis. As this right is an extension of free expression, it is not strange that articles 21–22.2 *ICCPR* restrict the exercise of peaceful assembly in virtually the same words as do articles 18.3–19.3 *ICCPR*.

As to copyright (article 27 *UDHR*), the *Berne Convention* recognizes the need to strike an adequate balance between the rights of authors and the public interest in access to information (article 19 *UDHR*), education (article 26 *UDHR*), and research (article 27 *UDHR*). Much information produced by historians will fall under so-called fair-practice clauses: others are allowed to freely use (published) information of historians for quotation and teaching purposes if they clearly indicate the source and its author.²³ The area is complex because the economic component of copyright can be relinquished and inherited.²⁴ Although firmly rooted in universal human rights, the fourth right, academic freedom, is duty-dependent: it protects historians only when they are exercising their scholarship, that is, when they are engaged in the honest search for historical truth in research and teaching in the broad sense. “In the broad sense” includes statements on scholarship-related activities *outside* academe, but excludes statements on matters unrelated to their scholarship. The latter are not protected by academic freedom, but they still are by the right to free expression.²⁵

If in section II.B I argued that historians have an absolute right to silence regarding their opinions and particularly regarding their moral evaluations, I can now add that they have a limited right to silence regarding their facts. In principle, it is a core task of historians to mention all facts that are relevant in the search for historical truth. The only selection criterion for facts is scholarly method, the only control, debate among peers. Even in this realm of historical facts, however,

and sufficient. See UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1985); Alexandre Kiss, “Permissible Limitations on Rights,” in Henkin, ed., *International Bill*, 290-310; and Morsink, *Universal Declaration*, 248-251.

23. CESCR, *General Comment 17*. See also World Intellectual Property Organization, *Copyright Treaty* (1996), preamble; *Berne Convention*, article 10.1-3: “It shall be permissible to make quotations from a work . . . , provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose. . . . It shall be a matter for legislation . . . to permit the utilization . . . of literary or artistic works . . . for teaching, provided such utilization is compatible with fair practice. Where use is made of works . . . mention shall be made of the source, and of the name of the author if it appears thereon.”

Traditional knowledge (often the oral product of a community) and unpublished manuscripts are protected by moral rights, but it is uncertain to what extent they are by economic rights. See *Berne Convention*, article 3.3: “[T]he public recitation of a literary work . . . shall not constitute publication,” and article 14^{ter}.1: “The author . . . shall, with respect to . . . original manuscripts . . . , enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.”

24. *Berne Convention*, article 2.6: “This protection shall operate for the benefit of the author and his successors in title”; article 6^{bis}.2: “The rights granted to the author . . . shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized . . .”; article 7.1: “The term of protection . . . shall be the life of the author and fifty years after his death.” In its article 4.2, the UNESCO *Universal Copyright Convention* (originally 1952; 1971) prescribed a term of twenty-five years after the author’s death.

25. For interesting remarks on the *political* freedom of academics, see Edward Shils, “Academic Freedom,” in *International Higher Education: An Encyclopedia*, ed. Philip Altbach (New York and London: Garland, 1991), I, 4, 12.

there exists a right to silence, however narrowly restricted. According to articles 18.3–19.3 *ICCPR*, historians should remain silent about facts that harm the privacy and reputation of other individuals (or their rights), and about facts that harm national security, public order, public health, or morals. Whether they really use this restricted right to silence for facts can be decided only after they carefully balance the public interest in disclosure of those facts about their subjects of study against the interests formulated in the six areas of restriction. If nevertheless their subjects of study bring charges, judges will rule according to the balancing procedure described above.²⁶

D. The duties of historians

The rights of others not only create limits to the rights of historians, but also duties. The *UDHR* contains only two general duties: the duty to act in a spirit of brotherhood (article 1 *UDHR*), and the duty to the community (article 29 *UDHR*).²⁷ They can be read in combination with the rights of everyone to access information (article 19 *UDHR*), to receive education (article 26 *UDHR*), and to participate in the cultural life of the community and to share in the benefits of scientific progress (article 27 *UDHR*). Since the *UDHR* addresses all human beings, and since these are organized into a society, the combination of articles 1 and 29 *UDHR* (understood as duties for historians) and articles 19, 26, and 27 *UDHR* (understood as rights of others) provides a basis for the society to make claims upon its historians that go beyond mere restrictions on their rights.

Hence, the *UDHR* seems to imply three duties for academic historians: that they produce expert knowledge about the past (linked to the right to science in article 27 *UDHR*), disseminate it (linked to the rights to information and culture in articles 19, 27 *UDHR*), and teach about it (linked to the right to education in article 26 *UDHR*). In addition, given the importance of information dissemination and teaching, it is tenable to interpret these duties broadly. Therefore, academic historians have a duty to help enhance the quality of history-teaching in primary and secondary education, including the contents of history curricula and history textbooks.²⁸ The social demands also require that, in principle and to the best of their ability, historians should contribute to answering important historical questions asked by their societies. This implies that they should further the historical awareness of their societies and facilitate what in section III.B I shall call their right to history. Of course, this is a duty of means and conduct, not of result.

Other duties can also be derived from the *UDHR*, although less firmly. Arguably, the combined articles 7, 19, and 29 *UDHR* imply that historians should ensure fair discussion of contrary views of colleagues, and thus provide a duty

26. When the subjects of study die, judges will take into account the interests of their heirs. However, this is a point of controversy: see my *Responsible History* (New York and Oxford: Berghahn, 2009), 77-78, 124-126, 132-133.

27. Morsink, *Universal Declaration*, 239-252. It is noteworthy that the duty is toward the community and not toward the state.

28. CESCR, *General Comment 13*, paragraph 6, supports this view: it prescribes that all education should exhibit four essential features, one of which is: "Acceptability: the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students. . . ."

regarding their work habit. And the combined articles 12 and 19 *UDHR* imply that historians should handle sensitive information responsibly. Even after inventively combining articles, the *UDHR* remains silent about many other duties. It clearly is an instrument of rights, not duties. In the first place, it tells us nothing about the duties of historians regarding their primary scholarly mission, the search for truth. The truth concept is not mentioned in the *UDHR* nor are its preconditions: accuracy (to find truth) and sincerity (to tell truth).²⁹ Likewise, and understandably, many aspects of their scholarship (such as systematic criticism) and their profession (for example, their duty to protect the infrastructure of historical sources and related heritage) are not found there.³⁰

In sum, although its coverage of duties is far from complete, the *UDHR* offers insight about some core duties. Hence, the *UDHR* is not only a source for the rights of historians, but it is also indirectly a source for some of their duties; and because of both, for their system of ethics. And since their duties arise from legitimate claims emanating from others and from the society (understood as a local, national, and global society), the *UDHR* is also a framework in which the social functions of historical writing take shape.

E. No duty to remember

A question that emerges while talking about duties is whether historians, as experts in matters of time, have a duty to remember. This question has two answers: a general and a specific one. The specific answer will be discussed in section II.F. The general answer is that the *UDHR* is compatible with a right to remember but not with a duty to remember. For legal purposes, memories belong to the realm of thoughts, beliefs, and opinions (like moral evaluations). This means that statements about thoughts and opinions in the *UDHR* apply equally to memories. Articles 18–19 *UDHR* (and article 4.2 *ICCPR*) protect the non-derogable freedom to *form* and *hold* thoughts and opinions, and by extension, memories. The right to freely *express* opinions, and by extension, memories, can be exerted in private or in public. When expressed in private, memories are protected by the right to privacy. When expressed in public, for example during commemorations or wakes, they are protected by the right to free expression and to peaceful assembly, but subject to the restrictions already mentioned. Thus, every human being has a right to memory.

29. See Bernard Williams, *Truth and Truthfulness: An Essay in Genealogy* (Princeton and Oxford: Princeton University Press, 2002), 84–148. UNESCO's *Recommendation* mentions the truth concept at paragraph 33: “[T]he exercise of rights carries with it special duties . . . , including the obligation to respect the academic freedom of other members of the academic community and to ensure the fair discussion of contrary views. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research on an honest search for truth.” Recent resolutions of the UN Commission of Human Rights [hereinafter CHR] and the UN Human Rights Council [hereinafter HRC] about a “right to the truth” show the increasing importance of the truth concept; see section III.B. Among several international declarations on human duties, the most authoritative one—the *Universal Declaration of Human Responsibilities* by the InterAction Council of Former Heads of States and Governments (<http://www.interactioncouncil.org>; 1997)—devotes attention to truthfulness in its articles 12–13.

30. For an overview of the duties of historians, see the code of ethics in De Baets, *Responsible History*, 188–196.

The thesis that everyone has a duty to remember, however, is contrary to the *UDHR* spirit. The same rule that governed the approach to moral evaluations is at stake here: article 18.2 *ICCPR* prescribing that nobody shall be coerced to have or adopt beliefs (or opinions) of others. The freedom to *form and hold* opinions, and by extension, memories, without interference also covers the freedom *not to form and hold* them without interference. If there is a right to memory, there is a right to oblivion also. Likewise, the freedom to express opinions, and by extension, memories, necessarily covers the freedom *not to express* them and the freedom *not to be informed* of what happened. If there is freedom of expression, there is also a right to silence. Consequently, a duty to remember forcefully imposed *on others* would amount to a violation of their human rights. The right to memory of a person would be seriously compromised by any duty to hold or express memories that are not in truth held by this person.³¹ Of course, there is nothing against a *self-imposed* duty to remember because such a self-imposed duty in reality is a radical variant of the right to memory exercised by an autonomously deciding person.

F. Limits to the duties of historians

From this discussion, it emerges that the duties of historians are limited by three factors. First, by their *rights*. Next, by the mutually *conflicting* character of several of these duties: historians have social and professional roles, and they belong to local, national, and global societies—and, therefore, claims emanating from these roles and societies may conflict. Last but not least, historians' duties are limited by the *concessions* they demand from society in order to carry out their rights and duties well: as society benefits from them and demands them to be accountable, it should tolerate an area of autonomy in which historians can work freely; in addition, it should provide resources and responsible archival and information policies.

We have come full circle. The duties of historians arising from the *UDHR* are matched by concessions from the society to historians in order to allow them to exercise their rights and fulfill their duties. These requirements are expressed in the notion of academic freedom at the individual level, and in the notion of university autonomy as the institutional form of academic freedom. Academic freedom is a prerequisite for realizing the rights to education and to science, and for heeding the warning issued to the state to respect scientific freedom. In short, there can be no external accountability without internal autonomy. It is here that I see a major role for a professional code of ethics: the adoption of such a code by the historical profession is both a form of accountability to society and a guarantee of professional autonomy.

The issue of limits to duties can be convincingly illustrated in the case of education. According to article 26 *UDHR*, education *shall promote* respect for human rights and peace. Implicitly, this also means the promotion of a democratic society because only such a society embodies these values. It is obvious that this triad (human rights, peace, democracy) should be an *object* of research and

31. There are other strong arguments against the duty to remember. See De Baets, *Responsible History*, 147-151.

teaching for historians, and that, anyway, its ramifications are so wide that they are virtually unavoidable. Article 26 *UDHR*, however, is more radical (it speaks of “shall promote”) in that it demands that the triad become a *motive* for writing and teaching history. Given that the only *intrinsic*, therefore scientific, motives for the writing and teaching of history are the search for, and the disclosure of, true historical knowledge, the triad constitutes an *instrumental* and therefore non-scientific motive. Certainly, instrumental and intrinsic motives need not be mutually incompatible, and both can fuel sound history, but at the very least there is a tension between them.

If, then, the instrumental motive supersedes the intrinsic truth motive, and provides the dominant perspective for writing history, several reservations must be expressed. First, the triad can be promoted not only through the study of human rights, peace, and democracy, but also through the study of their counterparts, such as human-rights abuses, war, and dictatorship, which may prove the same points *a contrario*. Second, the values of the current social and political system are often conveniently decreed to be synonymous with or are confused with the humanistic values embodied in the triad, when, in fact, the former are promoted instead of the latter. Third, if the triad plays a major role, it becomes tempting to distort data selection in its favor. Fourth, if the emphasis on the triad is uncritical or deterministic, a critical public may resist it as a form of indoctrination. Finally, even a critical historical study driven by the triad does not necessarily promote it: the many failures and weak performances on the humanistic front that will unavoidably be among the findings of such a critical study may discourage rather than encourage readers and students to embrace the triad. In short, the direct goal of historical education should *not* be the promotion of the values of human rights, peace, and democracy, but the teaching of those provisional historical truths that have been established after methodical and critical research.

The issue of the duty to produce and disseminate historical knowledge is more complicated. It can be argued that, even if there is no universal duty to remember, such a duty exists *specifically* for the historical profession. At first sight, this seems odd because, by the grace of academic freedom, individual historians have the right to choose their own research subjects. They cannot be obliged to study topics they do not want to study. Moreover, they should not be forced to a duty to remember any more than other human beings. There is, however, a tension between the freedoms of individual historians on the one hand, and the duties of the scholarly community to which they belong on the other. As members of a *worldwide* community of professionals, historians are accountable not only to their local and national societies but also to the *global* society. Therefore, they have the collective responsibility, at least as a matter of principle, to investigate the past in its entirety. Even if many people insist that historians should look into the moments of pride of the local or national society only, other people inside and outside that society should also demand investigations of its moments of shame. Therefore, historians should shatter silences and explode taboos. Since they approach the past as experts, they should accept a moderate duty to remember. This collective duty is “moderate” because it is tempered by the freedom of individual historians and by the weighing of conflicting social demands.

The conclusion of this discussion is that no *direct* relationship exists between the promotion of humanistic values recommended in the *UDHR* and the search for historical truth in research and education. It is arguable, however, that there is an *indirect* relationship, one that is procedural rather than substantial in nature. A sound historiography, seen either as a form of scholarship or as a profession, *reflects* a democratic society (a society that embodies humanistic values). Sound historical *scholarship* constitutes a practical demonstration of some of the values—(regulated) freedom of expression and information, plurality of opinions, and an open and critical debate—that are central to democracy. The same is true for the core values of the historical *profession*—autonomy and accountability: the balance between these values generates social trust in the profession. Furthermore, a sound historiography *strengthens* a democratic society, because its result—a form of provisional but tested historical truth—rejects historical myths once believed in and replaces them with more plausible historical interpretations. The same is the case for archival science: by making information accessible, it facilitates democratic principles of transparency and accountability. A sound historiography, then, is a necessary (though, of course, not sufficient) condition for a *sustained* democracy and culture of human rights.³² If the historiographical procedure is carried out properly, it is an act of democracy in itself and, as such, it contributes to the UN goals. Therefore, historians should be allowed a broad margin of appreciation in interpreting how they carry out their social duties implied in the *UDHR*.

III. THE IMPACT ON THEIR SUBJECTS OF STUDY

A. *Human and posthumous dignity*

I will now address the impact of the *UDHR* on historians' subjects of study. As has already become clear, the *UDHR* contains several subtle references to Enlightenment philosophy.³³ From the first line of its preamble, it introduces the concept of human dignity as the central concept from which all human rights are derived. The *UDHR* uses the concept five times, and the *ICCPR* and *ICESCR* do so three times each. Indeed, the *UDHR* is an attempt to make the concept of human dignity—a concept of natural law in its Kantian version—operational. Kant maintained that rational human beings have an autonomous will or, in other words, that they are free to act, which means that they act either morally or not. According to Kant, when they choose the first option, they follow the categorical imperative: in their actions they consider other human beings (and themselves) not as mere means but as ends in themselves. In so doing, they assign human dignity to them. In short, free, morally informed human beings are the source of dignity.³⁴ Because for Kant

32. See De Baets, *Responsible History*, 68-71.

33. See also Morsink, *Universal Declaration*, 281-328.

34. Immanuel Kant, "Grundlegung zur Metaphysik der Sitten" (1785), in *Kant's gesammelte Schriften* (Berlin: Preußische Akademie der Wissenschaften, 1903), IV, 429, 433-440, 450. The Kantian idea that freedom is the source of dignity is not clearly expressed in the first recital of the *UDHR* preamble: "Whereas recognition of the . . . dignity . . . of all members of the human family is the foundation of freedom. . . ." This recital omits the cause of the recognition of dignity (namely, morally informed freedom) and emphasizes only the consequence of that recognition (namely,

dignity was a characteristic of human beings who were rational, autonomous, and free to act morally, by implication he excluded the dead.

This is a serious problem for historians: it means that the concept of human dignity used in the *UDHR* is not applicable to the dead—by far the largest category of historians’ subjects of study. This is so because the dead are not human beings but *past* human beings.³⁵ The fact that the *UDHR* does not apply to the dead has five important consequences. The first is that the dignity they possess is of a special kind: as past human beings, the dead possess what I shall call *posthumous dignity*. Posthumous dignity, not human dignity, is the ground on which they deserve respect and protection. Elsewhere, I have offered a set of arguments and a set of assumptions as evidence for the existence of posthumous dignity, which I will not repeat here.³⁶ The crucial importance of posthumous dignity, however, also poses potential dangers for historians. Quite a number of laws contain provisions for the “protection of the memory of the dead” and “defamation of the dead.” When they are abused—and they often are—such laws have a chilling effect on the expression and exchange of historical ideas and are often only barely veiled attempts at censorship.

In the second place, since the dead are not human beings, they do not possess human rights. This means that if such concepts as *posthumous privacy* and *posthumous reputation* exist (and I certainly believe that they do), they are not rights of the dead. Instead, they are empirical dimensions of the posthumous dignity of the dead. As such, evidence for them can be provided—as it can for posthumous dignity itself.³⁷ In the third place, it means that there cannot be a *Universal Declaration of Rights of the Dead*. However, this does *not* imply that the living (including historians) have no duties toward the dead. On the contrary, inspired by the *UDHR* (and similar instruments), it is possible to identify a set of universal duties to the dead. These duties of respect and protection, based on posthumous dignity, form the outline for a *Universal Declaration of the Duties of the Living to the Dead*.³⁸ In the fourth place, as the living have duties to the dead, they can fail to fulfill them, for example by mutilating dead bodies or by refusing to bury them. The International Criminal Court has even declared that “outrages upon the dignity of dead persons” are crimes. But the fact that the dead are not human beings means that the many moral and legal wrongs to which the dead can be and are subjected are not human-rights abuses. It is the living near and dear who are offended and outraged by these wrongs, not the dead themselves.³⁹

freedom again). However, freedom does not always lead to a recognition of dignity (of oneself or of others)—it does so only when freedom is morally informed—and a recognition of dignity often entails limits upon freedom.

35. I have discussed this definition of the dead (and the defects of alternatives) in *Responsible History*, 115-118.

36. For the set of facts proving that posthumous dignity does exist, see De Baets, *Responsible History*, 119-121.

37. See note 26.

38. These duties can be summarized under eight *chapeaux*: body, funeral, burial, will, identity, image, speech, and heritage. Inspiration for them is found in articles 2, 8, 12, 15, 17-19, 29 *UDHR*. See De Baets, *Responsible History*, 123, 165-166.

39. For a list of sixty moral and legal wrongs to the dead, see De Baets, *Responsible History*, 134-137.

B. Recent historical injustice

The last consequence of the fact that the *UDHR* does not apply to the dead is this: when the *UDHR* is concerned with historical injustice, generally it is with recent rather than remote historical injustice. At first sight, the situation is confusing because the *UDHR* does not speak anywhere of victims and perpetrators—the main parties in any injustice.⁴⁰ Only in 1985 did the UN adopt a *Declaration* containing a definition of “victim,” distinguishing direct victims (those suffering harm through crime, including abuse of power) from indirect victims (mainly the immediate family or dependents, while excluding the extended family or other heirs).⁴¹ This definition is consistent with the basic *UDHR* position: it excludes the distant dead, and insofar as it seems to include the recent dead, it emphasizes the role of their heirs. The 1985 *Declaration* itself speaks of the dead only once—in the context of compensation to their families.⁴² In short, it does not leave room for claims of harm emerging after long delays or at great distances. Therefore, in the spirit of the *UDHR*, I define *recent* historical injustice as injustice of which at least some of the victims and perpetrators are still alive, while *remote* historical injustice is injustice of which all victims and perpetrators are dead.

Many *UDHR* articles allow possibilities for working against recent historical injustice: for example, the rights to a legal personality, to equality before the law, to an effective remedy, and to an independent judiciary for former victims, and, in addition, the rights not to be tortured and to a fair trial for former perpetrators, and to equality and non-discrimination for all. In addition, the UN has adopted a convention against enforced disappearances (that is, for persons of whom it is not known whether they are alive or dead),⁴³ and has developed two strong instruments to cope with the problems of impunity of former perpetrators and of reparations for their former victims.⁴⁴

When these new instruments were being discussed, roughly between 1990 and 2006, a right once called the “right to know” but recently renamed “the right to the truth” gradually emerged. First formulated embryonically in the mid-1970s, it means that everybody has a right to know the truth about past human-rights abuses: surviving victims and relatives of deceased victims in the first place, but also other individuals, and, most importantly, society at large. It is both an indi-

40. The *ICCPR* uses “victim” once.

41. UN, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), principle 1: “‘Victims’ means persons who . . . suffered harm . . . through acts or omissions that are in violation of criminal laws . . .”; principle 2: “The term ‘victim’ also includes, where appropriate, the immediate family or dependents of the direct victim . . .” The 1985 *Declaration* uses the term “perpetrator” twice.

42. *Ibid.*, principle 12: “. . . States should endeavour to provide financial compensation to . . . (b) The family, in particular dependents of persons who have died . . . as a result of such victimization.”

43. UN, *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), especially preamble, articles 8, 24.2. Its predecessor (the 1992 *Declaration on the Protection of All Persons from Enforced Disappearance*, at article 17) perceived enforced disappearances not as crimes of the past, but as *ongoing* crimes (as kidnappings without an end) as long as the perpetrators continued to conceal the fate of the disappeared.

44. CHR, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (2005), and 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).

vidual right (to achieve some form of reparation) and a collective right (to prevent the same abuses from occurring in the future and to gain access to information essential for a sustained democracy). Several combined rights from the *UDHR* firmly found this new right: freedom of expression and information, naturally, but also (and I am not being exhaustive here) the right not to be tortured mentally, the right to an effective remedy, the right to privacy, and the right to a family life (articles 5, 8, 12, 16 *UDHR*).⁴⁵

The right to the truth is broader than the right to freedom of information in two respects. While article 19 *UDHR* can be restricted under certain circumstances (see section II.C), the right to the truth is imprescriptible, inalienable, and non-derogable: it can *never* be taken away from *anybody* under *any circumstances*.⁴⁶ This is so because it is a *procedural right*, an autonomous right that is necessary to protect other human rights: like *habeas corpus*, it arises after human rights are violated; it is itself violated when the information relating to the first violations is not provided. The other factor that makes the right to the truth different is the concomitant *affirmative* duty of states to investigate human-rights violations themselves, *even after a change of regime*.⁴⁷ This governmental duty appears to include the active compilation of information (regardless of whether it is in the possession of the government) and its analysis, preservation, and access, as well as the publication of reports about this information. Neither government change nor amnesty laws nor the passage of time (particularly the deaths of perpetrators and victims) affect it, and, typically, it takes the form either of an official truth commission or an *ad hoc* tribunal.

Developments in this area have accelerated at the speed of light. The right to the truth is of cardinal 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 the “right to *historical truth*” or the “right to history.”

C. Remote historical injustice

If the *UDHR* offers efficient tools for tackling *recent* historical injustice, it does not do so for *remote* historical injustice (injustice of which all victims and perpetrators are dead). The *UDHR* is an instrument for the living, not for the dead (section III. A), and, seen from a historian’s perspective, the UN definition of “victims” is rather narrow (section III.B). Remote historical injustice does not fall within the *immediate* ambit of the UN—in sharp contrast to recent historical injustice. When we review the 2005 UN principles in the domain of reparation of historical injustice, the only

45. For a history of the right to the truth/right to history, see CHR, *Updated Set*, principles 1-18; *idem*, *Right to the Truth: Resolution 2005/66* (2005); HRC, *Right to the Truth: Decision 2/105* (2006) and *Resolution 9/11* (2008); Office of the UN High Commissioner for Human Rights, *Study on the Right to the Truth* (2006), and *idem*, *Right to the Truth* (2007) [See footnotes of the latter studies for leading international jurisprudence.] See also De Baets, *Responsible History*, 154-165. The Organization of American States (OAS) adopted resolutions on the right to the truth in 2006–2008. Both the UN and the OAS have planned special reports and meetings on the subject for 2009.

46. In practice, disclosures will be duly balanced against the interests of victims, of their relatives, and of witnesses.

47. Inter-American Court of Human Rights, *Velásquez Rodríguez Case: Judgment of July 29, 1988* (1988), paragraphs 166-181, 184, 194; CCPR, *General Comment 26 [Continuity of Obligations]* (1997), paragraph 4, and CCPR, *General Comment 31 [General Legal Obligation]* (2004), paragraph 15.

measures mentioned in it that seem applicable to the remote dead are measures of satisfaction—that is, of *symbolic* reparation such as solemn reburial and posthumous social, legal, and political rehabilitation. At most, a very broadly interpreted version of the right to a remedy for immediate descendants of deceased victims demanding such symbolic reparation and demanding truth, is applicable here.⁴⁸

Nevertheless, more can be said about the UN approach to remote historical injustice. In a 1997 study about the impunity of perpetrators of violations of economic, social, and cultural rights, the UN Commission on Human Rights explored four historical practices of injustice: apartheid, slavery, the looting of cultural heritage, and colonization. Apartheid and slavery were labeled as sub-categories of crimes against humanity in 1973 and 2001 respectively (see section II.B). The destruction of cultural monuments and sacred sites, if carried out without overriding military necessity, is seen by the International Criminal Court as a form of persecution, which is also a subcategory of crimes against humanity. Moreover, many types of colonization were accompanied by what would today doubtlessly be called crimes against humanity—and in some cases even genocide. Thus, all of these historical practices fall (or, in the case of colonization, partly fall) under the category of crimes against humanity—and this is an imprescriptible category.⁴⁹

Hence, the same contradiction as discussed in section II.B is at play: UN action on behalf of the victims of remote historical injustice is discouraged because of remoteness in time, and is encouraged because in retrospect the injustices appear to be crimes against humanity. How can this problem be solved? On the one hand, there are strong arguments for not dealing with remote injustice: arguments of principle (the dead are not human beings) and arguments of efficiency (the past cannot be altered; parties involved in injustice die, which makes prosecution and most reparation gradually impossible; they are succeeded by generations less aware of the injustice; it is impossible to reevaluate all of the past all of the time; and so on). On the other hand, the right to the truth, as an imprescriptible right for societies, implies that it continues to exist not only after an amnesty for, or the death of, the last prosecutable perpetrator, but also after the death of the last victim. This is strengthened by the fact that the historical awareness of a people often stretches back to centuries-old events of shame. Thus, dealing with remote historical injustice is primarily a mission not for judges, but for historians. The

48. UN, *Basic Principles*, principle 22. John Rawls estimated that intergenerational care stretched over at least two generations either way: see his *A Theory of Justice* [1971] (Cambridge, MA: Cambridge University Press, 1999), 128.

49. CHR, *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)* (1997), paragraphs 27-52, especially 32. The plea of its author, El Hadji Guissé, to expand the 1985 UN definition of victim (at paragraph 137: “The status of victim and the rights attaching thereto are transmissible to the successors. This concept of successor should be understood in a wide sense . . .”) was not taken up. Almost unavoidably, because of its macrohistorical ramifications, his report never gained the status of its twin, Louis Joinet’s report on civil and political impunity (1997), which eventually became the authoritative 2005 *Updated Set*. See also, however, Sub-Commission on the Promotion and Protection of Human Rights, *Recognition of Responsibility and Reparation for Massive and Flagrant Violations of Human Rights Which Constitute Crimes against Humanity and Which Took Place During the Period of Slavery, of Colonialism and Wars of Conquest—Resolution 2002/5* (2002) [preceded by decision 2000/114 and resolution 2001/1].

latter possess the power to reopen cases and challenge the prevailing amnesia and historical myths. Knowledge of the facts of historical injustice, recent and remote alike, has a major reparatory effect *in itself*; conversely, failing to deal with historical injustice is an injustice *in itself*. In its turn, this conclusion strengthens historians' moderate duty to remember discussed in section II.F. Needless to say, however, research into historical injustice is delicate as it may result in too much memory or too much oblivion.

IV. CRITICISM

However rich a resource the *UDHR* may be, it was received not only with enthusiasm but also with criticism. Much of this criticism extended to the very idea of human rights itself, and was directed to its foundation and universality. Philosophers, for example, maintained that the concept of human dignity was "essentially contested." Many of them argued that there were actually two concepts rather than one: inherent human dignity, which is the inherent worth of the human being, and external human dignity, which is equated with worthiness of respect. Others asserted that human dignity was an axiom without a further basis, or a useful fiction, or even that it did not exist.⁵⁰

The debate about the universality of the *UDHR* and of human rights in general took place on a wider scale.⁵¹ Since the late eighteenth century, conservative, liberal, and socialist thinkers have argued against the abstract and absolute character of human rights and have maintained that the latter should be related to the society in which they were to be exercised. The liberal utilitarian Jeremy Bentham, for example, believed only in the force of positive legislation. For him, human rights were imaginary, "nonsense upon stilts." He feared that they were powerful rhetoric in the hands of rulers and a substitute for effective legislation. Although the human-rights idea became overshadowed by the state-centered thinking of the nineteenth century, it survived, and after the human-rights catastrophe of World War II, it was rehabilitated in the *UDHR* formula, which gained wide acceptance across the political spectrum. The critics soon reappeared, however. In 1947, American anthropologists issued a memorandum in which they questioned the universality of human rights and warned against their ethnocentric dimension.⁵² At the same time, UNESCO carried out an inquiry into the philosophical problems raised by a *UDHR*. Many participants noted tensions between human beings and their societies and states. Most felt that practical but not theoretical agreement on a *UDHR* could be reached. Of the thirty comments published, five came from historians (Edward Carr, Benedetto Croce, Salvador de Madariaga, S. V. Puntambekar, and Pierre Teilhard de Chardin). While all issued warnings, Croce was the most critical: for him rights varied historically and could not be

50. For this debate, see my "A Successful Utopia: The Doctrine of Human Dignity," *Historiein* (Athens), no. 7 (2007), 71-85.

51. For an extensive overview of this criticism, see my "Human Rights, History of," in *International Encyclopedia of the Social and Behavioral Sciences*, ed. Neil Smelser and Paul Baltes (Oxford: Elsevier-Pergamon, 2001), X, 7012-7018.

52. American Anthropological Association, "Statement on Human Rights," *American Anthropologist*, 49, no. 4 (October-December 1947), 539-543.

universal. Even so, he called for a debate about the principles underlying human dignity and civilization.⁵³ When the UN General Assembly adopted the *UDHR* on December 10, 1948, though forty-eight countries voted in favor and none against, eight countries abstained (and two were absent): in practice, universality meant absence of dissent rather than unanimity.⁵⁴ After the *UDHR* was approved, a new generation of scholars pointed to the contrast between the universality claim and the influence of historical factors (particularly the Holocaust and the Cold War), competing philosophical views, diplomacy, and voting strategy on the final scope and wording of the *UDHR*. Decades later, Asian political leaders claimed that specific Asian values existed. In sum, contemporary human-rights criticism has a long pedigree.

Although the UN Commission on Human Rights paid scant explicit attention to many of these warnings while drafting the *UDHR*,⁵⁵ scholars who studied this complicated and lengthy drafting process demonstrated that its multicultural character was unusually broad and widely underestimated, thus rendering baseless the allegation that the *UDHR* is a purely Western instrument.⁵⁶ Additional proof for the universal appeal of the *UDHR* was the fact that it was frequently invoked by non-Western victims of human-rights violations. Furthermore, substantial parts of the critical tradition were eventually heeded in the *UDHR*, particularly by adding economic, social, and cultural rights to civil and political ones. Despite all justified criticism, today almost everyone agrees that a world without *UDHR* is worse than one with such a declaration.⁵⁷

A further question is whether my reading of the *UDHR* is methodologically valid. As for the sections on the rights of historians and their subjects of study (II.A-C; III.A-C), my method of identifying rights by combining articles and interpreting them in relation to one another is a widely accepted approach. As an authoritative body to interpret international public law, the International Court of Justice recognizes “the teachings of the most highly qualified publicists of the various nations” as a valid source.⁵⁸ Among those publicists, the Office of the UN High Commissioner for Human Rights, for example, in studying the right to the truth, follows this method of combination and interpretation. For the duties-related parts (II.D-F), further clarification is needed. Many critics in the UNESCO inquiry recommended giving virtues and duties a proper place in the *UDHR*. In conformity with its name, however, the *UDHR* gave duty a minimalist treatment because states (particularly dictatorial ones) are always tempted to use the call to duty to

53. *Human Rights: Comments and Interpretations*, ed. UNESCO (London and New York: Wingate, [1949]). Croce’s contribution is on pages 93-95.

54. Six communist countries led by the USSR abstained because of the lack of emphasis on the role of the state; Saudi Arabia because of equal marriage rights and the freedom to change religion; and South Africa because of the implicit condemnation of its apartheid policy. Morsink, *Universal Declaration*, 21-28.

55. *Ibid.*, ix-xiv, 301, 337-338, 376-377.

56. See particularly Verdoodt, *Naissance*, and Morsink, *Universal Declaration*.

57. It is worth remembering here that the first *UDHR* draft, written by John Humphrey (director of the Human Rights Division in the UN Secretariat) in early 1947, was itself based on thirteen proposals, one of which came from H. G. Wells (1866–1946), the successful popular historian and science fiction writer. See his *The Rights of Man*, (Harmondsworth, UK, and New York: Penguin, [1940]).

58. ICJ, *Statute*, article 38(1)(d).

their citizens as a pretext to abuse their power and violate citizens' rights. As was shown, the *UDHR* contains only two general duties (articles 1, 29). Consequently, much of my duty-related analysis is based on inferences that a close reading of the *UDHR*, the two *Covenants*, and authoritative commentaries on them, I believe, logically imposes. The *UDHR*, in short, is a direct source for the rights of historians and an indirect one for their duties.

V. HISTORY-RELATED CONCEPTS IN THE INTERNATIONAL BILL OF HUMAN RIGHTS

The following table may orient the search for history-related concepts in the *International Bill of Human Rights*:

<i>Concepts</i>	<i>explicitly mentioned in (*) / derived from:</i>		
	<i>UDHR</i>	<i>ICCPR</i>	<i>ICESCR</i>
academic/scientific freedom	18-20, 26-27	18-22	13, 15*
assembly/association, right to	20*	21*-22*	
copyright	27		15.1
culture, right to	27*		15*
dead, duties of living to	2, 8, 12, 15, 17-19, 29	2.3, 17-19	
democratic society	21, 29*	14*, 21*-22*, 25	4*, 8*
dignity, human	preamble*, 1*, 22*, 23*	preamble*, 10*	preamble*, 13*
dignity, posthumous	2, 8, 12, 15, 17-19, 29	2.3, 17-19	
duties, general	1*, 29*	preamble*	preamble*
duties of historians	1, 7, 12, 18-19, 26-27, 29	18-19	13, 15
duty to investigate, by states	8, 19	2.3, 7, 40; first protocol, 4*	
education, right to	26*		13*
freedom of expression	19*	19*	
freedom of information	19*	19*	
freedom of thought	18*-19*	4.2*, 18*-19.1*	
hate speech, as incitement	2, 7, 19	20*	
historical injustice, recent	1-2, 5-11	<i>passim</i>	
historical injustice, remote	8	2.3	
history, right to	5, 8, 12, 19	2.3, 7, 17, 19	
history, view of	preamble*		
imprescriptibility		15.2*	
intellectual property	27		15.1
memory, right to	12, 18-19	4.2, 17-19	
moral evaluations	18-19	4.2, 18-19	
moral right	27*		15.1*
non-derogability of rights		4.2*	
non-retroactivity of crimes	11*	15*	
oblivion, right to	18-19	4.2, 18-19	
past abuses and tyranny	preamble*		
petition, right to		first protocol*	
privacy, right to	12*	17*, 19.3	
rebellion, right to	preamble*		
remedy, right to	8*	2.3*	
remember, <i>no</i> duty to	18-19	4.2, 18-19	
reparation, right to	8	2.3	
reputation, right to	12*	17*, 19.3*	

<i>Concepts</i>	<i>explicitly mentioned in (*) / derived from:</i>		
	<i>UDHR</i>	<i>ICCPR</i>	<i>ICESCR</i>
respect	preamble*, 26*, 29*	preamble*, 2*, 10*, 19*	preamble*, 13*
rights, limitations of	1*, 29*	4*-5*, 18.3*-19.3*, 21*-22.2*	4*-5*
science, right to	27*		15*
silence, right to	18-19	4.2, 18-19	
truth, right to (right to know)	5, 8, 12, 16, 19	2.3, 7, 17, 19, 23	
university autonomy	18-20, 26-27	18-22	13, 15

VI. CONCLUSIONS

My reflection about the impact of the *UDHR* and its two covenants on the study of history leads to the following conclusions:

1. The *UDHR* contains an ageless view of history: it condemns past atrocities and past dictatorships, and advocates a democratic society.

As far as the impact on historians is concerned:

2. The *UDHR* is a *direct* source of rights for historians, particularly their freedom of expression and information, their right to meet and found associations, their intellectual property, and their academic freedom.

3. The *UDHR* affirms that historians have a right to silence that is absolute for opinions and limited for facts. Retroactive moral evaluations are not mandatory, but if historians make them, they must solve the tension between anachronism and imprescriptibility.

4. The *UDHR* provides a balancing procedure to evaluate whether restrictions on the five rights of historians are justified.

5. The *UDHR* is an *indirect* source of duties for historians, foremost the duty to produce expert knowledge about the past, the duty to disseminate it, and the duty to teach about it. It is, however, silent about other core duties, particularly the duty to find and tell the truth.

6. The *UDHR* supports the thesis that everyone has a right to memory, but opposes the thesis of a duty to remember. Historians, though, have a collective duty to (un)cover the past in its entirety (including its periods of shame), constituting as they do a worldwide community responding to a global society.

7. The *UDHR* provides restrictions on the duties of historians because their duties can conflict with their rights and with one another, and because having duties entitles historians to demand autonomy from society to carry out their work properly. The *UDHR* requirement that historical education serve humanistic values conflicts with the scholarly requirement that historians search for true historical knowledge. The contribution of historiography to human rights is less substantial than procedural: rather than its findings, it is its very operation that supports *UDHR* goals.

As far as the impact on their subjects of study is concerned:

8. The *UDHR* applies to the living but not to the dead. However, as past human beings, the dead possess posthumous dignity, and therefore deserve respect and protection. The *UDHR* is a powerful source of inspiration for our duties to the dead.

9. The *UDHR* offers firm guidance for dealing with recent historical injustice (injustice of which at least some of the victims and perpetrators are still alive). In addition, several of its articles support the emerging right to the truth, which in crucial respects is nothing less than a right to history.

10. The *UDHR* offers little guidance for dealing with remote historical injustice (injustice of which all victims and perpetrators are dead). The right to the truth, however, is an imprescriptible right of societies, and the knowledge provided by historians about the painful past may have a reparatory effect in itself.

On balance, the potential impact of the *UDHR* is profound. A fresh reading of it demonstrates that several basic ethical principles guiding the historical profession in its rights and duties *consistently* flow from it. The document was drafted under the leadership of Eleanor Roosevelt. If the *Universal Declaration of Human Rights* is a “*Magna Carta* of all men everywhere,” as she maintained, it surely is one for all historians.

APPENDIX: KEY FRAGMENTS

Preamble *UDHR*: “*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; *Whereas* disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . . *Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected . . .”

Article 8 *UDHR*: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 11 *UDHR*: “. . . No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence . . . at the time when it was committed.” [Article 15.2 *ICCPR*: “Nothing . . . shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”]

Article 12 *UDHR*: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation . . .”

Article 18 *UDHR*: “Everyone has the right to freedom of thought [and] conscience . . . ; this right includes freedom to change his . . . belief, and freedom, either alone or in community with others and in public or private, to manifest his . . . belief in teaching [and] practice . . .” [Articles 18.2-18.3 *ICCPR*: “No one shall be subject to coercion which would impair his freedom to have or to adopt a . . . belief of his choice. Freedom to manifest one’s . . . beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Article 4.2 *ICCPR*: “No derogation from article . . . 18 may be made under this provision.”]

Article 19 *UDHR*: “Everyone has the right to freedom of opinion and expression; this right

- includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” [Article 19.3 *ICCPR*: “The exercise of the rights [of free expression] 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 . . . , or of public health or morals.” *Note*: Article 20 *ICCPR*: “Any propaganda for war shall be prohibited by law. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Article 20 *ICCPR* is derived from article 7 *UDHR* (“All are entitled to equal protection against . . . any incitement to . . . discrimination.”) and article 19 *UDHR*.]
- Article 20 *UDHR*: “Everyone has the right to freedom of peaceful assembly and association. No one may be compelled to belong to an association.”
- Article 21 *UDHR*: “. . . The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections”
- Article 26 *UDHR*: “Everyone has the right to education . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further . . . the maintenance of peace.”
- Article 27 *UDHR*: “Everyone has the right freely to participate in the cultural life of the community . . . and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” [Article 15.3 *ICESCR*: “The States Parties . . . undertake to respect the freedom indispensable for scientific research and creative activity.” Article 15.4 *ICESCR*: “The States Parties . . . recognize the benefits . . . of international contacts and co-operation in the scientific and cultural fields.”]
- Article 29 *UDHR*: “Everyone has duties to the community . . . In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society . . .” [See also article 1 *UDHR* (“All human beings . . . should act towards one another in a spirit of brotherhood.”) and Preamble, Articles 4-5 *ICCPR/ICESCR*.]

University of Groningen