

## A DECLARATION OF THE RESPONSIBILITIES OF PRESENT GENERATIONS TOWARD PAST GENERATIONS

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### ABSTRACT

Historians study the living and the dead. If we can identify the rights of the living and their responsibilities to the dead, we may be able to formulate a solid ethical infrastructure for historians. A short and generally accepted answer to the question of what the rights of the living are can be found in the *Universal Declaration of Human Rights*. The central idea of human rights is that the living possess dignity and therefore deserve respect. In addition, the living believe that the dead also have dignity and thus deserve respect too. When human beings die, I argue, some human traces survive and mark the dead with symbolic value. The dead are less than human beings, but still *reminiscent* of them, and they are more than bodies or objects. This invites us to speak about the dead in a language of posthumous dignity and respect, and about the living, therefore, as having some definable core responsibilities to the dead. I argue further that these responsibilities are universal. In a *Declaration of the Responsibilities of Present Generations toward Past Generations*, then, I attempt to cover the whole area. I identify and comment on four body- and property-related responsibilities (body, funeral, burial, and will), three personality-related responsibilities (identity, image, and speech), one general responsibility (heritage), and two consequential rights (memory and history). I then discuss modalities of non-compliance, identifying more than forty types of failures to fulfill responsibilities toward past generations. I conclude that the cardinal principle of any code of ethics for historians should be to respect the dignity of the living and the dead whom they study.

1. I first began thinking about responsibilities to the dead when writing "History of Human Rights," in *International Encyclopedia of the Social and Behavioral Sciences*, ed. Neil Smelser and Paul Baltes (Oxford: Elsevier-Pergamon, 2001), X, 7012–7018. Its systematic format obliged me to pose the question: "[D]o past and future generations have human rights? As to past generations, one could think of the right to a decent burial or the right to be treated with respect in historical works" (7013). Around the same time, I wrote elsewhere: "It is . . . the historians' professional obligation to see that the dead do not die twice; for it is the first human right of deceased persons to be treated with dignity" ("Resistance to the Censorship of Historical Thought in the Twentieth Century," in *Making Sense of Global History: The 19th International Congress of Historical Sciences, Oslo 2000, Commemorative Volume*, ed. Sølvi Sogner [Oslo: Universitetsforlaget, 2001], 390). I want to express warm thanks to my wife Elly De Roo for our walks during which we talked about the core ideas presented here. I am also very grateful to my student Claire Boonzaaijer for discussing the merits of some of my main theses with me. The text benefited greatly from comments by forums of history students (April and December 2003) and colleagues (October 2003), and by Frank Ankersmit, Derek Jones, Frans Visser, and Sacha Zala. In addition, I was very fortunate that Toby Mendel (Head of Law Programme of the Global Campaign for Freedom of Expression *Article 19*) shared his sharp insights with me. I acknowledge the financial support of the Netherlands Organisation for Scientific Research NWO. All website texts mentioned here were last accessed on September 22, 2004.

Our days are ended. Think, then, of us,  
Do not erase us from your memory, nor forget us.  
—*Popol Vuh*, sacred book of the Quiché Maya.<sup>2</sup>

Those who are dead are never gone  
They are in the shadow that fades away  
And in the shadow that darkens  
The dead are not under the earth  
The dead are not dead.  
—*Souffles*, Birago Diop.<sup>3</sup>

Yet meet we shall, and part, and meet again  
Where dead men meet, on lips of living men.  
—*Mellonta tauta*, Samuel Butler.<sup>4</sup>

## I. INTRODUCTION

In a famous recent essay, demographer Carl Haub “guesstimated” that the total number of people who have ever been born since the dawn of the human race is 106 billion. Of these, six billion are alive and 100 billion are dead.<sup>5</sup> This essay is about these two very large and very unequal groups: the living and the dead. Historians consider members of both groups to be actual or potential subjects of study. Furthermore, the *rights* of the subjects studied by historians determine the latter’s system of professional ethics, as is the case with any profession.<sup>6</sup> Knowledge of the rights of the living and the dead, therefore, may provide historians with a solid infrastructure for formulating their responsibilities.

The first question—what are the rights of the living—has occupied many in past centuries.<sup>7</sup> Worldwide, the 1948 *Universal Declaration of Human Rights* (UDHR), if imperfect, is increasingly acknowledged as the best approximation

2. *Popol Vuh: The Sacred Book of the Ancient Quiché Maya* (English translation by Delia Goetz and Sylvanus Morley from the Spanish translation by Adrián Recinos; London: William Hodge, 1951), 205. The Spanish text: “[N]uestros días están terminados. Pensad, pues, en nosotros, no nos borreís [de la memoria], ni nos olvidéis,” in *Popol Vuh: Las antiguas historias del Quiché*, translated from original text with introduction and notes by Recinos [1947] (México City: Fondo de Cultura Económica, 1976), 140.

3. My translation of the French original: “Ceux qui sont morts ne sont jamais partis/Ils sont dans l’ombre qui s’éclaire/Et dans l’ombre qui s’épaissit/Les morts ne sont pas sous la terre . . . Les morts ne sont pas morts.” Part of a poem in the short story *Sarzan*, in Birago Diop, *Les Contes d’Amadou Koumba* [1947] (Paris: Présence Africaine, 1987), 180. When printed separately, the poem bears the title *Souffles* (Sighs). English translation of the story (and poem) published as “Sarzent the Madman,” in *Jazz and Palm Wine and Other Stories*, ed. Wilfried Feuser (Burnt Mill, Harlow: Longman, 1981), 103–115.

4. Quoted in “Pamphlet by Henry Festing Jones: Charles Darwin and Samuel Butler—A Step towards Reconciliation, Published by A. C. Fifield, 1911,” reprinted in *The Autobiography of Charles Darwin, 1809–1882*, ed. Nora Barlow (London: Collins, 1958), 197–198; from Butler’s 1898 sonnet with the Greek title *Mellonta tauta* (Things of the Future) and the first line “Not on Sad Stygian Shore.”

5. Carl Haub, “How Many People Have Ever Lived on Earth?” *Population Today* 30:8 (November/December 2002), 3–4 (update of original: *ibid.*, February 1995).

6. The medical profession, for example, considers the patient to be its primary ethical focus. See World Medical Association, *Declaration of Geneva* [also called “Physician’s Oath”] (1948, 1994): “The health of my patient will be my first consideration.”

7. For a short overview, see my “History of Human Rights.”

of those rights for the time being. In its bare essence, the UDHR is an attempt to make the cardinal concept of “human dignity” operational. This is announced from the very first line of the preamble, which states:

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.<sup>8</sup>

Although the question of whether human dignity is inherent (as the UDHR states) is important, it will not yet concern us here. For the moment, it is sufficient to note that we can look at the UDHR from two perspectives: the broader perspective of the rights of the living and the narrower perspective of the rights of historians themselves. Seen from the broader perspective, the full UDHR is of interest, as it summarizes the core rights of the living (that is, of the living subjects that historians study). Article 2 of the UDHR, for example, urges us not to discriminate among human beings. One article in particular stands out for historians, as it protects the living in a way that directly affects their work:

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

This article about privacy and reputation constitutes an important basis for responsibilities to be fulfilled by all human beings, including those who, as academics and professionals, specialize in research about human beings. Seen from the narrower perspective, many UDHR articles are indirect and obvious conditions for the practice of historical research, for example UDHR Article 5 (the right not to be tortured). Here too, however, one article is of paramount interest to historians, as it directly protects their work:

UDHR Article 19: 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.

The guarantee in Article 19 applies to all. Seen from a professional perspective, however, it establishes the rights of historians relating to research, which is a form of freedom of information, and to publication and teaching, which are forms of freedom of expression. With these UDHR tools, we have a short, coherent, and generally accepted answer to the question of what the rights of the living are and, at the same time, to the question of how they relate to the ethics of the historian.

The second question—what are the rights of the dead—is far more difficult. I shall ask, first, who the dead are and, second, whether they have rights. I shall demonstrate that the dead do not possess rights, but that the living nevertheless have some definable core responsibilities to them. I will identify these responsi-

8. The concept is stated once more in the preamble and in Articles 1, 22, and 23. It is likewise mentioned in the 1945 United Nations (UN) Charter, the preamble of the UN *International Covenant on Civil and Political Rights* (ICCPR; 1966), and numerous other human-rights instruments. In addition, 75% of the constitutions of the world's 193 states use the concept of “human dignity” or “personal dignity” explicitly, most of them in a prominent place. See my paper “A Successful Utopia: The Doctrine of Human Dignity,” to be presented at the *Twentieth International Congress of Historical Sciences*, University of New South Wales, Sydney, July 5, 2005.

bilities and explore the many aspects related to them, including modalities of non-compliance. In my conclusion, I try to distill one central principle from the harvest of answers that can serve as an ethical infrastructure for the historical profession.

## II. WHO ARE THE DEAD?

It should be made clear from the start that this essay deals with the dead and not with the dying. Dying and the debate about the right to life and the right to die are different matters.<sup>9</sup> I shall attempt to answer the question whether the dead have rights by first asking another, more elementary, question: who are the dead? That this is a most elusive question will become evident in the discussion of terms and definitions.

*Are the dead bodies?* The dead are bodies, but ample evidence suggests that bodies, dead or alive, are qualitatively different from other things.<sup>10</sup> Particularly, they (or their parts) are not property as such and therefore have no price and cannot be commercialized.<sup>11</sup> Further, the dead are more than dead bodies or corpses alone, for lingering human characteristics play an essential role in discussions about them, as we shall see time and again. Because it is too narrow, I reject the term “bodies” in my definition.

*Are the dead persons?* The vast literature on the concept of “person” shows two things. First, it shows that persons are human beings with certain characteristics. They are variously defined as *conscious* human beings, *rational* human beings, human beings *with interests*, *free* human beings, or *moral* human beings. Second, some exclude certain categories of human beings from the definition of person, depending on how exactly “conscious,” “rational,” “with interests,” “free,” or “moral” are defined. These categories include young children (according to many, they are human beings who are only potential or developing persons), the mentally ill (according to some, they are human beings who, temporarily or permanently, are not persons), and the irreversibly comatose (according to some, they are human beings who are no longer persons).<sup>12</sup> I argue that it is foolish not to include these groups, when deceased, in the community of the dead. Because it is too exclusive, I reject the term “persons” in my definition. Here, my position diverges from the conception used in the *Geneva Conventions* and by the International Criminal Court, both of which speak of “dead persons.”<sup>13</sup>

9. This also implies that we are not dealing here with such diverse phenomena as suicide, the death penalty, or human sacrifice.

10. For the concept of the body (living or dead) as a *res nullius* (thing of nobody) with a status between human being and thing, see Jacob Rendtorff and Peter Kemp, *Basic Ethical Principles in European Bioethics and Biolaw*, volume 1, *Autonomy, Dignity, Integrity and Vulnerability* (Copenhagen: Centre for Ethics and Law, and Barcelona: Institut Borja de Bioètica, 2000), 24, 65–70, 348–354.

11. See text of the World Health Organization quoted in the Appendix at the end of this essay.

12. Kenneth Iserson, *Death to Dust: What Happens to Dead Bodies?* (Tucson AZ: Galen Press, 1994), 18–19; also Jay Rosenberg, *Thinking Clearly about Death* (Englewood Cliffs, NJ: Prentice-Hall, 1983), 116–125. UDHR Article 1 seems to equate human beings and persons: “all human beings . . . are endowed with reason and conscience.”

13. For both, see Appendix; for uses of the concept of dead persons elsewhere, see also, e.g., UN Commission on Human Rights, *Resolution 1998/36* (17 April 1998) (“Human Rights and Forensic Science.”)

*Are the dead human beings?* This question raises a preliminary and contentious problem: how long may we appropriately speak of human beings?<sup>14</sup> No word seems to indicate the ontological status of the dead satisfactorily. We have already argued that speaking of the dead as corpses or as (dead) bodies suggests too little, and that speaking of them as persons or postpersons suggests too much. *Human beings* is a better term than either *bodies* or *persons*, but to call the dead human beings is problematic. In the usual sense, human beings have interests, claims, needs, duties, choices, and entitlements—things that the dead obviously do not possess. Without exception, however, they all have *been* human beings. I therefore reject the simple term “human beings” in my definition of the dead. Nothing prevents me, however, from retaining qualified uses of this term.

It is time to go from terms to definitions. *Are the dead human beings who no longer live, or are they human beings who no longer exist?* This question rests on definitions that are confusing because they appear to refer to two classes of human beings (those who live or exist and those who do not), which is not accurate. But there is more. We come no further with *non-living*. Regardless of whether the criterion for death is brain-death or heart-lung death, it is obvious that some body parts (can) live on for some time after the human being has died. Death is a process rather than a moment.<sup>15</sup> Nor is *non-existent* foolproof; the body continues to exist after death, and the skeleton, when not cremated, survives.<sup>16</sup> Neglecting physical postmortem existence is to miss an entire area of responsibilities that may be rightfully assigned to the living.<sup>17</sup> I therefore reject these definitions.

The war of terms and definitions leaves us with only one solution, helpless and modest but meaningful: *the dead are former human beings*. It clearly reflects the paradoxes at stake; the dead are no longer human beings (or persons), but are still

14. The mirror question reads: “From which moment do we speak of human beings?” Although there is strong disagreement about the status of human zygotes, embryos, and fetuses, a minimal basis for consensus is the viewpoint that they are *potential* human beings and persons. See, among others, Hugh McLachlan, “Must We Accept either the Conservative or the Liberal View on Abortion?” *Analysis* 37 (1977), 197–204 (with a passage on the duties to the dead on page 199). I think that one responsibility to the dead applies unreservedly to all cases of miscarriage, abortion, or stillbirth (my Article 1) and one other unreservedly to stillbirth (my Article 3). Other responsibilities are optional (my Articles 2 and 5) and depend, I think, on the estimated viability of the fetus and on the philosophical and religious views of the parents. See also Ruth Chadwick, “Corpses, Recycling and Therapeutic Purposes,” in *Death Rites: Law and Ethics at the End of Life*, ed. Robert Lee and Derek Morgan (London and New York: Routledge, 1994), 66–68.

15. Iserson, *Death to Dust*, 13–18. Lawrence Becker argued that “the being/has-been boundary [of the human being] lies at the completion of the disintegration of the human being considered as a biological organism.” See “Human Being: The Boundaries of the Concept,” *Philosophy and Public Affairs* 4:4 (summer 1975), 336, 352–359. He added that “Their [people’s] death does not in itself relieve us of moral obligations toward them” (357), and that the boundary between being and has-been is not, by itself, a moral divide (358).

16. See also Fred Feldman, *Confrontations with the Reaper: A Philosophical Study of the Nature and Value of Death* (New York and Oxford: Oxford University Press, 1992), 89–124, especially 113–115, 148.

17. Palle Yourgrau’s solution—reserving the term “existence” for the living and the term “being” for the non-living—is not convincing, because, by doing so, he introduces the new problem of how to distinguish the dead from fictional and future human beings. See his “The Dead,” *Journal of Philosophy* 86:2 (February 1987), 89–90.

*reminiscent* of them. They are less than human beings, but more than objects. Such paradoxes shall accompany us until the end of our discussion.

### III. DO THE DEAD HAVE RIGHTS?

Since the dead are not human beings, they do not constitute a category of rights-holders because, unlike living persons, they are incapable of having needs, interests, or duties, or of making choices or claims, either now or in the future. The idea that the dead nevertheless possess rights has an interesting linguistic side, recognized not only by the few who defend it,<sup>18</sup> but also by many who reject it. Speaking of the rights of the dead may sometimes further our understanding of the issues at stake.<sup>19</sup> By way of example, I offer the oft-stated principle of a decent burial, which can be formulated in three different ways: as a responsibility of the living, as a right of the living, or as a right of the dead. I could say that the living have the responsibility to give the dead a decent burial. Assuming for a moment that the living have responsibilities to the dead (a question broached below), this understanding is accurate, as the living are *capable* of fulfilling responsibilities such as this. I could also say that the living have a right to *expect* a decent burial when they die.<sup>20</sup> This, too, would be correct, as the living are *capable* of expecting something, but without the mandatory character that is so obviously linked with responsibilities and rights. Finally, I could say that the dead have a right to a decent burial. This is not accurate, for the dead do not have rights, but still provides a short and transparent way to express the idea of a responsibility of the living to the dead.

When we turn the principle of a decent burial on its head, however, repeating the same exercise is less convincing. *Refusal* of a decent burial is a problem only for the living. When relatives refuse a decent burial to the dead, they fail to fulfill their responsibility; when third parties (such as perpetrators of human-rights abuses) refuse it, the latter fail not only to fulfill their responsibility, but also offend the feelings of relatives. In addition, the expectations of all (relatives, third parties, and outsiders) are frustrated, because the probability that they themselves will be buried decently becomes smaller. That is clear. There is no corresponding perspective, however, from which the refusal of a decent burial can be perceived by the dead themselves, for the dead do not see anything. Even the perspective closest to the nonexistent perspective of the dead—lack of respect for

18. For inspiring defenses of the view that the dead have rights, see Raymond Belliotti, "Do Dead Human Beings Have Rights?" *The Personalist* 60 (1979), 201–210; and Loren Lomasky, *Persons, Rights, and the Moral Community* (New York and Oxford: Oxford University Press, 1987), 212–221.

19. Joel Feinberg, *Harm to Others* (New York and Oxford: Oxford University Press, 1984), 81, writes that we irresistibly speak of the dead in the language of loss, although it is only accurate to speak about destruction, not loss, because there is no survivor to be the proper subject of harm or benefit. He adds: "[T]his linguistic strictness would deprive us of metaphors of striking aptness and utility." The question of whether death is a harm is widely discussed among philosophers. For a collection containing many essays on this topic, see *The Metaphysics of Death*, ed. John Martin Fischer (Stanford: Stanford University Press, 1993).

20. Wording proposed by Christopher Hill, "Some Philosophical Problems about Rights," in *Rights and Wrongs: Some Essays on Human Rights*, ed. Christopher Hill (Harmondsworth, Eng.: Penguin, 1969), 9.

the dead body—is unavoidably a perspective from the living and not from the dead. So it was for Antigone when she lamented the fate of her unburied brother: “[T]he order says he is not to be buried, not to be mourned; to be left unburied, unwept, a feast of flesh for keen-eyed carrion birds.” As Antigone attempted to fulfill her “duty to the dead,” the tragic chain of sorrow and pain led to three more deaths.<sup>21</sup> Lack of respect for the dead body is considered an offense at all times and places, but those offended are alive. From this discussion, I conclude that the dead, while still alive, have rights and responsibilities by virtue of the fact that they are autonomous agents, but that, once deceased, they lose that autonomy and therefore have neither rights nor responsibilities.

#### IV. DO THE LIVING HAVE RESPONSIBILITIES TO THE DEAD?

That the dead have neither rights nor responsibilities does not imply, however, that the living have no responsibilities to them. Moral philosopher Alan White emphasized this point:

Moral and religious codes, such as the *Decalogue*, commonly lay down duties without conferring any corresponding rights . . . [E]ven where one person has . . . a duty to someone, the one to whom he has such a duty does not necessarily thereby acquire any corresponding right . . . If we have duties to the dead, for example to tend their graves or not to slander their memory, it does not follow that they have a corresponding right.<sup>22</sup>

Why do the living have responsibilities to the dead? I argue that this is so because the dead deserve respect,<sup>23</sup> and they deserve respect because they possess dignity. Respect, according to Abraham Edel, is the form under which this dignity appears.<sup>24</sup> The basis for assigning responsibilities to the living is thus to show that the dead possess dignity. Given that the dead are *former* human beings, *posthumous dignity* is not the same as the *human dignity* of the living, but it is still closely related. Human dignity is an appeal to respect the actual humanity of the living and the very foundation of their human rights; *posthumous* dignity is an appeal to respect the past humanity of the dead and the very foundation for the responsibilities of the living.<sup>25</sup> The defense of this claim consists of one fact and five assumptions.

One of the most corroborated facts within anthropological research is that the living quasi-universally *do* respect the dead and believe that the latter have dignity. In 1955, the anthropologist Claude Lévi-Strauss wrote: “There is probably

21. Sophocles, *The Theban Plays: King Oedipus; Oedipus at Colonus; Antigone*, transl. E. F. Watling [1947] (Harmondsworth, Eng.: Penguin, 1974), here *Antigone* [442–441 BCE], quotations at 127, 140.

22. Alan White, *Rights* (Oxford: Clarendon Press, 1984), 60–62, also 86–89.

23. For moderate criticism of the notion of respect for the dead, see Nigel Barley, *Dancing on the Grave: Encounters with Death* [1995] (London: Abacus, 1997), 42–43, 136, 164, 205.

24. Abraham Edel, “Humanist Ethics and the Meaning of Human Dignity,” in *Moral Problems in Contemporary Society: Essays in Humanistic Ethics*, ed. Paul Kurtz (Englewood Cliffs, NJ: Prentice-Hall, 1969), 227–240, here 240.

25. The source of contemporary thinking about human dignity is Immanuel Kant’s *Grundlegung zur Metaphysik der Sitten* [1785], in *Kant’s gesammelte Schriften*, ed. Preußischen Akademie der Wissenschaften (Berlin: Reimer, 1903), IV, 434–440, especially 436, 438, 440. For Kant, only rational and autonomous beings (persons) can possess dignity, and therefore, by implication, he excludes the dead.

no society that does not treat its dead with dignity. At the borders of the human species, even Neanderthal man buried his dead in summarily arranged tombs.<sup>26</sup> Archeologists consider traces of funerary rites in a certain territory as very powerful proof of—indeed as virtually equivalent to—the presence of human activity there. Human-rights instruments, such as the *Geneva Conventions*, stress similar points: “The remains of persons . . . shall be respected, and the gravesites of all such persons shall be respected, maintained and marked.”<sup>27</sup> Posthumous restoration of the dignity of deceased victims of serious human-rights abuses has been a powerful motive behind the recent establishment of the International Criminal Court. One of the crimes within the court’s jurisdiction is the war crime of outrages upon personal dignity, which includes outrages upon the dignity of the dead.<sup>28</sup> Neglecting the view that the dead possess dignity offends the sensibilities of humanity at large. This fact is buttressed by five assumptions.<sup>29</sup> The first two concern the dead themselves, the third concerns the dead when still alive, and the last concern the relationship between the dead and the living.

I have already expounded my first assumption, that dead bodies have a special status between human beings and things. My second, related, assumption is that men and women retain some traces of human being and personhood after they die. In referring to the deceased as “postpersons” and “neomorts,” the leading social philosopher Joel Feinberg formulated the following key insight:

[P]ostpersons . . . are naturally associated with actual persons, and thus become natural repositories for the sentiments real persons evoke in us. . . . [T]he neomort . . . is not only a symbol of human beings generally, but . . . it is the symbolic remains of a particular person and his specific traits and history. . . . One cannot murder a corpse . . . but one can violate it symbolically, and few societies are prepared to tolerate its public mutilation.<sup>30</sup>

26. “Il n’existe probablement aucune société qui ne traite ses morts avec égards. Aux frontières mêmes de l’espèce, l’homme de Néanderthal enterrait aussi ses défunts dans des tombes sommairement aménagées.” Claude Lévi-Strauss, *Tristes tropiques* (Paris: Plon, 1955), 241. Also Johannes Fabian, “How Others Die: Reflections on the Anthropology of Death,” in *Death in American Experience*, ed. Arien Mack (New York: Schocken Books, 1973), 189–190 (burials and the hominization process), and Barley, *Dancing on the Grave*, 13–45 (about the emotional universality of death.)

27. Text quoted in Appendix.

28. Text quoted in Appendix.

29. See (chronologically): Joel Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton: Princeton University Press, 1980), 173–176 (“Dead persons” [originally in a 1971 paper first published in 1974]); Frank Harrison III, “What Kind of Beings Can Have Rights?” *Philosophy Forum*, 12: 1–2 (September 1972), 115, 126; Kenneth Goodpaster, “On Being Morally Considerable,” *Journal of Philosophy* 75:6 (June 1978), 308–325; W. R. Carter, “Once and Future Persons,” *American Philosophical Quarterly* 17:1 (January 1980), 61–66; Peter Singer, “The Concept of Moral Standing,” in *Ethics in Hard Times*, ed. Arthur Caplan and Daniel Callahan (New York and London: Plenum Press, 1981), 40–45; Ernest Partridge, “Posthumous Interests and Posthumous Respect,” *Ethics* 91:2 (January 1981), 255–259; Rosenberg, *Thinking Clearly about Death*, 116–136, especially 120–123; Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 495; White, *Rights*, 75–92; Peter Jones, *Rights* (Houndmills, Basingstoke: Macmillan, 1994), 67–71.

30. Joel Feinberg, *Offense to Others* (New York and Oxford: Oxford University Press, 1985), 57; also 70–72, 94–95, 115–118. Chadwick, “Corpses, Recycling and Therapeutic Purposes” (62–63) expressed the concomitant view about the living by stating: “Our treatment of the corpse symbolises not only the respect for the individual whose corpse it is but also for human life in general . . . Even those worldviews which do not regard the corpse as the shell of a now departed person, still treat the body with respect.” Also Rosenberg, *Thinking Clearly about Death*, 121–22: “[W]e do, in practice, assign some special moral status to the corpse of a human being. This is shown, for exam-



The dead are defenseless and vulnerable, and arouse the need for protection in the living. Feinberg spoke of the recently deceased, but I do not believe that the passage of time erodes these feelings of compassion. When we observe how the living treat the distant dead, how skulls, relics, effigies, masks, and ashes inspire awe, the symbolic value that is attached to them does not seem to diminish significantly over time.<sup>31</sup> Some may believe that this dignity can be actively attributed to the dead by the living, others that it is intrinsic—and recognized as such by the living. Perhaps both are true in that the dead possess potential dignity that is activated each time the living come into contact with them.

The third assumption is that concerns can extend beyond the limits of one's lifetime, and that some interests and claims survive their owner's death. The wishes of the living about what will happen to their body, wealth, or reputation after their deaths are often expressed as promises, contracts, life insurance policies, last wills and testaments, and deathbed wishes. Nobody would ever go to that much trouble if it were known that these wishes would not be honored posthumously.<sup>32</sup> The fourth assumption is that, for most, the mutual web of rights and responsibilities does not stop at death. We pity the dead because we knew them before they died and experience their death as a loss. "We *think of* the dead as the persons they were antemortem."<sup>33</sup> Despite this loss, many traces of human beings who died survive—in their dead bodies, as remarked above, but also in the objects, projects, and works on which they left their mark. The dead are also present in the resemblance of their children and in memories that capture the mind of surviving families, friends, and, perhaps, of wider circles. All this constitutes a personal legacy and continues the relationship beyond death.<sup>34</sup> The fifth and last assumption repeats this idea at the level of humanity as a whole. The living and the dead are two groups sufficiently similar to speak of them as members of one historical community. The dead, while alive, transmitted the human genome through the ages. In a 1997 declaration, UNESCO stated that, in a symbolic sense, the human genome is the heritage of humanity.<sup>35</sup> At the same time,

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ple, by the fact that it is possible to *desecrate* a person's corpse. . . . Like human beings, then, the corpses of human beings are due a certain respect—although not, of course, the full measure of respect for 'human rights' due a (living) person . . . [A] person's corpse is itself an independent ethical kind, characterized by *certain rights of treatment* [my italics] and duties of respect of its own." Note the phrase "rights of treatment:" the skeptical Rosenberg, who, like Goodpaster, perceives only selected living entities as rights-bearers, assigns rights to the dead in an inadvertent moment!

31. One indication of this is the frequent practice of archeologists to give nicknames to skeletons; see Paul Bahn, "Do Not Disturb? Archaeology and the Rights of the Dead," *Oxford Journal of Archaeology* 3:1 (1984), 131.

32. This argument is developed at length by Partridge, "Posthumous Interests and Posthumous Respect," 259–261; also Belliotti, "Do Dead Human Beings Have Rights?" 208; Lomasky, *Persons, Rights, and the Moral Community*, 216–217.

33. Joan Callahan, "On Harming the Dead," *Ethics* 97:2 (January 1987), 347.

34. Thomas Nagel, *Mortal Questions* (Cambridge, Eng.: Cambridge University Press, 1979), ("Death" [1970]), here 5–7; A. I. Melden, *Rights and Persons* (Oxford: Blackwell, 1977), 48–52 ("Deathbed promises"); Yourgrau, *The Dead*, 85–86; Roger Scruton, *Modern Philosophy: An Introduction and Survey* (London: Mandarin, Reed International Books, 1996), 307, 312; Raymond Belliotti, *What Is the Meaning of Human Life?* (Amsterdam and Atlanta, GA: Rodopi, 2001), ("Death"), 147–148, 154–155, also 88–91; Avishai Margalit, *The Ethics of Memory* (Cambridge, Mass.: Harvard University Press, 2002), 91–94.

35. UNESCO, *Universal Declaration on the Human Genome and Human Rights* (1997), Article 1.

the living and the dead are sufficiently different to assign them a different moral status, entailing rights and duties for the living and protection for the dead.

From the preceding discussion, I conclude that the dead possess dignity and therefore deserve respect and protection, which constitutes a credible basis for assigning responsibilities to the living. I do not need concepts with such metaphysical echo as “afterlife,” “immortality,” “spirits,” “souls,” or even “ancestors” to justify these responsibilities, but I cannot imagine them without the concepts of dignity and respect. If, then, I were asked to characterize these responsibilities to the dead, I would say that they are:<sup>36</sup>

1. partly (perhaps mostly) *passive* or *negative*, partly *active* or *positive*: many favoring abstention, others favoring intervention;

2. wholly *moral* and partly *legal*: all are valid claims addressed to the conscience of all, and some are also enforceable by law; in general, the more remote the dead, the more the responsibility is moral;

3. *universal*, not specific.

I will implicitly show the validity of the first and second characteristic later, as I present a list of responsibilities. For the moment, there is more to tell about universality.

#### V. ARE THE RESPONSIBILITIES OF THE LIVING TO THE DEAD UNIVERSAL?

Universality of responsibilities does not mean that such responsibilities cannot vary across cultures. I think of three other features: that the list of responsibilities I shall identify is irreducible, that all of the living are in charge of them, and that they apply to all of the dead in the anthropological and historical sense. The list of core responsibilities shall be presented in Table 1. Although I consider this list to be irreducible, its exhaustiveness is, of course, open to debate. The other forms of universality concern not the responsibilities themselves but the parties involved in them. When we say that *all* of the living have responsibilities to *all* of the dead, we formulate a general principle. In practice, however, responsibilities for *specific* deceased human beings will be prescribed by law or taken care of by certain groups. We may ask who precisely are the living in charge of the dead. Foremost among them, of course, are the dead themselves when they were still alive. By leading a life, developing a personality, having interests, uttering wishes, and writing wills, they leave indications of how they would like to be taken care of after their death. The next guardians are the relatives, who usually bury and mourn the dead. There may be no surviving relatives, however, or these may be indifferent or even hostile to the dead. The circle of acquaintances, family friends, religious counselors, and sometimes wider solidarity networks and the whole community assist the relatives. The extent to which these groups—affiliated with the deceased through friendship, culture, and shared traditions—are allowed to intervene is pre-eminently culture-bound. Physicians determine the moment of death and often play an important role in postmortem research. Notaries and judges also act as agents on behalf of the dead, the first to execute

36. Feinberg, *Rights*, 134; *Idem*, *Harm*, 109–110.

the will, the second to rule on charges made on their behalf. At more organized levels, truth commissions investigating past human-rights abuses, civil groups organizing commemorations, or governments and parliaments regulating cemeteries, making repression-archives accessible, returning human remains of disappeared victims to families, or issuing apologies for past abuses, can be said to take care of the dead. Historians (and such related professionals as archivists, archeologists, and curators) have a special place among the guardians of the dead because they are the only ones (or among the few, anyway) who, in principle, occupy themselves *systematically* with *all* the dead of history—the near and the distant, the known and the anonymous.

Typically, groups representing the dead have at least three problems when fixing protective strategies, thereby possibly undermining their guardianship. The first of these is the problem of which guardians have the authority to represent the dead. This is particularly important when conflicts arise between the rights of the living and their responsibilities to the dead. Second, all guardians risk misinterpreting the wishes of the dead. Even when the dead themselves leave clearly formulated wishes, vexing problems of interpretation may arise each time the posthumous circumstances for carrying out the wishes are different from, or unforeseen at, the time at which they were formulated. This may lead to a third risk: abuse of the memory of the dead. Perhaps historians are more aware of these risks than are others. Whether they are more immune to them remains to be seen. Much depends upon the ethical principles regulating their work.

Let us now look at the third form of universality. Anthropological universality would mean that the responsibilities of the living to the dead are applicable to all of the dead without discrimination. In a sense, the wording of the non-discrimination article of the UDHR (Article 2) can be used here: “Everyone is entitled to all the rights and freedoms . . . without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” A considerable problem may arise, however, when the clause “other status” is taken to mean “moral quality.” When we say that responsibilities apply to all of the dead, regardless of the fact that they may have led a morally gratifying or shameful life, is anthropological universality still acceptable? I am convinced that it is. Applicability of responsibilities does not refer only to the benefactors and saints of humanity, but also to its tyrants, criminals, and mass murderers. Although this may sound too lenient for perpetrators of human-rights abuses and too bitter for their victims, the responsibilities cover characteristics that all human beings still have in common after death, regardless of their moral merit. Moreover, even deceased tyrants, criminals, and mass murderers have mourning relatives. If moral quality makes a difference, then, we would be forced to exclude many from the benefits of these responsibilities and, in addition, we would create a problem of admission to the circle of those benefiting from them. This would render our whole operation senseless.

Historical universality—applicability to all the dead, from the first human being in history to the one who died a second ago—is more troubling. This is because most responsibilities seem to have a built-in time factor. The passage of

time gradually erases the possibility of discharging them. To address this problem, it is advisable to distinguish two classes among the dead: the known (including the recent dead, and the dead of longer ago who left traces [the rich, the powerful, the famous]), and the anonymous, including the dead of longer ago who left no traces or no recognizable traces. There are few problems with the recent dead, whose bodies and personality traces still exist and who usually have several caretakers. There are more, but still manageable problems, with the distant dead who were rich and could afford to build tombs, or with the powerful and famous, who survived in many historical sources. What shall we do, however, with the countless anonymous dead of history who left no recognizable traces at all and about whose existence historical sources inform us only indirectly? Here, identification and remembrance of individual persons are impossible, and the sensibilities of the living absent. Our power to imagine their abstract existence as at least a category—a category that forms the majority of the 100 billion dead—is the only basis for discharging responsibilities to them. I believe, however, that the burden of proof is larger for those rejecting historical universality than for those accepting it. Fully aware of the fragile knowability of so many dead and of the irrelevance of almost all the responsibilities to them, the countless anonymous dead of past generations cannot be excluded. If we did, we would have to erect a moving time barrier for identifying those dead who are within the scope of the responsibilities of the living and those who are not, and, consequently, for identifying the moment when “he” and “she” become “it.” Such a barrier would be arbitrary and, in cases where historical or archeological research uncovers data about hitherto unknown people, absurd. The time that “he” and “she” transform into “it” never arrives in any absolute sense. By retaining the known dead and rejecting the anonymous dead, we would also violate the nondiscrimination principle on which anthropological universality is based. Anonymity and untraceability can never derogate responsibilities, although it may suspend them almost indefinitely. At least in principle, then, the responsibilities to the dead are retroactively universal.<sup>37</sup>

#### VI. WHICH RESPONSIBILITIES DO THE LIVING HAVE TO THE DEAD?

Although (or perhaps because) the dead have an ambiguous ontological status (less than human beings but still reminiscent of their humanity), attempts to formulate specific responsibilities of living generations to past generations are unavoidably inspired by the responsibilities that the living have to one another, as formulated in international codes emanating from global entities. Five United Nations (UN) instruments developed for the living contain articles partly applicable to the dead; three texts about victims of armed conflicts describe the treatment of the dead directly; and finally, three other codes tell museums, archeologists, and physicians how to behave responsibly toward the dead. The relevant passages of these texts are quoted in the appendix.

37. Belliotti defends a view comparable to mine (“Do Dead Human Beings Have Rights,” 209–210, discussing the posthumous defamation of Rocky Marciano and Cicero); Lomasky defends the view of gradually extinguishing “rights” of the dead (*Persons, Rights, and the Moral Community*, 218).

On the basis of these documents I identify eight responsibilities for what I call *A Declaration of the Responsibilities of Present Generations toward Past Generations*:<sup>38</sup> four body- and property-related responsibilities, three personality-related responsibilities, and one general responsibility. In addition, I distinguish two consequential rights.<sup>39</sup> As I said before, all articles are about moral responsibilities, but most also carry important legal aspects. A preamble should refer to the posthumous dignity of the dead, and perhaps state one general regulatory clause: when the responsibilities of the living to the dead conflict with the rights of the living, the latter take precedence (because the living have a higher moral status than the dead have), but only after the performance of a test in which both are carefully assessed. In principle, such tests should be based on principles of accountability (of those taking action) and free and informed consent (of the dead when still alive or of their representatives, as discussed above). My Declaration is subject to two caveats: each responsibility deserves more commentary than I can provide here, and taken together, they should be seen as a set of ten hypotheses that map the field without pretensions to being definitive.<sup>40</sup> Let us now look at the *Declaration*.

38. From the perspective of the dead (if such a perspective existed), my Declaration could be read as a *Universal Declaration of Rights of the Dead*. The present name is inspired by the 1997 UNESCO *Declaration on the Responsibilities of the Present Generations towards Future Generations*. I do not differentiate between “responsibilities,” “obligations,” and “duties.” Interesting though these distinctions may be, they are of little direct relevance to our problem. Given that UNESCO consistently uses “responsibilities” and that I am engaged in a similar project, I have some preference for that term. Some speak—correctly I think—about responsibilities *regarding* rather than *toward* the dead (Chadwick, “Corpses, Recycling and Therapeutic Purposes,” 58).

Interestingly, the UNESCO Declaration speaks about “the needs and interests of future generations,” “intergenerational solidarity,” and about “due” or “full” “respect for the dignity of the human person.” For considerations about future generations, see, for example, John Rawls, *A Theory of Justice* [1971] (Cambridge, Eng.: Cambridge University Press, 1999), 111, 118–121, 183, 251–262, 514; and Parfit, *Reasons and Persons*, 349–441. Rawls, for example, writes: “[I]n first principles of justice we are not allowed to treat generations differently solely on the grounds that they are earlier or later in time” (260). For an explicit attempt to link future generations to past ones, see Bruce Auerbach, *Unto the Thousandth Generation: Conceptualizing Intergenerational Justice* (New York: Peter Lang, 1995), 173–206 (“Obligations to past generations.”)

39. Belliotti (“Do Dead Human Beings Have Rights,” 209) identified four “rights” of the dead: “(a) the right to dispose of property; (b) the right to the reputation which is merited by deeds performed when alive; (c) the right to any posthumous award to which a claim of entitlement can justifiably be lodged; (d) the right to specify the burial procedures and handling of one’s corpse.” Belliotti’s “rights” (a) and (d) are covered by my Article 4; (b) by my Articles 6 and 7; but I can see no urgent reason to incorporate (c) as a separate article.

40. Given the scope of this essay, I have refrained from giving examples. For numerous cases, see my *Censorship of Historical Thought: A World Guide 1945–2000* (Westport CT and London: Greenwood, 2002.) Search its index for: ancestors; anonymity; archeology; bones; burials; cemeteries; commemorations; defamation; denial of genocide and massacres; dignity; ethics; exhumations; falsification and distortion of history; graves; heritage; human remains; indigenous peoples; integrity; legacy; lies; manipulation of history; memorial; memory; obituaries; obligations; omissions; patrimony; propaganda, historical; rights; reputations; sacred; shrines; taboos; tombs; traditions.

<b>Table 1: Declaration of the Responsibilities of Present Generations toward Past Generations (outline)</b>		
<b>Class</b>	<b>Responsibilities</b>	<b>Sources of inspiration<sup>41</sup></b>
<b>Body- and property-related responsibilities</b>	Art. 1 <b>Body</b> The responsibility to preserve their physical integrity.	API I, Art. 34(1) ICC, Arts. 8(2)(b)(xxi), 8(2)(c)(ii) JP, Princ. 36 UDHR, Arts. 5, 12a WAC, Art. 1 WHO, Princ. 5
	Art. 2 <b>Funeral</b> The responsibility to honor them with last rites.	API I, Arts. 34(1), 34(2)(b), 34(2)(c) DDRIP, Art. 13 GC III, Art. 120c–d
	Art. 3 <b>Burial</b> The responsibility to bury or cremate them decently and not to disturb their rest.	ICC, Arts. 8(2)(b)(xxi), 8(2)(c)(ii) UDHR, Art. 12a WAC, Arts. 1–2
	Art. 4 <b>Will</b> The responsibility to respect their will concerning body and estate.	GC III, Art. 120a UDHR, Art. 17(2) WAC, Art. 2
<b>Personality-related responsibilities</b>	Art. 5 <b>Identity</b> The responsibility to identify their body; record their death; and preserve their name, dates of birth and death, and nationality.	API I, Art. 33(2)(b) DRC, Art. 3 GC III, Art. 120b JP, Princ. 36 UDHR, Art. 15(1)
	Art. 6 <b>Image</b> The responsibility to weigh their privacy and reputation against the public interest when showing them in exhibits and images.	ICOM, Art. 6(6) UDHR, Art. 12
	Art. 7 <b>Speech</b> The responsibility to weigh their privacy and reputation against the public interest when disclosing or formulating facts about them.	UDHR, Art. 12
<b>General responsibilities</b>	Art. 8 <b>Heritage</b> The responsibility to identify and safeguard their heritage.	UNESCO, Art. 7
<b>Consequential rights</b>	Art. 9 <b>Memory</b> The right to mourn, to hold funerals, to bury and cremate, and to commemorate.	API I, Art. 34(2)(a) JP, Princ. 2, 36 UDHR, Art. 19a
	Art. 10 <b>History</b> The right to know the truth about past human rights abuses.	API I, Arts. 32, 33(2)(b), 34(4)(b) AP II, Art. 8 JP, Preamble, Princ. 1–4, 13–14 UDHR, Arts. 8, 19b

Abbreviations:

AP Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Non-International Armed Conflicts (Protocol II) (1977).

41. See appendix.

DRC	<i>Declaration of the Rights of the Child</i> (1959).
DDRIP	<i>Draft Declaration on the Rights of Indigenous Peoples</i> (1994).
GC III	<i>Geneva Conventions of August 12, 1949: Third Geneva Convention Relative to the Treatment of Prisoners of War</i> (1949).
ICC	<i>International Criminal Court Statute</i> (1998) and <i>Elements of Crimes</i> (2002).
ICOM	<i>Code of Ethics for Museums</i> (1986, 2001).
JP	<i>Set of Principles for the Protection and Promotion of Human Rights through Action To Combat Impunity</i> ["Joinet Principles"] (1997).
UDHR	<i>Universal Declaration of Human Rights</i> (1948).
UNESCO	<i>Declaration on the Responsibilities of the Present Generations towards Future Generations</i> (1997).
WAC	<i>Vermillion Accord on Human Remains</i> (1989).
WHO	<i>Guiding Principles on Human Organ Transplantation</i> (1991).

### *Body- and property-related responsibilities*

ARTICLE 1. Dead bodies are the necessary starting point because without them, in a sense, the declaration does not exist. Article 1 has, however, a paradoxical tinge. What can "physical integrity" possibly mean when a body is disintegrating? It means that, even then, the body should be handled with respect. Problems of compliance may arise in times of mass death (epidemics, natural disasters, wars, and political violence) when urgent disposal of bodies is needed for public-health reasons. Another problematic moment may be the regular clearance of old graves at cemeteries, as the maintenance of graves in perpetuity is a sheer impossibility.<sup>42</sup> A typical area in which the regulatory clause has to be applied is the tension between the integrity of the dead body and the use of organs or the transplant of tissue to prolong the lives of patients. In general, the use of dead bodies for autopsies and for medical research for scientific or therapeutic purposes should be allowed, if carried out in accordance with the law.<sup>43</sup>

Article 1 contains aspects of both privacy and property. Although many maintain that privacy does not extend beyond death, I argue that privacy is part of the dead by virtue of their dignity, and that, in addition, it is double because it refers both to the responsibility not to disturb the body (relevant to Articles 1 and 3) and to selective disclosure of information (relevant to Articles 6 and 7). Privacy understood as the responsibility not to disturb the body is summarized in the phrase "rest in peace." It has been the object of heated debate between indigenous peoples and archeologists in recent decades, as a result of which the latter tried to codify professional conduct in this area.<sup>44</sup> As to the property aspect, most

42. Iserson, *Death to Dust*, 516–532.

43. Objections against medical or forensic research may be of a medical, religious, ethical, political, ideological, or cultural nature. The free and informed consent principle may be overruled solely when there are compelling public interests, such as verifying whether death resulted from a criminal act. For an overview of these medical and legal aspects, mentioning many historical controversies, see Dorothy Nelkin and Lori Andrews, "Do the Dead Have Interests? Policy Issues for Research after Life," *American Journal of Law and Medicine* 24:2–3 (Summer/Fall 1998), 261–291. Also Lori Andrews *et al.*, "Constructing Ethical Guidelines for Biohistory," *Science* 304 (9 April 2004), 215–216; Thomas Grey, *The Legal Enforcement of Morality* (New York: Knopf, 1983), 16–19, 103–153 ("The treatment of the dead"); Feinberg, *Offense*, 72–77, 94–95; Iserson, *Death to Dust*, 100, 153–154, 514; Chadwick, "Corpses, Recycling and Therapeutic Purposes," 65–69.

44. See the *Vermillion Accord* (quoted in Appendix); the 1990 Native American Graves Protection and Repatriation Act (NAGPRA) in the United States; the *Code of Ethics for Museums* (quoted in Appendix), Article 4.4 ("Return and restitution of cultural property"); and Bahn, "Do Not Disturb?" 127–139.

legal systems provide relatives with *quasi-property rights* to custody of the body between death and burial. This means, according to Thomas Grey, “that they have a legal duty to see that the body receives a prompt decent burial, and if anyone interferes with the body in a way that causes the family emotional distress, they can recover compensatory money damages.”<sup>45</sup> This implies that a body should be returned to relatives when it is not in their custody.<sup>46</sup>

ARTICLES 2 AND 3. Article 2 is a direct translation of the principles of dignity and respect, as is Article 1. Indeed, organizing funerals or last rites is one of the distinguishing features of human beings. Universal though it may be, cultural and religious traditions and diversity should be taken into account when carrying out this responsibility.<sup>47</sup> Normally (though not always), funeral and burial go together, but they have separate ramifications, funeral with memory (Article 9) and burial with body and will (Articles 1 and 4). A burial is the act of depositing individual human remains below, on, or above the surface of the earth, usually as part of the funeral.<sup>48</sup> In fact, the destination can be earth (burial), fire (cremation), air (air burial), or water (sea burial). The remains are the body and what is finally left of it (bones; ashes or cremains; mummies; embalmed bodies). Article 3 raises problems in cases of collective disposal of remains. “Collective disposal of remains” means either that unidentified remains of different human beings (for example, victims of war or disaster) are buried or cremated together regardless of their nationality or religion, or that identified remains of different human beings *become* intentionally unidentified, either partly (for instance, in family tombs) or wholly (when paupers are buried in common graves, or when cemeteries are cleared and exhumed remains stored together). These forms of collective disposal are different from a third one, collective disposal in mass graves as a result of violence. All forms have implications for Article 5.

Also problematic is a concept seemingly at odds with the privacy element of Article 1, that of a double burial. This concept covers five situations. First, it is customary in many cultures to enclose the period of mourning between a provisional and a definitive burial. Second, provisional burial may be necessary if the body cannot immediately be identified or transported to its permanent place of rest.<sup>49</sup> Third, exhumation is sometimes required to regroup graves, relocate cemeteries, or to carry out autopsies, after which the bodies are reinterred. The fourth situation refers to the end of periods of human-rights abuses. At such times, it may happen that bodies from anonymous graves are reburied in a solemn man-

45. This definition of “quasi-right” is from Grey, *The Legal Enforcement of Morality*, 16; also Hugh Bernard, *The Law of Death and Disposal of the Dead* (New York: Oceana Publications, 1966), 12–17; Iserson, *Death to Dust*, 556–559; Chadwick, “Corpses, Recycling and Therapeutic Purposes,” 61–62; Nelkin and Andrews, “Do the Dead Have Interests?” 282, 284–285.

46. With the qualification that return should be excluded when relatives are estranged from the deceased.

47. For good overviews of the cultural diversity of attitudes toward death, see Barley, *Dancing on the Grave*, 27, 37, 61–76, 101, 152–153, 219 (giving examples of myths about the origins of death and about why people die).

48. This definition adapted from NAGPRA, section 2.1. Also Iserson, *Death to Dust*, 525–528; Barley, *Dancing on the Grave*, 205.

49. Iserson, *Death to Dust*, 347–349, 422. Article 3 implies that repatriation of remains of those deceased abroad should be facilitated.



ner. The last situation relates to periods of human-rights abuses themselves. During genocide, for example, bodies may be exhumed and transported from primary to secondary mass gravesites in order to erase traces of the crime.

The burial sites in Article 3 are usually graves and urns. When their meaning is extended, they also encompass such symbolic places as effigies, ancestral masks, busts, tablets, funerary statues, altars for ancestor worship, or memorial monuments.<sup>50</sup> From this, it is clear that Article 3 has some important property aspects. It includes mortuary architecture (crypts, mausoleums, charnel houses, columbaria, and shrines), funeral offerings, and grave goods. It implies that property rights for places of rest should be carefully arranged. A conflict between the living and the dead may arise when displacing cemeteries is necessary to create space for the living. The scattering of ashes in a place and on a time of personal significance, which can be considered as a dignified destination of human remains, is perhaps the only legitimate exception to the rule that there has to be a place to rest. It is a paradoxical act, however. While the scattering of ashes dissolves identity, the choice of a place and a time dear to the deceased emphasizes it (see also Article 5).

ARTICLE 4. As already indicated above, perceptions of the wishes of the dead may vary considerably. Article 4 therefore applies to clearly formulated wishes, and, in their absence, to cases where they can be established beyond reasonable doubt. The article is body-related when it regulates the disposal of the remains, and property-related when it regulates the estate (including both tangible and intangible property). Traditions and legal provisions, of course, limit the execution of the will, for example when the property bequeathed was acquired illegally or when burial wishes are unlawful, unreasonable, or unfeasible. In my view, Article 4 does not include wishes unrelated to body or property, such as wishes regarding the desired behavior of close relatives, although this does not mean that those wishes are unimportant. As making a will is an act implying rational decisions, Article 4 is the only article of the *Declaration* where one category of human beings, the mentally ill incapable of rational agency, may be treated as an exception: execution of wills drafted by them should be reviewed and approved by a notary. Article 4 could cover such diverse matters as intellectual property questions<sup>51</sup> and endowments for memorials and commemorations. In this way, it can become a strategy for saving certain personality characteristics (the subject of Articles 5 to 7) from oblivion.<sup>52</sup> A troubling complication, however, arises—not the least for archivists and historians—when the will stipulates that personal papers should be destroyed after the death of their author.

50. For an analysis of effigies as substitutes, representations, and doubles of the dead, see Carlo Ginzburg, "Representation: The Word, the Idea, the Thing" [1991], in *idem*, *Wooden Eyes: Nine Reflections on Distance* [1998] (New York: Columbia University Press, 2001), 63–78, 201–207.

51. See *Berne Convention for the Protection of Literary and Artistic Works* ([http://www.wipo/int](http://www.wipo.int); Berne and Paris: World Intellectual Property Organization, 1886, 1979), Articles 6bis, 7.

52. Compare S. C. Humphreys, "Death and Time," in *Mortality and Immortality: The Anthropology and Archaeology of Death*, ed. S. C. Humphreys and Helen King (London: Academic Press, 1981), 271, 273.

*Personality-related responsibilities*

ARTICLE 5. Whereas body- and property-related responsibilities refer to what is left of the living *human being* after death, personality-related responsibilities refer to what is left of the living *person* after death. Article 5 (“identity”) is meant to protect against anonymous death. It signifies, first of all, searching for the dead when they have disappeared (after abuses) or are lost (after calamities). It includes official registration of individual particulars and of marked graves and urns. This emphasis on personal identity is shared by most cultures,<sup>53</sup> and it is a cornerstone of human-rights philosophy.<sup>54</sup> When death occurs in a context of massive human-rights abuses, identification of dead bodies is an act establishing a form of elementary historical truth. In recent decades, millions of surviving relatives have demanded this form of truth (see Article 10).

ARTICLES 6 and 7. Article 6 does not refer to images of the dead when they were alive, but to the display of human remains, effigies, grave goods, and burial sites, and to pictorial representations (photographs, pictures, drawings, lecture slides, and films) of them.<sup>55</sup> The public interest may override the private interest implied in Article 6, for example in historical works, war reporting, or artistic endeavors. Article 7 covers the whole range of relevant texts: tape recordings or descriptions of funerals, epitaphs, death notices, obituaries, commemorative addresses and texts, biographies, genealogies, and other historical works. Articles 6 and 7 include complex aspects of intellectual property, which I cannot discuss here.<sup>56</sup> It is essential to emphasize that Articles 6 and 7 are applicable to *facts only and not to opinions*. In other words, they *do not* apply to statements “which either do not contain a factual connotation which could be proved to be false, or cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).”<sup>57</sup> Opinions (or “comments” or “value judgments”) are not susceptible to proof because they do not fit a true/false schema and therefore enjoy greater protection than do facts. Without this essential provision, many conversations, writings, or images would become entirely impossible.

Articles 6 and 7 presuppose that reasons of privacy and reputation impel researchers to treat sensitive personal data with care, and, in exceptional cases, with confidentiality.<sup>58</sup> I think that the dead possess privacy (understood here as selective disclosure of information about them), which can be damaged, and rep-

53. Though not all. Some practice the collective disposal of remains; see S. C. Humphreys, “Introduction: Comparative Perspectives on Death,” in Humphreys and King, ed., 6, 10–11; and *Idem*, “Death and Time,” in: Humphreys and King, ed., 270; Barley, *Dancing on the Grave*, 79, 108, 158–159. For burial as an act of self-identification, see Barley, *Dancing on the Grave*, 133–135.

54. De Baets, “History of Human Rights,” 7012.

55. The use of dead bodies for educational purposes is allowed, if exercised with respect.

56. For the issues of transferability of fame after death and descent of the right of publicity, see John David Viera, “Images as Property,” in *Image Ethics: The Moral Rights of Subjects in Photographs, Film, and Television*, ed. Larry Gross, John Stuart Katz, and Jay Ruby (New York and Oxford: Oxford University Press, 1988), 145–154 (discussing the Elvis Presley case).

57. Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* (<http://www.article19.org/>; London: Article 19, 2000), Principle 10 (“Expressions of opinion”); also Principle 7 (“Proof of truth”).

58. See David Flaherty, “Privacy and Confidentiality: The Responsibilities of Historians,” *Reviews in American History* 8:3 (September 1980), 419–429.

utations, which can be harmed. Laws containing provisions for “protection of the memory of the dead” or “defamation of the dead” exist worldwide. In many countries, these laws are abused. They have a chilling effect on the expression and exchange of ideas, historical or otherwise, and are often only barely veiled attempts at censorship.<sup>59</sup> The problem, then, is how to maintain that the dead possess privacy and reputations without blocking access to sensitive archives or preventing critical research and writing about the dead. The solution involves two steps: *dejudicialization*, and the application of a test. *Dejudicialization* means allowing responsible historians and other researchers, not judges, to handle the problem. It is reached (1) when harm to the privacy of the dead is not equated with invasion of privacy, (2) when harm to the reputation of the dead is not equated with defamation, and (3) when privacy and reputation are not seen as inheritable (that is, when the interests of grieved relatives and friends in the untarnished privacy and reputation of the dead are not equated with the interest of the dead in their own reputation when they were still alive). Of these three points, the third is the most important, because judges tend not to occupy themselves with the dead if no surviving relatives or other living complainants are involved. In all cases, I believe, the honest search for historical truth by responsible historians and others concerned with the past is the best guarantee for complying with Articles 6 and 7.

Nevertheless, the right of historians (and society as a whole) to know the truth can come into genuine conflict with their duty to respect the privacy and reputations of the dead. For such cases, a *proportionality test* should be devised to determine whether the benefit gained in terms of privacy—and reputation—protection substantially outweighs the harm inflicted on freedom of expression and historical truth. An integral part of the critical method used by historians, such a test should not be obligatorily mentioned in their work. Otherwise, taking controversial or new positions on historical facts would become exceedingly difficult, if not impossible. It is, however, recommended that historians append substantive objections of their subjects of study or of the latter’s surviving relatives, if known, to their statements or theses. Conversely, historians should have a right to silence: in particular, they should be allowed to omit sensitive privacy- and reputation-related statements when mention of them does not serve the public interest. *Dejudicialization* is possible only when historians can convince judges, potential complainants, holders of historical data or sources, and society at large of their accountability. A necessary condition for this is, I believe, that they operate on the basis of a clear code of ethics, in which the responsible handling of information and the proportionality test are described. Similar solutions apply, *mutatis mutandis*, to comments on the dead by other groups, such as journalists and writers.

### *General responsibilities*

In discussing the last three articles, I shall switch the perspective from the level of individuals (on which the first seven articles were discussed for the most part) to the level of communities.

59. See my “Defamation Cases against Historians,” *History and Theory* 41 (October 2002), 349–350; see footnotes for further references, particularly the work of John Gilissen and Jean-Denis Bredin. Also Feinberg, *Rights*, 175–176; *idem*, *Harmless Wrongdoing* (New York and Oxford: Oxford University Press, 1988), 254–256; Robert Wennberg, “The Moral Standing of the Dead and the Writing of History,” *Fides et Historia* 30:2 (Summer/Fall 1998), 51–63.

ARTICLE 8. “Heritage” does not require extensive comment here, as UNESCO has already done much pioneering work in this area during the last decades. Tangible cultural heritage covers monuments (architecture, monumental sculpture and painting, archeological structures, inscriptions, cave dwellings), buildings, and sites (including archeological sites) on land or under water, which are of outstanding universal value from the historical, esthetic, or anthropological viewpoint. Intangible cultural heritage is manifested in oral traditions and expressions, including language, the performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe, and traditional craftsmanship. Natural heritage encompasses natural features, formations, sites, and areas of outstanding universal value from the viewpoint of science, conservation, or esthetics.<sup>60</sup>

*Consequential rights*<sup>61</sup>

The responsibilities to the dead can be discharged on two conditions only. First, the living have a right to “pay their last respects.” Second, they have a right to know what happened during periods of grave human-rights abuses. I refer to the first as a right to memory, and to the second as a right to history.

ARTICLE 9. Everybody has a right to memory. This is so because memories can be, and should be, seen as forms of opinions, and opinions are protected by UDHR Article 19 and by the Covenants emanating from the UDHR. This UDHR Article 19 covers the freedom to *hold* opinions and the right to *express* them. The official UN comment on this article tells us that “the freedom to hold opinions without interference” permits no exception or restriction.<sup>62</sup> Therefore, UDHR Article 19 also includes the right to hold memories without interference. This right to memory can be analyzed at two levels. As private remembrance and mourning, it causes no problems, as nobody can be prevented from having memories. As a public and institutionalized tribute to the dead, the freedom to hold memories changes into the right to express them. Public commemorations are common in most cultures and few cultures seem to favor forgetting over remembering. At the same time, such commemorations are frequently disturbed.<sup>63</sup>

60. See UNESCO instruments quoted in Appendix. The concepts of heritage, patrimony and legacy did not escape critical assessment; see David Lowenthal, *Possessed by the Past: The Heritage Crusade and the Spoils of History* (New York: The Free Press, 1996).

61. Articles 9 and 10 are the subject of my paper “A Duty to Remember or a Right to Historical Truth?” presented at the University of Santiago de Compostela, 17 July 2004, and to appear in *Historia a Debate: Actas del III Congreso Internacional*, ed. Carlos Barros (Santiago de Compostela: Historia a Debate [2005]).

62. UN Human Rights Committee, *International Covenant on Civil and Political Rights General Comment 10* (Nineteenth session; 29 June 1983). ICCPR Article 19(3) explicitly states that the right to express them may be subject to restrictions (namely respect for the rights or reputations of others and protection of national security, public order, public health, or morals).

63. Article 9 should not be seen as being in conflict with the custom of tabooing names of the dead and of mourners, which, we are told by the anthropologist James Frazer, existed in many cultures for fear of disturbing the spirit of the deceased; see *The Golden Bough: A Study in Magic and Religion*, volume 2, *Taboo and the Perils of the Soul* [1890] (London: Macmillan, 1914), 138–145 (names of mourners), 349–374 (names of the dead). Frazer writes that in some cultures, the tabooing of names hampered, and even made impossible, historical knowledge, for “how can history be written without names?” (363.) For the tabooing of names of the dead and the use of necronyms (names expressing

Today, however, some groups advocate not only a right to memory but also a duty to remember. Looking more closely at those pleading such a duty, we can distinguish three independently operating groups. The first and most important group does not need much elaboration: its view is that the living owe a debt toward all those ancestors who achieved something positive; for example, those who built society and its infrastructure, or those who inspired us by their teachings, writings, or art. It is the ancient idea expressed by Bernard of Chartres around 1120: “We are like dwarfs on the shoulders of giants.” In short, we owe a debt to those who created our heritage (see Article 8). The second group believes that we have a duty to remember the dead who were victims of grave human-rights abuses. Acknowledging and recounting their suffering would, they say, posthumously restore the dignity of the victims, a dignity that they were denied during their lives. In his *Statement to the Inaugural Meeting of Judges of the International Criminal Court*, UN Secretary-General Kofi Annan declared: “For those who have been slaughtered, all we can do is seek to accord them in death the dignity and respect they were so cruelly denied in life.”<sup>64</sup> Restoration of dignity at the individual level takes the form of posthumous rehabilitation, elements of which are also present in Articles 5, 7, and 10 of our *Declaration*. Deceased individuals may be rehabilitated legally (when court judgments are retroactively reviewed); socially (when compensation is paid to surviving relatives); and politically (when permission is given to publicly mention their names again, to republish their works, and to publish biographies about them—in short, to commemorate them). Rehabilitation at the community level generally consists of symbolic measures intended to provide moral reparation, such as official apologies from governments succeeding abusive regimes.<sup>65</sup> The third group combines views of the two former groups and asserts that the living should accept the whole past, whether good or bad, as the dead created it.<sup>66</sup> Of these three groups, the first attempts to individualize its claims, as a glance at the plethora of works detailing individual contributions to the history of civilizations easily demonstrates. The second group is even keener on demanding individualized remembrance, as can be inferred from the format of most truth-commission reports detailing long and impressive lists of victims of human-rights abuses.<sup>67</sup> The third

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kinship relations between persons and their deceased relatives), see Claude Lévi-Strauss, *La Pensée sauvage* (Paris: Plon, 1962), 234, 243, 250, 253–265, 278.

64. The Hague, 11 March 2003 (New York: Office of the Spokesman for the Secretary-General, 2003).

65. See “Joinet Principles” (fully quoted in Appendix), paragraph 42: “On a collective basis, symbolic measures intended to provide moral reparation, such as formal public recognition by the State of its responsibility, or official declarations aimed at restoring victims’ dignity, commemorative ceremonies, naming of public thoroughfares or the erection of monuments, help to discharge the duty of remembrance.” To Joinet’s quotation we could add the collective minute of silence for the dead.

66. See Jörn Rüsen, “Responsibility and Irresponsibility in Historical Studies: A Critical Consideration of the Ethical Dimension in the Historians’ Work” (manuscript; Essen, June 1999 version), 9–16 (published in German as: “Geschichte verantworten: kritische Überlegungen zur ethischen Dimension der Historie,” in *idem*, *Kann Gestern besser werden? Essays zum Bedenken der Geschichte* (Berlin: Kadmos, 2003), 47–87. With thanks to the author.

67. The paradigmatic text in this respect is the dedication of *The Gulag Archipelago*, written by Aleksandr Solzhenitsyn, who formed a truth commission *avant la lettre* on his own: “I dedicate this to all those who did not live to tell it. And may they please forgive me for not having seen it all nor remembered it all, for not having divined all of it.” *The Gulag Archipelago 1918–1956: An Experiment in Literary Investigation* [1973] (New York: Harper & Row, 1974), v.

group is certainly not averse to specification, but, to the extent that specification is not necessarily identical to individualization, its conception of a duty to remember is more abstract.<sup>68</sup>

I recognize that gratitude, restored dignity, and acceptance of the entire past are powerful motives to remember. I believe, however, that the duty to remember should be rejected, because it is impracticable, controversial, undesirable, and contrary to the spirit of international law. It is impracticable if it is meant to cover all the dead of history, including the forgotten. If it is *not* meant to cover all the dead of history, it is likely to be controversial because it creates problems of admission and exclusion. For example, to whom exactly should we be grateful for their past works? Should our debt of gratitude be eternal? And who exactly are the victims we should remember? Which family members and friends to commemorate and which ones not? It is undesirable for two reasons. First, why should anyone be obliged to remember individuals one has never known? Second, a duty to remember risks domination by present interests and may lead to the sanctification of the past or to the political abuse of history.<sup>69</sup> Finally, it is contrary to the spirit of international human-rights law, because the “freedom to hold opinions without interference,” mentioned in the UDHR, also covers the right *not* to hold opinions, and by extension, memories. For all these reasons, I reject the concept of a duty to remember. Therefore, I list it as a right, not a responsibility, in my *Declaration*.

There are, however, two exceptions, one full and one partial, to this rejection of a duty to remember. The full exception is the historical profession, the partial exception the state. Individual historians have the right to choose their own subject of study. Perceived as a worldwide community, however, they have a responsibility, at least as a matter of principle, to investigate the whole past. They must look not only into its cherished episodes but also reveal painful, forgotten, or suppressed episodes and explode silences and taboos. In other words, professional historians as a community should accept a mild form of the duty to remember. I will not tackle this problem of professional ethics here. Suffice it to say that ethical concerns are always in the back of the minds of historians but seldom on the

68. For a discussion about a duty to remember, see, among others, Tzvetan Todorov, *Les Abus de la mémoire* (Paris: Arléa, 1995) [English: “The Abuses of Memory,” *Common Knowledge* 5:1 (spring 1996), 6–26]; *idem*, *Mémoire du mal, tentation du bien: Enquête sur le siècle* (Paris: Laffont, 2000), 173–191; *Idem*, “The Uses and Abuses of Memory,” in *What Happens to History? The Renewal of Ethics in Contemporary Thought*, ed. Howard Marchitello (New York and London: Routledge, 2001), 11–22; Henry Rousso, *La Hantise du passé* (Paris: Éditions Textuel, 1998), 42–47; Paul Ricœur, *La Mémoire, l'histoire, l'oubli* (Paris: Éditions du Seuil, 2000), 105–111, 471–480, 585–589; Alain Finkielkraut, *Une Voix vient de l'autre rive* (Paris: Gallimard 2000), chapter 1; Margalit, *Ethics of Memory*, 70–83. When Primo Levi and other camp survivors talked about the duty not to forget, it was an appeal that camp survivors addressed *to themselves*; the duty to remember was a duty to bear witness to the horrors of the Holocaust (and vice versa). Jewish camp survivors discharging this duty could draw inspiration from the biblical injunctions to memory; see Yosef Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (New York: Schocken Books, 1982), 1–26. The duty to remember, however, should not be confused with the traumatic inability to forget.

69. A duty to remember can become an obsession leading to selective and even falsified memories and to either paralyzing those who remember or mobilizing them for unjust causes. Such obsessive remembrance may lead to revenge and violence. *Strong* historical awareness is not necessarily *good* historical awareness. In my “History under the Auspices of Power: Political Control and Manipulation of the Past,” *Nieuw tijdschrift van de Vrije Universiteit Brussel* 15:4 (2002), 30–32, I study the question of whether the political abuse of history is on the rise today.

tip of their tongues. Under dictatorial circumstances, historians sometimes fulfilled this ethical duty to remember the whole past by criticizing the official rewriting of history with its blank spots and black holes and by claiming a right to historical truth. The government was asked to *abstain* from the field of historical research and guarantee freedom of information and expression to historians in their search for the truth. When we now discuss the partial exception to the duty to remember, we will see that governments are sometimes urged to *intervene* in the field of historical research and actively investigate past crimes.

ARTICLE 10. Article 10 is prompted by recent discussions about transitional justice: how can societies emerging from periods marked by major crimes do justice? Both the scale and the gravity of these crimes (genocide, crimes against humanity, and war crimes) usually imply that the very institution charged with protecting human rights, the state, is involved in violating them. This institutionalized violence leads survivors to ask haunting questions: what exactly happened to the countless victims who did not survive the horrors? Did they die? If so, how and why? Where were they buried? Above all, will the perpetrators be punished?<sup>70</sup> The length of time crimes remain unsolved and unpunished—sometimes decades, sometimes forever—is almost impossible for the humiliated survivors to bear. To answer their questions, a new principle of international humanitarian law was formulated a quarter of a century ago, a principle called the “right to know” or “the right to truth.”<sup>71</sup> The discussion about this principle is of cardinal importance for historians because, in a certain sense, what is called the “right to truth” in international law today is nothing less than the “right to *historical truth*” or the “right to history.” Two UDHR articles form the basis for this new “right to truth:” UDHR Article 8, which stipulates the right of victims to an effective remedy, and UDHR Article 19, which covers, *inter alia*, the right to access information.<sup>72</sup> From both, it follows that a right to truth is only effective when the state accepts the obligation to investigate and prosecute past crimes.<sup>73</sup>

70. In this context, Natalie Zemon Davis spoke about an intense “hunger to know;” Robert Darnton called it “Rankean rage,” the urge to know history “as it actually happened.” See Davis, “Censorship, Silence and Resistance: The *Annales* during the German Occupation of France,” *Historical Reflections* 24:2 (summer 1998), 352–353; Darnton, “Poland Rewrites History,” *New York Review of Books* (16 July 1981), 8.

71. The expression “right to know” is more modest (and more commonly used) than the expression “right to truth.” Both are problematic. The former raises the question “know what?” and the answer cannot be but “the truth.” Regarding the latter term (preferred in Latin America), the trouble is that it may be hard to pin down the truth. Discovering factual truth can be very complex, especially in cases of conflicting evidence, betrayal, espionage, and complicity. See Janet Cherry, “Historical Truth: Something To Fight for,” in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000), 137–142.

72. UDHR Article 19 thus establishes four crucial rights: the right to memory, the right to truth, and the rights (of historians and other scholars) relating to research (which is a form of freedom of information), and to publication and teaching (which are forms of freedom of expression).

73. What I am trying to do in the following lines is to sketch a history of the right to truth, not a history of truth itself. For this, see Felipe Fernández-Armesto, *Truth: A History* (London: Bantam Press, 1997). For an authoritative overview of the history of the right to truth, see “Legal Brief *Amicus Curiae* Presented by the International Commission of Jurists Before the Inter-American Court of Human Rights in the Case of Efraín Bámaca Velásquez vs. Guatemala,” *The Review* (International Commission of Jurists), no. 62–63 (September 2001), 129–158. For an authoritative overview of the history of the duty to prosecute, see Diane Orentlicher, “Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100 (1991),

The formulation of the right to truth was preceded by considerable changes in the thinking about time and suffering. In its turn, it was followed by new standard setting and jurisdiction. The new thinking about time dimensions started in 1945–1946, during the Nuremberg trials. At the trials, three exceptional crimes were identified: crimes against peace, war crimes, and crimes against humanity; later, after the trials, the crime of genocide was added. These capital crimes had to be punished. This view was confirmed in 1966. The *International Covenant on Civil and Political Rights* stipulated that, although no one would be held guilty for acts that were not criminal at the time they were committed (the principle of non-retroactivity), this would not apply to persons who had 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.”<sup>74</sup> In 1968, the UN reconfirmed that no time limits applied for prosecuting major crimes, irrespective of the date of their commission.<sup>75</sup> This principle has gradually become accepted as a norm of customary international law.<sup>76</sup> Another important step was taken with the 1992 *Declaration on the Protection of All Persons from Enforced Disappearance*, which identified enforced disappearances as crimes against humanity and perceived them not as crimes of the past, but as *ongoing* crimes, as kidnappings without an end, as long as perpetrators did not acknowledge their victims’ fate.<sup>77</sup>

Not only did the time perception change, so did the notion of suffering: this notion was gradually expanded to include not only the suffering of the victims of abuses but also the pain of their families and friends and the anguish of society

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2537–2615. Orentlicher states that the duties to investigate and prosecute serious violations of physical integrity derive from the obligations of states to ensure rights set forth in the conventions that they ratified (2568).

Article 19 (Global Campaign for Freedom of Expression) and the National Security Archive seem to equate the “right to know” with *access* to (governmental) information only. See their (very instructive) texts: Article 19’s *The Public’s Right To Know: Principles of Freedom of Information Legislation* (<http://www.article19.org/>; London: Article 19, 1999); *Idem*, “Who Wants To Forget?” *Truth and Access to Information about Past Human Rights Violations* (London: Article 19, 2000), especially 2, 4–5, 25; and Thomas Blanton, “The World’s Right To Know,” *Foreign Policy* (July–August 2002), 50–58. This broadens the scope of the right to know from human-rights abuses to almost any type of information (e.g., about scandals, disasters, corruption, reproductive health, and so on). Still, it is conceptually too narrow because the right to know encompasses more than access alone; it obligates governments to investigate actively.

74. ICCPR, Article 15.

75. UN, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (1968), Article 1a (covering war crimes) and Article 1b (covering crimes against humanity and genocide). See also *International Criminal Court Statute* (1998), Article 29. See useful reflections on imprescriptibility and retroactive justice in Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 62–66, and 15–16, 20–21, 33–34, 138–141.

76. Christine Van den Wyngaert and John Dugard, “Non-Applicability of Statute of Limitations,” in *The Rome Statute of the International Criminal Court: A Commentary*, volume 1, ed. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 887.

77. UN, *Declaration on the Protection of All Persons from Enforced Disappearance* (1992), Article 17(1). In addition to disappearances, another phenomenon that stimulated the discussion about the right to truth was the kidnapping of babies during the military regime in Argentina (1976–1983). Born in captivity to pregnant women imprisoned for their dissidence, they were adopted by families of the military or security forces who were unable to have children of their own. Many of these children attempted to establish their real identity afterwards.



as a whole.<sup>78</sup> Like the direct victims, they too go through dramatic and traumatic experiences and suffer from the fact that they do not know what happened to their loved ones. This suffering was recognized as a form of cruel, inhuman, and degrading treatment. The right of victims or their next of kin to obtain clarification of the facts was seen as a basis for reparation claims, and indeed as a form of reparation itself. At the collective level, the duty to prosecute and the right to know the truth were perceived as means to prevent the atrocities and suffering of the past from recurring in the future.

As far as I know, the actual story of the right to know starts in 1977, when the First Protocol added to the *Geneva Conventions* stressed the right of families to know the fate of their missing and dead relatives as a general principle.<sup>79</sup> In the 1980s, the first mentions of the “right to know” and “right to truth” occur. In a crucial decision of 21 July 1983 in the *Quinteros versus Uruguay* case, submitted by the mother of a woman who had been missing for several years, the UN Human Rights Committee spoke of “the 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 [i.e. the mother] has the *right to know* [*my emphasis*] 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 [i.e. the right not to be tortured].”<sup>80</sup> In 1988, the Inter-American Court of Human Rights ruled in *Velásquez-Rodríguez versus Honduras*, a pioneering judgment concerning a case of disappearance, on the duty to investigate past crimes. It emphasized that changes of government did not affect the duties of states to prevent, investigate, punish, and compensate human-rights violations.<sup>81</sup> Gradually, the principle of obligatory investigation of past abuses even after a change of regime became entrenched. A growing body of case law emphasized the individual (reparatory) and collective (preventive) role

78. See UN, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), Article 2: “The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

79. Article 32 quoted in Appendix. The 1989 *Convention on the Rights of the Child*, Article 9(4), also recognized the right of families to information about absent family members. I believe that the genealogy of the “right to truth” extends further back in time than 1977. It should probably start in the seventeenth century (1679) with *habeas corpus*, the remedy that enables a person to petition the court so that a judge can command authorities to produce detainees in person before the court and to determine whether they are still alive, safe, and lawfully detained. In fact, the “right to truth” is sometimes also called the right to *habeas data*. As far as I know, *habeas data* was first used as a constitutional provision in Brazil in 1988. It meant the right to access information about oneself, but from the very beginning, petitioners asked the court to make it applicable to information about the fate of the “disappeared.” See Amnesty International, *Report 1989* (London: Amnesty International, 1989), 110.

80. “Torture” should be understood as psychological torture here. UN Human Rights Committee, *Quinteros versus Uruguay*, decision of 21 July 1983 (Communication no. 107/1981; CCPR/C/19/D/107/1981), paragraph 14.

81. Inter-American Court of Human Rights, *Velásquez Rodríguez Case: Judgment of July 29, 1988* (<http://www.corteidh.or.cr/>; San José: Inter-American Court of Human Rights, 1988), paragraphs 166–181, 184, 194. In paragraph 184, the court said: “According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal.”

of the right to truth.<sup>82</sup> In 1995, Leandro Despouy, the UN Special Rapporteur on States of Emergency, called it “a right to truth” and “a rule of customary international law,” and made a plea to recognize it as non-derogable.<sup>83</sup> In the meantime, many official and unofficial truth commissions had put this rule into practice and others would soon follow.

Finally, UN Special Rapporteur on Impunity Louis Joinet brought the various ideas together in 1997 into a coherent set of principles to combat impunity. He maintained that victims of gross human rights violations had three legal rights: a right to know, a right to justice, and a right to reparation. Here I will summarize Joinet’s view on the right to know only and will not deal with the other two. For Joinet, the right to know included seventeen principles: four general ones, eight principles about extrajudicial commissions of inquiry (commonly called “truth commissions”), and five principles on the preservation of, and access to, archives bearing witness to violations. He called the right to know an imprescriptible and inalienable right for individuals as well as for society. Legal forms of forgetting such as statutory limitations, pardons, and amnesties did not extinguish it. This means that there does not exist a moment in the future from which a right to truth becomes completely meaningless.<sup>84</sup> Joinet considered public knowledge of the history of repression as a part of a people’s heritage and linked it explicitly to a duty to remember on the part of the state in order to preserve collective memory from extinction. This duty did not imply that governments monitor or manipulate expressions of collective memory; quite the contrary, it implied that they should create adequate conditions for such expressions to flourish. Governments must investigate (i.e., collect and analyze) data on gross human-rights abuses, preserve them, make them accessible, and publicize reports about them.<sup>85</sup> The Sub-

82. For leading jurisprudence about the right to truth, see Inter-American Court of Human Rights judgments in the cases of *Castillo Páez* (1997), *Bámaca Velásquez* (2000), *Barrios Altos* (2001), *Myrna Mack Chang* (2003), and numerous of its judgments on reparations; and the judgment of the European Court of Human Rights (<http://www.echr.coe.int/>) in the case of *Kurt* (1998).

83. *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency—Eighth Annual Report and List of States which, since 1 January 1985, Have Proclaimed, Extended or Terminated a State of Emergency, Presented by Mr. Leandro Despouy, Special Rapporteur* (E/CN.4/Sub.2/1995/20; Geneva: UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, June 1995), 54. For the question of the non-derogable character of the duty to prosecute, see Orentlicher, “Settling Accounts,” 2606–2612.

84. There is no room here to outline the different views on rectifying historical wrongs. See, however, (among many others) Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103:1 (October 1992), 4–28. For the UN debate about recognition of responsibility and reparation for human rights violations which took place during periods of slavery, colonialism, and wars of conquest, see, e.g., Sub-Commission on the Promotion and Protection of Human Rights, *Resolution 2002/5* (12 August 2002). The basic document is: *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, Pursuant to Sub-Commission Resolution 1996/24* (E/CN.4/Sub.2/1997/8; Geneva: Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1997).

85. “Joinet Principles,” Principles 1–4, 13–14 (quoted in the Appendix). For the problems of access to, and reliability of, dictatorial archives, see my “The Dictator’s Secret Archives: Rationales for Their Creation, Destruction, and Disclosure,” in *Scholarly Environments: Centres of Learning and Institutional Contexts*, ed. Alasdair MacDonald and Arend Huussen, Jr. (Louvain: Peeters, 2004), 181–196. For the view that archiving is an act of burial, see Achille Mbembe, “The Power of the Archive and Its Limits,” in *Refiguring the Archive*, ed. Carolyn Hamilton *et al.* (Cape Town: David Philip, 2002), 21–22; for the view that historical writing is like a funerary rite, see Michel de Certeau, *L’Écriture de l’histoire* (Paris: Gallimard, 1975), 117–120.

Commission on Prevention of Discrimination and Protection of Minorities adopted the “Joint Principles” without a vote in 1997. They were distributed widely both within and outside the UN and are frequently quoted as an essential reference by many international human-rights bodies and national states. Year after year, they were noted and recommended in resolutions by the Commission on Human Rights. In April 2004, the commission requested that Kofi Annan appoint an independent expert to update the principles.<sup>86</sup> Hence, the story is not yet complete. When the updated principles are drafted, presumably in early 2005, they will still require formal approval by the commission, and, later, adoption by the UN General Assembly.

The right to memory and the right to history are rights held both by individuals and society as a whole. At the individual level, the right to memory and the right to history are exactly what they say they are: rights, not duties. There exists an individual right *not* to hold memories and a right *not* to be informed; if there is a right to memory, there is a right to oblivion too. At the collective level, things are very different. Every people has the inalienable right to know the truth about past abuses. Concomitantly, the state has an obligation to investigate and prosecute these past abuses and, hence, a duty to remember. Sometimes, tensions arise between the individual urge to forget—or to remember in private—and the collective right to know. These tensions are inevitable and painful. Only when the state fulfills its duty to remember are the necessary conditions created for its citizens to exercise their rights to memory and to history, to give past events a proper place, and, perhaps, to forget and go on with their lives. In any case, the rights to memory and to history are necessary conditions for citizens to discharge their responsibilities to the dead.

#### VII. WHEN ARE THE RESPONSIBILITIES OF THE LIVING TO THE DEAD UNFULFILLED?

After this overview, it is time to ask whether the living can fail to fulfill their responsibilities to the dead. Table 2 provides the evidence by specifying more than forty wrongs, either legal or moral. All are worthy of extensive comment, but that is impossible within the present context. My main purpose is to indicate the nature and range of possible failures. The following list is tentative:

86. UN Commission on Human Rights, *Resolution 2004/72* (21 April 2004), paragraphs 16–20. The basis for this resolution was: *idem*, *Promotion and Protection of Human Rights: Impunity—Note by the Secretary-General* (E/CN.4/2004/88; 27 February 2004). Attached to this note is an *Independent Study on Best Practices, Including Recommendations, To Assist States in Strengthening Their Domestic Capacity To Combat All Aspects of Impunity*, by Diane Orentlicher. For the right to know in this study, see paragraphs 14–23.

<b>Table 2: Moral and/or Legal Wrongs toward Past Generations (tentative overview)</b>	
<b>Description</b>	<b>Responsibility<sup>87</sup></b>
<ul style="list-style-type: none"> <li>* <i>Enforced disappearances of persons</i> (as crimes against humanity or otherwise) followed by execution and hiding or abandonment of bodies</li> <li>* <i>Outrages upon the dignity of dead persons</i> (as war crimes or otherwise); unwarranted invasions of their privacy (understood as disturbing the body), intentional ill-treatment: cannibalism/necrophagy;<sup>88</sup> mutilation; necrophilia</li> <li>* Suspension of, or obstruction to, <i>habeas corpus</i> to avoid identification of dead detainees</li> <li>* Unwarranted de-identification of bodies</li> <li>* Confiscation, illegal collection or theft of (parts of) bodies</li> <li>* Unlawful autopsy or medical research</li> <li>* Disrespectful post-autopsy or post-research treatment of bodies</li> <li>* Routine salvaging of, or commerce in, body parts</li> </ul>	1, 5, 9
<ul style="list-style-type: none"> <li>* <i>Outrages upon the dignity of dead persons</i> (as war crimes or otherwise): live burial; disrespectful burial; refusal of burial</li> <li>* Imposition of last rites culturally or religiously alien to the dead or their families</li> <li>* Fanciful burial<sup>89</sup></li> <li>* Inappropriate delay of burial, including, in many instances, conditional return of bodies to relatives<sup>90</sup></li> <li>* Disrespectful, premature, or unauthorized exhumation of bodies<sup>91</sup></li> <li>* Reburial or cremation to erase crime traces and forensic evidence</li> </ul>	2–3, 5, 9
<ul style="list-style-type: none"> <li>* Anonymous grave/cemetery (unknown to all)<sup>92</sup></li> <li>* Clandestine grave/cemetery (unknown to family and friends)</li> <li>* Distortion of religiously or culturally prescribed orientation of graves or position of bodies</li> <li>* Degrading location in cemeteries by burying bodies together or not together</li> <li>* Desecration and looting of grave/cemetery</li> <li>* Disrespectful or unauthorized use or clearance of cemetery</li> </ul>	1–3, 5, 9
<ul style="list-style-type: none"> <li>* Pillage of dead bodies; confiscation of property of the dead</li> <li>* In many instances: refusal to keep promises to the dead or honor their wills</li> <li>* Imposition of unreasonable inheritance taxes<sup>93</sup></li> </ul>	4

87. See Table 1.

88. Application of Article 1 may raise anthropological problems in cases of cannibalism or necrophagy. See, for example, Lévi-Strauss, *Tristes tropiques*, 242: “Certaines sociétés . . . refusent le repos [à leurs morts,] elles les mobilisent: littéralement parfois, comme c’est le cas du cannibalisme et de la nécrophagie quand ils sont fondés sur l’ambition de s’incorporer les vertus et les puissances du défunt . . .” (Some societies refuse rest [to their dead,] they mobilize them: sometimes literally, as is the case with cannibalism and necrophagy when they are based on the ambition to incorporate the virtues and powers of the deceased). I consider cannibalism and necrophagy as crimes. Also Iserson, *Death to Dust*, 38–39, 366–380, 404–407; Barley, *Dancing on the Grave*, 198–200.

89. Cryonic suspension (freezing of corpses) in the anticipation of reanimation is considered unethical: Iserson, *Death to Dust*, 290, also 271–272, 291, 300–301, 560–562.

90. Often politically inspired for fear that bodies and graves would become rallying points for political opposition.

91. Of course, exhumation of mass graves in order to rebury remains ceremonially is no abuse.

92. The “tomb of the unknown soldier” is a way to cope with the anonymity of death during war. There is a vast body of literature on the commemoration of war dead.

93. Lomasky, *Persons, Rights, and the Moral Community*, 270, n.19.

<ul style="list-style-type: none"> <li>* Disrespectful display of human remains when not in the public interest</li> <li>* Distorted reproduction or contextualization of images when not in the public interest</li> <li>* Unwarranted invasions of privacy (understood as selective disclosure of information)</li> <li>* Offense and defamation</li> <li>* Posthumous trial, sentence, and punishment<sup>94</sup></li> <li>* Improper omission (including censorship and self-censorship) of facts about the dead</li> <li>* Denial of certified facts about the dead<sup>95</sup></li> <li>* Distortion (lies, hate speech, falsification, manipulation) of facts about the dead</li> <li>* Invention of facts about the dead</li> </ul>	6–7
<ul style="list-style-type: none"> <li>* Damage to, or intentional destruction of, heritage<sup>96</sup></li> </ul>	8
<ul style="list-style-type: none"> <li>* Desecration of memorials</li> <li>* Obstruction of mourners attending ceremonies or accessing cemeteries, graves, urns</li> <li>* Suppression of funerary cortèges and pilgrimages, wakes and commemorations</li> <li>* Persecution (censorship, intimidation, arrest, killing) of mourners</li> <li>* In many instances: attendance of offensive persons at funerals and commemorations</li> <li>* Public or institutionalized ceremonies for deceased perpetrators of human-rights abuses<sup>97</sup></li> </ul>	9
<ul style="list-style-type: none"> <li>* Noncompliance with the <i>duty to investigate</i> and the <i>right to (historical) truth</i> (or <i>the right to know</i>) in cases of genocide, crimes against humanity, war crimes</li> <li>* Politically inspired destruction, removal or concealment of archives</li> <li>* Excessive archival secrecy<sup>98</sup></li> <li>* Neglect, distortion (falsification, manipulation), or invention of archives</li> </ul>	10

#### VIII. WHAT DO THE RIGHTS OF THE LIVING AND THE RESPONSIBILITIES TO THE DEAD IMPLY FOR HISTORIANS' ETHICS?

How can the preceding analysis be crystallized into one ethical principle for the historical profession? The answer is that concern for the dignity of the subjects of historical study constitutes the most important of several classes of responsibilities of historians. Suppose that the International Committee of Historical Sciences—as the International Council on Archives or the World Archaeological Congress did in the past—were to prepare a code of ethics, then it should contain three sections: one on the tasks of historians (research and teaching), one on their rights (both universal and responsibility-dependent rights), and one on their

94. The opposite of posthumous rehabilitation, it played an important role in history (see e.g., the Roman *damnatio memoriae*); also Iserson, *Death to Dust*, 510–512, 559.

95. Denial of genocide appears to be especially offensive, as it reverses our relationship with the dead. *Bona fide* historians respect the dignity of the dead by bringing the past to life but leaving the dead alone; deniers of genocide violate that dignity by bringing the dead to life but erasing the past.

96. See International Council on Monuments and Sites, *Heritage at Risk: ICOMOS World Report on Monuments and Sites in Danger* (annually; Munich: Saur, 2000–).

97. There may be problems in cases where perpetrators of human-rights abuses were also victims at previous or later stages.

98. See my “Archives,” in *Censorship: A World Encyclopedia*, ed. Derek Jones (London and Chicago: Fitzroy Dearborn: 2001), 76–82.

responsibilities. In the section on responsibilities, I would introduce six classes: general responsibilities; primary responsibilities regarding the subjects of historical study (the living and the dead); responsibilities regarding access to, and disclosure of, information, historical or otherwise; responsibilities regulating their work; social responsibilities toward society at large; and, finally, responsibilities toward the profession.<sup>99</sup> In accordance with the ideas emanating from the preceding discussion, the code should recall the rights of the living and the responsibilities to the dead, and give a rule to adopt when they conflict with historians' responsibilities. The wording could be as follows:

Aware of the universal rights of the living and the universal responsibilities of the living toward the dead, historians shall respect the dignity of the living and the dead they study. They shall use a test when handling or publishing sensitive personal information: when privacy and reputation interests of subjects of study conflict with the responsibility to search honestly for the historical truth, private and public interests shall be fairly assessed.

When I speak out for a professional code of ethics for historians, it is not because I believe in policing the profession or in imposing historical truth. On the contrary, I firmly believe that historical truth is searched for, not imposed, and that we should use the force of arguments, not of coercion, to further our aims. I see three valid reasons for such a code: first, it enhances the autonomy and self-regulatory function of our profession; second, it creates clarity about its foundations for its members, and for history students, judges, potential complainants, holders of historical data or sources, and society at large; third, it enhances the confidence of others in our work. It is our professional expertise—our access to and possession of expert knowledge about the past—that distinguishes us from others interested in the past. This creates many responsibilities, primarily to our subjects of study. *Sagesse oblige*.<sup>100</sup>

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99. This essay is not the appropriate place to develop my ideas on a code of ethics for historians. In fact, I do have a draft proposal consisting, at the time of writing, of twenty articles grouped into the sections sketched in the text. Article 1 of the Constitution of the International Committee of Historical Sciences (1926, 1992) cannot function as a code. Its last sentence reads: "*Purpose of the Committee* . . . It shall defend freedom of thought and expression in the field of historical research and ensure the respect of professional ethical standards among its members," in *CISH Bulletin d'information*, nos. 25–26 (1999–2000), 13. This passage does not mention a crucial right (the right to information) nor does it speak about a crucial task (history teaching).

100. "Wisdom obligates," a dictum of André Mercier's, in his "Science and Responsibility," in *Induction, Physics, and Ethics: Proceedings and Discussions of the 1968 Salzburg Colloquium in the Philosophy of Science*, ed. Paul Weingartner and Gerhard Zecha (Dordrecht: Reidel, 1970), 342.

**APPENDIX: Selected International Instruments as Sources of Inspiration for a Declaration of the Responsibilities of Present Generations toward Past Generations (DRPGPG)—Including a Right to Memory and to History**

*Note:* items marked with (\*) or (\*\*) cover the rights to memory and to history respectively.

**UNITED NATIONS**

(<http://www.ohchr.org/>)

**Universal Declaration of Human Rights** (1948) [inspired DRPGPG Articles 1, 3–7, 9–10.]

Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 8: “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 12: “No one shall be subjected [a] to arbitrary interference with his privacy, family, home or correspondence, nor [b] to attacks upon his honor and reputation.”

Article 15(1): “Everyone has the right to a nationality.”

Article 17(2): “No one shall be arbitrarily deprived of his property.”

Article 19: “Everyone has the right [a] to freedom of opinion and expression; this right includes freedom to hold opinions without interference and [b] to seek, receive and impart information and ideas through any media and regardless of frontiers.” (\*/\*\*)

<sup>101</sup>

**Declaration of the Rights of the Child** (1959) [inspired DRPGPG Article 5.]

Article 3: “The child shall be entitled from his birth to a name and a nationality.”<sup>102</sup>

**UNITED NATIONS COMMISSION ON HUMAN RIGHTS**

(<http://www.ohchr.org/>)

**Draft Declaration on the Rights of Indigenous Peoples** (E/CN.4/Sub.2/1994/2/Add.1; Geneva: Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 1994) [inspired DRPGPG Article 3.]

Article 13: “Indigenous peoples have the right to . . . the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.”<sup>103</sup>

**Set of Principles for the Protection and Promotion of Human Rights through Action To Combat Impunity [“Joinet Principles”],** in: *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet* [UN Special Rapporteur on Impunity (Civil and Political Rights)] *Pursuant to Sub-Commission Decision 1996/119* (E/CN.4/Sub.2/1997/20/Rev.1, Annex II; Geneva: Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 1997), 9–17, here 10–13 [inspired DRPGPG Articles 1, 5, 9–10.]

*Preamble*

“The General Assembly, . . . Equally aware that forgiveness, which may be an important factor of reconciliation, implies, insofar as it is a private act, that the victim or the victim’s beneficiaries know the perpetrator of the violations and that the latter has recognized the deeds and shown repentance, . . . Convinced, therefore, that national and

101. Similar ideas as in Articles 5, 8, 12, 15(1), 19 in ICCPR, Articles 2(3), 7, 17, 19, 24(2), 24(3).

102. Similar ideas in *Convention on the Rights of the Child* (1989), Articles 7(1), 8(1).

103. Similar ideas in *Principles and Guidelines for the Protection of the Heritage of Indigenous People* (2000), Articles 13, 19, 21, 25.

international measures must be taken . . . with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity . . .” (\*\*)

*Right To Know—A. General Principles:*<sup>104</sup>

Principle 1: “*The inalienable right to the truth.* Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.” (\*)

Principle 2: “*The duty to remember.* A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be preserved by appropriate measures in fulfillment of the State’s duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.” (\*\*/\*\*)

Principle 3: “*The victims’ right to know.* Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate.” (\*\*)

Principle 4: “*Guarantees to give effect to the right to know.* States must take appropriate action to give effect to the right to know. If judicial institutions are wanting in that respect, priority should initially be given to establishing extrajudicial commissions of inquiry and to ensuring the preservation of, and access to, the archives concerned.” (\*\*)

Principle 5: “*Role of the Extrajudicial Commissions of Inquiry.* Extrajudicial commissions of inquiry shall have the task of establishing the facts so that the truth may be ascertained, and of preventing the disappearance of evidence. In order to restore the dignity of victims, families and human rights advocates, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.” (\*\*)

*Right To Know—C. Preservation of and Access to Archives Bearing Witness to Violations* (extracts):

Principle 13: “*Measures for the preservation of archives.* The right to know implies that archives should be preserved. Technical measures and penalties shall be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of human rights violations.” (\*\*)

Principle 14: “*Measures for facilitating access to archives.* . . . When access is requested in the interest of historical research, authorization formalities shall normally be intended only to monitor access and may not be used for purposes of censorship.” (\*\*)<sup>105</sup>

*Right To Reparation—A. General Principles* (extract):

Principle 36: “*Scope of the right to reparation.* . . . In the case of forced disappearances, when the fate of the disappeared person has become known, that person’s family has the imprescriptible right to be informed thereof and, in the event of decease, the per-

104. Similar ideas in UN *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (1989), Principles 6, 16; UN *Declaration on the Protection of All Persons from Enforced Disappearance* (1992), Article 13; UN *Guiding Principles on Internal Displacement* (1998), Article 16.

105. The remaining principles on archives are labeled: cooperation between archive departments and the courts and extrajudicial commissions of inquiry; specific measures relating to archives containing names; specific measures related to the restoration of or transition to democracy and/or peace.



son's body must be returned to the family as soon as it has been identified, whether the perpetrators have been identified, prosecuted or tried or not." (\*)<sup>106</sup>

## UNESCO

(<http://www.unesco.org/>)

### **Declaration on the Responsibilities of the Present Generations towards Future Generations** (1977) [inspired DRPGPG Article 8.]

Article 7: "*Cultural diversity and cultural heritage.* ( . . . ) The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations."<sup>107</sup>

## WORLD HEALTH ORGANIZATION

(<http://www.who.int/>)

### **Guiding Principles on Human Organ Transplantation** (1991) [inspired DRPGPG Article 1.]

Principle 5: "The human body and its parts cannot be the subject of commercial transactions. Accordingly, giving or receiving payment (including any other compensation or reward) for organs should be prohibited."

## GENEVA CONVENTIONS

(<http://www.icrc.org/>)

### **Geneva Conventions of August 12, 1949: Third Geneva Convention Relative to the Treatment of Prisoners of War** (1949) [inspired DRPGPG Articles 2–5.]

Article 120: "[a] Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin . . . [b] The death certificates . . . shall show particulars of identity as set out in . . . Article 17 [surname, first names, . . . date of birth, . . . the signature or the fingerprints, *adb*], and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves . . . [c] The detaining authorities shall ensure that prisoners of war who have died in captivity are honorably buried, if possible according to the rites of the religion to which they belonged, and [d] that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place. Deceased prisoners of war shall be buried in individual graves, unless unavoidable circumstances require the use of collective graves."

106. Similar ideas in *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* (E/CN.4/2004/57, Appendix I; Geneva: Commission on Human Rights, 2003), Article 24: "Satisfaction should include . . . : . . . (b) Verification of the facts and full and public disclosure of the truth . . . ; (c) The search for the whereabouts of the disappeared and for the bodies of those killed and assistance in the recovery, identification and reburial of the bodies in accordance with the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; (e) Apology, including public acknowledgment of the facts and acceptance of responsibility; . . . (g) Commemorations and tributes to the victims . . ." See also Articles 12(c), 26.

107. See also *Geneva Conventions Protocol (I)* (1977), Article 53; and *International Criminal Court Statute* (1998), Articles 8(2)(b)(ix) and 8(2)(e)(iv); see also UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage* (1972), Article 1; *Idem*, *Preliminary Draft Convention for the Safeguarding of the Intangible Cultural Heritage* (2003), Article 2; *Idem*, *Draft Declaration Concerning the Intentional Destruction of Cultural Heritage* (2003); see also the conventions for the protection of cultural property during armed conflicts (1954) or against illegal trade (1970, 1995).

**Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977)**, Articles 32–34 (“Part II, Section III: Missing and dead persons”)<sup>108</sup> [inspired DRPGPG Articles 1, 2, 5, 9–10.]

Article 32—*General Principle*: “. . . [T]he right of families to know the fate of their relatives.” (\*\*)

Article 33(2)(b): “To the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such [i.e., missing] persons if they have died in other circumstances as a result of hostilities or occupation.” (\*\*)

Article 34(1): “The remains of persons . . . shall be respected, and the gravesites of all such persons shall be respected, maintained and marked.”

Article 34(2)(a): “To facilitate access to the gravesites by relatives of the deceased . . .” (\*)

Article 34(2)(b): “To protect and maintain such gravesites permanently.”

Article 34(2)(c): “To facilitate the return of the remains of the deceased . . . to the home country upon its request or, unless that country objects, upon the request of the next of kin.”

Article 34(4)(b): “A High Contracting Party in whose territory the gravesites referred to in this Article are situated shall be permitted to exhume the remains only: . . . Where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.” (\*\*)

**Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977)** [inspired DRPGPG Article 10.]

Art 8—*Search*: “Whenever circumstances . . . all possible measures shall be taken, without delay, . . . to search for the dead, prevent their being despoiled, and decently dispose of them.” (\*\*)

## INTERNATIONAL CRIMINAL COURT

(<http://www.icc-cpi.int/>)

**Statute** (1998) [inspired DRPGPG Articles 1, 3.]

Articles 8(2)(b)(xxi) and 8(2)(c)(ii) concern the war crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment” [during international and internal armed conflicts respectively].<sup>109</sup>

**Assembly of States Parties to the Rome Statute of the International Criminal Court** (2002) [inspired DRPGPG Articles 1, 3.]

*First Session—Official Records* (New York: UN, 3–10 September 2002), “**Elements of Crimes**,” 108–55, here 140, 146.

The first element of the war crime of “committing outrages upon personal dignity” as defined by the Assembly of States Parties reads: “1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.” A note attached to this element adds: “For this crime, ‘persons’ can include dead persons.”

A legal advisor of the Red Cross commenting on this element explains that “outrages upon the dignity of dead persons” include (1) mutilation of bodies and (2) refusal of decent burial.<sup>110</sup>

108. All texts should be read together with the extensive commentaries by the Red Cross (official custodian of the conventions). Similar ideas in *Geneva Conventions (I)* (1949) (wounded and sick of armed forces), Articles 15–17; *(II)* (1949) (wounded, sick and shipwrecked at sea), Article 20; and *(IV)* (1949) (civilians), Articles 129–130.

109. Similar ideas in *Geneva Conventions*, Common Article 3(1)(a), 3(1)(c); *Geneva Convention III*, Article 14; *Geneva Convention IV*, Article 27; *Geneva Conventions Protocol (I)* (1977), Articles 75(1), 75(2), 85(4)(c); *Geneva Conventions Protocol (II)* (1977), Articles 4(1), 4(2).

110. Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, Eng.: Cambridge University Press, 2003), 314, 323.

**INTERNATIONAL COUNCIL OF MUSEUMS**

(<http://www.icom.museum/>)

**Code of Ethics for Museums** (1986; revised 2001) [inspired DRPGPG Article 6.]

Article 6(6): “*Human remains and material of sacred significance.* ( . . . ) When sensitive material is used in interpretive exhibits, this must be done with great tact and with respect for the feelings of human dignity held by all peoples ( . . . ).”

**WORLD ARCHAEOLOGICAL CONGRESS**

(<http://www.wac.uct.ac.za>)

**Vermillion Accord on Human Remains** (1989) [inspired DRPGPG Articles 1, 3–4.]

Article 1: “Respect for the mortal remains of the dead shall be accorded to all, irrespective of origin, race, religion, nationality, custom and tradition.”

Article 2: “Respect for the wishes of the dead concerning disposition shall be accorded whenever possible, reasonable and lawful, when they are known or can be reasonably inferred.”<sup>111</sup>

111. Similar ideas in the remaining articles of the Accord and in World Archaeological Congress, *First Code of Ethics* ([1990]), Principle 3 and Rule 5.