IMT School for Advanced Studies Lucca

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A RIGHT TO DESTROY? THE LEGAL BOUNDARIES OF CULTURAL MEMORY.

An Examination of the Role of the International Community in the Protection of National Heritage Sites against Deliberate Destruction.

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Dedicated to the memory of my mother

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VITA & PUBLICATIONS

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CATALDO M., *Preserving cultural memory: the role of technology*, in Aedon 2/2020.

CATALDO M., *Untangling the ties between the responsibilityto protect and cultural heritage: a global governance for the protection of cultural heritage*, in the book titled The Limits of Responsibility to Protect (Ljubljana: University of Ljubljana, 2023, pp. 193-212).

ABSTRACT

The dissertation explores the deliberate destruction of cultural heritage under international law. The main thread of theresearch concerns the legal boundaries of cultural memory by examining when a duty to remember cultural heritage can translate into a legal obligation to preserve it - a right to remember- and when, at the same time, there may be a symmetrical legal duty to forget it. In other terms, the dissertation seeks to study not only the "pathological" dimension of destruction but also tracetheborders of destruction by verifying lawful situations in which is possible to recognize "a right to destroy", b comparing different casesof destruction, or, as the case may be, removal of heritage. Thestudy explores cases of the destruction of heritage in national contexts authorized by domestic governments in light of applicable international norms in both peacetime and wartime contexts. The scope of the research includes mainly examples of tangible cultural heritage (more specifically, public monuments and buildings), which are characterized as contested heritage with accompanying issues of memory and divisive identity narratives. The research will focus on iconoclastic episodes driven by ideological reasons, rooted in three case-studies: Soviet monuments in Ukraine, Confederate iconography in the United States, and the situation of the Rohingya in Myanmar. It will exclude cases of peacetime threats to cultural heritage caused by economic development.

The study seeks to enrich the interdisciplinary literature on memory and heritage studies in connection with law.

Introduction

1. The conflict between memory and oblivion.

Heritage destruction for ideological purposes is a time-honoured phenomenon with roots in distant eras[1]. Even today, the contestation of cultural heritage appears central both in armed conflicts and in phases of political transitions occurring in peaceful contexts.

Current globalization has led to the inevitable confrontationwith different cultures, which often appears difficult: the supposed threat of losing one's cultural identity within the globalized world has had the adverse effect of viewing cultural diversity with suspicion[2]. At the same time, it seems equally difficult to confront a past whose cultural values are no longer permeable in the present. It is only possible to understand the phenomenon of the deliberate destruction of cultural heritage without taking into account its intangible component related to the cultural values embedded in it, including the value of memory.[3]

The destructive acts that should be examined pertain to publicart in public spaces[4]. Actually, the real subject of the controversy concerns the shaping of public space, namely the choice of the

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[1] For an overview of the history of iconoclasm see GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, London, Reaktion Book, 1997.

[2] On this topic see SETTIS S., *Resurrezioni* , in the exhibition catalogue "Anche le statue muiono, conflitto e patrimonio tra antico e contemporaneo", 2018.

[3] BLACKE J., *On defining the cultural heritage,* The international Comparative law quarterly, Vol. 49, No.1 pp. 61-85, 2000.

[4] On destruction and removal of public art, see DOSS E., *The process frame, Vandalism, Removal, Re-siting, Destruction*. In the book A Companion to Public Art (pp. 403-421), 2016.

cultural values in which a society intends to recognize itself [5]. Cultural changes make vulnerable the cultural heritage struggle to permeate the present. The problem is how the decision-making processes underlying the choice of cultural values occur within the complex system of heritage governance. State governments have often (ab)used, in both democratic and dictatorial regimes, cultural heritage to shape society through their political vision[6]. So, studying the contested cultural heritage becomes relevant to preserving democracy: it allows us to grasp the flaws within the democratic system.

Inside the complex heritage governance, a State's legitimate claim to challenge its own cultural heritage following cultural changes should be balanced with the international community's interest in its preservation.

The dissertation wants to explore this tension in the light of the "universal dimension" of cultural heritage[7]. The study takes inspiration from the case of the destruction of the Bamiyan Buddhas in Afghanistan in 2001. The destruction authorized by the then-ruling Taliban's government in a context of peaceleft the international community powerless[8].

The main thread of the research concerns the legal boundaries of cultural memory under the international law perspective by examining when a duty to remember cultural heritage can translate into a legal obligation to preserve it - a right to

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[5] MONTANARI T., *Le statue controverse finiscano in un museo,* in emergenzacultura.org, 2020.

[6] See LEVINSON S., *Political Change and the 'Creative Destruction' of Public Space,* in Cultural Human Rights edited by Francesco Francioni and Martin Scheinin, Leiden—Boston 2008, about the concept of "tutelary politics" aimed at empowering the legitimacy of an existing political order through the management of public space.

[7] FRANCIONI F. *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, (2004) 25 Michigan Journal of International Law 1209.

[8] O'KEEFE R., *World Cultural Heritage Obligations to the International Community as a Whole?* (2004) 53 ICLQ 189.

remember- and when, at the same time, there may be a symmetrical legal duty to forget it. In other terms, thedissertation aims at studying not only the "pathological" dimension of destruction but also tracing the borders of destruction by verifying lawful situations in which it is possible to recognize "a right to destroy" by comparing different cases of destruction, or, as the case may be, removal of heritage. Although preservation and destruction are in continuous dialogue, the entire international body of law has been characterized by the central value of preservation. This implies the difficulty of open debates within the legal scholarly community on the lawfulness of destroying cultural heritage.

The concept of "borders" is a recurring term within the dissertation. Indeed, the whole study crosses concepts at the antipodes of each other; actually, these are only apparent dichotomies in that the boundary dividing them is very blurred. For instance, the iconoclasm phenomenon encompasses opposite worlds: it is both religious and political in nature, runs through both the West and the East, and crosses dictatorships, regimes, and democracies. It is a source of destruction but also thecreation of "images of destruction" since iconoclasm has a "performative" character aimed at creating and imprinting on minds theimage of destruction that becomes more important than the work itself destroyed[9]. Another dichotomy concerns the concepts of memory and forgetting, seemingly opposites but simultaneously complementary in that there can be no forgetting without awareness of what one wants to forget.

Furthermore, the antinomy regarding preservation versus destruction of cultural heritage is worth mentioning. Actually, preservation and destruction present a critical common element: the core concept of memory. Memory issues around cultural heritage cross both paths of preservation and destruction as they can be deemed "two sides of the same coin": the choice of

[9] SETTIS S., *Resurrezioni*, ibid, p. 14.

preserving a particular cultural artwork implies a choice to forget something else[10].

Moreover, tangible and intangible cultural heritage: the intentional destruction of tangible heritage aims to target its intangible value. There is another aspect to consider: the destruction of tangible cultural heritage has a connection and impact on the exercise of cultural rights and intangible manifestations of expression related to the people living around the contested buildings and monuments.

As far as the context, the line between peacetime and wartime in which destruction can occur is also very blurred: evendestruction in peace hides a profound crisis of values and public institutions; it may be a prelude to the emergence of more severe conflicts.

The other opposition is that between past and present. The contestations around cultural heritage challenge the memory and the past, but actually, they pertain to battles of the present, to values crises that concern the current society. The intent is to shape the future of society through the contestation of the past. Finally, another dichotomy concerns the relationships between ethics and law. Memorialization processes involve ethicalchoices. If legal choices are not always ethically right, the law should respond to ethical needs by translating them into legal terms.

These dichotomies are all inherent in the study of cultural property, which itself contains a paradox in its very meaning: culture is a dynamic evolutionary concept, while *"property is fixed, possessed, controlled by its owner, and alienable."*[11]

The key research questions are the following: how should we balance a responsibility to protect cultural heritage under

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[10] GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, ibid, p. 329.

[11] MEZEY N., *The Paradoxes of Cultural Property*, 107 Colum. L. Rev. 2004-2046 (2007).

international law with a State's legitimate claim to come to terms with a difficult past through the erasure of a corresponding cultural legacy? If the cultural heritage is linked to gross human rights violations, what should be done according to international law? Should such heritage be destroyed or preserved? Does the principle of state sovereignty always prevail over the protection of cultural heritage? Can different acts of destructionbe placed on the same level from a legal point of view?

2. Scope and content of the research.

The study explores cases of the destruction of heritage innational contexts authorized by domestic governments in light of applicable international norms in peacetime and wartime contexts. The scope of the research includes mainly examples of tangible cultural heritage (more specifically, public monuments and buildings), characterized as contested heritage with accompanying issues of memory and divisive identity narratives. It will focus on iconoclastic episodes driven by ideological reasons, excluding cases of peacetime threats to cultural heritage caused by economic development.

The first two chapters present the theoretical framework to explore the legal boundaries of iconoclasm. An attempt is made to challenge the status quo of the concepts of preservation and destruction by grasping their respective subjective dimensions to deconstruct the assumptions underpinning the heritage discourse, which helps better examine the phenomenon of iconoclasm[12]. Both chapters show the vital link between law, collective memory, cultural heritage preservation, and destruction.

More specifically, the first chapter examines the legal dimension of collective memory, how international law shapes collective

[12] DOSS E., *Memorial Mania, Public Feeling in America*, University of Chicago Press, Chicago, 2010.

memory and vice versa, as well as the link between collective memory and cultural heritage.

In the second chapter, the analysis highlights the dynamics between international law, cultural memory, and the intentional destruction of cultural heritage. Starting from an aest hetics perspective, it focuses on the legal dimension of the deliberate destruction of cultural heritage and its relationship withmemory by examining the international legal framework through thelens of international criminal law, transitional justice, and human rights. It looks at the international practice (particularly UNSC resolutions) and the jurisprudence of international courts, tracing the most critical cases of intentional destruction.

Subsequently, chapter 3 aims to compare the theoretical results examined in the first two chapters with the study of concretecases of intentional destruction. The lawfulness of destroying monuments seems worth challenging in light of recent iconoclastic acts and the international community's reaction, taking into account the dividing line between peacetime and wartime. The choice of case studies is related to the desire to explore "borderline cases" where the line between lawful and unlawful is blurred. The dissertation takes the risk of comparing, for the first time, cases that stand on "opposite boundaries" with each other. On the one hand, destructions that target cultural property symbolic of oppressive regimes; on the other hand, destructions that intend to erase the cultural rights of specific cultural groups. The Ukrainian case explores the subtle line between the legitimate attempt to construct one's collective memory and the risk of uncritically removing one's Soviet heritage. In contrast, the case of the United States offers the possibility of comparing national, local, and global interests that normally interface with cultural heritage law and can often conflict with each other. Finally, the case of Myanmar allows us to analyse "the dark side" of iconoclasm aimed at the destructionof national minorities' culture.

Lastly, Chapter 4 will examine the results of the comparative study, trying to propose alternative solutions to the removal or destruction of contested heritage. It will investigate the relationships between the different levels of heritage governance in dealing with controversial cultural heritage, with a specific focus on the role of International law, looking at thecurrent trends in the field.

3. Methodology.

The methodology used in the dissertation project is both international and comparative. As a comparative study, it examines the legal framework of specific nations and regions, domestic public policies, and their implementation. It uses traditional scholarly research and data collection through interviews with experts in the field. In each case study, the examination focuses on the level of democratic participation within the decision-making process to remove or destroycultural heritage, the political background of the decision, and the implications of the public policies endorsed.

4. Goals of the dissertation.

The contribution aims to enrich the interdisciplinary literature on memory studies and heritage studies in connection with law. It seeks to provide a legal framework to orient the current international norm on intentional destruction driven by iconoclastic ideology and authorized by States in peacetime and wartime, identifying which factors, if any, can justify the destruction of culture.

First chapter: The interplay between cultural heritage, collective memory, and preservation

1. Cultural heritage between memory and oblivion

The phenomenon of iconoclasm has always been challenging critical heritage studies, describing it as a form of "anti-heritage."[13] If intentional destruction of cultural heritage is deemed a form of anti-heritage, it would seem audacious to ask whether there is a right to destroy cultural heritage and what factors can justify its destruction from a legal perspective, especially considering that the law is geared towards its protection. Nevertheless, are the processes of construction and destruction of the cultural heritage really at odds witheachother? Currently, on the one hand, there is an expansion of the concept of heritage worthy of protection and a veritable obsession with memory, almost a spasmodic search for cultural values with which to identify oneself in today's globalization, which is also characterised by losses of identity and values. On the other hand, the cultural heritage seems to be vulnerable to identitychangesof society[14]. More specifically, what is challenged is the set of cultural values embedded into cultural heritage; among these

[13] HARRISON R., *Heritage critical approaches*, Routledge, Oxon, 2013, p. 171, has used the expression of iconoclasm as "anti-heritage".

[14] On the "memory boom" and the broadening of heritage concept see VIEJO-ROSE D. (2015) *"Cultural heritage and memory: untangling the ties that bind."* Culture & History Digital Journal, 4(2): e018. doi: http://dx.doi.org/10.3989/chdj.2015.018 . HARRISON R., *Heritage critical approaches*, ibid, pp.1-12. DOSS E., *War memory, and the public mediation of affect: The National World War II Memorial and American imperialism*, Memory studies, Vol 1(2): 227–250. SETTIS S., *Cieli d'Europa, cultura, creatività, uguaglianza*,2017, Utet, Milano, p. 11: *"Stiamo disimparando a convivere con il nostro passato, a cui non sappiamo più guardare se non con nostalgia o con disagio."*

values, there is certainly one of memory. Although iconoclasmis a long-rooted phenomenon, there is still no shortage of memory issues around cultural heritage today, translating into claims for destruction or removal, arising both "from above and below" in times of conflict and peace. It would seem that the phenomenon of iconoclasm would measure society's relationship with its past and how it is reinterpreted in the present. Culturalheritagewould seem to oscillate between memory and oblivion. Thus, the legal lens on this topic deserves attention.

The study wants to investigate the legal boundaries of cultural memory, wondering about the lawfulness of destroying cultural heritage and, above all, what the perspective of internationallaw is regarding cultural heritage destruction, especially when States authorize it. It seems important to underline that the intentional destruction of cultural heritage has always been a critical issue within cultural heritage law, considering that several international conventions have often been concluded following destructive attacks against cultural artefacts in their tangible and intangible forms[15]. Moreover, the topic of deliberate destruction of cultural heritage is also a lens through which to detect the structural faults concerning the international legal system as a whole.

In exploring the topic of iconoclasm, the discussion will start by analysing its antithetical side, namely the preservation of cultural heritage and its relationship with memory, wondering if preservation and destruction are at odds. An attempt willbe made to examine which factors affect the choice of selection and theact of destruction of cultural heritage, focusing on how cultural globalization has been shaping the role of the international

[15] BLACKE J., *On defining the cultural heritage*, The international Comparative law quarterly, Vol. 49, No.1 pp. 61 -85. The author refers to the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict of UNESCO, drafted in response to the destruction of cultura l heritage during the Second World War.

community and the single States in protecting cultural heritage[16]. The common thread linking preservation and destruction would seem to be that of memory.

To understand the meaning of iconoclasm, one cannot but start from what is being questioned, namely the cultural values attached to cultural heritage in a given historical moment, its intangible component, which includes memory. Some authors note the lack of neutrality, which characterizes the cultural heritage[17]. Cultural heritage is deemed a career of meanings ascribed to it by the human sciences, linked to the collective imaginary and historical events[18]. Only by recognising this intangible value can it be possible to understand the phenomenon of the deliberate destruction of cultural heritage[19]. Does thislack of neutrality make cultural heritage vulnerable to destruction? What happens if these cultural values change?

The chapter will examine the link between memory, cultural heritage, and law, trying to understand what the processes of construction and destruction of cultural heritage haveincommon. The following paragraphs will investigate why cultural memory should be preserved and, above all, which cultural memory and who has the right to build it within the well-known debate of cultural nationalism versus cultural internationalism.

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[16] STARRENBURG S., Cultural heritage protection: a truly "global" legal problem? In Völkerrechtsbog, Sept. 2018.

[17] GENNARO A. M., *Il mondo salverà la bellezza? Alcune considerazioni sulla distruzione del patrimonio culturale*, L'indice penale, Gennaio-Aprile 2017.

[18] ibid.

[19] BLACKE J., *On defining the cultural heritage,* ibid.

2. Untangling the link between cultural heritage, cultural memory and Law

What is the link between cultural heritage, cultur al memory, and Law? How are they interconnected? It seems worth starting with examining the relationship between law and cultural heritage, drawing attention to the legal dimension of the latter.

The need to preserve cultural artefacts and the link between law and cultural heritage appears to be rooted in time. Interest inthe past and attention to ancient remains appear in the earliest civilizations, where cultural artefacts were also conceived as carriers of understanding the past.[20] Within Greek philosophy, attention to beauty is described as something innate and natural to humankind.[21] This innate bond gives rise to theneed to identify legal instruments aimed at its protection. Legal aspects oncultural property, mainly ownership and ethics issues, appear in Cicero's speeches, the so-called "Verrines", against Verres in 70 B.C., governor of Sicily, whose main charge was extorsion sincehewas accused of abusing his official authority for having acquired works of art[22]. A public dimension of the cultural property also emerges, recognizing the social uses and purposes of art, said, in other terms, the concept of "*utilitas publica*[23]. If in republican

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[20] TRIGGER B.G., *A history of ancient thought*, Cambridge, 2006, pp. 40-79 when the author mentions celebration rituals of the past by the civiliza tions Maya, Aztecs, Inkas, and Egyptians. […] *"In ancient Egypt and Mesopotamia, artefacts and ancient buildings came to be valued not only as relics of former rulers and periods of political greatness but as sources of information about what happened in the past."*

[21] On a historical evolution on the protection of cultural heritage see CORTESE B., *Patrimonio culturale, diritto e storia*, in the volume Patrimonio culturale profile giuridici e tecniche di tutela, 2017, pp. 11 -23. Concerning the concept of beauty as inherent, the author quotes a passage from Phaedrus of Plato.

[22] MILES M. M.: *Cicero's Prosecution of Gaius Verres: A Roman View of the Ethics of Acquisition of Art*, International Journal of Cultural Property, 11 (01), pp. 28-49.

[23]Consider the Officis of Cicero. DYCK A. R., *A commentary on Cicero de Officiis*, The University of Michigan Press. CORTESE B., *Patrimonio culturale, diritto e storia*, ibid, p. 22 SETTIS S., *Le radici romane della tutela del patrimonio*

Rome, the aesthetic values of art were central, in imperial Rome, cultural property became a political instrument to promote the grandeur of the empire. Hence, the protection of culturalproperty was aimed at achieving political purposes through a process of "public monumentality[24]". Following the fall of the Roman Empire after years in which the protection of cultural property lost relevance, the work of the Church played a crucial role inthe history of cultural property protection, which also served as a model for protection systems in the Italic kingdoms[25]. A significant legislative body appeared in the 15th century with edicts within the ecclesiastical sphere[26]. However, the idea of "heritage" or "patrimoine" as the object of an actual public policy developed in the nineteenth century in Europe and North America with the rise of new nation-states and the corresponding national cultures to be defined through cultural artefacts[27]. The

culturale, 2009, pp. 1-7, https://www.chiesadinapoli.it/wp-content/uploads/sites/2/2009/08/Le-radici-romane-della-tutela-del-patrimonio-culturale.pdf.

[24] See CORTESE B., *Patrimonio culturale, diritto e storia*, p. 14, where the author speaks about "Monumentalismo pubblico" about the Empire of Augustus; the author also mentions some legal actions aimed at protecting cultural property such as the *actio iniuriarum* in the event of damage or injury against cultural artefacts.

[25] CORTESE B., ibid, p. 15. She refers to the regulations approved, for example, by the Grand Duchy of Tuscany regarding the export of paintings. The author also refers to the use of art by the church as a means of affecting the population's thought.

[26] BLACKE J., *On defining The Cultural heritage*, The International Comparative Law Quarterly, Vol. 49, No.1 pp. 61-85. . 2. PROTT L. V., O'KEEFE P. J., *Law and the Cultural Heritage*, Vol. I, 1984, p. 34; CASINI L., *Ereditare il futuro,* Bologna, 2016, pp. 7-10. FERRAZZI S., *The notion of "Cultural Heritage" in the international field: Behind Origin and evolution of a Concept,* International Journal for the Semiotics of Law- revue international de Sémiotique juridique, 2020, URL: https://doi.org/10.1007/s11196-020-09739-0.

[27] SETTIS S., ibid, p. 2. HARRISON R., *Heritage, Critical approaches*, Routledge, Abington, 2003, pp. 42-67, particularly p. 42. SAX J.L., *Heritage preservation as a public duty: The Abbé Gregoire and the origin of an idea,* Michigan Law Review, Apr. 1990, Vol. 88, No. 5, pp. 1142- 1169. The author mentions the French Monument Act of 1887 as the beginning of modern policy in France.

same development goes in parallel with the concept of state sovereignty. Still, in the second half of the 19th century, important cultural property legislation was provided to protect cultural artworks during wartime, such as the Lieber Code issued by Abraham Lincoln in the context of the American Civil War and the Declaration of Brussels in 1874[28]. In the same wake, other treaties followed, such as the 1899 Hague Convention, the 1907 Hague regulations concerning the law and Customs of the War on Land protecting "historical monuments" from sieges and monuments; moreover, the international pact for the protectionof artistic and scientific institutions, historical monuments, missions and collections" (the so-called Roerich Pact)[29].

This brief historical excursus emphasizes the strong tie between law and cultural heritage. Moreover, legal science hascontributed to shed light on the value of cultural heritage for society and its many underlying issues[30]. It is worth highlighting that Law plays a role in authorizing the preservation and conservationof cultural heritage: a legal act recognizing the legal status of a cultural good[31]. Still, the terms "cultural property" and "culturalheritage" appear for the first time within the international legal order, precisely within the "Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), in

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[28] GIBBON K. F., *Who owns the past? Cultural Policy, Cultural Property, and the Law*, Chicago, 2005, pp. 5-7.

[29] GIBBON K. F., *Who owns the past?: Cultural Policy, Cultural Property, and the Law*, ibid, p. 4. BLACKE J., *On defining cultural heritage*, ibid, p. 61; WERNER V. T., *The evolution of "cultural heritage" in International Law*, 2005, 15th ICOMOS General Assembly and International Symposium: 'Monuments and sites in their setting - conserving cultural heritage in changing townscapes and landscapes', 17 – 21 Oct 2005, Xi'an, C
hina. URL: http://openarchive.icomos.org/id/eprint/303/1/1-33.pdf.

[30] CASINI L., *Ereditare il futuro,* ibid, p. 7; ELSEN A., *Introduction: Why do we care about art?* Hastings Law Journal, 1976 Vo. 27, No. 5, pp. 951-972: "[…], often it is art that is a powerful force for uniting a society […]"

[31] LIXINSKI L., *Legalized identities, Cultural heritage Law and the shaping of Transitional Justice*, Cambridge 2021, p. 95,CASINI L., *Ereditare il futuro,* ibid, pp. 7-10.

response to the destruction and looting of monuments of the Second World War, as well as the European cultural Convention[32].

Nevertheless, why is cultural heritage worthy of legal protection[33]? The cultural heritage sector involves arangeof legal interests that can often conflict with each other, of which several public and private actors are holders. Merryman describes the network of the actors surrounding the cultural heritage as an"art system"[34]. An art system has its rules and actors, which play

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[32] See the preamble of the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954: *"Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction;*
Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection;"(guided by the principles concerning the protection of cultural property during armed conflict, as established in the Conventions of The Hague of 1899 and of 1907 and in the Washington Pact of 15 April 1935);
See also article 1 of the European Cultural Convention: article 1: *"Each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe". On the origin of the term "cultural heritage and cultural property"* see: CASINI L., *Ereditare il futuro*, ibid, pg.8. BLACKE J., *On defining cultural property*, ibid, pp. 61-85. FERRAZZI S., *The notion of "Cultural Heritage" in the international field: Behind Origin and evolution of a Concept*, ibid, pg. 9; WERNER V. T., The evolution of "cultural heritage" in International Law, ibid, pg. 1.

[33] On this topic, ELSEN A., *Introduction: Why do we care about art?* Hastings Law Journal, 1976 Vo. 27, No. 5, pp. 951 -972; ELSEN, *Founding the Field of art Law*, Standford1987, Vo. 39, pp. LACHS, *The defenses of culture*, Museum international1985, Vo. 37, No. 3, pp. 167 -168; JAYME E., *Globalization in Art Law: clash of interests and International tendencies*, Vanderbilt Journal of Transnational Law 2005, Vo. 38, pp. 927 -943;

[34] MERRYMAN J. H., *Collections as a Good, Il patrimonio culturale e le sue regole*, Aedon, n.1-2, 2012*: "[…] An "art system" is a social construct that*

different roles. Every national art system includes private and public elements, and the inclination for a more public or private paradigm depends on the choice of every single state[35].

Regarding the interests at stake, among the various classifications developed by scholarly literature, the dichotomous group of private and public interests deserves attention[36]. Indeed, from one side, it is possible to notice, for instance, the private interests of the cultural good's owner or the interests underpinning the private sphere of the artist who has created that artwork. About the latter, one can observe his moral rights, which can be distinguished into four pillars: the attribution of the work of art and the right to its integrity; the freedom of deciding if publishor not work of art, as well as the right to remove a work from circulation[37]. On the other side, cultural property underpins a

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includes players, supporters, and a paradigm. Players are people and institutions whose lives are centrally concerned with works of art- artists, collectors, dealers, museums, art historians, critics, and the art press. Supporters – the interested public, patrons, foundations, corporations and the State - provide moral and material support to the players. The paradigm is the organizational structure and the set of assumptions and attitudes that direct the way players and supporters think and act. Two paradigms, which we can call "public" and "private," compete for domination of the world's visual art systems."

[35] Ibid.

[36] JAYME E., *Globalization in Art Law*, ibid, MERRYMAN J. H., *The public interest in cultural property*, California law review 1989, Vol. 77, pp. 339- 364, CASINI L., *Ereditare il futuro*, ibid, pp. 26-31; FECHNER F. G., *The fundamental aims of Cultural Property Law, International Journal of Cultural Property*, Vol 7, No. 2, 1998, pp. 376– 394; CASSESE S., *I beni culturali: dalla tutela alla valorizzazione*, Rivista trimestrale di diritto pubblico, 2011, pp. 473 ss.; CASSESE S., *I beni culturali da Bottai a Spadolini*, Rassegna degli Archivi di Stato, 1-3,1975, pp. 116-142.

[37] See RUSHTON M., *The moral rights of artists: Droit Moral ou Droit Pécuniaaire?*, Journal of Cultural Economics 1998, Vol. 22, No. 1, pp. 15 -32: *"The four key aspects of moral rights legislation are commonly named as follows: (1) attribution or paternity- the right to be identified as the creator of a work (or, conversely, the right not to be identified as such); (2) integrity – the right of protection against alteration or mutilation of a work; (3) disclosure- the right to publish or not to publish a work ; (4) withdrawal – the right to remove a work*

plurality of public interests that distinguish it from ordinary property[38]; public interests that take up precisely the Roman concept of *utilitas publica* mentioned before, namely the 'social function' that cultural property fulfils for the collectivity as a whole, thanks to its inner cultural value belonging to everyone[39]. As far as the Italian legal order, for a long time, legal science placed emphasis on cultural property in relation to the concept of private ownership, placing administrative constraints and limitations on the owner of cultural artworks and classifying cultural property according to its ownership regime. Subsequently, it turned its attention to the cultural value of the artwork itself and its cultural function, irrespective of its

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from circulation". See also ELSEN A., Introduction: Why do we care about art ?, ibid, pp. 954-959.

[38] POSNER, Eric A. (2007) *"The International Protection of Cultural Property: Some Skeptical Observations,"* Chicago Journal of International Law: Vol. 8: No. 1, Article 12. CASSESE S., *I beni culturali da Bottai a Spadolini*, ibid, p. 127, in relation to Bottai Law (1939): *"In questo disegno unitario trovano una collocazione i vari interessi che ruotanointorno ai beni culturali. Al Bottai, in particolare, fu chiaro che essi sono in una " rete di rapporti" nei quali sono presenti quelli privati, dalla fruizione artistica al commercio antiquario; quelli collettivi o generali, dalla fruizione artistica al commercio antiquario; quelli collettivi o generali, dalla fruizione popolare, alla ricerca, alla valorizzazione; e quelli, di cui deve darsi carico il potere pubblico, del coordinamento tra questi interessi e tra loro e altri interessi (in particolare, quelli urbanistici)"*.

[39] On funzione sociale of cultural property, see ROLLA G., *Beni culturali e funzione sociale*, Regioni,1987,1-2. It i salso interesting in Italian legal scholarship the link of cultural property with the category " beni comuni" , namely MATTEI U. , *Beni culturali, beni comuni, estrazione, Patrimonio culturale Profili giuridici e tecniche di tutela*, 2017, in particular, see p. 152: "Beni culturali che, attenzione, la Commissione Rodotà inquadrava come beni comuni, in primissimo piano, anche perché erano il primo esempio a disposizione di una istituzione giuridica informata al lungo periodo e all'interesse delle generazioni future, capace di vincolare certi beni indipendentemente dalla titolarità formale pubblica o privata. […] Se sono proprietario di un quadro di Picasso di valore inestimabile e voglio farmi cremare con il quadro non posso, anche se esso formalmente è mio. […] Questo perché c'è un valore, che è intergenerazionale di quella produzione artistica che non può essere oggetto di proprietà privata idiosincratica."

ownership regime, which may be public or private[40]. Its cultural function for society makes cultural heritage worthy of legal protection. Indeed, quoting an important concept of the Italian legal scholarship: *"Un bene culturale è pubblico non in quanto bene di appartenenza, ma in quanto bene di fruizione"*[41].

Therefore, among the public interests, one can include the public interest in preserving the cultural property in its original form, as well as an interest in ensuring its accessibility to the public. Furthermore, accessibility for scientific research and information and an interest in preserving the cultural property in its original context, including repatriation issues, as well as a public interest in controlling the circulation of cultural assets[42]. In light of the current international order, the public interest in protecting cultural heritage should be taken into account in a twofold dimension, including a national interest and a worldwideinterest attached to cultural artefacts, which are often conflicting. In the following paragraphs, this dichotomy (global, national) introduced by Merryman[43], has been developed since it now takes into account the local dimension, which means interest in preserving cultural heritage on the part of local communities,

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[40] ROLLA G., *Beni culturali e funzione sociale*, ibid, p. 60-62, this focus on the cultural function of cultural property is due to an evolving interpretation of article 9 of the Italian Constitution according to which the preservation of cultural property is not for itself, but it is aimed at promoting the development of culture; Article 9, Italian Constitution: The Republic promotes the development of culture and scientific and technical research. It safeguards the natural landscape and the historical and artistic heritage of the Nation.

[41] GIANNINI M. S., *I beni culturali*, 3 Rivista trimestrale di diritto pubblico 3, 8 (1976).

[42] FECHNER F. G., *The fundamental aims of Cultural Property Law*, ibid. CASINI L., ibid, pp. 26-31. Moreover, there is also no shortage of economic interests underlying cultural property, which can be both public and private, such as those related to cultural tourism or adaptive reuse: WANGKEO K., *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, 28 YALE J. INT'L L. 183 (2003).

[43] MERRYMAN J. H., *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986)

which also paves the way for greater recognition of intangible cultural heritage, in the light of the principle of cultural diversity[44]. The plurality of interests just described indicates why cultural heritage is worthy of legal protection, where the lawmaker is called upon to weigh the different legal issues and strike the right balance. Assuming the link between cultural heritage and law, how do these two elements relate to cultural memory?

21 The legal dimension of cultural memory

In detecting the link between Law, cultural heritage, and cultural memory, it would seem appropriate to start with Merryman's famous essay, in which he identifies the public interest sourcesin cultural property and the corresponding goals that a cultural property policy must pursue[45]. This latter should guarantee the preservation of cultural property and its cultural truth; at thesame time, a public policy should ensure its access to the public and preserve its national identity, of which the cultural good is the bearer. According to his analysis, the sources of public interest should be identified into a series of elements. First, the truth or authenticity of cultural property is interpreted as a "search for accuracy, certainty in objects[46]". Other elements concernmorality as the set of values for whom the cultural object is the bearer, especially relating to religious objects, as well as an interest in protecting the *pathos*, defined as "A special emotion", which is embedded into cultural property[47]. Even the need for cultural

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[44] LIXINSKI L., *A Third Way of Thinking about Cultural Property*, 44 Brook. J. Int'l L. 563 ().

[45] MERRYMAN J. H., *The public interest in cultural property*, California law review 1989, Vol. 77, pp. 339 - 364

[46] MERRYMAN, J. H., *The public interest in cultural property*, ibid, pg. 346 :" I use the term "truth" to sum up the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship. The basic concern is for authenticity and is fundamental to most of the reasons why we care about cultural property".

[47] MERRYMAN J.H., ibid, pp. 346-349: "[...] Cultural objects embody and express moral attitudes. This is most obviously true of religious objects […]", "[…]

identity and for a sense of community which cultural objects evoke are additional sources of public interest since cultural artworks are symbolic means through which recognizing one's roots[48]:

Finally, the public interest in cultural property finds its source in preserving cultural memory, which is relevant to the current discussion. Indeed, among the reasons why the legal system protects cultural artefacts, cultural memory holds a central role: "Cultural objects are the basis of cultural memory". […] Why do they care about such things? Although there are other explanations, at the centre is the desire to remember and to be remembered. We instinctively act to preserve, to forestall "the eternal silence created by the destruction of culture."[49]". One could say that cultural memory encompasses all the other elements mentioned above: the sense of belonging to a community, as well as the cultural identity evoked by thecultural heritage. Authenticity means the search for certainty and preservation of the past. They embed all cultural memory meant as need to remember and be remembered, as well as to trace the cultural roots of belonging.

Thus, cultural memory as the source of public interest in cultural property shows how the current analysis's three elements (cultural heritage, law, and memory) are closely connected.

Indeed, this link is evident in one of the first conventions regarding the protection of historical monuments, like the Roerich

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Pathos: Relics excite a special emotion, even when they have no religious significance. There is a pathos in objects. They evoke nostalgia for the people, events, and cultures that produced them […]".

[48] Ibid, pg. 349, an art historian explains that works of art and, by extension, other cultural objects, " tell […] us who we are and where we came from"(…) When war or natural disaster or vandalism destroys cultural objects, we feel a sense of loss "(…) "Cultural objects nourish a sense of community , of participation in a common human enterprise […]"

[49] Ibid.

pact[50]. Suppose one looks at the etymological sense of the term "Monument". In that case, it is possible to notice that it derives from the Latin word "monumentum", specifically the Latin verb "monere", which means to inform, to remind the memory[51]. The term "monument" evokes the concept of memory: "a monument is at first anything durable made or erected to perpetuate the memory of persons or events"[52]. Within the Roerich Pact, the historical monuments deserving of legal protection were considered carriers of past and memorable events[53]. Onecanread the cultural heritage as "a tangible manifestation of a form of memory[54]".

Disentangling the examined relationship, the link between cultural heritage and memory has been taken for granted by scholars since memory has been conceived as something intrinsic to the essence of heritage[55].

How can cultural memory be defined? First, by examining the relationship between heritage and memory, it seems appropriate to distinguish two grades of cultural memory: the individualand

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[50] The Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments or Roerich Pact, (an inter-American Treaty), signed in 1935. The term "Historic Monument" is mentioned for the first time in an international convention.

[51]WERNER V. T., *The evolution of "cultural heritage" in International Law* "[…] In the etymological sense of the term , it means all the artefacts, of any nature, shape or size, explicitly built for a human group so as to recall and commemorate individuals or events, rites or beliefs that are founded on a genealogy as to their identity".

[52] WERNER V. T., *The evolution of "cultural heritage"*, ibid.

[53] Ibid.

[54] VIEJO ROSE D., *Cultural heritage and memory: untangling the ties that bind,* culture, history digital journal, 2015, 4 (2), pp. 1 -13. See pg. 2:" […]The description of John Soane's museum as "treasures salvaged from a shipwrecked dream" (Woodward, 2002: 160) could well be applied to some approaches to both cultural heritage and memory: cultural heritage as the ruinous remains of past creations, memories as the imperfect remains of past experiences".

[55] VIEJO ROSE D., *Cultural heritage and memory: untangling the ties that bind,* ibid, pg. 2.

the collective dimension. Cultural heritage shows this twofold dimension triggering a person's memory both as an individual and as a part of a community. What is relevant for the following research is the collective memory. Memory studies trace their origin to the thinking of the French sociologist M. Halbwachs, who first highlighted the collective dimension of memory[56]: social groups and social processes enable individual memory since the individual is a social being[57]. According to sociologists, theterm "collective memory" includes cultural transmission, the creation of tradition, and shared versions of the past[58]. Still, heemphasizes the duality of heritage-memory within the materiality of an urban

[56] HALBWACHS M., *the collective memory*, translated from the French by Francis J. Ditter, Jr., and Vida Yazdi Ditterry, New York 1980, pg. 23: "Our memories remain collective, however, and are recalled to us through others even though only we were participants in the events or saw the things concerned. In reality, we are never alone. Other men need not be physically present, since we always carry with us and in us a number of distinct persons. I arrive for the first time in London and take walks with different companions. An architect directs my attention to the character and arrangement of city buildings. A historian tells me why a certain street, house, or other spot is historically noteworthy. A painter alerts me to the colours in the parks, the lines of the palaces and churches, and the play of light and shadow on the walls and façades of Westminster and on the Thames. A businessman takes me into the public thorough fares, to the shops, bookstores, and department stores. Even if I were unaccompanied, I need only have read their varying descriptions of the city, been given advice on what aspects to see, or merely studied a map." See also ASSMANN, *La memoria culturale, Scrittura, ricordo e identità politica nelle grandi civiltà antiche*, 1997, Einaudi, Torino, traduzione di Francesco De Angelis, p. 11, quotng Halbwachs: "La tesi principale, cui Halbwachs ha tenuto fermo in tutte le sue opere, è quella del carattere socialmente condizionato della memoria. Egli prescinde completamente dalla base fisica (ossia neuronica e cerebrale) della memoria, mettendo invece in risalto i quadri di riferimento sociale senza i quali nessuna memoria individuale potrebbe costituirsi e conservarsi. […] Un individuo che crescesse nella solitudine totale- questa è la sua tesi, che però non è mai formulata con chiarezza- non possederebbe memoria".

[57] ANTON L., *Cultural memory*, chapter 10, 2016"For Halbwachs, remembering was socioculturally framed, as the individual is a social being. Thus, memory is collective, as people acquire and construct it as members of a group and always recall their memories in the context".

[58] ERIL A., *Memory in culture*, 2011.

space: the structures and monuments of an urban space remind memory and "serve as a reference of identity"[59]. Cultural artefacts are "collective representations that have been resistant over time and therefore constitute a social or collective memory". What is relevant in Halbwachs' thought is the statement according to which collective memory is socially constructed; it is "a selective process" of events.

Assmann, starting from the premises of Halbwachs, takes into consideration the cultural sphere of collective memory; he distinguishes within the collective memory the communicative memory or "everyday memory"[60] from cultural memory, meant as a body of institutionalised memories through which the transmission of the past takes place. Quoting Assmann: " Things do not "have" a memory of their own, but they remind us, may trigger our memory because they carry memories which wehave invested into them, things such as dishes, feasts, rites, images, stories and other texts, landscapes, and other "lieuxde mémoire". On the social level, with respect to groups and societies, the role of external symbols becomes even more important because groups which, of course, do not "have" a memory tend to "make" themselves one by means of things meant as reminders such as monuments, museums, libraries, archives, and other mnemonic institutions. This is what we call cultural memory[61]." Cultural memory, thus, is concerned with the transmission of the past

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[59] VIEJO ROSE D., *Cultural heritage and memory: untangling the ties that bind*, ibid,: " With regarding to the formation of urban space, the monument and the heritage are structures that constantly serve as references of identity, for the cultural representation of a group in a given area and at a given time. "

[60] ASSMANN J., *Collective memory and cultural identity*, Cultural memory studies. An international and Interdisciplinary Handbook, Berlin, New York, 2008, pp. 109-118. Communicative memory: "the concept of communicative memory" includes those varieties of collective memory that are based exclusively on everyday communications … Everyday communication is characterized by a high degree of non-specialization, reciprocity of roles, thematic instability, and disorganization."

[61] ASSMANN J., *Communicative and cultural memory*, ibid, p. 111.

within social groups through rituals, objects, and cultural artefacts.

Clarified its definition, it is important to understand how the interrelationship between law and collective memory occursand how it intertwines with cultural heritage discourse. Scholars on this topic have identified a mutual interaction between Law or better International law and collective memory: Internationallaw affects collective memory, and at the same time, collective memory shapes International Law[62]. From one side, collective memories are "activated into legislative and legal decisions".[63] This is evident if one looks at the international tribunals who have produced a certain narrative of events, shaping the future collective memory; for instance, the Nuremberg trial has built a historical narrative with the aim to affect the collective memory of future generations[64]. The truth commissions have played the same role in constructing a new notion of the nation based on a culture of human rights as the South African TRC did on the experience of apartheid. The same is true with certain resolutions of the UN Security Council that affect collective memory through the narrative of historical events, like in the case of resolution1368 on the self-defence against terrorism in relation to the September 11, 2001, in the United States[65]. The power of international institutions to shape collective memory depends on certain features that characterize them, such as their legitimacy, the

[62] On this issue: SAVWLABERG R., KING D., *Law and collective memory*, Annual review of law and social science 2007, Vo. 3, 189-211. HIRSCH M., *Collective memory and International* Law, ESIL reflection 2014, Vol. 3, no. 7; HIRSCH M., *Collective memory and international law*, Invitation to the sociology of international law 2015; HUYSSEN A., international human rights and the politics of memory: limits and challenges, Criticism2011, pp. 607-624.

[63] SAVWLABERG R., KING D., *Law and collective memory*, ibid, pg. 190.

[64] HIRSCH M., *Collective memory and international law*, Invitation to the sociology of international law 2015.

[65] HIRSCH M., *Collective memory and international law*, ibid, pg. 7.

rituals involved in the procedures, and the description of historical events[66].

At the same time, collective memory shapes the law-making process, the content of rules or the interpretation of treaties. For instance, the human rights movement fed on politics of memory to reach its goals, even to reinforce the idea of a natural law tradition. The Genocide convention[67] or the Universal Declaration of human rights of 1948 are the products of a process of recognition of massive human rights violations perpetuated during World War II[68]; as well as a series of treaties that originated as the outcome of anticolonial projects of liberation[69].

The relationship between international law and collective memory finds its conjuncture within the heritage discourse. Indeed, there are international instruments which are explicitly aimed at shaping collective memory, such as the mechanism provided by the World Heritage Convention, according to which protection is granted to certain sites of memory through the inscription on the World Heritage List on the grounds of a series of criteria including also the historical value of monuments[70]. Consider the inscription on the World Heritage list of Auschwitz- Birkenau since 1979, a site of memory selected with the purpose of not forgetting the atrocities of the past based on a racist

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[66] Ibid.

[67] URL: https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx .

[68] HUYSSEN A., *international human rights and the politics of memory: limits and challenges*, ibid, pg. 609.

[69] Ibid, pg. 609, for instance the Helsinki Final Act of the Conference on security and cooperation in Europe.

[70] HIRSCH, ibid. p. 8. Consider also the UNESCO "Memory of the World Program" in 1992, born with the aim of promoting the world's documentary heritage from the risk of looting, dispersal and destruction, with the creation of lists such as The memory of the World register: https://en.unesco.org/programme/mow.

ideology, as well as with the aim of reminding the truth[71]. Still, in relation to the World Heritage list, it is worth mentioning the phenomenon of the so-called "absent heritage" or the "absent presence", which consists of granting legal protection to the memory of a heritage site that, has been destroyed[72]. This is the case of the "The Buddhas of Bamiyan" in Afghanistan, which were only inscribed on the World Heritage list in 2003 after being destroyed by the Taliban forces in 2001[73]. A similar example concerns the inscription on the World heritage List of the Hiroshima remains, on the grounds of non-aesthetic criteria but as a "guarantee of non-repetition"[74].

International courts also play a key role in reconstructing memories destroyed after deliberate attacks on the cultural heritage of minority groups. This is the case of the International Tribunal for the former Yugoslavia, which, through oral testimonies and collected evidence used in the trial, hasrecovered and reconstructed the lost collective memory of ethnic and religious groups in Bosnia, supporting reconstruction projectson the targeted cultural heritage[75].

Moreover, Museums also play an important role as catalysts of collective memory, especially in the context of transitional contexts as part of reparations and as a "guarantee of non-

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[71] LIXINSKI L., *Legalized identities, Cultural Heritage Law and the shaping of transitional justice*, ibid p. 62.

[72] HARRISON R., *Heritage, Critical approaches*, ibid, p. 169:"Absent Heritage—the memorialisation of places and objects whose significance relates to their destruction or absence- has developed as a significant global cultural phenomena in which the visual and aesthetic language of heritage conservation is applied to the conservation of voids or absent spaces to maintain an "absent presence".

[73] HARRISON R., Ibid, pp. 182-192.

[74] LIXINSKI L., *Legalized identities*, ibid, pp. 66-70, the author quotes the World Heritage Committee on Hiroshima Peace memorial Park: " The most important meaning of the surviving structure of the Hiroshima Peace Memorial is in what it symbolizes, rather than just its aesthetic and architectural values".

[75] SUPPLE, SHANON, *Memory slain: Recovering Cultural heritage in Post-war Bosnia*, Interactions: UCLA Journal of Education and Information Studies 2005, 1(2).

repetitions of difficult pasts[76]. For instance, museums conceived as public institutions authorized by the law in post-conflict scenarios help to reconstruct the historical truth and create anew identity for society.

Finally, the topic of memory has been acquiring increasing importance within the evolution of the cultural heritage's legal concept. Collective memory has been incorporated in several treaties on the protection of cultural heritage; for example, the Faro Convention defines cultural heritage as a sourceof European collective memory and, therefore, deserving of protection[77].

Indeed, in the following paragraphs, the starting point willbethe evolving meaning of cultural heritage with a focus on the Faro Convention, trying to understand if, within the evolving interpretation of the cultural heritage's concept, it is possible to detect a growing legal dimension of collective memory. The discussion will continue by examining the functioning of the selective process on the cultural heritage worthy of protection, looking at the actors involved, and taking the mechanismadopted by the World Heritage Convention as a case study. The research will also focus on how the World Heritage Convention affects collective memory, asking whether there is a deliberativeselection of a certain memory which underpins a certain idea of culture.

3. From cultural property to cultural heritage: a growing importance of collective memory?

Can it be said that "cultural heritage" is more attentiveto thelegal dimension of collective memory than the concept of "cultural property"?

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[76] LIXINSKI L., *Legalized identities*, pp. 129-164. He examines the Atrocity Museums as a means to rethink transition through artefacts (for instance the House of Terror in Budapest); Human rights Museums as "sites of persuasion" for a peaceful society, putting an emphasis on their "social mission" (consider the Museum of Memory of Human rights in Santiago, Chile).

[77] Convention on the Value of Cultural heritage for Society (Faro Convention 2005): https://www.coe.int/en/web/culture-and-heritage/faro-convention.

Greater attention to the legal dimension of memory means emphasising the cultural values that cultural artefacts embody beyond their materiality, in other words, their intangible component; at the same time, it means recognising theimportance of the intangible cultural heritage category.

It is important to underline how difficult it is to definetheconcept of cultural heritage, given the plurality of interests involved and due to the meaning of culture, which is not per se absolute but it is changing over time depending on the social context of thetarget group.[78] Indeed, every legal instrument has its own definitionof cultural property, depending on the specific purpose it seeks to achieve. As we said before, the difficulty in defining cultural heritage is due to its "liminal nature" since its legal definition refers to other disciplines[79].

Still, it is important to premise that the relationship between the two concepts (cultural property, cultural heritage) is not clear [80]; the two concepts have taken hold in parallel even though the "cultural heritage" concept would seem progressively more central in International Law. In this study, both termswillbe used interchangeably. However, the view of those who argue that the concept of cultural heritage is more comprehensive in relation to the intangible component and thus embedding collective memory deserves attention.

Indeed, looking at the most important international conventions, one can observe a progressive shift from merely static protection

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[78] See BLACKE J., *On defining the cultural heritage*, pg. 63, The fundamental aims of cultural property, F. G. Fechner, cit., pg. 377, 378, LOSTAL M. *The intentional destruction of cultural heritage in armed conflict , Case-studies of Syria, Libya, Mali, Invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge University Press, 2017.

[79] BLACKE J., *On defining the cultural heritage*, ibid, pg. 63-64.

[80] BLAKE J., *On defining the cultural heritage*, ibid, p. 66: "The relationship between "cultural property" or "cultural heritage" is unclear, appearing interchangeable in some cases, while in others, cultural property is a sub-group within "cultural heritage".

of monuments, conceived as material entities, to wider attention on artefacts' non-material elements[81].

The legal concept of cultural property appears for the first time in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[82], whose content is provided in article 1; more specifically, article 1 does not define the term cultural property but identifies the categories that are part of it[83]. Culture property echoes the French "biens culturels" and the Italian "beni culturali[84]". The same concept was takenup in the 1970 UNESCO Convention on the Means of Prohibitingand Preventing the Illicit Import, Export, and Transfer of Ownership

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[81] WERNER V. T. ,*The evolution of cultural heritage in International Law*, ibid, pp.1-3

[82] J. Blake, *On defining the Cultural heritage*, The international and Comparative Law Quarterly, Vol. 49, No. 1 , pp. 61 -85; FRIGO M., *Cultural property v. cultural heritage: A " battle of concepts" in international Law*?, 2004, vol. 86, n. 854; L. V. PROTT, P. J. O' KEEFE, *" Cultural Heritage" or "Cultural Property"?* According to these latter the Hague Convention boosts the provisions contained in the 1907 Hague Convention for Respecting the Laws and Customs of War on Land.

[83] Article 1 of the 1954 Hague Convention :

"For the purposes of the present Convention, the term `cultural property' shall cover, irrespective of origin or ownership:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined. above;
(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
(c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as `centers containing monuments'.

[84] PROTT L. V., O' KEEFE J., *"Cultural Heritage" or "Cultural Property"?*, ibid, p. 312.

of cultural Property[85], followed by the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999[86]. The reading of these articles shows greater attention to tangible cultural heritage in comparison to intangible cultural manifestations. The

[85] Article 1, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property 1970:
For the purposes of this Convention, the term `cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
(a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
(b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
(c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
(f) objects of ethnological interest;
(g) property of artistic interest, such as:
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs ;
(iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments

[86] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, link: http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html.

notion of property and ownership are fundamental concepts of the Western legal tradition, which emphasize mainly the private interests underpinning cultural artefacts such as "the protection of the rights of the possessor"[87]. Scholars have identified two orders of issues arising from the notion of cultural property: first, due to the centrality of private interests mentioned above, the category of property is inadequate to encompass all the social values surrounding cultural heritage[88]. Moreover, the emphasis on property values risks granting exclusively an economic value to cultural artefacts, putting in the background the socialgoalsfor which they are deemed worthy of protection; in other words, a risk of "commodification of cultural artefacts"[89]. Second, the narrow notion of cultural property is inappropriate to embed all

[87]PROTT L. V., *International Standards for Cultural Heritage,* in UNESCO World Culture Report (UNESCO publishing, Paris, 1998). P. 234 (quoted by BLAKE J, ibid, p. 66); see also PROTT L. V., *Cultural Property*, pg. 309

[88] BLAKE J., ibid, p. 65.

[89] See BLAKE J., ibid, pp. 65-69: *"Property is a fundamental legal concept around which important political and philosophical theories have developed. It carries with it a range of ideological baggage which is difficult to shed when using the term in relation to the cultural heritage or environmental protection where one needs to modify these associated traditional values in order to achieve social goals desired. It is problematic to apply a legal concept involving the rights of the possessor to the protection of cultural resources which may involve a severe curtailment of such rights and the separation of access and control from ownership. Implicit also in the use of the term "cultural property" is the idea of assigning to it a market value, in other words the "commodification" of cultural artefacts and related elements by treating them as commodities to be bought and sold"*. On the topic of commoditization or "giacimento culturale" see PROTT L. V., O' KEEFE J., *"Cultural Heritage" or "Cultural Property"* , ibid, p. 311?; MONTANARI T., La cultura della mercificazione universale, link: https://www.officinadeisaperi.it/materiali/firenze-prostituita/, SETTIS S., Il patrimonio "boccheggia", ma tutti esaltano le "Eccezionali Mostre", il Sole 24 ore, link: http://www.albanologia.unical.it/SportelloLinguistico/CS/rassegnaStampa/BENCULTURALISMO_PAROLAIO-Salvatore_Settis-28-5-2006-IL_SOLE_24_ORE.pdf.

the cultural manifestations, especially some intangible categories such as "rituals, ceremonies, oral history and performing arts"[90].

That is why the notion of cultural heritage has increasingly taken hold in International Law, being inclusive of all cultural manifestations and incorporating values not related to property rights. Cultural heritage better expresses the social goals behind cultural heritage law, like the possibility of ensuring the enjoyment of cultural heritage through public access[91]. Moreover, the cultural heritage category is the most accepted in international Law since it encapsulates the notion of inheritance, which means the transmission of the past and cultural values to the next generations[92]. Indeed, the world "heritage", coming from the Latin verb "hereditare" (to inherit), evokes that one of "inheritance[93]; in other words ", the inheritance of something from the past (in the case of cultural heritage, culture)"[94].

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[90] See PROTT L. V., O' KEEFE J., ibid, pg. 313: *"In societies where intellectual and spiritual life has found forms not represented by great monumental complexes or the creation of a vast number of material objects, the preservation of cultural identity depends far more on the appreciation of tradition and the preservation of folklore, rituals and traditional skills. This has created a complex of protective needs which is not well comprehended by the word 'property'. It is true that there are various forms of property and property can exist in intangible things, including secrets and information quite outside the formal and artificial statutory regimes of patents, copyright and registered designs. Nevertheless, there is no unified system of property law applying to all aspects of these cultural manifestations".*

[91] See PROTT L. V. , O' KEEFE J., p. 309.

[92] BLAKE J., *On defining the cultural heritage*, ibid, p. 69: "The idea of inheritance is central to the force of the term cultural heritage and adds a further set of notions to its meaning. It appears relatively straightforward to view cultural heritage as a valuable resource which we as a society wish to preserve in order to pass it on to future generations as their inheritance".

[93] VIEJO ROSE D., ibid, p. 4.

[94] HATALA MATTHES E., *"The Ethics of Cultural Heritage ", The Stanford Encyclopedia of Philosophy* (Fall 2018 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2018/entries/ethics -cultural-heritage/>. p. 2. See also HARRISON R., Understanding the politics of Heritage, Manchester University Press in association with the Open University,

While property is a traditional legal concept, cultural heritagehas been developed in the context of other disciplines[95], which isthe reason why it is difficult to define its content from a legalpoint of view, given its liminal nature[96]. However, the meaning of inheritance embedded in the definition of cultural heritage already appears in UNESCO's Constitution, including among its founding purposes the protection of the world's inheritance concerning cultural artefacts[97]. It is also used in the preamble of

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Manchester and Milton Keynes, 2010, p. 9: " The Oxford English Dictionary defines "heritage" as property that is or may be inherited ; an inheritance', 'valued things such as historic buildings that have been passed down from previous generations', and 'relating to things of historic or cultural value that are worthy of preservation'. […]Heritage is something that can be passed from one generation to the next, something that can be conserved or inherited, and something that has historic or cultural value" […]. See also PROTT L. V., O' KEEFE J., ibid, pg. 311 *" Heritage creates a perception of something handed down; something to be cared for and cherished. These cultural manifestations have come down to us from the past; they are our legacy from our ancestors. There is today a broad acceptance of a duty to pass them on to our successors, augmented by the creations of the present."*

[95] See BLAKE J., *On defining the cultural heritage* : "The concept of cultural heritage has itself been imported from other academic disciplines such as anthropology and archaeology without incorporating the theoretical background which led to its development viz. the conceptual framework which gives it content and meaning.."

[96] On the " nozione liminale", see GIANNINI M. S., *I beni culturali*, 3 Rivista trimestrale di diritto pubblico 3, 8 (1976);

[97] Article 1 UNESCO Constitution: Purposes and functions:

1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations , through education, science and culture in order to further universal respect for justice , for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world , without distinction of race , sex, , language or religion , by the charter of the United Nations
2. To realize this purpose the Organization will: […](c) Maintain, increase and diffuse knowledge :

By assuring the conservation and protection of the world's inheritance of books, works of art, and monuments of history and science, and recommending to the nations concerned the necessary international conventions. On this matter, see J. Blake, pg. 71

the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[98], emphasizing and anticipating the universal dimension of cultural heritage, as well as in article 1 of the same Treaty.

At the European level, there was already an endorsement of a broader notion of cultural heritage as opposed to the narrower one of cultural property provided in the existing international instruments. For instance, The 1954 European Cultural Convention makes explicit reference to the "European cultural heritage ", boosting the contracting members to empower its development, followed by further treaties[99].

Subsequently, the 1970 United Nations Educational Scientificand Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export an Transfer of Ownership of Cultural Property has enshrined the concept of "cultural heritage", repeating it eight times. It will be later used explicitly in the title of the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, whose instrument is considered by some authors a shift of perspective comparing to the previous regulation, granting an universalvalue

[98] […] Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection […];

[99] Article 1 : " Each Contracting Party shall take appropriate measures to safeguard and to encourage the development of its national contribution to the common cultural heritage of Europe ".See " The evolution of cultural heritage" in International Law ; the other conventions are : the 1969 European convention on the protection of archaeological heritage , the 1985 European Convention on Offences relating to cultural property, the 1985 European Convention on the Protection of the Architectural Heritage of Europe, the European Convention on the Protection of the Archaeological Heritage of 1992 and the European Landscape Convention of 2000. These conventions are partly more detailed than the UNESCO Conventions and aim at a comprehensive protection of the European cultural heritage.

to cultural heritage, emphasizing its meaning of inheritanceof the past[100]. Indeed it is not accidental the matching of the cultural heritage with natural heritage, since they are conceived both as "non-renewable resources" to protect and preserve them for future generations[101].

3.1 A look at the Italian legal framework : the concept of "testament having value for civilization."

From the very beginning of the first Italian regulations on cultural heritage, there was an interest in protecting the "existing memory ", as can be seen in the law of the Grand Duchy of Tuscany, 1571, which prohibited the removal of inscriptions and "memoriae existenti from buildings[102]. Therefore, the intrinsic and intangible value of cultural goods was recognised since cultural artefacts were meant as careers of the historical memory deemed worthyof protection.

However, within the framework of the Italian legal order, the process, which has led to a deeper legal recognition of the intangible dimension of cultural heritage, has been even slower than that within the international legal order. The same applies to the category of intangible cultural heritage, which Italian lawmakers have struggled to recognise and confer a legal status for a long time.

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100 BLAKE J., *On defining the cultural heritage*, p. 69.

101 Ibid, p. 69- 75.

102 On this point, see BARTOLINI A., *l'immaterialità dei beni culturali*, in Aedon 2014, n. 1, pag. 3 "Del resto al fondo della tradizione giuridica italiana n materia di beni culturali vi è sempre la volontà di salvaguardare la rimembranza, la memoria dei fatti umani e dei loro accadimenti.

Questa volontà emerge già dalla prima normativa in materia che la storiografia ricordi, ovvero la legge del Granducato di Toscana del 30 maggio 1571, recante" legge contro chi rimovesse o violasse Armi, In scrittioni, o memorie existenti apparentemente negli edifitii così pubblici come privati". Questa legge, dunque, mirava – pure- a reprimere coloro che rimuovessero le "memorie existenti". See FOFFANO T., *Tutela e valorizzazione dei beni culturali*, in Aedon 2003, 77. Pag. 720; MAESANO M., *I beni culturali*, in Diritto amministrativo 2017, pg. 1.

The Italian legal order has historically focused on emphasising the material aspect of cultural goods, providing mechanisms for ensuring their physical preservation, overshadowing the social function of cultural heritage, which also corresponds to the public interest in enjoying the values it embodies[103]. This approachalso shows in the evolving terminology of "cultural heritage". Indeed, the first Italian legislation described cultural artefacts in terms of "things" of various interests (archaeological, historical, paleontological or artistic)[104].

The expression "things" has been crystalized with the important Bottai law n. 1089, 1939, that espoused an aestheticizing conception rather than based on art-historical evaluations. A unitary category of cultural heritage did not exist, but only specific categories of cultural goods were worthy of protection in the name of their aesthetic value, by using the term "cose d'arte"[105].

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[103] On the historical prevalence of the tangible aspect of cultural heritage as well as the function of "protection" over valorisation, see BARTOLINI A., *l'immaterialità dei beni culturali*, op. cit., pg. 1; LAZZARO A., *Innovazione tecnologica e patrimonio culturale tra diffusione della cultura e regolamentazione*, in Federalismi.it, 2017;
MORBIDELLI G., *Il valore immateriale dei beni culturali*, in Aedon, 2014,1; LUPO A., *La nozione positiva di patrimonio culturale alla prova del diritto globale*, in Aedon 2019, n. 2; GUALDANI A., *I beni culturali immateriali: una categoria in cerca di autonomia* in Aedon 2019, n. 1.

[104] Legge 12 giugno 1902, n.185, G.U. June 27, 1902, n. 149 art.1. Legge 20 giugno 1909, n.364, G.U. June 28, 1909, n.150, art. 1.

[105]Legge 1 giugno 1939, n.1089, G.U. August 8, 1939, n. 184. See Article 1: "Sono soggette alla legge le cose, immobili e mobile, che presentano interesse artistico, storico, archeologico o etnografico… In particolare: c) i manoscritti, gli autografi, i carteggi, i documenti notevoli, gli incunaboli, nonché i libri, le stampe e le incisioni con carattere di rarità e pregio. Sono pure compresi le ville, i parchi e i giardini che abbiano interesse artistico o storico. Non sono soggette alla legge le opere di autori viventi o la cui esecuzione non risalga ad oltre 50 anni". However, the set of laws of the Bottai reform in the fascist age, had also the merit to describe as subject matter not only "cultural things" but also "beni-attività", for instance theatre and opera. It had also had the merit of better organising the

Subsequently, the Italian Constitution marks a pivot al turning point in the evolution of cultural heritage regulation, including among the fundamental principles of promoting culture and safeguarding the natural landscape and historical and artistic heritage[106]. By reading the article, one can observe the concept of inheritance again through the expression "patrimonio culturale" (cultural heritage) as part of the identity of the Nation[107] . It is clear from the reading of the Constitution that the protection of cultural heritage is aimed at ensuring the ultimate goal of promoting culture, meant as public interest of the society in the

administrative apparatus of cultural heritage management and, above all, of emphasising the necessary public intervention in the field of cultural heritage conservation. On the importance of Bottai reform see CASSESE S., *I beni culturali da Bottai a Spadolini*, ibid, pp. 116-142, in particular at p. 118, he describes the Bottai reform as "un autentico e complessivo programma di politica della cultura".

[106] Article 9, Italian Constitution :

"The Republic promotes the development of culture and of scientific and technical research.

It safeguards natural landscape and the historical and artistic heritage of the Nation."

On the evolving interpretation of article 9 see CAVAGGIONI G., *Diritti culturali e modello costituzionale di integrazione*, Torino, 2018, p. 18; AINIS M., FIORILLO M., *L'ordinamento della cultura, manuale di legislazione dei beni culturali*, Milano, 2008. LUTHER J., *Articolo 9, Stato della Costituzione*, (a cura di) G. Neppi Modona, Milano, Il saggiatore, 1998. ROLLA G,. *Beni culturali e funzione sociale*, ibid, p. 53.

[107] See LENZERINI F., *The Impact of Uniform Laws on the Protection of Cultural Heritage and the Preservation of Cultural Heritage in the 21st Century*, pag. 440: " Therefore , the first purpose of the relevant legislation consists in making fruition of cultural heritage available for the entire community. This characterization is inherent in the same Italian translation of the word "heritage"- i.e., patrimonio – which derives from the latin term patrimonium , indicating the inheritance left by the father (pater) to his descendants, inheritance that they must preserve, valorize and transmit in their turn to future generations. The precept in point is also epitomized in one of the fundamental principles included in the Italian Constitution, as article 9 affirms that "[t]he Republic promotes the development of culture and scientific and technical research. It protects the landscape and the historical and artistic heritage of the Nation".

enjoyment of cultural values. The cultural heritage plays a social function since its embedded cultural values contribute to shaping and developing the human personality. The enjoyment of cultural heritage can be ranked among social rights; hence, it is up to the public powers to ensure the promotion of culture in the light of the principle of social solidarity set out in Article 2 of the Italian Constitution[108]. After all, the term used "culture", from an etymological point of view, evokes the idea of development improvement since it comes from the Latin verb "colere", meaning "to cultivate"[109]. Article 9, thus, reveals an anthropological conception of cultural heritage, which should be protected beyond its artistic value.

However, what the Constitution stated has been left unimplemented for a long time[110], as the Italian legal order was geared towards purely physically preserving cultural goods rather than valorising the intangible dimension of cultural heritage and its public access.

During the years of urban reconstruction and industrial development, the outcomes of the Franceschini Commission (a public inquiry set up in order to protect cultural heritage from possible abuses) introduced a unitary definition of the term cultural heritage through the locutions "beni culturali" and "patrimonio culturale", abandoning the previous fragmentary

[108] Article 2, Italian Constitution: The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

[109] On the etymology of the word "cultura" see CAVAGGIONI G., *Diritti culturali e modello costituzionale di integrazione*, Torino,2018, p. 2 ; The author refers to Cicero, who in *Tusculanae Disputationes*, book II, 13, uses the expression *cultura animi* to describe the role of philosophy in preparing the soul alla "semina" (sowing) , namely the enhancement of human consciousness.

[110] MABELLINI S., *La tutela dei beni culturali nel costituzionalismo multilivello*, pag. 2, pag.18-19.

category of "cose d'arte"[111]. The term "beni culturali" has been incorporated for the first time into the decree-law n 657, 14th of December 1974, converted into Law n 5, the 29th of January 1975, establishing the Ministry of Cultural Heritage[112]. That Commission had discarded a conception based on the mere artistic and aesthetic value of the cultural artefacts in favour of an anthropocentric approach according to which the historical dimension acquires increasing importance, granting legal protection to all cultural artefacts, which represent "ogni testimonianza materiale di civiltà "(material testament having value for civilization)"[113]. The reference to "civiltà" is meant the cultural thinking of a social group in a given space and time, as described in the well-known essay of Giannini, whichwasgaining ground at that time and it is still a benchmark in the field nowadays[114]. As said before, according to the same author, Cultural good as "testimonianza materiale di civiltà" is a liminal notion whose content refers to other disciplines beyond thelegal field. In other words, "testimonianza materiale di civiltà" is concerned with the intangible element of cultural heritage; it refers to the cultural value inherent in the good. Indeed, according to Giannini's notion, cultural heritage is a combination of two components: the material element and the intangible one[115]; in

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111 Commissione Franceschini was established by Law 310 of 26 April 1964 for the Protection and of historical, archaeological, artistic and landscape heritage,

112 See FOFFANO T., *Tutela e valorizzazione dei beni culturali*.

113 See Per la salvezza dei beni culturali in Italia. Atti e documenti della Commissione d'indagine per la tutela e la valorizzazione del patrimonio storico, archeologico, artistico e del paesaggio, I, 1967, pag. 22: "[Patrimonio culturale della Nazione]. Extract from Franceschini Commission Declaration:" Appartengono al patrimonio culturale della Nazione tutti i beni aventi riferimento alla storia della civiltà. Sono assoggettati alla legge i beni di interesse archeologico, storico, artistico, ambientale e paesistico, archivistico e librario, e ogni altro bene che costituisca testimonianza materiale avente valore di civiltà". On this topic, see BARTOLINI, *l'immaterialità dei beni culturali*.

114 GIANNINI M.S., *I beni culturali*, in Rivista trimestrale di diritto pubblico, n. 1, 1976.

115 See GIANNINI M.S., *I beni culturali*, in Rivista trimestrale di diritto pubblico, n. 1, 1976, pag. 24: "Il bene culturale abbia a supporto una cosa , ma non si

view of this notion, it is the intangible aspect that qualifies agood as "cultural" and distinguishes it from other public goods[116]". It would seem that the Franceschini Commission had the merit of highlighting the intangible value of cultural heritage.

Continuing the discussion on the link between memory and heritage, it is worth noting that the reference "testimonianza materiale di civiltà" alludes to the concept of memory[117]. Therefore, the concept of memory is certainly embedded into the intangible value of cultural heritage; according to influential scholarship, the rationale underpinning the legal protection of cultural goods is the preservation of memory in its tangible or intangible forms[118]. The Italian code of Cultural Property and

identifichi nella cosa medesima, bensì, come bene, si aggettivi in quel valore culturale inerente alla cosa: siamo arrivati qui al nucleo effettivo della teorica dei beni culturali; detto in termini concreti il quadro del grande pittore è una cosa, che è supporto insieme di uno o più beni patrimoniali, e di un altro bene che è il bene culturale […]

[116] See GIANNINI M. S., *I beni culturali,* in Rivista trimestrale di diritto pubblico, pag. 26: *"Esaminiamo ora partitamente I caratteri del bene culturale. Esso non è bene materiale, ma immateriale: l'essere testimonianza avente valore di civiltà è entità immateriale, che inerisce ad una o più entità materiali, ma giuridicamente è da queste distinte, nel senso che esse sono supporto fisico ma non bene giuridico. Strutturalmente si distinguono differenti modi con cui il bene culturale inerisce alla cosa, però il carattere immateriale è sempre individuabile".*

[117] On the concept of "testimonianza materiale di civiltà" see CORTESE B., *Patrimonio culturale, diritto e storia*, ibid, pp. 11-12; according to the author this expression had the merit to focus on not onlty the public function of preservation but also on the valorisation function: "il termine 'testimonianza', soprattutto, rende in modo mirabile il duplice aspetto dell'essere soggetti ed oggetti del rapporto con la cultura tout court, oltre che coniugare efficacemente entrambi i principi della 'conservazione' della tradizione e della sua 'valorizzazione' in chiave futura che costituiscono i cardini della tutela del patrimonio culturale." The same author refers to the Italian jurisprudence, Cons . Stato, sez. VI, 17 ottobre 2003, n. 6344, according to which "il bene culturale sia ormai «protetto per ragioni non solo e non tanto estetiche, quanto per ragioni storiche, sottolineandosi l'importanza dell'opera o del bene per la storia dell'uomo e per il progresso della scienza».

[118] See BARTOLINI , *L'immaterialità dei beni culturali*, ibid, pg. 3: "[…] E la memoria da intendersi modernamente come testimonianza di civiltà

Landscape has incorporated the intangible element precisely through the notion of "testimonianza di civiltà"(removing the adjective "material")[119]. Moreover, the Italian code of Cultural Property and Landscape evokes the concept of memory and inheritance among its general principles, more specifically, in article 1, paragraph 2, in which it is possible to see the use of the word " heritage" linked to that one of Nation, as well as the concept of memory[120]. By reading the article, the preservationof memory is conceived as one of the main aims underpinning cultural heritage law.

This approach certainly paved also the way for the category concerning intangible cultural heritage. However, apart from a few attempts by the law-maker to remove any linksto thetangible element (such as the legislative-decree, 31st of March 1998, n 112), the current Cultural Heritage Code, for a long time, did not expressly recognise the category of intangible cultural heritage with an explicit provision. It was followed the Italian traditional approach, that grants prevalence to the tangibility of theheritage. Currently, it is moving in the direction of explicit recognition, especially following the ratification of the Faro Convention, which will be the subject of the next paragraph.

, è, innanzitutto un valore immateriale. Sicché ogni normativa che intende tutelare i beni culturali si pone come scopo quello di conservare la memoria, sia essa tramandata mediante forme rappresentative orali e comunque intangibili, sia essa contenuta in involucri materiali rappresentativi della memoria".

[119] See Decreto legge 22 gennaio 2004, n. 42, G.U. Feb. 24, 2004, n. 45, https://www.bosettiegatti.eu/info/norme/statali/2004_0042.htm

[120] Article 1 "Principi", paragraph 2: La tutela e la valorizzazione del patrimonio culturale concorrono a preservare la memoria della comunità nazionale e del suo territorio e a promuovere lo sviluppo della cultura.
Article 2 "Patrimonio culturale", paragraph 2: Sono beni culturali le cose immobili e mobili che, ai sensi degli articoli 10 e 11, presentano interesse artistico, storico, archeologico, etnoantropologico, archivistico e bibliografico e le altre cose individuate dalla legge o in base alla legge quali testimonianze aventi valore di civiltà.

From the analysis we have carried out, it can be deduced that both the international and national legal systems, although at different times and with different approaches, have both come to accept a broad notion of cultural heritage that embeds the value of memory. Indeed, the intangible value of cultural heritagehas been acquiring a growing dimension, including the value of inheritance. In researching the link between memory and cultural heritage through this terminological study, it seems worthwhile to focus on an international Convention that represents the result both for the international legal system at a regional level, within the Council of Europe, and for the Italian one that has recently ratified it: the Faro convention.

32 The Faro convention and the "cultural inheritance."

The Convention on the value of cultural heritage for Society is a crucial landmark in our examination of the meaning of memory in cultural heritage law[121]. Indeed, it introduces a broad concept of cultural heritage, explicitly conceived as "cultural inheritance", already mentioned in the previous international instruments but under a different lens of interpretation. The Faro Convention marks an important milestone in the development of cultural heritage law in many respects. On the one hand, it introduces an unprecedented definition of cultural heritage, meant as "cultural inheritance for society"[122]; on the other hand, it identifies new actors beyond the State that shape what is cultural heritage through the concept of "heritage communities"[123]. In this

[121] Link https://rm.coe.int/1680083746.

[122] "cultural inheritance for society" refers to a conception of cultural heritage as a resource for society. For a deep commentary on the faro convention see Ond ej Vícha, *The concept of the right to cultural heritage within the Faro Convention*, International and Comparative Law Review, 2014, Vol. 14., No. 2, pp. 25 –40. DOI: 10.1515/iclr-2016-0049

[123] On the meaning of Heritage community see The Faro Convention, Report from the Swedish National Heritage Board, 2014: "[…] "Heritage community" […] refers to "a much broader spectrum of communities" […]the "Heritage Community" represents a means to achieve social and economic sustainability with reference to cultural heritage. The definition of the new concept of "Heritage

paragraph, we will focus on the content of the introduced definition while we will discuss in the next session about the heritage communities and the other actors who contribute to building cultural memory.

According to article 2, letter a: *" […]Cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places throughtime". As far as the common heritage of Europe, in the light of article 3, it consists of: "[…] all forms of cultural heritage in Europe which together constitute a shared source remembrance, understanding, identity, cohesion and creativity […]"*[124]. From the readingof the mentioned article, one can thus notice that the definition of cultural heritage is very broad, including tangible and intangible manifestations, and it does not take into account the private or public ownership of what is recognized as cultural heritage. Both definitions (cultural heritage and the common heritageof Europe) embed the concept of memory since they are deemed as a set of values inherited from the past.

Compared to other international instruments, in this case, the memory the articles refer to is not anchored only in the past but is a memory whose values are continually adapted to the present time, a "living cultural heritage"[125]. This interpretation is very

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Community" has deliberately been kept as wide as possible, both to respond to the new forms of civil society that exists today, and to increase the opportunity for a number of other social players to be involved in the cultural process. The basis for a "Heritage Community" is a group that together with the public cultural environment management, promotes a specific cultural heritage.

[124] Faro Convention, article 3, (b): "the ideals, principles and values, derived from the experience gained through progress and past conflicts, which foster the development of a peaceful and stable society, founded on respect for human rights, democracy and the rule of law."

[125] PINTON S., *La convenzione di Faro: alcuni profili di diritto internazionale*, in the Volume Il valore del patrimonio culturale per la societa' e le comunita'. La

close to what scholars in memory studies said about theevolution of the notion of cultural heritage, deemed as a process: "Cultural heritage has gone from being understood as property, an object, to being assessed as a process[126]. In other words, culturalheritage is deemed *"[…] As an assemblage that includes material and immaterial forms: representations and aspirations, mortar and emotions, values and interpretations, symbols and narrative. One crucial component is memory. Without the notion of memory and everything that it suggests about time and narrative, continuity and change, and individual and collective identifications, heritage would be reduced to "old things"*[127].

The Faro convention, thus, adopts an anthropocentric concept of cultural heritage, emphasizing the relationship between the individual and what is culturally relevant; therefore, the social dimension of cultural heritage, previously described, acquires greater emphasis. Indeed, the definitions must be read inthelight of the main aims according to which the Convention has been drafted, such as the protection of cultural heritage aimed at achieving human development and a good quality of life[128]; as well as its role in the construction of a peaceful society, sustainable development and promotion of cultural diversity".

In the light of the preamble, what is new comparing to other legal instruments is the link between cultural heritage and human rights as well as democracy and the rule of law, as well as the values and principles of democracy are components of cultural heritage; this connection is even more evident within the definition of the European cultural heritage. The aim isto connect

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Convenzione del Consiglio d' Europa tra teoria e prassi, 2019.

[126] VIEJO ROSE D., *Cultural heritage and memory: untangling the ties that bind,* ibid, p. 3.

[127] VIEJO ROSE D., ibid, p. 1.

[128] GUALDANI A., *I beni culturali immateriali: una categoria in cerca di autonomia* , in Aedon 2019, pag. 2-3.

cultural politics within the branch of fundamental human rights[129], recognising a right to cultural heritage understood as part of the right to cultural life, as laid down in the United Nations Universal Declaration of Human rights (1948) and in the International Covenant on Economic, social and cultural life[130].

As far as the Italian legal order, Italian lawmakers have recently ratified the Faro Convention with Law n 133 of the 1st of October 2020[131]. It will be worth of interest to dwell on the legaleffectsof the ratification within the Italian legal order, especially inrelation to the definition of cultural heritage as enshrined in the Italian Code of Cultural Property and Landscape, which is so narrow compared to that one provided by the Faro convention. Although the two concepts do not overlap because of their different scope and aims[132], it may be ambiguous and difficult "from a logical point of view" to identify what is worthy of protection and what "cultural heritage" means[133].

A relevant scholarship[134] would like to replace the term "Patrimonio culturale", as it was translated from Englishto Italian within the Italian ratification law, with the expression of "eredità culturale" (cultural inheritance) since it would embrace a broad concept of culture including both tangible and intangible aspects, as well as cultural activities and fundamental principles. The word "eredità" would also be more appropriate because of its Latin etymological root "heres", the same as that one of the

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[129] Beni culturali immateriali e diritto al bene culturale: prospettive per una ricerca, in federalismi.it, pg. 30-31

[130] Ond ej Vícha, *The concept of the right to cultural heritage within the Faro Convention*, ibid.

[131] On the link https://www.gazzettaufficiale.it/eli/id/2020/10/23/20G00152/sg.

[132] GUALDANI A., *L'Italia ratifica la convenzione di Faro: quale incidenza nel diritto del patrimonio culturale italiano*?, in Aedon 2020.

[133] CARPENTIERI , *La Convenzione di Faro sul valore dell'eredità culturale per la società (da un punto di vista logico),* in Federalismi.it.

[134] CARPENTIERI , *La Convenzione di Faro sul valore dell'eredità culturale per la società (da un punto di vista logico),* ibid.

English word "heritage". That is why the translation of cultural heritage with "patrimonio culturale" within the law of ratification could be a source of misleading interpretation in the future.[135]

It is important to state first that the Italian Constitution, with its article 9, although not well implemented for a long time, hasbeen forward-looking in including among the fundamental rights the protection of cultural heritage, not as an end in itself but aimed at contributing to the development of the human person. Inaddition to the anthropological conception of cultural heritage, although not explicitly laid down, the right to cultural heritage, understood as a component of the right to cultural life, can also be inferred from a series of constitutional provisions, for instance, freedom of religion (art. 19), freedom of expression (article 21),

4. "Who owns the past [136] "? The cultural memory to preserve

The study of the previous paragraphs has shown how law, cultural memory, and cultural heritage are closely interconnected and affect each other. The study also revealed that the cultural heritage law has increasingly recognised the importance of the intangible component of the cultural heritage conceived as the expression of the immanent values of a society. Hence, withinthe evolution of cultural heritage's definition, the topic of cultural memory becomes central through the notion of "cultural inheritance", as expressed in the legal framework previously mentioned, a set of inner values to transmit to future generations, regardless of the tangible or intangible form. This has led to a

[135] Ibid.

[136] The expression has been taken from the book of Kate Fitz Gibbon, *"Who owns the past?: Cultural Policy, cultural Property, and the Law"* , Rudger University Press, 2005.

broadening notion of cultural heritage, including tangible and intangible aspects[137].

The changing nature of the concept of culture[138], the difficultyof introducing an unambiguous definition of cultural heritage and the current broad scope of the category prompts the question of which cultural memory to protect and who are the actorsinvolved in this choice. How does this process of recognising cultural heritage worthy of protection take place? What collective memory becomes the subject matter of legal protection? Above all, according to what criteria does this process take place? Neutral criteria that draw on scientific parameters, given the liminal nature of cultural heritage? On the other hand, in attaching importance to the intangible component, meant as a set of values in which a society recognises itself, can the political dimension underpinning the cultural heritage not be ignored? So, is it

[137] Consider the risk highlighted by some scholars on of an overly broad notion of cultural heritage, realising the so-called "Panculturalismo" (according to which everything can be considered culture) with the consequence of weakening the legal system of protection. On this point, See FECHNER, *the fundamental aims of cultural property*, cit., and pg. 378: "Yet, an overly inclusive definition of cultural property means not only a weakening of the notion itself but also a weakening of the legal rules for its protection. Thus, a broad notion of cultural property can be even more harmful than a too-narrow one; if a tight definition might exclude some objects worthy of protection, a too broad one might well fail to be effective at all. Only a clear and a narrow definition can prevent misuse of cultural property law and the loss of cultural property itself". Blake J., *On defining the cultural heritage*, pg. 64 " There is, however , a difficulty with any attempt to identify exactly the range of meanings encompassed by the term cultural heritage as used now in international law and related areas since it has grown beyond the much narrower definitions included on a text-by-text basis." [138] MEZEY N., *The paradoxes of cultural property*, Georgetown University Law
center,pag. 2005, 2007 "First, cultural property is contradictory in the very pairing of its core concept. Property is fixed, possessed, controlled by its owner , and alienable. Culture is none of these things. Thus, cultural property claims tend to fix culture, which if anything is unfixed , dynamic , and unstable. They also tend to sanitize culture, which if it is anything is human and messy, and therefore as ugly as it is beautiful, as destructive as it is creative, as offensive as it is inspiring".

possible to say that cultural heritage is "an act of deliberate selection[139]" made by States at national level, as well as by international organizations on the global level?

Indeed, the political dimension within the identification process of cultural heritage can be detected through different lenses: it is up to political institutions, namely by State authorities, to decide what cultural goods and cultural values are worthy of protection, including whether they are worthy of being transmitted to future generations[140]. Moreover, the international and national legal instruments on cultural heritage reflect the specific political context in which they were adopted[141]. Indeed, accordingto what has been said in the previous paragraphs, it is the law-maker, on international and national level, to introduce the concept of "cultural heritage", identifying its content for each Convention, depending on the legal purpose to achieve. It is still the lawmaker, on an international and national level, who has been increasingly emphasizing the intangible component of cultural heritage, as well as the notion of cultural inheritance.

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139 BLAKE J., *on defining the cultural heritage*, pg. 74

140 BLAKE J., *on defining the cultural heritage*: "One must recognise that the identification of cultural heritage is based on an active choice as to which elements of this broader "culture" are deemed worthy of preservation as an "inheritance" for the future. Through this, the significance of cultural heritage as symbolic of the culture and those aspects of it which a society (or group) views as valuable is recognised. It is this role of cultural heritage which lends it its powerful political dimension since the decision as to what is deemed worthy of protection and preservation is generally made by State authorities on national level and by intergovernmental organisations--comprising member States--on international

141 BLAKE J., ibid., she mentions the 1970 convention that reflects the post-colonial geopolitical framework about the control over artworks between developing countries and developed countries , as well as the 1972 convention that embodies the ideology concerning the global concept of a cultural heritage for mankind.

The 1972 World Heritage Convention is an important example of global regulatory regimes on which to focus on mechanisms of identification of cultural heritage deemed to have an"outstanding universal value", which concur in shaping "the cultural heritage for mankind". This mechanism shows that different actors are involved in the decision-making process and how easily conflicts of interest can be raised between the national, local and international spheres. The Convention is also a good case to wonder if the identification of the "outstanding universal value" is grounded on a neutral evaluation or if it is eminently a political act, reflecting specific geopolitical balances of the global order in which the meaning of culture seems to be in the hands of the States with a major political weight, as it will see in the next paragraph.

4.1 Shaping the Collective Memory through the UNESCO World Heritage Convention

As previously emphasized, The Convention Concerning the Protection of the World Cultural and Natural Heritage is a good example of how International Law, with its legal instruments, can affect collective memory[142]. If considering the definition of cultural heritage deemed of protection in Article 1, among the values taken into consideration, there is still a reference to the historical value of heritage sites[143]. Still, according to article 13, the World Heritage Committee should give priority to the

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[142] HIRSCH M., *Collective Memory and International Law*, ibid, p. 8.

[143] Article 1 states that: "For the purposes of this Convention, the following shall be considered as "cultural heritage":

monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;

groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view".

requests for international assistance related to the cultural heritage most representative of the "history of the people of the world"[144]. Among the criteria to meet for selection of World Heritage sites, you can consider criteria number (iv): "to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history"[145]. Moreover, with the growing importance of the intangible dimension of heritage, there is an increasing number of nominated heritage sites associated with memories of recent conflicts[146]. Even the list instrument itself could be a way to crystallise intangible memory through the protection of tangible forms of heritage (heritage sites as tangible manifestations of memory) to transmit to future generations.

From a historical point of view, The World heritage Convention has been drafted with the aim of aligning cultural heritage with the environment, both of which are seen as non-renewable resources that need to be protected[147]. This global regulatory regime has also been established with the purpose of complementing the national legal system in cases where it is lacking in its protection function. The Convention embeds the

[144] Article 13, paragraph 4, states that: "The Committee shall determine an order of priorities for its operations. It shall in so doing bear in mind the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world, the urgency of the work to be done, the resources available to the States on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means".

[145] See The Operational Guidelines for the implementation of the World Heritage Convention, https://whc.unesco.org/en/guidelines/.

[146] On sites associated with conflicting memories see the Report of the expert meeting held in Paris in December 2019, independent study conducted by Dr. Cameron and Dr. Beazley (May, 2020) *ICOMOS SECOND DISCUSSION PAPER, SITES ASSOCIATED WITH MEMORIES OF RECENT CONFLICTS AND THE WORLD HERITAGE CONVENTION*, February 2020

[147] BLAKE J., *On defining the cultural heritage*, ibid, p. 69.

concept of "cultural heritage of humankind", which implies the existence of a universal interest in preserving it. This is the expression of the so-called approach "cultural internationalism" illustrated by the well-known article of Jhon Merrymann, " Two ways of thinking cultural property[148], according to whichthereis a common interest in preserving cultural property, irrespective of ownership's matter or national interests since it belongs to the humanity[149]. This view is opposed to "cultural nationalism", which ascribes more importance to the national interests surrounding cultural property, focusing on the relevance of national control over the export and import of cultural artworks.

Actually, according to some scholarly literature[150], the World Heritage Convention is a bridge between the two ideologies, cultural nationalism and international one, owing to its operating mechanism. Indeed, it is up to the Convention Member-Statesfirst to select the cultural heritage deemed to be included inthe World heritage list. Even after the inscription, the Convention stresses the responsibility of each State to monitor the status of protection of the inscribed heritage sites. States prepare a tentative list in which they identify the heritage sites that are particularly important for which to submit a nomination request. To be nominated, a heritage site should be of "outstanding universal value" and meet at least one of the ten criteria provided by the Operational Guidelines for the implementation of the World Heritage Convention[151]. The cultural property must also meet the

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[148] MERRYMAN J. H., *About two ways of thinking cultural property*, 80 AM. J. INT'L L. 831 (1986).

[149] He refers to the 1954 Hague Convention, which embodies this narrative through the concept of cultural heritage of the mankind, emerging from the preamble, it is the common interest for cultural property which justifies a global set of rules aimed at protecting it

[150] ANGLIN R., *The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide*, 20 YALE J.L. & HUMAN. (2008). Available at: https://digitalcommons.law.yale.edu/yjlh/vol20/iss2/.

[151] The operational Guidelines for the implementation of the World Heritage Convention Criteria: **(i)** to represent a masterpiece of human creative

criteria of authenticity and integrity under a comparative study with other sites with similar characteristics. The evaluation process seems based on neutral criteria and scientific methods. Different advisory bodies, which assist the World Heritage Committee, play a role in proving the *site's outstanding universal valu*e. Once the evaluation ends, the final decision is up to the World Heritage Committee, which is composed of 21 national delegations serving four-year terms. The inscription of aheritage site on the World heritage List brings international prestigeto the host national-State: first, the duty of the international community to provide assistance for the heritage site the financial support for the preservation or restructuration, as well as the financialhelpto train personnel in charge of assistance. So, within the

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genius;**(ii)** to exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;**(iii)** to bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;**(iv)** to be an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; **(v)** to be an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change;**(vi)** to be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance. (The Committee considers that this criterion should preferably be used in conjunction with other criteria);**(vii)** to contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance;**(viii)** to be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features;**(ix)** to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals;**(x)** to contain the most important and significant natural habitats for in-situ conservation of biological diversity, including those containing threatened species of outstanding universal value from the point of view of science or conservation.

identification process, it is possible to notice different stakeholders: State-parties that have a primary role in the selection of the sites most representative for the countries. UNESCO, which, with the 1972 World Heritage Convention, has developed a set of global rules to identify the cultural heritage deemed of protection; in addition, the operational Guidelinesfor the implementation of the World Heritage Convention promote the widest possible participation of the actors involved: local communities, indigenous peoples, governmental, non- governmental and private organizations"[152]. Finally, experts play an important role in evaluating the "outstanding universal value", conferring a neutral character to the identification process[153].

However, there are several limits underpinning theword heritage convention[154]. First, is the identification process of heritage deemed to be inscribed within the World Heritage list really neutral and impartial? What does "outstanding universal value" mean? According to the Operational Guidelines for the implementation of the World Heritage Convention, it means "cultural and natural significance which is as exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity"[155]. Therefore, the cultural values of the cultural property deemed to beinscribed must be "outstanding universal" from an artistic, historical or

[152] See paragraph 123 of the Operational Guidelines for the implementation of the World Heritage Convention

[153] On the role of experts, see LIXINSKI L., *Stakeholders in International heritage Law*, Chapter 3, in *International Heritage Law for Communities*, 2019, Oxford University Press.

[154] BERTACCHINI E., LIUZZA C., MESKELL L., *Shifting the balance of power in the UNESCO World Heritage Committee: an empirical assessment*, International Journal fo cultural policy2015

[155] See paragraph 49-53 Operational Guidelines for the Implementation of the World Heritage Convention, 31 July 2021. See also the Preamble of the 1972 UNESCO World Heritage Convention stating that "parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole".

scientific point of view[156]. However, the concept of "universality" is the most controversial aspect. Universal for whom?Inassessing cultural values, is it possible to reach a universal consensus? The concept of outstanding universal value has been challenging , especially for the irreconcilability of measuring cultural values that are eminently subjective with the concept of universality. Western culture sometimes makes the mistake of universalising categories that are actually unknown to communities outside Western influence[157]. Still, the prevailing Eurocentric conception of heritage is also evident in the choice to anchor protection only to the tangible cultural heritage[158]. Moreover, the concept of the list is contested since there is the risk of granting protection only to the heritage inscribed and not to the heritage of the world, as emphasized in the preamble, ignoring important non-listed

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[156] See article 1 of the World Heritage Convention.

[157] On the contested concept of universality, see SACCO R., *Antropologia giuridica*, Il Mulino, Bologna, p. 6 2007. See also SMITH L. *USES OF HERITAGE*, Routledge, London and New York, 2007, pp. 95-102, in particular, p. 97 " However, the vagueness of both these criteria and the general vagueness of the Convention, especially with regard to defining 'universal value' and 'heritage', work to create a sense that the reader assumes that they know what is meant This both invites the reader into fellowship with the document, while the simple statements of what is of value and principle creates once again a text of consensus and authority. See also CLEERE H., *The uneasy bedfellows: universality and cultural heritage, in Destruction and Conservation of Cultural Property*, Routlege, 1st edition, 2001.

[158] BERTACCHINI E., LIUZZA C., MESKELL L., *Shifting the balance of power in the UNESCO World Heritage Committee: an empirical assessment*, ibid; FREY B. S., STEINER L., *World heritage list: does it make sense?* , centre for research in economics, management and the arts, Switzerland , 2010. MUSITELLI J., 2002, *World Heritage, between universalism and globalization*. International Journal of cultural property LUPO A., *La nozione positiva di patrimonio culturale alla prova del diritto globale*, Aedon : *"Pur dichiarandosi universale e basato su valori scientifici-umanistici condivisi, il progetto di costruzione di un "patrimonio mondiale dell'umanità" segue, però, un'impostazione eurocentrica e monumentalista che enfatizza unicamente i beni materiali (culturali e naturali) aventi "valore universale eccezionale"*. BERTACCHINI E., LIUZZA C., MESKELL L., *Shifting the balance of power in the UNESCO World Heritage Committee: an empirical assessment*, ibid.

properties[159]. Although the updated version of operational guidelines gives a more scientific approach to the evaluation through the concept of integrity and authenticity, it cannot be taken into account the political dimension behind the World Heritage Convention since States are the first act ors who havethe power to trigger the enrolment mechanism.

It is clear that the World heritage Convention creates a certain narrative of cultural heritage by choosing which cultural goods are worthy of being listed; it shapes a certain world cultural memory. The political content of the selection of world heritage sites is evident when a member state exploits the World Heritage List to boost its sovereignty; the list becomes an instrument to enhance its own nationalism. Indeed, behind the rhetoricof global interests, it is possible to notice national interests underpinning the world heritage list. This is the case of the temple of Preah Vihear, located in a contested territory whose ownershiphasbeen disputed for a long time between Cambodia and Thailand, despite a judgment of the International Court of Justice finding that the temple belongs to the Cambodian State[160]. The inscription of the temple into the World Heritage list ended up inflaming the tensions and the nationalistic flames between Cambodia and Thailand, which resulted in a hard-fought conflict, even damaging the temple. The case once again has invested the International Court of Justice for the interpretation of the 1962 Judgement, confirming what had been stated about the sovereignty of Cambodia over the territory of the temple.

The recognition of a heritage site as a World heritage Site becomes a tool for the Member State to affirm its power within the international arena, as it happened with the increasing number of Chinese heritage sites. The political content of theWorld Heritage

[159] See LUPO A., ibid; FREY B., STEINER L., ibid, pg. 9.

[160] International Court of Justice, Judgment of June 15, 1962, https://web.archive.org/web/20080918225331/http://www.icj-cij.org/docket/index.php?sum=284&code=ct&p1=3&p2=3&case=45&k=46&p3=5#.

inscription also appears in relation to the Chendge site, including the Manchu dynasty palace and the temple complex, which contains a miniature replica of the Potala Lhasa. The Chinese nomination of this site, listed by UNESCO as a World Heritage site in 1995, was aimed to symbolise a view of a multicultural China that incorporates minority groups like the Tibetan one[161]. It was a way to reinforce its sovereignty over Tibet and to place it within the Chinese borders. These are only a few examples that show how the World Heritage List can be a tool to strengthen national interests and build a selective narrative surrounding cultural heritage.

The Western view also appears in the UNESCO World Heritage Policy, which is oriented to a preservationist approach[162]. The UN organization has triggered a process of cultural globalizationnot only through the establishment of the World Heritage list but also through the adoption of best practices, which provided the adoption of common standards for cultural institutions. The international legal framework created by UNESCO is in linewith the European tradition focused on pure preservation. Indeed, once the heritage site is inscribed in the list, the Member State loses part of its sovereignty in compliance with the limits set by the UNESCO World Heritage Convention and accepts its protection rules, sometimes at the expense of urban development.

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[161] HEVIA J. L. *World Heritage, National Culture, and the Restoration of Chengde*, in positions East Asia cultures critique, 9,1, 2001,according to *which " […]the application made it clear that Chengde was about more than beauty and harmony; it also had a significant political content. In addition to having been a summer palace for imperial rest and recreation away from Beijing, the site was "a second political center of the Qing dynasty," built to "appease and unite the minority peoples living in China's border regions and to consolidate national unity." As such, it provided "historic evidence of the final formation of a unitary, multicultural China."*

[162] M. Askew, the author mentions Smith according to which: " Smith sets up a straw man by portraying this AHD as being based on a Western elitist idea of universal cultural values, one which marginalises alternative and 'subaltern' heritage, embedded in ideas that privilege monumentality and preservation for various purposes, including the construction of national identities…

This enables claims between preservationists and developers, especially for emerging countries who embrace a policy geared towards urban development, even for historic religious buildings,[163]that are often characterized by continued reconstructions with a symbolic meaning of rebirth in the East. This happened with the historical and religious site Bagan in Myanmar, which consists of over 3000 Buddha brick pagodas. It has struggled to be inscribed on the World Heritage List due to its renovation practices being considered by international conservation standards to be destructive practices[164].

Moreover, there is an issue related to the representativeness of member-States. Overall, the majority of world heritage sites are located in the developed areas of the world. Heritage site locations reflect the geopolitical balances of the current world order. Indeed, in the last year's developing countries, theso-called BRICS, such as China, South Africa, Russia, and India, have exerted a growing political weight within the UNESCO World Heritage decision-making, expanding the number of their world heritage sites[165]. According to research carried out by ICOMOS, it is possible to detect a balance by looking at the number of nominated properties in relation to the time qualification[166] . It can be noticed that state parties that ratified the Convention first have more properties on the list than states that ratified later. The

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[163]ASKEW M., *UNESCO, World heritage and the Agendas of States*, […] It affirmed that variant conservation practices were acceptable and indeed essential- they needed to reflect, for example, the values placed on symbolism in East Asia, which demanded continued reconstruction of religious monuments as opposed to purist preservation that was the norm in Europe.

[164] KRAAK A.L., k (2018) *Heritage destruction and cultural rights: insights from Bagan in Myanmar*, International Journal of Heritage Studies, 24:9, 998-1013, DOI: 10.1080/13527258.2018.1430605.

[165] BERTACCHINI E., LIUZZA C., MESKELL L., *Shifting the balance of power in the UNESCO World Heritage Committee: an empirical assessment* , ibid, pg. 16.

[166] ICOMOS, The world heritage list : Filling the Gaps- an Action Plan for the Future, February 2004, pg. 89-97, URL: file:///C:/Users/utente/Downloads/activity-590-1%20(2).pdf.

active participation of a State in the implementation of the world heritage convention, thus, favours a greater number of heritage sites registered in the list. However, among the States thatratified the convention first, Europe and Latin America seemto have more properties inscribed than the African States[167]. Another balance concerns the tentative lists, which represent the first step for heritage sites to be nominated. According to this research, thereis a lack of tentative lists in some regions of the world. This implies an under- representativity of some States within the world heritage framework. Moreover, there is a correlationbetweenthe membership within the World Heritage Committee and the number of nominated heritage sites that obtain the inscriptionto the World Heritage List. Thus, the political weight of a State within the world heritage committee increases the likelihood of inscribing its heritage.

This is why the international legal system has shifted its attention towards greater recognition of cultural diversity on theone hand, as well as the intangible heritage on the other. In 1992, UNESCO introduced a list of the World's Documentary Heritageto facilitate worldwide common preservation. In 1994, the World Heritage Committee launched the global strategy plan with the aim of broadening the world heritage list in such a way as to make it more representative and more balanced and to reflect therangeof cultural diversity better.

In the same wake, one can mention the Nara Document on Authenticity, issued at the Nara Conference in 1994 under the auspices of UNESCO and ICOMOS, which affirmed the importance of respecting cultural diversity in conservation practices[168]. This trend has led to the introduction of a UNESCO

[167] ibid

[168] It is noteworthy to mention article 4 of the preamble: " In a world that is increasingly subject to the forces of globalization and homogenization , and in a world in which the search for cultural identity is sometimes pursued through aggressive nationalism and the suppression of the cultures of minorities, the

list of intangible cultural heritage, as well as the adoption of the UNESCO Convention for the Safeguarding of intangible cultural heritage in 2003. Finally, the UNESCO Convention on the Protection and Promotion of the Diversity of cultural expressions was in 2005. With the Faro convention, the introduction of the "heritage communities" embraces the same vision, affirming the importance of involving local communities in the selection of cultural heritage with the purpose of democratising heritage governance. However, there has been no shortage of criticism, especially with regard to the idea of a list of intangible heritage; the universal value of world heritage can often be in contrast with the local value of the intangible heritage of a specific community. Moreover, the idea of a list clashes with the changing nature of the intangible heritage, defined as "living culture"[169]. At the same, an overextension of the intangible cultural heritage can affect the efficacy and functioning of the legal protection[170].

In any case, part of international legal scholarship[171] is moving beyond the classic dichotomy of cultural internationalism and cultural nationalism, which is also a Western construct. Indeed, this dichotomy risks excluding important key actors inthe process of heritage identification. Moving beyond this distinction, "athird way of thinking about cultural property" is finally acknowledged, taking into account the interests of specific cultural communities. Even the cultural property policy based on the core values of preservation, truth, and access, examined above, has been

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essential contribution made by the consideration of authenticity in conservation practice is to clarify and illuminate the collective memory of humanity".

[169] For a critical reading of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, see ZAGATO L., *La convenzione sulla protezione del patrimonio intangibile*, in the Volume Le identità culturali nei recenti strumenti UNESCO, Cedam, 2008.

[170] LOGAN W., *Closing Pandora's box: human rights conundrums in cultural heritage protection.*

[171] LIKINSKI L., *A third way of thinking about Cultural property*, Brooklyn Journal of International law 2019, Vo. 44; BAUER A. A., *New ways of thinking about Cultural Property: a Critical Appraisal of the Antiquities Trade Debates* .

challenging since they are not universal values but are based on Western thinking about cultural artefacts[172].

To sum up, the analysis carried out did not want to discredit the mechanism of the World Heritage List that, in any case, offers a double level of legal protection, but simply wanted to highlight its political dimension, which is unavoidable when dealing with cultural values. The process of identifying cultural heritage, while relying on scientific methods, is a political act, also considering the intangible component of cultural heritage, namely thecultural values on which a society recognises itself[173]. The selection of cultural heritage worthy of protection is a choice of certain cultural values that necessarily implies forgetting other cultural values. This is an important starting point to reflect on the intentional destruction of cultural heritage, wondering if iconoclasm is also a political act involving a decision of which values to erase. Are preservation and destruction "thesidesof the same coin"? Before asking this question, it seems important to investigate the meaning of preservation.

5. The meaning of preservation

In the previous paragraphs, it has been shown how Law, collective memory and cultural heritage are extremely interconnected with each other, as well as that the process of identification of cultural heritage implies a political choice and a certain idea of culture. At the same time, this politics of selection on cultural heritage shapes and contributes to building a certain pattern of collective memory. Does this conjunction between cultural heritage, cultural memory and the Law shape the meaning of preservation? What does it mean to preserve the cultural heritage?

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[172] THOMPSON E., *Rethinking Merryman's 'The public interest in cultural property'*, Art Antiquity and Law 2017, Vol. 22, issue 4.
[173] ZAGATO L., *La Convenzione sul patrimonio intangibile*, ibid, p. 29.

Looking at the two models previously mentioned, namely cultural internationalism and cultural nationalism, it is possibleto capture different nuances of the meaning of preservation. According to cultural nationalism, the protection or preservation of cultural heritage responds to the need to keep a nation's cultural identity intact, placing repatriation issues at thecentre[174]
. This implies that cultural goods must either remain in the state of belonging in accordance with the principle of retention or be returned to the country of origin. This approach underpins the idea of building "a national patrimony", especially for developing countries and former colonies[175]. That is why, according to this view, preservation also means the conservation of artefacts by ensuring information and transparency around their origin and their history. This approach anchors the protection of cultural heritage to the principle of territorial sovereignty, a classical principle of International Law, which is itself linked to the principle of non-interference and non-intervention[176]. Hence,

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[174] EAGEN S., *Preserving Cultural Property: our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, Pace International Law Review, 2001, Vo. 13, Issue 2. MASTALIR R. W., *A proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law,* 16 FORDHAM INT'L L. J. , pp. 1045- 1993. See pag. 1046: *"Protection" may mean that the objects are so much a part of the cultural identity of a people or nation that they must remain in or be returned to that country even if the physical safety of the objects cannot be assured. 5 This form of protection stresses the cultural aspect of the object over its physical integrity. In a sense, it is the culture that is being preserved at the expense of the property by this form of protection. I*

[175] Consider the 1970 UNESCO Convention on the Means of Prohibiting and Preventing Illicit Import, Export, and Transfer of Ownership of Cultural Property that puts an emphasis on the role of states especially within the process of selecting cultural heritage worthy of protection. On repatriation issues, see WILLIAMS T. L., *Cultural Perpetuation: repatriation of first nations cultural heritage*, U.B.C., Law review, 1995.
FISHMAN J. O., *Locating the International interest in Intranational Cultural Property Disputes*, The Yale Journal of International Law , Vol. 34, 2010[176] .
VERNON M. C., *Common Cultural Property : The Search for Rights of Protective Intervention*, Case Western Reserve Journal of International Law, vo. 26, issue 2, 1994, See in particular pg. 445.

international law is interested in protecting cultural heritageasan extension of the principle of territorial sovereignty, with the purpose of internationally recognising the domestic jurisdiction over cultural property located in state territory[177]. This perspective, thus, affects the sphere of competence in preserving the cultural heritage, identifying it in that of the State if the field of national property is undoubtedly within the sphere of competence of the State since it holds the sovereignty over the property located in its territory, the same reasoning canbeapplied to cultural property.

There is no short of criticism from some legal scholars in relation to this approach since it does not take into account the interestsof minority groups towards certain cultural artefacts that do not always coincide with the concept of "national patrimony"[178]. These critical issues led to the development of cultural internationalism, which introduces different shadows withinthe meaning of preservation. This second model, differently, putsthe cultural artefacts at the centre, regardless of their location and provenance from their country of origin, in the name of a universal interest in the protection of cultural heritage. According to this theory, preserving cultural heritage means guaranteeing the physical safety of cultural objects from deterioration and destruction[179]. This perspective broadens the scope of action in

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[177] Ibid.

[178] VERNON M. C., *Common Cultural Property : The Search for Rights of Protective Intervention*,, ibid. FISHMAN J. O., locating the International interest in Intranational Cultural Property Disputes, The Yale Journal of International Law, ibid, quoting Alexander A. Bauer, New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates, 31 FoRDHAM INT'L L.J. 690, 703 (2008): *"This state centric power structure has prompted the observation that "local communities may be among the least empowered players in the 'cultural property world' currently in place."* See also Lyndel V. Prott, *The International Movement of Cultural Objects*, 12 INT'L J. CULTURAL PROP. 225, 228 (2005)).

[179] EAGEN S., *Preserving Cultural Property: our Public Duty: A Look at How and Why We Must Create International Laws that Support International Action*, ibid, pg. 417; MASTALIR R. W., *A proposal for Protecting the "Cultural" and*

the preservation of cultural heritage: States would be responsible for preserving their cultural heritage also in relation to the international community. As will be discussed in the next chapter, this orientation lays the groundwork for those who argue for the customary nature of an international norm prohibiting the destruction of cultural heritage[180]. As seen in the previous paragraph, the idea of universal heritage underlying this orientation has also come under criticism, as it collides with cultural relativism.

However, both theories are antithetical to each other only in appearance. Actually, both approaches, in addition to recognising a twofold dimension of cultural heritage, national and international[181]. Above all, it is possible to notice that thedifferent meanings of preservation detected pass both through the principle of state sovereignty, as even international conventions that embrace a definition of the cultural heritage of humankind grant protection to cultural goods so selected by the states to which they belong[182]. For instance, in the case of the World Heritage Convention, source nations are more powerfulthannon- source nations to identify what are the cultural artefacts to be included in the world heritage list.

To sum up, both theories converge in this twofold dimension of the cultural heritage, national and international, and on the central role of States in choosing what to preserve. The primacy of the State and the application of the principle of territorial sovereignty to cultural heritage is also due to the traditional

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"Property" Aspects of Cultural Property Under International Law, 16 FORDHAM INT'L L. J. , pp. 1045- 1993.

[180] FISHMAN J. O., *Locating the International interest in Intranational Cultural Property Disputes*, ibid.

[181] See The 1970 UNESCO convention according to which the duty of host states to protect their cultural heritage, also reflects an interest in its preservation that belongs to everyone.

[182] EAGEN S., *Preserving Cultural Property: our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, ibid, pg. 444.

function of international law, namely to regulate the relations between States and to reinforce the concept of independence of States through the regulation of borders[183]. As a matter, it isalso up to States, in the first line, to ensure the preservation of cultural property and bear the related costs[184].

Moreover, the most important convergence of the two theories concerns the centrality of preservation: both put at the centre of the concept of preservation as conservation[185]. Inother words, the

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[183] VERNON M. C., *Common Cultural Property: The Search for Rights of Protective Intervention*,, ibid. see pg. 445 : The growth of classical international law reflecting the emphasis upon the nation and national territorial sovereignty is believed to have derived from political circumstances directly related to the nineteenth century function of international law of bringing a minimum order to relations between states by imposing certain restraints upon their sovereignty

[184] FISHMAN J. O., *Locating the International interest in Intranational Cultural Property Disputes*, The Yale Journal of International Law, ibid; WANGKEO K.: *Monumental challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, The Yale Journal of International Law, Vol. 28. See pg 186: *"Cultural heritage is conceived of as part of the "common heritage of mankind" so that these objects are a common resource, like air or water, and states hosting these resources become custodians of the property for the benefit of all. The problem with this conception, however, is that cultural heritage is not common property in the traditional sense. The resource is not necessarily open to public access and use, and the costs of use are borne by only one party. The host state necessarily bears the responsibility for protecting cultural treasures because of their location, and this puts preservation in direct conflict with fundamental principles of international law -state sovereignty and the right of non-intervention".*

[185] MASTALIR, ibid: *"There is a zone of strong agreement among the interests described above. That agreement is on the fundamental importance of preservation of cultural property. The preservation of cultural property requires measures against the destruction, mutilation, or division of sets and collections, and measures to prevent the deterioration as the result of neglect or environmental damage. This area of agreement reflects the property aspect of cultural property. Preservation is the first principle of protection of cultural property because if cultural property is destroyed the source nations or peoples, as well as the world heritage at large, are divested of valuable objects. Destruction makes any question of allocation moot. Deterioration, vandalism, and accidental damage also diminish the nation's and the world's cultural resources."* See also E. PEROT BISSELL V., *Monuments to the Confederacy and*

core value behind the completely international legal body on cultural heritage concerns the importance of preservation. Indeed, Once a good is recognised as "cultural property", it is automatically worthy of preservation. To preserve means to conserve cultural artworks in their original form and the cultural values embedded into them, conceived as "products of the past to transmit to future generations". As some scholars have pointed out, the concept of preservation is inherent in the very concept of heritage: "the idea of cultural heritage as cultural inheritance to transmit to future generations requires preservation"[186].

From a historical point of view, the "paradigm of conservation"[187] finds its roots in the very origin of heritage in late nineteenth-century Europe. The idea of heritage developed with the emergence of nationalism and liberal modernity, which characterized nineteenth-century romanticism, where the conservation of cultural artworks was conceived as the physical representation of cultural identity to legitimize[188]. The conservation of monuments is also a means through which the elites promote their cultural values. The paradigm conservation met the aesthetics' "qualifiers of that time, namely artistic, picturesque, historical, antique, or substantial"[189]. This romantic conception of conservation can also be read as a response to the industrial and urban progress of the time[190]. The result was a conception of preservation based mainly on tangible cultural

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the Right to Destroy in Cultural-Property Law, The Yale Law Journal 2019, pp. 1130- 1172.

[186] O' KEEFE P. J. & L. V. PROTT, *Law and the cultural heritage* 1984, Vol I, pg. 7: Implicit in the world "heritage" is also the idea of something cherished and to be preserved".

[187] The term "Paradigm of conservation" has been used in LIXINSKI L., *International Heritage Law for Communities*, 2019. The same author uses the term "preservationist impulse" to describe the centrality of preservation within cultural heritage law".

[188] SMITH L. *USES OF HERITAGE*, Routledge, London and New York, 2007.

[189] Ibid.

[190] ibid

heritage since a monumental heritage better promoted the Western concept of a universal idea of cultural heritage[191].

This Euro-American perspective has been influential in the cultural heritage legal framework, which is entirely pervaded by this conservation ethic[192]. Heritage once is selected as worthyof protection, must be preserved as if it were acquiring a sort of sacred aura: it is assumed as being "irreplaceable, authentic and monumental[193]". These precepts can be noticed within the Venice Charter[194]adopted by ICOMOS in 1965, which specifies which monuments and heritage sites should be conserved in their original form; even restoration cannot alter the layout or decoration of the monument[195]. The Charter has endorsed a scientific approach, putting heritage experts at the centre of the evaluation of what heritage sites to protect, for whom, and how to preserve them. This approach has affected the following UNESCO

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[191] SMITH L., *Uses of heritage*, ibid.

[192] SMITH L., *Uses of Heritage*, ibid, pp. 17- 42, in relation to the origin of the "Heritage discourse" the author refers to the European conservation monument and the American preservation movement developed in the nineteenth century.

[193] KRAAK A.L. *Heritage destruction and cultural rights: insights from Bagan in Myanmar*, International Journal of Heritage Studies, 24:9, 998 -1013, DOI: 10.1080/13527258.2018.1430605.

[194] International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter), approved May 31, 1964, available at https://www.icomos.org/charters/venice_e.pdf. See also the Athens Charter for the Restoration of Historic Monuments (1931), For a comment on the Venice Charter see LIXINSKI L., *Confederate Monuments and International Law , ibid,* p. 13; SMITH L., *Uses of Heritage*, *ibid.*, p. 21.

[195] Concerning the Venice Charter see article 2: "The conservation and restoration of monuments must have recourse to all the sciences and techniques which can contribute to the study and safeguarding of the architectural heritage. Article 4: It is essential to the conservation of monuments that they be maintained on a permanent basis. Article 5: The conservation of monuments is always facilitated by making use of them for some socially useful purpose. Such use is therefore desirable but it must not change the lay-out or decoration of the building. It is within these limits only that modifications demanded by a change of function should be envisaged and may be permitted.

treaties, as the World Heritage Convention previouslyexamined, where heritage experts play an important role within the identification process[196]. According to some scholars, the emphasis on scientific methods has taken Western narratives surrounding cultural heritage assumptions for granted, undermining subaltern narratives of heritage, resulting in theso-called "Authorized heritage discourse"[197]. However, as seen in the previous section concerning the World Heritage Convention, the scientific evaluation is only apparently neutral since it cannot consider the political dimension behind the cultural heritage.

The answer to the initial question of whether the previously examined link between memory and cultural heritage influences the meaning of preservation would seem to be positive. Indeed, for a long time, a static rather than a dynamic conception of preservation has prevailed, aimed at protecting cultural property

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[196] LIXINSKI L., *Confederate Monuments and International Law*, 32 Wisconsin International Law Journal (2018), p. 13.

[197] This concept (authorized heritage discourse) has been introduced by SMITH L., *Uses of Heritage*, ibid, pp. 4-12, to describe the identification process of heritage as a social construct*: "[…] there is a dominant Western discourse about heritage, which I term the "authorized heritage discourse", that works to naturalize a range of assumptions about the nature and meaning of heritage. […], the 'heritage' discourse therefore naturalizes the practice of rounding up the usual suspects to conserve and 'pass on' to future generations, and in so doing promotes a certain set of Western elite cultural values as being universally applicable. Consequently, this discourse validates a set of practices and performances, which populates both popular and expert construction of 'heritage' and undermines alternative and subaltern ideas about 'heritage'. […] This discourse takes its cue from grand narratives of nation ad class on the one hand, and technical expertise and aesthetic judgement on the other. The 'authorized heritage discourse' privileges monumentality and grand scale, innate artefact/site significance tied to time depth, scientific/ aesthetic expert judgement, social consensus and nation building […]".* It is interesting the distinction made by HARRISON R., *Heritage critical approaches*, ibid, pp.14-15, between "official heritage" meant as "a set of professional practices that are authorised by the state and motivated by some form of legislation or written charter. […] "unofficial heritage" to refer to a broad range of practices that are represented using the language of heritage, but are not recognised by official forms of legislation."

in its physical integrity as well as the values of the past embedded into it to be transmitted to future generations, anchoring aveneer of sacredness. Today, while criticism of this Eurocentricapproach to cultural heritage has led to an increased focus on the intangible component of cultural heritage, as well as on intangible forms of heritage, preservation remains the central value of cultural heritage law. Preservation means, above all, the protectionof the cultural values embedded into cultural heritage. What has been changed today is the subject matter of preservation since thereis an expansion of the concept of heritage, whereby anything can potentially become heritage. In the years of "memory obsession", preservation has crossed the frontiers of the tangible, not onlyin relation to the intangible heritage but, for example, in the previously mentioned example of the "absent heritage", where the cultural property destroyed continued to be in certain cases worthy of legal protection. In other words: "More heritage means better culture; less heritage is an objective evil[198]".

However, what happens if the cultural values of a societychange? How does cultural heritage adapt to new values? Moreover, if the conservation paradigm dominates cultural heritage law, what room for discussion is there to reflect on the legal boundaries of collective memory? If preservation is the core-value of the entire legal framework, can the phenomenon of iconoclasm onlyberead in a negative way? Indeed, within scholarly literature, there is a lack of structural theoretical framework to investigate the lawfulness of destruction and whether there are factors that can justify a Nation to legitimately destroy its cultural heritage[199].

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198 LIXINSKI L., *Legalized identities: Cultural Heritage Law and the shaping of transitional justice*,2021, Cambridge University Press, p. 95.

199 On the lack of a conceptual framework for recognizing when a culture might be justified in destroying its own cultural property, see E. PEROT BISSELL V., *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, The Yale Law Journal 2019, pp. 1130 - 1172. On this point see also WANGKEO K., *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, 28 YALE J. INT'L L. 183 (2003) who

This chapter has attempted to underline, first, the symbolism attached to the cultural heritage that makes it vulnerable to changes in the cultural values of society; as well as, it wanted to deconstruct the concept of heritage and preservation withtheaim to examine the phenomenon of iconoclasm under a wide range of meanings without assumptions, grasping its different nuances.

underlines the difficulty of agreeing on an international preservation norm in peacetime.

Chapter 2: Untangling the Law and the deliberate destructionof cultural heritage.

1. Iconoclasm and its legal dimension

The subject of the previous chapter was the relationship between heritage construction, collective memory and internationallaw. It has shown how they are interdependent: International law, with its tools, shapes collective memory and vice versa; at the same time, cultural heritage is a "marker of memory"[200]. The act of choosing a cultural artefact worthy of preservation implies the construction of a certain narrative of memory, a certainversionof the past. It has shown how the criteria underlying this choice are challengeable and how the concept of preservation is anchored to a certain idea of conservation that comes closest to a central Western vision of heritage.

The following chapter will focus on the dynamics between international law, cultural memory, and the intentional destruction of cultural heritage by investigating the so-called "heritage iconoclasm" phenomenon. Therefore, after examining the factors affecting the path of cultural heritage constructionand the rationale behind its legal protection, attention needs to be focused on the legal dimension of the deliberate destruction of cultural heritage and its relationship with memory.

Culture and conflict have always been inextricably linked [201]: cultural claims are often at the root of the emergence of a conflict, or if they are not the main motivations, cultural rhetoric has

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[200] LIXINSKI L., *Confederate monuments and International Law*, 32 Wisconsin International Law Journal (2018)

[201] On the relationship between cultural and conflict, as well as about how one's own cultural profile affects the perception of a conflict see CHEW P. K. *The Pervasiveness of culture in Conflict*, Journal of Legal education, Vol. 54, No. 1 (March 2004), pp.60-71.

always accompanied the description of a conflict[202]. The current globalisation and post-colonial scenario have probably stimulated the need to claim individual cultural identities, which often risk being absorbed by a dominant cultural homologation[203]. Thereis no shortage of memory issues surrounding cultural heritageeven today, both in times of war and peacetime. If cultural artefactsare conceived as markers of memory and imbued within an ideological frame, they become the perfect target for cultural claims and for challenging the narrative embedded into them through their destruction. The memory discourse, therefore, intersects not only with the preservation of cultural artefacts but also with their destruction[204]. Indeed, it seems appropriate to investigate and challenge the memorialization processes surrounding cultural heritage from the side of its destruction through the lens of law.

After exploring the meaning of "iconoclasm" and its different nuances, the following research questions should be addressed: what are the legal boundaries of the iconoclasm, and what is the role of International Law in this field? Does the Responsibilityto protect doctrine also extend to cultural heritage destruction?If the process of constructing cultural heritage is the result of a selective choice, indicating a certain type of narrative of collective memory worthy of preservation, does intentional destruction also, paradoxically, create a new memory? In addition, what is the position of Law in this regard? Is it possible to distinguisha'legal'

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[202] VIEJO ROSE D. *Conflict and the deliberate destruction of cultural heritage*, Conflicts and tensions, Helmut Anheier and Yudhishthir Raj Isar, Chapter 6, 2007, pp. 103-117.

[203] On the relationship between cultures, conflict and globalization see VIEJO ROSE D. *Conflict and the deliberate destruction of cultural heritage*, ibid.

[204] On memory and destruction of cultural heritage see VIEJO-ROSE D., *Cultural heritage and memory: untangling the ties that bind*, Culture & History Digital Journal, Vol. 4 No. 2 2015. BEVAN R. *The Destruction of Memory: Architecture at War*. Reaktion, London, 2006. ELSNER J., *Iconoclasm and the preservation of memory*, in Monuments and Memory, Made and Unmade, edited by R. Nelson & Olin M. University of Chicago Press, Chicago: 209-232.

iconoclasm from an illegal one? As well as there is a right to memory, is there a corresponding right to oblivion?

In addressing the mentioned questions, the scope of the research will concern public art that can be defined as "art in any media intended and displayed in the public domain, usually outside or in public buildings and accessible to all persons"[205]. Public art is vulnerable since it is constantly exposed to the judgement of a wide audience. The same cultural object can be the source of a conflict between different cultural groups claiming diverging interpretations[206]. Moreover, the original interpretation of a cultural object can become anachronistic and dissonant compared to its era of construction[207]. The conflict can be even more heated when two different States or two different identity groups at the domestic or local level claim ownership rights to the same cultural object[208]. The study wants to challenge, from a legalpoint of view, the permanence of public art, threatened by the so-called "symbolic vandalism", aimed to target the intangible value of public art[209]. The symbolic vandalism can have different forms like wanton destruction, removal or damage of property. The research will deal with the destruction and removal of public art

[205] SMITH C. Y. N. , *Community rights to public art*, 90 St. John's L. Rev. 369 (2016), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/134 . CURTIS L. CARTER, *Toward an Understanding of Sculpture as Public Art*, in 14 INTERNATIONAL YEARBOOK OF AESTHETICS, "DIVERSITY AND UNIVERSALITY IN AESTHETICS" 161 (2010), http://epublications. marquette.edu/cgi/viewcontent.cgi?article=1062&context=phil_fac.

[206] See ZAGATO L., *Sul patrimonio culturale dissonante e/o divisivo*, Dialoghi mediterranei, 2022. The author draws a distinction between different cases of contested or dissonant heritage. He distinguishes the ipothesis of synchronic dissonance when it occurs at the same time among different groups; instead, the dissonance is diachronic when the same group changes its mind toward the same heritage object. Finally a cultural object is contested when two states or cultural groups claim ownership rights over it.

[207] Ibid.

[208] Ibid.

[209] DOSS E., *The process frame, Vandalism, Removal, Re-siting, Destruction*. In the book A companion to public art (pp. 403 -421), 2016.

by grasping the main emerging legal issues. The followingchapter will focus on the legal framework concerning the deliberate destruction of cultural heritage that will help to pave the wayfor the case studies, which will examined subsequently.

1.1 Shaping the patterns of iconoclasm: an aesthetic perspective

From an etymological point of view, "iconoclasm" literally means "The breaking of images"[210] and derives from Late Greek eikonoclastes, "breaker or destroyer of images". The originof the term can be traced back to the religious sphere, in the context of the Byzantine 'Quarrel of Images", but the phenomenon of art destruction appears in earlier times, already in the ancient world[211]. Today, the term does not refer exclusively to the religious sphere but extends to any destruction involving the erasure of both religious and secular images, buildings, worksof art, and statues that have a certain symbolic value. What distinguishes iconoclasm from other forms of destruction is the presence of a motif[212].

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[210] KILA, J. D., *Iconoclasm and cultural heritage destruction* during contemporary art conflict.

[211] On the origin of the term "iconoclasm", GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, London, Reaktion Book, 1997. FREEDBERG D., *Il potere delle immagini*, Il mondo delle figure: reazioni e emozioni del pubblico, Einaudi, 1993 and 2009, p. 557 -625, the author mentions cases of art's destruction in ancient Egypt and ancient Greece as the destruction of Hipparchus statues. On the Byzantine dispute on images see RUSSO L., *Vedere l'invisibile, Nicea e lo statuto dell'Immagine*, 2017, Aesthetica Edizioni, Palermo.

[212] On the broadening of the concept of iconoclasm see HARRISON R., Heritage, critical approaches, ibid,. p. 171. See also GAMBONI D., *The destruction of Art*, ibid, p. 18:" Iconoclasm grew from the destruction of religious images and opposition to the religious use of images to, literally, the destruction of , and opposition to, any images or works of art and metaphorically, the 'attacking or overthrow of venerated institutions and cherished beliefs, regarded as fallacious or superstitious' […]

In recent times, the phenomenon of iconoclasm has become a central topic for International Law again following thedestructive events in the Middle East. However, it is far from being a new theme as it has crossed different epochs since antiquity. Moreover, an extremely reductive reading of the latest destructive attacks has portrayed iconoclasm as being limited to the Islamic world, whereas there have been iconoclastic phases affecting Christianity in the past. Actually, it is a transversal phenomenon affecting different cultures from West to East[213].

The destruction of the image is not simply dictated by religious reasons but is determined by the most diverse motivations[214]. This is the case of the destruction of cultural heritage, such as during Regime changes. Examples include the toppling of Saddam Hussein's statue during the Iraq war and the removalof statues during the post-communist transition in Eastern Europe.

Moreover, going back in time, one can cite the iconoclastic wave that characterised the French revolution. In imperial Rome, one can mention the practice of "damnatio memoriae", which was a political tool through which to express institutional changes[215]. The Senate towards public figures and emperors who were declared enemies of the State in order to preserve the honour of Rome by demonising their memory addressed it. It was often a deletion process carried out by an emperor with the purpose to delegitimize and build his power legitimation and imperial propaganda programme. The measures that could be undertaken were various; they included, for instance, the erasure of imperial

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213 GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, ibid.

214 Ibid. See also THOMPOSON E., *Destruction of art*, The Oxford Encyclopedia of Aesthetics, 2014.

215 On this topic FREEDBERG D., *Il potere delle immagini*, ibid. HUET V., *images et damnatio memoriae*, in cahiers du centre Gustave Glotz, 2016. STEWART P. *Statue in Roman Society. Representation and response*. KINNEY D., *Spolia, Damnatio, and Renovatio memoriae*", in memoirs of the American academy in Rome, vol. 42, 1997. VARNER E. R., *Monumenta Graeca et Romana: Mutilation and transformation : damnatio memoriae and Roma imperial Portraiture*, 2004.

names from inscriptions, the destruction or reworking of statues and any other image of the person[216]. Indeed, owing to the importance attached by the Romans to the preservationof cultural treasures, the "damnatio memoriae" did not imply the destruction of a work of art but the modification of the narrative embedded into a certain monument. This is the case of the Basilica of Maxentius, which was not destroyed but appropriated by Emperor Constantine in order to condemn the memory of his predecessor and represent a change of direction fromPaganismto Christianity while still preserving the monument[217].

There are so many different cases of deliberate destructionof art. We have, from one side, iconoclasm due to political and religious ideologies, destruction for social purposes and during regime changes[218]. On the other hand, the destruction of art isdue to the need for modernisation and economic development[219]. This isa classic dichotomy between the preservation of antiquity and urban development, a debate that concerns, for example, the cultural property inscribed within the world heritage list, whose protection constraints sometimes hinder the modernisation processes of urban spaces[220]. At the same time, the conservation of cultural sites is often undermined by tourist demands and threats posed by the risks of mass tourism. Economicinterests that threaten instances of conservation. Another kind of destruction concerns acts of vandalism carried out without a structured ideological motivation. In this case, the defacement of images

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[216] Ibid.

[217] On this topic, GIAVARINI C., *La Basilica di Massenzio: il monumento, i materiali, le strutture, la stabilità*, Roma 2005. COARELLI F., *Basilica Costantiniana*, B. Nova, in Eva Margareta Steinby (a cura di), Lexicon Topographicum Urbis Romae, I, Roma, Quasar, 1993.

[218] For a classification of motivations behind iconoclastic acts, see VIEJO ROSE D., *Conflict and the deliberate destruction of cultural heritage*, in Conflicts and tensions, 2007, v. 6, pp. 102-106.

[219] WANGKEO K., *Monumental challenges*, ibid, p. 191.

[220] CASINI L., *International regulation of historic buildings and nationalism: the role of UNESCO, Nations and Nationalisms* 24 (1), 2018, 131-147.

does not have any political purpose, thus disregarding the intangible dimension and the symbolic value embedded into cultural artworks.

The destruction of images also affects certain artistic movements that recognise an aesthetic value in destruction as a metaphor for breaking with the past and tradition. Destruction as an artistic process, in some cases, remains on a theoretical level; in others, it is actually part of the artistic practice of the artist, especiallyinthe so-called performance art[221]. Some authors speak of a cathartic value of destruction," an aesthetic catharsis when it is aimed to remove monuments symbolising a disturbing past [222]. A value, moreover, is able to create a narrative as its construction[223].

There are also other forms of destruction of images. Is not the neglect of cultural heritage a form of destruction or at least aform of oblivion[224]? The carelessness of monuments is, for part of the scholarship, a form of abandonment. Nevertheless, is not the selection process itself in choosing which works are worthy of legal protection a construction of a certain narrative that excludes other works? Is not construction (in the sense of selectingwhat to protect) the same side of the coin as destruction?

In relation to this subject, it is worth recalling the practice of De-accessioning, which is defined by the International Council of

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221 THOMPSON E., *Destruction of art*, ibid.

222 PEROT BISSEL V E., *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*

223 Ibid, pg. 1150: *" Destruction of cultural property has a way of generating headlines globally and of creating lasting cultural memories in the collective consciousness. In certain cases, the power of the statement sent through the destruction can outweigh the value of preserving the work itself"*. See ADLER A., *Against Moral Rights*, 97 CALIF. L. REV. 263, 280 (2009), pg. 279: *"Here I make a claim that many might find repugnant: that there is an artistic value in modifying, defacing and even destroying unique works of art. In fact, these actions may reflect the essence of contemporary-art making. As a result, moral rights law endangers art in the name of protecting it"* .

224 SETTIS S., *Cieli d'Europa, cultura creatività, uguaglianza*, 2017, UTET, Milano. MONTANARI T., *Chiese chiuse*, Einaudi, Torino, 2021.

Museums as "The act of lawfully removing an object from a museum's collections[225]. It may occur for various reasons: lossof aesthetic value for exhibition and study purposes, questioningof authenticity, deterioration of the physical state of the object and the museum's inability to take care of it[226]. The de-contextualisation of a cultural object represents in some wayaloss of its intangible value, the content of which changes depending on the museum exhibiting it. The soul of the objects is a whole with the museum that displays them.

After this examination of cases of destruction, we have noticed that Iconoclasm is not necessarily conceived in a negative sense but is also linked, for example, to the desire to express political change following the collapse of authoritarian regimes. Now, it would seem appropriate to ask what the role of internationallaw is in relation to the intentional destruction of cultural heritage. Do the results of aesthetics converge with those of law? What is the legal dimension of iconoclasm? What are its legal boundaries? Is it possible in certain cases to speak about the lawfulness of destroying cultural heritage? Should the internationalcommunity also intervene when the state destroys its cultural property? The study will cover only the ideologically motivated iconoclasm, namely the deliberate destruction of cultural heritage.

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[225] ICOM, Guidelines on Deaccessioning of the International Cou ncil of Museums.

[226] Ibid, the criteria include for instance: 1 - The physical condition of the object is so poor that restoration is not practicable or would compromise its integrity. Objects that are damaged beyond reasonable repair and are of no use for st udy or teaching purposes may be destroyed. 2 - The object poses threats to health and safety to the staff and the public. 3 - The museum is unable to care adequately for the object because of its particular requirements for storage or conservation. 4 - The object is a duplicate that has no added value as part of a series. 5 - The object is of poor quality and lacks aesthetic, historical and/or scientific value for exhibition or study purposes.

2. From aesthetics to Law: iconoclasm over ownership rights.

The term "iconoclasm" is also accepted within the legal scholarship with a wide scope, including destructive acts for religious, military, and social purposes, even though looking at the legal body, the expressions used are: "unlawful destruction", "deliberate destruction", "intentional destruction"[227]. All these expressions stress the intention of directly targeting a heritage site; the damage caused by iconoclasm is not accidental or collateral but is provoked to deliberately target the symbolic meaning behind a specific heritage site.

A first consideration in framing the destruction/ removal of public art within the legal domain is a focus on property rights. Intentional destruction of cultural property is conceived in negative terms since it might be read as a violation of property rights[228]. Cultural heritage is supposed to belong to the international community, to a nation, to a single community; thus, intentional destruction might amount to a violation of property rights[229]. From an international perspective, the right to property is internationally recognised as a human right; thus, cultural vandalism would be indirectly a violation of human rights[230].

However, the concept of cultural property is different from regular property since many stakeholders and interests converge on it. Owners of public art are not free to dispose of their rights

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[227] LOSTAL M., CUNLIFFE M., MUHESEN N., *the Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations* , International Journal of Cultural Property (2016), pp. 3 -4.

[228] DOSS E., *The process frame, Vandalism, Removal, Re-siting, Destruction,* in the book A companion to public art (pp. 403-421), 2016.
BEHZADI E., *Destruction of cultural heritage as a violation of human rights: application of the alien tort statute*, 73 Rutgers U.L. Rev. 525 (2021).
Available at: https://scholarlycommons.law.cwsl.edu/fs/354.

[229] BEHZADI E., *Destruction of cultural heritage as a violation of human rights: application of the alien tort statute,* ibid, pp. 39-41.

[230] Ibid, p. 40.

due to the public significance of cultural heritage[231]. In the case of heritage privately owned, the property owner's intention of destroying its cultural property can clash with the public interest in protecting the rights of specific cultural groups or even the artists 'rights[232]. More specifically, regardless of ownership, cultural property belongs to everybody since it is for public enjoyment[233]. The level of property rights curtailment would vary according to each domestic legal framework.

Public art is thus always controversial since it is susceptible to different interpretations from different viewers[234]. Inchallenging

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[231] ADLER A., *Against moral rights*, 97 Cal. L. Rev. 263, 2009. YOUNG J. O., *Destroying Works of Art*, The Journal of Aesthetics and Art Criticism , Autumn, 1989, Vol. 47, No. 4 (Autumn, 1989), pp. 367-373. SMITH C. Y. N., *Community rights to public art*, 90 St. John's L. Rev. 369 (2016), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/134. According to the author, p. 378: *"Indeed, certain property is so symbolic of a culture, community, or society that its owner is not the only one to have an interest in its preservation or destruction. In such cases, the community whose culture and heritage the property represents also has significant interest in the property, and its de jure owner should not have the absolute right to destroy it"*.

[232] SMITH C. Y. N. , *Community rights to public art*, ibid, p. 370. ADLER A., *Against moral rights*, ibid, pp.2-3. YOUNG J. O., *Destroying Works of Art*, ibid, p. 370.

[233] Consider the famous concept of the Italian scholarship from GIANNINI M.S., *I beni culturali*, 3 Rivista trimestrale di diritto pubblico 3, 8 (1976), according to *which "Il bene culturale è pubblico non in quanto bene di appartenenza ma in quanto bene di fruizione"*. Consider also the public trust doctrine applied to cultural property according to which cultural property is held in trust for the benefit of the public and that the public has the right to access and use the property for certain public purposes. GERSTENBLITH P., *Identity and Cultural Property: The Protection of Cultural Property in the United States* , 75 B.U. L. REV. 559, 647 (1995). See also SAX J. L., *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES*
48 (2004), quoting Victor Hugo: *"There are two elements in an edifice, its utility and its beauty. Its utility belongs to its owner, its beauty to everyone. Thus to destroy it is to exceed the right of ownership"*.

[234] ARTH, K. W. (2020). *The art of the matter: linguistic analysis of public art policy in confederate monument removal case law*. Gonzaga Law Review, 56(1), 1-64.

the permanence of art, it becomes difficult to identify who the affected owners are that can claim its destruction/ removal. Actually, to frame contested heritage in the property rights field would be wrong since the concept of ownership and publicart are at opposite ends of the spectrum: public art is difficult to define since it is an evolving process, while property is fixed and static.[235]The same contradiction can be found in the concept of "cultural property" since culture is an evolving concept, and it cannot be crystalized in the fixed rules of property[236]. In relation to controversial heritage, the emphasis on ownership rightsrisks stir up cultural conflicts: actually, in a multicultural society, the culture of each community is the result of the contamination of various cultures; for instance, the same heritage site canbelong to more than one culture[237]. Hence, the legal constraints deriving

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[235] DOSS E., *The process frame, Vandalism, Removal, Re-siting, Destruction*, ibid, p. 412: *"The "propertizing" of culture, in other words, holds that public art – and other forms of public culture – basically constitutes owned, fixed, and unchanging property, and as such is subject to the protection of property laws. This static view of property, and of culture, discounts more creative and efficacious under-standings of public art. As a catalyst for public dialogue, for example, public art is typically unfixed and unresolved: it is processual. It constitutes, and is constituted by, the ever-changing processes and dynamics of the public sphere, including vandalism".*

[236] MEZEY N., *The Paradoxes of Cultural Property*, 107 Colum. L. Rev. 2004-2046 (2007): *"Cultural property is paradoxical in two distinct ways. First, cultural property is contradictory in the very pairing of its core concepts. Property is fixed, possessed, controlled by its owner, and alienable. Culture is none of these things."*

[237] MEZEY N., *The Paradoxes of Cultural Property*, ibid, p. 2007: *"[…]disputes over intangible resources, unlike claims for reparations or the return of indigenous lands, lead "to vexing questions of origins and boundaries that are commonly swept under the rug in public discussions, which tend to treat art, stories, music, and botanical knowledge as self-evidently the property of identifiable groups. I would go further still: As groups become strategically and emotionally committed to their "cultural identities," cultural property tends to increase intragroup conformity and intergroup intransigence in the face of cultural conflict […]".* On the concept of "cultural hybridity, seep. 2038 -2045: *"[…] For centuries, cultural practices, icons, and symbols have passed from one culture to another and have been transformed by their passage. These perpetual*

from a duty to preserve the cultural heritage can clash with the purpose of public art, that is, beyond being site-specific, to reflect the values of a targeted audience in a given temporal context[238].

From the described premise, it is worthwhile to lookat thecurrent international legal framework on intentional destruction by taking into account the wartime-peace time context.

2.1. Wartime, international law, intentional destruction.

In examining the body of law at the international level, it is possible to notice that binding multilateral treaties specifically devoted to the intentional destruction of cultural heritage, bothin times of war and peace, do not exist[239]. A worthy exceptionisthe Council of Europe Convention on Offences relating to Cultural Property, adopted in May 2017. Even though it criminalises not only the intentional destruction of cultural property but also other offences and given its regional nature, it can only apply to a limited number of States[240]. However, one can easily deriverules that attribute a legal disvalue to intentional destructionalso inthe light of the so-called "preservationist impulse" pervading the entire system[241]. As seen in the previous chapter, preservationis conceived as "la raison d'être of cultural-property law[242]"; both

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passages also transform the cultures themselves over time". "[…] Cultural hybridity is part of this anti-essential tradition of cultural theory. It is not new and not without its critics, but it may be the best alternative we have to the anemic theory that animates cultural property". "[…] Cultures, like people, are now thought of in terms of movement and migration".

238 SMITH C. Y. N., *Community rights to public art*, ibid, pp. 408-413.

239 LENZERINI F., *The intentional destruction of cultural heritage*, ibid, p. 79.

240 See the Convention on the link https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=treaty-detail&treatynum=22.

241 LIXINSKI L., *Confederate monuments and International Law*, 32 Wisconsin International Law Journal (2018) ; PEROT BISSEL V E., *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law;* WANGKEO K., *Monumental challenges*, ibid.

242 PEROT BISSEL V E., ibid; MERRYMAN J. H. *The Nation and the Object*, 3 INT'L J.CULTURAL PROP. 61, 64-65 (1994, see pg. 64): *"In an object-oriented cultural property policy, the emphasis is on three conceptually separate but, in*

approaches mentioned in the previous paragraphs have the core value of preservation in common. If the entire body of law has historically developed on preservation, it seems that the legal system gives a negative meaning to the destruction of cultural heritage.

However, in order to better understand these critical issues, it is appropriate to retrace the evolution of legislation on the intentional destruction of cultural heritage. Traditionally, the legal dimension of iconoclasm has developed in two parallel fields: intentional destruction during armed conflict and peacetime[243]. Classical international law has developed with the aim of regulating the relations between States and safeguarding the principle of territorial sovereignty, with a particular focus on the regulation of wartime conflict[244]. It was precisely inthelaw of war that the problem of protecting cultural property arose. Indeed, cultural heritage law flourishes with the purpose of protecting cultural property during war. The first moderntreaties were created following the wave of destruction during the Second World War. The aim was to prevent not only destruction due to war but also iconoclasm dictated by the intent to exterminate a given community, as it happened with the Hague Conventionfor the protection of cultural property in the event of armed conflict[245]. This was in reaction to the destruction of the Jewish

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practice, interdependent considerations: preservation, truth and access, in declining order of importance. The most basic is preservation: protecting the object and its context from impairment".

[243] LENZERINI F., *The UNESCO declaration concerning the intentional destruction of cultural heritage: one step forward and two steps back*, The Italian yearbook of international law online,

[244] PAAWE J., PITTALWALA J., *Cultural destruction and Mass Atrocities Crimes: Strengthening Protection of Intangible Cultural Heritage*, Global Responsibility to protect 13 (2021) 395 -402. VRDOLJAK A. F., *Intentional Destruction of Cultural Heritage and International Law*, available at: http://works.bepress.com/ana_filipa_vrdoljak/3

[245] See the preamble: *"Recognizing that cultural property has suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction; Being*

cultural heritage by the Nazis, based on a racist ideology[246]. The same is true with the 1977 protocols in addition to the Geneva Convention, which condemn the destruction of cultural heritage. The same rationale can be seen in the second protocol to the Hague Convention of 1954 for the Protection of cultural Property

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convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world; see also article 4, section 1 and 3: The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility, directed against such property.
The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

[246] WANKEO K. ; VRDOLJAK A. F., MESKELL L., Part I Historical Overview, Ch. 2 Intellectual Cooperation Organisation, UNESCO, And the Cultural conventions, Oxford Public International Law, 2020, p. 13 , *see "These developments affirmed that the destruction of a group and their culture is an affront to humanity as a whole. The recognition of the impact of these developments on the rationale for the international protection of cultural heritage is encapsulated in the preamble of the 1954 Hague Convention. It makes clear that the purpose of the Convention is to ensure the contribution of all peoples and their cultures—not cultural property in and of itself."* POULOS A. H., *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis*, 28 INT'L J.LEGAL INFO. 1, 21 (2000), according to the author the convention had the following merits : *" The principal innovations of Hague 54 were: 1) inclusion of non international armed conflicts; 2) equal application to occupation forces; 3) applicability to the various parameters of armed conflict (by including civil wars and wars of liberation); and 4) responsibilities of states in peacetime".*

in the event of armed conflict, adopted in 1999[247]. At the regional level, the legal stigma attached to intentional destruction is even more striking, for example, within the 2017 Council of Europe Convention on Offences relating to Cultural Property[248].

At a domestic level, some scholars, comparing different legal systems, have noticed that the core value is still the preservation of monuments accompanied by the provision of "prohibition against destroying, damaging, or altering cultural relicsand sites" without containing a provision on whether to authorize the state (and under which conditions) to the destruction of cultural heritage[249].

At the customary level, it is unanimous in the light of international practice that a customary norm on the prohibition of intentional destruction is established[250]. The customary rule can be derived

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[247] LENZERINI F., *intentional destruction of cultural heritage*; see in particular article 15 and 16. See also FRANCION F. *Cultural heritage*, Oxford Public International Law, 2021, according to which the second protocol has extended the protection of cultural property to non- international conflicts; it has replaced the system of special protection with the one of enhanced protection; it has strengthened the regime of individual state responsibility.

[248] LENZERINI F., *intentional destruction*, oxford public international law. WANKEO K. *Monumental challenges*,; see art. 10 par. 1 of the Council of Europe Convention on offences relating to cultural property; see also the European Cultural Convention (1954); the European Convention on the Protection of the Archaeological Heritage (1969); the European Convention on Offences Relating to Cultural Property (1985);the Convention for the Protection of the Archaeological Heritage (Revised) (1992).

[249] WANKEO K., *Monumental challenges*, ibid, pp. 196-197.

[250] FRANCIONI F. , Part III General International Law, Ch. 23 *Custom and General Principles of International Cultural Heritage Law*, in Oxford Public International Law; the author refers also to the ruling of Eritrea- Ethiopia commission on the "Stela of Matara" as evidence of the recognition of a customary norm applicable in the field of cultural heritage. The Commission condemns the destruction of the stela, an ancient obelisk, during the wartime occupation of Ethiopia. The ruling emphasises the customary nature of the rule in question by deriving it from the 1954 Convention, despite the fact that Ethiopia and Eritrea were not signatory states. See Eritrea -Ethiopia claims commission, see https://pca-cpa.org/en/cases/71/.

from the huge number of treaties on the protection of cultural heritage during the armed conflict but also on the ground of the practise of the UN Security Council condemning the unlawful destruction of cultural heritage by a series of resolutions[251]. Despite its non-binding character, the 2003 UNESCO declaration on the intentional destruction of cultural heritage confirms the establishment of a customary rule on the subject. The same appears by examining the jurisprudence of the ICTY, which confirms the existence of a consolidated customary rule on the prohibition of cultural heritage destruction in the context of conflict[252].

2.2. Challenging the principle of state sovereignty in the face of intentional heritage destruction in peacetime

The scenario changes when referring to the intentional destruction of cultural heritage in times of peace or in relation to intangible cultural heritage[253]. As mentioned before, the international discourse focuses mainly on the destruction of cultural heritage (tangible) during armed conflict. This is because of classical international law aimed to safeguard the prerogatives of States that could be highly compromised in the context of war[254]. Now, the concept of cultural heritage, as we saw in the previous chapter, is not necessarily linked to the prerogatives of the State but is an expression of individual communities and the values that people embrace. We face a new trend that sees the

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[251] In particular UNSC resolution number 2347 (2017). See a deep exam at the paragraph 3 on the role of the UNSC in protecting the cultural heritage.

[252] LENZERINI F. 2008, *La distruzione intenzionale del patrimonio culturale come strumento di umiliazione dell'identità dei popoli, in Le identità culturali nei recenti strumenti Unesco* (pp. 3-25). PADOVA: CEDAM.

[253] PAAWE J., PITTALWALA J., *Cultural destruction and Mass Atrocities Crimes: Strengthening Protection of Intangible Cultural Heritage*, ibid.

[254] On the relation between cultural property and State-centricity, see FISHMAN J. P., *Locating the International Interest in Intranational Cultural Property Disputes*, 35 Yale Journal of International Law. 347 (2010) Available at: https://scholarship.law.vanderbilt.edu/faculty-publications/1017

need to protect cultural heritage in peacetime[255], even in thelight of current threats to its preservation. Although there are no treaties on the deliberate destruction of cultural heritage intimes of peace, there is no shortage of treaties preserving cultural heritage outside the context of war. Examples are the 1970 Convention on the Means of Prohibiting and preventing theillicit import, export, and transport of ownership of cultural property and the 1972 World heritage convention, or the 2003 UNESCO convention on safeguarding Intangible cultural heritage.

However, despite the mentioned treaties, there is a controversial debate within the scholarship on the recognition of a customary norm protecting cultural heritage from intentional destructionin peacetime. It is apt to examine the different approaches in order to understand their impact and to face the previously mentioned research questions. The issue is complex because recognising a customary rule prohibiting the destruction of cultural heritage would also imply condemning the state for carrying out such destructive acts against cultural property on its territory. This would inevitably run counter to classic principles of international law, such as the principle of sovereignty, the principle of non-interference and the principle of non-intervention.

Indeed, within the context of peace, it is possible to distinguish two kinds of iconoclasm[256]: iconoclasm from above that is sponsored and legitimised by the state in order to promote a certain ideology so that it becomes the dominant one over other cultural groups. In this case, cultural heritage becomes an

[255] VRDOLJAK A. F., *Intentional destruction of cultural heritage and International Law*, 2007, available at http://works.bepress.com/ana_filipa_vrdoljak/3/.

[256] LEE R. & GONZALEZ ZARANDONA J. A. (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies, 26:5, 519-538, DOI: 10.1080/13527258.2019.1666294.

instrument for the state to assert its power [257]. Iconoclasm from below, on the other hand, is when it is triggered bythe people and lacks state authorisation and is therefore illegitimate[258]. What is the role of international Law in the face of these forms of iconoclasm? Can the iconoclasm from above be qualified lawful in any case? It would be worth focusing on the two main legal approaches concerning the destruction of cultural heritageduring peacetime.

Part of the scholarship supports the idea of moving in the direction of overcoming the peacetime/wartime distinction by recognising a customary norm prohibiting the intentional destruction of cultural heritage regardless of the context inwhich it is destroyed[259]. The arguments in support are grounded onthe evidence of international practice if one considers the number of international instruments aimed at protecting cultural heritage even in peacetime and the ever-increasing number of signatory states[260], as well as the condemnation of destructive attacks at domestic level. The same is evident from the reading of the ICTT jurisprudence in which the destruction is not more necessarily linked to the consequence of a conflict, but it is linked to theintent of targeting the identity of specific communities beyond the States, conflating it with crimes against humanity[261]. Thus, it isno longer a question of legal protection of cultural property todefend

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[257] LEE R. & GONZALEZ ZARANDONA J. A. (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies.

[258] Ibid.

[259] VRDOLJAK A. F., *Intentional Destruction of Cultural Heritage and International Law*. FRANCIONI F. *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, (2004) 25 Michigan Journal of International Law 1209;

[260] VRDOLJAK A. F., *Intentional Destruction of Cultural Heritage and International Law*. FRANCIONI F., *Beyond State sovereignty: the protection of cultural heritage as a shared interest of humanity*, 25 MITCH J. INT'L L. 1209 (2004)

[261] ibid

the national interest of a State but the interest of individual communities, a kind of humanisation of cultural heritage [262].

Furthermore, authoritative doctrine[263] observes that the proven existence of a customary rule prohibiting destruction in wartime confirms and reinforces the evidence of a similar rule in peacetime. It would be paradoxical to prohibit destruction only during a conflict where it may constitute a collateral effect of the actions of war and almost justified by the extraordinary nature of war, which implies suspension of the rule of law. For this reason, the ordinariness of peacetime would leave no room for justification of attacks on art[264].

Recognising a customary rule on the prohibition of destructionin peacetime would also lead to prohibitions for the state from destroying cultural heritage located on its territory, challenging the principle of state sovereignty. Those who advocate this position point out that the customary rule in wartime extendsnot only to international but also to internal conflicts, thus limiting the state's power to dispose of its own cultural heritage[265].

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[262] FRANCIONI F. *The human dimension of cultural heritage.*

[263] LENZERINI F., *The UNESCO declaration concerning the intentional destruction of cultural heritage. One step forward and two steps back*, The Italian Yearbook of International Law on line, v. 13, i. 1, 2003, 131 -145, pg. 139. VRDOLJAK A. F., Intentional Destruction of Cultural Heritage and International Law. the author, in supporting Lenzerini's thesis, refers to an advisory opinion of the International Court of justice, " the legality of the Threat or Use of Nuclear Weapons comparing the protection of the environment to the protection of cultural heritage in both times of peace and war: *" Implicit in the Court 'reasoning is the understanding that the existing international law for the protection of the environment during peacetime is applicable during armed conflict subject to certain provisos, including military necessity. That is, protection provided by international law during peacetime is necessarily greater than that applicable during armed conflict. It is suggested similar reasoning can be extrapolated to cover the prohibition on the intentional destruction of cultural heritage."*

[264] LENZERINI F., ibid.

[265] ibid

However, what is most emphasised is the universal character of cultural heritage, which is not the exclusive property of any state but belongs to the international community as a whole, the well-known concept of "the cultural heritage of all mankind."[266]It has previously been pointed out that the concepts of culture and property are, in some ways, at odds, as the concept of culture is itself a changing concept and cannot be the subject of exclusive rights[267]. In fact, the protection of cultural heritage respondsto a public interest in its preservation that concerns everyone [268]. Taking up a well-known definition, a cultural asset is public not because it belongs to the public administration but because it isof public access. It is its intangible value that makes a cultural good worthy of protection; intangible value is understood as a "testimony having the value of civilisation".[269] And precisely, its intangible value gives rise to the public interest in making the cultural good publicly enjoyable. This is why the canonical concept of property is incompatible with the universal value intrinsic to cultural heritage[270]. The state would be accountable to the international community in the event of the deliberate destruction of cultural heritage of universal value. At this point, two considerations must be made. What is meant by universal heritage? Universal for whom? The concept of universal heritage certainly recalls the World Heritage Convention. We haveseenin the previous chapter how the concept of universality is highly debatable, as what is considered to be of outstanding importance for humanity does not necessarily correspond to thelocalinterests

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266 FRANCIONI F., *Beyond State sovereignty: the protection of cultural heritage as a shared interest of humanity*, 25 MITCH J. INT'L L. 1209 (2004).
267 MEZEY N., *The paradox of cultural property*, ibid.
268 MERRYMAN J. H., *The public interest in cultural property*, ibid.
269 GIANNINI M. S., *I beni culturali*, ibid.
270 LENZERINI F., *UNESCO declaration on intentional destruction of cultural heritage*, ibid, pg. 139:*"[…] the recognized universal value of cultural heritage, which transcends any kind of "private" power, both individual property or national sovereignty, in view of the need to safeguard the collective interest to its preservation. "*

of individual communities, as well as the criteria of " outstanding value" highly western-centric. Moreover, taking into account the world heritage list, would unlisted cultural goods also be considered of outstanding universal value? Another consideration to be made is how the principle of state sovereignty is limited based on a weak assumption, namely the heritage of humankind. A reflection that should be made in a broader discussion concerning the relationship between global legal instruments and state sovereignty. The issues raised are, therefore, many and complex if one embraces this position. Certainly, the UNESCO declaration is important evidence of this scholarship approach, which recognises a customary norm onthe destruction of cultural heritage even in peacetime. [271] The declaration condemns any form of intentional destruction of cultural heritage, both tangible and intangible, listed or not, in times of conflict as well as in times of peace[272]. The deliberate destruction is so conceived as an offence against the international community as a whole.

However, while being an important tool in the system of cultural heritage protection, there are some critical issues[273]. First, the choice of a soft law instrument, which therefore does not contain any mandatory provisions for states. Above all, it appears doubtful the weak language used to indicate the responsibilities of individual states vis-à-vis the international community[274]. It is clear that the vision is always state-centric and that it isdifficult to

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271 LENZERINI, FRANCIONI F. ibid.

272 Article 6: *[a] State that intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction, to the extent provided for by international law".*

273 LENZERINI F., ibid.

274 LENZERINI F., *The UNESCO declaration concerning the intentional destruction of cultural heritage. One-step forward and two steps back,* The Italian Yearbook of International Law on line, ibid.

resize the sovereignty of individual states. Another critical point is the failure to include in the scope of protection the cultural heritage as an expression of the local interests of individual communities, referring only to the questionable concept of the heritage of humanity, especially in the current globalization where the culture of a State is not homogenous[275].

It is precisely from the critique of the assumption of the cultural heritage of humankind that the oppositions to the above thesis develop. As mentioned above, some scholars are not unanimous in recognising a customary rule requiring States to preserve cultural heritage in the eyes of the international community as a whole[276]. The argument is based on classical principles of international law. The obligations of states to protect the cultural heritage of humankind derive from a series of treaties, but these treaties only have effect between the contracting parties; asiswell known, treaties can only have effect vis-à-vis third parties if the contracting states consent[277]. The principle "pacta tertiis nec prosunt nec nocent" is in line with the principle of equality between states and respect for state sovereignty. The same discourse applies to states' obligations with respect to cultural heritage situated on their territory. Looking at the instruments qualifying cultural heritage as belonging to humankind and calling on states to preserve the cultural heritage located on their territory, one finds a weak terminology that does not impose legal obligations. This can be deduced from the choice of usingsoft law instruments, but also from the language used, referring, for example, to the responsibility of states and not to or obligations legal duties[278]. In the same way, the statements of the

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[275] FRANCION F. ibid.

[276] O'KEEFE R., *World Cultural Heritage Obligations to the International Community as a Whole?* (2004) 53 ICLQ 189.

[277] ibid

[278] On the terminology of the 2003 UNESCO declaration, see LENZERINI F. , *The UNESCO declaration concerning the intentional destruction of cultural heritage. One step forward and two steps back*, The Italian Yearbook of International Law on line. LENZERINI F. 2008, *La distruzione intenzionale del*

international community in the face of the destruction of the buddhas appear rhetorical, speaking generically of crimes against the common heritage of humanity", whose vagueness prevents the development of a rule in accordance with the principle *nullum crimen sine lege*'[279]. However, this does not detract from the evidence of a unanimous approach of the international community in countering the intentional destruction of cultural heritage, whose diplomatic efforts and soft law achievements may be even more productive than the introduction of an explicit legal obligation[280].

Other scholars[281] point out that within the current international legal framework, there is a real regulatory gap on intentional destruction in peacetime due to the original intent of safeguarding heritage only in wartime, thus sheltering it from external threats. The current treaties are, therefore, silent on the legitimacy of States to destroy their heritage. Moreover, the centrality of the cultural heritage law, namely preservation, leaves little roomfor a discussion on the legitimacy of iconoclasm. The legal limits of iconoclasm are not examined in detail in legal theory if there are cases in which intentional destruction for ideological reasons is permitted. However, some authors have noticed how the international community has reacted differently to the iconoclastic acts that have taken place over the last few decades. If, from one side, it has unanimously condemned the destruction of the Buddhas in Afghanistan but from the other side, has not expressed the same disapproval for the removal of the statues of

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patrimonio culturale come strumento di umiliazione dell'identità dei popoli, in Le identità culturali nei recenti strumenti Unesco (pp. 3-25). PADOVA: CEDAM.

[279] O'KEEFE R., *World Cultural Heritage Obligations to the International Community as a Whole?*, ibid. VRDOJAK A. F., *Intentional Destruction of Cultural Heritage and International Law*, in MULTICULTURALISM AND INTERNATIONAL LAW 377, 380 (2007)

[280] Ibid.

[281] WANKEO K., ibid, *"Even though development and iconoclasm are serious threats to cultural heritage in contemporary society, there is surprising lack of legal authority to guide decision-makers"*.

the Stalinist regime in post-soviet Russia or the removal of the statue of Saddam Hussein in Iraq[282]. Therefore, do alliconoclastic acts have the same weight and legal disvalue? Could itbe possible in certain cases to destroy the so-called difficult heritage? What about periods of institutional changes where cultural heritage plays an important role in the reconstruction of a certainnarrative of memory and cultural identity? The role of cultural heritage is functional for transitional justice in countries emerging from dictatorial periods[283].

It is important to discuss the legitimacy or otherwise of iconoclasm, if only because iconoclastic acts are not to be placed in a homogeneous category but express different intentions. For example, the actions of the Islamic state in the MENA region cannot be compared with the controversy over the confederate monuments in the United States. On the contrary, within the international community, the iconoclasm topic is associated only with the iconoclastic fury of the Islamic State[284]. Moreover, as mentioned above, the preservationist impulse that pervades the entire legal system leaves no room for a discussion on the legitimacy of iconoclasm[285]. However, this approach, which focuses on preservation as an absolute value, espouses a static conception of cultural heritage anchored to the past and not to the local communities it represents in a given historical period [286]. More precisely, it gives rise to a hegemonic idea of irreplaceable,

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[282] WANKEO K., *Monumental challenges*; DRUMBL M. A. *From Timbuktu to the Hague and Beyond, the War Crime of intentionally Attacking Cultural property*, Journal of international criminal justice 17 (2019) 77 -99. POSNER, *The International Protection of Cultural Property: Some Skeptical Observations* (University of Chicago Public Law & Legal Theory Working Paper No. 141, 2006), *'The history of iconoclasm is long: are all iconoclastic movements to be condemned because they destroy cultural property?'*

[283] LIXINSKI L., *Confederate Monuments and International Law*, 32 Winsconsin International Law Journal (2018)

[284] LIXINSKI L., *Confederate Monuments and International Law*, ibid.

[285] ibid.

[286] Ibid.

untouchable cultural heritage and consequently of its intentional destruction as unacceptable, which, however, is the result of a Western vision that does not take into account individualcultural communities. Authoritative scholarship has criticised the assertive conclusions of the UN Special Rapporteur , who has stated that intentional destruction is automatically linked withthe violations of cultural rights without taking into account the multi- layered nuances behind this issue. In the Bagar case, certain acts of temple renovation were classified as destructive practices that did not meet ordinary conservation standards, slowingdownthe inscription on the world heritage list. For local communities, on the other hand, those acts were in line with their culture; the deterioration of the monument is seen as something natural and inevitable; therefore, restoration practices were aimed at preserving not the materiality of the monument but its inner value that is independent by the tangible dimension of the artwork.

The subjective dimension of intentional destruction can also be seen in reference to Japanese culture. The concept of eternity of the monument is not necessarily given by a static preservationof the monument but by a continuous renewal which alternates between destruction and reconstruction. For example, thetemple of Ise is destroyed and rebuilt every 20 years[287]. The continuous renewal gives a sense of eternity to the monument. At the same time, reconstruction has a strong symbolic value of cyclical rebirth, incorporating a concept of cultural memory that renews itself over time and brings together elements of the past and the future.

The concept of culture, on the other hand, is in itself dynamic changing, representing the historical evolution of a given society. Cultural heritage should be historicised, always taking into account the narrative that local communities wish to attach to it. It is, therefore, necessary to understand whether it is possible to

[287] On the temple of Ise in Japan see the link https://www.fondazionerenzopiano.org/en/page/presentazione/ .

explore and question the current processes of memorisation that take place through cultural heritage, giving space to living local communities that are often left out of the decision-making process.

However, certainly, deconstructing the concept of preservation, and consequently that of destruction, does not mean accepting all destructive practices. Exploring the legal boundaries of iconoclasm also means identifying the limits beyond which it is not permitted. Putting local communities and their relationship with cultural heritage at the centre also means identifying those cases where destruction becomes a reason to eradicate their cultures. For example, iconoclasm from above must be challenged when it becomes a tool for erasing cultural memories of certain cultural groups, as it happened with the destruction of Rohingya heritage carried out by the Myanmar government[288]. This Muslim community has been the victim of a state campaign aimed at eradicating its culture through the destruction of important heritage sites such as the Jama Mosque, as well as through the target of its intangible cultural heritage by restricting access to sites of worship. A similar example of cultural destruction affecting tangible and intangible heritage concerns the Uighur community targeted by the Chinese government, with the aimto erase its cultural identity[289].

[288] : Ronan Lee & José Antonio González Zarandona (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies, 26:5, 519-538, DOI: 10.1080/13527258.2019.1666294.
[289] PAAWE J., PITTALWALA J., *Cultural destruction and Mass Atrocities Crimes: Strengthening Protection of Intangible Cultural Heritage*, ibid.

3. The meaning of cultural destruction through the lens of international courts.

What is the meaning of intentional destruction of culturalheritage in the jurisprudence of international courts? What is the trend with regard to intentional destruction in peacetime?

The criminalisation of cultural heritage also arose in connection with the war context, where it is possible to distinguish two main approaches: "the civilian use and the cultural use approach[290]". According to the first approach, the protection of culturalheritage does not have its own legal autonomy but takes place reflexively in connection with the protection of civilians; it prioritises the protection of civilians over the protection of cultural assets, which are protected in their material dimension. Meanwhile, with the second approach, cultural heritage is the subject of a distinct legal protection that is especially linked to the intangible value embedded in it[291]. This latter is the background to the 1954 convention, which was created precisely with the aim of criminalising acts against the cultural heritage per se, while emphasising its universal importance. The convention came about in the wake of the systematic destruction of Jewish cultural

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[290] FRULLI M., *The criminalization of Offences against Cultural Heritage in times of Armed Conflict: The quest for Consistency*. The European Journal of International Law Vol. 22 no. 1, 2011; FRULLI M., Substantive Aspects, Ch.5 *International Criminal Law and the Protection of Cultural Heritage*, The Oxford Handbook of International Cultural Heritage Law, 2021

[291] FRULLI M. *The criminalization of Offences against Cultural Heritage in times of Armed Conflict*, ibid, pg. 207: *"The civilian-use approach sets us a clear priority the safeguard of civilians; protection is afforded basically only to the buildings and it serves the main purpose of sparing civilian lives. Hence, this traditional IHL approach fails to address the concern that historic buildings, monuments, and works of art deserve protection above and beyond their material dimension, precisely because of their cultural value both for the local community and for humanity as a whole."*

heritage by the Nazis. The act of destruction is thus conceived not only as a side effect of the war but also ideologically motivated.

The focus of protection is, therefore, not only the material aspect of the property but its intangible value (hence, the cultural approach). The two approaches have been developing inparallel, as can be seen from the legal framework of reference. However, it would seem that the cultural approach is dominant if one considers the criminal trials on the subject. From the reading of the relevant jurisprudence, what emerges is the emphasis on the intangible value of cultural property: what is affected by intentional destruction is not the cultural heritage itself but its embedded cultural value. For instance, as in the first one on the international enforcement of cultural property[292], the International Military Tribunal of Nuremberg emphasized the racist ideology behind the systematic destruction of Jewish synagogues by the Nazis, amounting not only to war crimes but also to crimes against humanity. Many Nazi defendants were convicted for the crimes of "plunder of public or private property" and "devastation not justified by military necessity" since their programme of extermination against the Jewish people included the destruction of their cultural heritage. So destroyingthe Jewish cultural heritage meant destroying the memory, the cultural identity of a people.

The Nuremberg trial was a landmark for subsequent caseslaw on the subject. The extensive jurisprudence of the International Criminal Tribunal for Yugoslavia (ICTY) also reaffirmed the link between the destruction of cultural heritage and the memory of a particular cultural community. Here again, the deliberate destruction of cultural heritage does not concern theheritageitself but the intangible symbolic value that a particular community attaches to it[293]. This is evident in the Jokic case, where the court

[292] GOTTLIEB Y., *Attacks against cultural heritage as a Crime Against Humanity*, 52 Case W. Res. J. Int' L. 287 (2020).
[293] LENZERINI F., *Intentional destruction of Cultural Heritage*, ibid pg. 82.

condemns the intentional destruction of the historical centre of Zagreb, a world-heritage site. [294] The seriousness of the crime is based precisely on the loss of the intangible value that the historical centre represented not only for the region but also for the entire international community, being a world site. In the decision, there is no lack of references to historyand to theconcept of loss of heritage, understood as a legacy of values to be transmitted, focusing on the non-renewability of culturalheritage that is inexorably compromised by destruction[295].

The destruction of cultural heritage translates into thedestruction of the memory of a people. In a number of cases, the court qualifies the destruction of cultural heritage as a crime of persecution against humanity if these destructive acts are perpetrated with discriminatory intent against a certain cultural

[294] Jokic' (Judgment) IT-01-42/1-S (18 March 2004). The same approach can be noticed within the case Hadzihasanovic and Kubur focusing on the spiritual value of the destroyed religious buildings. See also Prli et al. (Judgment), IT-04- 74-A (29 November 2017) concerning the destruction of the Old Bridge of Mostar (Stari Most) and other religious properties in East Mostar. On this topic FRULLI M., *Substantive Aspects*, Ch.*5 International Criminal Law and the Protection of Cultural Heritage*, The Oxford Handbook of International Cultural Heritage Law, 2021; LENZERINI F. *The role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, in *Enforcing cultural heritage law*, Francioni F. VRDOLJAK A. F. *The Criminalisation of Intentional Destruction of Cultural Heritage*

[295] Ibid see para 46- 58, in particular para 51: *The whole of the Old Town of Dubrovnik was considered, at the time of the events contained in the Indictment, an especially important part of the world cultural heritage. It was, among other things, an outstanding architectural ensemble illustrating a significant stage in human history.71 The shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.72 Moreover, the Old Town was a "living city" (as submitted by the Prosecution)73 and the existence of its population was intimately intertwined with its ancient heritage. Residential buildings within the city also formed part of the World Cultural Heritage site, and were thus protected. Para 52: Restoration of buildings of this kind, when possible, can never return the buildings to their state prior to the attack because a certain amount of original, historically authentic, material will have been destroyed, thus affecting the inherent value of the buildings.*

group. This is what is stated in the Blaskic case, where the Court points out that the systematic destruction of religious institutions dedicated to Muslim worship had the discriminatory intent of erasing cultural identity[296].

The court went even further by stating that the intentional destruction of cultural heritage may indicate an intent to commit genocide. Thus, although cultural destruction is not subsumed under the crime of genocide, which the Geneva Conventiondoes not cover in relation to the destruction of cultural heritage, it may

[296] Prosecutor v Blaški (hereafter Blaški) (Judgment), IT-95-14-T (3 March 2000) para 233: *227. However, persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind. As put forward by the Prosecutor in the indictment against the accused440, persecution may thus take the form of confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to the Muslim population of Bosnia-Herzegovina.*

See also Prosecutor v. Kordic Cerkez, Case IT-95-14/2- T, Trial Chamber, Judgement of 26 February 2001, d. Destruction and damage of religious or educational institutions para 206: *This act is the same as the "destruction or wilful damage done to institutions dedicated to religion", a violation of the laws or customs of war enumerated under Article 3(d) of the Statute. This act has therefore already been criminalised under customary international law and the International Tribunal Statute in particular . Moreover, the IMT, the jurisprudence of this International Tribunal, and the 1991 ILC Report,inter alia, have all singled out the destruction of religious buildings as a clear case of persecution as a crime against humanity. Para 207: This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and wilful damage of institutions dedicated to Muslim religion or education, coupled with the requisite discriminatory intent, may amount to an act of persecution.*

See also Prosecutor v Sainovi et al (Judgment), IT-05-87-T (26 February 2009). Prosecutor v Karad i (Judgment) IT-95-5/18-T (24 March 2016)

constitute evidence of the mens rea requisite to commit genocide as in the Kristi case[297].

In tracing the intentional destruction of cultural heritage through the lens of international courts, it seems appropriate to focus on the Al- Mahdi Case in which the International Criminal Court, for the first time, explicitly recognised the intentional destructionof cultural heritage as a war crime, under article 8, paragraph2, letter e) (Iv) of the Rome statute[298]. In examining the legal dimension of iconoclasm, one can notice once again the link betweencultural

[297] Prosecutor v Krsti , Case IT-98–33-T, Trial Chamber, Judgment of 2 Aug. 2001, para. 580: *where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.* On this topic: FRULLI M., *Substantive Aspects*, Ch.5 *International Criminal Law and the Protection of Cultural Heritage*, ibid; LENZERINI F. *The role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, ibid; NAFZIGER J. A. R., *The responsibilities to protect cultural heritage and prevent cultural genocide*, in The Oxford Handbook of International Cultural Heritage Law, Francesco Francioni, Ana Filipa Vrdoljak, 2020.

[298] Article 8, paragraph 2, letter b) (IX) (international conflict) and letter e) (Iv) (non-international conflict), Rome Statute of the International Criminal Court: 2 *For the purpose of this statute war crime means : (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:. (IX) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;*

destruction and the intent to erase memory[299]; as is the human dimension of cultural property, highlighting the connection of destroyed sites with the local population. This is clear by reading what the prosecutor has stated: "To destroy Timbuktu's mausoleums is therefore to erase an element of collectiveidentity built through the ages. It is to eradicate a civilisation's landmark. It is the destruction of the roots of an entire people, which irremediably affects its social attitudes, practices and structures […]"[300]. What also stands out is the emphasis on rituals and religious and cultural practices surrounding the destroyed heritage sites[301]. If one considers the confirmation of charges within the proceedings, the prosecutor adopts an anthropocentric line, relying precisely on the intangible dimension of destroyed cultural property[302].

Having said that, one has to ask how the development of international jurisprudence fits into the present study. What does

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[299] ELLIS M. S., *The ICC's Role in Combatting the Destruction of Cultural Heritage*, 49 Case W. Re. J. Int'l L. 23 (2017) Available at https: //scholarlycommons.law.case.edu/jil/vol49/iss1/5.

[300] Prosecutor v. Al Madhi, Case No. ICC-01/12-01/15, Statement of the Prosecutor of the International Criminal Court, (Aug. 22, 2016), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822 [https://perma.cc/7MUL-G7NP] [hereinafter Prosecutor's Statement].

[301] FALKOWSKA CLARYS M., MARTINET L., *Keeping the "delicate mosaic" together: can the ICC deal with intangible cultural heritage?* See pg. 89 : *"The tangible and intangible dimensions of the monuments in Al Mahdi maintain a symbiotic relationship. For example, some rituals and practices of the local population, such as the cultural, symbolic and festive crépissage, are directly associated with these holy places. The Trial Chamber was able to factor this aspect in when establishing the material elements of the crime and put forth the 'emotional attachment' to assess the extent of the damage caused within its evaluation of the gravity of the crime for purposes of sentencing".*

[302] See *ICC, Al Mahdi Transcript of the Charges Hearing* (1 March 2016) at 13*: " Let us be clear: What is at stake here is not just walls and stones. The destroyed mausoleums were important from a religious point of view, from an historical point of view and from an identity point of view.* See LOSTAL M. *"The misplaced emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC"* (2017) 1 (2) Intergentes 45.

it add to the debate on the legal boundaries of iconoclasmand the underlying research questions?

First, case law identifies the meaning of intentional destruction. It focuses on the intangible value of cultural heritage. Destroying cultural heritage means affecting its intrinsic value as a link with the identity and the past of a people. The symbolic power of cultural heritage is the target of intentional destruction; according to some authors, it probably drives conflicts[303]. What is also evident is the anthropocentric conception of crimes against cultural property[304]. The value of cultural heritage is measured in relation to its relationship with the community of a people. Indeed, the ICTY case-law shows the connection between crimes against individuals and crimes against cultural property[305]. The same approach in the Al-Mahdi case, as highlighted before, is in relation to the intangible dimension of the destroyed heritage sides. Recognising the destruction of cultural property as a war crime means linking it to a serious violation of humanitarianlaw. The anthropocentric approach is part of the current trend in international practice to link the destruction of culturalheritageto the violation of human rights[306].

The examination of international jurisprudence also reveals the constant link with collective memory: destroying the cultural heritage of a people means destroying its memory[307]. The importance of lost memory is also evident in the reparations established in the judgments the al Mahdi case provides for, as forms of symbolic collective reparations, memorial processes.

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[303] WANKKEO K., *Monumental challenges*, ibid, pg. 189.

[304] On the anthropocentric approach see LOSTAL M., *the misplaced emphasis*, ibid; FRULLI M. *Advancing the protection of cultural property through The implementation of individual criminal responsibility: The case-law of the International Criminal Tribunal for the Former Yugoslavia* 2005,Italian Yearbook of International Law, vol. XV /2005), pp. 195-216.

[305] FRULLI M., *Advancing the protection of cultural property*, ibid, pg. 17

[306] See the previously cited report of Karima Bennoune, Special Rapporteur in the field of cultural rights, HRC, 2016, A/HRC/31/59 at para 47.

[307] BEVAN, *The destruction of memory*, ibid.

Still, the international tribunal of the former Yugoslavia hasbeen involved in the memorialisation of the conflict. The reconstruction of facts within the trials, through oral testimony and evidence, is aimed at recovering the memory targeted through the deliberate destruction of cultural heritage[308]. These memorialisation processes are so important, especially in the phase of reconstruction of cultural heritage. This observation echoeswhat was said in the first chapter of the following study about the link between the construction of cultural heritage, collective memory and international law, in particular on how internationallaw tools can affect the collective memory as well as the narrative behind the construction of cultural heritage.

At this point, it is necessary to reflect on the most critical issues. One has to ask whether this anthropocentric approach effectively protects cultural heritage. Some authors argue that an overemphasis on the intangible aspect of cultural heritage may narrow the area of its protection, excluding those destroyed cultural goods where there is no immediate connection with a given community[309]. For better protection, would it not bebetter to restore a kind of neutrality to cultural heritage by deconstructing the narratives that underlie it? Does the conception of cultural heritage as the bearer of symbols anchored to a certain identity foster the emergence of conflictsaround it[310]? Moreover, by endorsing this anthropocentric conception, isn't there a risk of qualifying all destructive acts as violat ions of human rights?

Another critical issue concerns the inclusion of destroyed siteson the World Heritage List. In the al Mahdi case, scholarshavenoted that there was a convergence of interests between the

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308 SUPPLE, SHANON, *Memory slain: Recovering Cultural heritage in Post -war Bosnia*, Inter Actions: UCLA Journal of Education and Information Studies 2005, 1(2).

309 LOSTAL M., *the misplaced emphasis on intangible*, ibid.

310 GENNARO A. M. *Il mondo salverà la bellezza? Alcune considerazioni sulla distruzione del patrimonio culturale*, L'indice penale, n. 1, 2017

international community, the Court and the Malian State, leading to the prosecution of the cultural crime at the expense of other atrocities[311]. The designation of the destroyed sites ontheworld heritage list facilitated the establishment of the trial before the international criminal court; the fact was part of the broader context of the war on terror[312]. Intervening on behalf of the universal value of the destroyed cultural heritage, therefore, had a symbolic value for the international community. The inscription of the destroyed heritage sites within the World Heritage list has been one of the grounds for establishing the gravity of the crime[313]. At this point, one must ask: would the international community have had the same emphasis if the sites had not been world sites and if the destruction had occurred under different circumstances? As pointed out in the first chapter, there is no shortage of criticism of the listing system, which is seen as highly politicized by some scholars, risking creating a fragmented system of protection by giving greater value to listed sitesthanto others[314]. Moreover, does the universal interest invoked in the judgment really correspond to that of the communities concerned? Research studies point to the misalignment of thelocal communities' interests with the court's priorities, pointing to the fact that it has been given greater prominence to the destruction

311 BA O., *Contested Meanings: Timbuktu and the prosecution of destruction of cultural heritage as war crimes*, African Studies Review, Volume 63, Number 4 (December 2020), pp. 743-762.

312 BA O., *Contested Meanings*, ibid.

313 See judgment para 80*: "Furthermore, all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community […]".*

314 BA. O. ibid, DRUMBL M. A., *From Timbuktu to the Hague and Beyond ,The War Crime of Internationally attacking cultural property*, Journal of International Criminal Justice 17 (2019), 77 -99 see pg. 88; STARRENBURG S., *"Who is the victim of cultural heritage destruction? The Reparations Order in the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi,* EJIL: Talk! Blog of the European Journal of International Law, 25 August 2017.

of cultural heritage by Jihadist groups than other atrocities committed by various non-state groups as well as security state forces. The court has, therefore, eminently political content that is evident in the choice of cases to be judged and the narrative that is intended to give them; political content that in itself is not to be condemned but, as some scholars point out, to legitimize its role it would be appropriate to justify its choices[315]. In the Al-Mahdi case, the International Criminal Court should have motivated why it gave priority to this crime over others and how to balance local and universal interests in the quantification of harms[316]. This discourse fits into the broader debate about what cultural property one decides to protect and according to which criteria. Returning to the broader debate over the legal boundaries of iconoclasm, jurisprudential developments, particularly with regard to the last case, do not provide all the answers sought. This is due to more general legal gaps concerning the topic. For instance, the Al-Mahdi case does not identify the scope in which the criminalization of intentional destruction extends, whether only to tangible property or also to intangible property. In fact, Article 8 of the Rome Statute of the International Criminal Court embraces a notion that is narrowly defined, only including the immovable cultural property[317]. Furthermore, what about deliberate destruction in times of peace? And in the case of "iconoclasm from above", legitimately approved by a government? Article 8 applies only in times of hostilities; there is

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315 DE HOON M., *The ICC's Al Mahdi case is (also) a political trial, and that's fine!* EJIL: Talk! Blog of the European Journal of International Law, 2016. NOUWEN S., M. H.Werner, Wouter G., *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, European Journal of International Law, Vol. 21, no. 4, 2011.

316 HARRINGTON A., *Balancing interests in cultural crimes*, INTLAWGRRLS, 2016.

317 See Rome Statute of the ICC, Art. 8 (2) (e) (iv): Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

no case law on this topic within a peacetime context[318]. Legal vacuums are also found in the difficulty of recognizing the intentional destruction of cultural heritage intended to eradicatea given community as cultural genocide.

Further open questions emerge by interweaving intentional destruction with transitional justice when memory issues around the cultural heritage express the need for politicalchange[319]. Isthe destruction of cultural heritage to be condemned a priori, as appears unequivocally in the Al-Mahdi case?

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[318] BAGOTT P-L.: *How to solve a problem like Al Mahdi: proposal for a new crime of "attacks against cultural heritage";* GOTTLIEB Y., *Attacks against Cultural Heritage as a Crime Against Humanity*, 52 Case W. Re. J. Int'I L. 287 (2020); DRUMBL M. A., *From Timbuktu to the Hague and Beyond ,The War Crime of Internationally attacking cultural property.*

[319] DRUMBL M. A., *From Timbuktu to the Hague and Beyond ,The War Crime of Internationally attacking cultural property*, ibid pg. 98 : *"What about the toppling of Saddam Hussein's statue in Baghdad ç one of the iconic images of the Iraq war ç and which served no military advantage whatsoever? Would that become a war crime? What about the dismantling, gouging, and removal of all those statues to Lenin and Stalin that occurred in post -communist transitions throughout Eastern Europe? Were the Czechs and Poles, and many others, under a duty to preserve these monuments and keep them in place?[…] How to distinguish intentional attacks on Sufi shrines by Salafists, declared a crime in Al Mahdi and condemned in The Hague? How to analogize? Who to convict? Who not to charge? Following the Al Mahdi case, it may be that the international legal imagination offers less in the way of support for toppling and destroying cultural property which comes to be seen in the prevailing Zeitgeist as offensive, degenerate, or abusive."* POSNER E.A. , *'The International Protection of Cultural Property: Some Skeptical Observations'* (University of Chicago Public Law & Legal Theory Working Paper No. 141, 2006): *"'The history of iconoclasm is long: are all iconoclastic movements to be condemned because they destroy cultural property?".* LIXINSKI L., *Confederate monuments*, ibid.

4. The destruction of cultural heritage as a threat to peace? The role of the UN Security Council.

Another side of the legal dimension of cultural heritage worthyof study is the "securitization of cultural heritage", which means conceiving the intentional destruction of cultural heritage as a threat to international security and peace. This trend came out as a legal result of the international practice following destructive events over the past 20 years, particularly as a response to the iconoclastic acts of so-called cultural terrorism. This led to an increasing role in the UN Security Council, whose resolutions helped to define the legal dimension of iconoclasm. As said inthe previous paragraph, even the UNSC practice shapes thecollective memory in selecting the narrative of certain events. The intentional destruction of cultural heritage becomes at the centre of a series of resolutions through a securitization process.

Since the end of the II World War, the concept of security hasbeen dominating the political agendas of the States; for instance, it becomes a key element in understanding the geopoliticalbalances between the United States and the Soviet Union during the cold war. Indeed, a structured theory on security within international relations arose with the beginning of the Cold war, starting from the Copenhagen School, thanks to which security studies have acquired an autonomous academic undertaking[320], defining "the securitization process". Within this process, the political power

[320] On security studies see: CHARRETT C., *A Critical Application of Securitization Theory: Overcoming the Normative Dilemma of Writing Security*, INTERNATIONAL CATALAN ISTITUTE FOR PEACE, 2009. BARRY BUZAN, PEOPLE, STATES & FEAR, 1991. BALDWIN D. A., *Security studies and the end of the cold war*, WORLD POLITICS, Vol.48, No. 1, 1995. According to the author, three different phases can be identified within the security theory: the interwar period, the cold war and the post-cold war phase. Within the interwar period, it is possible to notice preliminary studies on security, whose the focus was on how to eliminate wars and achieve international peace by empowering national security and democracy.

grants the status of "security issue" to a threat for an existential value. Calling a security problem as a strong threat against the sovereignty or independence of a state. This enacts the adoption of extraordinary measures by the state that adopts arealnarrative by turning a particular issue into a security threat. The securitization process is indeed a social construct[321].

Within the post-Cold War, the scope of security issues has been gradually expanded, not only including the military security characterizing the previous historical phase but also other security issues. Among these new ones arose the intentional destructionof cultural heritage conceived as a threat to security and international peace. This securitization of cultural heritage is evident if one considers the primacy of The UN Security Council over UNESCO, to whom it falls more a role of coordination[322]. Several resolutions have been approved on the subject, starting from Resolution 1214 (1998) concerning the situation in Afghanistan[323].

Within the UNSC resolutions, the protection of cultural heritage is inserted in the context of armed conflict and cultural terrorism to the point of acquiring an autonomous significance as athreat to international peace and security. The action of the Security Council has been addressing two issues, namely the intentional

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321 WAEVER O., *Securitization and Desecuritization*, chapter 3, *ON SECURITY* by Ronnie D.: *"We can regard security as a speech act. In this usage, security is not interest as a sign that refers to something more real; the utterance itself is the act. By saying it, something is done (as in betting, giving promise, naming a ship). By uttering security, a state-representative moves a particular development into a specific area, and thereby claims a special right to use whatever means are necessary to block it."*

LIPSCHUTZ, HOLGER, STRITZEL, *Towards a Theory of Securitization: Copenhagen and Beyond*, EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS, (2007), p. 360 *:"…The articulation of security entails the claim that something is held to pose a threat to a valued referent object that is so existential that is legitimate to move the issue beyond the established games of normal politics , to deal with it by exceptional, i.e. security, methods".*

322 LENZERINI F., *Intentional destruction of cultural heritage*, ibid.

323 See on the link http://unscr.com/en/resolutions/doc/1214 .

destruction and illicit traffic that is out of topic, accordingly, Chapter VII of the UN Charter[324]. The first resolution, including the protection of cultural heritage, is Resolution 1483, in 2003, on the conflict between Iraq and Kuwait[325]. Other resolutions concern the fighting against ISIL in Iraq and Syria[326]. It can be noticed in paragraphs 15 and 17 of Resolution 2199 (2015): "Condemns the destruction of cultural heritage in Iraq and Syria particularly by ISIL and ANF, whether such destruction is incidental or deliberate, including targeted destruction of religious sites and objects; "Reaffirms its decision in paragraph7 of resolution 1483 (2003) and decides that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011 […]".

The resolution of the Security Council that undoubtedly marks an important step forward in the protection of cultural heritage isthe

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[324] See namely article 39 and 41 of the UN Charter, Chapter VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression "; article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. Article 41:

[325] UNSC Resolution 1483 (2003) of 22 May 2003, Preamble para. 7 : " *Decides that all Member States shall take appropriate steps to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of resolution 661 (1990) of 6 August 1990, including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed, and calls upon the United Nations Educational, Scientific, and Cultural Organization, Interpol, and other international organizations, as appropriate, to assist in the implementation of this paragraph"*.

[326] UNSC Resolution 2170 (2014) of 15 August 2014. UNSC Resolution 2199 (2015) of 12 February 2015. UNSC Resolution (2015) of 12 February 2015. UNSC Resolution 2253 (2015) of 17 December 2015.

number 2347 (2017). This is the first resolution exclusively dealing with the intentional destruction of cultural heritage and illicit traffic within armed conflicts and terrorism[327]. It seems appropriate to quote part of the preamble from whichit is possible to derive the meaning of intentional destruction: " […]the unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts, notably by terrorist groups, and the attempt to deny historical roots and cultural diversity in this context can fuel and exacerbate conflict and hamper post-conflict national reconciliation, thereby undermining the security, stability, governance, social, economic and cultural development of affected States". Even the Security Council links intentional destruction to the destruction of historical roots and cultural diversity, conceiving of it as destabilizing the security of a state.

Moreover, it is worth mentioning paragraph 5, according to which the UN Security Council: "Stresses that Member States have the primary responsibility in protecting their cultural heritage and that efforts to protect cultural heritage in thecontext of armed conflicts should be in conformity with the Charter, including its purposes and principles, and international law, and should respect the sovereignty of all States"[328].

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[327] Approaches taken by the Security Council to the Global Protection of cultural heritage: an evolving role in preventing unlawful traffic of cultural property

[328] See also paragraph 16 : Also encourages Member States to take preventive measures to safeguard their nationally owned cultural property and their other cultural property of national importance in the context of armed conflicts, including as appropriate through documentation and consolidation of their cultural property in a network of "safe havens" in their own territories to protect their property, while taking into account the cultural, geographic, and historic specificities of the cultural heritage in need of protection, and notes the draft UNESCO Action Plan, which contains several suggestions to facilitate these activities;

19 : "Affirms that the mandate of United Nations peacekeeping operations, when specifically mandated by the Security Council and in accordance with their rules of engagement, may encompass, as appropriate, assisting relevant authorities, upon their request, in the protection of cultural heritage from destruction, illicit excavation, looting and smuggling in the context of armed conflicts, in

Coming back to explore the legal meaning of iconoclasm, fromthe exam of UNSC practice, it can be noted that member states must also intervene in third states to safeguard cultural heritage. The international community has a duty to protect cultural heritageat risk or in times of conflict. The following aspects emerge anotion of "world cultural heritage", which belongs to humanity. In the name of a universal concept of cultural heritage, the international community has a corresponding duty to protect cultural heritage. The Security Council, therefore, embraces the internationalist approach by conceiving the intentional destruction of cultural heritage as a global threat. A second profile concerns questioning the principle of territorial sovereignty and a state-centric vision related to cultural heritage. Member states have a duty to circumvent this classical principle when cultural heritage is under threat. This topic foreshadows "the responsibility to protect cultural heritage", the subject of the next paragraph.

As said before, the securitization process leads to the adoptionof extraordinary measures. The same happened with the destruction of cultural heritage conceived as a security threat. On the one hand, it has strengthened bilateral cooperation betweenstatesand revived cultural diplomacy. In this last regard, it is relevant to mention the first G7 meeting of Ministers of culture held in Florence in March 2017, leading to a joint declaration on "Culture as an instrument for dialogue among Peoples"[329]. In some passages of the document, the States Parties have unanimously condemned the destruction and the illicit trafficking of cultural

collaboration with UNESCO, and that such operations should operate carefully when in the vicinity of cultural and historical sites

[329] See joint declaration on "Culture as instrument for dialogue among Peoples", paragraph 5 and 6*: "We express our deep concern at the ever-increasing risk, arising not only from terrorist attacks, armed conflicts and natural disasters but also from raids, looting and other crimes committed on a global scale, to cultural heritage and all related institutions and properties, such as museums, monuments, archaeological sites, archives and libraries"; "We express our deep concern about the destruction of cultural heritage sites, as such actions obliterate irreplaceable patrimony, extinguish the identity of targeted communities and erase any evidence of past diversity or religious pluralism"*;

heritage, perceived as increasing security issues and global risks to deal with. Still, in relation to this topic, it is worth mentioning the bilateral cooperation between France and the United Arab Emirates: in 2015, a conference between the two countries was held in Abu Dhabi with the aim of creating an international network of safe havens. Within this framework of bilateral cooperation, in 2017, one can mention the creation of an international fund in the form of a public-private foundation, whose purpose was to attract and manage resources for the implementation of preventive and emergency protection programmes for cultural property in danger . Another example regards the French Act on the Freedom of Creation, Architecture and Heritage in 2016, which aimed to incorporate the security practice of a safe haven for cultural properties endangered by armed conflicts and terrorism. A further effect of the UNSC practice is the establishment of a task force (under the initiative Unite4heritage) based on the agreement between the Italian Government and UNESCO, with the purpose of protecting cultural heritage in risky zones.

What is relevant is the peacekeeping in Mali, including a cultural component for the first time, established by the UNSC resolution 2100 of 25 April 2013, with the purpose of supporting the political process, the transitional authorities, and helping stabilize Mali[330]. Scholars have defined it as "robust peacekeeping" since it achieves wider aims that go beyond what the UN Charter Chapter 7 initially provided for.

Summing up, a reading of the practice shows that targeting cultural heritage does not only mean destroying the memoryof a specific cultural expression but also destabilizing international security.

There is no shortage of controversial aspects that do not help to answer the research questions regarding the legal boundaries of iconoclasm. First of all, the scope of application of the UNSC

[330] MINUSMA : The United Nations Multidimensional integrated Stabilization Mission in Mali.

resolutions (particularly number 2347): the resolutions refer exclusively to armed conflicts or terroristic acts. There is no reference to the intentional destruction of cultural heritage in times of peace or in the case of "iconoclasm from above". Still, the focus of these resolutions is exclusively the tangible cultural heritage. Another critical issue concerns the binding nature of the measures contained in the resolution. While resolutions 2199 and 2153 (2015) have been adopted pursuant to Chapter VIIof the UN Charter providing compulsory measures for the States, this has not happened with resolution 2347 (2017), which is exclusively on cultural heritage. Moreover, looking at the terminologydeployed in relation to the measures to adopt, there are more recommendations for states than binding measures[331].

It can, therefore, be stated that the analysis of the normative framework and the jurisprudence of the international courts arrive at similar results in relation to the topic of intentional destruction.

5. Cultural heritage destruction as a transitional justice issue?

The previous section has examined the deliberate destruction of cultural heritage, taking place during armed conflict or under a terroristic action conceived as a threat to international peace and security. However, cultural heritage and peace are also linked in the reconstruction phase of a society within a post-conflict scenario. This connection is also evident from the side of the destruction of cultural heritage. In investigating the legal

[331] URBINATI S., *La risoluzione 2347 (2017): il Consiglio di sicurezza e la difesa dei beni culturali in caso di conflitto armato. Molto rumore per nulla?!*

boundaries of iconoclasm, it seems appropriate to focus also on the intentional destruction of cultural heritage during transitional changes aimed at building new narratives that give voice to political changes. According to some scholars,[332] this side of intentional destruction might find its legal ground through the lens of transitional justice. Before going into depth on this path, it seems noteworthy to speak more generally about the intersection between cultural heritage and transitional justice[333].

Cultural heritage intersects with that of transitional justice, understood as a set of judicial and extrajudicial mechanisms aimed at facilitating the reconstruction of a society with the purpose of overcoming a hostile past (such as a dictatorship or conflicts)[334]. In the context of transitional justice, issues of memory persist: on the one hand, there is the need to assert the right to truth, understood as a truthful reconstruction of the past in order not to forget and as a guarantee of non-repetition[335]. On the other hand, there is the need to assert the right to forget in order to overcome the oppressive past. Cultural heritage lends itself well to these antithetical instances; it becomes an essential tool for the reconstruction of a new political identity withinpost- conflict scenarios or transitional contexts.

The intersection between transitional justice and culturalheritage comes into play in many ways. For example, in the al-Mahditrial, the intentional destruction of cultural heritage, as a transitional justice issue, was a source of reparation both in terms of economic compensation for the damages suffered by the international

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[332] LIXINSKI L., *Confederate Monuments and International Law*, ibid. LIXINSKI L., *Erasing or Replacing Symbols* in Legalized Identities: Cultural Heritage law and the shaping of transitional justice, Chapter 4, ibid.

[333] On this topic, see VRDOLJAK A. F., *Cultural Heritage, Transitional Justice, and Rule of Law* in the Oxford Handbook of International Cultural Heritage Law, 2020.

[334] RUTI TEITEL G., *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, (2003).

[335] VRDOLJAK A. F., *Cultural Heritage, Transitional Justice, and Rule of Law, ibid.*

community and local community (including moral harm). Aswell as in terms of rehabilitation through the adoption of specific measures as memorials or commemorations, aimed at overcoming the suffered trauma[336].

A second dimension, irrespective of intentional destruction, concerns the processes of memorialisation of certain heritagesites through the inscription on the world heritage list, whichfulfilsthe guarantee of non-repetition and reconstruction of the truth. Examples are the concentration camp of Auschwitz-Birkenau, listed in 1979, or the Hiroshima Peace Memorial Park, listed in 1996, as evidence of historical fact and with the message that it will no longer occur[337].

However, as stated above, in transitional contexts, erasure claims are very frequent from the side of a community concerning "difficult pasts" that spill over into cultural heritage, either through the demand to remove certain heritage sites or to attribute new narratives to them. This is where the connection between intentional destruction and transitional justice claims comes into play. In this case, too, it is possible to speak about "heritage iconoclasm". Well, it seems important to examine the phenomenon of heritage destruction, taking into account not only destructive acts associated with violations of human rights that are aimed at erasing certain cultural identities but also linked to the so-called "difficult heritage[338]" that represents difficult

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[336] Ibid; see Prosecutor v. Al Mahdi (Reparation Order) ICC-01/12- 01/15 (17 August 2017); see also paragraph 2 of the chapter.

[337] LIXINSKI L., *Confederate Monuments and International Law*, ibid. VRDOLJAK A. F. ibid. See also the first chapter of the following contribution.

[338] "Difficult heritage" is also a form of "dissonant heritage"; to distinguish the two terms see CARTER N. , SIMON M., (2019), *Dealing with difficult heritage: Italy and the material legacies of Fascism*. Modern Italy. 24(2), pp. 117-122. https://doi.org/10.1017/mit.2019.16 . CASSESE S., *Lo stato fascista*, il Mulino ,(2010), pg. 24: *"While dissonant heritage focuses on disputes over how the past is presented and commodified for public consumption (for example, in museums, exhibitions, and heritage sites), 'difficult heritage' is more concerned with questions of legacy and reception: how a society deals with the physical*

historical pasts; destructive acts aimed to create new political narratives. Due to the preservationist approach that characterises international law, this side of transitional justice linked to claims for the removal of monuments has had little room for investigation[339]. However, the law is decisive in not only authorising and selecting which heritage to preserve but also in authorising their removal/destruction[340]. Indeed, at thedomestic level, there is no shortage of references to regulations providing for the removal or destruction of heritage with the meaning of erasing problematic pasts. The post-Soviet case, under "Decommunisation" policies, is an example of the use of law in attributing new narratives through the cultural heritage. In Ukraine, the law "on condemning the communist and National-socialist totalitarian regimes and prohibiting the use of their symbols"[341] has established a program of removal and destruction of monuments that celebrate the Soviet regime. In contrast, Hungary did not destroy the Soviet monuments but simply relocated them to another part of the city by building a memorial park[342].

Instead, if one considers the dissonant heritage in South Africa, one can cite the case of the Cape Floral Region Protected Areas (CFRPA), which was inscribed on the World heritage list in 2004 as an expression of natural biodiversity[343]. Without erasing the monument, the historical aspect that links it to apartheid, more

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reminders of a discredited – and often very recent – past; and how (and why) that relationship changes over time.

[339] LIXINSKI L., *Confederate Monuments and International Law*, ibid.

[340] LIXINSKI L., *Erasing and replacing symbols,* in Legalized identities in the shaping of transitional justice, ibid.

[341] Law No.2558, on May 15, 2015. See LIXINSKI L., *Confederate Monuments and International Law, ibid.* DRUMBL M. A., *From Timbuktu to the Hague and Beyond, The War Crime of Internationally attacking cultural property*, ibid.

[342] DRUMBL M. A., *From Timbuktu to the Hague and Beyond ,The War Crime of Internationally attacking cultural property*, ibid.

[343] UNESCO World Heritage List Entry - Cape Floral Region Protected Areas, http://whc.unesco.org/en/list/1007.

specifically in relation to the hedge inside it, which was historically a barrier between indigenous communities and the Dutch colonizers, it has been put on the back burner, emphasising its natural side. This iconoclasm, thus, expresses itself in different ways, not necessarily with the physical destruction of the monument but simply by changing the meaning it symbolises.

The same debate has been investing the Italian fascist cultural heritage, concerning how contemporary Italy has come to terms with this "difficult heritage"[344]. In the light of Italian cultural heritage, where the "preservationist impulse" is very prominent and the destruction of monuments is forbidden[345], onecanchange historical narratives or the meanings of problematic monuments without requiring their destruction[346]. Even problematic monuments (such as fascist ones) adapt to the evolution of a society's identity, still preserving their tangible dimension. Under Italian law, cultural property, including problematic monuments), is recognized as such according to a seriesof criteria: aesthetic, archaeological, artistic, and not only historical. In addition, even this last criterion has a broad scope and is not strictly linked to Italian identity history. This helps to consider the cultural value of a cultural good as a whole with the right distance

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[344] JOSHUA A., *Fascism as "Heritage" in Contemporary Italy*, in Italy Today: The Sick Man of Europe 114 (Andrea Mammone & Giuseppe A. Veltri eds., 2010).BARTOLINI F., *From Iconoclasm to Museum: Mussolini's Villa in Rome as a Dictatorial Heritage Site.* STONE M. S., *The Patron State: Culture and Politics in Fascist Italy* Paperback – International Edition, August 31, 1998. CARTER N., SIMON M., (2019), *Dealing with difficult heritage: Italy and the material legacies of Fascism*. Modern Italy, ibid.

[345] See article 20, Italian Code of Cultural Property: *"[c]ultural property cannot be destroyed, [allowed to] deteriorate, damaged or designated for uses that are not compatible with their historic or artistic character or are such that would prejudice their conservation".*

[346] CAPONIGRI F., *Malleable monuments and comparative cultural property law: The Balbo monument between the United States and Italy*, I•CON (2021), Vol. 19 No. 5, 1710–1737, https://doi.org/10.1093/icon/moab136

from its historical narratives[347]. In addition, the passage of time that is necessary to classify a good as cultural helps to recognise the cultural value of a problematic monument through greater neutrality[348].

Memory issues and claims of removal with the purpose of erasing a contested past occur in recent debates in considering the case study of Confederate monuments in the United States[349]. These monuments celebrate a pre-civil war culture belonging to the Confederacy, which represented the southern states defeated in the Civil War. The confederacy culture embraced an economic model based on the exploitation of enslaved African-Americans. For that reason, these monuments are deemed racist. Of course, protests are encouraged by the subaltern condition that African-American still have in the current American society. Within the civil society, distinguish those who support the retention of the monuments by invoking the argument of their historical importance and those who instead argue for removal dueto their racist significance. These memory contestations are even more understandable when one considers the importance attached to historical value and the link to American identity in legally recognising cultural property[350]. Overall, many confederate statues have been removed. However, one should notice several state legislatures prohibiting the removal or alteration of Confederate monuments, like in North Carolina[351]. More generally, these instances of removal can be read as part of a

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[347] CAPONIGRI F., *Malleable monuments and comparative cultural property law: The Balbo monument between the United States and Italy*, Ibid.

[348] Ibid.

[349] PEROT BISSEL V., *Monuments to the Confederacy and the Right to destroy in Cultural-Property Law*, ibid. LIXINSKI L., *Confederate Monuments and International Law*, ibid. FORMAN J., *Removing the Confederate Flag from Southern State Capitols*, The Yale Law Journal, Vol. 101, No. 2 (Nov.1991).

[350] BRONIN S. C. & ROWBERRY R., *National Historic Preservation Law in a Nutshell* 50 (2d ed. 2018).

[351]See SL 2015-170 (Cultural History Artefact Management and Patriotism Act of 2015).

broader phenomenon originating in the United States, namely 'the cancel culture', a social phenomenon arising from social mediaas a form of ostracism against those who express morally deplorable judgements[352]. The term was subsequently extended to include the forms of iconoclasm just described that challenge difficult cultural heritage, such as the confederate monuments[353].

In this overview of examples, one can see how complexand varied the phenomenon of iconoclasm is, especially when it is tied to heritage sites that represent "dissonant heritage". As stated before, iconoclasm around difficult heritage can be expressed in different forms: tangibly destroying the monument, relocating it to another space, or simply changing the narrative attributed to it. Some authors speak of the "malleability" of the monument, meant as its adaptability to identity changes in a society[354]. This malleability changes according to public preservation policies and each country's cultural lens: it can give a new narrative to cultural property through its removal or relocation or without affectingits structure permanently.

That said, from a legal point of view, a comparative study of the various public policies might help to enrich the legal instruments aimed at resolving these memory debates affecting cultural heritage. Nevertheless, what is the perspective of international law, and how does it relate to the different domestic laws? How does the international perspective shape domestic law and vice versa? What has been the impact of these policies? In the case of Ukraine, for example, has the removal of monuments fomented radical ideologies?[355]

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[352] NORRIS P., *Cancel culture: Myth or reality?* Political Studies, 1-30, 2021.

[353] CHOMSKY N. *Warns against 'cancel culture' establishing itself in the United States*, http: https://paradoxpolitics.com/2021/02/noam-chomsky-cancel-culture-harpers-letter/.

[354] The expression "Malleable monuments" has been used in CAPONIGRI F., *Malleable monuments and comparative cultural property law*, ibid.

[355] LIXINSKI L., *Confederate Monuments and International Law*, ibid.

Indeed, drawing conclusions from the analysis conducted, taking into account the current legal framework, the UNSC practice and the judicial evolution of international courts, the "preservationist impulse" would be dominant, and there would be no room for any iconoclastic act, especially if intentional destruction has recently been recognised as a violation of human rights[356], as mentioned in the previous paragraphs. On this point, the general questions that run through the chapter return, questioning whether all iconoclastic acts can be placed on the same level and criminalised. Should claims of difficult heritage removal prevail over "classical" instances of preservation? What significant factors might excuse this kind of intentional destruction? Could transitional justice really be the right legal ground for understanding the destruction or removal of monuments to express political changes and forget difficult pasts? In addition, how can we distinguish iconoclastic acts to be condemned aswar crimes from forms of intentional destruction such as those in relation to difficult heritage[357]?

[356] Report of the special rapporteur Karima Bennoune in the field of cultural rights for the United nations council on human rights, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/254/44/PDF/N1625444.pdf?OpenElement

[357] On these heritage challenges see DRUMBL M. A., *From Timbuktu to the Hague and Beyond ,The War Crime of Internationally attacking cultural property*, ibid. pg. 98-99. See also POSNER E. A., *The International Protection of Cultural Property: Some Sceptical Observations*, ibid.

6. A R2P doctrine applied to cultural heritage destruction?

In this conclusive paragraph, it seems appropriate to reflect onthe role of international law in protecting cultural heritage through the concept of sovereignty as a responsibility, both of individual states and of the international community as a whole[358]. More specifically, one should challenge the concept of state sovereignty and its limits in the face of a growing international legal body in the field of cultural heritage.

In the preceding paragraphs, it has been shown that the phenomenon of deliberate destruction is highly diverse. The responsibility of states and the international community should, be modulated according to the different nature of destructive acts under consideration. One should consider a responsibility in relation to intentional destruction accompanied by the intent to destroy certain cultural identities. Second, there is a responsibility within transitional contexts, both in relation to the cultural heritage to be reconstructed and in relation to those iconoclastic acts meant to erase a difficult past.

It has also shown how the scenario changes completely if the deliberate destruction takes place in wartime or differently in peacetime. While wilful destruction in wartime is wellrecognised, there is no unanimity within the international discourse on the existence of an international norm prohibiting wilful destruction in peacetime and thus implying a prohibition against individual states destroying cultural heritage located on their own territory. As said before, in cases of iconoclasm from above, it becomes more complex to challenge the classic principle of state sovereignty. Proof of this is the ongoing cultural destruction in Myanmar's Rakhine state, to which the international community lacks an effective response. The same can be said about the

[358] Responsibility in terms of responsibility to protect cultural heritage. SEE LENZERINI F., *Intentional destruction of cultural heritage*, ibid: "State responsibility for intentional destruction of cultural heritage may also be conceived in terms of responsibility to protect (R2P) such heritage".

destruction of the Buddhas of Bamiyan in Afghanistan, wherethe unanimous condemnation by the international community, which also spoke of cultural crimes, had the taste of pure rhetoric, as pointed out by some scholars[359]. Consequently, the responsibility of individual states and the international community must be calibrated not only by taking into account the different nature of the various forms of iconoclasm but also the context inwhichthey take place (wartime- peacetime).

Nevertheless, the discourse on responsibility should take into account the evolving meaning of state sovereignty. State sovereignty should be meant as "The legal identity of a state in international law" or "the capacity to make authoritative decisions with regard to the people and resources within the territory of the state[360]". State sovereignty, thus, is conceived asa principle of international law granting equality between states and the international order. However, it is not an absolute principle since it encounters limits dictated by the rule of law: it is constrained internally by constitutional power and externally by international obligations. Sovereignty is no longer conceived only as control over territory and protection of borders but also as "responsibility" towards its citizens, as well as the international community. This shifting meaning of sovereignty is also due to the increasing importance of humanitarian law and human

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[359] LOSTAL M., *The misplaced emphasis on the Intangible Dimension of Cultural Heritage*, ibid, pg. 56: *"One statement in particular deserves attention here. The destruction of the Buddhas led the then-UNESCO Director-General, Koïchiro Matsuura, to speak of "crimes against culture". This was pure rhetoric. Firstly, the destruction of the Buddhas happened during peacetime and there is no crime against cultural heritage enforceable outside armed conflict, at least at the international level. Secondly, Afghanistan deposited its instrument of accession to the ICC Statute on 10 February 2003 and, in principle, the Court could only start exercising jurisdiction over crimes committed on its territory or by its nationals after 1 May 2003".*

[360] ICISS (International commission on intervention and state sovereignty), *The responsibility to protect, Report of the International commission on intervention and state sovereignty*. See also UN Charter, article 2.1

security rather than military security within international relations, as noted in the previous paragraphs[361].

It is on these premises that the doctrine of the responsibility to protect was developed. It was introduced by a commissionreport in 2001, at the initiative of the Canadian government, with the intention of regulating humanitarian intervention after the failed experiences of the 1990s. The R2P was subsequently framed within the UN framework with the World Summit Outcome Document approving the responsibility to protect from genocide, war crimes, ethnic cleansing and crimes against humanity[362]. The responsibility to protect one's own population is twofold, being borne not only by states but also by the international community, which has a subsidiary obligation to intervene, even militarily, if the state fails to do so. It is an example of a global modelwhereby the international community can apply measures that erode the sovereignty of individual states in the name of humanitarian intervention and solidarity between states[363].

In the light of the considerations on "sovereignty as responsibility", would it be possible to apply the responsibilityto protect the protection of cultural heritage from intentional destruction, also overcoming the issues of the current legal framework, especially in relation to peace contexts? This is a question that we should wonder, especially in view of theanalysis

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361 Ibid. See also the paragraph on securitization of cultural heritage.

362 UN General Assembly Resolution 60/1 (2005), paras. 138-139. *The R2P is based on three pillars:1) each state has the responsibility to protect its populations from said crimes; 2) the international community has the responsibility to assist States in fulfilling their R2P; 3) when a state manifestly fails to fulfil its own R2P, the international community has the responsibility to take timely and decisive action through peaceful diplomatic and humanitarian means and, if that fails, through other more forceful means, including the use of military force.* See UN General Assembly, *'Implementing the responsibility to protect. Report of the Secretary-General'*, Doc A/63/677, 12 January 2009, para 11.

363 CASINI l., *Lo stato nell'era di Google*, Rivista trimestrale di diritto pubblico 2019, n. 4.

carried out on international practice and international case law, where the human dimension of cultural heritage and its securitisation process emerge in an overwhelming way. If so, what limits would it encounter? Could it apply to all iconoclastic acts? How would responsibility towards a third state translate into humanitarian assistance or even military intervention? Can the international community intervene when the government in charge explicitly orders such destruction?

To address these questions, it would be appropriate to start with the UNESCO "Expert meeting on the Responsibility to Protect and the Protection of Cultural Heritage", which took place inParis (2015) as a reaction to the intentional destruction in Iraq and Syria[364]. From the reading of the UNESCO recommendations resulting from this expert meeting, it should be noted that the principles of the responsibility to protect are transposed to the protection of cultural heritage. First, It is possible to notice an emphasis on the possible connection of intentional destruction with the gross violations of human rights, conceived as an "aggravating factor of armed conflict"[365]. It emerges once again the human dimension of cultural heritage: protecting cultural property means "the protection of the living culture of populations and humanity"[366]. Finally, a twofold responsibility to

[364] Expert meeting on the "responsibility to protect" and the Protection of Cultural Heritage, Recommendations, 21 November 2015 https:www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/ R2P-Recommendations-EN.pdf

[365] Ibid, paragraph 2-3, preamble: *"Noting that acts of intentional destruction and misappropriation of cultural heritage can constitute war crimes and crimes against humanity, can indicate genocidal intent, and are frequently associated with ethnic cleansing and its accompanying 'cultural cleansing', "Noting further that the intentional destruction and misappropria tion of cultural heritage and the violation of cultural rights are aggravating factors in armed conflict and represent major obstacles to dialogue, peace and reconciliation".*

[366] Paragraph 4, preamble: *"Emphasizing that the ultimate objective of protecting cultural heritage is the protection of the living culture of populations and humanity, of human rights and dignity, and of the interests of past and future generations".*

protect cultural heritage arises a responsibility of each territorial State, a responsibility of external actors (UNESCO member States and the UNESCO secretariat) to assist a third State through bilateral or multilateral cooperation, and with the adoption of appropriate measures such as the establishment of safe havens and cultural protected zones[367]. There is no reference to the military intervention included in the third pillar. Thus, two conditions must be satisfied to apply the RTP model: the iconoclastic acts should result in gross violations of humanrights. It would seem necessary to adopt a universalist conception of cultural heritage, the protection of which from intentional destruction constitutes an *erga omnes* obligation.

Nevertheless, what would be the benefit of applying the R2P model to the field of cultural heritage? What does it add? In fact, the legal framework already foresees responsibilities for individual states and the international community if considering the 1954 Hague Convention for the protection of cultural property, calling on state parties to implement preventive safeguards for cultural heritage within their bordersand to refrain from damaging cultural heritage in other states. Safe havens and culturally protected zones have come up within this convention[368]. The same can be said in relation to the 1970 Convention for the Protection of Cultural Property and Preventing the Illicit Import, Export and Transfer of Ownershipof Cultural Property, where Member States have prevention obligations. Finally, the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage provides the international community with an obligation to protect cultural heritage.

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[367] Ibid, paragraph 1-3. See VON SCHORLEMER S., *The Usefulness of the "Responsibility to Protect" as Applied to the Protection of Cultural Heritage in Armed Conflict.*

[368] See paragraph 5 of the Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

However, according to some scholars, the R2P model would strengthen the legal framework in terms of implementationand a better commitment to the international community and states with the establishment of protecting measures on a globalscale. It would give a legal ground to the international community in intervening where these cultural crimes occur, whenever a State fails to protect its own cultural heritage.[369] Indeed, the core-principles of the RTP (responsibility to prevent, to react, to rebuild) would fit well with the protection of cultural heritage both in conflict and post-conflict scenarios[370]. Moreover, other authors argue that the UNESCO recommendations may beagood basis for filling legal gaps regarding cultural genocide. Indeed, in some cases, the destruction of cultural heritage is a foreshadow of impending humanitarian crises[371]. According to the UNESCO recommendations, if the ultimate objective of protecting cultural heritage is to protect human lives, destroying it would mean eradicating the identity of a particular group. On this basis, by giving independent significance to cultural destruction, thislatter could amount to the crime of cultural genocide in itself and not simply be evidence of genocide[372]. The R2P mechanism could be

[369]VON SCHORLEMER S., *The Usefulness of the "Responsibility to Protect" as Applied to the Protection of Cultural Heritage in Armed Conflict* ; WEISS T. G., CONNELLY N., y (2019) *Protecting cultural heritage in war zones*, Third World Quarterly, 40:1, 1-17, DOI: 10.1080/01436597.2018.1535894. LENZERINI F., (2016) *Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage*, The International Spectator, 51:2, 70 -85, DOI: 10.1080/03932729.2016. 1155028; NAFZIGER J. A. R., *The responsibilities to protect cultural heritage and prevent cultural genocide, The Oxford handbook of international Cultural Heritage Law*, FRANCIONI F., VRDOLIAK A. F.

[370] WEISS T. G., CONNELLY N., y (2019) *Protecting cultural heritage in war zones*, ibid, pg. 5.

[371] VON SCHORLEMER S., *The Usefulness of the "Responsibility to Protect" as Applied to the Protection of Cultural Heritage in Armed Conflict*, ibid.

[372] NAFZIGER J. A. R., *The responsibilities to protect cultural heritage and prevent cultural genocide*, The Oxford handbook of international Cultural Heritage Law, ibid

instrumental in bypassing the territorial sovereignty of those states that commit gross violations.

However, within the international practice, are there any examples of RTP extension to cultural heritage? Although not explicitly invoked, examples include the establishment of asylum areas. These shelters are aimed "to care for cultural material that has been endangered by armed conflict, natural disasters, illegal excavation, or other insecurity and has therefore been removed for safekeeping and preservation from the territory of thesource state or to a place of safety in the source state"[373]. The safehaven, thus, can be external to the source State or internal concerning a place of safety in the source state. Consider the outcomes of the bilateral cooperation between France and UAE, already mentioned in the previous paragraphs, which led to a networkof safe havens at an international and domestic level[374]. At the domestic level, The Swiss Federal Law[375] on the protection of cultural objects in the event of armed conflict, disaster and emergency situations is also a good example in that respect, providing the establishment of safe havens through bilateral cooperation between the Swiss Federal Council and the requesting State[376]. In addition, there is no lack of examples of non-state actors taking preventive measures, such as the British Council[377], in collaboration with the British Museum and the Department for Digital, Culture, Media and Sport, providing a

[373] Taken from " Guidelines for the Establishment and conduct of Safe havens for Cultural material" adopted by the International Law Association's (ILA9 Cultural Heritage Committee) in 2008, implemented by UNESCO recommendations.
[374] the "ALIPH" (international alliance for the protection of heritage in conflict areas). See the paragraph on securitization of cultural heritage.
[375] It discusses in VON SCHORLEMER S., ibid.
[376] At domestic level, See also United States and China.
[377] It is a quasi- non governmental organization.

program of funds and training for professionals in countries where cultural property is under threat.[378]

As far as the controversial third pillar of RTP, as said before, the UNESCO recommendation does not envisage military intervention but only generically assistance. However, some measures on a global scale can be subsumed to it since they present a more invasive approach, reflecting the RTP rationale, albeit they are non-military interventions in the context of peace missions. Consider the already mentioned cultural peacekeeping in Mali, namely the UN Stabilization Mission (MINUSMA), grounded on the UNSC resolution 2100 (2013), calling up the international community to assist Malian transitional authorities also through the cultural preservation and the reconstruction of destroyed heritage. On the same line, one can mention the "Unite4Heritage" initiative (the "blue helmets" of culture", grounded on the Memorandum of Understanding, concluded between UNESCO and Italy in 2016, creating a cultural heritage task force with the aim of assisting a Member State upon its request during the crisis and in its aftermath[379].

In relation to the exam carried out in the previous paragraphs, one can observe that these solidarity measures, on a global scale reflecting the RTP rationale, are in line with the current trends characterising the international practice and the evolving case laws on cultural heritage destruction. Indeed, the securitization process and the extension of RTP to cultural heritage are complementary to each other. A universalistic conception of cultural heritage and its human dimension emerges from the overall picture.

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[378] FORADORI P., GIUSTI S., LAMONICA A. G., *Reshaping Cultural Heritage Protection Policies at a Time of Securitisation: France, Italy, and the United Kingdom*, The International Spectator 2018, VOL. 50, NO. 3, 86-101.

[379] Memorandum of understanding between the Government of the Italian Republic and the UNESCO recommendation.

Although the application of r2p to cultural heritage can have a positive impact in improving the implementation of the regulatory framework, a number of "structural problems" concerns the doctrine as a whole.[380] First, the legal nature is challenged, as no international norm exists to crystallise it. For some authors, it would rather be a political concept[381]. Moreover, what is more controversial is the third pillar, which also provides for military intervention by the international community if astate fails to protect its population from gross human rights violations. As known, the R2P model is an exception to the general principle of banning the use of force in inter-state relations enshrined inthe UN charter, pursuant to article 2. The UN charter provides only two exceptions to the use of force ban: the taking of military actions by the Security Council for the maintenance of international peace and security and the endorsement of unilateral actions by Member States within the legalframework of the self-defence right. The human intervention, therefore, carried out on the legal grounds of the R2P doctrine would be added asa further derogation to the principle of the prohibition of armed force[382]. Indeed, it is possible to remark that protecting human rights with the use of force is a paradox inherent to the RTPthird pillar[383].

A final aspect that appears controversial is undoubtedly linked to the international community's wide discretion in decidingwhom to protect, which is eminently political. Criticisms are also reflected in the current voting system within the UN Security

[380] The expression " structural problems " is used by PARIS R., *The 'Responsibility to protect' and the Structural Problems of Preventive Humanitarian Intervention International Peacekeeping*, 569-603, 2014.

[381] VON SCHORLEMER S., ibid. PARIS R., ibid. HURD I., *Is Humanitarian Intervention legal? The Rule of Law in an Incoherent World*, Ethics & International Affairs, 25, no. 3 (2011), pp. 293 –313.

[382] PARIS R., ibid.

[383] CASINI L., *Lo Stato nell'era di Google*, ibid pg. 1132-1133; WOLFRUM R., *Solidarity amongst States: An Emerging Structural Principle of International Law*, 49 Indian Journal of International Law (2009).

Council. For instance, RTP has not applied to the humanitarian crisis in Myanmar's Rakhine State due to the veto opposed by some countries such as China and Russia[384]. The political nature undoubtedly delegitimizes the credibility of the doctrine. These humanitarian missions then, in some cases, risk colliding withthe principle of self-determination within unstable political contexts; if these humanitarian mandates go beyond the purposes for which they were intended by actively participating in regime change, they could be perceived as "a sort of occupation"[385]. The Libyan intervention in 2011 has shown all the issues raised since it led to even more human rights that are serious violations in terms of civilian death, exacerbating internal political tensions[386]. Actually, the issues described are challenges that recur in all global regulatory systems, and the field of cultural heritage is another area in which to study them.

Thus, the structural problems described are inevitably transferred to the field of cultural heritage protection. There is no shortageof criticism about which criteria to apply when choosing where to intervene, which cultural property to protect and above all, who has the right to intervene[387]; for example, should one only intervene in protecting World Heritage sites? The concept of

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[384] Iqthyer Uddin Md Zahed (2021) *RESPONSIBILITY TO PROTECT? THE INTERNATIONAL COMMUNITY'S FAILURE TO PROTECT THE ROHINGYA*, Asian Affairs, 52:4,934-957, DOI: 10.1080/03068374.2021.1999689.

[385] PARIS R., ibid. PARIS R., *International peacebuilding and the "mssion civilisatrice"*, Revue of International Studies (2002), 28, 637 -656. MAMDANI M. (2010) *Responsibility to Protect or Right to Punish?* JOURNAL OF INTERVENTION AND STATEBUILDING, 4:1, 53 -67, DOI: 10.1080/17502970903541721. MALLAVARAPU S., *Colonialism and the Responsibility to protect*. O'HAGAN J., *The Responsibility to Protect: a Western idea?*

[386] PARIS R., *Structural problems*, ibid. SCUCCIMARRA L., *Proteggere l'umanità. Sovranità e diritti umani nell'epoca* globale, Bologna, il Mulino, 2016, 95.

[387] WEISS T. G., CONNELLY N., y (2019) *Protecting cultural heritage in war zones*, ibid. LENZERINI F. , (2016) *Terrorism, Conflicts and the Responsibility to Protect Cultural Heritage*.

universality on which it would be grounded, as seen, is not unanimously accepted. Moreover, what modalities of intervention? Should the RTP third pillar be extended in its entirety to include military intervention[388]? Furthermore, asfar as cultural peacekeeping in transitional contexts, it seems important to establish the limits within which to act to avoid the post-colonial argument, ensuring the participation of all stakeholders, especially local communities, to identify what new meanings to attribute to cultural heritage following a conflict [389]. Safe havens, too, can raise ethical questions; it is fundamental to the temporariness of these measures; otherwise, there can bearisk of interfering with the principles of sovereignty and non-intervention, especially in case of safe havens outside of national boundaries.

A final observation concerns the scope of the application. Reading UNESCO recommendations, it would seem that the choice of using "Cultural heritage" would include both tangible and intangible heritage. The intentional destruction takeninto account is the only one linked to gross violations of human rights. As far as the context, despite the UNESCO recommendations referring to the 2003 UNESCO declaration condemning all forms of destruction (both in peacetime and in wartime), reading the text, explicit reference is made only to intentional destruction in wartime. Nevertheless, if only iconoclastic acts linked to gross violation of human rights are taken into consideration, one can observe that violation of human rights can also happen in peacetime. So, by correcting the structural problems involvingit,

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388 Scholars that support even the military intervention: WEISS T. G., CONNELLY N., y (2019) *Protecting cultural heritage in war zones*, ibid.

389 VIEJO ROSE D., *Conflict and the Deliberate Destruction of Cultural Heritage, Conflicts and tensions*, ibid, pg. 114: *"The decisions made on what cultural heritage is rebuilt and how it is interpreted affect the development of meaning and symbols in societies, and their relations to others. Therefore, forging a narrative of the past that does not carry the seeds of conflict into the future is essential. This can only be done with the involvement of the society that will create or/and legitimize the mew meanings and symbols".*

could the responsibility be to improve the protection of cultural heritage by filling the legal gaps in it, overcoming the peacetime-war-time dichotomy? Could The RTP model extend to the "iconoclasm from above" where the government in charge explicitly order the destruction of cultural heritage initsterritory? Consider the intentional destruction of cultural heritage committed by China against the Uighurs or the cultural heritage destruction in Myanmar against Rohingya Muslims (tangible and intangible)[390]. Alternatively, would it otherwise undermine its effectiveness by carving out of the scope of protection all those iconoclastic acts that do not violate human rights? On the other hand, with regard to instances of destruction towards a difficult past as an expression of human rights violations, how would the responsibility to protect be remodelled?

[390] See PAAUWE J., PITTAWALA J., *Cultural Destruction and Mass Atrocity Crimes: Strengthening Protection of Intangible Cultural Heritage*, Global Responsibility to Protect 13 (2021) 395 -402. LEE R., ZARANDONA J. A. G., *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, ibid.

Chapter 3: A right to destroy the cultural heritage? The destruction of memory from a legal perspective.

1. The legal boundaries of collective memories through the case-studies of Ukraine, Confederate Monuments and Myanmar.

The previous two chapters have shown the theoreticalframework within which to explore the legal boundaries of the intentional destruction of cultural heritage. An attempt was made to deconstruct the concepts of preservation and destruction by grasping their subtle shades. Both chapters have shownthestrong link between law, collective memory, cultural heritage preservation and destruction.

The key word in the following chapter is "boundaries," which means the limits of cross-cultural heritage in relation to intentional destruction. The intent is to explore the boundariesof opposing trends that can often appear blurred.

First, preservation and destruction are at the antipodes of each other. However, they present a key element in common: thecore-concept of collective memory. Issues of memory around cultural heritage cross both the patterns of preservation and destruction, and they are defined by the scholarly literature as "thesidesof the same coin": the choice of preserving a certain cultural artwork implies a choice of disqualifying something else[391] . At the same time, on the side of intentional destruction, in certain cases, there is not only the intent to erase a certain memory but also to create a new pattern of memory[392]. Some legal scholars talk about

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[391] GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, ibid, p. 329.

[392] HARRISON R., *Heritage critical approaches*, Routlege Francis Group, London, New York, 2013, pp. 155-203, in particular, p.171 *:" […] The process of destroying or removing an object, place, or practices is not only a destructive*

"creative destruction" as the transformation of the public landscape into a new shape with a new meaning after destructive acts [393]. Therefore, collective memory would seem to sit perfectly in the middle between preservation and destruction, the boundaries of which would seem to be fuzzy.

Moreover, it has been shown that, although preservation and destruction are in continuous dialogue with each other, theentire international legal body has been characterised by the central value of preservation. It is clear the existence of a customary international norm prohibits the intentional destruction of cultural heritage in times of conflict.

Nevertheless, what if the destructive acts are authorized by the state in which the contested property is located? If thedestruction takes place in peacetime? What will happen if the global interest in preserving cultural heritage collides with the local interest in erasing contested cultural artefacts? Is there a public interest in destroying cultural heritage associated with human rights violations?

In the previous chapters, it has been shown that what is being challenged with deliberate destruction corresponds to thecultural values attached to cultural heritage in a given historical moment. Cultural heritage is indeed inscribed with a number of meanings by the human sciences, linked both to the collectiveimaginary and

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process but a process by which an attempt is made to clear the way for the creation of new collective memory".

[393] See Sanford Levinson which uses the term "Creative destruction" in cultural heritage field, originally used by the economist Joseph Schumpeter "to describe the dynamic of capitalist economic development" in LEVINSON S. , *Thomas Ruffin and the Politics of Public Honour: Political Change and the Creative Destruction of Public Space*, 87 N.C. L. Rev. 673 (2009). Available at: http://scholarship.law.unc.edu/nclr/vol87/iss3/, p. 682: *"[…] Entire cultures have been radically transformed by technological developments, even prior to our present age of "globalization". It should be equally clear that political development also brings in its wake, for good and for ill, similar destruction, "creative" or otherwise, in the public landscape."*

to historical events[394]. What happens if these cultural values change? Does this symbolism show a lack of neutrality? Does it ake cultural heritage vulnerable to destruction?

The chapter wants to explore this further tension between the desire to preserve transnational cultural heritage and theattempts of national or local governments to shape their own versions of national heritage, wondering how to balance global, nationaland local interests surrounding the cultural heritage. How should we balance a responsibility to protect cultural heritage under international law with a State's legitimate claim to come to terms with a difficult past through the erasure of a corresponding cultural legacy? What are the legal boundaries of the preservation of cultural heritage? At the same time, what are the legal boundaries of the principle of state sovereignty in destroying its own cultural heritage? Can different acts of destruction be placed on the same level from a legal point of view?

This chapter precisely compares the theoretical results examined in the first two chapters with the study of concrete cases of intentional destruction. It seems worth challenging thelawfulness of destroying the cultural heritage in light of recent iconoclastic acts and the international community's reaction, taking into account the dividing line between peacetime and wartime.

All the case studies share some common features: they are all related to contested heritage whose destruction/removal is authorized by States. In each case study, the examination focuses on the level of democratic participation within the decision-making process to remove or destroy cultural heritage, the political background of the decision, parallel illegal removal ("iconoclasm from below"), and the implications of these public policies. The scope of the research includes mainly examples of tangible cultural heritage (more specifically, public monuments), which are characterized as contested heritage with accompanying

[394] GENNARO A. M., *Il mondo salverà la bellezza? Alcune considerazioni sulla distruzione del patrimonio culturale*, L'indice penale, Gennaio-Aprile 2017.

issues of memory and divisive identity narratives. However, in comparing the case studies, it is important to take into account the identity of those who destroy, following the "oppressor-oppressed" paradigm[395]. In other words, by exploring the boundaries of the right to destroy, it is necessary to observe whether the one who destroys affects the cultural heritage deemed oppressive or whether, on the contrary, it isadestruction conducted by the oppressor.

The first case study embraces the Ukrainian case, particularly the memory law on the condemnation of the Communist and National Socialist (Nazi) regimes and the prohibition of propaganda of their symbols focusing on the removal of Soviet public monuments[396] . The second study includes the legal issues surrounding the removal of confederate monumentsinthe United States. Finally, the following dissertation will explore heritage destruction in Myanmar's Rakhine State.

The choice of case studies is tied to the desire to explore "borderline cases" where the line between what is lawful or unlawful is blurred. The case of Ukraine captures the desire to break away from the Soviet past and to find values of belonging that go to identify the new State.

Diversely, in exploring the boundaries of cultural memory, the case of the United States offers the possibility of comparing national, local and global interests that normally interface with cultural heritage law and can often conflict with each other. Finally, the last case identifies Myanmar's difficulty in dealing with its colonial legacy.

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[395] This expression has used by BEHZADI E., *Destruction of cultural heritage as a violation of human rights: application of the alien tort statute.*

[396] Law of Ukraine No 317-VIII of 9 April 2015 "Pro zasudzhennya komunistychnoho ta national-sotsialistychnoho (natsysts'koho) totalitarnykh rezhymiv v Ukrayini ta zaboronu propahandy yikhn'oyi symvoliky" [On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon3.rada.gov.ua.

The legitimacy of States to destroy disputed cultural heritage for ideological purposes will be assessed in accordance withdifferent branches of international law: human rights, international criminal law, humanitarian law and transitional justice[397]. However, before international law, the intentional destructionof cultural heritage will be examined in relation to property rights. Cultural heritage is linked to a certain nation, community or individual. If there is intentional destruction of cultural heritage, there is first a violation of property rights[398].

The study aims to analyse various iconoclastic episodes and the international community's reaction, trying to offer a framework for orientation and identifying which factors, if any, canjustify the destruction of art. The scope of the research will exclude cases of peacetime threats to cultural heritage caused by economic development, but it will focus on iconoclastic episodes drivenby ideological reasons. It will explore what answers the law has given to the destruction of cultural heritage.

[397] LINSKINSKI L., LIXINSKI L., *Legalized identities, Cultural heritage Law and the shaping of Transitional Justice,* Cambridge, 2021.
[398] BEHZADI E. Destruction of cultural heritage as a violation of human rights: application of the alien tort statute, ibid.

Section 1.

1. The post-soviet case: cultural heritage, collective memory and Law in Ukraine.

In the first two chapters, the interplay between collective memory, heritage, and the law is grasped. This interaction between these three elements is now to be examined by applying it to the Ukrainian case within its nation-building process after the dissolution of URSS. How do these three elements (collective memory, cultural heritage and the law) interact in transitioning societies dealing with the trauma of difficult pasts such as totalitarian regimes? How do we tackle cultural heritage representative of a difficult past? Is there a right to destroy cultural heritage representing totalitarian regimes in whichthere were committed violations of human rights? If so, what are the risks of these heritage destruction policies?

Ukraine, which is the former Soviet country with the largest number of statues[399], has gone through several iconoclasticwaves pertaining to Soviet heritage to erase the memory of the totalitarian past and reconstruct a new identity with which to recognise itself. Since the declaration of independence, "the iconoclastic fury" resulted not only in the removal or destruction but also in the creation of an underwater space where 32 statues from the Soviet period have been submerged, evoking the metaphorical idea of burying the past[400].

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[399] HARTMOND M., *"Lenin after the Fall"*, in Niels Ackermann and Sébastien Gobert (eds.), Looking for Lenin (London: FUEL Publishing, 2017) see p. 1: *"At 5500 individual statues, the density of Lenin monuments per square kilometre was highest in Ukraine, in contrast with the 7000 Lenins in Russia, 600 in Belarus, 500 in Kazakhstan, and a mere 300 in the entire Trans-Caucasus and Central Asian region"*.

[400] LIXINSKI L., *Legalized identities*, ibid, p. 122.

HARTMOND M., *"Lenin after the Fall", pp. 1 -2: "Thirty-two sculptures depicting Lenin, Marx, Engels, Dzerzhinsky and Nadezhda Krupskaya (Lenin's wife), alongside a number of literary figures from the Soviet period, were collected from the cities of Simferopol, Odessa, Kyiv, and Kherson. They were*

Iconoclastic events found their legitimacy through aseriesof laws that banned communist symbols. However, the climax of this policy of erasure was reached in 2014 with the Euromaidan protests that resulted in the adoption of 4 important memory Laws (decommunization laws): Law on the condemnation of the Communist and National Socialist (Nazi) regimes and the prohibition of propaganda of their symbols[401]; law on the legal status and honouring the memory of fighters for Ukrainian 's independence in the 20th century[402]; Law on perpetuation of the victory over Nazism in the Second World War of 1935- 1945[403]; Law on access to the archives of repressive agencies of the Communist totalitarian regime of 1917-1991[404].

The following paragraphs are aimed to examine the content of the memory law related to cultural heritage, basically the one "on the condemnation of the Communist and National Socialist (Nazi) regimes, and the prohibition of propaganda of their symbols", looking at the impact of its implementation on Ukrainian society. This is a concrete example of the ties between collective memory, cultural heritage and the Law. In this case, Law plays a role in authorizing shifting historical and identity

transported to Cape Tarkhankut, on the Crimean coast, where they were sunk offshore to create an underwater hall of infamy fifty feet below the surface.

[401] 5 Law of Ukraine No 317-VIII of 9 April 2015 [On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon3.rada.gov.ua.

[402] Law of Ukraine no. 314-VIII of 9 April 2015 [On the legal status and honoring the memory of fighters for Ukrainian's independence in the 20th century], zakon3.rada.gov.ua

[403] 7 Law of Ukraine no. 315-VIII of 9 April [On perpetuation of the victory over Nazism in the Second World War of 1935-1945], zakon3.rada.gov.ua.

[404] Law no. 316-VIII, which opens access to the secret archives, is not a memory law, rather a technical one. It does not regulate historical narratives or directly affect historical debates. It facilitates historical research by providing new sources. For this reason, Law no. 316-VIII will not be analysed in this Article.

narratives through the removal of the Soviet cultural heritage[405]. This memory law affects the tangible cultural heritage related to the public landscape, more specifically, the renaming of streets and the removal and demolition of plaques and public monuments devoted to historical and political figures of the Soviet past[406]. The research will concern the removal and demolition of public monuments. It also wants to challenge the use of Law in shaping collective memories.

The key questions that will guide the case study are thefollowing: who decided to destroy? What cultural values have been challenged though the removal? What was the effect of the implementation of these memory laws? What is the international law perspective about these destructive acts? What was the reaction of the international community?

Before going into depth on the study of these memory laws, it seems important to focus on the meaning of the contested communist monuments and on the historical and political background in which these destructive acts took place.

2. The meaning of communist monuments.

As said before, the 2015 memory law under examination affects public space, particularly public monuments devoted to thesoviet legacy. As seen in the first chapter, "monument" from an etymological point of view comes from the Latin word "monumentum", which means "something that remains" or "memorial", deriving from the verb "to remind". Therefore, the

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405 LINXINSKI L., *Legalized identities: Cultural heritage law and the Shaping of Transitional Justice*, ibid, p. 95:" *[…]Law plays a role in authorizing the construction, protection, and removal of monuments and symbols. Heritage law in particular is used to protect and maintain monuments, but it is not often thought of as a tool to enable change to monuments, regardless of whether change means their destruction or relocation".*

406 LIUBARETS A., *The Politics of Memory in Ukraine in 2014: Removal of the Soviet Cultural Legacy and Euromaidan Commemorations* , Kyiv. Mohyla Humanities Journal 3 (2016):197 -214.

function of the monument is to crystalize the time in the present to make certain memories of the past eternal. Monuments also evoke the original Western concept of cultural heritage as monumental and tangible[407]. Indeed, looking at international treaties, every attempt to define cultural property or cultural heritage always includes monuments[408]. The international Charter for the conservation and restoration of Monuments and sites (The Venice Charter 1964) defines monuments as every single architectural work or urban or rural setting with cultural significance, with evidence of a particular civilization, a significant development or a historic event.[409]What is relevant is the cultural significance that monuments have for the present. They are so anchored to an idea of a monumental past at the

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[407] LINXINSKI L., *Legalized identities: Cultural heritage law and the Shaping of Transitional Justice*, ibid, p. 96.

[408] See the 1954 Hague Convention, article 1 *: "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collect ions and important collections of books or archives or of reproductions of the property defined above"*. They are classified as cultural objects by the 1970 Convention and covered by the World Heritage Convention.

[409] See article 1 of the Venice Charter*: ""The concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which is found the evidence of a particular civilization, a significant development or a historic event. This applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time"*.

See also the preamble of the Venice Charter according to which*: "Imbued with a message from the past, the historic monuments of generations of people remain to the present day as living witnesses of their age-old traditions. People are becoming more and more conscious of the unity of human values and regard ancient monuments as a common heritage. The common responsibility to safeguard them for future generations is recognized. It is our duty to hand them on in the full richness of their authenticity […]"*.

antipodes with change[410]. However, if their function is that of memory, what happens if society no longer recognizes itself with cultural values related to the monument? Do monuments adapt to new cultural values?

Certain artworks are more vulnerable than others; they are more exposed to the threat of destruction. This is the case of communist monuments that, in the post-soviet phase, have been the subject of different public policies endorsed by the countries of theformer Soviet bloc, providing for the removal, destruction or reallocation of Soviet legacy. Following the dissolution of the Soviet Union, cultural heritage becomes a means on which to build new national identities in which the former soviet countries can strengthen their state sovereignty. One should ask what factors makecertain monuments more vulnerable than other monuments to policiesof removal. Thus, in the case of communist monuments, it seems important to explore what narratives underpin and what meaning was originally attributed to them since monuments have a "cycle"[411].

It is first necessary to define and contextualize the concept of Soviet heritage, which does not reflect the Western conceptionof heritage[412]. The expression "Soviet Heritage" is used to indicate

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[410] LEVINSON S., *Written in Stone, Public Monuments in changing societies*, Duke University Press, Durha,. 2018, p. 5. *The author quotes Nietzsche 's observations in "On Utility and Liability of History for life" according to which a monumental view of the past […] represents " a belief in the coherence and continuity of what is great in all ages, it is a protest against the change of generations and against the change of generations and against transitoriness"* .

[411] The concept of the "cycle of a cultural object" is well interpreted and explained in a temporary exhibition of the Egyptian museum in Turin, held in 2019, entitled: "Statues also die. Conflict and Heritage between Ancient and Contemporary", precisely to illustrate that loss and destruction, in opposition with the themes of conservation and preservation, are experienced not only by human beings but also by artworks·
See on the website:https://museoegizio.it/en/explore/exhibitions/statues-also-die/.

[412] See DESCHEPPER J., r (2019) *Between future and eternity: a Soviet conception of heritage*, International Journal of Heritage Studies, 491-506. For a

the specific conception of heritage that was adopted during the Soviet years and its close link with the Marxist-Lenin ideologyon state sovereignty[413]. The concept also needs to be historicized, as it has spanned several decades presenting different nuances[414].

Undoubtedly, the Revolution of 1917 represents a turning point for the definition of heritage. A first feature of the after-October Revolution heritage policy is undoubtedly the paradoxical destruction-preservation dynamic of pre-revolutionary monuments. While on the one hand, a wave of iconoclastic acts has accompanied pre-revolutionary monuments celebrating the tsarist period, on the other hand, a policy of preserving the same monuments by assigning them new values took place[415]. Inother words, there was this opposing tendency between thedemolition of the pre-Revolutionary heritage and the interest in preserving the past but reinterpreting it in a communist key. Indeed, another keyword to grasp the meaning of soviet heritage is that of "appropriation" in relation to the heritage of the past by conferring to pre-revolutionary monuments values of the Marxist-Lenin ideology. Consider the appropriation on the Bolshevik list

deep study of the concept of Soviet Heritage see the literature of Julie Deschepper and Corinne Geering.

[413] DESCHEPPER J., Translated from the French by Stephen Seizilles de Mazancourt, «*"Soviet Heritage" from the USSR to Putin's Russia*» , Vingtième Siècle. Revue d'histoire 2018/1 (No 137), p. 77 -98.
Available at : https://www.cairn-int.info/journal-vingtieme-siecle-revue-d-histoire-2018-1-page-77.htm?WT.tsrc=pdf.

[414] DESCHEPPER J., *Between future and eternity: a Soviet conception of heritage*, ibid.

[415] LEVINSON S., *Written in Stone, Public Monuments in changing societies*, Duke University Press, Durha,. 2018. The author quotes Vitalist Komar, a Russian dissident artist:" *This is a classic old Moscow technique: either worship or destroy. Bolsheviks topple czar monuments, Stalin erases old Bolsheviks, Khruschev tears down Stalin, Brezhnev tears down Khrushchev, and now this. No difference. Each time it is history, the country's true past, which is conveniently being obliterated. And usually by the same people!In most cases, there weren't passionate crowds doing tearing down it was cool hands of officials, by bureaucratic flat. Same guys who used to order our shows bulldozed now arranging these bulldozings".*

of several churches and civic buildings or the turning of churches into museums or secular buildings[416]. This appropriation was a sort of iconoclasm without demolition[417].

In any case, what characterizes the Soviet conception of patrimony compared to Western categories is the value of time in the process of patrimonialization. Beginning in the 1930s, newly built monuments that represent the new values of communist ideology became part of the cultural heritage, regardless of the depth of time[418]. Thus, the 1917 revolution also createda"heritage revolution", introducing a concept of heritage completely de-historicized and subjected to an ideological purpose [419].

Indeed, as scholarly literature points out, the expression "Communist monument" is suggestive of the extent to which political ideology is a characterizing element of these artworks, prevailing over the aesthetic and historical qualifiers; rather, the aesthetic judgment was used to justify their removal[420]. In other words, the communist ideology behind these monumentsdefines them. Their story intertwines with the wake of iconoclastic acts and appropriation of the previous heritage from the new regime, and it is extremely linked to the political events of the Soviet Union.

They fulfilled a propaganda function of Soviet power and a celebratory function of political leaders, characterized bya "quasi-religious" feature that prevails over the aesthetic value of these monuments[421]. They also fulfilled a pedagogical function for

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[416] DESCHEPPER J., *« Soviet Heritage » from the USSR to Putin's Russia*, ibid.
[417] DESCHEPPER J., *Between future and eternity: a Soviet conception of heritage*, ibid.
[418] Ibid, p. 7.
[419] DESCHEPPER J., *« Soviet Heritage » from the USSR to Putin's Rus*sia, ibid.
[420] GAMBONI D., *The Destruction of Art, Iconoclasm and Vandalism since the French Revolution*, ibid, chapter 3 "The Fall of communist Monuments" pp. 51-90 in particular p. 52.
[421] On the commemorative and pedagogical function of communist monuments and on their "quasi-religious" feature see GAMBONI D., ibid, p. 57.

society, which meant the transmission of communist values, conceiving art as the mirror of soviet policy on which the society could recognize itself[422].

This topic should be read more generally within the total lack of freedom of expression during the soviet regime in which a state monopolization of art dominated and artists were completely subjected to political power[423]. A sort of state censorship on artistic freedom; even though it does not involve the destruction of cultural property, is this form of censorship a kind of iconoclasm?

To sum up, both politics of destruction and preservationshare the submission of art to political power. It could be argued that heritage policy passed through the concept of the Soviet state, which was based on the class struggle[424]. Iconoclasm due to revolutionary changes would be tolerated if it were functionalto legitimate the new political power[425].

Therefore, examining the factors that made communist monuments more vulnerable, whose fate seems to be predestined from the beginning of their creation, cannot be uncoupled from the political context in which they were erected. Eveninthecourse of their history, their narratives were subjected to reinterpretations if considered the "destalinization process"

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[422] Ibid.

[423] On the lack of freedom of expression in art, consider the movie "Never look away, "*Werk ohne Autor* " directed by Florian Henckel in 2019.

[424] CHAKSTE M., *Soviet concepts of the State, International Law and Sovereignty*. The American Journal of International Law, Jan., 1949, Vol. 43, No. 1 (Jan., 1949), pp. 21-36 .

[425]It is worth noting that in the draft codification of international crimes, the crime of vandalism proposed by Lemkin, described as destruction of works of art and culture of religious or social groups, was not accepted by Russian scholarship since "revolutionary fight was incompatible with historical monuments". On this topic WEISS-WENDT A., *The Soviet Union and the Gutting of the UN Genocide Convention*, University of Wisconsin Press, 2017,
pp. 13-14; DRUMBL M. A., *From Timbuktu to the Hague and beyond*, ibid, pp. 98-99.

ordered in 1956 by Khruschev, when many of the former dictator's statues were removed[426]. Thus, with the fall of the Berlin Wallin 1989 and the dissolution of the USSR in 1991, the characterising element of Soviet monuments disappeared. Political change has, affected the public space[427].

However, it should be pointed out to take into account the complexity and the variety of the phenomenon since, after thefall of the Soviet Union, the politics of memory have been endorsed differently in every single country accordingly to their single history and, above all according to their relationship with the communist regime[428]. That is why it is important to look at the political background behind the politics of memory applied in Ukraine, paying attention to the claims involved around the removal of communist monuments, the actors at stake, and the impact of their implementation in light of the historical and political background.

21 The political background behind "Leninopad."

With the dissolution of URSS and the declaration of independence, which established state independence in 1991, confirmed with a referendum held in December 1991, theneedfor Ukraine to build its collective memory on which ground its state

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[426] GAMBONI D., IBID; HARRISON R., *Heritage Critical approaches*, ibid, p. 175.
[427] LEVINSON S., *Written in stone*, ibid, p. 14:*" Perhaps we should view the change of name as a censurable act of state-sponsored cultural silencing, the extirpation of seventy-five years of Russian history, a submission to hat is often pejoratively described as political correctness. Alternatively, we could instead describe it as state's recognition of a moment of cultural liberation, the reclaiming of a different cultural heritage that itself had been ruthlessly silenced by those who wished to impose a Communist hegemony over Russian culture."* [428] GABOWITSCH M., *The limits of Iconoclasm: Soviet War Memorials since the end of Socialism, International Public History*, 2018. GAMBONI D., ibid, p. 54. MYSHLOVSKA O., *Delegitimizing the Communist Past and Building a new Sense of Community: The Politics of Transitional Justice and Memory in Ukraine*, International Journal for History, Culture and Modernity, VOL. 7, 2019, p. 378.

sovereignty came up[429]. The state-building processappeared very difficult and complicated due to a several number of questions. Ukraine, from an etymological point of view, means "borderland"; its etymological root and geographical position are meaningful to grasp its geopolitical instability[430]. From one side, Ukraine was historically on the frontline between East and West and at the centre of two opposing cultural views: the Western- Catholic-Roman and the Eastern-Orthodox-Bizantine[431]. However, these dichotomies also appear internally when considering Ukraine's extremely diverse territory in terms of language, culture and religion. Except for the attempt to become independent in 1917, Ukraine became an independent State only

[429] On the topic of the need of a collective memory within the State building process see NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective*, International Journal of Transitional Justice, Volume 11, Issue 1, March 2017, Pages 132–153, https://doiorg.eres.qnl.qa/10.1093/ijtj/ijw025 .

According to the author collective memory is fundamental for the "social reconstruction" of a State, to ensure political stability, defines a country's political agenda and the national interests it intends to pursue in its foreign policy within the international chessboard.

See also CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine, European Papers*, Vol. 5, NO 1, 2020, pp. 119-136., according to which the construction of collective memory "matters politically", helping to define domestic and foreign policies.

See MÜLLER J. W., *Memory and Power in Post-War Europe: Studies in the Presence of the Past*, Cambridge: Cambridge University Press, 2002, pp. 1-10.

See also Durkheim position quoted by MISZTALMB. A., *Durkheim on Collective Memory*, Journal of Classical Sociology, Vo 3 (2), pp. 123-143,2003. In particular p. 136*: " […] Durkheim's belief that every society displays and requires a sense of continuity with the past, and that the past confers identity on individuals and groups, allows us to define collective memory as one of the elementary forms of social life, or as part of society's intellectual and moral framework, and see it as the essential factor in creating solidarity".*

[430] CELLA G., *Storia e geopolitica della crisi ucraina*, Studi storici Carocci, Roma, 2021.

[431] Ibid.

in 1991[432]. For all these reasons, the process of buildingacommon collective memory has struggled to be straightfor ward.

Nevertheless, what is the purpose of building a collective memory within transitional societies? The construction of a collective memory serves, primarily, to strengthen the self-determinationof a people, an identity in which to recognize themselves[433].

What explains well the importance of building a collective memory in transitional societies is the thread of research that anchors it to a question of state security[434]. Indeed, within a nation-building process, what matters is not only the physical security (namely the protection of territorial integrity from external threats) but also the ontological security, which islinked to the identity of a Community[435]. The concept of security has been transposed from the individual dimension to the collective dimension: just as individuals need to achieve this self-

[432] However, scholars point out that signs of an idea of an autonomous and independent Ukraine already existed in the Middle Ages, where the city of Kiev was the prodromal centre for the emergence of the Russian, Belarus and Ukrainian Nations.

[433] Scholars underline also the importance to build a collective memory to come to terms with difficult past and to prevent the recurrence of mass atrocities violations. LOPEZ R., *The (Re)collection of memory after mass atrocity and the dilemma for transitional justice*, International Law and Politics, Vol. 47, pp.799 - 853,2015; see p. 811*: " […] Collective memory is especially likely to develop in societies coping with mass atrocity. In these societies, the impetus to make sense of systematic murder and ruthless violence make the healing power of collective memory all the more essential."*

[434] On security studies and memory, in particular ontological security see MITZEN J., *Ontological security in World Politics: State Identity and the Security Dilemma*, European Journal of International Relations, 2006 SAGE Publications and ECPR-European Consortium for Political Research, Vol. 12(3): pp. 341 –370. On the link between ontological security and collective memory see also NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis*, ibid, p. 2-5. MARPLES, D. R., *Decommunization, Memory Laws, and " Builders of Ukraine in the 20th century"*, ACTA,SLAVICA IAPONICA, TOMUS 39, pp. 1-22, 2018.

[435] MITZEN J., *Ontological security in World Politics: State Identity and the Security Dilemma*, ibid, p. 342.

awareness, this need extends to national group identity [436]. Hence, one can explain the importance of Ukraine in defining a collective memory in terms of national security.

Ukraine has chosen to shape its collective memory around its soviet past[437], creating historical narratives that repudiate or revalue it, depending on the political agenda that Ukrainian politicians were intent on pursuing; thus, there are phases in which neo-soviet narratives prevail over nationalist-historical narratives and vice-versa. The nationalist model aims to distance itself from the Soviet legacy, portraying Ukraine as a victim of Soviet power or better invaded by an external power, drawingon the suffering inherited from totalitarianism[438]. On the contrary, the "post-soviet model accepted the soviet cultural legacy[439].

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[436] On the meaning of ontological security see MITZEN J., ibid, p. 342*: "[…]Specifically, I propose that states also engage in ontological security-seeking. Like the state's need for physical security, the need for ontological security is extrapolated from the individual level. Ontological security refers to the need to experience oneself as a whole, continuous person in time — as being rather than constantly changing — in order to realize a sense of agency" […].* See also pp. 344-345: *"Ontological security is security not of the body but of the self, the subjective sense of who one is, which enables and motivates action and choice.5 To say that individuals need security of this self is to say that their understandings of it must be relatively stable. Needing stability does not mean that self-understandings must be forever unchanging; indeed such changes are essential for learning and personal development. The idea is rather that individuals value their sense of personal continuity because it underwrites their capacity for agency. […]Ontological security, in contrast, is the condition that obtains when an individual has confident expectations, even if probabilistic, about the means–ends relationships that govern her social life. Armed with ontological security, the individual will know how to act and therefore how to be herself […]'.*

[437] NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis*, ibid, p. 7, according to the author the difficulty to build a distinct post -Soviet identity leads to define the collective memory around the Soviet Past.

[438] LIUBARETS A., *The Politics of Memory in Ukraine in 2014: Removal of the Soviet Cultural Legacy and Euromaidan Commemorations* , Kyiv. Mohyla Humanities Journal 3 (2016):197 -214. NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis*, ibid.

[439] Ibid.

Within the politics of memory, what role does Soviet cultural heritage play? It is possible to observe that culturalheritagewould seem a means to define the collective memory; it is functional to the historical narratives that prevail in that particular historical period. Indeed, as seen before, the fate of communist monuments would seem inexorably linked to the political events that took place following Ukraine's alternating governments in the dichotomy of national versus post-soviet model of collective memory. Depending on the historical narrative adopted, the Soviet cultural heritage would seem to be less or more vulnerable to destruction: a real visual de-socialisation[440].

The destination of the Soviet legacy also followsadifferent course depending on the territorial geography of Ukraine, whichreflects strong political diversity[441]. Indeed, with the dissolution of the Soviet Union and the Ukrainian declaration of sovereigntyinJuly 1990, the iconoclastic fury of Soviet monuments would proceed more slowly in central Ukraine while it would seem most absent in the predominantly Russophile eastern Ukraine[442].

In examining heritage politics, it seems convenient to consider three main political phases as reconstructed by the scholarly literature: the early 1990s of Ukrainian independence, the Orange revolution of 2004, finally, the Euromaidan protest of 2014 and the Memory laws of 2015[443].

In the early 1990s of independence, projects to reconstruct collective memory were very fragile and ambivalent due to Ukraine's cultural inhomogeneity, presenting both nationalistic

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[440] DESCHEPPER J., *« Soviet Heritage » from the USSR to Putin's Rus*sia, ibid.
[441] GAMBONI D., ibid, pp 54-55.
[442] GAMBONI D., the Destruction of Art, pp. 54-55.
[443] CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, ibid, p.121. According to the author there are three periods of de-communization: "i) from the prohibition of the Communist Party of Ukraine (1991) to its re-establishment (1993); ii) from the Orange Revolution (2004) to Viktor Yanukovych's victory in the presidential elections (2010); and iii) from Euromaidan and the laws on decommunization (2015) to the present.

elements and nostalgic reminders of the Soviet past [444]. One should also consider local and national differences in the perception of the Soviet legacy, as in the case of WesternUkraine, which applied stricter memory policies than the rest of the Nation[445].

Indeed, as far as the cultural heritage, in Western Ukraine, where the Communist Party did not enjoy a broad consensus, the first dismantling of soviet monuments took place even before the declaration of Ukrainian independence. The first monument to Lenin was removed in Chervonohard in 1990, subsequently in Ternopil, Kolomyia, authorized by local municipalities. After the independence, a first measure concerning the cultural heritage was adopted in the Galicia local administration, in particular in the city of Lyiv and Volyn, which authorized the removalofsoviet

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[444] The ambivalence of this phase is evident if consider the ban on the Communist party (Decree of the Verkhovna Rada of Ukraine no. 1435-XII of 26 August 1991) but re-established in 1993, since it was declared unconstitutional (Decision of the Constitutional Court of Ukraine no. 20, 2001 of 27 December [Case of the prohibition of the Communist Party of Ukraine, registered on 22 July 1991], zakon5.rada.gov.ua.
On this topic see LIUBARETS A., *The Politics of Memory in Ukraine in 2014: Removal of the Soviet Cultural Legacy and Euromaidan Commemorations* , ibid, pp.198-199.
MYSHLOVSKA O. , *Delegitimizing the Communist Past and Building a New Sense of Community: The Politics of Transitional Justice and Memory in Ukraine*, International Journal For History. Culture and Modernity 2019, Vol. 7, 372-405. In this first phase at national level, from one side a first attempt to come into terms with the Soviet past was made with the Law on Rehabilitation of Victims of Political Repressions in Ukraine, adopted by the Supreme Rada of Ukraine on 17 April 1991. (Law of Ukraine no. 963-XII of 17 April 1991, [On rehabilitation of victims of political repressions in Ukraine], zakon.rada.gov.ua. For a comment on this law, see CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine,* ibid.The scope of the law concerned only the crimes committed during the Stalinism without a general condemnation of the communism.
[445] MYSHLOVSKA O., *Delegitimizing the Communist Past and Building a New Sense of Community: The Politics of Transitional Justice and Memory in Ukraine,* ibid.

monuments and the renaming of Soviet toponyms, as well as the closure of Russian schools[446].

The second phase of de- communisation and removalof the Soviet heritage corresponds to the event of the Orange Revolution, with which there is a first more systematic programme of creating a common collective memory[447]. The election of Yushchenko has led to the adoption of several memory laws, including one authorising the removal of more than 400 statues dedicated to communist leaders and the renaming of streets, deleting every soviet reference[448]. It is interesting to note that the regulations invoked as a legal basis for the destruction and removal of monuments concern with the memory law recognising the Holodomor famine as a genocide against Ukrainian people committed by Soviet functionaries in 1932/1933[449]. From here, one can grasp the political significance behind the post-Soviet iconoclasm, intended to totally erase the Soviet cultural heritage by leveraging the brutalities of totalitarianism and thegenocideof Holodomor, also a crime to erase the memory of a people.

Alongside these laws that erase cultural memory, others have been adopted that create new patterns of memory: consider the law celebrating the OUN nationalistic movement (Organizationof Ukrainian movement) and its leader, as well as the decree commemorating the establishment of the Ukrainian Insurgent

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446 BECHTEL D., *Ukrainian Lviv since 1991- a city of selective memories*, on the website "European Network Remembrance and Solidarity", 2011 see the link https://enrs.eu/article/ukrainian-lviv-since-1991-a-city-of-selective-memories.
For a reportage on the destruction of soviet monuments see the following press: *The first Lenin fell in 1990: how the idol of communism was dropped*, in Gazeta.ua (8 December 2018); (10 November 2018); Volodymyr Semkiv, "Fall Lenin Fall", Wayback Machine (9 August 2016).

447 CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, ibid, p.121.

448 HARTMOND M., *"Lenin after the Fall"*, in Niels Ackermann and Sébastien Gobert (eds.), Looking for Lenin (London: FUEL Publishing, 2017).

449 CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, ibid.

army (UPA), nationalist movement and its leader Roman Shukhevych[450]. Subsequently, one can observe a relaxation of memory policies under the Yanukovich government, which completely downgraded the importance of nationalist movements in the Ukrainian collective memory. For this reason, the nationalistic narrative shifted again to Western Ukraine, where legal measures have been applied in contradiction to the national legislation[451].

Nevertheless, this oscillation of opposing narratives came to ahalt in 2014 with the Euromaidan protests that marked a point of no return in the construction of the national collective memory. The spark that triggered the protests was due to the Yanukovich government's alignment with Russian Policy, which backed out of the EU Association agreement. The protests werecharacterised by the outbreak of an iconoclasm from below aimed at wiping out the Soviet legacy finally. The expression "Leninopad" indicates precisely the massive removal of Lenin statues that characterised the protests. The removal of the statue of Lenin in Kyiv became precisely the symbol of the protests. Hence, the eminently political significance of the removal of the Soviet statues, where their aesthetic and historical value would seem to take second placeto the political significance of which they are an expression. The protests are followed by two important events that contribute to souring Ukraine's relationship with its Soviet cultural heritage: the annexation of Crimea by Russia and the conflict in Donbas. These events make Ukraine's relationship with its Soviet cultural

[450] These decrees are both deemed controversial since these nationalistic movements are known to have collaborating with Nazis against the Soviets during the second world war. Still under the government of Yushchenko, the institute of national remembrance has been established. Following this nationalistic model, the narrative of the Great Patriotic War Museum has been shifted in more nationalistic one, organizing exhibitions of these national movements (OUN) (UPA).

[451] MYSHLOVSKA O., *Delegitimizing the Communist Past and Building a New Sense of Community: The Politics of Transitional Justice and Memory in Ukraine*, ibid, pp. 395-396.

heritage sour even more. Hence, these iconoclastic acts from below gained governmental support and legal recognition through a series of "memory laws", justifying the erasure of soviet monuments.

To sum up, the measures described result in a cultural heritage completely subjugated by politics, functional to the pursuit of the political goals of successive Ukrainian governments, as wellas an expression of the collective memory that is meant to be constructed. One can observe phases in which the question of Soviet cultural heritage seems to be set aside and phases inwhich the questioning of the Soviet past results in the erasure of its cultural traces. Thus, depending on the politics of memory adopted, political changes shape or do not shape public space[452]. During political changes, in cases in which the politics of memory do not affect public space, the term 'invisible monuments' coined by Musil is evocative of the loss of significance of monuments celebrating previous regimes that precisely become invisible in urban space[453]. On the contrary, if the nationalistic narrative prevails, their presence becomes cumbersome. In the next paragraph, the memory law concerning the removal of soviet monuments will be examined in detail.

[452] Concerning changes in political regimes having the power to affect public spaces, see LEVINSON S., *Written in stone , public monuments in changing societies*, ibid, p. 7.

[453] The expression "invisible monuments" of Robert Musil is quoted by LEVINSON S., *Written in stone , public monuments in changing societies,* ibid, pp. 4-5; it is quoted also by LIUBARETS A., *The Politics of Memory in Ukraine in 2014: Removal of the Soviet Cultural Legacy and Euromaidan Commemorations*, ibid, p. 200.

3. Heritage removal and Memory laws

The protests and popular uprising that broke out following the failure to reach an agreement with the European Union found their legal legitimisation through four important memory Laws (de-communization laws); among these, the Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and the prohibition of propaganda of their symbols[454].

Academic literature describes the memory laws as the output of Russia's annexation of Crimea and the outbreak of conflict in eastern Ukraine[455]. Indeed, the rationale is to be found in the desire of Ukraine to reaffirm its territorial sovereignty and independence from Russia by erasing everything that refersto the soviet legacy. The need for condemning the Soviet legacy is related to a question of national security: to erase the soviet past means to reaffirm Ukraine's independence and territorial sovereignty[456].

Indeed, looking at the explanatory note to the Draft Law under examination, the regulation is aimed at preventing the repetition of criminal communist and national socialist (Nazi) totalitarian regimes in order to protect "the sovereignty, territorial integrity and national security", invoking article 1, 3 and 11 of Ukrainian

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[454] 5 Law of Ukraine No 317-VIII of 9 April 2015 [On the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon3.rada.gov.ua.

[455] NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective*, International Journal of Transitional Justice, Volume 11, Issue 1, March 2017.

[456] NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective*, International Journal of Transitional Justice, MARPLES, D. R., *Decommunization, Memory Laws, and " Builders of Ukraine in the 20th century"*, ACTA,SLAVICA IAPONICA. LIUBARETS A., *The Politics of Memory in Ukraine in 2014: Removal of the Soviet Cultural Legacy and Euromaidan Commemorations*, ibid, pp.198-199, 2018. The author anchors the removal of the Soviet cultural heritage to the affirmation of the collective subjectivity of Ukraine

Constitution[457]. The preamble to the law recalls the same principles as the object of protection, more specifically, independence, sovereignty, territorial integrity and national security of Ukraine. Still, the preamble invokes article 11 of the Constitution, according to which: "the State contributes to the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture, as well as the development of ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine".

The law bans propaganda and symbols of communist and National-socialist totalitarian regimes. The "visual de-socialisation" concerns not only flags, images of communist slogans, and the toponymy of places celebrating the USSRbut also monuments, the object of this research. In particular according to letter e) symbols of totalitarian communist regimes include: " images, monuments, memorial signs, inscriptions dedicated to persons who held senior positions in the Communist Party (the position of secretary of the district committee and above), persons who held senior positions in the highest authorities and administration of the USSR, the USSR (USSR), other allied or autonomous Soviet republics, authorities and management of regions, cities of republican subordination, employees of Soviet state security bodies of all levels[458]". What is interesting to note

[457] Article 1: Ukraine is a sovereign and independent, democratic, social, law-based state; Article 3: The human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individua l for its activity. To affirm and ensure human rights and freedoms is the main duty of the State. Article 11: The State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.

[458] Still according to letter e) images, monuments, memorial signs, inscriptions dedicated to events related to the activities of the Communist Party, with the establishment of Soviet power on the territory of Ukraine or in separate

is that this ban does not extend to symbols used in specific contexts, as provided for Article 3, fourth paragraph[459]. It follows from the reading that symbols are not prohibited if used in museum exhibitions or private collections and in works of art created before the entry into force of this law, as well as worksof

administrative-territorial units, persecution of participants in the struggle for Ukraine's independence in the 20th century (except for monument s and memorial signs related to the resistance and expulsion of Nazi invaders from Ukraine or with the development of Ukrainian science and culture);

[459] 3. The ban does not apply to cases of use of symbols of the communist totalitarian regime, symbols of the National Socialist (Nazi) totalitarian regime:
1) on the documents of state bodies and local self-government bodies (local state authorities and administration), adopted or issued before 1991;
2) on documents issued by educational and scientific institutions, enterprises, institutions, organizations before 1991;
3) in the expositions of museums, thematic exhibitions, the Museum Fund of Ukraine, as well as library funds on various media;
4) in works of art created before the entry into force of this Law;
5) in the process of scientific activity, including during scientific research and dissemination of their results in a manner not prohibited by the legislation of Ukraine;
6) on the original battle markings;
7) at state awards, jubilee medals and other awards awarded to persons before 1991 and during 1991-2015 in connection with the anniversaries of the events of the Second World War, as well as on documents certifying the awarding of them;
8) on the graves located on the territory of burial sites, places of honorable burials;
9) during the presentation or reconstruction (including historical) historical events;
10) in private collections and private archival collections;
11) as objects of antique trade.
The ban does not apply to cases of the use of symbols of the communist totalitarian regime, symbols of the National Socialist (Nazi) totalitarian regime (provided that this does not lead to propaganda of the criminal nature of the communist totalitarian regime of 1917-1991, the criminal nature of the National Socialist (Nazi) totalitarian regime):
1) in manuals, textbooks and other materials of scientific, educational and educational nature, which are used in educational, educational and educational processes;
2) in works of art created after the entry into force of this Law.

art created after whose symbols are not used for propaganda purposes.

Therefore, what is noticeable is that the politics of memory erasure concerns the removal of those monuments celebratingthe Soviet totalitarian regime located in public spaces. This erasure of memory affects the urban planning of a city with its commemorative monuments, also shaping the names of streets and squares. Indeed, what these politics of memory challenge is the public function of such monuments, which is no longer relevant. At the same time, this phase was characterized by the construction of a new path of collective memory based on the celebration of national heroes and preserving the memory of the Euromaidan protests with the creation of the Museum of the Revolution of National Dignity[460]. What was emphasised in the first part about the link between collective memory, cultural patrimony, and law would seem to be confirmed. Memory law, in this case, is aimed at enabling change in society, affirming new cultural values, and erasing the old ones.

Nevertheless, in terms of the protection of cultural heritage, does this memory law comply with domestic Ukrainian Law and International Law? What legal issues does it raise? It seems important to examine it in the light of Ukrainian domesticlaw and International Law.

31 A look at the Ukrainian legal framework

The first thing to asses is whether the Ukrainian legal framework grants protection to the cultural heritage and according to which qualifiers. It is possible to notice that the protection of cultural heritage finds its legal ground in the Ukrainian Constitution in Article 54 and article 66[461]. There is a specific constitutional

[460] MARPLES, D. R., *Decommunization, Memory Laws, and "Builders of Ukraine in the 20th century*, ACTA,SLAVICA IAPONICA, 2018.

[461] Article 54: Citizens are guaranteed the freedom of literary, artistic, scientific and technical

provision on cultural heritage, copyright law, and the preservation of historic monuments and other objects of cultural value.

Moreover, the Law of Ukraine, "On the fundamentals of the National Security of Ukraine", includes among the objects of national security, article 3 ", Society and its spiritual, moral, ethical, cultural, historical, intellectual and material values, information media and environment as well as its natural resources"[462]. Therefore, according to this law, territorial integrity, sovereignty and cultural values are connected, andthey are all objects of national security. Moreover, one should note in the Law on Culture that the main principles of cultural policy include "the recognition of culture as one of the main factors of

creativity, protection of intellectual property, their copyrights, moral and material interests that arise with regard to various types of intellectual activity.

- Every citizen has the right to the results of his or her intellectual, creative activity; no one shall use or distribute them without his or her consent, with the exceptions established by law.
- The State promotes the development of science and the establishment of scientific relations of Ukraine with the world community.
- Cultural heritage is protected by law.
- The State ensures the preservation of historical monuments and other objects of cultural value, and takes measures to return to Ukraine the cultural treasures of the nation, that are located beyond its borders.

Article 66:

Everyone is obliged not to harm nature, cultural heritage and to compensate for any damage he or she inflicted.

[462] See the Law of Ukraine "On the Fundamentals of the National Security of Ukraine", Article 3. Objects of National Security Objects of National Security are:

• A person and citizen - his/her constitutional human rights and freedoms;

• Society and its spiritual, moral, ethical, cultural, historical, intellectual and material values, information media and environment as well as its natural resources;

• The state and its constitutionally ordered system, sovereignty, territorial integrity and inviolability.

Ukrainian's identity as well as of national minorities livingonthe territory of Ukraine[463]".

In addition, the Law of Ukraine, "On Protection of Cultural Heritage," includes the definition of cultural heritage and monuments[464]. More specifically article 1 defines cultural heritage as " system of objects of cultural heritage inherited by humanity from previous generations" and object of cultural heritage: " a prominent place, a construction (creation), acomplex (ensemble), their parts, related movable items, and also territories or water objects, other natural, natural-and-anthropological or created by people objects, irrespectively of safe keeping condition, that preserved until our time its values from archaeological, aesthetic, ethnological, historical, architectural, creative, scientific or art point of views and have saved their authenticity."[465] Still, article 1 defines a monument as an "Object of cultural heritage, which has been included in the State register of immovable monuments of Ukraine". This latter is described in the third part of the law, according to which the listing of cultural heritagesites follows two different categories: categories of national and local importance[466].

From a reading of the articles, it is possible to observe that the protection of cultural heritage has a constitutional ground, and it

[463] See article 2, main principles of cultural policy, of Law of Ukraine, basic legislation on culture.

[464] https://en.unesco.org/sites/default/files/ua_law_protection_cultural_heritage_engtof.pdf

[465] See the Law of Ukraine, On Protection of Cultural Heritage, article 1.

[466] Article 13. State Register of immovable monuments of Ukraine.

1. Cultural heritage objects regardless of their forms of propriety according to their archaeological , aesthetic, ethnological, historical , creative, scientific or art value are to be registered by including to the State register of immovable monuments of Ukraine (Register) according to categories of national and local importance monuments. Cabinet of Ministers of Ukraine establishes the procedure of category defining. After inclusion to the Register the object and all its component parts gain the status of monument.

would seem anchored to a prevailing definition of cultural heritage as tangible cultural heritage[467]. Moreover, it would appear that the definition of cultural heritage and the criteriathat identify cultural heritage as deserving legal protection follow international legislation on cultural property. Consider that Ukraine is a signatory country to a number of international conventions, including, among these, the Convention for the Protection of World Cultural and Natural Heritage (Paris, 1972), Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 2003), Council of Europe Framework Convention on the Value of Cultural Heritage for Society (The Faro Convention, 2005). Finally, it emerges that cultural values aretied to the principle of independence and territorial sovereignty; they are fundamental to building Ukraine's national identity.

However, the point is to understand which cultural values to build national identity. In light of this legal framework , do communist monuments have legal protection, even though cultural values are anachronistic and do not reflect the national identity that is to be built? According to article 15 of the Law of Ukraine on the Protection of Cultural Heritage, a monument from the register can be excluded if it has lost the subject of protection. This is what happens to communist monuments with the 2015 law excluding them from the scope of protection.

There are no rulings of the Ukrainian Constitutional Court specifically devoted to the compliance of the removal of communist monuments provided by the 2015 memory law with the Ukrainian cultural heritage law. However, there is a ruling of the Ukrainian Constitutional Court, which confirmed the

[467] However within the law on culture there are references to intangible cultural heritage at article 14 : " Creates conditions for preservation and development of folk culture, assists in revival of centres of traditional national creation , art crafts and trades, creation of museums of folk art, folklore and ethnographical ensembles, ensures their organizational and financial support. Ukraine has also signed Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 2003).

constitutionality of the 2015 memory law more generally[468]. The appeal, filed by a number of parliamentarians, raised the issue of constitutionality with regard to the prohibition of censorship, freedom of expression, and the right to collect and spread information freely[469]. Interestingly, according to the Court, the freedom of expression can be restricted in the name of national security, territorial integrity or public order. The memory law has been applied with the aim of preventing the repetition of crimes of Nazi and communist regimes and to eliminate every threat to independence, sovereignty, territorial integrity and national security of Ukraine. The constitutional Court relies on the systematic violation of human rights that characterized the communist and Nazi regimes. Banning the symbols of regime propaganda means avoiding glorification and a return to the past. It means setting aside anti-democratic values negative and destructive political ideas. The symbolism is directly tied to the regimes and the violation of human rights. In any case, the implementation of the policy of remembrance, which includes the prohibition of the use of their symbols and the dismantling of monuments, must take place with respect for other human rights[470].

To sum up, if the soviet symbols, including the communist monuments, fulfil a function of propaganda that constitutes a threat to the territorial sovereignty of Ukraine, it is legitimate to ban them, all the more so in light of the historical context of the occupation of part of its territory. The court, therefore, relies on the particular historical context and the purpose of this law to prevent further occupation of Ukrainian territory[471].

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[468] Judgment of the Constitutional Court of Ukraine no. 9 -p/2019 of 16 July 2019 [On constitutionality of Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and prohibition of propaganda of their symbols], zakon.rada.gov.ua.

[469] Ibid, see paragraph 1 of the ruling under examination.

[470] See paragraph 13.

[471] See paragraph 11

An analysis of the judgment again reveals the commonthread that explains these policies of erasing the Soviet cultural heritage: these memory laws are linked to a security issue and to the protection of territorial sovereignty and are extremely tied to historical circumstances.

Having established the constitutionality of the law, what is actually controversial is the decision-making process that would have taken place in the absence of a serious public debate and the involvement of all the communities concerned [472]. The greatest criticism comes from a group of academics who have raised the question of the compatibility of the laws with freedom of expression and the right to historical truth[473]. They challenge the compliance of memory laws with the principles of the Council of Europe and Osce. They criticise the instrumentation of historical memory, which can exacerbate Ukraine's internal divisions, as well as the lack of a serious public debate without dissenting votes[474]. The most critical issues concern the impossibility of questioning controversial groups such as the Upa and Oun, as well as recognising certain aspects of the Soviet cultural legacy that have positively affected Ukrainian culture like it happened during the Gorbachev period and with the movement of Perestroika[475].

[472] On this topic see CHERVIATSOVA A., *On the frontline of European Memory Wars: Memory Laws and Policy in Ukraine*, ibid,

[473] MARPLES D. R. , *Open letter from Scholars and Experts on Ukraine Re. the So-Called "Anti-Communist Law"* , in KRYTYKA Thinking Ukraine, 2015, https://krytyka.com/en/articles/open-letter-scholars-and-experts-ukraine-re-so-called-anti-communist-law.

[474] Ibid.

[475] Ibid.

4. The international legal lens.

In examining the international perspective, it seems important to consider what conflicting interests come into play in memory policies regarding the removal/destruction of controversial cultural heritage. As seen in the first chapter, several legal interests bear on cultural heritage, interests that can often be in conflict with each other. Regarding the destruction/removal of cultural heritage, an initial tension emerges in relationto property rights. As said before, cultural heritage belongs to the individual, to the local community as well as to a Nation, and to the international community as a whole[476]: who gets to decidewhen it comes to controversial cultural heritage?

Further tension arises if the protection of cultural heritage is recognized as a human rights issue, which in turn comes into conflict with the preservation of controversial heritagecelebrating contested regimes associated with human rights violations.

On the other hand, the interest in protecting controversial cultural heritage can be in conflict with the interest in coming to terms with a difficult past recognised by the field of transitional justice.

It is about balancing different interests at stake and reconciling the responsibility to protect envisaged by international law with national iconoclastic instances, linked also with the need to assert state sovereignty. The responsibility to protect cultural heritage bears on both the international community and individual states. Ukraine has ratified many international treaties[477]. So, Ukraine

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[476] Behzadi E., *Destruction of cultural heritage as a violation of human rights: application of the alien tort statute*, Ibid.

[477] Among the ratified conventions there are Convention concerning the protection of the World Cultural and Natural Heritage; the European Convention on the Protection of the Archaeological Heritage, European Landscape Convention, Convention on the Protection of the Underwater

has the duty to protect its cultural heritage not only in accordance with its Constitution and national legislation but also international conventions. However, this is to be balanced with the principle of state sovereignty, equally recognised by international law, which also implies the control of cultural heritage within one's own territory. In the Ukrainian case, state sovereignty is under threat, and the control of cultural heritage becomes a way to securitize state sovereignty.

In grasping what legal issues come up in the face of Soviet heritage removal in Ukraine, it seems important to examine the legal advice issued by the international community on this subject.

At the international level, it is noteworthy to consider asageneral framework the United Nations Report of the Special Rapporteur in the field of cultural rights (Farida Shaheed) on memorialization processes of the events of the past in post-conflict and divided societies in which it makes a number of recommendations on memorial practices[478]. According to the report, memorials pursue a function of guaranteeing the non-repetition of mass crimes committed in periods of repression; they fulfil a duty of remembrance[479]. As far as the memorialization process of monuments and sites of past oppressive regimes, according to the report, it is up to the state governments to choosehow to dealwith this controversial heritage[480]. It should ensure thetransparency of the decision-making process, and it should guarantee dialogue between the different stakeholders. Memorialization standards

Cultural Heritage, Convention for the Protection of the Architectural Heritage of Europe. For an overview on Ukrainian cultural legislation and cultural policy.

[478] 'Report of the Special Rapporteur in the Field of Cultural Rights,' UN Doc. A/68/296 (9 August 2013).

[479] Ibid, see paragraph 11 of the cultural rights report.

[480] Ibid, see paragraphs 61-63. In particular paragraph 63:" *The choice to conserve, transform or destroy always carries meaning and so needs to be discussed, framed and interpreted. For example, the destruction and transformation of such monuments may be interpreted as a willingness to erase one part of history or a specific narrative.* "

also emerge from the UN report Joinet-Orentlicher, which provides a set of principles based on the right to know, to justice, to reparation and guarantees of non-recurrence, recognising the right to truth as part of the heritage of a people[481].

In relation to the "Law on the Condemnation of the Communist and National Socialist (Nazi) Regimes, and Prohibition of Propaganda of their Symbols", the first document deemed to be examined is "the Heritage at risk word report" (2014-2015) issued by Icomos[482]. This report states the lack of scientificmethodology within the decision-making process. Furthermore, the report denounces the lack of a serious public debate on the choice of which monuments to preserve or destroy, as well as the online sale of parts of the destroyed statues[483].

On the same line, according to the International Committeeof the Blue Shield, some monuments were officially listed as heritage sites, and their dismantling required certain procedures to be observed[484].

It is also interesting to consider the case-law of the European Court of Human rights[485]. The European Court of Human Rights, even though it does not recognise explicitly the right to culture,

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481 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/141/42/PDF/G9714142.pdf?OpenElement .
See also the Van Boven- Bassiouni Principles, UN report on the right to remedy and reparation https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation.

482 See the link http://openarchive.icomos.org/id/eprint/2108/ pp. 133- 135.

483 Ibid.

484 GOMEZ H. R., *"Ukraine says goodbye Lenin", in New Eastern Europe*, 2014. https://web.archive.org/web/20160806164419/http://old.theartnewspaper.com/articles/Ukraine-says-Goodbye-Lenin/31830

485 See the report on Cultural rights in the case –law of the European Court of Human rights. https://www.echr.coe.int/documents/research_report_cultural_rights_eng.pdf.

many cultural rights find their protection under core civil rights such as the right to freedom of expression (Article 10) and the right to education (article 2 of Protocol No. 1). Cultural rights include not only the right to cultural heritage but also the right to see historical truth, the right to academic freedom, the right to education. All of these cultural rights may come into play withthe memory law under examination. On this point, what appears relevant is the joint interim opinion adopted by the Venice commission (European Commission for democracy throughlaw) and the Office for democratic institutions and human rights to verify the compliance of the law with the principles of the European Convention on human rights[486]. What is relevant in relation to the removal of public monuments and renaming of streets is the freedom of expression. Indeed, the scope of freedom of expression extends not only to the freedom of expressingideas and information but also to the form in which they are conveyed, including a display of symbols and symbolic acts[487]. The articles of law that are relevant are articles 3 and 4, prohibiting propaganda of the communist and Nazi regimes, 7.26 and 7.29, obliging to rename geographical locations, the removal of communist monuments and memorial signs of leading representatives of the communist regime.

According to this joint opinion, Law no. 317-VIII pursues legitimate goals, recognising Ukraine's right to ban or even criminalise the use of certain symbols and propaganda for totalitarian regimes[488]. These measures aim to prevent totalitarian regimes and align with the principles of democracy, the rule of law and the protection of human rights. Moreover, the historical

[486] European Commission for Democracy through Law (Venice Commission), OSCE Office for Democratic Institutions and Human Rights, Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of Their Symbols, of 21 December 2015, CDL-Ad (2015) 041.

[487] Ibid, see paragraph 43.

[488] Ibid, see paragraph 15, 16.

context legitimizes these measures since they are aimed at enhancing social cohesion by creating a historical memory for the country[489]. The historical circumstances under which thelaw was passed justify taking such measures with the aim of eliminating any threat to territorial integrity and state sovereignty. Indeed, the Joint Opinion recalls the same principle of the Ukrainian Constitutional Court that is "democracy capable of defending itself", recognising these provisions as measures of self-defence[490].

However, what is contested concerns the way in which the decision-making process took place. The joint opinion underlines that behind these objects and spaces, there are different stakeholders and interests[491]. The process should comply with the principle of inclusiveness and good governance by ensuring consultations with the population and balancing all the interests involved[492]. What would be missing is precisely the absence of an inclusive debate involving especially local communities, whichis necessary when dealing with symbols having different meanings or, more generally, in the presence of issues of public interest. As far as the right to seek historical truth, the joint opinionunderlines that the Law "pertains to history and its interpretation and […] such tools should not be used to impose a view of history on the person living in a State or to forestall public debate"[493]. At the same time, it remarks that the vagueness of the terms propaganda and symbols may affect academic freedom and free artistic creation, as no exception is provided in Articles 3-4 on the prohibition of symbols[494]. Moreover, the joint opinioninvokesthe OSCE Ljubljana Guidelines on Integration of Diverse Societies, according to which the creation of historical memory in relation

[489] Ibid, Paragraph 18.
[490] Ibid, Paragraph 16.
[491] Ibid, Paragraph 100.
[492] Ibid, Paragraph 101.
[493] Paragraph 89.
[494] Paragraph 92.

to the display and use of symbols in shared public space should not violate the rights of minority groups[495]. The opinion recalls the recommendation of the Council of Europe on the erasure of the Soviet legacy, which states that this process of de- communisation must be carried out in accordance with the principle of the rule of law[496].

Among the Council of Europe's recommendations, two other important documents deserve to be mentioned. The first one is Recommendation 898 (1980) on Memorials, in which the Parliamentary assembly stresses the importance of diversity within Europe's cultural heritage[497]. Above all, the recommendation envisages the removal of controversial monuments as a measure of last resort, calling for the preservation of such monuments in museums[498]. Consider also the recommendations 1652 and 1859 (2009) on the "attitude to memorials exposed to different historical interpretations in Council of Europe member states"[499]. The two recommendations, in addition to emphasizing the role of the Council of Europe in shaping collective memory even related to museums, cultural heritage and history, stress the importance of involving all possible stakeholders when it comes to making

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[495] Paragraph 62.

[496] Resolution 1096 (1996) on Measures to dismantle the heritage of former communist totalitarian systems. https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507.

[497] https://pace.coe.int/en/files/14932/html. See paragraph 1 : *reaffirming the continuing interest of the Assembly in the diversity of Europe's cultural heritage; 2: Calling attention to the artistic or historical significance of the many memorials to individuals and to events throughout Europe that are not moveable objects and do not form a protected part of a building , ruin or archeological site"*
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[498] See paragraph 5 of the recommendation under examination : *"Believing that even where it is felt necessary to remove monuments set up by invaders or by a regime regarded as oppressive or hated, some considera tion should be given to their conservation in a museum"*;

[499] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17713&lang=en. https://pace.coe.int/en/files/17712 .

decisions on controversial monuments[500]. While recalling the prescriptions of the previously mentioned recommendation on the removal of controversial monuments as a last resort, the recommendation defers to state sovereignty the decisiononhow to come to terms with its own past, including every decision on controversial monuments, still in compliance with international rules[501]. Finally, mentioned is the paragraph in the recommendation that, in turn, recalls Article 7 of the Faro Convention that calls for dialogue between public authorities and experts in the face of cultural heritage exposed to different historical interpretations, emphasizing the principle of cultural diversity, as well as the importance of the educational aspect attached to cultural heritage.[502]

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[500] See paragraph 7 of Recommendation 1652 (2009): *" Because of the controversial nature of such memorials, the Assembly calls on Council of Europe member states to initiate the broadest possible discussions between historians and other experts on the complexity of the historical background of these monuments, their meanings to different segments of the societies, internally and, if appropriate, internationally"*.

[501] See paragraph 4 of Recommendation 1652 (2009) : *"The Assembly, while drawing attention to its Recommendation 898 (1980) on memorials, which suggests conserving "monuments set up by invaders or by a regime regarded as oppressive or hated" in museums as an alternative to their demolition, expresses its belief that the final decision on the fate of such memorials is a sovereign one of the state in which the monument is located; it should, nevertheless, be based on the norms of international conventions and bilateral agreements"*.

[502] In the context of general analysis of the significance of cultural heritage in changing societies, see DOLFF- BONEKAMPER G., *Dividing lines, connecting lines – Europe's cross-border heritage*, Council of Europe publication, 2004. In this publication there is a focus on the issue of the often divergent successive or parallel interpretations of heritage situated in regions, which have experienced conflicts or changes in sovereignty. The discussions were then carried forward during the preparation of the Framework Convention on the Value of Cultural Heritage for Society (Faro, 2005) which, for the first time in a text of that legal standing, included provisions on heritage interpretation while highlighting the concept of the "common heritage of Europe". Under Article 7 of the Convention, entitled "Cultural heritage and dialogue", public authorities are called on to *"encourage reflection on the ethics and methods of presentation of the cultural heritage, as well as respect for diversity of interpretations"* and *to "establish*

It is interesting to see that the Venice Commission, in its legal opinion commission on the Ukrainian Law on Supporting the Functioning of the Ukrainian Language as the State Language (2019), reaches the same conclusions as those on the removal of Soviet heritage[503]. The subject of language has always been a sensitive issue in the multi-identity country of Ukraine and in its relationship with the Russian Federation; even within thecurrent conflict, the language issue has been embedded into a narrative used by the Russian Federation as one of the pretexts to erodethe Ukrainian state sovereignty[504]. It should be premised that Ukraine recognizes linguistic pluralism at the constitutionallevel, and it has signed important international treaties onthe protection of language minorities[505]. However, as relations with Russia soured, Ukraine increasingly adopted restrictive language legislation to empower and promote the use of Ukrainian as the state language. The 2019 Language law extends the use of Ukrainian for the majority in most areas of the public sphere, including cultural activities, book publishing and media.

In this legal opinion, the Venice Commission reported the lack of participation of language minority stakeholders in the decision-making process of this law. While recognizing the legitimate right of Ukrainians to strengthen Ukrainian as an official language, this

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processes for conciliation to deal equitably with situations where contradictory values are placed on the same cultural heritage by different communities".

503 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)032-e. CDL-AD(2019)032-e. Ukraine - Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language, adopted by the Venice Commission at its 121st Plenary Session (Venice, 6 -7 December 2019).

504 POWDERLY J., STRECKER A. , *Afterword Heritage destruction and the war on Ukraine, in Heritage Destruction, Human Rights and International law*, published by Brill | Nijhoff., pp. 423 454, 2023.

505 Consider article 10 and article 11 of the Ukrainian Constitution. As far as the international treaties ratified by Ukraine on minorities 'language protection consider the International Covenant on Civic and Political Rights, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

should not be at the expense of the exercise of minority language rights[506]. It is interesting to see how the border betweentangible and intangible heritage appears very blurred within the construction of collective memory as part of the nation-building process.

To draw conclusive remarks, the right to remove controversial cultural heritage would not seem to be prohibited if it is done properly, balancing with other rights. The removal of monuments of an oppressive regime is conceived as a symbolic reparation for the victims of the regime.

It is primarily up to state sovereignty to control the disputed cultural heritage. What is important in light of international practice is how the decision-making process takes place, involving all the stakeholders and in the light of the principle of transparency.

5. Closing remarks on the Ukrainian case.

As seen, a political transitional phase can affect the public space and its heritage. When it comes precisely to public art, arevisiting of the values it represents as a result of regime change is inevitable. It is a matter of choosing the values in which the changing society recognises itself. The memory policies have challenged the values attached to the soviet heritage. Moreover, it would seem that the link between state sovereignty and cultural heritage is inseparable. If state sovereignty is fragile, its vulnerability also affects the cultural heritage located in its public space. The removal of the soviet legacy would seem a matter of state security: it would pursue a function of legitimation of the

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506 See paragraph 136 of the Venice Commission's legal opinion: *"While fully recognising that it is a legitimate aim of every State to strengthen the State language, this legitimate purpose has to be coordinated and adequately balanced with guarantees and measures for the protection of the linguistic rights of Ukraine's minorities, which may not be unduly diminished. In order to avoid the language issue becoming a source of interethnic tensions within Ukraine, it is of crucial importance that Ukraine achieve an appropriate balance in its language policy".*

existing power as a response to historical events like the annexation of Crimea from the Russian Federation[507]. The Ukrainian case can be deemed as an identity-based conflictwhere, as seen since its independence, two opposing narratives contended, namely the pro-Western one in western Ukraine and the pro-Russian one in the eastern territory[508].

However, there are some observations to be made. First, it seems opportune to challenge the concept of identity. The concept refers to a group's membership in the same values, qualifying as those who are excluded from this collective self-identification[509]. From the ancient cultures, what is different is perceived as an enemy to be feared; from the earliest cultures, the "other" is seen as" the stranger", as something to be feared. However, the concept of identity is a construct, and diversity among collectivegroups does not necessarily imply a conflict of values[510].

The same argument can apply to the Ukrainian case. What is meant by Ukrainian cultural identity? Several authors point out that the representation of "the two Ukraine" is a construct, simplistic, not corresponding to the actual reality where the two oppositions coexist together[511]. As mentioned earlier, it is in the inherent nature of Ukraine to be a borderland crossed bydifferent empires and ideologies. The narrative of "the two Ukraine" would seem to have fuelled internal conflicts and has been exploited by

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[507] Ibid.

[508] KOROSTELINA K., *Understanding Values of Cultural Heritage within the Framework of Social Identity Conflicts*, in Enrica Avrami, Susan Macdonald, Randall Mason, David Myers (ed. By), Values in heritage management. Emerging Approaches and Research Directions, 2019, https://www.getty.edu/publications/heritagemanagement/part-two/6/.

[509] On this concept see SACCO R. *Antropologia giuridica*, ibid p. 62.

[510] Ibid p. 63.

[511] On this point ZAHARCHENKO T., *'Polyphonic Dichotomies: Memory and Identity in Today's Ukraine,'* Demokratizatsiya: Journal of Post Soviet Democratization 21(2) (2013). CELLA G. , *Storia e geopolitica della crisi ucraina*, ibid. NUZOV I., *The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective*, ibid.

internal and external political actors for other purposes[512]. Ukraine is an excellent case in which to explore the legal boundaries of the collective memory insofar as the division that characterizes it appears very blurred. These boundaries are blurred since the two cores of Western and Eastern are not opposing but actually coexist[513].

One should then ask whether the legal tool is the best way to define collective memory. there is no single version of the past ; what some authors point out is that the legal definition of a people's collective memory would end up espousing one interpretation of history to the exclusion of others[514]. Limitations placed by a law risk undermining academic freedom in the field of history[515]. The exploitation of collective memory for political purposes can also involve cultural heritage, which, as seen, canbe used for the legitimization of political power [516]. The strong centrality of the State in deciding what controversial heritage it chooses to preserve entails risks: the risk that some culturalassets will be forgotten or destroyed if they do not reflect its political vision[517]. The state interest is not always representative of its

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[512] Ibid.

[513] ZAHARCHENKO T, *'Polyphonic Dichotomies: Memory and Identity in Today's Ukraine*,iid.

[514]GLISZCZYNSKA-GRABIAS A., *Memory Laws or Memory Loss? Europe in Search of Its Historical Identity through the National and International Law*, Polish Yearbook of International Law, *Vol. 34 (2014), pp. 161-186*. BELAVUSAU U., *On Ephemeral Memory Politics, Conservationist International Law and (in-)alienable Value of Art in Lucas Lixinski's Legalizied Identities: Cultural heritage Law and the Shaping of Transitional Justice*, Jerusalem Review of LEGAL STUDIES (2022)

[515]GLISZCZYNSKA-GRABIAS A. , *Memory Laws or Memory Loss? Europe in Search of Its Historical Identity through the National and International Law*, ibid.

[516] DE CLIPPELE M.S., *Does the Law Determine What Heritage to Remember*?, int J Semiot Law, 34, (2021), pp. 623 –656 https://doi.org/10.1007/s11196-020-09811-9. On the concept of "manipulation of memory" see RICOEUR P., *La Mèmoire, l'histoire, l'oubli*, Paris, Seuil 2000.

[517] DE CLIPPELE M.S., *Does the Law Determine What Heritage to Remember?* ibid, The author identifies different risks attached to a State Monopoly on

various constituent collective groups. Therefore, the importance of a decision-making process that is as inclusive and transparent as possible seems clear. It is also appropriate to reflect on the boundaries of these memory laws concerning policies of cultural heritage removal. These policies' risk extends from tangible to intangible heritage as it happened by touching the issue of the Russian language, a sensitive topic that can affect the rights of minority groups.

Finally, the link between memory laws and state security should be challenged[518]. The security purpose of such memory laws is well known. However, as stated earlier, incorporating the narrative of one version of historical memory excludes other interpretations[519]. This can be a source of conflict among collective groups which embrace different interpretations of the past. Inthe case of Ukraine, it would seem that state sovereignty has been further exposed to risk[520].

Heritage regulation: the risk of forgetting, of abandoning or of destroying heritage.

[518] On this topic, MALKSOO M., *'Memory must be defended': Beyond the politics of mnemonical security*, Security Dialogue 2015, Vol. 46(3) 221–237.

[519] Ibid.

[520] Ibid, see also LIXINSKI L., *Legalizied Identities: Cultural heritage Law and the Shaping of Transitional Justice*, ibid.

Section 2

Conflicts of memory over confederate monuments in the United States.

1. Introduction

In echoing Musil's concept of invisibility, some monuments become invisible, with their presence unnoticed in the current public spaces.[521] Diversely, other monuments linked to a specific historical context evoke controversial emotions if their embodied values struggle to adapt to changing societies. In this case, public monuments are extremely "visible" since their image isdisruptive and is often a source of competing interpretations depending on the viewer.

This is what happens to monuments dedicated to the Confederacy in the United States, whose image seems to be dissonant withthe current American society[522]. This dissonance challenges the public interest in preserving them.

The next section will try to understand the divisive nature of such monuments and what makes them more vulnerable to removal, as well as what legal issues come into play. As said, the research question that runs through the whole study pertains to the limits

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[521] Quoted by LEVINSON S., *Written in Stone, Public Monuments in changing societies*, ibid, p.

[522] The expression "Confederate monument" is not a legal term but it identifies the monuments erected to celebrate personalities related to the Confederacy. On this point see CAPONIGRI F., *Malleable monuments and comparative cultural property law: The Balbo monument between the United States and Italy*, I•CON (2021), Vol. 19 No. 5, 1710–1737, p. 1713, note 11, https://doi.org/10.1093/icon/moab136.

of States in removing or destroying controversial culturalheritage in light of an international interest in protecting cultural heritage.

Actually, whereas in the Ukrainian case, the desire to preserve transnational cultural heritage clashes with the nationalinterest in coming to terms with its past by removing Soviet public monuments, in the U.S. case, the removal claims over confederate monuments clash with the so-called "Statue statutes" that prevent or cumbersome the process of removing public monumentsat the local level[523].

In grasping the main tension over confederate monuments, one should consider from one side the attempt to recognise the confederate monuments worthy of legal protection as historically and artistically significant art objects; from the other side, the values they convey as symbols of the confederacy's ideology, based on slavery and on white race supremacy[524]. Indeed, thelife of Confederate monuments is closely linked to a re-evaluationof the Confederacy from the Southern States.

As in the Ukrainian case, the controversy over Confederate monuments pertains to the construction of a collective memory pattern. Both pro-removal and pro-preservation paradigms struggle to identify a collective memory in which the U.S. can recognize itself. It is a matter of understanding the culturalvalues these two paradigms endorse. It is also a matter to identify who shapes the American collective memory: challenging confederate monuments is also a way to control the present by interpreting the past[525].

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[523] STOLL W., *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities* , 26 U.C. Davis Soc. Just. L. Rev. 91 (2022).

[524] CAPONIGRI F., *Malleable monuments and comparative cultural property law: The Balbo monument between the United States and Italy*, ibid, p. 1731-1732. To have an overview of the main challenges over confederate monuments see the documentary "The neutral ground" (2001).

[525] FABBRI D., *Sulla Memoria L'America si gioca il futuro*, Limes rivista italiana di geopolitica, 8/2020.

The next paragraphs will look in detail at the legal arguments in favour of removal and preservation, asking what is the deeper meaning of this "memory war" around Confederate monuments? Do these monuments have real historical and artistic value? Where does the public interest in preserving "racist monuments" stop? At the same time, what limits does the interest indestroying these controversial monuments encounter? What is the perspective of international law? If societies change, should monuments with outdated values be removed?

Before getting to the heart of these questions, it is appropriate to contextualize the meaning of Confederate monuments and their function, as well as the historical narrative they embody, mainly focusing on the timing and the place in which they were located, as well as what events have fomented removal claims. It is also necessary to understand why the monuments that belong to a distant historical period are not more "invisible" within public spaces but are a source of conflict today. The study cannot ignore the question of what public art and cultural property preservation mean according to the U.S. legal framework, also by taking into account the federal level.

2. Contextualizing the historic and artistic value of confederate monuments

Confederate monuments are linked to a crucial event in American history: the Civil War (1861-1865), fought between the United States (the North) and the Confederacy made up of southernslave states that seceded, following the presidential election of Lincoln, who opposed against the Southern economic system based on slavery. The outcomes of the Civil War appear to be fundamental events in that they shaped the constitutional values and union in which American democracy is still defined today[526]. The conflict

[526]See MCPHERSON J., *A brief Overview of the American Civil War. A defining Time in Our Nation's History*, American battlefield Trust, 2008, p. 1: *"The civil war is the central event in America's historical consciousness. While the Revolution of 1776-1783 created the United States, the Civil War of 1861-1865*

ended with the collapse of the Confederacy and the abolition of slavery[527]. However, the end of slavery was only formalsince the rights of African Americans had never been de facto fully guaranteed for a long time[528].

It is precisely in the post-conflict phase that the history of Confederate monuments fits in. They are mainly located in the deep South, even though it is possible to see some of them in northern states as a sign of reconciliation.[529]

However, just after the Civil War, only a few monuments were erected. Subsequently, the monuments fulfilled the function of celebrating the ideology behind the Confederacy: associated with their erection is the narrative of the so-called "lost cause", which includes a revisited storytelling of the Civil War in favour of the Confederacy. According to this narrative, the Civil War would not have been fought to keep alive an economic system based on

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determined what kind of nation it would be. The war resolved two fundamental questions left unresolved by the revolution: whether the United States was to be a dissolvable confederation of sovereign states or an indivisible nation with a sovereign national government; and whether this nation, born of a declaration that all men were created with an equal right to liberty, would continue to exist as the largest slaveholding country in the world". Link : https://www.battlefields.org/learn/articles/brief-overview-american-civil-war.

[527] On December 18, 1865, the 13th Amendment was adopted as part of the United States Constitution. The amendment officially abolished slavery.

[528] LINXINSKI L., *Erasing or Replacing Symbols* in Legalized Identities: Cultural Heritage law and the shaping of transitional justice, ibid, p. 98.

[529] For a geographical location of the monuments and a collection of data see the report of the Southern Poverty Law Center, *Whose Heritage? Public Symbols of the Confederacy*, 2019, 8, www.splcenter.org/201902001/whose-heritage-public-symbols-confederacy, LINXINSKI L., *Confederate Monuments and International Law*, Forthcoming in : 32 Wisconsin International Law Journal (2018), p. 5 : *" There are at least 1500 monuments to the Confederacy across the United States, spread across 31 statues. These are mostly in southern states, with Virginia having the largest number, followed by Texas, but there are also a number of monuments in northern or traditionally liberal states like new York, Massachusetts, and California". The location shows the deep connection of these artworks with the values of the southern states.*

slavery but to defend the rights and freedoms of southern states against central government oppression, as well as to promote the "southern way of life in opposition with the industrial society of the central government"[530]. This narrative offered aromanticand heroic vision of the Confederacy, aimed at restoringitsreputation, depicted as a victim of the invasion from the central government[531].

In this context, confederate monuments became "visible markers" of the lost cause narrative[532]. This change of directionis evident in the choice of their location: no longer privatespacesbut

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[530] SNIDER S., *Grey State, Blue City: Defending Local Control Against Confederate "Historical Preservation"*, VAND. J. ENT.& TECH. L., 2022, Vol. 24, 4 see p. 853: *"Heritage groups erected many of these monuments as backlash against assertions of civil rights to spread the historically unfounded "Lost Cause" narrative that the Civil War "was not about slavery", but rather preserving states' rights and a " Southern way of life"* . PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e memoria* , DPCE online, 4/2021.
On this topic see also FABBRI D., *Sulla Memoria L'America si gioca il futuro*, Limes rivista italiana di geopolitica, 8/2020. See also PHELPS J. R., PWLEY J., *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FL., L. REV. 627 (2019), p. 636: *" There are four tenets to the lost Cause ideology: (1) that the South fought honourably and bravely; (2) that the South was not defeated, but was overwhelmed by superior Northern economic prowess and population; (3) that preservation of states' rights, not slavery, was the cause of the war; and (4) that secession was constitutional (not treasonous)".*

[531] STOLL W., *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities* , ibid, p. 104: *"Lost Cause proponents sought and seek to romanticize the Confederacy, portray it in a positive light, and distance themselves from the reality that the Civil War's cause was the South's intention to preserve slavery as an institution. The myth attempts to cast the confederacy as a heroic collection of states uniting in a hopeless, noble fight for independence against a foreign oppressor, reinforce the concept that the war was primarily fought for states' rights, and minimize any role that slavery played on provoking it".*

[532] STOLL W., *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities*, ibid, p. 104*: "[…] The Confederate monuments and symbols play an important role in Lost Cause mythology, as they serve to normalize it in the eyes of viewers".*

public spaces such as public cemeteries, universities, town squares, and government buildings.

Hence, monuments placed in a public space convey a strong message of values that is intercepted by a wide audience [533]. Placement in a public space would give legitimacy to the values they convey[534]. Despite they did not directly depict scenes of slavery, they celebrated personalities embracing these racist values. Indeed, the display of such divisive monuments in public spaces raises the main legal issues[535]. Can monuments with a racist message be publicly displayed? Public artworks are susceptible to different interpretations depending on the viewer. Among the stakeholders involved, there are undoubtedly the African American communities who consider the statues to be painful and whose demands are supported by decisions at the local level that have ordered the demolition of a number of monuments[536]. On the other side, groups that carry on thelegacy of the Confederacy, whose instances are supported at the state level, especially in those states that have existing statue statutes or have passed memory laws that prevent or hinder the removal of Confederate monuments[537].

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[533] Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, ibid, pp. 1408-1410.

[534] Ibid. See also LEES W., *The Problem with "confederate" Monuments on our Heritage Landscape*, Social science quarterly, 2021, 102, Issue 3, pp. 1002-1015

[535] GHERARDT D., *Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & L. 1 (2021). ibid, : *"The presence of a Confederate monument on public property suggests support for an army that–regardless of the motivations of individual soldiers–fought to preserve slavery and the legalized social divisions between blacks and whites, which could unintentionally signal that divisions between blacks and whites are publicly sanctioned".*

[536] KRISTI W. ARTH, *The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, Gonzaga Law Review, Vol. 56, No. 1, 2020, p. 15. According to the author, looking at the case law on confederate monuments the typical parties are historical preservation groups affiliated with supporters of confederacy against local governmental entities (cities, public universities).

[537] Among these anti-removal laws consider:

Even though the false narrative of the "Lost Cause" has affected the American historiography and American education system, shaping a distorted collective memory for a long time, contemporary historians have recognised that the "lost Cause" was historically unfounded, and they identify the slavery as the first cause of the war and of the confederacy's ideology[538]. Onthis point, it seems important to mention the American historical association's statement on Confederate monuments, according to which: "Memorials to the Confederacy were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate themfrom the mainstream of public life"[539]. The American Historical Association also highlights the lack of consultations withAfrican-

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Tennessee's 2013 'Heritage Protection Bill (Tenn. Code Ann. §4-1-412, as amended in 2016 and 2018).

North Carolina's "Cultural History Artefact Management and Patriotism Act'.

Alabama's 2017 Memorial Preservation Act.

Other States implemented their existing statue statues to prevent the removal or destruction of confederate monuments. See Missisipi Code, the 2000 South Carolina Heritage act, the 2001 Georgia Code. Virginia. For a deep study on memory laws and Confederate monuments see EIJK C. V., *Assessing the Problems and Impacts Caused by Laws Preventing the Removal of (Confederate) Monuments in the United States of America* , from the project MELA "Memory Laws in European and Comparative Perspective".

[538] On this point, see FABBRI D., *Sulla Memoria L'America si gioca il futuro,* ibid, p. The author cites a report that in 2011 the 48 % of Americans believed the Civil War was fought to defend the freedoms of the southern states, c ompared with the 38 % who considered slavery to be the main cause. See HEIMLICH R., *What caused the Civil War?,* Pew Research Center, 18/05/2011.

[539] https://www.historians.org/news-and-advocacy/aha-advocacy/aha-statement-on-confederate-monuments. See also, *"[…] History comprises both facts and interpretations of those facts. To remove a monument, or to change the name of a school or street, is not to erase history, but rather to alter or call attention to a previous interpretation of history […]To remove such monuments is neither to "change" history nor "erase" it. What changes with such removals is what American communities decide is worthy of civic honour".*

American residents during the decision-making process for these monuments[540].

Indeed, the issue of racist ideology and the supremacy of the white race are extremely interconnected with the life of Confederate monuments if we consider the timing in which they were erected. Apart from the first monuments that were erected just after the civil war, the peak of their construction has been achieved during two main historical phases. The first one concerns the period between the beginning of the 20thcentury and the Ku Klux Klan (KKK), the approval of Jim Crow Laws and the impact of the Plessy v. Ferguson decision of the Supreme Court of the United States[541]. The second phase, covering the yearsof 50's and 70's of the 20th century, coincides with the civil rights movement and the approval of the civil rights act, as well as with the decision of the Supreme Court of United States, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Finally, a few monuments have been erected in the last 15 years following the

[540]See note 18. On this point see LINXINSKI L., *Confederate Monuments and International Law*, ibid, p. 6. UPTON D., Confederate Monuments and Civic Values in the Wake of Charlottesville, SOC. OF ARCHITECTURAL HISTORIANS BLOG. Sep. 13, 2017.

[541] For a chronological reconstruction see PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e memoria* , ibid.

The intersection between confederacy and slavery is also evident from the reading of the Confederate Constitution legalizing the institution of slavery, recognising the citizens' right to property on slaves, at article IV. On this point see STOLL W., *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities,* ibid, p. 107-114. The author identifies primary source Documents to prove that the Confederate was founded to preserve slavery. The documents include the Confederate Constitution, constitutions, and documents on distinct state levels (Constitution of Alabama, Georgia, and South Carolina). Among the primary source documents, the author quotes also the "Corner Stone speech" given by Alexander Stephens, Confederate vice-president, according to which : " its foundations are laid, [the Confederacy's] cornerstone rests upon the great t ruth, that the negro is not equal to the white man; that slavery- subordination to the superior race- is his natural normal condition" , available at www.battlefields. Org/learn/primary-sources/cornerstone-speech.

election of President Obama[542]. It seems that confederate monuments were erected to either empower white supremacy or in opposition to the advancement of Black people's rights.

To summarize, Confederate monuments are tied to a distorted historical narrative. It is no coincidence that they were not built during the Civil War but in historical contexts of revaluing or discrediting slavery. Hence, the preservationist argument based on the historical value of the confederate monuments isextremely weak[543].

The second argument supporting the preservationist paradigmis the artistic value of these monuments as "art on public landscape"[544]. A first thought to make is that it is controversialin academia whether the category of "art monument is truly art", as its strictly celebratory function would distance it from a true art form[545]. By the way, confederate monuments would alsodiverge from the concept of public art, as it is understood because their construction does not arise from an inclusive decision-making

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[542] Ibid. Even the recent calls for removal are tied with the topic of racism since they came out just after the racially episodes in Charleston and Charlottesville. On this point see https://www.blackpast.org/african-american-history/charleston-church-massacre-2015/. https://abcnews.go.com/US/happen-charlottesville-protest-anniversary-weekend/story?id=57107500.

[543] However it is important to underline that at least 67 Confederate monuments have been listed on the National Register mainly according to the criteria a or c of the national register, according to which they are cultural significant since *" they are associated with events that have made a significant contribution to the broad patterns of our history"*. On this point see Jess R. Phillips & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 Fl. L. Rev. 627 (2019). The federal perspective will be examined in the next paragraphs.

[544] Ibid.

[545] On this point see CLEMENTS P., Public Art: Radical, Functional or Democratic Methodologies?, 7 J. OF VISUAL ARTS PRAc. 19, (2008), quoted by Arth, K. W. (2020). *The art of the matter: linguistic analysis of public art policy in confederate monument removal case law* ,Gonzaga Law Review, 56(1), 1-64.

process but is intended to represent a specific politicalmessage[546]. Their artistic value is actually very controversial in academia[547]. To sum up different positions on the topic, in grasping the artistic value of these statues, it would seem important to distinguishcase by case[548]. Surely, some confederate monuments have high artistic value; for instance, the confederate monument in Florida, also known as Florida's tribute to the women of the confederacy (Monument to the women of the confederacy) which has the structure of a real temple, or the ones made by important sculptors.[549]However, most of them are mass-produced and cheaply constructed[550]. Indeed, the artistic value should also be evaluated by taking into account not only the artistic qualities of an outdoor sculpture but also the placement of the monument, which is often chosen not for aesthetic reasons, as well as its embedded meaning[551]. Many of them are contextualized on purpose in public spaces to convey a specific message of white supremacy. Some art historians propose to remove the

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546 UPTON L., *Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog, Sep 13 2017.

547 See Standing Up for Justice—and Art (2018) (on file with author) (referring to confederate monuments and signed by some 206 members of the art historical community in the United States). According to the art historians who signed some confederate monuments should be preserved for their artistic and educational value.

548See the letter mentioned above Standing Up for Justice—and Art . See also LEES W., *The problem with confederate monuments on our heritage landscape* , Social science quarterly.

UPTON L. ,*Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog, Sep 13 2017.

549 Ibid, p. 1007. FABBRI D., *Sulla Memoria L'America si gioca il futuro*, ibid. LEES W., *The problem with confederate monuments on our heritage landscape*, ibid, p.1007.

UPTON L., *Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog, Sep 13 2017, the author mentions the statues made by sculptors such as Charles Keck (Stonewall Jackson, Charlottesville) or Jean-Antoine Mercié (Lee, Richmond)

550 UPTON L., *Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog, Sep 13 2017.

551 Ibid, p.1009-1013.

confederate monuments with artistic value from public space by reallocating them to museums. In contrast, for the others with standardized elements, it seems important to "let art go"[552]. Anyway, it is more essential to eliminate the embedded white-supremacy message than preserve them for their artistic quality[553].

However, why have Confederate monuments been challenging now? On first reading, the issue of racism has never disappeared, and the events cited above have only exacerbated an unresolved conflict that is clashing with the current multicultural society.

For clarity of exposition, one particular monument is chosento be examined by grasping its divisive nature and the emerging legal issues around its removal.

3. Challenging Richmond's historic avenue

Monument avenue, located in Richmond, Virginia, whichwasthe capital of the Confederacy, is an emblematic case to grasp the meaning of confederate monuments. This avenue has shaped the internal social divisions within the city of Richmond. The mall historically represented the central and economic hub of the city, as well as an important attraction for tourists. In other words, it identified what was the heart of Richmond. Recently, it hasbeen the centre of several protests due to the presence of five

[552] See UPTON L. , *Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog, Sep 13 2017. See also "Jhon Nicholas Brown, centre for public humanities and cultural heritage", *Introduction to public humanities, Preserving confederate monuments?*, Fall 2017.
[553] See UPTON L. , *Confederate Monuments and Civic Values in the wake of Charlottesville, Society of architectural historians blog*, ibid.

confederate monuments that have been all removed at different times and ways.

Despite its divisive meaning, the site has been protected under different layers of law. Indeed, monument avenue historicdistrict has been inscribed within the U.S. National Register of Historic places, the U.S. National Historic Landmark District, the Virginia Landmark Register, and the Richmond City Historic district[554]. Due to the variety and mix of important architectural styles and the complex of five monuments, this boulevard was deemed significant nationally and one of the few avenues that have "a memorial program"[555]. The five statues were also visually striking because of their sculptural features, such as height and volume.

Going back to the origin of the project, its aim was to promote the reconstruction of the city in urban and economic terms just after the Civil War[556]. The state of Virginia chose to rebuild its national pride through a revaluation of the Confederacy, and the building of Confederate monuments lent itself to this end. Therefore, the statues never fulfilled a pure commemorative function to the lost heroes, but they symbolized the values of the confederacy, including white supremacy, embodying the lost cause narrative. This is evident if one looks at the ceremonies accompanying the inaugurations of the monuments in which speeches by political figures were steeped in political symbolism celebrating Southern pride. During these ceremonies, the representatives of black communities were placed to the extreme on the side-lines of the

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554 The Monument Avenue Historic District was entered into the National Register of Historic Places in 1967, was extended in 1989, and was designated a National Historic Landmark in 1997.

555https://www.livingplaces.com/VA/Independent_Cities/Richmond_City/Monument_Avenue_Historic_District.html.

PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e memoria*, ibid

556 The project dates back to 1887 when the State of Virginia was in dire economic straits due to the aftermath of the Civil war.

parade[557]. This is also evident from the readings of the newspapers of the time in which black communities complained of a sense of exclusion[558].

Moreover, the erection of the monuments helped promote the city's urban and economic development, with the monument avenue becoming the city's main business centre but only for whites as the neighbourhood explicitly excluded black people[559]. Racial exclusion was provided both through discriminatory ordinances and through private pacts between housing agencies and whites under which houses in the neighbourhood could not be sold to people of African descent[560].

So Confederate monuments helped to justify racial segregation, locating the city's centre of gravity in the wealthier, whites-only Monument Avenue neighbourhood while relegating the city's most blighted and suburban neighbourhoods to blacks.

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[557] HARTLEY R. C., *Monumental harm*, The University South Carolina Press, 2020, pp. 44-48.

[558] See Richmond Planet, dated June 7, 1890. See also BONIS R., RICHARDSON S., in The Shockoe Examiner Blogging the History of Richmond, Virginia, 2020, link: https://theshockoeexaminer.blogspot.com/.

[559] LEVIN K. M., *Richmond's Confederate Monuments Were Used to Sell a Segregated Neighborhood*, The Atlantic, 2020:
"Confederate monuments dedicated throughout the South from 1880 to 1930 were never intended to be passive commemorations of a dead past; rather, they helped do the work of justifying segregation and relegating African Americans to second-class status. Monument Avenue was unique in this regard. While most monuments were added to public spaces such as courthouse squares, parks, and intersections, Monument Avenue was conceived as part of the initial plans for the development of the city's West End neighborhood—a neighborhood that explicitlybarred black Richmonders."

[560] Ibid, : *"In addition to private restrictive covenants that ensured only white families would reside in the shadows of Lee, Jackson, Stuart, Maury, and Davis, the city of Richmond passed a number of discriminatory ordinances, including one in 1911 that restricted African American residents to those city blocks in which they already constituted a majority. In 1929, the city passed another ordinance that, relying on Virginia's newly adopted "racial-integrity law," prohibited a person from living in a neighborhood where he or she was prevented from marrying any member of the majority population".*

With the activism of the black community, a greater awareness of the importance of more inclusive public art was slowly achieved, especially in the late 1980s with the election of the first black governor[561].

The Charlottesville bombing and the killing of George Floyd were only the sparks that broke the camel's back and fuelled instances of confederate monuments removal[562]. The removal process has contained both elements of a bottom-up and top-down iconoclasm. In fact, citizen activist groups have removed the Statue of Jefferson Davis, and subsequently, the municipality ordered the removal of the other confederate monuments it owned. Diversely, the removal of the Lee statue followeda more complex procedure since it was not owned by the municipality and was the subject of a lawsuit.

One can move into the legal discourse starting from the picture just described. The choice to display racist monuments has certainly challenged a duty of preservation in light of today's

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561 A number of statues were erected as counter-altars in opposition to Confederate monuments such as the statue dedicated to the iconic tennis player Arthur Ashe, a slavery reconciliation memorial, the statue "Rumors of war" by the sculptor K. Wiley.
"Arthur Ashe Statue set up in Richmond at last", The New York Times, July 5, 1996, Section A, Page 12. STAMBERG S. *Rumors of War' In Richmond Marks A Monumentally Unequal America*, NPR.blog, 2020, link : https://www.npr.org/2020/06/25/878822835/rumors-of-war-in-richmond-marks-a-monumentally-unequal-america.
However, the dialogue between these new statues and the Confederate monuments was irreconcilable, given also the different sculptural features: the new statues like the Arthur Ashe one were visually less imposing than Confederate statues, and this in symbolic terms only reiterated white supremacy and emphasized the social differences that characterized the city of Richmond. https://www.npr.org/2020/06/25/878822835/rumorsof -war-in-richmond-marks-a-monumentally-unequal-america.
On this point, see Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & L. 1 (2021).

562 https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

values. The next section will examine different spectrums of legal protection, starting from the statute of Virginia.

3.1 "Memory laws": The Virginian Statue statute

As said in the previous section on Ukraine, the legal instrument of "memory law" presents many issues, especially because they normally crystalize a specific interpretation of history excluding others, despite the fact that it is difficult to reach a unanimous consensus about the past[563].

In the case of the United States, laws that "impose" a certain version of history on the confederacy concern the so-called statute statues that are expressed at the state level[564]. These laws "save" and celebrate the values and past of the Confederacy throughthe preservation of Confederate monuments, shaping a distorted collective memory[565]. Indeed, from a legal point of view, the most legally stringent restrictions on the removal of confederate

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563 Gliszczy ska- Grabias A., *Memory Laws or Memory Loss?* Europe in Search of its Historical Identity through the National and International Law, ibid.

564 EIJK C. V., *Assessing the Problems and Impacts Caused by Laws Preventing the Removal of (Confederate) Monuments in the United States of America* , from the project MELA "Memory Laws in European and Comparative Perspective", 2021. The author identifies the strictest legislations at state level that passed after the recent protests against confederate monuments. Consider Tennessee's 2013 'Heritage Protection' Bill , North Carolina 2015 Cultural History Artifact Management and Patriotism Act", Alabama's 2017 Memorial Preservation Act , . Mississippi Code § 55-15-81 (2017), 2000 South Carolina Heritage Act , the 2001 Georgia Code §50-3-1 . All set the following provisions:

- The prohibition on removing monuments, loosely defined. (Often temporary removals are possible, on strict deadlines to return the monument to its previous location.)
- The establishment or broadening of the mandate of state "Historical Commissions", responsible for adjudicating petitions for monument removal.
- The establishment of procedural obstacles preventing public entities from successfully petitioning for a monument's removal.
- The establishment of a punishment for violating the above elements.

565 Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 Buff. L. Rev. 1393 (2020).

monuments come from these state legislations: they confer a sacred aura on these statues, banning or hampering their removal, destruction or alteration.

Like in the Ukrainian case, there is cultural heritage at theheart of these laws, which is again functional in shaping a specific historical interpretation of the past, but in this case, through the preservation of the monuments and symbols of that period.

There is no shortage of critical issues over these preservationlaws, especially due to the lack of a public decision-making process[566]. Scholars highlight their lack of neutrality and inclusivity by representing the interests of only select stakeholders, with the exclusion of minority groups, particularly the black community[567].

Coming back to the Historic monument avenue, the code of Virginia was one of the most restrictive statue statutes in

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[566] On critical issues of statue statutes and the link between the false narrative of confederacy and confederate monuments see : Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 Buff. L. Rev. 1393 (2020). Available at:. SNIDER S., Grey State, Blue City: Defending Local Control Against Confederate "Historical Preservation", VAND. J. ENT. & TECH. L., 2022, Vol 24. BRAY, Zachary A., *"Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"* (2018). Law Faculty Scholarly Articles. 638. https://uknowledge.uky.edu/law_facpub/638 .
Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*.
KRISTI W. ARTH, *"The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, ibid.
William Stoll, T*he Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities*, ibid. BEHZADI E., *Statues of Fraud: Confederate monuments as public nuisances*, STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES, 2022.
BRAY Z. (2020) *"From 'Wonderful Grandeur' to 'Awful Things': What the Antiquities Act and National Monuments Reveal about the Statue Statutes and Confederate Monuments,"* Kentucky Law Journal: Vol. 108: Iss. 4.
See also AHA Statement on Confederate Monuments (August 2017) previously mentioned.
[567] MURALI M. , *Shaping history: Monument- Toppling, Racial Justice and the Law*, Center for art law, 2017.

preventing the removal of confederate monuments, granting the state approval to the former confederacy ideology[568]. Theoriginal code did not allow counties and local governments "to remove, modify, or add historical context to official war memorials" without express authority from the State to do so[569]. Even the most recent code in 1997 prohibited counties and local governments from making autonomous decisions on the removal/ destruction of confederate monuments. Only after the tragic events in 2017 and 2020 did the shifting values of the Virginian society affect the code, which was the object of important amendments[570].

However, in 2020, the statues were removed before the new amendment came into force: the Jefferson statue was removed by protesters, while the remaining ones were removed according to a mayor's decision based on public safety without following the procedure provided by the new code.

It is interesting to note that the removal of the statues was anchored to a matter of public security. This legal loophole has also been used by local governments whose states have legislation even more hostile to removal[571]. Public safety and the use of emerging powers are linked not only to the protection of public order from unrest caused by protests around Confederate monuments but also to the concept of public nuisance resulting from the suffering inflicted on black communities at the mere sight of such statues. It appeals to the protection of minorities and the monumental harm they suffer, conceiving Confederate

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[568] Bray, Zachary A., *"Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"* (2018). Law Faculty Scholarly Articles. 638. https://uknowledge.uky.edu/law_facpub/638.

[569] Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, ibid, pp. 1444-1447.

[570] A bill came into force to amend the law to grant local authorities the power to remove confederate monuments by introducing two different procedures: a public hearing and voter referendum.

[571] [571] William Stoll, *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities*, ibid, pp. 123-126.

monuments as a form of hate speech[572]. Confederate monuments are deemed sources of harm and "ever-present and permanent symbols of exclusion[573]". The Virginian case law followsasimilar pattern in relation to the Lee statue on Monument Avenue.

32 The fate of the Lee statue

The removal of the Lee statue follows a different path since it was owned by the government, not by the municipality. In that case, the Governor of Virginia made the decision to remove thestatue, which was subsequently contested by private individuals who filed two lawsuits, which were then suspended by two lawsuits filed by private individuals before The Virginia Supreme Court[574].

The plaintiffs, who claim property and trustee rights over the land, grounded their challenge on a restrictive covenant behind the purchase between the Government of Virginia and the Lee association, according to which the Government was bound to keep up the monument its purpose to which has beendevoted[575]. The Governor would not have had the power to remove the monument, and the eventual removal would have violated the

[572] William Stoll, *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities*, ibid, pp. 114-119

[573] Ibid, p. 118.

[574] See Virginia Supreme Court Authorizes Removal Of General Robert E. Lee Statue In Richmond, in Jackson & Cambell blog, worthwhile legal news and commentary, 2 Sept 2021. See the ruling Gregory v. Northam http://www.courts.state.va.us/opinions/opnscvwp/1201307.pdf ; Taylor v. Northam http://www.courts.state.va.us/opinions/opnscvwp/1210113.pdf .

[575] See the first and second paragraphs of the opinion Taylor v. Northam http://www.courts.state.va.us/opinions/opnscvwp/1210113.pdf .
The Plaintiffs refer to the 1889 Joint Resolution according to which the Governor was authorized to accept the donative transfer of the ownership of the Circle and the Lee Monument from the Lee Monument Association to the Commonwealth of Virginia and it gave the guarantee "of the state that it will hold the said [Lee Monument] perpetually sacred to the monumental purpose to which it has been devoted." They refer also the 1890 deed that executed the joint resolution and according to which the Lee Monument Association conveyed the ownership of the Lee Monument and the Circle to the Commonwealth.

Constitution of Virginia, which provides the separationof powers since the violation of the resolution would have interfered with the legislature's power[576]. They finally supported the preservationist argument on the fact that Monument Avenue has been designed as a National Historic Landmark District[577].

The Court bases its decision on the concept of public policy. It first defines what public policy means: "[t]he collective rules, principles, or approaches to problems that affect the [C]ommonwealth or [that] promote the general good," and it more particularly pertains to "principles and standards regarded by the legislature or by the courts as being of fundamentalconcern to the state and the whole of society."[…] It actsto restrainpersons from lawfully performing acts that have "a tendency to be injurious to the public welfare"[578].

Moreover, according to the Court, the concept of public policy would be very dynamic since it follows social changes. It can be gathered from the set of opinions of the Court, legislative enactments and expressions of the executive power in a given time. Looking at the current legal framework, it is possible to gather that the Commonwealth of Virginia no longer wants to perpetually protect symbolic celebrations of the Confederacy. The 1890 deed, as well as being not legally binding (a joint resolution

[576] See p. 3 of the Virginian Supreme Court opinion: "They argue that Governor Northman's order violates the Constitution of Virginia because his violation of the 1889 Joint Resolution encroaches upon the legislature's powers, violates the doctrine of separation of powers, and defies the Commonwealth's current public policy as expressed in the 1889 Joint Resolution. See also Code § 2.2 -2402(B) prohibiting the removal of state-owned structures, located on state-owned property, that are intended primarily for memorial purposes and which were funded from the state treasury, unless particular procedural steps are followed.

[577] See Code § 2.2-2402(B) prohibits the removal of state-owned structures, located on state-owned property, that are intended primarily for memorial purposes and which were funded from the state treasury, unless particular procedural steps are followed. See also last paragraph of the Opinion, p. 8.

[578] See p. 17- 18 of the opinion. The definition is taken from Black's Law Dictionary 1487 (11th ed. 2019). The Court quotes also the lawsuit Wallihan v. Hughes, 196 Va. 117, 124 (1954).

is not law), has been signed in circumstances and conditions that have radically changed now. The Court highlighted that eventhe concept of democracy is inherently dynamic: "values change and public policy changes too"[579].

Hence, confederate monuments were compliant with the past public policy at that time, while the principles they expressed were inconsistent with the current public policy and the values that reflect Virginia today[580].

Moreover, the Court also grounds its decision on the "Government speech doctrine", according to which monuments displayed in public spaces are an act of government speech[581]. The Government has the freedom and is entitled to choose what monuments to display, and any restrictive covenant that would limit this sovereign right would interfere with the interest of the public[582].

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[579] Ibid, p. 23.

[580] Ibid, see p. 22.

[581] "Permanent monuments displayed on public property typically represent government speech." Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009). This form of government speech includes "privately financed and donated monuments that the government accepts and displays to the public on government land." […]Government speech is a vital power of the Commonwealth, the democratic exercise of which is essential to the welfare of our organized society. […]

[582] Ibid, see p. 23: "The Government of the Commonwealth is entitled to select the views that it supports and the values that it wants to express. See Pleasant Grove City, 555 U.S. at 467-68. The TaylorPlaintiffs erroneously assert that the Commonwealth is perpetually bound to display the Lee Monument because of the 1887 Deed, the 1890 Deed, and the 1889 Joint Resolution. A restrictive covenant against the government is unreasonable if it compels the government to contract away, abridge, or weaken any sovereign right because such a restrictive covenant would interfere with the interest of the public.

See Hercules Powder Co., 196 Va. At 940; see also Mumpower v. Housing Auth. of City of Bristol, 176 Va. 426, 452 (1940). *"[T]he State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the exercise of which in full vigor is important to the well-being of organized society."* Mumpower, 176 Va. at 452.

Finally, as far as the plaintiff's assertion on the violationof historic preservation, what is interesting is that, according to the Court, the Government there is a duty to monitor the maintenance of state-owned historic properties, taking into account the broad public interest in the property, including "other public interest considerations, such as "community values and comments"[583].

To sum up, as well as the concept of democracy, even the concept of historic preservation is dynamic, and in the case of publicart, it is necessary to have a continuous review of the values it represents by verifying whether the community always shares them. This also implies the right to demolish or remove cultural property displayed in public spaces that do not represent the values of a society.

To draw some final remarks, in the case of Virginia, legislation and case law translate the shifting values of the current society. Despite the fact that it had one of the strictest codes on the preservation of confederate monuments, it was permeable to the change.

However, in other States where the preservation laws are still forced, there is no shortage of legal loopholes through which to overcome the ban on removing Confederate monuments by exploiting their weakness and lack of enforcement mechanisms[584]. For instance, a solution employed by

[583] See p. 25, ibid, where the Court recalls Code § 10.1-2202.3(A) (providing the Department of Historic Resources' duty to review the maintenance of state-owned historic properties and requiring its consideration of the broad public interest in the property, "tak[ing] into account other public interest considerations," such as "community values and comments"); Code § 10.1 - 1702(A)(7) (authorizing public bodies, through the Open-Space Land Act, to demolish or dispose of structures inconsistent with the use of real property as open space land).

[584] On this point see EIJK C. V., *Assessing the Problems and Impacts Caused by Laws Preventing the Removal of (Confederate) Monuments in the United States of America* , from the project MELA "Memory Laws in European and Comparative Perspective". Bray, Zachary A., *Monuments of Folly: How Local Governments Can Challenge Confederate "Statue Statutes"* (2018). Law Faculty

municipalities was to sell the monuments to private actors in order to bypass the removal ban[585]. Other local governments invoke public safety and public nuisance doctrines to justify the removal of these statues. In other cases, cities were willing to infringe the law and pay the fine to remove confederate monuments, considering the urgency to fight racial injustice [586]. Actually, the monument toppling is even more powerful in symbolic terms when it is unlawful[587].

Hence, beyond the legal issues described, the study of preservation laws helps to identify who are the stakeholders involved in this battle over monuments. It grasps the deep division between southern states and northern states. More specifically, this cultural conflict goes beyond the preservation of confederate monuments.

The study of these state legislations reveals that the conflict over confederate monuments is eminently political between the conservative claims at the state level and a more inclusive and progressive approach at the municipal level[588]. It is aconflict over

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Scholarly Articles. 638. https://uknowledge.uky.edu/law_facpub/638 . William Stoll, *The Problem with Confederate Monuments: State Laws as barriers for Removal and Methods Available to Localities*, ibid, pp. 114-119. . SNIDER S., *Grey State, Blue City: Defending Local Control Against Confederate "Historical Preservation"*, VAND. J. ENT. & TECH. L., 2022, Vol 24. BEHZADI E., *Statues of Fraud: Confederate monuments as public nuisances*, STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES, 2022. Deborah R. Gerhardt, *Law in the Shadows of Confederate Monuments*, ibid.

[585] Ibid.

[586] Consider the Alabama case, Jessica Owley & Jess Phelps, The Life and Death of Confederate Monuments, 68 Buff. L. Rev. 1393 (2020). Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss5/3

[587] MURALI M., *Shaping history: monuments-toppling, racial justice and the law*, Center for art law

[588] BYRNE J. P., *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws* (2020), https://ssrn.com/abstract=3633473. BRAY Z., *We Are All Growing Old Together: Making Sense of America's Monument-Protection Laws*, 61 WILLIAM & MARY L. REV. 2020. DANNA S. , *America contro America*, Rivista Domino,

values to endorse according to two different views of thecurrent American society between northern states and southern states. Reverberates on the monuments, but it has deeper originsthat are rooted in the widening economic gap between small and rural states and the larger states and by a deep distrust of the federal government that causes states to close in more and more on themselves[589].

4. The concept of public art and preservation in the United States

In the previous paragraph, it has been shown that the preservationist claim coming from state laws shows the fragility of the United States as a union at the federal level in sharing the same values[590].

It also seems important to keep an eye on the cultural conflict through the lens of federal laws, wondering about the lawfulness of removing confederate monuments at the federal level.

There is no shortage of Confederate monuments protected under federal law; for instance, Monument Avenue in Richmond was listed in the U.S. National Register of Historic places in 1969, as well as in the U.S. National Historic Landmark District in1997[591].

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n. 8, 2022: *"L'America è sempre stata divisa ma […] oggi assomiglia di più alla confederazione di due nazioni che a un'unica grande nazione"*.

[589] On this point, see UPTON L., *Confederate Monuments and Civic Values in the wake of Charlottesville*, Society of architectural historians blog.
BROWINSTEIN R., *America is growing apart, possibly for go*od, The Atlantic, 24/06/2022. The author mentioning Pofhorzer writes: *"The differences among states in the Donald Trump era, he writes, are "very similar, both geographically and culturally, to the divides between the Union and the Confederacy. And those dividing lines were largely set at the nation's founding, when slave states and free states forged an uneasy alliance to become 'one nation.'"*

[590] American policy is splitting, state by state, into two blocs, The Economist, 3/9/22.

[591] Jess R. Phillips & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 Fl. L. Rev. 627 (2019).

At the federal level, the legal paradigm is the National Historic Preservation act, passed in 1966, establishing the Nationalregister of Historic Places[592]. To be inscribed into this register, the property must be included in the categories of building, structure, object, site, or district. It must meet a series of qualifiers and be evaluated in consideration of its significance, age, and integrity.
[593]

What is important to underline is that a property is culturally significant if it is important for American history, architecture, archaeology, engineering, and culture[594].

The Monument avenue, previously examined, would have fulfilled criteria (a) and (c) as artistically and historically significant. The site was considered to be "a splendid series of architecturally dignified townhouses, churches and apartment buildings", "a nationally significant example of city planning""as a unique memorial to the heroes of the Confederacy in itscapital, serves a symbolic function for Richmond and the South".[595]

In drawing some considerations, one can observe that , like the statues of Monument avenue, many confederate monuments were deemed to be worthy of preservation and eligible to be

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[592] Pub. L. No. 89-665, 80 Stat 915 (1966), repealed by National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3187.

[593] 54 U.S.C. § 302101; see also 36 C.F.R. § 60.3 (2018) (defining some of these terms). The criteria are the following:
(a) "associat[ion] with events that have made a significant contribution to the broad patterns of our history;" -(b) association with the lives of significant individuals; (c) architectural or artistic value; or (d) "have yielded, or may be likely to yield," archaeological information/data.' For a full description of the National register of historic places see BRONIN S. C., ROWBERRY R., *Historic Preservation Law in a nutshell*, 2nd edition, 2017. Jess R. Phillips & Jessica Owley, Etched in Stone: Historic Preservation Law and Confederate Monuments, 71 Fl. L. Rev. 627 (2019).

[594] Jess R. Phillips & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 Fl. L. Rev. 627 (2019).

[595] https://www.dhr.virginia.gov/wp-content/uploads/2018/04/127-0174_Monument_Avenue_HD_1969_NRHP_nomination_Final.pdf

inscribed on the National Register of Historic Places by meeting criteria A or C because of their historic value or artistic value[596].

One first question to address is why the monuments whose historical and artistic values are objectionable were also protected at the federal level. First, this could be explained by lookingat the inscription's procedure, according to which the nomination is state-centric, so it reflects the interests of thesinglestates[597]. It was also a way to promote the reconciliation between states in the reconstruction phase. In addition, the preservation movement was originally very elitist, and the national register sites did not embed an inclusive historiography at all[598]. The purpose of the preservation movement was to build an American identitybased on select groups of Americans[599].

Today, in the current multicultural society, thanks to a greater awareness of the gaps within traditional American historiography, there is a need for a more inclusive approach to preservation, representing all aspects of American society.

Hence, the concept of preservation is extremely linked to that of American identity if one considers the preamble of the Historic Preservation Act, where there are many references to the

[596] William Lees, *The Problem with "Confederate" Monuments on our Heritage Landscape*.

[597] Jess R. Phillips & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, ibid, p. 642.

[598] FREY P., *Why Historic Preservation needs a New Approach*, Citylab.com, 2019.

William Lees, The Problem with "Confederate" Monuments on our Heritage Landscape, ibid, p. 1013.

Bray, Zachary (2020) *"From 'Wonderful Grandeur' to 'Awful Things': What the Antiquities Act and National Monuments Reveal about the Statue Statutes and Confederate Monuments,"* Kentucky Law Journal: Vol. 108: Iss. 4, Article 3. Available at: https://uknowledge.uky.edu/klj/vol108/iss4/3 .

[599] FONER E., *Who Owns History? Rethinking the Past in a Changing World*, Hill & Wang Pub, New York, 2003.

American nation[600]. Even the National Historic Preservationact was passed with the purpose of developing a "national consciousness": the property sites should be a mirror inwhichthe American society can recognize itself.

However, what is preserved is not crystalized in the past , but it is in a continuous dialogue with the present, since as affirmed inthe preamble, "the historical and cultural foundations of the Nation should be preserved as a "living" part of our community life and development in order to give a sense of orientat ion to the American people"[601].

The dynamic nature of the concept of preservation, already captured in the jurisprudence previously examined onmonument avenue, is also linked to the idea of progress that characterizes American culture, namely in looking forward where creationand destruction are different aspects of the same process. Inthiswake, for instance, one can explain the practice of de-accessioning within US museums, according to which the work of art can permanently be removed from a collection if it is no longer consistent with the mission of a museum[602].

So, if preservation reflects the present and the past, it followsthat removing monuments whose values are anachronistic would be lawful. Otherwise, they would lose their function of "orientation" to the American people[603].

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[600] On this point see CAPONIGRI F., *Malleable monuments and comparative cultural property law: The Balbo monument between the United States and Italy*, *ibid*, pp. 1732-1733. Sarah C. Bronin & J. Peter Byrne, *Historic Preservation Law* 68 (2012).

[601] BYRNE J. P., *Stone Monuments and Flexible Laws: Removing Confederate Monuments through Historic Preservation Laws*, ibid, p. 2.

[602] https://www.artnews.com/feature/most-controversial-museum-deaccessioning-plans-1234575019/.

[603]BYRNE J. P., *Stone Monuments and Flexible Laws: Removing Confederate Monuments Through Historic Preservation Laws*, ibid, pp. 1-10. The author supports the flexibility of the historic preservation act in providing mechanisms to revisit the property inscribed More specifically, Section 106 provides a legal

Indeed, there was not permanence at all in the case of Monument Avenue despite the inscription of confederate monuments onthe National Register.

Looking at the federal jurisprudence, the Supreme Court seems to propend the removal of confederate monuments, relying the decisions on the public speech doctrine according to which monuments displayed in public spaces are "government speech" protected by the first amendment of the American Constitution[604]. However, the freedom of speech faces some constraints like the equal protection clause pursuant to the XIV amendment, from which would derive the prohibition of racist government speech through confederate statues[605].

The element of public display dissolves many questionsabout the legal argument for removal. Their public display would conflict with some paramount public policy goals of public art, such as its functional value, which implies the idea of recognizing public art as a public amenity, as well as its democratic value, meant "to create a space for democratic dialogue"[606]. That is why scholars link the removal of confederate monuments with the public nuisance doctrine, according to which these statues are public nuisances that affect the public's health and safety rights, and they

procedure in which different stakeholders can discuss and revisit the significance of the property which is eligible for listing on the national register, through study and consultation. In addition, monuments with the sole commemorative function are not eligible on the National register, if they are not historically or artistically significant. In the case of confederate monuments, as seen before, their historical and aesthetic values are very controversial. On a contrary interpretation see e Jess R. Phillips & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 Fl. L. Rev. 627 (2019).

[604] Supreme Court of the United States, Pleasant Grove City v. Summum. On this point see PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e mem*oria, ibid., p. 3586.

[605] Ibid.

[606] ARTH, "*The Art of the Matter: A Linguistic Analysis of Public Art Policy in Confederate Monument Removal Case Law*, ibid, pp. 22-26. BEHZADI E., *Statues of Fraud: Confederate monuments as public nuisances* , STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES, 2022.

are a constant reminder of the cultural trauma experienced by black communities.

To draw some conclusions, even the historic preservationlaw and the federal jurisprudence would not hamper the removal of confederate monuments. This should be read in light of the evolution of the historic preservation movement, the dynamic concept of preservation according to the American eye, as wellas the awareness of a more inclusive public art.

5. The international perspective in the face of confederate monuments

After examining the monumental issue in the face of the legal American system, the next step is to challenge the lawfulness of removing confederate monuments before internat ionallaw. What limits does the United States encounter in light of theinternational framework? Actually, given that the removal claims over Confederate monuments come from local governments, how can we balance the dichotomy of local interest versus international interest? The challenge is to reconcile the interest in preservation that shines through the entire international body with the legitimate interest of local communities in coming to terms witha difficult heritage. What contribution can international law add?

The case matters in international law since, as previously stated, the cultural heritage is deemed "a shared interest of humanity" which transcends state borders[607].

[607] FRANCIONI F., *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared interest of Humanity*, ibid. As examined in the second chapter the concept of "cultural heritage of mankind" appears in many treaties starting form the 1954 Hague convention until to the World Heritage Convention.

It is unequivocal that preservation is the core value of the entire international cultural property law[608]. As seen in the second chapter, looking at the international body and international practice, the international community and the single states bear the responsibility to protect the cultural heritage [609]. Moreover, according to the case-law of international courts, the intentional destruction of cultural heritage in wartime may amount to a war crime or a crime of humanity or persecution when associated with the violation of human rights[610]. International courts recognise the ideologically –-driven destruction of cultural property as a "crime against people" when it is aimed to destroy a cultural symbol belonging to a group identity[611].

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[608] PEROT BISSEL V E., *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law.*

Ibid. LIXINSKI L., *Confederate monuments and International Law,* 32 Wisconsin International Law Journal (2018). PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e memoria*, ibid. LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United Sta*tes, 4 Cardozo Int'l & Comp. L. Rev. 361 (2020-2021). NEWMAN B., *America's scarlett letter: how International law supports the removal and preservation of confederate monuments as world heritage of America's discriminatory history*,Notes & Comments, 26(1) Southwest. J. 2020. Int. Law, 1404 (2020). L. Lixinski, *Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Cambridge, 2021. [609] See 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, U.N. EDUC., SCI. AND CULTURAL ORG. [UNESCO], EXPERT MEETING ON THE 'RESPONSIBILITY TO PROTECT': FINAL
REPORT (Nov. 26-27, 2015). On this topic, see COLLINS. E. (2018). *Preventing Cultural Heritage Destruction and the Responsibility to Protect* . Intercultural Human Rights Law Review, 13, 299-336.

[610] The International Court of Justice in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand). The International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Miodrag Joki , the International Criminal Court in the case of Prosecutor v. Al Mahdi.

[611] GERSTENBLITH P., *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?* 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016).

So, if the entire international cultural property law inclines toward preservation, does it imply a prohibition upon States to destroyor remove their own heritage intentionally? Is there acustomary rule prohibiting destruction in times of war and peace? Do confederate monuments find protection under international law as historically significant cultural objects of humanity?

In tracing an international framework in which to contextualize confederate monuments, it seems important to underline that the United States has signed many important internationaltreaties[612]. It first implemented the Lieber Code during the Civil War, and it bolstered the protection of cultural property over any military necessity with the inter-American treaty on the Protection of Artistic and Scientific institutions (Roerich Pact). Moreover, it isa signatory member of the 1954 Hague Convention, the UNESCO Convention on the means of prohibiting and preventing the illicit Import, Export and Transfer of Ownership of Cultural Property and the World Heritage Convention, as well as a series of recommendations and declarations, among them the 2003 UNESCO declaration. However, even though the United States shares the values and goals of the international legal body and is bound by the conventions it ratified, it has always pursued an independent policy over the years not necessarily related to the United Nations by withdrawing also from UNESCO in 2019[613]. This is indicative of the attitude of the United States toward the United Nations and the primacy of state sovereignty over the international body.

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[612] BRONIN S. C., ROWBERRY R., *Historic Preservation Law in a nutshell*, 2nd edition, 2017. LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, ibid. NEWMAN B., *America's scarlett letter: how International law supports the removal and preservation of confederate monuments as world heritage of America's discriminatory history* Notes & Comments.

[613] NEWMAN B., *America's Scarlett letter: how International law supports the removal and preservation of confederate monuments as world heritage of America's discriminatory history*, ibid.

As far as the confederate monuments, they do not result in being listed as internationally protected heritage[614]. Therefore, it is worth wondering whether they are culturally protected under a customary international rule prohibiting their removal by deriving it from the international legal body and the international practice.

A first observation to draw concerns the context in which calls of removal/destruction happen, that is, the scope of peacetime. As seen in the previous chapter, there is no unanimous consensus within the scholarly literature about the existence of an international customary norm prohibiting the intentional destruction of cultural heritage in peacetime when thedestructive acts are domestically authorized. It would challenge classical principles such as the principle of state sovereignty, the principle of non-interference, as well as the principle of non-intervention[615].

Looking at international practice, scholars observe that international law would allow States to destroy or remove cultural property (not internationally listed) when it is necessary to guarantee economic development, still in compliance with good faith, by mitigating the damaging effects and balancing the parties' interests involved[616]. In case of abuse of development justification, international law would provide a packet of sanctions to isolate the State from international relations.

As for heritage destruction driven by ideological purposes, the leading case of international practice is that of Buddhas of Bamiyan in Afghanistan (2001). According to some scholars, the reaction of the international community with recommendations and declarations condemning the destructive act would identifya customary international norm prohibiting it when it occurs

[614] LIXINSKI L. , ibid, p. 105

[615] O'KEEFE R., *World Cultural Heritage Obligations to the International Community as a Whole?* (2004) 53 ICLQ 189. WANGKEO K., *Monumental challenges*, ibid.

[616] WANGKEO K., *Monumental challenges*, ibid., p. 187.

without legitimate justification[617]. Actually, there is no evidence of a customary obligation upon the state not to destroyor remove their heritage on its territory if one considers thechoiceof thelegal instruments adopted by the international community (mainly, recommendations and declarations) and, above all, the used language in compliance with the principle of non-interference in the State's domestic affairs[618]. The set of instruments adopted does not create legal obligations, but they constitute more of a "diplomatic condemnation"[619]. One should note that the international community unequivocally condemned the destruction of Buddhas in a State where it never recognized the state sovereignty of its government. Moreover, BamiyanBuddhas were deemed "unique" according to the international community's interpretation, without taking into account thevalue attached to them by the local communities, almost a sort of "cultural appropriation"[620].

To sum up, even though there is no evidence of a legal obligation not to destroy, the mentioned case shows the political condemnation of the international community for destroying domestically cultural property without a proper justification.

However, what happens in the case of cultural property, whichis associated with violations of human rights, like Confederate monuments? It is a matter of understanding what rights protected under international law come into play and are conflicting with each other.

To identify the different interests at stake, some scholars have argued that transitional justice is the better regime to frame internationally confederate monuments since it gives more

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617 Ibid.

618 O'KEEFE R., *World Cultural Heritage Obligations to the International Community as a Whole?* , ibid, pp. 202-207.

619 Ibid.

620 This was often accompanied by a misguided interpretation of the Islamic religion where actually there is not an "image" issue but rather an "aniconism".

pragmatic solutions, also justifying their removal, while cultural heritage law and human rights offer less mediating solutions in dealing with all the claims involved[621].

Surely, the case can be contextualized within transitional justice since the memorialization processes can take place even after years of oppressive past trauma to overcome. Actually, all the regimes of transitional justice, cultural heritage law and human rights intertwine with ach other, as seen in the previous chapters: cultural heritage is often associated with the field of humanrights, and cultural rights play an important role within transitional processes. Thus, all of them can be taken into account to grasp internationally the issues underpinning confederate monuments.

From the side of preservationist claims, one can consider a literal "right to cultural heritage", understood as a right to access, contribute and participate in cultural life and the conduct of cultural practices; in other words, enjoyment of heritage in its tangible, intangible, natural and mixed manifestations[622]. Additionally, a right to education stresses the link between cultural heritage and its educational function. Another right that could be taken into account concerns the freedom of artistic expression.

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[621] LIXINSKI L., *Confederate monuments and International Law*, 32 Wisconsin International Law Journal (2018). LIXINSKI L., *Erasing or Replacing Symbols* in Legalized Identities: Cultural Heritage law and the shaping of transitional justice, ibid, pp. 94-128. According to the author, in relation to confederate monuments, international cultural heritage law and human rights law "tend to suggest all-or-nothing responses" since the first legal body propends only to preservation, prohibiting the removal. The same, IHRL (international human rights law) obligations (with the exception of incitement of racial discrimination), either support preservation , either give too much discretion to the state, being often not-applicable due to many reservations of United States to human rights treaties. Diversely, transitional justice shows that memorialization processes can also lead to the removal of troubling monuments. [622] 5. The Special Rapporteur, Report of the Special Rapporteur in the Field of Cultural Rights: Memorialization Processes, delivered to the General Assembly,
U.N. Doc. A/HRC/25/49 (Jan. 23, 2014). For a commentary see

From the side of the communities affected negatively by confederate monuments, these mentioned cultural rightscanbein contrast with other cultural rights, such as those relating to minority groups. Given their racist message, the right to equality and the right against discrimination and degrading treatment can be potentially used in this context. Furthermore, one canconsider the right to historical truth within memorialization processes. It is a matter of figuring out how to balance these conflicting rights in the face of the Confederate monuments case.

On this point, it is worth examining the report of the special Rapporteur in the field of cultural rights, addressing memorialization processes of the events of the past inpost-conflict and divided societies[623]. It focuses specifically on memorials in public space, understood as "physical representations that concern specific events regardless of the period of occurrence […] or the person involved […][624]. Memorials in post-conflict societies are symbolic reparations to the victims of past atrocities. The report recognises the duty of memory and the importance of the ways in which narratives of past events are crystalized in the collective memory, given their impact in shaping current societies. Memorials have an educational value and should be functionalin addressing current challenges[625]. Recommendations explicitly discourage government choices to destroy places of suffering and erase related memories[626].

However, if, from one side, the report recognises the legitimacy of seeking reparation through memorials and museums, memorialization processes should be victim-centred[627].

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[623] CHOW P.Y. S., *Memory Denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, The International Lawyer, Vol. 48, No. 3 (WINTER 2015), pp. 191-213.
[624] Ibid, Paragraph 5, p. 3.
[625] Ibid, Paragraph 17.
[626] Ibid, Paragraph 44.
[627] Paragraph 53.

Memorials in public spaces amounting to memorial tyrannies or negative figures might hurt victims, especially those living near these troubling monuments, by creating discriminatory spacesas well as "sectorial tensions"[628]. This orientation reflects the general trend that sees the emergence of an international norm that protects the cultural rights of minorities and their memorial sites[629]. Indeed, looking at "dark heritage" unlisted within the UNESCO World Heritage list, for instance, Auschwitz - Birkenau, it is normally victim-centred. This comes up from international case-law and the body of treaties that increasingly require states to guarantee the principle of cultural diversity while respecting memorial sites belonging to minorities[630]. The report reflectsthis trend in protecting minority rights in case the site is itself asource of harm within post-conflict societies.

Hence, from a human rights perspective, the memorialization process in the public sphere should be as inclusive and democratic as possible, with the participation of all stakeholders involved. Even the freedom of artistic expression is not absolute but should be exercised by taking into account all the multiple narratives involved in a memorial; it is up to the States to ensure aninclusive public space.

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[628] Paragraph 53: "*Memorialization processes that only identify one group as victims while obliterating serious crimes committed against other parties in the conflict are of concern. When, for example, after a civil war memorials are erected that are devoted to the victims of one ethnic group without consideration for others, this may heighten sectarian tensions, fuel an "ethnicization" of the victims and lead to further violence. In the most acute cases, when memorials bear symbols exclusively associated with one community, be it ethnic, religious, linguistic or political, they delimit communities, drawing boundaries between people, including by marking territorial borders within and between States. Such delimitations impact the freedom of movement of people who may feel uncomfortable in a specific cultural and symbolic landscape. Consequently, memorials can contribute to continuing ethnic cleansing started during the war*". [629] Berkes, A. (2018). "*Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites*. Intercultural Human Rights Law Review, 13, 47-130.
[630] Ibid, p. 125.

Looking at the international practice of the UN Human rights Council, in case of a conflict between norms enshrining cultural rights and others embodying human rights, peremptory norms entailing *erga omnes* obligations would prevail, such as the right to equality and the right against discrimination and degrading treatment[631].

By extending these recommendations to the confederate monuments, it can be deduced that they do not comply with the human rights standards and principles provided within the memorialization process, namely principles of democracy, equality and the right of an inclusive truth. They were not conceived to be from the side of the victims of the Confederacy but to celebrate figures of an oppressive time based on slavery. They indeed created discriminative boundaries between people within public space by conveying a racist message in violation of human rights standards laid down in the Durban declaration at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as established bythe report of the UN special rapporteur on contemporary forms of racism.

Following this perspective, calls for the removal or destructionof confederate monuments would not be in contrast with International law; rather, the so-called memory laws themselves would be contestable since they embody a non-inclusive memorialization process. Indeed, it would be a paradox if the international community, which condemns the unlawful destruction of cultural heritage associated with the violation of human rights, would not adopt the same approach when cultural

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631 See UN Human rights Council, Resolution 10/23, 2019. https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_23.pdf

On this point see BHARATT G., *Decay of The Colossal Wreck: Confederate Statues as Protected Cultural Property*, JURIST – Student Commentary, October 8th, 2020, https://www.jurist.org/commentary/2020/10/bharatt -goel- confederate-statutes/.

heritage is itself a source of suffering and a symbol of periods of oppression and human rights violations[632].

According to the examined positions, despite a prevailing preservationist approach, it could be possible to identify exceptional cases of removal/ destruction of heritage sites as a last-resort solution associated with the violation of human rights[633]. Hence, the right to cultural heritage would not be absolute, but in case of conflict with human rights protected by peremptory norms, it can be curtailed within a hierarchicscale[634]. The emerging international law protecting minority rights over memorial sites would prevail over other cultural rights[635]. This can be the limit that States would encounter in disposing of their own cultural heritage[636].

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[632] LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, 4 Cardozo Int'l & Comp. L. Rev. 361 (2020-2021).

[633] Scholars supporting this argument: E. PEROT BISSEL, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, The Yale Law Journal, 128, 2019. LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, ibid, pp. 397-398. Bharatt Goel, *Decay of The Colossal Wreck: Confederate Statues as Protected Cultural Property*, JURIST – Student Commentary, October 8th, 2020, https://www.jurist.org/commentary/2020/10/bharatt-goel- confederate-statutes/. Even the author Lixinski l. contemplates a right to remove controversial heritage as a symbolic reparation within the transitional justice scope. LIXINSKI L., *Confederate monuments and International Law*, 32 Wisconsin International Law Journal (2018).

[634] Bharatt Goel, *Decay of The Colossal Wreck: Confederate Statues as Protected Cultural Property*, JURIST – Student Commentary, October 8th, 2020, https://www.jurist.org/commentary/2020/10/bharatt-goel-confederate-statutes/

[635] BERKES A.. *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites*, ibid, pp. 124-128.

[636] Ibid, according to the author, despite this international rule protecting minority rights over memorial sites, it would emerge a wide discretion left to States in deciding what to preserve or not but above all due to the lack of enforcement mechanisms of h

However, this position does not appear to be entirely agreeable. These are isolated doctrinal positions that are not based on established international practice. Moreover, it would open the way for an iconoclastic scenario in relation to so many monuments associated with the violation of human rights or controversial pasts, which, actually, no longer represent a source of discord, thanks in part to the passage of time, but are admired for their artistic, aesthetic and educational value[637].

More compatible with the preservationist spirit of international law appears to be the less drastic solution that provides an alternative to destruction: removing the monument from its public context to place it in a museum setting. This latter is grounded on the international cultural heritage law, namely the International Charter for the Conservation and Restoration of Monuments and Sites, the so-called Venice Charter, which states that removal of monuments is possible where " the safeguarding of that monuments demands it or where it is justified by the national or international interest of paramount importance".[638] In the examined case, the removal from the public context would respond to a policy of racial justice and public safety interest, given the recent riots in southern cities, without compromising the interest in its own preservation.

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uman rights regimes.

[637] On this topic, BELAVUSAVU U., *on Ephemeral Memory Politics, Conservationist International Law and (IN-) alienable Value of Art in Lucas Lixinski's Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Jerusalem Review of legal studies (2022).

[638] On this point see, NEWMAN B., *America's Scarlett letter: how International law supports the removal and preservation of confederate monuments as world heritage of America's discriminatory history*, ibid, p. 168.

Int'l Council on Monuments & Sites [ICOMOS], Int'l Charter for the Conservation and Restoration of Monuments and Sites, The Venice Charter, May 31, 1964, https://www.icomos.org/charters/venice_e.pdf.. See article 7: "The moving of all or part of a monument cannot be allowed except where the safeguarding of that monument demands it or where it is justified by national or international interest of paramount importance".

To draw some final remarks, in the present case, the international community in relation to the confederate monuments has approved no acts of hard law or soft law (as in the Ukrainiancase). The scenario would have been different if they had been placed on the World Heritage List. International law does not, therefore, enter into the merits of the issue.

Moreover, although Confederate monuments symbolizevalues in contrast with cardinal principles of international law, one can observe that there are no discernible valid international legal principles supporting the destruction of this heritage, as there is no established international practice in this regard.

It is also possible to see in the light of the UN recommendations on memorialization processes that international law would seem to be interested not in preservationist or removal choices over disputed heritage but in how the decision-making processes underlying these selective choices take place, providingstandards that are as inclusive as possible[639].

[639] LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, ibid, p.

Section 3. Myanmar Case.

1. The dark side of iconoclasm: the memory denied in Myanmar.

In exploring the legal boundaries of cultural memory, the next section will focus on the difficult case of Myanmar,[640] where the State's lawful attempt to build a collective memory in which to recognise itself within a post-colonial scenario has been affecting the enjoyment of minorities' cultural rights, more specifically the Rohingya community[641]. Therefore, the coming paragraphs will attempt to examine an extreme case of destruction and its legal consequences from an international and comparative perspective. As in the previous cases, the topic under discussion will be the limits of the Myanmar State in destroying its own cultural heritage in front of international obligations.
However, while in previous cases, the destruction, enacted bythe "victim", was investing cultural objects, which symbolize an oppressive message and are associated with the violation of human rights, in Myanmar, instead, the destruction of cultural heritage put into place by "oppressor", has an oppressive purpose per se, since it is aimed to deny the memory of a minority group[642]. Hence, in Myanmar's case, the State actor who perpetrates destructive acts is "the oppressor".

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[640] It should be noted that within the Burmese language and English language there have been controversies about the name of the country "Burma" or " Myanmar". In 1989, the military regime officially adopted the name "Myanmar"into the English language. In the following paper both names will be used.

[641] AZEEM I., *The Rohingyas, inside Myanmar's genocide*, C. Hurst & Co., London, 2018.

[642] The study of iconoclasm in this research is read through the "oppressor-oppressee paradigm " , expression taken from BEHZADI E, *Destruction of cultural heritage as a violation of human rights : application of the alien tort statute*, 73 Rutgers U.L. Rev. 525 (2021), pp. 572 -573, available at t: https://ssrn.com/abstract=3820038 .

The study wants to examine the international perspectiveinfront of these destructive domestic acts, wondering if the international response is more impactful compared to the two other cases of eroding the state's sovereignty to enforce the protectionof cultural heritage and related rights. Diversely from the previously examined case studies, in the Burmese context, the scope of destruction includes religious sites, more specifically, mosques, non-Buddhist religious icons and buildings in areas with a high number of non-residents Buddhist, above all in the Rakhine state[643]. This cultural vandalism, hence, does not concern commemorative monuments, but it is aimed to affect symbols of the Islamic religion celebrated by the Rohingya community, as well as its right to access these sites of worship.
Like previous cases, this deliberate destruction affects the construction of collective memory in a new political phase after colonization. It intertwines, especially with the strengthening of state sovereignty within the nation-building process. It isa matter of understanding how far the legitimate attempt to construct a collective memory might go from a legal perspective.

The focus of the discussion is again the construction and "the appropriation" of public space in a transitional context, more specifically, the post-colonial scenario, where different cultural groups coexist in the same environment. The issue again intertwines with ownership rights in that it is a question of who decides in the construction of a public space within the nation building-process, "who owns" the right to interveneand select the range of values in which to identify oneself. Even in this case, the question to address is to challenge the role of internationallaw in protecting the cultural heritage in front of the constructionof state sovereignty.

643 LEE R. & GONZALEZ ZARADO G. A. (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies, 26:5, 519-538, DOI: 10.1080/13527258.2019.1666294.

It is clarified that the persecution against minorities doesnot only affect only the Rohingya, but this is chosen to be examined as it is the most striking and the one with cultural heritage implications. Although this persecution has its signs as early as independence in 1948, the focus is chosen to dwell on the years 2012-2021, in which the human rights violations of this minority have been exacerbated.

2. Behind and beyond the iconoclasm.

The destruction of cultural heritage related to the Rohingya Muslim community is part of a larger pattern of discrimination affecting not only the cultural sphere. The causes of persecution inevitably interweave with the nation-building processsince 1948, the year Myanmar became independent. In building democracy, it becomes necessary to find social cohesion in the majority without discriminating against minorities[644]; in the Burmese context, this balance has failed to exist. Indeed, the cultural contestation under discussion fits within a deeper civil war affecting the ethnographic variety of Myanmar[645]. Since 1948, Myanmar has been torn by numerous subnational conflictsled by local groups against the central government to gain enhanced rights and establish a federal state[646]. The central government has consistently suppressed these local demands for independence by

[644] AZEEM I., *The Rohingyas, inside Myanmar's genocide,* ibid.

[645] It is important to underline that the civil conflicts affect not only the Muslim community of Rohingyas but also other minorities.

[646] BURKE A. , WILLIAMS N., BARRON P., JOLIFFE K., CARR T., *The Contested area of Myanmar, Subnational Conflict, aid, and Development,* 2017, the Asia Foundation, in particular Chapter 2 *Subnational conflict in Myanmar*. According to the analysis carried out by the authors: *"Myanmar's subnational conflicts affect more than one-third of the country's 330 townships. Many of the conflicts have persisted for over six decades. […] Conflict is generated by competing local demands for control of territory, authority over the population, and access to resources."*

implementing discriminatory policies. These latter were expanded more and more, covering different spheres of sociallife with the escalation within the military junta of 1962, which contributed to exacerbating social tensions[647].

The persecution of Rohingya fits within this tension betweenlocal claims to have more independence and the desire to impose centralized control by the government. The persecution of Muslims, hence, is a "conflict within a conflict", as it is put inplace both centrally and by the military army of the predominantly Buddhist and Burmese Rakhine State. They have beenpersecuting by the nationalist parties of the Rakhine State with the complicity of the national military regime.[648] Different narratives havebeen established to justify the persecution against this religious minority: one is related to ethnic reasons according to which the religious community does not belong to the Burmese people and territory; a second narrative would link the Rohingya to terrorist groups and jihadist movements[649].

Indeed, according to some scholars, the origin of the mentioned subnational conflicts against minorities, including Rohingya, might have political and historical roots[650]. The fear of anexternal threat and the suffering from the colonial period led the Myanmar government to look for a national unity based exclusively on the

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[647] Timeline legislature in Myanmar: 1948 - Independence from the United Kingdom; 1962- 2011 military governments; 2015- 2021 party of National league for democracy; 2021 coup d'état.

[648] AZEEM I., *The Rohingyas, inside Myanmar's genocide* ibid, p.79. The author underlines that after 1988 a close alliance between the NLD and the regional ethnics Rakhine parties was established.

[649] Ibid, p. 125, p. 17. According to the author: *"The attitude towards the Rohingyas that the Myanmar establishment displays, and its hostile actions towards the Rohingyas, are informed by a narrative that the Rohingyas, are informed by a narrative that the Rohingyas do not have a legitimate place in the state"*.

[650] BURKE A., WILLIAMS N., BARRON P., JOLIFFE K., CARR T., *The Contested area of Myanmar, Subnational Conflict, aid, and Development* , 2017 the Asia Foundation.

Burman ethnicity and Buddhist religion that characterized the pre-colonial period at the expense of other cultural identities of minority groups, including the Rohingya community[651]. The destruction of Muslim memory, hence, is beyond religious motivations but has roots that go back to colonialism and stems from the perception that the British favoured Muslims over Buddhists[652].

It seems appropriate to point out that Burma and the Rakhine state have two different historical paths. Indeed, the Rakhine State ((previously named Arakan State) originally imbued a predominant Indian culture and only later experienced Burmese influence. It was historically an independent kingdom, and it was formally annexed to Burma only in 1784; this explains the cultural diversity that characterizes the Rakhine state compared to therest of the Burmese Country, where different religions coexisted[653]. Following the Anglo-Burmese wars, it was ceded to the Britishin 1826 to annex it within British India[654]; this followed the whole annexation of Myanmar to the British in 188 with the colonial period, Burma was going through a phase of secularizationwhere the exercise of political power did not intersect with Buddhism. Buddhist nationalists never accepted the secularization phase of the colonial period since, according to the tenets of the Buddhist

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[651] PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights,* Chapter 6, in Cultural diversity, Heritage and Human Rights, intersections in theory and practice, edited by W. Logan, W. Langfield, M. N. Craith, 2010. See also PALMER E., *Adapting international criminal justice in southeast Asia, beyond the international Criminal Court* , Cambridge University Press 2020, in particular p. 161: *" Colonialism encouraged, in some, the development of 'strong nationalist sentiments' and mistrust towards foreigners, while colonial practices including forced evictions, citizenship laws, and administrative structures, contributed to divisions between different groups".*

[652] Ronan Lee & José Antonio González Zarandona (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies, 26:5, 519-538, DOI: 10.1080/13527258.2019.1666294

[653] AZEEM I., *The Rohingyas, inside Myanmar's genocide* ibid, p. 17.

[654] Ibid.

religion (in particular Theravada Buddhism), the strength of religion derives from the protection granted to it by the state[655].

Moreover, according to some scholars, the attitude of the British was more inclined to favour Muslim Burmese as they werecloser to Indian influence by entrusting them with governmental roles[656]. Hence, the animosity toward the Rohingya was exacerbated also by language and religious differences[657].

As far as cultural contestation, as is well known, cultural heritage plays a key role in the nation-building process.[658] It might be functional to build a cohesive and homogeneous national entity. The Myanmar case is a good example to show the abuses that might occur in the exercise of sovereignty through policies on cultural patrimony that tend to select a national cultural heritage by absorbing minorities' heritage sites into the dominant culture or by erasing them[659]. In other words, what stands out from the majority is perceived as a threat to state sovereignty.

The process of memory's erasure, therefore, still ongoing, isnot limited to the tangible heritage but also to the religious practices of Muslims by denying them their cultural rights, especially the right to access places of worship. The main target of destruction concerns mosques, which are in many cases replaced with Buddhist icons; this destruction has been taking place since the 1980s, as in the case of the Musa Pali Mosque, destroyed by the

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655 AZEEM I., *The Rohingyas, inside Myanmar's genocide* ibid, p. 23.
656 Ibid p.
657 LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar, in Cultural Contestation: Heritage, Identity and the Role of Government*
658 LOGAN W., *Whose Heritage? Conflicting narratives and top-down and bottom-up approaches to heritage management in Yangon, Myanmar,* in Urban Heritage, Development and Sustainability, 2016.
659 Ibid, p. 256. PETROVIC J., *What next for endangered cultural treasures? The Timbuktu crisis and the responsibility to protect,* (2013), 11 NZJPIL, see pp. 404-405. VERNON M. C., *Common Cultural Property: The Search for rights of Protective Intervention* (1994) 26 Casa W Res J Int'l L435;

military junta in 1983[660]. It has also resulted in the expropriation and occupation of mosques by occupying them as military areas, as happened with Babagyi Mosque in 1985;[661] moreover, one should mention the ban on Muslim worship, as well as a ban for the Muslim community and closure of mosques to the public throughout the area of Sittwe in 2012[662]. More specifically, inthe period between 2008 and 2015, the destruction of mosques reached its peaks, piloted by nationalist parties in alliance with extremist Buddhists, justifying it because they were built illegally without a legitimate permit[663]. Being affected is the freedom of religion not only through the destruction of mosques and the construction of pagodas in non-Buddhist areas but also througha forced campaign of conversion to the Buddhist religion by lifting restrictions for those who adhered[664].

Although persecution reached its highest levels during the years of the military junta, registering peaks in the years 2012 and 2017, the discriminatory pattern did not stop during the years of the democratic transition[665]. On the contrary, in the years of the democratic transition, the conflict worsened, probably due to the

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660 http://ercam.blogspot.com/p/existence-of-arakan.html, Ethnic Rohingya Committee of Malaysia.

661 http://ercam.blogspot.com/p/existence-of-arakan.html.

662 PUGH C., *Rohingya Crisis: Rakhine's Fallen Mosques*, 2018, SOUTH ASIA INSTITUTE, HARVARD UNIVERSITY.

663 AZEEM I., *The Rohingyas, inside Myanmar's genocide* ibid, p. 80.

664 Ibid, p. 80.

665 ALBERT E., MAIZLAND L., *The Rohingya crisis, in Council on foreign relations* 2020, https://www.cfr.org/backgrounder/rohingya-crisis; FABBRI D., *Myanmar le poste in gioco*, swissinfo.ch 2015, https://www.swissinfo.ch/ita/myanmar--le-poste-in-gioco/42624554; BENINI I., *Il buddhismo poco pacifico: il caso birmano*, Il Manifesto 2016. AGOSTINI J., *Myanmar, la persecuzione Rohingya da un regime all'altro*, Il Manifesto 2021, https://ilmanifesto.it/myanmar-la-persecuzione-rohingya-da-un-regime-allaltro. LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar, in Cultural Contestation: heritage, Identity.* The author points out that the leader of the Democratic Party has never taken a public stand for the Rohingyas, asking international leaders not to use the term " Rohingyas " but to identify them as the Rahkine state Muslim community, see pp. 53 -54.

political uncertainty and fragility typical of the transition[666]. Political uncertainty, despite the party's victory, resulted in the 2021 coup d'état that sees the military junta in power again to this day. From an international law perspective, the coup that took place breached a number of international norms: international norms of democratic standards for superseding a legitimately elected government, as well as international humanitarianlaw For causing the deaths of many civilians (Geneva Convention IV in 1949) and the forced fleeing of many refugees (1951 Convention Relating to the Status of Refugees)[667].

The erasure of cultural memory intersects in parallel with the violation of human rights; it is difficult to distinguish the boundary between the destruction of mosques and cultural practices, as well as the violation of other human rights. One can notice that the destruction of cultural heritage has been developing in parallel or, better, it follows the restrictions of Rohingyas' civil rights as a final step of a broader frame of ethinic cleansing[668]. The discriminatory policy has resulted in the government's control of public space, starting from the denial of Rohingya citizenship rights. The citizenship law already had restrictions in 1948, only to be permanently denied citizenship rights beginning in 1962 with the advent of the military junta. The discriminatory policy has also affected the exercise of other rights related to education, civil rights and labour rights[669]. In denying the belonging of a people to a space and a territory, theyhave also denied the cultural rights that might be exercised within that

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[666] Nyi Nyi Kyaw, *the excuse of (Il) legality in discriminating and persecuting religious Minorities: Anti-Mosque legal Violence in Myanmar*, in Asian Journal of Law and Society (2021), 8, 108 -131.

[667] Nurul Habaib Al Mukarramah, *The Governance Crisis in Myanmar: an International Law Perspective and International Society Response Towards Myanmar 2021 Coup D' Etat*, Hasanuddin University, Makassar –Indonesia.

[668] Ronan Lee & José Antonio González Zarandona (2020) *Heritage destruction in Myanmar's Rakhine state: legal and illegal iconoclasm*, International Journal of Heritage Studies, 26:5, 519-538, DOI: 10.1080/13527258.2019.1666294

[669] Ibid.

space. Cultural rights, indeed, are nothing more than the projection of an individual's personality. After trying to analyse the causes and seeing that the iconoclast wave is only theelement of broader discrimination, one should ask whether the Burmese legal system supports this process of persecution. Is cultural destruction legally lawful according to the Burmese legal framework?

3. **Cultural heritage law in Myanmar**

The evolution of cultural heritage law should be read by taking into account the different regime changes that succeeded from independence in 1948: The protection of cultural heritage varies depending on the importance the political governments have attached to nationalist claims[670]. Indeed, two key wordsintersect with cultural heritage policy: nationalism and Buddhism. As mentioned above, in grasping the mentioned connection, one should consider that Myanmar is a former colony, so nationalist tones are evident early on as a reaction to the external invasion suffered. The nationalist reaction tends to make the cultural elements of the majority prevail. In this post-colonial scenario, cultural heritage fits well to booster the Burman ethnic nationalism[671]. This might also be grasped by looking at the domestic legislative acts in the field of cultural heritage. It should be pointed out that the cultural heritage legal framework appears

[670] MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Myanmar*, Santander Art and Culture Law Review 2/2022 (8): 217 -244, DOI: 10.4467/2450050XSNR.22.019.17032.

[671] . In 1988, with the regime change, the government sets 4 social objectives among them *"The uplift of national prestige and integrity and preservation and safeguarding of cultural heritage and national character"*. On this point see LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar, in Cultural Contestation: heritage, Identity and the role of Government*, 2018. NANDA HMUN, *Overview of a journey of Myanmar Cultural preservation and Promotion: The emergence of Political changes and the cultural policy*, The Global new light of Myanmar 2013, https://www.gnlm.com.mm/overview-of-a-journey-of-myanmar-culture-preservation-and-promotion-the-emergence-of-political-changes-and-the-cultural-policy/.

very weak and poor compared to other Asian countries because of a young and extremely diverse nation[672].

Starting the study from the current Constitution, drafted in 2008 and entered into force in 2011, what emerges is a linkbetweenthe concept of cultural heritage and "national races," as well as that of citizenship[673]. More specifically, the Constitution focuses on the preservation of the cultural heritage belonging to the so-called national races and cultural rights pertaining only to Myanmar citizens[674]; the scope of protection excludes minorities 'rights.

Looking at the domestic legislation, the first domestic law was approved in 1957 as "The antiquities act"[675]. The legislation aimed to regulate the circulation of cultural objects by controlling the import and export of cultural artefacts and preventing the

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[672] MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, Marshall-Wythe School of Law College of William & Mary, Fall 2015. https://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/_documents/morrison-paper.pdf. The author highlights that Myanmar, since becoming a country, has passed only 5 laws pertaining protection of cultural heritage: The Antiquities Act of 1957, The protection and preservation of Cultural Heritage Regions Law of 1998, the Law Amending the Protection; The Protection of Cultural Heritage regions Law of 1998, The Law Amending the Protection and Preservation of Cultural heritage regions Law of 2009, and the two not-yet translated laws of 2015.

[673] See LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar*, ibid, p. 47.

[674] Ibid, The author underlines the link between national races and protection of cultural heritage within the Constitution, by mentioning article 22, according to which *" The Union shall assist: a)to develop language, literature, fine arts, and culture of the National races"*. Moreover, article 365 states that: *"Every citizen, shall, in accordance with the law, have the right to freely develop literature, culture, arts, customs and traditions they cherish. In the process, they shall avoid any act detrimental to national solidarity. Moreover, any particular action which might adversely affect the interests of one or several other national races shall be taken only after coordinating with and obtaining the settlement of those affected".*

[675] http://www.asianlii.org/mm/legis/laws/taa1957184/ . The law was amended in 1962.

illicit traffic of antiquity. By reading the law, it emerges a centralised system in which it is up to the government to declare a monument to be preserved or protected; only in relation to the scheduled monuments, the law ensures the protection of placeof worship from misuse, pollution or desecration[676]. It isevident in this phase, hence, a highly protective cultural heritage policy, in the wake of the colonial aftermath, aimed at rebuilding Burmese unity and based on the repatriation of cultural objects eventually expropriated during colonialism[677]. This legal text, however, shows poor regulation; for instance, there is a vague definitionof cultural heritage: the law pivots around the concept of antiquity meant as "any objects of archaeological interest [including] any land on or in which any such objects exist or is believed to exist".[678] It does not specify what criteria a culturalartefact should meet to be worthy of preservation, and it mainly relies on archaeological objects, leaving many categories unprotected, especially intangible cultural heritage[679].

The following legislation absorbs the nationalist attitude that is even more extreme within the military regime of the State peace development Council (SPDC), starting from 1962[680]. The military government carried out a policy aimed at restoring the pre-colonial period where political legitimacy was derived from the

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[676] Ibid.

[677] In this phase, the central role in the management of cultural heritage is the Ministry of culture, who in 1953 established the Department of Cultural Institute, with the aim to "strengthen the national unity of Burma by raising the cultural level of the people".

[678] Antiquities Act of 1957, sec. 1(b). On this point see MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, ibid, p. 14.

[679] Ibid, p.14.

[680] PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights,* Chapter 6, in Cultural diversity, Heritage and Human Rights, intersections in theory and practice, edited by W. Logan, W. Langfield, M. N. Craith, 2010.

religion of Theravada Buddhism, in other words, a theocracy[681]. The nationalist cultural policy of those years resulted not only in the restoration of the existing temples and pagodas and the creation of new Buddhist monuments but also in the destruction of heritage sites and cultural practices not belonging to the dominant Burmese ethnicity[682]. The military junta, moreover, used to reconstruct heritage sites belonging to cultural minorities in a way that they were assimilated into the Burmese culture asit happened in the city of Bago (Mon State)[683]. The military junta, hence, enacted a veritable erasure of the cultural memory of all those minorities who could hamper the design of a united and culturally homogeneous Nation.

Indeed, within the 1998 protection and Preservation of Cultural Heritage Regions law, although it provides a wider definitionof cultural heritage, the scope of protection is still limited to the Buddhist heritage[684]. The same focus on Buddhist heritage is evident in the most recent legislation enacted during the democratic transition[685]. Although they are the most comprehensive legislations and most closely follow international standards, the echo of nationalism always underpins the protection of cultural heritage. Neither the 2015 Protection and Preservation of Ancient Monuments Law nor the 2015 Protection and Preservation of Cultural Heritage Regions Law contemplates

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681 PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights,* Chapter 6, in Cultural diversity, Heritage and Human Rights, intersections in theory and practice, edited by W. Logan, W. Langfield, M. N. Craith, 2010.

682 Ibid.

683 Ibid, p. 86.

684 MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, ibid, p. 17.

685 Law n. 43/2015 Law protecting ancient objects, See MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Myanmar*, ibid, p. 226: " […] The preservation of Buddhist sites and antiquities has been indissolubly interwoven with a certain conception of national pride". Law No. 51/2015: Law on the Preservation and Protection of Ancient Buildings

protection for intangible heritage, minority cultures, or cultural rights[686].

There is no provision requiring the removal or destruction of Muslim places of worship. However, in omitting the protectionof minorities' cultural rights, the destruction/removal of Rohingya heritage falls within the scope of legality[687]. Indeed, in the narrative justifying this form of iconoclasm, the motive of illegality is invoked: mosques would have to be torn down as illegal religious buildings[688]. The legal argument to justify this erasure of memory is also invoked as a matter of security and public order, especially with their unlawfulness would be because many mosques were built during British colonization without the explicit permission of native Buddhists; hence, this would justify the illegitimacy of such places of worship[689]. From a strictlylegal point of view, the illegality of these sites would stem from the denial of citizenship to members of the Rohingya community: since they are not citizens of Myanmar, they could not enjoy cultural rights. It should be noted that Islam is not constitutionally prohibited; however, it is indirectly prohibited as most of the

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[686] See LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar*, ibid, pp. 47-48.

[687] Nyi Nyi Kyaw, *the excuse of (Il) legality in discriminating and persecuting religious Minorities: Anti-Mosque legal Violence in Myanmar*, in Asian Journal of Law and Society (2021), 8, 108 -131. The author introduces the concept of "legal violence" when legal tools might also produce violence and counterproductive effects.

[688] Nyi Nyi Kyaw Ibid, pp. 118-120. The author underlines that mosques are perceived by Buddhsts as a *threat "in at least three ways: (1) mosques are secret and opaque; mosques are enemy bases in which an aggressive anti-buddhist brand of Islam is taught and propagated; hundreds of mosques have been illegally built"*.

[689] Nyi Nyi Kyaw Ibid, p. 120. According to the author, the mosques built during the last Burmese King before colonization would be less contested than the ones built during the British colonization: *"For these Buddhists, everyone or every group that existed in pre-colonial Burma is native, indigenous, rightful, legitimate, and lawful, whereas those that came to exist colonial Burma and independent Burma/Myanmar is foreing, non-native, ungranted, non- legitimate, unlawful, or even illegal"*.

Muslim population belongs to the Rohingya community[690]. Moreover, the Muslims legally recognized are considered second-class citizens, hence lower than native citizens are[691]. In thesame vein are the four "race and religion protection laws" that aim to discriminate directly against Muslims, adopted in December 2014, declaring certain tenets of the Muslim religion illegal[692].

To sum up, there is evidence of instrumental use of law and cultural heritage policies to pursue discriminatory goals, as well as a social hierarchy of different classes which correspond to different layers of heritage sites 'protection: the lower the social rung, the weaker the protection of the corresponding cultural heritage[693]. Moreover, although in different ways, theconnection of cultural policies with nationalism emerges in all political governments across the country, even during the democratic transition. It is worth seeing whether this nationalist attitude persists even in the incorporation of international legalstandards, as it will be examined in the next paragraph.

31 The implementation of international conventions.

As far as the incorporation of international cultural heritagerules, it can be argued that the Myanmar government has shown an ambivalent relationship that has different nuances dependingon the political phase[694]. On the one hand, it is possible to identify a

[690] Ibid, p. 111. Myanmar recognizes the Muslim community called Kaman but it represents only the four % of the total Muslim population.

[691] Ibid, p. 111

[692] Library of congress, Burma: Four "Race and Religion Protection Laws" Adopted, 2015, https://www.loc.gov/item/global-legal-monitor/2015-09-14/burma-four-race-and-religion-protection-laws-adopted/.

[693] See LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar*, ibid, p. 55.

[694] See MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Mya*nmar, ibid.

desire to distance itself from international law for fear of the external threat related to colonial aftermath, and on the other hand, there is the need to bring legislation in line with international conservation standards to promote its international legitimacy.

The early years of the military junta are characterized by astrong outward closure where no international conventions are ratified, except for the 1954 Hague Convention that was ratified quite early, precisely in 1956[695]. For at least two decades, Myanmar adopted a very weak foreign policy of no international relations by adopting an isolationist position with respect to external influences from third countries that were viewed with suspicion given the colonial past[696]. Fear of an outside power that could undermine Burmese state sovereignty and cultural identity has resulted in the absence of ratification of internationalconventions, even on cultural heritage[697]. The turnaround came in the 1990s with a new coup that brought a military government back to power. The new junta shows signs of openness to international relations to incorporate international standards in order to promote its international prestige on the geopolitical stage. In 1994, it ratified the 1972 World Heritage Convention withtheaim to booster its national supremacy.

As seen in the first chapter, the 1972 UNESCO Conventionhasthe limit of being excessively state-centric, thus especially in non-democratic governments like Myanmar, there is the risk that the State can manipulate its national patrimony to forge a prevailing

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[695] TIN MYO MYO SWE, *Cultural Heritge Protection in Myanmar*, J. Myanmar Acad. Arts Sci. 2019 Vol. XVII. No. 8. However, Myanmar had been one of the first countries to adopt the Universal Declaration on Human righs (1948), see LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar*, ibid, p. 38.

[696] MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, ibid, p. 9. See MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Myanmar*, ibid., p. 221.

[697] PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights*, ibid, p. 93.

cultural narrative that excludes cultural practices of minority groups[698]. The military government chose on purpose to nominate the Bagan archaeological area to gain legitimacy and clean up its image through Buddhism[699]. Indeed, Bagan was historically important as this is where the roots of the Buddhist empire lay and where Burmese civilization reached its peak inthe 11th and 13th centuries.

The area of Bagan, the archaeological zone, has been thesubject of an extensive renovation project that has not been met with enthusiasm by Western experts. Indeed, the path of the inscription was long and tortuous, as the restoration project did not comply with the international standards of conservation, with particular regard to the criterion of authenticity[700]. Diversely from the Western canon, in some countries such as Myanmar, heritage conservation comes through the concept of impermanence. Just as existence for Buddhism is cyclical, so is art, which is impermanent: material deterioration is accepted, and what matters is the preservation of the spiritual element[701]. Althoughit was nominated in 1996, it was not enlisted until 2019, during the years of democratic transition that represented the most open phase of international relations. Looking at its description onthe World Heritage list, Bagan conveys cultural values that amount to "outstanding" and "universal" from the point of view of history and art since: *"It is a sacred landscape which features an exceptional array of Buddhist art and architecture, demonstrates centuries of the cultural tradition of the Theravada Buddhist*

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[698] MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, ibid,

[699] See MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Myanmar*, ibid., p. PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights*, ibid, p. MORRIS J. A., Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar, ibid

[700] KRAAK A. L-(2018) *Heritage destruction and cultural rights: insights from Bagan in Myanmar, International Journal of Heritage Studies*, 24:9, 998-1013, https://doi.org/10.1080/13527258.2018.1430605.

[701] Ibid, pp. 1008-1009.

practice of merit-making (Kammatic Buddhism), and provides dramatic evidence of the Bagan Period (Bagan Period 11th –13th centuries), when redistribution Buddhism became a mechanism of political control, with the king effectively acting as the chief donor"[702]. It fulfils criteria III.IV, VI, being a "an exceptional testimony of to the Buddhist cultural tradition and monumental architecture", as well as "an exceptional example of the living Buddhist beliefs and traditions of merit-making […]". Byreading this document, the centrality of Buddhist character in all its aspects, such as artistic, architectural, historical, and intangible declinations, is evident. Even though the legal protection provided by the World Heritage Convention transcends national boundaries, the single States identify the very best cultural heritage located in their territory worthy of global protection. In the case of Myanmar, the impact of the Bagan inscription on the world heritage list was to give greater emphasis to the idea of national cultural heritage sponsored by the military government and, at the same time, to marginalize contested sites that weaken the national identity design forged by the junta.

Moreover, many human rights violations have been committed towards the local population living in that area since this latter was obliged to move from Old Bagan to New Bagan to renovate the archaeological area, in addition to the exploitation of workers involved in the restoration process, exploitation that is still ongoing for tourism reasons.[703]

The democratic transition phase is one of the most open to incorporating international conservation standards. The 1970 Convention and the 1995 Unidroit Convention were ratified in 2013 and 2015, respectively, improving the restitution of ancient Buddhist relics compared to the past[704]. The 2015 Law Protecting

[702] UNESCO World heritage Convention, https://whc.unesco.org/en/list/1588
[703] LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar*, ibid, p. 38.
[704] MATTEZ A., *Ethnonationalism and Cultural Heritage Law in Myanmar*, ibid, p. 229.

Ancient Objects and the 2015 Law on the Preservation and Protection of Ancient Buildings follow and comply with the ratified international conventions, bringing a general improvement to domestic regulation. The government also ratified the 2003 UNESCO Convention on 7 May 2014[705].

However, even in the democratic stage, there is no shortage of critical issues, especially on the side of human rights protection. The government has never ratified the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which is the opposite of the nationalistic goals of its policy[706]. This Convention, indeed, promotes the concept of cultural diversity and the importance of community participation within the cultural heritage protection process. The same reluctance has been registered towards the human rights body, especially during the SPDC regime, which did not accept the western notion of human rights because of their foreignnesswith Asian values. [707]

In sum, even in the case of incorporating international law, Myanmar has exploited international conventions to pursue nationalistic ends with the acquiescence of the international community, which has not favoured the promotion of more inclusive sites based on an international framework still centred on state prerogatives.

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[705] See LOGAN W., *Ethnicity, heritage and human rights in the union of Mya*nmar, ibid, p. 50.

[706] MORRIS J. A., *Rebuilding a Troubled Nation, one Brick at a Time: Cultural Heritage and the Law in Myanmar*, ibid, p.9.

[707] PHILP J., *The political appropriation of Burma's cultural heritage and its implications for human rights*, ibid, pp. 83-94, more specifically p. 94: *"[…] the SPDC has shown a concern to preserve its Burmese cultural identity and has argued that internationally accepted notions of human rights encompass Western concepts that are alien to traditional values, and therefore, have no applicability to Burma's contemporary political, cultural and economic realities".*

4. Minorities' heritage sites through the eye of international law

In examining the international community's reaction to the cultural heritage destruction by the military junta in Myanmar, it seems important to start from the international framework onthe protection of memorial sites. Two considerations are noteworthy: this iconoclasm in Myanmar affects religious heritage on the one hand and particularly the heritage that belongs to minorities. As far as the definition of minority, although there is no definitionof religious or cultural heritage, international law offers legal protection to religion under many layers: on the side of international human rights law, if consider the freedomofreligion as a human rights issue, from the other side of cultural heritage law if consider the religious heritage[708]. As far as this latter, the legal protection of religious cultural heritage can bedetected from the set of international conventions starting from the 1954Hague

[708] The reference here is to LIXINSKI L., *Religious Heritage in International Law: Nationalism, Culture, and Rights*, 64 (1) Pravovedenie 138-155 (2021). LIXINSKI L., '*Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm, and Identity*', in Glenn Hooper (ed.), Heritage at the Interface: Interpretation and Identity (University Press of Florida, 2018) 121 -135. The author quotes the scholar Chechi (pp.3 -4), according to which the definition of religious heritage meets two out of three criteria *: "(1) current religious value; (2) symbolic or profane value, related to associations of value to people not affiliated with that faith, which can be a living or dead religion; and (3) its artistic or cultural value, embodying the idea that many religious buildings are also masterpieces of a certain architectural style"*. CHECHI A., *'Protecting Holy Heritage in Italy – A Critical Assessment through the Prism of International Law'*, in International Journal of Cultural Property 21 (2014): 397 (397 -421).

Convention[709]. When religion is protected as culture, it receives greater legal protection: when a religious monument is classified as heritage, it is legally protected not only for its religious aspect but also for its cultural, architectural, and artistic value; the protected interests cover a broad sphere of stakeholders, including non-believers, hence the social value of religious heritage is taken into account[710].

Religion, thus embedded in heritage, can become an important tool in building a collective memory within the nation-building process. The problem arises when the State chooses to grant legal protection to the religion of relevance at the expense of minority religions, as in the case of Myanmar. In this case, the protectionof religious heritage is used to pursue discriminatory and oppressive purposes.

Beyond religious heritage, which is out of the scope of this dissertation, one should wonder what protection international law grants to memorial sites belonging to minorities and what limits it imposes on States in protecting these heritage sites. Minorities' culture is exposed to constant threats due to both external factors and the risks of often being absorbed by the

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[709] LIXINSKI L., *'Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm, and Identity'*, ibid, pp. 5- 8, according to the author they are applicable to religious cultural heritage: the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict; The 1970 Convention on the Means to Prevent and Prohibit the Illegal Import, Export and Transfer of Ownership of Cultural Property, article 1. The Operational Guidelines for the Implementation of the 1972 World Heritage Convention (2015) also do mention religious or spiritual significance as a ground upon which to assess the "Outstanding Universal Value" of monuments and sites up for inscription on the World Heritage List. Finally, for the author it is important to mention the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (ICHC) in relation to religious practices.

[710] LIXINSKI L., *Religious Heritage in International Law: Nationalism, Culture, and Rights*, 64 (1) Pravovedenie 138-155 (2021). LIXINSKI L., *'Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm, and Identity'*, in Glenn Hooper (ed.), Heritage at the Interface: Interpretation and Identity (University Press of Florida, 2018) 121 -135

dominant majority[711]. Hence, it is up to the State to grantee the right of minorities "to maintain" their own culture; moreover, if one embraces the definition of culture as "an evolving process", inevitably exposed to change, it is incumbent on the State to also guarantee minorities the right "to develop" their own culture, meant as the freedom to challenge it[712].

As far as the concept of minority in international law, there is no unanimous definition of "minority"[713]. The concept is stressed on the non-dominant position of minorities compared to the rest of the population of a State[714]. Looking at article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities provides that States should protect minorities, conceived as groups of people belongingto the same "identity" from a cultural, religious or linguistic point of view[715]. This latter is the main reference in the field of minority

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[711] See MAKKONEN T., *Minorities's Right to maintain and Develop Their Cultures: Legal implications of Social Sciences Research,* in Cultural human rights, Francioni F. Scheinin M., Martinus Nijhoff Publishers, Leiden- Boston. According to the author, many external factors shape cultures such as ecology, biology, religions, major historical events, often beyond direct human control.

[712] Ibid, p.195. According to the author, the State should also ensure minorities the conditions under which cultural change can take place.

[713] BERKES A. (2018). *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites,* Intercultural Human Rights Law Review, 13, 47-130., U.N. Office of the High Commissioner for Human Rights [OHCHR], Minority Rights: International Standards and Guidance for Implementation 2 (2010), http://www.ohchr.org/ Documents/Publications/MinorityRightsen.pdf.

[714] Ibid., Consider the definition of Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/384/Rev.1, 1979: *"A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language".*

[715] Declaration on the rights of persons belonging to National or Ethnic, Religious, and Linguistic Minorities, 1992, General Assembly resolution 47/135, article 1*: "States shall protect the existence and the national or ethnic, cultural,*

rights, even though there is a considerable international legal framework dealing with this subject[716]. The declarationprovides obligations upon States aimed at protecting the existence of minorities within their respective territories and the right to enjoy their own culture[717].

The international human rights instruments also provide protection for minorities who are denied their citizenship because

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religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity". Within regional European instruments, it is worthy of mention the 1998 Convention for the Protection of National Minorities, drawn up within the Council of Europe, more specifically art. 5 (1)" The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage".

[716] On this point see, U.N. Office of the High Commissioner for Human Rights [OHCHR], Minority Rights: International Standards and Guidance for Implementation 2 (2010), http://www.ohchr.org/ Documents/Publications/MinorityRightsen.pdf. , p. 14-15. Consider article 27 of the International Covenant on Civil and Political Rights; moreover article 2 of the International Covenant on Economic, Social and Cultural Rights according to which *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".* Consider also Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[717] Declaration on the Rights of Persons belonging to National or Ethnic, Religious, and Linguistic Minorities, article 1 : *"States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. 2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life".*

of their cultural diversity compared to the dominant culture within a Country, as in the Myanmar case[718].

That said what is relevant in the concrete case of post-colonialand post-conflict situations is the right of these minorities to the protection of the transmission of their cultural memory: within International law, is there a legal ground of "a right to memory"?

In international law, the legal basis of "a right to memory" is disputed. From one side, scholars recognise a possible legalbasis in the right to truth, which is recognised in many international treaties as an important pillar of transitional justice. The right to truth refers not only to the victims of gross violations of human rights within a post-conflict society but also to the societyat large as a right to know its own past"[719].

On the other side, if one considers the transmission of memory through the cultural lens, which is relevant to the current discussion, scholars identify it as a legal basis for international human rights protection on cultural rights[720]. This law protects the "access to culture" with the International Covenant on Economic, Social and Cultural Rights, already mentioned[721]. According to some scholars, "access to culture" might also include the community's right to access its collective memory[722]. Inother

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[718] See the 1961 Convention on the reduction of Statelessness.

[719] On this point see CHOW P. Y., *Memory Denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, The International Lawyer, Vol. 48, No. 3 (WINTER 2015), pp. 191 -213, https://www.jstor.org/stable/43923929.

[720] ibid

[721] On this point CHOW P. Y., *Memory Denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, ibid. See more specifically article 15 (1) (a) of ICESC*:" 1. The States Parties to the present Covenant recognize the right of everyone:*
(a) To take part in cultural life."

[722] On the concept of cultural heritage and memory's transmission, see also The 2005 UNESCO Convention on the protection and promotion of the

words, the transmission of cultural memory is viewed as intangible cultural heritage.

Looking at the general framework, as seen in the previous chapters, it is possible to identify at the customary level an international rule prohibiting the intentional destruction of cultural heritage in wartime is established[723]. Wartime is also referred to as internal conflicts inside the same country as in Myanmar. This customary rule is evident from the set of international treaties, more specifically the 1954 Hague Convention, granting protection to memorial sites bothinexternal and internal conflicts[724]. However, international treaties, especially the early conventions on the protection of cultural property, recall the prerogatives of the States, giving protectionto heritage of national significance. In cases like Myanmar, where the government in charge destroys the memory of minorities, bypassing the principle of state sovereignty through international instruments becomes more difficult. International jurisprudence fulfilled this gap by imposing limits on States in disposingof their cultural heritage for oppressive purposes. In particular, the jurisprudence of the tribunal of the former Yugoslavia, according to which, for the intentional destruction of religious monuments to amount to a war crime, it is sufficient that the spiritual value of a cultural property belonging to a particular community or minority has been affected; the affected cultural site need not be

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diversity of cultural expressions and the 2007 declaration on the rights of Indigenous People. CHOW P. Y., *Memory Denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, ibid.

[723] See paragraph 2.1 of the 2nd chapter of this dissertation.

[724] Among the international treaties one should mention the 1907 Hague Convention, the 1954 Hague Convention for international and internal conflicts; the 1977 Additional Protocols to the Geneva Conventions providing for the prohibition of acts of hostility against historic monuments, works of art, or places of worship which constitute the cultural or spiritual heritage of peoples". On this topic BERKES, A. (2018*). "Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites* , Intercultural Human Rights Law Review, 13, 47-130.

necessary of national importance[725]. In addition, from the jurisprudence of the International Criminal Court of the former Yugoslavia, the protection of minority memory sites also emerges in cases where intentional destruction is part of a systematicattack on the civilian population or presents a discriminatory intent against a particular community[726].

This trend of more focus on local communities and the local interest in cultural property also emerges in the last international treaties of cultural property, as seen in the previous chapters[727]. In any case, even in the case of iconoclasm perpetrated by states in peacetime, pathological destruction that results in it being an act against people, violating human rights, is not acceptable in international law, as seen in the international practice examined in the previous paragraphs in relation to the Bamiyan Buddhasin Afghanistan[728]. In other terms, iconoclasm implies a violationof human rights; an act of persecution is unlawful. In grasping the

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[725] Consider the Statute of the International Criminal Tribunal for the Former Yugoslavia, article 3, lett. d: according to *which " Seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science"*. Consider Prosecutor v. Hadlihasanovid & Kubura, Case No. IT-01-47-T, Judgement, 161, (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006), in which the ICTY did not require the criterion of "national importance" for the affected cultural heritage". On this, BERKES, A. (2018). *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites*, ibid, pp. 57-69.

[726] BERKES, A. (2018). *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites*, ibid, pp.62-69. Consider the case-law Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000). According to the same author even in the Al Mahdi case, even though it was an attack not against a religious minority, the International Criminal Court examined the destruction under the perspective of local communities.

[727] LIXINSKI L., *A Third Way of Thinking about Cultural Property*, 44 Brook. J. Int'l L. 563 (). Available at: https://brooklynworks.brooklaw.edu/bjil/vol44/iss2/2.

[728] WANGKEO K., *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage during Peacetime*, 28 YALE J. INT'L L. 183 (2003).

legal framework for protecting minorities' memorialsites, onecan consider the Report of the Special Rapporteur in the Field of Cultural rights: memorialization processes, delivered to the General Assembly, previously mentioned.[729] As seen in the previous sections, the principles set for memorializationprocesses within post-conflict societies are victim-oriented, providing for State obligations relating to the protection of communities' past"[730]. The report calls for the endorsement of the principle of pluralism and cultural diversity in shaping the historicalnarrative of national identity; more specifically, according to the Report, paragraph 104 lit. (e*): "[…]States and other stakeholders should refrain from using memorialization processes to further their own political agendas and ensure that memorial policies contribute to, in particular: "(e) Redefining national identity by a policy of pluralism that acknowledges different communities and recognizes the crimes committed by all parties; "*[731]. Principles issued by the report aim to construct historical narratives that are as inclusive as possible.

41 The international response

If, from a theoretical point of view, the protection of minorities' memorial sites has a legal ground, what has been in practice the

[729] U.N. Doc. A/68/296 (Aug. 9, 2013).
[730] On this point, CHOW P. Y., *Memory Denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, The International Lawyer, Vol. 48, No. 3 (WINTER 2015), pp. 191-213, https://www.jstor.org/stable/43923929 .
[731] Report of Memorialization processes, ibid, para 104, lett. (e).

international remedies from the international community in dealing with the cultural repression of Myanmar's junta against Rohingyas? Does the international community have a duty to intervene by eroding Myanmar's state sovereignty?

Looking at the Rtp model, examined in the previous paragraph, the measures that have been taken by the international community can be subsumed under the Rtp model under the aegis of the third pillar by dealing with a State that has failed to protect its people[732].

Among the many actions taken to crack down on human rights violations are economic sanctions. For instance, the United States, for years, passed a sanctions package consisting of the arms embargo, prohibition of importing Myanmar – origin goods, as well as exporting U.S. financial services and participating in new investments[733]. The European Union had applied the same approach by pursuing the aim of economically isolating Myanmar[734].

In boosting the democratic process through the application of economic sanctions that are aimed to discourage the violation of democratic standards, the impact of these economicmeasures was very limited in purpose since there was a lack of joint coordinating action among the states of the international community[735].

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[732] GERSTENBLITH P., *Protecting Cultural Heritage: The Ties between People and Places*, ibid, p. 370. Among the scholars pro military intervention in the field of cultural heritage see CUNO J., *"The Responsibility to Protect the World's Cultural Heritage,"* Brown Journal of World Affairs 23, no. 1 (2016): 106.

[733] Wynn H. Segall, Thomas J. McCarthy, Lars-Erik A. Hjelm, Justin Williams, Nnedinma C. Ifudu Nweke, Jenny Arlington, *Recent Actions Suspending Myanmar Sanctions*, 2012, https://www.akingump.com/en/insights/alerts/recent-actions-suspending-myanmar-sanctions-and-implications-for-potential-investors.

[734] EU Council Regulation (EC) No. 194/2008. The sanctions include restrictive trade and economic measures on the military regime and its affiliates.

[735] Andréasson G., *Evaluating the effects of economic sanctions against Burma*. https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1335119&fileOId=1646821.

Myanmar simply diversified its economy, forging trade relations with ASEAN countries or, in any case, with Asian partners. The restricted outcome of these sanctions is also because the United Nations chose not to implement economic sanctions[736].

Prominent among the measures taken to counter human rights violations are recommendations under so-called "soft law" instruments. Among these soft law recommendations, one can mention the 2021 European Parliament resolution of 7 October 2021 on the human rights situation in Myanmar, including the situation of religious and ethnic groups (2021/2905 (RSP)), through which it condemns the well-planned "coup d'etat" of the military junta in 2021[737]. In relation to cultural heritage, thereisa specific provision condemning the attacks against ethnic and religious minorities' patrimony[738]. However, these non-binding measures have merely a political orientation content.

Under the aegis of the United Nations, one can consider the U.N. approved an initial report containing a series of recommendations to overcome the internal conflict, despite the centralgovernment's reluctance to establish a UN advisory Commission[739]. These

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[736] Ibid.

[737] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0417_EN.html.

[738] See paragraph 4 of the 2021 EU Parliament resolution: *"Denounces the Tatmadaw's widespread violent response to any kind of protest and the gross human rights violations it has committed and continues to commit against the people of Myanmar, including against ethnic and religious minorities, which amount to crimes against humanity; expresses its deep concern at the frequent attacks on churches, mosques, schools and medical facilities, and the arrests of religious leaders".*

[739] See Final Report of the Advisory Commission on Rakhine State, " Towards a peaceful, fair and prosperous future for the people of Rakhine", 2017, https://www.kofiannanfoundation.org/app/uploads/2017/08/FinalReport_Eng.pdf.

For a commentary see Advisory Commission on Rakhine State, " Overview of key points and recommendations, Final report of the Advisory Commission on Rakhine State".

recommendations focus principally on respecting human rights with respect to communities, particularly the Muslim community, calling for restoring freedom of movement and recognising citizenship, ensuring their participation in

As far as the cultural aspect, recommendations call on States to recognize citizenship rights in order to ensure cultural diversity and pluralism by listing and protecting *"historic, religious and cultural sites of all communities in Rakhine"*[740]. More specifically, the report supports the inscription of the Mrauk U site on the UNESCO World Heritage list located in the Rakhine State since it is a symbol of "cultural interaction between Buddhism and Islam, which is currently within the tentative list"[741].

Another important report was approved by the United Nations Human rights Council in 2019 to ascertain human rights violations and abuses committed by the Myanmar military and also by ethnic armed organizations (EAOs), especially against

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It is important to underline again that the aggravation of the persecution against Rohingya occurred during the years of the democratic transition and the then leader refused the establishment of the UN Advisory Commission on Rakhine State in 2016/2017. On this point LOGAN W., *Ethnicity, heritage and human rights in the union of Myanmar, in Cultural Contestation: Heritage, Identity and the Role of Government*, Springer International, 2018.

740 https://www.kofiannanfoundation.org/app/uploads/2017/08/FinalReport_Eng.pdf. See paragraph 77 of the "Cultural development" section : "77. *The Government should list and protect historic, religious and cultural sites of all communities in Rakhine. This includes sites such as U Ye Kyaw Thu Monastery, St. Mark Anglican Church, Sri Moha Dev Bari Hindu Temple, the Badar Makkar Sufi Shrine and other cultural landmarks".*

741 Mrauk-U is described as a site with *"Impressive decoration includes outstanding examples of stone carving and sculpture. The Myauk-u kingdom had an important rôle in the history of trade and warfare in the Bay of Bengal, and was the seat of intense cultural and religious interaction between. Bhttps://whc.unesco.org/en/tentativelists/824/uddhism and Islam through the Bengali sultanates, between Buddhism and Christianity through the Portuguese"*, see on the website.

Rohingya, providing a set of recommendations to the Government and the United Nations[742].

Again, these are quasi-legal instruments with no legally binding force; they do not envisage interventions from the side of the international community. The UNSC Council, which has the power to intervene, has been a great absence in this affair.

Indeed, the lack of the Security Council's action has resulted, for many scholars, in one of the greatest failures to protect human rights against crimes committed by the Myanmar government[743]. This is due mainly to the veto powers exercised by China and Russia as permanent members of the UN Security Council[744]. Moreover, the international community, in particular Western countries, especially during the years of the civil government, has focused more on the country's reform and modernizationprocess rather than the humanitarian crisis[745]. The same Asean, in compliance with the principle of non-intervention and the

[742] United Nations Human rights Council, 19 Sept 2019, report Detailed findings of the Independent International Fact-Finding Mission on Myanmar, link : https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index.

[743] MENNECKE M., *The Failure of the International Community to apply R2p and Atrocity prevention in Myanmar*, in Global Responsibility to Protect, Volume 13 (2021): Issue 2-3 (Jun 2021): Special Issue: Myanmar and (the Failure of) Atrocity Prevention, by Martin Mennecke and Ellen E. Stensrud, pp. 111 -130. [744] ZAHED I. U. MD, *Responsibility to Protect? The International Community's Failure to protect the Rohingya*, December 2021, Asian Affairs DOI:10.1080/03068374.2021.1999689.

[745] On this topic, MENNECKE M., *The Failure of the International Community to apply R2p and Atrocity prevention in Myanmar*, in Global Responsibility to Protect, Volume 13 (2021): Issue 2 -3 (Jun 2021): Special Issue: Myanmar and (the Failure of) Atrocity Prevention, by Martin Mennecke and Ellen E. Stensrud, pp. 111-130; ZAHED I. U. MD, *Responsibility to Protect? The International Community's Failure to protect the Rohingya* , December 2021, Asian Affairs DOI:10.1080/03068374.2021.1999689. PEDERSEN M. B., *The Rohingya Crisis, Myanmar, and R2P 'Black Holes'*, in Global Responsibility to Protect, Volume 13 (2021): Issue 2-3 (Jun 2021): Special Issue: Myanmar and (the Failure of) Atrocity Prevention, by Martin Mennecke and Ellen E. Stensrud, pp. 349 -378.

principle of state sovereignty, has desisted from intervening to protect the afflicted people in Myanmar[746].

Only recently, the UN body passed a historical resolution, finally in December 2022[747]. The resolution was adopted with the votes of 12 out of 15 members, with the abstention of China, Russia, and India[748]. The Council calls for an end to all forms of violence throughout the country; more specifically, "it urges all parties to respect human rights, fundamental freedoms and the rule of law"[749]. However, by interpreting the UNSC resolution, onecan notice that it was not adopted under Chapter VII. Thus, it would not be legally binding, and it would lack enforcement mechanisms in case of non-compliance[750]; above all, looking at the language of the resolution, it might be interpreted as a soft measure instead of a legally binding act[751]. In other words, the resolution is more a political act than a legally binding act since it also did not recognize the current military regime as a "coup d'etat" but as a declaration of emergency"[752].

As far as the prosecutions brought before internationalcourts, the Myanmar vs Gambia case before the International Court of Justice

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[746] Ibid.

[747] https://digitallibrary.un.org/record/3998406?ln=en#record-files-collapse-header.

[748] HAMID G. H., *Security Council Resolution 2669 (2022) on the Situation in Myanmar: Too Little, Too Late?* Blog of the European Journal of International Law, January 42023.

[749] See p. 2 of the UNSCR 2669 (2022).

[750] HAMID G. H., *Security Council Resolution 2669 (2022) on the Situation in Myanmar: Too Little, Too Late?* Blog of the European Journal of International Law, January 42023.

[751] Ibid. Consider the verbs "it calls, it urges, it demands". For the interpretation of the UNSC resolutions see the International Court of Justice, Namibia Advisory Opinion of 1971.

[752] HAMID G. H., *Security Council Resolution 2669 (2022) on the Situation in Myanmar: Too Little, Too Late?*,ibid. On the limited effects of this resolution see also U.S. Department of State, *UN Security Council Adopts Resolution on Burma, press statement 2022*, STRANGIO S., *and UN Security Council adopts rare resolution on Myanmar*, ibid.

is worth mentioning[753]. The case was initiated by the Gambia on behalf of the minority Rohingya population in Myanmar by requesting the Court to adjudge Myanmar's responsibility for violations of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide through acts adopted against members of the Rohingya group. The Gambia relies its action on the existence of an obligation on the international community at large to prevent and punish acts of genocide[754]. In Gambia's allegations, one can grab references to cultural heritage and cultural rights in part requiring Myanmar *"to return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind" and "ensure theright of the Rohingya to identify as such"*[755]. One can note the juxtaposition of *"places of worship"* within the field of ownership's rights and a right to recognise their *"cultural identity"*.

In its judgement, the International Court of Justice rejected Myanmar's arguments against Gambia's claims by admitting the genocide case against Myanmar[756]. More specifically, Myanmar

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[753] The Republic of The Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures, 11 Nov. 2019, https://www.icj-cij.org/case/178.

[754] PILLAI P., *The Gambia v. Myanmar and Ukraine v. Russian Federation: A Tale of Two Cases at the International Court of Justice*, in Opinio Juris 2022, https://opiniojuris.org/2022/07/14/the-gambia-v-myanmar-and-ukraine-v-russian-federation-a-tale-of-two-cases-at-the-international-court-of-justice/.

[755] See pg. 13, lett. b) (2) and (/), Judgment of ICJ.

[756] OCHAB U. E., *International Court of Justice Proceeds with the Case Against Myanmar*, https://www.forbes.com/sites/ewelinaochab/2022/07/23/international-court-of-justice-proceeds-with-the-case-against-myanmar/, Md. Rizwanul Islam, *The Gambia v. Myanmar: An Analysis of the ICJ's Decision on Jurisdiction under the Genocide Convention* , American society of International law, V. 26, Issue 9, 2022, https://www.asil.org/insights/volume/26/issue/9 . CRUVELLIER T., *ICJ admits genocide against Myanmar*, Justiceinfo .net, 2022, https://www.justiceinfo.net/en/104023-icj-admits-genocide-case-against-myanmar.html. PILLAI P., *The Gambia v. Myanmar- International Court of*

argued that Gambia was not affected by the Rohingya migrant crisis, and there was no disagreement between the parties (Gambia and Myanmar), also contesting the court's jurisdictionin the matter. The international Court of Justice has rejected it since no special interest of a State was necessary to invoke the responsibility of another State under the Genocide Convention; to invoke a violation of the Geneva Convention, it is sufficient to be a signatory state, as in the case of Gambia[757].

The rejection of preliminary objections will follow the examof the merits. Anyway, the decision is a step forward that opens up the possibility for a third state to bring action in cases of humanrights violations that do not concern its nationals[758].

Moreover, the international Criminal Court has authorized its prosecutor to investigate gross violations of human rights in Myanmar and in relation to the situation in Bangladesh[759].

It is important to underline that Myanmar has not ratified the Rome Statute; hence, the investigation has been grounded onthe detection of crimes committed mainly on the territory of the People's Republic of Bangladesh – a State Party to the Rome Statute, as well as other crimes linked to these events (committed in the Rakhine State)[760]. To prosecute crimes committed directly

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Justice Judgment on Preliminary Objections, Opinio Jiuris 2022, http://opiniojuris.org/2022/07/22/the-gambia-v-myanmar-international-court-of-justice-judgment-on-preliminary-objections/.

[757]Md. Rizwanul Islam, *The Gambia v. Myanmar: An Analysis of the ICJ's Decision on Jurisdiction under the Genocide Convention*, ibid: *" the Court pointed that in the Genocide Convention Case, it had observed that the Convention is not about any individual advantage or disadvantage of a state, but rather for the achievement of common purposes. It concluded that the breach of erga omnes obligations such as those contained in the Genocide Convention, even without establishing any special interest in the matter, is plausible".*

[758] Md. Rizwanul Islam, The Gambia v. Myanmar: An Analysis of the ICJ's Decision on Jurisdiction under the Genocide Convention, ibid.

[759] https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.pdf

[760] https://www.icc-cpi.int/victims/bangladesh-myanmar

in the territory of Myanmar, it would be necessary the ratification of the Rome Statute or the intervention of the UN Security Council before the Court[761].

It is interesting to note that the scope of the investigation aims to prove also "the alleged destruction of houses and other buildings underlying the alleged coercive acts", including the destructionof mosques that are again embedded within the ownership's rights cluster[762]. It seems worthy to point out that the investigation is alsoaimed at proving the discriminatory use of iconoclasm pursued against Rohingyas, more specifically in paragraph 33 in relation to the *"alleged discriminatory intent"*: *"all victims' representations assert that these aforementioned allegedactswere committed on the grounds of their ethnicity and religion, namely Rohingya and Muslims* […]"[763]. This orientation is in line with international case law, according to which the wantondestruction of cultural heritage might be significant evidence of a *mensrea* to commit a genocidal act[764]. As we know, cultural genocideisnot a

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[761] See PALMER E., *Adapting international criminal justice in Southeast Asia, beyond the international Criminal Court*, ibid, p. 191.

[762] Paragraph 32: *"Alleged destruction of houses and other buildings underlying the alleged coercive acts: most victims' representations mention that in addition to the aforesaid violent acts committed against them or their family members, their property were destroyed or taken away from them. Victims' representations also refer to incidents of burning of their homes, as well as destruction of schools and mosques, either during the attacks to their villages or while they were on their way to Bangladesh.66 They also claim that their livestock and their property was taken away from them. Some victims' representations mention that, in some instances, entire villages were destroyed"*. [763] Paragraph 33: *"[…] Furthermore, the Registry states that victims 'insisted to convey to the ICC Judges how important it is to them to have an acknowledgement that the Rohingya as a recognised and recognisable group by virtue of a common culture, identity and religion were victims of atrocious crimes exclusively based on their ethnicity and religion"*.

[764] NAFZIGER J. A. R., *The Responsibility to protect cultural heritage and prevent cultural genocide*, in the Oxford handbook of International Cultural heritage Law 2020. CHECHI, RENOLD, *The Usefulness of the "Responsibility to protect" as applied to the Protection of Cultural Heritage in armed conflict* , in Cultural heritage law and ethics, 2017, pp. 69 -93.

distinct atrocity itself; the 1948 Geneva Convention does not envisage "cultural genocide" as a distinct crime itself.

To sum up, these open case laws may lead to a breakthrough in the repression of crimes committed in Myanmar. It is important to underline that as part of the ICC's prosecution, therehavebeen no other investigations from international criminal tribunals (the international Court of justice focuses on state responsibilityrather than international criminal justice)[765]. This is due to manyfactors. First, as described above, the reluctance of the State of Myanmar to accept an international norm, even on the part of thedemocratic government, which has prioritized a program of institutional reforms rather than the repression of crimes committed in the Rakhine State[766].

5. The failure of the International community in protecting the Burmese cultural heritage.

As seen in the previous section, the international community has responded non-homogeneously to human rights violations. This depends greatly on the geopolitical interests of each State with respect to Myanmar. Some states have responded with economic sanctions, others through soft law instruments. Other States, such as those in the ASEAN area or Russia, China and India, have refrained from taking concrete action to condemn the gross violations of human rights in Myanmar. The patchwork of interests of the international community, as well as the voting systems within the UN Security Council, have led to inaction for a long time in the suppression of crimes in the Rakhine State. In other words, although there is a favourable legal framework to

[765] See PALMER E., *Adapting international criminal justice in Southeast Asia, beyond the international Criminal Court*, ibid, pp. 170-192.

[766] Ibid, pp. 159-206. Moreover, the author underlines that even the civil society, although it does not reject the international criminal norm, it focuses more on the empowerment of the rule of law rather than international criminal justice, since the establishment of democratic principles might be the necessary condition to avoid the violation of human rights and the commission of wrongdoing.

limit the abuses in the exercise of state sovereignty, from a practical point of view, it lacks enforcement mechanisms.

As far as the contestation of cultural heritage, it is possible to draw similar conclusions. From a theoretical point of view, the *"damnatio memoriae"* against minority groups from the side of States is legally forbidden by International law: as said in the previous chapters, it is possible to detect an international norm protecting minorities' cultural heritage. However, international cultural heritage law leaves states wide discretion in deciding what to preserve or not and how to protect memorial sites of minority groups[767]. Above all, the entire treaty body lacksstrong enforcement mechanisms enabling the implementation of nor ms to protect the cultural heritage of vulnerable minorities[768].

Actually, the Rtp model might be a tool to overcome these legal gaps within the international legal system through which to ground a humanitarian intervention by the international community in Myanmar. Unfortunately, in Myanmar's case, the international community, while denouncing human rights violations against Rohingyas, has so far failed in any attempt to assist or intervene[769]. The scope of the Rtp model appeared very

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[767] Berkes, A. (2018). *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites*, ibid.

[768] Ibid.

[769] On this topic, MENNECKE M., *The Failure of the International Community to apply R2p and Atrocity prevention in Myanmar*, in Global Responsibility to Protect, Volume 13 (2021): Issue 2-3 (Jun 2021): Special Issue: Myanmar and (the Failure of) Atrocity Prevention, by Martin Mennecke and Ellen E. Stensrud, pp. 111-130; ZAHED I. U. MD, *Responsibility to Protect? The International Community's Failure to protect the Rohingya*, December 2021, Asian Affairs DOI:10.1080/03068374.2021.1999689. PEDERSEN M. B., *The Rohingya Crisis, Myanmar, and R2P 'Black Holes'* in Global Responsibility to Protect, Volume 13 (2021): Issue 2-3 (Jun 2021): Special Issue: Myanmar and (the Failure of) Atrocity Prevention, by Martin Mennecke and Ellen E. Stensrud, pp. 349 -378. Among the UN actions and statements on Myanmar consider the UN Special Rapporteur on the Human Rights situation in Myanmar, 2012 https://www.ohchr.org/en/press-releases/2012/07/myanmar-visit-un-special-rapporteur. UN General Assembly resolutions on Burma,

limited for several reasons. First, when examining the endorsed measures, the protection of cultural heritage assumes relevance when associated with gross violations of human rights. Therefore, the destruction of cultural heritage is not significant per se to intervene. At the heart of the recommendations and prosecutions previously examined, there is the violation of the Rohingyas' human rights, whose destruction of their cultural heritage isonly one aspect. This latter is absorbed within crimes that are more serious.

To sum up, from a practical perspective, the case shows that the principle of state sovereignty would still prevail over human rights violations, although they have both elevated to *jus cogens norm*. This is even more true in the case of violations of cultural rights, confirming the tradition according to which cultural heritage law has relied for a long time on a state-centricapproach, to move only recently on a local dimension of culturalheritage[770].

https://burmacampaign.org.uk/useful-resources/un-general-assembly-resolutions-on-burma/, Joint Statement by UN Special Adviser on the Prevention of Genocide and UN High Commissioner for Human Rights - on Myanmar 2021,https://www.un.org/sg/en/content/note-correspondents-joint-statement-un-special-adviser-the-prevention-of-genocide-and-un-high-commissioner-for-human-rights-myanmar.

[770]LIXINSKI L., *A Third Way of Thinking about Cultural Property*, 44 Brook. J. Int'l L. 563 (). Available at: https://brooklynworks.brooklaw.edu/bjil/vol44/iss2/2.

Chapter 4. Reinterpreting the past? Possible perspectives of valorisation.

1. Comparative overview

The expression *"damnatio memorie"*, with which to identify the iconoclastic acts crossing the previous chapters, which has a negative meaning in itself (literally translated as "condemnation of memory"), is certainly emblematic in grasping the difficulty that sometimes arises in processing the past[771].

The next section will address the comparative analysis of thecases by starting to identify the common thread, namely the social extra-legal issues affecting the three cases and then compare the different legal solutions adopted by the three countries (horizontal comparison), finally looking at the legal solutions provided by international law (vertical comparison)[772].

The *tertium comparationis*, namely the common thread that links the three case studies, is concerned with the memorisationof past traumatic events and the reconstruction of a collective memory following major cultural changes, affecting the cultural heritage located in a public space whose values are dissonant withthenew reality, or at least contested. Cultural changes may concern transitional regimes such as post-colonial or post-dictatorial periods following regime changes. Cultural changes may also concern democratic governments: the values of a democracy may be challenged or threatened anytime. The point is how permeable a contested or dissonant heritage is to relevant cultural changes.

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[771] See generally VARNER E. R., *Mutilation and transformation: Damnatio memoriae and Roman Imperial Portraiture*, (Monumenta Graeca et Romana 10), Brill, Leiden-Boston, (2004), pp. 1-20.

[772] In dealing with the comparative analysis it will be applied the method proposed by CAPPELLETTI M., *Metodo e finalità degli studi comparativi sulla giustizia*, in Dimensioni della giustizia nella società contemporanea, 1994.

By examining the legal solutions taken by the mentioned countries, in the first case, the Ukrainian government chose to drastically distance itself from the Soviet past by removingsoviet monuments located in the country's most significant public squares within the legal framework of the controversial"memory law" about the removal of soviet symbols in public squares[773]. As seen, the boundary between contested tangible and intangible heritage is very blurred since the memory policy even went so far as to challenge the Russian language[774].

From a legal point of view, these legal solutions to deal with the Soviet legacy, while deemed constitutionally lawful according to the Ukrainian legal framework, the European Court of Human Rights has highlighted the lack of transparency and citizen participation within the decision-making process, not reflecting the heterogeneity of the Ukrainian population. As well asthelack of protection of the linguistic rights of Ukraine's minoritieswithin its language policy. What is interesting to notice is that theselegal solutions have been justified in emergency terms as a matter of "state security" because of the annexation of Crimea and the Russian invasion of Donbas in 2014. They respond, hence, to contingent situations.

As far as the United States, the cultural changes that have been characterising the current political context have led to light being shed on racial issues within American society and to challenge the Confederate statuary, especially throughout the AmericanSouth. The controversy over confederate monuments has seentwo main different legal approaches that reflect the internal divisions over the values in which today's American society struggles to identify itself. As seen before, from one side, the preservationist claims have been ensured at the state level through the controversial "preservation laws" prohibiting the removal of Confederate

[773] The 2015 Law on the condemnation of the Communist and National Socialist (Nazi) regimes, and the prohibition of propaganda of their symbols.
[774] The 2019 Law on supporting the functioning of the Ukrainian Language as the State language.

monuments on the grounds of a distorted narrative of the Civil war, an interpretation of the past to which many local communities are against[775]. The latter raises issues of dubious constitutionality[776]. Diversely, notwithstanding these state laws, the transformative claims from local communities have been satisfied by enacting local laws to remove monuments on public squares, grounded on legal loopholes, such as on the grounds of "Public nuisance" and security, or on the basis of the Federal Civil Rights Act's core value of equality[777]. The legal debate on these monuments still seems to be irreconcilable and conceals a deeper crisis gripping the United States today.

With regard to the case of Myanmar, the extremist iconoclasm previously examined also moves along a legal framework that codifies a historical memory aimed at representing a selected group to the exclusion of others. The discrimination against Rohingyas' cultural rights has been legalised within a framework again grounded on security and public order principles[778].

11 Differences and similarities.

It is worth examining the legal solutions by emphasizing the differences between the three cases. First, the memorialization process develops in extremely different contexts. In the Ukrainian case, the construction of collective memory is part of the nation-

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[775] VAN EIJK C., *Assessing the problems and impacts caused by laws preventing the removal of (confederate) monuments in the United States of America* , in Memory Laws in European and Comparative Perspective, 2021, https://melaproject.org/blog/423 .

[776] On this topic see the Alabama Supreme Court on November 27, 2019 against the 2017 Alabama Memorial Preservation Act, declaring it in violation of the First and Fourteenth Amendments to the Constitution.

[777] GERHARDT D. R., *Law in the Shadows of Confederate Monuments*, 27 MICH. J. RACE & L. 1 (2021). Available at: https://repository.law.umich.edu/mjrl/vol27/iss1/2 .

[778] See section 3 of the third chapter, more specifically the concept of "legal violence" evoked by the author Nyi Nyi Kyaw, *the excuse of (Il) legality in discriminating and persecuting religious Minorities: Anti-Mosque legal Violence in Myanmar,* in Asian Journal of Law and Society (2021), 8, 108 -131.

building process immediately after the collapse of the Soviet Union, dwelling, in the dissertation, on the wartime context of the Euromaidan revolution in 2015, which occurred in a geographical territory deeply marked by significant political differences.

Diversely, the memory-challenged in the U.S. case pertains to a cultural dispute in a peacetime context that is still ongoing but in relation to a historical period going back in time to the present, namely the legacy of the Confederacy.

Finally, the memorialization process of Myanmar refers to a post-colonial scenario within a never-accomplished nation-building process in a context where democracy is suspended and a military dictatorship is in power. As seen in the previous section, this last one is the most extreme and violent iconoclastic case. It is possible to notice, moreover, that diversely from the United States, both Ukraine and Myanmar have experienced foreign domination.

The object of contestation is also different: monuments depicting historical figures from a controversial past, located in public squares, in the American and Ukrainian cases. However, in the Ukrainian case, the statues were built during the Soviet period and had an actual historical character, while in the Americancase, the Confederate monuments were erected after the Confederacy Civil War and with a racist message in opposition to the movements fighting against racial discrimination[779]. Differently, in the Burmese case, iconoclasm affects religious buildings still located in public environments.

The main difference, however, concerns the target of destruction: in the first two cases, iconoclasm is aimed at destroying oppressive values embedded in monuments; in the last case , iconoclasm has an oppressive meaning in itself as it is aimed at erasing the cultural memory of minorities' groups.

[779] On this topic see LIXINSKI L., *Confederate monuments and International Law* , 32 Wisconsin International Law Journal(2018), pp. 1-42, more specifically p. 10.

While there are relevant differences, at the same time, many important similarities can be pointed out. These include thechoice to place the removal or destruction of cultural heritage within a legal framework, as well as the choice of the instrument of "memory law" to legalize historical narratives and identities. In all three cases, moreover, the concept of collective security as a ground to justify the removal or destruction of culturalheritage is evoked where in the Ukrainian case but even more so in the Burmese case, it is channelled into public policies with a nationalist tone. Cultural contestation, albeit on very different levels, develops in environments of political fragility and value crisis, as in the case of the U.S.

In all three case studies, there was no transition in whichto reckon with a difficult past, more specifically, the relationship with the soviet inheritance for Ukraine, the slavery and the racial discrimination in the United States, and finally, the colonial domination of Myanmar. If the processing of collective trauma is absent, its cultural aftermath recurs whenever a society's political system or values are fragile. The common element binding these cases is that the drastic choice to erase certain cultural symbolsis, in each case, extreme; one speaks, as mentioned at the beginning of the paragraph of "damnation of memory", and this hides the absence of an effective elaboration of a cultural trauma that has affected the three countries.

12 A vertical comparison: the international law lens.

Looking at international law, it is possible to draw general conclusions related to the three case-studies.

More specifically, regarding the memorialization processes, it seems useful to consider the previously examined soft law tools

enacted under the aegis of the United Nations and at the regional level, such as the EU Parliament recommendations and the legal opinions of the European Commission for democracy through law[780]. One can observe in the first two cases that international law leaves wide discretion to States in deciding how to grapple with "difficult heritage". In the case of Ukraine, it would bewithin the prerogatives of the exercise of state sovereignty to choose a historical memory and a language with which to identify.

The focus of international law would pertain less to "whether"to preserve or remove the disputed heritage and more to how the decision-making process takes place. The latter should take place as democratically as possible by encouraging dialogue and involving the participation of different stakeholders and cultural groups. Memorials should be victim-oriented and designed as inclusively as possible. Within memorialization processes, the state sovereignty, in dealing with its controversialheritage, would encounter the limitation of respecting the cultural rights of minorities in order not to erupt into dangerous nationalisms. It is important to underline that in these first two cases, the contested monuments have not been inscribed within the World Heritage list.

Despite the wide discretionarily left to the States, acco rding to these soft law principles and the international legal framework overall, the preservationist tendency is undeniable, which has been grasped from the beginning of the dissertation. The most compliant solution with international law would not beto destroy the controversial heritage but to move it from public spaces to museums. In line with this orientation is also the Faro Convention,

[780] See the first section of the third chapter. Consider the EU Parliament recommendation on memorials, n. 898 (1980), and recommendations n. 165 2 and 1859 (2009) on the "attitude to memorials exposed to different historical interpretations in Council of Europe member states". Consider the mentioned the 2015 joint interim opinion adopted by the Venice commission (European Commission for democracy through law) and Osce Office for democratic institutions and human rights, no. 823.

which, as seen in the previous chapter, calls for dialogue and democratic participation in the face of controversial heritage, emphasizing its educational value[781].

With regard to Myanmar, beyond principles of soft law concerning memorialization processes, on the grounds of the international legal body and the international practice, it is possible to detect an international customary rule limiting state sovereignty in front of the destruction of minorities' heritagesites. However, the lack of enforcement measures, a still State-centric legal framework, as well as structural problems related to the UN bodies make the protection of minorities' cultural heritage difficult in practice. For instance, On the World heritage list, mostly Buddhist sites have been inscribed, with the harmfuleffect of boosting the nationalist policies of Myanmar's military junta.

To sum up, uniformity can be detected in the perspective offered by international law. In all three cases, a favour was granted to minority rights, particularly the cultural right to have public spaces and places of memory that are as inclusive as possible. The shifting focus on minorities, thus on the level of local community interests that do not always coincide with state or supra-state interest, constitutes a current trend in cultural heritagelaw. If one thinks of the latest conventions on cultural heritage, theyfocus on the protection of tangible and, above all, intangible cultural heritage of specific cultural groups, emphasizing the principle of cultural diversity, although they lack enforcement mechanisms to implement [782].

13 The effects of the legal solutions.

After examining the similarities and analogies, it is necessary to reflect on the effects of the legal solutions previously examined in

[781] Art. 7 of the Faro Convention.

[782] Consider the 2003 UNESCO Convention for the Safeguarding of the Intangible cultural heritage, the 2005 UNESCO Convention on Diversity of Cultural Expressions, the 2005 Convention on the Value of Cultural heritage for Society (Faro Convention).

solving the issue initially posed. As of today, with regard to the first case, there is an ongoing conflict with the Russian federation. The cultural policies adopted by the Ukrainian government might be interpreted as a symptom of a deeper historical injurywiththe Russian Federation that has never been resolved. This latter has been used by Russia as a pretext to justify the use of force and the invasion of Ukraine, with the construction of a false genocide narrative[783]. Moreover, the destruction of Ukrainian tangibleand intangible cultural heritage appears central to the ongoingconflict on the grounds of Russia's denial to recognise Ukraine's right to exist as a country[784]. In any case, if the purpose of these policies was to come to terms with the Soviet past, the result has been ineffective.

As for the United States, since the "cultural conflict" is still ongoing, it is difficult to make an assessment of the legalsolutions adopted. As examined in the previous section, it is a contestation that goes beyond the questioning of Confederate monuments but pertains to a deep divergence of values and political visions that divide the United States. While referring to an event of the past, the contestation is related to problems in America today, suchas the need for racial justice and the plagues of racism that are still present in American society. It would also seem, in the American case, that there has been no real acknowledgement about the legacies of past injustices toward African Americans[785]. On one side, the preservation laws embed a distorted narrative of history;

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[783] On this point see POWDERLY J., STRECKER A. , *Afterword Heritage destruction and the war on Ukraine, in Heritage Destruction, Human Rights and International law*, published on 24 Jul 2023 by Brill | Nijhoff., pp. 423 -454.

[784] Ibid, pp. 452-454.

[785] On this topic VALLS A., *Racial Justice as transitional justice*, Polity, Volume XXXVI, Number 1, October 2003. According to the author, the transition tha t took place during the civil rights era in the United States was incomplete in terms of prosecution of perpetrators, compensatory measures for victims and acknowledgement of the past atrocities.

on the other side, the risk is that these forms of iconoclasm may avoid a confrontation with the injustices of the past.

Even in the case of Myanmar, this is an ongoing conflict where a complete assessment is not possible. The cultural policies endorsed were aimed at strengthening nationalism at theexpense of minorities, enacting a genocidal design. Here, too, inparticular, the persecution of the Rohingya has its roots in the unresolved wound of British colonialism. This is the case where international law should have played a prominent role. However, one can see a delayed response by the international community, which has been completely ineffective so far. In this case, the principle of state sovereignty would be impervious to the actions takenbythe international community because of the disparate and conflicting interests of state actors and the blocking mechanisms within the bodies of the United Nations, particularly the Un Security Council.

The following conclusions can be drawn.

In all three cases, heritage contestation is a symptom of a deeper crisis, of an unprocessed collective cultural trauma. Moreover, the proposed legal solutions have a contingent, in some cases, emergency character. The legal tool of "Memory law" appears controversial[786]. Starting from the difference betweenhistoryand memory, memory laws do not regulate history but how to remember a historical event. It might be risky to fix a version of history at the expense of others unless they are an expression of the majority and the minority, the state authorities can also abuse this instrument for their own political interests, officialising a version of history that is not inclusive of certain cultural groups[787].

[786] In all the three cases, it is possible to see the adoption of laws shaping a specific collective memory through the regulation of cultural heritage.

[787] On the controversial aspects of "Memory laws " see BRANTS C., KARSTEDT S., *Transitional justice and the Public Space, Engagement, Legitimacy and Contestation*, Oxford and Portland, Oregon, 2017, more specifically chapter 12

There is thus an absence of long-term structural and cultural policies, and the level of protection accorded by internationallaw, in every case, for different reasons, would seem too far removed from addressing contested heritage at national and locallevels. In all three cases, it would be worth finding legal solutions that may balance the different values underpinning art by avoiding therisk of exploiting it for political reasons.

2. Public space and public art are reckoning with a cultural trauma.
It seems appropriate to focus on the common thread of the three case studies, namely, the failure to elaborate on cultural trauma and the implications on processes of memorialization throughthe meaning of public space and public art.

The word "trauma" applies to extremely varied disciplines; its meaning varies according to the scope of application[788]. However, it is possible to grasp some elements that are common to the

"Memory laws". CHOW P. Y. S., *Memory denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, The International Lawyer, Vol. 48, No. 3 (WINTER 2015), pp. 191-213. The author outlines the point of view of historians according to which *"these memory laws violate the freedom of expression and restrict academic freedom by dictating the manner in which estimations, hypotheses, and arguments are made. History is by nature "a permanent questioning of events and facts"*, quoting Sévane Garibian, Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law, 9 CARDOZO J. CONFLICT RESOL . 479, 484 (2007). On "memory law", see also
LIXINSKI L. *Legalized identities and the shaping of transitional justice*, ibid, pp. 167- 186.

[788] On the topic of cultural trauma see ALEXANDER J. C., *Toward a Theory of Cultural Trauma, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1, 1 (Jeffrey C. Alexander et al. eds., 2004), 299. Angela Onw*uachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 336 (2016). BEHZADI E., *Statues of Fraud: confederate monuments as public nuisances*, STANFORD JOURNAL OF CIVIL RIGHTS & CIVIL LIBERTIES, 2022, pp. 1-48, more specifically pp.42-48.

different subjects, namely that the definition of trauma relies on *"severe violation of integrity"* with *"lingering, long-term impact"*[789].

In the social sciences field, In every field, according to a well-known definition, "cultural trauma" occurs "*when members ofa collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group concoiusness, marking their memories forever and changing their future identity in fundamental and irrevocable ways"*[790].

However, the perception of an event as "traumatic" depends greatly on the social context in which it takes place [791]. In other words, cultural trauma is a social process, a social construct where different institutions and actors contribute to identify the "experience of trauma"[792]. Within the construction of thecultural trauma, public authorities should identify the origin of the pain, who the perpetrators were, and what groups of persons were affected[793]. The reconstruction of a collective trauma is essential to the achievement of social cohesion and reconciliation.

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[789] KRONDORFER B., *Unsettling Empathy: Intercultural Dialogue in the Aftermath of Historical and Cultural trauma* , Chapter 5, in Wang, Xiafei. Breaking the cycle of intergenerational trauma. The Ohio State University, 2019, see pp. 91-93. From an etymological point of view trauma comes from the Greek term "would", initially referred to the "physical would" and subsequently extended to the field of psychology. On the etymology of the word "trauma" see CARUTH C., *Unclaimed experience: Trauma, Narrative, and History*, The Johns Hopkins University Press, Baltimore, 2016.

[790] Definition introduced by Jeffrey C. Alexander "Cultural trauma and Collective identity".

[791] KRONDORFER B., *Unsettling Empathy: Intercultural Dialogue in the Aftermath of Historical and Cultural trauma* , ibid, p. 91 : *"Theorists of cultural trauma, on the other hand, emphasize that it is the social environment that largely determines whether an event is experienced as traumatic".*

[792] Jeffrey C. Alexander, Toward a Theory of Cultural Trauma, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY 1, 1 (Jeffrey C. Alexander et al. eds., 2004).

[793] Jeffrey C. Alexander, *Toward a Theory of Cultural Trauma, in CULTURAL TRAUMA AND COLLECTIVE IDENTITY*, ibid, pp. 12-15.

Public authorities may heal the trauma, create it, exacerbate it or hide it within memorialization processes[794]. They can create a narrative around a past event through the endorsement of cultural policies since cultural representations help to ease or exacerbate collective traumas.

In facing cultural changes within any kind of transition and in dealing with a cultural trauma, memorialization processes, even before posing legal questions, raise ethical questions that pertain not only to the choice of what to memorialize but, more importantly, to why to celebrate a particular memorial, focusing on what aesthetic experience is intended for viewers[795]. Memorialization processes imply a choice of values on which a society can build its present and future. The selection of a particular cultural heritage in the public space is indicative of the democracy it is intended to build. It can be argued that the aesthetics of public space and its heritage measure the degree of democracy within a country. For instance, in the extreme case of Myanmar, the destruction of cultural heritage is accompanied by the restriction of additional rights of the Rohingya community, particularly citizenship rights: to destroy the cultural heritage of this minority is tantamount to excluding them from public space[796].

How cities are conceived from an urban planning perspective influences and is indicative of how democracy is exercised[797].

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[794] BEHZADI E., *Statues of Fraud: confederate monuments as public nuisances* , ibid, p. 44.

[795] See SCOTT R. Stroud and Jonathan A. Henson, *Memory, Reconstruction, and Ethics in Memorialization* The Journal of Speculative Philosophy , Vol. 33, No. 2 (2019), pp. 282-299 https://www.jstor.org/stable/10.5325/jspecphil.33.2.0282. [796] Moreover, in the section of "confederate monuments" we saw that not only the destruction of cultural heritage but also its preservation could be instrumental in excluding cultural groups that do not identify with certain monuments as in the case of Virginia, where the selected cultural heritage was sectarian and exclusive.

[797] On the interpretation of public space as essential to democracy, see KORNGOLD G., *Land Use Regulation as a Framework to Create Public Space*

Functional to an ethical conception of public space is the theoryof critical multiculturalism, which ascribes to public space the meaning of an evolving context where multiple identitiesexist[798]. According to this theory, public space is nothing more than a visual representation of a democracy.

Following this mentioned theory, public art should also be as representative as possible of the various identities that animate democracy[799]; public art is conceived as a tool to produce public debate. This interpretation is tied to the meaning of public art as "agora", thus as a "metaphor of democracy"[800].In other words, public art should be an expression of the communities that experience it, a source of dialogue, the selection of which should be the result of a democratic process of participation. Actually,

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for Speech and Expression in the Evolving and Reconceptualized Shopping Mall of the Twenty-First Century, 68 Case W. Rsrv. L. Rev. 429 (2017) Available at https://scholarlycommons.law.case.edu/caselrev/vol68/iss2/6, more specifically paragraph 2.

[798] FISHER D. H., *Public art and Public space*, Soundings: An Interdisciplinary Journal, Spring/Summer 1996, Vol. 79, No. 1/2 (Spring/Summer 1996), pp. 41 - 57, Penn State University Press, http://www.jstor.com/stable/41178737 , see pp. 45-47.

The author describes the different definitions given to public space. According to the theory of possessive individualism

from the most liberal definition that defines public space as neutral to that of critical multiculturalism according to which *public space is imagined as a neutral , if not a dead or empty territory"*, without value *except as a possible resource awaiting future private appropriation and development"* , while according to theory of critical multiculturalism as a place of

[799] Ibid, p.48: *"Finally, from a perspective that values multiculturalism, public art is an essential medium for representing, placing into opposition, and linking the different persons, communities, and sub- cultures that form a pluralistic society. The identification and play of these in public space is one of the essential bases upon which mutual recognition - and reconciliation - in a cultural as well as a political sense becomes possible".*

[800] KNIGHT C. K., *Public Art: Theory, Practice and Populism*, Wiley-Blackwell, 2008. Chapter 1 "Introduction: A short history of the United States' "Official" Public Art", pp. 37-41: *"Perhaps public art's nobles function is to nurture participatory citizenship", to create an unfettered intellectual space for debate and socio-political engagement that is not necessarily tied to a physical place".*

this does not imply that public art cannot be divisive[801]. Afortiori when cultural values change, in coming to terms with the traumatic events of the past, public art becomes a fundamental tool for reflection and debate among different views. Differences are at the heart of democracy. After all, if public art is tied to its audience, it is always exposed to being challenged as society's values change[802]. This does not mean it is necessary to destroy controversial art that no longer reflects society's values, as it can be reinterpreted in the past. Controversial monuments animate the public debate and are part of the democratic process[803].

Problems emerge in the extremes of public debate. The risk of these iconoclastic waves is that they might crush dialogue and lead to a "removal" of cultural trauma or, at worst, to theexclusion of the most vulnerable cultural groups. It can be seen that in the examined cases, albeit in extremely different contexts and for extremely different reasons, iconoclasm occurs in its most violent forms. To sum up, if the experience of cultural trauma is a social construct, the democratic process of negotiation of the various stakeholders involved did not work properly within the case-studies. To these politics of destruction, there was no "creation" of a new memory; indeed, there is no reconciliation with the past if there is no real acknowledgement of what has been.

The real object of controversy, albeit in profoundly different shades, more than cultural heritage, is a community's sense of ownership of their public spaces[804]. It is about understanding

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801 ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?* Rassicurazione e memoria per dare un futuro alla pace, 2012, pp. 109-134.

802 SMITH C. Y. N. , *Community Rights to Public Art* , 90 St. John's L. Rev. 369 (2016), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/13

803 MONTANARI T., *Le statue controverse finiscano in un museo, in emergenzacultura.org*, 2020.

804 MONTANARI T., *Le statue controverse finiscano in un museo, in emergenzacultura.org*, 2020. FLETCHER C., *Public Art: Why Ownership Matters in Public Art*, in Mtart.agency, https://mtart.agency/public-art-why-ownership-matters-in-public-art/.

what role law plays in the construction of public space and the cultural heritage that characterizes it within memorialization processes.

3. Challenging the concept of universality: the role of International Law in dealing with controversial heritage.

One should wonder what legal solutions could translate the ethical needs behind memorialization processes and what levelof governance best tackles the issues previously examined. Wehave seen that the legal solutions adopted, namely both legal instruments incorporating a "historical" narrative and cultural policies of "erasure", do not "heal" and solve, in the long run, the causes underpinning the contestation of cultural heritage.

The core questions of the current dissertation are whether there are international principles supporting the destruction of controversial heritage or a duty to remember within complex memorialization processes after transitions and whether the international rule, in the name of "universal heritage", prevails over the legitimate interest of States in tracing its own collective memory regarding a traumatic event.

The "universal dimension" makes heritage protection a matter of international law. The concept of universality applied to heritage derives from the international customary and treaty law; as known, it has taken root since the 1954 Hague Convention and then crystalized within the 1972 World Heritage Convention. Moreover, the human rights dimension has empowered the concept of "universal heritage"[805]. In the following paragraph, to

[805] On the concept of the "common heritage for humanity" and "human rights dimension of heritage " as aspects that make heritage protection a matter of

grasp the international principles supporting the "destruction" of heritage tied to cultural changes, it will be important to dwellon the current meaning of "universal heritage".

The second chapter was premised on the assumption that thereis an overall tendency to condemn the intentional destructiontied to iconoclastic purposes, although there is no robust international norm to that effect[806]. This is evident from the reactions of the international community, which appear heterogeneous depending on the iconoclastic acts under consideration[807].

Looking at the case studies, to sum up, it is worth mentioningthe position of some scholars described in the previous chapters, according to which, within memorialization processes, international law would support the destruction of monuments rejecting values crystalized in international law, for instance, cultural heritage established in celebration of a violation of the customary international law of human rights[808]. This approach, grounded on international human rights law, would envisage a

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international law see STRECKER A., POWDERLY J., *Introduction* in A. Strecker, & J. Powderly (Eds.), Heritage destruction, human rights and international law (pp. 1-18). Brill Nijhoff, 2023, https://doi.org/10.1163/9789004434011_002. [806] WANGKEO K.: *Monumental challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, ibid, pp. 273-274

[807] Ibid.

[808] On this approach : E. PEROT BISSEL, *Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law*, The Yale Law Journal, 128, 2019. WANGKEO K.: *Monumental challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, ibid, pp. 271-274. BHARATT G., *Decay of The Colossal Wreck: Confederate Statues as Protected Cultural Property*, JURIST – Student Commentary, October 8th, 2020, https://www.jurist.org/commentary/2020/10/bharatt-goel-confederate-statutes/. LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, 4 Cardozo Int'l & Comp. L. Rev. 361 (2020-2021). SINGH B. *Monument Toppling: A Review of International Laws related to Cultural–Heritage Property and their Implications to Tourism*, Article History, 2021, https://nepjol.info/index.php/njhtm/article/view/44394/33471.

hierarchy within the arena of human rights, according to which the right to the preservation of cultural heritage may be curtailed if it infringes upon peremptory norms entailing *erga omnes* obligations[809].

Another part of the scholarly literature identifies principles supporting the destruction/removal of contested cultural heritage on the grounds of transitional justice, conceiving the destructive acts as symbolic reparations[810]. According to these points of view, the destruction/removal of cultural heritage within the first two case-studies would be compliant with international law.

These approaches are not acceptable. First, there is no established sufficient practice and *opinio juris* to set them up as crystallized principles in international law. Moreover, it could pave the way to challenge and legalize the destruction of that cultural heritage linked to "negative symbols" that are preserved for their artistic, historical and aesthetic value.

These approaches raise the risk of overshadowing the aesthetic and didactic value of cultural heritage since art has a value initself beyond its political function[811].

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[809] For instance the rights to equality and the right against discrimination and degrading treatment, the prohibition of racial discrimination would be prevailing over the preservation of confederate monuments.

[810] LIEBENBERG NEL A., *Should they stay, or should they go? Statue politics in shifting societies: the permissibility of peacetime removal, alteration and destruction of problematic political monuments in the United States*, ibid, pp. 397-LIXINSKI L., Erasing or Replacing Symbols in *Legalized Identities: Cultural Heritage law and the shaping of transitional justice*, IBID, pp. 94-128. BURCH- BROWN J., *Should Slavery's Statues Be Preserved? On Transitional Justice and Contested Heritage*, Journal of Applied Philosophy, Vol. 39, No. 5, November 2022 doi: 10.1111/japp.12485.

[811] On this opinion and against a transitional justice approach legitimizing destruction see BELAVUSAVU U., *on Ephemeral Memory Politics, Conservationist International Law and (IN-) alienable Value of Art in Lucas Lixinski's Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Jerusalem Review of legal studies (2022).

Thus, there are no general principles to be applied that support destruction, but one should, therefore, contextualize thedisputes around cultural heritage on a case-by-case basis. Certainly, the lens of transitional justice helps to frame the phenomenon and provide the tools to address causes, which, however, can be resolved not necessarily through the "destruction" of contested heritage[812].

Looking at the case studies, as seen in the paragraph on the vertical comparison, what can be said is that international law leaves broad discretion to States in regulating memorialization processes. Actually, it is important to underline that thecontested heritage is not inscribed within the World Heritage list; otherwise, the international norm would prevail over the national one.

Within the three case-studies, the construction of a state's collective memory would not fall under the domain of international law. Indeed, to impose "from above" the choiceof a collective memory would be to go against cardinal principles of international law, such as the principle of self-determinationand the principle of non-interference. The universal dimension of cultural heritage does not mean to bypass classical principles of international law.

However, the fact that international law leaves the constructionof collective memory in the prerogatives of the state does not mean that it allows destruction. As seen in the first paragraph, the comparison between the theoretical part and the analysis of cases in the dissertation confirms the prevailing preservationist approach to international law. The choice most consistent with international law would be to contextualize the disputed monument, conceiving the destruction as a last resort measure.

Moreover, the wide discretion of States is not unlimited since international law does not refrain from intervening if the

[812] Ibid, p. 12.

iconoclastic acts are accompanied by the violation of other rights. Confirming the premises of this dissertation, international law would be concerned with the pathological aspect of heritage destruction, namely the intentional destruction associated with the violation of human rights, especially if it is a tool for the persecution of minorities and vulnerable groups. This is evident from the international legal framework, international case-law and practice, from which one can ascertain a solid international norm prohibiting states from intentional destruction associated with human rights violations, although it appears to be more qualified in wartime than in peacetime[813].

In light of the *favour* attributed by international law to minorities' cultural rights, namely the right to access cultural heritage, International law would come into play if the State excludes and restricts minorities' rights or, in any case, fails in the mediation process between majority and minority within memorialization processes. It would be up to States to ensure the rights of minorities to maintain and develop their cultures and for international law to play a "supervisory" role from above against the state's abuses[814].

The cultural rights of minorities also include a component related to memory. As seen in the previous chapters, some scholars argue

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[813] BERKES A. (2018). *"Lieux de Memoire" in International Law: The Rights of National and Ethnic Minorities Related to Their Memorial Sites.* Intercultural Human Rights Law Review, 13, 47-130.

[814] About the right to maintain and develop national minorities' culture see MAKKONEN T., *Minorities' Right to Maintain and Develop their cultures: Legal implications of Social Science Research* in Cultural Human Rights, edited by Francesco Francioni and Martin Scheinin, Martinus Nijhoff, Publishers, 2008. The author quotes article 5 (1) of the Framework Convention for the Protection of National Minorities, drawn up within the Council of Europe according to which *:"The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.*
The minorities 'right to develop their cultures would include also the possibility to change some aspects of their culture.

that a "right to memory" falls under intangible cultural heritage, grounded on the 2005 UNESCO Convention on the Protectionand Promotion of the Diversity of cultural expressions[815]. The protection of cultural groups' memory from an international law perspective, hence, would mean recognising the different waysin which cultures can manifest themselves, in other words, protecting cultural diversity. Looking at the development of international conventions on cultural heritage, one can see a shift in focus from a concept of cultural heritage as part of a collective memory beyond national borders to a focus on protection concerning individual and collective memories[816].

Moreover, contested domestic heritage would appear relevant to international law not only if the destructive acts are aimed at targeting the most vulnerable groups but also if they represent an inkling of a larger conflict or a threat to international peace. The more the State's cultural policies fail, the more crucial the role of international law will be. In this case, the intervention of the international community would have a preventive function of possible conflicts.

To sum up, in tracing the role of international law, one must start from the premise that heritage governance is a complex system: cultural heritage belongs to the international community, states, and local communities. However, cultural property refers to a special category of property, as art has intrinsic value that

[815] CHOW P. Y. S., *Memory denied: A Commentary on the Reports of the UN Special Rapporteur in the Field of Cultural Rights on Historical and Memorial Narratives in Divided Societies*, ibid, pp. 202-204.

[816] READING A., *identity, memory, and cosmopolitanism: the otherness of the past and a right to memory?*, European journal of cultural studies online, 2011, pp. 379-386, HUYSSEN A., *International human rights and the politics of memory, limits and challenges, Criticism*, Vol. 53, No. 4, Transcultural Negotiations of Holocaust memory, (Fall 2011), pp. 607 -624, https://www.jstor.org/stable/23133899 .

transcends the rights of its owners[817]. In this regard, it isrelevant the public trust doctrine applied to cultural heritage, according to which certain property is held in trust for the benefit of the public[818]. The territorial State would be a trustee of the cultural heritage situated within its territory. It could be added that the international community and local communities are also trustees of cultural heritage. Starting from the concept that cultural heritage is an "interesting diffuse", it is necessary to think of the different levels of governance not in conflict with each other but from a subsidiary perspective[819]. In other words, in the application of the principle of subsidiarity, it is necessary to evaluate, case by case, the best-suited level of governanceto tackle the issues around cultural heritage.

It is possible to state that the memorialization process is still tied to national public policy. Democratically accountable public institutions have the tools to involve all the necessary stakeholders within the decision-making process, including representatives of local communities and commissions of experts, the latter to ensure a more detached judgment to preserve the artistic-historical-aesthetic value.

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[817] On the special category of "cultural property", see CASSESE S. *I beni culturali dalla tutela alla valorizzazione*, Giornale di diritto amministrativo, 1998, n. 7, pp. 673- 675.

[818] On the public trust doctrine applied to cultural heritage see more specifically GERSTENBLITH P., *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 647 (1995). STARRENBURG S., *The Genealogy of 'Universality' within Cultural Heritage Law*, A. Strecker, & J. Powderly (Eds.), Heritage destruction, human rights and international law, Chapter 2. Brill Nijhoff, 2023, https://doi.org/10.1163/9789004434011_002 . SMITH C. Y. N. *Community Rights to Public Art*, 90 St. John's L. Rev. 369 (2016), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/13.

[819] "Interesse diffuso" means the interest in the achievement or maintenance of a "good", non- renewable resource- belonging not to a predetermined individual, but to an undifferentiated collectivity. On this topic see FEDERICI R., *Il problema della loro tutela nel diritto amministrativo*, CEDAM, 1984.

Hence, in dealing with contested domestic cultural heritage, it would be a matter of international law to intervene whenever the state is unable to adopt appropriate public policies or if it commits abuses against the most vulnerable cultural groups.

Coming back to the concept of universality, it doesn't exist as a universal cultural heritage, but the universal dimension of cultural heritage should be interpreted as a duty for the international community to intervene in order to halt states 'abuses and to prevent the exacerbation of conflicts. The concept of universality implies, hence, a focus on the "particularity" of cultural heritage since this latter should be read through the lens of anthropology as site-specific, people –specific and time- specific[820].

In relation to case studies, therefore, international law willtakeon a different role within the complex system of heritagegovernance.

31 An application of the subsidiarity principle to the casestudies.

In light of the above considerations, international law would play a major role in the case of Myanmar, where the abuse of state prerogatives at the expense of minorities has reached the highest levels. However, the previous chapter shows how unsuccessful the international community's intervention has been inMyanmar. Actually, the intervention of the international community has been counterproductive also in other domestic contexts. For example, in relation to the so-called "cultural terrorism", monuments on the world heritage list have proven to be particularly sensitive targets. Even the destructionof the Buddhas

[820] STARRENBURG S., *The Genealogy of 'Universality' within Cultural Heritage Law*, A. Strecker, & J. Powderly (Eds.), Heritage destruction, human rights and international law, Chapter 2. Brill Nijhoff, 2023, https://doi.org/10.1163/9789004434011_002 .

of Bamiyan has been viewed as the result of the wrong policiesof the international community and UNESCO[821].

The case of Myanmar has highlighted that the cultural heritage law lacks strong enforcement mechanisms and is still State-centric[822]. The merits of the measures taken have also proved to be controversial, such as the application of economic sanctions leading to the differentiation of the affected state's economic partners without having the effect of discouraging the repressive policies adopted.

How, then, can international law rise to the role of upholder of the most vulnerable cultural groups if it continues to be state-centric?

In identifying possible solutions, one can primarily ascertain that the cultural heritage legal framework appears exhaustive. Thus, there is no need to change or introduce new conventions, but there is a necessity to improve the implementation of the current legal body.

To overcome the critical issues related to enforcement mechanisms, the international community might intervene by invoking the Rtp model since it draws a framework of responsibility between states and the international community that may be subsumed under the principle of subsidiarity[823]. Under the aegis of the Rtp concept, the international community may adopt soft law measures, which may prove to be more effective than the hard law as well as states with awell-established tradition in the protection of cultural heritage may intervene and export their domestic measures of protection.

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821 On this topic see COLLINS E., *Preventing Cultural Heritage and the Responsibility to Protect*, 13 INTERCULTURAL HUM. . Rts. L. REV. 299 (2018), more specifically paragraph 3.

822 Consider the mechanism provided for the inscription of cultural properties on the world heritage list whose application is driven by the states.

823 About the relationship between Rtp model and cultural heritage protection see the bibliography quoted in Chapter 2, paragraph 6.

However, the application of the Rtp model is not sufficient since there are structural problems that affect the accountability of the UN system overall.

It would be necessary for the international community to address its democratic deficit through a structural reform of its institutions. The UN framework no longer represents thecurrent geopolitical order. A reform concerning the membership of the UN Security Council and its voting system, aimed at reflectingthe current geopolitical chessboard, would be extremely important to fill the democratic deficit; as well as, it would be desirable to expand the powers of the UN General Assembly, which is more representative than the UN Security Council. Moreover, as the most positive developments in the field of cultural heritage have been achieved through the case-law of international courts, it would also be appropriate to extent the jurisdictions of international courts for more effective prosecution of crimes related to the intentional destruction of cultural heritage. Besides, as the World heritage Convention remains a key tool for eroding state sovereignty, it would be appropriate to involve representatives of local communities in the decision-making process in order to promote the inscription of more inclusive sites and reject nominations reinforcing dangerous nationalisms.

These reforms would serve to increase the trust and accountability of UN institutions, improving the impact and effects of the measures taken.

As far as the current situation in Myanmar, the results of ongoing legal processes will be crucial. In the post-conflict phase, it willbe important to implement the RTP model with the involvement of local communities[824]. For instance, the international community

[824] On the importance of applying RTP model to cultural heritage protection with the consent and for the benefits of local communities, by avoiding a top-down approach see GERSTENBLITH P., Pro*tecting Cultural heritage: The Ties between People and Places*, in Cuno, James, and Thomas G. Weiss, eds. Cultural

could endorse a cultural peacekeeping in the wake of Mali's, by focusing on the reconstruction and preservation of the disputed heritage with the necessary involvement of local people. Truth commissions should also be established to reconstruct the relationships among the various cultural groups by going to heal the historical trauma of colonization.

Regarding the Ukrainian case, being a cultural conflict between two states, the intervention of the international community would have been crucial since the Ukrainian nation-building process beginning in the 1990s. In such cases, the lens of internationallaw that is supposed to be "neutral" and "impartial" would help to settle the dispute in a way that is detached from the parties involved.

Possible solutions that the international community could have addressed include the adoption of UNESCO's cultural policies aimed at mediating Ukraine's relations with Russia, whichwould place precisely the divisive heritage at the centre in order to encourage dialogue and confrontation with the past. After all, one of the main goals placed behind the founding of UNESCO is to contribute to the maintenance of peace through the channel of culture. Again, it would have been fundamental to establishtruth commissions as well as cultural peacekeeping during the yearsof reconstruction of the Ukrainian State, building inclusive memorialization processes with the necessary involvement of the local population.

The Ukrainian case highlights how the cultural contestation that has developed not only in the context of the civil war examined in the dissertation but since the beginning of the nation-building process, therefore also in contexts of "peace", may prelude the escalation of more serious conflicts. Therefore, intervening pre-emptively through the adoption of cultural policies that arebased

Heritage and Mass Atrocities. Los Angeles: Getty Publications, 2022, Chapt.21 https://www.getty.edu/publications/cultural-heritage-massatrocities.

on democratic procedures could avoid the escalation of more serious conflicts.

Finally, in relation to the confederate monuments, the filter of international law would seem to be the least appropriate one to tackle the cultural dispute; it represents a lens too distant to deal with it. In the American case, cultural protest develops at thelocal level, clashing with the state level, particularly in the southern area. In light of the subsidiarity principle, the federal level seems to be the most appropriate one to deal with cultural contestation. As stated earlier, there was a lack of a structural policy aimed at recognizing what has been. This omission should be patched up by the federal government since the legacy of the racist past has affected American society as a whole[825].

In order to decide on the fate of Confederate monuments, it would be up to local governments to establish public procedures that involve different stakeholders, including both civil society representatives and expert commissions. At the same time, there is a need for the federal government to adopt long-term policies based on acknowledging the "racist past" and admitting guilt toward African-American citizens[826]. International law, while being a purely internal matter, could lend tools of transitional justice, such as the establishment of truth commissions, but it must be necessarily embedded within internal policies.

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[825] VALLS A., *Racial Justice as transitional justice*, Polity, Volume XXXVI, Number 1, October 2003. The author outlines that only recently, in 2003, an act of Congress was approved to create an African American history as part of the Smithsonian, located on the Mall in Washington D.C.. The National Museum of African American History and Culture is the only national museum devoted exclusively to the documentation of African American life, history, and culture.

[826] Ibid, pp. 60-71. The author identifies two major attempts y the federal government to reckon the "racist past", comparable to truth commissions, namely president Clinton 's Commission on Race that looks into the history of racial injustice, and the bill introduced by Congressman John Conyers , in 1989 with the aim to create an annual commission to study the American history of racism, now retired.

To sum up, one can thus see a multi-level governance, wherethat level prevails, which, depending on the cases and underlying issues, is the best at addressing them. Policies that deal with the contested heritage are proposed alongside long-term cultural policies that address the deeper causes of the phenomenon. Moreover, in all three cases, the importance of putting in place democratic procedures behind choices affecting cultural heritage with the necessary involvement of the communities involved is highlighted.

This perspective is tied to the concept of "heritage community" introduced by the Council of Europe's Faro Convention, mentioned in the first chapter of the current dissertation, which shifts the focus to the cultural value that local communities attach to specific cultural assets rather than to the value of the heritage itself[827]. According to this definition, local communities become active players in the process of selecting the cultural heritage in which they identify themselves, stakeholders of "A right to cultural heritage"; cultural heritage, hence, should be theresult of a democratic process[828].

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827 ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?*, Rassicurazione e memoria per dare un futuro alla pace, 2012,v. 1, pp. 109-134, in particular, pp. 131-134. See also ZAGATO L., *The Notion of "Heritage community" in the Council of Europe's Faro Convention . Its impact on the European Legal Framework: Between Imagined Communities of Practice: Participation, Territory and the Making of Heritage* [online]. Göttingen: Göttingen University Press, 2015 (generated 10 septembre 2020). On the relationship between privately owned cultural heritage and local communities , See also Cathay Y. N. Smith, *Community Rights to Public Art* , 90 St. John's L. Rev. 369 (2016), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/134 , see more particularly: *"certain property is so connected to a community's identity that the community's right to preserve its heritage may trump a property owner's right to destroy"*.

828 ZAGATO L., *The Notion of "Heritage community" in the Council of Europe's Faro Convention . Its impact on the European Legal Framework*, ibid, p. 147: *"At this point, the notion of heritage community helps us in better understanding what the "right to cultural heritage" means: not only the right to benefit from the*

4. From international to transnational governance: the reconciling role of museums?

As seen in the examined cases, the iconoclast acts might have the harmful effect of exacerbating conflicts and political tensions. Furthermore, the process of *damnatio memoriae* could involve the risk of subjecting art to the temporariness of socio-political changes[829]. There is also the risk of censoring the difficult past without the possibility of reconciliation.

It is necessary, on the one hand, to respond to the need due to cultural changes for a more inclusive public space that reflectsthe values with which today's society wants to identify itself. After all, the ultimate goal of preservation is not only the physical

existing heritage, but also the right to take part in the selection of new cultural expressions aimed at belonging to the notion of cultural heritage".

[829] About the risks linked to a "*damnatio memoriae*" policy see MONTANARI T., *le statue controverse in piazza o nei musei*, volerelaluna.it, 2020, MONTANARI T., *Le statue controverse finiscano in un museo, in emergenzacultura.org*, 2020. PAGOTTO T., *I monumenti dei Confederati d'America tra diritto, storia e memoria*, DPCE On line, Vol. 49 No 4 (2021). ZAGATO L., *Sul patrimonio culturale dissonante e/o divisivo*, in Dialoghi Mediterranei, n. 55, 2022, https://www.istitutoeuroarabo.it/DM/sul-patrimonio-culturale-dissonante-eo-divisivo/. BELAVUSAVU U., *on Ephemeral Memory Politics, Conservationist International Law and (IN-) alienable Value of Art in Lucas Lixinski's Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, Jerusalem Review of legal studies (2022).

preservation of cultural property but to make the latter accessible to the public[830].

On the other hand, it is essential to protect the intrinsic value of art, understood as historical-artistic-aesthetic value, which is detached from its political function.

In balancing the protection of art's intrinsic values and society's need to respond to cultural change, an alternative to "iconoclasm" could be to attribute new interpretations to the past by challenging how an event is remembered[831]. In the complex system of heritage governance, and in order to overcome the problems of IGOS, the institution of museums, with the initiatives undertaken by ICOMOS and ICOM, can play an important role[832]. A museum can be the appropriate place for the reconstruction of the truth and the continuation of public dialogue, but above all, to ensure that the mistakes of the past do not fall into oblivion, the place in which a victim-oriented memory might be built.

In this sense, for controversial monuments, if the object of t he controversy is the public space, the contextualisation of thestatue through its relocation to a museum could be decisive[833]. Actually,

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[830] On the different meanings of preservation, see CASSESE S., *I beni culturali dalla tutela alla valorizzazione*, Giornale di diritto amministrativo, 1998, n. 7, pp. 673- 675.

[831] It is interesting the idea of "addomesticating the past" in order to make art reconciliatory and not divisive in ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?*, ibid, p. 128; the author quotes LOWENTHAL D. "The Past is a Foreign Country, Cambridge University Press, Cambridge- N.Y.., 1985, p. 412: " *What our predecessors have left us deserves respect, but a patrimony simply preserved becomes an intolerable burden; the past is best used by being domesticated- and by accepting and rejoicing that we do so*".

[832] On the importance of the interpretation of cultural heritage sites ,It is worth mentioning the 2003 ICOMOS- Charter for the interpretation of Cultural Heritage Sites and the 2004 ICOM Code of Ethics for museums, that both insist on an inclusive interpretation of cultural heritage.

[833] On the "Museum solution" see ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?* ibid, pp. 125- 131; PAGOTTO T. *I monumenti dei Confederati d'America tra diritto, storia e*

the mentioned solution might not be feasible for monuments of large size or weight, in which case one might consider removing the statues from the public space, reproducing their image, or even filming the visual process of their removal in order to place them in digital archives of memory to be managed in the museum environment. A further alternative to moving controversial monuments in a museum could be to affix plaques explaining the dramatic event to which they relate in order to give justice to the victims[834]. It is also worth considering the solution of creating counter-monuments next to the statues to provide versionsof the past that are more ethical without obliterating a publicdebate[835]. In the case of immovable cultural heritage, it might be interesting to reconvert nefarious places into places where democracy canbe redeemed by building counter-narratives to previous regimes[836].

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memoria, ibid, MONTANARI T., *Le statue controverse finiscano in un museo, in emergenzacultura.org*, ibid. As a "museum solution" consider the moving of Soviet monuments from public squares to a park called "Memento park" in Hungary. On this topic , LIXINSKI L, *Legalized identities, Cultural heritage Law and the shaping of Transitional Justice*, ibid, pp. 124-125. LEVINSON S., Written in stone: Public monuments in changing societies, 2018.

[834] For example, consider the fascist monument "Monumento alla vittoria" in Bolzano (Italy) where the introduction of a "museum path" explains the history of the monument. On this topic ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?* ibid, p. 8.

[835] An example of a counter-monument that was mentioned in the section of confederate monuments within this dissertation is "the Arthur Ashe monument" installed along Richmond, Virginia's Monument Avenue. On this topic see Jessica Owley & Jess Phelps, *The Life and Death of Confederate Monuments*, 68 Buff. L. Rev. 1393 (2020). Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol68/iss5/3 .

[836] For example the Constitution Hill in Johannesburg, South Africa, a former prison during the Apartheid period, that is now the site of Constitutional Court and a musem. On this topic, PAGOTTO T. *I monumenti dei Confederati d'America tra diritto, storia e memoria*, ibid, p. 3598. LIXINSKI L., *Cultural heritage law and transitional justice. Lessons from South Africa* , 9(2) Int. J. T.T. 278–96 (2015). Consider also the example of the recontextualization of the fascist building of the Palazzo della Civiltà italiana now the headquarters of fashion brand Fendi; on this topic CAPONIGRI F., *Malleable monuments and comparative cultural property law : the Balbo monument between the United*

It can be argued that the choice of moving public art from its original public space to a museum is not neutral but political[837]. Indeed, it is a political choice to decide to 'depoliticise a statue' by removing it from its public context in order to deprive it of its tutelary function. Hence, removal from its context could be viewed as a form of "destruction".

However, a museum is undoubtedly more neutral than an "agora" since is an institution that also has an educative function, where it is possible to explain events and make critical reflections objectively, with the proper distance[838]. The de-contextualisation of the object can be resolved through the construction of a narrative concerning the events that characterised it[839].

The museum option can also be valid for mitigating conflicts between two cultural groups, as in the case of Myanmar, through reconciliatory paths of mutual recognition of each other'scultures,

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States and Italy, I•CON (2021), Vol. 19 No. 5, 1710 –1737, https://doi.org/10.1093/icon/moab136 . Consider the Whitney Plantation in Louisiana, home to 2.797 enslaved workers in 1807, now a museum where to reflect on the legacy of slavery in the United States, https://www.whitneyplantation.org/.

[837] Skeptical about the "museum solution" is LEVINSON S., *Political Change and the 'Creative Destruction' of Public Space*, in Cultural Human Rights edited by Francesco Francioni and Martin Scheinin, Leiden—Boston 2008. According to the author, the "museum solution" is not "neutral" since it always implies political choices.

[838] BARGNA I., *Black lives matter e la vita sociale dei monumenti, anche le statue vivono e per questo possono morire*, Associazione per gli studi africani in Italia, https://www.asaiafrica.org/blacklivesmatter-italia-asai/black-lives-matter-e-la-vita-sociale-dei-monumenti/.

[839] GRECO C., *Il museo e la sua natura*, in the exhibition catalogue "Anche le statue muiono, conflitto e patrimonio tra antico e contemporaneo", 2018. According to the author, it is important to trace a sort of "biography" of the object from its origin to the events that shaped its course, so that the museum is not a static institution but a place where the dialogue between past and present is continuous.

thus focusing on the importance of the cultural diversity principle[840].

Finally, it is important to underline that, although its positive effects, the museum solution undoubtedly has its limitations, since in order to 'aestheticise' an object, it is necessary to put an end to the causes that have made that cultural object a source of conflict. Parallel to the action of museums, therefore, it would be necessary to put in place more structural cultural policies by public institutions, as mentioned in the previous paragraphs.

5. The afterlife of contested heritage through technology?

From a forward-looking perspective, it seems necessary to reflect briefly on the impact of new technologies on cultural heritage protection. New technologies have broadened the spectrum of possibilities in which people can enjoy cultural heritage. They have also introduced new ways of presenting and interpreting cultural heritage. Cultural heritage acquires new meanings through digital representations such as holograms, non-fungible tokens, 3d modelling, and printing[841]. The virtual dimension challenges the "physicality" of cultural heritage.

What contribution can new technologies make toward contested and destroyed/removed heritage? What challenges do theyraise?

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[840] On this topic see ZAGATO L., *Rassicurare anche le pietre, ovvero: il patrimonio culturale come strumento di riconciliazione?*, ibid, pp. 125-131. The author quotes as an example the museum for peace model implemented at t he borders of Germany and Denmark in the region of Schleswing-Holstein with the aim to reconciling the conflicting history between the national minorities of each country (The museums are located in Schleswing and Sonderberg).

[841]On this topic, see CATALDO M., *Preserving cultural memory: the role of technology*, Aedon 2/2020, pp. 88-95. THOMPSON E.L., *Legal and Ethical Considerations for Digital Recreations of Cultural Heritage*, 20 Chap. L. Rev. 153 (2016).Available at: http://digitalcommons.chapman.edu/chapman-law-review/vol20/iss1/6. ALCALA R., *Cultural evolution: protecting "digital cultural property" in armed conflict*, International Review of the Red Cross (2022), 104 (919), 1083–1119.

Can the destroyed heritage still have legal status by surviving in a new digital dimension? Destroyed heritage may still have legal recognition if one considers that, for instance, the statues of the Buddhas of Bamiyan Valley in Afghanistan have been inscribed on the World Heritage List after being destroyed. The statues of the Buddhas also represent an example of the application of technology for destroyed heritage since they were reproduced temporarily as digital holograms in their empty niches in2015[842].

In cases akin to Myanmar, technology might have a preventive aim by creating digital archives to document cultural heritage at risk. It might be crucial to reconstruct digitally destroyed heritage sites. For instance, many heritage sites destroyed by ISIS in the Middle East have been digitally reconstructed through 3d modelling and printing[843]. Hence, technology becomes a tool through which the cultural values embedded in the destroyed heritage can survive; in a certain way, digitisation may make cultural property indestructible.

As far as the "oppressive" cultural property, like the case of the Confederate monuments, contested heritage may be moved from real to virtual space. Creating digital reconstructions could bean alternative to the drastic choice of destruction/removal from public space, allowing the artwork to live in another dimension presented as neutral and clean.

While new technologies create new frontiers of protection, there is no shortage of grey areas in applying them in the cultural heritage sphere, raising ethical and legal questions. This is due to

[842] CATALDO M., *Preserving cultural memory: the role of technology*, ibid. ROUHANI B., 2023. *Ethically Digital: Contested Cultural Heritage in Digital Context*, SDH, Vol. 7, No 1, 1-16, https://doi.org/10.14434/sdh.v7i1.35741 .

[843] Consider for instance the European project called "Rekrei" for the 3D reconstruction of intentionally destroyed cultural heritage in the Mosul Museum (Iraq). On this topic ROUHANI B., 2023. *Ethically Digital: Contested Cultural Heritage in Digital Context*, *ibid*, p. 7.

the lack of a comprehensive legal framework that can catch up with rapid technological development.

Ethical and legal concerns pertain to the decontextualisationof the artwork. In the virtual space, the cultural property is detached from its context of origin, where the connection with the affected community is absent. In other words, the human dimension of cultural heritage is missing. The virtual space is a "non-place", indeterminate temporally and locally, with no relational dimension[844]. For example, the Roman arch of Palmyra (Syria), destroyed by ISIS, was digitally reconstructed and installed in many Western cities, in sites geographically and culturallydistant from its original context; within the recreation process, therewas no involvement of Syrian communities[845]. These digitalproducts, therefore, challenge the legal meaning of preserving artefacts in their original context. Furthermore, technological models typically give a neutral and homogenous interpretation of heritage sites since they cannot represent all the different interpretations underpinning cultural heritage, especially if contested[846]. For instance, if the use of artificial intelligence in

[844] Non-place is a neologism coined by the French anthropologist Marc Augé in his work "Non-places: Introduction to an anthropology of supermodernity", (1992), to refer to anthropological spaces of transience where human beings remain anonymous. This concept could also be extended to virtual space where the relational dimension is missing.

[845] On this topic CATALDO M., *Preserving cultural memory: the role of technology*, Aedon 2/2020, pp. 88-95. THOMPSON E.L., *Legal and Ethical Considerations for Digital Recreations of Cultural Heritage*, ibid, p. 160. ROUHANI B., 2023. *Ethically Digital: Contested Cultural Heritage in Digital Context*, *ibid*, p. 7.

[846] See THOMPSON E.L., *Legal and Ethical Considerations for Digital Recreations of Cultural Heritage*, ibid, pp. 170-171: " Even seemingly simple digital models transmit convincing, unified interpretations of objects, leaving no room for alternate interpretations or even any signal that these alternate interpretations might exist. Compare the experience of visiting the same sites. Visitors to physical heritage sites encounter plenty of evidence of alternate interpretations and uses. […]They get a sense of local attitudes toward the site […].Digital reconstructions can avoid this welter of conflicting attitudes and interpretations. They generally present clean, seamless views of the past".

recreating and disseminating digital cultural heritage is based on data that does not consider the affected communities. Finally, digital products raise legal issues related to ownership rights. Who are the owners of these cultural products? What criteria guide the selection of heritage sites for digital reproduction, wildly if they are contested or have been destroyed? Indeed, Western Countries typically own digital projects that reproduce destroyed sites in the Middle East, choosing to produce sites closer to Western culture (pre-Islamic heritage sites such as the arch of Palmyra)[847].

The described concerns contrast with the concept of heritage community introduced by the previously mentioned Faro Convention, according to which heritage is conceived not as a product but as a social process, that reflects the values of the communities around it. Because of the lack of a relational dimension, digital heritage would not comply with the general anthropocentric approach to cultural heritage developed by recent international practice[848].

If heritage is a social process, this principle should be applied also to digital projects. Procedures behind creating digital products must be inclusive, involve as many stakeholders as possible, and respect the cross-cultural significance of a heritage site. Developing a clear legal framework to regulate the subject would

[847] See THOMPSON E.L., *Legal and Ethical Considerations for Digital Recreations of Cultural Heritage*, ibid, p. 155. ROUHANI B., 2023. *Ethically Digital: Contested Cultural Heritage in Digital Context , ibid.* p. 11. The authors both raise the risk of a "digital colonialism due to the predominance of Western countries in managing digital products, cutting of the affected local communities surrounding the cultural heritage digitally reproduced.

[848] See ROUHANI B., 2023. *Ethically Digital: Contested Cultural Heritage in Digital Context, ibid.* p. 11. DRUMBL M., *The International Criminal Court and Cultural Property, What Is the Crime?* In The Preservation of Art and Culture in Times of War (Claire Finkelstein et al. eds., 2022), https://scholarlycommons.law.wlu.edu/fac_books/162 .

be fundamental. In this regard, several soft law instruments can be a starting point for future regulation.

Among these, we can mention the 2021 UNESCO on the Ethicsof Artificial Intelligence, which provides a legal framework to support national policies on artificial intelligence grounded onthe principles of transparency, data protection, and multi-stakeholder governance[849]. Moreover, it is worthy to mention the best practices laid down by the global program called "ReACH (Reproduction of Art and Culture), launched in 2017 by UNESCO in partnership with the Victoria and Albert Museum. In regulating digital reproduction, The Declaration lays out principles concerning the digital documentation of cultural property subjected to risks of potential destruction, for instance, scientific rigour, transparency in documenting the historical context, and respect for cultural diversity principles[850].

The 2008 London Charter for The computer-based visualizationof cultural heritage, the Digital Display of Cultural Heritage, implemented by the 2011 Seville Charter, is worth noting. The central focus of the Charter is undoubtedly the principle of

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849 UNESCO Recommendation on the Ethics of Artificial Intelligence' https://www.unesco.org/en/articles/recommendation-ethics-artificial-intelligence, see article 37: *"The transparency and explainability of AI systems are often essential preconditions to ensure the respect and promotion of human rights, fundamental freedoms and ethical principles. Transparency is necessary for relevant national and international liability regimes to work effectively. A lack of transparency could also undermine the possibility of effectively challenging decisions based on outcomes produced by AI systems and may thereby infringe the right to a fair trial and effective remedy, and limits the areas in which these systems can be legally used".*

850 https://www.vam.ac.uk/research/projects/reach-reproduction-of-art-and-cultural-heritage#outputs. More specifically see art. 5: *" Before making and sharing Records, the historic context of and possible cultural and national sensitivities about the Works should be considered, as well as applicable legal and ethical constraints, and the rights of donors and third parties. Transparency and participation by communities or cultural groups with ties to the Works should be encouraged".*

Documentation (Principle 4), according to which *"'[S]ufficient information should be documented and disseminated to allow computer-based visualization methods and outcomes to be understood and evaluated about the contexts and purposes for which they are deployed"*[851].

The mentioned soft law declarations all stress the importance of representing and interpreting digital heritage in a way that considers the original context and different cultural sensitivities; the use of technologies would be lawful if it follows democratic and inclusive procedures, mainly applied to contested heritage[852]. Hence, digital tools can be an opportunity to support the management of contested heritage and enhance preservationand accessibility, assuming that the importance of democratic procedures arises in both the real and virtual realms.

[851] https://londoncharter.org/introduction.html.

[852] A good example of inclusive digital heritage is the project of the artist Morehshin Allahyari, called " Material Speculation : ISIS", where she collected a large number of images and documents of cultural objects destroyed by ISIS , creating 3d printed artefacts. All the documentation collected by the artist was later saved on a flash drive and memory card to make the image indestructible and infinitely reproducible. Within the digital representation she included information from many sources and different languages. On this topic CATALDO M., *Preserving cultural memory: the role of technology*, Aedon 2/2020, pp. 88-95. THOMPSON E.L., *Legal and Ethical Considerations for Digital Recreations of Cultural Heritage*, ibid, p. 161.

6. Conclusive remarks.

The dissertation has sought to evaluate the current international norm against the intentional destruction of cultural heritage for iconoclastic purposes committed by a governing authority within its own territory. If the construction of collective memory is a prerogative of the state domain, within international law, persists a presumption against the destruction for iconoclastic purposes and a conservative paradigm that should be read in terms of responsibility to protect cultural heritage against the abuses of national authorities within memorialization processes. This responsibility to protect also implies the duty upon the international community to assist and intervene in the domestic contested heritage in cases in which it is necessary to prevent the escalation of major conflicts[853] . Actually, to absolve this role, it will be necessary to fill the gridlocks and democratic gaps within the UN institutions. Hence, the field of cultural heritage is a lens to study general problems affecting international law as a whole and to detect the faults regarding global regulatory regimes.

In any case, both the international community and states should be conceived as trustees towards cultural heritage since art is a special category of property, reflecting a collective interest that takes precedence over an owner's rights[854]. That is why, beyond the preservationist and "transformational" arguments, the

[853] It might be an example the adoption of a cultural policy at international level on the contested heritage in Taiwan to claim its national identity against China, with the preventive aim of averting the outbreak of more serious conflicts. On this topic, see JENNINGS R. *Lawmakers Eye Removal of Taiwan's Top Chiang Kai-shek Memorial*, in EAST ASIA, 2016 , https://www.voanews.com/a/lawmakers-eye-removal-of-taiwan-top-chiangkai-shek-memorial/3321370.html.

[854] CASSESE S. , *I beni culturali dalla tutela alla valorizzazione*, Giornale di diritto amministrativo, 1998, n. 7, pp. 673 - 675.

dissertation highlights the importance of establishing democratic processes behind the selection of cultural heritage, with the involvement of all possible stakeholders, including experts inthe field.

The dissertation proposes the following concluding remarks as summarized below. Within the multi-level global framework, one would need to assess on a case-by-case basis what level of governance is best suited to address the issues underlying memorialization processes in light of the principle of subsidiarity. Short-term and long-term public policies need to be distinguished. Short-term public policies should address the management of contested cultural heritage. Regarding the "bad cultural property", if destruction/removal does not appear to be a necessarily inevitable choice, it would be mandatory to attribute new meanings and interpretations that comply with the constitutional principles of a democratic public space[855]. However, these cultural policies are not enough if they do not profoundly investigate the motives behind the contestation of cultural heritage. Indeed, long-term cultural policies should soothe the cultural trauma underlying the contestation since finding exclusively direct solutions to managing the disputed cultural heritage does not eliminate the root cause of the dispute.

We have seen that the transition process did not work in allthree cases. If the transition process has not worked, problems related to the memorialization of a traumatic past event may resurface even years later, as happened in the United States. That is why long-term cultural policies should bridge to transitional justice remedies through backward-looking measures[856]. Amongthese is the establishment of truth commissions to acknowledge the injustices and victims of a traumatic past event and to build a unified collective memory, renegotiating relationships between

[855] MONTANTARI T., *Le statue giuste*, Roma, Editori Laterza, 2024.
[856] VALLS A., *Racial Justice as transitional justice*, Polity, Volume XXXVI, Number 1, October 2003.

majority and minorities[857]. Within truth commissions, contested or destroyed heritage can become a means to create a reconciliatory dialogue between opposing forces. Only after adopting backwards-looking measures will it be possibleto adopt forward-looking measures such as institutional reforms, educational curriculum reform, and revision of national and international heritage lists to reflect enhanced inclusiveness[858].

These transitional justice remedies can be included within national or international policies. It will be up to internationallaw to oversee any abuses committed by states in adopting cultural policies. Crucially, the choice of cultural heritage to be preserved or removed should result from majority and minority expression. Given the cross-cutting nature of the art concept, it is up to the lawyers to identify and study the sociological causes behind the phenomenon of heritage contestation to avoid the risk of exploiting cultural heritage for political purposes and subjecting it to the ephemerality of cultural changes.

Possible further avenues of research may involve investigationof intentional destruction of intangible heritage and intentional destruction for economic development reasons, both authorized by state governments.

Finally, the research stresses the need to reconcile with the past in order to build better democracies and public spaces reflecting cornerstone constitutional principles, among them principle of equality.

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