

CONFEDERATE MONUMENTS AND INTERNATIONAL LAW

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ABSTRACT

This article engages with the controversy around the removal of Confederate Monuments in the US, from the perspective of international law. While the issue is *prima facie* domestic, international law offers a laboratory to consider the multiple tensions a step removed from their current charged and emotional environment. The article argues that, for the most part, international law supports maintaining the status quo with respect to the monuments, particularly through its preference for all-or-nothing responses. However, read from the perspective of transitional justice, greater nuance and pragmatism is added to the debate, leading to more constructive responses that can actually live up to international law's promises with respect to the fields affected by the Confederate Monuments controversy.

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INTRODUCTION

Across the United States, and around the world, issues of memory have been revisited, and particularly the ways memorialization processes are used to enshrine and advance certain versions of the past that stop reflecting social consensus. Cultural heritage or property,¹ as a marker of memory, is at the center of current debates about the version of history told through monuments and sites.

¹ “Cultural property” is the term more commonly used in the United States, whereas the rest of the world prefers “cultural heritage.” In this text I will use the latter term, but they are largely interchangeable for our present purposes.

In the United States specifically, the debate has for the most part centered on the issue of monuments erected to commemorate or memorialize the United States Civil War (1861–1865).² The offending monuments are particularly those that relate to the Confederacy, the side of the war representing US southern states that was ultimately defeated in the war.

The basic narrative around the Civil War is that it was a war for the rights of southern states to maintain their way of life, most notably, the economic model based on the use of imported African slaves.³ And, while accounts lamenting the defeat of US Southern Chivalry exist,⁴ much like the lament about the end of a Southern lifestyle that privileged local community over centrally-imposed identities and even economic models,⁵ ultimately the outcome of the Civil War is largely considered positive, at least in that it meant the end of formal slavery on US soil.

The end of formalized slavery did not automatically mean the full gamut of rights for African-Americans, however. Neither did the end of the Civil War mean the termination of attitudes regarding racial inferiority (which endure even after formal legal rights based on anti-discrimination law, and in many ways hinder the effectiveness of these rights). These resilient attitudes have translated into systemic and even legalized discrimination such as the doctrine of “separate but equal”

² For a history of the Civil War, see SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* (1986); JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988); CHARLES PIERCE ROLAND, *AN AMERICAN ILIAD: THE STORY OF THE CIVIL WAR* (2002).

³ There are ongoing attempts at revisionist histories of the Civil War, which tend to downplay the role of slavery in the motivations behind the war. These revisionist attempts are usually discredited by scholarly consensus on the matter, even if they are increasingly invoked in political rhetoric around the Civil War, particularly in the context of confederate monuments. See Tony Horwitz, *150 Years of Misunderstanding the Civil War*, *THE ATLANTIC* (June 19, 2013), <https://www.theatlantic.com/national/archive/2013/06/150-years-of-misunderstanding-the-civil-war/277022/>; Richard Joltes, *The US Civil War and Historical Revisionism*, *CRITICAL ENQUIRY* (July 31, 2015), <http://criticalenquiry.org/wp/2015/07/31/the-us-civil-war-and-historical-revisionism/>; James W. Loewen, *Why do people believe myths about the Confederacy? Because our textbooks and monuments are wrong*, *WASH. POST*, (July 1, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/01/why-do-people-believe-myths-about-the-confederacy-because-our-textbooks-and-monuments-are-wrong/?utm_term=.f3da4db34f12. Nevertheless, it is important to bear in mind that racial motivation at the moment of erection of the monuments may be less relevant than current narratives that attribute racist meanings to their ongoing presence.

⁴ See generally WOLFGANG SCHIVELBUSCH, *THE CULTURE OF DEFEAT: ON NATIONAL TRAUMA, MOURNING, AND RECOVERY* (Jefferson Chase trans., 2004) (arguing that southern chivalry was defeated by uncouth northern factory efficiency, in an application of industrial skills to warfare).

⁵ I am thankful to Sean Pager for this insight.

endorsed by the US Supreme Court in *Plessy v. Ferguson*,⁶ which only started to be reversed much later, with *Brown v. Board of Education* and other decisions.

Among the enduring practices that attempt to enliven and glorify pre-Civil War culture (whether about race or something else) is the erection of monuments across the United States (mostly in Southern States) that celebrate the Confederacy. These range from monumental mountain carvings that attempt to rival Mount Rushmore (Stone Mountain in Georgia)⁷ to statues, parks, schools, and other public buildings named after Confederate Generals and other figures on that side of the Civil War.⁸ These monuments, for the most part erected in the twentieth century, have come increasingly under attack in the twenty-first.

The main reason there are calls for the removal of these monuments (and often actual removals) is because these monuments are deemed racist. Details on the arguments vary depending on the specific place, but the common thread is that these monuments are seen as glorifying a social, political, and economic system that naturalized and even mandated discrimination against African-Americans, and that their continuing presence glorifies the past of slavery and in doing so helps perpetuate a message about the subaltern position of African-Americans in today's society.⁹

The reaction against these calls for removal of confederate monuments has been swift, invoking the importance of history and cultural heritage, and decrying the erasure of the past for the sake of "political correctness," among other variations of the same theme.¹⁰ Importantly for our purposes, the status of these monuments as cultural

⁶ For the context in which *Plessy v. Ferguson* was decided, as well as its antecedents and aftermath, see KEITH MEDLEY, *WE AS FREEMEN: PLESSY V. FERGUSON* (2012).

⁷ For a description and context, see Grace Elizabeth Hale, *Granite Stopped Time: The Stone Mountain Memorial and the Representation of White Southern Identity*, 82 GA. HIST. Q. 22 (1998).

⁸ See *infra* Part II (discussing this idea in further detail).

⁹ David A Graham, *The Stubborn Persistence of Confederate Monuments*, THE ATLANTIC (Apr. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-stubborn-persistence-of-confederate-monuments/479751/>.

¹⁰ Larry Carson, Letter to the Editor, *Confederate monuments placed to obscure history*, BALTIMORE SUN (Aug. 25, 2017), <http://www.baltimoresun.com/news/maryland/howard/columbia/ph-ho-cf-letters-0824-carson-20170825-story.html>; Robert Shapiro, Letter to the Editor, *Political Correctness and Confederate Monuments [Letter]*, LAS VEGAS REV. J. (Jul. 10, 2017), <https://www.reviewjournal.com/opinion/letters/political-correctness-and-confederate-monuments/>.

heritage, and part of the patrimony of the community, has nearly always been invoked.

This article grapples with the validity of arguments invoking the language of cultural heritage in relation to Confederate Monuments, from the perspective of international law. I choose to use international law because it allows for the consideration of these matters in a uniform way that is less dependent on the specific terminology used by different state and city statutes, thereby lending conceptual clarity to a debate that can otherwise be rendered opaque. One of international cultural heritage law's (ICHL) greatest achievements has been precisely the establishment of a uniform language of practice, and I rely on that language to make sense of the Confederate Monuments controversy in broader terms. Further, and most importantly, international law allows for the articulation of the arguments in a one-step removed, less emotionally charged, stage. It thus operates as a comparatively more neutral stage, or a laboratory, where these issues can be discussed. I do not suggest that international law removes the political issues from the table, because that would be both fallacious and undesirable;¹¹ rather, international law allows for the consideration of political values against a broader frame of human morality that is less tied to the specific historical contingencies of US history, which often invoke emotional responses that muddle the debate and prevent it from advancing.¹²

I show in this article that international law supports a change in the status quo with respect to confederate monuments. However, I argue that this change should not happen on the basis of the specialized bodies of international law that immediately spring to mind in this context, namely, international cultural heritage law, and international human rights law (IHRL). These two bodies of law tend to suggest all-or-nothing responses that are ultimately less helpful in mediating the many sensitivities at stake with respect to confederate monuments. Instead, I suggest it is transitional justice (TJ) law that provides the best outcomes, because it is more committed to pragmatic solutions than either IHRL or ICHL. Read through the lenses of TJ, the controversy around Confederate Monuments can be mediated through compromise. TJ can also help articulate a version of ICHL that better takes into account the

¹¹ DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* (2016).

¹² On the role of contingencies in legal analysis, see Susan Marks, *False Contingency*, 62 *CURRENT LEGAL PROBS.* 1 (2009).

interests of communities who live in, with, or around heritage more generally, and particularly those upon whom the discursive and symbolic effects of heritage bear more harshly.

The article proceeds as follows: section I provides some background as to the erection of Confederate Monuments, their legal protection as cultural heritage, and some of the current and recent controversies surrounding them. On the basis of this background, section II discusses the status of these monuments as cultural heritage, and what ICHL would have to say about their removal, particularly taking into account the framework of treaties under the United Nations Educational, Scientific, and Cultural Organization (UNESCO).¹³ After that, I will consider in section III the issue of Confederate Monuments in IHRL, since human rights are often invoked in this context as well, particularly freedom of speech¹⁴ and rights related to racial discrimination. Section IV then brings the tools of TJ into the mix, particularly considering ideas around heritage that has been termed at times “dissonant,”¹⁵ “difficult,”¹⁶ or even “negative,”¹⁷ and the role of this heritage as a catalyst for the main goals of transition. Section V takes a step back and reframes the issue with respect to international law’s ability to redress historical injustices that go as far back as the Civil War. Section VI concludes that more pragmatic engagement is needed with the issue, towards re-signifying this difficult heritage.

¹³ Even though the United States has announced its withdrawal from UNESCO, which is set to take effect at the end of 2018, it is still bound by the treaties on cultural heritage law under UNESCO that it has ratified. These include: Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force 15 Dec. 1975) [hereinafter WHC] (since Dec. 7, 1973); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (entered into force 24 Apr. 1972) [hereinafter 1970 Convention] (since Sept. 2, 1983); Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, May 14, 1954, S. Treaty Doc. No. 106-1, 249 U.N.T.S. 240 (entered into force 7 Aug. 1956) [hereinafter 1954 Hague Convention] (since Mar. 13, 2009). For more on the US withdrawal, see also Press Release, U.S. Dep’t of State, The United States Withdraws From UNESCO (Oct. 12, 2017), <https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm>.

¹⁴ In international law, the term of art is “freedom of expression,” but they will be used interchangeably in this article.

¹⁵ JOHN E. TUNBRIDGE & GREGORY J. ASHWORTH, *DISSONANT HERITAGE: THE MANAGEMENT OF THE PAST AS A RESOURCE IN CONFLICT* (1996).

¹⁶ *PLACES OF PAIN AND SHAME: DEALING WITH “DIFFICULT HERITAGE”* (William Logan & Keir Reeves eds., 2008).

¹⁷ Ben Boer & Stefan Gruber, *Heritage Discourses*, in *ENVIRONMENTAL DISCOURSES IN PUBLIC AND INTERNATIONAL LAW* 375 (Brad Jessup & Kim Rubenstein eds., 2012).

**I. THE CONFEDERATE MONUMENTS CONTROVERSY:
BACKGROUND**

This section's objective is to provide some background on the circumstances that have led to the current controversies around the removal of Confederate Monuments. The Confederate Statues, in some respects, are a new battleground over symbols of the Confederacy and the Civil War military past. Confederate Monuments echo discussions about the use of the Confederate flag (in Oregon, for instance, the flag of Mississippi is the only one absent from a ring outside the Oregon State Capitol, because it incorporates the Confederate flag).¹⁸ Other similar issues with which the Confederate Monuments resonate involve the role of slave sales in the early endowments of US universities; the renaming of schools, buildings, and streets; and even the presence of slave holders on other US symbols like currency. While all these issues are important in their own right, I focus here on the monuments as one of the more recent battlegrounds, and one that has had more severe repercussions recently. Likewise, the Civil War past is tangled with an enduring narrative of military pride and, in spite of deep-seated racial elements to the monuments, there is also an important military memorialization thread that must not be overlooked.

The discussion below will show that these monuments were largely erected in response to advances in civil rights for African-Americans in the US, thereby inextricably linking their existence to the mainstream narrative about the Civil War, that of racial oppression. The racial story around the monuments, for the most part, seems to be more strongly pursued than the military one. Further, the section shows that, in spite of a tradition of monument toppling as political acts in the US and elsewhere, a number of states have sought to protect these statues. There have been a range of responses to the ongoing presence of these monuments in recent years, many of which focused on the removal of the statues, often with polarizing and escalating effects. Experiences in the ex-Soviet space, particularly Ukraine in 2015, show that this problem is not uniquely American, and that therefore international law is in a position to consider its implications for the US and other countries in comparable situations.

¹⁸ I am thankful to Jim Nafziger for this insight.

A. THE ERECTION OF CONFEDERATE MONUMENTS

There are at least 1,500 monuments to the Confederacy across the United States, spread across 31 states.¹⁹ 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,²⁰ Massachusetts, and California.²¹

These monuments are normally statues, but also include monumental works like Stone Mountain and the naming of parks, schools, military bases, and even parts of buildings like the US Capitol. They range in size and visibility, from main streets and town squares in metropolitan areas to rural parks of difficult road access. Several of them sit in front of courthouses and other civic buildings.²²

For the most part, Confederate Monument-building has often been tied at least partly to movements of instability in racial relations, more so than actual commemoration of the Civil War. Two of the waves of more prolific erection of these monuments correspond with the rise of the Ku Klux Klan in the 1920s,²³ and with the Civil Rights Movement in the 1950s and 1960s.²⁴ In other words, it has been argued that these monuments have often been used to assert white supremacy, while justifying Jim Crow laws in the South.²⁵ They have therefore been part of reinforcing mandated segregation, and “were intended, in part, to obscure the terrorism required to overthrow Reconstruction, and to intimidate African Americans politically and isolate them from the mainstream of

¹⁹ Graham, *supra* note 9.

²⁰ J.C. Hallman, *Monumental Error: Will New York City finally tear down a statue?*, HARPER'S MAG. (Nov. 2017), <https://harpers.org/archive/2017/11/monumental-error/>.

²¹ See S. POVERTY LAW CTR., WHOSE HERITAGE? SYMBOLS OF THE CONFEDERACY, https://www.splcenter.org/sites/default/files/whoseheritage_splc.pdf (last visited Nov. 2, 2017); *List of Confederate monuments and memorials*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_Confederate_monuments_and_memorials (last visited Nov. 2, 2017).

²² S. POVERTY LAW CTR., *supra* note 21; WIKIPEDIA, *supra* note 21.

²³ Rory McVeighn, *Structural Incentives for Conservative Mobilization: Power Devaluation and the Rise of the Ku Klux Klan, 1915–1925*, 77 SOC. FORCES 1461 (1999) (arguing that the rise of the Klan relied on cultural imagery and economic incentives to exclude other actors from the market and prevent their rise as economic forces).

²⁴ For the relationship between civil rights memorials and confederate memorials, see Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233 (2005).

²⁵ Jonathan I. Leib et al., *Rebel with a cause? Iconography and public memory in the Southern United States*, 52 GEOJ. 303, 304 (2000).

public life.”²⁶ There are admittedly problems in drawing causation from correlation (in the sense that the erection of monuments and particularly tense windows in racial relations have coexisted, but there is no definitive evidence that the latter led to the former), but the pattern suggests that the racial narrative is at least one of the possible explanations for spikes in monument construction.

Importantly, historical consensus shows that these monuments were erected without consultation with residents in these areas, particularly African-American residents.²⁷ In other words, the decisions to build these monuments were not representative of the democratic will of the communities living in, with, or around heritage, and particularly the views of minorities (who can arguably trump majoritarian politics, in order to avoid a dictatorship of the majority).

Thirty-two Confederate Monuments were dedicated in the twenty-first century. While not all of these were new (some were re-dedications to commemorate anniversaries of their original erection),²⁸ they also correspond (whether as a correlation or causation) to renewed interest in the rights of African-Americans through the election of Barack Obama.²⁹ And, alongside this renewed interest in the twenty-first century, a number of states also passed legislation on the protection of these monuments. States like Alabama (2017), Mississippi (2004), North Carolina (2015), South Carolina (2000), and Tennessee (2016) all have passed legislation prohibiting the removal or alteration of Confederate Monuments.³⁰

²⁶ AHA Statement on Confederate Monuments, AM. HISTORICAL ASS'N (AHA) (Aug. 2017), <https://www.historians.org/news-and-advocacy/statements-and-resolutions-of-support-and-protest/aha-statement-on-confederate-monuments>.

²⁷ Dell Upton, *Confederate Monuments and Civic Values in the Wake of Charlottesville*, SOC'Y OF ARCHITECTURAL HISTORIANS BLOG (Sept. 13, 2017), <http://www.sah.org/publications-and-research/sah-blog/sah-blog/2017/09/13/confederate-monuments-and-civic-values-in-the-wake-of-charlottesville>.

²⁸ Amanda Holpuch & Mona Chalabi, 'Changing history'? No – 32 Confederate monuments dedicated in past 17 years, THE GUARDIAN (Aug. 16, 2017), <https://www.theguardian.com/us-news/2017/aug/16/confederate-monuments-civil-war-history-trump> (including a graphic from the Southern Poverty Law Center showing spikes in the erection of Confederate Monuments during the 1920s and Civil Rights periods).

²⁹ Patrik Jonsson, *Confederate History Month Fight: Obama rebukes Virginia governor*, CHRISTIAN SCI. MONITOR (Apr. 9, 2010), <https://www.csmonitor.com/USA/2010/0409/Confederate-History-Month-fight-Obama-rebukes-Virginia-governor>.

³⁰ Kaeli Subberwal, *Several States Have Erected Laws To Protect Confederate Monuments*, HUFFINGTON POST (Aug. 17, 2017), http://www.huffingtonpost.ca/entry/states-confederate-statue-laws_us_5996312be4b0e8cc855cb2ab. On Mississippi specifically, see Bobby Harrison,

The timing of erection of these monuments is relevant in determining the way the law connects with them. By shedding light on the context of building, one can draw inferences on the intention of the builders and thereby get a better sense of the narratives associated with those monuments. In this context, it seems that Confederate Monuments exist to commemorate a Civil War social and political structure that at least in part encouraged and institutionalized racism, since the impetus to commemorate through monuments is connected (at least as a correlation, arguably as a causation) to the rise of racist (Ku Klux Klan) or anti-racist (Civil Rights) movements. To be sure, narratives around the monuments can change over time (as discussed and suggested below), but for the most part drastic changes in meaning require positive acts (like a new sign) that seem largely absent with respect to Confederate Monuments. Rather, in the absence of positive acts to re-signify narratives, these monuments reinforce the context of their erection, while falling prey to increasing polarization in racial and identity politics.

B. RECENT CONTROVERSIES

The (re-)dedication of Confederate Monuments in the twenty-first century is not the only type of action aimed at them, of course. The new state laws respond to specific claims for the removal of these statues, often at the behest of organized civil society on African-American Civil Rights. In the past few years, Confederate Monuments have been removed or renamed (with respect to schools, parks, and other public institutions) in at least sixty-five cities across twenty-eight states.³¹ Triggers, strategies, and responses have been varied, and at least a few are worth mentioning to illustrate this variety and underline common threads.

In Louisiana, removals of Confederate Monuments in New Orleans in 2017 were largely seen as a reaction to the Charleston church shooting (2015), meaning they were a direct response to a resurgence of

Mississippi law prohibits removal of historical markers, DAILY JOURNAL (May 28, 2017), http://www.djournal.com/news/state-news/mississippi-law-prohibits-removal-of-historical-markers/article_f4e8c3a6-82a2-54a7-bcf9-f8979d95322f.html. On South Carolina, see Cassie Cope, *SC law protects Confederate monuments; some leaders want to change that*, THE STATE (Aug. 16, 2017), <http://www.thestate.com/news/local/article167638407.html>.

³¹ For a full list, see *Removal of Confederate monuments and memorials*, WIKIPEDIA, https://en.wikipedia.org/wiki/Removal_of_Confederate_monuments_and_memorials (last visited Nov. 2, 2017).

violent racism, and an attempt at de-emphasizing public narratives (through the Confederate Monuments) that could be seen as suggesting the racial supremacy beliefs behind this particular mass shooting.³² The rise in race-related crimes is therefore a direct trigger to action in relation to these monuments.

The examples of Virginia and Maryland highlight the matter of response, whether actual or anticipated, to the removal of Confederate Monuments. In Virginia, a state of emergency declared after the “Unite the Right” rally, which was convened to protest against the removal of a statue in Charlottesville. The violence that ensued was directed particularly at African-Americans who counter-protested in favor of the removal.³³ In the aftermath of this violent incident, in Maryland statues were removed from Baltimore under cover of night, precisely to avoid violent demonstrations and counter-demonstrations.³⁴ These reactions and strategies (removal during the night) underscore the level of public sentiment associated with Confederate Monuments, and the radicalization of politics around them.

Another type of strategy focuses less on when to remove the statues and more on the selection of which statues to be removed. In Kentucky, the Mayor of Lexington asked that two statues in front of a courthouse be relocated to a nearby cemetery.³⁵ In doing so, there is a clear severing of any possible symbolic ties between Confederate Monuments and civic or public life in Lexington. I suggest that this element, consideration of the connection between civic life and the monuments, is key to any determinations about their fate.

In addition to the violent backlash in Virginia, state police were also involved in an incident in North Carolina (one of the states to pass

³² Darran Simon & Steve Almasy, *Final Confederate statue comes down in New Orleans*, CNN (May 19, 2017), <http://www.cnn.com/2017/05/19/us/new-orleans-confederate-monuments/index.html>.

³³ Jason Hanna et al., *Virginia governor to white nationalists: ‘Go home . . . shame on you’*, CNN (Aug. 13, 2017), <http://www.cnn.com/2017/08/12/us/charlottesville-white-nationalists-rally/index.html>; Matt Pearce, *Who was responsible for the violence in Charlottesville? Here’s what witnesses say*, L.A. TIMES (Aug. 15, 2017), <http://www.latimes.com/nation/la-na-charlottesville-witnesses-20170815-story.html>.

³⁴ Nicholas Fandos et al., *Charlottesville Violence Spurs New Resistance to Confederate Symbols*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/us/charlottesville-violence-spurs-new-resistance-to-confederate-symbols.html>.

³⁵ Darcy Costello & Justin Sayers, *Confederate statues in Lexington removed Tuesday night in quick move*, COURIER-JOURNAL (Oct. 18, 2017), <http://www.courier-journal.com/story/news/2017/10/17/lexington-confederate-statues-unexpectedly-moved/774366001/>.

recent legislation protecting Confederate Monuments). There, protesters toppled the Confederate Soldiers Monument outside Old Durham County Courthouse. These activists were arrested.³⁶ In criminalizing these protests, the state sends a strong message against civil society committed to the removal of Confederate Monuments.

It seems that, in spite of the actions of some progressive segments of civil society, a majority of the total US population is in favor of maintaining the monuments.³⁷ The question that the results of this opinion poll present is whether, and to what extent, democratic processes that did not count when the monuments were put in place should be relevant when considering their removal. Further, since the poll is starkly divided along racial and political lines, with the vast majority of African-Americans favoring removal,³⁸ there is a query as to whether the more affected segments of the population should have more of a say, or whether they do not constitute a minority for these purposes.

The variety of responses and questions surrounding Confederate Monuments is not unique to the United States, however. Numerous other countries have experienced the removal of monuments, as attempts to sever ties between current political life and problematic political pasts of oppression. The statuary of Lenin and other Soviet leaders is a worthwhile example to consider briefly, as it frames statue removals as political acts that allow for a nation to overcome a past of subjugation of one segment of society by another.

C. MONUMENT ERECTION AND REMOVAL AS POLITICAL ACTS: THE POST-SOVIET EXAMPLE

The experience in the post-Soviet space in the aftermath of the fall of the communist regime is enlightening as a different way of thinking about why people would want to remove monuments that testify to a certain troubled and contested past, the mechanisms they use, and public reaction to the removals. Two examples will be looked at in this respect: the creation of Memento Park in Budapest, Hungary and the

³⁶ Amanda Jackson & Ralph Ellis, *Seven arrested in toppling of Confederate statue in North Carolina*, CNN (Aug. 16, 2017), <http://www.cnn.com/2017/08/14/us/confederate-statue-pulled-down-north-carolina-trnd/index.html>.

³⁷ Chris Kahn, *A majority of Americans want to preserve Confederate monuments: Reuters/Ipsos poll*, REUTERS (Aug. 21, 2017), <https://www.reuters.com/article/us-usa-protests-poll/a-majority-of-americans-want-to-preserve-confederate-monuments-reuters-ipsos-poll-idUSKCN1B12EG>.

³⁸ *Id.*

widespread removal of statues in Ukraine under a specific decommunization law.

In Budapest, monuments to the Soviet regime occupied prominent places all around the city. After the fall of the regime, these statues were moved to a park outside Budapest, named *Szoborpark* (“*Memento Park*”), where they can still be visited but are now separated from the contexts that connected them to public and political life in Hungary. I will come back to Memento Park below.³⁹

In Ukraine, a law, “On condemning the Communist and National-Socialist totalitarian regimes and prohibiting the use of their symbols,” went much further and ordered the complete removal and destruction of monuments that “glorify functionaries of [the] Soviet totalitarian regime.”⁴⁰ Having the largest concentration of Lenin statues monuments in the entire USSR,⁴¹ and not being a successor to the Soviet Union, Ukraine is an important case study of the uses of the law and of monuments to try and shift narratives about identity.

In Ukraine, the vast majority of monuments ended up in warehouses, melted away, broken beyond recognition, or even rescued and stored in people’s private residences.⁴² A group of thirty-two statues were collected from four different Ukrainian cities and sunk off the Crimean coast to create “an underwater hall of infamy 15 meters below the surface.”⁴³ In Ukraine, unlike in Hungary, there is no provision for the collective display of these monuments.

The impetus to remove the monuments arises in part from the resurgence of pro-Russia sentiment in parts of Ukraine, and removal is therefore an attempt at quelling extreme political action. Private citizens attempting to remove the statues were portrayed in media as terrorists, and these protesters have been marginalized by large segments of the Ukrainian population that favored closer relationships with Russia.⁴⁴

Attitudes and responses to the removal of these statues have varied across Ukraine, without regard for profession, political

³⁹ See *infra* Section IV.C.

⁴⁰ Myroslava Hartmond, *Lenin After the Fall*, in NIELS ACKERMANN & SÉBASTIEN GOBERT, *LOOKING FOR LENIN* 5, 11 (2017).

⁴¹ *Id.* at 6.

⁴² *Id.* at 13.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 8–9.

preferences, age, gender, or any other major demographic indicator.⁴⁵ But they tend to oscillate in a pendulum: while some view the statues as an opportunity to educate the population (present and future) about the negative legacy of communism, others see removal as “an act of autonomy – where an animal under threat discards part of its body. Ukraine, like a lizard, sheds its tail to escape the totalitarian past. There is no educational value in museifying this appendage,” which would only benefit tourists from foreign countries.⁴⁶

There are, of course, some key differences between the situation in Ukraine and that in the US. First, the Confederate Monuments were not erected during a period of foreign domination like in Ukraine, where the erections were ordered by local politicians very closely aligned with, and oftentimes receiving direct instructions from, Moscow. Second, the effort to remove statues in Ukraine, a unitary state,⁴⁷ is much more systematic, and it can be so precisely because of the unitary character of the country (unlike United States federalism, where decisions about culture are relegated to the more local level of states). Lastly, there is a crucial difference in the timing of the construction of the monuments in relation to the events to which they nominally refer. In Ukraine, the monuments were built during the Soviet regime, and in direct connection to it; in the US, as discussed above, the monuments came into being long after the end of the Civil War, and more likely in response to events that were not really about the Civil War, but rather about enshrining certain attitudes about racial superiority.

In spite of these differences, there are sufficient commonalities to make the Ukrainian example still useful. For instance, in both countries the monuments were put into place in order to pursue specific oppressive agendas (foreign domination by Russia in Ukraine; oppression of African-Americans by the white majority in the US). Further, and relatedly, in both countries there is an undertone—larger in the US than in Ukraine—of racial superiority, with enduring myths about the inferiority of Ukrainians relative to Russians still in circulation today.⁴⁸ Importantly, too, in both contexts there is a catalyst of considerable political upheaval (Crimea annexation in Ukraine, the

⁴⁵ As documented by ACKERMANN & GOBERT, *supra* note 40, at 19–159 (collecting a mixture of photographs of Lenin statues and testimonials by their current keepers).

⁴⁶ Hartmond, *supra* note 40, at 15 (quoting historian Olha Kovalevska).

⁴⁷ Tensions around the separation of the Crimea to the side.

⁴⁸ MYROSLAV SHKANDRIJ, *RUSSIA AND UKRAINE: LITERATURE AND THE DISCOURSE OF EMPIRE FROM NAPOLEONIC TO POSTCOLONIAL TIMES* (2001).

resurgence of far-right and white supremacist ideology in the US). In both countries, too, there are media attempts to portray forces engaged in the removal of monuments as criminals or extremists, violating the rights of the majority of the population. All the while, in both countries these movements seek to remove from civic life and sever ties with the ideology of previous regimes (communism in Ukraine, Jim Crow laws in the US).

The fact that the contexts are comparable with respect to those characteristics makes the idea of monument removal more acceptable in the United States, particularly in considering the positive reception of the removal of statues of Lenin in the country. For instance, a toppled statue of Lenin was for years prominently displayed in Freedom Park in Washington, D.C., close to important symbols of national identity like the Arlington National Cemetery, before being moved to the Newseum that is just a few blocks from the US Capitol. At the Newseum, it currently sits as part of an exhibition on the fall of the Berlin Wall, and the toppling of this monument is connected to a broader narrative of emancipation and the triumph of freedom and human rights.⁴⁹

Further, one must remember that, even in US history, the toppling of statues has been commended and celebrated as important political acts in the name of freedom. Famously, a statue of King George III was toppled in New York City in 1776 as one of the symbolic opening salvos of the Revolutionary War that led to US independence. The toppling is celebrated in the Museum of the American Revolution in Philadelphia through a video that serves as the first exhibition in the entire museum, and the museum has even commissioned a replica of the statue.⁵⁰ The clear precedent in US history, coupled with the celebration of more contemporary situations in other countries, denies the validity of any absolute argument against the toppling of monuments as an erasure of history.

Naturally, one of the lessons from the removal of statues of Lenin in Ukraine is that “history hates empty pedestals,”⁵¹ and that the

⁴⁹ John Burns, *D.C. as freedom theme park*, GA. STRAIGHT (Aug. 17, 2006), <https://www.straight.com/d-c-as-freedom-theme-park>.

⁵⁰ David W Dunlap, *Long-Toppled Statue of King George III to Ride Again, from a Brooklyn Studio*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/21/nyregion/toppled-statue-of-king-george-iii-to-ride-again.html>; Johannes Adam Simon Oertel, *Pulling Down the Statue Of King George III* (1836), N.Y. HISTORICAL SOC'Y, <http://www.nyhistory.org/exhibit/pulling-down-statue-king-george-iii-new-york-city> (last visited Nov. 2, 2017) (discussing the importance of this act in the artistic imaginary).

⁵¹ Hartmond, *supra* note 40, at 11 (quoting photographer Donald Weber).

plain removal without a serious attempt at a conversation about national memory would just allow for the rise of other (similar or different) radical ideologies. That is a lesson to be considered, and one that speaks against an extreme approach to Confederate Monuments.

But what can international law say or do with respect to the Confederate Monuments? It would seem at first that the areas of international law that have something to say about the Confederate Monuments are not applicable, given their rise only in the second half of the twentieth century and these treaties' non-retroactivity. However, as we have seen, a large number of these monuments were built in the post-UN era. Further, and most importantly, the effects of these monuments are experienced today, so it is perfectly fine to consider today's global morality (as reflected by international law).⁵² Further, the United States is committed to a number of international instruments that, even if not considered self-executing or directly applicable, at least should inform interpretations of the applicable domestic law.⁵³

As indicated in the introduction, international law offers an analytical space that allows us to confront the arguments stripped of some of their emotional charge. International law offers a different set of perspectives and tools that can be brought to bear on trying to untangle the current discourse in the US that seems to be at a stalemate. Further, as international law has come some way in denouncing the (neo)colonial structures and practices of the nineteenth and early twentieth century, there are certainly lessons to be learned from these (admittedly incomplete) efforts.⁵⁴

Therefore, in the next three sections, I will frame and reframe the issue of Confederate Monuments from the perspective of different specialized fields of international law. Each one of these framing exercises will prioritize certain values over others, but, ultimately, the values of international law as a whole suggest that action is needed to alter the status quo with respect to Confederate Monuments still adorning public squares and buildings around the US.

⁵² For the connection between international law and global morality, see A.E. BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2007).

⁵³ Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 706–07 (1995); see also *Murray v. The Charming Betsey*, 6 U.S. 2, 64 (1804).

⁵⁴ Anthony Anghie, *Imperialism and International Legal Theory*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 156 (Anne Orford & Florian Hoffmann eds., 2016) (arguing that efforts to uncouple international law from its imperial baggage, while valid and ongoing, have so far not been entirely successful).

II. CONFEDERATE MONUMENTS AS AN INTERNATIONAL CULTURAL HERITAGE LAW ISSUE

The body of international cultural heritage law is made up primarily of the treaties under UNESCO, which divide the way heritage is treated according to different types, or, to use UNESCO terminology, domains. These are: cultural heritage in wartime;⁵⁵ cultural objects (which include statues and monuments);⁵⁶ world heritage (which includes certain monuments and groups of monuments);⁵⁷ underwater cultural heritage (which with time may potentially include shipwrecks like the

⁵⁵ 1954 Hague Convention, *supra* note 13, at 14, 44.

⁵⁶ 1970 Convention, *supra* note 13.

Article 1

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:

....

(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;

....

(d) elements of artistic or historical monuments or archaeological sites which have been dismembered;

....

(g) property of artistic interest, such as:

....

(ii) original works of statuary art and sculpture in any material;

Id. art. 1.

⁵⁷ WHC, *supra* note 13.

Article 1.

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.

Id. art. 1.

USS Arizona);⁵⁸ and intangible cultural heritage (colloquially referred to as folklore, including social practices like dance, song, festivals, crafts, among others).⁵⁹

These categories, even though they are set out in international treaties, are often reflected in domestic law as well, inasmuch as domestic law implements international treaties in the area, and these treaties contain requirements that domestic processes mirror at least some of the international mechanisms.⁶⁰ The common language and set of mechanisms of the body of international heritage law, therefore, are useful in framing and understanding the Confederate Monuments controversy, since these monuments are often protected as heritage, and rhetoric around them often invokes their heritage value.⁶¹

To grapple with the effects of cultural heritage law on debates over Confederate Monuments, it is important to examine cultural heritage law's preservationist impulse, particularly in light of events broadly termed "heritage iconoclasm," which galvanize outrage against

⁵⁸ Records of the General Conference, *Convention of the Protection of the Underwater Cultural Heritage*, 2562 U.N.T.S. 3 (Nov. 2, 2001) [hereinafter UCHC] (U.S. is not a party).

⁵⁹ Convention for Safeguarding of the Intangible Cultural Heritage, 2368 U.N.T.S. 3 (Oct. 17, 2003) [hereinafter ICHC] (U.S. is not a party).

⁶⁰ See, e.g., WHC, *supra* note 13, art. 5.

Article 5

To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country:

- (1) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive planning programmes [sic];
- (2) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- (3) to develop scientific and technical studies and research and to work out such operating methods as will make the State capable of counteracting the dangers that threaten its cultural or natural heritage;
- (4) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- (5) to foster the establishment or development of national or regional centres [sic] for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

Id.

⁶¹ See *supra* Introduction.

the destruction of heritage. After the discussion of these international debates, I will transplant the discussion to the specific domestic context of Confederate Monuments.

A. THE PRESERVATIONIST IMPULSE OF CULTURAL HERITAGE LAW

International cultural heritage law, and cultural heritage law more generally, are built on the premise that the preservation of cultural heritage is a worthwhile objective. Therefore, calls for the removal or destruction of things designated as heritage tend to be met with scorn by a large number of heritage professionals. This general attitude is what I call, for our present purposes, the preservationist impulse.

The International Council of Monuments and Sites (ICOMOS) is a leading NGO in the area of heritage preservation, and it assembles heritage professionals committed to the preservation of heritage around the world. The key instrument adopted by ICOMOS is the Venice Charter, which, even though not a legal document per se, informs the actions of this organization and many heritage professionals around the world.⁶² The Venice Charter does not define its terms directly, but it implies that conservation is the maintenance of a monument on a permanent basis (Article 4), and that conservation implies preserving the monument's setting. The Venice Charter states that scientific methods are key to the way heritage is protected through conservation and restoration (Article 2). It makes some allowance for social uses of heritage (as it facilitates conservation), but only to the extent that the layout or decoration of the building are not in any way changed (Article 5). Heritage is therefore made into a frozen snapshot of the past, and changes are only allowed in rigidly set out circumstances. Heritage must be preserved if it is to exist for the future. Importantly, the Charter does not provide guidance in the selection of heritage, and rather defers to other external processes. It merely implies that, once selected, heritage must always be preserved.

The Venice Charter has been influential in UNESCO activity in the area, not only because ICOMOS became an important participant in the activities of the UNESCO culture sector for many heritage treaties, but also because its views on scientific approaches to heritage were

⁶² Int'l Council on Monuments & Sites, *International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter)*, May 31, 1964, https://www.icomos.org/charters/venice_e.pdf.

endorsed in the negotiation of multiple heritage treaties. In the history of UNESCO standard-setting, experts have traditionally been considered to be better placed to “evaluate the material conditions necessary to ensure that monuments shall be protected and respected.”⁶³ The Venice Charter has also been constantly hailed as “a basic document of great importance,”⁶⁴ an importance reiterated by other participants who incorporated many of the Venice Charter precepts in other drafting history of the World Heritage Convention.⁶⁵

The scientificism of the preservationist impulse, particularly in the Venice Charter, is very much historically contingent, if not in its origins, then at least in its perpetuation. More specifically, the emphasis on scientific methods and expert rule is a product of a Cold War environment in which the engagement of local communities (or any sort of communities), an important part of UNESCO’s beginnings,⁶⁶ was seen as too political and paralyzed by the bipolarity of international relations. UNESCO’s early activities in the field of culture comprised of facilitating direct communications with and among artists and heritage managers, but that practice was eventually replaced by more concerted standard-setting.⁶⁷ Even if UNESCO was originally created to be the soul to the United Nations’ body,⁶⁸ the Cold War had a deep influence in UNESCO’s activities from a fairly early stage, not only in sidelining much of its activity,⁶⁹ but also in enshrining a certain way of thinking about its mandate as less political, which was necessary to set even small programs in motion.⁷⁰

⁶³ United Nations Educ., Sci. & Cultural Org. [UNESCO], *Meeting of Experts to Co-ordinate With a View to Their International Adoption, the Principles and Scientific, Technical and Legal Criteria Which Would Make It Possible to Establish an Effective System for the Protection of Monuments and Sites*, ¶ 14, U.N. Doc. No. SHC/CS/27/3 (Jan. 26, 1968) (prepared by G. De Angelis d’Ossat).

⁶⁴ *Id.* ¶ 20.

⁶⁵ UNESCO, *Meeting of Experts to co-ordinate with a view to their international adoption, the principles and scientific, technical and legal criteria which would make it possible to establish an effective system for the protection of monuments and sites: Scientific and technical rules for protection operations*, ¶ 23, U.N. Doc. No. SHC/CS/27/3 (Jan. 26, 1968) (prepared by J Zachwatowicz).

⁶⁶ WALTER H.C. LAVES & CHARLES A. THOMSON, UNESCO: PURPOSE, PROGRESS, PROSPECTS 17 (1957).

⁶⁷ *Id.* at 106–33.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 310–11.

⁷⁰ CHRISTOPHER E.M. PEARSON, DESIGNING UNESCO: ART, ARCHITECTURE AND INTERNATIONAL POLITICS AT MID-CENTURY 52–56 (2010). For an alternative, and more optimistic, version of the

This preservationist impulse therefore forces one to think about heritage in a way that privileges scientific ways of engaging with or displaying heritage. It means preservation of heritage in its original form⁷¹ and assumes that heritage is a product of the past that needs to be kept in that position—for the appreciation of present and future generations—lest a sense of loss be experienced.⁷² It ultimately defines heritage and selects it as “showcased history,” alienating communities by failing to acknowledge “contiguous histories that are under interpreted.”⁷³ Also important for our purposes, scientific heritage ends up assuming its own neutrality, and decontextualizes heritage from political messages tied to certain symbols. However, as the Confederate Monuments controversy and other examples throughout this article show, heritage is in many instances highly political, and the purported neutrality of the preservationist impulse only has the effect of reinforcing status quo politics, even if they mean oppression of whole classes of people.

In doing so, this preservationist impulse defines heritage along similar lines as the Authorized Heritage Discourse (AHD), expressed by Laurajane Smith as the idea that:

[T]here is . . . a hegemonic discourse about heritage, which acts to constitute the way we think, talk and write about heritage. The ‘heritage’ discourse . . . naturalizes the practice of rounding up the usual suspects to conserve and ‘pass on’ to future generations, and in so doing . . . validates a set of practices and performances, which populates both popular and expert constructions of ‘heritage’ and undermines alternative and subaltern ideas about ‘heritage.’⁷⁴

The AHD assumes the prevalence of expert opinion, which, coupled with the “breathless bureaucratic machinery” of some bodies under UNESCO overseeing international heritage regimes,⁷⁵ leads to a reinforcement of preservation at the expense of community sentiment.

history of UNESCO with respect to heritage, see ROGER-POL DROIT, *HUMANITY IN THE MAKING: OVERVIEW OF THE INTELLECTUAL HISTORY OF UNESCO 1945–2005* 131–49 (2005).

⁷¹ Frank C. Fechner, *The Fundamental Aims of Cultural Property Law*, 7 INT’L J. CULTURAL PROP. 376, 382 (1998).

⁷² CHRISTOPH BRUMANN & DAVID BERLINER, *Introduction UNESCO World Heritage – Grounded?*, in *WORLD HERITAGE ON THE GROUND – ETHNOGRAPHIC PERSPECTIVES* 1, 17 (Christophe Brumann & David Berliner eds., 2016).

⁷³ Jonathan S. Bell, *The Politics of Preservation: Privileging One Heritage over Another*, 20 INT’L J. CULTURAL PROP. 431, 432 (2013).

⁷⁴ LAURAJANE SMITH, *USES OF HERITAGE* 11 (2006).

⁷⁵ BRUMANN & BERLINER, *supra* note 72, at 1.

Since the bulk of Confederate Monuments receives some sort of legal protection as cultural heritage, it is important to understand the key underlying principle behind more orthodox readings of cultural heritage law.⁷⁶ The question that underlies Confederate Monuments, and much of heritage law, is whether they can be legitimately destroyed or changed.

A growing body of literature among heritage scholars argues that heritage, in fact, can—and sometimes even should—be lost. David Lowenthal, for instance, has argued that we have become hoarders with respect to heritage.⁷⁷ The only means to counter this impulse and save us from being drowned and paralyzed by our own past is to allow at least some heritage to disappear. In doing so, important questions are posed as to how and whether to select heritage. Considering heritage has always been selected using processes that, even though ostensibly neutral, are in fact highly political, the only difference here is that we are more open about the politics of selection and are also willing to let heritage go after it has been designated as such (as opposed to letting cultural artifacts and sites disappear by simply not designating them as heritage).

In order to assist with these choices, traditionally international heritage law⁷⁸ (and domestic heritage law of most countries, too, including the United States)⁷⁹ has often relied on expert rule. In some places, however, increasingly communities are involved in decision-making about their heritage, in recognition of the fact that heritage is only important inasmuch as it plays a role in society.⁸⁰ Therefore, the views of communities living in, with, or around heritage are increasingly important in these decisions.

A challenge is to determine who the community is with respect to Confederate Monuments. The community at large, considering the Reuters poll discussed above, is favorable to keeping the monuments in place. Are there values that would trump over simple democratic

⁷⁶ For a discussion of orthodox and heterodox approaches to heritage conservation, with an emphasis on the US regulatory context, see Jeremy C. Wells & Lucas Lixinski, *Heritage values and legal rules: Identification and treatment of the historic environment via an adaptive regulatory framework (part 1)*, 6 J. CULTURAL HERITAGE MGMT. & SUSTAINABLE DEV. 345 (2016) [hereinafter *Part 1*]; Jeremy C. Wells & Lucas Lixinski, *Heritage values and legal rules: Identification and treatment of the historic environment via an adaptive regulatory framework (part 2)*, 7 J. CULTURAL HERITAGE MGMT. & SUSTAINABLE DEV. 345 (2017) [hereinafter *Part 2*].

⁷⁷ David Lowenthal, *Why Sanctions Seldom Work: Reflections on Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 393, 396–97 (2005).

⁷⁸ Lucas Lixinski, *International Cultural Heritage Regimes, International Law and the Politics of Expertise*, 20 INT'L J. CULTURAL PROP. 407 (2013).

⁷⁹ See *Part 1*, *supra* note 76; *Part 2*, *supra* note 76.

⁸⁰ See *Part 1*, *supra* note 76; *Part 2*, *supra* note 76.

majoritarian assessments? That is a question to be further explored in the discussion on IHRL below.

Now, it is important to examine in some more detail some of the arguments made in defense of Confederate Monuments. These arguments rely on the language of iconoclasm as a means to strengthen protections around these monuments even further.

B. HERITAGE ICONOCLASM AS A FRAME

The idea of heritage iconoclasm is not novel. It evokes the idea of the destruction of religious symbols as part of the Crusades and other “holy wars” as a means of purifying the conquered land and reestablishing the “true” ideology. It is therefore in its origins associated with the idea of a purge. Over time, however, iconoclasm has come to gain negative connotations and is associated with the destruction of icons in the pursuance of radical or fundamentalist political ideology, often connected to religious beliefs.⁸¹

The idea of iconoclasm has been tied to the destruction of sacred indigenous heritage,⁸² and, more recently, invoked in relation to the Buddhas of Bamiyan (destroyed by the Taliban regime in Afghanistan in 2001)⁸³ and the actions of the Islamic State in the Middle East.⁸⁴ The connection to iconoclasm in the field of heritage, particularly with respect to the Buddhas of Bamiyan and Islamic State actions, emphasizes the idea of destruction as an act of terror, meant to shock and to supplant an entire culture that is under threat from external evil forces. In this respect, and also because of its connection to religious fundamentalism, it is a powerful rhetoric, because it gives additional strength to the preservationist impulse by adding a veneer of sacredness to the heritage under attack. The most significant result is that it precludes the possibility of a discussion about whether heritage could be modified or taken down, by turning it into an absolute good.

⁸¹ José Antonio González Zarandona, *Towards a Theory of Landscape Iconoclasm*, 25 CAMBRIDGE ARCHAEOLOGICAL J. 461, 464–67 (2015).

⁸² *Id.*

⁸³ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT’L LAW 619, 619 (2003); Roger O’Keefe, *World Cultural Heritage Obligations to the International Community as a Whole?*, 53 INT’L & COMP. L.Q. 189, 196–98 (2004).

⁸⁴ Benjamin Isakhan & José Antonio González Zarandona, *Layers of religious and political iconoclasm under the Islamic State: symbolic sectarianism and pre-monotheistic iconoclasm*, 24 INT’L J. HERITAGE STUD. 1 (2018).

In connection with the Confederate Monuments, the story of Judge Jim Hinkle from Gwinnett County, Georgia, is illustrative. In social media, this judge likened those favoring removal of Confederate Monuments to ISIS, decrying their attacks on heritage and history.⁸⁵ Judge Hinkle was suspended⁸⁶ and subsequently resigned⁸⁷ because of these posts, which were deemed as incompatible with the expected impartiality of his public office. But the use of this kind of rhetoric needs to be addressed, particularly its effect in stifling the possible debates around Confederate Monuments and radicalizing them in unproductive ways.

C. INTERNATIONAL HERITAGE LAW AND LOCAL MONUMENTS

Whether the rhetoric is likened to iconoclasm or simply to the view of monuments as heritage, it is important to underscore that the heritage values of Confederate Monuments are often invoked in their defense. Even though none of these Confederate Monuments have, to the best of my knowledge, been listed as internationally protected heritage, their protection under domestic law still triggers international principles given the fact that UNESCO treaties, as suggested above, create a uniform language that necessarily shapes domestic responses.

A key concept is the preservationist impulse, which tells us that heritage must be preserved in all contexts. However, as also indicated above, this notion has come under attack, not only for practical reasons (the argument against humanity as collective hoarders), but also morally (in that the emphasis on preservation disallows subaltern narratives around heritage, which may in fact call for its destruction). These ideas need to be translated locally, and the opening to subaltern narratives around heritage in particular undermines the default response against more inclusivity, which is based on majoritarian democratic principles.

Therefore, what international law does is offer the key to framing these monuments as cultural artifacts that shape local identity. In

⁸⁵ Tyler Estep, *Gwinnett judge suspended after posts about Confederate monuments*, ATLANTA JOURNAL-CONSTITUTION (Aug. 15, 2017), <http://www.ajc.com/news/local-govt—politics/gwinnett-judge-suspended-after-posts-about-confederate-monuments/0BhU3WXwawztlLcn95ipqJ/>.

⁸⁶ *Id.*

⁸⁷ Tyler Estep, *Gwinnett judge resigns after controversial Confederate monument posts*, ATLANTA JOURNAL-CONSTITUTION (Aug. 16, 2017), <http://www.ajc.com/news/local-govt—politics/gwinnett-judge-resigns-after-controversial-confederate-monument-posts/eO1o7wMa0zUNoa7IGz4YZK/>.

effect, the definition in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970 Convention) explicitly talks of the importance of certain heritage as the national heritage of a country. There is an inextricable link between cultural heritage and national political and cultural identity, which international law recognizes and reinforces.⁸⁸ Likewise, the World Heritage Convention, in defining the criteria for protection, includes the possibility of national narratives. Even though the “outstanding universal value” required for inscription on the World Heritage List is meant to transcend national boundaries,⁸⁹ it makes some allowance for national values, too.⁹⁰ Otherwise, Independence Hall would

⁸⁸ 1970 Convention, *supra* note 13, art. 4.

Article 4

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

Id.

⁸⁹ UNESCO, World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, ¶ 49, UNESCO Doc. No. WHC.16/01 (Oct. 26, 2016).

Outstanding Universal Value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole.

Id.

⁹⁰ *Id.* ¶ 77.

The Committee considers a property as having Outstanding Universal Value . . . if the property meets one or more of the following criteria. Nominated properties shall therefore:

- (i) represent a masterpiece of human creative genius;
-
- (iii) bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
-

not be on the World Heritage List.⁹¹ Notwithstanding this argument, no Confederate Monuments are on the World Heritage List, so the important lesson here is the trickle-down effect of this way of framing heritage and its importance, which is then reflected in domestic law and protective mechanisms as well.

Exploring the possibility of international recognition of these monuments helps address the question of who the community around the Confederate Monuments heritage is. It suggests, importantly, that the community is not only those who seek to protect heritage (even though that is what a traditional rendering of the preservationist impulse would suggest), but also those who are affected by it.⁹² Further, the context of the erection of these monuments as responses to the rise in racial politics should be understood as influencing the values this heritage seeks to project, and undermines any claims to its historical neutrality. Further, as the American Historical Association said itself, to remove a monument

(vi) 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);

Id.

⁹¹ *World Heritage List Entry - Independence Hall*, UNESCO WORLD HERITAGE CENTRE, <http://whc.unesco.org/en/list/78> (last visited Nov. 3, 2017). Note that the description of outstanding universal value of the site indicates its value is based on the following:

The Declaration of Independence was adopted and the Constitution of the United States of America framed in this fine early 18th-century building in Philadelphia. These events, which took place respectively in 1776 and 1787, were conceived in a national context, but the universal principles of freedom and democracy set forth in these two documents have had a profound impact on lawmakers and political thinkers around the world. They became the models for similar charters of other nations, and may be considered to have heralded the modern era of government.

. . . .

Criterion (vi): The universal principles of the right to revolution and self-government, as expressed in the United States of America's Declaration of Independence (1776) and Constitution (1787), which were debated, adopted, and signed in Independence Hall, have profoundly influenced lawmakers and politicians around the world. The fundamental concepts, format, and even substantive elements of the two documents have influenced governmental charters in many nations and even the United Nations Charter.

Id.

⁹² See Mike Crang & Divya P. Tolia-Kelly, *Nation, Race, and Affect: Senses and Sensibilities at National Heritage Sites*, 42 ENV'T & PLAN. 2315, 2317 (2010) (arguing for the need to better consider affect in the evaluation and safeguarding of heritage sites, particularly the felt experience and the organization of sensibilities towards heritage which have racialized modalities).

“is not to erase history, but rather to alter or call attention to a previous interpretation of history.”⁹³

A community-centric take on heritage law in this context therefore means considering the impact of heritage in particularly affected segments of the population. The impulse for preservation should therefore be responsive to those segments of the population and support action that alters the status quo of Confederate Monuments. But international heritage law alone—because of its biases and focus on the built fabric alone, as discussed above—does not provide the answers as to how to consider these issues of effect on and protection of minority groups.

Therefore, it is important to articulate the implications of the proposition that international heritage law does not operate in a vacuum. Rather, it intersects and informs other legal responses by giving other regimes the “cultural clout” they need to grapple with renderings of history through heritage markers. It is, therefore, crucial to consider the range of possible responses to Confederate Monuments not only in light of cultural heritage law, but also with respect to other fields. A particularly important one is IHRL, since many of the arguments around Confederate Monuments have been articulated in the language of human rights. The next section undertakes this challenge.

III. CONFEDERATE MONUMENTS AS AN INTERNATIONAL HUMAN RIGHTS LAW ISSUE

The language of human rights is useful in this respect inasmuch as it is a body of international rules that contains minimum agreed standards of behavior of one State towards people under its control. The US is a party to a number of relevant instruments, and, as such, has committed itself to upholding those standards domestically and abroad. More relevant for the present purposes, the United States is a party to the International Covenant on Civil and Political Rights (ICCPR)⁹⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁹⁵ The United States is also a signatory to the

⁹³ AHA, *supra* note 26.

⁹⁴ See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, SEN. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [hereinafter ICCPR] (of which the United States has been a party since June 8, 1992).

⁹⁵ See generally International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Mar. 7, 1966, SEN. TREATY DOC. NO. 95-18, 660 U.N.T.S. 195 (entered

International Covenant on Economic, Social and Cultural Rights,⁹⁶ and, even though it has not ratified it, it is bound under customary international law to not defeat its object and purpose.⁹⁷

These three treaties, taken together, add significant texture to the ways in which Confederate Monuments can be discussed. But, before turning to their specific provisions, it is important to briefly consider the broader connections between cultural heritage and human rights, since they are central to understanding the influence of human rights in decision-making about cultural heritage.

A. THE CONNECTIONS BETWEEN CULTURAL HERITAGE LAW AND HUMAN RIGHTS LAW

The UNESCO Constitution outlines that one of its purposes is to use culture to further the protection of human rights and fundamental freedoms, particularly without distinction as to race.⁹⁸ As such, the entire action of UNESCO in the field of culture and cultural heritage, and its echoes in domestic law, must be read as advancing human rights. This is

into force 4 Jan. 1969) [hereinafter CERD] (of which the United States has been a party since Oct. 21, 1994).

⁹⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16 1966, SEN. TREATY DOC. NO. 95-19, 993 U.N.T.S. 3 (entered into force 3 Jan. 1976) [hereinafter ICESCR]. The United States signed it on October 5, 1977.

⁹⁷ Vienna Convention on the Law of Treaties, May 23, 1969, SEN. TREATY DOC. NO. 92-1, 1155 U.N.T.S. 331, 336 (entered into force 27 Jan. 1980) [hereinafter VCLT]. The relevant customary rule is codified in the Vienna Convention on the Law of Treaties, Article 18:

Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry into force.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty;

Id. art. 18.

⁹⁸ Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 STAT. 2495, art. 1, 4 U.N.T.S. 275 (entered into force 4 Nov. 1946) [hereinafter UNESCO Constitution].

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.

Id. art 1(1).

the key provision that articulates a connection between cultural heritage and human rights in the context of international action in the area.

This connection has been pursued further in other contexts, too, such as the right of access to and participation in cultural life, discussed below.⁹⁹ For our purposes, suffice to say that this provision establishes a relationship between the two bodies of law that must be cooperative. In other words, heritage advances human rights, and human rights create the conditions for the preservation of cultural heritage. A classic example of heritage advancing human rights has to do with the right to cultural life, but it can also be seen in the grounding of the rights of indigenous peoples on their culture and cultural heritage.¹⁰⁰ Similarly, human rights advance heritage by, for instance, promoting mechanisms for the participation of communities in heritage governance.¹⁰¹

In practice, however, there are numerous instances in which heritage conservation operates as an obstacle to the exercise of human rights, or the exercise of human rights impinges upon heritage preservation. As to the former, an example is the rhetoric of heritage conservation being used to prevent the access to affordable housing.¹⁰² And an example of the latter is that of religious communities who seek to alter or even replace church buildings when they no longer meet the needs of the religious community.¹⁰³ The exercise of their religious freedom, they claim, should trump the interest in preserving the built fabric of a religious building.

The latter is the subject of a textbook case in US constitutional law, *Boerne v. Flores*.¹⁰⁴ In this case, ultimately the US Supreme Court decided that heritage protection, because it was a neutral value, overrode

⁹⁹ See *infra* Section III.B.3.

¹⁰⁰ Even if that connection is not without its problems. See generally KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010). For a collection of essays on the different relationships between heritage and human rights law, see HERITAGE, CULTURE AND RIGHTS – CHALLENGING LEGAL DISCOURSES (Andrea Durbach & Lucas Lixinski eds., 2017).

¹⁰¹ William Logan, *Cultural diversity, cultural heritage and human rights: towards heritage management as human rights-based cultural practice*, 18 INT'L J. HERITAGE STUD. 231 (2012).

¹⁰² Amelia Thorpe, *Between rights in the city and the right to the city: Heritage, character and public participation in urban planning*, in HERITAGE, CULTURE AND RIGHTS – CHALLENGING LEGAL DISCOURSES 121 (Andrea Durbach & Lucas Lixinski eds., 2017).

¹⁰³ See Lucas Lixinski, *Religious Cultural Heritage: The Law and Politics of Conservation, Iconoclasm and Identity*, in HERITAGE AT THE INTERFACE: INTERPRETATION AND IDENTITY 121 (Glenn Hooper ed., 2018). See generally Logan, *supra* note 16, 1–13 (discussing a movement of taking places of pain and making them into memorials and museums).

¹⁰⁴ *City of Boerne v. Flores*, 521 U.S. 507, 511–13 (1997).

the request for the accommodation of religious groups.¹⁰⁵ We will come to this case later and engage with this reasoning in the context of Confederate Monuments. For now, suffice to say that the discourse of the preservationist impulse, which sees heritage as neutral, still pervades reasoning that connects heritage and the exercise of human rights, which affects the way Confederate Monuments can be evaluated through a human rights prism.

There are also instances in which cultural heritage and human rights clash with respect to racial discrimination. One instance is the listing as protected heritage, under Dutch domestic law, of the tradition of “Black Pete” (*Zwarte Piet*), a Christmas tradition which includes a “helper” of Santa Claus as a black-face or just black person, who was once historically Santa Claus’s African slave. Much of the controversy centers on the argument that “Black Pete is an invented tradition that marks a ‘white Dutch habitus’ in which the historical context of colonialism and the legacy of slavery is repeatedly ignored or denied.”¹⁰⁶ On January 15, 2015, the Dutch tradition “Sinterklaas festival and Black Pete” was placed on the National Inventory of Intangible Cultural Heritage (a requirement under the ICHC, to which the Netherlands is a party). In August of the same year, the United Nations Committee for the Elimination of all Forms of Racial Discrimination chastised The Netherlands on this festival and urged them to revisit the tradition.¹⁰⁷ Protesters against the tradition have been arrested, thus shedding light on the contrast between the right of the majoritarian population to uphold a cultural practice that some people, in the name of human rights, find abhorrent.¹⁰⁸

We will revisit these two examples, *Boerne v. Flores* and Black Pete, below, when discussing specific rights that could or have been invoked with respect to the Confederate Monuments. The first one of

¹⁰⁵ See generally Elizabeth C. Williamson, *City of Boerne v Flores and the Religious Freedom Restoration Act: The Delicate Balance between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVT. L. 107 (1997).

¹⁰⁶ Yvon van der Pijl & Karina Goulordava, *Black Pete*, “Smug Ignorance,” and the Value of the Black Body in Postcolonial Netherlands, 88 NEW W. INDIAN GUIDE 262, 262 (2014).

¹⁰⁷ Ishaan Tharoor, *U.N. to the Dutch: This blackface thing is a problem*, WASH. POST (Aug. 29, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/08/29/u-n-to-the-dutch-this-blackface-thing-is-a-problem/?utm_term=.5b5e5ccc71be.

¹⁰⁸ *Meet ‘Black Pete’, the Dutch Christmas tradition that’s under fire for being racist blackface: About 100 protesters were arrested today*, THEJOURNAL.IE (Nov. 12, 2016), <http://www.thejournal.ie/black-pete-netherlands-3078810-Nov2016/>.

these rights, and of paramount importance in the US context, is freedom of expression or speech.

B. SPECIFIC RIGHTS

1. *Freedom of Expression or Speech*

Freedom of expression or speech is one of the key human rights, protected in all general human rights instruments. For our present purposes, we will consider the language as framed in the ICCPR, the key treaty applicable to the US that protects this right.

One notable caveat is that there is a marked difference in the way freedom of expression is protected in the US and in international human rights law. More specifically, freedom of speech in the US is more strongly protected than freedom of expression in IHRL, which is seen as being more amenable to balancing against the rights of others.¹⁰⁹ That reflects in the fact that hate speech is less protected under IHRL than in the US.¹¹⁰

But, before even getting to that, one must consider the expression at stake and the ways in which the right protecting it is triggered. The language of the ICCPR includes artistic expression as a form of valid expression, so there are no obstacles with respect to the content of speech in Confederate Monuments.¹¹¹ The problem, rather, lies in who is uttering the expression. To the extent that Confederate Monuments are part of public buildings, it seems that they would be expressions of the State, and, as such, not protected under the law on freedom of expression, which gives rights only to individual persons

¹⁰⁹ Sionaidh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 307–12 (1999).

¹¹⁰ Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World*, 53 ME. L. REV. 487, 493–97 (2001).

¹¹¹ ICCPR, *supra* note 94, art. 19.

Article 19.

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, *in the form of art*, or through any other media of his choice.

Id. (emphasis added).

under the jurisdiction of the State and not the State itself.¹¹² So, it would seem that the expression at stake here is not the monuments themselves, but rather expressions associated with them by protesters and counter-protesters. In this way, the category of heritage, inasmuch as it is made official by State processes, excludes itself from the protection of IHRL.

Arguendo, if freedom of expression protections applied to Confederate Monuments per se, IHRL would pose additional obstacles to their full protection. First and foremost, there is the basic proportionality test, which determines that expression can be restricted (in this case, monuments taken down) in pursuance of public objectives like public order (like in Maryland, where monuments were removed under cover of night to preempt manifestations), or the rights of others (like those who see themselves as being diminished on account of their race by the messages sent by these monuments).¹¹³ Even if the US has said through a declaration deposited when it ratified the ICCPR that it would seek to not restrict this right “whenever possible,” restrictions are still permissible.¹¹⁴

¹¹² *Id.* art. 2 (“Article 2. 1. Each State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant”) (emphasis added).

¹¹³ *Id.* art. 19.

Article 19.

. . . .

3. The exercise of the rights . . . carries with it special duties and responsibilities. It may therefore be *subject to certain restrictions*, but these shall only be such as are *provided by law and are necessary*:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Id. (emphasis added).

¹¹⁴ United States of America, Reservations and Declarations to the ICCPR (June 5, 1992), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec. The text of the reservation is as follows:

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognizes them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

Id. See also Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT’L HUM. RTS. 36, 44 (2005).

Second, there is also the prohibition on hate speech in the ICCPR.¹¹⁵ The treaty is very clear in that expression that incites hate is not permissible. To harmonize its position on the higher level of protection to speech, the US has made a reservation to the ICCPR with respect to this specific provision.¹¹⁶

It would seem, therefore, that even if the ICCPR applied to Confederate Monuments, the US position with respect to it would support keeping the statues, in contravention of practice elsewhere that criminalizes hate speech. It remains to be seen whether other human rights would provide different answers.

2. *Minority Protection*

Another provision from the ICCPR that could potentially be used in this context is the one protecting the rights of persons belonging to minorities.¹¹⁷ The provision has more often than not been used for specific linguistic minorities¹¹⁸ or indigenous peoples,¹¹⁹ but it also applies to specific ethnic minorities.

One of the challenges associated with this provision is to clearly identify African-Americans in the US as an ethnic minority. That seems to be a relatively minor challenge, though, as there is widespread consensus at least on a rhetorical level that African-Americans constitute a minority.¹²⁰ The protection of minority rights in international law, particularly if articulated as speaking to historical wrongs in the

¹¹⁵ ICCPR, *supra* note 94, art. 20 (“Article 20. 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

¹¹⁶ United States of America, *supra* note 114 (The text of the reservation is as follows: “(1) That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.”); Ash, *supra* note 114, at 44 (analyzing the US reservation).

¹¹⁷ ICCPR, *supra* note 94, art. 27.

Article 27. In those States in which *ethnic, religious or linguistic minorities* exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to *enjoy their own culture*, to profess and practise [sic] their own religion, or to use their own language.

Id. (emphasis added).

¹¹⁸ Robert Dunbar, *Minority Language Rights in International Law*, 50 INT’L COMP. L.Q. 90, 99–100 (2001).

¹¹⁹ See ENGLE, *supra* note 100. See generally PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* (2002).

¹²⁰ See Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 152, 156 (1994).

international legal order itself (like the legacies of slavery),¹²¹ would clearly attribute minority status in international law to African-Americans in the US.

A bigger challenge is the proposition that the full exercise of cultural rights of African-Americans requires the removal of Confederate Monuments. Another challenge is the proposition that the full exercise of cultural rights requires that African-Americans themselves be allowed to remove these monuments. That seems to be a tall order, at least if one considers other international jurisprudence which determines that expressive practices (like the action of taking down a monument) can only be fully protected inasmuch as they are integral parts to the way of life for which one seeks protection.¹²² Further, even though Article 27 in all likelihood entails positive obligations from the State (which in this case would be the removal of monuments),¹²³ it is unclear whether these positive obligations could impinge on the rights of others in this way. At any rate, it is doubtful these obligations could be construed in this way, especially considering the test usually applied to Article 27.

The test for determining whether the rights under Article 27 have been violated is also a version of the proportionality test that exists for freedom of expression. In this case, it is likely that what would be at stake is the rights of others (the Confederate Monument-supporting population) to enjoy the monuments, or the prong of public policy and general welfare under which heritage law is usually placed, and a balancing test would be attached to the proportionality analysis. However, with respect to Article 27 international bodies have established that they should be particularly deferent to what States see as the best means to accommodate minorities' rights and have seldom declared violations of the rights protected in this provision of the ICCPR.¹²⁴ There is therefore an uphill battle to be pursued if Article 27 is to be invoked.

Therefore, even if the US has no reservations to Article 27 of the ICCPR specifically, and African-Americans constitute a minority for the purposes of IHRL, just the general degree of deference given to States in the implementation of this provision would be sufficient to render it unlikely to be helpful in resolving these controversies. Coupled with the

¹²¹ Patrick Macklem, *Minority rights in international law*, 6 INT'L J. CONST. L. 531, 532 (2008).

¹²² See *Arrowsmith v. United Kingdom*, 3 Eur. Ct. H.R. 218 (1978).

¹²³ Macklem, *supra* note 121, at 535–37.

¹²⁴ For a review of this case law, see LUCAS LIXINSKI, INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW 154–58 (2013).

general declaration of the US that it will whenever possible not restrain rights when the rights of others are at stake,¹²⁵ it is unlikely the US will see itself as bound, by virtue of its obligations under Article 27, to take action that benefits the African-American minority.

A parallel discussion is the possible argument that there are two possible minorities who could arguably benefit from these protections: White Southerners and African Americans. The idea that White Southerners constitute a minority is certainly not new,¹²⁶ and it has regained traction in US (conservative) political circles in recent years, a proposition even backed by demographic projections.¹²⁷ In this respect, if White Southerners can establish themselves as a minority (and the prevailing narrative in US White Southern circles portrays a history of oppression of the South in the aftermath of the Civil War), arguably Article 27 of the ICCPR could also apply to this group. But, like with respect to the application of this provision to African-Americans, the exegesis of Article 27 does not shed much light on the matter.

3. *Right to Cultural Life*

A right that is closely intertwined with minority protection, to the extent that much of the discourse around minority rights is grounded on culture, is that of the right to participate in cultural life, protected in Article 15 of the ICESCR.¹²⁸ As indicated above, the US is not a party to the treaty, but considering it has signed it, it is at least bound in good faith to consider its object and purpose, which, as the title of the treaty suggests, includes the advancement of cultural rights.

¹²⁵ United States of America, *supra* note 114 (in relation to article 19).

¹²⁶ LEWIS M. KILLIAN, *WHITE SOUTHERNERS* 1, 4–5 (1970).

¹²⁷ Katie Reilly, *America Keeps Getting Less White and Less Christian*, *TIME* (Sept. 6, 2017), <http://time.com/4928811/white-christian-minority-united-states-survey/>.

¹²⁸ ICESCR, *supra* note 96, art. 15.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

....

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

Id.

This right, as interpreted by the Committee on Economic, Social and Cultural Rights that was created to be the key authority in providing guidance on the content of obligations under this instrument,¹²⁹ includes several rights related specifically to cultural heritage.¹³⁰ This right creates the State obligation to ensure the right of access to heritage¹³¹ as well as the obligation to “[r]espect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups.”¹³² This obligation, of course, depends on the difficult articulation, discussed above, that the removal of monuments is part of the cultural rights of marginalized groups.

Further obligations include the obligation to promote heritage through education and awareness-raising¹³³ and the obligation to fulfill the right via programs for the preservation and restoration of heritage.¹³⁴ With respect to the obligation to fulfill in particular, it assumes that the enhancement of cultural diversity is a worthwhile objective in all instances. It seems, thus, that more heritage means more diversity, whereas the destruction of heritage impoverishes diversity, and with it, humanity.

In other words, the right to participate in cultural life seems premised on the idea that the existence of heritage is a good thing, and that human rights harm that accrues in relation to cultural heritage is related to its destruction, not its continuing existence. Therefore, the right to cultural life seems to favor an interpretation that focuses on the right to cultural life of those seeking to maintain Confederate Monuments, rather than the cultural life of minorities (in spite of extensive use of language on minorities throughout the Committee’s General Comment).¹³⁵

A competing narrative to this interpretation, which is less supported in the General Comment and other literature, is two-pronged. First, it relies on the fact that the General Comment frames the interests

¹²⁹ Economic and Social Council Res. 1985/17, U.N. Doc. E/1984/WG.1/SR.5, ¶¶ (a), (d), (f) (May 28, 1985) (creating the Committee to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the ICESCR).

¹³⁰ Comm. on Econ., Soc. & Cultural Rights, General comment No. 21: Right of everyone to take part in cultural life, ¶ 49(d) *passim*, UN DOC. E/C.12/GC/21 (Dec. 21, 2009).

¹³¹ *Id.* ¶ 49.

¹³² *Id.* ¶ 50(b).

¹³³ *Id.* ¶ 53.

¹³⁴ *Id.* ¶ 54.

¹³⁵ *Id.* ¶ 49 (which borders on framing the right of access to cultural heritage as belonging primarily with minorities and Indigenous peoples).

of cultural minorities as one of its primary concerns. Second, it reconnects culture and cultural heritage with the idea of promoting lasting peace, which is one of the key objectives of UNESCO in all areas, particularly with respect to heritage. As enshrined in the UNESCO Constitution, heritage is a conduit for mutual understanding among peoples and lasting peace, an idea which had earlier historical antecedents.¹³⁶

Therefore, it is only a more progressive interpretation of the connection between heritage and the right to cultural life (and the idea of cultural rights more broadly) which would support the removal of Confederate Monuments. This interpretation may well be more in line with the US's broader obligations with respect to the ICCPR, which are simply with respect to its broader object and purpose, but considering other US obligations and attitudes towards applicable IHRL provisions, it is unlikely the treaty will be interpreted in this manner.

4. Freedom from Racial Discrimination

Yet another way of thinking about Confederate Monuments in relation to IHRL is within the framework of CERD. This treaty has a specific provision, Article 4, requiring States to declare a punishable offense the "dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination," among a series of other measures.¹³⁷

¹³⁶ CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 11–13 (2010).

¹³⁷ CERD, *supra* note 95, art. 4.

Article 4.

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour [sic] or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour [sic] or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

(b) *Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*

Importantly, Article 4 also applies directly to State authorities and tells the State it must not allow public entities “to promote or incite racial discrimination.”¹³⁸

This treaty seems to offer the strongest and most directly relevant language in relation to Confederate Monuments. For one, it applies directly to public institutions, which would include the speech of these institutions (a problem with the application of ICCPR Article 19). Further, it orders the criminalization of conduct that incites hate or discrimination.

Challenges to the application of this provision are twofold. First, there is the question as to whether the monuments themselves incite hate and discrimination. Considering the history of the monuments and recent events, discussed above,¹³⁹ there is a case to be made that, at least in their effects, the monuments can incite hate and discrimination. Further, it is well established that racist hate speech includes non-verbal forms of expression.¹⁴⁰ Therefore, the CERD would seem to provide clearer guidance determining the removal of Confederate Monuments.

Second, and most problematic, is the reservation the US has made when it ratified the CERD.¹⁴¹ Under the terms of this reservation, the US refuses to implement any laws in pursuance of Article 4 CERD that would impinge upon freedom of expression.¹⁴² The Committee, in a general recommendation titled “combating racist hate speech,”

(c) *Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.*

Id. (emphasis added).

¹³⁸ *Id.*

¹³⁹ See *supra* Section I.

¹⁴⁰ Comm. on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 35: Combatting racist hate speech, ¶ 7, U.N. Doc. CERD/C/GC/35 (Sep. 26, 2013).

¹⁴¹ The relevant text is:

I. The Senate’s advice and consent is subject to the following reservations: (1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

2. *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en.

¹⁴² *Id.*

specifically recommended that reservations be withdrawn, or, when kept, that the state justify their necessity.¹⁴³

However, as discussed above,¹⁴⁴ the Confederate Monuments cannot qualify for the protection of freedom of expression (at least not those that are public monuments), since they are State speech which falls outside the purview of this right. It may be possible to suggest that the right to freedom of expression includes the right to receive information,¹⁴⁵ and that is related to the argument that the Confederate Monuments are part of history. This argument would mean that having fuller knowledge of history is part of the right to receive information, which is a corollary of the right to freedom of expression. So, in the name of the free exchange of information, these monuments should stay. That position may be harder to argue in light of the CERD's much clearer language in this respect. However, US courts have determined the applicability of the first amendment to the US Constitution to the right to receive information, meaning that governments in the US may see this right as falling within the federal government's reservation to the CERD.¹⁴⁶

C. SUMMARY: INTERNATIONAL HUMAN RIGHTS AS PRO-MONUMENTS

Therefore, out of all existing IHRL obligations that could apply to the Confederate Monuments controversy, it seems that only the prohibition on the incitement of racial discrimination offers any real support for the proposition that the monuments should be removed (even if a relatively weak one, given strong US reservations on the grounds of freedom of expression). Other provisions are either not applicable (like

¹⁴³ General Recommendation No. 35, *supra* note 140, ¶ 23. The relevant language is:

As part of its standard practice, the Committee recommends that States parties which have made reservations to the Convention withdraw them. In cases where a reservation affecting Convention provisions on racist speech is maintained, States parties are invited to provide information as to why such a reservation is considered necessary, the nature and scope of the reservation, its precise effects in terms of national law and policy, and any plans to limit or withdraw the reservation within a specified time frame.

Id.

¹⁴⁴ *See supra* Section III.B.1.

¹⁴⁵ Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789–90 (2005).

¹⁴⁶ *Id.*

freedom of expression under the ICCPR), give too much discretion to the State (Article 27 ICCPR), or outright seem to support the existence of more heritage and go against the suggestion that it may be removed (ICESCR).

One possible way of addressing this impasse within IHRL is to refer back to the content of freedom of expression or speech, and the adequacy of these protections in relation to hateful or discriminatory expression. While the US has a clear reservation to the relevant treaties in order to establish and safeguard its view of the supremacy of freedom of speech over other human rights, there is an argument to be made that these reservations may be invalid, inasmuch as, by privileging one specific right, the US is in fact preventing the full implementation of other rights, which would run counter to the object and purpose of human rights treaties.

It is a well-established rule of international law that reservations may not defeat the object and purpose of a treaty.¹⁴⁷ The Human Rights Committee, in charge of overseeing the implementation of the ICCPR, has also said that, if a reservation is found by the Human Rights Committee to be incompatible with the object and purpose of the ICCPR, it will be severable, meaning the treaty will apply to the relevant State without the benefit of the reservation.¹⁴⁸ It does not seem, however, that the US speech reservation has been considered incompatible in the Committee's reports.

To be sure, all of these provisions discussed are non-self-executing, meaning they cannot create direct rights or obligations, and require specific implementing legislation. A full examination of the existing—or lacking—implementing legislation (not to mention the federalism dynamics with respect to international treaties, since heritage protection is a state or local legislative affair) is beyond the scope of this article. However, I reiterate that one of the main purposes of the use of IHRL in this context is to evoke and gauge international morality on the matter, as a testing ground for ideas that are deemed too sensitive in a

¹⁴⁷ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28); see also Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 EUR. J. INT'L L. 1061, 1065 (2013).

¹⁴⁸ Human Rights Comm., General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

purely domestic or local setting. The references to US reservations to the relevant treaties help shed light on the limits of IHRL ideas in the US legal and political spheres.

But overall, it seems that IHRL would not necessarily support a change in the status quo with respect to Confederate Monuments, either deferring in practice to the preservationist impulse (ICESCR), or simply preempting the discussion on hate or racist speech through reservations (ICCPR and CERD). The fact that heritage is assumed to be neutral may play in favor of keeping the monuments as a heritage issue, but IHRL's push against hate speech could prevail were it not for the US's staunch defense of freedom of expression.

With respect to the two examples discussed in the previous section regarding the interface between cultural heritage and human rights (*Boerne v. Flores* and the Black Pete tradition), and in light of the analysis of applicable IHRL provisions, these examples could also be read as supporting a pro-heritage stance. Black Pete seems to support the idea that the listing of racist heritage is possible, inasmuch as it showcases and enhances cultural diversity instead of diminishing it. ICHL's ostensible legal neutrality prevails, even if at the expense of the sentiments of historically persecuted minorities.

In adding texture to IHRL, heritage law in *Boerne v. Flores* can be read in one of two ways: (1) conservatively, meaning that preservation is a (neutral) public policy objective or public good, and that minority wishes to take down, change, or relocate monuments may well go against this public good; or (2) the rights of an interest group associated with the heritage (here, the pro-monuments camp) must give way to decisions or interests of society at large, and that includes the interest in protecting minorities. This latter interpretation is valid particularly considering the status of African-Americans as a minority, and that one of the purposes of their protection as such is to atone for structural and historical injustice.

Amends for historical injustice, however, are somewhat foreign to much of IHRL, and fully foreign to orthodox readings of ICHL. It is only through bringing another specialized regime of international law to the table that we can fully comprehend the scope and possibilities of this mandate to redress historical injustice to the Confederate Monuments controversy.

IV. CONFEDERATE MONUMENTS AS A TRANSITIONAL JUSTICE ISSUE

Transitional justice (TJ) is broadly defined as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹⁴⁹ It is, in other words, the set of legal, political, and social measures aimed at helping a society overcome a past of oppression or conflict and (re)establish the rule of law. It has been influential in addressing the past across the world, ranging from the redemocratization process in Latin America after the end of military dictatorships there in the 1980s and 1990s, to Eastern Europe after the fall of communism, and a range of African and Asian countries today.¹⁵⁰ It is not a body of international treaty law per se, but rather a way of reading applicable international law with respect to the specific circumstances of transitioning societies.

Given the examples above, it may seem odd to apply a TJ framework to a country like the United States, which has not experienced a recent past of conflict or dictatorship internally. In fact, scholarship that connects the US to TJ practices focuses exclusively on US involvement abroad.¹⁵¹ However, TJ has been used to address more distant pasts in other countries and contexts, particularly in the indigenous context,¹⁵² and can still be a useful framework.

Most importantly, TJ is useful for being a more pragmatic engagement with current law as a means of addressing harm done in the past that continues to be felt today. Among the key mechanisms of transitional justice are: accountability or justice; truth-seeking; reparations; and guarantees of non-repetition (GNR). Accountability presumes legal trials and lustrations and is thus more narrowly legal and

¹⁴⁹ Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

¹⁵⁰ For a mapping of trends around the world, see Tricia D. Olsen et al., *Transitional justice in the world, 1970-2007: Insights from a new dataset*, 47 J. PEACE RES. 803, 807–08 (2010).

¹⁵¹ ZACHARY D. KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 2–3 (2016) (noting US pragmatism in the area, which trumps over adherence to specific legal principles).

¹⁵² See, e.g., Jennifer Balint et al., *Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach*, 8 INT'L J. TRANSITIONAL JUST. 194, 195–96 (2014); Michelle Bonner & Matt James, *The Three R's of Seeking Transitional Justice: Reparation, Responsibility, and Reframing in Canada and Argentina*, 2 INT'L INDIGENOUS POL'Y J. 1, 2 (2011); Courtney Jung, *Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous Peoples in a Non-Transitional Society*, SSRN (Apr. 8, 2009), <https://ssrn.com/abstract=1374950>.

familiar, in fact being one of the preferred ways of framing TJ.¹⁵³ Truth-seeking includes efforts such as truth commissions and other fact-finding efforts, which can be done domestically or through international or mixed bodies.¹⁵⁴ Reparations can be a monetary or symbolic means to redress the harm suffered by victims (either individually or collectively).¹⁵⁵ And GNR are measures, usually institutional reform, aimed at preventing the conflict or dictatorial regime from happening again.¹⁵⁶ Out of these mechanisms, the only ones that seem unavailable when addressing more distant pasts are justice and accountability (for pragmatic reasons such as statutes of limitations, the death of direct perpetrators and victims, among others). But harm still felt can and has been addressed through the other available mechanisms, as discussed below.

Before discussing the way these mechanisms operate with respect to cultural heritage, it is necessary to briefly explore the relationship between human rights and transitional justice. Understanding this relationship allows us to understand the ways rights claims related to Confederate Monuments could be pursued in a TJ framework, as well as the limitations of a human rights focus on TJ.

A. TRANSITIONAL JUSTICE AND HUMAN RIGHTS

The fields of TJ and IHRL share numerous goals, particularly the issue of accountability as a means of remedying for past atrocities. Since IHRL provides a subject-matter affinity (as many of the wrongs of repressive regimes are human rights violations), as well as an available and willing institutional machinery (through regional courts in Europe¹⁵⁷

¹⁵³ For a critique, see Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1070 (2015).

¹⁵⁴ PRISCILLA B HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* (2d ed. 2010).

¹⁵⁵ David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043, 1043 (2010).

¹⁵⁶ Lisa J. Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 57 (2007).

¹⁵⁷ Eva Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5 INT'L J. TRANSITIONAL JUST. 282, 283 (2011).

and the Americas,¹⁵⁸ as well as international criminal tribunals elsewhere¹⁵⁹), it is natural that the two fields find support in each other.

That said, the two fields also sometimes stand in tension. IHRL seems to have a hard time accommodating the pragmatism of TJ: whereas IHRL requires that situations be framed in rights and wrongs, victims and perpetrators, yes-or-no questions, TJ accommodates (and even arguably requires) a much more pragmatic engagement.¹⁶⁰ This pragmatism of TJ has led to more expansive views on mechanisms of redress, even removing accountability from the table altogether. But the pull of IHRL persists and has led to a keen focus on anti-impunity,¹⁶¹ which in turn has increasingly helped shift IHRL towards criminal law.¹⁶²

More specifically, the emphasis on anti-impunity in TJ narratives, even though it aligns with IHRL aspirations, has transformed the two fields by focusing only on specific types of impunity as the objective of IHRL and TJ. In other words, the “focus on anti-impunity has created blind spots in practice and scholarship that result in a constricted response to human rights violations, a narrowed conception of justice, and an impoverished approach to peace.”¹⁶³

This move has admittedly helped broaden the appeal of the TJ enterprise, as well as the universality of IHRL. In some respects, too much specific context, to which cultural heritage markers such as Confederate Monuments belong, is a distraction from establishing the universality of human rights.¹⁶⁴ However, at the same time, the internationalization of TJ and IHRL in this way has removed attention from structural issues of inequality that are at the root of social tensions

¹⁵⁸ Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS 511 (Pablo De Greiff ed., 2006).

¹⁵⁹ Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 496–97 (1996); Rosemary Nagy, *Transitional Justice as Global Project: critical reflections*, 29 THIRD WORLD Q. 275, 275 (2008); see also TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE (Alexander Laban Hinton ed., 2010) (collecting a range of domestic and international experiences).

¹⁶⁰ Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SEC., Winter 2003/2004, at 5.

¹⁶¹ See ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle et al. eds., 2017).

¹⁶² Engle, *supra* note 153, at 1070.

¹⁶³ Karen Engle et al., *Introduction*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 1 (Karen Engle et al. eds., 2017).

¹⁶⁴ Mahmood Mamdani, *Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 329 (Karen Engle et al. eds., 2017).

and repression.¹⁶⁵ Applied to the Confederate Monuments example, a focus on accountability and justice distracts from structural discrimination against African-Americans. In fact, a focus on TJ seen from the perspective of IHRL and the focus on anti-impunity prevents seeing Confederate Monuments as a TJ issue altogether. Even zero-tolerance measures with respect to racism have a limited reach in that they fail to address structural discrimination and focus on isolated instances.

As Mahmood Mamdani has put it, the focus on narrow legal accountability solutions confuses political with criminal violence, and by focusing on perpetrators we forget “the issues that drive the violence. As such, it is likely to magnify rather than mitigate violence in the public sphere.”¹⁶⁶ This focus on TJ allied with human rights, thus, much like the human rights framework discussed in the previous section, tends to highlight all-or-nothing responses, and it does not seem to be sufficiently pragmatic to tackle a situation as difficult and multi-faceted as Confederate Monuments.

Can this focus be overcome, though? A focus on transitional justice in relation to cultural heritage that moves IHRL to the background, and is less informed by anti-impunity, can reignite mechanisms of truth, reparations, and GNR in the field. The next subsection discusses these possibilities by looking at a range of examples of the uses of cultural heritage in transitional contexts.

B. TRANSITIONAL JUSTICE AND CULTURAL HERITAGE

In addition to a focus on accountability or the rebuilding of institutions for the rule of law,¹⁶⁷ TJ is also very fundamentally about rebuilding the nation.¹⁶⁸ Part of the process of nation-building often involves the refashioning of cultural identity, and cultural heritage is

¹⁶⁵ Vasuki Nesiah, *Doing History with Impunity*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 95 (Karen Engle et al. eds., 2017).

¹⁶⁶ Mamdani, *supra* note 164, at 330.

¹⁶⁷ See generally PADRAIG MCAULIFFE, TRANSITIONAL JUSTICE AND RULE OF LAW RECONSTRUCTION: A CONTENTIOUS RELATIONSHIP (2013); Jirí Pribán, *Constitutional Symbolism and Political (Dis)continuity: Legal Rationality and Its Integrative Function in Postcommunist Transformations*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM: CONSTITUTIONALISM, DEALING WITH THE PAST, AND THE RULE OF LAW 305 (Adam Czarnota et al. eds., 2005).

¹⁶⁸ Ruti G. Teitel, *Transitional Justice in a New Era*, 26 FORDHAM INT'L L.J. 893, 893 (2002).

particularly adept at this task.¹⁶⁹ Cultural heritage has been specifically included in some TJ processes such as the people's tribunal about the 2003 Iraqi war (the specific cultural heritage sections, which included consideration of the looting of the Baghdad Museum,¹⁷⁰ were in Istanbul, and a part of the World Tribunal on Iraq).¹⁷¹

Heritage in this context can involve a series of specific manifestations, such as parades,¹⁷² monuments,¹⁷³ museums of memory and reconciliation,¹⁷⁴ and sites of remembrance,¹⁷⁵ among others.¹⁷⁶ This heritage can play a series of roles in favor of reconstructing the nation and can send important "never again" messages. This heritage is what is conventionally called dissonant or difficult heritage,¹⁷⁷ and below I will discuss some examples of how heritage and heritage processes mediate goals and mechanisms of transitional justice.

1. *Dissonant Heritage as Truth: Auschwitz-Birkenau*

The concentration camp of Auschwitz-Birkenau has been on the World Heritage List since 1979.¹⁷⁸ It is listed because of its role as the principal and most notorious concentration camp put in place by Nazi Germany. Located in Poland, it was responsible for the extermination of over a million Jewish people, in addition to thousands of Roma and Sinti. It serves as a reminder of the results of policies rooted on racist ideology

¹⁶⁹ See, e.g., Flora E.S. Kaplan, *Introduction*, MUSEUMS AND THE MAKING OF 'OURSELVES': THE ROLE OF OBJECTS IN NATIONAL IDENTITY 1, 1 (Flora E. S. Kaplan ed., 1994).

¹⁷⁰ See Ana Filipa Vrdoljak, *Unravelling the cradle of civilization 'layer by layer': Iraq, its peoples and cultural heritage*, in CULTURAL DIVERSITY, HERITAGE AND HUMAN RIGHTS: INTERSECTIONS IN THEORY AND PRACTICE 65 (Michele Langfield et al. eds., 2010).

¹⁷¹ Diane Otto, *Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility*, in ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 291 (Karen Engle et al. eds., 2017).

¹⁷² Kris Brown, *What It Was Like to Live through a Day: Transitional Justice and the Memory of the Everyday in a Divided Society*, 6 INT'L J. TRANSITIONAL JUST. 444, 454 (2012).

¹⁷³ SANFORD LEVINSON, WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES 5 (1998); Sanford Levinson, *Political Change and the Creative Destruction of Public Space*, in CULTURAL HUMAN RIGHTS 341 (Francesco Francioni & Martin Scheinin eds., 2008).

¹⁷⁴ LAVINIA STAN, TRANSITIONAL JUSTICE IN POST-COMMUNIST ROMANIA: THE POLITICS OF MEMORY (2013).

¹⁷⁵ JUDY BARSALOU & VICTORIA BAXTER, THE URGE TO REMEMBER: THE ROLE OF MEMORIALS IN SOCIAL RECONSTRUCTION AND TRANSITIONAL JUSTICE (2007).

¹⁷⁶ THE ARTS OF TRANSITIONAL JUSTICE: CULTURE, ACTIVISM, AND MEMORY AFTER ATROCITY (Peter D. Rush & Olivera Simic eds., 2014).

¹⁷⁷ See *supra* Introduction.

¹⁷⁸ *Auschwitz Birkenau: German Nazi Concentration and Extermination Camp (1940-1945)*, UNESCO, <http://whc.unesco.org/en/list/31> (last visited Nov. 4, 2017).

that foster the degradation and annihilation of a specific racial or ethnic group. The buildings in the concentration camp “were inscribed on the World Heritage List as evidence of this inhumane, cruel and methodical effort to deny human dignity to groups considered inferior,” and are a testimony to the murder of a race.¹⁷⁹

In assessing the outstanding universal value of the site, UNESCO inscribed it because it “bears irrefutable evidence to one of the greatest crimes The site is a key place of memory for the whole of humankind for . . . racist policies . . . and a sign of warning of the many threats and tragic consequences of extreme ideologies and denial of human dignity.”¹⁸⁰

In this respect, the listing of Auschwitz-Birkenau responds to two TJ mechanisms, acting both as a truth-teller and as a guarantee of non-repetition.¹⁸¹ The experience of the visitor is meant to have a pedagogical effect that reinforces the truth about the Holocaust, as well as a message that such events should not be allowed to happen again.¹⁸²

For being on the World Heritage List, the site is ruled not only by ICHL but also through domestic law that mirrors and implements requirements in the WHC and provides for the preservation of heritage sites.¹⁸³ There is therefore a clear role for the law here in articulating the TJ message and in using cultural heritage to promote broader reconciliatory goals through shaping the meanings and uses of the site.

The heritage process in Auschwitz-Birkenau is seen as serving primarily the international community by sending the world the truth and GNR messages discussed above. It also fosters international collaboration in this respect, narrowing the key stakeholders to a smaller number of states.¹⁸⁴ Most importantly, the preservation of this heritage site serves to tell a specific interpreted history about the events in the concentration camp and the struggle of the Jewish people.¹⁸⁵

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Julia Röttjer, *Safeguarding “Negative Historical Values” for the Future? Appropriating the Past in the UNESCO Cultural World Heritage Site Auschwitz-Birkenau*, 4 AB IMPERIO 130 (2015).

¹⁸² See Avital Biran et al., *Sought Experiences at (Dark) Heritage Sites*, 38 ANNALS TOURISM RES. 820, 836–37 (2011).

¹⁸³ WHC, *supra* note 13, art. 5.

¹⁸⁴ Yaniv Poria, *Establishing cooperation between Israel and Poland to save Auschwitz Concentration Camp: globalising the responsibility for the Massacre*, 1 INT’L J. TOURISM POL’Y 45 (2007).

¹⁸⁵ Röttjer, *supra* note 181.

2. *Dissonant Heritage as Guarantee of Non-Repetition: Hiroshima Peace Memorial Park*

Another example of a World Heritage Site connected to the difficult past of World War II is the Hiroshima Peace Memorial, listed in 1996.¹⁸⁶ The remains of the Hiroshima Prefectural Industrial Promotional Hall (later named Genbaku Dome, Genbaku being the word in Japanese for atomic bomb) at the center of the park were the only structure left standing in the area where the first atomic bomb exploded on 6 August 1945.¹⁸⁷ The structure remains in the same condition as the day after the explosion, to stand as a symbol of the power of nuclear weapons, while also expressing “hope for world peace and the ultimate elimination of all nuclear weapons.”¹⁸⁸

According to the World Heritage Committee, 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.”¹⁸⁹ In assessing its outstanding universal value, the Committee listed it because it is “a stark and powerful symbol of the achievement of world peace for more than half a century following the unleashing of the most destructive force ever created by humankind.”¹⁹⁰ Hiroshima, therefore, is listed primarily as a GNR.

Hiroshima’s truth-telling aspects are arguably downplayed, and that may have to do with the opposition to the listing. Reactions against the listing of the Hiroshima Peace Memorial are also illustrative of the essentialization of heritage narratives. China protested the effects of the listing in obscuring other facets of the same tragedy (World War II) elsewhere, and particularly the role of the Japanese in inflicting significant harm on the Chinese people during the War; the US objected to the listing because it amounted to making Japanese people the only victims of World War II and neglecting their role as perpetrators.¹⁹¹

Importantly, this contestation shows the fluidity of the boundaries of heritage processes with respect to transition, and that, while multiple meanings may exist or be attributed to the same site,

¹⁸⁶ *Hiroshima Peace Memorial (Genbaku Dome)*, UNESCO, <http://whc.unesco.org/en/list/775> (last visited Nov. 4, 2017).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Boer & Gruber, *supra* note 17, at 387.

international processes will in fact prefer those that articulate a view conducive to peace. Coupled with the example of Auschwitz-Birkenau, which tells a narrative of atrocity on the basis of racism, the Hiroshima Peace Memorial confirms the possibility of heritage that addresses difficult pasts while at the same time protects the site.

A qualitative difference between these two World Heritage Sites and Confederate Monuments, however, is that the physical fabric of these sites, the preservation of which is sought, itself tells the story of the tragedy. There is thus a qualitative difference vis-à-vis Confederate Monuments, which on the contrary are themselves defiant of anti-racism sentiment, much in the way the Confederacy proudly challenged the US northern states during the Civil War. In other words, the preservationist impulse goes entirely unchallenged.

There are examples, though, where this qualitative difference has been successfully addressed through the resignification of difficult heritage and through the use of existing heritage processes. One example is in South Africa, and it can offer important lessons for dealing with Confederate Monuments.

3. *Dissonant Heritage as Reparation: Local Heritage in South Africa*¹⁹²

This example focuses on Jan Van Riebeeck's indigenous wild almond tree hedge (now housed in 'Kirstenbosch,' the National Botanic Gardens in Cape Town, and part of the Cape Floral Region Protected Areas, a World Heritage Site since 2004)¹⁹³ and its continued protection in the 'new' South Africa, despite its origins. Planted in 1660 by Dutch colonial administrator and founder of Cape Town, Jan Van Riebeeck, the hedge was originally designed by the Dutch colonizers as a distinct barrier against settlement or co-existence with indigenous communities (the Khoisan people) and prevented their access to vital resources, marking a critical first step towards implementing *apartheid*. It "inscribed a civilized order on the Dutch colony by distinguishing it from

¹⁹² This subsection and the next draw on some of my previous work. See Lucas Lixinski, *Cultural Heritage Law and Transitional Justice: Lessons from South Africa*, 9 INT'L J. TRANSITIONAL JUST. 278 (2015).

¹⁹³ *Cape Floral Region Protected Areas*, UNESCO, <http://whc.unesco.org/en/list/1007> (last visited Nov. 4, 2017) [hereinafter *Cape Floral Region*].

the expansive, uncharted continent occupied by indigenous African populations. . . . [It] gave physical expression to colonial categories.”¹⁹⁴

Van Riebeeck’s hedge is today marked by a plaque, which indicates the origins of the hedge. This plaque was surrounded by a significant amount of controversy, especially after 1994. It was eventually taken down by the South African Heritage Resources Agency (SAHRA) in 2001, after being defaced.¹⁹⁵ While the stone where the original plaque was still remains, a new site for the new plaque was erected. The old plaque simply said:

This hedge of wild almonds was planted in the year 1660 A.D. by order of Commander Jan van Riebeeck as to mark the southern frontier of the Cape Colony, from Kirstenbosch along Wynberg Hill, to a point below the Hen and Chickens Rocks. Thence the hedge continued by a fence of poles across the camp ground to the mouth of the Salt River.¹⁹⁶

By contrast, the new text says:

This wild almond hedge was planted in 1660 by order of Commander Jan van Riebeeck as a barrier protecting the expanding European population against the indigenous Koisian inhabitants of the Cape. The hedge stretched from Kirstenbosch along Wynberg Hill to a point below the Hen and Chickens Rocks. Beyond this the barrier continued as a pole fence to the mouth of the Salt River. The hedge has come to be a symbol of exclusion.

South African Heritage Resources Agency¹⁹⁷

The new plaque certainly tells, however subtly, a very different story about what the hedge is and what it has historically stood for. It is an attempt to come to terms with the symbolism of the hedge and portray that symbolism to the plaque’s visitors. But it is noteworthy that the empty stone where the old plaque was once nested still stands on its own. The clear separation between the old and the new plaques in their placement can be seen as an attempt to clearly separate the two moments of the hedge’s narrative. Or it can be seen as somehow celebrating the social movement by Cape Town residents that attempted to symbolically reclaim Cape Town for Africans by effacing Van Riebeeck’s presence.¹⁹⁸

¹⁹⁴ Richard Marback, *A Tale of Two Plaques: Rhetoric in Cape Town*, 23 RHETORIC REV. 253, 254–55 (2004).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 257.

But it can also be read as a resistance to totally overwriting a narrative of the hedge as nothing more than a natural barrier, or, even worse, a memento of a narrative of the triumph of European colonization.

If this example is brought over to the Confederate Monuments context, it means that it is possible, in theory, to resignify a number of monuments without necessarily removing them. There are still qualitative problems associated with resignification of Confederate Monuments, namely in that (1) they still display certain human features that convey pride and defiance in a way that an almond hedge cannot; and (2) they are often tied to civic and political life in a way that the hedge, housed in a botanical garden, is not necessarily connected. Further, even if the monuments were individually given new plaques explaining their difficult past and thereby incorporating competing historical narratives about the ideas they represent, it might not still be enough, as cultural heritage law can offer other means of overriding historical nuance through the preservationist impulse.

4. *Dissonant Heritage as Erasure: World Heritage in South Africa*

The botanical garden where the hedge is located covers an area of 828 ha,¹⁹⁹ which makes it seem almost irrelevant in light of the 553,000 ha of the Cape Floral Region Protected Areas (CFRPA),²⁰⁰ the World Heritage site of which the botanical garden is a part. The CFRPA is part of a select category of “serial sites,” or World Heritage sites that are geographically dispersed but listed together as a group. Other examples include the South African Fossil Hominid Sites (popularly known as “the cradle of humankind”), the Australian Convict Sites, and the Imperial Palaces of the Ming and Qing Dynasties in Beijing and Shenyang (China). One of the advantages of a serial site is that it allows multiple areas or sites to reinforce each other in reaching the threshold of “outstanding universal value” required for inscription on the World Heritage List (and probably out of reach to any of the sites on their own). This type of mechanism could apply to the treatment of the Confederate Monuments collectively, rather than in isolation.

The CFRPA was added to the World Heritage List in 2004, in recognition of it being:

¹⁹⁹ *Kirstenbosch National Botanical Garden*, SA PLACES, <http://www.places.co.za/html/kirstenbosch.html> (last visited Mar. 23, 2018).

²⁰⁰ *Cape Floral Region*, *supra* note 193.

[O]ne of the *richest areas for plants in the world*. It represents less than 0.5% of the area of Africa but is home to nearly 20% of the continent's flora The outstanding diversity, density and endemism of the flora are *among the highest worldwide*. Unique plant reproductive strategies, adaptive to fire, patterns of seed dispersal by insects, as well as patterns of endemism and adaptive radiation found in the flora, are of *outstanding value to science*.²⁰¹

The area's outstanding universal value statement highlights that it is one of the world's 18 biodiversity hotspots.²⁰² The characterizations of the place thus seem to suggest it is listed to the world exclusively for its natural features and any sort of cultural associations with any of the site's multiple areas are not important. The international packaging of the heritage seems to be one that wipes the slate clean in terms of dissonant, difficult, or negative features.

Granted, the garden, and particularly the hedge in it, is but a very small part of the World Heritage site. But it seems almost as if the listing as natural heritage cancels the history of the place and instead replaces it all with a narrative of nature and biodiversity, perceived to be apolitical and ahistorical, therefore not subject to the same contingencies of narrative in the context of colonialism and apartheid. Biodiversity is neutral, and cultural heritage can be seen as divisionary and exclusionary.²⁰³ This narrative would align with Meskell's account of the domestic listing of Kruger National Park. She argues that there is "a dominant concern in the new South Africa," "a distinctive articulation of nature in the cosmopolitan discourse of biodiversity."²⁰⁴

None of the mentions of Kirstenbosch in the international listing process deal with its complicated history, or even mention Van Riebeeck's hedge. In that way, the listing of the hedge and Kirstenbosch as part of a natural area works almost as a means to erase their status as symbols of colonialism and/or apartheid, which is not an uncommon strategy in times of transition.²⁰⁵ It is unclear whether this omission is part of a deliberate strategy or it was simply considered irrelevant in a

²⁰¹ *Id.* (emphasis added).

²⁰² UNESCO World Heritage Committee, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, WHC-04/28 COM/26, 14B.12 (Oct. 29, 2004).

²⁰³ LYNN MESKELL, *THE NATURE OF HERITAGE: THE NEW SOUTH AFRICA* 123 (2012).

²⁰⁴ *Id.* at 89.

²⁰⁵ For instance, national holidays celebrating the oppressive regime are routinely excluded from official calendars as part of the transitional process. *See, e.g.*, Elizabeth Jelin, *Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America*, 1 INT'L J. TRANSITIONAL JUST. 138, 142–46 (2007).

process that deals with a much larger area and, at any rate, is meant to highlight nature over culture. But there are certainly unintended consequences of this omission, connected to the role of heritage in creating and signifying memory and working as a tool to promote human rights values.

C. LESSONS FOR THE UNITED STATES

The examples discussed above, while admittedly focused more on World Heritage Sites, can offer valuable lessons for the Confederate Monuments controversy as heritage. There is a qualitative difference between those sites, which lend themselves more easily to being portrayed as containing a difficult message, though. I do not suggest there is equivalence between a somber site like Auschwitz and a proud and imposing statue of Robert E. Lee. The key lesson to be drawn from Auschwitz and Hiroshima is that heritage processes can be used both to tell a difficult truth about the past and to send a strong message of non-repetition.

Notably, and unsurprisingly, there is very little discussion in heritage circles, even those connected to TJ, about the removal of monuments. Partly because of the preservationist impulse, partly out of commitment to the idea that more cultural diversity means better cultural diversity, there are very few suggestions that heritage sites with a difficult, dissonant, or negative meaning be removed. At most, suggestions have been made (but even then, not specifically in a TJ context) that heritage be periodically re-listed, and in this process allowed to have its heritage status lapse in certain cases, so as to allow for a re-evaluation of the values attached to specific protected heritage.²⁰⁶ This suggestion, however, was not taken up in the context of the World Heritage Convention to which it referred, and, to the best of my knowledge, the mechanism of periodical lapsing of heritage listings does not exist in cultural heritage law (international or domestic).

Instead, a solution within the preservationist impulse is that a Confederate Monument can be ascribed new meaning through changing the sign that attaches to it, for instance, like with the hedge in Cape Town. This attribution of new meaning is not required by heritage law and happens on an ad hoc basis, differently from a mechanism of

²⁰⁶ *E.g.*, CHRISTINA CAMERON & MECHTILD RÖSSLER, MANY VOICES, ONE VISION: THE EARLY YEARS OF THE WORLD HERITAGE CONVENTION 57–58 (2013).

periodical lapsing. Admittedly, there are limits to the possibilities of the medium. In talking about sculptures, for instance, a new plaque will not change the posture or look of the sculpture's subject. A hedge, in this sense, is more neutral. Altering the sign is but one step required to change the meaning of the site.²⁰⁷ More important than new explanatory texts (which not all visitors consult, preferring their own interpretation and/or no interpretation at all)²⁰⁸ is the severing of the connection to civic and public life. That is done through altering the location of a statue in a public building (which translates as an endorsement of that historical figure's legacy) or from in front of a courthouse (which evokes a connection between that figure and law and justice).

Removal to a different location is one possibility. Budapest, with its Memento Park, is one notable example. Memento Park is a site where public monuments and other statues erected during the Soviet period have been moved after the redemocratization of Hungary. There, statues serve as a means "to emphasize the dignity of democracy and the responsibility of historical thinking," according to former Hungarian President Árpád Göncz.²⁰⁹ The removal of Confederate Monuments across many cities in the US is in contrast with the Budapest Memento Park, showcasing different ways in which heritage (and the law surrounding it) equips people to deal with a past of violence. Protests in US cities such as New Orleans also underscore how past violence can continue to have echoes in the present, and the cultural heritage markers of that past serve as lightning rods for those confrontations and engagements with a difficult history.

Another possibility, less dramatic than removal to a different location, is that the monuments have others added to them, to counterbalance and enrich the narrative around them by being reminders of alternative accounts of the impact and meaning of Confederate Monuments. This type of strategy is comparable to the mixing of religious and secular symbols related to winter holidays, which has been found to be permissible inasmuch as it conveys balanced and neutral

²⁰⁷ A similar strategy, suggested in the Charlottesville context, is to wrap the statue with a glass case that contains a counter-narrative, such as the words of a former slave about Robert E. Lee. See Benjamin Wallace-Wells, *Battle Scars: How Virginia's past spurred a racial reckoning*, NEW YORKER, Dec. 4, 2017, at 32, 33.

²⁰⁸ For a critique of this mode of tourism, see EMMA WATERTON & STEVE WATSON, *THE SEMIOTICS OF HERITAGE TOURISM* (2014).

²⁰⁹ *Conception*, MEMENTO PARK, <http://www.mementopark.hu/pages/conception/> (last visited Mar. 23, 2018).

ideas, not endorsing one specific set of beliefs over another.²¹⁰ In Richmond, Virginia, Monument Avenue in the city's heart is known for its succession of Confederate Monuments and also for the counter-presence of a statue to Arthur Ashe, a notable African-American tennis player.²¹¹ Nevertheless, the presence of this statue has not prevented Richmond's mayor from coming out in favor of the removal of Confederate Monuments in the aftermath of the Charlottesville events.²¹²

The crucial lesson here is to avoid the whitewashing effect that heritage processes, committed to the preservationist impulse and under guise of neutrality, can have over difficult heritage. Ignoring the past does not make it go away, nor does it help overcome it. Rather, it is proactive measures of truth-seeking, reparations (through the erection of "counter-monuments," for instance, or even monument removal), and guarantees of non-repetition that can lead to a positive engagement between society and its cultural heritage.

Heritage, read through a transitional justice prism, is much more pragmatic than the framing provided by IHRL. The range of possible engagements is magnified, and even if the removal of heritage is still rare, it is at least conceivable. That said, the destruction or permanent removal (as opposed to relocation) of Confederate Monuments (or any monuments associated with a difficult past, for that matter), even though it should be on the table, can have negative effects and unintended consequences. In Ukraine, for instance, as discussed above, the removal has galvanized pro-Russia sentiment. In the United States, conversely, the removals (actual or imminent, like in Charlottesville) have in many instances been catalysts for white supremacist and racist movements and demonstrations.

Therefore, it is important to account for the meaning of monuments in their historical context. That makes it harder to have a

²¹⁰ The comparison is with the Establishment Clause in the U.S. Constitution, with respect to religious symbols. See *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (noting that the contest in which the religious display was inaugurated was relevant in determining its non-neutral stance towards religion—*mutatis mutandis*, towards history); *Van Orden v. Perry*, 545 U.S. 677 (2005) (a monument is permissible if it serves a secular—*mutatis mutandis*, neutral—purpose); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) (upholding that symbols conveying—and, *mutatis mutandis*, balanced—winter holiday traditions are permissible).

²¹¹ Steve Tignor, *How an Arthur Ashe Statue Ended Up in Richmond's Confederate Memorial*, TENNIS (Aug. 22, 2017), <http://www.tennis.com/pro-game/2017/08/statue-arthur-ashe-richmonds-monument-confederacy/68685/>.

²¹² *Id.*

blanket rule, but, at least as a trend, it seems that the specific context would support a change in the status quo of these statues, taking into account the framework of TJ and its mechanisms beyond justice and accountability. The local level where monuments sit helps place them in their context and challenge the preservationist impulse that seeks to apply a blanket pro-monument rule.

V. THE CONTEMPORARY INTERNATIONALIZATION OF HISTORICAL GRIEVANCES

Cultural heritage is a means to relay a society's relationship with its own past, whether it is a past they embrace or ignore, accept as is or wish to change. Heritage helps us convey not a historical "truth" but what a society wishes to tell themselves (and others) "about what they forget, remember, memorialize and/or fake."²¹³ That said, and as the Confederate Monuments controversy makes abundantly clear, the way heritage tells the past is necessarily affected by certain contingencies of the moment when the past is told, as well as the contingencies of when heritage was created in that past and the present. As such, heritage simultaneously oscillates between negotiating the past in the present and also negotiating the present through the past. This understanding qualifies us to understand the historically contingent and embedded nature of heritage and its role in the production of power, identity, and authority in any given society.²¹⁴ In other words, "what counts as heritage changes all the time; it is no finished product pickled in amber but an ever-changing palimpsest."²¹⁵

However, such a fluid relationship between heritage and time is not allowed by international heritage law. UNESCO was created only after World War II, and it has since engaged in prolific standard-setting activity in the field of culture in general, and cultural heritage in particular. One result of this activity is wider international protection of cultural heritage, which is for the most part positive. Heritage's role in shaping identity and power in events prior to the creation of UNESCO is

²¹³ David C. Harvey, *Heritage Pasts and Heritage Presents: Temporality, Meaning and the Scope of Heritage Studies*, 7 INT'L J. HERITAGE STUD. 319, 320 (2001).

²¹⁴ *Id.* at 321.

²¹⁵ Lowenthal, *supra* note 77, at 395.

largely ignored, and those statements about power and authority are taken for granted as untempered historical narratives.²¹⁶

Another consequence of the creation of UNESCO and its standard-setting activity has to do with the nature of international law, and particularly international treaties. It is a rule of international law that treaties do not retroact, unless they explicitly indicate so.²¹⁷ As such, the new order of heritage only applies to heritage's existence after the treaty enters into force. The law cannot be a tool to renegotiate the meanings and uses of heritage in the past; it can only really impact on the status quo at the moment the law enters into force. That is not to say that the law cannot change that meaning at all, but it must do so using legal categories that are only prospective-looking and that engage with the past in at best rudimentary and secondary ways. Consequently, the past becomes a sacred, pure truth against which heritage is tested, as opposed to being itself a contingent phenomenon. The power relationships of the past become established truths that can certify or deny the value of heritage, instead of being themselves fluid concepts that have often created, recreated, and eliminated heritage.

The drafters of the 1970 UNESCO Convention on Cultural Objects,²¹⁸ which engages directly with monuments, as discussed above, initially wanted an instrument that could promote the return of cultural objects to their countries of origin. More specifically, the newly decolonized countries that pushed for and produced the initial draft of this instrument wanted their heritage, their cultural artifacts, returned. They wanted to use heritage as a means to contest the power relationships that were created and made possible by colonialism. But this proposal was defeated by the former colonial powers at the negotiating table. Thus, the treaty that was ultimately approved is very explicit in that it does not apply to situations that happened before the

²¹⁶ *Id.*

²¹⁷ *See, e.g.,* VCLT, *supra* note 97, art. 28.

Article 28. Non-retroactivity of treaties.

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Id. While this provision does not apply directly to a number of UNESCO treaties (concluded before the entry into force of the Vienna Convention), it applies as a matter of customary international law.

²¹⁸ 1970 Convention, *supra* note 13.

treaty's entry into force.²¹⁹ Thus, colonialism and its history are on some level legitimized by the law, which hinders the possibility of heritage being used as a means to contest said history and its power relationships. The law has the effect of protecting and enshrining colonialism through heritage, alongside its identities and power relations.²²⁰

In this respect, heritage law has also very little to say about the role heritage plays in transitional contexts. Because of its reified relationship with time, ICHL also has a reified relationship with heritage and does not allow it to change from the original meaning it had, which was ascribed at the moment the heritage monument was constructed. A consequence is that, in contexts where heritage's meanings could (or even should) be altered, ICHL gets in the way.

This is not a unique phenomenon to ICHL, though, with international law more generally having a hard time dealing with the past, as indicated above in relation to imperialism.²²¹ However, international law at least attempts to address these shortcomings, and increasingly, it is used to redress long-standing historical grievances. Some examples are the United Nations Declaration on the Rights of Indigenous Peoples²²² and the many domestic and international legal initiatives aimed at providing reparations for historical harm.²²³

Historical events triggering reparations (sometimes relying on specific TJ mechanisms, as discussed above) often share a few characteristics in their relationship with time: (1) the historical repression has ongoing tangible effects; (2) measures adopted fall outside the scope of justice and accountability; (3) these measures, while largely symbolic, respond to other TJ mechanisms (reparations, GNR, truth-seeking); (4) significant events catalyze action in the present, like a tipping point; and (5) organized civil movements, local or international, lend support to the cause. All of these elements are present in the Confederate Monuments context, which indicates that the issue is ripe for action. At the very least, a reconsideration of the status quo with respect to these monuments is now due.

²¹⁹ See, e.g., *id.* art. 7 (referring to the application of the Convention only to situations that happen "after the entry into force of this Convention").

²²⁰ For additional discussion of this matter, see ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS, AND THE RETURN OF CULTURAL OBJECTS* (2006).

²²¹ Anghie, *supra* note 54.

²²² G.A. Res. 61/295 (Sept. 13, 2007).

²²³ See *REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* (Federico Lenzerini ed., 2008).

VI. CONCLUDING REMARKS

International law, as a comparatively neutral and less charged arena, is a useful environment in which to analyze and question different arguments in the Confederate Monuments controversy. Its increased profile helps draw attention to the use of monuments and heritage for oppressive purposes, such as the destruction of monuments by religious fundamentalist forces in Afghanistan and Syria.

Analyzed on its own, ICHL seems to only favor one possibility: that Confederate Monuments be kept in place. The purported neutrality of the field translates into a preservationist impulse that lies at the very foundation of most thinking about heritage.

IHRL gives important tools for the potential enforcement of claims related to these monuments, so it needs to be considered. But ICHL coupled with IHRL arguments, including freedom of expression associated with the monuments and the history they relate to (whether the Civil War or more recent history), or the rights of African-Americans to be free from racial discrimination, also does not provide clear answers. Part of the reason is inherent ambiguities and assumptions within IHRL that align with the preservationist impulse. Another key element is strong US objections to applicable international standards and staunch defense of freedom of expression, particularly hate speech, at odds with international law. Most fundamentally, though, a problem is the uncompromising nature of the field: one either has the right, or does not; the monuments either come down or stay. Principled positions in this area add to principled positions in ICHL and to the fervor with which different viewpoints have been articulated in relation specifically to Confederate Monuments.

It is only TJ that provides a more pluralistic roadmap for future action. This field's pragmatism adds more texture to the all-or-nothing possibilities in both ICHL and IHRL. In using TJ, therefore, one not only has the moral legitimation for other local governments to follow the example of the many who have taken action with respect to Confederate Monuments; TJ also gives a range of possible mechanisms to choose from, ranging from demolition to removal to a different location to changing the meaning of Confederate Monuments.

The Confederate Monuments situation challenges many of the tenets of ICHL. First, it teaches us that the connections between ICHL and IHRL are not as mutually reinforcing or supportive as often assumed, and these intersections need further problematizing. Further, it

underscores the necessity for ICHL (and its domestic mirrors) to abandon its ostensible neutrality, since even the lack of politics is in itself a political position. ICHL needs to be further aware of the harm that heritage can cause, as opposed to assuming that more heritage is always good, and that heritage must never be allowed to disappear. And, with respect to the call for the inclusion of communities, this controversy also teaches us that determining who the relevant community is does not always follow simple democratic principles. Or, at the very least, counter-majoritarian impulses found in IHRL need to be applied.

More broadly, this situation also teaches us that international law (much like domestic law) can help perpetuate structural racism by allowing background structures (which include regimes regulating symbols, such as ICHL) to enshrine and disguise racism. In the grand scheme of things, would it not be possible to argue that we are better off adopting the approach of always increasing diversity, rather than allowing for a selection we may not always control? I suggest no. What we need is clearer rules on controlling diversity in relation to heritage by acknowledging that the politics of the field necessarily go beyond the preservationist impulse, and that heritage is not an absolute good, but rather one that has knock-on effects on other social goals. We further need to be mindful that diversity is controlled by the sheer economic power of those building monuments, and then the less visible structures that select heritage, even when we deny that such forces control heritage selection. It is time that action be taken with respect to these Confederate Monuments, to allow for African-American experiences to stop being haunted by these physical cultural markers of oppression. International law can inform a more probing and honest exploration and discussion of options and pathways in this arena.