

The UK's 'Statue Wars': Can Human Rights Law Assist in their Resolution?

Introduction

On 7th June 2020 Black Lives Matter protestors in Bristol toppled a statue, erected in 1895, of the seventeenth century slave trader—and philanthropist—Edward Colston (1636 - 1721).¹ They rolled it through the streets and dumped it in the city's docks. Four of the protestors (the 'Colston Four') were subsequently acquitted of charges of criminal damage to the statue by a jury at Bristol Crown Court.²

This well-publicised event focused attention on a debate that had been simmering over memorials to controversial figures, such as that over the statue of the 19th century imperialist Cecil Rhodes outside Oriel College, Oxford.³ But the toppling in Bristol ignited a furious

¹ Saima Nasar, 'Remembering Edward Colston: histories of slavery, memory and black globality' (2020) 29(7) *Women's History Review* 1218-1225; Andrew Wells, 'Introduction – is it wise to decolonise?' (2021) 54(5) *Patterns of Prejudice: Remembering Wrongs in Public Space: A forum on the toppling of Edward Colston in Bristol, June 2020* 473-483. For the story of the campaign to remove the statue, and the resistance to it, see: Tristan Cork, 'How the city failed to remove Edward Colston's statue for years', *Bristol Post*, 10 June 2020; Antonia Layard, 'Edward Colston: Listing Controversy', *University of Bristol Law School Blog*, 15 June 2020, <https://legalresearch.blogs.bris.ac.uk/2020/06/edward-colston-listing-controversy/>

² See Damian Gayle, 'BLM protesters cleared over toppling of Edward Colston statue', *Guardian*, 5 January 2022. For an analysis of the legal arguments that might apply in such a case of criminal damage see Ivan Hare, 'Statues, Statutes and Freedom of Expression' (2021) 4 *Public Law*, 691-706.

³ See Amit Chaudhuri, 'The real meaning of Rhodes Must Fall', *Guardian*, 16 March 2016. There had also been a long running unsuccessful campaign to remove the Colston statue, see Tristan Cork, above, note 1.

explosion of ill-tempered argument concerning the memorialization of figures from Britain's slave-trading, colonial and imperial past.⁴

In the months that followed the toppling of the Colston statue it was reported that a “reckoning” had taken place with the removal/planned removal or renaming of over 70 such monuments, buildings and streets.⁵ The statues removed ranged from those of slave traders such as Robert Milligan outside the Museum of London Docklands and Sir John Cass at the University of East London to that of the notorious colonial governor Sir Thomas Picton in Cardiff City Hall.⁶ But calls for removal have extended much further to include memorials in public places to prominent national “heroes” such as Sir Francis Drake, Sir Oliver Cromwell, Major-General Robert Clive (“Clive of India”), Lord Horatio Nelson, Sir Robert Peel and Sir Winston Churchill.⁷

⁴ See e.g., Charles Moore, ‘The case for the “Colston Four” was not based on facts but on political feelings’ *Daily Telegraph*, 7 January 2022; David Olusoga, ‘Britain’s shameful slavery history matters – that’s why a jury acquitted the Colston Four’, *Guardian*, 5 January 2022. See also, e.g., the events surrounding the National Trust’s published a report detailing the connections between its properties and colonialism: Sally-Anne Huxtable, Corinne Fowler, Christou Kefalas and Emma Slocombe (eds.), ‘Interim Report on the Connections between Colonialism and Properties now in the Care of the National Trust, Including Links with Historic Slavery (National Trust, 2020). The Chair of the Trust resigned, reportedly as a result of a backlash to this woke agenda’: Henry Goodwin, ‘National Trusts “woke” leader quits after member backlash’ *The London Economic*, 26 May 2021.

⁵ Aamna Mohdin and Rhi Storer, ‘The reckoning: the toppling of monuments to slavery in the UK’, *Guardian*, 29 January 2021.

⁶ Picton was a hero of the Peninsular War campaign, of 1808-14 and was killed in action leading his troops at Waterloo in 1815; but as a notoriously cruel governor of Jamaica, he authorised the torture of a 14-year-old girl to compel a confession and allegedly ordered the execution of a dozen slaves.

⁷ Richard Evans, ‘The History Wars’, *The New Statesman*, 17 June 2020. In London the Mayor established a Commission for Diversity in the Public Realm <https://www.london.gov.uk/what-we-do/arts-and-culture/commission-diversity-public-realm> and multiple authorities across the UK have established similar initiatives. In respect of contested memorials in ecclesiastical settings see *In the Matter of The Rustat Memorial, Jesus College, Cambridge* [2022] ECC Ely 2.

In their turn these calls for ‘decolonisation of public space’ have themselves been subjected to a backlash, both in rhetoric and in legal regulation. For example, the then Prime Minister Boris Johnson commented on Twitter that:

We cannot now try to edit or censor our past. We cannot pretend to have a different history. The statues in our cities and towns were put up by previous generations. They had different perspectives, different understandings of right and wrong. But those statues teach us about our past, with all its faults. To tear them down would be to lie about our history, and impoverish the education of generations to come.⁸

Early in 2021, the then Local Government Minister Robert Jenrick introduced changes to planning regulations so as to require planning permission to remove unlisted statues, plaques or memorials.⁹ In an article in *The Sunday Telegraph*, the Minister criticised “the flash mob” and “town hall militants or woke worthies” who are attempting to “censor our past or pretend we have a different history to the one we have”.¹⁰ The government proceeded to introduce a “retain and explain” policy whereby, upon applications to remove such items, “local planning

⁸ Boris Johnson, Twitter @BorisJohnson, 12 June 2020. See also e.g., Charles Moore, ‘Why our statues need protecting’ (The Spectator, 19 July 2020), <https://www.spectator.co.uk/article/why-our-statues-need-protecting>. Others have made similar arguments, see e.g., Mary Beard, ‘Cecil Rhodes and Oriel College Oxford’, *The Times Literary Supplement* 2015, <https://www.the-tls.co.uk/articles/cecil-rhodes-and-oriel-college-oxford/>

⁹ HC Deb vol 687, col 35, 18 January 2021. See, Town and Country Planning (Demolition – Description of Buildings) Direction 2021, Background Note. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/979413/Demolition_Direction_2021.pdf For an overview of the planning law in relation to these issues, see Richard Harwood, Catherine Dobson and David Sawtell, *Contested Heritage: Removing Art from Land and Historic Buildings* (Law Brief Publishing, 2022).

¹⁰ Robert Jenrick, ‘We will save our history from woke militants’, *Sunday Telegraph*, 17 January 2021 <https://www.telegraph.co.uk/news/2021/01/16/will-save-britains-statues-woke-militants-want-censor-past/>

authorities should have regard to the importance of their retention in situ and, where appropriate, of explaining their historic and social context rather than removal”.¹¹

In the criminal law sphere, the maximum penalty for damage to a memorial, irrespective of the value of that damage, was increased from 3 months to 10 years imprisonment by virtue of section 50 of the Police, Crime, Sentencing and Courts Act 2022. This change addressed a perceived “concern ... voiced in Parliament and society that the law focuse[d] too heavily on the monetary value of the damage with insufficient consideration given to the emotional or wider distress caused by this type of offending ...”.¹² As a consequence all such matters are now potentially triable in the Crown Court.

The United Kingdom thus finds itself caught amidst the kind of ‘statue wars’ once more commonly associated in the public mind with statues of Confederate Civil War generals,¹³ or Soviet era dictators.¹⁴ Its self-image as a beacon of moderation, toleration, democracy and civility has been seriously called into question,¹⁵ with the controversies raising profound and uncomfortable questions concerning identity, history and the national “mythscape”.¹⁶ Indeed,

¹¹ National Planning Policy Framework 2021 para 198.

¹² See Policy Paper, *Criminal Damage to Memorials: Police, Crime, Sentencing and Courts Act 2022 factsheet*, 27 May 2022. Previously, where the damage value was less than £5000, the case had to be tried summarily, and attracted a penalty of 3 months imprisonment or a fine of up to £2500.

¹³ See e.g., Marouf A. Hasian Jr and Nicholas S. Paliewicz, *Memory and Monument Wars in American Cities: New York, Charlottesville and Montgomery* (New York: Palgrave Macmillan, 2020) p. 59; Alicia Dixon, ‘Remembering to Forget: Correcting the False History of the Lost Cause in the American South Through *Damnatio Memoriae*’ (2020) XXV(3) *Art, Antiquity and Law* 189.

¹⁴ See e.g., Andrew Foxall, ‘A contested landscape: monuments, public memory, and post-Soviet identity in Stavropol, Russia’ (2013) 46(1) *Communist and Post-Communist Studies* 167.

¹⁵ Nasar, above, note 1.

¹⁶ Duncan Bell, ‘Mythscape: Memory, Mythology and National Identity’ (2003) 54(1) *British Journal of Sociology* 63.

one prominent commentator has advocated the removal of *all* statues of historical figures in the public realm, on the basis that they are “lazy, ugly and distort history.”¹⁷

The “debate” over the commemoration of figures from Britain’s imperial and colonial past has undoubtedly generated more heat than light, becoming one of most visible areas of conflict in the contemporary “culture wars”.¹⁸ The stage seems set for protracted, acrimonious and possibly even violent disputes between those who flatly oppose any memorialisation of historical figures associated with slavery, colonialism and imperialism, versus those who counter that to destroy such monuments is to “censor our past” and “lie about our history”.¹⁹ It is a situation in which, given these starkly opposed battle lines, there seems to be very little possibility of finding any common-ground.²⁰

¹⁷ Gary Younge, ‘Why every single statue should come down’, *Guardian*, 1 June 2021

<https://www.theguardian.com/artanddesign/2021/jun/01/gary-younge-why-every-single-statue-should-come-down-rhodes-colston>.

¹⁸ See e.g., Andrew Pilkington, ‘Changing the Narrative on Race and Racism: The Sewell Report and Culture Wars in the UK’ (2021) 11 *Advances in Applied Sociology* 384; Bobby Duffy, Kirstie Hewitt, George Murkin, Rebecca Benson, Rachel Hesketh, Ben Page, Gideon Skinner and Glenn Gottfried, ‘Culture wars in the UK: how the public understand the debate’ (King’s Research Portal, 26 May 2021) at <https://www.kcl.ac.uk/policy-institute/assets/culture-wars-in-the-uk-how-the-public-understand-the-debate.pdf>; and David Olusoga, ‘Historians have become soft targets in the culture wars. We should fight back’, *The New Statesman*, 8 December 2021 <https://www.newstatesman.com/culture/2021/12/historians-have-become-soft-targets-in-the-culture-wars-we-should-fight-back>

¹⁹ For a historical reflection on these matters see e.g., A. Dixon, above, note 13, and for philosophical reflections see Johannes Schultz, ‘Must Rhodes Fall? The Significance of Commemoration in the Struggle for Relations of Respect’ (2019) *The Journal of Political Philosophy* (27) 2 166; and Chong-Ming Lim, *Vandalising Tainted Commemorations* (2020) 48(2) *Philosophy and Public Affairs*, 185.

²⁰ On the nature of this “polarisation” see e.g., Chong-Ming Lim, *Ibid.*; Report of a Commission of Inquiry Established by Oriel College Oxford into Issues Associated with Memorials to Cecil Rhodes, April 2021, 5.63. https://www.oriel.ox.ac.uk/sites/default/files/oriel_rhodes_commission_full_report.pdf

In this article we explore the potential for a hitherto un-utilized mechanism to facilitate nuanced and balanced resolutions of these disputes, namely human rights law.

It is axiomatic that, in one sense, human rights discourse is very close to the epicentre of these conflicts. After all, they concern memorials to men (and it is almost always *men*) who participated in and profited from the Atlantic slave trade and colonial exploitation, activities based on assumptions of racial superiority. But, until now, little attention has been paid to how human rights law might apply to these memorial disputes in the UK.²¹ Admittedly, the role of human rights and memory/memorialisation in the transitional justice context has been extensively interrogated,²² and some scholars have critiqued the role of human rights in the memorialisation of past atrocities in such situations. For example, Lea David has argued against what she terms human rights “ideology” as a way of dealing with the collective memory of historic crimes, arguing that they constitute an “oppressive force” prescribing a “proper way of remembrance” with which states are expected to comply.²³ However, in this paper, we take a different approach. We contend that UK human rights *law*, far from mandating “proper” ways of remembering rather, in the context of the current statue wars, may provide a mechanism whereby nuanced and sensitive balances *can* be struck between the

²¹ In one of the leading works, Harwood *et al*, above, note 9, human rights are mentioned only once; and at the trial for criminal damage of the ‘Colston Four’ human rights arguments were cited only in the context of whether the statue’s toppling constituted an exercise of the right to freedom of expression with which the prosecution constituted a disproportionate interference. On this point see *Attorney Generals’ Reference (No 1 of 2022)* [2022] EWCA Crim 1259. These arguments are more fully explored in Ian Hare, ‘Statues, Statutes and Freedom of Expression’ (2021) 4 *Public Law* 691.

²² See e.g., Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (Abingdon: Routledge 1999); and Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History* (Cambridge University Press, 2017).

²³ Lea David, *The Past Can’t Heal Us: The Dangers of Mandating Memory in the Name of Human Rights* (Cambridge University Press, 2020) pp. 1-2. See also David Reiff, *In Praise of Forgetting: Historical Memory and its Ironies* (Yale University Press, 2016).

different interests in play, which include the collective memory of the various groups concerned and the importance of historical debate.

With this aim in mind, this paper will analyse the recent jurisprudence of the European Court of Human Rights (the Court or ECtHR) as it relates to collective memory and historical expression. It will be argued that the interests at stake in these disputes are captured by Articles 8 and 10 of the European Convention on Human Rights (ECHR) — the rights, respectively, to private and family life, and to freedom of expression. We maintain that, often (and especially when they were erected many years after their subjects lived), the statues at the centre of the current disputes, rather than primarily being seen as “history” as members of the UK Government and others claim, can be conceived as embodying, carrying and expressing *particular* collective memories. As such they may have considerable value to certain groups, relevant to identity and a sense of belonging to place, community and a shared past.²⁴ However, crucially, such embodiments of *some* people’s collective memory, where they comprise monuments to slave-traders and colonialists, might gravely interfere with the collective memories of those whose forebears were the victims of such men. In celebrating certain figures from the past — quite literally by putting them on a pedestal — such monuments may not only may fail to take into account, but could risk causing serious insult to the very different collective memories of those whose ancestors were enslaved and/or subjugated by the men depicted. In such circumstances we argue, following Strasbourg case

²⁴ Consider for example the statue of Winston Churchill, undoubtedly a hero to many in Britain, that had previously been daubed with the words “Is a racist” outside the Houses of Parliament, which was boarded up in order to protect it before BLM protests in 2020: ‘London monuments boarded up ahead of protests’ (BBC News, 12 June 2020) <https://www.bbc.co.uk/news/uk-england-london-53020306>.

law, a public monument might potentially cross the threshold so as to constitute an interference with the Article 8 rights of (at least some of) those living under its “shadow”.²⁵

Statues we argue are carriers of collective memory *and* are a form of expression, engaging Article 10, but they also have the potential to interfere with the Article 8 rights of those living in their vicinity or passing beneath them. Neither Article 8 nor Article 10 has hierarchical priority over the other and, as the ECtHR has emphasised, they “deserve equal respect”.²⁶ As we shall see, where there is a clash between these rights, the structures of the Articles require the striking of a “balance”, using criteria that attribute weight to the various interests in play.²⁷ This exercise, far from prescribing “proper ways of remembrance”, requires a fine balance to be struck that neither mandates the “tearing down” of statues nor their preservation in perpetuity. If we apply this balancing methodology to disputes over statues commemorating slavers and colonialists in public space, we can see them as carriers of identity and collective memory, and as forms of expression which may have value for (parts of) the communities in which they stand. But they may also interfere with the rights of *others* to *their* identity and collective memory, where those people’s ancestors were subjected to grave human rights abuses by the figures depicted.

Finally, in the Strasbourg Article 10 case law, we see that the search for historical truth has special value, and we argue that the balancing human rights approach could foster the kind of critical and inclusive dialogue that might contribute to a better understanding of British

²⁵ Farida Shaheed ‘Memorialization processes’, Report of the Special Rapporteur in the Field of Cultural Rights, General Assembly, UNGA A/HRC/25/49, 23 January 2014 at para. 64.

²⁶ *Von Hannover v. Germany (No 2)* Application Nos. 40660/08 and 60641/08 (ECtHR GC 7 February 2012) at para 106; and *Axel Springer AG v. Germany* Application No. 39954/08 ECtHR GC 7 February 2012) at para 87.

²⁷ *Ibid.*

history — doing so in a way that the current statue-scape *status quo* cannot provide. Indeed, these statue wars create an *opportunity* to engage in a critical conversation about important contemporary issues, most notably the representation of UK history in public space.

Three preliminary *caveats* may be in order. First, we acknowledge that the argument advanced here may be seen by some as radical or controversial, for it requires the development of existing case law principles not hitherto dealt with in exactly this way. However, we maintain that a fresh approach which steps outside of the currently entrenched positions, applying some kind of balance and ultimately backed up by law, is highly desirable, particularly given the acrimonious and polarised nature of these conflicts.

Secondly, in making the argument that human rights can have a role to play in the resolution of these disputes, we do not propose to examine the contemporary planning law regime as it relates to issues of “contested heritage”.²⁸ Rather we intend to delineate a normative framework based upon certain rights contained within the European Convention on Human Rights (1950) and enacted into UK law by the Human Rights Act 1998, in the light of which UK law must be read and public authorities must act.²⁹

Thirdly, we are not endeavouring here to examine the question of when the causing of damage to a memorial might be justified under the Convention right to freedom of expression. This is a separate issue concerning the extent of the right to public protest in domestic law and was considered by the Court of Appeal in *Attorney Generals’ Reference (No 1 of 2022)* which concerned the offence of criminal damage with which the ‘Colson

²⁸ For an excellent overview see Harwood *et al*, above, note 9.

²⁹ Section 3 and section 6 HRA 1998.

Four’ were charged. It was held that, on such a charge, where the damage is violently caused and/or is significant, there exists no separate requirement to consider Convention rights.³⁰

This paper shall adopt the following structure. In Part 1 we will briefly compare two connected though distinct “ways of knowing the past” which are of crucial relevance in these controversies, namely “collective memory” and “history”.³¹ In Part 2 we will then set out the human rights law context under the ECHR, where it will be argued that the interplay of Article 8 and 10 and their relationship to collective memory and historical debate provide a balancing mechanism which can help find solutions in the statue wars. In Part 3 we will attempt to illustrate what the result of the balancing approach might look like on the ground in the UK. Finally, Part 4 concludes with a brief summary of this paper’s central argument.

1 . Statues, Collective Memory and History

Before we examine the relationship of human rights to statue controversies, it is important to distinguish between two connected though distinct ways of knowing about the past: history and collective memory. As noted above, the need to prevent “history” from being “erased”, “censored” or “lied about” is commonly invoked by those wielding political power as a reason for opposing the removal of, or alteration to, monuments of past figures. Yet it will be suggested that what is really at issue here is not so much *history*, but rather *collective memory* — the collective memory of a particular part of a national community, which might contrast

³⁰ *Attorney Generals’ Reference (No 1 of 2022)* [2022] EWCA Crim 1259. See Tom Lewis, ‘Criminal Damage and Protest Law’, *Solicitors’ Journal*, 25 January 2023 <https://www.solicitorsjournal.com/sjarticle/criminal-damage-and-protest-law/440880>.

³¹ David Lowenthal, *The Past is a Foreign Country – Revisited* (Cambridge University Press, 2015) at pp. 303-378.

strikingly with the collective memory of other members of the same broader national community. As will be seen, history and memory map on to the human rights discourse that can be brought to bear in such disputes, where the collective memory of one group is very different from that of another. To do this, however, we need to understand exactly what is meant by “collective memory”. Therefore, we will now seek to interrogate this term, and outline its relationship to history, in the context of the acrimonious and emotive statues debate.

Collective memory

There exists a huge literature on what is most commonly referred to as “collective memory” and its connection to individual and group identity.³² This literature may itself be seen as part of what has been called a “memory boom” in recent decades.³³ Characteristics of this memory boom range from a fascination with personal ancestry and historic buildings, novels and TV shows, to the academic discipline of memory studies and even (in some countries) the passing of “memory laws” that enshrine (to varying degrees) legally authorised versions of the past.³⁴

³² See e.g., Jeffrey Blustein, *The Moral Demands of Memory* (Cambridge University Press, 2008) at pp. 182-239; Aleida Assmann, ‘Re-framing memory: Between individual forms and collective forms of constructing the past’ in Karin Tilmans, Frank van Vree and Jay Winter (eds.) *Performing the Past: Memory, History and Identity in Modern Europe* (Amsterdam University Press, 2010); and Jeffrey K. Olick, Vared Vinitzky-Seroussi and Daniel Levy (eds.) *The Collective Memory Reader* (Oxford University Press, 2011) especially Part II. There is by no means a consensus on the terminology, with scholars using, *inter alia*, “shared memory”, “historical memory”, “cultural memory” and “public memory”, see Geoffrey Cubitt, *History and Memory* (Manchester University Press, 2007) at pp. 9-10.

³³ Jay Winter, ‘The Generation of Memory: Reflections on the “Memory Boom” in Contemporary Historical Studies’ (2007) 1 *Archives & Social Studies: A Journal of Interdisciplinary Research* 363; Olick *et al*, *ibid.* at p. 3.

³⁴ See e.g., Nikolay Koposov, *Memory Laws, Memory Wars: the Politics of the Past in Europe and Russia* (Cambridge University Press, 2018).

The term “collective memory” was coined by Maurice Halbwachs, an early 20th century French sociologist and disciple of Durkheim and Bergson. His key insight was that memory cannot be a purely individual attribute — in the Lockean sense of a continuous awareness of the self through time³⁵ — but must exist within a “social frame” in which individual images of the past are only remembered when they are set within conceptual structures that are defined by communities at large.³⁶ When we *remember*, we do not retrieve images of the past as we originally perceived them, but rather as they fit into our present conceptions, shaped by the social forces acting upon us.³⁷

There is general agreement that an essential component — perhaps *the* essential component — of any kind of human identity is memory.³⁸ Human identity is not just a sense of “sameness through time, or persistence through change, but also of reflective consciousness of personal connection with the past”.³⁹ Because, as individuals, we live our lives as members of social groups, our memories and our *communication* of those memories to others contribute to the processes by which groups develop a sense of collective identity extending over time.⁴⁰ As the sociologist Barbara Misztal explains, collective memory is the

³⁵ John Locke, *An Essay Concerning Human Understanding* (first published in 1689, Prometheus Books, 1995) 188.

³⁶ Maurice Halbwachs, *On Collective Memory* (first published in 1925 as *Les cadres sociaux de la mémoire*, Lewis Coser tr. and ed. University of Chicago Press, 1992).

³⁷ Patrick Hutton, *History as an Art of Memory* (University of New England Press, 1993) pp. 6-7.

³⁸ Émile Durkheim, *Elementary Forms of Religious Life* (first published in 1912, J.W. Swain tr, New York) (Dover Publications, 2008) 375; Jeremy Waldron, ‘Superseding Historical injustice’ (1992) 103(1) *Ethics* 4; Anthony Smith, *Myths and Memories of a Nation* (Oxford University Press, 1999) p. 208; and Blustein, above, note 32, at pp. 41- 49.

³⁹ *Ibid.*, Smith.

⁴⁰ Cubitt, above, note 32, at p. 155.

“representation of the past, both that shared by a group and that which is collectively commemorated”, and this “gives substance to the group’s identity, its present conditions and its vision of the future”.⁴¹ In a similar vein, the historian Geoffrey Cubitt says:

For there to be a past worth worrying about, there must always be the imaginative supposition of a continuity in social existence, and such continuity is generally envisaged from the standpoint of identification: the past in question is *our* past, the past that gives meaning and value to our continuing existence as a collectivity, the past that belongs to us as a constitutive element in our common identity.⁴²

The concept of collective memory linked to identity is notoriously difficult to define with precision.⁴³ But the philosopher Avishai Margalit draws an enlightening distinction between what he terms “common memory” and “shared memory” which may help explicate the concept for present purposes.⁴⁴ For Margalit, “common memory” is an aggregate of the memories of all those people who remember a particular event which each of them experienced individually. If the number of people in a particular society reaches a certain proportion of the total, then we might call the memory of that episode a “common memory” — for example, those witnessing (in person or via footage) the attacks on the World Trade Centre in New York in 2001.⁴⁵ In contrast, “shared memory” is not a simple aggregation, but requires communication whereby the different perspectives of those who remember an event

⁴¹ Barbera A. Misztal, *Theories of Social Remembering* (Open University Press, 2003) at p. 7.

⁴² Cubitt, above, note 32, at pp. 199-200 (emphasis in original).

⁴³ *Ibid.* at pp. 5-22.

⁴⁴ Avishai Margalit, *The Ethics of Memory* (Harvard University Press, 2004) pp. 50-51. See also Assmann, above, note 32, at p. 35.

⁴⁵ *Ibid.* Margalit, at pp. 50-51.

are integrated and calibrated into a single version. Crucially, this means that other people in the community who were *not* witnesses at the time may be “plugged into the experience ... through channels of description rather than by direct experience” and, as such, shared memory is grounded in what Margalit calls a “division of mnemonic labour”.⁴⁶ Moreover, this need not necessarily be confined to memories of a single point in time, but can take place diachronically, *over time, across generations*.⁴⁷ Margalit explains that:

As a member of a certain community of memory, I am related to the memory of people from a previous generation. They in turn are related to the memory of people from the generation that preceded them, and so on, until we reach that generation which remembers the event in question first-hand.⁴⁸

Thus, shared memory becomes a “memory of memory” of what others have told future generations about their past.⁴⁹ So, whilst the personal use of the term *remember* is akin to *know*, collective memory is closer to *believe*.

Groups and institutions clearly do not and cannot have “embodied” memories in the same way as individuals. Rather collective or shared memory, for it to survive and persist across generations, needs to be “re-embodied” in “durable carriers” so as to be transmittable across time.⁵⁰ These carriers can come in the form of rites, ceremonies and rituals but also — pertinently for present purposes — as public monuments and memorials, which

⁴⁶ *Ibid.* at p. 52.

⁴⁷ *Ibid.* at pp. 51-55.

⁴⁸ *Ibid.* at p. 59.

⁴⁹ *Ibid.* at p. 58. See also Osiel, above, note 22.

⁵⁰ Assmann, above, note 32.

offer reminders of people or moments in that group's past, and hence also of the group's own continuous existence and identity.⁵¹

In the late 20th century, the eminent French historian Pierre Nora identified the growth of what he called *lieux de mémoire*, sites or places “where memory crystallizes and secretes itself”, defined as “any significant entity ... which by dint of human will or the work of time has become a symbolic element of the memorial heritage of any community”.⁵² These carriers or sites of memory — examples of which may include “[r]ituals, myths, monuments, statues, founding fathers, historical battles, and burial places”⁵³ — can have great importance, since they may help to create and sustain narratives about the past, and even hold communities together.⁵⁴

Although collective/shared memory is a term and concept about which there is much disagreement, there is a general acknowledgment that something *like* collective memory is necessary for group identity to emerge and survive⁵⁵ — and that, if it is to be carried across generations, it must be embodied, with one type of such embodiment being monuments and memorials.⁵⁶ The question arises then, what is the relationship between “collective memory”

⁵¹ *Ibid.* See also Margalit, above, note 44, at p. 54.

⁵² Pierre Nora, ‘From *Lieux de Mémoire* to Realms of Memory: Preface to the English-language edition’ in Lawrence D. Kritzman, (ed.) *Realms of Memory: the Construction of the French Past*, vol 1: *Conflict and Divisions* (Arthur Goldhammer tr. Columbia University Press, 1996) p. xv, xvii.

⁵³ Maykel Verkuyten, *The Social Psychology of Ethnic Identity* (Psychology Press, 2005) p. 87.

⁵⁴ *Ibid.*

⁵⁵ Waldron, above, note 38; Blustein, above, note 32, p. 187.

⁵⁶ See e.g., Robert S. Nelson and Margaret Olin, *Monument and Memory, Made and Unmade* (University of Chicago Press, 2003); James E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (Yale University Press, 1993); and Nora, above, note 52.

as a way of knowing about the past and that other way, namely history? It is to this question that we now turn.

History and its relation to collective memory

The term “history” is used frequently in general discourse as a very broad synonym for “the past” or, more colloquially, “the olden days”,⁵⁷ and it may also be used in the different sense of state-sponsored official history⁵⁸ — “single, politically dictated historical narratives”, which are possible through the imposition of “restrictions affecting the entire process of researching and writing history”.⁵⁹ We are not using the term in either of these senses here. Instead, we refer to history in the sense of it being a *discipline* that, notwithstanding overlaps with memory,⁶⁰ is crucially *distinct* from it. In this regard a useful “shorthand distinction” is provided by (the historian) Jay Winter:

History is memory seen through and criticised with the aid of documents of many kinds — written, aural, visual. Memory is history seen through affect. And since affect is subjective, it is difficult to examine the claims of memory in the same way as we examine the claims of history. History is a discipline. We learn and teach its rules and its limits. Memory is a faculty. We live with it, and at times are sustained by it.⁶¹

⁵⁷ See e.g., ‘Ian Hislop’s The Olden Days’: <https://www.bbc.co.uk/programmes/b040tm16>

⁵⁸ See e.g., Julie Fedor, “‘Historical Falsification’ as a Master Trope in the Official Discourse on History Education in Putin’s Russia’ (2021)13(1) *Journal of Educational Media Memory and Society* 107.

⁵⁹ See e.g., Farida Shaheed ‘On the writing and teaching of history’ Report of the Special Rapporteur in the field of cultural rights, General Assembly, UNGA A/HRC/68/296, 9 August 2013. See also Evans, above, note 7.

⁶⁰ Historical research itself *utilises* memory: see Cubitt, above, note 32, pp. 4-5; and Charles Maier, ‘A Surfeit of Memory? Reflections on History, Melancholy and Denial’ (1993) 5(2) *History and Memory* 136, 143.

⁶¹ Jay Winter, ‘Introduction. The Performance of the Past: Memory, History and Identity’ in Tilmans *et al*, above, note 32, p. 12. See also Blustein, above, note 32, p. 188.

Whilst of course it is true that the past can never be captured perfectly, it is nevertheless the case that historians do at least *aim* for “impartial, checkable accuracy, minimizing bias as inescapable but deplorable”.⁶² In contrast, those invoking memory use the past for different purposes, such as “to find roots, to affirm identities, to claim legacies, to celebrate collective bonds, and to traduce rivals”.⁶³

Crucially historians seek to *understand and explain* the past.⁶⁴ They presuppose different perspectives or life situations, and they “reconstruct causal sequences” in order to “explain events by their antecedents” whereas memories “are to be retrieved and re-lived, not explained”.⁶⁵ Pierre Nora distinguishes between memory and history — the former being emotional, selective and particular, whereas the latter is rational, critical and universalist in its aspiration. Thus, for Nora: “[m]emory takes root in the concrete, in spaces, gestures, images and objects; history binds itself strictly to temporal continuities, to progressions and to relations between things.”⁶⁶

Having regard to the above scholarship, it is reasonable to suggest, as Blustein does, that the pursuit of the truth is “the *regulative ideal* of history”, and that the “accuracy in what is said about the past is the primary criterion for assessing the quality of historical research and the

⁶² David Lowenthal, ‘History and Memory’ (1997) 19(2) *The Public Historian* 30, at p. 32. There is a long running debate concerning the possibility of objectivity in the doing of history. See e.g., Richard Evans, *In Defence of History* (Granta, 1997).

⁶³ *Ibid.* See also Assmann, above, note 32, and Margalit, above, note 44, at p. 61.

⁶⁴ Evans, above, note 7.

⁶⁵ Maier, above, note 60, at p. 143. See also Blustein, above, note 32, ch 4; Stina Löytömäki, *Law and Politics of Memory* (Abingdon: Routledge, 2014) at pp. 6-7; and Lowenthal, above, note 31, at p. 292.

⁶⁶ Pierre Nora, ‘Between Memory and History: *Les Lieux de Mémoire*’ (1989) 26 *Representations* 7, at pp. 8-9. See also Assmann, above, note 32, at p. 38, on the distinction between subjective and objective truth.

achievements of historical enquiry”.⁶⁷ In contrast, memory has no regulative ideal. Rather, as we saw in the previous section, it serves an essential function for groups and their members, sustaining their collective life and maintaining and enhancing social cohesion, through “identification with the group and its past”.⁶⁸

The relationship between collective memory and history has long provoked debate yet, in recent years, there has been a fresh strand to this discussion — the influence of human rights. In post-conflict and transitional justice situations the duty to memorialise past atrocities as a mark of penance, and as a way of ensuring that the crimes of the past are not repeated, has become a mainstay of human rights discourse within transitional justice movements.⁶⁹ However, the role of human rights has also been subject to criticism. For example, scholars such as Lea David argue that it effectively constitutes an “ideology”, which may ultimately constitute an “oppressive force”, for it prescribes a “proper way of remembrance” with which states are expected to comply, “based on normative world-views of human rights that promote “facing the past”, “duty to remember” and “justice for victims” as its pillars”.⁷⁰ There may be some merit to David’s argument in transitional justice contexts. But we argue that, in context of the UK’s current statue wars, the European Convention on Human Rights — part of UK law by virtue of the HRA 1998 — far from prescriptively mandating “proper way[s] of remembrance”, rather provides a sophisticated balancing mechanism whereby the interests at play may be subjected to detailed weighing. These interests involve the interplay,

⁶⁷ Blustein, above, note 32, at p. 178 (emphasis added). However, Blustein concedes that there are “difficult and important questions about what historical truth consists in”, at p. 191.

⁶⁸ *Ibid.* at p. 180. Blustein also sees strong parallels between collective memory and “myth” in that, for both, “aptness” is more important than “literal historical truth”, at p. 190.

⁶⁹ See e.g., Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 2000).

⁷⁰ David, above n 23, at pp. 1-2. See also Reiff, above, note 23.

as discussed above, of collective memory and history, and they are encapsulated by Articles 8 and 10 of the ECHR. Accordingly, it is to this balance that we now turn.

2. Statues and Human Rights: Balancing the Scales

On the face of it, human rights law has clear relevance to controversies involving memorials to slave traders and colonialists from the past, since they involve issues of, amongst other things, identity, dignity and freedom of expression. Significantly, at the level of international human rights law, the idea that such commemorations in prominent public places might engage the human rights of those living and working in their vicinity has been acknowledged. The former UN Special Rapporteur in the field of cultural rights, Farida Shaheed, in her report on memorialisation processes, argues that “people’s access to pluralistic memory [i]s a human right”.⁷¹ She draws upon a range of sources, including: the principles of transitional justice;⁷² the work of truth and reconciliation commissions;⁷³ the case law of the Inter-American Court of Human Rights;⁷⁴ and the outcomes of diplomatic conferences such as the 2001 Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance.⁷⁵ She also draws upon the cultural rights enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides that “States Parties recognize the right of everyone ... to take part in cultural life...”.⁷⁶ As

⁷¹ Shaheed, above, note 25, at para. 61.

⁷² *Ibid.* Shaheed cites in particular the ‘Louis Joinet and Diane Orentlicher principles’ for the protection and promotion of human rights through actions to combat impunity, see paras. 27-32.

⁷³ *Ibid.* at paras. 39-44

⁷⁴ *Ibid.* at paras. 36-38.

⁷⁵ *Ibid.* at paras. 33-35.

⁷⁶ See General Comment 21 (2009), Right of everyone to take part in cultural life (art. 15, para. 19A), of the ICESCR, E/C.12/GC/21. See also Universal Declaration of Human Rights 1948, Articles 22, 25 and 26; and

Shaheed says, this Article provides that “all persons have the right to access, participate in, enjoy and contribute to culture, and in particular cultural heritage, which encompasses both history and memory”.⁷⁷

Having regard to the above principles Shaheed argues — quoting the anti-apartheid campaigner and former Justice of the South African Constitutional Court, Albie Sachs — that

from a human rights perspective, what counts is creating conditions that allow a “broadly located, mobile, multi-layered and interactive dialogical truth” to emerge, meaning a debate on past events and actions that enables society to overcome “completely separate and unrecognised accounts of what happened so as to move forward and develop more peaceful relationships.”⁷⁸

In relation to memorials in particular, Shaheed states that as:

part of the symbolic-cultural landscape, memorials impact on people’s perspectives and understanding of past events but equally of contemporary issues. Hence, they must be critically assessed. This is particularly important when people, including

International Covenant on Civil and Political Rights 1966, Article 27, the right of minorities to enjoy their own culture.

⁷⁷ Shaheed, above, note 25, at para. 48. See further See General Comment 21 *ibid.* especially paras. 11-16, and 49(d).

⁷⁸ Shaheed, above, note 25, at para. 20, citing Albie Sachs, *The Soft Vengeance of the Freedom Fighter* (University of California Press, 2014). See further Hanne Hagtvedt Vik, ‘History, memory and memorialization processes – Reports 2013-2014 (A/68/269, 2013 and A/HRC/25/49, 2014),’ in Lucky Belder and Helle Porsdam (eds.) *Negotiating Cultural Rights: Issues at Stake, Challenges and Recommendations* (Edward Elgar, 2017).

children, live under the shadow of numerous, repetitive images and symbols, such as murals and statues.⁷⁹

Shaheed cautions against “memorial tyrannies” whereby “continuously multiplying memorials do not take into account alternative voices or suffer questions, enclose people within their past and leave little space for the remembrance of other events and relations between groups of people”. She says: “Too much memory, especially if presented in the form of irreconcilable versions of the past, might hurt rather than help a society”.⁸⁰

Shaheed’s successor as Special Rapporteur, Karima Bennouna, has emphasised that human rights, especially cultural rights, “must be understood as requiring the enjoyment of adequate public spaces by all, without discrimination”. She urges that the “question of public space be recognised as a human rights issue, and that a human rights approach which centres on cultural rights should be taken to decision-making in these areas”.⁸¹ In particular Bennouna contends that because local authorities often have a “responsibility to guarantee the collective and participatory character of public spaces” they “should promote creation and regeneration of public spaces in conditions of quality, equality, inclusiveness, accessibility and universal design”.⁸²

On the basis of the above snapshot, a persuasive case can be made that collective memory forms part of cultures and lies at the centre of cultural rights. Moreover, an important aspect

⁷⁹ Shaheed, above, note 25, at para. 64.

⁸⁰ Shaheed, above, note 25, at paras. 16-17

⁸¹ Karima Bennouna, ‘The importance of public spaces for the exercise of cultural rights’ Report of the Special Rapporteur in the Field of Cultural Rights, General Assembly, UNGA A/HRC/74/255, 30 July 2019, at para. 1.

⁸² *Ibid.* at para 84.

of such collective memories is how they are transmitted or carried through symbols and monuments in the public arena not least because, as Bennoune contends, public spaces and the symbols that populate them should be inclusive and non-discriminatory.⁸³ Thus, it is strongly arguable that these principles are relevant in the resolution of disputes over statues of slave traders and colonialists. Certainly, a monolithic and unquestioning glorification of such figures—as such statues are—without any context or counter-narrative from the standpoint of those who suffered at their hand, raises human rights issues along the exact lines envisaged by the UN Special Rapporteurs. This is especially the case in places inhabited by diasporic communities in many British cities and towns, where the social and economic legacies of slavery and colonialism are still felt to this day.⁸⁴

However, the implementation and enforcement of these ‘soft-law’ international human rights norms notoriously “lacks teeth”.⁸⁵ In particular, within the context of the UK, the ICESCR is not a part of UK law and nor is it enforceable in UK courts or binding on public authorities.⁸⁶ These principles therefore carry very little *domestic* legal weight that might be brought to bear in the kind of memorialisation disputes outlined above.

The question arises, then, whether the human rights law that *is* applicable in the UK — namely the ECHR as brought into legal effect by the HRA 1998 — might be of assistance, and it is to this question that we now turn. What follows may seem a radical argument, for it

⁸³ *Ibid.*

⁸⁴ For examples of these legacies see below, notes 149-153.

⁸⁵ For an overview of the implementation and enforcement mechanisms see e.g., Rhona K. Smith, *International Human Rights Law*, 9th ed, (Oxford University Press, 2019), 144-168.

⁸⁶ See *R (o/a Miller and another) v. Secretary of State for Exiting the European Union* [2018] AC 61; [2017] UKSC 5, at paras 55-57; Lord Mance, ‘International Law in the UK Supreme Court’, Speech at Kings College, London, 13 February 2017, <https://www.supremecourt.uk/docs/speech-170213.pdf>

involves the application of Convention rights to new *factual* circumstances. But it is important to remember that the principles of international human rights are of relevance in interpreting Convention rights,⁸⁷ and whilst not formally part of UK law, they have been taken into account by the UK courts⁸⁸ and the ECtHR⁸⁹ when developing human rights norms.⁹⁰ Furthermore, as is well-known, the ECHR is not set-in-stone but rather evolves, as a “living instrument which must be interpreted in the light of present-day conditions”.⁹¹ In the current context therefore it can be argued that the principles explicated, *inter alia*, in the reports of the Special Rapporteurs are of relevance in determining the direction of travel of ECHR rights.

Accordingly, we maintain that the ECHR and recent case law of the ECtHR has a potentially important role to play. This is especially so in respect of the complex interplay of Articles 8 and 10, and their relationship to collective memory, memorialisation and historical debate. It is to this issue that we now turn.

ECtHR: Articles 8 and 10 – Towards a Mnemonic Right to Collective Memory?

⁸⁷ See e.g., A. Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5(1) *Human Rights Law Review*, 57–79.

⁸⁸ See e.g., Thomas Bingham, *Widening Horizons. The Influence of Comparative Law and International Law on Domestic Law* (Cambridge University Press, 2010); and Katherine Reece Thomas, ‘The Changing Status of International Law in English Domestic Law’ (2006) *Netherlands International Law Review*, 53(3), 371–398.

⁸⁹ See e.g., *Bayatyan v. Armenia*, Application no. 23459/03, (ECtHR, 7 July 2011) at para. 105. See also Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press, 2010).

⁹⁰ On this issue more generally see e.g., M. Shah Alam ‘Enforcement of international human rights law by domestic courts: A theoretical and practical study’ (2006) *Netherlands International Law Review* 53(3) 399–438.

⁹¹ *Bayatyan v. Armenia*, Application no. 23459/03, (ECtHR, 7 July 2011) at para. 102.

The ECHR does not contain an explicit right to collective memory. However, over the last decade, the ECtHR has begun to explore the possibility that collective memory may, in some circumstances, fall within the ambit of Article 8. In a series of cases the Court has dealt with claims in which, in one way or another, the memory of one person or group — linked to identity and dignity — has been impugned by another person’s expression that has sought to impact or shape contemporary perceptions of the past. They have therefore involved clashes between Article 8 and Article 10 of the ECHR.⁹²

Articles 8 and 10 are not absolute rights but may be balanced against competing interests, as provided for under their respective second paragraphs, which require that any limitation on the right(s) must be “in accordance with” or “prescribed by” law and “necessary in a democratic society” in the pursuit of one of the aims listed.⁹³ Amongst these “legitimate aims” is the “protection of the reputation and rights of others”, and these “rights of others” necessarily include the *human rights* of others. Thus, the protection of the Article 8 rights of some may constitute a legitimate reason to interfere with the Article 10 rights of others, and vice versa.

A significant step in the methodology of balancing these rights came with the 2012 case of *Aksu v. Turkey* which concerned derogatory terms about the Gypsy/Roma culture and community used in official publications by the Turkish Ministry of Culture.⁹⁴ The applicant

⁹² See Peter Cumper and Tom Lewis, ‘What to do with the Buried Giant? Collective Historical Memory and Identity in the Freedom of Expression Case Law of the European Court of Human Rights’ in Jill Marshall (ed.) *Personal Identity at the European Court of Human Rights* (Routledge/Taylor and Francis, 2022), 152-176.

⁹³ This latter essentially denotes the principle of proportionality. See further, Grant Huscroft, Bradley W. Miller and Grégoire Webber (eds.) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

⁹⁴ *Aksu v. Turkey* Application nos. 4149/04 and 41029/04 (ECtHR, 15 March 2012).

was of Roma origin and brought an application under Article 8, the right to respect for a private and family life. The ECtHR stated that personal autonomy was an important underpinning of Article 8, which embraced multiple aspects of physical and social identity.

The Court continued:

... an individual's ethnic identity must be regarded as another such element... In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and feelings of self-worth and self-confidence of members of the group.⁹⁵

The ECtHR stated that since there is “no hierarchical relationship” between Articles 8 and 10, when these rights have to be balanced against each other, the Court's role is to ensure that a fair balance has been struck by the domestic authorities. As long as the balancing exercise has been carried out in accordance with criteria established by the ECtHR, giving appropriate weight to the respective rights involved, then “strong reasons” would be required for it to substitute its own view for that of the domestic courts.⁹⁶

Aksu did not concern memory in express terms, but the following year, in *Putistin v. Ukraine*, the ECtHR took a clearer step down this road.⁹⁷ The case concerned the infamous “Death Match” of 1942, a football match between a team composed of Ukrainian players who before the war had been professionals, but by this time were working in a local bread factory, and a

⁹⁵ *Ibid.*, *Aksu* at para. 58.

⁹⁶ *Ibid.*, *Aksu* at paras. 63-68. See also *Von Hannover v. Germany (No 2)* Application nos. 40660/08 and 60641/08 (ECtHR, 7 February 2012) at para. 106, and *Axel Springer v. Germany* Application nos. 39954/08 (ECtHR, 7 February 2012) at [87]. The first of these was an Article 8 claim, against which Article 10 rights were balanced; the second was an Article 10 claim against which Article 8 rights were balanced.

⁹⁷ *Putistin v. Ukraine* Application no. 16882/03 (ECtHR, 21 November 2013).

team composed of Luftwaffe personnel. Despite alleged threats and a biased referee, the Ukrainians won the match. The story goes that after the game the winning team members suffered serious repercussions, including arrest, torture, and being sent to a concentration camp, where four were eventually executed.⁹⁸ However, newspaper reports at the time of the game's 60th anniversary alleged that some of the Ukrainians had in fact been Nazi collaborators, and the son of one of these players, Vladlen Putistin, brought an action against the newspaper and journalist alleging the dissemination of falsehoods and seeking a rectification and damages. Having failed before the domestic courts, he claimed that there had been a violation of Article 8. The ECtHR stated that the "reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8".⁹⁹

In *Putistin*, as in *Aksu*, the applicant was ultimately unsuccessful. The ECtHR held that, having regard to all the various factors, especially the importance of press freedom in a democracy and the indirect nature of the interference, the domestic courts had *not* failed to strike an appropriate balance between his rights and those of the press. Nevertheless, by accepting that Article 8 *could* cover the reputation of a *deceased ancestor*, the Court took a step towards recognising the existence of some 'right to memory' or mnemonic right linked to private life and identity.

It is however in the case of *Perinçek v. Switzerland* that the Grand Chamber of the ECtHR took a significant step towards recognising that, in some circumstances at least, collective

⁹⁸ The match has become a part of Ukrainian collective memory, being the subject of several feature films. However, perhaps unsurprisingly, the 'historical facts' are far less clear-cut. See James Riordan, 'The Match of Death: Kiev, 9 August 1942' (2003) 4(1) *Soccer and Society* 87.

⁹⁹ *Putistin*, above n 97 at [33].

memory may fall within the ambit of Article 8.¹⁰⁰ The case concerned spoken statements at three events in Switzerland concerning the 1915-17 Armenian genocide, made by the Turkish politician Dogu Perinçek. He stated amongst other things that:

allegations of an “Armenian genocide” are an international lie ... invented in 1915 by the imperialists of England, France and Tsarist Russia who wanted to divide the Ottoman Empire during the First World War ... Turkey was on the side of those defending their homeland and the Armenians were on the side of the Imperialist powers and their instruments.¹⁰¹

Perinçek was convicted and fined under a Swiss hate speech law which criminalises the denial, justification or gross trivialisation of a genocide. Having exhausted domestic legal remedies in Switzerland, he applied to the ECtHR claiming a breach of Article 10.

However, whilst the case was *brought* under Article 10, the ECtHR stated that it fell into that category of cases requiring a balance to be struck between competing Convention rights — namely the Article 10 right of the applicant as against the Article 8 rights of modern-day Armenians whose forbears were victims of the Armenian genocide. The Court stated that the “rights of others” in Article 10(2) were:

the rights of Armenians to respect for their and their ancestors’ dignity including their right to respect for their identity constructed around the understanding that their

¹⁰⁰ *Perinçek v. Switzerland* Application no 27510/08 (ECtHR, 15 October 2015). See Cumper and Lewis, above, note 92, at pp. 164-168.

¹⁰¹ *Ibid.*, at paras.13-16.

community had suffered genocide. In the light of the case-law in which the Court has accepted that both ethnic identity and reputation of ancestors may engage Article 8 ... under its “private life” heading the Court agrees that these were rights protected under [Article 8].¹⁰²

Thus, the ECtHR in *Perinçek* stated that modern-day Armenians have, under Article 8, protection for their collective memory as a group which had suffered historical trauma a century before: something akin to a mnemonic right, linked to Armenians’ identity and dignity *qua* Armenians.¹⁰³

Moreover, whilst this case was brought under Article 10 (because there had been an interference with the applicant’s speech under Swiss law) the Court noted that a *failure* to protect this mnemonic aspect of identity and dignity of a particular group might have led to an admissible claim under Article 8. This was a case in which competing Convention rights had to be “balanced” and in such cases:

the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect.¹⁰⁴

¹⁰² *Ibid.*, at paras. 227 and 156.

¹⁰³ See e.g., Uğur Ümit Üngör, ‘Lost in commemoration: the Armenian genocide in memory and identity’ (2014) 48(2) *Patterns of Prejudice* 147.

¹⁰⁴ *Perinçek*, above, note 100, at para.198.

To summarise, the ECtHR in *Perinçek* found that modern-day Armenians have, under Article 8, a human right linked to their identity and dignity *qua* Armenians — something that comes close to a right to collective memory of their ancestors who, nearly a century before, had been subjected to gross human rights violations and which, today, is an integral part of contemporary Armenian identity.¹⁰⁵

A Fine Balance

On the facts of *Perinçek*, by a majority of ten to seven, the Grand Chamber found that the scales tipped in favour of Article 10.¹⁰⁶ The majority stressed that “statements on historical issues ... are as a rule seen as touching on matters of public interest” and are therefore “in principle entitled to strong protection”.¹⁰⁷ Here the Court was following a well-established line of case law wherein the level of protection afforded is determined to a large extent by the *type* of expression at issue.¹⁰⁸ Expression that relates to democracy, especially political and journalistic speech, or that contributes to debate upon matters of public concern¹⁰⁹ tends to be

¹⁰⁵ See e.g., Richard Hovannisian (ed.) *The Armenian Genocide In Perspective* (Routledge, 1986).

¹⁰⁶ On the debate over Holocaust denial and the where the line should be drawn see Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave Macmillan, 2004). In Holocaust denial cases the ECtHR tends to utilise Article 17, which prevents the use of Convention rights for purposes antithetical to the Convention. See e.g., *Garaudy v. France* Application no. 65831/01 (ECtHR, Fourth Section Decision, 24 June 2003). The ECtHR displays a reticence to utilise Article 17 and it removes any prospect of balancing competing rights and interests. It therefore seems unlikely (though not impossible) that it would be of relevance to the issues under consideration in this paper.

¹⁰⁷ *Perinçek*, above, note 100, at para. 230.

¹⁰⁸ See e.g., Tom Lewis, ‘At the deep end of the pool: religious offence and the margin of appreciation before the European Court of Human Rights’ in András Koltay and Jeroen Temperman (eds.) *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections after the Charlie Hebdo Massacre* (CUP, 2017) 259–293.

¹⁰⁹ See e.g., *Jersild v. Denmark*, Application no. 15890/89, (ECtHR, 23 September 1994).

afforded a higher level of protection than artistic,¹¹⁰ religious¹¹¹ or commercial expression.¹¹² In what has been referred to as a “hierarchy” of expression, the Strasbourg court employs the margin of appreciation doctrine whereby far less latitude is afforded to states as to how they strike balances between freedom of expression and competing interests/rights in cases of political, journalistic and public interest debate-speech than in the other kinds of expression referred to above.¹¹³ As the Court has said: “there is little scope under Article 10(2) for restrictions on debates on questions of public interest”.¹¹⁴ However States are afforded a much wider margin of appreciation:

when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Similarly states have a broad margin of appreciation in the regulation of commercial speech ...¹¹⁵

¹¹⁰ *İ.A v. Turkey*, Application no. 42571/98, (ECtHR, 13 September 2005).

¹¹¹ *Murphy v. Ireland*, Application no. 44179/98, (ECtHR, 10 July 2003).

¹¹² *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, Application no. 10572/83, (ECtHR, 20 November 1989).

¹¹³ On the “hierarchy of expression” in Article 10 case law see e.g., Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP, 2006) at pp. 50-72; Dan Kolowski, “‘For the Protection of the Reputation or Rights of Others’: The European Court of Human Rights’ interpretation of the Defamation Exception in Article 10(2)” (2006) 11(1) *Communication Law and Policy* 133-178. On the margin of appreciation see e.g., George Letsas, ‘Two Concepts of the Margin of Appreciation’, 26(4) *Oxford Journal of Legal Studies* 705; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press, 2012).

¹¹⁴ *Animal Defenders International v. United Kingdom* Application no. 48876/08, 22 April 2013, at para. 102.

¹¹⁵ *Mouvement Raëlien Suisse v. Switzerland* Application no. 16354/06, 13 July 2012, at para. 61.

This approach is consonant with the view that freedom of expression is valued primarily because it “constitutes one of the essential foundations of democratic society”¹¹⁶ which itself, as the Preamble to the Convention itself states, is essential to the protection of human rights themselves.

Historical Expression

The assiduous protection afforded by the Court to political, journalistic and public interest debate-speech has not been confined to expression on matters of strictly contemporary import. The ECtHR has extended high levels of protection to expression which engages in *historical debate*. Thus, for example, in *Lehideux and Isorni v. France* (concerning convictions for the publication of an article exonerating Marshall Pétain for his actions as leader of the 1940s Nazi-backed Vichy Regime), the ECtHR stressed that it is vital that proper debates take place over a nation’s past, especially on controversial issues. It stated that “every country must make [efforts to] debate its own history openly and dispassionately”.¹¹⁷ Similarly, in *Giniewski v. France* (concerning convictions for controversial statements made about the role of Roman Catholic doctrine and the Holocaust), the ECtHR stressed that “it is an integral part of freedom of expression to seek historical truth” and, with regard to such matters of “indisputable public interest”, restrictions on freedom of expression must be “strictly construed”. Moreover, it was “essential in a democratic society that a *debate* on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely”.¹¹⁸

¹¹⁶ *Ibid.* at para. 48. Reflecting the three classic theoretical justifications of freedom of speech the Court also habitually states that freedom of expression is valuable since it constitutes, in addition to being essential for democracy, ‘a basic condition for [societal] progress and for each individual’s self-fulfilment’.

¹¹⁷ *Lehideux and Isorni v. France*, Application no. 24662/94 (ECtHR, 23 September 1998) at para. 55.

¹¹⁸ *Giniewski v. France*, Application no. 64016/00 (ECtHR, 31 January 2006) at para. 51 (emphasis added). See also *Chauvy and others v. France*, Application no. 64915/01 (ECtHR, 29 June 2004) at para. 69.

Returning to the case of *Perinçek*, it was against this backdrop of “strong protection” for public interest speech in general, and historical-debate-speech in particular, that the ECtHR proceeded to apply its several “balancing criteria” whereby the Article 10 rights of the applicant were set against the Article 8 rights of modern-day Armenians. Of these criteria, the most relevant, for present purposes, were: the nature of the statements; the context — in terms of the place in which they were made and the lapse of time since the events in question; and the extent to which they affected Armenians’ rights.¹¹⁹ With regard to the first of these, the ECtHR found that the “overall thrust” of *Perinçek*’s utterances were “not a form of incitement to hatred or intolerance”, nor did he express contempt or hatred for the victims or call the Armenians liars. Rather, his remarks were directed at the “Imperialist powers” and their “allegedly insidious designs on the Ottoman Empire”.¹²⁰ In relation to the geographical context the majority found that there was “no direct link” between Switzerland and the Armenian genocide, with the “only such link” being the presence of an Armenian community on Swiss soil — and this was “tenuous”, as there was no evidence of friction between the Armenian and Turkish communities in Switzerland.¹²¹ As for the other contextual element, the “time factor”, the Court pointed to the long “lapse of time between the applicant’s statements and the tragic events to which he was referring”, and the fact that there would “surely be very few, if any, survivors of these events”. Whilst the majority accepted that this was still a “live issue for many Armenians”, nevertheless the “time element could not be

¹¹⁹ The other criteria listed in *Perinçek*, above, note 100, are: the extent of consensus among contracting states on the need to criminally sanction such statements; the existence of any relevant international law rules; the methods employed by the Swiss courts to justify the conviction; and the severity of the interference, at paras. 228-273.

¹²⁰ *Ibid.* at para. 233.

¹²¹ *Ibid.* at para. 244.

disregarded” and the “need for regulation” of such statements was “bound to recede with the passage of time”.¹²²

In respect of the impact of the Perinçek’s statements at public meetings, the ECtHR did not accept that the statements were “so wounding to the dignity of Armenians who suffered and perished and the dignity and identity of their descendants as to require criminal-law measures in Switzerland”.¹²³ This was not to say that there:

might exist circumstances in which, in view of the particular context, statements relating to traumatic historical events could result in significant damage for the dignity of groups affected by such events: for instance if they are particularly virulent and disseminated in a form that is impossible to ignore.¹²⁴

However, these circumstances did not exist on the particular facts of this case.

Whilst ten of the *Perinçek* judges found that the balance nudged in favour of Article 10, applying the criteria discussed above, seven dissenting judges held that it tipped towards Article 8. As the President of the Court, Judge Spielmann, joined by six others, said in relation to the context:

¹²² *Ibid.* at para. 250.

¹²³ *Ibid.* at para. 252.

¹²⁴ *Ibid.* at para. 253.

Minimising the significance of the applicant’s statements by seeking to limit their geographical reach amounts to seriously watering down the universal, *erga omnes* scope of human rights — their quintessential defining factor today.¹²⁵

Moreover, the dissenters stated, the majority’s “geographically restricted approach might lead to the conclusion that denial of genocides beyond Europe — such as those in Rwanda or Cambodia — would be protected by Article 10, an approach that was inconsistent with the “universal values enshrined in the Convention”.¹²⁶ Additionally, Judge Nussberger, albeit agreeing with the majority on the overall outcome, made the point that:

Legislation expressing solidarity with victims of genocide and crimes against humanity must be possible everywhere, even if there are no direct links to the events or the victims, *even if a long period of time has elapsed*, and even if the legislation is not directly aimed at preventing conflicts.¹²⁷

She stressed that every society had to be able to resolve the conflict between freedom of debate on historical events and the “personality rights of victims and their descendants” in accordance with its own vision of historical justice.

Thus, we see that the balance struck in *Perinçek* was a fine one, with arguments, especially those stressing the universality of human rights wherever and whenever they are/were

¹²⁵ *Perinçek*, above, note 100, joint dissenting opinion of Judges Spielmann, Casadeval, Berro, De Gaetano, Sicilianos, Silvis and Kūris at para. 6.

¹²⁶ *Ibid.* at para. 7.

¹²⁷ *Ibid.* Partly concurring and partly dissenting judgment of Judge Nussberger (emphasis added).

violated, being particularly prevalent. Clearly, with a slightly different application of the criteria, the scales might have tipped in favour of Article 8.

The question arises then: how might this Strasbourg case law, coupled with the distinction sketched out above between history and collective memory, be of relevance in resolving the UK's statue wars? It is to this question that we now turn.

Relevance to the UK's Statue Disputes

The expression at issue in *Perinçek* comprised *spoken* comments in three public meetings about the Armenian genocide and the ECtHR held that these speeches engaged the Article 8 rights of modern-day Armenians. On the facts, however, the importance of free historical debate outweighed the small chance of damage to the Article 8 rights of modern-day Armenians in Switzerland.

Some might question whether this line of authority, culminating in *Perinçek*, does or ought to apply to the controversial statues of slaver traders and colonialists in the UK's streets and squares. Yet it is beyond doubt that such public memorials constitute symbolic expression, given the wide definition accorded to expression in the case law of the ECtHR.¹²⁸ After all,

¹²⁸ See e.g., *Vajnai v. Hungary*, Application no. 33629/06 (ECtHR, 8 November 2008) (concerning a conviction under a law banning the wearing of the red, five-pointed star); *Tatár and Fáber v. Hungary*, Application nos. 26005/08 and 71685/16 (ECtHR, 16 June 2012) (involving the display of dirty clothes outside the Hungarian Parliament, symbolising the “dirty laundry of the nation”); and *Mătășaru v. the Republic of Moldova*, Application no 69714/16 and 71685/15 (ECtHR, 15 January 2019) (pictures of well-known officials, attached to public sculptures of male and female sexual organs, erected by the applicant to protest about corruption in the criminal justice system).

Article 10 protects the right to both impart *and receive* information and ideas.¹²⁹ Moreover, as expression, a statue must be accepted as having the capacity to have an impact upon those who see it, those on-lookers and passers-by who *receive* the information it undoubtedly imparts. Likewise, in the same way that written or spoken words might interfere with the Article 8 rights of those who read or hear them, so might a public memorial. We can envisage a hypothetical scenario to illustrate this principle: imagine that a statue of the 1930s's British Union of Fascists leader, Oswald Mosely, has been erected in a district with a large Jewish population, or in the vicinity of a synagogue. The statue would certainly constitute a form of expression. However, it would also constitute a deep insult to the memory of Jewish residents or passers-by to such an extent that it would surely engage their Article 8 rights in the way described by the Court in *Perinçek*. Admittedly this is an extreme example, but the point about *engagement* of Article 8 rights would stand even were the facts to be adjusted. So, for example, if the statue had been standing for many years, it becomes no less offensive (and is arguably *more* so) on account of its longevity; or if it were located nowhere near a Jewish area or synagogue, Jewish people will still see it, pass-it-by, and be aware of its presence. The Article 8 rights of Jewish people — in the *Perinçek* sense of a right “to respect for their and their ancestors’ dignity including their right to respect for their identity constructed around the understanding that their community had suffered genocide”— would surely be engaged by such a monument.¹³⁰

The presence of monuments in public space in the UK, commemorating slave traders such as Edward Colston does, we argue, *engage* the Article 8 rights of members of those

¹²⁹ Interestingly, the U.S. Supreme Court has held that monuments on public land constitute a form of government speech, even where they are privately donated: *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009).

¹³⁰ *Perinçek*, above, note 100, at para. 227.

communities that, as the former Special Rapporteur Farida Shaheed put it, “live under their shadow”¹³¹ — people whose forbears were kidnapped, tortured, bought, sold and killed at the hands of the Royal Africa Company, of which he was a Director. It is estimated that Colston alone was responsible for the transportation of 84,500 Africans into slavery, and for the deaths of approximately 19,300 men, women and children.¹³² Yet the plaque that adorned the plinth upon which his statue stood read simply: “Erected by the citizens of Bristol as a memorial of one of the most virtuous and wise sons of their city”.¹³³ There was no reference to the methods by which he secured the wealth that enabled him to bestow his philanthropy upon the city.¹³⁴ Such a permanent, cast-in-bronze, larger-than-life depiction of a man placed literally on a pedestal in a prominent public space, with a plaque celebrating his virtue, must be considered *at least* as impactful as the ephemeral spoken words of Dogu Perinçek, uttered at three public meetings, particularly given the greater public awareness of Colston’s colonial legacy in recent years.¹³⁵

In *Perinçek* the historical debate/public interest value of the applicant’s comments weighed in their favour, entitling them, the Court held, to “strong protection” under Article 10.¹³⁶ This was coupled with contextual factors such as the fact that very few if any Armenians were likely to have been impacted by the comments and that they related to events that occurred a long time ago. But it is different with statues. Whilst they certainly constitute forms of

¹³¹ Shaheed, above, note 25.

¹³² Nasar, above, note 1, at p. 1.

¹³³ See Roger Ball, ‘Myths within myths ... Edward Colston and that statue’ (Bristol Radical History Group, 2018) at <https://www.brh.org.uk/site/articles/myths-within-myths/>

¹³⁴ Madge Dresser, ‘Colston Revisited’ (History Workshop, 27 June 2020) at <https://www.historyworkshop.org.uk/colston-revisited/>.

¹³⁵ *Perinçek*, above, note 100, at para. 254.

¹³⁶ *Perinçek*, above, note 100, at para. 230.

expression protected by Article 10(1), they can scarcely be said to contribute to *debates* about the past or discussions relating to historical or contemporary matters. Thus, they are unlikely to occupy a high position in the hierarchy of types of expression (in the sense discussed above). Statues stand monolithic. For sure they may be seen as carriers of the collective memory of groups within the societies in question — *lieux de mémoire* in the Pierre Nora sense, or embodiments of what Avishai Margalit calls “shared memory”. However, whilst they may embody certain collective memories, they are *not* “statements on historical issues ... seen as touching on matters of public interest” even to the extent that Dogu Perinçek’s speeches were.¹³⁷ It is certainly very difficult to view them as contributions to the kind of vital debates which (the ECtHR states) nations must conduct about controversial episodes from their past, in a quest for the “historical truth” that is essential for a democracy society.¹³⁸

More broadly, considering the classical arguments that are often advanced to justify freedom of expression, such statues contribute little to democratic debate on matters of public interest, and neither can they be said to aid the pursuit of truth and social progress, or promote individual self-fulfilment.¹³⁹ Like all symbols, it might be argued that statues convey multiple meanings.¹⁴⁰ But the *ostensible* message conveyed by such memorials is decidedly one-dimensional, namely the celebration of a particular historical figure. A long-standing statue, whilst communicating *something*, can hardly be said to contribute to pluralistic debate, nor is it normally associated with the dynamic exchanges of which we expect valuable speech

¹³⁷ *Ibid.*

¹³⁸ See e.g., *Lehideux*, above, note 117, at para. 55 and *Giniewski*, above, note 118, at para. 51.

¹³⁹ These are the goods that the ECtHR invariably says that freedom of expression is said to foster, as stated for the first time in *Handyside v. United Kingdom*, Application no 5493/72 (ECtHR, 7 December 1976) [49], and reiterated in all of the Court’s Article 10 case law. They align broadly with the classical justifications for a free speech principle: see e.g., E. Barendt *Freedom of Speech* (Oxford: Oxford University Press, 2005), pp. 1-38.

¹⁴⁰ *Vajnai v. Hungary*, above, note 128, at para. 51.

to be a part. Thus, whilst it would come within the protective scope of Article 10, in the “hierarchy”¹⁴¹ of “types” of expression, it would not fall with the category of political or public interest speech, which is afforded the highest level of protection.¹⁴² Nor indeed, it is submitted, would a statue come within the category of historical speech that contributes to vital debate, as seen in the cases of *Giniewski*, *Lehideux* or *Perincek*.

A further consideration to bear in mind is that statues in public space are necessarily erected and maintained by, or at least with the active consent of, governmental agencies, requiring as they do various forms of official support (e.g., finance, planning consents, maintenance etc). Thus, even in a liberal democracy, they tend to be the conveyors of “officially” sanctioned information. As Gary Younge argues, statues:

... are erected with eternity in mind — a fixed point on the landscape. Never to be moved, removed, adapted or engaged with beyond popular reverence. Whatever values they represent are the preserve of the establishment. To put up a statue you must own the land on which it stands and have the authority and means to do so. As such they represent the value system of the establishment at any given time that is then projected into the forever.¹⁴³

Statues, because of their innate characteristics (i.e., high cost, prominent occupation of public space, long-standing duration) tend to embody and carry the collective memories of the

¹⁴¹ Fenwick and Phillipson, above, note 113.

¹⁴² See *Castells v. Spain*, Application no 11798/85 (ECtHR, 23 April 1992) [43].

¹⁴³ Younge, above, note 17.

dominant group.¹⁴⁴ When individuals from this group find their own collective memory, consonant with their identity depicted in public space, “that space becomes a comfortable place that belongs to them”, but when those from “marginalised groups encounter the same statues, they find depictions of people ... who dehumanised, conquered or bought and sold their ancestors”.¹⁴⁵ Thus, commemoration of this kind engages the Article 8 rights of such people in terms of their collective memory, in exactly the same way envisaged by the Grand Chamber of the ECtHR in *Perinçek*.

Impact of the Spoken/Written Word Compared to the Impact of Bronze/Stone

It will be recalled that the majority of the ECtHR in *Perinçek* was influenced by the fact that the words spoken had very little relevance to “Swiss political life”, and that the only possible link between the words spoken and Switzerland had to “come from the presence of an Armenian community on Swiss soil” — and that there was “no evidence that the atmosphere in Switzerland was tense and could result in serious friction between Turks and Armenians there”.¹⁴⁶ But this state of affairs stands in vivid contrast to the position with slaver statues. Whilst slavery was abolished over two centuries ago in the UK, its legacy in this country remains.¹⁴⁷ The historian David Olusoga has shown that the “roots of European racism lie in

¹⁴⁴ Sadia Habib, Chloe Peacock, Ruth Ramsden-Karelse and Megan Tinsley, *The Changing Shape of Cultural Activism Legislating Statues in the Context of the Black Lives Matter Movement* (Runnymede Trust, June 2021), p. 3, at

[https://assets.website-files.com/61488f992b58e687f1108c7c/61d4554b46a20952a3266ff4_Runnymede_CoDE_Cultural_Activism_and_statues_briefing_FINAL%20\(1\).pdf](https://assets.website-files.com/61488f992b58e687f1108c7c/61d4554b46a20952a3266ff4_Runnymede_CoDE_Cultural_Activism_and_statues_briefing_FINAL%20(1).pdf)

¹⁴⁵ *Ibid.*, p 2. See also Bell, above, note 16, at p. 74.

¹⁴⁶ *Perinçek*, above, note 100, at para. 244.

¹⁴⁷ On this generally see Padraic Scanlon, *Slave Empire: How Slavery Built Modern Britain* (Robinson, 2022); Nigel Sadler, *The Legacy of Slavery in Britain* (Amberley Publishing Limited, 2018); and David Olushoga, *Black and British: A Forgotten History* (Picador, 2016).

the slave trade”,¹⁴⁸ and the ongoing legacy of slavery and colonialism in the UK continues to cast a long shadow, especially given longstanding racial disparities in areas such as education,¹⁴⁹ health,¹⁵⁰ employment,¹⁵¹ police powers,¹⁵² and deaths in police custody.¹⁵³ Thus, compared to cases like *Perinçek*, where the majority of the ECtHR found that the contextual factors of time and geography weighed in favour Article 10, the balance here would seem to weigh more in favour of some kind of protection for the Article 8 rights of those descendants of African slaves whose ancestors were bought and sold as chattels by Colston and his ilk.¹⁵⁴ As the ECtHR said in *Handzhiski v. Bulgaria*: “[t]he social significance of the monument in question, the values or ideas which it symbolises, and the degree of veneration that it enjoys in the respective community will ... be important considerations”.¹⁵⁵

¹⁴⁸ David Olusoga ‘The roots of European racism lie in the slave trade, colonialism – and Edward Long’, *Guardian*, 8 September 2015, <https://www.theguardian.com/commentisfree/2015/sep/08/european-racism-africa-slavery>.

¹⁴⁹ See e.g., YMCA, *Young and Black*, October 2020, at p. 7, which reveals that 95 per cent of young Black people have heard and witnessed racist language at school:

<https://www.ymca.org.uk/wp-content/uploads/2020/10/ymca-young-and-black.pdf>

¹⁵⁰ See e.g., Tracey Bignall, Samir Jeraj, Emily Helsby and Jabeer Butt, ‘Racial disparities in mental health: Literature and Evidence Review’ (Race Equality Foundation, 2019) at <https://raceequalityfoundation.org.uk/wp-content/uploads/2020/03/mental-health-report-v5-2.pdf>

¹⁵¹ See e.g., Tobi Thomas, ‘Black youth unemployment rate of 40% similar to time of Brixton riots, data shows’, *Guardian*, 11 April 2021), https://www.theguardian.com/society/2021/apr/11/black-youth-unemployment-rate-brixton-riots-covid?utm_term=Autofeed&CMP=twl_b-gdnnews&utm_medium=Social&utm_source=Twitter#Echobox=161815054

¹⁵² In England and Wales, between April 2020 and March 2021, there were 52.6 stop and searches for every 1,000 black people compared to 7.5 stop and searches for every 1,000 white people. See GOV.UK, *Stop and Search* (27 May 2022): <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>

¹⁵³ See e.g., Ryan Erfani-Ghettani, ‘The Defamation of Joy Gardner: Press, Police and Black Deaths in Custody’ (2015) 56(3) *Race and Class* 102.

¹⁵⁴ See Scanlon, Sadler and Olushoga, above, note 147.

¹⁵⁵ *Handzhiski v. Bulgaria*, Application no. 10783/14 (ECtHR 6 April 2021) at para. 55. See also *Shvydka v. Ukraine*, Application no. 17888/12 (ECtHR 30 October 2014) at paras. 39-40; *Tatár and Fáber v. Hungary*,

Are Memorials/Statues Sufficiently Direct Expression to Engage Article 8?

It could be argued, by way of objection to the above, that statues in public places are not direct enough ‘expression’ to constitute sufficient interference to warrant an engagement of the Article 8 rights of those in their vicinity, in the way that words (spoken/written) in cases like *Aksu*, *Putstin* and *Perinçek* were held to be. Our response to this objection is twofold.

First, in *Perinçek* itself, the words spoken by the applicant — deemed not to be direct attacks on Armenians, but rather attacks on “Imperialist powers” — were held by the ECtHR to have engaged Article 8. The Court then carried out a balancing exercise, applying its balancing criteria in this regard. Whilst the Court, on the facts, ultimately found that the balance weighed in favour of Article 10, this should not diminish the significance of the fact that Article 8 was engaged in the case.

Secondly, an argument can be made drawing on a different strand of the ECtHR’s expressive-rights jurisprudence: the strong line of authority suggesting that expression that attacks, criticises or ridicules objects of *religious* veneration may legitimately be curtailed in order to protect the sensibilities of religious believers, *even* where those believers were not present to hear or see the offending expression itself. Thus, in *Otto-Preminger-Institut v. Austria*, it was held that a satirical film ridiculing God, Jesus and the Virgin Mary, was “gratuitously offensive to others and thus an infringement of their rights, and ... therefore [did] not contribute to any form of public debate capable of furthering progress in human affairs”.¹⁵⁶

above n 128 at [36]; and *Ibrahimov and Mammadov v. Azerbaijan*, Application nos. 63751/16 and 5 others (ECtHR 13 February 2020) at paras. 166-167.

¹⁵⁶ *Otto-Preminger-Institut v. Austria*, Application no.13470/87, 20 September 1994, para. 49.

Accordingly there was held to be no violation of Article 10 when the Austrian authorities banned the film, even though it is improbable that anyone likely to have been offended by the film would ever have actually seen it. *Otto-Preminger* was reaffirmed by the ECtHR in the subsequent cases of *Wingrove v. UK* (concerning a video of an actor playing Saint Teresa having erotic visions of the crucified Christ),¹⁵⁷ *İ.A. v. Turkey* (concerning a novel in which a passage stated that the Prophet Mohammad did not forbid sexual intercourse with dead persons or live animals),¹⁵⁸ and *E.S. v. Austria* (concerning words spoken in a right-wing political meeting accusing the Prophet Mohammad of paedophilia).¹⁵⁹ In none of these cases was the expression in issue likely to have caused direct offence to believers since they would be highly unlikely to have viewed the films, read the passages or attended the meeting. In each case the offence was of an attenuated kind, caused by the knowledge that *others* were viewing, reading or hearing the expression at issue. Moreover, the *Otto-Preminger* principle was approved domestically by the High Court in *R (Ghai) v. Newcastle City Council* — a case concerning potential offence (and not specifically religious offence) caused by knowledge of an open-air Sikh funeral pyre albeit, again, it would be out of sight of anyone likely to be offended. Referring to *Otto-Preminger*, the High Court said: “[t]he ECtHR concluded that there was sufficient public knowledge of the basic content of the film to give a clear indication of its nature, such that it was capable in and of itself of causing offence, even though those offended had not seen it”.¹⁶⁰

¹⁵⁷ *Wingrove v. United Kingdom*, Application no. 17419/90, 25 November 1996.

¹⁵⁸ *İ.A. v. Turkey*, Application no. 42571/98, 13 September 2005.

¹⁵⁹ *E.S. v. Austria*, Application no. 38450/12, 25 October 2018

¹⁶⁰ *R (Ghai) v. Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2009] EWHC 978 (Admin) [2009] WLR (D) 151, para 120 (*per* Cranston J.). The Court of Appeal subsequently upheld Mr Ghai’s appeal but not on the basis that his Article 9 rights had been breached, *R (Ghai) v. Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2010] EWCA Civ 59. See Peter Cumper and Tom Lewis, ‘Last Rights and Human Rights: Funeral Pyres and Religious Freedom in the United Kingdom’ (2010) 12(2) *Ecclesiastical Law Journal* 131–151.

The cases considered above are authority for the proposition that the rights of religious adherents not to be subjected to gratuitous offence may be legitimately protected from expression which they do not witness directly with their senses. As a matter of principle and consistency, a monument to a slave trader in a prominent public place, inscribed with words unambiguously extolling his virtues, is at least as “gratuitously offensive... and thus an infringement of [the] rights”¹⁶¹ of the descendants of those enslaved by such men and still suffering the kinds of contemporary discrimination which today are a legacy of the Atlantic slave trade.

Many — probably most — of the memorials to prominent figures from Britain’s past contain threads of controversy, as the disputes over statues of figures such as Drake, Cromwell, Nelson, Peel and Churchill, bear testimony. Undeniably, these monuments have a value — they carry a collective memory of a part of the community in which they stand and, in several cases, the ECtHR itself has affirmed that “public monuments are frequently physically unique and form part of a society’s cultural heritage...”.¹⁶² Indeed, this value is evident even for the paradigm case of Edward Colston. His name was given to (and long retained for) schools, a concert hall, a pub, a tower-block, streets and even a local bread-roll.¹⁶³ Yet monuments such as the Colston statue are not themselves, *contra* Boris Johnson, *history* in the sense discussed above, especially when they have been erected many decades or centuries after those they depict have died. They neither contribute to our understanding of

¹⁶¹ *Otto-Preminger*, above, note 152, at para. 49.

¹⁶² *Handzhiski*, above, note 155, at para 53; *Murat Vural v. Turkey*, Application no. 9540/07 (ECtHR, 21 October 2014) at [41]; and *Sinkova v. Ukraine*, Application no. 39496/11 (ECtHR, 27 February 2018); *Genov and Sarbinska v. Bulgaria*, Application no. 52358/15 (ECtHR, 30 November 2021).

¹⁶³ See Layard, above, note 1.

the past's rich complexity, nor do they furnish explanations, offer critiques, balance opposing views or provide insightful context. To quote the historian Yosef Hayim Yerushalmi: the collective memory embodied in such statues is “drastically selective ... certain memories live on: the rest are winnowed out, repressed or simply discarded ...”.¹⁶⁴

3. Striking the Balance on the Ground

The human rights balancing methodology sketched out above, applying the case law of the ECtHR and supported by the reports of Special Rapporteurs, provides a framework within which statue-disputes may be resolved. Such an approach militates *not* towards “tearing such statues down” and consigning to oblivion these carriers of collective memory. Instead, it points towards innovative solutions that provide context, nuance and balance. We now explore two ways of achieving this goal, drawing on those connected through distinct “ways of knowing about the past”, discussed above in the section on history and memory.

The first way to achieve this goal would be to make use of these statues as offering perfect opportunities to engage in dialogue, and to provide historical education about Britain's prominent role in the story of slavery and colonialism. This would allow for the pursuit of historical truth and debate about the past as advocated by the ECtHR.¹⁶⁵ Indeed, as argued recently by a group of scholars in a publication for the Runnymede Trust, these controversies present “an opportunity for a critical national conversation about Britishness and history”.¹⁶⁶ An obvious way to accomplish this would be to transpose controversial statues to museums

¹⁶⁴ Yosef Hayim Yerushalmi *Zakhor, Jewish History and Jewish Memory* (University of Washington Press, 1989) at p. 95.

¹⁶⁵ See above n 117, *Lehideux* and n 118, *Giniewski*.

¹⁶⁶ Habib *et al*, above, note 144, 1.

where full historical context could be provided¹⁶⁷ — thereby following the example of Berlin’s Citadel Museum, which houses the monuments to Prussian rulers.¹⁶⁸ Moreover, this very suggestion has recently been put forward for the toppled Colston statue by an independent commission (the “We Are Bristol” History Commission), which has recommended that it be displayed horizontally in its damaged form (i.e., dented, and daubed with paint) in a city museum.¹⁶⁹

Alternatively, given the limited storage capacity of museums and pressures on public finances, a more minimalist version of this approach would be to provide historical context at the site of the monuments themselves. For example, in relation to the 80-foot-high obelisk monument in Carmarthen, West Wales, to the cruel and despotic colonial governor of Trinidad (and undisputed hero of Waterloo), Sir Thomas Picton,¹⁷⁰ the local authority, having engaged in a public consultation, has chosen to install information boards providing historical context rather than pulling it down.¹⁷¹ Likewise, in October 2021, an explanatory plaque was placed next to the controversial statue of Cecil Rhodes, at Oriel College Oxford, describing

¹⁶⁷ After its fall the Colston statue was displayed at the M-Shed Museum in Bristol, complete with graffiti and images from the protest that toppled it. Consultation is ongoing as to the long-term plans: See Joanna Burch-Brown and Tim Cole, *The Colston Statue: What Next?* (Bristol: Bristol History Commission, 2022), https://exhibitions.bristolmuseums.org.uk/the-colston-statue/wp-content/uploads/sites/22/2022/02/History_Commission_Short_Report_Final.pdf

¹⁶⁸ The Berlin Citadel museum’s permanent exhibition ‘Unveiled – Berlin and its monuments’ (opened 2016) housing statues from Germany’s past, is a prime example of this kind of approach: <https://www.zitadelle-berlin.de/en/museums/unveiled/>

¹⁶⁹ Burch-Brown *et al*, above, note 167.

¹⁷⁰ See above, note 6.

¹⁷¹ Robert Harries and Ian Lewis, ‘Monument to “war hero” linked to slave trade to stay put in Carmarthen after public vote’ WalesOnline 1 September 2021 at <https://www.walesonline.co.uk/news/wales-news/controversial-statue-welsh-town-not-19483962> . See also Rees, above, note 6.

him as a “committed British colonialist” who exploited the “peoples of southern Africa”, and that his activities “caused great loss of life”.¹⁷²

In view of the previously discussed distinction between collective memory and history, this approach would (in a sense) constitute an attempt at converting or transitioning such monuments *from* being pure(ish) carriers of collective memory of a particular group, *into* the kind of critical educational history that has been advocated by the ECtHR, and the Special Rapporteur Farida Shaheed. As Shaheed points out:

Positive processes of memorialization encourage critical thinking around history and in a variety of contexts, memorials can use creative ways to catalyse this civic engagement by opening new opportunities for dialogue about threats to human rights and what people can do to address them.¹⁷³

With ECtHR case law in mind, this history-based approach would not just be educative, but it would also help foster debate on controversial issues from the nation’s past in that elusive seeking of “historical truth”.¹⁷⁴ In addition to addressing the human rights problems associated with the celebration of slavers and colonialists, this approach would also breathe life into history itself for, as Jeffrey Blustein puts it: “to realize its social function, history must have a public use and an impact on collective memory, that is, be taken up by it, enter into its construction, and become the society’s possession”.¹⁷⁵ And finally, such historical

¹⁷² Jamie Grierson and Damien Gayle, ‘Oxford college installs plaque calling Cecil Rhodes a “committed colonialist”’ *Guardian*, 11 October 2021.

¹⁷³ Shaheed, above, note 25, at para. 64.

¹⁷⁴ See e.g., *Giniewski* above, note 118.

¹⁷⁵ Blustein, above, note 25, 179.

matters have deep resonance for contemporary issues of inequality, discrimination and social justice. After all, as Farida Shaheed observes:

As part of the symbolic-cultural landscape, memorials impact on people's perspectives and understanding of past events but *equally of contemporary issues*. Hence, they must be critically assessed. This is particularly important when people, including children, live under the shadow of numerous, repetitive images and symbols, such as murals and statues.¹⁷⁶

This contextualizing would also be in line, arguably, with the current UK government "retain and explain" policy in relation to planning applications on contested heritage as stated in the recently amended National Planning Policy Framework.¹⁷⁷ There are however certain objections to this approach. Chong-Ming Lim argues for example that "commemorations present their information in a primarily visual format", whereas information boards or contextualizing plaques do so in a far less impactful "textual format". As Lim says, "[t]hese differences in accessibility will affect the effectiveness of the contextualization in addressing the tainted commemoration".¹⁷⁸ Moreover the comparative size of the monument and the information board/plaque necessarily diminishes their message. For example, the Picton Monument in Carmarthen stands 80 feet tall and is visible from many miles away, whilst the information board which briefly recounts his involvement in torture and slavery as Governor of Trinidad stands on the adjacent pavement next to a municipal rubbish-bin, and is only appreciable upon very close inspection. Furthermore, whilst the addition of historical

¹⁷⁶ Shaheed, above, note 25, above, at para. 64.

¹⁷⁷ NPPF, above, note 11.

¹⁷⁸ Lim, above, note 20, at p. 204

contextualizing/explanatory information to memorials *in situ* may indeed provide historical education, it does not thereby “transform it into a commemoration that *also* includes [the] victims”.¹⁷⁹ Therefore, in terms of the human rights balance, whilst contextualization and a “retain and explain” approach might well satisfy the competing balance between Article 8 and 10 in some cases, in others it may fail to give appropriate weight to the Article 8 mnemonic rights of those from communities whose forbears were enslaved by such men.

A second, more innovative, approach that might address some of these issues would be to go down the route of collective memory itself, attempting to tap more into emotion than to rationality. Engaging and innovative ways of communicating the nuance and complexity of the past with its echoes in the present might include artistic adaptations of existing monuments.¹⁸⁰ For example, on 18 October 2018, Anti-Slavery Day, the then-still-standing Colston statue in Bristol became the subject of a ‘guerrilla’ art installation. A series of concrete blocks were laid out on the pavement in front of the statue in the shape of ship’s hull, enclosing 100 prone plaster figurines in powerful recollection of the famous eighteenth century diagram of the *Brookes* slave-ship depicting captives crammed on the decks. Upon the concrete blocks were listed the jobs performed by victims of modern-day slavery.¹⁸¹ On another occasion a ball-and-chain made of wool, symbolizing enslavement, was attached to the Colston statue’s ankle.¹⁸² Such artistic endeavours could potentially have the role of

¹⁷⁹ *Ibid.*

¹⁸⁰ Lim suggests that the “vandalising” of statues might address such objections, *ibid.* at pp. 207-208. Alicia Dixon examines the Roman practice of *damnatio memoriae*, whereby statues of those who had committed crimes against the state would be removed or defaced so as to *enable* their dishonour and infamy to be remembered, see Dixon, above, at note 13.

¹⁸¹ ‘Anti-Slavery Art Installation by Colston Statue in Bristol’, *Inspiring City*, 22 October 2021 at <https://inspiringcity.com/2018/10/22/anti-slavery-installation-appears-next-to-edward-colston-statue-in-bristol/>

¹⁸² Michael Young, ‘Ball and chain attached to Edward Colston’s statue in Bristol city centre’, *Bristol Live*, 6 May 2018 at <https://www.bristolpost.co.uk/news/bristol-news/ball-chain-attached-edward-colstons-1539315>

helping to create and embody new, and more inclusive, collective memories. They are able to shed new light on the past not through the recounting of historical facts, but by facilitating the ability to “‘imagine’ the other”.¹⁸³ As Shaheed comments: by “[f]ocusing on ‘concrete others’, artistic expressions can make victims visible: ‘they can raise awareness of the depth, breadth and effects of rights violations in a way that other forms of communication can hardly aspire to...’”.¹⁸⁴ It is of course the case, as Andreas Huyssen reminds us, that “memories clash just as rights clash”, and therein lies the risk of this approach.¹⁸⁵ But these kinds of memory-based initiatives might, we suggest, provide for the laying down of new, broader based and more inclusive collective memories, in pursuance of Albie Sachs’ ideal of a “broadly located, mobile, multi-layered and interactive dialogical truth”.¹⁸⁶ Moreover, and crucially, such initiatives are underpinned by human rights *law* in the form of Articles 8 and 10 of the ECHR, and the balance between them, as incorporated by the HRA. The HRA makes it “unlawful for a public authority to act in a way which is incompatible with a Convention right”,¹⁸⁷ and this imposes a legal duty on those public authorities with responsibility for statues in public space, to take cognisance of human rights law.

The approaches outlined above,¹⁸⁸ majoring on memory or history, would also facilitate the avoidance of what Shaheed calls “memorial tyrannies”, which fail to take into account

¹⁸³ Shaheed, above, note 25, at para. 66.

¹⁸⁴ *Ibid.* quoting Pablo de Grieff.

¹⁸⁵ Andreas Huyssen, ‘International Human Rights and the Politics of Memory: Limits and Challenges’ (2011) 53(4) *Criticism* 607.

¹⁸⁶ Sachs, above, note 78.

¹⁸⁷ HRA, section 6(1).

¹⁸⁸ Whilst our focus here is on two approaches, given the fuzzy hinterland between memory and history (alluded to at the start of this article), there obviously exists a possible third route, whereby a blend of history and memory, rationality and emotion might be possible. Under this third, blended, model both imaginative art eliciting empathy and critical historical context could be used in tandem.

“alternative voices”, and would foster the ability of all to choose their identity and to know and understand their culture — even perhaps facilitating the kind of “productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory”.¹⁸⁹ Thus, we argue that in contemporary Britain, the aforementioned approaches — underpinned by politically significant and morally influential principles of European, domestic and international human rights — are necessary to build bridges between different communities and help promote racial, social and cultural inclusivity.

Some will no doubt argue that the approach outlined above is a prime example of the human rights “over-reach” or “rights inflation” that has generated criticism in recent years.¹⁹⁰

According to this school of thought, the statue controversies should be seen as quintessentially *political* matters, demanding resolution by elected representatives who are accountable to “the people”.¹⁹¹ Indeed, this argument fits the narrative of some senior government figures such as the current Attorney General, Suella Braverman, who, in attacking the Human Rights Act 1998, has referred to the “alarming constitutional and practical consequences” in respect of “how fundamental rights are protected in the UK”.¹⁹² There are however (at least) two responses to these critiques.

First, for many years, the political process has offered little in respect of such controversial statues and monuments. To retain the *status quo* is effectively to see these issues entirely

¹⁸⁹ General Comment 21, above, note 76, at para. 16(a).

¹⁹⁰ See e.g., Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books, 2019).

¹⁹¹ John Tasioulas ‘Are human rights taking over the space once occupied by politics’ (New Statesman, 26 August 2019), <https://www.newstatesman.com/politics/2019/08/are-human-rights-taking-over-the-space-once-occupied-by-politics-2>.

¹⁹² Suella Braverman, 2022 Speech at the Policy Exchange, 11 August 2022, <https://www.ukpol.co.uk/suella-braverman-2022-speech-at-the-policy-exchange/>

from the perspective of the dominant group, and to adopt a Nelsonian blindness to the impact of these monuments in the communities who live in their shadow. As the eminent historian and philosopher Tzvetan Toderov once put it, when commenting on what he termed the “sacralisation of the past”: “[w]hen commemoration freezes into permanent forms that cannot be changed without cries of sacrilege, we can be certain that it serves the particular interests of its defenders and not their moral edification”.¹⁹³

Secondly, and more starkly, is the fact that these are areas in which the impact of the law has, in recent years, been ever more significant — as demonstrated, for example, by the changes to planning regulations concerning monuments, the prosecution of protestors and the increase in penalties for damage to memorials.¹⁹⁴ Under the HRA section 3, there is an obligation on the courts to interpret legislation—including planning law—in a way that is, as far as possible, compatible with Convention rights.¹⁹⁵ Moreover, under section 6, public authorities themselves—including those making planning determinations—are bound to act compatibly with Convention rights (unless compelled to do otherwise by primary legislation). The intervention of law necessarily *requires* the adoption of a human rights approach, which, in Convention terms, in turn requires a highly nuanced balance to be struck between the competing rights in play.¹⁹⁶

¹⁹³ Tzvetan Toderov, “The Uses and Abuses of Memory” in Howard Marchitello (ed.) *What Happens to History: The Renewal of Ethics in Contemporary Thought* (L Golsan tr. Routledge, 2001) 2.

¹⁹⁴ See text accompanying notes 10, 11, 12 and 13, above.

¹⁹⁵ See Harwood et al, above, note 9.

¹⁹⁶ The government published its Bill of Rights Bill on 22 June 2022 which, if enacted, would alter the interpretive obligation on the courts under s 3 HRA, reducing the influence of ECtHR interpretations, but at the time of writing the status of the proposal remains uncertain <https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf>

4. Conclusion

Few issues today in Britain generate more disagreement than public memorials to figures from the past. Colston's statue may have been toppled in Bristol, but it seems only a matter of time before the next acrimonious dispute makes headline news.¹⁹⁷ Moreover, it is not just memorials to those connected to slavery, colonialism, and imperialism that generate controversy. In 2020, following an online petition to remove a statue of Mahatma Gandhi in Leicester on the basis that he was "a fascist, racist and sexual predator", his supporters gathered around the statue to "symbolically protect" it.¹⁹⁸ And the *construction*, rather than the *removal* of statues, can be equally controversial — a case in point being the rejection by Westminster Council of an application to put a bronze statue of Margaret Thatcher in Parliament Square, London.¹⁹⁹ As Madge Dresser pithily observes, "[e]ven dead statues have the power to provoke".²⁰⁰ Accordingly, there is need for fresh insights into the resolution of these disputes.

The recent eruption of controversies over statues, monuments, place names and other prominent legacies from Britain's past might, at first glance, seem somewhat surprising. But on closer inspection, it is less so given that much of this country's wealth and power has its roots in enslavement and colonial exploitation. However, this self-same country, which was

¹⁹⁷ See e.g., *In the matter of the Rustat Memorial, Jesus College Cambridge* [2022] ECC Ely 2; and Sally Weale 'Church leaders object to keeping slave trader memorial in Cambridge college chapel', *Guardian*, 29 March 2022, <https://www.theguardian.com/uk-news/2022/mar/29/church-of-england-leaders-object-to-keeping-slave-trader-memorial-in-college>

¹⁹⁸ 'Gathering to "symbolically protect" Leicester Gandhi statue', BBC News, 13 June 2020, at <https://www.bbc.co.uk/news/uk-england-leicestershire-53036785>

¹⁹⁹ See 'The sorry tale of Margaret Thatcher's statue', *The Economist*, 8 January 2022 at <https://www.economist.com/britain/2022/01/08/the-sorry-tale-of-margaret-thatchers-statue>

²⁰⁰ Dresser, above, note 134, at p. 26.

once at the very epicentre of the slave trade and imperial expansion, has also been at the vanguard of human rights protection, the promotion of democracy and opposition to violent tyrannies. It is this uneasy contradiction that emerges in the disputes around those statues listed in the introduction to this article.²⁰¹ Such is the jagged complexity of history.

By utilising the delicate balancing mechanism afforded by human rights law, particularly Articles 8 and 10 of the ECHR, we advocate a model that makes possible the nuanced resolution of these controversies. In so doing we challenge the current Government narrative and argue that statues, rather than being a form of history, are carriers of particular collective memories — memories that may be of great significance to certain groups, but extremely hurtful and damaging to others. One of the most celebrated — but also controversial — figures from the last century to be commemorated on plinths across the nation, Winston Churchill, is famously alleged to have asserted that “jaw-jaw” is always preferable to “war-war”.²⁰² If the balancing mechanism described above is utilised, then fresh opportunities will be presented for informed debate about Britain’s fascinating and multi-layered past — and the impact of that past on the nation’s present and future.

²⁰¹ See text accompanying note 7, above.

²⁰² WH Lawrence ‘Churchill Urges Patience in Coping with Red Dangers; Tells Congressional Group it is ‘Better to Jaw-Jaw than to ‘War-War’ (New York Times, 27 June 1954) p 1, at <https://www.nytimes.com/1954/06/27/archives/churchill-urges-patience-in-coping-with-red-dangers-tells.html?searchResultPosition=33>