

Banksy ‘Walled Off’: A Human Rights Perspective to Graffiti and Street Art

Dr. Eleni Polymenopoulou*

This Article explores the question of graffiti and street art through the lens of international human rights law. After discussing its sui generis nature as a phenomenon oscillating between legality and illegality, the Article examines the protection afforded to graffiti and street art under key human rights treaties. It argues that the blanket criminalization of graffiti and street art prevents judicial bodies from balancing the rights and interests at stake, therefore amounting to an illegitimate restriction not only to individual artistic freedom but also to the public’s right to access cultural life. The Article further examines the established “necessity” and “proportionality” tests that are commonly used by human rights bodies to assert the legitimacy of an infringement against graffiti and street artists’ rights. It suggests three possible contextual criteria that may be useful in the balancing exercise: firstly, the aesthetic value of the works; secondly, communities’ determination to preserve the work; thirdly, political graffiti as evidence of human rights activism. The Article suggests that from these criteria, only the last two are sustainable (popular works and activist works). It concludes that within these two scenarios, States should be liable for violations of communities’, artists’, human rights activists’, and human rights defenders’ cultural rights.

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* Associate Professor of Law, Hamad Bin Khalifa University, College of Law (Qatar Foundation).

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INTRODUCTION

In May 2023, The Times reported that a couple paid over 200,000 USD to remove the *Seagull*, a giant graffiti stenciled by Banksy on their property's external wall in Suffolk, UK.¹ According to the couple, the *Seagull* was their "living nightmare."² Why would anyone reject Banksy? Banksy's street art is clever, original, and satirical, as well as highly profitable. He was voted as the number one most loved artist of all time in the UK,³ while his work *Venice in Oil* made an entry to the 2019 Venice Biennale. Many of his works are present on the segregation wall and the Walled Off Hotel in Palestine,⁴ in Ukraine,⁵ and elsewhere in support of human rights causes.⁶ *Girl with Balloon*, a work sprayed

1. Ben Ellery, *Homeowners Spend £200,000 Removing Banksy's Seagull Mural*, TIMES (May 23, 2023), <https://www.thetimes.co.uk/article/homeowners-spend-200-000-removing-banksys-seagull-mural-f30j7zd7w>.

2. *Id.* According to the couple, the artwork needed to be removed because it was "targeted by vandals, thieves and council bureaucrats."

3. Jonathan Jones, *Banksy Is the Brits' Favourite Painter of All Time - Is This Status Deserved?*, GUARDIAN (July 15, 2019), <https://www.theguardian.com/artanddesign/shortcuts/2019/jul/15/banksy-brits-favourite-painter-all-time-status-deserved-secretive-stenciller-high-art-alienates>.

4. CAROL DIEHL, *BANKSY: COMPLETED*, 185–94 (The MIT Press, 2021); Ian Fisher, *Banksy Hotel in the West Bank: Small but Plenty of Wall Space*, NY TIMES (Apr. 16, 2017), <https://www.nytimes.com/2017/04/16/world/middleeast/banksy-hotel-bethlehem-west-bank-wall.html>; see also SABRINA DE TURK, *STREET ART IN THE MIDDLE EAST*, 69–88, (June 13, 2019) (on local and international street art on the separation barrier).

5. Victoria Bisset, *Banksy Unveils Mural of Gymnast on a Destroyed Building in Ukraine*, WASH. POST (Dec. 11, 2023), <https://www.washingtonpost.com/world/2022/11/12/banksy-ukraine-borodyanka-mural-gymnast-judo/>; See also, Teresa Nowakowski, *Ukraine Releases Banksy Postage Stamp on War's One-Year Anniversary*, SMITHSONIAN MAG. (Mar. 1, 2023), <https://www.smithsonianmag.com/smart-news/ukraine-banksy-postage-stamp-putin-180981719/>.

6. For a brief overview, see Anny Shaw, Comment, *Banksy's Activism is His Greatest Work: Funding a Refugee Rescue Boat is Just the Latest in a Long History of Politically Motivated Acts*, ART NEWSPAPER (Sept. 3, 2020), <https://www.theartnewspaper.com/2020/09/03/banksys-activism-is-his-greatest-work/>.

on paper, based on the graffiti, was sold at Sotheby's for over \$ 1 million USD. And although half-shredded, it was resold at an astronomical price.⁷ At the same time, many of his works reject capitalist values. An exemplary illustration is his temporary art project *Dismaland* (a sarcastic imitation of Disneyland) that was converted into shelters for migrants in Calais.⁸

The simple incident of the *Seagull*, however, is illustrative of a deep contrast. There is no absolute or uniform truth: beauty lies in the eye of the beholder—and eventually also, the property owner. Street art decorating the property of third parties is not free from legal consequences, whether on public or private property. In virtually all legal systems around the world, graffiti and street art are considered vandalism. Yet, at the same time, both are steadily evolving away from illegality,⁹ and increasingly, arguments are propagated in favor of their preservation.¹⁰ The more rapidly urban cultural tourism grows,¹¹ the more currency commissioned street art acquires. Banksy is arguably the ultimate expression of this oxymoron. His incongruous art is not just found on the *street*; it is also exhibited in the art market, including auction houses, galleries, and other cultural spaces.¹²

Research pertaining to graffiti and street art so far has focused primarily on intellectual property (IP) law.¹³ This is because of a side problem, namely, the

7. Jonathan Edwards, *Banksy Tried to Destroy His Art After It Sold for \$1.4 Million. The Shredded Version Just Went for \$25.4 Million*, WASH. POST (Oct. 15, 2021), <https://www.washingtonpost.com/nation/2021/10/15/shredded-banksy-painting/>.

8. DIEHL *supra* note 4, at 152.

9. See, e.g., Cameron McAuliffe & Kurt Iveson, *Art and Crime: Conceptualising Graffiti in the City*, 5 GEOGRAPHY COMPASS 128, 128–43 (2011); Al Roundtree, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L. J. 959, 986 (2013); Katya Assaf-Zakharov & Tim Schmetgok, *Reading the Illegible: Can Law Understand Graffiti?* 53 CONN. L. REV. 3, 10 (2020) (highlighting that "graffiti . . . is increasingly labelled as 'street art,' which marks a conceptual move from the context of vandalism into the world of 'high' culture").

10. See, e.g., Griffin Barnett, *Recognizing Stature: Protecting Street Art as Cultural Property*, 12 CHICAGO-KENT J. INTELL. PROP. 204, 205 (2013).

11. See, e.g., Montserrat Crespi-Vallbona & Oscar Mascarilla-Miró, *Street Art as a Sustainable Tool in Mature Tourist Destinations: A Case Study of Barcelona*, 27 INT'L J. CULTURAL POL. 422, 422–36 (2020); Alexandra Duncan, *From the Street to a Gallery*, in UNDERSTANDING GRAFFITI: MULTIDISCIPLINARY STUDIES FROM PREHISTORY TO THE PRESENT 126, 129 (Troy Lovata & Elizabeth Olton eds., 2nd ed. 2016). Cf. Matthew Ryan Smith, *Indigenous Graffiti and Street Art as Resistance*, in STREET ART OF RESISTANCE 251, 262 (Sara Awad & Brady Wagoner eds., 2018) (noting that "[s]treet art today has become a hot commodity").

12. Maia Morgan Wells, *Graffiti, Street Art, and the Evolution of the Art Market*, in ROUTLEDGE HANDBOOK OF GRAFFITI & STREET ART (Jeffrey Ian Ross ed., 2016).

13. Cf. Roundtree, *supra* note 9; Danwill Schwender, *Promotion of the Arts: An Argument for Limited Copyright Protection of Illegal Graffiti*, 55 J. COPYRIGHT SOC'Y U.S.A., 257 (2008); Galley Luma Zayad, *Tagged: Graffiti's Advancements in Mainstream Culture Through Expanded Copyright Protection in Williams v. Cavalli*, 26 DEPAUL J. ART, TECH., & INTELL. PROP. L. 161 (2019); Sara Cloon, *Incentivizing Graffiti: Extending Copyright Protection to a Prominent Artistic Movement*, 92 NOTRE DAME L. REV. 54 (2017); Enrico Bonadio, *Graffiti, Street Art and Copyright*, 4 STREET ART & URB. CREATIVITY J. 75 (2018); Enrico Bonadio, *Street Art, Graffiti and the Moral Right of Integrity: Can Artists Oppose the Destruction and Removal of Their Works?* 1 NUART J. 17 (2018); Celia Lerman, *Protecting Artistic Vandalism: Graffiti and Copyright Law*, 2 N.Y.U. J. INTELL. PROP. & ENT. L. 295 (2013).

fact that street artists are seldom able to claim copyright benefits from their work—either because of the illegality of the underlying act or because of the ephemeral nature of the works.¹⁴ The question has practical implications because the vast majority of street artists are prevented from enjoying reproduction and other exclusive rights associated with their works, which are increasingly appropriated by the fashion industry and other corporate interests.¹⁵ Copyright, however, is an important source of income for street and graffiti artists,¹⁶ given that, with the exception of Banksy and a few others, street artists are seldom able to ‘cut off’ from a wall and sell their original works. Such extraction is expensive, time consuming, and dangerous.¹⁷

Besides related IP rights, a small part of the scholarship has ventured to analyze the criminal dimension of street art,¹⁸ and its place in criminology discourse.¹⁹ The literature on the relationship between graffiti and property law is even more scarce.²⁰ Interestingly, a handful of articles emphasize the rationales underlying freedom of speech protection or community participation in decision making, including Jenny Carroll’s suggestions of defenses for graffiti against property damage,²¹ and Zakharov and Schnetgok’s proposals for a world whereby

14. Cf. McAuliffe & Iveson, *supra* note 9, at 129, 137–139 (describing “ephemeral” and “permanent” works).

15. Enrico Bonadio, *Banksy’s Copyright Battle with Guess – Anonymity Shouldn’t Compromise His Legal Rights*, CONVERSATION (Nov. 25, 2022), <https://theconversation.com/banksys-copyright-battle-with-guess-anonymity-shouldnt-compromise-his-legal-rights-195233> (referring also to other artists, such as “US artists Dash Snow, Ahol, Revok and Rime”); see also Eileen Kinsella, ‘Livid’ Graffiti Artists Sue Fashion Label Vince Camuto for Using Their Artwork in Ads, ARTNET (July 11, 2017), <https://news.artnet.com/art-world/graffiti-artists-sue-vince-camuto-1019147>.

16. Amelia K. Brankov, *Does Art Need Copyright After All?* 43 COLUM. J. L. & ARTS 367, 369 (2020).

17. *Mastermind of Kyiv Banksy Removal Could Face Years in Jail*, DEUTSCHE WELLE (Mar. 1, 2023) <https://www.dw.com/en/mastermind-of-banksy-removal-in-ukraine-could-face-years-in-jail/a-63974481>.

18. Ian Edwards, *Banksy’s Graffiti: A Not-so-simple Case of Criminal Damage?*, 73 J. CRIM. L. 345, 345 (2009) (arguing that “the work of artists such as Banksy forces a reappraisal of the precision and applicability of criminal damage”); Gabry Vanderveen & Gwen van Eijk, *Criminal but Beautiful: A Study on Graffiti and the Role of Value Judgments and Context in Perceiving Disorder*, 107 EUR. J. ON CRIM. POL. & RSCH. 125 (2016) (suggesting that “a more lenient policy may signify awareness to different views on what public space should look like”); see generally, CAMBRIDGE HANDBOOK OF COPYRIGHT IN STREET ART AND GRAFFITI (Enrico Bonadio ed., 2019); MARTA ILJADICA, COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE (2016).

19. Andrew Millie, *Crimes of the Senses: Yarn Bombing and Aesthetic Criminology*, 59 BRIT. J. CRIMINOLOGY 1269, 1272–73 (2019).

20. Peter Salib, *The Law of Banksy: Who Owns Street Art?*, 83 U. CHI. L. REV. 2293, 2293–95 (2015); see also Bertrand Crettez & Régis Deloche, *On the Preservation of Illegal Street Art*, 19 REV. L. ECON. 185, 185–89 (2023) (extending Salib’s argument of “social fabric loss” and explaining split ownership from an economics perspective). Cf. Iljadica, *supra* note 18, at 81–102.

21. Jenny Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1287, 1347 (2020) (submitting that it is possible to “carve a protected space for graffiti in criminal law” in order to promote the values of the First Amendment); see generally Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (advancing the idea of the free speech value of “individual self-realization”); Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (discussing the scope of freedom of speech in the American cultural context).

the “boundaries of physical property are redefined” and graffiti is legitimized as “medium of visual expression creating a public forum.”²² Such arguments, essentially entrenched in a liberal rationale of freedom of speech, and using US law and the First Amendment as a point of departure, are valuable in light of the criminalization of graffiti and the removal of works from the public space.

This Article contributes to this discourse through a different lens, by adding to the existing literature the study of street art based on international human rights law. The human rights approach to graffiti is beneficial in informing policy and decision making for at least three distinct reasons. Firstly, it is not confined to one jurisdiction alone. Human rights are predicated on the idea of universality in defining the scope of rights and seeking cultural, political, and social legitimacy in various legal systems and traditions. Secondly, human rights law is the only regime that allows for a nuanced answer in relation to graffiti and street art, adapting solutions to a particular context. This is not only because established tests of human rights law (such as the “necessity” and “proportionality” tests) allow balancing between conflicting interests, but also because of human rights law’s appeal to liberal and democratic²³ values, such as pluralism, tolerance, and diversity.²⁴ Finally, human rights law is not confined to freedom of speech claims. An array of human rights is pertinent to graffiti and the street art phenomenon, including the right to participate in cultural life, authors’ rights, and creative freedom.

In terms of structure, the Article is divided into three sections with the first part addressing the protection of graffiti and street art through the various layers of international human rights law and State practice on the matter. Part two briefly comments on the definitions of the terms “graffiti” and “street art,” and examines their nature as phenomena oscillating between legality and illegality. This part also provides a short overview of their treatment under domestic laws and in a comparative perspective. Part three analyzes the international human rights law perspective on graffiti and street art, considering both individual freedoms and cultural rights. Part four discusses criteria that could be considered in the balancing exercise (between street artists’ rights and other private rights or public interests), including the aesthetic value of the works, their popularity, and their political function as evidence of activism. For example, States’ obligations relative to popular works could go as far as involving cultural policies and strategies that improve community participation and consultation with concerned neighborhoods.

22. Assaf-Zakharov & Schnetgok, *supra* note 9, at 153 (introducing “a novel perspective on graffiti regulation” and arguing that “an alternative vision of public space is possible”); *see generally* ALISON YOUNG, STREET ART, PUBLIC CITY: LAW, CRIME AND THE URBAN IMAGINATION (2014).

23. *Compare* European Convention on Human Rights., art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 *with* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

24. *See, e.g.*, John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1771 (2009).

I. BRIEF COMMENTS ON THE LEGAL STATUS OF GRAFFITI AND STREET ART

A. *The Sui Generis Nature of Graffiti and Street Art: Oscillating Between Legality and Illegality*

Graffiti boomed in Brooklyn, Manhattan, Los Angeles and other American cities in the 1960s and 1970s.²⁵ At the time, the public largely associated the practice with crews working in neighborhoods and suburban lifestyles—as well as with gangs.²⁶ More broadly, however, graffiti has always been associated with some level of illegality (and in fact, some anthropologists have gone as far as arguing that “graffiti . . . may revolve around . . . a *need* to break the law”).²⁷ Graffiti is also commonly associated with dangerous activities, as evidenced by a Greek case concerning the electrocution of a graffiti artist working on the roof of a train wagon.²⁸

It should be noted nonetheless that there is no accepted definition of either *vandalism* or *art* (at least in a manner that requires that it be protected, let alone copyrightable). This is also evident in the terminology related to graffiti “art.” Graffiti consists of “bomb spraying,” “tagging,” and “throw-ups” on surfaces located in public spaces.²⁹ Graffiti “art” and street art, on the contrary, although sometimes used interchangeably with graffiti, denotes the presence of at least some creative elements and implies content that is generally tolerated. Such artistic elements vary and may include not just spraying, but also stencil graffiti and posters.³⁰ The more elaborate techniques associated with a particular piece of graffiti, the more it is likely to be labeled graffiti “art.”³¹ Street art, in addition, has clearly more positive connotations and commonly denotes not only graffiti and graffiti art but also large murals (including “see-through murals made for wild optical illusions”),³² yarn bombing (i.e., colorful knitting), and other interventions in the public space, regardless of its legitimate or illicit nature.³³ Adding to the

25. See, e.g., Ronald Kramer, *Straight from the Underground: New York City's Legal Graffiti Writing Culture*, in ROUTLEDGE HANDBOOK, *supra* note 12.

26. Susan Philips, *Deconstructing Gang Graffiti*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 48.

27. Amardo Rodriguez, *On the Origins of Anonymous Texts That Appear on Walls*, in UNDERSTANDING GRAFFITI, *supra* note 11, at 12.

28. Areios Pagos [A.P.] [Supreme Court] 892/2018 (Greece).

29. Jeffrey Ian Ross, *Introduction: Sorting It All Out*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 2 (noting that mural graffiti is generally considered art, while graffiti tags are merely vandalism); see also Fernando Loureiro Bastos, *Legal Implications of Street Art as a 'Democratized'/'Open' Form of Art*, 18 REVISTA OPINIÃO JURÍDICA [REV. OPIN. JUR.] 210, 216 (2020) (Braz.).

30. RAFAEL SCHACTER & JOHN FEKNER, THE WORLD ATLAS OF STREET ART AND GRAFFITI (2017); GARRY HUNTER, STREET ART FROM AROUND THE WORLD (2012).

31. *Id.*

32. Darcy Schild, *An Artist Uses Spray Paint to 'Carve' Through Walls, and the See-Through Murals Make for Wild Optical Illusions*, BUS. INSIDER (Sept. 17, 2019), www.insider.com/spray-paint-optical-illusions-2019-9.

33. See, e.g., Millie, *supra* note 19, at 1272–73.

complexity, street art, and especially its French equivalent, *arts de la rue*, generally refers to all artistic expressions in the public space, including performing, children's theatre, and music concerts. In other words, unlike graffiti, street art denotes forms of expression that are more likely to be both legal and acceptable.³⁴ This is also illustrated by the fact that tagging or spraying on street art is curiously also considered in and by itself vandalism.³⁵

In practice, however, graffiti and street art are highly conflated, as are the crews behind each. The latter cannot be reduced to a single identity, nor be stereotyped as outlaws or vandals. Most graffiti and street artists have received artistic training, and it is fairly common for top street artists to shift from the street to museums and galleries. It is instructive that Keith Haring's originally illicit interventions³⁶ in the New York subway are now taught in art education classes at the primary school level. Still, for each remarkable piece of street art, an appalling throw-up will serve as evidence that the slogan "graffiti is vandalism" still stands.

B. State Practice in Relation to Graffiti and Street Criminalization

Commissioned or otherwise, State-sanctioned art is growing. Graffiti artworks are increasingly displayed in exhibitions, museums, and festivals in New York, Los Angeles, and many European capitals,³⁷ while graffiti is also gradually visible in the Middle East, including in Gulf countries.³⁸ At the same time, any

34. Bastos, *supra* note 29, at 224–25 (referring to distinctions between "graffiti vandalism," "graffiti art," and "mural art" in the Toronto Municipal Code Ch. 485, amended by bylaw no. 1218-2011, Oct. 25, 2011).

35. Including even Banksy works. *See, e.g.*, Peter Stubley, *Banksy's Valentine's Day Mural in Bristol Vandalised Within 48 Hours*, INDEPENDENT (Feb. 15, 2020), <https://www.independent.co.uk/news/uk/home-news/banksy-new-mural-bristol-graffiti-vandalism-valentines-a9337551.html>; Hunter, *supra* note 30, at 16 (giving an example of a work by Banksy that was bomb-sprayed); *Cf.* Benedikt Feiten, *Answering Back: Banky's Street Art and the Power*, in CULTURE JAMMING: ACTIVISM AND THE ART OF CULTURAL RESISTANCE 218, 224 (Marilyn DeLaure & Moritz Fink eds., 2017) (noting that "illicit art in the public space 'runs the risk of being buffed out by graffiti removal, painted over by other artists, or gradually worn away by weather'").

36. Ulrich Blanché, *Keith Haring - a Street Artist?*, 2 STREET ART & URB. CREATIVITY 1, 13 (2016).

37. *See, e.g.*, MUSEUM FOR URBAN CONTEMPORARY ART, <https://urban-nation.com/> (last visited Apr. 5, 2024); ART42 | MUSÉE D'ART URBAIN, <http://www.art42.fr/en/home.html> (last visited Apr. 5, 2024); MUSÉE DES GRAFFITIS, <https://parisjetaime.com/eng/culture/musee-des-graffitis-p948> (last visited Apr. 5, 2024) ("invit[ing] graffiti artists to come and exert their talent on boards that are changed once a fortnight"); *see also* Andrew Wasserman, *Sites of Counter-Culture: The Move of the New Museum to the Bowery*, in MUSEUMS AND PUBLIC ART? 181, 185 (Cher Krause Knight & Harriet Senie eds., 2018).

38. Wasserman, *supra* note 37, at 187; De Turk, *supra* note 4, at 21–68 (on Egypt and Lebanon); *id.* at 137–54 (on Tunisia), 179–01 (on various Gulf countries); Nuha Alshurafa & Alia Aljoofi, *Walls Have Ears: A Critical Discourse Analysis of Graffiti in Jeddah, Saudi Arabia* 28 J. KING ABDULAZIZ UNIV.: ARTS & HUMANITIES 281, 282–3 (2020) (Saudi Arabia); *see also* *Saudis Bid to Beautify Their Cities with Street Art*, ARAB NEWS (Apr. 15, 2019), <https://www.arabnews.com/node/1482066/saudi-arabia>; Ismael David, *Colouring the Streets of Muscat: Oman's Graffiti Artists Leave Their Mark*,

unauthorized modification or use of either private or public property is tantamount to criminal damage and an illicit act in the legal systems of the world. It is also often punishable by domestic criminal law, or by laws concerning damage or defacement of property, but also by specifically targeted legal provisions or laws passed by local authorities. Some examples of the former are the UK Criminal Damage Act 1971, which contains provisions on “[d]estroying or damaging property” and punishes damage with incarceration and fines;³⁹ and the French Criminal Code, which distinguishes between “light” and serious damage, depending on parameters such as medium and surface.⁴⁰ An example of the latter are laws of various US states specifically addressing the defacement of property by graffiti;⁴¹ the Australian Anti-graffiti Act;⁴² laws adopted by the city of New York on the “defacement of property by means of aerosol” in the 1970s;⁴³ and the laws passed by Cape Town in 2010.⁴⁴ Such laws often encompass both graffiti and street art—including murals and other works that some believe are beautiful or otherwise worth preserving.⁴⁵

In this respect, it does seem that the proliferation of graffiti also entails the spread of anti-graffiti laws. This may well be the result of the deep divide between the “crucial where of graffiti” (i.e., the concept that graffiti as a phenomenon is not simply a type of “misplaced art” but rather, a behavior associated with deviance, resistance and transgression, and a general rejection of acceptable norms)⁴⁶ and the law as a set of rules that implies at least some sense of

NAT’L NEWS (Feb. 10, 2019), <https://www.thenationalnews.com/arts-culture/art/colouring-the-streets-of-muscat-oman-s-graffiti-artists-leave-their-mark-1.824026>.

39. Criminal Damage Act 1971, c. 48, § 1 (UK) (codifying penalties ranging from 1,500 to 30,000 euros).

40. Code pénal [C. pén.] [Penal Code] arts. 322-1 to 322-4-1 (Fr.) (most recently amended in February 2023).

41. See, e.g., CAL. PENAL CODE § 594 (providing that graffiti carries up a sentence to up to three years); D.C. CODE § 22-3312.01; LA. STAT. § 14:56.4.

42. See Graffiti Control Act of 2001 (amended by the additional Graffiti Control Regulation of 2013) (S.A.).

43. See, i.e., Edwards, *supra* note 18, at 345, 348.

44. *Graffiti By-Law*, W. CAPE PROVINCIAL GAZETTE 6767 (July 9, 2010).

45. See Chandra Morrison, *Graffiti vs. the “Beautiful City”: Urban Policy and Artistic Resistance in São Paulo*, LONDON SCHOOL OF ECONOMICS: LATIN AMERICA AND CARIBBEAN CENTRE (Apr. 20, 2017), <https://blogs.lse.ac.uk/latamcaribbean/2017/04/20/graffiti-vs-the-beautiful-city-urban-policy-and-artistic-resistance-in-sao-paulo/> (referring to a mural erased by state contractors); Clotilde Kullmann, *De l’exposition de la Tour Paris 13 au concept de musée à ciel ouvert* [From the Exhibition at the Tour Paris 13 to the Concept of an Open-Air Museum], 34 TÉOROS REVUE DE RECHERCHE EN TOURISME (2015), <https://journals.openedition.org/teoros/2776> (referring to the demolition of Tower 13 in Paris in 2013 “after having hosted the largest group exhibition of street art”).

46. See TIM CRESSWELL, IN PLACE/OUT OF PLACE GEOGRAPHY, IDEOLOGY, AND TRANSGRESSION 39–40 (1994) (Cresswell writing about the appearance of graffiti in the streets of New York in the late 1970s, explains that the latter was considered and labeled as “obscene,” and something “dirty.” According to Cresswell, this criticism is related to (1) appropriateness, rather than the content of graffiti per se, and (2) the fact that graffiti is not simply deviance from rules (the “crucial

formality.⁴⁷ As McAuliffe and Iveson write in relation to the framing of graffiti as a crime:

in seeking to justify the link between graffiti and criminality, politicians and media commentators frequently draw upon the so-called 'broken windows' theory of urban disorder and crime. In its most basic form, the broken windows theory states that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken; that by breaking the codes of order we invite further disorder to occur.⁴⁸

Moreover, punishment for damage to cultural property is inherently part of laws aiming at the preservation of monuments and cultural property. Graffiti-related damage may be expressly stated in such laws,⁴⁹ like in Chile's recent amendments to its 1970 National Monument Law.⁵⁰ In many other cases, laws can be extremely rigid and punitive, as is the case with some Asian States,⁵¹ but also States where international tourism revenue is high.⁵²

Punishment for graffiti-related damages on cultural property is equally common in the practice of courts in many States around the world, including even the Vatican.⁵³ In the unique case of France, a property owner was found "guilty"

'where' of graffiti"), but rather, "a permanent despoiling of whole sets of meanings — neighborliness, order, property, and so on.").

47. *Id.* at 25–26.

48. McAuliffe & Iveson, *supra* note 9, at 130. Cf. Stephen Block, *Challenging the Defense of Graffiti*, in *Defense of Graffiti* in ROUTLEDGE HANDBOOK OF GRAFFITI AND STREET ART 440, 440–41 (Jeffrey Ian Ross ed., 2016) (arguing that the easy conflation of the two distinct street-based subcultures [gang subculture and graffiti subculture] could not be more distorted).

49. See generally Sara Rosano Birgit Kurtz, *Tear Down This Wall?: The Destruction of Sanctioned Street Art Under U.S. and Italian Law*, 768 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 767 (2021); Anne Sophie Hulin, *Les lieux du droit et les objets culturels* [Places of Law and Cultural Objects], 51 REVUE DE DROIT DE L'UNIVERSITE DE SHERBROOKE 465 (2022) (Fr.); Guillermo Fernández & Pedro Guerra, *Daños a la propiedad con sistemas de marcaje o Graffiti: Análisis de legislación comparada* [Property Damage with by Systems of Drawing or Graffiti: A Comparative Legislation Analysis], BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE 1, 1–10 (2020), https://www.bcn.cl/obtienearchivo?id=repositorio/10221/28364/1/BCN_GF_Danos_con_sistemas_de_marcaje_o_GraffitiFINAL.pdf (Chile) (comparing various civil and common law systems, including Chile, Germany, Belgium, Spain, and France, as well as under common law systems, U.S. and Canada).

50. Law No. 17.288 art. 38, National Monuments Law, Feb. 4, 1970 (Chile) (and amendments to the Chilean Penal Code (*para tipificar como delito de daños las inscripciones, pinturas o dibujos hechos en propiedad ajena sin autorización*) (June 20, 2019), <https://www.camara.cl/verDoc.aspx?prmTipo=SIAL&prmlD=48998&formato=pdf>; (more recently the municipality of San Diego has passed additional by-laws).

51. See Rujun Shen, *Two Germans to Be Caned, Jailed for Singapore Train Graffiti*, REUTERS (Mar. 5, 2017), <https://www.reuters.com/article/world/two-germans-to-be-caned-jailed-for-singapore-train-graffiti-idUSKBN0M10DK/>.

52. The Balearic Islands, for example, maintains fines and penalties up to 500,000 euros (100 million pesetas) for "grave" attacks to cultural property, defined as "any action or omission that produces irreparable damage of this type of property." See del Patrimonio Histórico de las Illes Balears arts.101(2), 108 (B.O.E. 1999, 12) (Spain).

53. See Nicole Winfield, *Vatican Court Convicts Climate Activists for Damaging Statue, Fines Them More Than 28,000 Euros*, ABC NEWS (June 12, 2023),

of graffiti and street artworks on his *own* property, because his property was *facing* a classified monument. The case concerned the transformation of an 18th-century property in the French countryside, close to Lyon, into a contemporary *Abode of Chaos* that was covered with graffiti and street art.⁵⁴ Graffiti may also be incidentally addressed under other areas of legislation ranging from laws on criminal liability for public morality and “social behavior,”⁵⁵ to breaches of urban planning and environmental regulations.⁵⁶ Graffiti may also involve a variety of other offences in terms of content and freedom of speech limitations (obscenity, criminal defamation, hate speech, etc.), but also in terms of means (typically petty crimes and misdemeanors such as trespassing of private property).⁵⁷

II. GRAFFITI AND STREET ART PROTECTION UNDER KEY INTERNATIONAL HUMAN RIGHTS TREATIES

A. *Graffiti, Street Art, and Creative Freedom*

Artistic freedom is the first provision pertaining to street artists as right-holders. This right is based on freedom of speech, which is, in turn, proclaimed in Article 19 of the Universal Declaration of Human Rights (UDHR). A separate provision exists also in Article 15(4) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), emphasizing that “art is free.” Further, the two most relevant provisions in international human rights law instruments are Article 19 of the International Covenant on Civil and Political Rights (ICCPR) on freedom of expression and Article 15, paragraph 3 of the ICESCR. The latter provides that “the States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.” Creative freedom is also protected by regional instruments, as part of both freedom of expression and cultural rights.⁵⁸

Nonetheless, artistic freedom is not a *carte blanche* right that allows infringement upon private and public interests. Safeguards to this right are mentioned in Article 19, paragraph 3 of the ICCPR, allowing restrictions to

<https://abcnews.go.com/International/wireStory/vatican-court-convicts-climate-activists-damaging-statue-fines-100014338>.

54. See *Grenoble Court of Appeal*, Dec. 16, 2008, cited in Ehrmann and *SCI VHI v. France*, App No. 2777/10, 2 (June 7, 2011), https://www.stradalex.eu/en/se_src_publ_jur_eur_cedh/document/echr_2777-10 (referring to Article L. 621-31 of the French Heritage Code); see also ELENI POLYMEPOULOU, ARTISTIC FREEDOM IN INTERNATIONAL LAW 82, 146–49 (2023).

55. See Anti-social Behaviour, Crime and Policing Act 2014, c.12 (UK).

56. See Clean Neighbourhoods and Environment Act 2005 (UK); see also Bonadio, *supra* note 13; Millie, *supra* note 19.

57. See Lovata & Olton, *Introduction*, in UNDERSTANDING GRAFFITI, *supra* note 11 (on the association of graffiti with illegality). Cf. Paula Westenberger, *Copyright Protection of Illegal Street and Graffiti Artworks*, in CAMBRIDGE HANDBOOK, *supra* note 18, at 55, 58 (distinguishing between types of “illegality”); Millie, *supra* note 19.

58. See Org. Am. States, Protocol of San Salvador, art. 14, Nov. 17, 1988, O.A.S.T.S No. 69 (recognizing the right to take part in the artistic life of the community).

speech based on both private rights (the “rights of others,” such as property) and public interests (for example, “public order”).⁵⁹ Although, what is important is whether such limitations are acceptable under human rights law,⁶⁰ particularly in light of the established scrutiny tests of human rights bodies such as the legality, necessity, and proportionality tests. The UN Human Rights Committee (UNHRC) highlighted these limitations to speech in its first General Comment on the interpretation of Article 19, in 1983,⁶¹ as well as in its more recent one.⁶² These considerations have also been reiterated in the rich jurisprudence of the Committee.⁶³ Additionally, restrictions to all types of expression should be construed *narrowly* and taken in the most restrictive sense.⁶⁴ In numerous judgments, the European Court of Human Rights (ECtHR) flags that “freedom of expression . . . is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.”⁶⁵ As such, restrictions incorporating an absolute necessity test should also be the yardstick in assessing the legality of interference with graffiti and street artists’ rights.

59. U.N. Hum. Rts. Comm. [hereinafter UNHRC], *General Comment No. 23 on the Rights of Minorities (art. 27)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 3 (Apr. 8, 1994), <https://documents.un.org/doc/undoc/gen/g94/162/61/pdf/g9416261.pdf>; see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

60. See U.N. Comm’n Hum. Rts., *Rep. to the Econ. & Soc. Council*, U.N. Docs. E/L371 and E/CN.4/350, at 34 (June 23, 1949) (noting that from the early stages of drafting of the ICCPR, the debate between State representatives focused on the extent of acceptable limitations to this right); see also MARC BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 373 (1987).

61. UNHRC, *General Comment No. 10 on Freedom of Expression (art. 19)*, 2 (June 29, 1983), <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>.

62. See e.g., UNHRC, *General Comment No. 34 on Freedoms of Opinion & Expression (art. 19)*, U.N. Doc. CCPR/C/GC/34, at 5–13, ¶¶ 21–52 (Sept. 12, 2011), <https://www.ohchr.org/sites/default/files/english/bodies/hrc/docs/gc34.pdf>; see also Michael O’Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, 4 HUM. RTS. L. REV. 627, 627–654 (2012).

63. See UNHRC, Communication No. 1772/2008, *Belyazeka v. Belarus*, U.N. Doc. CCPR/C/104/D/1772/2008 (June 6, 2012), <https://digitallibrary.un.org/record/728758?v=pdf>; UNHRC, Communication No. 780/1997, *Laptsevich v. Belarus*, U.N. Doc. CCPR/C/68/D/780/1997, ¶ 8.1, (Mar. 20, 2000), <https://digitallibrary.un.org/record/420310?ln=en&v=pdf> (“[A]ny restriction on freedom of expression must not be overly broad in nature, that is, it must be the least intrusive among the measures that might achieve the relevant protective function and proportionate to the interest whose protection is sought.”).

64. See, e.g., UNHRC, Communication No. 2137/2012, *Bakhytzhon Toregozhina v. Kazakhstan*, U.N. Doc. CCPR/C/112/D/2137/2012 (Nov. 20, 2014), <https://digitallibrary.un.org/record/788588?ln=en&v=pdf> (in relation to an activist who was convicted for organizing an art-mob event at the monument of Mahatma Gandhi).

65. *The Sunday Times v. United Kingdom (No. 1)*, App. No. 6538/74, Judgment, ¶ 50 (Apr. 26, 1979) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57584>; *Observer and Guardian v. the United Kingdom*, App. No. 13585/88, Judgment, ¶ 59 (Nov. 26, 1991) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57705>.

In addition, graffiti and street art are unlikely to be considered lawful when it comes to the deeply held normative value of property rights. The origins of this *de facto* hierarchy are found in the formation of Western legal systems. Both the civil and common legal traditions have evolved around the notions of individualism and liberty,⁶⁶ in which property ownership is quintessential. In the civil law tradition, property rights and freedom of contract play a quasi—sacred role.⁶⁷ The human rights movement itself was born not only out of struggles against injustice, but also out of the French *bourgeoisie*'s resolve to guarantee property against public authorities' interference, as the last article of the French Declaration of 1789 shows.⁶⁸

Human rights bodies have also maintained a *de facto* hierarchy in favoring property rights. The oldest and most relevant case to come before the European Court of Human Rights concerned a well-known Swiss graffiti artist who was held criminally liable for damages of property and public disorder. In 1983, the court ruled against the artist and found no violation of the “freedom of expression” provision of the European Convention,⁶⁹ even though the artist claimed that the value of the graffiti on private property outweighed the interests of its owner.⁷⁰

In contrast, the UNHRC has never had the chance to interpret the question of street art specifically. This is because the case law of the Committee has not been well developed. There have been few chances to consider creative expression. One exception is the case of a Korean painter whose work was censored.⁷¹ The only other relevant case is one against Chile concerning the takedown of a large installation of banners in the Mapocho River, a spot for street artists with remarkable graffiti artworks in the breakwaters.⁷² In that case, the UNHRC elaborated on the form that reparations could take when artistic freedom

66. Craig M. Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems*, 6 HASTINGS INT'L & COMP. L. REV. 85, 110 (1982); see also PETER STEIN & JOHN SHAND, LEGAL VALUES IN WESTERN SOCIETY (1976).

67. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 65 (3rd ed. 2007) (noting that “private property and liberty of contract were treated as fundamental institutions that should be limited as little as possible”).

68. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN DE 1789 [Declaration of the Rights of Man and of the Citizen] art. 17 (banning expropriation on the grounds that “the right to Property is inviolable and sacred”).

69. *N. v. Switzerland*, App No. 9870/82, Comm'n dec. Oct. 13, 1983, DR 34, <https://hudoc.echr.coe.int/eng?i=001-74714>.

70. See Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RTS. L. REV. 511, 521 (2016) (noting, however, that the then European Commission of Human Rights did appreciate that the question of protection of illicit works “remains open-ended”).

71. UNHRC, Communication No. 926/2000, *Hak-Chul Shin v. Republic of Korea*, U.N. Doc. CCPR/C/80/D/926/2000 (Mar. 16, 2004), <https://juris.ohchr.org/casedetails/1107/en-US> (concerning the punishment of a Korean painter who made a work allegedly in breach of domestic national security law and finding a violation of art. 19 of the ICCPR).

72. Palmer, *The Battle for Public Space Along the Mapocho River, Santiago de Chile, 1964–2014*, in ROUTLEDGE HANDBOOK, *supra* note 12, at 256–57.

is violated, addressing the question of an effective remedy.⁷³ In particular, the Committee found that Chile was under an obligation to provide full reparation under Article 2(3) of the ICCPR, including *inter alia* to locate the missing banners and make a public acknowledgement of the violation of artistic freedom.⁷⁴

Therefore, the question that naturally arises is whether, today, human rights bodies such as the ECtHR and the UNHRC could potentially find in favor of street art on the basis of freedom of expression provisions. A twofold argument can be made. Firstly, interference with creative freedom is only permissible under exceptional circumstances in accordance with the interpretation of these bodies' provisions, and in light of the well-established necessity and proportionality tests. Secondly, the interpretation of the term "necessity," in Article 19 of the ICCPR and Article 10 of the ECtHR considers values present in "democratic society" (in fact, Article 10 directly mentions the term "democratic society"). Such values would involve, for example, giving more weight to minority and dissenting views, and considering the particular context of certain cases. The European Court, in particular, has reiterated hundreds of times, especially in Article 8 and Article 10 cases, that values such as pluralism, tolerance, and broadmindedness are the "hallmarks" of a democratic society.⁷⁵ It follows that not just States, but also individuals should be limited in their actions from interfering with others' rights.⁷⁶ In this regard, values should also be maintained in considering actions by non-State actors, including private individuals.⁷⁷ The only way that this is possible is to ensure that all voices are heard in democratic societies. In the words of the ECtHR, "it is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a 'democratic society.'"⁷⁸ Accordingly, it is this balance that is the essence of a

73. UNHRC, Communication No. 2627/2015, Claudia Andrea Marchant Reyes et al. v. Chile, U.N. Doc. CCPR/C/121/D/2627/2015, ¶¶ 9–10 (Nov. 7, 2017) [hereinafter UNHRC, *Reyes v. Chile*] (concerning demolition of a large installation in Mapocho river in Santiago, Chile, by the Chilean carabinieri); see also Polymenopoulou, *supra* note 54, at 103; Sarah Joseph, *Art and Human Rights Law* in RESEARCH HANDBOOK ON ART & LAW 389, 401 (2020).

74. UNHRC, *Reyes v. Chile*, *supra* note 73, at 10. This is because positive obligations for States for those whose rights have been violated are entitled to prompt and adequate reparation, including restitution, compensation, satisfaction, or guarantees of non-repetition.

75. See, e.g., *Handyside v. United Kingdom*, App. No. 5493/72, Judgment, ¶ 46 (Dec. 7, 1976) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57499>; *S.A.S. v. France* [GC], App. No. 43835/11, Eur. Ct. H.R. (2014), Judgment, ¶ 128 (July 1, 2014) [hereinafter *S.A.S.*], <https://hudoc.echr.coe.int/fre?i=002-9952>.

76. Cf. Frédéric Mégret, *Nature of Obligations*, in INTERNATIONAL HUMAN RIGHTS LAW 97, 97 (2nd ed. 2017); ILIAS BANTEKAS & LUTZ OETTE, INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 832–33 (3rd ed. 2020).

77. See, e.g., ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

78. *S.A.S* *supra* note 75, at ¶ 128; *Chassagnou and Others v. France* [GC], App. Nos. 25088/94; 28331/95; & 28443/95 (1999), Judgment, § 113, (Apr. 29, 1999), <https://hudoc.echr.coe.int/eng?i=001-58288>. Cf. *Young, James and Webster v. United Kingdom*, App. Nos. 7601/76; 7806/77, Judgment, ¶ 63 (Aug. 13, 1981) (Plenary), <https://hudoc.echr.coe.int/eng?i=001-57604>; *United Communist Party of Turkey and Others v. Turkey* [GC], App. No. 19392/92, Eur. Ct. H.R. (1998), Judgment, ¶ 45 (Jan. 30, 1998), <https://hudoc.echr.coe.int/eng?i=001-58172> (noting that pluralism and dialogue "must also be based

democratic society, and not an assumption of one right's prevalence over another. Therefore, in scenarios where private entities (such as property owners or development companies) are liable for taking down illicit graffiti and street art, the balancing between the right to property on the one hand, and private interests, on the other should also be considered in light of these values.

B. Graffiti, Street Art, and the Right of Authors to Benefit from Economic and Moral Rights

Intellectual property rights are a solid part of international human rights law.⁷⁹ The rights of authors are recognized in the International Bill of Rights (including, Article 27 (2) of the Universal Declaration of Human Rights (UDHR)⁸⁰ and Article 15 (1)(c) of the ICESCR, which guarantees authors' rights, both moral and economic rights). This, however, does not mean that any graffiti work automatically benefits from copyright protection or gives rise to moral rights.⁸¹ The interpretation of these provisions is broad and substantially different from IP law. Under copyright law, for example, street artists' rights are *in principle* filtered through arguments of own illegality—such as illegal placement, or illegality of circumstances in which the work was created (the so-called 'unclean hands' doctrine under US copyright law).⁸² Human rights law does not distinguish between authors of commissioned and illicit works—the same degree of protection is offered to “all human beings.”⁸³ Both Article 15 of the ICESCR and Article 27 (2) should be read in conjunction with Article 27 (1) of the Universal Declaration of Human Rights (UDHR), which firmly incorporates cultural rights as human rights for everyone.⁸⁴ However, the aforementioned balancing exercise warranted under human rights law is more likely to consider the context of a particular case in a more decisive manner, including cultural rights. This is because State practice in relation to granting IP rights to graffiti and street art is still not consolidated.

on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society”).

79. See, e.g., Peter Yu, *The Anatomy of the Human Rights Framework for Intellectual Property*, 69 SMU L. REV. 37–95 (2016) (discussing linkages). Cf. Farida Shaheed (Special Rapporteur) [S.R.], UNHRC Rep. of the S. R. in the Field of Cultural Rights, *The Right to Freedom of Artistic Expression & Creativity*, ¶¶ 6–8, U.N. Doc A/HRC/23/34, (Mar. 14, 2013); Farida Shaheed (Special Rapporteur), UNHRC Rep. of the S.R. in the Field of Cultural Rights, *Copyright Policy and the Right to Science and Culture*, U.N. Doc A/HRC/28/57 (Dec. 24, 2014).

80. UDHR, art. 27 ¶ 2 (proclaiming the protection of one's moral and material interests “resulting from any scientific, literary or artistic production of which he is the author”).

81. Berne Convention for the Protection of Literary and Artistic Works (as amended in 1979), art.6 bis; see also Cyrill Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L. J. 353, 355 (2006).

82. See, e.g., Cloon, *supra* note 13, at 61–62; Lerman, *supra* note 13, at 332; Rosano & Kurtz, *supra* note 49, at 776.

83. Cf. UDHR, art. 1: “All human beings are born free and equal in dignity and rights”.

84. UDHR, art. 27 (stating “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

It does seem in fact that both civil and common law jurisdictions are increasingly sympathetic to street art copyright claims.⁸⁵ In the United States, in particular, the question of moral rights protection of street artists has been extensively discussed as part of the Visual Artists Rights Act (VARA) litigation, which, albeit not relevant to illicit graffiti, provides an illustration of a gradual endorsement of street art as mainstream (the most famous case in this respect is arguably the *5Pointz* case, whereby a district New York Court found VARA protections applicable and awarded the plaintiffs over six million dollars-worth of damages for the irreparable harm they suffered).⁸⁶ However, moral rights protections for street artists, especially in civil law countries such as France⁸⁷ and Germany⁸⁸ remain minimal.

The UN Committee on Economic, Social and Cultural Rights (ESCR), has noted in respect of limitations against authors' rights that these "must be proportionate" and "compatible with the very nature of the rights protected in Article 15(1)(c), which lies in the protection of the personal link between the author and their creation."⁸⁹ In other words, under human rights law, the question raised is not whether graffiti and street art are copyrightable (which may be the case in some jurisdictions,⁹⁰ and more recently, Brazil),⁹¹ but rather whether the interference with a graffiti is justified under human rights standards. In this respect, one should consider not just the individual rights of the artists, but also those of the public, and communities' rights. The ESCR Committee, for example, has stipulated in its general comment on authors' rights, in its examination of Article

85. Bonadio, *supra* note 13, at 17. Cf. Marta Iljadica, *Works and Walls: Graffiti Writing and Street Art at the Intersection of Copyright and Land Law* in CAMBRIDGE HANDBOOK, *supra* note 18, at 81–82.

86. Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020) (affirming Cohen v. G & M Realty (Aerosol Art Center inc.)); Rosano & Kurtz, *supra* note 49, at 769–76 (discussing *5Pointz* in light of VARA); see also Polymenopoulou, *supra* note 54, at 149–52 (discussing the 'legacy of the *5Pointz*). Cf. Hulin, *supra* note 49, at 505–06 (referring to Canadian courts, e.g., to *Vaillancourt v. Carbone*, [1999] R.J.Q. 490 (C.S.), (ruling that a property owner was obliged to pay 150,000 Canadian dollars in damages for destroying the sculptural *ensemble* of Armand Vaillancourt).

87. Cf. *Tribunal de Grande Instance de Paris*, 20/08482 (Jan. 21, 2021) (finding no protection when it comes to 'liberte de panorama,' concerning a street artist who had created a work entitled *La Marianne asiatique*).

88. Cf. Ines Duhanic, *Rip Me to Pieces! No Moral Copyright Protection for the Destruction of Site-Specific Art in Germany*, 69 GRUR INT'L, 1234, 1234–41 (2020) (regarding the installation 'Hhole').

89. U.N. Comm. on Econ., Soc., & Cultural Rts. [CESCR], *General Comment No. 17 on the Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author* (art. 15, ¶ 1(c)), U.N. Doc E/C.12/GC/17, ¶¶ 22–24 (Jan. 12, 2006), (discussing limitations).

90. *Re Pictures on the Berlin Wall* (Case IZR 68/93) [1997] ECC 553; see, e.g., Iljadica, *supra* note 18, at 107–08; Marc Mimler, *Street Art, Graffiti and Copyright: A German Perspective*, in CAMBRIDGE HANDBOOK, *supra* note 18, at 188–206; Westenberger, *supra* note 57, at 60; Zayad, *supra* note 13, at 169–72; Lerman, *supra* note 13, at 332; See also Judgment of the Brazilian Super. Ct. Just., 25.08.2020, Special Appeal No. 1.746.739/SP (Aug. 10, 2021) (Braz.).

91. *Commercial Reproduction of Works Permanently Located in a Public Space*, 70 GRUR INT'L 889, 889–93 (Sept. 2021), (pointing to Brazilian Law No 706/07 (Aug. 10, 2021)).

15(1)(b) ICESCR, that the rights of authors cannot be ‘isolated’ from other socio-economic rights, including the rights of the public to access art.”⁹² Taken even further, obligations to preserve authors’ moral rights could also encompass minimizing vandalism, such as random graffiti tags (*i.e.*, graffiti without aesthetic value), in order to preserve authors’ moral rights, as well as to preserve the right of the public to access that art.

It should also be noted that the argument on street art’s perceived antithesis⁹³ to intellectual property norms is entirely misleading. Banksy, for example, has recently agreed to allow his legal team to initiate lawsuits “to stop unauthorised merchandising.”⁹⁴ and this, as Bonadio says, “despite saying copyright is for losers.”⁹⁵ Firstly, graffiti and street art, akin to other arts, is shaped through the practice of artists. Artists come before art and artworks, and it is up to them to oppose appropriation of their artworks, move them to galleries, sell or donate them for a good cause.⁹⁶ Secondly, a clear distinction should be made between in-circle appropriation and appropriation by outsiders. It is one thing for artists to copy each other in their artistic practice, but another to allow brands and fashion designers to appropriate their work.⁹⁷ The use and reuse of the similar motifs within the art world is not only legitimate and fairly common, but also an indispensable learning tool. Influences are quite common in all forms of art, as well as formal exchanges between art circles. This is especially true for successful street artists who spawn imitators of their individual styles. For example, as early as 1979, in one of the early graffiti stories in the United States, an artist named Taki 183 claimed that he had spawned “hundreds of imitators.”⁹⁸ This is also true of Banksy, who has countless imitators today. As *Wooster Collective*, an informal group which “spotlights street art around the world,” emphasizes, most artists “start by copying others before they develop their own style.”⁹⁹

92. CESCR, *General Comment No. 17*, *supra* note 89, at 35 (“In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration”).

93. Roundtree, *supra* note 9, at 967 (noting that many street artists “choose not to use the legal system for the IP controversies that arise in the industry” and that this “rebellious nature of graffiti” may also be the reason why street artists do not recur to legal means to vindicate copyright claims).

94. Enrico Bonadio, *Banksy Finally Goes to Court to Stop Unauthorised Merchandising, Despite Saying Copyright is for Losers*, CONVERSATION (Feb. 25, 2019), <https://theconversation.com/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers-112390>.

95. *Id.*

96. *Cf.* Bonadio, *supra* note 15 (CONVERSATION).

97. *See* Smith, *supra* note 11, at 289 (arguing “introducing intellectual property rights into this culture [of street art], where street artists may be sued by other street artists under VARA or copyright law for intervening in another artist’s work, could significantly change the culture and norms of street art and harm further creation”); Iljadica, *supra* note 18, at 1 (arguing that ‘street art has its own rules’).

98. Tyson Mitman, *Advertised Defiance: How New York City Graffiti went from “Getting Up” to “Getting Over”* in UNDERSTANDING GRAFFITI, *supra* note 11, at 195.

99. Pitchaya Sudbanthad, *Roundtable: Street Art*, MORNING NEWS (Mar. 23, 2005), <https://themorningnews.org/article/roundtable-street-art> (transcript of the interview with Wooster Collective).

C. *Street Art and the Right to Participate in Cultural Life*

The right to participate freely in cultural life is a crucial element in informing the protective framework for street art. Creative freedom is part of the right to participate in cultural life, as guaranteed in Article 15, paragraph 1, of the ICESCR. The UN CESCR has never expressly discussed 'street art' in its general comments. It has, however, held the view that States have a general obligation to facilitate access to arts in the public space.¹⁰⁰ As pointed out in 2013 by then UN Special Rapporteur for Cultural Rights, Farida Shaheed "[t]he use of public space for art is crucial as it allows people, including marginalized people, to freely access, enjoy and sometimes contribute to the arts, including in its most contemporary forms."¹⁰¹ In the UN Committee on the Rights of the Child's elaboration of Article 31 of the Convention on the Rights of the Child regarding street art specifically for children, it noted that street art contributes to generating a "culture of childhood,"¹⁰² and is a particularly important element for children's physical, emotional, cultural, and sentimental development.¹⁰³

Moreover, art is part of the vast ensemble of elements that are unique to a culture and in this sense, artistic expressions are part of collective cultural identities too. Hence, on the one hand, artistic freedom, including that of artists who work in the public space, serves as a precondition to enable full participation in cultural life, not only for street artists themselves (who contribute to cultural life),¹⁰⁴ but also for members of the public who should be given the opportunity to learn about street art and graffiti as a form of expression in the public space,¹⁰⁵ as well as about their own culture.

Under international human rights law, States must take positive measures to ensure that such preconditions are in place to facilitate participation and access to

100. U.N. Comm. Econ. Soc. & Cultural Rights [CESCR], *General Comment 21 on the Right of Everyone to Take Part in Cultural Life (art. 15, § 1(a) of the ICESCR)* (Dec. 21, 2009), at 4 ¶ 16, U.N. Doc. E/C.12/GC/21.

101. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, ¶ 65.

102. U.N. Comm. on the Rts. of the Child, *General Comment 17 on the Right of the Child to Rest, Leisure, Play, Recreational Activities, Cultural Life and the Arts (art. 31)*, U.N. Doc. CRC/C/GC/17, at Section III (Apr. 17, 2013), <https://digitallibrary.un.org/record/778539> (Significance of article 31 in children's lives: 'Children's play generates a "culture of childhood," from games in school and in the playground to urban activities such as playing marbles, free running, street art and so on').

103. *Id.* ¶ 15.

104. CESCR, *General Comment No. 21*, *supra* note 100, at 4 ¶ 15 (c) (noting that "contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community"); *See also* JANUSZ SYMONIDES, HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT (2003); JANET BLAKE, INTERNATIONAL CULTURAL HERITAGE LAW 305–06 (2015); Patrice Meyer-Bisch, *Les Droits Culturels: Forment ils une Categories Specifique des Droits de l'Homme?*, in LES DROITS CULTURELS: UNE CATEGORIE SOUS-DEVELOPPEE DE DROITS DE L'HOMME ? 18–19 (Patrice Meyer-Bisch ed. 1993) [in French]; Julie Ringelheim, *Cultural Rights*, in INT'L HUM. RTS. L. 283 (2014).

105. CESCR, *General Comment No. 21*, *supra* note 100, at 4 ¶ 15 (b) ("Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication").

cultural life.¹⁰⁶ In this regard, it is essential to recognize that graffiti and street art may be found not only in central squares and busy streets, but also on sterile and abandoned buildings and alleys—typically also on trains and tumbledown houses and ruins—where persons with low income or homeless persons may live. Therefore, States should have obligations to make good use of this public space.¹⁰⁷ Secondly, the right to practice art in the public space has a strong collective dimension in the case of street artists who belong to minority or indigenous groups, and whose art often tells the story of cultural resistance and political dispossession.¹⁰⁸ The practice of arts in those cases, as well as the participation in the artistic life of *their* community, is a central element of the consolidation, preservation, and strengthening of their collective cultural identity.¹⁰⁹ At the same time, the exercise of artistic freedom in the case of those street artists who advocate in favor of their collective rights should enjoy additional guarantees. This is also full part of the function of artistic freedom, which is precisely to “contest[] meanings and revisit[] culturally inherited ideas and concepts.”¹¹⁰

III. CONTEXTUALISING OFFENSES UNDER HUMAN RIGHTS LAW

So far, this Article has established that the rights of graffiti and street artists to create and benefit from their moral and economic rights, are protected under human rights law; that artists’ rights should be balanced against other rights and public interests, in light of the necessity and proportionality tests; that values such as pluralism, broadmindedness and tolerance should be considered in that balancing exercise; and that the rights of the public, as well as communities’ cultural rights, should also be taken into account in the event of an infringement of artists’ rights. What remains to be examined is whether there are contextual criteria that human rights bodies might use to assess the legitimacy of infringing upon the aforementioned rights (i.e. creative expression, authors’ rights, and the rights of the public). Such contextualization is not unknown to the ECHR. In interpreting the European Convention, the ECHR may establish lists of criteria and safeguards with respect to violations of qualified rights such as expression and privacy.¹¹¹ This is because under the ‘balancing’ test, human rights bodies

106. *Id.* at 2 ¶ 6.

107. *Cf.* Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 14, ¶ 65 (noting that “the use of public space for art is crucial as it allows people, including marginalized people, to freely access, enjoy and sometimes contribute to the arts, including in its most contemporary forms”).

108. *See generally* Smith, *supra* note 11.

109. *Cf.* Yvonne Donders, *A Right to Cultural Identity in UNESCO*, in CULTURAL HUM. RTS. 317, 331 (Francioni & Scheinin, eds., 2008).

110. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 3 ¶ 3.

111. *Cf.* Axel Springer AG v. Germany, App. No. 39954/08 [GC] (2012), Judgment (Feb. 7, 2012), <https://hudoc.echr.coe.int/fre/?i=001-109034> (establishing a list of contextual criteria defining the legitimacy of privacy breaches vis a vis article 10 protection).

will eventually also need to consider the particular context and circumstances of an artwork's creation, especially given that the scope of these rights is defined by reference to other rights.

A. *What is the Significance of the Aesthetic Quality of the Works at Stake?*

The first criterion that should be considered in the balancing exercise between artists' rights and the rights of others (*i.e.* public interests) is the aesthetic *value* of the work. Weighing value in this way could eventually play in favor of preservation, or even, decriminalization of graffiti. Doing so would also resonate well with public perceptions: in most peoples' minds there is a difference between graffiti as vandalism and aesthetically beautiful street art. For example, the widespread graffiti slogan "Putin is a d—head" that has been scrawled on virtually every wall in Ukraine undoubtedly falls within the definition of graffiti but, arguably, is not what most people would call "art." Contrastingly, *Slave Labour*, which depicts a child hunched over a sewing machine making a string of Union Jacks,¹¹² is perceived as genuine street art.¹¹³ Likewise, graffiti art (and not throw ups) is probably what most art educators have in mind when discussing the educational value of street art¹¹⁴ or expanding traditionally constrictive art curricula in a way that incorporates street art.¹¹⁵

This is a tempting argument because value-based assessments are unavoidable in all spheres of cultural policy, including art funding, residence grants, and other chances for governmental support. From the perspective of the art world in the streets, however, a value distinction between art is fairly fluid—if a distinction at all. However, this line of argumentation is a minefield from a freedom of speech perspective. This is not only for philosophical reasons related to the impossibility of defining universally acceptable criteria of value,¹¹⁶ but also because the subjectiveness of the value judgment. The latter can be easily disguised and used for governmental censorship or collateral censorship when imposed by private parties, particularly intermediaries. In the United States¹¹⁷

112. Adam Taylor, "Khuiilo": *The offensive term that has attached itself to Putin*, WASH. POST, (June 17, 2014) <https://www.washingtonpost.com/news/worldviews/wp/2014/06/16/khuiilo-the-offensive-term-that-has-attached-itself-to-putin/>.

113. Susan Hansen & Flynn Danny, *'This is Not a Banksy!': Street Art as Aesthetic Protest*, 29 CONTINUUM J. MEDIA & CULTURAL STUD. 892, 898 (2015); Salib, *supra* note 20.

114. This perception is corroborated by the fact that Wood Green residents held protests in North London carrying signs that read "Bring back our Banksy" after the work mysteriously disappeared one day. See Jessie L. Whitehead *Graffiti: The Use of the Familiar*, 57 ART EDUC. 25, 32 (2004); Hansen & Danny, *supra* note 113 at 898.

115. James Daichendt, *Artist-driven Initiatives for Art Education: What We Can Learn from Street Art*, 66 ART EDUC. 12, 12 (2015).

116. Amy Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L. J. 1359, 1360 (1990).

117. *Miller v. California*, 413 U.S. 15, 24 (1973) (establishing the three-part test to establish obscenity, of which the third feature is "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"); Adler, *supra* note 116, at 1359–60.

and other common law jurisdictions,¹¹⁸ artistic value is a reason not to exclude works that would otherwise be considered as indecent, obscene, or pornographic from the protective scope of artistic freedom. Essentially, value-based judgments risk acting as limitations to the exercise of free speech when taken in its most liberal sense. Who decides what is a work of value? What should the criteria be to understand value and why should “value” be a significant parameter, given the evolution of contemporary art? This is even more problematic in the case of street art because of its subversive content.¹¹⁹ Even when objective criteria are defined to assess a work’s value (such as *artistic excellence*, for instance, as in the case of the current NEA funding schemes),¹²⁰ a subjective judgment is involved, and the viewpoint conveyed by an artwork, is necessarily intermingled with the assessment of the artwork’s merit and views entrenched in one or another theory of art.¹²¹ Subsequently, the “value” criterion, albeit close to public perceptions about art, is not a criterion that could be sustained in international human rights law—in part because it is a dangerous one. An example is the aforementioned judgment in *Ehrmann*.¹²² In this case, the Court held that the State’s interests in urban planning and monument preservation were lawful and, in fact, superior to the owner of the property, who subsequently lost the case. This judgment implies there is an unavoidable possibility of the legislator making subjective value judgments about works of art. This would essentially allow them to sort State-favorable art from art that is not as a basis of value and therefor allow censorship.

118. See PAUL KEARNS, FREEDOM OF ARTISTIC EXPRESSION: ESSAYS ON CULTURE AND LEGAL CENSURE 10 (2014) (noting that British courts grant the possibility to submit “overriding artistic merit” as a defence to charges of either public morality, or obscenity).

119. See, e.g., Feiten, *supra* note 35, at 221.

120. National Council on the Arts, 20 U.S.C.A. § 955 (f)(1) (Advisory functions [of the National Council on the Arts]; policies, programs, and procedures; recommendations; authority of Chairperson; action by Chairperson pursuant to delegation of authority); see also *Grants for Arts Projects: Application Review*, NAT’L ENDOWMENT FOR ARTS (last visited July 22, 2024), <https://www.arts.gov/grants/grants-for-arts-projects/review-criteria> (noting that “applications will be reviewed on the basis of the criteria below, with equal weight assigned to artistic excellence and artistic merit” and that “the review criteria reflect the NEA’s priorities and are aligned with [the NEA] strategic plan”); *Nat’l Endowment Arts v. Finley*, 524 U.S. 569 (1998) (discussing the constitutionality of 20 U. S. C. § 954(d), concerning the NEA funding schemes, which provided at the time that “(1) artistic excellence and artistic merit are the criteria by which applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public”).

121. Adler, *supra* note 116, at 1365–67 (discussing *Miller v. California* and noting that the “The Miller test presupposes a theory of art”); *id.* at 1373 (noting that “any post-modern artist who uses sexually explicit material could be at risk under Miller, and the potential chilling effect is incalculable”). Cf. Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. REV. 381, 389–93 (2017); Polymenopoulou, *supra* note 54, at 172–74; Svetlana Mintcheva, *When words and Images Cause Pain: The Price of Free Speech*, in CENSORING CULTURE: CONTEMPORARY THREATS TO FREE EXPRESSION (2006).

122. *Ehrmann*, *supra* note 54, at 12–13 (stating that “the general interest, which in the present case is constituted by the protection of heritage, requires that the applicants comply with certain planning regulations”).

B. Political Content and Subversive Graffiti as a Means of Resistance

In carefully defined contexts, graffiti may also be a peaceful way to express political ideals, namely as a way to protest and express dissent and resistance. Such graffiti and street art should stand better chances against its removal, since it is an especially important means of expression for marginalized and disenfranchised people with no other means of expression,¹²³ and those without access to art.¹²⁴ Graffiti and street artists working in extremely repressed conditions should be additionally granted the protective status of human rights activists. This is especially true in contexts where the political situation is fragile. For example, when political violence and conflict rise, street art fulfills an additional role—that of activism in societies where the media are heavily regulated by the State. In these cases, street art should always be protected in the public sphere, whether commissioned or illicit. Few examples corroborate this view. In a case involving graffiti artists vandalizing walls in the streets of Beirut, for example, a Lebanese court found that graffiti of political content is a legitimate exercise of the artists' peaceful protest, and freedom of creative expression.¹²⁵ Inversely, taking down street art in the context of political unrest and arresting street artists—as was the case of Egypt during the Arab Uprisings¹²⁶—should entail State responsibility for violations of these rights.

That said, a contextual approach should always be considered. For example, a difference should be made between private and public property. Destruction of graffiti and street art on public or abandoned property should be considered a violation of freedom of speech regardless of its illicit creation or placement. In this scenario, street artists are not only rights holders of freedom of speech guarantee but also political protesters—and possibly human rights defenders. The ECtHR in particular places a lot of weight on the political nature of a work, action, or form of expression and its contribution to the public debate, particularly when humorous or satirical works are concerned. This Court for example, has sanctioned satirical interventions in the public space, as well as light forms of vandalism, when they express a form of protest.¹²⁷ Also, the Human Rights

123. See Roundtree, *supra* note 9, at 963 (stating “rebellion refers to the value in violating social norms, clashing with authority,” and “bucking the establishment”); Assaf-Zakharov & Schnetgok, *supra* note 9, at 126; Millie, *supra* note 19, at 1282.

124. Cf. Shaheed, *The Right to Freedom of Artistic Expression and Creativity*, *supra* note 79, at 14 ¶ 65 (noting that “creations are used in public spaces as a peaceful way of manifesting dissent or alternative viewpoints”).

125. *Pub. Prosecutor v. Thebian and Nassereddine*, Beirut First Instance Ct. (Nov. 29, 2019) (judgment in Arabic and English summary available at <https://globalfreedomofexpression.columbia.edu/cases/thebian-and-nassereddine-v-public-prosecutor/>).

126. John Lennon, *Writing with A Global Accent: Cairo and The Roots/Routes of Conflict Graffiti*, in UNDERSTANDING GRAFFITI, *supra* note 11, at 59, 62–72.

127. See *Faber v. Hungary*, App. No. 26005/08 & 26160/08, ¶ 41 (June 12, 2012) (Second Section), <https://hudoc.echr.coe.int/eng?i=001-112446>; *Alekhina v. Russia*, App No. 38004/12 (Sept. 17, 2018) (Third Section), <https://hudoc.echr.coe.int/eng?i=001-184666>; Polymenopoulou,

Committee, since its early case law, has found that when States punish “subversive activities” they must explain their scope and meaning¹²⁸ and substantiate the relevant offences with a “concrete factual analysis.”¹²⁹ In a case against Azerbaijan,¹³⁰ protestor applicants were caught “vandalizing” a statue during protests in Baku. The Court held *inter alia* that the applicants’ Article 10 claim was relevant because the interference with the applicants’ rights to freedom of expression was “grossly arbitrary and incompatible with the rule of law.”¹³¹ Graffiti on private property, however, would likely not enjoy the same protection.¹³² This is because community-based decision making and self-help measures taken by property owners with damaged walls could create tensions within and among communities.

An affirmative defense against criminal prosecution of graffiti artists¹³³ is likely to fail in low-income contexts, particularly where liberal values are endangered. In these contexts, the burden to erase or demolish graffiti and street art is shifted from the State to property owners. This essentially benefits rich and privileged property owners, who can afford such self-help measures, since graffiti removal is generally expensive. It should be held that the content of graffiti or street art should be evaluated under general human rights standards, which accept general restrictions and prohibit hate speech and war propaganda.¹³⁴ For example, content-wise, general limitations to freedom of speech should also apply regardless of the actual medium used to express an opinion. For instance, in a case against Armenia, the ECtHR did not even examine the question of creative freedom in the case of homophobic graffiti used to harass and intimidate a leading

Expressing Dissent: ‘Gag Laws’, Human Rights Activism and the Right to Protest, 32 FLO. J. OF INT’L L. 337, 366–68 (2021) (on minor disturbances and light forms of vandalism).

128. UNHRC, Communication No. 33/1978, Leopoldo Buffo Carballal v. Uruguay, U.N. Doc. CCPR/C/OP/1 at 63 (Mar. 27, 1981); *see also* UNHRC, Comm’n No. 1128/2002, Rafael Marques de Morais v. Angola, U.N. Doc. CCPR/C/83/D/1128/2002, (Mar. 29, 2005).

129. UNHRC, Communication No. 28/1978, Luciano Weinberger Weisz v. Uruguay, U.N. Doc. CCPR/C/11/D/28/1978, (adopted Oct. 29, 1980).

130. Ibrahimov & Mammadov v. Azerbaijan, App. No. 63571/16, Judgment, ¶¶ 10, 12, 14, 24, 50, 144 (Feb. 13, 2020) (Fifth Section), <https://hudoc.echr.coe.int/eng?i=001-200819>.

131. *Id.* ¶¶ 173–74; *see also* Polymenopoulou, *supra* note 127, at 336–37.

132. *See* Carroll, *supra* note 21, at 1347–48 (suggesting that a defense against governmental interference could even include “measures of self-help in the hands of community members” – namely, property owners, who would not be prevented according to Carroll, “from either seeking civil remedies for the damage caused by the graffiti or from engaging in the self-help remedy of removing graffiti from private property.” According to Carroll, such approach “enforces a bottom up democratic process that seems somehow poetically fitting for street speech such as graffiti” – although in fact it does not offer “a guaranteed platform for speech, but only protection from governmental interference in the form of a criminal conviction” while “in public forums, the defense would arguably carry more protection, though even this may be limited.”).

133. *Id.* (suggesting that “a vision of democracy based on an open exchange of ideas and a free debate of values that occurs both in formal spheres of government, but also in the informal sphere of the citizenry”).

134. Int’l Covenant on Civ. & Pol. Rts. [ICCPR], *opened for signature* Dec. 16, 1966, 1057 U.N.T.S. 171; UNHRC, *General Comment No. 34*, *supra* note 62, at 5 ¶ 21.

figure of LGBT communities in Yerevan.¹³⁵ However, in a case against Georgia on the arrest of applicants for stenciling on the wall of a Church the phrase “F* homophobia,” the freedom of expression aspect, although claimed, was not found to be relevant.¹³⁶

C. Communities' Participation and Urban 'Legitimacy'

For street art that is evidence of large community engagement, the benefit of the human rights approach is twofold. First, the cultural aspects of graffiti and street art, as well as the need for safeguarding and preservation are taken into account. Examples include the *Great Wall of Los Angeles* in California, a mural painted on the wall adjacent to a Flood Control Channel, representing the history of ethnic peoples of California,¹³⁷ and the great murals in Pretoria and Durban, South Africa, depicting the South African struggles of independence and fight against apartheid.¹³⁸ For such artworks of the public space, obligations to safeguard and maintain may arise, regardless of whether they are commissioned or unsolicited.¹³⁹

The question that arises is whether positive obligations to preserve meaningful and culturally relevant street artworks that express the history of communities and human rights struggles also apply to States in this case. Such safeguarding obligations could be deduced, to the extent of a State's available resources, as per standards related to the art of the public space. Former Special Rapporteur on cultural rights, Karima Bennouna, noted in her 2019 report on culture and the public space that “[p]ublic authorities should promote the presence of arts in public spaces as part of the right to have access to a wide variety of artistic expression.”¹⁴⁰ At this point, one may wonder whether these obligations exist even if that graffiti or street art is not a commissioned work. In this regard, it is important to emphasize that the public does not distinguish between lawful and unlawful artworks. Removal of works from the public space, whether they are made lawfully or not, infringes upon the right of the public to view or otherwise access the artwork. This is especially relevant given that human rights

135. *Oganezova v. Armenia*, App. No. 71367/12;72961/12, Judgment, (May 7, 2022) (Fourth Chamber), <https://hudoc.echr.coe.int/fre?i=001-217250>.

136. *Dzerkorashvili & others v. Georgia*, App. No. 70572/16, Judgment, (March 2, 2023) (Fifth Chamber), <https://hudoc.echr.coe.int/eng?i=001-223292>.

137. Maliha Ikram, *Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy*, 14 NW. J. L. & SOC. POL. 69 (2018) (arguing that the government should maintain such property under the public trust doctrine).

138. Sabine Marschall, *A Postcolonial Reading of Mural Art in South Africa*, 14 CRITICAL ARTS 96, 101 (2000) (noting that while writing on these projects a journalist coined the term “official graffiti” to denote – and “urban art tolerated by officials”).

139. Ikram, *supra* note 137, at 89 (discussing long-term preservation of public art and arguing that ‘In general, when public art is determined to be a mainstay of a locality, then the public art should be held in public trust for the people’).

140. Karima Bennouna (Special Rapporteur) [S.R.], UNHRC Rep. of the S.R. in the Field of Cultural Rights, ¶ 63, U.N. Doc A/74/255 (July 30, 2019).

law warrants the economic accessibility (*i.e.*, affordability) of economic, social, and cultural rights. States have obligations to provide minimum access to arts. This is because “creative activities” are fully part of the right to access and freely participate in cultural life, which is protected in turn under Article 15(1)(a) of the ICESCR.¹⁴¹

As the UN Committee on ESCR has stipulated in General Comment 21, the ICESCR provides for obligations of all States both to access and participate in cultural life.¹⁴² Among other things, this covers not only “the right to benefit from the cultural heritage and the creation of other individuals and communities,”¹⁴³ but also the “right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community.”¹⁴⁴ In accordance with the Committee’s views on cultural rights, States should ensure availability of artistic expressions in the public space, in order to fully realize the right of everyone to take part in cultural life, and ensure that “arts in all forms,” as well as “shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets” are open to everyone.¹⁴⁵ This, in turn, implies that States should not take deliberate measures to take down street art that is popular in certain localities, but rather preserve it, and ensure it continues to be accessible to everyone. In practice, policy and decision making in cultural matters is likely to preserve such works either by retrospectively legitimizing them,¹⁴⁶ by giving citizens the right to vote as to their fate,¹⁴⁷ or by deciding to restore them.¹⁴⁸ Likewise, when street art is likely to bring substantial touristic revenues to local municipalities, local authorities and property owners are in practice likely to grant permissions to graffiti artists. This is evidenced in Mexico and other Latin American States, which are gradually also changing their legal frameworks in ways that aim at “legalizing” graffiti.¹⁴⁹

141. CESCR, *General Comment No. 21*, *supra* note 100, at 2 ¶ 4.

142. *Id.* at 2 ¶ 3.

143. *Id.* at 4 ¶ 15(b).

144. *Id.* at 4 ¶ 15(c).

145. *Id.* at 5 ¶ 16(a).

146. Peter Levy, *Who Owns Street Art? Missing Banksy Mural Sparks Debate*, WORLD CRUNCH (Sept. 22, 2016), <https://worldcrunch.com/culture-society/who-owns-street-art-missing-banksy-mural-sparks-debate> (noting that Cheltenham, UK, chose to legitimise Banksy’s *Spy Booth* retrospectively even though part of the work was drawn on public property - and in fact, a heritage listed monument).

147. Caroline Davies, *Bristol Public Given Right to Decide Whether Graffiti is Art or Eyesore*, GUARDIAN (Aug. 31, 2009), <https://www.theguardian.com/artanddesign/2009/aug/31/graffiti-art-bristol-public-vote>.

148. Tessa Solomon, *Damaged Banksy Mural in Venice Will Be Restored, Defying Local Critics*, ART NEWS (Oct. 5, 2023), <https://www.artnews.com/art-news/news/damaged-banksy-mural-venice-restored-controversy-1234681275/>.

149. See, e.g., Patricia Covarrubia, *Legalizing Graffiti: Chilean Chamber of Deputies Says YES!* (Oct. 9, 2018), <https://iptango.blogspot.com/2018/10/legalizing-graffiti-chilean-chamber-of.html?m=0>; John Fox, *In Mexico City, Urban Walls Are an Artists’ Battleground*, EXP MAG (Jan. 1, 2020), <https://expmag.com/2020/01/in-mexico-city-urban-walls-are-an-artists-battleground/>.

CONCLUSION

There are indeed trends in the law that indicate States are granting better protection to graffiti and street art, but these trends are scarce and limited to intellectual property rights, primarily copyright law. There is no evidence that the decriminalization of graffiti is a plausible scenario in the near future. On the contrary, unless popular and economically beneficial, graffiti is likely to be taken down. State practice in fact indicates that the more graffiti expands, the more it is proscribed by either criminal or administrative law (for example, laws on urban planning and protection of the environment), or even by-laws. The human rights approach allows for a nuanced approach in demarcating State obligations and assessing the legitimacy of violations to artists' rights. State obligations under human rights law do not stem only from the right to respect and protect civil liberties such as free speech, creative freedom, or peaceful protest. Rather, State obligations encompass cultural rights and the right to meaningfully and freely participate in cultural life. In this sense, human rights law is more likely to give more just and equitable solutions to protect free speech and creators' rights, while enabling communities' participation in the decision-making process on the art of the public space.

The Article examined three possible criteria that could be taken into account when balancing between street artists' rights and other private rights or public interests: the significant aesthetic quality of the works at stake; the overwhelming consent of the residents of certain urban area; and the political value of works, including activist works in States that rank low in free speech standards and local communities that have no means to express themselves. From these criteria, only the latter two were found to be substantial. In the case of communities, it was emphasized that the public does not know what is illicit and what is commissioned street art. In other words, a decision whether or not to take down an artwork should not be based on the exercise of an individual's right to free speech. Rather, it should consider the context, including communities' cultural rights. For example, street art that is evidence of human rights activism, whether commissioned or illicit, should always be protected, primarily because of the need to protect human rights activists. In such exceptional circumstances violation of street artists rights is an unlawful interference with individual rights of the artists and the right of the public—exercised individually or jointly with others—to participate in cultural life. States should be held responsible under human rights law for taking such graffiti down. In addition, States should have obligations to maintain and safeguard street art that is evidence of cultural or urban heritage worth preserving, in accordance with the right of the public to access cultural life and arts in the public space.