

# Introduction

During transition, cultural heritage can be used to create, resurrect, and preserve certain narratives about the past that significantly impact national cultural identity and the overall possible directions of the transitional process. Culture, imagination, and ideology often play key roles in the making of massacres and atrocities.<sup>1</sup> The recording of atrocity and violence, in processes comparable to cultural heritage, could be a way to address its causes.<sup>2</sup> Heritage in this context can involve a series of specific manifestations, such as parades,<sup>3</sup> monuments,<sup>4</sup> museums of memory and reconciliation,<sup>5</sup> and sites of remembrance,<sup>6</sup> among others.<sup>7</sup> This heritage can play a series of roles in favor of reconstructing the nation and can send important “never again” messages. This heritage is what is conventionally called dissonant or difficult heritage, as discussed further in Chapter 2.

We safeguard and mythologize sites like the Auschwitz-Birkenau concentration camp, for instance, as World Heritage of universal importance. I write these lines on the day of the seventy-fifth anniversary of the camp’s

<sup>1</sup> Jacques Sémelin, “Analysing Massacres and Genocide: Contribution of the Social Sciences,” in *Violence and Its Causes: A Stocktaking* (Paris: UNESCO, Publishing 2005) 61–69, 67.

<sup>2</sup> *Ibid.*, 68.

<sup>3</sup> Kris Brown, “What It Was Like to Live through a Day: Transitional Justice and the Memory of the Everyday in a Divided Society” (2012) 6 *International Journal of Transitional Justice* 444, 454.

<sup>4</sup> Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Durham, NC: Duke University Press, 1998), 5; Sanford Levinson, “Political Change and the Creative Destruction of Public Space,” in Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2008).

<sup>5</sup> Lavinia Stan, *Transitional Justice in Post-Communist Romania: The Politics of Memory* (Cambridge: Cambridge University Press, 2013).

<sup>6</sup> Judy Barsalou and Victoria Baxter, *The Urge to Remember: The Role of Memorials in Social Reconstruction and Transitional Justice* (Washington: United States Institute of Peace, 2007).

<sup>7</sup> Peter D. Rush, and Olivera Simic (eds.), *The Arts of Transitional Justice: Culture, Activism, and Memory after Atrocity* (New York: Springer, 2014).

liberation, a day marked by many solemn ceremonies.<sup>8</sup> As I write these lines, I have a hard time choosing the right words: Is this heritage celebrated? Commemorated? None of these are words you would normally associate with Auschwitz, yet they are words we often associate with heritage.

Therein lies the uneasy relationship between cultural heritage, including the law that creates, enables, and safeguards it, and pasts of conflict or dictatorship. Dealing with these pasts is the work of a field referred to as transitional justice (TJ),<sup>9</sup> whereas heritage and the law around it usually deals with more positive, even triumphant pasts. Yet, heritage law engages with a number of memories of difficult pasts, in spite of TJ.

We come to the proverbial ships in the night: the fields of cultural heritage law and TJ, while both sharing a close connection to the law (explored in more detail in Chapter 2), largely speak past one another. Cultural heritage law has a hard time coming to terms with this difficult heritage and the politics of memory, which are largely seen as falling outside the law; and TJ has a hard time understanding that memory can be and is shaped by law. After all, Auschwitz is listed on an international register, the World Heritage List, because of the 1972 World Heritage Convention,<sup>10</sup> an international treaty; said international treaty requires, in order for listing<sup>11</sup> to take place, that there is a domestic list, authorized by domestic law;<sup>12</sup>

<sup>8</sup> For instance, see Joanna Berendt, "At Auschwitz, Holocaust Survivors Plead 'Never Forget,'" *NY Times* (27 January 2020), at [www.nytimes.com/2020/01/27/world/europe/auschwitz-memorial-anniversary.html](http://www.nytimes.com/2020/01/27/world/europe/auschwitz-memorial-anniversary.html).

<sup>9</sup> For a broad examination of the field, see Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017).

<sup>10</sup> Convention concerning the Protection of the World Cultural and Natural Heritage 1972 (adopted 23 November 1972, entered into force 15 December 1975) 1037 UNTS 151 (WHC).

<sup>11</sup> WHC, Article 11(2): "On the basis of the inventories submitted by States in accordance with paragraph 1, the Committee shall establish, keep up to date and publish, under the title of "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, as defined in Articles 1 and 2 of this Convention, which it considers as having outstanding universal value in terms of such criteria as it shall have established. An updated list shall be distributed at least every two years."

<sup>12</sup> WHC, Article 5(4): "To ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavor, in so far as possible, and as appropriate for each country: . . . to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; . . ." See also *Ibid.*, Article 11(1): "Every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the list provided for in paragraph 2 of this Article. This inventory, which shall not be considered exhaustive, shall include documentation about the location of the property in question and its significance."

further, the site cannot be added to the international list unless there are a number of domestic measures for its protection, including legal ones.<sup>13</sup> At the very least, too, the keeping and conservation of Auschwitz are funded by state money, which itself requires legal approval.

Law shapes what heritage is possible, and is a powerful means to create collective memory since it involves very effective rituals, as posited by Durkheim.<sup>14</sup> Law, like heritage, carries the past into the present, and can in many ways be memorials to past wrongs.<sup>15</sup> Sometimes these are very explicit laws, like the decommunization laws in the Ukraine discussed further in Chapter 4: the laws “On the Condemnation of the Communist and Nazi Totalitarian Regimes in Ukraine and Banning of Propaganda of Their Symbols,” and the law “On the Legal Status and Commemoration of Fighters for the Independence of the Ukraine in the 20th Century” are two overt examples of laws that memorialize the past very explicitly.<sup>16</sup> Chapter 6 returns to the discussion of memory laws in connection to pragmatism, but it is important to bear in mind that these laws deliberately manipulate collective memory and perpetuate historical narratives containing tendentious readings of history.<sup>17</sup> While they attempt to break away decisively from that past, the unintended consequence of their swinging too far in that direction is that they in fact exacerbate the same tensions they were meant to counter and deepen divides they were meant to bridge.<sup>18</sup> There are therefore dangers attendant to laws that attempt to shape memory. They are more visible in these overt pieces of legislation, but as the rest of the book shows, all of heritage law can arguably have similar effects, not to mention background norms that operate in relation to heritage.

To carry the past into the present, as a return of history, can “engulf the present experience with new meanings that seek to undermine the settler-colonial system of power,” as the experience of Palestinians in Israel shows, who went on strike to hold a commemoration of the Nakba, the

<sup>13</sup> Operational Guidelines for the Implementation of the World Heritage Convention (adopted 10 July 2019), UNESCO Doc. WHC.19/01, para. 98: “Legislative and regulatory measures at national and local levels should assure the protection of the property from social, economic and other pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property. States Parties should also assure the full and effective implementation of such measures.”

<sup>14</sup> Cited by Joachim J. Savelsberg and Ryan D. King, “Law and Collective Memory” (2007) 3 *Annual Review of Law and Social Science* 189, 190.

<sup>15</sup> *Ibid.*, 200.

<sup>16</sup> Ilya Nuzov, “The Dynamics of Collective Memory in the Ukraine Crisis: A Transitional Justice Perspective” (2017) 11 *International Journal of Transitional Justice* 132, 147.

<sup>17</sup> *Ibid.*, 135. <sup>18</sup> *Ibid.*, 136.

dismantling of Palestine for the establishment of the Israeli state.<sup>19</sup> In a TJ context, heritage law enhances these attributes of the law, and consequently shapes what kind of relationship to culture and identity is possible in the aftermath of a dictatorship or conflict. Heritage in a TJ context is not a strategy that can be opted in or out of, depending on whether heritage is seen as having positive effects; rather, it is a necessary element of societies.<sup>20</sup> That critical period when a society is attempting to reinvent or rediscover itself to break away from an oppressive past, therefore, is influenced by bodies of law we pay scant attention to, but which nevertheless limit what can and cannot be done to allow a new identity to be forged, a past to be broken away from, a society to rediscover itself beyond or despite a period of suffering. This book aims at shining a light onto this dark corner, and investigate the ways in which cultural heritage law shapes the identities that are possible in TJ contexts, and in some respects to showcase how heritage practices can be of aid in TJ contexts, alongside more typically legal mechanisms.<sup>21</sup>

Cultural heritage law mediates this process by enabling and embedding choices about what heritage is, why it should be protected, and for whose benefit. However, in places like Bulgaria transition can also have very negative impacts on heritage, as underfunded heritage gets pushed aside (and during transition the funding of heritage is seldom a priority), and then this heritage re-emerges quietly later.<sup>22</sup> The law is where this book puts its attention. As it creates the conditions for the listing of a heritage site, monument, or even a manifestation of intangible heritage, the conditions it imposes on that listing also shape heritage practice and management in problematic ways. And, as international heritage obligations are implemented, they shape domestic heritage legislation and practice according to the international expectations. This ripple effect

<sup>19</sup> Nadim N. Rouhana and Areej Sabbagh-Khoury, "Memory and the Return of History in a Settler-Colonial Context: The Case of the Palestinians in Israel," in Nadim N. Rouhana (ed.), *Israel and Its Palestinian Citizens: Ethnic Privileges in the Jewish State* (Cambridge University Press, 2017) 393–432, 398.

<sup>20</sup> John Daniel Gibling, "Post-Conflict Heritage: Symbolic Healing and Cultural Renewal" (2014) 20 *International Journal of Heritage Studies* 500, 500–01.

<sup>21</sup> Inês Virginia Prado Soares, "Arqueologia e Justiça de Transição no Brasil," in Aline Vieira de Carvalho, Inês Virginia Prado Soares, Pedro Paulo A. Funari, and Sérgio Francisco Serafim Monteiro da Silva (eds.), *Arqueologia, Direito, e Democracia* (São Paulo: Hábilis, 2009) 273–94, 294.

<sup>22</sup> Petya Koleva, "Rehabilitation of Cultural Heritage in Bulgaria: Policy and Heritage Management Impact," in *Heritage for Development in South-East Europe: New Visions and Perceptions of Heritage through the Ljubljana Process* (Strasbourg: Council of Europe, 2014).

of international heritage law has significant impacts on how heritage is narrated.<sup>23</sup>

At the same time, however, cultural heritage law often escapes the observing eye of those making choices about the laws to be reformed as part of transition. And, in doing so, heritage can be used to write and rewrite history in the nomination and selection process of heritage items. Sometimes this process can even mean the removal of the memories of a discredited past, through removal of existing cultural heritage.<sup>24</sup> If “[t]he paradoxical goal in transition is to undo history,”<sup>25</sup> the selectivity of heritage can play an important role in this process. I focus on heritage in this book as a formalized process of engagement with culture, much like I focus on relatively formalized TJ mechanisms, while also acknowledging the role of informal TJ mechanisms and the arts more broadly, which have been critical in TJ contexts like Tunisia.<sup>26</sup>

All of these issues are tied to interests in the broader accounts of the TJ field, in which law itself is “above all, symbolic – a secular ritual of political passage,” in the words of leading TJ authority Ruti Teitel.<sup>27</sup> Because cultural heritage is part of the national narrative, a new national narrative in the aftermath of transition necessitates new heritage, or, at the very least, the re-signification of that heritage. All domains of heritage can play roles in transition, be it World Heritage, intangible cultural heritage,<sup>28</sup> or even movable cultural heritage.<sup>29</sup> This adaptation informs not only the human right to heritage, but also the “right to truth,”<sup>30</sup> or even a “right to

<sup>23</sup> In other contexts it also impacts who gets to narrate heritage, often to the exclusion of the communities that live in, with, or around heritage. See Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford: Oxford University Press, 2019), 227–30.

<sup>24</sup> Levinson, *Written in Stone*; and Levinson, “Political Change and Creative Destruction.”

<sup>25</sup> Ruti G. Teitel, “Transitional Justice Genealogy” (2003) 16 *Harvard Human Rights Journal* 69–94, 87; see also Erin Daly, “Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition” (2008) 2 *International Journal of Transitional Justice* 23–41, 27–28.

<sup>26</sup> Arnaud Kurze, “Youth Activism, Art and Transitional Justice: Emerging Spaces of Memory after the Jasmine Revolution” (2015) 37 *Department of Justice Studies Faculty Scholarship and Creative Works*, 2.

<sup>27</sup> Ruti Teitel, *Globalizing Transitional Justice* (Oxford: Oxford University Press, 2014), 104.

<sup>28</sup> For an example of traditional cultural practices as intangible cultural heritage being used in transition, see Joanna R. Quinn, “Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice” (2007) 8 *Human Rights Review* 389–407; on intangible cultural heritage in general, see Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford: Oxford University Press, 2013).

<sup>29</sup> Thérèse O'Donnell, “The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm of the Raft of the Medusa” (2011) 22(1) *European Journal of International Law* 49–80.

<sup>30</sup> United Nations Human Rights Council, *Right to the Truth*, UN Doc. A/HRC/Res./9/11 (18 September 2008).

memory,”<sup>31</sup> at least to the extent the selection of heritage to be protected and treasured can inform one of the truths about what a country has undergone.<sup>32</sup>

The relationship between truth and memory is convoluted, and discussed further throughout the book. But truth-telling and memory relate to one another both in informing truths and in debunking myths that have contributed to the conflict, allowing one to “challenge distortions of the truth that allow groups only to see their own members as ‘victims.’”<sup>33</sup> Heritage law, however, also allows victimhood to be reinforced, as discussed in subsequent chapters, because of the state-centric nature of the conservation paradigm, which is all the more reason to understand heritage not just as an abstract set of ideas about culture and identity, but also as a deeply institutionalized and law-shaped set of practices.

Truth is but one of the key mechanisms of TJ. Other mechanisms include reparations, guarantees of non-repetition, and justice and accountability. The latter, as discussed in Chapter 2, is a key focus of the TJ field, which gives it legalistic undertones, and is part of the obstacle for heritage law, spilling over onto international heritage law framings as well. For instance, a chapter in an authoritative mapping of the field of international cultural heritage law (ICHL) which discusses the connection between TJ and heritage gives prominence to international criminal law efforts, mirroring the focus on anti-impunity elsewhere in TJ, while also discussing other mechanisms. Ana Vrdoljak’s conclusion in this chapter is that cultural heritage is still largely seen as an add-on to promote TJ goals, rather than an integral part of those objectives.<sup>34</sup> That gap is to be addressed in this book, which attempts to make cultural heritage and the law that creates, authorizes, and shapes it, a more central part of TJ conversations.

In addition to a focus on accountability or the rebuilding of institutions for the rule of law,<sup>35</sup> TJ is also very fundamentally about rebuilding the

<sup>31</sup> Anna Reading, “Identity, Memory and Cosmopolitanism: The Otherness of the Past and a Right to Memory?” (2011) 14 (4) *European Journal of Cultural Studies* 379.

<sup>32</sup> On the multiple truths connected to transition, see generally Erin Daly, “Truth Skepticism.”

<sup>33</sup> Paige Arthur, “Identities in Transition – Challenges for Transitional Justice in Divided Societies,” International Center for Transitional Justice (2009), 7.

<sup>34</sup> Ana Vrdoljak, “Cultural Heritage, Transitional Justice and Rule of Law,” in Francesco Francioni and Ana Vrdoljak (eds.), *Oxford Handbook of International Cultural Heritage Law* (Oxford: Oxford University Press, 2020), 169–99.

<sup>35</sup> See generally Padraig McAuliffe, *Transitional Justice and Rule of Law Reconstruction: A Contentious Relationship* (London: Routledge, 2013); Jiri Pribán, “Constitutional Symbolism and Political (Dis)continuity: Legal Rationality and Its Integrative Function in Postcommunist Transformations,” in Adam Czarnota et al. (eds.), *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (Budapest: CEU Press, 2005), 305.

nation.<sup>36</sup> Part of the process of nation-building often involves the refashioning of cultural identity, and cultural heritage is particularly adept at this task.<sup>37</sup> For instance, cultural heritage has been specifically included in some TJ processes such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), which had a specific cultural heritage mandate, seen as part of TJ measures by commentators in the field.<sup>38</sup> In the context of the ECCC, too, culture has been seen as instrumental to ground TJ measures, including through Buddhist readings of justice bearing a close relationship to intangible cultural heritage across the country.<sup>39</sup>

Another example is the people's tribunal about the 2003 Iraqi war (the specific cultural heritage sessions, which included consideration of the looting of the Baghdad Museum,<sup>40</sup> were in Istanbul, and a part of the World Tribunal on Iraq).<sup>41</sup> That the Istanbul session of this people's tribunal focused specifically on cultural heritage destruction, ultimately charging the US and UK governments with the failure to protect Iraqi cultural heritage as a violation of international law, indicates that there is interest to civil society groups in the TJ space regarding the fate of heritage.

There are four key characteristics of TJ: (1) pervasive structural inequality; (2) collective and political wrongdoing that has been normalized; (3) existential uncertainty in society; and (4) uncertainty about authority in a society.<sup>42</sup> These circumstances affect the possibilities of justice in transitional societies and TJ can thus be broadly defined as the measures countries

<sup>36</sup> Ruti G. Teitel, "Transitional Justice in a New Era" (2002) 26 *Fordham International Law Journal* 893, 893.

<sup>37</sup> See, e.g., Flora E. S. Kaplan, "Introduction," in Flora E. S. Kaplan (ed.), *Museums and the Making of "Ourselves": The Role of Objects in National Identity* (Leicester: Leicester University Press, 1994), 1, 1.

<sup>38</sup> Joanna R. Quinn, "The Development of Transitional Justice," in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017), 11–34, 18.

<sup>39</sup> Tallyn Gray, "Justice and the Khmer Rouge: Concepts of a Just Response to the Crimes of the Democratic Kampuchean Regime in Buddhism and the Extraordinary Chambers in the Courts of Cambodia at the Time of the Khmer Rouge Tribunal" (2012) *Centre for East and South-East Asian Studies at Lund University, Sweden, Working Paper No. 36*.

<sup>40</sup> Ana Filipa Vrdoljak, "Unravelling the Cradle of Civilization 'Layer by Layer': Iraq, its Peoples and Cultural Heritage," in Michele Langfield et al. (eds.), *Cultural Diversity, Heritage and Human Rights: Intersections in Theory and Practice* (London: Routledge, 2010), 65.

<sup>41</sup> Dianne Otto, "Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility," in Karen Engle, Zinaida Miller and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), 291–328, 301.

<sup>42</sup> Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press 2017), 41.

take to overcome difficult pasts and addressing these four factors, even if the field tends to focus less on structural inequality, as discussed in Chapter 2, than on the other factors.

When speaking of TJ, a central consideration is the nature of that past, which could speak to structural inequality, but more often than not translates into a label about the nature of wrongdoing. More specifically, it may matter whether the country is emerging from an armed conflict (internal or international) or simply from a dictatorship (which itself often also includes elements of internal armed conflicts in the resistance to the dictatorship). This distinction between conflict and dictatorship is particularly relevant in the realm of international human rights law, with the commitment to anti-impunity being firmer in the post-dictatorship context, where for instance amnesties are not permissible in the eyes of international human rights law, whereas in post-conflict situations amnesties and relinquishing justice and accountability may be an acceptable price to pay for peace.<sup>43</sup>

This distinction, therefore, plays a role in the prioritization of key TJ mechanisms over others. Those key mechanisms are discussed in more detail, and in relation to heritage law, in Chapter 2 and in many examples in other chapters, but it is worth flagging this difference at the outset, since it also underscores that TJ operates on a spectrum. More important than the nature of the pre-transition regime, however, may be the nature of the transition process itself. As also discussed in Chapter 2, the difference between TJ processes with marked breaks with the past, as opposed to transitions that are negotiated pacts, plays a significant difference in the institutional and legal arrangements available as a TJ matter. These institutional and legal arrangements shape what type of heritage law and processes are within reach. Also importantly, they frame the types of heritage that are desirable, and whether a society chooses to turn the difficult past into heritage, or to focus instead on the reconstruction of social fabric by looking at a more distant past. This book is particularly concerned with the former mode, even if examples of the latter will be discussed.

With respect to human rights, too, it is worth stating that the connection to human rights is a key part of the conversation this book attempts to start. Both TJ and cultural heritage law increasingly rely on the language of human rights,<sup>44</sup> which can heighten the stakes and, as discussed in more

<sup>43</sup> I/A Court H.R., *Case of the Massacres of El Mozote and Surrounding Areas v. El Salvador*. Merits, Reparations and Costs. Judgment of October 25, 2012. Series C No. 252.

<sup>44</sup> On cultural heritage law and human rights, see Andrea Durbach and Lucas Lixinski (eds.), *Heritage, Culture and Rights: Challenging Legal Discourses* (Oxford: Hart Publishing, 2017).



detail in Chapter 2, also has effects on how the fields of TJ and heritage, and the conversation between them, operate.

For one, cultural heritage in this context is a move to contextualize atrocity and its remediation. However, context is often seen as a distraction from the universalistic tendencies of human rights<sup>45</sup> and TJ tends to defer to universalistic trends over localizing ones.<sup>46</sup> Similar trends can be seen in TJ's engagement with international law more broadly, with it moving, on account of UN managerialism, away from nationally determined priorities and towards conformity with a growing body of international legal standards.<sup>47</sup> This universalizing turn can disconnect TJ projects from people on the ground, and also speaks to TJ as a project of a non-transitional set of stakeholders telling transitional "others" what to do to overcome transition.<sup>48</sup> This othering move, deeply managerial and universalistic, with colonial undertones, also helps exclude heritage from the equation because of its contextualism. That same contextualism, though, is a reason why cultural heritage should be a central part of this conversation.

Heritage thus runs the risk of being less relevant because it is too contextual or local, and we end up privileging universalizing narratives like international lists that exist under UNESCO heritage treaties, which, as discussed particularly in Chapter 3, below, can erase difficult histories in favor of specific binaries of victim and perpetrator, and use concepts like "Outstanding Universal Value" (a key criterion from inscription onto the World Heritage List) as a sort of "feelgood tale" about heritage, at the expense of the difficult memory work it should be doing for TJ purposes.

The reliance on the language of human rights in TJ also means a focus on violations of civil and political rights that speak directly to the anti-impunity mandate (torture, enforced disappearances, imprisonment, executions), while neglecting that violations of these rights are "intrinsically linked" to violations of economic, social, and cultural rights, which speak to structural causes of oppression, as causes or consequences.<sup>49</sup> This blind spot

<sup>45</sup> Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa," in Karen Engle, Zinaida Miller, and D. M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016), 329–60, 352.

<sup>46</sup> Lieselotte Viaene and Eva Brems, "Transitional Justice and Cultural Contexts: Learning from the Universality Debate" (2010) 28(2) *Netherlands Quarterly of Human Rights* 199.

<sup>47</sup> Leena Grover, "Transitional Justice, International Law and the United Nations" (2019) 88 *Nordic Journal of International Law* 359–97, 361.

<sup>48</sup> Fionnuala Ní Aoláin, "Justice in Times of Transition: A Reflection on Transitional Justice" (2013) 29 *Constitutional Commentary* 81–91, 90.

<sup>49</sup> Cited in Colleen Murphy, *Conceptual Foundations*, 29.

is in fact a major area of critique of TJ. However, even among those who advocate for the inclusion of other rights dimensions, the focus is primarily on economic and social rights, and culture tends to be excluded.<sup>50</sup> Part of the reason for the exclusion of culture may be, as indicated above, its localizing tendencies, which do not sit well with the universalizing mandates of both human rights and the TJ enterprise.

Cultural heritage and other memorialization processes nonetheless play a key role in how transitional societies (that is, societies overcoming a past of dictatorship or conflict) come to terms with a violent past, and the law dictates the boundaries within which these processes can take place. It also sheds light on how these processes can be coopted, and in some cases state authorities can engage in “retelling history, inventing traditions and celebrating heritage in ways that serve their own interests, which are often as crude as maintaining a grip on power.”<sup>51</sup> As Susan Stryker has put it in another context, history is often used by those in power as “raw material to build a monument to their own greatness,”<sup>52</sup> and heritage gets folded into a tool of that history-making project. A critical relationship to the history that produces a society, however, is crucial to throw off the oppression of those who are crushed by a set of circumstances, as Nietzsche once put it.<sup>53</sup>

This book fills a gap in the existing literature on TJ and memorialization, by investigating how cultural heritage law shapes memory and identity, and can be used to create safeguards against the resurgence of violence, in transitional (particularly ethnic) contexts. In doing so, this book seeks to understand cultural heritage law’s role in articulating, negotiating, and ultimately rewriting violence, and how TJ needs to move structural and cultural violence to the center of its endeavors.<sup>54</sup> We still know relatively little about how to construct reliable safeguards of this kind. This is an

<sup>50</sup> Catherine Turner, “Transitional Justice and Critique,” in Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds.), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017), 52–73, 59. But see Inês Virgínia Prado Soares, “Justiça de Transição e Direitos Culturais,” in Márcia Rodrigues Bertoldi and Kátia Cristine Santos de Oliveira (eds.), *Direitos Fundamentais em Construção: Estudos em Homenagem ao Ministro Carlos Ayres Britto* (Rio de Janeiro: Fórum, 2010), 175–95.

<sup>51</sup> William Logan and Keir Reeves, “Introduction: Remembering Places of Pain and Shame,” in William Logan and Keir Reeves (eds.), *Places of Pain and Shame: Dealing with “Difficult Heritage”* (London: Routledge, 2009) 1–14, 2.

<sup>52</sup> Susan Stryker, *Transgender History: The Roots of Today’s Revolution* (Berkeley: Seal Press, 2017), 234.

<sup>53</sup> Cited by Stryker, *Transgender History*, 234.

<sup>54</sup> Matthew Mullen, “Reassessing the Focus of Transitional Justice: The Need to Move Structural and Cultural Violence to the Centre” (2015) 28 *Cambridge Review of International Affairs* 462, 463.

urgent problem because violence on ethnic, religious, or other cultural grounds is on the rise, and, as these conflicts come to an end, it is imperative to address the risk of resurgence of violent divisions along ethnic lines. Cultural heritage sites – both intact and damaged – often serve as lightning rods for the resurgence of these divisions.

Further, even mature democracies such as Australia and Canada are introducing TJ frameworks to redress historical harm to their Indigenous populations. Given the centrality of culture and cultural heritage to the articulation of Indigenous claims, a better understanding of the relationship between cultural heritage and transition is essential in these contexts as well. This book focuses particularly on the role of international heritage processes under UNESCO, but also examines a range of domestic processes, and the interaction between the domestic and the international in promoting UNESCO's key objective of lasting peace through cultural exchange and understanding.

In April and May 2017, the city of New Orleans removed a number of Confederate statues from public view. In the view of many, these statues, built during the Reconstruction period as a challenge to the values of the victorious North (including their views on the end of slavery), stand for racism and oppression. For others, their removal is an “Orwellian attempt to erase history.”<sup>55</sup> The removal of these statues is commanded by a city ordinance signed in December 2015, in the aftermath of a racial mass shooting in Charleston, South Carolina. This law represents in many respects an attempt at tackling structural racism through the removal of heritage markers. And yet, it is on the surface a simple urban planning and heritage ordinance.

Protesters for and against the removal of these statues have underscored the role of the statues – and laws concerned with their preservation or removal – in reinforcing or even defusing racial tensions. In common, they have highlighted the importance of the statues, and their legal overlays, in the shaping of local identity, how they allow us to revisit the past and be tethered to or released from it. Where they diverge is whether this tether is a means to reinforce or move on from the past. In this instance, the law assumes the former, and thus commands the removal of the monuments.

Elsewhere, other countries have chosen to likewise remove monuments, but have created special sites where they can still be displayed, and serve as

<sup>55</sup> Richard Fausset, “Tempers Flare Over Removal of Confederate Statues in New Orleans,” *NY Times* (May 7, 2017), [www.nytimes.com/2017/05/07/us/new-orleans-monuments.html](http://www.nytimes.com/2017/05/07/us/new-orleans-monuments.html).

a reminder of the past. Budapest, with its Memento Park, is one notable example. There, statues serve as a means “to emphasize the dignity of democracy and the responsibility of historical thinking,” according to former Hungarian President Árpád Göncz. Both the New Orleans and Budapest responses showcase different ways in which heritage (and the law surrounding it) equips people to deal with a past of violence. Protests in New Orleans also underscore how past violence can continue to have echoes in the present, and the cultural heritage markers of that past serve as lightning rods for those confrontations and engagements with a difficult history.

During transition, cultural heritage can be used to create, resurrect, and preserve certain narratives about the past that significantly impact national cultural identity and the overall possible directions of the transitional process. These directions are particularly important when it comes to transition from ethnic conflict, but it also applies in other contexts; at stake is the shaping or reshaping of a local, regional, or national identity that transcends lines once drawn to give rise to conflict and violence. In this sense, cultural heritage has the power to defuse violence by being the tropes through which identity is shaped and experienced. Cultural heritage law mediates this process by enabling and embedding choices about what heritage is, why it should be protected, and for whose benefit. As it creates the conditions for the listing of a heritage site, monument, or even a manifestation of intangible heritage (songs, dances, storytelling), the conditions it imposes on that listing also shape heritage practice and management in problematic ways.

Because a key objective of this book is to generate a conversation so far proven elusive between cultural heritage law and TJ, I have two theses and, related to them, two interventions each on two different fields. With respect to the theses, I have a descriptive and a normative thesis. Descriptively, I argue that the gap between heritage law and TJ merits examination, lest we keep misunderstanding the processes that shape the types of identity that are possible, seen through their important tangible and intangible markers, in transitional contexts. Normatively, I argue that the convergence of the two fields generates much-welcome opportunities for pragmatic engagement. Transitional justice can imbue cultural heritage law with much-needed pragmatism as it challenges preconceptions about what heritage is and why and how it is selected and protected; cultural heritage law imbues TJ with pragmatism by showcasing the viability of legal energy being expended on pursuits other than anti-impunity.

Accompanying these two theses are also two interventions in two fields. For the field of TJ, my interventions are a recovery of pragmatism impulses

in the field that were lost by the perceived appeal of anti-impunity and justice and accountability discourses; and that cultural heritage law should be taken seriously in our conversation about the legalistic aims of TJ. For (international) heritage law, the interventions are to show how law plays a role in the shaping of memory: rather than just responding to memory that predates the law, the law itself is a factor that shapes it; the second intervention is that said memory is intrinsically malleable, political, and, for those reasons, also pragmatic in effect or at least in its potential.

So as to pursue these theses, the remainder of this book is organized in five substantive chapters, and a conclusions chapter. This introduction laid down the key objectives of the book, its theses, and intervention. I showed here that there are different strands in the TJ literature that largely miss each other. On the one hand, there is a rich body of literature on memorialization processes and the role of memory and heritage in transition. This body of knowledge does not engage with the law, due to a perception that the law's main focus is on accountability and prosecutions. On the other hand, the bulk of legal literature on TJ indeed tends to focus on accountability, neglecting its role in promoting reparations and guarantees of non-repetition, which are central to the success of TJ efforts. This introduction shows that, as a result of these two bodies not engaging one another, the law around culture, and cultural heritage in particular, is left at the mercy of other political forces in the transitional process, forces which tend to align with the pre-transition status quo, and therefore cultural heritage law unwittingly becomes a point of resistance to transitional efforts, aided by cultural heritage law's reliance on the conservation paradigm (discussed in further detail in Chapter 2).

Chapter 2 further pursues these basic insights by engaging in a systematic review of the literature as a means to provide support for the central premise of the book, particularly the stakes of the fields of TJ and cultural heritage, their possible interrelationships, the way they connect to time, human rights law, and pragmatism. In doing so, this thick description of the literature will provide the key background for the case studies that follow. Further, the book examines the regime for the protection of cultural heritage in wartime of the 1954 Hague Convention and its Protocols<sup>56</sup> as

<sup>56</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Hague Convention); Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358 (Hague Protocol I); and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) 2253 UNTS 172 (Hague Protocol II).

a paradigmatic case study of cultural heritage law's reluctance to engage with transitional efforts. The chapter's engagement with the idea of anti-politics in the context of the conservation paradigm also aligns the book with critical work on the anti-impunity move in the international human rights movement.

Chapter 3 focuses primarily, from a TJ perspective, on the dynamics and narratives of victimhood, but transposing them to an international, diplomatic level, done through international heritage listing mechanisms. From a heritage perspective, the conversation turns to two key regimes, the one on World Heritage<sup>57</sup> and the one on intangible cultural heritage,<sup>58</sup> to examine how listing is used to promote victimhood, control, and even to attempt to settle disputes that conflict left unresolved. This chapter also starts with the deeper examination of case studies in the book, and I chose better-known examples of TJ's interaction with cultural heritage law. The chapter engages with the recognizable framework of the World Heritage Convention, examining it through the lenses of the World Heritage Sites of Auschwitz-Birkenau (Poland), Hiroshima Peace Memorial Park (Japan), and Robben Island (South Africa). It engages with law's role in shaping the narratives around these sites, and their role in promoting transitional efforts. Lastly, the chapter will engage with the uses of intangible cultural heritage (colloquially known as folklore) as a living culture in transitional societies, focusing particularly on the efforts to revitalize, through international listing, intangible cultural heritage in North Macedonia (Glasoechko, male two-part singing in Dolni Polog), which is under threat of disappearing because of the dispersal of the community of heritage practitioners during and in the aftermath of the wars that led to the dissolution of Yugoslavia.

The following chapter then introduces a second set of case studies, focused primarily on statues and monuments, tied in cultural heritage jargon to movable cultural heritage or cultural objects. The chapter focuses primarily on efforts to remove or relocate statues and other monuments that are associated with oppressive periods in a nation's history. It examines in particular tensions around statue removals in the United States (Confederate monuments that celebrate the US Civil War), and Eastern Europe (the reaction to monuments to the Soviet regime after its fall in Eastern Europe). Particularly with respect to the latter, it will also investigate in depth the creation of Memento Park in Budapest.

<sup>57</sup> WHC, note 10.

<sup>58</sup> Convention for Safeguarding of the Intangible Cultural Heritage 2003 (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 3 (ICHC).

Chapter 5 changes gears to examine not the ways in which existing heritage is narrated or re-narrated in TJ contexts, but rather the creation of new symbols to do heritage work. In particular, the chapter focuses on tensions around the making of new heritage that marks atrocity and transition. The chapter starts by analyzing the creation of atrocity museums, particularly in East Asia and Eastern Europe, as a means to come to terms with a difficult past and re-narrate the nation moving for the future through artefacts. It also discusses the use of archives as heritage, and as means of pursuing both truth and prosecutions as a justice and accountability measure. Moving to underwater cultural heritage, the chapter engages with the 2001 Convention on the Protection of the Underwater Cultural Heritage's<sup>59</sup> provisions on human corpses, which are given stronger protections than human corpses receive in other heritage regimes. The history behind this treaty reveals that the reason for these stronger protections has precisely to do with the bodies of fallen soldiers during the World Wars. Australia is an example of a country that, after initially rejecting the treaty, is now considering its ratification at the behest of civil society representing war veterans, thus becoming a case study of how underwater heritage, traditionally understood as largely separate from political and affective processes on the ground, can also have an important role in transitional contexts.

After that, Chapter 6 revisits some of the key tensions presented in this book and its intervention to recover pragmatism as a fertile product of the encounter of heritage law and TJ. Therefore, the chapter returns to the main normative claims of the book, by re-engaging, in more depth, the debates around anti-impunity in the law around TJ. The chapter offers cultural heritage law as a space where more pragmatic engagement with TJ mechanisms is possible and necessary in the law. In doing so, it also engages with the need for pragmatism around cultural heritage, beyond the conservation paradigm, given the malleable nature of the narratives of history, nation, and identity that are made through cultural heritage. Chapter 7 then summarizes the book's main findings, underscoring the reverberations of the research on the fields of TJ and cultural heritage law, and setting out questions for future research in other contexts.

<sup>59</sup> Convention on the Protection of the Underwater Cultural Heritage 2001 (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3 (UCHC).