

## **After the Dust Settles: Transitional Justice and Identity in the Aftermath of Cultural Destruction**

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## 20

## **After the Dust Settles: Transitional Justice and Identity in the Aftermath of Cultural Destruction**

Philippe Sands

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The question of ownership of cultural heritage has long been contentious. The identity of groups and the feelings of their members are often associated with monuments and other cultural objects. The accompanying traditions, histories, and customs are considered emblematic of a group's culture, perhaps even that of multiple groups. Yet cultural heritage has also come to be seen as a common heritage of humankind, belonging to everyone and no one in particular. The tension between these rival conceptions of belonging and ownership can have far-reaching ramifications in the interplay between law and politics. Often it is circumstance and perspective that determine the relative legitimacy of competing claims, providing only temporary or incomplete answers to the enduring question of ownership.

This is particularly apparent when cultural heritage is destroyed in an armed conflict or during a period of significant repression of human rights. Such destruction frequently occurs with the specific intent of intensifying the material and psychological harm to victim communities. An attempt to move past traumatic episodes requires inquiry into the nature of cultural ownership, as efforts at recovery will invariably require the involvement of the most affected stakeholders, whether at the local, national, or international level.

These attempts at post-conflict recovery have, since the 1990s, become increasingly internationalized. This seems inevitable in a society transitioning out of a period of armed conflict or repression, since it is likely to find itself facing atrocities on so great a scale that its own justice system is unable to address the legacy.<sup>1</sup> Under the rubric of

“transitional justice,” international organizations and local authorities tend to work together to create judicial and nonjudicial mechanisms “including tribunals, truth commissions, memorial projects, reparations and the like to address past wrongs, vindicate the dignity of victims and provide justice in times of transition.”<sup>2</sup>

This conception of “justice” for a post-atrocity society has evolved over the years. “Justice, in transitional justice . . . has long meant retributive or criminal justice,” as characterized by the push toward the development and use of international criminal tribunals to address mass atrocities in the 1990s.<sup>3</sup> Nevertheless, the success of less conventional mechanisms, such as the South African and East Timorese truth commissions, has led to a growing place for the idea of restorative justice—of “re-establishing social peace through the repair of relationships.”<sup>4</sup> Whether focused on the past through formal criminal proceedings or on the present through informal conciliation and community building, these complementary visions of transitional justice are ultimately focused on preventing the recurrence of violence and creating a sustainable peace.

However, there is little theoretical or practical consistency in the approaches taken toward achieving this vision of transitional justice. Numerous factors may influence the choice of approaches, such as the particular circumstances of the affected society or international political will and mobilization.<sup>5</sup> But these approaches and the mechanisms of their implementation are not mutually exclusive. While each mechanism may address some aspects of the atrocities committed, a combination may address the needs of a society or conflict. For instance, transitional justice efforts that were undertaken in the aftermath of the eleven-year civil war in Sierra Leone included a hybrid criminal tribunal based on international and domestic law, a consequence of the conflict having been ended by government forces working with UN peacekeepers as well as British military involvement. A truth commission was also set up at the insistence of civil society and as a guarantee of accountability due to the likelihood of amnesties. Additionally, a human rights commission was created, institutional reform of the security agencies was carried out by the UN and the British Commonwealth Community Safety and Security Project, and UN-funded reparations programs offered monetary compensation and emergency medical and educational services to affected populations.<sup>6</sup> Other, longer-term efforts included strengthening the media and civil society with the help of international nongovernmental organizations.<sup>7</sup>

Increasingly, cultural rights are addressed by transitional justice strategies, and there is a growing recognition of the specific needs of societies that have faced the destruction of cultural heritage. This chapter uses the framework of transitional justice and its approaches to cultural destruction to deepen the understanding of cultural ownership and belonging in relation to heritage. The discourse on what justice means in the context of cultural destruction is deepened by the recognition of how the cultural identity of individuals and groups molds, and is molded by, intentional destruction and projects of reconstruction. Ultimately, it allows a more holistic understanding of the link

between cultural heritage and identity—a link organically felt by groups and individuals, but also normatively conceptualized by law- and policymakers in addressing and redressing threats to culture.

### **Cultural Heritage as a Transitional Justice Strategy**

Where intentional cultural destruction has been a characteristic of an armed conflict or repression, some transitional justice mechanisms have addressed aspects of cultural heritage or cultural rights in formulating their strategies for the recovery of these damaged societies. The reasons for doing so are manifold. Recognizing the occurrence of past atrocities, including, among others, cultural destruction, may be an essential first step for establishing the factual record. This is often necessary to restore the dignity of victims and establish accountability for perpetrators—key objectives of retributive as well as restorative justice.

Further, where cultural destruction has been deliberately perpetrated with the intent to erode social cohesion among a targeted group, such recognition can assist in rebuilding that cohesion by delineating the space where there existed cultural markers upon which the group's identity was based. Significantly, in a psychological sense, recognition may offer a grant of legitimacy to the group and its identity, and also a narrative of cultural loss upon which social identity and cohesion may be rebuilt.<sup>8</sup>

For instance, East Timor's Commission for Reception, Truth and Reconciliation made specific note of the fact that "Indonesian practice in such areas as education, health and land rights violated the norms and integrity of East Timorese culture" and was in breach of the 1966 International Covenant on Economic, Social and Cultural Rights.<sup>9</sup> The truth commission and other post-conflict trust-building initiatives also reverted to reliance on Timorese intangible cultural heritage, in the form of traditional communal meetings, to initiate dialogue for both information and reconciliation.<sup>10</sup>

In recent years international criminal justice has also institutionalized the practice, dating back to the International Military Tribunal at Nuremberg, of recording and recognizing harm caused to cultural heritage as a crime.<sup>11</sup> The foundational instruments of tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Court (ICC) explicitly authorize prosecutions for "seizure of, destruction or wilful damage done to . . . historic monuments and works of art," and for "intentionally directing attacks against buildings dedicated to . . . art . . . or . . . historic monuments."<sup>12</sup> In its judgments, the ICTY frequently noted the nature and extent of cultural destruction, and in some cases its irreversibility—with the symbolism of such recognition forming an integral part of the justice sought. In *Prosecutor v. Jokić*, the ICTY noted that while the World Heritage Site of "the Old Town of Dubrovnik was . . . an especially important part of the world cultural heritage," it was also "a 'living city' . . . and the existence of its population was intimately intertwined with its ancient heritage. Residential buildings within the city also formed part of the World Cultural Heritage site and were thus protected. Restoration of

buildings of this kind, when possible, can never return the buildings to their state prior to the attack.”<sup>13</sup>

In some cases, addressing cultural crimes through restoration of cultural heritage may be useful to recreate a degree of normality in the wider region, and defuse tensions between formerly hostile factions, preventing cycles of violence. It has been observed that “in the Balkans and after the civil war in Spain, refugees and displaced people did not return to their former towns and villages until rebuilding of significant heritage sites occurred, even if this was many years later,” and that engagement with heritage limits the emigration of victim communities, even during peace.<sup>14</sup>

Alternatively, tangible or intangible memorialization of loss permits state-sanctioned public displays of grief and anger, as well as constituting a widely accessible marker of group identity based on cultural loss. Again, this may vitiate the urge for social cohesion and catharsis through retributive cycles of violence.<sup>15</sup> In Rwanda, for instance, “places of education, healing and faith became places of butchery . . . because genocide embodies the inversion of human values.” Sacred sites were defaced as massacres were carried out within, such as the church at Kibeho famed for its Marian apparitions. This site has since been reconsecrated and now functions as both a church and a memorial, with only a curtain separating the preserved skulls and bones of the genocide victims from view.<sup>16</sup> Such restored cultural heritage—and memorialization of past atrocities or past cultural losses—may serve also as sites of touristic interest and memory, bringing economic activity and investment to reduce the likelihood of instability, aiding the transition to a more lasting peace.<sup>17</sup>

Even in conflicts or repression without an element of explicit cultural loss, cultural heritage—which may be essential to the formation of narratives and self-identity—can be instrumentalized to reshape hostile group identities or to change the course of historical narratives that would otherwise foment violence. As part of its restorative goals and as an aspect of strategies to achieve long-term peace and stability, transitional justice pays attention to cultural matters such as historical accounts in education and memorialization of atrocities, even where there was no overt destruction of cultural heritage.<sup>18</sup> The report of the UN special rapporteur in the field of cultural rights on “memorialization processes” notes that “cultural rights have an important role to play in transitional justice and reconciliation strategies,” and “the ways in which narratives are memorialized have consequences far beyond the sole issue of reparations,” since “entire cultural and symbolic landscapes are designed through memorials and museums reflecting, but also shaping negatively or positively, social interactions and people’s self-identities, as well as their perception of other social groups.”<sup>19</sup>

Shaping cultural memory is particularly important in working toward nonrecurrence, a shared goal of retributive and restorative approaches to transitional justice. However, due consideration for multiple narratives, including local and nonofficial ones, as well as a clarity of purpose that emphasizes a peaceful and final

resolution, may be necessary in ensuring that such memorialization does not itself become a source of fresh tensions.<sup>20</sup>

The inclusion of cultural heritage within transitional justice approaches thus offers a strategic use of the power of cultural identity to rebuild or reshape a society's conception of itself. Such narratives, if offered with sensitivity and inclusivity toward those affected by mass atrocities, can be important in transitioning to a sustainable peace.

### **At Cross-Purposes: Transitional Justice and International Cultural Heritage Law**

By incorporating cultural heritage within its range of strategies, transitional justice draws attention to internal conflicts in the international law, and international conceptions, of “cultural heritage.” The tension between the terminology of “cultural heritage” and “cultural property” is itself long-standing in international law. One understanding is that it is a proxy for a deeper tension between competing notions of cultural ownership: on one hand that of ownership by the international community of states (or others), as exemplified by the use of phrases such as “cultural heritage of all [hu]mankind” in the main cultural heritage treaties;<sup>21</sup> and on the other the conception of ownership by the individual state within whose current geographical boundaries the tangible manifestations of culture may lie.<sup>22</sup>

Elements of the cultural nationalist model persist in the international law concerning cultural heritage, for instance treaties permitting only the territorial state to designate “their cultural property” as worth protecting from looting<sup>23</sup> or armed conflict.<sup>24</sup> Nevertheless, this tension has largely been resolved in favor of the cultural internationalist model with the postwar creation of the UN Educational, Scientific and Cultural Organization (UNESCO). The adoption of its 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage—which speaks of “world heritage of mankind as a whole” and establishes intergovernmental committees and funds for its protection—is sometimes seen as the high-water mark of this vision.<sup>25</sup>

Transitional justice, meanwhile, does not see the protection and restoration of cultural heritage as an end in itself, but as a means toward another end—that of reviving post-conflict or post-repression societies and protecting them from future atrocities. It skirts the internationalist–nationalist divide and tends to be focused on the communities (and geography) directly affected by conflict or repression: victim groups who remain in the geographical vicinity of the atrocities and those forcibly displaced by the atrocities, as well as new inhabitants of the geographical area.

While it is the dynamic between international and national actors that may give rise to these transitional justice mechanisms, the mechanisms themselves are considered to function with the best interests of the victims as their guiding rationale.<sup>26</sup> This victim-centric focus is often made evident in the functioning of these bodies. For instance, even though prosecution for the destruction of cultural property fell within the express terms of the ICTY statute, the tribunal acknowledged the harm caused to victim communities

by this crime in multiple cases. In *Prosecutor v. Strugar*, while noting that the “offence of damage to cultural property (Article 3 (d))” had occurred and that “such property is, by definition, of . . . great importance to the cultural heritage of every people,” the tribunal highlighted that “even though the victim of the offence at issue is to be understood broadly as a ‘people,’ rather than any particular individual, the offence can be said to involve grave consequences for the victim.”<sup>27</sup>

This approach differs significantly from the rules of international law relating to tangible cultural heritage. These tend to function within the internationalist paradigm, with the best interests of the property constituting cultural heritage as their guiding rationale, rather than the holistic interests of associated communities. This can, at times, put the two approaches in conflict. For instance, from a transitional justice perspective the listing of the Cape Floral Region in South Africa as a World Heritage Site has been criticized for decontextualizing and providing value-neutral heritage status to a property which includes a colonial botanical garden and an apartheid-era hedge used to physically and visually separate the colonists’ settlement areas from the local population. While the UNESCO listing guarantees a certain standard of conservation, and a stream of tourist revenue, the international law structures in place do not appear to embrace a connection with the negative cultural memories associated with the site.<sup>28</sup>

The differentiating factor lies in the recognition of cultural embeddedness. The focus in international cultural heritage law on the internationalist–nationalist dichotomy is an extension of traditional international law’s overwhelming emphasis on the state. This tends to overshadow the third and most proximate layer of cultural ownership and belonging—that of the community (or communities) in which the cultural heritage is embedded.<sup>29</sup> Such embeddedness may come about through the interweaving of tangible sites and objects with intangible cultural heritage or community life, forming a living culture. Such interweaving may itself be the consequence of perceived or actual historical continuity, or even of mere geographical proximity. The crucial distinction is whether individual and group identity, as well as social cohesion, are inextricably connected to the tangible cultural heritage or whether they can survive the loss.

The destruction at the Palmyra site in Syria, for instance, had a global resonance, as one of the oldest archaeological marvels of humanity. In many ways, it was the archetypal UNESCO World Heritage Site, seen to stand at the “crossroads of several civilizations.”<sup>30</sup> It also spurred transnational interest in Western countries, not only among archaeologists and classicists but even the public, in no small part due to its Greco-Roman roots and perceived historical connection with Western civilization. Technologically advanced reconstructions have been created and exhibited in New York, London, Luxembourg, and Washington, DC.<sup>31</sup>

Meanwhile, the Syrian state has concertedly deployed Palmyra within its national narrative as a marker of collective identity, with the monuments featuring on banknotes. Syrian refugees have rebuilt miniature models from memory,<sup>32</sup> and the government has announced on several occasions an intention to rebuild the site.<sup>33</sup> But



Palmyra also served for many generations as a backdrop to everyday life for local communities who lived in nearby settlements, including a bustling tourist town. For them, the loss is felt viscerally as not only that of their houses and livelihoods, but also of the landscape they know as home.<sup>34</sup> Felt as deeply is the impact of its loss on the family of Khaled al-Asaad, Palmyra's former head of antiquities. Al-Asaad's son and son-in-law, both archaeologists, fled the city with over 400 antiquities loaded on trucks, but al-Asaad, who had stayed behind to safeguard the remaining structures, was killed. His daughter, named Zenobia after the last queen of Palmyra, describes a childhood spent amid the ruins—but also states emphatically that she cannot conceive of ever returning.<sup>35</sup> The vernacular of international cultural heritage law, however, is incapable of distinguishing between these varied affective experiences of cultural loss, and its dual categorization as the international and national elides the multiplicity of global and local experiences.

That international law should fall short in accounting for the embeddedness of culture in communities is no surprise, given the primacy of the state in its worldview. In a case involving a disputed temple on the Thai–Cambodian border, for instance, Judge Antônio Augusto Cançado Trindade of the International Court of Justice highlighted the disjuncture between international human rights law's claims of universalized protection for peoples and their cultural heritage on the one hand, and international law's inherent deference to statehood on the other. Observing that the armed hostilities leading to the case had erupted due to Thailand's opposition to Cambodia's unilateral inscription of the temple on the UNESCO World Heritage List, the judge noted that “despite the wealth of information placed before it by the Parties concerning the fate and the need of protection of people in territory, the Court repeatedly insisted on respect for ‘sovereignty’ and ‘territorial integrity.’”<sup>36</sup> Therefore the principal judicial organ of the United Nations created a provisional demilitarized zone for the latter reason, rather than for the protection of “the populations that live thereon, as well as the set of monuments found therein.”<sup>37</sup> This abstraction undermined an understanding that international law norms such as “territorial sovereignty [ought] to be exercised to secure the safety of local populations . . . in cooperation with the other State concerned, as parties to the World Heritage Convention, for the preservation of the Temple at issue as part of the world heritage . . . and to the (cultural) benefit of humankind.”<sup>38</sup>

Transitional justice, by contrast, is far more concerned with embeddedness in assessing harm caused to cultural heritage, and by extension to a people. This extends from assessing whether an instance of cultural destruction falls within the scope of crimes suffered by an individual or group, to determining to whom reparations are due and to formulating reconstruction or memorialization strategies for restoring community life. In its reparations order in *Prosecutor v. Al Mahdi*, for example, the ICC invited expert submissions to determine who might constitute the “victims” of the cultural crimes in question—the destruction of Timbuktu's heritage mosques and mausoleums—and thus toward whom reparations should be directed. It concluded that

although the international community and the national community of Mali were victims within the understanding of international cultural heritage law, the reparations would only be directed toward those most directly affected—the guardian families and faithful local inhabitants. It was considered “self-evident that the community of Timbuktu suffered disproportionately more harm as a result of the attack on the Protected Buildings.”<sup>39</sup>

The transitional justice approach to redressing cultural destruction may thus, at first sight, appear to fulfill Cançado Trindade’s ideal of “bringing territory, people and human values together.”<sup>40</sup> However, it can also at times privilege embeddedness to the exclusion of certain kinds of cultural heritage and, by extension, the cultural rights of concerned groups.

### **Places without People: Embeddedness as the Cause of Exclusion**

Transitional justice’s focus on embeddedness may not always guarantee enhanced protection for the cultural rights of individuals and groups. In some instances, a perceived lack of embedded interests, disinterest, or contestation may lead transitional justice approaches to overlook the protection of local cultural heritage in favor of what are considered the more pressing needs of victim communities. Such a calculus does not necessarily factor in the cost to groups who may be less embedded, yet still have a vested interest in the cultural heritage and associated cultural rights.

One example is the division of Cypriot heritage sites in Nicosia and Famagusta, on either side of the UN buffer zone and Green Line. This physical separation has split the region’s cultural identities and caused these heritage sites to lack embeddedness in either of the two mutually exclusive communities created. The collective memories they embody are either disjunctive with the monoethnic identities now sought to be created or, in cases where the local population consists of newly “resettled” groups from mainland Turkey, disconnected from them. This has led to their neglect by the communities on either side of the divide,<sup>41</sup> while transitional justice approaches to the conflict have left the issue unaddressed as well.<sup>42</sup> In fact, a decontextualized focus on cultural heritage as an end in itself may have better preserved memories of a historically contiguous past for Cypriots on either side, as well as for the peoples of the greater Mediterranean region.

Similarly, the reconstruction of the Bamiyan Buddhas in Afghanistan has suffered from a perceived lack of connection with the national and local community. Although their destruction in 2001 galvanized international attention and led to UNESCO’s seminal Declaration Concerning the Intentional Destruction of Cultural Heritage in 2003,<sup>43</sup> repeated assurances of reconstruction by the Afghan government have come to naught. In the ICC’s *Al Mahdi* case, expert submissions noted that the Buddhas had neither function nor meaning in modern Afghan life, and their destruction had “little or no impact on the modern Afghan community.”<sup>44</sup> Consequently, this cultural reconstruction was of low priority in an ongoing conflict.

Nevertheless, this left transnational cultural claims to the heritage unaddressed, as the Buddhist community in countries such as Sri Lanka, Thailand, and Japan had been negatively affected by the destruction and had expressed deep interest in supporting reconstruction.<sup>45</sup> Afghans in the immediate geographical vicinity of the Buddhas too had expressed their sense of dislocation at the sudden erasure of a dramatic facet of their home landscape, not to mention the loss of livelihoods through the drying up of tourism. One of the locals forced to assist the Taliban in its destruction described them as having been “a source of pride for all Bamiyan,” and that destroying them had been “like taking an axe to [his] own house”; having to continue living within sight of the ruins was said to be deeply affecting.<sup>46</sup>

In fact, one perspective on transitional justice considers even the reconstruction of Palmyra unnecessary insofar as the best interests of local communities are concerned.<sup>47</sup> Admittedly, there is little historical continuity between the modern communities and the Palmyrene Semitic and Greco-Roman civilizations. It could be argued that social cohesion might be better served through privileging the reconstruction of such small-scale heritage sites in Syria as the Mar Elian monastery, or the traditional jasmine-covered courtyard houses of Aleppo, in the physical structures of which a greater degree of local identity was vested.<sup>48</sup> However, such an approach would negatively affect the cultural rights of the larger Syrian national community as well as the international community, while undermining the impact of geographical proximity in fostering embeddedness among the local communities. The reliance of Syrian refugees on the iconography of Palmyra in commemorative art projects is testament to the impact of its physical presence on their memories of home and self, even without more characteristic features of embeddedness.<sup>49</sup> It may even be developing new meaning for the Syrian diaspora as a symbol of their losses, creating a deeper bond than that which existed before the conflict.

Conserving culture for the sake of culture may even have unexpected outcomes for local communities and consequently for transitional justice. Cultural heritage can carry meaning(s) across both time and space. Even where continuity with historical heritage has been broken, there are instances where this link has been reestablished, during or after the changes wrought by conflict. Conservation strategies for cultural heritage sometimes posit the involvement of the local community in heritage management as being more likely to ensure the effective conservation of heritage in the long term. This may have the additional benefit of binding in the local communities, through livelihood and a sense of ownership, even where such links did not earlier exist.<sup>50</sup> This recreated embeddedness can aid in the healing and social cohesion of these societies, which forms one of the primary goals of any transitional justice approach.

For instance, in Mexico's Chiapas state, home to Maya ruins and one of the largest Indigenous populations in the country, it has been noted that “the existence of a cultural break or discontinuity after the Conquest between the Indigenous communities and [archaeological] sites was usually taken for granted, given that many of the

archaeological sites had already been abandoned for a long time when the Spanish arrived in the sixteenth century.”<sup>51</sup> Archaeological management of these sites remained unaffected by the Zapatista armed rebellion in the region. In the aftermath of the conflict, there was a “re-appraisal of Indigenous traditions and beliefs, and a consequent resurgence of pride in different communities.”<sup>52</sup> Indigenous communities began to identify as “Maya,” and reestablished a sense of cultural ownership over ancient Maya sites such as the World Heritage Site of Palenque. They began taking a more active part in their management and benefited economically from a burst of post-conflict tourism and commercial activity in relation to these sites—to the mutual benefit of the cultural heritage and the transitional communities.<sup>53</sup>

This is not to say that transitional justice should privilege heritage protection over the immediate needs of local communities, if hard choices are necessary. To choose stones over people could be considered as running counter to the pluralistic but ultimately humanitarian visions of justice. Yet, an overemphasis on the local and immediate insofar as multifaceted questions of cultural heritage and identity are concerned may risk failing to redress the full spectrum of cultural damage wrought. It can fall short of the restorative ideal of transitional justice by delegitimizing claims of cultural loss and identity that may fall beyond the bounds of an externally-imposed vision of the “local.”<sup>54</sup> From the perspective of international cultural heritage law, this can eventually denude the heritage itself of a layer of associated cultural value since it is the varied cultural meanings ascribed to immovable sites that makes them “cultural heritage.”<sup>55</sup>

## **Conclusion**

In a society that is transitioning out of mass atrocities, the distinct aims of both transitional justice and international cultural heritage law are ultimately oriented toward and best achieved through a peace that is sustainable and effective over the long term. Such a peace, premised on not only ending but also preempting violence, calls for an approach to cultural heritage that is responsive to the simultaneous narratives, multiple identities, and unpredictable associations that link people with culture. Neither transitional justice nor international cultural heritage law provides easy or immediate solutions in this regard. Both frameworks have their own set of goals and concomitant priorities that influence how they confront the interlinking of cultural heritage with identity and, by extension, the cultural rights of individuals and groups. While neither framework can entirely encapsulate these multilayered associations, each works within its paradigm to safeguard different aspects of these structures of cultural meaning.

The challenge for the independent but connected trajectories is that privileging one frame of reference in relation to cultural heritage at threat may wipe out the parallel claim of another. In contrast, a contextually flexible approach that recognizes and gives due weight to the many concentric and overlapping (and sometimes conflicting) circles of cultural interest, ownership, and belonging might offer a means of addressing the

dynamic challenges of preserving cultural heritage at risk and the troubled past of associated communities, while working toward a peaceful future.

#### SUGGESTED READINGS

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