Adjudicating attacks targeting culture: revisiting the approach under state responsibility and individual criminal responsibility

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REVISITING THE APPROACH UNDER STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

Hirad Abtahi

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Proefschrift

ter verkrijging van

de graad van Doctor aan de Universiteit Leiden,

op gezag van Rector Magnificus prof.dr.ir. H. Bijl,

volgens besluit van het College voor Promoties

te verdedigen op donderdag 27 mei 2021

klokke 10.00 uur

door

Hirad Abtahi

geboren te Teheran, Iran

in 1968

Promotor: Prof. dr. C. Stahn

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Promotiecommissie: Prof. dr. W.A. Schabas (Secretary)
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To me all a country really has is its culture. The rest is all infrastructure. Lawyers and doctors and shopkeepers and so on are, in my view, necessary to back up the culture, the things we can create, the things that will last. Music and art and design and writing, the things we are good at.[*]
Sir Peter Thomas Blake

[*] Tim Adams, "Sir Peter Blake: all a country really has is its culture. The rest is all infrastructure" (The Guardian, 21 May 2017) <https://www.theguardian.com/lifeandstyle/2017/may/21/lunch-with-sir-peter-blake-mr-chow> accessed 14 April 2019. Sir Peter Blake designed the Beatles' Sgt Pepper's Lonely Hearts Club Band album sleeve.

PREFACE

This thesis was in the making for over a quarter of a century.

My first exposure to a non-exclusively anthropocentric posture of international law occurred in the academic world. Having studied international environmental law at Essex University in 1994, I chose, for my Strasbourg University 1997 Diplôme d'Etudes approfondies dissertation, to write on the protection of the environment during the Second Persian Gulf War, where I explored the intersection between the legal protection of the natural and anthropical environment.

Later that year, when working as a young ICTY practitioner, I was in a position to consider cultural property crimes under individual criminal responsibility. This resulted in my 2001 article "The Protection of Cultural Property in Times of Armed Conflict: The practice of the International Criminal Tribunal for the Former Yugoslavia",[1] which considered cultural property under the war crimes and crimes against humanity angles. Being further exposed to cultural property damage in the ICTY cases, specifically when serving the *Milošević* Chamber, I furthered my research when, in 2004, I published "Le conflit armé du printemps 2003 en Irak et le sort du patrimoine culturel mésopotamien",[2] which focused on war crimes and "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes Against Civilization under the ICC Statute",[3] which focused on crimes against humanity. Later in 2005, I took these further into an anthropological context in an interview with Le Monde newspaper.[4] These reflections culminated in my 2007 article "Does International Criminal Law Protect Culture in Times of Trouble? Defining the Scope",[5] which summarised my 2006 winter course in Brazil's Centro de Direito Internacional**,** which I later updated for my teaching in the 2007 Winter session of the Hague Academy of International Law. Therein, I expanded the protection of cultural property to genocide, given the fact that, together with Dr Philippa Webb, during the writing of our 2008 volumes "The Genocide Convention: The Travaux Préparatoires",[6] I discovered the drafters of the convention's passionate and detailed discussions regarding cultural genocide. Later in 2017, Dr Webb and I would detail these in "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention".[7]

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[1] Hirad Abtahi, "The Protection of Cultural Property in Times of Armed Conflict: The practice of the International Criminal Tribunal for the Former Yugoslavia" (2001) 14(1) *Harvard Human Rights Journal.*

[2] Hirad Abtahi, "Le conflit armé du printemps 2003 en Irak et le sort du patrimoine culturel mésopotamien" *in* Karine Bannelier, Olivier Corten, Théodore Kristakis and Pierre Klein (eds), *L'intervention en Irak et le droit international* (Centre de droit international ULB 2004).

[3] Hirad Abtahi, "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes Against Civilization under the ICC Statute" (2004) 4(1) *International Criminal Law Review.*

[4] Martine Jacot (interview with Abtahi Hirad), "La Capacité des Nations face à la destruction du patrimoine" (Le Monde, March 2005) <https://www.lemonde.fr/culture/article/2005/03/16/la-capacite-des-nations-face-a-la-destruction-du-patrimoine_625752_3246.html> accessed 26 September 2019.

[5] Hirad Abtahi, "Does International Criminal Law Protect Culture in Times of Trouble? Defining the Scope" (2007) 2 *Brazilian Yearbook of International Law* 180.

[6] Hirad Abtahi and Philippa Webb (eds), *The Genocide Convention: The Travaux Préparatoires* (Brill Nijhoff 2008).

[7] Hirad Abtahi and Philippa Webb, "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention" *in* Margaret deGuzman and Diane Marie Amann (eds) *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2017).

But cultural property would resurface in my research activities on the typology of injury and forms of reparations which focused on State responsibility's inter-State claim mechanisms and regional human rights courts. This path was initiated by my 2013 lecture co-organised by King's College, Oxford Transitional Justice Research and Swisspeace, and was published in two parts: "Types of Injury in Inter-State Reparation Claims: A Guide for the International Criminal Court" in 2015;[8] and "Types of Injury in Inter-State Reparation Claims: Direct Injury to the State" in 2017.[9]

To the invitation of Sciences Po's Paris School of International Affairs to teach a course, beginning in 2018, I proposed "Mass Cultural Violations in International Law: from State Responsibility to Individual Criminal Responsibility". Throughout these teaching years, students' complex questions have made me constantly adjust my thought-process.

These decades of publications and teaching revealed to me two major gaps in academia. First, attacks targeting culture had not been considered, comparatively, under State responsibility and individual criminal responsibility. Second, the latter had placed little focus on culture's intangible, as I realised, eg, in my 2007 article "Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights".[10] In sum, a dedicated focus on the concept of culture constituted the missing link, resulting in the terminological opacity of cultural property and cultural heritage – and a hesitant reference to culture's tangible and intangible.

This thesis attempts to bridge the above gap, by drawing upon my twenty-five years of exposure to cultural ravages through teaching, writing, and practicing in international courts and tribunals. In what follow, I propose a systematic comparative analysis of attacks that target culture's tangible and intangible under both State responsibility and individual criminal responsibility. My proposed concepts and neologisms do not carry any pretence of erudition, even less so perfection. These are a mere standardisation of the subject at hand which, as a first of its kind, constitutes a foundation for critical thinking, reflection and enhancement of the protection of something which is always attacked not because it represents humanity, but because it *is* humanity.

Hirad Abtahi
The Hague, April 2021

[8] Hirad Abtahi, "Types of Injury in Inter-State Reparation Claims: A Guide for the International Criminal Court" (2015) 30(2) *Canadian Journal of Law and Society* 259.
[9] Hirad Abtahi, "Types of Injury in Inter-State Reparation Claims: Direct Injury to the State" *in* James Crawford, Abdul G Koroma, Said Mahmoudi and Alain Pellet (eds) *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill/Nijhoff 2017).
[10] Hirad Abtahi, "Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights" (2007) 36(1) *Denver Journal of International Law and Policy* 71.

ACKNOWLEDGEMENTS

In an age of inflationist electronic information, it is illusory to conceive that an international lawyer with a full-time employment may have the capacity to explore the outer limits of anthropology so as to propose a legally workable scope for the polymorphic concept of culture. It would also be pretentious for that single individual to propose placing culture in the little explored realm of comparative State responsibility and individual criminal responsibility.

That this research has been concluded at all owes it to both broad encouragements and substantive concept discussions.

On the former, the author wishes to express his gratitude to Professor Carsten Stahn for having first proposed and then, together with Dr Joseph Powderly, continuously encouraged the author to synthesise his scattered publications into Leiden University's Grotius PhD Track which enables and encourages a flexible combination of past publications and ongoing additions. The author also wishes to thank his students at Sciences Po's Paris School of International Affairs (classes 2018-2021) for the enriching exchanges on the topics of culture, State responsibility and individual criminal responsibility. The author is immensely grateful to Dr Donatella Toracca who enlightened him with respect to archaeology, art history and cultural concepts, in terms of both methodology and substance.

Finally, the author's thanks go to Irina Cristescu, Rebecca Amy Gore, Kathrin Ebner, Greemn Lim, Joao HR Roriz and Aurélie Vaningelgem for their research assistance and to Helen Roytblat for locating old anthropological, legal and linguistic sources that seemed out of reach.

TABLE OF ABBREVIATIONS

1863 Lieber Code	*Instructions for the Government of Armies of the United States in the Field*
1874 Brussels Declaration	*Project of an International Declaration concerning the Laws and Customs of War*
1880 Oxford Code	*The Laws of War on Land, Oxford*
1899 Hague Regulations II	*Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*
1907 Hague Regulations IV	*Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*
1907 Hague Regulations IX	*Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War*
1935 Pan American Treaty	*Treaty on the Protection of Movable Property of Historic Value*
1935 Roerich Pact	*Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments*
1948 OAS Charter	*Charter of the Organization of American States*
1949 Geneva Convention II	*Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*
1949 Geneva Convention IV	*Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*
1950 ILC Nürnberg Principles	*Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*
1954 Hague Convention	*Convention for the Protection of Cultural Property in the Event of Armed Conflict*
1954 Hague Convention 1999 Protocol	*Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999*
1969 European Archeological Heritage Convention	*European Convention on the Protection of Archaeological Heritage*
1970 Cultural Property Convention	*UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*
1972 World Heritage Convention	*UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage*
1972 World Heritage in Danger List	*World Heritage in Danger List*
1972 World Heritage List	*World Heritage List*
1976 San Salvador Convention	*Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations*
1977 Additional Protocol I	*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*
1977 Additional Protocol II	*Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*
1985 European Convention	*European Convention on Offences Relating to Cultural Property*
1985 European Architectural Heritage Convention	*European Convention for the Protection of the Architectural Heritage of Europe*
1985 Victims Basic Principles	*UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*
1991 ILC Report	*Report of the International Law Commission on the Work of its Forty-Third Session*
1995 UNIDROIT Convention	*UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*

1996 ECOSOC Recommendations	*ECOSOC Standards and Norms in the Field of Crime Prevention and Criminal Justice*
1996 ECOSOC Resolution	*ECOSOC Resolution of the Economic and Social Council at the Forty Fifth Plenary Meeting*
1996 ILC Report	*Report of the International Law Commission on the Work of Its Forty-Eighth Session*
1996 Victims Basic Principles	*ECOSOC Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*
2001 Underwater Cultural Heritage Convention	*UNESCO Convention on the Protection of the Underwater Cultural Heritage*
2003 Intangible Cultural Heritage Convention	*UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage*
2005 Victims Basic Principles	*UNGA Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*
2007 ECtHR Practice Direction	*ECtHR, "Practice Direction: Just Satisfaction Claims" (28 March 2007)*
2017 Cultural Property Offences Convention	*European Convention on Offences Relating to Cultural Property*
ACHPR	*African Charter on Human and People's Rights*
ACmHPR	African Commission on Human and People's Rights
ACHR	*American Convention on Human Rights*
ACtHPR	African Court of Human and Peoples Rights
AI	Possessors of Artificial Intelligence
ARSIWA	*Articles on Responsibility of States for Internationally Wrongful Acts*
CaH	crimes against humanity
CCL	*Control Council Law No 10*
CETS	*Council of Europe Treaty Series*
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Law	*Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
EECC	Eritrea-Ethiopia Claims Commission
ETS	*European Treaty Series*
FIDH	Féderation internationale des Droits de l'Homme
Genocide Convention	*Convention on the Prevention and Punishment of the Crime of Genocide*
HRCts	regional human rights courts
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICC Statute	*The Rome Statute of the International Criminal Court*
ICCPR	*International Covenant on Civil, Political and Cultural Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
ICJ	International Court of Justice
ICL	International Criminal Law
ICR	individual criminal responsibility
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	*Statute of the International Criminal Tribunal for Rwanda*
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY Statute	*Statute of the International Criminal Tribunal for the former Yugoslavia*

IHL	International Humanitarian Law
IJCP	*International Journal of Cultural Property*
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMT Charter	*Charter of the International Military Tribunal*
IMTFE	International Military Tribunal of the Far East
IMTFE Charter	*Charter of the International Military Tribunal for the Far East*
ISCMs	Inter-State claim mechanisms
Montevideo Convention	*Montevideo Convention on the Rights and Duties of States*
OAS	Organization of American States
OASTS	*Organization of American States Treaty Series*
OTP	Office of the Prosecutor of the International Criminal Court
SCSL	Special Court for Sierra Leone
SCSL Rules	*Special Court for Sierra Leone Rules of Procedure and Evidence*
SCSL Statute	*Statute of the Special Court for Sierra Leone*
STL	Special Tribunal for Lebanon
UDHR	*Universal Declaration of Human Right*
UNESCO	The United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNGA Res	United Nations General Assembly Resolution
UNHRC	United Nations Human Rights Committee
UNIDROIT	International Institute for the Unification of Private Law
UNCC	United Nations Compensation Commission
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	*United Nations Treaty Series*
UN	United Nations
VCLT	*Vienna Convention on the Law of the Treaties*

TABLE OF CHARTS

GENERAL INTRODUCTION: MAPPING ATTACKS TARGETING CULTURE

I. Background and primary research question

That culture's tangible elements may be harmed as a collateral damage is no more questionable than human life being so affected. Particularly reprehensible, however, is when culture's tangible elements are intentionally targeted as part of attacking the enemy's identity. Suffice it to cite Babylonian King Nabuchodonosor's destruction of the First Temple, Germanic tribes' sack of Rome, Arabs' pillage of Ctesiphon; Genghis Khan's ravages on Western Asia, and the Conquistadores' annihilation of the so-called "Pre-Colombian" cultures. This deliberate targeting becomes more prominent in iconoclastic movements, such as the late antiquity and seventh-ninth centuries' alteration of Pagan images, the Reformation's depredations, and the French and Bolshevik revolutions' destruction of religious icons.[11] In the twenty-first century, one may refer to the Al Qaeda/Taliban destruction of the Bamiyan Twin Buddhas and Manhattan Twin Towers,[12] or else Daesh's destruction of Palmyra. While these attacks manifest the destruction of the tangible, there always looms, in the background, the feeling of the intangible's alteration. This is so because the tangible itself will often form part of memory, which also contributes to collective identity. Hence the alteration of the tangible will impact on collective identity, which is also intangible. Thus, culture's tangible components (eg a temple) are often a manifestation of or a support to its intangible (eg spiritual practice). Therefore, attacking the former will impact the latter. But it is also possible to alter the latter (eg prohibition of practice) without altering the former. However obvious, these observations have not been systematically considered in international law. For legislators, adjudicators/practitioners and scholars have not always made a neat delineation between culture's intangible and tangible when it comes to the adjudication of attacks targeting culture.

Hence the primary research question: to what extent and how international adjudicatory mechanisms have considered the causes, means and consequences of intentionally attacking the tangible and intangible components of culture; and how should their separate practice be brought together.

This thesis will thus provide a critical review of the practice of international law actors, who will consist of legislators (treaty law makers), adjudicators (State responsibility and individual criminal responsibility ("ICR") judicial/arbitral mechanisms) and scholars. This thesis will first review how their ongoing struggle with the relationship between culture's tangible and intangible components has resulted in findings that would have been different had there been a systematic undertaking to consider culture's tangible and intangible. To this end, this thesis will consider treaty law provisions in order to identify nuances the absence of which has resulted in mantras seldom questioned by adjudicators/practitioners and scholars. In so doing, this thesis will identify divergences and convergences between State responsibility and ICR in order to propose common denominators (general introduction). From that vantage point, this thesis will generate a holistic view of how international law could improve addressing the, cause, means and consequences of attacks targeting culture (Parts I-II).[13]

[11] Abtahi, "Does International Criminal Law Protect Culture in Times of Trouble?" (n 5).
[12] Abtahi, "Does International Criminal Law Protect Culture in Times of Trouble?" (n 5).
[13] This may be akin to scientific modelling, which conceptually represents and processes logically and objectively empirical phenomena. Models may help understand complex phenomena and systems. *See*

Before embarking on this, the sections below will set-out this study's approach with respect to the problematic through treaty law making process, State responsibility/ICR-based jurisdictions (A) and international law scholars (B).

A. Treaty law and modes of responsibility: legal niches or anthropological uncertainty?

Since the late nineteenth century's war crimes instruments, international law has gradually addressed the question of damage to culture's tangible, which has been referred to as cultural property from the post-Second World War era onward and, increasingly by scholars, as tangible cultural heritage since the 2010s. Terminology aside, the tangible has been addressed in a fashion dissimilar to that of human life. The general misperception being that culture's tangible does not deserve a degree of protection equivalent to that of human life. The ultimate argument to back this is why focus on the protection of rituals and stones in the midst of human massacres. Precisely, while stones are tangible, rituals are not, although their practice (eg prayers) may require the tangible (eg the temple). These intricacies have prompted international law to address culture's intangible components. Initially linked to the 1920s' minority rights, treaty law has undergone an expansion to eventually consider as heritage, in the early twenty-first century, many intangible elements surrounding humans. But here too, one can detect international law's – more specifically treaty making's – oscillations, which, intriguingly, has included as part of culture's intangible (eg music), the tangible elements associated with it (eg musical instruments).

Absent a universally agreed definition, whether in anthropology or in international legal instruments, "culture" is inherently abstract and open to multiple interpretations. This is illustrated by international adjudicatory bodies which, as this thesis will show, when focusing on the attacking of culture, have tended to refer interchangeably to cultural property and cultural heritage. Treaty law making's opacity regarding the concept of culture means that State responsibility and ICR-based jurisdictions have struggled to properly address its intentional attacking. Or so it appears. Through a holistic analysis of international judicial/arbitral decisions, this thesis will demonstrate that each mode of responsibility has in fact addressed the attacking of culture's tangible and intangible components. However, while both have done so substantively, they have failed to do so formally. In other words, and as will be demonstrated, both modes of responsibility have often come to the same conclusions when adjudicating the causes, means and consequences of the intentional attacking of culture, but they have been blurred formalistically when referring to the interplay between culture's tangible and intangible components. A situation akin to contemplating galaxies, stars and nebulae in the observable universe, but failing to systematically distinguish between them, merely because they all are luminescent.

Kara Rogers, "Scientific modelling" *in Encyclopædia Britannica* (2012) <https://www.britannica.com/science/scientific-modeling> accessed 14 April 2019. In this study, attacks targeting culture constitute the "phenomena" and international actors constitute the "systems".

B. Academia: specialisation or compartmentalisation?

Two reasons explain why this uncertainty has not spared academia either. First, there is the aforementioned lack of a unified consideration of the concept of culture. When even anthropology cannot provide a universal definition of culture, it is neither fair nor realistic to expect legal scholars to so do. Of course, exceptions such as Blake, Lixinski and R O'Keefe have been constantly – and usefully – refining terminological and substantive issues regarding cultural heritage, cultural property, intangible cultural heritage and tangible cultural heritage.[14] Second, while there is an abundance of literature with respect to each of international law's modes of responsibility, the same cannot be said about a literature that would combine and/or compare them. Here too, there are exceptions such as Ben-Naftali, Lostal, Mettraux, Schabas, Stahn and van den Herik, whose work transcends the status quo.[15] The reason is simple. Unlike State responsibility's over one hundred years of scholarly reflection, ICR's application goes back to the twentieth century's last decade. Time is needed for the latter's maturation.

Notwithstanding its wealth, because of this specialised and specialising trend, the legal literature remains often compartmentalised. Consequently, it cannot provide a clear answer to this thesis' primary research question. This thesis will thus explore multiple

[14] Much of this legal literature will be reviewed. It will consist of Janet Blake, "On Defining the Cultural Heritage" (2000) 49(1) *International and Comparative Law Quarterly* 61; Janet Blake, *International Cultural Heritage Law* (Oxford University Press 2015); Manlio Frigo, "Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?" (2004) 86(854) *International Review of the Red Cross* 367; Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013); John Henry Merryman, "Two Ways of Thinking About Cultural Property" (1986) 80(4) *American Journal of International Law* 831; Roger O'Keefe, "Cultural Heritage and International Humanitarian Law" *in* Francesco Francioni and Ana Filipa Vrdoljak (eds) *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020 Forthcoming); Lyndel V Prott and Patrick J O'Keefe, "'Cultural Heritage' or 'Cultural Property'?" (1992) 1(2) *International Journal of Cultural Property* 307; Tullio Scovazzi, "The Definition of Intangible Cultural Heritage" *in* Silvia Borelli and Federico Lenzerini (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff 2012); or else Charlotte Woodhead, "Art, Culture and Heritage: Law in Context" (2013) 18 *Art Antiquity & Law*.

[15] Insofar as it touches on attacks targeting culture, much of this literature will be reviewed and will consist of, inter alia, Clémentine Bories, *Les bombardements serbes sur la vieille Ville de Dubrovnik* (2005) 27 *CEDIN Paris X Perspectives Internationales;* Andrea Gioia, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" *in* Orna Ben-Naftali (ed) *International humanitarian Law and International human rights Law* (Oxford University Press 2011); Marina Lostal, *International Cultural Heritage Law in Armed-Conflict: Case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge University Press 2017); Marina Lostal, "The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC" (2017) 1(2) *The McGill Journal of International Law & Legal Pluralism*; Vittorio Mainetti, "Des crimes contre le patrimoine culturel? Réflexions à propos de la criminalisation internationale des atteintes aux biens culturels" *ESIL-SEDI, Conférence inaugurale, 13-15 mai* (*European Society of International Law* 2004); Guénaël Mettraux, *International Crimes: Law and the Practice. Genocide*, vol 1 (Oxford University Press 2019); Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016); Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011); William A Schabas, *Genocide in International Law: the Crimes of Crimes* (Cambridge University Press 2000); Yuval Shany, "Human Rights and Humanitarian Law as Competing Legal Paradigms for fighting Terror" *in* Ben-Naftali (n 15); Carsten Stahn and Larissa van den Herik (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010); or else Ana Filipa Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law" *in* Ben-Naftali (n 15).

directions within the legal literature. One direction will be definitional. It will include scholarly commentaries with respect to the so-called peacetime legal instruments, international humanitarian law ("IHL") and international criminal law ("ICL") instruments (general introduction; Part II, Chapter 1). This thesis will rely on the aforementioned intellectual stream in order to delimit the contours of cultural property/tangible cultural heritage and cultural heritage/intangible cultural heritage. This will be done under the broader concept of culture, by noting those definitional inconsistencies that characterise those international instruments. To this end, a multi-disciplinary approach will be adopted, by drawing upon scholarly writings on anthropology, art and architecture, neuroscience, cognitive and gender studies (general introduction; Part I, Chapter 2; Part II, Chapter 2).

Another direction will include scholarly literature on State responsibility and ICR. The former will include inter-State claim mechanisms ("ISCMs") as well as regional human rights courts ("HRCts"). As will be seen, most of the relevant ISCMs-related literature mentions, incidentally at best, the intentional attacking of culture. Nonetheless, this literature will be most useful in that its rigor helps establishing a useful methodological guide – the analytical backbone – for the proper understanding of both HRCts and ICR (Part I, Chapter 1). In contrast to ISCMs-related literature, the HRCts-related one has been to the point when considering the intentional attacking of culture, whether tangible or intangible. This is so because HRCts' abundant jurisprudence on the subject is explicit, firm and seldom equivocal (Part I, Chapter 2). Furthermore, given their object and purpose, HRCts have naturally been commented upon mainly by human rights scholars, thereby reinforcing the specialised approach – ie human rights-based – as regards attacks targeting culture. But ICR-related literature too has been specialised, with a twofold focus. First, and most frequently, most commentaries concern culture's tangible (Part II, Chapters 1-3). Unlike the HRCts' abundant jurisprudence, however, ICR-based jurisdictions have adjudicated essentially two cases that focused primarily on the intentional attacking of culture; a limiting factor with respect to the choice of case-analysis. Second, when ICR-related literature has regarded the attacking of culture's intangible, it has done so through detailed commentaries with respect to victims and the elements of crimes of genocide, crimes against humanity ("CaH") and war crimes. However, these commentaries tend to be retrospective, in that they provide precious account on negotiations that shaped the delimitation of victims and those crimes. Because the negotiators' main focus was not on culture, the commentaries often do not touch upon attacks targeting culture in the way conceived by this thesis (general introduction; Part II, Chapters 1-3). Generally speaking, ICR-related commentaries approach each of the international crimes separately, without seeking to bring them together in the context of the intentional attacking of culture. For example, there has been little attempt (Part II, Chapter 1) to dissect the definition of CaH in order to demonstrate how they can warp one's understanding of attacks targeting culture.

Contemplating the above leaves one with a sense of riches scattered in niches. This thesis will propose an overall web of connectors between these scholarly treasures that have been orbiting often in isolation. This novel approach will combine culture's tangible/intangible with State responsibility/ICR's practice as regards attacks targeting culture. The views and practice of international law actors – legislators, practitioners and scholars – will be compared and contrasted, so as to propose a theoretical tool to faciliate the consideration of the causes, means and consequences of attacking culture.

Preliminarily, this general introduction will conceptualise the intentional attacking of culture (II), provide the relevant framework and tools (III) and propose a roadmap (IV).

II. Conceptualising attacks targeting culture

This thesis will consider culture as a metaphorical triptych (A), which can be attacked in two ways (B).

A. Culture as a metaphorical triptych

Treaty law has progressively viewed culture as a triple-layered concept, with local, national and international dimensions (general introduction). This has in turn shaped State responsibility and ICR practice (Parts I-II).

International lawyers' intuitive temptation will be to view these dimensions vertically, with the international one constituting the hierarchy's summit. Accordingly, when considering the intentional attacking of culture, international lawyers will generally consider whether international law had recognised the targeted element as cultural heritage/intangible cultural heritage or cultural property/tangible cultural heritage. This methodology may however constitute a mental trap. As this thesis will show, such verticality may not characterise all attacks on culture. For instance, there will be situations where supranational courts will recognise the targeting of local or national culture, absent an international dimension (Part I, Chapter 2). To address this reality, this thesis will view culture's three dimensions horizontally. In so doing, one should guard against assuming that the local dimension always constitutes the centre from which one moves toward the national and international dimensions. As a totalising concept (III.A.3), culture will not always obey these patterns, being thus capable of undergoing six different combinations. For instance there may be situations where cultural features coalesce first internationally, and then are co-opted nationally/locally.

International law ought to view culture's triple dimensions holistically. Altering any dimension will impact upon the other two. To better comprehend attacks targeting culture, this thesis will consider culture as a metaphorical triptych, made of local, national and international panels. While each of the three panels can be appreciated in isolation, the full picture emerges when considering their interplay which, like the representation on the back of a closed triptych, will have its own significance.[16]

B. Ways of attacking culture: tangible-centred or heritage-centred?

Both the scope and victims/claimants of attacks targeting culture may be tangible-centred and/or heritage-centred.

[16] Where culture has two dimensions (in any combination), it will be viewed as a diptych.

The former's scope is determined by its focus on culture's tangible components, stricto sensu, whether secular or religious, movable or immovable, anthropical or natural (general introduction). This thesis will use the terms "culture's tangible" alongside cultural property, as context requires. This is so because, as will be explained in the analysis of the jurisprudence of State responsibility and ICR-based jurisdictions, culture's tangible need not always have been placed on cultural property conventions' lists or registers (Parts I-II). Accordingly, the characterisation of the tangible as cultural property/tangible cultural heritage is both objective (how the international community views it) and subjective (how the concerned collective regards it). Moreover, international legislators and adjudicators have allowed for culture's tangible, itself, to be the victim/claimant of such attacks, in two ways. First, there will be situations where a legal person, such as a religious institution, may be able to claim material and/or moral damage, as a result of attack on its property such as objects of arts. Second, sometimes cultural tangible itself – eg a museum – is endowed with legal personality and, as such, can claim damage and reparations as a result of attacks directed against it, regardless of the cultural movable that it contains (general introduction, Parts I-II). This thesis will use the terms "tangible-centred" except where the context requires the use of the terms "cultural property-centred" (those instances that expressly reference cultural property through eg cultural property-related instruments). Furthermore, the terms "tangible cultural heritage" and "tangible cultural heritage-centred" will not be used in order to avoid confusion with the below heritage-centred approach (which may combine the tangible and the intangible), and to also assist those not specialising in the heritage field.

But the scope of attacks targeting culture includes also culture's intangible in isolation or in combination with its tangible. The former will essentially consist of mass cultural rights violations and/or mass cultural crimes, in the form of, eg linguistic or religious rights discriminations (Parts I-II). As for the combination of culture's intangible and tangible, it will address more holistic contexts, ie all things immaterial (eg cult practice) and material (eg the natural environment) that define a collective's identity (Parts I-II). As regards the victims/claimants of these attacks, both State responsibility and ICR-based jurisdictions have recognised that these may consist of natural persons, as part of the collective, or by the collective, as their sum (Parts I-II). Attacks directed against culture are capable of altering the collective's identity and, depending on the circumstances, impacting on local/national/international heritage. Evidently, natural persons can also seek reparations for material and/or moral damage they suffered as a result of attack directed at cultural property. To avoid confusion by the myriad of terminological concepts (CH, intangible cultural heritage, cultural rights), the thesis will broadly opt for the term "heritage-centred" for such situations.

The dichotomy proposed aims to enhance the adjudication of attacks targeting culture, in order to prevent those instances where ICR-based instruments and jurisdictions have considered cultural attacks only partly, eg when addressing cultural genocide (Part II).

III. Proposed framework and tools

But to move forward, it is important to provide this thesis' understanding of the concept(s) of culture. This will not consist of defining culture, a task that even anthropology has been struggling with since the nineteenth century. On the other hand, avoiding to address the concept of culture, even in broad strokes, is tantamount to denying sociocultural anthropology's raison d'être. To strike the right balance, this section will view culture in three different ways. First, culture will be placed in its linguistic and anthropological context so as to briefly review linguistic heterogeneities attached to the concept of culture and to present the evolution of some of anthropology's main understandings of it (A). This will help placing culture in law, ie to see how international legislators have gradually situated culture in a legal framework (B). Following this, culture will be placed in judicial proceedings. In other words, culture locus standi before State responsibility and ICR-based jurisdictions will be determined (C). This analysis will thus pave the way for critically reviewing and proposing enhancement of the international adjudication of attacks targeting culture in tangible-centred and heritage-centred manners (Parts I-II).

A. Placing culture in linguistics and anthropology

Undoubtedly, "a word that means all things to all men", culture is anthropologically relative to individuals and to the collective, making any attempts to define it to almost always result in academic controversy.[17] Should a survey be taken, there would undoubtedly be as many definitions of "culture" as people taking part. To understand this complexity, the following will first review the linguistic challenges of this term (1) in order to then focus on the anthropological approaches of the concepts of culture (2), before drawing up on their common elements (3).

1. Linguistic heterogeneity: inter-language and intra-language variations

World languages use different words to designate the concept of culture. This etymological heterogeneity result in different understandings of the concept both inter-language and intra-language. As regards the former, the word culture comes from the Latin *cultura*, which means to cultivate, agriculturally. Cicero used it metaphorically to describe the cultivation of the soul (*cultura animi*), one that leads to a civilised life in

[17] "Culture" *in* HW Fowler, *Pocket Fowler's Modern English Usage* (Oxford University Press 1999), p 151: "here is a word that has had mixed fortunes in the twentieth century, and means all things to all men. There are about 10 000 examples of it (including the plural forms and compounds)". *See* Blake, "On Defining the Cultural Heritage" (n 14); Frigo (n 14) and Asbjørn Eide, "Cultural Rights as Individual Human Rights" *in* Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001), p 289.

society, with communal participation.[18] This word is used by virtually all western Indo-European,[19] and most eastern Indo-European languages.[20] Among the latter, the Indo-Iranian languages use a different word, although with the same conceptual meaning as their Latin sister. For example, Persian uses the 300 BCE Middle-Persian word "فرهنگ" (*far-hang*) which, from its "forerunning" or "elevation" etymology has come to embrace "education, knowledge".[21] Hindi uses the word "संस्कृति" (*Sanskrti*) which derives from the elite's polished language *saṃskṛta* – meaning "adorned, cultivated, purified", in contrast to the vernacular language *prakrta*, meaning "original, nature".[22]

Many non-Indo-European languages designate the concept of culture by importing a word from another linguistic group. One such series uses a derivative of the Latin cultura. These are, eg, Hungarian ("*kultúra*"), Finnish ("*kulttuuri*"), or Turkish ("*kültür*"); the latter as a recent import as part of Turkey's post-Ottoman secularisation efforts, which was essentially a Westernisation. Other non-Indo-European languages have imported an Arabic derivative roughly equivalent to the concept of "urban" – as opposed to that of "nomad". These are eg Azeri ("*mədəniyyət*") and Swahili ("*utamaduni"*). Intriguingly, Arabic uses a different Arabic word, "ثقافة" (*seghafah*), the root of which means skilful, smart. Hebrew too uses its own word, "תרבות" (*tarbut*), the root of which means "increase", in the sense of the human value added to a pristine state's natural resources.[23] Hebrew's etymological conceptualisation of the word culture is thus akin to a combination of the Latin *cultura* and the Persian *farhang*.

The above demonstrates that using any given language to define culture is in and of itself a confining factor. Accordingly, throughout this thesis, which is in the English language, readers should be mindful that the terminological and conceptual discussions will be restricted to the English language.

But this inter-language heterogeneity is also intra-language. Among two of the most commonly used English-language dictionaries, the Cambridge English Dictionary describes "culture" as:

> The way of life, especially the general customs and beliefs, of a particular group of people at a particular time.[24]

Or

> music, art, theatre, literature, etc.[25]

According to these definitions, "culture" may be seen in two ways: first, as a collective

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[18] "Cultura" *in Enciclopedia Italiana di Scienze, Lettere ed Arti* <http://www.treccani.it/enciclopedia/cultura/> accessed 14 April 2019.
[19] *See* eg: *culture* (English, French), *cultura* (Italian, Portuguese, Spanish) *cultură* (Romanian), *cultuur* (Dutch), *κουλτούρα* (Greek), *Kultur* (Danish, German, Norwegian, Swedish), *Kultuur* (Afrikaans).
[20] *See* eg: *Kultura* (Czeck, Polish), *kultúra* (Slovak), култура (Bulgarian, Macedonian, Serbian), культура (Russian).
[21] "فرهنگ" *in* DN Mackenzie, *A Concise Pahlavi Dictionary* (Oxford University Press 1971).
[22] George Cardona, "Sanskrit language" and "Prakrit languages" *in Encyclopædia Britannica* (2013) <https://www.britannica.com/topic/Prakrit-languages> accessed 14 April 2019.
[23] Eliezer Schweid, *The Idea of Modern Jewish Culture* (Academic Studies Press 2008), p xi.
[24] "Culture" *in Cambridge English Dictionary Online* (3rd edn Cambridge University Press) <https://dictionary.cambridge.org/dictionary/english/culture?q=culture_1> accessed 14 April 2019.
[25] "Culture" *in Cambridge English Dictionary Online* (n 24).

way of life at a given time interval; and second, as a set of intellectual and artistic fields. The Oxford English Dictionary too proposes two definitions. First, it characterises the term as the:

> Refinement of mind, taste, and manners; artistic and intellectual development. Hence: the arts and other manifestations of human intellectual achievement regarded collectively.[26]

This description combines the above-mentioned Cambridge definitions to depict "culture" as a collective's artistic and intellectual achievements. However, Oxford provides another definition, where culture is viewed holistically:

> Chiefly as a count noun. The distinctive ideas, customs, social behaviour, products, or way of life of a particular society, people, or period. Hence: a society or group characterized by such customs, etc.[27]

This definition considers culture and the collective as two sides of the same coin, whereby each exists in function of the other.

Thus, within a given language, any attempt to produce a single definition of culture is an uneasy task. Challenges are further increased when that language is used in international fora. Therein, frequently constituting the majority, non-native speakers can be "lost in translation". This issue becomes even more salient when discussions evolve around cultural concepts. Accordingly, a number of international legal instruments use the word "culture" without defining it. For example, having provided for "the right of everyone" "to take part in cultural life" in its article 15(1)(a), article 15(1)(c) of the International Covenant for Economic, Social and Cultural Rights ("ICESCR") provides for everyone's right "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author", potentially using "literary or artistic" as a synonym for "culture".[28] However, in 2009, the Committee on Economic, Social and Cultural Rights indicated that, under article 15(1)(a), culture:

> encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces

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[26] "Culture" *in Oxford English Dictionary* (3rd edn Oxford University Press 2008) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1> accessed 14 April 2019.
[27] "Culture" *in Oxford English Dictionary Online* (n 26). Along these lines, s*ee* also Roger O'Keefe, "The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR" (1998) 47(4) *International and Comparative Law Quarterly* 904, 905.
[28] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, (ICESCR) <https://treaties.un.org/doc/Treaties/1976/01/19760103%2009-57%20PM/Ch_IV_03.pdf> accessed 4 April 2020. For human rights purposes, the ICESCR should be read together with the International Covenant on Civil, Political and Cultural Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 4 April 2020.

> affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.[29]

Moving to the International Covenant on Civil, Political and Cultural Rights ("ICCPR"), article 27 provides that:

> persons belonging to [*ethnic, religious or linguistic*] minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practise their own *religion*, or to use their own *language*.[30] [emphasis added]

This passage establishes a relationship between "ethnic, religious or linguistic" groups and their "culture", "religion" or "language". In this relationship, one cannot help but to remark the absence of a strict terminological parallelism between the groups' identity and the enjoyment of their specific features. Accordingly, how does the enjoyment of one's culture differentiate from professing one's religion or using one's language? One may wonder whether this terminological ambiguity results from the above-discussed linguistic uncertainties. It could equally be conceived that this may be further exacerbated by non-native treaty negotiators' use of words such as "ethnic" and "culture". Either way, this opacity shows the complexity of the concept of culture. This linguistic ambiguity leads to and results from an anthropological ambiguity.

2. Anthropological heterogeneity: evolutionism, holism or relativism?

Scholars have discussed the meaning of the term "culture" since anthropology's early days. While it is not within the scope of this legal thesis to re-open the anthropological debate, a brief review of the main features of the concept of "culture", ie evolutionism, relativism and holism, will serve to delimit, from a legal viewpoint, the scope of culture. In 1871, Tylor first defined culture in an evolutionist context as:

> that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society. […] its various grades may be regarded as stages of development or evolution, each the outcome of previous history, and about to do its proper part in shaping the history of the future.[31]

This inaugural definition regards the relationship between the individual and the collective as the establishing feature of culture. No Robinson Crusoe could create a culture on his own on an island. Culture identifies a collective as the sum of individuals and their tangible and non-tangible creations. These differentiate the collective from

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[29] Committee on Economic, Social and Cultural Rights, 'General Comment No. 21: Right of Everyone to take part in Cultural Life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009), UN Doc E/C.12/GC/21, para. 13. *See* also Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights, Ms Farida Shaheed, Submitted Pursuant to Resolution 10/23 of the Human Rights Council' (March 2010) UN Doc A/HRC/14/36, para. 9. *See* also Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 (1948 OAS Charter), <http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS.asp> accessed 14 April 2019. As of April 2019, 35 States were parties to this Charter, art 19, prohibiting State interference with respect to other States' inter alia, "political, economic, and cultural elements".

[30] ICCPR (n 28) art 27.

[31] Edward B Tylor, *Primitive Culture* (first published 1871, Harper Torchbooks 1958), p 1.

each other. Nevertheless, Tylor's definition contains factors that have progressively become questionable. Tylor views culture as a means to effect progress within a society and hence, humankind. While some cultures would contribute to this end (Tylor viewed Victorian Britain as such a culture), others would condemn their society to decay, leading Tylor to suggest that the criterion for ranking a given society's culture is its technological mastery.[32] Accordingly, technological development becomes the barometer by which societies' progress is ordered.

Anthropologists continued to associate these elements of evolutionism with the idea of "culture" until Boas brought the perspectives of relativism when, in a 1896 article, he criticised the comparative model of anthropology.[33] He disagreed that cultures could be ranked and advocated against the qualitative comparative evaluation. The choice for a ranking criterion, such as technology, is itself the result of a specific culture; it is therefore relative. Boas' ideas on cultural relativism generated multiple debates. Since Boas, in 1952, Kroeber and Kluckgord have produced a list of 164 definitions for culture.[34] While some anthropologists have been proposing new concepts,[35] others, like Haring, questioned whether the term is definable at all.[36] Mitchell has even denied its existence.[37] In the midst of this debate, it is useful to refer to Bierstedt's four broad interpretations of culture as:

> (1) […] the veneer of refinement, taste, and comity which covers the most jagged surfaces of our barbarian ancestry; (2) the higher expressions of group life, such as art, religion, science, literature, and philosophy; (3) all forms of group life, comprising institutions, artefacts, mores, customs, rites, ceremonies, and behavior patterns; and (4) the organic unity or dynamic ethos of a social group in its growth and development.[38]

The first interpretation is close to what has become a colloquial usage of the term rather than a scientific one. It indirectly confronts "barbarian ancestry" and its antithesis – civilisation; legitimising the domination of the "civilised". Although the second interpretation links culture to society, it retains a hierarchical approach, as it implies that "higher" collective expressions face "lower" ones. Interestingly, this interpretation encompasses a non-exhaustive list of expressions of collective life. The third interpretation joins Tylor's definition to the extent that culture is characterised in both tangible and intangible forms, such as "behaviour patterns" that allow the individual to identify with the collective, and *vice-versa*. Nevertheless, Bierstedt points to some limitations in Tylor's concept by providing that:

> This type of culture cannot, by definition, be developmental nor dynamic. A complex whole of traits has never yet acted nor reacted, nor has it moved through cycles, spirals, or helices of development. It simply is. One may correctly describe it as *social heritage*,

[32] Tylor (n 31) pp 26 and 28.
[33] Franz Boas, "The Limitations of the Comparative Method of Anthropology" (1896) 4(103) *Science* 901. Boas has been considered as "the founder of modern field work", *see* Paul Bohannan and Mark Glazer (eds) *High Points in Anthropology* (2nd edn, McGraw-Hill 1988), p 82.
[34] Alfred L Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions*, vol 47 (Harvard University Printing Office 1952), p 149.
[35] *See* eg Albert Blumenthal, "A New Definition of Culture", (1940) 42(4) *American Anthropologist* 571; Omar Khayyam Moore, "Nominal Definitions of 'Culture'", (1952) 19(4) *Philosophy of science* p 245.
[36] Douglas G Haring, "Is 'Culture' Definable?" (1949) 14(1) *American Sociological Review* 26.
[37] Don Mitchell, "There's No Such Thing as Culture: Towards a Reconceptualization of the Idea of Culture in Geography" (1995) 20(1) *Transactions of the Institute of British Geographers* 102.
[38] Robert Bierstedt, **"**The Meanings of Culture" (1938) 5(2) *Philosophy of Science* 204, p 205.

> passed on from generation to generation, and swelled by constant accretions of new materials and customs along the way.[39] [emphasis added]

Thus, Bierstedt introduces what he calls "social heritage" – a key feature for this thesis which will be further discussed (general introduction). Bierstedt's remarks about the inert character of Tylor's definition is pertinent, as it would be a peculiar idea to portray culture as stationary, since encounters between cultures alter or reaffirm some of their features. As for the fourth interpretation, Bierstedt introduces the notion that culture is always in motion: it is neither static nor isolated from humans. Whereas in the third interpretation culture is what binds humans together, in the fourth one it means humans bound together.[40] The combination of these two interpretations makes culture and the collective one and the same; a key factor in understanding the work of the Inter-American Court of Human Rights ("IACtHR") (Part I, Chapter 2),[41] and ICL's (mis)apprehensions regarding the CaH of persecution (Part II, Chapter 2) and the crime of genocide (Part II, Chapter 3).

From evolutionism into relativism, the concept of culture finally entered its symbolic and holist phase. In 1973, Geertz portrayed culture as a system of symbols by adopting a semiotic approach.[42] In Geertz's words, culture:

> denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.[43]

Geertz compares the movement of culture with an octopus with different tentacles moving simultaneously towards different directions.[44] Geertz focuses on culture's intangible features. An object would be just an object unless it is given a special meaning. A wedding ring is no more than a piece of metal unless it is given a specific symbolic significance – a context, ie a cultural trait.

Geertz's approach is critical to understanding this thesis' viewing of attacks targeting culture in international law, as specifically developed in Part I, Chapter 2 and Part II. The protection of culture is essential not only because it shelters a collective's soul, but also because attacking a collective's culture means attacking human diversity as such.

3. Common elements: a totalising anthropo-centred concept

As put by Sider in 1986, culture is:

> [a] totalising concept because everything becomes, or is considered, culture. There are material culture, ritual culture, symbolic culture, social institutions, patterned behaviour,

[39] Bierstedt (n 38) p 208.
[40] Bierstedt (n 38) p 215.
[41] Statute of the Inter-American Court of Human Rights (adopted 1 October 1979) Organisation of American States (OAS) General Assembly Resolution No 448 (IACtHR). <http://www.corteidh.or.cr/index.php/en/about-us/estatuto> accessed 14 April 2019.
[42] Roger M Keesing, "Theories of Culture" (1974) 3(1) *Annual Review of Anthropology* 73, p 79.
[43] Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973), p 89.
[44] Geertz (n 43) p 408.

> language-as-culture, values, beliefs, ideas, ideologies, meaning and so forth. Second, not only is almost everything in a society culture, but the concept is also totalising because everything in the society is supposed to have the same culture (as in the concept of culture as shared values).[45]

Thus, culture's open-ended scope does not, a priori, sit well when considering legal issues. However, although there is no single accepted definition, two elements – often interrelated – are fundamental to culture. First, there is a tangible element, whether anthropical or natural, movable or immovable, secular or religious. This is relevant to understanding the evolution of international law with respect to culture's tangible. Hence what this thesis has conceived as the tangible-centred way of attacking of culture. Second, there is an intangible element, such as language, religion, traditions and belief systems, that contributes to a collective's identity which, in turn, may also be defined by tangible elements. Hence the heritage-centred attacking of culture.

In fact, culture is not conceived without humans. It is anthropo-centred, although not anthropocentric. A Western philosophical worldview, anthropocentrism considers that humans are the world's central entities and that they can exploit other entities (such as animals, plants and minerals) as mere resources.[46]. To avoid confusions with doctrinal considerations – the suffix ism conveys a set of beliefs, studies or ways of behaving – and to take account of anthropocentrism's contestation by more secular viewpoints, such as conservationism, environmental ethicism, biocentrism and ecofeminism,[47] this thesis will opt for the neutral term anthropo-centred. While not denying human centrality in the context of culture, the proposed terminology will also facilitate considering humans and culture symbiotically, so as to enable understanding those cases where humans and their environment's interplay and interdependence have been adjudicated (Part I, Chapter 2).

B. Placing culture in a legal mould

1. Introduction: reducing culture's tangible and intangible to law

Notwithstanding the lack of a universally accepted definition of culture, it is crucial to propose a legally workable scope for an anthropologically multifaceted subject-matter. Like Akhavan's reducing genocide to law, doing the same with culture, akin to Johannot-Gradis' work, will be crucial in analysing the adjudication of attacks targeting culture in international law, whether under State responsibility or ICR.[48] Placing

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[45] Gerald M Sider, *Culture and Class in Anthropology and History* (Cambridge University Press 1986), p 6.

[46] The philosophical expression "anthropocentrism", is derives from some Judeo-Christian viewpoints. *See* Sarah E Boslaugh, "Anthropocentrism" *in Britannica* <https://www.britannica.com/topic/anthropocentrism> accessed 14 April 2019.

[47] *See* Boslaugh (n 46).

[48] *See* Payam Akhavan, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012); and Christiane Johannot-Gradis, *Le patrimoine culturel matériel et immatériel : quelle protection en cas de conflit armé?* (Genève: Schulthess 2013), <http://archive-ouverte.unige.ch/unige:83307>. With respect to the latter, and thus for culture specifically, *see* Lyndel V Prott, "Problems of Private International Law for the Protection of the Cultural Heritage" (1989) 217

culture, a polymorph concept, in a legal framework will help bring predictability to judicial proceeding involving attacks targeting culture. Conversely, it transforms culture, a dynamic concept, into a static legal concept. On balance, however, this moulding of culture will offer clarity as to its scope. This reduction will be done by analysing international legal instruments' convergence and divergence when addressing culture's tangible and intangible. Rather than proposing unifying terminologies to address these concepts – academia has already done so through intangible cultural heritage and tangible cultural heritage – this section will establish how international legislators have defined cultural property and cultural heritage. For, it is important to understand their evolutionary viewing of tangible and intangible culture which, except in limited cases, they generally continue not to reference as intangible cultural heritage and tangible cultural heritage.[49]

To this end, a review of lex lata will helps proposing a lex ferenda that would best suit the adjudication of attacks targeting culture. As regards the former, it will be shown that international instruments have followed a multi-track approach. Their initial tangible-centred approach meant that they focused on some of the tangible elements that would constitute the future cultural property (2). A second generation then considered the tangible as part of the broader heritage, first by combining the terms cultural property with cultural heritage (defining the former, though not the latter) and then by eventually defining cultural heritage (3). The review of each of these overlapping tracks will be conducted chronologically, in order to provide a dynamic picture of culture, an evolving concept. In light of this evaluative analysis, this section will propose a lex ferenda, so as to provide an evolutionary picture of how international legislators have been attempting to reduce culture to law, a feature too often overlooked in similar studies (4).

In sum, the focus of this section *is not on how* attacks targeting culture are adjudicated – this is addressed in Parts I-II. Rather this section will focus on its subject-matter, ie culture; in other words, *how* culture ought to be understood legally for the purpose of the said adjudications.

Recueil des Cours, p 224 and Janet Blake, *International Cultural Heritage Law* (n 14), pp 6-9. Contra *see* argument that legally defining culture may be "a misconception, ie that cultural rights protect culture itself rather than the enjoyment of culture, and that [they] offer a right to culture (with culture construed as a noun) as opposed to the right to participate in or enjoy culture". *See* Pok Yin Stephenson Chow, *Cultural Rights in International Law and Discourse: Contemporary Challenges and Interdisciplinary Perspectives* (Brill Nijhoff 2018), p 29.

[49] In their sentencing judgments with respect to Jokić (Dubrovnik) and Al Mahdi (Timbuktu), both the ICTY and ICC used the term "cultural property" nearly twice as often as "cultural heritage" (excluding references to the latter through cited documents' titles); *See Prosecutor v Blagojević & Jokić*, (ICTY) Judgment (17 January 2005) Case No IT-02-60-T and *Prosecutor v Al Mahdi,* (ICC) Judgment and Sentence (27 September 2016) No ICC-01/12-01/15. However, in the ensuing reparations order issued in Al Mahdi, "cultural heritage" was used three times as much as "cultural property". But even that does not seem to have been deliberate. The Chamber held eg that "Cultural items considered as cultural heritage are objects, monuments and sites that are considered to be testimonies of human creativity and genius. It is this exceptional quality which warrants their labelling as cultural heritage. Cultural heritage is important not only in itself, but also in relation to its human dimension. Cultural property also allows a group to distinguish and identify itself before the world community" [footnotes omitted]. *See Prosecutor v Al Mahdi*, (ICC) Reparation Order (17 August 2017) No ICC-01/12-01/15, para 16.

2. The tangible-centred approach: culture's tangible sometimes linked to legal persons

International law first considered culture from a tangible-centred angle, through the Project of an International Declaration concerning the Laws and Customs of War ("1874 Brussels Declaration") and the Manual of the Laws and Customs of War at Oxford ("1880 Oxford Code").[50] Each of these constituted a separate path that subsequent legal instruments followed by expressly referencing culture's anthropical and natural tangible, whether movable or immovable, secular or religious, although falling short of using the terms cultural property/tangible cultural heritage. According to article 8 of the 1874 Brussels Declaration:

> *The property of* municipalities, that of *institutions dedicated to religion*, charity and *education, the arts and sciences* even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, *institutions of this character*, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.[51] [emphasis added]

This provision considers some of culture's tangible movable and immovable, secular and religious items that would be referenced in future as cultural property/tangible cultural heritage. Importantly, by linking the enumerated properties to institutions dedicated to religion, education, the arts and sciences, the first sentence allows for legal persons to become the subject-matter of injury on account of damage to culture's tangible owned/administered by them. Most importantly, however, the second sentence outlaws damaging culture's tangible not only as inanimate ("works of art and sciences") but also as a legal person (damage to "institutions of this character"). Thus, culture's tangible is protected as an inanimate, whether movable (eg an amulet) or immovable (eg architectural ruins). Second, and most interestingly, culture's tangible possesses legal personality; in other words, culture's tangible (the museum) owns/administers

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[50] The Instructions for the Government of Armies of the United States in the Field (1863 Lieber Code) would form the origin of the 1874 Brussels Declaration, which was adopted by 15 European States – but not ratified. The Institute of International Law's further work on this text resulted in the adoption of the 1880 Oxford Code. Both the 1874 Brussels Declaration and the 1880 Oxford Code (and indirectly, the 1863 Lieber Code) formed the basis of the Hague Law. *See* Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher 1988), pp 3-34, 36-48. *See* also Instructions for the Government of Armies of the United States in the Field (adopted 24 April 1863) (1863 Lieber Code) <http://www.icrc.org/ihl.nsf/INTRO/110?OpenDocument> accessed 14 April 2019; Project of an International Declaration concerning the Laws and Customs of War, Brussels (adopted 27 August 1874) (1874 Brussels Declaration) <http://www.icrc.org/ihl.nsf/WebART/135-70008?OpenDocument> accessed 14 April 2019; The Laws of War on Land, Oxford (adopted 9 September 1880) (1880 Oxford Code) <http://www.icrc.org/ihl.nsf/INTRO/140?OpenDocument> accessed 14 April 2019; *See* Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) (1899 Hague Regulations II) <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> accessed 14 April 2019; and Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (1907 Hague Regulations IV) <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument> accessed 14 April 2019; and Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, (adopted 18 October 1907, entered into force 26 January 1910) (1907 Hague Regulations IX) <http://www.icrc.org/ihl.nsf/INTRO/220?OpenDocument> accessed 14 April 2019

[51] 1874 Brussels Declaration (n 50) art 8.

other culture's tangible (the amulet). Followed by a number of IHL-ICL instruments, this path will constitute one of the salient features of this thesis (C.2.b below and Parts I-II). The 1907 Hague Regulations IV and the ICTY Statute, and the Treaty between the United States of America and the Other American Republics on the Protection of Artistic and Scientific Institutions and Historic Monuments ("1935 Roerich Pact") too linked the tangible to legal persons.[52] By linking culture's tangible to legal persons, the 1874 Brussels Declaration scheme impacted the future adjudication of attacks targeting culture, wherein legal persons may appear, before State responsibility and ICR-based jurisdictions, as injured party on account of damage to cultural property they own and/or administer (Parts I-II).

Chart 1: IHL and ICL instruments linking culture's tangible to legal persons

	(property of) Institutions dedicated to					Historic monuments	Works of art and science	Museums
	Religion	Education	Arts	Sciences	Culture			
1874 Brussels Declaration	X	X	X	X		X	X	
1907 Hague Regulations IV article 56	X	X	X	X		X	X	
The 1935 Roerich Pact		X	X	X	X	X		X
ICTY Statute article 3(d)	X	X	X	X		X	X	

In contrast to the 1874 Brussels Declaration, the 1880 Oxford Code's scheme considered culture's tangible as inanimate, by referencing "buildings dedicated to religion, art, science".[53] This path was followed by the 1899 Hague Regulations II, 1907 Hague Regulations IV, 1907 HC IV, the ICC Statute, and the SPSC Regulations.[54] While doing the same, the Pan American Treaty on the Protection of Movable Property of Historic Value ("1935 Pan American Treaty"), added natural elements to the

[52] *See* 1907 Hague Regulations IV (n 50) art 56, UNSC, "Security Council Resolution 827 on the Adoption of the Statute of the International Tribunal for the Former Yugoslavia" (May 25 1993) (amended 7 July 2009) UN Doc S/RES/827, 32 ILM 1159 (ICTY Statute) art 3(d) and Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (adopted 15 April 1935, entered into force 26 August 1935) 167 LNTS 289 (1935 Roerich Pact) <https://ihl-databases.icrc.org/ihl/INTRO/325?OpenDocument> accessed 14 April 2019. This treaty was signed by 21 States in 1935, and as of April 2019, it had been ratified by 10 States (Brazil, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Guatemala, Mexico, USA and Venezuela). *See* Roger O'Keefe, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006) pp. 51-52.

[53] 1880 Oxford Code (n 50) art 34.

[54] See 1899 Hague Regulations II (n 50) art 27, 1907 Hague Regulations IX (n 50) art 5, 1880 Oxford Code (n 50) art 34, The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, 37 ILM 999 (1998) (ICC Statute) <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> accessed 14 April 2019. As of April 2019, 122 States were parties to the ICC Statute art 8(2)(b)(ix) and (e)(iv), and United Nations Transitional Administration in East Timor (UNTAET), "On the Organization of Courts in East Timor" (14 September 2001) Regulation No 2001/25, <https://www.legal-tools.org/doc/b35f1b/pdf/> accessed 14 April 2019. *See* also Knut Dörmann, Louise Doswald-Beck and Robert Kolb, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (International Committee of the Red Cross Cambridge 2003), pp 215-222 and Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *International Committee of the Red Cross* (Martinus Nijhoff Publishers 1987) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> accessed 14 April 2019, para 2065.

anthropical ones, as a local-national and/or national-international diptych, paving the way for future international and regional instruments (3.b).[55]

Chart 2: IHL, ICL and peacetime instruments not linking culture's tangible to legal persons

	Buildings/edifices dedicated/devoted to				Historic monuments	Works of art and science	Fauna
	Religion	Education	Art	Science			
1880 Oxford Code	X		X	X			
1899 Hague Regulations II art 27	X		X	X			
1907 Hague Regulations IV art 27	X		X	X	X		
1907 Hague Regulations IX art 5	X		X	X	X		
The 1935 Pan American Treaty						X	X
ICC Statute art 8(2)(b)(ix) and (e)(iv)	X	X	X	X	X		
SPSC Regulation 6(b)(ix)	X	X	X	X	X		

3. The heritage-centred approach: linking culture's tangible to heritage

Having focused on culture's tangible as such, international legislators linked the tangible to heritage, from the post-Second World War onwards. The first track considered the tangible as part of anthropical and natural heritage, through falling short of defining heritage (a). The other, more recent track, finally defined heritage by considering the tangible, together with the intangible, as intangible cultural heritage (b).

a. Culture's tangible linked to anthropical and natural heritage

From the Second World War onward, international legislators listed, in both IHL-ICL and peacetime instruments, the tangible movable and immovable, secular and religious, anthropical and natural components – that they would often reference as cultural property – and link to heritage or cultural heritage.

Beginning with IHL-ICL instruments, as noted by Chechi, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention") is the first instrument to both use and define the term cultural property.[56]

[55] Treaty on the Protection of Movable Property of Historic Value (adopted 15 April 1935, entered into force 1 May 1936) OAS Treaty Series No 28 (1935 Pan American Treaty). As of April 2019, 9 States are signatories and of these 5 States have ratified this Treaty. Art 1 divides "movable monuments" into four periods and considers "zoological specimens of beautiful and rare species threatened with extermination or natural extinction […]".

[56] Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014), p 26. For further background and detailed discussion *see* R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 92-111. *See* Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954

By considering cultural property as, inter alia, movable or immovable, secular or religious items "of great importance to the cultural heritage of every people", this convention links cultural property to an undefined, yet legacy-oriented cultural heritage.[57] This would be confirmed by the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention 1999 Protocol"), which conditions cultural property's enhanced protection to it being "cultural heritage of the greatest importance for humanity".[58] Later, this scheme was repeated – by express reference to the 1954 Hague Convention – by the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) ("1977 Additional Protocol I"); the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) ("1977 Additional Protocol II") (together, "1977 Additional Protocols"); and the ECCC, making it the only ICR-based jurisdiction whose statute names cultural property.[59]

Notwithstanding their titles referencing cultural property or heritage, UNESCO and the European and Inter-American systems too have drawn-up instruments that reference heritage and cultural heritage, but actually describe tangible elements. Among the UNESCO instruments, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 Cultural Property Convention") expands cultural property's secular and religious movable to

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(adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240 (1954 Hague Convention) <http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 April 2019. As of April 2019, 133 States were parties to this convention.

[57] 1954 Hague Convention (n 56) art 1 and preamble.

[58] *See* Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (adopted 26 March 1999, entered into force 9 March 2004) UNESCO Doc HC/1999/7(1954 Hague Convention 1999 Protocol) <http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 April 2019, art 10. *See* also Nout van Woudenberg and Liesbeth Lijnzaad (eds) *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (Martinus Nijhoff 2010). For a discussion of the "cultural value" approach, *see* Micaela Frulli, "The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency" (2011) 22(1) *The European Journal of International Law* 203; Sigrid Van der Auwera, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges" (2013) 43(4) *The Journal of Arts Management, Law, and Society* 175. For an extensive discussion, *see* O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 236-301.

[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (1977 Additional Protocol I) <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079> accessed 14 April 2019. As of April 2019, 174 States were parties to the 1977 Additional Protocol I; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (1977 Additional Protocol II) <http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument> accessed 14 April 2019. As of April 2019, 168 States were parties to the 1977 Additional Protocol II. Arts 53 and 16 of the 1977 Additional Protocol I and 1977 Additional Protocol II reference tangibles that "constitute the cultural or spiritual heritage of peoples". By providing that the tangible's secular or religious character should be determined through the value accorded to it by its people, the ICRC Commentary of 1987 furthers the tangible-heritage link. *See* Sandoz et al, *Commentary of 1987* (n 54) para 2065. *See also* R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 202-235.

natural components and introduces a time factor,[60] as if, as noted by Blake, to be considered culture, age matters.[61] The Convention concerning the Protection of the World Cultural and Natural Heritage ("1972 World Heritage Convention") too considers anthropical and natural tangibles, although it references them as heritage.[62] The Convention for the Protection of Underwater Cultural Heritage ("2001 Underwater Cultural Heritage Convention") too considers anthropical and partly natural underwater tangibles with a time factor.[63] As regards regional instruments, the 1969 European Convention on the Protection of Archaeological Heritage ("1969 European Archaeological Heritage Convention") and the 1985 Convention for the Protection of Architectural Heritage of Europe ("1985 European Architectural Heritage Convention") consider as archaeological and architectural heritage a set of moveable/immoveable, secular/religious objects, with the more recent convention adding topographical natural elements.[64] The 1976 Convention on the Protection of the

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[60] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231 (1970 Cultural Property Convention) <http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 April 2019. For the UNESCO's Conventions' history, *see* Poul Duedahl (ed), *The History of UNESCO: Global Actions and Impacts* (Palgrave Macmillan 2016). Art 1 provides, for "Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest"; "antiquities" and "articles of furniture more than one hundred years old". *See* also UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457 (1995 UNIDROIT Convention) <https://www.unidroit.org/instruments/cultural-property/1995-convention> accessed 14 April 2019. As of April 2019, 46 States were parties. *See* also Convention on Offences Relating to Cultural Property (adopted 3 May 2017, entered into force 1 September 2017) ETS No 221 (2017 Cultural Property Offences Convention) <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680710435> accessed 14 April 2019; and the 2017 Cultural Property Offences Convention was preceded by the 1985 European Convention on Offences Relating to Cultural Property (not in force) ETS No 119.

[61] Blake, "On Defining the Cultural Heritage" (n 14) p 66.

[62] UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, 11 ILM 1358 (1972) (1972 World Heritage Convention) <http://whc.unesco.org/en/conventiontext> accessed 14 April 2019, 1092 sites located in 167 States parties were on the 1972 World Heritage List. These are anthropical (845), natural (209) and mixed (38). 47.07% of these sites are located in the European and North-American zone. *See* UNESCO, "World Heritage Centre" <http://whc.unesco.org/en/list> accessed 14 April 2019. Arts 1-2, referencing: "natural features consisting of physical and biological formations […]; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants […]; natural sites […]". *See* UNESCO, "Operational Guidelines for the Implementation of the World Heritage Convention" (2012) <http://whc.unesco.org/archive/opguide12-en.pdf> accessed 14 April 2019, pp 20-21; and the ICOMOS International Charter for the Conservation and Restoration of Monuments and Site (The Venice Charter 1964) <https://www.icomos.org/charters/venice_e.pdf> accessed 14 April 2019, *in* Yahaya Ahmad, "The Scope of and Definition of Heritage: From Tangible to Intangible" (2006) 12(3*) International Journal of Heritage Studies* 292, p 293.

[63] UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 40 (2002) (the 2001 Underwater Cultural Heritage Convention) <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text> accessed 14 April 2019. As of April 2019, there were 61 States parties to this convention. *See* 2001 Underwater Cultural Heritage Convention (n 63) preamble, art 1(1)(a) (on time) and (a)(i) and (ii) (on "archaeological and natural contexts").

[64] European Convention on the Protection of Archaeological Heritage (adopted 6 May 1969, amended 16 January 1992, entered into force 25 May 1995) ETS No 143 (1969 European Archaeological Heritage Convention) <http://conventions.coe.int/treaty/en/treaties/html/143.htm> accessed 14 April 2019 art 1(2)-(3); and Convention for the Protection of the Architectural Heritage of Europe (adopted 3 October 1985, entered into force 1 December 1987) ETS No 121 (1985 European Architectural

Archaeological, Historical, and Artistic Heritage of the American Nations ("1976 San Salvador Convention") does the same, while adding time factors.[65]

These instruments share two common denominators. First, their wording is confusing, as some of them refer to the tangible as cultural property, whereas others reference it as heritage or cultural heritage, while most of them mix these terms even within their own framework.[66] Second, and notwithstanding the terminological confusion regarding the tangible, these instruments link it to an intangible legacy-oriented cultural heritage/heritage which, although undefined, is viewed as a national-international diptych, or a local-national-international triptych.[67] Accordingly, these instruments are tangible-centred, in that they focus on culture's tangible. But they are also heritage-oriented since, by linking the tangible to heritage, they immerse it in a legacy context.

Chart 3: IHL, ICL and peacetime instruments referring to cultural property as such

	Movable	Immovable	Religious	Secular	Fauna and flora	Time factor
1954 Hague Convention	X	X	X	X		
1954 Hague Convention 1999 Protocol	X	X	X	X		
1977 Additional Protocols	X	X	X	X		
ECCC Law	X	X	X	X		
1969 European Archaeological Heritage Convention	X	X	X	X	X	
1970 Cultural Property Convention	X		X	X	X	X
1972 World Heritage Convention	X	X	X	X	X	
1976 San Salvador Convention	X	X	X	X	X	X
1985 European Architectural Heritage Convention		X	X	X	X	X
1995 UNIDROIT Convention	X		X	X	X	X
2001 Underwater Cultural Heritage Convention	X	X	X	X	X	X
2017 European Convention on Offences Relating to Cultural Property	X	X	X	X	X	X

Heritage Convention) <http://conventions.coe.int/treaty/en/treaties/html/121.htm> accessed 14 April 2019 art 1. Frank G Fechner, "The Fundamental Aims of Cultural Property Law" (1998) 7(2) *International Journal of Cultural Property* 376, pp 379-380, considers that paleontological finds, mineral and natural monuments are not culture.

[65] Paul Kuruk, "Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States" (2007) 34(3) *Pepperdine Law Review* 629, p 666. *See* Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) (adopted 16 June 1976, entered into force 30 June 1978) OAS Treaty Series No 47 (1976 San Salvador Convention) <http://www.oas.org/juridico/english/treaties/c-16.html> accessed 14 April 2019. As of April 2019, 13 of the 35 States were parties to this convention. 1976 San Salvador Convention (n 65) art 2.

[66] *See* 1972 World Heritage Convention (n 62) arts 4-7, 11(1)-(2), 11(4)-(5), 12, 13(1), 17, 19-20, 22-24, and 27 ("heritage"); arts 11(6) and 13(2) ("property"); and arts 11(1)-(5), 12, 13(1), 13(4)-(5), 19-20, and 28 (including property in cultural heritage). 1976 San Salvador Convention (n 65) arts 2, 7, 8(b)-(e), 9-15 and 17 (referencing objects as cultural property); art 1 (including cultural property in cultural heritage); and arts 5, 8 and 16 (equating cultural property and cultural heritage); *See* also R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 310-314.

[67] For the diptych, *see* 1970 Cultural Property Convention (n 60) preamble. In contrast to the preamble's English version, the French and Spanish versions include cultural property in heritage ("protéger le patrimoine constitué par les biens culturels" and "proteger el patrimonio constituido por los bienes culturales") (*See* also the 1995 UNIDROIT Convention (n 60) preamble, arts 1(b) and 5(2)); 1969 European Archaeological Heritage Convention (n 64) art 1(1) and 1985 European Architectural Heritage Convention (n 64) preamble and art 1. For the triptych, *see* 1972 World Heritage Convention (n 62) preamble ("Considering" 1, 3-4), arts 4 and 13(4); 2001 Underwater Cultural Heritage Convention (n 63) preamble; and1976 San Salvador Convention (n 65) preamble.

b. Culture's tangible and intangible as heritage

Adopted in the 1950s-1980s, three regional legal instruments refer to culture, heritage and cultural heritage without clearly defining them, though linking them mainly to the intangible. The Charter of the Organization of American States ("1948 OAS Charter") explicitly references cultural heritage, attaches intangible and tangible elements to it, and views "heritage" as a legacy-oriented, local-national-international triptych.[68] The European Cultural Convention and the African Charter on Human and Peoples' Rights of 1981 ("ACHPR") would do the same.[69] Notably, the latter would link African States' "historical tradition" and "African civilization", in other words it links culture to human rights, further strengthening this by linking "civil and political rights" to "economic, social and cultural rights".[70]

The beginning of the twenty first century witnessed the adoption of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage ("2003 Intangible Cultural Heritage Convention") as the first international instrument to clearly reference intangible cultural heritage.[71] Thus:

> The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the *instruments, objects, artefacts* and cultural spaces associated therewith – that *communities, groups and, in some cases, individuals* recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from *generation to generation*, is *constantly recreated by communities and groups* in response to their *environment*, their interaction with *nature* and *their history*, and provides them with a sense of identity and *continuity*, thus promoting respect for *cultural diversity* and human creativity […].[72] [emphasis added]

Despite a contradiction in terms, intangible cultural heritage may include both intangible (eg music) and tangible components associated with them (eg musical instruments).[73] Moreover, intangible cultural heritage is viewed as a local-national-international triptych made of both the collective and individuals.[74] Thus, although it clarified intangible cultural heritage, the 2003 Intangible Cultural Heritage Convention

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[68] 1948 OAS Charter (n 29) arts 2(f), 3(m), 30-31, 47-48 and 52.
[69] European Cultural Convention (adopted 19 December 1954, entered into force 5 May 1955) ETS No 018 <http://conventions.coe.int/Treaty/en/Treaties/Word/018.doc> accessed 14 April 2019 preamble, arts 2 and 4-5; and African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) Organization of African Unity, 21 ILM 58 (ACHPR). <http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf> accessed 14 April 2019. As of April 2019, 53 States were parties to this convention, see preamble.
[70] ACHPR (n 69) preamble.
[71] UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1 (2003 Intangible Cultural Heritage Convention) <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00006> accessed 14 April 2019. *See* in particular, the preamble's second "considering".
[72] 2003 Intangible Cultural Heritage Convention (n 71) art 2(1).
[73] *See* 2003 Intangible Cultural Heritage Convention (n 71) art 2(2), providing ICH as comprising, inter alia: "(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship."
[74] 2003 Intangible Cultural Heritage Convention (n 71) preamble. *See* also Scovazzi (n 14).

did not end decades of conceptual and terminological hesitation.

So why these oscillations? When in Brazil, one may visit any of the country's 1972 World Heritage List sites. But what about, eg Capoeira, the Carnival or Samba? Loulanski views heritage as "a 'cultural process', and as a 'human condition'", which is dynamic (it is shaped by "contemporary concerns and experiences"); elastic (through continuously adding values and meaning, it keeps the past from being perceived as static); and multiple (culture's heterogeneity expresses humans' aptitude to deny the world's monolithic interpretation).[75] According to UNESCO:

> Having at one time referred exclusively to the monumental remains of cultures, heritage as a concept has gradually come to include new categories such as the intangible, ethnographic or industrial heritage. A noteworthy effort was subsequently made to extend the conceptualisation and description of the intangible heritage. This is due to the fact that closer attention is now being paid to humankind, the dramatic arts, languages and traditional music, as well as to the informational, spiritual and philosophical systems upon which creations are based.
> The concept of heritage in our time accordingly is an open one, reflecting living culture every bit as much as that of the past.[76]

Thus, heritage is both tangible and intangible, whether statically anchored in the past or dynamically evolving. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Population has described cultural heritage as "all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks."[77] In this heritage-centred concept, humans are viewed within their anthropical and natural environment, whether tangible or intangible, secular or religious; one that holistically defines their identity, through a local-national-international triptych.

4. Conclusion: a legal concept defined by anthropical and natural components

As Blake notes, there exists no universally accepted definition of culture, cultural property and cultural heritage.[78] Having established the variety of linguistic, anthropological and legal scholarly views, this section explored these concepts' contours so as to delimit the scope of "culture" and propose a working concept for adjudicating attacks that target culture.

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[75] Tolina Loulanski, "Revising the Concept for Cultural Heritage: The Argument for a Functional Approach" (2006) 13(2) *International Journal of Cultural Property* 207, pp 210-211 and 227.
[76] UNESCO, "Cultural Heritage" <http://webarchive.unesco.org/20161022002430/http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 April 2019.
[77] UN Sub-Commission on the Promotion and Protection of Human Rights, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations" (1993) E/CN 4/Sub 2/1993/28, pp 11-13 *in* Michael F Brown, "Can Culture Be Copyrighted?" (1998) 39(2) *Current Anthropology* 193, p 197.
[78] Blake, "On Defining the Cultural Heritage" (n 14) pp 62-63.

Prott and PJ O'Keefe opt for "heritage", since "property" implies private ownership and commoditisation, whereas an object becomes more significant when presented with reference to its context.[79] Cultural property connotes the idea of isolation, whereas cultural heritage connotes contextualisation. As Blake notes, heritage acts "as a qualifier which allows us to narrow [culture] down to a more manageable set of elements".[80] Nonetheless, as noted by UNESCO, "the concept of heritage – much like that of culture" has undergone "a profound change".[81] Given that culture encompasses literature and the arts, ways of life, value systems, traditions and beliefs, as well as humans' interaction with their natural environment[82] and indeed anything characterising a society, both "property" and "heritage" help limiting culture to a workable concept. Legally, cultural property provides a practical scope although, as noted by Frigo, even the cultural property-centred instruments have linked cultural property to the broader cultural heritage.[83] Notably, a growing trend, within UNESCO and legal scholars, such as R O'Keefe and Lixinski, has been substituting tangible cultural heritage-intangible cultural heritage for cultural property-cultural heritage.[84] In contrast, anthropology scholars, such as Di Giovine and Cowie have noted cultural heritage's loaded connotation, which originates in the nineteenth century's age of industrial revolution (and fears of socio-cultural deformation by modernisation) and imperialism (that needed to order an expanding world into enlarging national boundaries).[85] The authors also note that heritage's ownership-through-descent approach forms exclusionary group identities, empowering cultural heritage to determine who is allowed a voice in heritage debates.[86] Likewise, Blake cautions against cultural heritage's use as a "double-edged sword" that supports hostile identity claims.[87]

To propose tools that facilitate the adjudication of attacks targeting culture, this section has sought not to define culture but to delimit its scope within the existing international

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[79] Prott and PJ O'Keefe (n 14) pp 310-311. *See* also Lyndel V Prott, "International Standards for Cultural Heritage" *UNESCO World Culture Report* (UNESCO Publishing 1998), pp 222-236, *in* Blake, "On Defining the Cultural Heritage" (n 14) p 66. *See* also John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (first published 1689, Yale University Press 2003); and Adam Smith, *The Wealth of Nations* (first published 1776, Penguin Classics 1982).

[80] Blake, "On Defining the Cultural Heritage" (n 14) p 68.

[81] UNESCO, "Cultural Heritage" (n 76).

[82] UNESCO, "Cultural Diversity" <http://webarchive.unesco.org/20151231042342/http://portal.unesco.org/culture/en/ev.php-URL_ID=34321&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 14 April 2019.

[83] Frigo (n 14) p 369. *See* also Gabriella Venturini, "International Law and Intentional Destruction of Cultural Heritage" (2017) *Sapere l'Europa, sapere d'Europa 4,* pp 103-104.

[84] *See* Lixinski (n 14) pp 5-10 and 18-22; R O'Keefe "Cultural Heritage and International Humanitarian Law" (n 14), pp 1-2; Woodhead (n 14) pp 1-2; Christiane Johannot-Gradis, "Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?" (2015) 97(900) *International review of the Red Cross*, p 1255; Romulus Brâncoveanu, "When Does 'Tangible' Meet 'Intangible'"? Some Reflections About the Relation between the Tangible and Intangible Cultural Heritage" (2018) 21 *Hermeneia: Journal of Hermeneutics, Art Theory & Criticism*, pp 7-18.

[85]cultural heritage appeared as "patrimoine" (France, 1830s) and "heritage" (UK 1882 Ancient Monuments Act). *See* Michael A Di Giovine and Sarah Cowie, "The Definitional Problem of Patrimony and the Futures of Cultural Heritage" (2014) *Anthropology News*, p 1. On French-Spanish translation challenges regarding "tangible" and "intangible", *see* Blake, *International Cultural Heritage Law* (n 14) pp 10-11.

[86] *See* Di Giovine and Cowie (n 85) p 2.

[87] *See* Blake, "On Defining the Cultural Heritage" (n 14) p 84.

legal framework. This analysis has revealed a great deal of terminological variety, which include cultural property, cultural heritage, tangible cultural heritage and intangible cultural heritage, with cultural property/tangible cultural heritage being included in cultural heritage/intangible cultural heritage. Adjudicators need definitional certainty so as to assess the intention behind breaches of international law, as well as their means and consequences. Rather than choosing between the aforementioned terms, this study will use them, as applicable. For all purposes, this study will consider culture as a polymorph, whether anthropical or natural, secular or religious, movable or immovable, tangible or intangible, in isolation or in combination.

C. Placing culture in judicial proceedings

The previous section reduced culture to law. The present section will place it in judicial proceedings. To do so, focus will first be placed on the adjudicatory mechanisms attached to the modes of international responsibility that this thesis will consider (1). Thereafter, culture's locus standi before each of the adjudicatory mechanisms will be envisaged (2).

1. Modes of international responsibility's adjudicatory mechanisms

To place culture in judicial proceedings, it is first important to set out this study's delineation of the contours of State responsibility (a) and ICR (b) applicable to the intentional attacking of culture. Before that, it is noteworthy to propose the threshold of violence. Attacks targeting culture may occur during armed conflicts, times of trouble and peacetime. While the latter is self-explanatory, the first two require some clarifications. As the legal phraseology used in IHL, national/international armed conflict has been authoritatively defined as:

> a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[88]

The two aspects of armed conflict that are important for such qualification are the organisation of the parties to the conflict and the intensity of the armed violence. These criteria serve to distinguish armed conflicts "from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not necessarily subject to international humanitarian law".[89] In practice however, the exact moment of the commencement of an armed conflict is challenging, in that the line which separates it from sporadic acts of violence will most frequently be tenuous and relative.[90] Hence directing attacks against culture may also – and in particular – occur in "times of trouble" which, legally, fall short of armed conflict. These times of trouble are not hermetic, as they are not meant to constitute a third category in addition to peacetime

[88] *Prosecutor v Tadić*, (ICTY) Appeal Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) Case No IT-94-1, para 70.
[89] *Prosecutor v Tadić*, (ICTY) Opinion and Judgment (7 May 1997) Case No IT-94-1-T, para 562.
[90] *Tadić* Jurisdiction Decision (n 88) para 70.

and wartime. They thus embrace scenarios ranging from those considered by HRCts (Part I, Chapter 2) as well as cases of genocide and "attack" under CaH (Part II, Chapters 2-3) none of which require an armed conflict, whether or not international.[91]

a. State responsibility

By focusing on State responsibility-based jurisdictions, Part I will show that both ISCMs and HRCts have addressed attacks that target culture. The ISCMs examined encompass relevant multilateral and bilateral legal instruments and mechanisms other than the HRCts and the ICCPR article 28 Human Rights Committee ("UNHRC"). The multilateral mechanisms include the United Nations' ("UN") both judicial and non-judicial universal bodies. The former comprises the Permanent Court of International Justice ("PCIJ"), the International Court of Justice ("ICJ") and the International Tribunal on the Law of the Sea ("ITLOS"). Non-judicial universal bodies include the United Nations Security Council's ("UNSC") subsidiary bodies, such as the United Nations Compensation Commission ("UNCC").[92] The universal mechanisms also include the United Nations General Assembly's ("UNGA") subsidiary bodies, such as the International law Commission ("ILC"), with particular reference to Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA").[93] The bilateral mechanisms include arbitral awards mechanisms that were set-up after armed conflicts, such as the post-First and Second World Wars commissions; the Eritrea-Ethiopia Claims Commission ("EECC");[94] or after major international crises, such as the Iran-United States Claims Tribunal ("IUSCT").[95]

The HRCts will include the European Court of Human Rights ("ECtHR") and the IACtHR.[96] Given its still embryonic case law, reference to the African Court on Human

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[91] Abtahi, "Does International Criminal Law Protect Culture in Times of Trouble?"(n 5) p 195.

[92] Created in 1991 to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait. *See* UNSC, "Security Council Resolution 687 (1991)" (8 April 1991) UN Doc S/RES/687, para 18; UNSC, "Security Council Resolution 692 (1991)" (20 May 1991) UN Doc S/RES/692.

[93] ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (November 2001) UN Doc A/56/10 (ARSIWA), art 31(2) <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/9_6_2001.pdf&lang=EF> accessed 14 April 2019. *See* also International Law Association, "Draft Declaration Conference Report" (2010) (ILA Draft Declaration) <http://www.ila-hq.org/en/committees/index.cfm/cid/1018> accessed 14 April 2019.

[94] The Eritrea-Ethiopia Claims Commission was established pursuant to Agreement Signed in Algiers on 12 December 2000 Between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eritrea-Ethiopia) (12 December 2000) <https://pcacases.com/web/view/71> accessed 14 April 2019.

[95] "General Declaration of the Government of the Democratic and Popular Republic of Algeria" (19 January 1981) <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf> accessed 14 April 2019.

[96] European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; ETS No 5 (ECHR) <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 14 April 2019; First Protocol to the European Convention on Human Rights of 1950 for the Enforcement of certain Rights and Freedoms not included in Section 1 of the Convention 1952 (adopted 20 March 1952, entered into force 18 May, 1954) (ECHR P1-1) <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 14 April 2019.; European Court of Human Rights, Rules of the Court, (entered into force 1

and Peoples' Rights ("ACtHPR") will only be made occasionally.[97] Given the focus of this study on cases involving violence, whether during armed conflict or times of trouble, reference will be made to the UNHRC (which is not a court and primarily addresses peacetime cases) only when it helps clarify the work of HRCts.

Part I, Chapter 1 will show how Westphalian ISCMs laid the foundations for the protection of culture as early as the beginning of the twentieth century. As for HRCts, Chapter 2 will show that, depending on their legal framework, they have addressed both natural and legal persons in the context of deliberately attacking culture. By adhering to the principle of dynamic interpretation, HRCts have recognised as victims of attacks that target culture not only natural persons as members of the collective, but also the collective as the sum of natural persons. The same dynamic interpretation has enabled to recognise that legal persons may sustain non-pecuniary damage.

b. Individual criminal responsibility

Finally, Part II will consider the adjudication, by ICR-based jurisdictions, attacks targeting culture. This is of utmost importance as the post-Cold War 1990s witnessed a telluric change, with the creation of international and hybrid criminal jurisdictions. The former consisted of jurisdictions established pursuant to Chapter VII of the UN Charter directly (like the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR")),[98] and indirectly (the East Timor Special Panel for Serious Crimes ("SPSC");[99] and the International

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January 2020) (ECtHR Rules) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 14 April 2020; ECtHR, "Practice Direction: Just Satisfaction Claims" (28 March 2007) (2007 ECtHR Practice Direction) <http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf> accessed 14 April 2019; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36; 1144 UNTS 123 (ACHR) <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> accessed 14 April 2020; and Rules of Procedure of the Inter-American Court of Human Rights (adopted 16-25 November 2000) (IACtHR Rules) <http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf> accessed 14 April 2019.

[97] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 8 June 1998, entered into force 25 January 2004) (ACtHPR) <https://www.african-court.org/en/> accessed 14 April 2020; African Commission on Human and Peoples' Rights, Rules of Procedure (adopted 2-13 February 1988, entered into force 12-26 May, 2010) (ACmHPR Rules) <http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf> accessed 14 April 2019; and African Court on Human and People's Rights, Rules of Court (amended 2 June 2010) (ACtHPR Rules) <http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf> accessed 14 April 2019.

[98] ICTY Statute (n 52); ICTY, Rules of Procedure and Evidence (8 December 2010) IT/32/Rev 45 (ICTY Rules) <http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf> accessed 14 April 2019; UNSC, "Security Council Resolution 955 (1994) on the Establishment of the International Criminal Tribunal for Rwanda" (8 November 1994) UN Doc S/RES/955 (1994) (ICTR Statute) <http://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf> accessed 14 April 2019; and ICTR, Rules of Procedure and Evidence (13 May 2015) (ICTR Rules) <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf> accessed 14 April 2019

[99] United Nations Transitional Administration in East Timor (UNTAET), "On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences" (6 June 2000) Regulation No

Criminal Court ("ICC")).[100] As for hybrid criminal jurisdictions, their creation required agreements between national governments and the UN. These consist of jurisdictions such as the Special Court for Sierra Leone ("SCSL"),[101] the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea ("ECCC" and "ECCC Law"),[102] and the Special Tribunal for Lebanon ("STL").[103]

By assessing their practice regarding ICL's tripartite crimes, common to the statutes of most of them, and referred to by the Rome Statute of the International Criminal Court ("ICC Statute"), as "the most serious crimes of concern to the international community as a whole", ie war crimes (Chapter 1), CaH (Chapter 2) and genocide (Chapter 3),[104] this thesis will show how despite their varying statutory definitions, these jurisdictions have considered attacks targeting culture's both tangible and intangible components.

2. Culture's locus standi before international adjudicatory bodies

Having identified the State responsibility and ICR-based adjudicatory mechanisms that this thesis will review, the following will show that culture's standing before them can be both anthropo-centred (a) and tangible-centred (b).

2000/15 <https://www.legal-tools.org/doc/c082f8/pdf/> accessed 14 April 2019. *See* UNSC, "Security Council Resolution 1272 (1999) on the Situation in East Timor" (25 October 1999), UN Doc S/RES/1272. *See also* United Nations Transitional Administration in East Timor (UNTAET), "On the Authority of the Transitional Administration in East Timor" (27 November 1999) Regulation No 1999/1, which recalls that in establishing UNTAET, resolution 1272 (1999) endowed it with the overall legislative and executive authority, including the administration of justice.

[100] ICC Statute (n 54).

[101] Pursuant to UNSC, "Security Council Resolution 1315 (2000) on the Establishment of a Special Court for Sierra Leone" (14 August 2000) UN Doc S/RES/1315, the Special Court for Sierra Leone (SCSL) was established on 16 January 2002 by an agreement between the UN and the Sierra Leone, to which the Statute of the Special Court for Sierra Leone was annexed. *See* Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, UN Doc S/2002/246 (SCSL Statute) <https://treaties.un.org/pages/showDetails.aspx?objid=08000002800860ff> accessed 14 April 2019; and SCSL, Rules of Procedure and Evidence (13 May 2012) (SCSL Rules) <http://www.rscsl.org/Documents/RPE.pdf> accessed 14 April 2019.

[102] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) Cambodia, (amended 27 October 2004) NS/RKM/1004/006 (ECCC Law) <http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf> accessed 14 April 2019; and Internal Rules (ECCC Rules) <http://www.eccc.gov.kh/en/document/legal/internal-rules> accessed 14 April 2019.

[103] Following the killing of Prime Minister Hariri and others, and pursuant to Lebanon's request, the "Security Council Resolution 1664 (2006) on the Situation in the Middle East" (29 March 2006) UN Doc S/RES/1664, enabled the UN and Lebanon to conclude an agreement on the establishment of the STL. *See* UNSC, "Security Council Resolution 1757(2007) on the Establishment of a Special Tribunal for Lebanon" (30 May 2007) UN Doc S/RES/1757, and annexes comprising the agreement and the Statute of the Special Tribunal (STL Statute) <https://www.stl-tsl.org/en/documents/statute-of-the-tribunal/223-statute-of-the-special-tribunal-for-lebanon> accessed 14 April 2019; and Special Tribunal for Lebanon, Rules of Procedure and Evidence (3 April 2014) (STL Rules) <https://www.stl-tsl.org/images/RPE/20140403_STL-BD-2009-01-Rev-6-Corr-1_EN.pdf> accessed 14 April 2019.

[104] The crime of aggression (ICC Statute (n 54) art 8*bis*) will be omitted, since it is not in the statutes of other supranational criminal courts, and lacks precedent (excluding post-Second World War trials).

a. The anthropo-centred approach: natural persons as victims of attacks targeting culture

In the anthropo-centred approach, natural persons can appear as injured party/victims and claim that attacks directed against culture's tangible, whether anthropical or natural, and intangible (eg human rights curtailment) adversely impacted their heritage.

Under State responsibility, natural persons may varyingly seize HRCts as victims/claimants and seek reparations individually or, for this study's purpose, as members of the collective or as the collective as their sum.[105]

After its early esquisses during the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"),[106] the question of victims in judicial proceedings resurfaced with the adoption of three major non-binding instruments. Specifically, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ("1985 Victims Basic Principles"); and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("2005 Victims Basic Principles") (together "1985 and 2005 Victims Basic Principles") would shape ICR's understanding of victims.[107] All ICR-

[105] ECHR P1-1 (n 96): "[e]very natural or legal person" may enjoy their possessions".
[106] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277(Genocide Convention).
[107] UNGA, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" (29 November 1985) UN Doc A/RES/40/34 (1985 Victims Basic Principles) <http://www.un.org/documents/ga/res/40/a40r034.htm> accessed 14 April 2019. Adopted by consensus; and UNGA, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (21 March 2006) UN Doc A/RES/60/147 (2005 Victims Basic Principles) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> accessed 14 April 2019. The latter updated the Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law ("1996 Victims Basic Principles"); ECOSOC, "Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr. Theo van Boven Pursuant to Sub-Commission Decision 1995/117" (25 May 1996) E/CN 4/Sub 2/1996/17 (1996 Victims Basic Principles) <http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/Sub.2/1996/17> accessed 14 April 2019. The 1985 Victims Basic Principles considers victims as "persons who, individually or *collectively*, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. *See* 1985 Victims Basic Principles (n 107) paras 1-2, as reflected in 2005 Victims Basic Principles (n 107) para 8. Contra including "emotional suffering other than mental injury", "every form of economic loss", and "substantial impairment of fundamental rights", *see* ILA Draft Declaration (n 93) p 9. Both texts' contextual reading shows that they exclude legal persons. *See* 1985 Victims Basic Principles (n 107) paras 2 and 2005 Victims Basic Principles (n 107) para 8. For participation-reparations rights, *See* 1985 Victims Basic Principles (n 107) paras 4-6, 8-13; and 2005 Victims Basic Principles (n 107) paras 2(b)-(c), 3(c)-(d), 11-23. Under the 1985 and 2005 Victims Basic Principles combined, reparations comprise restitution, both material (eg return of CP) and juridical (eg restoration of rights), compensation, rehabilitation, satisfaction and guaranties of non-repetition. The 1985 Victims Basic Principles foresees establishing national compensation funds, as well as "financial compensation" to victims "who have sustained significant bodily injury or impairment of physical or mental health". *See* 2005 Victims Basic Principles (n 107) paras 12-13.

based jurisdictions allow, in varying degrees, for a heritage-centred approach with respect to attacks targeting culture. They recognise that, whether individually or collectively, victims may, as natural persons, claim harm resulting from heritage damage. In contrast to the ICTY-ICTR-SCSL scheme's absence of participation and very limited reparations,[108] the ICC scheme, as followed by the SPSC-ECCC, has been most comprehensive, since it provides victims with detailed participation-reparations rights.[109] Article 68(3) of the ICC Statute provides that victims can participate at all stages of the proceedings.[110] Under article 75 ("Reparations to victims") and corresponding ICC Rules, Chambers may order individual and/or collective reparations, including through the TFV, in the form of, inter alia, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[111] As will be seen, the mass atrocity nature of ICC crimes, which renders collective awards relevant, enables a heritage-centred approach to reparations, akin to the IACTHR (Part I, Chapter 2). The TFV mandate has been extended into an assistance mandate applicable to existing situations, regardless of a conviction ruling.[112] Beyond categories of victims (eg sexual violence), assistance projects have included psychological rehabilitation, agricultural assistance, "healing of memories" sessions, orphans'

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[108] *See* ICTY Rules (n 98); ICTR Rules (n 98), common rule 2(A), SCSL Rules (n 101) rules 2, 6(a) and 70(b)-(d); and STL Rules (n 103) rule 2(A). *See* Claude Jorda and Jérôme de Hemptinne, "The status and role of the victim" *in* Antonio Cassese, Paola Gaeta and John RWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol 2, Oxford University Press 2002). On reparations, *See* ICTY Statute (n 52) art 24(3) and ICTR Statute (n 55) art 23(3), UNSC, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)" (3 May 1993) UN Doc S/25704 <http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf> accessed 14 April 2019 and ICTR Statute. The SCSL Statute (n 101) art 19(3) ("Penalties") reflects partly ICTY Statute (n 52) art 24(3) and ICTR Statute (n 55) art 23(3). SCSL Rules (n 101) rule 105 imports ICTY Rules and ICTR Rules (n 98) common rule 106. STL Statute (n 103) art 25 ("Compensation to victims") broadly replicates ICTY and ICTR Rules (n 98) common rule 106. STL Statute (n 103) art 17 imports quasi-verbatim ICC Statute (n 54) art 68(3); *See* also STL Rules (n 103) rules 2(a), 50-51, and 86-87.

[109] From the ILC's 1994 Draft Statute for an International Criminal Court with Commentaries to the Preparatory Committee for the Establishment of an International Criminal Court ("PrepCom") and up to the adoption of the ICC Statute on 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, Rome 15 June-17 July" <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v1_e.pdf> accessed on 14 April 2019, the question of victims evolved from protection into participation-reparations. *See* ILC, "Draft Statute for an International Criminal Court with Commentaries" (22 July 1994), (1994) 2(2) *Yearbook of the ILC* (1994 ILC Draft ICC Statute), arts 26 (2), 27 (5) (d), 38(2), 43, 47(3)(c); and UNGA "Establishment of an International Criminal Court" (11 December 1995) UN Doc A/RES/50/46. M Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32(3) *Cornell International Law Journal,* p 8; John Washburn, "The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century", (1999) 11(2) *Pace International Law Review* 362.

[110] See ICC Statute (n 54) art 68(3). *See* also *Prosecutor v Lubanga*, (ICC) Decision on Victim's Participation (18 January 2008) No ICC-01/04-01/06, paras 96-98.

[111] *See* ICC Statute (n 54) art 75 and rules 94-99 of the Rules of Procedure and Evidence of the International Criminal Court (adopted 9 September 2002) ICC-ASP/1/3 at 10, UN Doc PCNICC/2000/1/Add.1 (2000) (ICC Rules). For the TFV, *see* ICC Statute (n 54) art 79; William A Schabas, "Article 75 Reparation to Victims" *The International Criminal Court, A Commentary on the Rome Statute* (Oxford 2010), p 879; and David Donat-Cattin, "Article 75 Reparations to Victims" *in* Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2nd edn CH Beck-Hart-Nomos 2008), pp 1400 and 1406.

[112] *See* Regulations of the Trust Fund for Victims Regulation 50(a) (adopted 3 December 2005) ICC-ASP/4/Res3 <https://www.icc-cpi.int/NR/rdonlyres/0CE5967F-EADC-44C9-8CCA-7A7E9AC89C30/140126/ICCASP432Res3_English.pdf> accessed 14 April 2019.

scholarships, livelihood activities, or else vocational training.[113] These collective projects are capable of adopting a heritage-centred approach with respect to attacks targeting culture, wherein the individuals making up the collective and/or the collective as their sum may claim reparations as a result of damage to culture's tangible and/or intangible, as done by the IACtHR (Part I, Chapter 2).[114]

As for the definition of victims, it eventually materialised in the ICC Rules rule 85.[115] Addressing natural persons, paragraph (a) provides that "'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court".[116] The *Lubanga* Appeals Chamber has since clarified that victims can suffer both material and moral harm, which "can attach to both direct and indirect victims".[117] As will be seen, the IACtHR practice allows for a heritage-centred approach toward attacks targeting culture, where natural persons could claim material and moral harm as a result of attacks against their tangible (cultural objects) and intangible (cultural rights) (Part I, Chapter 2).[118]

b. The tangible-centred approach: legal persons' locus standi as victims of attacks targeting cultural property

As this study has partly shown and will comprehensively show, international legislators and adjudicators have recognised legal persons' right to participate in judicial proceedings and to claim material and moral reparations for damages inflicted on their property. When the latter is culture's tangible, then the approach becomes tangible - centred in terms of both the subject (eg a museum) and object (looting of its items) of attacks targeting culture. In law, the legal person will act *for* the cultural tangible that it owns/administer (objects of art contained in a museum). When the legal person is

[113] *See* Trust Fund for Victims, "Assistance & Reparations: Achievements, Lessons Learned, and Transitioning" TFV Progress Report (2015), pp 11-12 and 18-19. <https://www.legal-tools.org/uploads/tx_ltpdb/FinalTFVPPR2015_02.pdf> accessed 14 April 2019.
[114] The SPSC followed the ICC participation-reparations scheme; *See* Regulation No 2001/25 (n 54) (participation) and Regulation 2001/25 Section 50(2) ("Claim for Compensation by the Alleged Victim") and Regulation No 2000/15 (n 99) Section 25. So did the ECCC for participation. On reparations, the ECCC Rules (n 102), rules 23 bis and *quinquies* and 100 follows the ICTY and ICTR Statutes art 24(3) and 23(3). By focusing on "real property" (immovable property and anything affixed to it), restitution may encompasses looted movable and immovable cultural property.
[115] *See* Silvia A Fernández de Gurmendi, "Definition of Victims and General Principle" *in* Roy SK Lee and Hakan Friman (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Translational Publishers 2001), p 430. *See also* Fiona McKay, "Paris Seminar on Victims' Access to the ICC" (1999) 12 *The International Criminal Court Monitor* 5.
[116] ICC Rules (n 111) rule 85, originally presented in UNPCNICC, "Report of the Preparatory Commission for the International Criminal Court, Addendum" (12 July 2000) PCNICC/2000/INF/3/Add.1, p 45.
[117] The Chamber noted that child soldiers' recruitment may result in suffering of the child and their parents. *See Prosecutor v Lubanga,* (ICC) Judgment (11 July 2008) No ICC-01/04-01/06 OA9OA10, para 32. SPSC, Regulation 2001/25 (n 54) Section 1(x) imports the 1985 and 2005 Victims Basic Principles (adding "an organization or institution directly affected by a criminal act"). Under ECCC Rules (n 102) Glossary, a victims is "a natural person or legal entity that has suffered harm".
[118] However, *See* 2007 ECtHR Practice Direction (n 96) para 7, excluding a "tenuous connection" between the violation and the damage; and ILA Draft Declaration (n 93) pp 10-11 excluding "harm that is too remote (such as eg the harm suffered by unrelated persons far removed from the conflict who are merely emotionally affected by the news on the conflict)".

cultural property (institution dedicated to religion, arts and sciences), it will act *as* cultural property, by claiming damage to either itself, its components or both.

State responsibility's ISCMs and HRCts provide legal persons with standing before adjudicatory bodies. Under the former, States make claims against States. Legal persons – and not natural persons – have standing in adjudicatory proceedings. As will be seen (Part I, Chapter 1), a State can sustain injury directly (through its territory/government) and indirectly, through its nationals (whether natural or legal persons). This study will show how this State-centred approach has addressed damage to culture's anthropical and natural tangible. Moving to HRCts, legal persons have standing before the ECtHR, which has awarded them material and moral damage (Part I, Chapter 2).[119]

As explained, left out of the ICC Statute, the question of the definition of victims was placed on PrepCom's agenda for the preparation of the ICC Rules.[120] From then on, the 1985 Victims Basic Principles constituted the backbone of various draft definitions.[121]

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[119] *See* ECHR P1-1 (n 96), providing that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions" and ECtHR Rules (n 96) Practice Directions, Institution of Proceedings, para 8, which considers legal persons as companies, NGOs or associations. *See* also Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006). While ACHR (n 96) art 1(2) references "every human being", art 44 permits "[a]ny person or group of persons, or any nongovernmental entity" to petition before the Inter-American Commission on Human Rights, although the latter has distinguished between victims and petitioners (legal persons' petitions apply only on behalf of natural persons and not for injury caused solely to it). *See Mevopal, S.A. and Argentina*, Petition, Inter-American Commission on Human Rights Report (11 March 1999) Report No 39/99, paras 13 and 18. For a general discussion, *see* Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013) pp 135-136. Finally, under the ACHPR (n 69) art 5(1), the African Commission on Human and Peoples' Rights ("ACmHPR"), States Parties, and African IGOs may submit cases to the ACtHPR. States Parties can submit cases if the complaint was initiated by them to the ACmHPR; was lodged against them; or if their nationals are victims of a violation. Under arts 5(3) and 34(6), individuals and NGOs can lodge claims, if the State Party has accepted the Court's competence to this effect. *See* also ACmHPR Rules (n 97) rule 94. By 2017, legal persons had accessed the ACtHPR in *The Matter of Actions pour la protection des droits de l'hommme v The Republic of Côte d'Ivoire,* (ACtHPR) Judgment (18 November 2016) App No 001/2014; *Tanganyika Law Society & Legal and Human Rights Centre & Reverend Christopher R. Mtikila v United Republic of Tanzania,* (ACtHPR) Judgment (14 June 2013) App Nos 009/011/2011, paras 1 and 3, paras 67, 75, 126(1)-(3).

[120] Fernández de Gurmendi (n 115) pp 428-429, referencing ECOSOC, E/1996/14, para 6.

[121] Fernández de Gurmendi (n 115) p 432. The first definition was proposed at a Paris Seminar ("1999 Paris Victims Definition"), providing that ""Victims", where appropriate, may also be organizations or institutions which have been directly harmed." *See* UNPCNICC, "Rule X (article 15) Definition of victim" (1999) PCNICC/1999/WGRPE/INF/2 (1999 Paris Victims Definition), para 3. At PrepCom's Mont Tremblant March session, a definition combining the 1985 Victims Basic Principles and the 1999 Paris Victims Definition paragraph 3 was proposed. This would be reflected as UNPCNICC, "Rule Q (Definition of victims)" PCNICC/2000/WGRPE/INF/1, p 74. *See* Fernández de Gurmendi (n 115) p 432. Redress and FIDH combined the 1985 Victims Basic Principles and the 1999 Paris Victims Definition (which also considered legal persons directly harmed). *See* REDRESS, "Seeking Reparation for Torture Survivors: Rules of Procedure and Evidence for the International Criminal Court, Recommendations to the Preparatory Commission Regarding Reparation and Other Issues Relating to Victims" (2000); and FIDH, "The New Letter of the FIDH", *Commentary and Recommendations for the Adoption of the Rules of Procedure and Evidence and the Elements of Crimes,* Preparatory Commission for the International Criminal Court (12-30 June 2000) No 294/2, p 7. The Women's Caucus for Gender Justice preferred to base the definition "on evolving international law" by including the 1985 Victims Basic Principles and "victims who have suffered environmental and cultural damage and incorporate a broader concept of family relations", reflecting ecofeminisim's wider anthropical and natural cultural heritage. *See* Women's Caucus for Gender Justice, "Recommendations and

As it became clear that this approach would not gather consensus,[122] some Arab States proposed a definition which, in addition to natural persons (in paragraph a), read "b) The Court may, where necessary, regard as victim legal entities which suffer direct material damage."[123] The wording "may, where necessary" illustrated the ongoing concession that was required in order to consider legal persons as victims, albeit limiting damage to a material type suffered directly by them. Notwithstanding this, the UK claimed that legal entities' inclusion could jeopardise the Court's funds, favouring powerful commercial corporations over individuals.[124] As a result of France and Hispanophone delegations' objection to the terms "legal entities" whose French and Spanish meaning was unclear, "organizations or institutions" was proposed. France, the Holy See and others submitted that very often culture's tangible was damaged during armed conflicts, as proscribed by the ICC Statute article 8(2)(b)(ix) and (e)(iv). Consequently, the draft was amended to reflect quasi-identically the ICC Statute article 8(2)(b)(ix) and (e)(iv).[125] This compromise text became ICC Rules rule 85(b):

> (b) Victims *may* include *organizations or institutions* that have sustained *direct harm to any of their property which is dedicated to religion, education, art or science* or charitable purposes, *and to their historic monuments*, hospitals and other places and objects for humanitarian purposes.[126] [emphasis added]

Despite these achievements, legal persons must have sustained harm directly while the verb "may" enables Chambers to make case-by-case determinations.[127]

Notwithstanding the difficulty of including legal persons, even qualified, in the definition of victims, it is noteworthy that while the ICC criminally charges only natural persons, the ICC Rules rule 85 recognises both natural and legal persons as victims.[128] In terms of attacks targeting culture, this definition allows for a tangible-centred approach, wherein legal persons may participate in ICC proceedings and directly claim both material damage and moral harm for cultural tangible related damages owned/administered by them, in the same vein as the ECtHR (Part I, Chapter 2).[129]

Commentary for the Elements of Crimes and Rules of Procedure and Evidence submitted to the Preparatory Commission for the International Criminal Court" (12-30 June 2000), p 3.

[122] Fernández de Gurmendi (n 115) p 432.

[123] *See* UNPCNICC "Proposal Submitted by Bahrain, Jordan, Kuwait, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia and the United Arab Emirates" (13 June 2000) Preparatory Committee for the International Criminal Court, PCNICC/2000/WGRPE(2)/DP.4. Paragraph (a) read "Victim shall mean any natural person who suffer harm as a result of any crime within the jurisdiction of the Court", amending a Japanese victim's definition proposal's "person" into "natural person". *See* Fernández de Gurmendi (n 115) p 432.

[124] Fernández de Gurmendi (n 115) p 433.

[125] Fernández de Gurmendi (n 115) p 432.

[126] ICC Rules (n 111) rule 85, originally presented in PCNICC/2000/INF/3/Add.1 (n 116) p 45.

[127] Fernández de Gurmendi (n 115) p 433.

[128] *See Prosecutor v Lubanga*, (ICC) Judgment (14 March 2012) No ICC-01/04-01/06-2842, paras 17 and 21; and *Prosecutor v Bemba,* (ICC) Judgment (21 March 2016) No ICC-01/05-01/08, para 21. On corporate responsibility, *see* Larissa van den Herik and Jernej Letnar Černic, "Regulating Corporations under International law: From Human Rights to International Criminal Law and Back Again" (2010) 8 *Journal of International Criminal Justice* pp 725-743.

[129] SPSC Regulation No 2001/25 (n 54) and ECCC Rules (n 102) would reflect ICC Rules (n 111) rule 85. *See* also Tatiana Bachvarova, "Victims' Eligibility before the International Criminal Court in Historical and Comparative Context" 2011 11(4) *International Criminal Law Review* 665, pp 684-693. *See* also more generally Tatiana Bachvarova, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill Nijhoff 2017).

c. Synthesis

As seen, both State responsibility and ICR-based jurisdictions permit considering culture in judicial proceedings, whether in a heritage-centred or tangible-centred manner, or both. Under the former, natural persons may appear as claimants/victims before State responsibility and ICR-based jurisdictions. In the case of attacks targeting culture, this will enable them to participate in HRCts (ECtHR, IACtHR, ACtHPR), and the ICC scheme-based jurisdictions (ICC, SPSC, ECCC and STL). For damage inflicted on culture's intangible and tangible components, natural persons, whether individually or as part of the collective, may also seek reparations before all HRCts, the ICC scheme-based jurisdictions (ICC, SPSC, ECCC), and more limitedly, before and/or through the ICTY-ICTR-SCSL and STL. These features are both anthropo-centred, in terms of the claimant victims, and heritage-centred, in terms of cultural damages.

Under the tangible-centred approach, legal persons may participate and seek reparations before State responsibility and ICR-based jurisdictions. In the former, beyond ISCMs' State-centred and State-driven scheme (Part I, Chapter 1), legal persons may exercise such rights only before the ECtHR as far as HRCts are concerned (Part I, Chapter 2). As regards ICR-based jurisdictions, legal persons have locus standi before the ICC scheme-based jurisdictions (ICC, SCPS, ECCC) (Part II). Depending on the legal framework, two scenarios may be envisaged, in isolation and in combination. First, culture's tangible can be movable (an amulet) or immovable (ancient ruins). Second, instead of being inanimate, culture's tangible possesses legal personality. This means that the container (the museum) owns/administers its own content (the amulet). The former may thus participate in judicial proceedings as a result of damage to either its content (eg pillage of its items) or itself (eg blowing up the museum's walls).

Chart 4: Culture as victims and/or object of harm before ICR-based jurisdictions

	Victims		Standing		TFV
	Natural persons	Legal persons	Participation	Reparations	
ICTY-ICTR scheme					
ICTY 1993	X 1994			restitution compensation (national) 1994	
ICTR 1994	X 1995			restitution compensation (national) 1995	
SCSL 2002	X 2002-2003			restitution compensation (national) 2002-2003	
ICC scheme					
	Natural persons	Legal persons	Participation	Reparations	
ICC 1998	X 2002	X 2002	X 1998	X 1998	X 1998
SPSC 2000	X 2001	X 2001	X 2001	X 2001	X 2000
ECCC 2001	X 2007	X 2007	X 2001	X 2001	
STL scheme					
	Natural persons	Legal persons	Participation	Reparations	
STL 2007	X 2009		X 2007	compensation (national) 2007	

IV. Roadmap

Having placed culture in linguistic, anthropological, legal and judicial frameworks, this study will now consider the adjudication, by State responsibility (Part I) and ICR (Part II) jurisdictions, of its deliberate targeting. In so doing, culture will be considered as comprising anthropical and natural components, movable and immovable, secular and religious and, importantly, tangible and intangible. This thesis will not always be concerned with international law's formalities for an item to be considered cultural property or cultural heritage, except where relevant. In the latter case, specifically for war crimes (Part II, Chapter 1), this thesis will examine treaty law, which considers cultural heritage and cultural property only if formal requirements, such as signature, ratification, accession and marking of objects have been satisfied. However, this study will also adopt a more flexible approach by considering manifestations of culture's tangible and intangible components, without their being called cultural heritage and cultural property in terms of treaty law formalism. It should be recalled that, for example, the 1972 World Heritage Convention article 12 provides that the non-inclusion of "a property belonging to the cultural or natural heritage" in the 1972 World Heritage List or in the 1972 World Heritage in Danger List does not mean that it does not have an outstanding universal value.[130] This provision helps understand this study's use of the terms cultural heritage/cultural property regardless of treaty law's formalism. Furthermore, eluding this formalism is also logical when considering culture as a diptych devoid of an international dimension, yet precious locally and/or nationally. Notably, HRCts have shown that mass cultural violations will not need conventional law's seal of approval for culture's tangible and intangible components to be considered as cultural property or cultural heritage (Part I, Chapter 2). The same applies to international crimes, such as genocide and CaH (Part II, Chapters 2-3). This should contribute to striking the balance between the two trends that Merryman rightly identified in cultural tangible-related international legal instruments, ie "cultural internationalism" (which he saw in the 1954 Hague Convention) and "cultural nationalism" (which he identified in the 1970 Cultural Property Convention).[131]

This thesis will show how, in most cases of generalised use of violence, attacks targeting culture constitute "the elephant in the room". This thesis will propose, for the first time, a formal and comprehensive categorisation of the causes, means and consequences, of attacking culture and their corresponding modes of responsibility. Due to its vast scope, this thesis will carry a twofold restriction. First, it will limit itself to the analysis of the judicial interpretation and application of one primary source of international law, ie treaty law, as contemplated in the ICJ Statute article 38(1). Accordingly, reference to customary international law, national judicial practice, non-binding international instruments and diplomatic practice will be made only when they clarify the understanding of international legal instruments, and international adjudicatory practice. Second, this thesis will compare and contrast the most representative cases of attacks targeting culture, only when they have gone through a full judicial resolution phase.[132]

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[130] 1972 World Heritage Convention (n 62) art 12.

[131] Merryman (n 14) pp 845-846

[132] A fortiori, this thesis will not hypothesise cases that have not been internationally adjudicated, such as the destruction of Bamiyan Buddhas or Palmyra. Additionally, this study will analyse those crimes-

This thesis will demonstrate that, while seemingly unrelated, State responsibility and ICR-based jurisdictions share more common denominators than expected, *if* one transcends international law's traditional view (or lack thereof) surrounding the concept of culture and considers that culture, as a legacy-oriented triptych (or diptych, as applicable), should be viewed as being made of tangible and intangible components, regardless of terminological challenges. Accordingly, it will be shown that both modes of responsibility should consider attacks targeting culture from heritage-centred and tangible-centred viewpoints, separately or, as will often be the case, in combination. The former will view cultural damage through the lens of natural persons. This will be anthropo-centred in that natural persons, whether as the sum of individuals making up the collective or the collective as their sum will be the claimant of cultural damage. The tangible-centred approach will be twofold. First, and classically, damage to culture's tangible as inanimate (eg objects of art) will be considered. Second, and most interestingly, cultural damage will be considered from the lens of legal persons who, although endowed with limited judicial standing compared to natural persons, will be able to claim damage and reparations as a result of damage not only to inanimate tangibles that they own/administer (eg works of art), but also to themselves, when they are cultural tangible as such (eg a museum).

In sum, this thesis will propose a set of tools to enable international legislators, adjudicators and scholars to better process the adjudication of the causes, means and consequences of attacks targeting culture.

related provisions of IHL and ICL instruments that are likely to assist in dispelling any common misperceptions that adjudicators and academics may have developed over the years.

PART I: STATE RESPONSIBILITY

INTRODUCTION: ATTACKS TARGETING CULTURE – A WESTPHALIAN FORESIGHT?

In the context of State responsibility for wrongful acts, significant focus has been placed on the legal consequences of a State breaching an international obligation. Studies have generally addressed more the forms of reparations than the typology of injuries sustained by the injured parties.[133] This Part presents a typology of injured parties and of injuries under State responsibility mechanisms, in order to propose a framework for addressing attacks targeting culture.

Chapter 1 will examine the practice of ISCMs. As will be seen, the typologies of victims and damages will often overlap, as one violation can have several intersecting classifications. At first glance, the relationship between ISCMs and attacks targeting culture may appear remote. However, by constantly rethinking its own foundations over decades, ISCMS progressively paved the way for the materialisation of less State-centred mechanisms from the mid-twentieth century onward, in particular through the future HRCts and ICR-based jurisdictions. Accordingly, analysing this Westphalian concept par excellence – where States are the injured parties – helps to understand not only the other type of State responsibility mechanism – HRCts, where nationals are the injured parties – (Chapter 2) but also ICR-based jurisdictions (Part II). ISCMs provide a crucial methodological backdrop that assists in addressing attacks targeting culture. As will be seen, ISCMs pioneered the recognition that not only natural persons, but also legal persons, can sustain material and moral injury.

Chapter 2 will focus on HRCts. Departing from the ISCMs paradigm, the HRCts have gone one step further in adopting a heritage-centred approach, whereby they have recognised that attacks targeting culture's tangible and intangible – whether anthropical or natural – harm natural persons as part of the collective as well as by the collective as such, ie as the sum of natural persons. The ECtHR has also adopted a tangible-centred approach by recognising that legal persons may seek reparations as a result of damage to their property. This becomes relevant when the said property comprises culture's tangible. Even more interesting is the case where cultural property is the legal person (eg an institution dedicated to religion).

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[133] *See* Francisco V García-Amador and Louis B Sohn, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana Publications 1974); Marjorie M Whiteman, *Damages in International Law*, vol 1 (US Government Printing Office 1937); ILC, "Reports of the Special Rapporteur on State Responsibility" (1988-2001) Roberto Ago, Willem Riphagen, Gaetano Arangio-Ruiz & James Crawford <https://web.archive.org/web/20181130113841/http://legal.un.org/ilc/guide/9_6.shtml> accessed 14 April 2019. For a discussion on forms of reparation, *see* Diana Contreras-Garduño and Sebastiaan Rombouts, "Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights" (2010) 27(72) *Merkourios Utrecht Journal of International and European Law* 4; Federico Lenzerini, "Suppressing and Remedying Offences against Culture" *in* Ana Filipa Vrdoljak (ed) *The Cultural Dimension of Human Rights* (Oxford University Press 2013); UN Sub-Commission on the Promotion and Protection of Human Rights, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report/submitted by Theo van Boven, Special Rapporteur"(2 July 1993) E/CN4/Sub2/1993/8.

CHAPTER 1: INTER-STATE CLAIM MECHANISMS

I. Introduction: the subject-matters of injury and terminological challenges

By analysing selected cases addressed by ISCMs, the following will categorise the types of injuries sustained by States. Key determinations will be highlighted where applicable to other mechanisms addressing attacks targeting culture. For example, where ISCMs have recognised that States may sustain indirect injury as a result of the death of their nationals, reparations were awarded to the next of kin due to future loss of earnings. These conclusions may be likened to situations where the deaths of, for example community elders, may result in future generations' cultural loss (Chapter 2.II.B.). This section will discuss State responsibility's subject-matter of injury and terminological challenges before proposing this Part's general outline.

State responsibility refers to the legal consequences of a breach of an international obligation by a State. The PCIJ in the *Chorzow Factory* case, and article 36(2)(c) and (d) common to the Statutes of the PCIJ and the ICJ, have recognised the close link between that breach, its immediate legal consequence and forms of reparations.[134] Article 31(2) of the ARSIWA would later provide that "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State". [135] In inter-State responsibility mechanisms, one can categorise the types of injuries in accordance with Statehood indicia, ie: "a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states".[136] The fourth indicia aside, one may distinguish between injury caused to the State directly (through its territory and/or government (indicia b and c)) and indirectly (through its nationals (indicia a)).[137]

Before determining the types of injury susceptible of reparations, it is important to first note that ISCMs lack standard terminology to describe "injury", using "damage", "harm" and "loss" interchangeably. This is mainly attributable to an initial lack of codified reparations principles, coupled with the diversity of bodies – judicial and non-judicial, permanent and ad hoc – that have, over decades, resulted in the ARSIWA. This study will use the term "injury", since it is a comprehensive term for any wrong done to both an individual and a legal entity. "Damage" is best suited for wrongs caused to objects and property. Second, in accordance with article 31(2) of the ARSIWA, injury

[134] *Case Concerning the Factory at Chorzów (Germany v Poland)*(PCIJ) Merits (13 September 1928) PCIJ Rep Series A No 17, p 29.
[135] According to ARSIWA (n 93) art 42, an injured State can engage State responsibility when the obligation is owed to States, individually or collectively or to the international community.
[136] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19, 49 Stat 3097 (Montevideo Convention), art 1.
[137] *See* also Whiteman (n 133) pp 80-81. *See* ILC, "Yearbook of the International Law Commission 1956 Volume II" (20 January 1956) UN Doc A/CN4/96, pp 195-197, suggesting that the breach of international obligations "may consist of a direct injury to the public property of the [claimant] state, to its public officials, or to the state's honor or dignity, or of an indirect injury to the state through an injury to its national".

can be "material or moral".[138] Here too, inter-State terminology lacks uniformity, using terms such as "material and non-material damage"; "pecuniary" and "non-pecuniary"/"moral"/"mental" injury; and "mental or moral injury". Under the ARSIWA, material injury generally refers to "damage to property or other interests of the State and its nationals which is assessable in financial terms", such as unlawful expropriations, the confiscation of property or the seizure of vessels.[139] Often difficult to assess in financial terms, moral injury includes "individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life".[140] Unless otherwise provided, this Chapter will follow the ARSIWA terminology of material and moral injury.[141]

For such injuries, the ARSIWA lists four main forms of reparations: restitution,[142] compensation,[143] satisfaction,[144] assurances and guarantees of non-repetition.[145] But matters will not always be this clear. For example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* ("*Bosnia*"), Bosnia requested compensation to cover any "financially assessable damage" resulting from damage (i) to natural persons, including non-material damage suffered by direct and indirect victims; (ii) to the property of natural and public-private legal persons; and (iii) to Bosnia for "expenditures reasonably incurred to remedy or mitigate damage flowing" from the alleged acts of genocide.[146] Instead, the ICJ opted for "all damages of any type, material or moral" and, as reparations, for satisfaction through the judgment's declaration on Serbia's failure to comply and its cooperation obligation

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[138] ARSIWA (n 93) art 31(2).

[139] ARSIWA (n 93) art 31(2).

[140] ARSIWA (n 93) art 31(2).

[141] *See* García-Amador and Sohn (n 133) pp 115-116, on the point that mental injuries are pathological and may be cured, whereas moral injuries (eg loss of reputation) are intellectual.

[142] ARSIWA (n 93) art 35 provides for the obligation of the breaching States "to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed" where restitution:

> (a) is not materially impossible;
>
> (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

[143] ARSIWA (n 93) art 36:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

[144] ARSIWA (n 93) art 37:

> 1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
>
> 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
>
> 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

[145] ARSIWA (n 93) art 30 provides for the obligation of the breaching States:

> (a) to cease that act, if it is continuing;
>
> (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

[146] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (ICJ) Judgment (26 February 2007) ICJ Rep 2007, p 43, para 66.

with the ICTY.[147] While this study's focus is not on reparations, it will reference them where they shed light on cases addressing attacks that target culture.

As held by the PCIJ in *Mavrommatis*, when the State asserts "its own rights" while taking diplomatic steps or initiating judicial action against another State, it is in reality affirming "its right to ensure, in the person of its subjects, respect for the rules of international law."[148] Therefore, any injury caused to a State's nationals or their property is also an injury to that State.[149] This Chapter will consider how States can be injured, from a cultural property-centred (I) and heritage-centred (II) viewpoint.[150] The former will be concerned with States themselves as well as their nationals, when they are legal persons. The latter will concern States' nationals, but as natural persons. At first glance, some cases may appear remotely relevant at best, insofar as attacks targeting culture are concerned. Nevertheless, examining ISCMs' methodology in terms of injured parties and types of injury is key to better understanding the subsequent practice of HRCts and ICR-based jurisdictions.

II. Legal persons: actual and prospective tangible-centred approach

The following will consider how ISCMs have recognised injury to States, both directly (A) and indirectly (B), from a tangible-centred perspective.

A. Direct injury to States

1. Introduction

Under ISCMs, the State itself – a non-natural person – is the injured party. In other words, States make claims against States. Accordingly, ISCMs grant standing not to natural persons, but to legal persons. This approach helps considering injuries sustained by legal persons, when they are and/or administer/own culture's tangible. As will be seen, ISCMs have long recognised that States can sustain material injury in the form of damage to their anthropical and natural environment (1), and moral injury, in the form

[147] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 462-463 and 465, holding that compensation was not the appropriate form of reparation for breaching an obligation to prevent genocide. *See* also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (ICJ) Judgment (3 February 2015) ICJ Rep 2015, p 3, para 51, wherein Serbia claimed reparations "to the members of the Serb national and ethnical group" rather than to the State while Croatia claimed reparations for "all damage and other loss or harm to person or property or to the economy of Croatia".

[148] *The Mavrommatis Palestine Concessions (Greece v United Kingdom),* (PCIJ) Judgment (30 August 1924) Ser B No 3, para 21.

[149] *See* García-Amador and Sohn (n 133) p 93. *See* also *Dickson Car Wheel Company (US v United Mexican States)*, Mexico/US General Claims Commission, Judgment (July 1931) 4 RIAA 669, p 678, where a Mexico-US General Claims Commission held that injury to a Sate's national "signifies an offense against the State to which the individual is united by the bond of nationality."

[150] These will partly import Abtahi, "Types of Injury in Inter-State Reparation Claims: Direct Injury to the State" (n 9) and Abtahi, "Types of Injury in Inter-State Reparation Claims" (n 8).

of damage to State symbol and property (2). Although the latter has not concerned attacks targeting culture, a brief analysis of selected cases is useful for laying-down ISCMs' methodological foundation. This will help consider, conceptually and prospectively, direct moral injury to States in cases of attacks targeting culture. More generally, this section's case review helps exploring the practice of HRCts, the other pillar of State responsibility jurisdictions (Chapter 2), as well as the practice of ICR-based jurisdictions in relation to attacks targeting culture (Part II).

2. Material injury: anthropical and natural property

Material injury concerns both the State's territorial sovereignty and property. The former Westphalian concept par excellence aside,[151] it is the latter that concerns this study. ISCMs have long recognised that States can sustain injury through their property, which has encompass general public property,[152] culture's tangible and the natural environment. As was seen and will be seen, public property, when civilian, includes culture's tangible (general introduction, Part II, Chapter 1). Adjudications involving damage to general public property may accordingly prove useful when considering culture's tangible. For example, during the Eritrea-Ethiopia armed conflict, the EECC awarded monetary compensation to Ethiopia for damage caused to "public buildings and infrastructure", including "health institutions and educational institutions"; and to Eritrea for damage to buildings, including schools, Ministry of Agriculture facilities, hospitals and health stations.[153] Even though culture's tangible is not infrastructure, the

[151] State sovereignty violations are Westphalian classics and can concern the geographic territory. *See* eg *Legal Status of Eastern Greenland (Denmark v Norway)* (PCIJ) Judgment (5 April 1933) PCIJ Rep Series A/B No 53, pp 23 and 75; *Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v France)* (PCIJ) Judgment (7 June 1932) Rep Series A/B No 46, pp 97, 164 and 172; and *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* (ICJ) Merits Judgment (15 June 1962) ICJ Rep 1962, pp 14-15 and 36-37. They can also concern diplomatic and consular premises, wherein the ICJ has eg ordered the end of the "infringements of the inviolability of the premises, archives and diplomatic and consular staff of the United States Embassy". *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (ICJ) Judgment (24 May 1980) ICJ Rep 1980, paras 14-19 and 69.

[152] Attacks on diplomatic premises can also damage general public property. *See* eg ICJ's reparations ruling against Iran for, inter alia, the takeover of premises, property, archives and documents in the United States Embassy and consulates. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, paras 14-19, 57 and 95. This is more current in non-adjudicatory diplomatic practice. *See* eg China's reparations request for damage to its immovable and movable including its archives and Chinese flag during its embassy and consulates attacks in Indonesia; *in* Charles Rousseau, "Chronique des faits internationaux" (1966) 70 *Revue Générale de Droit International Public*, pp 1013-1115. *See* also Indonesia's compensation to the UK for damaged embassy during violence. *See* "Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia Concerning the Losses Incurred by the Government of the United Kingdom and by British Nationals as a result of the Disturbances in Indonesia in September 1963" (1 December 1966) Treaty Series No 34, p 81. In another case, most of the compensation paid by the Bahamas to Cuba after sinking its patrol boat concerned the vessel's loss. *See* "Bahamas et Cuba: Versement par le gouvernement cubain au gouvernement des Bahamas de l'indemnité dûe pour l'incident maritime du 10 mai 1980" (1981) 85 *Revue Générale de Droit International Public* 540.

[153] *Final Award: Ethiopia's Damages Claims (Ethiopia v Eritrea)* (EECC) Judgment (17 August 2009) 26 RIAA 631, paras 162-79 and 357-79. *See* also *Final Award: Eritrea's Damages Claims (Eritrea v Ethiopia)* (EECC) Judgment (17 August 2009) 26 RIAA 505, paras 49, 77, 81, 99, 105-09, 136 and 139-93.

EECC nonetheless declared that school damages could be admissible. Accordingly, damage inflicted on "buildings dedicated to religion, education, art, science and historic monuments" could be considered as damage to infrastructure. Ethiopia's claim for losses in tourism revenues was found admissible but dismissed for lack of evidence.[154] As seen earlier, (general introduction) cultural property is the closest concept to culture's mercantile framing. Therefore, damaging culture's tangible may not only alter its financial value, but also entail an economic loss to the relevant population if that damaged culture's tangible hurts tourism and its related income (see the *Al Mahdi* reparations, Part II, Chapter 1).[155]

But ISCMs have also addressed culture's tangible, as such. In the *Temple of Preah Vihear*, the ICJ ordered the return to Cambodia of property removed from the temple by occupying Thailand, including sculptures, stelae, fragments of monuments, sandstone models and ancient pottery removed from inside and around the temple.[156] ISCMS have also addressed culture's immovable religious tangible, eg when the EECC considered as State property government administration buildings in the form of religious institutions, such as churches, monasteries, mosques and parochial schools.[157] Eritrea received compensation for damage caused to a cemetery and various religious buildings, while Ethiopia obtained reparations for the looting and shelling of religious institutions.[158] But the EECC also considered culture's (im)movable secular tangible, by awarding Eritrea monetary compensation for damage to the Stela of Matara, an ancient monument in the Senafe Sub-Zoba which was deliberately damaged during the occupation by Ethiopia.[159]

Moving from culture's anthropical to natural tangible, ISCMs have recognised, very early on, an understanding of natural environment damages. While the latter was not cultural, the cases below are useful as regards their applicability to damage to culture's natural components (see general introduction). In the 1930s *Trail Smelter*, the US obtained reparations for damage to and the reduction of crop yield and land as a result of a Canadian smelter's polluting emissions.[160] Unlike this case's economic consideration of the environment, following the 1978 crash of its satellite in Canada, the Soviet Union paid financial compensation for injury caused by radioactive debris to Canadian territory, land and environment.[161] As regards natural environmental injuries during armed conflicts, the UNCC *Well Blowout Control Claim* ("WBC") granted the Kuwait Oil Company reparations in relation to Iraq setting Kuwaiti oil fields

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[154] *Final Award (Ethiopia v Eritrea)* (n 153) paras 458-461.
[155] Dacia Viejo-Rose, "Conflict and the Deliberate Destruction of Cultural Heritage" *in* Helmut K Anheier and Yudhishthir Raj Isar (eds) *Conflicts and Tensions* (SAGE Publications Ltd 2007), p 6. See also David Lowenthal, "Natural and Cultural Heritage" (2005) 11(1) *International Journal of Heritage Studies* 81, p 85.
[156] *Temple of Preah Vihear (Cambodia v Thailand)* (n 151) pp 10-11 and 36-37.
[157] *Final Award (Ethiopia v Eritrea)* (n 153) paras 180-198.
[158] *Final Award (Eritrea v Ethiopia)* (n 153) paras 105-109 and 224-226; *Final Award (Ethiopia v Eritrea)* (n 153) paras 174, 273 and 380-386.
[159] *Final Award (Ethiopia v Eritrea)* (n 153) paras 217-223.
[160] *Trail Smelter Case (US v Canada),* Trail Smelter Arbitral Tribunal, Decision (16 April 1938) 3 RIAA 1905, pp 1922 and 1924-1933. The Trail Smelter Tribunal operated under the 1935 Ottawa USA-Canada Convention.
[161] *Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, Annex A: Statement of Claim (23 January 1979) 18 ILM 899, pp 902-08; *Canada-Union of Soviet Socialist Republics: Protocol on Settlement of Canada's Claim for Damages Caused by 'Cosmos 954'*, Protocol (2 April 1981) 20 ILM 689, p 689.

ablaze.[162] Part of the injury to the Kuwait Oil Company involved losses and costs linked to the "[a]batement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters."[163] Natural environment cases are noteworthy not only from a tangible-centred viewpoint (culture considered beyond its anthropical component), but also from a heritage-centred viewpoint, when natural environment forms part of a collective's identity as reviewed (this Part, Chapter 2, Part II, Chapters 2-3).

3. Moral injury suffered by the State as a result of injury caused to it directly

Moral injury, which is a "failure to respect the honor and dignity of the State",[164] can be caused by an act aimed directly at the State or its official or nationals. This type of injury can take the form of insults to the Head of State/State symbols and attack against diplomatic/consular personnel and premises.[165] The former often generates moral rather than material injury.[166] For example, in 1974, reacting to the United States Treasury Secretary's vain explanation regarding his derogatory comments on the Shah of Iran, Secretary of State and National Security Adviser Henry Kissinger asked "just exactly how do you call the 'King of Kings' a 'nut' out of context?" and "convey[ed] to His Imperial Majesty our affection, regard, and mortification."[167] This example seems a

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[162] *See* UN Doc S/RES/687 (n 92) para 16; and "Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim" (15 November 1996) UN Doc S/AC26/1996/5/Annex, paras 66-86. The report was approved by the Governing Council in its Decision 40 of 17 December 1996.

[163] UNCC, "Report and Recommendations to Review the Well Blowout Control Claim" (n 162) Annex, paras 66-86 and 233.

[164] In French: "méconnaissance de la valeur et de la dignité de l'État en tant que personne du droit des gens". *See* Dionisio Anzilotti, "La responsabilité internationale des États à raison des dommages soufferts par les étrangers" (1906) 13 *Revue Générale de Droit International Public* 5, p 14. In the *Rainbow Warrior*, the arbitral tribunal found France responsible for non-material injury "of a moral, political and legal nature" resulting from "affront to the dignity and prestige" of New Zealand and its authorities. *See Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v France)* France-New Zealand Arbitration Tribunal, Decision (30 April 1990) 20 RIAA 215, paras 107-110.

[165] *See* García-Amador and Sohn (n 133) pp 94-95.

[166] *See* García-Amador and Sohn (n 133) p 95.

[167] Chicago Tribune, "*Simon to Skirt 'Nut' Meeting*" (16 July 1974) *cited by* Andrew Scott Cooper, *The Oil Kings: How the US, Iran, and Saudi Arabia Changed the Balance of Power in The Middle East* (Simon & Schuster 2011), pp 176-177 and 446. In the late nineteenth century, the French President apologised to the Spanish King after he was hissed at by a Paris crowd. *See* John Bassett Moore, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State* vol 6 (AMS Press 1906) 1906, p 864. Regarding State symbols, inter-State diplomatic practice has addressed the tearing down and lowering of embassy flags by apologies and, where relevant, punishment of the perpetrators. See Germany's apology to France *in* Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press 1928), pp 186-187; and *Petit Vaisseau* case, for Brazil's reparations to Italy (lowering a ship flag) *in* ILC, "Second Report on State Responsibility" (9 and 22 June 1989) UN Doc A/CN4/425, para 121. As regards the surrounding diplomatic/consular personnel and premises, see two contrasting example, In a 1908 incident, Britain asked for Persia's apology (its troops had surrounded the British embassy), *in* Eagleton (n 167) p 297.

priori unrelated to attacks targeting culture. However, there may be situations where a State symbol (a head of State who would be the sole repository of its nations' spiritual heritage) represents a value so intimate to its identity that, when for example desecrated, it would constitute moral injury to the State.[168]

B. Indirect injury to States: injury to States' nationals – legal persons

1. Introduction

The following will develop a typology of injuries that States may sustain indirectly. Where relevant, parallels will be drawn between the former and the heritage-centred approach of HRCts (Chapter 2) and ICR-based jurisdictions (Part II). The legal persons' discussion will help explain the tangible-centred approach, where culture's tangible possesses legal personality. Where applicable, armed activities and peacetime will be differentiated to facilitate the applicability of ISCMs' key-findings to HRCts and ICR-based jurisdictions. As in II above. While the injuries were inflicted by States, reviewing the cases at hand will help export their findings to attacks targeting culture.

The following will thus demonstrate that long before HRCts and ICR-based jurisdictions, in a purely Westphalian system, ISCMs pioneered the recognition of States' nationals as victims of abuse. Accordingly, it will be shown how ISCMs established an early form of reparations entitlement for legal persons. As previously seen (general introduction), damage to/destruction of culture's tangible is not only suffered by natural persons, but also by cultural property itself, when possessing legal personality. Decades before HRCts (Chapter 2) and international criminal jurisdictions (Part II), ISCMs recognised that legal persons can sustain both material damage (1) and moral injury (2). While certain examples below do not concern culture's tangible, the methodology used reflects on the aforementioned jurisdictions.

In contrast, in the 1989 Operation Nifty Package, the Vatican did not officially ask for reparations for the United States' blasting psychedelic, heavy metal and punk rock music during ten days at the Holy See's Panama Apostolic Nunciature for Manuel Noriega's successful surrender. *See* BBC, *Panama's General Manuel Noriega and His Fall from Grace* (11 December 2011) <http://www.bbc.com/news/world-latin-america-15853540> accessed 14 April 2019. As regards attacks on officials, note the early 1920s, when Bulgaria agreed to Yugoslavia's demands for satisfaction following an attack on a military attaché stationed at the Yugoslav embassy in Sofia. *See* Eagleton (n 167) p 299.

[168] *See* eg the United States' expression of regret to Cuba for its sailors' climbing the statue of national hero José Marti. *See* ILC, "Yearbook of the International Law Commission 1993 Volume II" (3 May-23 July 1993) UN Doc A/CN4/SER.A/1993/Add 1 (Part 2), p 79, *citing* André Bissonnette, "La satisfaction comme mode de réparation en droit international" (thesis, University of Geneva) (Imprimerie Grandchamp 1952), pp 67-68.

2. Material damage – property: loss, damage and expropriation

ISCMs have long recognised that not only legal persons in general, but also cultural property endowed with legal personality may suffer damage. The latter is illustrated by the PCIJ's ruling in *Peter Pázmány University*, wherein the university, represented by Hungary, successfully brought a claim against and recovered its immovable property from Czechoslovakia.[169] Under a 1919 Czechoslovak Ordinance regarding "the compulsory administration of certain ecclesiastical property", the University of Budapest's expropriation had caused injury to both itself and Hungary.[170] The PCIJ upheld the admissibility of the University's claim against Czechoslovakia, and the latter's obligation to legally and materially restore the university's immovable property.[171] Accordingly, the PCIJ's ruling that an institution dedicated to education and science could sustain damage with respect to its secular and religious movable and immovable components reflected the 1874 Brussels Declaration path up to ICC Rules rule 85. Thus, when possessing legal personality, culture's tangible could sustain injury.

Most other ISCMs cases are concerned with legal persons outside a culture's tangible context. Except for one restitution case, all examples concern compensation.[172] The latter have involved armed conflict scenarios with specifically identified legal persons, such as Ethiopian Airlines (EECC) and the Kuwait Oil Company (UNCC).[173] In contrast, in the *Wall*, the ICJ was non-specific as to the identity of legal persons, holding that Israel must compensate "all natural or legal persons having suffered any form of material damage as a result of the wall's construction".[174] Peacetime ISCMs have mainly concerned legal persons' financial losses. In *M/V "Saiga" (No 2)*, ruling on Saint Vincent and the Grenadines' material damage reparations claims "in respect of natural and juridical persons", ITLOS held that beyond the State, reparations were owed:

> for damage or other loss suffered by the *Saiga*, including all persons involved or interested in its operation. [Such d]amage […] comprises injury to persons, unlawful arrest, detention

[169] *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v The State of Czechoslovakia)*, (PCIJ) Judgment (15 December 1933) Ser A/B No 61, pp 216 and 226.
[170] *Peter Pázmány University v The State of Czechoslovakia* (n 169) pp 240-241.
[171] *Peter Pázmány University v The State of Czechoslovakia* (n 169) p 249.
[172] In *Différend Société Foncière Lyonnaise, Décision No 65*, French-Italian Conciliation Commission, Decision (19 July 1950) 13 RIAA 217, pp 217-219, the FICC held that Italy had to restore the property of a French company that owned a hotel seized by Italy.
[173] *See Final Award (Ethiopia v Eritrea)* (n 153) paras 454-455, wherein the EECC awarded monetary compensation for Ethiopian Airlines' bank accounts in Eritrea, which the airliner had been unable to operate; and UNCC, "Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim (n 162) Annex, paras 66-86 and 233; wherein the Kuwait Oil Company was entitled to compensation for its work on oil well fires. In contrast, in the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v the United States of America)*, (ICJ) Order (22 February 1996) ICJ Rep 1996, *reprinted in* 35 ILM 550 (22 February 1996), pp 213-216; the settlement agreement by which the United States agreed to compensate Iran to discontinue the case before the ICJ, together with earlier compensation claims Iran had made before the IUSCT, did not address the issue of Iran Air's financial losses, that had originally been requested by Iran before the ICJ in the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v the United States of America)*, (ICJ) Application Instituting Proceedings (17 March 1989) ICJ Rep 1989, pp 4-5 and 8-11.
[174] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (ICJ) Advisory Opinion (9 July 2004) ICJ Rep 2004, para 153.

> or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit.[175]

ITLOS thus recognised that injury could be sustained both by the legal person itself and the natural persons making up the legal person, echoing the ECtHR (Chapter 2).

3. Moral injury

Most importantly, beyond recognising that they may sustain material injury, ISCMs have ruled that legal persons may sustain moral injury. In *Desert Line Projects*, the International Arbitral Tribunal held that "a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only".[176] Notwithstanding the qualified nature of legal persons' damage, Yemen had to make monetary compensation for Desert Line having suffered significant injury to its credit, reputation and loss of prestige.[177] This included injury suffered by Desert Line's executives for the stress and anxiety of being harassed, threatened and detained by Yemen and by armed tribes, and for contract-related intimidation.[178] Echoing the ECtHR's approach eight years earlier (this Part, Chapter 2), this arbitral ruling illustrates ISCMs' ability and willingness to evolve organically as cultural perceptions do.

C. Synthesis: Westphalian avant-gardism regarding legal persons and cultural property

ISCMs have long recognised that States can sustain both material and moral injuries, whether directly or indirectly. Regarding the former, the typology has gone beyond the classical territorial sovereignty concept to include, as early as the 1930s-1950s, not only humans' anthropical emanations but also their natural environment. These mechanisms have similarly revealed their forward thinking regarding moral injury. They recognised a State's ability to sustain moral injuries as a result of an injury caused to it directly, including through insults and attacks against its officials and premises. In these situations, States have successfully claimed reparations for injury sustained as a result of damage to culture's anthropical and natural tangible. While these have all been material injury, there is no reason for not claiming moral injury as a result of anthropical or natural damages. While more limited, this proposition is not far-fetched, as there could be cases where a State symbol, whether its leader or its components, represents a

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[175] *M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea),* (ITLOS) Judgment (1 July 1999) Case No 2, para 168, <http://www.worldcourts.com/itlos/eng/decisions/1999.07.01_Saint_Vincent_v_Guinea.pdf> accessed 14 April 2019.

[176] *Desert Line Projects LLC v The Republic of Yemen,* (ICSID) Award (6 February 2008) Case No ARB/05/17, paras 3-49, 191-194, and 289-290.

[177] *Desert Line Projects LLC v The Republic of Yemen* (n 176) paras 286 and 289-290. Interestingly, the IAT considered injury suffered by Desert Line "whether it be bodily, moral or material in nature". *See Desert Line Projects LLC v The Republic of Yemen* (n 176) para 290.

[178] *Desert Line Projects LLC v The Republic of Yemen* (n 176) paras 286 and 290.

value so intrinsic to its identity that, when injured, it would constitute moral injury to the State.

However, and most importantly, ISCMs accepted early on that an injury caused to the person and property of States' nationals can also amount to an injury indirectly suffered by that State itself. This acquires a particular significance when those nationals are legal persons. While most ISCMs cases have been unrelated to attacks targeting culture, their analysis sets the conceptual and legal framework applicable to cases where legal persons are institutions or organisations dedicated to religion, arts and sciences. By entitling legal persons to reparations as a result of material and moral injury inflicted on them, ISCMs paved the way for a two-pillar tangible-centred approach within the broader State responsibility mechanisms. One pillar concerns claims by the legal persons (eg a museum) that property damage (eg looting of its movable) has inflicted material injury. The other prong, more audacious, but perfectly conceivable (because it has already occurred, albeit sporadically) is when culture's tangible possesses legal personality (eg the museum) and claims reparations for moral injury, including loss of reputation, as a result of damage to its components (eg the looting of its items).

III. Natural persons: a prospective heritage-centred approach?

As enunciated earlier, ISCMs have recognised indirect injury to States as result of injury to their nationals. In contrast to the previous sub-section, which reviewed the case of legal persons, the following will focus on natural persons. This will help explore the possible applications of ISCMs practice to a heritage-centred approach with respect to attacks targeting culture. ISCMs have recognised that natural persons can suffer both direct (A) and indirect injury, ie injury to third persons (B).

A. Direct injury: armed activities and peacetime

ISCMs awards often do not specify natural persons' injury-reparations correlation. The following attempts to do so by drawing up a typology, where possible, of personal injury (1) and material damage (2).

1. Personal (material and moral) injury

Personal injury can be material and/or moral.[179] As recognised by the EECC, UNCC and diplomatic practice, material injury may be bodily and financial. The former may

[179] As regards direct moral injury suffered by States as a result of injury to their nationals, having claimed that both the State and hundreds of thousands of its nationals had sustained moral injury, Ethiopia argued for considering damage to its "national interests and international standing in assessing the moral injury inflicted upon its nationals". While not considering moral injury alone, the EECC considered factors involved in its assessment (eg "the gravity of a particular type of violation") to award compensation for material harms. *See* also *Final Award (Ethiopia v Eritrea)* (n 153) paras 54-55

be as diverse as rape; disappearances; forced labour; unjustified arrest or detention;[180] or women undergoing difficult births as a result of damage to or destruction of medical facilities.[181] Financial losses include victims' medical expenses; convalescence-related pecuniary losses; and future work limitation due to injuries.[182] Virtually all of the above exemplify the concept of injury sustained by natural persons making up the collective. These injuries, particularly mass expulsions and unjustified arrests and detention, constitute some of the preconditions for a heritage-centred approach toward attacks targeting culture. As will be seen, these have taken the form of as mass cultural right violations in HRCts proceedings (Chapter 2) and mass cultural crimes, such as aspects of the CaH of persecution and genocide, before ICR-based jurisdictions (Part II, Chapters 2-3).

ISCMs have also addressed natural persons' moral injury. In *Diallo*, the ICJ stated that mental and moral injury "covers harm other than material injury."[183] In *Lusitania*, viewing them as "mental suffering, injury to [one's] feelings, humiliation, shame, degradation, loss of social position or injury to [one's] credit or to his reputation", Umpire Parker explained that "the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated".[184] Often presenting the features of injuries sustained by the victims of attacks that target culture, certain cases concern armed activity-related instances.[185] Noting that some of the institutions dedicated to

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and 65. *See* also *Heirs of Jean Maninat Case (France v Venezuela),* France-Venezuela Mixed Claims Commission (31 July 1905) 10 RIAA 55, pp 55, 75 and 80-82, finding that France suffered indignity as a result of its national's arrest and death and Venezuela's lack of punishment for the perpetrators.

[180] *See* the American Civil War's *Trent Incident* and *USS Wachusett in* J Moore (n 313) pp 768-771 and 1090-1091 and García-Amador and Sohn (n 133) p 92. *See* also Carmel Whelton, "The United Nations Compensation Commission and International Claims Law: A Fresh Approach" (1993) 85(3) *Ottawa Law Review* 607, p 620; and "États-Unis et Israël: Règlement de l'incident du Liberty (18 décembre 1980)" (1981) 85 *Revue Générale de Droit International Public*, p 562; wherein Israel apologised for attacking a US Navy ship and provided compensation for the dead and injured.

[181] *Final Award (Eritrea v Ethiopia)* (n 153) paras 208-216.

[182] *Final Award (Eritrea v Ethiopia)* (n 153) paras 202-216 wherein, as regards Eritrea's destroyed civilian infrastructure, although it dismissed – for lack of proof – the claims of inability to provide education; and damaged telecommunications infrastructure's economic harm; the EECC awarded Eritrea monetary compensation for its nationals' lack of access to medical care. *See* also García-Amador and Sohn (n 133) p 92; and *The Corfu Channel Case, Assessment of Amount of Compensation (United Kingdom v Albania),* (ICJ) Judgment (15 December 1949) 15 XII 49, paras 249-250.

[183] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, (ICJ) Compensation Judgment (19 June 2012), ICJ Rep 2012, p 324, para 18.

[184] *Lusitania Cases (US v Germany),* US-Germany Mixed Claims Commission, Opinion (1 November 1923) 7 RIAA 32, p 40 and p 37 holding that such injuries "must be real and actual, rather than purely sentimental and vague." *See* also García-Amador and Sohn (n 133) pp 92-93.

[185] Armed activity-related moral injury not linked to attacks targeting culture has included anguish resulting from ill treatment upon arrest or imprisonment (Chapter 2 and Part II). In *Lusitania*, Umpire Parker awarded reparations to passengers who endured "mental anguish" or experienced "nervous prostration", *see Lusitania Cases*, *Gladys Bilicke, Individually and as Guardian of the Estate of Carl Archibald Bilicke, & Others (US) v Germany,* US-Germany Mixed Claims Commission, Decision (24 September 1924) 7 RIAA 263, p 264; *See* García-Amador and Sohn (n 133) p 115. Elsewhere, France brought a claim on behalf of the widow of Chevreau, who had been deported by the British forces occupying Persia during the First World War on suspicion of being a German agent. *See Affaire Chevreau (France v United Kingdom),* France-United Kingdom Claims Commission, Decision (9 June 1931) 2 RIAA 1113, pp 1113-1143. For an English translation, see "Arbitral Award, In the Matter of the Claim Madame Chevreau Against the United Kingdom" (1933) 27 *American Journal of International Law* 153, pp 153-182. *See* also *William McNeill (Great Britain) v United Mexican States*, British-Mexican Claims Commission, Decision No 46 (19 May 1931) 5 RIAA 164, pp 165 and 168. *See* also UNCC, "Category

religion had been ransacked, desecrated or used for purposes other than worship and that the damaged or looted religious items "may have unique cultural value", the EECC recognised the "concern and distress many congregations experienced."[186] This approach is undoubtedly tangible-centred, since it addresses the uniqueness of the church's moveable and immoveable property. Most importantly, however, this approach is also anthropo-centred, since it considers the congregation members' distress, a result of both the movable's plunder and the desecration of the immovable. Transitioning toward a heritage-centred approach, the EECC noted that damage to organisations dedicated to religion "is a particularly severe consequence of armed conflict that tears at the fabric of the affected communities and deprives them of safe places of worship."[187] This disruption of spiritual practice is, in some case, akin to heritage-centred feature that will be analysed in HRCts' practice (Chapter 2). Furthermore, the EECC also found Ethiopia liable for wrongfully expelling "an unknown, but considerable, number of dual nationals" and for unlawfully depriving them of their Ethiopian nationality.[188] As will be seen, depending on the case at hand, both HRCts (Chapter 2) and ICR-based jurisdictions (Part II) have adopted a heritage-centred approach by characterising this type of discriminatory acts as mass cultural rights violations.

2. Material damage: property damage and confiscation

Injury sustained by natural persons can include damage to and confiscation of their property. This has been prominently ruled by the ICJ in the *Wall*, by holding that the wall had destroyed "land, orchards, olive groves and other immovable property seized from any natural or legal person".[189] The post-Second World War French-Italian Conciliation Commission ("FICC") and the EECC provide armed conflict related examples of States seeking reparations on behalf of their nationals for damage to (arson, looting) and confiscation of their property.[190] A UNCC case addresses the question of

"C" Claims" <http://www.uncc.ch/claims> accessed 14 April 2019; and *Final Award (Eritrea v Ethiopia)* (n 153) paras 212 and 238; *Final Award (Ethiopia v Eritrea)* (n 153) para 109; finding that "POWs suffered long-lasting damage to their physical and mental health", and that rape victims suffered "physical, mental and emotional harm".

[186] *Final Award (Eritrea v Ethiopia)* (n 153) paras 181 and 188.

[187] *Final Award (Ethiopia v Eritrea)* (n 153) para 381.

[188] *Final Award (Eritrea v Ethiopia)* (n 153) paras 289-302. *Diallo*, addressed Guinea's reparations claim for moral injury on behalf of its national, Mr. Diallo, following his peacetime unlawful arrest, detention and expulsion from the Democratic Republic of Congo ("DRC"). Having found violations of those rights, the ICJ held that the DRC had to compensate for both material and moral injuries. *See Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo),* (ICJ) Merits Judgment (30 November 2010) ICJ Rep 2010, paras 21, 73-74, 85, 97, 160 and 165; and *Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation Judgment (n 183) paras 1, 14-25, 59-60 and 79, describing it as non-material injury or mental and moral damage.

[189] *Wall* Advisory Opinion (n 174) paras 152-153.

[190] *See Différend Dame Hénon Decision No 153,* French-Italian Conciliation Commission, Decision (16 June 1953) 13 RIAA 243, paras 248-249 and 251, restoring the house of and proving financial compensation to a French national whose house had been requisitioned by Italy. *See* also *British Claims in the Spanish Zone of Morocco (Spain v United Kingdom)*, Decision (1 May 1925) 2 RIAA 615, paras 621-625 and 651-742, for claims for property destruction and looting. *See* also *Final Award (Ethiopia v Eritrea)* (n 153) paras 111-135 and *Final Award (Eritrea v Ethiopia)* (n 153) paras 51 and 76, as regards civilians property's looting and destruction, including livestock.

indirect injury to State via direct material damage to its national's cultural tangibles. It concerned Iraq's taking of an individual's Islamic art collection, wherein the Panel-designated expert submitted a valuation significantly higher than the amount claimed.[191] This illustrates the fact that, as stated in the ARSIWA, financially quantifying cultural damage is complex, specifically for "art works or other cultural property" due their unique or unusual character, even though compensation for cultural damage is possible.[192] As culture's tangible and, a fortiori, intangible components are not always subject to market transactions, cultural damage's financial assessment will thus require a case-by-case approach.[193]

Peacetime context provides examples that, while not related to attacks targeting culture, are conceptually and legally useful in those cases. In *Diallo*, the ICJ considered reparations for material injury (personal property and remuneration loss) suffered by Diallo.[194] This is an important feature, as will be seen in the ICC practice when considering remunerations and economic activity-related harm resulting from pilgrimage reduction following the destruction of culture's tangible (Chapter 2). Importantly, in the early twentieth century, ISCMs addressed property owned by natural persons but used for religious purposes. For example, an arbitral tribunal ordered Portugal to restore property, following France, Spain and the UK claims regarding Portugal's seizure of the property of their nationals, who had rented or made them freely available to religious associations.[195] In *Rhodopian Forests*, Bulgaria's forests' confiscation led to compensation to Greece for injury caused to its nationals.[196] While neither example addresses culture's tangible or heritage, they both concern deprivation of the tangible, both anthropical and natural. Conceptually therefore, they remain important for attacks targeting culture as they can be analogised with cases involving culture's anthropical and natural tangible, including in a heritage context (general introduction and Chapter 2).

B. Indirect injury: material and moral injury to third parties

Under ISCMs, indirect victims are injured as a result of injury sustained by direct victims. As held in *Lusitania*, the injury is not the taking of a person's life but the loss

[191] *Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Instalment of Individual Claims for Damages above $100,000 (Category "D" Claims)*, United Nations Compensation Commission (UNCC) Report (12 March 1998) S/AC.26/1998/3 <http://www.uncc.ch/sites/default/files/attachments/documents/r1998-03.pdf> accessed 14 April 2019, paras 48-49, 57-58.
[192] *See* ARSIWA (n 93) p 103.
[193] ILA Draft Declaration (n 93) p 23.
[194] *Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Compensation Judgment (n 183) paras 1, 3, 14 and 26-55.
[195] *Affaire des Propriétés Religieuses (France, United Kingdom and Spain v Portugal),* Decision (4 September 1920) 1 RIAA 7, pp 9, 13, 16, 20 and 22. *See* also The Hague Convention for the Pacific Settlement of International Disputes of 1907 (adopted 18 October 1907, entered into force 26 January 1910) 1 Bevans 577, arts 37-38 and 86-91; and The Hague Convention for the Pacific Settlement of International Disputes of 1899 (adopted 29 July 1899, entered into force 24 September 1900) 1 Bevans 230.
[196] *Affaire des forêts du Rhodope central (fond) (Greece v Bulgaria)*, Decision (29 March 1933) 3 RIAA 1405, pp 1423, 1426 and 1432.

sustained as a result thereof by third persons.[197] Thus, death causes indirect injury to third parties in the form of loss of potential earnings and financial support. The spirit of this decision has since been followed extensively, in cases of attacks targeting culture, by HRCts (Chapter 2) and ICR-based jurisdictions (Part II). While third parties can also suffer moral injury in the form of psychological suffering, ISCMs are not always clear about the type of injury-forms of reparations correlation. This is confirmed in both *The USS Liberty* and *The USS Stark* (lethal attacks against United States Navy ships by Israel and Iraq, respectively), where Israel and Iraq's apology and (offer of) compensation to the families of the killed crew did not specify the corresponding type of injury.[198] In contrast, the *Aerial Incident of 3 July 1988* provides more clarity. The case concerned the shooting down of an Iran Air aircraft by the *USS Vincennes* in the Persian Gulf during the Iran-Iraq war, resulting in the death of all 290 persons on-board. Therein, Iran sought reparations for injuries including "financial losses which Iran Air and the bereaved families" had sustained following "the disruption of their activities."[199] Of the US$131.8 that the United States agreed to pay Iran, US$61.8 million concerned the victims' heirs, with the settlement agreement implicitly suggesting that part of the award stemmed from material injury.[200] As for moral injury, ISCMs have held that it derives from injury to the deceased's dependents and is determined by the closeness of their relationship.[201]

In sum, the concept of "third party" depends on the legal system. For example, the IACtHR does not always distinguish "third party" from "next of kin" (Chapter 2). The key factor, however, is that someone else's injury caused the third party direct harm. The above short examples help understand the approach adopted by HRCts, specifically the IACtHR, as regards inter-generational harm in the context of mass cultural right violations (Chapter 2).

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[197] Umpire Parker presented a formula for determining the total compensation: "Estimate the amounts (*a*) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (*b*) the pecuniary value [...] of the deceased's personal services [to the] claimant's care, education, or supervision, and also add (*c*) reasonable compensation for such mental suffering or shock, if any, caused [to the claimant] [...] by reason of such death". Other facts include gender, health, station in life, the deceased and claimant's life expectancy, and the deceased's occupation and earning capacity. *See See Lusitania Cases (US v Germany),* US-Germany Mixed Claims Commission, Administrative Decision No VI (30 January 1925) 7 RIAA 155, p 156 pp 35-36 and 156.

[198] *See* "États-Unis et Israël: Règlement de l'incident du Liberty (18 décembre 1980)" (n 180) p 562; and Marian Nash Leich, "Contemporary Practice of the United States Relating to International Law" (1989) 83(3) *American Journal of International Law*, pp 561-564.

[199] *Aerial Incident (Islamic Republic of Iran v the United States of America)*, Application Instituting Proceedings (n 173) pp 4-5 and 8-11.

[200] *Partial Award Containing Settlement Agreement on the Iranian Bank Claims Against the United States and on the International Court of Justice Case Concerning the Aerial Incident of July 3, 1988*, Iran-United States Claims Tribunal, Award Decision (22 February 1996) 35 ILM 553. *Aerial Incident Partial Award (Islamic Republic of Iran v the United States of America)* (n 173) paras 213-216; *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v the United States of America)*, (ICJ) Order (22 February 1996) ICJ Rep 1996, pp 9-11, *reprinted in* 35 ILM 550 (22 February 1996), pp 550-554; For the settlement agreement, *see* General Agreement on the Settlement of Certain ICJ and Tribunal Cases (9 February 1996), attached to *Joint Request for Arbitral Award on Agreed Terms*, Iran-US Claims Tribunal (1996) vol 32, pp 213-216.

[201] *See* García-Amador and Sohn (n 133) pp 92-93 and 115. For reparation claims to family members' survivors, *see Lusitania (US v Germany) Administrative Decision* (n 197) pp 35-37. In *Di Caro Case (Italy v Venezuela)*, Italy-Venezuela Mixed Claims Commission, Decision (1903) 10 RIAA 597, pp 597-598, it was held that "affection, devotion, and companionship may not be translated into any certain or ascertainable", with monetary compensation being just one consideration.

C. Synthesis: Westphalian avant-gardism regarding natural persons

In contrast to their varied and long-standing practice regarding injury sustained by States through injury suffered by legal persons, ISCMs' practice with respect to natural persons is more homogeneous. This is so because being a Westphalian creation par excellence, ISCMs are primarily concerned with States – ie non-natural persons. As seen, the said practice has recognised that natural persons may suffer both direct and indirect harm, whether during armed activities or peacetime. Natural persons may thus suffer direct injury in the form of personal harm (material and moral) and material damage (property related). Natural persons may also suffer indirect injury, in the form of material and moral harm, as third parties.

The review of ISCMs practice provides a set of tools that can facilitate addressing the adjudication of attacks targeting culture in a heritage-centred manner. Therein, natural persons are the victims of exactions that impact the collective inter-generationally. Evidently, most afore-analysed cases do not reveal such a stance expressly. ISCMs have had seldom to adjudicate over attacks targeting culture, perhaps because States themselves are reluctant to engage in this controversial path, as with, eg cultural genocide (Part II, Chapter 3). However, the mere fact that ISCMs address some of the ingredients of what could be attacks targeting culture (eg mass expulsions, spiritual impact of damaging cult places on the collective and its cohesion) suffices to consider them if and when adjudicating cases of mass cultural rights violations before HRCts and mass crimes before ICR-based jurisdictions. In fact, as will be seen, the said jurisdictions have already adjudicated such scenarios (Chapter 2 and Part II, Chapters 2-3), confirming conceptual interactions, whether consciously or not, between them and ISCMs.

IV. Conclusion to Chapter 1

Recognising that States, as subjects of international law, may sustain direct injury as non-natural persons is classically Westphalian. This State-centric system gradually came to consider injuries caused directly to a State's nationals as one also suffered by the State – in other words, as an indirect injury to the State.[202] While this evolution has at times adjusted to the work of HRCts and ICR-based jurisdictions, it has most frequently anticipated it.

Some of ISCMs' core determinations provide a useful methodological basis for reflecting on HRCts and ICR-based jurisdictions. While some of these examples' relevance to attacks targeting culture may not be immediately apparent (eg harm to a diplomat, insult to diplomatic premises or death of a national), they have nonetheless paved the way for the aforementioned jurisdictions to address attacks targeting culture under both heritage-centred and tangible-centred approaches (Chapter 2 and Part II). For example, the direct victims' expulsion helps to understand mass expulsions in the

[202] *See* Donna E Arzt and Igor I Lukashuk, "Participants in International Legal Relations" *in* Charlotte Ku and Paul F Diehl (eds) *International Law: Classic and Contemporary Readings* (Westview Press 1998), pp 155-176.

context of mass cultural rights violations before HRCts (Chapter 2.II.A-B) and mass cultural crimes before the ICR-based jurisdictions (Part II, Chapters 2-3). When viewed in a heritage-centred standpoint, this helps explain the impact of such rights violations/crimes on the identity of the collective. This approach is supported by other cases, where injuries sustained by indirect victims as a result of direct victims' deaths has foreshadowed the IACtHR's conception of inter-generational injuries caused by killing the targeted group's elders or women (Chapter 2.II.B). But ISCMs have also gradually prepared the ground for a tangible-centred approach, by expanding their typology of injuries to recognise that in the case of anthropical and natural environment damage, States may be injured directly and indirectly, whether morally and/or materially. This matters even more with the recognition that legal persons can sustain both material and moral injury. More specifically, ISCMs already recognised in the 1930s some participation-reparations elements to institutions dedicated to education and science. This is critical for understanding how the ECtHR and ICR-based jurisdictions evolved to the point of granting victim status to culture's tangible, when possessing legal personality (Chapter 2 and Part II).

Another point demonstrated in this Chapter is that ISCMs acknowledged that natural and legal persons can sustain injuries during peacetime and armed conflict. Evidently, this does not differ from HRCts, which do not require an armed conflicts nexus in their jurisdiction ratione materiae. Importantly, however, with the exception of war crimes, ICR-based jurisdictions too do not require an armed conflict nexus for genocide and CaH. As such, many ISCMs typologies of injury may also apply to those jurisdictions, regardless of their connection with armed conflict. In particular, they may apply to the ICC crimes, notwithstanding factors specific to the ICC, such as its determination of the alleged crimes' threshold of gravity.[203] Therefore, while the EECC, the FICC or the *Aerial Incident of 3 July 1988* cases would evidently be useful in the context of an armed conflict, cases not involving armed activities, such as *Diallo* or the *Rhodopian Forests*, could prove equally valuable. This is because the type of injury identified in the latter cases may also – if amplified – form part of genocide or CaH.

By providing ISCMS' typology of injuries, this Chapter has shown how, over the decades, ISCMs prepared a transition from a pure State-centred Westphalian system to the realm of HRCts and ICR-based jurisdictions. Way before, during and since these jurisdictions' birth, ISCMs laid and applied the recognition that natural and legal persons may sustain material and moral injury during both peacetime and armed activities and benefit form most, if not all, forms of reparations. While it cannot be argued that the cases surveyed in this Chapter dealt expressly with attacks targeting culture, they each contained one of many of the ingredients relevant to such adjudications. These are tangible and intangible culture, whether anthropical or natural, movable or immovable, secular or religious. But the said ingredients consist also of concepts proposed in this study, ie conceiving the adjudication of attacks targeting culture in heritage-centred and tangible-centred manners. As will now be seen, HRCts would be the first of these non-Westphalian jurisdictions to apply ISCMs afore-described scheme and ingredients.

[203] *See* OTP, "Policy Paper on Preliminary Examinations, the Office of the Prosecutor" (November 2013) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 14 April 2019, paras 59-66.

CHAPTER 2: REGIONAL HUMAN RIGHTS COURTS

I. Introduction: the subject-matters of damage and terminological challenges

Over time, cultural heritage and international human rights law have become increasingly intertwined. This has brought Francioni to propose that while CH

> represents the symbolic continuity of a society beyond its contingent existence […], the obligation to respect cultural heritage is closely linked with the obligation to respect human rights.[204]

Thus, cultural heritage and human rights constitute the two sides of the same coin. Cultural heritage represents a collective's identity; human rights represent its protection. Specifically, this requires "defining cultural rights through international human rights treaties", as put by Chechi.[205] Indeed, among human rights, specifically those considered in the ICCPR and ICESCR, it is not always easy to identify which human rights are cultural rights, mostly because of culture's polymorph and evolving nature. As noted by Donders, international human rights instruments reference culture either expressly (eg ICCPR article 27 and IESCR article 15(a)) or through those civil, economic, political and social rights that have a connection with culture (eg freedom of religion, freedom of expression, freedom of association and the right to education), with the Committee on Economic, Social and Cultural Rights considering the cultural elements of the right to food, health and housing.[206]

For the purpose of reviewing the adjudication of attacks targeting culture, as explained in the general introduction, this Chapter will place its focus on the ACHR and the ECHR as the adjudication oriented human rights instruments with comprehensive jurisprudence (unlike the ACHPR). As will be demonstrated in details, while the IACtHR case-law has been ground-breaking in linking cultural heritage and human rights in indigenous communities cases, the ECtHR has also addressed this relationship in minority rights cases, eg within Cyprus, Russia and Turkey. Moreover, by developing the standing of legal persons before it, the ECtHR has further paved the way for a tangible-centred approach, wherein legal persons may become claim reparations as a result of attacks targeting culture's tangible, whether as a legal person itself or as the items that it owns/administers.

Prior to embarking on the above analysis, this section will first address the question of State responsibility and the subject-matter of damages before HRCts, then the

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[204] Francesco Francioni, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity" (2004) 25(4) *Michigan Journal of International Law*, p 1221. *See* also Fechner, (n 64) p 378. *See* eg Universal Declaration of Human Rights (adopted 10 December 1948) (UDHR) UNGA Res 217 A(III), art 17.

[205] Chechi, (n 56) p 26 and, for the relationship between human rights and cultural rights, pp. 20-33.

[206] Yvonne Donders, "Do cultural diversity and human rights make a good match?" (2010) 61(199) *International Social Sciences Journal*, pp 15 and 18-19. The ACHPR is particularly original in that it considers human rights broadly, by combining civil, cultural, economic, political and social rights (see specifically arts 17 and 22).

terminological challenges involved, before proposing a general outline. It will then review the practice of HRCts to draw-up typologies of victims and the damage they suffer. These typologies can then be applied to the adjudication of attacks targeting culture. The HRCts' definitions of reparations condition human rights violations' victims and the types of damages they may suffer. According to ECHR article 41 (Just Satisfaction), the ECtHR may "afford just satisfaction to the injured party"; with the respondent State having to end the ECHR violation and "restore as far as possible the situation existing before the breach" ("restitutio in integrum") and, if the latter is unavailable, an award for "just satisfaction" may be granted.[207] According to ACHR article 63(1), ACHR violations may "be remedied and […] fair compensation […] be paid to" injured parties.[208] As regards victims, whereas the ECtHR and ACtHPR mostly refer to the "applicant" for direct and indirect victims, the IACtHR refers to "injured party", "victims" or "next of kin".[209] In terms of the consequences of violating the

[207] ECHR (n 96) art 41. *See Papamichalopoulos & Others v Greece (Article 50),* (ECtHR) Judgment (31 October 1995) No 14556/89, para 34. Here, just satisfaction differs from the ARSIWA's "satisfaction" (n 93). *See* also 2007 ECtHR Practice Direction (n 196) paras 6, 16 and 18, clarifying that art 41 awards consist of compensation for "pecuniary damage", "non-pecuniary damage" and legal "costs and expenses". The latter includes legal assistance, court registration, travel and subsistence expenses. *See* more generally, Philip Leach, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011), pp 465- 478 and Antoine Christian Buyse, *Post-Conflict Housing Restitution: The European Human Rights Perspective, With a Case Study on Bosnia and Herzegovina* (Intersentia 2008), pp 127-138.

[208] ACHR (n 96) art 61(3). Since, however, "compensation" is but one form of reparations, the latter was first defined by the IACtHR in its first case of *Velasquez-Rodriguez v Honduras* in 1989. *Velásquez-Rodríguez v Honduras,* (IACtHR) Reparations and Costs (21 July 1989) Series C No.7, para 26. The following is this definition's most comprehensive subsequent development: "[t]he reparation of harm […] requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, [the IACtHR shall order] measures that […] will ensure that the damage […] is repaired, by way, inter alia, of payment of an indemnity as compensation […]." *See Moiwana Community v Suriname,* (IACtHR) Preliminary Objections, Merits, Reparations and Costs (15 June 2005) Series C No. 124, para 170. *See also* eg *"Juvenile Reeducation Institute" v Paraguay,* (IACtHR) Preliminary Objections, Merits, Reparations and Costs (2 September 2004) Series C No. 112, para 259; *Plan de Sánchez Massacre v Guatemala,* (IACtHR) Reparations (19 November 2004) Series C No. 116, para 53; *"Montero-Aranguren et al (Detention Center of Catia) v Venezuel*a, (IACtHR) Preliminary Objection, Merits, Reparations and Costs (5 July 2006) Series C No. 150, para 117; and *Miguel Castro-Castro Prison v Peru*, (IACtHR) Merits, Reparations and Costs (25 November 2006) Series C No.160, para 415. As regards the ACtHPR, to remedy the violation the ACtHPR "shall make appropriate orders[…], including the payment of fair compensation or reparation". ACHPR (n 69) art 27. This is to be understood as awarding reparations, since compensation is one form of reparations. To date, the Court has thrice deferred its ruling on the issue of damages or reparations in order to hear further from the parties and thus no judgment including reparations has yet been finalised. *See Beneficiaries of the Late Norbert Zongo et al v Burkina Faso*, (ACtHPR) Judgment (28 March 2014) Application No 013/2011, para 203(6); *Tanganyika Law Society and TLRC and Rev C Mtikila v Tanzania*, (ACtHPR) Judgment (14 June 2013) Application Nos 009/2011 and 011/2011, para 124; and *Lohé Issa Konaté v Burkina Faso*, (ACtHPR) Judgment (5 December 2014) Application No 004/2013, para 176(10).

[209] IACtHR Rules (n 96) art 2, references a "victim" as a "person whose rights have been violated, according to a judgment emitted by the Court". Like the concept of "third party", that of "next of kin" varies according to national legal systems and between state responsibility mechanisms. Generally, it will consist of financially dependent immediate and extended family members or members of a collective. For the IACtHR, the next of kin of the community members could be the injured parties and, should they have died, compensation would be distributed in accordance with succession laws. *See Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 61 and 65, 88-89; *Moiwana Community v Suriname* (n 208) para 71.To complicate matters, albeit under ICR, *See Lubanga* Trial Judgment (n 128) paras 32 and 39, wherein the ICC Appeals Chamber confirmed that "indirect

ECHR and ACHR, the ECtHR generally refers to "damage" and "loss", while the IACtHR refers to "damage" and "harm". Even when using the term "damage", both HRCts qualify it as "pecuniary/material damages" and "non-pecuniary", "non-material", "immaterial" or "moral" damages.[210] This heterogeneous terminology reflects the diversity of legal systems and languages.[211] Notwithstanding this, to adhere as closely as possible to the most frequently used terms by these HRCts' case-law, this Chapter will use "injured party" or "victim", "pecuniary damage" and "non-pecuniary damage". Depending on the context, however, recourse will be made to the actual terminology used in the case at hand.

This Chapter will propose an integrated typology of both victims and damages sustained during attacks that target culture, on the basis of the ECtHR and IACtHR practice. Thus, "any person, nongovernmental organisation or group of individuals" and "[a]ny person or group of persons, or any nongovernmental entity" may file applications/petitions before the ECtHR (ECHR article 34) and IACtHR (ACHR article 44), respectively. The aforementioned typology will show how HRCts have also found that attacking culture may be heritage-centred and/or tangible-centred.[212] As regards the former, this Chapter will address natural persons, in respect of both individual members of the collective and the collective as the sum of natural persons (II). The Collective will consist of a community (eg political groups or anthropologically stable entities like tribes) within the national population's majority. Thereafter, focus will be placed on the tangible-centred approach through legal persons. While often not linked to mass human rights violations, the ECtHR case law with respect to legal persons provides guidance for extrapolation, as necessary, into scenarios involving legal persons as the victims of attacks directed against culture's tangible (III).

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victims" designate persons (eg parents) who suffer harm as a result of harm perpetrated against direct victims (eg their children). Thus, "harm suffered by victims does not necessarily have to be direct".

[210] *See* 2007 ECtHR Practice Direction (n 96) paras 10 and 18-20, dividing pecuniary damage into "damnum emergens", meaning loss actually suffered, and "lucrum cessans", referring to anticipated future loss or diminished gain. While the IACtHR has sometimes adopted the same approach, *see* eg *"Juvenile Reeducation Institute" v Paraguay* (n 208) paras 288-294, neither court has used this terminology systematically nor have they consistently expressed in which of the two categories the damages fall; *see* eg *Loayza-Tamayo v Peru,*(IACtHR) Reparations and Costs (27 November 1998) Series C No. 42, para 129(b) and (d); *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 87(g); *Oyal v Turkey,*(ECtHR) Judgment (23 March 2010) No 3864/05, para 101.

[211] *See* Abtahi, "Types of Injury in Inter-State Reparation Claims"(n 8) pp 261-262.

[212] For a comprehensive discussion of the inter-American system, *see* Kristin Hausler, "Collective Cultural Rights in the Inter-American Human Rights System" *in* Andrjej Jakubowski (ed) *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016), pp 223-251. For an in-depth discussion of indigenous communities' cultural claims, *see* Contreras-Garduño and Rombouts (n 133). *See also* Karolina Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (Springer 2014); Lindsey L Wiersma, "Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims" (2005) 54(4) *Duke Law Journal* 1061; and Siegfried Wiessner, "Culture and the Rights of Indigenous Peoples" *in* Vrdoljak, *The Cultural Dimension of Human Right* (n 133).

II. Natural persons: the heritage-centred approach

When individuals suffer damage due to their community-based identity, the IACtHR considers as the beneficiaries of reparations not only their individual members but also indigenous and tribal communities as a whole.[213] The UNHRC has had the opportunity to consider this two-way heritage-centred relationship, holding that while "individual rights", ICCPR article 27 rights depend:

> on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect *the identity of a minority* and *the rights of its members* to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. [214] [emphasis added]

Having distinguished between the collective and its members' exercise of cultural rights as a whole, the UNHRC has explained that article 27 protects rights which are:

> directed towards *ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned*, thus enriching the fabric of society as a whole.[215] [emphasis added]

As explained earlier by Francioni, the unimpeded exercise of these human rights ensures the protection of heritage, which in turns defines the collective's identity. The UNHRC further explained that:

> culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[216]

Accordingly, In *Ominayak (Lubicon Lake Band) v Canada,* the UNHRC confirmed that State interference into lands belonging to the traditional owners living in a reserve threatened their existence, as culture was closely linked to a particular way of life,

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[213] *Saramaka People v Suriname,* (IACtHR) Preliminary Objections, Merits, Reparations, and Costs (28 November 2007) Series C No.185, para 189. *See* also *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* (IACtHR) Merits, Reparations and Costs (31 August 2001) Series C No. 79, para 164; *Yakye Axa Indigenous Community v Paraguay*, (IACtHR) Merits, Reparations and Costs(17 June 2005) Series C No. 125, para 189.

[214] UNHRC 'General Comment No 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev1/Add5, para 6(2).

[215] UNHRC, "General Comment No 23: Article 27 (Rights of Minorities)" (n 214) para 9. In *Mavlonov & Sa'di v Uzbekistan,* Communication No 1334/2004 (19 March 2009) UN Doc CCPR/C/95/D/1334/2004, the cancellation of the publishing rights of Uzbekistan's Tajik minority violated art 27 for both the publication's editor and the Tajik reader, as they were denied their right to enjoy their culture in community with others. *See* also, *Prince v South Africa,* Communication No 1474/2006 (14 November 2007) UN Doc CCPR/C/91/D/1474/2006; *Poma Poma v Peru,* Communication No 1457/2006 (24 April 2009) UN Doc CCPR/C/95/D/1457/2006; and *Kalevi Paadar et al v Finland,* Communication No 2102/2011 (5 June 2014) UN Doc CCPR/C/110/D/2102/2011.

[216] UNHRC, "General Comment No 23: Article 27 (Rights of Minorities)" (n 214) para 7. further discussion, *see* Roger O'Keefe, "Tangible Cultural Heritage and International Human Rights Law" *in* Lyndel V Prott, Ruth Redmond-Cooper and Stephen K Urice (eds) *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Builth Wells: Institute of Art and Law 2013), pp 4-10.

including hunting, trapping and fishing.[217] In a number of complaints against Finland and Sweden, the UNHRC has also linked reindeer husbandry to cultural identity, while in cases against Canada and New Zealand, the UNHRC has done the same with fishing.[218] As explained in the general introduction, however, these cases are not concerned with the threshold of violence contemplated by this study. Their reference here is thus meant to inform the discussion below on the practice of the ECtHR and IACtHR in those cases that have involved attacks targeting culture.

As will be seen, the IACtHR has considered these elements in indigenous/tribal cases. However, it is not always easy to establish the type of damage suffered by individuals as members of the collective and by the collective as a sum of individuals. Often, one is to proceed by deduction, from the forms of reparations awarded by the IACtHR.[219]

Where the "violation of the applicant's rights originated in a widespread, systematic problem as a consequence of which a whole class of persons has been adversely affected",[220] the ECtHR uses the "pilot judgment procedure".[221] As explained by Lenzerini, due to the ECHR's individual rights-based foundation, the Court has seldom expressly addressed collective rights, except where national minorities are involved, as in *Gorselik & Others*, where the ECtHR recognised associations established for:

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[217] *Ominayak (Lubicon Lake Band) v Canada,* Communication No 167/1984 (26 March 1990) UN Doc CCPR/C/38/D/167/1984. In *Lovelace v Canada*, Communication No 24/1977 (30 July 1981) UN Doc CCPR/C/13/D/24/1977, the UNHRC determined that the denial of a native person (married to a non-native) to live with members of her group in their native reserve amounted to an art 27 violation, as the community existed only inside the reserve.

[218] For the former, *See* eg, *Kitok v Sweden,* Communication No 197/1985 (27 July 1988) UN Doc CCPR/C/33/D/197/1985; *Länsman (Ilmari) et al v Finland,* Communication No 511/1992 (8 November 1994) UN Doc CCPR/C/52/D/511/1992; *Länsman (Jouni) et al v Finland,* Communication No 671/1995 (22 November 1996) UN Doc CCPR/C/58/D/671/1995; *Länsman (Jouni) et al (II)) v Finland*, Communication No 1023/2001 (15 April 2005) UN Doc CCPR/C/83/D/1023/2001; *Äärelä & Näkkäläjärvi v Finland,* Communication No 779/1997 (7 November 2001) UN Doc CCPR/C/73/D/779/1997. For fishing, *see* eg, *Howard v Canada,* Communication No 879/1999 (4 August 2005) UN Doc CCPR/C/84/D/879/1999, and *Mahuika et al v New Zealand,* Communication No 547/1993 (16 November 2000) UN Doc CCPR/C/70/D/547/1993.

[219] The IACtHR sometimes divides incoherently its reparations into "material damages", "moral damages", and "other forms of reparations". Indeed, the first two are types of damage, whereas the third is the resulting reparations.

[220] *Broniowski v Poland,* (ECtHR) Friendly Settlement (28 September 2005) No 31442/96 28, para 34.

[221] The Court designates a pilot case, to both expedite resolution in the national order and prevent an ECtHR overload with similar applications regarding the same facts. *See* ECtHR, "The Pilot-Judgment Procedure: Information Note Issued by the Registrar" <http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf> accessed 14 April 2019. Furthermore, the procedure allows for adjourning or "freezing" the examination of all other related cases for a certain period of time. Meant as an additional means to encourage national authorities to take the necessary steps, such adjournments require keeping applicants informed of each development in the procedure. Given the ECtHR's case-load and the many resource constraining urgent cases and cases raising questions of greater importance, repetitive applications may be pending for many years before they are adjudicated. However, as set out by the Court, "It is not every category of repetitive case that will be suitable for a pilot-judgment procedure and not every pilot judgment will lead to an adjournment of cases". In additional to this drawbacks, there is also the fact that only the pilot judgment's applicants receive reparations, *see Broniowski v Poland* (n 220) paras 34-35.

> protecting *cultural or spiritual heritage*, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness […].[222] [emphasis added]

The ECtHR and IACtHR have thus clearly adopted a heritage-centred approach in relation to attacks targeting culture, by linking them to the breach of ECHR and ACHR human rights provisions. This has concerned both the scope of the damage, ie the targeting of culture's intangible and tangible components, and the victims of the damage, ie natural persons. In other words, both courts have combined an identity-based approach with a legacy-oriented one. The following sections will propose a typology of damage suffered by natural persons as members of the collective (A) and by the sum of natural persons making-up the collective (B), so as to better encapsulate the adjudication of attacks targeting culture in the form of mass cultural rights violations/crimes. Notably, the ECtHR and IACtHR have extracted cultural rights from the ECHR and ACHR human rights provisions. In turn, they have correlated the respect of these rights and the safeguarding of heritage.

A. Natural persons as members of the collective

Both the ECtHR and IACtHR have established that, by virtue of belonging to the collective, natural persons may suffer pecuniary and non-pecuniary damage directly (1) or indirectly (2), with heritage-centred implications.

The following will show how these HRCts contextualised human rights violations against their broader identity-based background, thereby linking rights violations to heritage. Sometimes, these violations targeted the cultural features of members of the collective by, eg, restricting their language or faith. Often, members of the collective were targeted merely on grounds of their collective identity, whether national, ethnic, racial, religious or political. This section will focus on both HRCTs. The ECtHR's case-law has been twofold. First, it has addressed situations of internal armed conflict, where national authorities faced autonomist movements, such as the 1990s Russian-Chechnya and Turkey-Kurdistan clashes. Second, the ECtHR has considered situations of State intervention in another State in support of autonomy-seeking groups, such as Turkey's 1974 intervention in Cyprus. The IACtHR has also addressed two types of situations, ie armed violence between national authorities and indigenous populations; and national authorities quashing dissident political groups during civil wars. Both scenarios have at times overlapped, as ethnic communities mobilised into separatist political groups.

[222] Federico Lenzerini, "The Safeguarding of Collective Cultural Rights through the Evolutionary Interpretation of Human Rights Treaties and Their Translation into Principles of Customary International Law", Lenzerini *in* Jakubowski (n 212) p 150. *See Gorzelik & Others v Poland*, (ECtHR) Judgment (17 February 2004) No 44158/98, para 92. *See* also *Chapman v the United Kingdom*, (ECtHR) Judgment (18 January 2001) No 27238/95, para 93.

1. Direct victims

Both the ECtHR and IACtHR have held that direct victims can suffer pecuniary damage, often in situation where ECHR and ACHR violations do not directly concern cultural rights (a) and non-pecuniary damage, often where the conventions' violations concern cultural rights (b).[223]

a. Pecuniary damage: human rights violations not directly related to cultural rights

In a number of cases addressing minorities and armed activities, many of the ECHR violations concerned not the intangible-related rights of the minority groups' individual members (eg language), but the targeting of their private property. In adjudicating them, however, the ECtHR had to link these violations to the broader targeting of the individuals because of their membership to national minority groups. In *Ayder & Others*, which involved security forces deliberately destroying a town in retaliation for its inhabitants' alleged sympathy for the Kurdistan Workers' Party ("PKK"), having found ECHR violations of, inter alia, the protection of property, the ECtHR held that the loss of income suffered by farmers as a direct result of being forced from their homes because of Turkish attacks is pecuniary damage.[224] The reparations only considered individuals nominally, largely focusing on their membership in a Kurdish community faction suspected of supporting the PKK. The *Isayeva, Yusupova & Bazayeva* decision concerned a civilian convoy that was repeatedly attacked by Russian airplanes during fighting in Grozny, Chechnya.[225] Having found violations of, inter alia, the protection of property, and having noted Russia's breach of the principle of distinction, the ECtHR awarded, inter alia, compensation for the pecuniary damages of the destruction of an applicant's car.[226] While in both cases the members of the collective suffered damage to their private property – a car is not cultural property, the broader context made it clear that the individuals sustained pecuniary damage by virtue to being targeted as members of national minority groups. While not addressing heritage as such, the cases bring the reasoning one step closer to it by looking at minorities as cultural entities.

The IACtHR's practice is best illustrated in *Plan de Sánchez Massacre*, which dealt with the massacre of nearly 300 persons, mostly Maya-Achí indigenous people by the

[223] The IACtHR considers deceased victims as entitled to compensation for pecuniary and non-pecuniary damage, which is transmitted to their next of kin. *See Aloeboetoe et al v Suriname,* (IACtHR) Reparations and Costs (10 September 1993) Series C No. 15, para 54.
[224] *Ayder & Others v Turkey*, (ECtHR) Judgment (8 January 2004) No 23656/94, paras 10, 140, 145-146 and 151-152.
[225] *Isayeva, Yusupova & Bazayeva v Russia*, (ECtHR) Judgment (24 February 2005) Nos 57947/00, 57948/00 and 57949/00, paras 13-19 and 22-23.
[226] *Isayeva, Yusupova & Bazayeva v Russia* (n 225) paras 27-30, 199-200, 225, 234, 240 and 242-246. For further discussion *see* Fabian Michl, "The Protection of Cultural Goods and the Right to Property Under the ECHR" *in* Evelyne Lagrange, Stefan Oeter and Robert Uerpmann-Wittzack (eds) *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer International Publishing 2018).

Guatemalan army and civil collaborators.[227] As this case's findings are multi-layered and will be used in various sections of this Chapter, a brief factual description is necessary. During the attack, the village was hit with mortar fire and separation was made between the girls and young women – who were "physically abused, raped and murdered" – and the older women, boys and men – who were executed with grenades and arson.[228] The commanders looted and destroyed Plan de Sanchez, forcing the surviving villagers to hastily bury their next of kin in mass graves.[229] The survivors gradually abandoned the village. Those who returned were forced to enlist in the civil defence and were subject to restrictions for some years.[230] Having found multiple violations of the surviving victims' rights,[231] under pecuniary damage, the IACtHR found that the atrocities affected the victims' employment activities and resulted in indigenous poverty, in the form of financial shortages and a lack of access to subsistence resources.[232] It therefore granted them nominal compensation.[233] Regarding violations of the right to property, the IACtHR considered damage to homes, domestic animals, basic grain, clothes, cooking utensils and furniture.[234] As with the ECtHR, although the specific pecuniary damages did not concern heritage, the IACtHR recognised that individuals could be targeted on grounds of membership of a national minority group, albeit an indigenous/tribal one.[235]

In *Moiwana Community*, the Surinamese military destroyed property and killed or wounded many villagers, who as a result left their homes and abandoned Moiwana and the surrounding traditional lands.[236] Having found violations of the right to humane treatment, property, freedom of movement and residence, the IACtHR considered the injured parties and beneficiaries of reparations to be the "Moiwana community members", ie those referred to nominally in the judgment, including the survivors and the next of kin of those killed.[237] Having found that Moiwana community members were in a situation of ongoing displacement and poverty, with their ability to practice

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[227] *Plan de Sánchez Massacre v Guatemala* Reparations paras 41(2)-(7) (n 208); *Plan de Sánchez Massacre v Guatemala,* (IACtHR) Merits (29 April 2004) Series C No. 105, paras 42(15)-(21).
[228] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 49(2).
[229] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 49(3)-(4).
[230] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 49(4)-(5).
[231] Namely, rights to humane treatment; to a fair trial; to privacy; freedom of conscience and religion; freedom of thought and expression; freedom of association; right to property; to equal protection; and to judicial protection ACHR (n 96), arts 5(1)-(2), 8(1), 11, 12(2)-12(3), 13(2)(a) and (5), 16(1), 21(1)-(2), 24 and 25, respectively). *See Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 50.
[232] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 73-74.
[233] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 73-76. In *Miguel Castro-Castro Prison*, having established violations of the ACHR rights of the terrorism offence prisoners, the IACtHR decided that the pecuniary damages included "the loss or detriment of income of the victims and […] of their next of kin", awarding reparations to surviving victims who suffered a permanent handicap from the physical and psychological damages. *See Miguel Castro-Castro Prison v Peru* (n 208) paras 197(15)-(17), (20)-(22), (31)-(32) and 425. *See also Loayza-Tamayo v Peru* (n 210) para 129(a).
[234] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 50 and 70(a).
[235] For a discussion of the communities' role in the protection of cultural heritage, *see* Sabrina Urbinati, "The Role for Communities, Groups and Individuals under the Convention for the Safeguarding of the Intangible Cultural Heritage" *in* Borelli and Lenzerini *Cultural Heritage, Cultural Rights, Cultural Diversity* (n 14).
[236] *Moiwana Community v Suriname* (n 208) paras 86(15) and 86(19). *See also* Gaetano Pentassuglia, "Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence" *in* Vrdoljak, *The Cultural Dimension of Human Right* (n 133).
[237] *Moiwana Community v Suriname* (n 208) paras 71, 103, 121, 135 and 176.

their customary means of subsistence and livelihood severely limited, the IACtHR granted compensation to each of them.[238] While reparations were individually granted, the IACtHR again connected individual victims to their broader community. Furthermore, the Court linked the customary means of subsistence to the collective's cultural practice (II.B). This identity-based approach aligns the case with the protection of cultural heritage, which necessitate the respect for, inter alia, the right to property.

b. Non-pecuniary damage: human rights violations directly related to cultural rights

The ECtHR and IACtHR have expressly addressed rights violations of individuals as a result of the targeting of their socio-cultural identity on grounds of their membership in a collective. In *Djavit An*, having found the Turkish Republic of Northern Cyprus' rejection of the applicant's visit permit for inter-community meetings had violated his right to freedom of association and to an effective remedy, the ECtHR granted him non-pecuniary damages for helplessness and frustration.[239] These conceptualised the identity-based nature of the violations of the individual applicant in the context of inter-community tension based on group identity.[240] In *Plan de Sánchez Massacre*, the IACtHR found that discriminatory judicial practices, including the failure to prosecute the perpetrators, increased rape victims' ongoing suffering, "designed to destroy the dignity of women at the cultural, social, family and individual levels", and caused women's stigmatisation by their communities.[241] While the IACtHR ordered compensation to victims nominally,[242] it clearly linked reparations to the victims' community and cultural rights.

But it is in the context of attacks targeting linguistic, religious and social rights that the breach of ECHR and ACHR rights has intersected most expressly with heritage. In *Temel & Others*, the ECtHR held that suspending students because they petitioned their university for Kurdish language options restricted their right to education.[243] It found that the unreasonable and disproportionate disciplinary action and subsequent legal proceedings caused the applicants non-pecuniary damage in the form of frustration and distress.[244] This restriction of the human right to education of members of the Kurdish minority targeted the linguistic component of their identity, which contributes to the Kurdish heritage. The same can be said about the human right to education of members of a faith with respect to their spiritual identity, which contributes to the inter-generational transmission of their heritage. In *Hasan & Eylem Zengin*, the applicants, an Alevi father and his daughter, failed to obtain the daughter's exemption from a religious class which did not discuss their faith. Finding that the right to education was violated, the ECtHR noted the Turkish educational system's "inadequacy", which in

[238] *Moiwana Community v Suriname* (n 208) paras 186-187.
[239] *Djavit An v Turkey*, (ECtHR) Judgment (20 February 2003) No 20652/92, paras 10-11, 69, 74 and 83-84.
[240] *See* also *Isayeva, Yusupova & Bazayeva v Russia* (n 225) paras 248-249, where the ECtHR considered as non-pecuniary damage the fact that during the Russian attacks, the applicants had been "deeply traumatized" and "suffered anguish and fear".
[241] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 49(18)-(19) and 87(f)
[242] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 80, 83 and 88-89.
[243] *İrfan Temel & Others v Turkey*, (ECtHR) Judgment (3 March 2009) No 36458/02, paras 6, 9 and 44.
[244] *İrfan Temel & Others v Turkey* (n 243) paras 46 and 52.

terms of religious education lacked objectivity, pluralism and respect for the parents' convictions. The judgment itself was rendered in satisfaction of the non-pecuniary damage.[245] Both of these cases thus considered in a heritage-centred manner the curtailment of the right to education and its consequences as non-pecuniary damage sustained by the individuals belonging to a minority group.

The forcible transfer of children from one group to another is another identity-based human rights violation that falls within a heritage-centred approach (for a discussion on it being an act of genocide if accompanied with the requisite mens rea, see Part II, Chapter 3). *Contreras et al* addressed the forced disappearance and name change of children as part of El Salvador internal armed conflict's "institutionalized State violence".[246] This "deliberate strategy" consisted of formal judicial adoptions; non-formal de facto adoptions or "appropriations" by Salvadoran soldiers' families for domestic or agricultural uses; and placements in orphanages or in military bases.[247] The IACtHR held that the children's forced disappearance caused them to feel "loss, abandonment, intense fear, uncertainty, anguish and pain".[248] For the children who could be traced, the IACtHR held that El Salvador must cover the expenses of "the reunion, and of the necessary psychosocial care" and help them re-establish "their identity" and "facilitate [biological] family reunification, should they so wish".[249] While focusing on individual members' reunification, this case touched upon the rebuilding of identity. It is however important as the judgment clearly contextualised the children's plight as part of attacks involving their identity within their wider community. The IACtHR thus conceived identity as biological and cultural since without their families, these individuals became culturally alienated (for a different understanding, see Part II, Chapter 3).

2. Indirect victims: pecuniary and non-pecuniary damage

Both the ECtHR and IACtHR have held that as a result of the direct victims' suffering as part of a collective, their next of kin can sustain pecuniary and non-pecuniary damage. While not expressly formulated through an inter-generational lens (II.B), the forms of reparations have, at times, been quasi-collective since the victims were targeted as part of the collective, ie the cultural unit that contributed to their identity.

On pecuniary damages, indirect victims too can sustain both actual and anticipated future loss/diminished gain. As with direct victims, while cases addressing such damages did not concern attacks targeting culture expressly, the victims belonged to political groups, which often corresponded to their ethnic background making-up their

[245] *Hasan & Eylem Zengin v Turkey,* (ECtHR) Merits and Just Satisfaction (9 October 2007) No 1448/04, paras 3, 10-12, 63-65, 76-77, 81-84, and para 3 of the dispositif.
[246] *Contreras et al v El Salvador,* (IACtHR) Merits, Reparations and Costs (31 August 2011) Series C No. 232, paras 41, 51, 53 and 85.
[247] *Contreras et al v El Salvador* (n 246) para 54.
[248] *Contreras et al v El Salvador* (n 246) para 85.
[249] *Contreras et al v El Salvador* (n 246) paras 2, 17, 51-54 and 192. *See* also *Las Dos Erres" Massacre v Guatemala,* (IACtHR) Preliminary Objection, Merits, Reparations, and Costs (24 November 2009) Series C No. 211, paras 2, 179-180 and 293.

socio-cultural identity.[250] But the HRCts have also granted non-pecuniary damage for emotional suffering in a variety of situations. In *Cyprus v Turkey*, having found that the lack of effective investigation into the fate of nearly 1500 missing Cypriots caused their relatives to "endure the agony of not knowing" and "a prolonged state of acute anxiety", the ECtHR ordered compensation for such non-pecuniary damages.[251] This case is important since it addressed the disappearance of members of a collective in the context of ethnic tensions resulting from an occupation. While not addressing heritage as such, the reparations measure concerned the consequences of the displacement and disappearance of the members of a cultural collective. The IACtHR has made similar findings when State authorities prevented family members from acquiring information about missing persons and accessing justice. In *Contreras et al*, the IACtHR held that the disappeared children's unknown whereabouts and the judiciary's inaction prolonged the applicants' feelings of powerlessness and uncertainty; and identified siblings born after the forced disappearance as injured parties. The IACtHR thus granted nominal compensation to both direct and indirect victims for all non-pecuniary damage.[252]

3. Outcome

Both the ECtHR and IACtHR have recognised that individuals may be the victims of human rights violations by virtue of their belonging to a collective. These victims are capable of suffering direct and indirect pecuniary and non-pecuniary damage. In this context, both regional courts adopted a heritage-centred approach by contextualising human rights violations against a broader identity-based background.

Two scenarios can extracted from the aforementioned cases. The first will concern the breach of those ECHR or ACHR rights that are more directly related to cultural rights, such as the freedom of thought, conscience and religion. In this scenario, one or more individuals' human rights violations are aimed at or result from eg the restriction of the right of education. This will adversely impact on the cohesion of their cultural units within the broader national collective. The second scenario, which is more frequent, is when ECHR and ACHR violations are unrelated to the group members' cultural features. This second type of human rights violations will concern, eg the right to property, in forms as varied as a car's destruction. In this configuration, such ECHR or ACHR breaches occur because the individuals belonged to specific collectives.

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[250] *See Akkoç v Turkey*, (ECtHR) Merits and Just Satisfaction (10 October 2000) Nos 22947/93 and 22948/93, para 133, and *Kişmir v Turkey*, (ECtHR) Judgment (31 May 2005) No 27306/95, para 154, wherein the ECtHR found that the deceased Kurds' loss of income led to their family's loss of financial support. *See* also *Estamirov & Others v Russia* (n 459) paras 14, 22-23 and 129. For the IACtHR, *see* eg *Miguel Castro-Castro Prison v Peru* (n 208) paras 413 and 423-424 and *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 50 and 105.

[251] *Cyprus v Turkey,* (ECtHR) Just Satisfaction (12 May 2014) No 25781/94, paras 58, 136, 150 and 157. *See* also *Association "21 December 1989" & Others v Romania,* (ECtHR) Merits and Just Satisfaction (24 May 2011) No 33810/07, paras 13, 19, 136, 145, 176, 198-199 and 203, *Kişmir v Turkey* (n 250) paras 82, 89, 98, 119 and 161, *Estamirov & Others v Russia* (n 250) paras 14, 22-23 and 133; and *Akkoç v Turkey* (n 250) para 136.

[252] *Contreras et al v El Salvador* (n 246) paras 62, 68, 79, 85, 121-124, 226-228 and 192. *See* also *Montero-Aranguren et al* (n 208) paras 60(16)-(19), 60(23)-(25) and 132(b), the IACtHR held that the next of kin's lack of access to justice and information about the locations of the bodies of hundreds of prisoners killed and/or transferred caused them prolonged suffering.

In sum, this identity-based concerns natural persons belonging to the collective. Both HRCts have however considered this matter more holistically, through the collective as the sum of natural persons.

B. The collective as the sum of natural persons

The IACtHR and the ECtHR have considered that the collective as a whole, ie as the sum of the individuals constituting it, can suffer both pecuniary and non-pecuniary damage, as a victim of attacks targeting culture resulting in breaches of ECHR and ACHR provisions. However, while both courts considered the collective without addressing its formal juridical personality (1), the IACtHR has, progressively and expressly, recognised that the collective can enjoy juridical personality and therefore suffer human rights violations as a result of the breaches of ACHR provisions (2).

The IACtHR's jurisprudence has often dealt with collectives in the form of indigenous/tribal entities subjected to restrictions of ancestral lands during both armed activities and peacetime. The ECtHR's jurisprudence has, on the other hand, mainly derived from armed activities, involving the fate of national – including linguistic or religious – communities. In both situations, a link has been established between the breaches of human rights provisions contained in the ECHR and ACHR and the identity of the collective. Adopting a heritage-centred approach, this section will show how human rights violations link to heritage.

1. The collective regardless of its juridical personality

Both the ECtHR and IACtHR have recognised that the collective can suffer pecuniary and non-pecuniary damage when its members suffer mass human rights violations. Where not expressly provided, this has been implied by the IACtHR when granting collective reparations according to the scope of the damage suffered by the collective's individual members. This section will first consider the injured party and the beneficiary of reparations (a), and then non-pecuniary damage in the form of heritage disruption (b).

a. Scope: injured party and beneficiary of collective reparations

Beyond recognising individual members of a collective as injured parties and beneficiaries of reparations, the IACtHR has also granted collective reparations,[253] in

[253] Some have viewed collective reparations as "the benefits conferred on collectives in order to undo collective harm". *See* Frederich Rosenfeld "Collective Reparations for Victims of Armed Conflicts" (2010) 92(879) *International Review of the Red Cross* 731, p 732. Others have proposed that "collective is used to qualify the 'reparations', 'or the types of goods distributed and [their mode of [distribution], as well as to qualify the 'subject' who receives them, namely collectivities, such as legal

isolation or in combination with individual reparations, to direct and indirect victims, dependants, next of kin and successors of victims based on the gravity of the violations.[254] As will be seen, the IACtHR has accounted for cultural customs and practices in determining who constitutes a direct victim.[255]

In *Plan de Sánchez Massacre*, the surviving victims nominally identified in the judgment were the injured parties and therefore the beneficiaries of reparations.[256] However, where it was impossible to individualise victims, the IACtHR granted reparations to "all the [affected] members of the communities",[257] given the importance of reparations "to the members of the community as a whole", especially for non-pecuniary damages that "have public repercussions".[258]

In *Moiwana Community*, notwithstanding its finding that individuals named in the judgment are the injured parties and reparations' beneficiaries,[259] the IACtHR held that "individual reparations" "must be supplemented by communal measures; said reparations will be granted to the community as a whole".[260] In *Kichwa Indigenous People of Sarayaku*, the IACtHR determined the Kichwa Indigenous People of Sarayaku as the injured party and beneficiary of reparations.[261] The IACtHR divided collective reparations into compensation and other forms of reparations which would also be reflected in the ICC practice regarding culture's tangible/cultural heritage damages (Part II, Chapter 1.III.D.).

As seen, compensation has been nominally granted, often for pecuniary damage, to the individual members of a community, as both direct and indirect victims.[262] The IACtHR has ordered States to compensate communal associations to allow communities to decide on "community infrastructure or projects of collective interest", such as education, culture, food security, health and eco-tourism.[263]

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subjects or ethnic or racial groups". *See* Ruth Rubio-Marín and Pablo de Greiff "Women and Reparations" (2007) 1(3) *International Journal of Transitional Justice* 318, p 335. Others have argued that reparations are collective, when they concern "the violation of a collective right or" "of a right that has an impact on a community"; or "the subject of the reparation is a specific group of people"; or because "of the types of goods distributed or [their] mode of [distribution], such as an apology". *See* Sylvain Aubry and Maria Isabel Henao-Trip "Collective Reparations and the International Criminal Court" *Briefing Paper No. 2* (Reparations Unit, University of Essex 2011) <https://www1.essex.ac.uk/tjn/documents/Paper_2_Collective_Reparations_Large.pdf> accessed on 14 April 2019.

[254] *See* Diana Contreras-Garduño *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia 2018), pp 10-11, 13, 101, 103 and 150.

[255] *See* Contreras-Garduño, *Collective Reparations* (n 254) p 101.

[256] *Plan de Sánchez Massacre v Guatemala* Reparations(n 208) paras 61-65, holding that if the victims had died, any compensation would have been distributed according to succession laws.

[257] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 62.

[258] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 86 and 93.

[259] *Moiwana Community v Suriname* (n 208) para 176.

[260] *Moiwana Community v Suriname* (n 208) para 194.

[261] *Kichwa Indigenous People of Sarayaku v Ecuador,* (IACtHR) Merits and Reparations (27 June 2012) Series C No. 245, para 284.

[262] *Moiwana Community v Suriname* (n 208) para 196; *Río Negro Massacres v Guatemala,* Preliminary objection, Merits, Reparations and Costs (4 September 2012), Series C No. 250, para 309.

[263] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) paras 317 and 323.*See also Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 213) para 167.

However, in cases of non-pecuniary damage, the IACtHR has frequently provided a collective context to the violations in order to grant, additionally, "other forms of reparations (satisfaction measures and non-repetition guarantees)", which "seek to impact the public sphere", given the damages' "collective nature".[264] These other forms of reparations have included: the establishment of "collective title to traditional territories";[265] the prosecution and punishment of those responsible for the violations; the location of remains of next of kin, in part to contribute to the reconstruction of the community's cultural integrity;[266] the public acknowledgment of international responsibility;[267] the publication and dissemination of judgments in both Spanish and the community's language;[268] the issuance of public apologies to community members;[269] State officials' training on indigenous people rights;[270] the institution of commemorative programmes for raising public awareness;[271] and the creation of museums and the erection of public monuments commemorating the victims and events.[272] The IACtHR has also ordered the adoption of infrastructure and community-related measures, such as medical and psychological treatments of a "collective, family and individual" nature, including by traditional healers and medicine;[273] and road, sewage, food, water supply, health and housing infrastructure programmes.[274]

The IACtHR has also ordered other forms of reparations that focus on the intangible components of the community's culture. These have included the implementation of programmes aimed at rescuing the community's specific culture by promoting the conservation of their ancestral customs and practices;[275] the provision of school teachers specialised in intercultural and bilingual teaching; and the study and dissemination of the affected communities' culture.[276] In the following, the various forms of reparations were granted to the beneficiaries considered as cultural units.

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[264] *Moiwana Community v Suriname* (n 208) para 201.
[265] *Moiwana Community v Suriname* (n 208) paras 209-211
[266] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 98-99; *Río Negro Massacres v Guatemala* (n 262) para 265; *Moiwana Community v Suriname* (n 208) paras 205-208.
[267] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 100-101; *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 305; *Río Negro Massacres v Guatemala* (n 262)paras 277-278.
[268] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 102; *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 308; *Río Negro Massacres v Guatemala* (n 262) paras 274-275.
[269] *Moiwana Community v Suriname* (n 208) para 216.
[270] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 302.
[271] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 104.
[272] *Río Negro Massacres v Guatemala* (n 262) paras 279-280 and *Moiwana Community v Suriname* (n 208) para 218. As seen in *Moiwana Community v Suriname* (n 208) para 196, for the aforementioned non-pecuniary damages, the IACtHR also granted the surviving victims monetary compensation.
[273] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 107; *Río Negro Massacres v Guatemala* (n 262) paras 284 and 289.
[274] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 110. Intriguingly, as part of these collective measures, the IACtHR also ordered the provision of housing for surviving victims nominally, *see Plan de Sánchez Massacre v Guatemala* (n 208) Reparations, para 105; *Moiwana Community v Suriname* (n 208) para 214; *Río Negro Massacres v Guatemala* (n 262) para 284.
[275] *Moiwana Community v Suriname* (n 208) para 214; *Río Negro Massacres v Guatemala* (n 262) paras 284-285.
[276] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 110.

b. Non-pecuniary damage: the disruption of heritage

Both the ECtHR and IACtHR have addressed what this study calls the "disruption of heritage", also referred to as "disruption of culture" by the ICC (Part II, Chapter 1) It concerns the destruction of, damage or access restriction to anthropical and natural heritage, whether intangible (language, beliefs, customs) or tangible (artefacts and land). This category illustrates best how both HRCts have adopted a heritage-centred approach by linking the impact of ECHR and ACHR violations on the collective's identity. This study proposes this category mainly by means of inferences from the forms of reparations granted for non-pecuniary damage.[277]

The disruption of heritage has involved the violation of anthropical and natural heritage (i), the prevention of knowledge transmission (ii), and the forced ethnical/national transformation (iii).

i. Anthropical and natural heritage: communal lands

The IACtHR has considered the disruption of culture's intangible caused by restrictions on indigenous/tribal communities' traditional lands and the resulting adverse effects on the victims' cultural identity. Due to the lands' communal nature, these ACHR violations eventually impacted the collective itself and, by implication, heritage. In the landmark judgment *Mayagna (Sumo) Awas Tingni Community*, having found Nicaragua's granting third parties access to an indigenous community's traditional lands to be a violation of the right to property, the IACtHR defined property under ACHR article 21 as movable and immovable, tangible and intangible "which can be possessed" and their correlated individual rights.[278] The IACtHR then expanded the enjoyment of property by an individual to that of a collective. It did so by holding that indigenous/tribal groups enjoyed a "communal form of collective property of the land"; wherein the "ownership of the land is not centred on an individual but rather on the group and its community".[279] With this, the IACtHR linked collective property to an inter-generational legacy-oriented concept, a collective notion, par excellence, by holding that:

> the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic

[277] The IACtHR has established that the collective is capable of suffering pecuniary damage as a result of the breach of some ACHR provisions, specifically the right to property. *See Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) paras 284 and 315, finding that expenses; loss of earnings; the impact on the community members' use and enjoyment of resources on their territory, including for hunting and fishing; all constituted pecuniary damage. In *Moiwana Community v Suriname* (n 208) paras 216-217, the IACtHR considered "the loss or detriment to the income of the victims, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the case *subjudice*".

[278] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 213) para 144, holding: "Property can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.

[279] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 213) para 149.

> survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[280]

Given the collective's particular demographics and territorial spread, the IACtHR adopted the holistic approach to culture (general introduction). The collective's identity is defined in relation to its anthropical heritage, whether tangible or intangible, spiritual or secular, and which intersected with the collective's natural heritage: its land. Although tangible, the land goes beyond the collective's economic resources to embody its intangible heritage, which defines the collective's identity. This position reflects international legal instruments' consideration of heritage as both anthropical and natural (eg the 1972 World Heritage Convention). It also considers that the tangible can support the intangible, somehow reflecting and preceding the 2003 Intangible Cultural Heritage Convention. From this position, the IACtHR found a violation of the community members' right to use and enjoy their property.[281]

Having granted indigenous groups the right to collective land and resources in the above judgment,[282] the IACtHR would subsequently deepens the heritage-centred implications of its finding. In *Moiwana Community*, the IACtHR focused on the spiritual implications of the breaches of the ACHR. Accordingly, the Moiwana community members' lack of access to justice and the resulting impunity meant that they feared that "offended spirits will seek revenge upon them".[283] Noting that Moiwana community members have their "own language, history, as well as cultural and religious traditions", the IACtHR found that not performing their traditional death rituals caused them "deep anguish and despair" in that "spiritually-caused illnesses" would "affect the entire natural lineage" inter-generationally.[284] Thus, community members experienced the psychological consequences of the breakdown of their symbiotic relationship with their land, with which they entertained a "vital spiritual, cultural and material" relationship. This "devastated them emotionally, spiritually, culturally, and economically".[285] Hausler's three layered definition of the community's culture (justice, spirituality and land) reflects best these fundamentals.[286]

In *Kichwa Indigenous People of Sarayaku*, the IACtHR held that international law recognises the rights of indigenous/tribal groups "as collective subjects of international law and not only as members of such communities or peoples".[287] The Court found that an oil company's activities adversely impacted the Kichwa people's means of subsistence, freedom of movement and right "to cultural expression".[288] The IACtHR found that these activities had already destroyed one spiritual site, suspended cultural ancestral events and further threatened "primary forest, sacred sites, areas for hunting, fishing and food gathering, medicinal plants and trees, and places used for cultural

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[280] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 213) para 149.
[281] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 213) paras 151-153.
[282] S James Anaya and Claudio Grossman, "The Case of Awas Tingni v Nicaragua: A New Step in the International Law of Indigenous Peoples" (2002) 19(1) *Arizona Journal of International and Comparative Law*, pp 1-2.
[283] *Moiwana Community v Suriname* (n 208) para 195.
[284] *Moiwana Community v Suriname* (n 208) paras 84(11), 86(4), 86(7)-86(9), 195 and 197(b).
[285] *Moiwana Community v Suriname* (n 208) para 195(c).
[286] Hausler (n 212) p 240.
[287] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) paras 231-232, 249, 271 and 278.
[288] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 2.

rites".[289] Reflecting again international instruments' conception of anthropical and natural heritage, the IACtHR held that the Kichwa peoples' relationship with their territory transcends its economic use to "encompasses their own worldview and cultural and spiritual identity".[290] Having again considered the indigenous/tribal group from the holistic approach to culture, the Court viewed as non-pecuniary damage the "suffering caused to People and to their cultural identity and the changes in their way of life, the impact on their territory".[291] This case thus clearly involved the heritage-centred implications of ACHR violations and their consequences on the identity of the collective, as recalled at the beginning of this sub-section in Francioni and the UNHRC's interpretation of ICCPR article 27.

ii. Knowledge: indigenous/tribal elders and women

In *Plan de Sánchez Massacre*, the IACtHR considered the disruption of intangible heritage in the form of inter-generational disintegration of knowledge, faith and rites as a result of damage to the community's social fabric.[292] One recurring pattern is the killing/detention of community leaders, elderly and women, which perturbs or interrupts the inter-generational transmission of traditions and language. The IACtHR held that killing women and elders, the oral transmitters of the Maya-Achí culture, caused a "cultural vacuum" because their knowledge could not be transmitted to youth through traditional education.[293] The IACtHR found that the State's forced replacement of traditional structures with a vertical, militaristic control system affected the reproduction and transmission of culture within the community. Consequently, the victims were unable to celebrate ceremonies, rites and other traditional manifestations or to bury their executed relatives in accordance with Mayan funeral rites.[294] This was an important cultural feature since, as noted by Viaene, for the Maya-Achí, the loss of people's spirit (*muhel*) can cause great suffering (*susto*).[295] It was thus imperative for the internally displaced Maya-Achí to recover the wandering spirits through a specific spiritual healing process and both return and access to their property, which was made impossible as it had been privatised.[296] When assessing these non-pecuniary damages, the IACtHR held that:

> [f]or the members of these communities, harmony with the environment is expressed by their spiritual relationship with the land, the way they manage their resources and a profound respect for nature. Traditions, rites and customs have an essential place in their community life. Their spirituality is reflected in the close relationship between the living and the dead, and is expressed, based on burial rites, as a form of permanent contact and

[289] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) paras 174 and 218.
[290] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 155.
[291] *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 323.
[292] *See also* Federico Lenzerini, "The Tension between Communities' Cultural Rights and Global Interests: The Case of the Maori Mokomokai" *in* Borelli and Lenzerini *Cultural Heritage, Cultural Rights, Cultural Diversity* (n 14).
[293] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 49(12), 49(13) and 87(b).
[294] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 87(a).
[295] Lieselotte Viaene, "Life is Priceless: Mayan Q'eqchi' Voices on the Guatemala National Reparations Program" (2010) 4(1) *The International Journal of Transitional Justice* 4, pp 21-22.
[296] Viaene (n 295) pp 21-22.

> solidarity with their ancestors. The transmission of culture and knowledge is one of the roles assigned to the elders and the women.[297]

This passage encapsulates two traits of the IACtHR's heritage-centred approach with respect to the collective as the sum of natural persons. First, the identity of the collective is defined by its symbiotic relationship with its natural environment. This relationship is fusional because it is both tangible (use of resources) and intangible (spirituality, including the relationship with the dead). Second, these defining features of the collective's identity are altered when its transmitters are targeted via ACHR violations. When the latter happens, it is heritage as such which is affected.[298]

Granted that violence does have a gendered nature, the measures adopted to redress such violence require a gendered component.[299] Reparations in the context of sexual and reproductive violence have proven to be a challenging transitional justice issue, specifically under the Guatemala National Reparation Program, which has struggled with Maya-Achí women's cultural specificities, when designing reparation schemes.[300] Under this programme, making public the identity of victims of sexual violence (eg at State-sponsored community ceremonies or through compensation cheques titled "victim of rape") has resulted in Maya-Achí women being pressured by their families to disseminate their stories (in order to receive reparations) or being undermined and ostracized, family-wise and socially.[301] Maya-Achí women claimed that they were "treated as prostitutes", felt guilty for the compensation received and were accused of creating stories to claim reparations.[302] This reflects the challenges of addressing injury to Maya-Achí women, whose identity, status and sexual reproductive capacity are inter-connected.[303] More generally, under the "violence continuum thesis", where gender violence spreads from that "of everyday life, through structural violence of economic systems that sustain inequalities and the repressive policing of dictatorial regimes, to the armed conflict of open warfare",[304] effective collective reparations ought to be transformative, by allowing women to design them, so as to reflect socio-cultural

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[297] *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) para 85.
[298] *See Río Negro Massacres v Guatemala* (n 262) paras 2, 82, 87, 151 and 162,finding that the Mayan community members had been the "victims of systematic persecution, aimed at their total elimination"; and that the loss of the community's leaders, midwives and spiritual guides prevented the performance of spiritual rites, leading to the gradual loss of the Maya-Achí language and the destruction of the community's social structure, especially in terms of culture's transmission on to children. *See* also *Norín Catrimán et al (Leaders, Members and Activist of the Mapuche Indigenous People) v Chile,* (IACtHR) Merits, Reparations and Costs (29 May 2014) Series C No. 279, paras 74, 78, 445-446 and 537, on the "foremost leaders" prolonged detention and adverse impact "on the values, practices and customs" of their community, noting "the inherent characteristics that differentiate members of the indigenous peoples from the general population and that constitute their cultural identity".
[299] Cynthia Cockburn, "The Continuum of Violence: A Gendered Perspective on War and Peace," *in* Wenona Giles and Jennifer Hyndman (eds) *Sites of Violence: Gender and Conflict Zones* (University of California Press 2004), p 44.
[300] *See* "Programa Nacional De Resarcimiento" <http://www.pnr.gob.gt/> accessed on 14 April 2019.
[301] Colleen Duggan Claudia, Paz y Paz Bailey and Julie Guillerot, "Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru" (2008) 2(2) *The International Journal of Transitional Justice* 192, pp 139, 142, 204 and 208; Alison Crosby, Brinton Lykes M and Brisna Caxaj, Carrying a Heavy Load: Mayan Women's Understandings of Reparation in the Aftermath of Genocide" (2016) 18(2/3) *Journal of Genocide Research*, pp 270-271.
[302] Crosby, Lykes and Caxaj (n 301) p 270; Duggan, Bailey and Guillerot, (n 301) pp 204 and 210; Viaene (n 295) p 16; and Lauren Marie Balasco, "Reparative Development: Re-conceptualising Reparations in Transitional Justice Processes" (2016) 17(1) *Conflict, Security and Development* 1, p 8.
[303] Duggan, Bailey and Guillerot (n 301) pp 204 and 208.
[304] Cockburn (n 299) pp 19, 43-44.

concepts, and turn them into "agents of social change".[305] Here, gender and cultural sensitivity coalesce so as to constitute the two sides of the same coin.

iii. Ethnicity/nationality: religion and language

The ECtHR has addressed the disruption of heritage caused by mass human rights violations during inter-State occupation and/or secession. *Cyprus v Turkey* addresses a situation of occupation following the 1974 Turkish military operations. Therein, the ECtHR found violations of the rights of missing persons and their relatives; of displaced persons with respect to their home and property; of Greek-Cypriots' living conditions in northern Cyprus; and of displaced Greek-Cypriots to hold elections.[306] Having acknowledged, inter alia, that the Karpas Greek-Cypriots' rights violations "had the effect of ensuring that, inexorably, with the passage of time the community would cease to exist", the ECtHR held that:

> the interferences at issue were directed at the Karpas Greek-Cypriot community for the very reason that they belonged to this class of persons […] in terms of the features which distinguish them from the Turkish-Cypriot population, namely their ethnic origin, race and religion.[307]

Thus, identifying the Karpas Greek-Cypriots as an ethnic, racial and religious group, the ECtHR held that the various ECHR violations of the members of the group aimed at their disappearance as a collective. With each of ethnic, racial and religious traits contributing to defining a collective's identity, the ECtHR found that the ECHR violation produced the Karpas Greek-Cypriots' "protracted feelings of helplessness, distress and anxiety".[308] Accordingly, the ECtHR granted compensation for non-pecuniary damages to be distributed to the missing persons' surviving relatives and to the enclaved Karpas Greek-Cypriots.[309] These reparations unquestionably linked the multiple ECHR violations to the collective, as a culturally distinct entity. Targeting that identity may be done not exclusively by physical means but also by various human rights restriction. When these are effected successfully, it is the collective's heritage that is threatened, potentially resulting into its disappearance. This ruling is also important as it helps understand attacks targeting culture through genocide and CaH (Part II, Chapters 2-3).

Catan & Others addresses Transdniestria's secession following the 1992 armed conflict. The constitution and laws of Transdniestria's separatist authorities recognised three official languages: Russian, Ukrainian and Moldovan, but only as transcribed in Cyrillic, thereby potentially outlawing its transcription through the Latin alphabet and

[305] For more examples of women's fundamental role in reparations *see* Ruth Rubio-Marín, "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression" *in* Ruth Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009), p 395.
[306] *Cyprus v Turkey,* (ECtHR) Judgment (10 May 2001) No 25781/94, paras 3 and 94-100.
[307] *Cyprus v Turkey* (Just Satisfaction (n 251) paras 307 and 309.
[308] *Cyprus v Turkey,* Just Satisfaction (n 251) paras 57 and 309-311.
[309] *Cyprus v Turkey,* Just Satisfaction (n 251) paras 57-58.

closing most of the schools.[310] Additionally, separatist authorities harassed and intimidated the applicants because of their educational choices for their children.[311] The ECtHR found the violation of the right to education in relation to respect for private and family life, given the fact that the language policy was designed "to enforce the Russification of the language and culture of [Transdniestria's] Moldovan community".[312] By addressing the community's language and corresponding alphabet through the right to education, the ECtHR reaffirmed the inseparable link between language, culture and identity. Language is a part of culture, and they both contribute to defining collective identity. In other words, the ECtHR adopted a heritage-centred approach wherein the protection of the collective's heritage is endangered when its members' human rights are violated. If not discontinued, such violations may impact on the collective's identity.

2. The collective with express juridical personality

The IACtHR observed that, under the "Right to Juridical Personality", according to which "[e]very person has the right to recognition as a person before the law":

> a person is recognized everywhere as a subject of rights and obligations, and may enjoy fundamental civil rights, which involves the capacity to be the holder of rights (capacity and enjoyment) and obligations.[313]

But the IACtHR has gradually expanded this concept by expressly recognising that the collective as the sum of natural persons may in fact possess juridical personality. Unlike the previous sub-section where the collective played a feature mainly for reparations purposes, the present will demonstrate how the express application of juridical personality to the collective enables its formal recognition as an injured party and beneficiary of reparations. This will be shown by considering the scope of the collective with juridical personality (a) and analysing non-pecuniary damage in the form of heritage disruption (b).

a. A narrow scope: the collective as injured party and beneficiary of reparations[314]

In a series of cases concerning indigenous groups' ancestral and communal property, the IACtHR jurisprudence established a narrower application of juridical personality to the collective than to the natural person. In *Yakye Axa Indigenous Community*, the IACtHR found violations of the rights to a fair trial, to property and to judicial

[310] *Catan & Others v Moldova and Russia*, (ECtHR) Judgment (19 October 2012) Nos 43370/04, 8252/05 and 18454/06, paras 43-45.
[311] *Catan & Others v Moldova and Russia* (n 310) para 82.
[312] *Catan & Others v Moldova and Russia* (n 310) paras 143-144, 148 and 150.
[313] *Río Negro Massacres v Guatemala* (n 262) para 119, referring to *Velásquez-Rodríguez v Honduras* (n 208) para 187. *See also Contreras et al v El Salvador* (n 246) para 88 and ACHR (n 96) art 3.
[314] For a comprehensive discussion of the IACtHR approach, *see* Lenzerini, "The Safeguarding of Collective Cultural Rights" (n 222) pp 142-148.

protection of the "members of the Yakye Axa Indigenous Community".[315] Without referring to ACHR article 3, the IACtHR observed that the Paraguayan Constitution recognised indigenous peoples as "cultural groups" and under Paraguayan law:

> the indigenous Community has […] become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity. Legal status [*sic*.], in turn, is a legal mechanism that grants them [*sic.*] the necessary status to enjoy certain basic rights, such as communal property, and to demand their protection when they are abridged. [316]

The IACtHR thus recognised the collective's juridical personality beyond that of its members. Yet, the Court identified the collective's right to juridical personality more narrowly than that of its members, in that it could enjoy "certain basic rights".[317] In *Saramaka People*, having found a violation of, inter alia, the rights to juridical personality of the "members of the Saramaka people" as a whole, the IACtHR observed that while a necessity, the legal personality of the community's individual members alone could not comprehend fully "the right to use and enjoy property collectively in accordance with their ancestral traditions".[318] Accordingly, the IACtHR declared that the Saramaka people should be granted "juridical capacity to collectively enjoy" property rights and to challenge their violation judicially.[319] The IACtHR found that recognising this right "is a natural consequence of the recognition of the right of members of indigenous and tribal groups to enjoy certain rights in a communal manner".[320] The Court thus considered the collective's right to juridical personality as a continuation of its members' right.[321]

The IACtHR's recognition of the possession of juridical personality by certain collectives – albeit qualified – logically resulted in their faculty to claim injury and seek reparations of a collective nature. In *Yakye Axa Indigenous Community*, noting the "special collective significance" of reparations, the IACtHR granted reparations "to the

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[315] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 179.

[316] *Yakye Axa Indigenous Community v Paraguay* (n 213) paras 79-80 and 83. *See also* Pentassuglia (n 236). In *Xákmok Kásek Indigenous Community v Paraguay,* (IACtHR) Merits, Reparations and Costs (24 August 2010) Series C No. 214, paras 59-60, 74-75, 81-82, 255 and operative para 16, noting that various land use restrictions had prevented the Xákmok Kásek from living on their ancestral land and carrying out their traditional activities, including hunting, fishing and gathering, the IACtHR found that the rights of the "Xákmok Kásek Community" to "communal property", judicial guarantees and judicial protection were violated, and that both international and Paraguayan laws "recognize rights to the indigenous peoples, as such, and not merely to their members".

[317] The second sentence gives the impression that the IACtHR considered the members of the group rather than the group itself ("…that grants them…"). However, the original Spanish reads: "La personería jurídica, por su parte, es el mecanismo legal que les [*sic*] confiere el estatus necesario para gozar de ciertos derechos fundamentales, como por ejemplo la propiedad comunal, y exigir su protección cada vez que ellos sean vulnerados." The use of "les" could only have been a typographical error for "le", otherwise the rest of the sentence would not make sense.

[318] *Saramaka People v Suriname* (n 213) paras 1-3, 164 and 168.

[319] *Saramaka People v Suriname* (n 213) para 174.

[320] *Saramaka People v Suriname* (n 213) paras 171-172.

[321] *See* also *See Kaliña and Lokono Peoples v Suriname,* (IACtHR) Merits, Reparations and Costs (25 November 2015) Series C No. 309, paras 1-2, 107 and 114, which concerned grants of private property titles and mining licenses, and the establishment of nature reserves on the Kaliña and Lokono peoples' lands, the IACtHR held that the Surinamese legislation's non-recognition of the collective exercise of juridical personality by indigenous and tribal peoples was a violation of the Kaliña and Lokono peoples' right, which impacted on their rights to property and judicial protection.

members of the communities as a whole".[322] The IACtHR has divided such collective reparations into compensation and other forms of reparations.[323] Regarding the former, the IACtHR ordered, for pecuniary damage, the provision of compensation to community leaders so that they could reimburse victims and use the rest for purposes decided by the community.[324] The IACtHR has also compensated through development funds that address the consequences of restrictions to land access and the extraction of natural resources.[325] With respect to non-pecuniary damages, the IACtHR has ordered the establishment of community development funds aimed at financing collective projects such as sewage, potable water, nutrition, sanitary infrastructure, medical care, education (including in the community's language), housing, electricity, agriculture and health.[326] The IACtHR has also identified "other forms of reparations" or "satisfaction and guarantees of non-repetition". Where communal land restitution was impossible, the IACtHR has ordered the establishment of a fund either to allow the community to purchase new land from private owners or to compensate it for expropriation.[327] Other measures have included the recognition of juridical personality, guarantees of collective property, participation, and access to justice; training measures;[328] the delimitation, demarcation and granting of collective title over the territory, including "the lands and natural resources necessary for [the community's] social, cultural and economic survival";[329] the assessment of environmental and social impacts prior to awarding concessions for development projects on the said territory;[330] public acts of acknowledgment of international responsibility;[331] and the judgment's publication, translation into the community language, and dissemination via radio broadcast.[332]

This section will not belabour on pecuniary damages, as they have focused mainly on income loss, legal representation, and the more obvious consequences of land access restrictions and the extraction of natural resources.[333] Instead, this section will focus on non-pecuniary damages since they have concerned cultural heritage.

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[322] Notwithstanding this, the IACtHR added that the beneficiaries of reparations would be those members of the community who in the judgment identified nominally, *see Yakye Axa Indigenous Community v Paraguay* (n 213) paras 188-189. See also *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 278, and *Kaliña and Lokono Peoples v Suriname* (n 321) para 273.
[323] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 199.
[324] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 195.
[325] *Saramaka People v Suriname* (n 213) para 199.
[326] *See Yakye Axa Indigenous Community v Paraguay* (n 213) paras 205 and 221 (the latter, however, as other forms of reparations); *Saramaka People v Suriname* (n 213) para 201; *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 323; and *Kaliña and Lokono Peoples v Suriname* (n 321) para 295, with the latter also applying to pecuniary damages.
[327] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 217.
[328] *Saramaka People v Suriname* (n 213) para 194(b); *Kaliña and Lokono Peoples v Suriname* (n 321) paras 279(i)(a), 304-306 and 309.
[329] *Saramaka People v Suriname* (n 213) para 194(a) and (c).
[330] *Saramaka People v Suriname* (n 213) para 194(e).
[331] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 226.
[332] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 227; *Saramaka People v Suriname* (n 213) paras 196-197; *Kaliña and Lokono Peoples v Suriname* (n 321) paras 312-313.
[333] *See* eg *Kichwa Indigenous People of Sarayaku v Ecuador* (n 261) para 309; *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 297; *Yakye Axa Indigenous Community v Paraguay* (n 213) para 195; and *Saramaka People v Suriname* (n 213) para 199.

b. Non-pecuniary damage: disruption of heritage – the collective-land symbiosis breakdown

By recognising the collective's juridical personality in cases of restrictions of access to communal lands, the IACtHR has adopted the holistic approach to culture as reviewed in the general introduction. Reflecting international legal instruments' trend to consider both anthropical and natural heritage has constituted one of the pillars of the IACtHR jurisprudence regarding the collective with juridical personality. Non-pecuniary damage has thus taken the form of disruption of heritage, as a result of the breakdown of collective-land symbiosis. This disruption involves a crossover between tangible and intangible heritage, which gradually departs from an exclusively anthropo-centred standpoint to include the symbiotic relationship between the community and its natural environment, including its resources. Any damage to this equilibrium likely perturbs the collective's fabric.

In *Yakye Axa Indigenous Community*, the IACtHR noted both the direct victims and their relatives' non-pecuniary alterations in their conditions of existence.[334] The IACtHR noted that the Yakye Axa Community members' lack of effective "right to communal property" resulted in their subsequent poor living conditions.[335] Noting the relationship between indigenous/tribal peoples and their lands, the IACtHR held that any curtailment of their territorial rights would impact:

> values that are very representative for [their] members […], who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations.[336]

The IACtHR explicitly regarded the relationship between the collective's land and cultural heritage, which defined its identity. To be sure, the IACtHR further noted that for indigenous people:

> [p]ossession of their traditional territory is indelibly recorded in their historical memory, and their relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity. […], the Yakye Axa Community […] identity […] is connected to a physically and culturally determined geographic space, […].[337]

To severe the land-collective relationship would thus result in cultural loss, as this defining feature of the collective's identity is closely linked to its living space. Such approach is unquestionably heritage-centred as it focuses on the collective's identity, which is perpetuated through the transmission of their legacy.

In *Xákmok Kásek Indigenous Community*, the IACtHR confirmed that "the traditional possession by the indigenous peoples of their lands has the same effects as a title of full ownership granted by the State".[338] Notably, the IACtHR dedicated a sub-heading entitled "[e]ffects on the cultural identity of the members of the Community of the

[334] *Yakye Axa Indigenous Community v Paraguay* (n 213) para199.
[335] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 202.
[336] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 203.
[337] *Yakye Axa Indigenous Community v Paraguay* (n 213) para 216.
[338] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 109.

failure to restore their traditional territory" to the violation of the right to property.[339] The IACtHR held that:

> The culture of the members of the indigenous communities corresponds to a specific way of life, of being, seeing and acting in the world, constituted on the basis of their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are an integral element of their cosmology, their spirituality and, consequently, their cultural identity.
>
> In the case of indigenous tribes or peoples, the traditional possession of their lands and the cultural patterns that arise from this close relationship form part of their identity. This identity has a unique content owing to the collective perception they have as a group, their cosmovision, their collective imagination, and the relationship with the land where they live their lives.[340]

Thus, according to the IACtHR, the collective and the land are symbiotic, where even the mode of production constitutes a defining aspect of the collective's own perception of identity that encompasses both spiritual and tangible components. Following this, the IACtHR espoused the concept of culture as a holism (general introduction), by holding that:

> For the members of the Xákmok Kásek Community, cultural characteristics such as their own languages […], their shamanistic rituals, their male and female initiation rituals, their ancestral shamanic knowledge, the way they commemorate their dead, and their relationship with the land are essential for their cosmovision and particular way of life.[341]

Having defined the symbiotic relationship between the collective and its ancestral lands as well as the characteristics of the collective itself, the Court found that the community's loss of access to its traditional lands affected its members' cultural characteristics and practices.[342] In fact, those places had "become less sacred" and, consequently "all that affective relationship, or that symbolic or spiritual relationship [could not] be developed" – as, for example, their inability to bury family members.[343] The IACtHR also referred to the loss of religion, as evidenced by difficulties created in "male and female initiation rites, as well as the gradual loss of shamanism".[344] The IACtHR also found that language was another characteristic of the community members' cultural integrity that had been lost, since members were not taught their own languages and their children and grandchildren did not speak the community's tongue.[345] Finally, regarding the community members' means of subsistence, the IACtHR noted that various limitations on traditional lands affected hunting, fishing and gathering, leading to partial exodus and the separation of the community.[346]

In light of the above, the IACtHR noted that the community members' "cultural identity" was affected as a result of the breakdown of the collective's symbiotic relationship with its territory and its resources.[347] From the original land use and its

[339] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) paras 174-182.
[340] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) paras 174-176.
[341] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) paras 174-176.
[342] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 177.
[343] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 177.
[344] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 178.
[345] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 179.
[346] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 180.
[347] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 182.

related property rights violations, the damage suffered became holistic, encompassing the collective identity as defined by the community's material needs (its modes of production) and non-material practices (its spirituality and rites). The IACtHR held that the curtailment of those property rights places them under "the risk of losing or suffering irreparable harm to their life and identity and to the cultural heritage to be passed on to future generations".[348] In sum, this symbiotic relationship that shaped the collective's character and modes of production was the foundation of the community's identity. It had been forged through the inter-generational transmission of collective values. Violations of certain ACHR human rights provisions thus seriously threatened heritage. Once again, by adopting a heritage-centred approach, the IACtHR showcases the relationship between human rights and heritage. In *Saramaka People*, the IACtHR identified the collective-land symbiosis as the defining feature of the community's identity, by likening the Saramaka People's distress resulting from their legal battle for their land's recognition as "a denigration of their basic cultural and spiritual values", holding that these "alterations to the very fabric of their society" constituted non-pecuniary damage suffered by the Saramaka people.[349] In *Kaliña and Lokono Peoples*, the IACtHR built on that momentum by noting their "special physical and spiritual relationship" with their physical environment since, to them, "all the animals, plants, fish, stones, streams and rivers are interconnected living beings that have protective spirits".[350] In particular, the peoples' special relationship with a river constituted "an essential element of their cultural identity and traditions".[351] The IACtHR was thus crystal clear with respect to the importance of the natural environment as a constitutive part of the collective' heritage, which is shaped by an shapes its culture. In finding violations of the right to property, the IACtHR noted that the indigenous peoples' right to collective territory is essential to ensure their physical and cultural survival as well as their development and evolution as a people.[352] The Court found that the harm caused affected the "cultural identity and […] the cultural heritage to be transmitted to future generations".[353] By adopting this heritage-centred approach, the Court's holistic approach to culture enabled it to define the relationship between ACHR provisions and cultural heritage.

3. Outcome

As seen, the IACtHR and – less expressly – the ECtHR have considered that the collective, as the sum of its individual members, can be the victim of attacks targeting culture, thereby suffering both pecuniary and non-pecuniary damage. Initially considering the collective regardless of its juridical personality, the IACtHR progressively and formally recognised its right to juridical personality, a position also implied by awarding collective forms of reparations. Either way, the HRCts' jurisprudence has been based on ECHR and ACHR rights violations that adversely impact on the identity of the collective as such.

[348] *Xákmok Kásek Indigenous Community v Paraguay* (n 316) para 321.
[349] *Saramaka People v Suriname* (n 213) para 200.
[350] *Kaliña and Lokono Peoples v Suriname* (n 321) para 33.
[351] *Kaliña and Lokono Peoples v Suriname* (n 321) para 35.
[352] *Kaliña and Lokono Peoples v Suriname* (n 321) paras 125, 130 and 278.
[353] *Kaliña and Lokono Peoples v Suriname* (n 321) para 295. Note that the judgment did not specify the type of injury, except in specific cases.

Regarding the collective without express juridical personality, the ECtHR's cases have dealt with armed activities during inter-State occupation or secession, such as the 1970s Turkey-Cyprus and the 1990s Russia-Transdniestria-Moldova conflicts. In these cases, the fate of national communities – including their linguistic or religious rights – was at stake. As for the IACtHR, its cases have concerned access restrictions on ancestral lands during peacetime as well as the fate of indigenous/tribal entities during both armed activities – involving intra-State violence against women and elders. All these cases have focused on the violations of rights enumerated in the ECHR and ACHR. These human rights violations in turn impacted on heritage, as manifested through the collective's identity.

Regarding the collective with express juridical personality, this matter was exclusively considered by the IACtHR, in phases. First, the IACtHR expanded the application of the right to property from the individual to the collective, with respect to indigenous/tribal communities. Second, and most significantly, the IACtHR expanded the application of the right to juridical personality from members of the collective to the collective itself. As a result, the collective has been considered the injured party and the beneficiary of reparations. Therein, indigenous/tribal land access has unquestionably constituted the IACtHR's real innovation. The IACtHR has thus considered both anthropical and natural heritage as well as tangible and intangible heritage. Moving away from an exclusively anthropo-centred standpoint, the IACtHR has analysed how the collective's tangible heritage shapes its intangible one to create a wholesome entity. Damaging this material-spiritual whole, which constitutes the backbone of the collective's social fabric – its identity – may alter heritage. In other words, the disruption of heritage as non-pecuniary damage.

C. Synthesis: a heritage-centred approach grounded on damages' typology and victims

Both the ECtHR and IACtHR have recognised that not only individuals as the members of the collective, but also the collective – regardless of express juridical personality – as the sum of its individual may be the victims of rights violations. These victims are capable of suffering, directly and indirectly, pecuniary and non-pecuniary damage, a feature established through the findings of ECHR and ACHR rights breaches and implied by collective reparations awards.

In HRCts context, attacks targeting culture consist of two non-mutually exclusive situations. Most apparently and less frequently, culture is targeted when it is the cultural features – eg language and religion – of a collective's individual members that are directly targeted. Conversely, most frequently and less apparently, culture is targeted when mass human rights violations target a group's individual members because of their collective identity. In both of these situation, attacks targeting culture materialise in both peacetime and armed activities. The latter concerns armed confrontation between central governments and ethno-political centrifuge formations. In all cases, is either intended to or results from the curtailment of ECHR and ACHR human rights. Either way, these threaten the transmission of heritage as a whole. This is easier to realise when addressing smaller national minorities. In the case of indigenous/tribal

groups, the community-natural environment symbiosis is the defining characteristic of the collective's identity, especially since the natural environment may form part of heritage more broadly. Damaging this material-spiritual oneness, which constitutes the backbone of the collective's social fabric results in the disruption of culture (see also Part II, Chapter 1 for ICR-based practice). These attacks that target culture are anthropo-centred, in terms of the victims of damages. But importantly, they are heritage-centred as regards the types of damage, including their implications.

The IACtHR has applied culture' holistic approach to isolated communities, and the juridical personality that it has granted to the collective has been more limited than that of individuals in terms of enjoying ACHR rights. Nevertheless, this does not diminish the Court's innovative approach. This is so since, as put by Lowenthal, "the legacies we inherit stem from both nature and from culture", thereby representing an expression of the collective's values, the loss of which may lead to an identity alteration.[354] This is supported by the way in which natural disasters are memorialised and impact collective memory.[355] But the situation is not necessarily similar in urban-type social organisations where anthropical creations overwhelm the natural environment. Therein, damage to culture's tangible (eg relics and monuments) is felt more deeply than environmental damage.[356] This is due, inter alia, to the latter's physical remoteness in contrast to the former's more personalised nature, which sparks a greater sense of empathy.[357] Accordingly, notwithstanding international instruments such as the 1972 World Heritage Convention, whether natural environment forms part of heritage is a more complex question that will require a case-by-case analysis.

What matters is that HRCts have adopted a heritage-centred approach when addressing the targeting of culture. They have done so by focusing on the collective, either through its individual natural persons or as their sum. Either way, HRCts' jurisprudence permits viewing anthropical and natural heritage disruption through the curtailment of ECHR and ACHR.

III. Legal Persons: the tangible-centred approach

The above-analysed ECHR and ACHR violations are heritage-centred in terms of their typology of damage (and their consequences) and anthropo-centred in terms of their victims. Accordingly, natural persons, whether as members of the collective or as the collective itself, can claim damage for attacks directed at their culture's intangible (eg language, religion) but also tangible (anthropical and natural tangibles). As regards the latter, this Section will explore the extent to which HRCts allow for a tangible-centred approach, in terms of victimhood. As seen (general introduction), unlike the IACHR

[354] Lowenthal (n 155) p 342.
[355] Benjamin Morris, "'Not Just a Place': Cultural Heritage and the Environment" *in* Helmut K Anheier and Yudhishthir Raj Isar (eds) *Heritage, Memory and Identity* (The Cultures and Globalization Series) (SAGE Publications Ltd 2011) 124, p 124.
[356] Lowenthal (n 155) p 86.
[357] It has also been noted that cultural objects are preserved in museums and collections whereas the natural environment is protected in order to remain untouched by humans. *See* John Henry Merryman, "The Public Interest in Cultural Property" (1989) 77 *California Law Review* 339, p 341.

and ACHPR, ECHR P1-1 acknowledges that legal persons, ie companies, NGOs or associations, can participate in proceedings and seek reparations. Unlike with natural persons, however, the jurisprudence on legal persons generally does not involve mass human rights violations. Nonetheless, as seen (general introduction), a number of international legal instruments – as inaugurated by the 1874 Brussels Declaration – outlaw damage and destruction not just to culture's tangible, but importantly, to "*institutions* dedicated to religion, charity and education, the arts and sciences" [emphasis added]. The below-analysis facilitates understanding a tangible-centred approach, wherein legal persons can be the victims of attacks targeting culture's tangible. As will be seen, the ECtHR has progressively established that pecuniary and non-pecuniary damages can be suffered by the legal person itself (A). Additionally, and equally importantly, the ECtHR has also offered a tangible-centred approach insofar as the damage itself is concerned. In such cases, the legal person's individual members will claim personal damage as a result of damage to the legal person. In this scenario, the approach is anthropo-centred insofar as the injured party is concerned (and therefore the IACtHR's jurisprudence will also analysed); and tangible-centred insofar as the primary damaged entity is concerned (B).

A. Tangible-centred approach: victims – Legal persons as such

The ECtHR first addressed the question of legal persons in the 1980 *Sunday Times* decision. Finding a violation of freedom of expression, the ECtHR declined, on procedural grounds, to rule on the request to grant compensation for non-pecuniary damage to the applicants, ie the publisher, the editor and a group of Sunday Times journalists.[358] As will be seen, the ECtHR has since refined and expanded the scope of damage suffered by legal persons. Accordingly, the ECtHR has established that, whether as private entities (1) or as institutions dedicated to religion (2), legal persons may sustain pecuniary and non-pecuniary damage. The understanding of this will inform the adoption of a tangible-centred approach and link State responsibility to ICR, specifically when applying ICC Rules rule 85, according to which "Victims may include organizations or institutions that have sustained direct harm to" their cultural tangible (general introduction).

1. Private entities: from pecuniary to non-pecuniary damage

The ECtHR has held that private entities can sustain pecuniary damage as a result of violations of the ECHR and its Protocols, specifically in relation to their right to a fair

[358] *Sunday Times v United Kingdom (No. 1)*, (ECtHR) Judgment (26 April 1979) No 6538/74, para 68. The Court, however, entitled them to costs and expenses incurred in connection with the ECtHR proceedings; *see Sunday Times v United Kingdom (Art. 50),* (ECtHR) Just Satisfaction (6 November 1980) No 6538/74, paras 1, 14 and p 25. *See also Sunday Times v United Kingdom (No. 1)* (n 358) para 1; and *Sunday Times v United Kingdom (No 2)*, (ECtHR) Judgment (24 October 1991) No 50/1990/241/312, finding an ECHR violation, and ordering the UK to pay costs and expenses to the Times Newspapers Ltd and a British national. This study will not address such expenses, as they are not pecuniary and non-pecuniary damage the 2007 ECtHR Practice Direction (n 96) para 6.

trial, freedom of expression, effective remedies, prohibition of discrimination and protection of property.[359] The ECtHR's recognition of the violation of private companies' right to property has often been coupled with the violation of their right to a fair trial. For example, in the 2002 *Sovtransavto Holding*, the ECtHR granted the applicant company pecuniary damages, inter alia, for its property, shares and market losses.[360] In the 2009 *Dacia SRL*, the ECtHR ordered restitution or, if not possible, compensation, including for profit loss.[361] On the violation of private companies' right to freedom of expression, in the 2008 *I AVGI Publishing And Press Agency S.A. & Karis*, finding that a domestic court's decision to fine the applicant company in a defamation claim was a violation of its freedom of expression, the ECtHR included the sum of the fine in its quantification of pecuniary damage.[362]

But while recognising pecuniary damage suffered by legal persons is one thing, expanding the typology of damage to the non-pecuniary one has been less straightforward. For many would question how a legal person may suffer, for example, distress. Following earlier uncertainties,[363] the ECtHR eventually did so in the 2000 *Comingersoll S.A*. Having found a violation of the applicant commercial company's right to a fair trial, the ECtHR held that awarding reparations to legal persons would depend upon the circumstances of the case, particularly by reference to the violation, its related damage, and factors such as member States' practice.[364] Noting the challenges of identifying "a precise rule common to all member states", the ECtHR concluded that it may award compensation for non-pecuniary damage to commercial companies depending on objective or subjective elements.[365] In making such an assessment, the ECtHR held that:

> [n]on-pecuniary damage suffered by such companies may include the company's reputation, uncertainty in decision-planning, disruption in the management of the company […] and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team.[366]

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[359] *See Union Alimentaria Sanders SA v Spain,* (ECtHR) Judgment (7 July 1989) No 11681/85, paras 42-45, and *Academy Trading Ltd & Others v Greece*, (ECtHR) Judgment (4 April 2000) No 30342/96, para 56. For a violation of the right to property only, *see Stran Greek Refineries & Stratis Andreadis v Greece,* (ECtHR) Judgment (4 December 1994) No 13427/87, paras 75 and 80-83,where, having found a breach of the applicant private company's protection of property, the ECtHR ordered monetary reimbursement and the payment of interests regarding domestic arbitration.

[360] *Sovtransavto Holding v Ukraine*, (ECtHR) Judgment (25 July 2002) No 48553/99, paras 2 and 72.

[361] *Dacia SRL v Moldova*, (ECtHR) Just Satisfaction (24 February 2009) No 3052/04, paras 2, 38-40, 44, 48 and 55.

[362] *IAVGI Publishing And Press Agency SA & Karis v Greece*, (ECtHR) Judgment (5 June 2008) No 15909/06, paras 35, 37 and 40. *See also Krone Verlag GMBH & Co KG v Austria*, (ECtHR) Judgment (26 February 2002) No 34315/96, para 44.

[363] *See Manifattura FL v Italy,* (ECtHR) Judgment (25 February 1992) No 12407/86, para 22, where "assuming that [the company] was capable of suffering" non-pecuniary damages, the ECtHR considered that its declaratory judgment in itself provided sufficient just satisfaction. *See also Pressos Compania Naviera SA & Others v Belgium (Art 50),*(ECtHR) Judgment (3 July 1997) No 17849/91, paras 7 and 21; *Academy Trading Ltd & Others v Greece* (n 359) para 56; and *Krone Verlag GMBH & Co KG v Austria* (n 362) para 45, finding a violation of the applicant company's freedom of expression, and holding that it would "leave it open whether a corporate applicant may claim non-pecuniary damages" since "the finding of a violation in itself provides sufficient satisfaction as regards any non-pecuniary damages the applicant company might have sustained".

[364] *Comingersoll SA v Portugal*, (ECtHR) Judgment (6 April 2000) No 35382/97, paras 25, 32 and 34.

[365] *Comingersoll SA v Portugal* (n 364) paras 34-35.

[366] *Comingersoll SA v Portugal* (n 364) para 35.

The ECtHR thus placed legal persons at the centre of the equation, not only by holding that they could suffer non-pecuniary damage, but also by emphasising that their natural person members could suffer such damage, "to a lesser degree". In the case at hand, the ECtHR determined that reparations were required for proceedings that had been ongoing for twenty years and which "must have caused Comingersoll S.A, its directions and shareholders considerable inconvenience and prolonged uncertainty".[367]

The ECtHR has since followed and expressly referred to *Comingersoll* in relation to non-pecuniary damage suffered by private companies resulting from the violation of their right to a fair trial and protection of property. For example, in the 2010 *Rock Ruby Hotels Ltd*, the ECtHR found that the applicant company's denied property access following Cyprus' 1974 Turkish military intervention caused inconvenience to it, its directors and shareholders, leaving the applicant "in a state of uncertainty", resulting in compensation for both pecuniary and non-pecuniary damage.[368] The ECtHR has also awarded pecuniary damages for what appears to be anticipated future loss, or diminished gain. For example, in the 2009 *Dacia SRL*, noting Dacia SRL's profit loss due, inter alia, to the loss of Dacia Hotel, the ECtHR noted that the ECHR violations had "worsened [its management's] emotional loss and the loss of business reputation" and awarded compensation to it for non-pecuniary damage.[369]

The typology of damage suffered by legal persons, as found by the ECtHR, is thus diverse, akin to that suffered by natural persons. Accordingly, not only damage may be pecuniary and non-pecuniary but also, and importantly, it may be sustained as a result of violations that transcend the right to property (logical when considering a private company's assets) to encompass the rights to fair trial and freedom of expression.

2. Institutions dedicated to religion: pecuniary and non-pecuniary damage

Having laid the foundation for private companies to successfully make claims of pecuniary and non-pecuniary damage, the ECtHR expanded this right to institutions dedicated to religion. This has been most evident in the Romanian cases regarding the restitution of immoveable and movable Church properties (sacerdotal clothing, library, etc.) that had been transferred to the Orthodox Church during the communist dissolution of the Greek Catholic Church.[370] In these cases the ECtHR has sometimes granted

[367] *Comingersoll SA v Portugal* (n 364) paras 6, 23, 25 and 36.
[368] *Rock Ruby Hotels Ltd v Turkey*, (ECtHR) Just Satisfaction (26 October 2010) No 46159/99, paras 2 and 35-37. *See* also *Sovtransavto Holding v Ukraine* (n 360) paras 2 and 80-82, granting non-pecuniary damage for the fact that the applicant's prolonged uncertainty caused it considerable planning, decision making and reputational damage.
[369] *Dacia SRL v Moldova* (n 361) paras 46, and 61-62. *See* also *Centro Europa SRL & Di Stefano v Italy,* (ECtHR) Judgment (7 June 2012) No 38433/09, paras 157 and 221-222, finding that a violation of the right to freedom of expression "must have caused the applicant company prolonged uncertainty in the conduct of its business and feelings of helplessness and frustrations", and awarding monetary compensation for pecuniary and non-pecuniary damage, without distinction.
[370] *Paroisse Gréco-Catholique Sfântul Vasile Polona c Roumanie*, (ECtHR) Judgment (7 July 2009) No 65965/01, para 5; *Paroisse Gréco-Catholique Sâmbata Bihor c Roumanie*, (ECtHR) Judgment (12 January 2010; 12 April 2010) No 48107/99, para 10; *Catholic Archdiocese of Alba Iulia v Romania*,

reparations for both pecuniary and non-pecuniary damage, without further clarification.[371] On other occasions, it has indicated that pecuniary damage should be addressed domestically.[372]

Importantly, the ECtHR has applied *Comingersoll* expressly to these institutions for non-pecuniary damage. The court has held that they can suffer such damage as a result of violations of their right to a fair trial either in isolation or in combination with other rights, such as the right to an effective remedy or the prohibition of discrimination. Before moving forward, it is noteworthy that awarding reparations depends on the nature of the legal person and the property in question. *Comingersoll SA* concerned a commercial company with market-related property, whereas the Romanian cases concerned denominations with historical and religious property, ranging from graveyards to sacerdotal items. Therefore, while the former's value can be quantified, the latter's valuation cannot be effected with ease. Thus, the functions and purposes of those two properties are intrinsically different. As noted by Judges Sajó, Karakaş, Pinto de Albuquerque and Mits in their joint partly dissenting opinion in the 2016 *Lupeni Greek Catholic Parish & Others v Romania*:

> churches and graveyards are not places of commerce which have a price. For believers, these are primarily places with an intrinsic and unique value that cannot be negotiated. There is a spiritual and historical aspect attached to the location and the building that has a value which cannot be set by market rules.[373]

With this caution in mind, the following will formulate propositions based on trends that can be singled-out from the cases. In the 2009 *Paroisse Gréco-Catholique Sfântul Vasile Polona*, the facts concerned the applicant parish's property expropriation, in terms of a church, a parochial house and the related land.[374] The ECtHR found a violation of the parish's right to a fair trial and to effective remedy.[375] Consequently, the court granted it compensation for non-pecuniary damage, as the violations caused both the parish and its representatives inconvenience and prolonged uncertainty, at least regarding the practice of worship.[376] This finding is interesting from two points of views. First, it concerns an institution dedicated to religion's ECHR rights. Second, it illustrates culture's tangible and intangible interconnection, albeit religious. The latter's limitation (religious practice) flows from uncertainties regarding the actual use of the former (place of practice). This echoes the 1874 Brussels Declaration path that

(ECtHR) Judgment (25 September 2012) No 33003/03, para 10; *Lupeni Greek Catholic Parish & Others v Romania*, (ECtHR) Judgment (29 November 2016) No 76943/11, paras 1-3 and 12.

[371] *See* eg *Paroisse Gréco-Catholique Sâmbata Bihor c Roumanie* (n 370) paras 75, 91 and 93.

[372] *See* eg *Catholic Archdiocese of Alba Iulia v Romania* (n 370) para 106.

[373] *Lupeni Greek Catholic Parish & Others v Romania* (n 370), Joint Partly Dissenting of Judges Sajó, Karakaş, Pinto de Albuquerque and Mits, para 19.

[374] *Paroisse Gréco-Catholique Sfântul Vasile Polona c Roumanie* (n 370) para 5.

[375] *Paroisse Gréco-Catholique Sfântul Vasile Polona c Roumanie* (n 370) paras 75, 83 and 108.

[376] *Paroisse Gréco-Catholique Sfântul Vasile Polona c Roumanie* (n 370) paras 118-119. *See also Paroisse Gréco-Catholique Sâmbata Bihor c Roumanie* (n 370) paras 75, 8, 82, 91 and 93, wherein having found a violation of the right to a fair trial and the prohibition of discrimination regarding the applicant's endeavour to obtain the recognition of its use of the place of worship, the ECtHR granted compensation to the applicant, for both pecuniary and non-pecuniary damage. *See* further *Lupeni Greek Catholic Parish & Others v Romania* (n 370) paras 135, 152 and 182-183, granting the applicants (a parish, a diocese and an archpriesthood) compensation for non-pecuniary damage linked to a violation of their right to a fair trial.

considered legal persons, specifically institution dedicated to religion, together with their property (general introduction)

But among the ECtHR Romanian cases, the 2012 *Catholic Archdiocese of Alba Iulia* is the most important judgment on this issue. The archdiocese brought the case with respect to the communist era expropriation of its immovable and movable property. The former consisted of the Batthyaneum Library, which also hosted the Astronomical Institute. The movable property included the library's significant collection of ancient books, some dating back to 810. A full paragraph of this brief judgment was dedicated to the book collection.[377] The ECtHR found that the property had an "exceptionnelle valeur culturelle et historique […] non seulement pour la Roumanie, mais au-delà, pour le public, en général".[378] Thus, the ECtHR viewed the tangible as a cultural national-international diptych. The ECtHR furthered this by noting the applicant's legitimate expectations for the issue's rapid settlement, given the importance of the property "non seulement pour le requérant, mais aussi étant donné l'intérêt général en cause".[379] Thus, the ECtHR approached the matter from the viewpoint of both the legal person and the "general interest" which, although not defined, suggests that the cultural tangible's importance is additional and transcendental to the legal person's own interest. The ECtHR found that Romania did not proceed with the required restitution, despite recognising the Church as the rightful owner and creating a property return mechanism.[380] In finding a violation of the protection of property, the ECtHR held that the significant inconvenience caused to the Archdiocese and its representatives was partly due to the nature of the cultural and historical property concerned, and thus granted the applicant compensation for those non-pecuniary damages.[381] Reflecting again the spirit of the 1874 Brussels Declaration path, the ECtHR considered protection owed to the former, and its tangible.

The ECtHR's handling of these cultural tangible related cases clearly demonstrates institutions dedicated to religion locus standi to make claims on account of damage or displacement of their movable and immovable religious property. There is no reason for this tangible-centred approach not to apply to secular movable and/or immovable property owned/administered by a legal person. When the latter is recognised as cultural property (eg a museum), then one faces the scenario where cultural property can claim reparations as a result of damage to itself and/or its inanimate cultural tangible, whether movable or immovable.

B. Tangible-centred approach: damage – Legal persons' natural person members

Both the ECtHR and the IACtHR have recognised that natural persons who embody a legal person can suffer pecuniary and non-pecuniary damage. Starting with the former, the IACtHR has found various ACHR violations of shareholders/managers of private

[377] *Catholic Archdiocese of Alba Iulia v Romania* (n 370) para 7.
[378] *Catholic Archdiocese of Alba Iulia v Romania* (n 370) para 87.
[379] *Catholic Archdiocese of Alba Iulia v Romania* (n 370) para 88.
[380] *Catholic Archdiocese of Alba Iulia v Romania* (n 370) para 56.
[381] *Catholic Archdiocese of Alba Iulia v Romania* (n 370) paras 98 and 107-109.

companies. In the 2001 *Cantos*, acknowledging that, unlike the ECHR, the ACHR does not expressly recognise legal persons, the IACtHR determined that it could still examine violations of Cantos' rights because he submitted his claims in both his own name and his companies' names.[382] The IACtHR thus distinguished between the rights of the company and those of shareholders, thereby recognising natural persons as injured parties on account of damage inflicted on the legal person.[383] In the 2007 *Chaparro Álvarez and Lapo Íñiguez*, the IACtHR concluded that the seizure of immoveable property, the tampering with its moveable elements and the resulting depreciation of value caused damage to the shareholder natural person.[384] These examples address primarily private or semi-private companies. Thus, it is not a priori evident to apply these rulings to cases where the legal person is not a private company managing a factory, but a public body managing culture's tangible. Indeed, while a private company will have its shareholders, the same cannot be said of a museum. Still, as seen in the general introduction and Part I, Chapter 1, both international legal instruments and the UNCC decisions provide for cases where culture's secular and religious tangible may be owned and managed by private collections. Like the ECtHR's expansion of injured party from private companies to institutions dedicated to religion, it would plausible for the IACtHR to expand it jurisprudence to the said bodies.

Moving to non-pecuniary damage, as seen, in *Comingersoll SA*, the ECtHR held that members of the company's management team could sustain non-pecuniary damage, "albeit to a lesser degree". In other words, the ECtHR did not decouple legal persons, from those operating it, ie its natural persons membership.[385] Likewise, in the 2001 *Ivcher-Bronstein*, the IACtHR ordered the restoration of "the use and enjoyments of [Ivcher-Bronstein's] rights as a majority shareholder" of a television broadcasting company, awarding him monetary compensation for non-pecuniary damage.[386] These rulings concerned legal persons in the form of commercial companies. However, one year before *Comingersoll SA*, in the 1999 *Freedom and Democracy Party (ÖZDEP)*, the ECtHR ruled that the legal person could also be a political party. The ECtHR held that the breach of the right to freedom of assembly and association that resulted from the applicant political party's dissolution was "highly frustrating for its founders and members", thereby awarding, for the first time, compensation for non-pecuniary

[382] *Cantos v Argentina*, (IACtHR) Merits, Reparations and Costs (28 November 2002) Series C No. 97, para 7(a)-(h) and *Cantos v Argentina*, (IACtHR) Preliminary Objections (7 September 2001) Series C No, 85, paras 29-30. *See also Ivcher Bronstein v Peru,* (IACtHR) Merits, Reparations and Costs (6 February 2001) Series C No. 74, paras 176 and 181.
[383] *Perozo et al v Venezuela* (IACtHR) Preliminary Objections, Merits, Reparations and Costs (28 January 2009) Series C No. 195, paras 2 and 400, on public authorities harassing, physically and verbally assaulting, and hindering the broadcast of a television channel's personnel and shareholders.
[384] *See Chaparro Álvarez & Lapo Íñiguez v Ecuador,* (IACtHR) Preliminary Objections, Merits, Reparations and Costs (21 November 2007) Series C No. 170, paras 2-3, 181-182, 228-229 and 289(3)-(4), Chaparro's yearlong detention for narcotics-related investigation of his factory resulting it right to property violation, awarding him compensation for financial losses due to the company's depreciation.
[385] However, it has been suggested that as a legal person cannot itself feel anxiety or distress, it has an "individual substratum", meaning that the ECtHR's expansive reading of ECHR (n 96) art 41, through the principle of interpretation, entailed the "protection of individual constituents within the company". See Szilvia Altwicker-Hàmori, Tilmann Altwicker and Anne Peters, "Measuring Violations of Human Rights, An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights" (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1*,* p 16; Marius Emberland, "Compensating Companies for Non-Pecuniary Damage: Comingersoll SA v Portugal and the Ambivalent Expansion of the ECHR Scope" (2003) 70(1) 1 *British Yearbook of International Law* 409, p 429.
[386] *Ivcher Bronstein v Peru* (n 382) paras 75(f)-(h) and (k)-(s), 176, 181 and 184.

damages suffered by the individual members of the legal person, which was a political party rather than a private company.[387] Importantly, as seen in the 2009 *Paroisse Gréco-Catholique Sfântul Vasile Polona*, the ECtHR awarded compensation for non-pecuniary damage, as the violations caused both the parish and its representatives inconvenience and prolonged uncertainty. Like the aforementioned pecuniary damages, it is plausible for natural persons to claim non-pecuniary damage for damage inflicted on legal persons managing or owning culture's secular and religious tangible.

C. Synthesis: from legal persons to "living organisms"

In the heritage-centred approach reviewed in Section 1, it was established that natural persons not only may be targeted due to their membership to a collective but also that the collective as the sum of natural persons may be targeted as such. The present Section has similarly shown that not only the members of legal persons but also the legal persons as such may be targeted. While not systematically involving attacks targeting culture, the cases reviewed illustrate the evolutionary thinking of international adjudicators with respect to damage to and through legal persons. These could be used as a model to guide the adjudication of the actual targeting of legal persons owning/administering culture's tangible, whether movable or immovable, secular or religious. This could be done in two non-mutually exclusive ways. Accordingly, international adjudicators may adopt a tangible-centred angle, wherein legal persons appear as injured parties of damage to their cultural tangible. But the adjudicators could also combine the tangible-centred approach with an anthropo-centred one. Under this scenario, natural persons appear as injured parties due to damage to the legal person's cultural tangible. In this case, however, it would appear easier when the legal person is a religious institution and the natural persons a religious community in charge of managing it. This has been confirmed in the Romanian cases. However, the matter is less straightforward when addressing legal persons owning/managing culture's secular tangible. For example, in the case of a museum, it is hard to see how the natural persons – generally civil servants or private employees – constitute a "community" with bounds similar to that of priests. This implausibility however does not mean impossibility. Thus, case-by-case reviews may reveal, for example, very smaller collectives partly living through managing small museums sheltering artefacts close to their identity.

Due to the ECHR and ACHR legal frameworks, only the ECtHR has considered legal persons as such. In so doing, the ECtHR has gone one step further by expanding private companies and institutions dedicated to religion's reparations entitlement from pecuniary to non-pecuniary damage, such as damage to reputation. This progress is best

[387] *Freedom and Democracy Party (ÖZDEP) v Turkey*, (ECtHR) Judgment (8 December 1999) No 23885/94, paras 48 and 57. *See* also *Tinnelly & Sons, Ltd & Others & McElduff & Others v United Kingdom,* (ECtHR) Judgment (10 July 1998) No 62/1997/846/1052–1053, paras 1, 79, 89 and 93 where, having found a violation of the right to a fair trial regarding the applicants (a company, its managing director, secretary, and self-employed workers), the ECtHR granted compensation, under the heading "pecuniary and non-pecuniary damage" to the managing director and self-employed workers for unlawful discrimination. *See also Rock Ruby Hotels Ltd v Turkey* (n 368) paras 35-37, where, having found that the continuing ECHR violation caused inconvenience to the company, its directors and shareholders, the ECtHR granted compensation to the applicant company for pecuniary and non-pecuniary damage, without distinction.

summed-up in the ECtHR judges' joint concurring opinion in *Comingersoll SA*, according to which:

> the company is an independent living organism, protected as such by the legal order of the State concerned, and whose rights also receive autonomous protection under the [ECHR…]. Although I accept that a number of provisions of the Convention may be inapplicable to companies or other juristic persons (for example, Articles 2 and 3), the great majority of them apply directly to such persons as autonomous legal entities deserving the protection of the Convention. I do not see why, in matters of compensation, the Court should be obliged to deviate, even partly, from such an approach and why it should be prevented from accepting, without any reservation, implied or otherwise, that a company may suffer non-pecuniary damage, not because of the anxiety or uncertainty felt by its human components, but because, as a legal person, in the society in which it operates, it has attributes, such as its own reputation, that may be impaired by acts or omissions of the State.[388]

The ECHR does not expressly provide for considering a legal person as a "living organism" that possesses "its own reputation". This ECtHR finding was the extra-step towards granting legal persons most of the ECHR rights. The above joint concurring opinion is a most revolutionary cultural stance adopted by international adjudicators. This is so because it directly challenges established cognitive and anthropological understandings of humans and their anthropical environment made of non-human entities.[389] The debate is thus bound to widen as humans' notion of what is human will

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[388] *Comingersoll SA v Portugal* (n 364), concurring opinion of Judge Rozakis joined by Judges Bratza, Caflisch and Vajic.

[389] This is already expanding toward the possessors of artificial intelligence ("AI"); *see* Paulius Cerka, Jurgita Grigiene and Gintare Sirbikyte "Is it possible to grant legal personality to artificial intelligence software systems?" (2017) 33(5) *Computer & Security Review* 685, p 686. While this discussion goes beyond the present scope of this study, some explanation may be useful. AI broadly refers to "systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals". *See* European Commission, "Artificial Intelligence: Commission outlines a European approach to boost investment and set ethical guidelines" <http://europa.eu/rapid/press-release_IP-18-3362_en.htm> accessed 14 April 2019. Other definitions link AI "to rapidly developing technologies, which enable computers to operate intelligently i.e. in a human like manner". *See* William J Raynor, *The Dictionary of Artificial Intelligence* (Glenlake Publishing Company 1998) 1, p 13. Under another definition, AI "are able to learn independently, gather experience and come up with different solutions based on the analysis of various situations independently of the will of the developer i.e. [AI] are able to operate autonomously rather than automatically". *See* Cerka, Grigiene and Sirbikyte (n 389) pp 686-687 and 696. While at the time of writing, AI are deemed objects – not subject – of law their unique ability to act autonomously – as opposed to automatically – has prompted ongoing debates regarding granting them legal personality. Proponents contend that given its autonomy, AI should be the bearer of responsibility, to avoid undue liability burden on the manufacturers or retailers. Therefore, adapting legislation should control technological advancements. *See* Cerka, Grigiene and Sirbikyte (n 389) pp 689-91; and *see* Jaap Hage, "Theoretical foundations for the responsibility of autonomous agents" (2017) 25(3) *Artificial Intelligence and Law* 255, pp 255 and 270. Opponents argue that legal personality requires possessing rights and obligations, which AI cannot independently exercise, given the opacity as to whether accountability mechanisms would ensure the correlative duties' enforcement (obligation not to infringe other rights). *See* SM Solaiman, "Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy" (2017) 25(2) *Artificial Intelligence and Law* 155, p 175. Furthermore, granting AI legal personality could shield other accountable natural and legal persons' liability. *See* Joanna J Bryson, Mihailis E Diamantis and Thomas D Grant "Of, for, and by people: the legal lacuna of synthetic persons" (2017) 25(3) *Artificial Intelligence and Law* 273, pp 285 and 288-89. Finally, even if AI obtained legal personality, in practice it would amount to "law in books" not "law in action". *See* Bartosz Brozek and Marek Jakubiec "On the legal responsibility of autonomous machines" (2017) 25(3) *Artificial Intelligence and Law* 293, p 303. The middle ground approach argues for a "borderline status" of quasi-personhood for AI, which would offer rights and obligation in some but not all

evolve as culture does, spatially and temporary.[390] In turn, this will impact on humans' definition of heritage and attacks targeting it.

The above illustrates the ECHR and ECtHR's foresight to recognise that legal persons can suffer *human* rights violations under the European Convention for the Protection of *Human Rights* and Fundamental Freedoms [emphasis added].

IV. Conclusion to Chapter 2

By drawing-up, on the basis of HRCts' practice, an illustrative typology of the victims and the damage they suffer in cases of widespread human rights violations, this Chapter modelled an integrated framework for analysing attacks targeting culture.

At the ECtHR level, this has concerned situations of internal armed conflict between central authorities and autonomists/separatists, such as the Russia-Chechnya and Turkey-Northern Kurdistan conflicts, as well as States intervening in another State in support of autonomists/separatists, as Turkey did in Cyprus in 1974. Before the IACtHR, this has consisted of confrontations between national authorities and indigenous/tribal populations, by means of armed activities or private companies' use of traditional lands, but also national authorities' suppression of political groups during internal armed activities. These scenarios have at times overlapped, where indigenous/tribal groups and political groups were one.

On the basis of the aforementioned analysis, this Chapter has proposed that both HRCts' approach can be viewed in heritage-centred and tangible-centred manners, separately or in combination. The former can apply to the scope of the damage, ie culture's intangible and tangible, movable or immovable, anthropical or natural, secular or religious. But it can also apply to victims, ie natural persons, who can sustain damage in two different ways. Most visibly, they can suffer damage on grounds of their identity, whether national, ethnic, racial, religious or political. In other words, individuals are targeted as members of the collective. On the other side of the coin, the subject of the injury is the collective, as such, ie the entity made up of the sum of natural persons. The

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respects. *See* Lawrence B Solum, "Legal Personhood for Artificial Intelligence" (1992) 70(4) *North Carolina Law Review* 1231, p 1231. *See* Cerka, Grigiene and Sirbikyte (n 389) p 697. These debates have even extended to the EU wherein, to account for technological innovation as part of the Digital Single Market strategy, the European Parliament adopted in 2017 a resolution on the Civil Law Rules and Robotics, and in 2018 the European Commission adopted a plan to launch the European initiative on AI. *See* European Commission, "Shaping the Digital Single Market" <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market> accessed 14 April 2019; European Parliament "European Parliament Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))", <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN#BKMD-12> accessed 14 April 2019; and European Commission, "Artificial Intelligence" (n 390).

[390] In 2001: A Space Odyssey, it is impossible not to feel for the spaceship computer HAL 9000's confession during its shut-down: "I'm afraid, Dave. Dave, my mind is going. I can feel it". *See 2001: A Space Odyssey*, dir. Stanley Kubrick, United Kingdom-United States, Metro-Goldwyn-Mayer, 1968, [film]. More recently, by considering human nature as "work in progress", transhumanism advocates for its enhancement through technological developments such as AI. *See* Nick Bostrom, "Transhumanist Values" (2005) 30(1) *Journal of Philosophical Research* 3, p 3.

IACtHR has recognised the latter both expressly and implicitly. Expressly, since it has granted the collective juridical personality, resulting into the recognition of the collective as an injured party entitled to reparations. This has reinforced the survivor-centred theory of reparative development, which focuses on restoring the collective's lost opportunities.[391] The collective's ability to be injured has also been implied in the IACtHR's reparations awards. These have included collective measures, such as the establishment of funds regarding community services and language courses; the establishment of road, sewage, water supply and health infrastructure programmes; the erection of commemorative monuments for the community; and the issuance of apologies to the community. The IACtHR, through ordering inter alia cultural education and community development, has thus harnessed the link between transitional justice and development.[392]

But, on the basis of the ECtHR and IACtHR jurisprudence analysis, this Chapter has also proposed that the adjudication of attacks targeting culture can be tangible-centred through legal persons. Specifically, the ECtHR has done so in cases concerning violations of the rights of institutions dedicated to religion and of their individual members, as in the cases concerning Romania's dissolution of the Uniate Church in the 1940s. Finally, of utmost interest is the recognition that legal persons can sustain pecuniary and non-pecuniary damage. By integrating this approach into their analysis, this study proposes that international jurisdictions could allow – where possible under their legal framework – legal persons to appear as injured parties of damage both to them as such and to their tangible property, whether secular or religious, movable or immovable. But, within this tangible-centred approach, international adjudicators could also introduce a heritage-centred element. Accordingly, they could envisage natural persons appearing as injured parties due to damage to the legal person as such or to its aforementioned tangibles. Placing legal persons at the centre of the equations and natural persons at is periphery may appear to be bold. But as seen, the ECtHR has already done so.

[391] On reparative justice, Guatemala has been relatively consistent with implementing pecuniary reparations, despite ongoing challenges. *See* Balasco (n 302) pp 1-3.
[392] *See* Rama Mani, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development" (2008) 2 *The International Journal of Transitional Justice* 253, p 253; Naomi Roht-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development" *in* Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009) 170, p 171; and Diana Contreras-Garduño, "Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR" (2012) 4(3) *Amsterdam Law Forum* 40, p 50.

CONCLUSION TO PART I: STATE RESPONSIBILITY'S GROUNDWORK FOR INDIVIDUAL CRIMINAL RESPONSIBILITY

State responsibility adjudicatory mechanisms have devised conceptual and legal tools that can assist the adjudication of attacks targeting culture. Originally, ISCMs ruled that States can sustain material and moral injury as a result of damage to their anthropical and natural tangibles. Rapidly, however, ISCMs recognised that States can make claims against each other for material and moral injury sustained by their nationals, whether natural or legal persons. In these instances too, both anthropical and natural tangibles were acknowledged. From this point, it was an organic flow for States to entitle their nationals, whether natural or legal persons, to make claims of material and moral damage before HRCts as a result of their human rights violations by States.

Having analysed the practice of ISCMs and HRCts, this Chapter has proposed to consider the adjudication of attacks targeting culture under State responsibility adjudicatory mechanisms in both anthropo-centred and tangible-centred manners, whether alternatively or cumulatively. Starting with the former, ISCMs' recognition that, as subjects of international law, States – ie non-natural persons – can sustain injury is classically Westphalian. However, the gradual expansion of injury suffered directly by States to indirect injury to States, ie that which is caused directly to their nationals, has been at the vanguard not only of State responsibility's other pillar, ie HRCts, but also of ICR-based jurisdictions. This anthropo-centred approach is best encapsulated by the IACtHR's finding of heritage disruption as non-pecuniary damage. This is so because it considers the symbiotic relationship between the collective and its natural environment which, as its tangible property, has shaped its intangible heritage. This material-spiritual totality constitutes the collective's identity. As this study proposes, this type of finding can benefit ICR-based jurisdictions. Accordingly, establishing that natural persons can suffer damage as members of the collective will prove useful when considering the moment at which human rights violations qualify as crimes, as with the CaH of persecution (see Part II, Chapter 2). But HRCts have also established that the collective as the sum of natural persons can suffer pecuniary and non-pecuniary damages. Therein, the IACtHR has gradually recognised the collective's right to juridical personality, albeit in a more limited manner than that of individual natural persons. This enables to draw parallels with the crime of genocide, where it is the destruction, wholly or partly, of the targeted group that is intended (see Part II, Chapter 3).

Regarding the tangible-centred approach of attacking culture, both ISCMs and the HRCts have acknowledged that legal persons may both suffer pecuniary and non-pecuniary damage and claim reparations. This has included damage to culture's tangible, whether secular or religious, moveable or immoveable. They have also acknowledged that not only legal persons' members – such as board/direction members – but also the legal persons as such. This is of paramount importance to attacks targeting culture since, provided that it owns/administer culture's tangible, whether secular or religious, moveable or immoveable, a legal person may seek reparations for pecuniary and non-pecuniary damage related to itself and/or the said property. Of utmost interest is the recognition that, as a result of the violation of their rights, legal persons may,

beyond pecuniary damage, suffer non-pecuniary damage. When applied to a tangible-centred approach, legal persons can thus claim reparations for *human* rights provisions provided for under the European Convention for the Protection of *Human Rights* and Fundamental Freedoms (emphasis added).

Stretching far more back in time and having a more diverse subject-matter than ICR-based jurisdictions, State responsibility adjudicatory bodies have thus gone the full circle, in terms of recognising damage to culture's tangible and intangible, whether anthropical or natural, secular or religious, movable or immovable. These adjudicatory bodies have thus been impressively avant-garde – if not revolutionary – whenever it was required of them. These adjudicatory bodies have thus addressed, in large part, Merryman's concern that cultural nationalism and cultural internationalism may depart to the extent of becoming inconsistent.[393] In 1986, Merryman opined that international organisations such as UNESCO, in a world dominated by nation States, were providing preferential treatment to cultural nationalism over cultural internationalism.[394] However, he noted that the emergence of both the international human rights law and its related institutions was eroding States' centrality in the international legal order.[395] Merryman's foresight is exactly what this Part has described, wherein both ISCMs and HRCts have looked at cultural ravages through both of Merryman's concepts, ie "one cosmopolitan, the other nationalist; one protective, the other retentive".[396]

The heritage-centred and tangible-centred approach analysed and proposed in this Part ought to assist ICR-based jurisdictions when adjudicating attacks targeting culture. As will now be seen, ICR-based jurisdictions have in fact referred to the findings of both ISCMs and HRCts (Part II), although they have tended to focus more on culture's tangible.

[393] Merryman (n 14) p 846.
[394] Merryman (n 14) pp 850 and 853.
[395] Merryman (n 14) p 853.
[396] Merryman (n 14) p 846.

PART II: INDIVIDUAL CRIMINAL RESPONSIBILITY

INTRODUCTION: ATTACKS TARGETING CULTURE – A TRIPARTITE CRIME MATTER?

Analysing the past and current reality of protecting culture in what the ICC Statute has referred to as the most serious crimes concerning the international community as a whole – namely war crimes, CaH and genocide – requires a common understanding of the word culture.[397] This has proven unusually difficult from a legal perspective; whereas normally terms are defined in statutes and similar legal instruments, whether national, regional or international – there is no single universally accepted definition of culture.[398] Undoubtedly, this is because the notion of culture is inherently personal – personal to individuals and to groups and societies. It can truly be said that this is "a word that means all things to all men".[399]

Having reviewed the ongoing century-long anthropological debates on the scope of culture and having analysed the diverging and unclear use of cultural property and cultural heritage in international legal instruments and among scholars, the general introduction proposed an interpretation of culture that is workable for legal analyses. This interpretation recognises that cultural heritage possesses both intangible and tangible components, with the latter being identified as cultural property. Rather than choosing between these concepts, this study has opted for considering them together or separately, as applicable. The tangible-centred approach is useful because it enables ICR-based jurisdictions to focus on the tangible elements of culture. On the other hand, by addressing culture's intangible elements, the heritage-centred approach enables the legacy-oriented or anthropo-centred understanding of culture.

All State responsibility mechanisms have addressed attacks that target culture under both their heritage-centred and tangible-centred approaches (Part I). So have the ICR-based jurisdictions. However, while they have recognised damage to and destruction of culture's tangible as war crimes (Chapter 1) or as CaH persecution (Chapter 2), they have been more vague regarding the heritage-centred means of attacking culture. Particularly in the case of the crime of genocide (Chapter 3), this vagueness can be explained for two reasons. First, as thoroughly demonstrated in the general introduction, both treaty-makers and ICR-based jurisdictions use interchangeably the expressions cultural property and cultural heritage when addressing attacks directed at culture. This in turn has led to a century-long misunderstanding that ICL may only address the tangible-centred means of attacks targeting culture even when treaty provisions, such as article II(e) of the Genocide Convention point, both literary and logically, to the contrary. On the other hand, this has led IHL and ICL, even in instances when the former forms part of the latter, to adopt an assertive stance on damage to and destruction of culture's tangible. While this development is welcomed, IHL and ICL have both remained cautious, at best, when addressing the heritage-centred attacks that target culture.

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[397] This is of utmost importance because, as the only multilateral treaty-founded ICR-based jurisdiction, the ICC draws its legitimacy from widespread negotiations among States and civil society.
[398] *See* Prott, "Problems of Private International Law for the Protection of the Cultural Heritage" (n 48) p 224.
[399] "Culture" (n 17) p 151.

An exegetic approach to ICL's treaty-making process and judicial practice shows a far more nuanced stance with respect to acknowledging the heritage-centred aspect of attacks targeting culture. In effect, mass atrocity crimes, specifically CaH and genocide, always perturb the transmission of culture. Consequently, while those crimes' heritage-centred means have rarely been formally recognised, they have, in reality, often constituted a major component of the thought process of international legislators and adjudicators.

This Part will show that both international legal instruments and ICR-based jurisdictions have addressed attacks targeting culture, whether heritage-centred or tangible-centred. By following the chronology of the recognition and application of the traditional tripartite ICL crimes, ie war crimes (Chapter 1), CaH (Chapter 2) and genocide (Chapter 3), this Part will shed light on ICL's missed opportunities, misunderstandings and innovations that display its full potential to address attacks that target culture.

CHAPTER 1: WAR CRIMES

I. Introduction: crimes concerned with culture's tangible only?

Armed conflicts and destruction are intrinsically intertwined. While the former always encompass the damaging of private or public property, at least collaterally, many belligerents have sought psychological advantage by directly attacking the enemy's tangible culture in the absence of military necessity.[400] War has thus always been the principal threat to culture's tangible and intangible.[401]

As will be seen, IHL-ICL instruments have adopted a tangible-centred approach, which considers culture's tangible, whether movable or immovable, secular or religious, and even anthropical and natural. This is done by focusing on culture's tangible either as such or by virtue of it being civilian property (II). Chronologically, it was IHL that first developed legal norms to protect the components of what would later be referred to as cultural property (general introduction). The post-Second World War advent of ICR-based jurisdictions incorporated into their statutes earlier IHL both as such and with modifications, thereby fusing IHL and ICL together. Unlike CaH and genocide (Part II, Chapters 2-3) this body of law contains a set of detailed conventions comprised mainly of The Hague and the Geneva Law as well as numerous ICR-based statutes, each of which deals at length and in details with elements of war crimes and their criminal proceedings. This detailed – if not often pristine – corpus sets a working framework for international adjudicators. But this corpus has also a serious drawback. Accordingly, the treaty-law formalism attached to it (signature, ratification, entry into force, etc) reduces the international adjudicators' much needed margin of manoeuvre in terms of innovation.

Notwithstanding the above, the practice of ICR-based jurisdictions shows an increased trend to link the tangible-centre approach to a heritage-centred one (III). Among the said jurisdictions, it is the ICTY that has, to date, focused mostly on attacks targeting culture. However, due to the nature of the former Yugoslavia's conflict, most ICTY cases focused on the destruction of culture's tangible, mainly in the form of local institutions dedicated to religion – and occasionally local secular(ised) objects. However, the ICTY, and in one case the ICC, have addressed more complex situations whereby IHL-ICL intersected with the so-called peacetime instruments (ie the 1972 World Heritage Convention) that formally grant sites the status of cultural property/cultural heritage. This trend has thus taken IHL-ICL from a strictly tangible-centred approach, in terms of the typology of damage, to a heritage-centred one, in terms of the consequences of those damages. The analysis of the two ICTY and ICC cases most representative of this dual approach, Dubrovnik and Timbuktu, will demonstrate how the intersection between IHL-ICL and peacetime instruments supports, almost organically, the ICR-based jurisdictions' dual tangible-centred and heritage-centred approach.

[400] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) p 1.
[401] Mainetti (n 15).

II. The tangible-centred approach: IHL and ICL instruments

A. Introduction

This Section will proceed with a comparative analysis of IHL-ICL instruments over their more than one hundred year-long development process. Due to the vast scope of this study, this Section will not consist of a thorough legal analysis of each relevant provision of the said instruments nor of a systematic analysis of ICR-based jurisdictions' practice, for example on the distinction and overlap between international and non-international armed conflicts. Legal literature abounds in this and any similar attempts by this study would produce a set of paraphrases, at best, of an excellent output that is already available.[402] Instead, through an evaluative narrative, this Section will demonstrate that two main trends characterise IHL-ICL instruments' protection afforded to culture's tangible. One is direct, by explicit reference to cultural property (A), the other is indirect, by assimilating culture's tangible to civilian objects (B). Accordingly, it will be argued that both trends are tangible-centred, since their typology of damage focuses on culture's tangible. Similarly, and as detailed at length in the general introduction and Chapter 1, IHL-ICL instruments following the 1874 Brussels Declaration path have, additionally, provided for instances where culture's tangible is a legal person. These instruments' approach may also be tangible-centred as regards the victims of their breaches. As with Part I, the aforementioned methodology proposes multiple entry-points for use by international adjudicators when approaching the targeting of culture as war crimes. Accordingly, this Section will not engage in a detailed assessment of the more technical details of IHL-ICL instruments and their interpretation and application by ICR-based jurisdictions. Evidently, where relevant, reference will be made to the said practice, but only when it points to the (mis)understandings of the concepts of culture in adjudicatory settings.

B. Direct protection: cultural property as such

IHL and ICR instruments contain fairly comprehensive provisions on the direct protection of culture's tangible.[403] As seen in the general introduction, this is done by

[402] For a detailed analysis of IHL-ICL instruments, see eg Dörmann, Doswald-Beck and Kolb (n 54); Mettraux, *International Crimes: Law and the Practice. Genocide, vol 1* (n 15); O'Keefe, *the Protection of Cultural Property in Armed Conflict* (n 52); Pictet Jean (ed), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>; and Sandoz et al, *Commentary of 1987* (n 54).

[403] The Charter of the International Military Tribunal: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) (IMT Charter) <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument> accessed 14 April 2019, the ICTR Statute (n 55)

referring to either some of culture's tangible (1) or cultural property as such (2).

1. IHL-ICL instruments listing culture's tangible

The Hague and Geneva Law, which have in part become customary international law,[404] as incorporated and expanded upon by the statutes of ICR-based jurisdictions, have addressed anthropical (a) and, to a much lesser extent, natural (b) components.

a. Culture's anthropical components

As seen (general introduction), The Hague Law prohibits damaging elements of culture's tangible, whether secular or religious. This prohibition is reinforced, inter alia, by the requirement for those components to be marked with visible signs when they are not being used for military purposes, or by listing them alongside buildings dedicated to charity, hospitals and places where sick and wounded are collected.[405] In terms of result requirements, some instruments require taking preventive measures so as "to spare as far as possible" culture's tangible, whereas others prohibit actual "seizure, destruction or willful damage".[406]

As seen in the general introduction, the ICTY Statute article 3(d) and the ICC Statute article 8(2)(b)(ix) and (e)(iv) – as imported verbatim by the SPSC regulation 6, enumerate culture's tangibles, whether secular or religious, movable or immovable, as the case may be. The ICTY Statute article 3(d) prohibits the "seizure of, destruction or willful damage done to" culture's tangible, whether inanimate or as a legal persons.[407] Many ICTY indictments have charged the accused with damage to the former (both secular and religious), although not to the latter.[408] The ICTY has also established that article 3 reflects customary international law and is applicable in international and non-

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and the SCSL Statute (n 101) do not mention culture's tangible. On the efficiency of IHL-ICL instruments protecting culture's tangible, *see* Van der Auwera (n 58).

[404] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (ICJ) Advisory Opinion (8 July 1996) ICJ Rep 1996, p 226, paras 81-82, as regards the Hague Regulations.

[405] See also 1907 Hague Regulations IV (n 50) regulation 56, prescribing legal proceedings in cases of its breach. *See* also the 1899 Hague Regulations II (n 50) art 27 and the 1907 Hague Regulations IX (n 50) art 5. The 1935 Roerich Pact (n 52) should also be noted.

[406] For the former, *see* 1899 Hague Regulations II (n 50) art 27, 1907 Hague Regulations IX (n 50) art 5, and 1935 Roerich Pact (n 52). For the latter, *see* 1907 Hague Regulations IV (n 50) art 56.

[407] ICTY Statute (n 52).

[408] For "widespread and systematic damage to and destruction of sacred sites", *see Prosecutor v Karadžić & Mladić*, (ICTY) Initial Indictment (24 July 1995) Case No IT-95-5, Count 6. For "destruction or wilful damage done to institutions dedicated to religion", *see Prosecutor v Brđanin*, (ICTY) First Amended Indictment (14 March 1999) Case No IT-99-36, Count 12; *Prosecutor v Naletilić*, (ICTY) Indictment (21 December 1998) Case No IT-98-34-I, Count 22; *Prosecutor v Martić*, (ICTY) Amended Indictment (18 December 2002) Case No IT-95-11, Count 13. For "destruction or wilful damage of institutions dedicated to religion or education", *see Prosecutor v Kordić & Čerkez*, (ICTY) First Amended Indictment (10 November 1995) Case No IT-95-14/2, Counts 43 and 44; *Prosecutor v Blaškić*, (ICTY) Second Amended Indictment (25 April 1997) Case No IT-95-14-T, Count 14; *Prosecutor v Ljubičić*, (ICTY) Corrected Amended Indictment (2 August 2002) Case No IT-00-41, Count 12.

international armed conflicts.[409]

Regarding the elements of the crime, unsurprisingly there must be a nexus between the alleged crimes and the armed conflict.[410] The provision's wording also suggests a result requirement. The *Štrugar* Trial Chamber held that article 3(d) "explicitly criminalises only those acts which result in damage to, or destruction of, such property".[411] Therefore, the Chamber considered that actual damage or destruction is an element of the crime, in contrast to the ICC Elements of Crimes (see further below). In 2000, the *Blaškić* Trial Chamber held that the intentional damage must have been inflicted on those religious or educational institutions that (i) could "clearly be identified" as such; (ii) were not used for military purposes during the acts and (iii) were not "in the immediate vicinity of military objectives".[412] The ensuing jurisprudence, however, departed from *Blaškić*. The *Naletilić & Martinović* and *Štrugar* trial chambers required (i) both an intent and a result requirements and (ii) the non-use of culture's tangible for military purposes at the time of the commission.[413] The third requirement remained unclear. While *Naletilić & Martinović* required the institution to be simply "dedicated to religion", thereby adopting a literal reading of article 3(d), *Štrugar* required that it constitute "the cultural or spiritual heritage of peoples", thereby replicating the wording of the 1977 Additional Protocols.[414]

The ICTY has, however, held that elements enumerated in article 3(d) are not always constitutive of cultural property. The *Kordić* Appeals Chamber reproduced verbatim the ICRC Commentary of 1987 that, in AP I 1977 article 53:

> cultural or spiritual heritage […] covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.[415]

Although the phrase "transcends geographical boundaries" is unclear, it may suggest that culture's tangible are considered not in isolation, but as part of a diptych/triptych. If so, as held by the Appeals Chamber, the Trial Chamber erred in considering that "'educational institutions are undoubtedly immovable property of great importance to

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[409] For an overview of ICTY jurisprudence on cultural heritage, *see* Serge Brammertz, Kevin C. Hughes, Alison Kip and William B. Tomljanovich, "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY" (2016) 14(5) *Journal of International Criminal Justice*; *See Tadić* Jurisdiction Decision (n 88) paras 98 and 127; *Prosecutor v Štrugar*, (ICTY) Judgment (31 January 2005) Case No IT-01-42-T, para 230.

[410] Even not necessarily "causal to the commission of the crime", the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed". *See Prosecutor v Kunarac et al "Foča"*, (ICTY) Appeal Judgment (12 June 2002) Case No IT-96-23&23/1-A, para 58. *See* also *Prosecutor v Tadić*, (ICTY) Judgment (14 July 1997) Case No IT-94-1-T, para 573, holding that the crimes need not be "part of a policy or of a practice officially endorsed or tolerated" by the belligerents; and *Tadić* Jurisdiction Decision (n 88) para 89, holding that art 3 "is a general clause covering" all IHL violations not falling under arts 2 and 4-5.

[411] *Štrugar* Trial Judgment (n 409) para 308.

[412] *Prosecutor v Blaškić*, (ICTY) Judgment (3 March 2000) Case No IT-95-14-T, para 185.

[413] *Prosecutor v Naletilić & Martinović*, (ICTY) Judgment (31 March 2003) Case No IT-98-31-T, paras 604-605; *Štrugar* Trial Judgment (n 409) para 310.

[414] *Naletilić & Martinović* Trial Judgment (n 413) paras 604-605; *Štrugar* Trial Judgment (n 409) para 310.

[415] *Prosecutor v Kordić & Čerkez*, (ICTY) Appeal Judgment (17 December 2004) Case No IT-95-14/2-A, para 91.

the cultural heritage of peoples'".[416] The Chamber thus adopted a formalistic stance on the question of cultural property, even though it did not clarify the "heritage" and "objects" relationship. The Commentary of 1987 addresses this ambiguity as follows:

> the adjective "cultural" applies to historic monuments and works of art, while the adjective "spiritual" applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value. The discussions in the Diplomatic Conference confirmed this.[417]

As seen in the general introduction, the anthropological and linguistic (mis)understanding of the concept of culture naturally impacts on its legal understanding by both international legislators (Diplomatic Conference) and adjudicators (ICTY). Thus, the Chamber considered that, to the extent that they are not protected as cultural property, buildings dedicated to religion, education, art, science or charitable purposes enjoy no special protected status, although they generally enjoy protection as civilian objects.[418] What the Chamber failed to note is the commentary's explanation that given the "subjectivity" of these expressions, where in doubt, "reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is",[419] somehow echoing the 1972 World Heritage Convention's position that the non-inclusion of a property in its lists does not mean that it does not have an outstanding universal value.

The ICC statute article 8(2)(b)(ix) and (e)(iv) ("War crime of attacking protected objects") provides for "other serious violations of the laws and customs applicable to" international and non-international armed conflicts, respectively. The corresponding ICC Elements of Crimes require, in addition to the armed conflict nexus and the perpetrator's awareness of factual circumstances surrounding the armed conflict, that (i) the components in question not be military objectives; and that (ii) the perpetrator who directed the attack must have "intended [those components] to be the object of the attack", thereby excluding the ICTY result requirement.[420] In *Al Mahdi*, the Trial Chamber held that article 8(2)(b)(ix) and (e)(iv) governs "the directing of attacks against special kinds of civilian objects, reflecting the particular importance of international cultural heritage".[421] Schabas has disputed this by explaining that as there was no armed conflict nexus at the time of the commission of the acts, the act of destruction of the mausoleums did not constitute an attack under war crimes.[422] Notwithstanding this proposition, the Pre-Trial Chamber confirmed in *Al Hassan* that there was a reasonable basis to believe that the demolition of mausoleums with pick, axes, hammers and iron bars met all of the ICC article 8(2)(e)(iv)'s elements of crime, including those religious and historical buildings not being military objectives, and that the perpetrators meant to target and cause their demolition.[423]

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[416] *Kordić & Čerkez* Appeal Judgment (n 415) para 92.
[417] Sandoz et al, *Commentary of 1987* (n 54) para 2065.
[418] *Kordić & Čerkez* Appeal Judgment (n 415) para 92. *See* also Cassese, Gaeta and Jones (n 108) p 410.
[419] Sandoz et al, *Commentary of 1987* (n 54) para 2065.
[420] The necessary intent is "wilfully" directing attacks, ie both direct and indirect intent as well as recklessness. *See* Dörmann, Doswald-Beck and Kolb (n 54) pp 146-147 and 215.
[421] *Al Mahdi,* Trial Judgment (n 49), para 17.
[422] Schabas William A, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit" (2017) 49(1) *Case Western Reserve Journal of International Law*.
[423] *Prosecutor v Al Hassan*, (ICC) Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (13 November 2015) ICC-01/12-01/18-461-Corr-Red 13-11-2019, paras 529-531 and 976-987.

b. Towards culture's natural components?

As seen in the general introduction, many international instruments, other than IHL-ICL, list not only culture's anthropical components, but also the natural environment in isolation or in combination with anthropical structures as part of humanity's heritage. IHL-ICL instruments do not do so. However, one IHL and one ICL instruments address the natural environment. The 1977 Additional Protocol I article 55 ("Protection of the natural environment") provides that:

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. […][424]

While protective of the natural environment, this provision requires a very high threshold, made of three cumulative elements (widespread, long-term and severe damage) for that breach to occur. Furthermore, it links the protection to that of natural persons. The ICRC Commentary of 1987 further confirms this anthropo-centred stance by explaining that while article 35 ("Basic rules") concerns the methods of warfare, article 55 focuses on the population's survival.[425] It further explains that the omission of "civilian" after "population" was deliberate in order to prevent environmental damage that may be long-lasting and would concern all the population without distinction.[426] The said commentary furthers this anthropo-centred approach by understanding the natural environment:

> in the widest sense to cover the biological environment in which a population is living. It does not consist merely of the objects indispensable to survival mentioned in [article 54 of the 1977 Additional Protocol I] – foodstuffs, agricultural areas, drinking water, livestock – but also includes forests and other vegetation mentioned in the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, as well as fauna, flora and other biological or climatic elements.[427]

Thus, notwithstanding this link to humans, the commentary considers the natural

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[424] 1977 Additional Protocol I (n 59), art 55. Para 2 prohibits "Attacks against the natural environment by way of reprisals".

[425] Sandoz et al, *Commentary of 1987* (n 54) para 2133. For the meaning of "widespread, long-term and severe damage", *see* ILC, "Report of the International Law Commission on the Work of its Forty-Third Session" (1991) Supp No 10 (A/46/10), p 106. *See also* Paul Fauteux, "The Use of the Environment as an Instrument of War in Occupied Kuwait" *in* Schiefer Bruno (ed), *Verifying Obligations Respecting Arms Control and Environment: A Post-Gulf War Assessment* (Canadian Department of External Affairs: 1992).

[426] "Health" concerns measures that jeopardise both the survival of the population and congenital defects, degenerations or else deformities. *See* Sandoz et al, *Commentary of 1987* (n 54) paras 2134-2135.

[427] Sandoz et al, *Commentary of 1987* (n 54) para 2126. According to the 1991 ILC Report (n 425) p 106, the natural environment covers "the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements".

environment with a very significant width and depth, in terms of its components. This is partly reminiscent of the IACtHR practice which considered the natural environment as a whole, in symbiosis with humans (Part I, Chapter 2). It is also useful to read this provision together with the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (also known as ENMOD).[428]

Among ICL instruments, the ICC Statute article 8(2)(b)(iv) considers as war crime:

> Intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[429]

This provision does not include any result requirement.[430] Otherwise, comments similar to those concerning the 1977 Additional Protocol I apply here, as the current provision is derived from them.

2. IHL-ICL instruments naming cultural property

Two IHL instruments name cultural property as such (a) and two IHL-ICL instruments name cultural property by reference to the 1954 Hague Convention (b).

a. Direct reference: the 1954 Hague Convention and the 1954 Hague Convention 1999 Protocol

As seen in the general introduction, both the 1954 Hague Convention and the 1977 Additional Protocols seek to protect cultural property's secular and religious components. The 1954 Hague Convention and the 1954 Hague Convention 1999 Protocol provide for general, special and enhanced protections of cultural property. Under the general protection, all cultural property must be protected, safeguarded and respected.[431] This means that cultural property should not be used for any purposes which would expose it to destruction or damage during armed conflict, including reprisals, subject to imperative military necessity.[432] But the 1954 Hague Convention is not only concerned with the destruction of cultural property. Article 4(3) prohibits "any form of *theft, pillage or misappropriation* of, and any acts of *vandalism* directed against cultural property" as well as "*requisitioning* movable cultural property" located in another party to the instrument.[433] It is unclear whether so many words were used as

[428] Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, (adopted 10 December 1976, entered into force 05 October 1976), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2AC88FF62DB2CDD6C12563CD002D6EC1&action=openDocument> accessed 14 April 2019. As of April 2019, 78 States were parties to ENMOD.
[429] ICC Statute (n 54).
[430] Dörmann, Doswald-Beck and Kolb (n 54) p 162.
[431] 1954 Hague Convention (n 56) arts 2-3.
[432] 1954 Hague Convention (n 56) art 4.
[433] 1954 Hague Convention (n 56) arts 4(3) and 14(1).

a matter of style or nuance. As will be seen in the next subsection, international adjudications have not clarified this terminology. Under the special protection regime, States may request that refuges sheltering movable cultural property and/or "centres containing monuments and other immovable property of great importance" be placed in the International Register of Cultural Property under Special Protection ("International Register").[434] But placing cultural property on this list may be hindered by treaty-law formalities. Under the Khmer Rouge and the ensuing civil war, cultural property was both targeted and subjected to international trafficking in illicit art.[435] Having requested assistance from the 1954 Hague Convention States Parties, Cambodia failed to place several monuments on the International Register, as States did not consider the "State authorities" making the request in 1972 to represent Cambodia.[436]

Moving to the 1954 Hague Convention 1999 Protocol, its enhanced protection regime safeguards (i) "cultural heritage of the greatest importance to humanity"; (ii) that is already protected by domestic measures; and (iii) not used for military purposes, as confirmed by the controlling party.[437] Property on the accompanying List of Cultural Property under Enhanced Protection loses its protection only if one of the three criteria is no longer met or if it has, through its use, become a military objective.[438]

b. Indirect reference: the 1977 Additional Protocols and the ECCC Law

As seen in the general introduction, both the 1977 Additional Protocols and the ECCC use the terms "cultural property" by reference to the 1954 Hague Convention. The former prohibit "acts of hostility" and reprisals against culture's secular and religious tangible and their use for military purposes, thereby excluding a result requirement.[439] Importantly, and as testimony to the importance of cultural property, under article 85 ("Repression of breaches of this Protocol"), a violation of article 53 may amounts to a grave breach and thus, a war crime.[440] As for the ECCC Law, it establishes jurisdiction,

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[434] 1954 Hague Convention (n 56) art 8(1)(a), requires that the shelter/centre be "at an adequate distance" from major industrial centres or military objectives and not be used for military purposes, subject, however, to two exceptions. Under art 8(2), the refuge for movable cultural property may benefit from special protection regardless of its location if its construction will prevent it from bomb damage "in all probability". Under art 8(5), cultural property placed near a military objective may still benefit from special protection if the requesting State undertakes, in the event of armed conflict, to make no use of the objective and particularly, divert all traffic it is a port, railway station or aerodrome.

[435] Roger O'Keefe, "World Cultural Heritage: Obligations to the International Community as a Whole?" (2004) 53(1) *International and Comparative Law Quarterly* 189, p 192. *See* Etienne Clément and Farice Quino, "La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l'application de la Convention de La Haye de 1954" (2004) 86(854) *International Review of the Red Cross* 389, pp 395-396.

[436] Clément and Quino (n 435) pp 391 and 393.

[437] 1954 Hague Convention 1999 Protocol (n 58).

[438] 1954 Hague Convention 1999 Protocol (n 58) arts 13(1)(a)-(b) and 14. Under art 13(2), an attack may be directed if it is the only means of terminating the use of the property and all feasible precautions have been taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to cultural property.

[439] 1977 Additional Protocol I (n 59) art 53 and 1977 Additional Protocol II (n 59) art 16.

[440] Specifically, art 85(4)(d) considers as a grave breach "when committed willfully" in violation of the 1949 Geneva Conventions and 1977 Additional Protocol I, making "the object of attack which results in extensive destruction, "the clearly-recognized historic monuments, works of art or places of worship

inter alia, over five crimes in international law, including article 7 which accounts for "the destruction of cultural property during armed conflict pursuant to the [1954 Hague Convention]".[441] At the time of writing, the ECCC has not yet addressed such crimes.[442]

3. Outcome

As seen above, a number of IHL and ICL instruments provide for the direct protection of culture's tangible during armed conflicts.[443] These are useful in the adjudication of attacks targeting culture's tangible insofar as they provide clear designation of its movable and immovable as well as secular and religious components. One set, composed mainly of the early IHL instruments, and followed up by ICR-based jurisdictions, lists the said tangible but also at times endows it with legal personality.

Chart 5: IHL and ICL instruments listing culture's tangible

	Spared as far as possible/ respected and protected	Directing an attack/ commit act of hostility directed at	Intention to damage	Wilful damage/ destruction/ seizure	Property use	Property location	Military necessity	No Reprisals	Property marking
Anthropical									
1899 Hague Regulations II art 27	X				X				X
1907 Hague Regulations IX art 5	X				X				X
1907 Hague Regulations IV art 56				X					
1935 Roerich Pact					X				X
ICTY Statute art 3(d)		X	X	X	X				
ICC Statute art 8(2)(b)(ix) and (e)(iv)		X	X						
Natural									
1977 Additional Protocol I art 55	X							X	
ICC Statute art 8(2)(b)(iv)		X	X						

Another set, initiated in the post-Second World War IHL and followed-up by the ECCC Law refers to culture's tangible as cultural property.

which constitute the cultural or spiritual heritage of peoples", which enjoy special protection and is not located in the immediate proximity of military objectives.

[441] ECCC Law (n 102).

[442] Caroline Ehlert*, Prosecuting the Destruction of Cultural Property in International Criminal Law, With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage* (Brill 2013), p 200.

[443] *Note* "Resolution on the Destruction and Trafficking of Cultural Heritage" (24 March 2017) UN Doc S/RES/2347, is the first to address the protection of cultural heritage in an armed conflict (as opposed to the protection of cultural heritage in relation to counter-terrorism). This resolution calls for brining to justice those "directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments".

Chart 6: IHL and ICL instruments naming cultural property

		Spared as far as possible/ respected and protected	Directing an attack/ commit act of hostility directed at	Intention to damage	Property damage	Property use	Property location	Military necessity	No Reprisals	Property marking
1954 Hague Convention	art 4		X			X	X	X	X	X
	art 8		X			X	X (with exception)	X		X
1954 Hague Convention 1999 Protocol	art 10		X			X				X
1977 Additional Protocol I	art 53		X			X			X	
	art 85		X			X			X	
1977 Additional Protocol II	art 16		X			X				
ECCC Law	art 7		X			X	X	X	X	X
			X			X	X (with exception)	X		X

Most of the protections are applicable during both international and non-international armed conflicts, even though the latter provides occasionally a lower level of protection (compare the 1977 Additional Protocols).

These instruments enumerate culture's secular and religious tangible components. While only some instruments expressly mention the movable, the latter are most likely implicitly encompassed by the others, as suggested in the general introduction. These instruments attach a multi-fold importance to the protection of culture's tangible. First, by listing its components alongside places devoted to charity, hospitals and places where the wounded are collected, these instruments grant them a high level of protection. Second, the majority of these instruments do not accept military necessity,[444] they do not require the tangible's destruction and/or damage as such,[445] nor do they consider the property to be a military objective through its location, as opposed to its use.[446] Finally, it is noteworthy that the 1977 Additional Protocol I article 55 and the ICC Statute article 8(2)(b)(iv) protect the natural environment, as a number of international instruments, including the 1972 World Heritage Convention, consider it a part of world heritage, alone or in combination with anthropical heritage.

C. Indirect protection of culture' tangible as movable and immovable of a civilian character

IHL-ICL instruments contain the general prohibition of attacking movable and immovable of a civilian character, which stems from the customary international law

[444] For the exception, *see* 1954 Hague Convention (n 56) arts 4 and 8.
[445] For the exception, *see* 1907 Hague Regulations IV (n 50) art 56 and ICTY Statute (n 52) art 3(d).
[446] For the exception, *see* 1954 Hague Convention (n 56) arts 4 and 8.

principle of distinction.[447] Provisions derived from this principle offer an indirect protection to culture's tangible, not because of its cultural importance, but as a specific category of movable and immovable of a civilian character. The following will review this through prohibitions regarding the tangible's destruction and damage (1) and seizure and pillage/plunder (2).

1. Attack, bombardment, destruction, and devastation

In IHL, the 1907 Hague Regulations IV laid the foundation for the protection of movable and immovable of a civilian character from damage – destruction, attack and bombardment – which the Geneva Law expanded and clarified – destruction and attack. The IMT Charter, ICTY Statute and ICC Statute have borrowed and adapted most of the Hague and Geneva Law's terminology with respect to such damage to civilian objects, ie attack, bombardment, destruction and devastation. The indirect protection of culture's tangible through these provisions may be achieved through the civilian character vested in urban ensembles (a), and in property and objects (b).

a. Culture' tangible as part of the collective: urban ensembles

Damage to culture's tangible may be indirectly addressed through damage to movable and immovable of a civilian character located in a collective setting, ie urban ensembles. The 1907 Hague Regulations IV article 25 prohibits "The attack or bombardment" of undefended "towns, villages, dwellings, or buildings".[448] Bombardment is in and of itself an attack.[449] The choice of words by the 1907 Hague Regulations IV leaves no doubt as to the damaging nature of the acts in question. Article 25 thus captures culture's tangible, whether movable or immovable, secular or religious, either as part of towns, villages or dwellings, or as buildings.

Moving to ICL, the IMT Charter article 6(b)'s violations of the laws or customs of war, which combines and enhances the 1907 Hague Regulations IV articles 23(g) and 25, criminalises the "*wanton destruction of cities, towns or villages*, or devastation not justified by military necessity" [emphasis added].[450] This provision is imported verbatim by the ICTY Statute article 3(b) ("violations of the laws or customs of war").[451] This provision is capable of protecting culture's tangible, whether movable or immovable, when it is located in or is part of an urban setting. This path is also reflected in the ICTY article 3(c) and the ICC Statute article 8(2)(b)(v), which either import the

[447] The parties to the conflict must distinguish at all times between civilians-combatants and civilian objects-military objectives, and to direct attacks only against combatants and military objectives. *See* Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (International Committee of the Red Cross Cambridge University Press 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha>. accessed 14 April 2019, pp 25-37
[448] 1907 Hague Regulations IV (n 50).
[449] *See* 1977 Additional Protocol I (n 59) art 49(1), characterising "attack" as "acts of violence against the adversary, whether in offence or in defence".
[450] IMT Charter (n 403).
[451] ICTY Statute (n 52) art 3(b).

1907 Hague Regulations IV article 25 or build upon it,[452] dispensing with any additional comments. ICR-based jurisdictions have already charged the accused for damage to culture's tangible as part of their broader urban settings. Such was the case in *Prlić*, where the accused was charged under the ICTY Statute article 3(b) for the destruction of the Old Bridge of Mostar. The Trial Chamber found that "at the time of the attack, the Old Bridge was a military target".[453] Nevertheless, the Chamber found that the destruction of the bridge isolated the residents with psychological impact on Mostar's Muslim population.[454] It thus concluded that the destruction was "disproportionate to the concrete and direct military advantage" sought.[455] The Appeals Chamber, however, found that as it "offered a definite military advantage", the destruction could not be viewed, "in and of itself, as wanton destruction not justified by military necessity".[456]

b. Culture's tangible as such: property and objects

Another set of IHL-ICL provisions permits assimilating culture's tangible to civilian property and objects, regardless of their urban settings. This approach enables addressing damage to culture's tangible in isolation, for example a statute or a structure located on a road, away from a dwelling. The 1907 Hague Regulations IV article 23(g) forbids "To destroy […] the enemy's property", subject to military necessity.[457] The use of the term "property" is wide enough to consider culture's tangible, whether movable or immovable, secular or religious. As for the meaning of "destroy", it may consist of, inter alia, arson and damage.[458] Within the 1949 Geneva Conventions system of protections, which the ICJ has held to be customary international law,[459] the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("1949 Geneva Convention IV") article 53 ("Prohibited destruction") carries over article 23(g)'s "property" destruction. Thus, it prohibits, subject to military necessity, the occupying power's destruction:

> of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations.[460]

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[452] ICTY Statute (n 52) art 3(b) prohibits "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings". For Indictments charging under ICTY Statute article 3, *see* *Brđanin* First Amended Indictment (n 408) Count 11; *Martić* Amended Indictment (n 408) Count 12; *Prosecutor v Rajić*, (ICTY) Amended Indictment (14 January 2004) Case No IT-95-12 Count 10; or else *Blaškić* Second Amended Indictment (n 408) Coun4; *Kordić & Čerkez*, First Amended Indictment (n 408), Counts 4 and 6 ("unlawful attack on civilian objects"). ICC Statute (n 54) art 8(2)(b)(v) prohibits "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives". The difference with the 1907 Hague Regulations IV is the addition of military objectives. For a comprehensive discussion, *see* Dörmann, Doswald-Beck and Kolb (n 54) pp 177-184, noting that The ICC Elements of Crimes require that the attacks and bombardments must have concerned non-defended localities that were not military objectives.

[453] *Prosecutor v Prlić et al*, (ICTY) Judgement (29 November 2017) Case No IT-04-74-A, Vol 1, para 1582.

[454] *Prlić et al* Trial Judgment (n 453) para 1583.

[455] *Prlić et al* Trial Judgment (n 453) para 1584.

[456] *Prlić et al* Trial Judgment (n 453) para 411.

[457] 1907 Hague Regulations IV (n 50).

[458] Dörmann, Doswald-Beck and Kolb (n 54) p 83.

[459] *Nuclear Weapons* Advisory Opinion (n 404) paras 81-82.

[460] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (1949 Geneva Convention IV), art 53.

As seen in Part I, Chapter 2, real property, which consists of immovable property such as land, buildings and fixtures, can encompass culture's immovable tangible and any components affixed to it. Importantly, the provision considers collectively owned property, and also that of the State, its agencies and organisations, echoing the scenarios envisaged in Part I. The ICRC Commentary of 1958 links this provision to the 1907 Hague Regulations IV articles 46 and 56, which describe, inter alia, some components of culture's tangible.[461] Most importantly, article 147 ("Grave breaches") classifies as a grave breach, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".[462] According to the ICRC Commentary of 1958, while "extensive" is to be opposed to an isolated act, case-by-case determinations are required as it would be hard to argue that only one hospital's destruction does not amount to an offence under article 147.[463] Two reasons support analogising this with culture's tangible. First, the Hague Law references some of culture's tangible alongside hospitals, a testimony to the former's importance. In parallel, as seen in Part I Chapter 2, depending on the cases, culture's tangible may represent such unique value to their people that their loss, as a unique object, may be analogised with the destruction of a single hospital.[464] Reflecting their titles or chapeau ("Grave breaches of the Geneva Conventions of 1949"), respectively, the ICTY Statute article 2(d) and the ICC Statute article 8(2)(a)(iv) import verbatim the 1949 Geneva Convention IV article 147.[465] The comments regarding the latter apply here.[466]

Moving to the 1977 Additional Protocol I, Part IV's Chapter III ("Civilian objects") article 52 ("General protection of civilian objects") prohibits attacks and reprisals against civilian objects, ie those that are not military objectives.[467] This provision's focus is thus on "objects", while the ICRC Commentary of 1987 explains it as "something that is visible and tangible".[468] Importantly, however, article 52(3) provides for the presumption of civilian use in cases of doubt regarding the military use of "an object which is normally dedicated to civilian purposes, such as a place of worship […] or a school".[469] The reference to places of worship as an illustrative example of civilian

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This is repeated verbatim in the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (1949 Geneva Convention II), art 51 ("Grave breaches").

[461] Pictet, *Commentary of 1958* (n 402).

[462] 1949 Geneva Convention IV (n 460) art 147.

[463] Pictet, *Commentary of 1958* (n 402) p 601, *cited in Blaškić* Trial Judgment (n 412) para 157.

[464] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) p 16.

[465] ICTY Statute (n 52) art 2(d) and ICC Statute (n 54) art 8(2)(a)(iv) as imported verbatim by the SPSC Regulation No 2001/25 (n 54) Regulation 6; *See also* the ECCC Law's art 9 reference to grave breaches of the 1949 Geneva Conventions, ECCC Law (n 102). *See* also *Tadić* Jurisdiction Decision (n 88) para 80. For art 2(d) charges, *see Karadžić & Mladić* Initial Indictment (n 408) Count 7 ("destruction of property"); *Blaškić* Second Amended Indictment (n 408) Count 11 ("extensive destruction of property"); *Karadžić & Mladić* Initial Indictment (n 408) Count 8; *Rajić* Amended Indictment (n 452) Count 7 ("appropriation of property"); and *Brđanin* First Amended Indictment (n 408) Count 10; *Rajić* Amended Indictment (n 452) Count 9; *Prosecutor v Kovačević*, (ICTY) First Amended Indictment (13 March 1997) Case No IT-97-24, Count 15 ("unlawful and wanton extensive destruction and appropriation of property not justified by military necessity").

[466] For the relationship with the Hague Law, *see* Dörmann, Doswald-Beck and Kolb (n 54) pp 81-96.

[467] 1977 Additional Protocol I (n 59) art 52. *See* also Sandoz et al, *Commentary of 1987* (n 54) paras 2021-2022, defining military objective by the object's location (must either be seized; or from which the enemy must retreat); purpose (intended future use of the object); and use (present function).

[468] *See* also Sandoz et al, *Commentary of 1987* (n 54) paras 2007-2010.

[469] 1977 Additional Protocol I (n 59) art 52(3).

objects reinforces the civilian character of culture's tangible. No equivalent provision exists under the 1977 Additional Protocol II.[470] Deriving from this provision, the ICC Statute article 8(2)(b)(ii) sets out a blanket prohibition on "intentionally directing attacks against civilian objects, that is, objects which are not military objectives".[471] This provision does not refer to military necessity.[472]

2. Seizure-appropriation and pillage-plunder

IHL-ICL impose a number of prohibitions that concern seizure-appropriation, (a) and pillage-plunder (b) of movable and immovable of a civilian character. When assimilated to these, culture's tangible may be indirectly protected.

a. Seizure and appropriation

The 1907 Hague Regulations IV article 23(g) forbids to "seize the enemy's property" subject to imperative military necessity.[473] The ICC Statute article 8(2)(b)(xiii) imports this provision quasi-verbatim.[474] As explained by the ICC Elements of Crimes, the crime requires the actual seizure of civil and public property protected under IHL and not justified by military necessity.[475] As IHL does not define the words seize/seizure,[476] guidance may be provided by the 1907 Hague Regulations IV article 55, which requires the occupying State to act only "as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates".[477] There is no reason for these civilian immovable, whether anthropical or natural, not to contain culture's tangible. In such cases, the provision further provides that the occupying State "must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".[478] In other words, it must account for any profits that may have been generated from eg visits to a museum or a 1972 World Heritage List natural site.

Derived from article 23(g), the 1949 Geneva Convention IV article 147 considers as a grave breach the "extensive […] appropriation of property", subject to military necessity, as imported by the ICC Statute article 8(2)(a)(iv).[479] The main difference

[470] Finally, a violation of art 52(2) can amount to a grave breach under the 1977 Additional Protocol I art 85(3)(b); *See* 1977 Additional Protocol I (n 59) art 85(3)(b). *See* also R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 202-207.
[471] ICC Statute (n 54) art 8(2)(b)(ii).
[472] As with the ICC Statute (n 54) art 8(2)(b)(ix) and (e)(iv), it is the act of intentionally directing an attack against civilian objects – as opposed to damage requirements – that constitutes the crime. *See* Dörmann, Doswald-Beck and Kolb (n 54) pp 148-149.
[473] 1907 Hague Regulations IV (n 50).
[474] ICC Statute (n 54) art 8(2)(b)(xiii) and, for non-international armed conflicts, art 8(2)(e)(xii).
[475] Dörmann, Doswald-Beck and Kolb (n 54) pp 250-251.
[476] Dörmann, Doswald-Beck and Kolb (n 54) pp 251, 257-258.
[477] 1907 Hague Regulations IV(n 50) art 55.
[478] 1907 Hague Regulations IV(n 50) art 55. *See* also 1907 Hague Regulations IV (n 50) art 53, according to which occupying powers "can only take possession" of public "movable property", such as "cash, funds" and "depots of arms". *See* further 1907 Hague Regulations IV (n 50) art 56, and the 1954 Hague Convention (n 56) arts 4(3) and 14(1) on public movable property.
[479] 1949 Geneva Convention IV (n 460) art 147 and ICC Statute (n 54) art 8(2)(a)(iv).

with article 23(g) is the use of the term "appropriation" instead of "seizure", and the requirement that it be extensive, wanton and unlawful.[480] Here again, the term "appropriation" holds many meanings, including withholding, requisition, theft, spoliation and plunder.[481] As seen in the ICRC Commentary of 1958, article 147 requires that the property be in occupied territory, and that the appropriation be extensive, rather than isolated.[482] As with the extensive destruction, this prohibition can encompass culture's tangible immovable and movable, anthropical and natural.

b. Pillage and plunder

The 1907 Hague Regulations IV articles 28 and 47 prohibit pillage, including that "of a town or place", as does the 1949 Geneva Convention IV article 33.[483] The ICC Statute article 8(2)(b)(xvi) and (e)(v) imports the 1907 Hague Regulations IV article 28.[484] According to the ICRC Commentary of 1958, the 1949 Geneva Convention IV article 33 does not apply to "requisition or seizure".[485] The commentary further explains that the 1949 Geneva Convention IV article 33 applies to "all types of property, whether they belong to private persons or to communities or the State".[486] Dörmann, Doswald-Beck and Kolb have noted that the ICC Elements of Crimes were drafted so as not to limit private property, despite the suggestion of several delegations.[487] This could encompass culture's tangible immovable and movable, anthropical and natural.

Unlike the above, the IMT Charter article 6(b), as imported verbatim by the ICTY Statute article 3(e), considers the "plunder of public or private property" as a violation of the laws or customs of war.[488] Building upon the 1907 Hague Regulations IV articles 28 and 47, this provision does not explain the meaning of "plunder". Linguistically, this word means acquiring property illegally, during armed conflicts, and is synonymous with pillage.[489] Judicially, however, things have not been pristine. At the IMT, the indictment's "Count Three – War Crimes (Charter, Article 6, especially 6 (b)" contained, as an underlying offence, the heading "(E) Plunder of public and private property".[490] Therein, it was alleged that, in the Western countries, the Nazis destroyed "industrial cities, cultural monuments, scientific institutions, and property of all types".[491] The subheading "*Looting* and Destruction of Works of Art" alleged that many museums were "*looted*" and many private art collections were "*stolen*" [emphasis added].[492] Thus, while count three focused on the IMT Charter article 6(b), it appears

[480] Dörmann, Doswald-Beck and Kolb (n 54) pp 251-252.
[481] Dörmann, Doswald-Beck and Kolb (n 686) p 83.
[482] Pictet, *Commentary of 1958* (n 402) p 601.
[483] 1907 Hague Regulations IV (n 50) arts 28 and 47; and 1949 Geneva Convention IV (n 460) art 147.
[484] ICC Statute (n 54) art 8(2)(b)(xvi) and (e)(v).
[485] Pictet, *Commentary of 1958* (n 402) p 227.
[486] Pictet, *Commentary of 1958* (n 402) pp 226-227.
[487] Dörmann, Doswald-Beck and Kolb (n 54) p 272-273.
[488] IMT Charter (n 403) art 6(b) and ICTY Statute (n 52) art 3(e). The Charter of the International Military Tribunal for the Far East (adopted 19 January 1946) (IMTFE Charter) art 5(b) simply referred to "conventional war crimes: namely, violations of the laws or customs of war".
[489] *Oxford English Dictionary* (n 26).
[490] *Trial of the Major War Criminals Before the International Military Tribunal*, (IMT) Judgment (Nuremberg 14 November 1945-1 October 1946), published at Nuremberg, Germany, 1947, <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed 23 January 2021, p 55.
[491] IMT Judgment (n 490) p 56.
[492] IMT Judgment (n 490) p 58.

to have used many words as synonym for "plunder". The IMT found that Rosenberg and his Einsatzstab "*plundered* museums and libraries, *confiscated* art treasures and collections, and *pillaged* private houses" [emphasis added].[493] The IMT added that "Jewish homes were *plundered* in the West, […], and it took 26,984 railroad cars to transport the *confiscated* furnishings to Germany. As of 14 July 1944, more than 21,903 art objects including famous paintings and museum pieces, had been *seized* by the Einsatzstab in the West".[494] The judgment appears to have considered plunder, pillage, confiscation and seizure interchangeably. Rosenberg was convicted on all four counts of the indictment, including count three, although as often with the IMT judgment, the exact relationship between facts and law is not clear.[495] At the ICTY, the *Blaškić* Appeals Judgment did not simplify the matter by noting that plunder includes the act of pillage.[496] On plunder's definition, the Chamber took note of the Trial Chamber's definition of plunder as "the unlawful, extensive and wanton appropriation of property", implying a contrario that appropriation may also be legal.[497]

Thus, and as also noted by Dörmann, Doswald-Beck and Kolb, IHL-ICL's understanding of the terms pillage and plunder (and looting, sacking and confiscation and seizure) remains unclear and varies depending on international jurisprudence.[498] This issue remains relevant also in the case of IHL instruments directly referencing "cultural property". As seen in the previous subsection, the 1954 Hague Convention article 4(3) prohibits "theft, pillage or misappropriation […] and […] vandalism*"* as well as "requisitioning movable cultural property".[499] Notwithstanding this opacity, the pillage/plunder of culture's tangible as civilian objects falls within this prohibition.

3. Outcome

Based on the foregoing, IHL-ICL can indirectly encompass culture's anthropical and natural movable and immovable, whether secular or religious, by assimilating them to civilian objects. This protection is twofold. The first type of protection consists of prohibiting the civilian objects' destruction, attack, bombardment and devastation. IHL-ICL use these words in both an overlapping and disjunctive manner. While the judicial nuances between these words depend on the case at hand, in contrast to the prohibition of destruction and devastation's subjection to military necessity, that of attack and bombardment is absolute. Attack is an act, bombardment is a means, and destruction and devastation are an aim and/or a result. Beyond the legislators' specific purpose, military necessity appear to be linked to its progressive import into IHL-ICL

[493] IMT Judgment (n 490) p 295.
[494] IMT Judgment (n 490) p 295.
[495] IMT Judgment (n 490) p 297.
[496] *Prosecutor v Blaškić*, (ICTY) Appeal Judgment (29 July 2004) Case No IT-95-14-A, para 147.
[497] *Blaškić* Appeal Judgment (n 496) para 144; *Blaškić* Trial Judgment (n 412) para 234, further adding "belonging to a particular population, whether it be the property of private individuals or of state or "quasi-state" public collectives". *See Karadžić & Mladić* Initial Indictment (n 408) Count 9; *Kordić & Čerkez*, First Amended Indictment (n 408) Counts 39 and 42; *Prosecutor v Jelisić*, (ICTY) Amended Indictment (19 October 1998) Case No IT-95-10, Count 44.
[498] Dörmann, Doswald-Beck and Kolb (n 54) pp 273-280. On "pillage", *see* Larissa van den Herik and Daniëlla Dam-de Jong, "Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict" (2011) 15 *Criminal Law Forum* pp 237-273.
[499] 1954 Hague Convention (n 56) arts 4(3) and 14(1).

instruments. Otherwise, a logical stance would require the subjection to military necessity of attacks and bombardment instead of destruction of devastation. Be that as it may, this scheme indirectly encompass culture's tangible, as movable and immovable of a civilian character, whether as part of an urban setting or as property/objects.

Chart 7: IHL-ICL instruments indirectly protecting culture's tangible: prohibition of destruction, attack, bombardment and devastation of civilian objects

		Attack	Bombardment	Destruction	Devastation	Military necessity	Urban settings
1907 Hague Regulations IV	art 23(g)			X		X	
	art 25	X	X				X
1949 Geneva Conventions	art 53			X		X	
	art 147			X		X	
1977 Additional Protocol I	art 52	X					
	art 85(3)(b)	X					
IMT Charter	art 6(b)			X	X	X	X
ICTY Statute	art 2(d)			X		X	
	art 3(b)			X		X	X
	art 3(c)	X	X				X
ICC Statute	art 8(2)(a)(iv)			X		X	
	art 8(2)(b)(ii)	X					
	art 8(2)(b)(v)	X	X				X
ECCC Law	art 9			X		X	

The second form of protection consists of the prohibition of seizure-appropriation and pillage-plunder; and qualified possession and administration of the enemy's civilian objects. While the prohibition of seizure-appropriation is subject to military necessity, that of pillage-plunder is (almost) absolute. Unfortunately, and as just analysed, both international legislators and adjudicators have used these terms incoherently, despite scholars' attempts for clarification.

Chart 8: IHL and ICL instruments indirectly protecting culture's tangible: prohibition of seizure-appropriation and pillage-plunder of civilian objects

		Seizure	Appropriation	Pillage	Plunder	Administrator/ usufructuary	Possession	Military necessity
1907 Hague Regulations IV	art 23(g)	X						X
	art 28			X				
	art 47			X				
	art 53						X	
	art 55					X		
1949 Geneva Conventions	art 33			X				
	art 147		X					X
IMT Charter	art 6(b)				X			
ICTY Statute	art 3(e)				X			
ICC Statute	art 8(2)(a)(iv)		X					X
	art 8(2)(b)(xiii) and (e)(xii)	X						X
	art 8(2)(b)(xvi) and (e)(v)			X				

D. Synthesis: direct protection as lex specialis to indirect protection

IHL-ICL protect culture's tangible, whether secular or religious, movable or immovable, during both international and non-international armed conflict – even though the latter occasionally provides a lower level of protection.[500] Accordingly, breaches of these protective norms can amount to war crimes. IHL-ICL are thus tangible-centred insofar as the typology of damage is concerned. But they are also so in terms of the victims of damage, when culture's tangible is a legal person.

IHL-ICL protect culture's tangible both directly and indirectly. Legal instruments that address the former may either name cultural property, or enumerate culture's tangibles, whether secular and religious. While most of these instruments expressly mention the immovable, some also refer to the movable. The latter may be otherwise implied as being part of the immovable. These instruments grant a high degree of protection to culture's tangible, as they list its components together with hospitals and places where the wounded are collected. Equally, only a minority accepts military necessity;[501] or expressly refers to cultural property as such;[502] or considers the property to be a military objective through its location, as opposed to its use.[503] Importantly, some IHL-ICL instruments also consider as a war crime damage to the natural environment, thereby enabling to transcend culture's anthropical components.[504]

However, IHL-ICL also provide for two forms of indirect protection of culture's tangible, whether movable and immovable, secular or religious, when considered as part of civilian objects. This is twofold: prohibiting the civilian objects' destruction, attack, bombardment and devastation; but also the prohibition of seizure, pillage, appropriation, plunder, and aspects of possession and administration of the enemy's civilian objects. Both the first form and, to a lesser degree, the second form of indirect protection are subject to military necessity. This is so given the fact that, unlike the direct protection afforded to culture's tangible, indirect protection applies not because of its special value, but owing to its characterisation as a civilian object. Accordingly, the direct protection is likely to be lex specialis to the indirect protection, as applicable.

When adjudicating attacks targeting culture as war crimes, damage inflicted on culture's tangible may be charged in two non-mutually exclusive manners. On the one hand, provisions that directly prohibit such damage could be used for the said acts. On the other hand, provision prohibiting the movable and immovable of a civilian character could encompass culture's tangible. The aforementioned paragraphs set-up the advantages and draw-backs for each of these two modes of charging the crime. In case of conflict, the former approach would normally be lex specialis. For example, in *Kordić & Čerkez*, the Trial Chamber noted that unlike the 1907 Hague Regulations IV article 56's absolute prohibition of destruction of culture's tangible, article 23(g) subjects the destruction of civilian property to imperative military necessity.

[500] *For example,* compare 1977 Additional Protocol I (n 59) and 1977 Additional Protocol II (n 59).
[501] *See* eg 1954 Hague Convention (n 56) art 4(2).
[502] 1954 Hague Convention (n 56), 1954 Hague Convention 1999 Protocol (n 58), 1977 Additional Protocol I (n 59), 1977 Additional Protocol II (n 59) and ECCC Law (n 102).
[503] 1954 Hague Convention (n 56) arts 4 and 8.
[504] *See* 1977 Additional Protocol I (n 59) art 55 and ICC Statute (n 54) art 8(2)(b)(iv).

Accordingly, the Chamber held that article 56 must be lex specialis.[505] But the issue would be more intriguing when the general protection is more favourable than the special protection. For example when the 1954 Hague Convention article 4(3) which subjects the prohibition of pillage to military necessity and the ICC Statute article 8(2)(b)(xvi) and (e)(v) which does not. Here, one could argue for the application of the latter on grounds of the most favourable treatment.

The interaction between the direct and indirect protection of culture's tangible acquires a different dimension when it extends to the so-called peacetime regime instrument. This facilitates moving from the tangible-centred to a heritage-centred approach.

III. Towards a heritage-centred approach: Dubrovnik and Timbuktu

A. Introduction

As seen, IHL-ICL instruments provide a detailed set of protections for movable and immovable of a civilian character in general, and for culture's tangible in particular. The parallel development of peacetime instruments (general introduction) means that culture's tangible that is attacked during armed conflict is also frequently protected by peacetime instruments.

To date, Dubrovnik and Timbuktu are the two ICTY and ICC cases that encapsulate best the intersection between IHL-ICL norms and the 1972 World Heritage Convention, as regards damage to and/or destruction of culture's tangible (A). It will be argued that not only both courts have viewed culture's tangible as (im)movable of a civilian character, but also, and most importantly, they have linked it to cultural heritage (B). As a consequence, it will be shown that this conceptualisation has impacted on the assessment of the gravity of the crime (C). It will transpire from this analysis that ICR-based jurisdictions have adopted a tangible-centred approach insofar as the typology of damage is concerned and an anthropo/heritage-centred approach with regard to the damage's victims and consequences. As will be demonstrated, it is the recourse to the 1972 World Heritage Convention that has made this linkage possible. Insofar as war crimes adjudications are concerned, this confirms the interconnection between culture's tangible and intangible, between material culture and heritage. This is so, notwithstanding terminological challenges with respect to what appears to be an interchangeable use, in the judgments, of the terms cultural property, cultural heritage and heritage.

[505] *Prosecutor v Kordić & Čerkez*, (ICTY) Judgment (26 February 2001) Case No IT-95-14/2-T, para 361. See also *Kordić & Čerkez* Appeal Judgment (n 415) paras 89-90; noting "two types of protection for cultural, historical and religious monuments ", ie "general protection" and "special protection".

B. IHL-ICL intersecting with peacetime instruments

The placement of Dubrovnik and Timbuktu on the 1972 World Heritage List (1) meant that choices had to be made on war crimes charges directly prohibiting the destruction of culture's tangible and/or those that indirectly do so by assimilating those sites to tangible of a civilian character (2).

1. The sites and the 1972 World Heritage Convention

a. Dubrovnik: culture's secular and religious tangibles

Located on Croatia's Dalmatian coast and founded in the seventh century, Dubrovnik experienced the rules of the Byzantines, Venetians, Ottomans and Austro-Hungarians. The old town of the city ("Old Town") offers an architectural mixture of gothic, renaissance and baroque styles.[506] In 1979, the Old Town was placed on the 1972 World Heritage List.[507] The Old Town is thus a collection of culture's tangible movable and immovable so intrinsically interconnected and spread that a whole site, in the sense of the urban setting of a civilian character described earlier, characterises it. During the 1991-1998 breakup of the former Yugoslavia, the Old Town was added to the 1972 World Heritage in Danger List.[508] During the armed conflict, the Yugoslav People's Army attacked Dubrovnik from land and sea. Heavily shelling the Old Town resulted in the total destruction of six buildings and damage to hundreds more.[509] Among the four persons indicted for these attacks, only Štrugar and Jokić were eventually tried.[510] Jokić pleaded guilty, inter alia, to the ICTY Statute article 3(d),[511] while Štrugar went

[506] *See* UNESCO, "Old City of Dubrovnik" <http://whc.unesco.org/en/list/95/> accessed 14 April 2019.
[507] *See* UNESCO, "Old City of Dubrovnik" (n 506).
[508] *See* UNESCO, "Old City of Dubrovnik" (n 506).
[509] *Prosecutor v Štrugar, Jokić, Zec & Kovačević*, (ICTY) Indictment (22 February 2001) Case No IT-01-42, paras 20 and 30-31; *Prosecutor v Štrugar*, (ICTY) Third Amended Indictment (10 December 2003) Case No IT-01-42-PT, paras 12-13 and 22-23; *Prosecutor v Jokić*, (ICTY) Second Amended Indictment (27 August 2003) Case No IT-01-42/1, paras 7-9, 18 and 27; *Prosecutor v Štrugar & Kovačević*, (ICTY) Second Amended Indictment (17 October 2003) Case No IT-01-42/2, paras 14-15 and 26-27; and *Prosecutor v Milošević*, (ICTY) Second Amended Indictment (28 July 2004) Case No IT-02-54-T, para 78.
[510] These were Slobodan Milošević (indicted in 2002 and 2004), who was the elected President of the Republic of Serbia in 1989-1997 and President of the FRY in1997-2000. The *Milošević* trial was unfinished due to the accused's death; *see Prosecutor v Milošević*, (ICTY) Order Terminating Proceedings (14 March 2006) Case No IT-02-54-T. For a full review of the indictments, *see* also Hirad Abtahi and Grant Dawson, "The Anatomy of the Milošević Trial (2001-2006)" (2016) 1(4) *Journal of International Humanitarian Action*, https://jhumanitarianaction.springeropen.com/articles/10.1186/s41018-016-0004-x accessed 14 April 2019. The others were all indicted in 2001. In 1991, Pavle Štrugar was the Commander of the Dubrovnik military campaign. Miodrag Jokić commanded one of the formations subordinated to Štrugar. As for Vladimir Kovačević, he did not have the capacity to enter a plea and to stand trial; *see Prosecutor v Kovačević*, (ICTY) Decision on Fitness to Stand Trial (12 April 2006) Case No IT-01-42/2-I.
[511] *Prosecutor v Jokić*, (ICTY) Judgment (18 March 2004) Case No IT-01-42/1, paras 74-78.

through a full trial. With respect to the Old Town, which it referenced as "World Cultural Heritage", the *Jokić* Trial Chamber noted that its "architectural ensemble" illustrated the development of "human history".[512] Consequently, as held by the Chamber, the attacks concerned both "the history of the region" and "the cultural heritage of humankind".[513] The Old Town's national and international importance are evident since they are a prerequisite for any site's inclusion on the 1972 World Heritage List. But the Chamber's reference to the importance of the site to the region adds a third layer, turning the Old Town into a local-national-international triptych.

b. Timbuktu: culture's religious tangible

Founded in the fifth century, Timbuktu reached its cultural heights in the fifteenth and sixteenth centuries, as an important centre for the dissemination of Islam. It housed a major Koranic university, schools and thousands of students. Timbuktu was also a commercial (given the trade of gold, salt and other goods) and cultural (given the provision of manuscripts) crossroad.[514] Following the 2012 armed conflict in Mali, Ansar Dine and Al-Qaeda in the Islamic Maghreb ("AQIM") took over Timbuktu, establishing an Islamic tribunal and police force, a media commission and a morality brigade.[515] Heading the latter, Al Mahdi sought to prohibit the community's prayer and pilgrimage in ten mosques and mausoleums in Timbuktu.[516] Eventually, attacks were conducted against them, resulting in their near total destruction.[517] Al Mahdi pleaded guilty to the charges under the ICC Statute article 8(2)(e)(iv) with intentionally directing attacks against sites "of a religious and historical character" in Timbuktu.[518] Like *Dubrovnik*, *Al Mahdi* represented the intersection between the 1972 World Heritage Convention and IHL-ICL. Similarly, the Trial Chamber used the same conception of culture as a triptych. Noting the function of the mausoleums and mosques in Timbuktu's "cultural life" and the inclusion of all but one on the 1972 World Heritage List, the Chamber held that the latter "reflects their special importance to international cultural heritage".[519]

2. Choice of charges against the accused

Before proceeding with this section's broader heritage-centred analysis, or perhaps as part of the latter, it is necessary to make a brief observation with respect to the choice of criminal charges within each of the ICTY and ICC war crimes provisions (a) as well as beyond as regards the 1972 World Heritage Convention (b).

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[512] *Jokić* Trial Judgment (n 511) para 51.
[513] *Jokić* Trial Judgment (n 511) para 51.
[514] *See* UNESCO, "Timbuktu" <http://whc.unesco.org/en/list/119> accessed 14 April l2019.
[515] *Al Mahdi* Trial Judgment (n 49) para 31.
[516] Born in the region of Timbuktu in a family greatly knowledgeable in Islam, Ahmad Al Faqi Al Mahdi received Koranic education and lectured as an expert on religious matters, before joining Ansar Dine in April 2012. *See Al Mahdi* Trial Judgment (n 49) para 9.
[517] *Al Mahdi* Trial Judgment (n 49) paras 31, 35 and 78.
[518] *Al Mahdi* Trial Judgment (n 49) paras 10 and 63. *See also* para 39 holding that the attacked mausoleums and mosques were "both religious buildings and historic monuments".
[519] *Al Mahdi* Trial Judgment (n 49) paras 39 and 46.

a. Within war crimes provisions

As just seen, both *Jokić* and *Štrugar* were charged for war crimes directly relating to culture's tangible. However, the accused were also charged for the destruction of tangibles of a civilian character. For this indirect prohibition of damage to/destruction of culture's tangible, the accused were charged for violations of the ICTY Statute article 3(b) as devastation not justified by military necessity. Curiously, the charge dropped the other phrase within that provision, ie "wanton destruction of cities, towns or villages". This deliberate omission shows that the ICTY opted for considering culture's tangible's as object/property rather than as part of an urban settings. This is intriguing to say the least, especially in light of the fact that, by virtue of being placed on the 1972 World Heritage List, the Old Town, including its residential buildings, enjoyed protection, as held in *Jokić*.[520]

While in *Al Mahdi*, the accused was only charged under the ICC Statute article 8(2)(e)(iv), the Trial Chamber noted that the accused was not charged with nor had any argument been raised with respect to the appropriateness of the destruction of civilian property under article 8(2)(e)(xii) on "Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict".[521] Thus, even in the alternative or in addition to the ICC Statute's more cultural tangible specific war crime provision, the ICC considered the destructions as those of objects/property rather than those of the urban ensembles.

Whether due to the standard of proof or elements of crimes, this is a path worth exploring in future cases involving large sites placed on the 1972 World Heritage List.

b. Beyond war crimes provisions

These cases present an interesting characteristic, ie while charging the accused with war crimes provisions, they emphasise the sites' links to the 1972 World Heritage Convention. In Dubrovnik, the indictments specifically mentioned that the totality of the Old Town was on the 1972 World Heritage List while certain buildings and the towers on the city walls were marked with the 1954 Hague Convention symbols.[522] In *Al Mahdi*, according to the decision confirming the charges, at the time of the facts, Timbuktu's cemeteries, including the Buildings/Structures within them, as well as 16 mausoleums were protected sites pursuant to the 1972 World Heritage Convention and, because of the conflict in Mali, on the 1972 World Heritage in Danger List.[523] Both sites were urban ensembles, as opposed to single movable or immovable of a civilian character. As will now be seen, this will have implications on the way the ICTY and ICC would make their findings which would be both tangible-centred in terms of damage and, importantly, heritage-centred in terms of the consequences on the victims.

For now, references to the *Jokić* Trial Judgment will illustrate the purpose. Therein, the Chamber held that directing attacks against "an especially protected site" is "a crimes

[520] *Jokić* Trial Judgment (n 511) para 51.
[521] *Al Mahdi* Trial Judgment (n 49) para 12.
[522] *See Milošević* (n 509) para 78.
[523] *Prosecutor v Al Mahdi*, (ICC) Decision on the Confirmation of Charges (24 March 2016) No ICC-01/12-01/15, para 36.

of even greater seriousness" than that of attacking "civilian buildings", as the former also includes the latter.[524] Thereafter, the Chamber noted Jokić's awareness of the Old Town's relationship with the 1972 World Heritage List and the 1954 Hague Convention.[525] By referring to a heightened legal protection provided to civilian objects that constitute cultural property, the Trial Chamber emphasised the gravity of attacks against it.[526] Later, the *Štrugar* Appeals Judgment concurred with the Trial Chamber's conclusion that, given the 1972 World Heritage List status of the "entire Old Town", and also the visibility of UNESCO emblems, article 3(d) applied to "each structure or building in the Old Town".[527] This passage leaves no doubt as to the organic relationship that the ICTY viewed between ICL and the 1972 World Heritage Convention.

C. The collective and its anthropical environment

In part I, Chapter 2, this study analysed the IACtHR's case law on the heritage-related implications of the destruction of the symbiosis between the collective and its natural environment. This subsection will propose that the ICR-based jurisdictions have replicated the same scheme, with the difference that the symbiosis will concern the collective and its anthropical environment. After formulating its scope (1), the proposition's implications on the typology of victims, whether locally (2) or nationally and internationally (3) will be analysed.

1. Introduction

A major implication of bringing the 1972 World Heritage Convention into the realm of IHL-ICL is to humanise the inanimate. In other words, to recognise not only the intrinsic value of culture's tangible, but also its contribution to the collective's identity.

In *Jokić*, by qualifying the Old Town as "a "living city"" whose "population was intimately intertwined with its ancient heritage",[528] the Trial Chamber viewed the site as more than a museum of inanimate tangibles. Attacking the city was to target its amalgamated population. This is reminiscent of the IACtHR practice, which considered the collective as the victim of the breakdown of its symbiotic relationship with its natural environment (Part I, Chapter 2). To attack the latter was to hurt the former. In Dubrovnik, the collective was the victim of attacks targeting the anthropical environment, both secular and religious. A strict analogy between the IACtHR and the ICTY cases is not possible. The IACtHR addressed the more isolated type of indigenous/tribal collectives with their system of belief; while the ICTY addressed that of a post-Socialist urban population. Notwithstanding these differences, the ICTY did

[524] *Jokić* Trial Judgment (n 511) para 53.
[525] *Jokić* Trial Judgment (n 511) para 23.
[526] However, the Trial Chamber found that the special status of the Old Town formed part of the assessment of the gravity of the crime and therefore should not be additionally considered as an aggravating factor. *See Jokić* Trial Judgment (n 511) para 67.
[527] *Prosecutor v Štrugar*, (ICTY) Appeal Judgment (17 July 2008) Case No IT-01-42-A, para 279.
[528] *Jokić* Trial Judgment (n 511) para 51.

view one such relationship, all proportions considered.

Clearly, this linking of the collective to its cultural anthropical environment is intertwined with the typology of victims, harms and reparations. As seen in the general introduction, in contrast to the ICTY, the ICC provides for a detailed reparations scheme. Therefore, most of the following will focus on *al Mahdi*. Therein, the trial judgment and reparations order allow making the proposition that victims may be viewed as a triptych. As seen throughout this study (specifically the general introduction), the metaphoric use of the triptych encapsulates, almost formulaically, the inter-connectedness between – yet independence from each other of – culture's local, national and international layers. Accordingly, the following will analyse the victims in the form of the local population (2) as well as the national population and the international community (3). For each of these, the types of harm and forms of reparations will be reviewed. This analysis will make the proposition that the ICC adopted a heritage-centred approach insofar as the consequences of the damage on the victims were concerned.[529]

2. The local population

In *Al Mahdi*, most of the attention of both judgment and reparations orders was dedicated to the population of Timbuktu which was considered as the largest victim (a) of the destructions and beneficiary of their related reparations (b).

a. Victims

The *Al Mahdi* Trial Judgment noted that, as "a common heritage for the community", the saints' mausoleums and mosques "are an integral part of the religious life of [Timbuktu's] inhabitants".[530] The mausoleums reflected the "commitment to Islam" of "the people of Timbuktu", as evidenced by the actual and symbolic maintenance of the sites of Timbuktu community of all ages and genders.[531] These passages illustrate the Chamber's viewing the collective as the sum of its natural persons. Interestingly, in evaluating the gravity of the crime, the *Štrugar* Trial Chamber held that the crimes had "grave consequences" on the victims, since they were ""people", rather than any particular individual".[532]

Furthermore, the Trial Chamber also viewed the collective and the sites as an integrated whole. Importantly, the Chamber held that the mausoleums "played a psychological role to the extent of being perceived as protecting" the Timbuktu population. This association of the collective's spiritual relationship with its religious tangible echoes to

[529] The Trial Chamber considered legal persons (together with natural persons) ordinarily residing in or very closely related to Timbuktu as victims. However, given the fact that the Reparations Order did not publicly disclose the identity of legal persons, it is unclear where and how the Chamber considered the type of harm they sustained, nor the related reparations. The legal person a/35140/16 appear not to be related to the destroyed tangible, as it acted as counsel the people of Timbuktu. *See Al Mahdi* Reparations Order (n 49) paras 56 and 92.
[530] *Al Mahdi* Trial Judgment (n 49) para 34.
[531] *Al Mahdi* Trial Judgment (n 49) para 78.
[532] *Štrugar* Trial Judgment (n 409) para 232.

some degrees the IACtHR's findings on the relationship between the collective's spirituality and its natural environment (Part II, Chapter 2).[533] While multiple nuances may be pointed out between the types of collectives, eg indigenous/tribal versus urban, unquestionable parallel trends emerge. And that is the existence of a collective as a victim of attacks targeting its tangible – religious in *Al Mahdi*. The Chamber would take this relationship between the collective and its cultural tangible of a religious and spiritual character into account for the evaluation of the gravity of the crime. This was so as, being among the "most cherished buildings" by the population of Timbuktu who attached "symbolic and emotional value" to them, the destruction "aimed at breaking the people of Timbuktu".[534]

b. Harm and reparations

On the basis of the *Al Mahdi* Reparations Order, it is possible to distinguish between material harm with its corresponding collective – and individual – reparations measures (i). Importantly, though, like the IACtHR, the Trial Chamber granted collective reparations for moral harm, ie the "disruption of culture" (ii).

i. Material harm: individual and collective reparations

The Trial Chamber identified two types of material harm: one focusing on the destructions as such and another on their consequences. As regards the former, noting the emotional and spiritual value accorded by the population to the destroyed buildings, the Trial Chamber found collective reparations to be most appropriate.[535] As for the modalities, noting UNESCO's renovation work, the Chamber determined that the most appropriate form of reparations was the rehabilitation of sites combined with guarantees of non-repetition.[536] Intriguingly, it is not clear how the latter operate in an ICR-based context. In State responsibility, combining State continuity and the fact that States are the bearer of responsibility, it is logical that they provide guarantees of non-repetition, as seen in the ISCMs and HRCts practice (see Part I). In ICR-based modes of responsibility, natural persons are the sole bearers of ICL violations. Unlike States, natural persons – mortals – evidently do not undergo "individual continuity". Therefore, while it is normal to expect a natural person to provide guarantees of non-repetition, their durability in time is not sustainable – since their effects are linked to the convicted person's life-span. Perhaps it is in recognition of this conundrum that the Chamber indicated that such guarantees (presumably by Al Mahdi) could be provided in consultation with Malian authorities, as necessary – even though the ICC Statute article 75 and it forms of reparations are linked to the convicted person.[537] The Chamber further ordered the video and transcript release of Al Mahdi's aforementioned apology in Timbuktu's primary languages.[538] These measures typically reflected the IACtHR practice regarding pecuniary damages and collective reparations (Part I, Chapter 2).

[533] *Al Mahdi* Trial Judgment (n 49) para 78.
[534] *Al Mahdi* Trial Judgment (n 49) paras 72 and 78-80.
[535] *Al Mahdi* Reparations Order (n 49) paras 60, 67 and 104.
[536] *Al Mahdi* Reparations Order (n 49) paras 67 and 104.
[537] *Al Mahdi* Reparations Order (n 49) para 67.
[538] *Al Mahdi* Reparations Order (n 49) paras 71 and 104.

The Chamber also considered the second type of harm, ie economic harm, as the consequence of the destructions.[539] Accordingly, considering that the buildings' destruction affected the victims' livelihood directly (eg the mausoleums' guardians and maçons) and indirectly (eg losses to the tourism industry), the Chamber noted the foreseeability of the economic impact of such attacks given the buildings' "prominent community role".[540] This analysis of economic loss reflects the practice of ISCMs, in that the Chamber referred, inter alia, to the EECC (Part I, Chapter 1). Having found that the harm sustained was primarily collective, the Chamber proceeded with an approach akin to that proposed in this study's Part I, Chapter 2. In so doing, it identified both the members of the collective as well as the collective as such, as the recipients of reparations for the attacks. The former resulted in individual reparations, in the form of financial compensation, to those whose livelihoods exclusively depended on the buildings.[541] As for collective reparations for the Timbuktu community as a whole, ie the collective as the sum of its individual members, it consisted of rehabilitation measures, such as:

> community-based educational and awareness raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a 'microcredit system' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.[542]

Showcasing its inter-connection with State responsibility, the Chamber thus ordered measures akin to those adopted by the IACtHR (Part I, Chapter 2).

ii. Moral harm: disruption of culture

The *Al Mahdi* Trial Chamber characterised moral harm as "mental pain and anguish" suffered in two manners. This concerned, first, those whose family members' burial places had been damaged.[543] For these, the Chamber ordered that individual reparations be addressed through financial compensation.[544] Not only was this measure akin to that for economic harm, but also, an importantly, it was reminiscent of the IACtHR practice. Indeed, cemeteries can be said to have formed part of culture's anthropical tangible. The dead remain among the alive mentally. But they also do so through their burial remains, thus contributing to identity and heritage.

This leads to the second type of harm identified by the Chamber, ie mental pain and anguish suffered by "the Timbuktu Community as a whole", also for the "disruption of culture", by express reference to the IACtHR.[545] Once again, the Chamber reflected the practice of the IACtHR. First, it considered the collective as the sum of its natural persons members. Second, it borrowed from the IACtHR the notion of "disruption of

[539] *Al Mahdi* Trial Judgment (n 49) para 108.
[540] *Al Mahdi* Reparations Order (n 49) paras 73, 75 and 104.
[541] *Al Mahdi* Reparations Order (n 49) paras 76, 83 and 104.
[542] *Al Mahdi* Reparations Order (n 49) paras 76, 83 and 104.
[543] *Al Mahdi* Reparations Order (n 49) para 90. *See* also *Al Mahdi* Trial Judgment (n 49) para 108.
[544] *Al Mahdi* Reparations Order (n 49) paras 90 and 104.
[545] *Al Mahdi* Reparations Order (n 49) paras 90 for *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 85 and 132. *See* also *Al Mahdi* Trial Judgment (n 49) para 108.

culture" which, although not used terminologically by the IACtHR, is broader than damage to the tangible. Accordingly:

> The attack […] not only destroyed and damaged physical structures. Its impact 'rippled out into the community and diminished the link and identity the local community had' with such valuable cultural heritage.[546]

Noting that "the inherently irreplaceable nature of historical buildings cannot be remedied by reconstruction",[547] the Chamber awarded, like the IACtHR, collective reparations, for the disruption of culture, to the Timbuktu community as a whole, in the form of rehabilitation and symbolic public measures, such as memorials, commemorations or forgiveness ceremonies.[548] Finally, in seeking to quantify the moral harm in question, the Trial Chamber used, as a methodological starting point, the EECC's financial quantification of the Stela Matara due to its "unique cultural significance" (Part I, Chapter 1).[549] Throughout the aforementioned, the Chamber thus established common grounds between State responsibility jurisdictions and ICR-based jurisdictions.

3. The national population and the international community

The *Al Mahdi* Trial Judgment and Reparations Orders did identify as victims both Mali's broader national population as well as the international community (a), with its sustained harm and related reparations, although to a lesser degree than Timbuktu's population (b).

a. Victims

In the *Al Mahdi* Trial Judgment, noting that all the sites but one were on the 1972 World Heritage List, the Chamber found the attacks to be of "particular gravity" since, beyond Timbuktu's inhabitants, the destruction affected the Malian population and "the international community".[550] Specifically, noted the Chamber, the Malian population "were indignant to see these acts".[551] Accordingly, beyond their use for prayer, the mausoleums were a pilgrimage centre and, together with the manuscripts, reflected Timbuktu's "crucial role in the expansion of Islam".[552] Intriguingly, Al Mahdi himself shared this vision, when he expressed remorse for the damage caused, inter alia, to "his community in Timbuktu, his country and the international community".[553] In the

[546] *Al Mahdi* Reparations Order (n 49) para 19.
[547] *Al Mahdi* Reparations Order (n 49) para 129.
[548] *Al Mahdi* Reparations Order (n 49) paras 90 and 104.
[549] *Al Mahdi* Reparations Order (n 49) paras 131-132.
[550] *Al Mahdi* Trial Judgment (n 49) para 80.
[551] *Al Mahdi* Trial Judgment (n 49) para 80. Having found of relevance the discriminatory religious motive invoked for the destruction of the sites in its assessment of the gravity of the crime, the Chamber concluded that Al Mahdi's crime was of significant gravity, although it did not consider the number of victims or the attack's religious nature as aggravating the crime's impact. *See Al Mahdi* Trial Judgment (n 49) paras 81-82 and 87-88.
[552] *Al Mahdi* Trial Judgment (n 49) paras 34 and 78.
[553] *Al Mahdi* Trial Judgment (n 49) para 103, considering the mitigating circumstances.

Reparations Order, the Trial Chamber concurred with an expert that victims were in Timbuktu (the guardian families responsible for the sites' maintenance as well as the faithful); in Mali (the general population); and consisted also of the "international community".[554]

The Chamber did not explain the latter. While the Malian "population" (whether locally or nationally) are clearly natural persons, what does the international community entail: UN/UNESCO Member States (since Timbuktu is on the 1972 World Heritage List) or the world population? In a West-centric narrative, the international community conveys the idea of Berlin, London, Paris and Washington DC, with an occasional inclusion of Beijing and Moscow. The rest of the planet being just a footnote. Accordingly, the word "international" in the expression "international community" can be understood as "inter-State" (a collective made of non-natural persons), rather than "inter-national" (collectives made of natural persons). In contrast, to the ICC Trial Chamber, as well as the expert, when read in context, the international community is at minimum "inter-national". Here, reference should also be made to Dubrovnik. Where assessing the gravity of the crime, noting that certain Old Town buildings were marked with the 1954 Hague Convention symbols,[555] the *Jokić* Trial Chamber observed that the violation of the ICTY Statute article 3(d) "represents a violation of values especially protected by the international community."[556] The *Štrugar* Trial Chamber added that the property in question was of "great importance to the cultural heritage of every people", recalling, like *Jokić*, that the Old Town was on the 1972 World Heritage List.[557]

b. Harm and reparations

Back to the *Al Mahdi* Reparations Order, the Chamber fully accepted that by addressing the specific harm to Timbuktu's population, their related reparations would also address the general harm suffered by the broader Malian population and the international community, even though the destructions varyingly affected the triptych, both in terms of degree and nature of harm.[558] For example, the Chamber linked its collective reparations measures to "the moral suffering endured" by the Malian population and the international community".[559] These are one of the clearest illustrations of the benefits of using the metaphorical triptych, wherein one affected panel impacts on the proper understanding of the three panels as a whole.[560] Accordingly, although focusing on the Timbuktu community, and notwithstanding the absence of reparations applications on behalf of the national and international communities, the Chamber ordered one symbolic euro to be granted to both Mali and the international community, through UNESCO.[561]

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[554] *Al Mahdi* Reparations Order (n 49) paras 52 and 55.
[555] *Jokić* Trial Judgment (n 511) para 23.
[556] *Jokić* Trial Judgment (n 511) para 46.
[557] *Štrugar* Trial Judgment (n 409) paras 232 and 461.
[558] *Al Mahdi* Reparations Order (n 49) paras 52 and 54.
[559] *Al Mahdi* Reparations Order (n 49) paras 91 and 104.
[560] *Al Mahdi* Reparations Order (n 49) para 52.
[561] *Al Mahdi* Reparations Order (n 49) paras 106-107. *See* also UNESCO, Press Release (29 March 2021), "Mali and UNESCO to receive a "symbolic euro" in token reparation for the heritage of Timbuktu" <https://en.unesco.org/news/mali-and-unesco-receive-symbolic-euro-token-reparation-heritage-timbuktu> accessed 10 April 2021.

Regardless of the international community's scope (natural persons, States, etc), it is noteworthy that UNESCO – a legal person – becomes the recipient of reparations for damage suffered by the international community. Accordingly, it can be argued that UNESCO acts as a mere trust fund that centralises financial compensation. But it can also be argued that UNESCO acts as a legal person that, as the custodian of the 1972 World Heritage List and 1972 World Heritage in Danger List, "absorbs" any damage inflicted on their anthropical and natural sites. This may be a bold, but plausible proposition, wherein the legal person acts as a proxy for the world by sustaining any damage suffered by the latter. Only time will tell the extent to which this proposition is capable of materialising.

What transpires, is that each of the triptych's three panels consisted as a collective made of the sum of its natural person.

D. Synthesis: blurring the distinction between the peacetime and non-peacetime legal regimes?

In 2001, UNESCO pointed out that the ICTY decision to prosecute Dubrovnik's destruction of cultural property was "the first time" since the IMT and IMTFE "that a crime against cultural property has been sanctioned by an international tribunal".[562] In reality, the ICTY had already convicted individuals for crimes involving property not categorised as cultural tangible by the 1972 World Heritage Convention or even by the 1954 Hague Convention.[563] While these sites were not formally recognised as cultural property, it was not excluded that they were viewed as such by the local and/or national population. In fact, rather than using the word "cultural property", the ICTY Statute article 3(d) merely lists some of its movable and immovable components. Nonetheless, as seen earlier, the ICTY has even held that the said components are not necessarily cultural property and that they will require a case-by-case determination. This is explained in part by the fact that ICTY cases initially centred on religious or educational property, due to the ethnic nature of the conflict in the former Yugoslavia.

What, however, distinguished Dubrovnik and Timbuktu from the aforementioned is attacks against sites that were also included in the 1972 World Heritage List. The ICTY and the ICC charged the accused under war crimes provisions. In the former's case, focus was placed on war crimes regarding the violations of damage to/destruction of culture's tangible as such, or indirectly by assimilating the sites to tangibles of a civilian character. While these provisions are part of IHL and ICL, the two jurisdictions also had to consider the 1972 World Heritage Convention, since the damaged and/or destroyed sites were on the 1972 World Heritage List. This combination blurred the distinction between the so-called peacetime and non-peacetime legal regimes. In fact, neither jurisdiction even discussed this.[564] IHL is essentially based on the principles of

[562] *See* UNESCO, "Press Release No. 2001-40 (13 March 2001)", *in* UNESCO, World Heritage Committee, "Twenty-Fifth Session: Item 4b of the Provisional Agenda; Acts constituting "crimes against the common heritage of humanity"" (22 November 2001) WHC-01/CONF.208/23 <https://whc.unesco.org/archive/2001/whc-01-conf208-23e.pdf> accessed 14 April 2019, p 9.
[563] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) fn 180.
[564] *See* also Lostal, *International Cultural Heritage Law in Armed-Conflict* (n 15) p 69, suggesting that

necessity, proportionality and distinction. However, these are just minimum standards. International human rights instruments continue to apply during armed conflicts, unless they provide otherwise. According to the ICJ, the ICCPR continues to apply during armed conflicts except by operation of its article 4 derogations, meaning that assessing whether an article 6 deprivation of life is arbitrary during armed conflict is to be done through an IHL lens, which constitutes lex specialis.[565] Transposing this to culture's tangible, not only does the 1972 World Heritage Convention not foresee any exception to its applicability, but it also creates a special protection regime and creates the 1972 World Heritage List and the 1972 World Heritage in Danger List, applicable during peacetime and "times of danger", respectively.[566] The second derives from the 1972 World Heritage Convention article 11(4), pursuant to which the 1972 World Heritage in Danger List protects sites that are "threatened by […] the outbreak or the threat of an armed conflict.[567] However, as suggested by Bories, even if the sites were not on the 1972 World Heritage in Danger List, the convention cannot be disregarded because of the uncontested psychological effect of the 1972 World Heritage List.[568]

But the ICTY and ICC references to the 1972 World Heritage Convention also establish another proposition argued in this study, which is the organic interplay between the collective as the sum of natural persons and its anthropical (and also natural, in the IACtHR's case) heritage. Thus, while war crimes offer a tangible-centred approach, their combination with the 1972 World Heritage Convention enables a heritage-centred approach, where the object is both considered as such and immersed in its contextual whole (see also general introduction). This was specifically demonstrated in the *Al Mahdi* reparations order, where the Trial Chamber viewed the victims as a triptych; with its accompanying definition of material and moral harm; as well as its individual and collective types of harm and forms of reparations (as with State responsibility practice Part I). In comparison, in *Prlić et al*, the Chamber noted that the indictment placed the Old Bridge's destruction under count 21, which referred to the violation as "destruction or wilful damage to institutions dedicated to religion or education", thereby omitting article 3(d)'s "historic monuments".[569] The Chamber held that the Old Bridge was a "historic monument of major historical and symbolic value, in particular for the Muslim community".[570] It also viewed the Old Bridge as a local-national diptych of "exceptional character" and of "historical and symbolic nature", since it "symbolised the link between the communities".[571] Consequently, its "destruction had a very significant psychological impact" on Mostar's Muslims.[572] Had the Old Bridge been on the 1972 World Heritage List, then it would have automatically acquired the triptych's international and third layer.

"if the protection of cultural property in armed conflict were reoriented around the World Heritage Convention, the field would finally constitute a coherent and comprehensive legislative framework".

[565] *Nuclear Weapons* Advisory Opinion (n 404) para 25. *See also Wall* Advisory Opinion (n 174) para 106.

[566] Bories (n 15) p 71.

[567] During the 2003 Iraq conflict, only the ruins of Hatra were considered as world heritage, even though Iraq submitted an "indicative list" to UNESCO in 2000, pointing at Ur, Wasit, Ukhaidhir, Samarra, Achour, Nimroud and Ninive. *See* Abtahi, "Le conflit armé du printemps 2003 en Irak et le sort du patrimoine culturel mésopotamien" (n 2) pp 204-205.

[568] Bories (n 15) p 68.

[569] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1611.

[570] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1611.

[571] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1282.

[572] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1584.

Accordingly, this Chapter has shown that State responsibility adjudicatory mechanisms (specifically the IACtHR) and ICR-based jurisdictions (specifically the ICTY-ICC) have considered the relationship between the collective and its anthropical and/or natural environment through a heritage-oriented lens. Therein, damage to the collective's cultural tangible adversely impacts on the collective's identity, which contributes to its heritage. This is so because the tangible supports the expression of the intangible. Contrast this with Al Mahdi's remark during an attack, that:

> Those UNESCO jackasses […] think that this is heritage. Does 'heritage' include worshipping cows and trees?[573]

At that time, Al Mahdi understood heritage as encompassing only the intangible ("worshipping") to the exclusion of the tangible ("cows and trees"). This rigorist interpretation of religious texts which excludes the physical representation of the divine often results in razing any tangible elements that the collective associates with it spirituality. But Al Mahdi's initial position evolved to the point where he offered to one of the mosques' imam to reimburse the cost of a destroyed door.[574] This is so even though the Trial Chamber held that property crimes "are generally of lesser gravity" than crimes against persons.[575]

Sites like Timbuktu are thus attacked not *despite* the fact that they are heritage but *because* they are so.

IV. Conclusion to Chapter 1: tangible-centred means with heritage-centred (intent and) consequences

When adjudicating attacks targeting culture through the prism of war crimes, it is that corpus of law's tangible-centred features that first come to mind. For the destruction and pillage of culture's tangible is what all relevant international legal instruments proscribe. However, behind ravages inflicted on culture's tangible, there often looms a heritage-centred consequence, if not intent. The distinction between the tangible-centred and heritage-centred approaches is not easily discernible nor does it always exist. This may be explained by the lack of clarity of, inter alia the belligerents' intentions when culture's tangible is ravaged, or the relationship between peacetime and non-peacetime legal instruments. These factors have in turn impacted on the findings of ICR-based jurisdictions as well as scholarly writings. This Chapter has sought to clarify this, by proposing a standardised approach.

Beginning with the tangible-centred approach, both IHL and ICL provide for the protection of culture's tangible during international and, more limitedly, non-

[573] *Al Mahdi* Trial Judgment (n 49) para 46.
[574] *Al Mahdi* Trial Judgment (n 49) para 104.
[575] *Al Mahdi* Trial Judgment (n 49) para 77. Referring to an expert witness' reliance on para 11 of the Report of the Special Rapporteur in the Field of Cultural rights, UN Doc A/71/317 (2016), The Chamber required that the reparations order be implemented "in a gender and culturally sensitive manner". *See Al Mahdi* Reparations Order (n 49) para 105.

international armed conflicts. This protection can be both direct and indirect. Under the former, the relevant instruments protect culture's tangible either by listing some of its movable and immovable components, whether secular or religious, or by referencing legal persons owning and/or administering them. Interestingly, some IHL and ICL instruments prohibit damaging the natural environment, an important feature for those instances where culture's tangible comprises natural feature. But some of these instruments also directly refer to the concept of cultural property itself. Either way, this category provides a very high level of protection to culture's tangible, the components of which it lists alongside, eg hospitals. As for the protection per se, these instruments prohibit damage, destruction and seizure of the property in question, while occasionally accepting the exception of military necessity. The second category provides a dual indirect protection to culture's tangible by enabling to consider the latter as part of tangibles of a civilian character, ie urban ensembles or property/objects. First, the protection consists of prohibiting destruction, attack, bombardment and devastation, with most of them being subjected to military necessity. Second, it prohibits the seizure, pillage, appropriation and plunder, as well as qualified possession and administration of the enemy's civilian property/objects, with some recourse to military necessity. As indicated earlier, the indirect protection of culture's tangible may be invoked not because of its special value, but because of the principle of distinction, which would characterise culture's tangible as civilian. This explains why the concept of military necessity is more permitted under indirect protection than under direct protection. While these layers of protection are complementary to each other, ie the direct and indirect protections should not be seen as an "either or" protections, the former is the lex specialis to the latter, as also noted by Bugnion and R O'Keefe.[576] These instruments are thus tangible-centred since their violation results in damaging culture's tangible.

The ICTY and ICC have addressed two scenarios of damage to culture's tangible. The one that comes to mind more readily is that which concerns the tangible that received treaty law's formal unction by means of recognition of their world importance. In these scenarios, the ICTY and ICC have had to combine IHL-ICL with a so-called peacetime instrument, ie the 1972 World Heritage Convention, thereby altering the very meaning of "peacetime". Under this scenario, the placement of culture's tangible on the 1972 World Heritage List automatically transforms the tangible into a local-national-international triptych for this is what the placement mechanism require. Consequently, the local and national population as well as the international community become the interested parties in such protection. In sum, both the object of the destruction (cultural property) and its victims (the collective as the sum of natural persons) are considered as a local-national-international triptych, each. Under the second scenario, the ICTY has considered damage to religious and educational institutions that, while important locally, have not gone through the aforementioned formal process of recognition as world cultural property. As a consequence of this lack of formalistic internationalisation of the tangible, both the object and the victims constitute at minimum a local-national diptych. Rather than a ceiling, however, this is a floor. Indeed, as seen before, the 1972 World Heritage Convention provides that the non-inclusion of a property on the 1972 World Heritage List or the 1972 World Heritage in Danger List does not mean that it does not have an outstanding universal value.[577]

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[576] François Bugnion, "La genèse de la protection juridique des biens culturels en cas de conflit armé" (2004) 86(854) *International Review of the Red Cross* 313, p 321. *See* also Roger O'Keefe, "Cultural Property Protection and the Law of War Crimes" (2017) 38 *NATO Legal Gazette* pp 2-6.
[577] World Heritage Convention (n 81) art 12.

In practice, thus, and as seen, when a site or an object is included on the aforementioned lists, it becomes inevitable for ICR-based jurisdictions to adjudicate their damage beyond the prism of war crimes provisions. Two main reasons explain this. First, the 1972 World Heritage in Danger List triggers its application during armed conflicts. Second, and most importantly, even when the site or object is not included in the former, its inclusion on the 1972 World Heritage List is also testimony to the tangible's importance to humanity as a whole. In fact, it is so important a matter that, like the right to life, it cannot be easily dismissed during armed conflicts. This approach has expanded war crimes' tangible-centred approach – in terms of typology of damage – towards the larger heritage-centred one, wherein focus is placed on the heritage-based consequences of the damage to the victims. In other words, this approach concerns not only the importance of the tangible as a local-national-international triptych, but also its interaction with the collective, which contributes to the latter's identity, memory and conscience. In other words, as seen in Dubrovnik and Timbuktu, the collective as the sum of its natural persons defines itself, inter alia, through its tangible environment. This may be anthropical, whether secular or religious or both. But it may also be natural, as with the IACtHR cases. Other disciplines underscore this reasoning. According to heritage and memory studies, destroying culture's tangible as a means of warfare shapes memory in various ways; it adds memories, new meanings, associations, discourses and contexts, since "the memory of a siege becomes part of the fabric of a city, its inhabitants, its memorials, and its ruins".[578] Neuroscience and cognitive studies reveal that beyond the details of traumatic events (such as the bombing of a cultural site), individuals remember their meaning, which showcases how memories are constructed and deconstructed, in turn generating a distinct narrative and impacts on the collective heritage.[579] Attacks directed at culture's tangible perturbs the collective's identity, memory and heritage, with the perpetrator's aim of creating a blank canvass in order to rewrite history.[580] Bevan, an architect, posits that in this "war against architecture":

> the erasure of the memories, history and identity attached to architecture and place – enforced forgetting – is the goal itself. These buildings are attacked not because they are in the path of a military objective: to their destroyers they *are* the objective.[581] [emphasis in the original]

Thus, attacks targeting culture's tangible aim at the intangible, ie the collective's memory, heritage and identity. They aim and/or result in the disruption of culture.

As echoed by the ICTY-ICC jurisprudence, this reasoning helps assessing the gravity of the crime and the determination of victims, natural and/or legal persons, and the assessment of the types of harms and forms of reparations, as with the ECtHR and IACtHR (Part I, Chapter 2).

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[578] Dacia Viejo-Rose, "Destruction and Reconstruction of Heritage: Impacts on Memory and Identity" *in* Anheier and Isar *Memory and Identity* (n 355) pp 3 and 9.

[579] Attacking cultural property may be grounded on, "striking an enemy by destroying what is held most dear to him; obliterating any historic trace of the Other; erasing reminders of a painful and contested past; eliminating perceived symbols of oppression to assert self-determination". *See* Dacia Viejo-Rose "Conflict and the Deliberate Destruction of Cultural Heritage" (n 155) pp 6 and 8.

[580] Viejo-Rose, "Conflict and the Deliberate Destruction of Cultural Heritage" (n 155) p 7. For a different view, s*ee* Lostal, "The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case (n 15) pp 45-58.

[581] *See* Robert Bevan, *The Destruction of Memory: Architecture at War* (Reaktion Books Ltd 2006), p 8.

In sum, when adjudicating attacks targeting culture as war crimes, the following methodology may be used. The tangible-centred approach provides a variety of possibilities to qualify the damages, given the vast body of war crimes provisions available. The heritage-centred approach will help understand the intent and/or consequence of such targeting by considering the relationship between culture's tangibles and natural persons, ie the collective. Both of these can be viewed as either a triptych or diptych, depending on whether or not so-called peacetime instruments are involved. In Part I Chapter 2, this methodology was successfully proposed for State responsibility's HRCts pillar. In the present Chapter, it has also been shown that ICR-based jurisdiction have used elements of this methodology, by even referencing ISCMs and, importantly, the IACtHR, eg for the disruption of culture. This study will now explore the applicability of the proposed methodology to CaH (Chapter 2) and genocide (Chapter 3), the other two pillars of ICR's tripartite crimes.

CHAPTER 2: CRIMES AGAINST HUMANITY

I. Introduction: crimes coined by the clash of civilisations

Unlike with war crimes and genocide, international legislators have yet to draw-up and adopt an instrument dedicated solely to CaH.[582] Only the statutes of ICR-based jurisdictions have defined, for their own purposes, CaH, alongside war crimes and genocide. This has resulted, pending the adoption of a CaH treaty,[583] in a complex situation with a multiplicity of definitions of CaH.

A denomination evoking the sacrality of human condition across the globe, CaH's origin is in fact quite the opposite, as they were born in deference to the clash of civilisations rather than their dialogue. Accordingly, the first multilateral reference to CaH in an ICL context dates back to the massacre of Armenians in the Ottoman Empire.[584] At a time of a pan-Christian peak in Europe, many Western diplomats referred to Armenians as "native Christians" to distinguish them from the Sunni Muslim Ottoman perpetrators.[585] Eager to satisfy its Armenian population, Russia proposed to France and the United Kingdom to issue the following declaration:

> In the face of these fresh *crimes* committed by Turkey *against Christianity and civilisation*, Allied Governments […] will hold all the members of the Ottoman Government, as well as such of their agents as are implicated, personally responsible for Armenian massacres.[586] [emphasis added]

France, however, omitted "Christianity and civilisation" so as to read "crimes committed by Turkey", to avoid alienating its Muslim colonies and possessions.[587] Pragmatic as ever, the United Kingdom omitted the word "Christianity" so that it read "crimes committed by Turkey against civilisation".[588] As a compromise, Russia successfully proposed substituting "humanity" for "Christianity", so as to read "crimes against humanity and civilisation".[589] Issued on 24 May 1915, the declaration read:

> the Kurd and Turkish population of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. […] In view of these new *crimes*

[582] There are conventions on specific types of crimes against humanity. *See* Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243; UNGA, "Declaration on the Protection of All Persons from Enforced Disappearance" (adopted 28 February 1992) UNGA Res 47/133, UN Doc A/47/49; Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OEA Doc AG/RES 1256 (XXIV-0/94).
[583] *See* UNGA, "Report of the International Law Commission Sixty-Ninth Session" (1 May-2 June and 3 July - 4 August 2017) UN Rep A/72/10. *See also* Sadat (n 15).
[584] The term would be used also in a moral context, such as for starting wars. *See* Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000), p 349.
[585] Bass (n 584) p 116.
[586] "Buchanan to Grey" (11 May 1915) FO 371/2488/58387 *in* Bass (n 584) pp 115 and 349.
[587] "Bertie to Foreign Office" (21 May 1915) FO 371/2488/63903 *in* Bass (n 584) pp 116 and 349.
[588] "Bertie to Foreign Office" (21 May 1915) FO 371/2488/63903 *in* Bass (n 584) pp 116 and 349.
[589] FO 371/2488/65759 (24 May 1915) *in* Bass (n 584) pp 116 and 349.

> of Turkey *against humanity and civilisation*, the Allied Governments […] will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.[590] [emphasis added]

CaH as a subject of ICL were thus first conceived in the context of a clash between Christianity and Islam. A Christian Europe felt duty-bound to rescue the Armenian Christian minority from the Ottoman Empire's Sunni Muslim population, ie Kurds and Turks. Initially conceived by three culturally Eurocentric empires against a culturally Asia-centric empire, the secularisation of this initially religion-based posture was driven by pragmatism more than idealism. The concept of CaH in ICL was thus born in a cultural/civilisational context.

CaH's *context* would change with the post-Second World War, Cold War and post-Cold War world order, respectively. However, CaH's *concept* has remained unchanged. This is best encapsulated in the ILC work, as reflected in its Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal ("1950 ILC Nürnberg Principles"),[591] the Draft Code of Crimes against the Peace and Security Mankind ("1954 ILC Draft Code"),[592] the 1991 ILC Report,[593] or the 1996 ILC Report.[594] Throughout the ILC work, not only the definition but also the denomination of CaH would evolve – the 1954 ILC Draft Code and the 1991 ILC Report would even at one time call it "inhumane acts" and "systematic or mass violations of human rights", respectively.[595] As this Chapter will show, CaH remain relevant for the adjudication of attacks targeting culture, as conceived in this study. Accordingly, CaH's chapeau elements will always require attacks against a collective, something akin to the ECtHR-IACtHR's practice with respect to gross human rights violations (Part I, Chapter 2). This collective aspect is further reinforced by CaH persecution, since it targets individuals by virtue of belonging to defined collectives, or even, under the ICC Statute, the collective as the sum of its individual persons. Finally, persecution's mens rea, ie its discriminatory grounds, will always have a twofold impact. On the one hand, they will be shaped by the adjudicators' cultural background. This is so because the meaning of those grounds will change as cultural cannons change geographically (where the adjudicators come from) but also chronologically (the era when the adjudicators assess the grounds). Thus, like the crime of genocide's groups, the grounds of CaH persecution will be filtered through cultural interpretations (this Part, Chapter 3). On the other hand, due to its mens rea's discriminatory grounds, persecution is almost always committed against a cultural backdrop, even if its accompanying actus rei do not target culture as such. Indeed, the discriminatory grounds will always involve identity concerns, something that attaches to heritage. Beyond its mens rea, it will also be shown that ICR-based jurisdictions have gradually recognised that persecution's actus rei may also target culture's tangible and intangible.

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[590] "Buchanan to Grey" (11 May 1915) FO 371/2488/58387 *in* Bass (n 584) pp 115 and 349.
[591] *See* ILC, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (1950) 2(3) *Yearbook of the ILC*, UN Doc No A/1316 (A/5/12), paras 95–127.
[592] ILC, Draft Code of Crimes against the Peace and Security Mankind with Commentary (1954) 2 *Yearbook of the ILC*, UN Doc No A/CN.4/SER.A/1954/Add.l.
[593] 1991 ILC Report (n 425) p 104.
[594] ILC, "Report of the International Law Commission on the Work of Its Forty-Eighth Session" (1996) 2(17) *Yearbook of the ILC,* UN Doc A/CN4/SERA/1996/Add1 (Part 2), p 48.
[595] 1954 ILC Draft Code (n 592) art 2(11); and 1991 ILC Report (n 425) p103.

Like this Part's other Chapters, the present will analysis relevant normative provisions and a selection of judgments that are most helpful to understand the adjudication of attacks targeting culture. Based on the comparative analysis of the aforementioned, this Chapter will propose how the said adjudication could consider CaH as targeting culture under both its anthropo-centred (II) and tangible-centred (III) approaches.

II. The anthropo-centred approach

A. Introduction

The chapeau elements of CaH do not speak to culture, even less so to attacks targeting it. However, as will be shown, from the very beginning of the criminalisation of acts under the denomination of CaH, the IMT Charter and the IMTFE Charter considered them to be so only in case of collectives, ie a civilian *population* [emphasis added]. Unlike these jurisdictions and later the ICTY, all other ICR-based jurisdictions' statutory definition of CaH delinked the commission of CaH from armed conflicts. Accordingly, by progressively considering CaH as a set of criminal acts within an attack against civilian populations, international legislators and adjudicators have made CaH's chapeau capable of addressing scenarios of gross human rights violations against the collective through its natural person members – a reminder of the IACtHR-ECtHR contexts (B). Among those underlying acts, this study will focus on persecution, since it is capable of encompassing all other CaH as well as ICR-based jurisdictions' other subject matter crimes. The mens rea of the crime of persecution grounds the commission of that crime on factors, such as ethnicity and religion. These are concepts that contribute to the identity of natural persons as members of the collective. Broadly unchanged from the IMT-IMTFE onward, those discriminatory grounds would be expanded into a non-exhaustive list, through the ICC Statute to encompass, inter alia, gender and culture. As will be discussed, these grounds turns persecution into a culture-based crime. For example, when grounded on persecution's discriminatory grounds, the CaH deportation may be characterised as persecution. This has promoted the IMT and ICTY to reference this as "cleansing" or "ethnic cleansing", respectively, since they manifested identity-based attacks, in other words, attacks targeting culture. But as will also be shown, ICR-based jurisdictions have also considered that persecution's actus rei can focus on damage to/destruction of culture's tangible. More recently, this has expanded to culture's intangible. If confirmed upon appeals and/or trial, as the case may be, the encompassing culture's intangible in persecution's actus rei would bring the broad aspect of the crime into a full circle (C).

By analysing the actual texts of the progressive definition of CaH from the IMT-IMTFE up to the ICC, this Section will thus show that CaH contain the essence of a heritage-centred approach enabling the adjudication of attacks targeting culture.

B. The chapeau elements: attacks against a collective

The underlying offences of CaH may qualify as such only if they occurred as part of a widespread or systematic attack against any civilian population. As it will be shown, it took half a century for these "chapeau" elements to settle, from the IMT-IMTFE-ICTY, where the offences required an armed conflict nexus, to the ICTR-ICC, where the offences constituted part of an attack unrelated to the said nexus (1). In this process, the brief introduction of discriminatory grounds within the Chapeau illustrates the reigning confusion between CaH and genocide, thereby emphasising the former's collective and cultural dimensions (2). As it will be argued, the chapeau elements' break-down and evolution shows how, as an original extension of war crimes, CaH have come to embrace gross human rights violations in the context of the collective, making them capable of addressing attacks targeting culture. In other words, while the ECtHR-IACtHR characterised such attacks as human rights violations, CaH are capable of criminalising them,

1. A war crimes' by-product turned into a human rights crime

The IMT-IMTFE Charters and the ICTY Statute conceived CaH as a series of crimes committed against the civilian population, with an armed conflict nexus. As regards the latter, as international law stood at the time, it was thought that CaH could crystallise only by expanding the scope of war crimes, yet by placing the former in a separate provision – hence the armed conflict nexus.[596] Fifty years later, the ICTY Statute article 5 ("Crimes against humanity") did the same so as to anticipate, as explained by its drafter Bassiouni, potential challenges to the legality of the ICTY Statute, given how the UNSC regarded the existence of armed conflicts in the former Yugoslavia (and later Rwanda).[597] Once the dust had settled, the ICTY jurisprudence would clarify that the

[596] M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge 2011), p 136. Art 6(c) reads "Crimes against humanity.- ' namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated". *See* IMT Charter (n 403) art 6(c). The IMTFE Charter art 5(c) reads: "Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders" organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any or' the foregoing crimes are responsible for all 'acts performed by any person in execution of such plan". The main difference was that the IMTFE charter omitted religion as a ground of persecution. *See* IMTFE Charter (n 488) art 5(c).

[597] Bassiouni, *Crimes Against Humanity* (n 596) pp 183-186 and 188, explaining that the said elements "were tailored to fit the situations to which they were to apply". As for the ICTY art 5, it reads:

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
> (a) murder;
> (b) extermination;

armed conflict nexus is merely a jurisdictional requirement and not an element of the crime.[598] In fact, the Control Council Law No 10 ("CCL 10") article II and the 1950 ILC Nürnberg Principles resembled the IMT-IMTFE Charter, except that they abandoned the armed conflict nexus.[599] So would the ICTR and eventually the ICC, further refining the definition of CaH by introducing a formal and substantive chapeau. According to the ICTR Statute article 3, CaH consist of a series of crimes, inter alia, "committed as part of a widespread or systematic attack against any civilian population".[600] Article 3 thus introduced a chapeau, formally, by separating a number of requirements from the "underlying" offences, and substantively, by clarifying those requirements. Abandoning the armed conflict nexus, the ICTY Appeals Chamber explained that such an attack "could precede, outlast, or continue during the armed conflict, but not be part of it", and therefore "is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".[601] As regards the latter, the *Tadić* Appeals Chamber clarified that the term "population" implies "crimes of a collective nature".[602] Thus, the use of the term "population" after "civilian" introduced an element of scale, going beyond individuals. Clearly, based on the 1996 ILC Report

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(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

See ICTY Statute (n 52).

[598] *Prosecutor v Tadić*, (ICTY) Judgment (15 July 1999) Case No IT-94-1-A, paras 249-251.

[599] Control Council Law No 10, "Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity" (20 December 1945) 3 Official Gazette Control Council for Germany 50–55, art II read:

> Crimes against Humanity: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.

The 1950 ILC Nürnberg Principles (n 591) would read:

> c. Crimes Against Humanity:
> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

See 1950 ILC Nürnberg Principles (n 591).

[600] ICTR Statute art 3 reads:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
> a) Murder;
> b) Extermination;
> c) Enslavement;
> d) Deportation;
> e) Imprisonment;
> f) Torture;
> g) Rape;
> h) Persecutions on political, racial and religious grounds;
> i) Other inhumane acts

See ICTR Statute (n 55).

[601] *Kunarac et al* Appeal Judgment (n 410) paras 70 and 86.

[602] *Tadić* Trial Judgment (n 89) para 644.

and the ICTY-ICTR jurisprudence, "widespread or systematic attack against any civilian population" thus conveys not only the idea of a large geographic and/or demographic attack, but also that of a collective, ie the civilian population.[603] This echoed the IMT which, when discussing CaH, had held that "The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic".[604] One further step was thus taken towards criminalising the mass cultural rights violations scenarios covered in Part I, Chapter 2.

After years of oscillations, and absent a CaH convention, the ICC Statute provided the neatest version of the chapeau. According to article 7 ("Crimes against humanity"), CaH consist of a series of eleven "acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[605] The ICC Statute thus relinquished the earlier armed conflict nexus and the discriminatory grounds. Unequivocally, article 7 now enables adjudicating gross human rights violations committed by governments against their nationals.[606] In this regard, it should be noted that the ICC Statute article 7(2)(a) in combination with the ICC Elements of Crimes ("Introduction to crimes against humanity") consider the said

[603] With respect to the terms "large scale" (ie widespread), the 1996 ILC Report has explained covers "a multiplicity of victims" who could result from "the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude". *See* 1996 ILC Report (n 594) p 47, *Kunarac et al* Appeal Judgment (n 410) para 94; *Blaškić* Appeal Judgment (n 496) para 101; *Kordić & Čerkez* Appeal Judgment (n 415) para 94; *Prosecutor v Muhimana*, (ICTR) Judgment and Sentence (28 April 2005) Case No ICTR- 95-1B-T, para 527; *Prosecutor v Muvunyi*, (ICTR) Judgment and Sentence (12 September 2006) Case No ICTR-2000-55A-T, para 512. As for the term "systematic", the 1996 ILC Report (n 594) p 47, explains that systematic means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy". By reformulating this, the ICTY would hold that it refers "to the organised nature of the acts of violence and the improbability of their random occurrence". *See Kunarac et al* Appeal Judgment (n 410) para 94; *Blaškić* Appeal Judgment (n 496) para 101; *Kordić & Čerkez* Appeal Judgment (n 415) para 94.

[604] IMT Judgment (n 490) p 254.

[605] ICC Statute art 7 reads:

> 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when *committed as part of a widespread or systematic attack directed against any civilian population*, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

See ICC Statute (n 54).

[606] Daryl Robinson, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93(1) *American Journal of International Law* 43, p 46.

attacks to mean the multiple commission of the eleven acts "against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" which "need not constitute military attack".[607] The latter is a logical requirement given the removal of the armed conflict nexus from the chapeau.[608] The element of scale, together with the separation of the attack from armed conflicts, now helps to neatly criminalise gross human rights – and thus cultural rights – violations regardless of the existence of an armed conflict, a scenario contemplated in Part I, Chapter 2.

2. A path toward genocide

But the ICC Statute would also abandon the ICTR Statute article 3's chapeau anomaly.[609] According to the latter, the said attack must occur "on national, political, ethnic, racial or religious grounds". As noted by Bassiouni, this language "which is so intrinsic to the Genocide Convention is puzzling, to say the least".[610] However, on further reflection, perhaps it is not. First, the express inclusion of genocide in the ICTR Statute title ("Genocide and Other Serious Violations of" IHL) may have confused matters during the drafting of the ICTR Statute, at a time when the separation between genocide and CaH was particularly unclear, as reflected in the 1991 ILC Report.[611] Second, and most importantly, the article 3 chapeau concerns attacks against any civilian population "on national, political, ethnic, racial or religious *grounds*" whereas article II of the Genocide Convention addresses the *intent* to destroy "a national, ethnical, racial or religious *group*, *as such*" [emphasis added]. As will be seen, during the Genocide Convention drafting, the words "as such" eventually replaced the enumerated grounds (national, racial, religious, political); with the motives being seen as reflecting the perpetrators' targeting "something different or alien" (this Part, Chapter 3). The discriminatory grounds enumerated in the ICTR Statute article 3 chapeau do in fact illustrate this approach. The widespread or systematic attack is conducted against any civilian population, as such. In other words, there is an attack against a collective as a cultural unit, (see the discussion on the crime of persecution). In practice, however, the ICTR Appeals Chamber clarified that the chapeau's discriminatory grounds were not part of the mens rea (which in light of the above explanation regarding motives is evident). Rather, they meant that the attack itself must

[607] ICC Statute (n 54). ICC, "Elements of Crimes: Crimes Against Humanity" (2011) Introduction, paras 2-3. The last two elements for each CaH describe the context in which the prohibited conduct should take place, ie the requisite participation in and knowledge of a widespread or systematic attack against a civilian population.

[608] D Robinson (n 606) pp 48 and 51. While the SPSC would copy-paste ICC Statute (n 54) art 7, SCSL Statute (n 101) art 2 would also require that the underlying offences "be committed […] as part of a widespread or systematic attack against any civilian population".

[609] D Robinson (n 606) pp 46-47.

[610] Bassiouni, *Crimes Against Humanity* (n 596) p 188.

[611] *See* Gideon Boas, James L Bischoff, Natalie L Reid and B Don Taylor, *International Criminal Law Practitioner Library Series: International Criminal Procedure*, vol 3 (Cambridge University Press 2011), pp 129 and 375-379. The ILC explained that:

> The autonomy of crimes against humanity was recognized in subsequent legal instruments which did not include this requirement. The [Genocide Convention] did not include any such requirement with respect to the second category of crimes against humanity, […].

See 1996 ILC Report (n 594) p 48.

be discriminatory.[612] Indeed, theories aside, a widespread or systematic attack against a civilian population will, in practice, not occur on random *grounds*. There would always be a reason for such an attack. It is true that the word "any" does mean that civilians are attacked regardless of whom they are (eg nationality).[613] However, notwithstanding the targeted population's single identity or a conglomerate of various identities, it is a collective that is attacked. This makes the attack *ultimately* identity-based. Within that attack, the targeting of culture may quality as CaH.[614]

3. Outcome

The CaH chapeau's half-a-century long evolution illustrates the international legislators and adjudicators' progressive differentiation between war crimes, CaH and genocide. Liberated from their armed conflict nexus, CaH are capable of addressing exactions both related and unrelated to war crimes. As for the ICTR's brief venture into discriminatory grounds, it showcases the difficulties inherent to separating CaH from genocide. Either way, CaH's chapeau elements embody the concept of mass crimes committed against individuals as part of a widespread or systematic targeting of a collective. Within these parameters, many of CaH's actus rei, such as deportation/disappearance; sexual crimes, enforced sterilisation; apartheid; other inhumane acts; or else persecution could be part of attacks targeting culture. Through this angle, a heritage-centred approach allows viewing the members of that collective as the actual victims of those underlying crimes which, under the ECHR-IACHR, qualify as human rights violations (Part I, Chapter 2). While judicial practice does not address expressly the heritage-centred targeting of culture, the following will compare and contrast the said practice so as to make propositions aimed at facilitating such adjudications. Since each of CaH's underlying offences may amount to persecution, the following analysis looks at the latter within the framework of attacks targeting culture.

C. The underlying offences: the crime of persecution

The crime of persecution has been ever present since the IMT Charter provided the first international statutory definition of CaH. Domestically, of those few legal systems that have criminalised persecution, the crime has included what Bassiouni has referenced as

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[612] *Prosecutor v Akayesu*, (ICTR) Judgment (1 June 2001) Case No IT-96-4-A, paras 464–469 and 595; *Prosecutor v Bagilishema*, (ICTR) Judgment (7 June 2001) Case No ICTR-95-1A-T, para 81. For the ICTY, see *Prosecutor v Tadić*, (ICTY) Appeal Judgment (27 February 2001) Case No IT-94-1-A, para 305. The ECCC too, which has the same chapeau, has considered the discriminatory grounds as a jurisdictional element rather than an element of the crime. *See Prosecutor v Kaing Guek Eav alias Duch*, (ECCC) Trial Chamber Judgement (26 July 2010) No 001/18-07-2007/ECCC/TC, para 313.

[613] *Tadić* Trial Judgment (n 89) para 635.

[614] This must be distinguished, from the perpetrator's commission of the underlying offences. As held by the *Kunarac* Appeals Chamber: "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.' […] It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof". *See Kunarac et al* Appeal Judgment (n 410) para 103.

"policies and practices of a discriminatory nature that cause a specific harm to a given person in violation of the law".[615] Bassiouni has further suggested that persecution:

> is more likely to take the form a motive, policy, or goal; it is not an act in and of itself. To accomplish "persecution" requires the intent to discriminate on prohibited grounds in conjunction with other acts, which are also usually criminal.[616]

It has thus befallen on ICR-based jurisdictions to determine the scope of CaH persecution. Unsurprisingly, the exercise has not led to a uniform approach. The analysis of the crime's mens rea (1) and actus reus (2) showcases the possibility to adjudicate attacks targeting of culture from an anthropo-centred approach.

1. Mens rea: a collective identity-based crime

a. The "lower genocide"

The crime of persecution is characterised by its mens rea, which requires the commission of its actus rei on discriminatory grounds, in contrast with all other underlying offences of CaH. Having long been limited to political, racial or religious grounds (IMT-IMTFE-CCL 10 and ICTY-ICTR-ECCC),[617] persecution's discriminatory grounds expanded to encompass ethnic grounds (SCSL), ie "Persecution on political, racial, ethnic or religious grounds".[618] Unlike the IMT-IMTFE-CCL 10 model, which provided for a disjunctive enumeration of the discriminatory grounds, the ICTY-ICTR-ECCC model opted for a cumulative one.[619] The ICTY, however, corrected this in light of customary international law.[620]

The telluric change was brought about by the ICC Statute article 7(1)(h), according to which, CaH includes:

> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.[621]

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[615] Bassiouni, *Crimes Against Humanity* (n 596) p 405.
[616] Bassiouni, *Crimes Against Humanity* (n 596) p 405.
[617] The IMT Charter (n 403) art 6(c) and the IMTFE Charter (n 488) art 5(c) included: persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated"; IMT Charter (n 403) art 6(c) and IMTFE Charter (n 488) art 5(c). CCL 10 (n 599) art I did the same, with some alterations: „persecutions on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated"
[618] SCSL Statute (n 101).
[619] *See* the ICTY Statute (n 52) art 5(h), followed by the ICTR Statute (n 55) art 3(h) and the ECCC Law (n 102) art 5.
[620] *Tadić* Trial Judgment (n 89) para 713. For an overview of the ICTY's earlier jurisprudence regarding persecution, *see* William J Fenrick, "The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY" (2001) 32 *Netherlands Yearbook of International Law* 81.
[621] ICC Statute (n 54).

Furthermore, article 7(2)(g) provides that:

> (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.[622]

Accordingly, beyond article 7's chapeau elements and the elements of crimes common to all CaH, the mens rea of persecution is multi-fold, as it relates to who is targeted and on what grounds. As regards the victims, one or more persons must be targeted by reason of a group or collective's identity; or the group or collective. The former is reminiscent of the IACtHR jurisprudence on mass cultural rights violations, where individuals are deprived of their cultural rights *because* they belong to certain groups (Part I, Chapter 2.II.A). On the other hand, targeting the group or collective, as such is reminiscent of those IACtHR mass cultural rights violations involving the targeting of the collective as such (Part I, Chapter 2.II.B). Therefore, the same discussions regarding attacks targeting culture apply here. Anecdotally, targeting the group or collective, as such confirms Fournet and Pégorier's coining persecution as a lower-genocide crime[623] since both here and in the definition of the crime of genocide, the focus is on the group, as such, and no longer on the individual. However, persecution differs from genocide since the latter requires an *intent to destroy* the group, as such [emphasis added]. The *Kupreškić* Trial Judgment has most eloquently summed-up this "lower-genocide" feature as follows:

> the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] [P]ersecution as a crime against humanity is an offence belonging to the same genus as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate […] Thus, […] from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.[624]

Persecution thus differs from other CaH because of its discriminatory grounds. It is the transition from other CaH into genocide. As will be fully explained (Chapter 3.III), the understanding of most of persecution's discriminatory grounds is evolutionary, as it depends on both time and space.[625] These two pillars of culture, as a dynamic concept

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[622] ICC Statute (n 54). *See* also ICC, "Elements of Crimes: Crimes Against Humanity, Persecution" (2011), art 7(2)(g):

> 1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
> 2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
> 3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
> 4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. […].

[623] Caroline Fournet and Clotilde Pégorier, "'Only One Step Away From Genocide: The Crime of Persecution in International Criminal Law" (2010) 10(5) *International Criminal Law Review* 713, p 718.

[624] *Prosecutor v Kupreškić et al,* (ICTY) Judgment (14 January 2000) Case No IT-95-16-T, para 636.

[625] In the *Justice Case*, the tribunal explained that "'Political' as all Nazi judges construed it […] meant any person who was opposed to the policies of the Third Reich". *See United States of America v Josef Altstötter et al* ("The Justice Case"), (United States Military Tribunal) Judgment (17 February and 4

(general introduction), mean that anthropological and ethnological terms will vary not only chronologically, but also geographically. Already planted in a cultural setting, the interpretation and application of these grounds by international adjudicators will evolve as anthropological cannons do. This has made persecution a crime capable of addressing attack that target culture.

b. The discriminatory grounds' cultural dimensions: the case of gender

Under the ICC Statute article 7(1)(h), the targeting must have been grounded on a non-exhaustive list of defining features of the collective, which consists of expressly newly enumerated grounds in an open-ended fashion. The ICC has expanded the post-IMT-IMTFE-CCL 10 and ICTY-ICTR's political, racial and religious grounds to include national, ethnic, cultural and gender grounds. Since the first four will be discussed in details under genocide (Chapter 3), the following will focus on the term gender, and to a lesser extent culture itself, as an illustration of these terms' spacio-temporal evolutionary aspects.[626] Under, article 7(3):

> the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.[627]

During the drafting of the ICC Statute, contentious debates surrounded the inclusion of gender as a ground of persecution.[628] One group of States, the Holy See, a group of Arab States and some NGOs opposed such inclusion for two reasons. First, gender could be interpreted to encompass further rights such as gender identity and sexual orientation which would challenge religious beliefs.[629] Second, they argued that the term gender was too vague and could undermine the principle of legality.[630] In contrast, the majority argued that the term gender is able to capture socially constructed gender roles.[631] They further argued that its inclusion in the ICC Statute would ensure consistency with the UN framework use of the term gender, which accounted for male and female's both biological and sociological aspects.[632] In order to overcome the

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December 1947) 6 LRTWC 1, p 81. The ICTY-ICTR-ECCC model too did not explain the terms, other than the perpetrator discriminated against the victims' political beliefs or faith. *See Akayesu* Trial Judgment (n 612) para 583 and *Tadić* Trial Judgment (n 89) para 711.

[626] For other references to gender in the ICC Statute, *see* arts 21(3), 42(9), 54(1)(b) and 68(1).

[627] ICC Statute (n 54) art 7(3).

[628] Cate Steins, "Gender Issues" *in* Roy SK Lee (ed) *The International Criminal Court: The Making of the Rome Statute: issues, negotiations and results* (Kluwer Law International, 1999), p 371.

[629] For a comprehensive discussion of how the various State Parties voted *see* Valerie Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (2014) 16(4) *International Feminist Journal of Politics* 563, p 566; *see* Rome Conference (n 109).

[630] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court"(n 629) p 566.

[631] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 566.

[632] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 566; Valerie Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice" (2005) 18(55) *Harvard Human Rights Journal*, p 67 listing the various United Nations definitions of gender that were available at the time of the Rome Conference, ie Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, Conference Addendum Annex IV (4-15 September 1995), A/CONF.177/20/Rev.1; Report of the Expert Group Meeting on the Development of

impasse, the debate honed in defining gender in article 7(3). The opposing States managed to secure a biological component of the definition so that gender "refers to the two sexes, male and female",[633] although it failed to have gender defined in terms of "society" or "traditional family unit".[634] The supportive States' push for the acknowledgment of gender's socially constructed nature morphed into the addition of the phrase "within the context of society".[635] Furthermore, both sides agreed that "gender does not indicate any meaning different from the above".[636] This exercise of constructive ambiguity par excellence allowed the supporting States to view the phrase as reaffirming gender's sociological construct and the opposing States to view it as reiterating gender's biological aspects.[637]

Notwithstanding this, the ICC Office of the Prosecutor's ("OTP") OTP Policy Paper on Sexual and Gender-Based Crimes distinguishes between sex, as "the biological and physiological characteristics that define men and women", and gender, which "acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys",[638] although failing to be explicit on sexual orientation and non-binary sexual identity. To date, the ICC jurisprudence has not expressly grappled with gender as a ground of persecution, although *Lubanga* listed sexual orientation as a protected class in accordance with the ICC Statute article 21(3) for reparations purposes.[639] That the

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Guidelines for the Integration of Gender Perspectives into the United Nations Human Rights Activities and Programmes UN ESCOR, Comm 'n on Hum. Rts, 52nd Sess, Agenda Items 9, 12, 13 UN Doc. E/CN.4/1996/105 (1995): "the term 'gender' refers to the ways in which roles, attitudes, values and relationships regarding women and men are constructed by all societies all over the world. Therefore, while the sex of a person is determined by nature, the gender of that person is socially constructed"; Integrating Human Rights of Women Throughout the United Nations System: Report of the Secretary General, UN ESCOR, 53rd session, 10 UN Doc. E/CN.4/1997/40 (1996): "as sex refers to biologically determined differences between men and women that are learned, changeable over time and have wide variations both within and between cultures".

[633] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court (n 632) p 64.

[634]Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 567.

[635] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court" (n 632) p 65.

[636] Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court" (n 632) p 65 and Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (n 629) p 567.

[637] Oosterveld, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court"(n 629) pp 564-68 and Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court"(n 632) p 64.

[638] *See* OTP "Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor" (June 2014) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 14 April 2019, p 3.

[639] *Prosecutor v Lubanga*, (ICC) Decision Establishing Principles and Procedures to be Applied to Reparations (7 August 2012) No ICC-01/04-01/06-2904, para 191; Among those believing art 21(3) will allow for an open interpretation of art 7(3), *see* Christopher K Hall, Joseph Powderly and Niamh Hayes "Article 7 Crimes Against Humanity" in Kai Ambos and Otto Triffterer (eds) C*ommentary on the Rome Statute of the International Criminal Court, Observers' Notes*, Article by Article (3rd edn CH Beck-Hart-Nomos 2015), pp 292-294; Steins (n 628) p 371. To critics who have noted that art 7(3) definition's biological starting point conflates gender with sex, thereby eroding the sociological aspect of gender, Oosterveld had responded that the biological definition is the point of departure and not determinative, there is room to still consider social construction, as required by the drafting history as well as how the UN considers gender issues. To critics who have noted that art 7(3)'s binary definition and "within the context of society" are too narrow to account for the social construction of gender thus

understanding of gender is both time-bound (as societies evolve) and space-bound (where societies evolve) reinforces the weight of culture's morals, values and norms, as illustrated by the heterogeneous terminology (LGBT, LGBTIQ, LGBTTTQQIAA, or else LGBTQ+) characterising sexual orientation and non-binary sexual identity.[640] These oscillations are reminiscent of the scope of culture as discussed in the general introduction. Indeed, virtually all the grounds of persecution are either part and parcel of culture or defined through it. Thus, it is the "cultural" ground of discrimination that epitomises the cultural setting behind the mens rea of persecution. This is a most interesting feature, in terms of the evolution of persecution's discriminatory grounds. Initially, viewing CaH under the denomination of "inhumane acts", the 1954 ILC Draft Code provided, inter alia, for:

> Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds […].[641]

Notwithstanding the fact that the distinction between social and cultural grounds is not evident, the 1954 ILC Draft Code expanded the IMT-IMTFE schemes' discriminatory grounds by adding the social and cultural ones. Later, the 1991 ILC Draft Report article 21 on "Systematic or mass violations of human rights" would drop social to read "persecution on social, political, racial, religious or cultural grounds".[642] Thus, up to 1991, culture constituted one of the discriminatory grounds of persecution's multiple transformations alongside CaH's evolution. Finally, the 1995 ILC Report article 18(e) on CaH would somehow align itself with the IMT-IMTFE ICTY-ICTR schemes in terms of discriminatory grounds, by adding "ethnic" and dropping "cultural" to read: "Persecution on political, racial, religious or ethnic grounds".[643] This confirms this study's position on the holistic concept of culture that has given rise to its multiple use by international legislators and adjudicators (general introduction). Initially constituting a discriminatory ground in the Cold War's four decade-long legislative activities, culture would eventually be dropped in 1995 only to return three years later in the ICC Statute. As a rule, thus, culture has constituted the longer stretch of the legislative existence of CaH's discriminatory grounds. Furthermore, the holistic understanding of culture is manifest in the transformation of the 1991 ILC Report's "political, racial, religious or cultural grounds" into the 1995 ILC Report's "political,

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potentially excluding sexual orientation and gender identity, Oosterveld has opined that "within context of society" is the international community as a whole rather than the society where the crime occurred. *See* Hilary Charlesworth, "Feminist Methods in International Law" (1999) 93(2) *American Journal of International Law* 379, p 394; Brenda Cossman, "Gender performance, sexual subjects and international law" (2002) 15(2) *Canadian Journal of Law & Jurisprudence* 281, p 284; Brian Kritz, "The Global Transgender Population and the International Criminal Court" (2014) 17 *Yale Human Rights & Development Law Journal* 1, pp 6 and 36; Charles Barrera Moore, "Embracing Ambiguity and Adopting Propriety: Using Comparative Law To Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court" (2017) 101(2) *Minnesota Law Review* pp 1290 and 1321-1325; Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law" (2000) 46(1) *McGill Law Journal* 217, p 237; and Oosterveld, "The Definition of Gender in the Rome Statute of the International Criminal Court", (n 921) pp 72-74 and 76.

[640] Moore (n 639) p 1292; Lisa Davis, "Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes against Women and LGBTIQ persons" (2017) 24(3) *William & Mary Journal of Women and the Law* 513, p 543

[641] 1954 ILC Draft Code (n 592) art 2, para 11.

[642] 1991 ILC Report (n 425) p 103.

[643] 1995 ILC Report (n 594) p 47.

racial, religious or ethnic grounds". In other words, and as will be discussed in-depth in this Part's Chapter 3, ethnic is used, if not as a synonym for culture, but as a concept that encapsulates its feature through human groups. In *Al Hassan*, it is noteworthy that the Chamber did not opt, in addition to religion and gender, for racial or ethnic, even though it noted that the darker a woman's skin (and as a matter of fact a man's), the harsher the AQIM repression.[644] Furthermore, culture itself was not used as a ground, even though the Chamber referred to the banning of "D'autres pratiques culturelles communes", such as "la musique, la télévision, la radio et le sport, les jeux et les loisirs, et la tenue vestimentaire des hommes et des femmes".[645]

Moreover, the ICC Statute article 7(1)(h)'s grounds are non-exhaustive as the enumeration includes any other grounds that are "universally recognized as impermissible under international law". The latter phrase was added as a compromise for those who opposed a non-exhaustive list, since they viewed the ICC Statute as an ICL instrument rather than a declaratory human rights instrument.[646] However, the ICC Statute does not explain what is a "universally recognized as impermissible under international law" ground. Ehlers has proposed that this refers to customary international law.[647] The scope of this ground is thus capable of covering grounds that would assist considering attacks targeting culture, as the case may be.

2. Actus reus: fundamental (human) rights violations

Unlike most other CaH, the crime of persecution has not been defined via a concrete set of acts, leaving this task to ICR-based jurisdictions, which have identified anthropo-centred and tangible-centred actus rei. The latter will be described in III, while the former will be described in the following paragraphs, by comparing and contrasting the post-Second World War trials (a) and the post-Cold War ICR-based jurisdictions (b).

a. The post-Second World War trials

The post-Second World War trials provide an in-depth analysis of the anthropo-centred targeting of culture. However, a close look calls for caution since, while particularly detailed and informative on the facts, the judgments often lack details with respect to their legal characterisation, at times even confusing them. Notwithstanding this omission, below is a brief analysis of selected IMT (i) and CCL 10 (ii) jurisprudence given the ICTY's heavy reliance on it.

[644] *Al Hassan* Confirmation of Charges Decision (n 423) para 702.
[645] *Al Hassan* Confirmation of Charges Decision (n 423) para 690.
[646] D Robinson (n 606) p 54.
[647] Ehlert (n 442) p 171.

i. The IMT: mixed legal and colloquial use of the word "persecution"

The IMT Charter required that the actus rei of persecution be "in execution or in connection with any crimes within the jurisdiction" of the IMT. The latter addressed the crime of persecution from both its anthropo-centred and tangible-centred angles. The following will focus on the former (for the latter, see III). The IMT judgment does not always allow distinguishing between a legal and colloquial use of the words "persecution"/"persecuted". Referring to "a policy of persecution, repression, and extermination of all civilians", count four, titled "crimes against humanity", paragraph (A) explained that the victims were subjected "to persecution, degradation, despoilment, enslavement, torture, and murder".[648] These passages illustrate the vague use of the word persecution, which is followed by both legal concepts and words such as repression and degradation, which were not expressly criminalised. Accordingly, no information can be extracted therefrom. In contrast, in describing the fact that civilians "were exterminated and persecuted", paragraph (B), titled in part "persecution on political, racial, and religious grounds", read "These persecutions were directed against Jews" and those "whose political belief or spiritual aspirations" diverged from the Nazis'.[649] It further added that "Jews were systematically persecuted", inter alia, through deprivation of liberty, forcible displacement, ill-treatment, and eventually murder.[650]

Unfortunately, the judgment itself does not clarify matters. Its structure is divided into a general part and a part specific to each accused. The former is divided into sub-headings the placement of which is not always intelligible. For example, the sub-section "Persecution of the Jews" describes the latter as consisting, inter alia, of legislative means (the wearing of the yellow star) accompanied by acts which resulted in their public professional, civic and physical discriminations.[651] From the placement of this sub-section, however, it is not clear whether the word persecution is used colloquially or as a CaH. The second part of the judgment systematically groups war crimes and CaH under the same heading for each accused, even though the indictment separated them. Therefore, while that sub-heading provides an excellent factual information, it

[648] IMT Judgment (n 490) p 66.
[649] IMT Judgment (n 490) pp 66-67.
[650] IMT Judgment (n 490) pp 66-67.
[651] IMT Judgment (n 490) p 248, reads: "A series of discriminatory laws was passed, which limited the offices and professions permitted to Jews; and restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of one billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettoes was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back". *See* also *The Attorney General of the Government of Israel v Adolf Eichmann*, (District Court of Jerusalem) Judgment (12 December 1961) (1968) 36 *International Law Report*, para 199, pp 227 and 238, holding that serious bodily or mental harm may be inflicted on the group, through its members, by their "enslavement, starvation, deportation and persecution […] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture".

remains unhelpful from a legal standpoint. Notwithstanding this, the following will briefly review the relevant parts since academia and the ICTY have relied on them in relation to CaH persecution. On Count Four, "War Crimes and Crimes against Humanity", Rosenberg was found to be responsible for, inter alia, segregating Jews, "cleansing the Eastern Occupied Territories of Jews", deporting labourers, and specifically for apprehending tens of thousands of youths, aged 10-14.[652] However, the judgment did not explain which acts constituted war crimes or CaH – let alone persecution. Frank and Streicher too were found guilty for anthropo-centred features under this heading. Regarding the former, the IMT explained that "the persecution of the Jews" included millions of them being "forced into ghettos, subjected to discriminatory laws, deprived of the food necessary to avoid starvation, and finally systematically and brutally exterminated".[653] With respect to Streicher, the IMT held that his actions "constitute persecution on political and racial grounds" as a CaH.[654]

Thus, the IMT viewed persecution as a discriminatory set of legislative and physical acts, ranging from forced displacement, ill-treatment and, as a final step, murder and extermination.[655] In the case of the Jewish population, these were undoubtedly anthropo-centred acts designed to bring them to their knees, on grounds of their political and "racial" identity. Uneasy to today's readers, these terms ought nevertheless to be contextualised, as will be explained in Chapter 3. What stands out from these passages of the judgment, is the heritage-centred goal of attacks against the members of the collective. Within the relevant contexts of the IMT and HRCts, the former saw CaH (probably persecution) as a series of acts that would otherwise be qualified as human rights breaches by the ECtHR and IACtHR practice (Part I, Chapter 2).

ii. CCL 10: Greiser's mixed use of persecution and genocide

Among the CCL 10 cases, *Greiser* stands out, since it provides, as part of the Nazis' multi-fold attempts at the Germanisation of Poland, a description of persecution's heritage-centred and tangible-centred actus rei. Below is the analysis of the former (for the latter, see III). The following will explain first how the indictment and the judgment understood these measures. According to the indictment, one means of Germanising was Greiser's "persecuting" Poles by, inter alia, forcibly transferring "Polish children and youth" to German families or institution dedicated to education so as to Germanise them totally by "cutting them off from all contact with their families and things Polish, and giving them German Christian names and surnames".[656] This study has already considered the IACtHR jurisprudence on the forcible transfer of the children of the group to another group as a heritage-centred means of attacking culture – therefore the same comments apply here (Part I, Chapter 2). Characterised here as ill-treatment and persecution, the said acts would be included in the Genocide Convention article II(e), as will be discussed in Chapter 3. The Indictment also alleged a threefold persecution

[652] IMT Judgment (n 490) pp 294-295.
[653] IMT Judgment (n 490) pp 297-298 and 339-340.
[654] IMT Judgment (n 490) p 304.
[655] *See* also IMT Judgment (n 490) pp 249-253, describing the killing of the Jews as persecution.
[656] *Poland v Gauleiter Artur Greiser*, (Supreme National Tribunal of Poland) Judgment (21 June and 7 July 1946) 13 LRTWC 70, p 72.

of Poles as part of the broader Germanisation.[657] First, it consisted of instilling fear among the victims, through food, health and employment restrictions. Second, it consisted of socially degrading measures, which could be symbolic (eg raising the hat to Germans) and operational (eg prohibition of employment where they would be in a position to give instructions to Germans). Third, it consisted of measures curtailing the religious component of the victim's culture, including, the removal and killing of religious leaders, a situation akin to the IACtHR jurisprudence (Part I, Chapter 2).

Moving to the judgment, under the section "specific charges", the UNWCC explained attacks targeting culture under a number of headings, most specifically, "Measures against Polish Culture and Science", "The Fight with religion", and "Exceptional Legal Status of Poles". The first of these headings described how all "began with the liquidation of the intelligentsia and clergy", which comprised "professors, scientists, teachers, judges, advocates, doctors, engineers" and all those who "constituted the greatest hindrance" to Poland's Germanisation.[658] The judgment described the subsequent closing of Poznan University's cultural centre, followed by the university officials and Professors' dispossession of their private and academic property, arrest, imprisonment, and transfer to concentration camps.[659] Beyond academia as such, these measures extended to art, where eg, choral societies were disbanded and their directors imprisoned.[660] Importantly, broadcasting stations became German-emitting, all Polish-owned wireless were confiscated, and death penalty was imposed on those listening to foreign stations.[661] Beyond these secular measures, focus was also placed on religious practice. The heading "The Fight with religion" contained the sub-headings "The Clergy", "Religious Practices" and "Churches, Cemeteries and Church Property". Therein, it was explained that, as intellectual leaders, the Polish clergy were first subjected to mass arrests, followed by their killing or transfer to concentration camps.[662] A further focus was placed on the limitation and prohibition of Poles' religious practice.[663] Finally, under the heading "Exceptional Legal Status of Poles", the sub-heading "Education" explained that "unqualified" Germans had to teach German to

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[657] The indictment described the three categories as follows:

> (1) keep the population in constant fear of life, health, and personal, liberty; and of losing their remaining property;
>
> (2) degrade the Polish population to a social status of serfs […], which took the form of constant insults, to the Poles on the part of the authorities; of creating for the Poles extra-legal obligations towards the Germans, from raising the hat to all Germans in uniform and descending off pavements, to prohibiting them from occupying positions in private undertakings, where they would have to give instructions to German employees; and by allotting to the Germans to the detriment of the Polish population easier conditions of life and better material comforts […];
>
> (3) deprive Poles of all confessions of the means of freely practising their religious cult, […] by […]
>
> (a) removing the majority of the clergy by killing them en masse, either on the spot, in concentration camps or by deporting them to the General Government;
>
> (b) depriving the Poles of so many of their places of worship as to amount in many localities to complete deprivation of the possibility of practising their cult […].
>
> (c) setting forth the time limit of religious services and forbidding certain kinds of them.

See Greiser (n 656) p 73.

[658] *Greiser* (n 656) pp 83-84.

[659] *Greiser* (n 656) pp 83-84.

[660] *Greiser* (n 656) pp 83-84.

[661] *Greiser* (n 656) pp 83-84.

[662] *Greiser* (n 656) pp 80-81.

[663] *Greiser* (n 656) p 81.

Polish children so as to both erode their Polish language skills and ensure that they would not master the German language.[664] Another sub-heading, "The Poles' Lingual Rights", described the Nazis' order that Poles could speak Polish only among themselves; otherwise, they had to speak German in Germans' presence.[665] These measures thus aimed at curtailing education-related rights (and by extension their language components) so as to erode Polish identity by progressively hybridising its language into something that would be neither Polish nor German. The above passage describes the "total character of the war against Polish culture" as a multi-fold criminal enterprise that encompassed both the secular and religious spheres.[666] The pattern consisted of professional restrictions, arrests and the eventual murder of both the secular and religious leadership, combined with a progressive transformation of Polish cultural (ie religious, educational and artistic) environment into German ones.

Notwithstanding the absence of the crime of genocide in the indictment, the UNWCC explained that the tribunal established "the commission of crimes against humanity (genocide) and crimes against peace".[667] This is not surprising as the distinction between CaH and the crime of genocide (which at the time did not exist) would continue to be commented on for decades to come. It is, however, unclear whether the judgment considered the above descriptions as a CaH persecution. Finally, the UNWCC explained that, when describing the three ways of the Germanisation of Poland, Greiser was found guilty of, inter alia:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; […];
> (c) Equally genocidal attacks on Polish culture and learning.[668]

The above shows the limited value that may be extracted from the CCL 10 judgments, for the purpose of the twenty-first century analysis of the CaH persecution.[669] Nonetheless, the *Greiser* example was briefly described for two reasons. First, it showcased how comprehensively prosecutors and adjudicators envisaged the heritage-centred means of attacks targeting culture. Second, and despite the legal and colloquial confusions, this and other post-Second World War cases would be used extensively by the ICTY when developing its jurisprudence on CaH persecution.

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[664] *Greiser* (n 656) p 80.
[665] *Greiser* (n 656) p 80.
[666] *Greiser* (n 656) p 82.
[667] *Greiser* (n 656) p 108.
[668] *Greiser* (n 656) p 112.
[669] The indictment also provided a detailed list of acts directed against what it called "cultural values", consisting of both secular and religious manifestations, whether tangible or intangible. Although not characterising them as persecution, the indictment alleged that *Greiser* had:

> (ix) […] direct[ed] activities intended to destroy cultural values of the Polish nation by:
> (1) closing down or destroying all Polish scientific and cultural institutions, the entire press, the wireless, cinemas and theatres;
> (2) closing down and destroying the network of Polish schools […] and closing down all Polish collections, archives, and libraries;
> (3) destroying many of the relics and monuments of Polish culture and art and transforming them so as no longer to serve Polish culture; and limiting the Poles in their own culture by confining the use of the Polish language to private intercourse and forbidding its use in public life or places of instruction.

See Greiser (n 656) p 74.

b. The post-Cold War trials: the scope of fundamental (human) rights

i. Laying the foundation: the first twenty years' limited scope

Both the 1991 and 1996 ILC Reports have explained that persecution can be multi-fold.[670] This, together with the post-Second World War jurisprudence, would shape the ICTY's jurisprudence on the crime of persecution, specifically regarding attacks targeting culture and the drafting of the ICC Statute. Absent a definition of the actus rei of persecution in the ICTY Statute, noting that while human rights are "dynamic and expansive", the *Kupreškić* Trial Chamber defined persecution as:

> (1) a gross or blatant denial, (2) on discriminatory grounds, (3) of a fundamental right, laid down in international customary or treaty law, (4) reaching the same level of gravity as the other crimes against humanity enumerated in Article 5 of the Statute.[671]

As clarified by the Appeals Chamber, (1) and (3)-(4) are the actus reus of persecution while (2) constitutes its mens rea.[672] During the drafting of the ICC Statute, many States feared an activist court's expanding the scope of discriminatory human rights breaches by characterising them as persecution; while States also agreed that extreme forms of discrimination could be characterised as persecution.[673] The compromise was that persecution would require an intentional and severe deprivation of fundamental rights contrary to international law in connection with any act under article 7(1) or with crimes within the ICC jurisdiction.[674] Many States desired this connection in order to avoid an otherwise expandable scope of the crime of persecution.[675] Others also feared that this nexus could turn persecution into an "auxiliary" crime, to be used as an additional charge or as an aggravating factor only, instead of a self-standing crime.[676] The outcome was the formulation of article 7(1)(h), which ensures that persecution is indeed a crime on its own right.[677] Thus, as noted by Schabas, while this provision's discriminatory grounds are the largest among the existing definitions of persecution, the nexus element reduces largely its scope.[678]

Notwithstanding the aforementioned legislative and adjudicatory stance, it is important to see whether this undefined crime, from a material standpoint, is capable of encompassing attacks targeting culture in an anthropo-centred manner. In other words, what are fundamental rights? The *Tadić* Trial Chamber, which first addressed this issue, held that attempting to define persecution through asylum and refugee law "cannot

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[670] 1991 ILC Report (n 425) p 104.
[671] *Kupreškić* Trial Judgment (n 624) paras 621 and 641. *See also Kordić & Čerkez* Trial Judgment (n 505) para 195. The Chamber in fact updated and enhanced the *Tadić* Trial Judgment (n 89) para 715.
[672] *Prosecutor v Krnojelac*, (ICTY) Appeal Judgment (17 September 2003) Case No IT-97-25-A, para 185.
[673] D Robinson (n 606) p 53.
[674] D Robinson (n 606) pp 53-54.
[675] D Robinson (n 606) p 54.
[676] D Robinson (n 606) p 54.
[677] D Robinson (n 606) p 54.
[678] Schabas William A., *An Introduction to the International Criminal Court*, (3rd edn Cambridge University Press 2007), p 108.

readily be applied" to ICL.[679] A contrario, the Chamber thus accepted that, with the evolution of international law, and also the facts of the case, this body of law may indeed by applicable to ICL. This was wise for multiple reasons. First, the 1991 ILC Report provides that persecution "relates to human rights violations" and the subjection of the victims "to a life in which enjoyment of some of their basic rights is repeatedly or constantly denied", such as the prohibition of religious worship; prolonged and systematic detention on grounds of representing a political, religious or cultural group; or else the prohibition of the use of national languages both in public and in private.[680] Similarly, the 1996 ILC Report saw the ICCPR article 2 as an illustration of the ICCPR and ICESCR common article 5's "fundamental human rights" in the context of persecution.[681] Second, a series of international instruments establish expressly the human rights-persecution link. In the refugee/asylum context, the UDHR article 15(1) provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution", and the 1951 Convention Relating to the Status of Refugees article 1(A)(2) refers to refugees' "fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion".[682] On the actual discrimination side, the International Convention on the Suppression and Prevention of the Crime of Apartheid article II(f) refers to "persecution of organizations and persons, by depriving them of fundamental rights and freedoms".[683] Finally, as noted by Novic, the EU system allows for considering cultural rights as fundamental rights.[684]

In its practice, the ICTY scanned existing human rights instruments. The *Kupreškić* Trial Chamber found attacks on political, social and economic rights as potential actus rei of persecution, depending on their contextual assessment.[685] Accordingly, the *Kordić & Čerkez* Appeals Chamber held that the breach of the right to life and to be free from cruel, inhuman or degrading treatment or punishment could constitute persecution, as recognised by both customary international law, the ICCPR articles 6-7 and the ECHR articles 2-3.[686] While both Trial Chambers dropped the word "cultural" from those rights, the ECCC and ICC would eventually, with the passing of time, characterise acts of an eminently cultural nature as CaH persecution.

ii. The *Case 002/02* and *Al Hassan* turning points: expanding the scope

After the *Tadić* two decade-long hiatus, the ECCC *Case 002/02* Trial Chamber and the ICC *Al Hassan* Pre-Trial Chamber would expressly establish, in 2018 and 2019 respectively, the relationship between human rights law and the crime of persecution

[679] *Tadić* Trial Judgment (n 89) para 694.
[680] 1991 ILC Report (n 425) p 104.
[681] 1996 ILC Report (n 594) para 11.
[682] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.
[683] Apartheid Convention (n 582).
[684] Novic (n 15) p 161.
[685] *Kupreškić et al* Trial Judgment (n 624) para 615. Accordingly, the Chamber found that acts targeting both natural persons (eg murder, imprisonment and deportation) and their property, *Kupreškić et al* Trial Judgment (n 624) paras 622 and 629-631.
[686] *Kordić & Čerkez* Appeal Judgment (n 415) para 106.

with respect to attacks targeting culture's intangible. Accordingly, the *Case 002/02* Trial Chamber found that the Cham "as an ethnic and religious distinct group" had been targeted through, inter alia, restrictions on their religious and cultural practices.[687] The Chamber held that restrictions on religious grounds had consisted of prohibition on daily prayers, burning of Korans and dismantling mosques or else using them for non-religious purposes, forcing the Cham to only speak the Khmer language, to eat pork and to dress and have haircuts similar to the Khmer.[688] The Chamber found that these acts constituted a violation of fundamental rights and freedoms as regards: movement, personal dignity, liberty and security, arbitrary and unlawful arrest, fair and public trial, and equality before the law.[689] The Chamber anchored these rights in customary international law by locating them in the ACHR, ECHR, ICCPR and the UDHR.[690] Considered cumulatively and contextually, the Chamber found that they lead to the requisite level of seriousness so as to constitute CaH persecution.[691] The Chamber found that the Vietnamese too were subjected to persecution on racial grounds.[692] This finding was based, inter alia, on the Vietnamese' identification through lists, and the mixed families' targeting based on matrilineal ethnicity.[693] As with the Cham, the Chamber grounded the said rights in customary international law.[694]

One year later, the ICC *Al Hassan* Pre-Trial Chamber confirmed ICL's turning point as regards attacks targeting culture's intangible. While at the time of writing, the trial was ongoing, the decision on the confirmation of charges contains anthropo-centred elements characterising attacks against culture's intangible as acts of CaH persecution. To reach this decision, the Pre-Trial Chamber first considered and found that crimes under counts 1-12 constituted severe deprivations of fundamental rights contrary to international law.[695] The Chamber considered acts that have both physical and mental consequences, such as forced marriage and sexual violence.[696] The Chamber further considered a set of restrictions. These, as held by the Chamber, consisted of the prohibition of "traditional and cultural" practice (wearing of talismans and amulets or practice of magic, witchcraft and sorcery) and of "cultural and religious" practice (prayer on the mausoleums and tombs' sites, the way of praying and the celebration of religious events).[697] The Chamber also considered within these acts what it referenced as the "control" of the freedom of education (prohibition of mixed classrooms, closure

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[687] *Case 002/02 Judgment*, (ECCC) Trial Chamber Judgment (16 November 2018) Case No. 002/19-09-2007/ECCC/TC, para 3328.
[688] *Case 002/02* Trial Judgment (n 687) para 3328.
[689] *Case 002/02* Trial Judgment (n 687) para 3330.
[690] *Case 002/02* Trial Judgment (n 687) para 3330.
[691] *Case 002/02* Trial Judgment (n 687) para 3331.
[692] *Case 002/02* Trial Judgment (n 687) para 3513.
[693] *Case 002/02* Trial Judgment (n 687) para 3513.
[694] *Case 002/02* Trial Judgment (n 687) para 3511.
[695] *Al Hassan* Confirmation of Charges Decision (n 423) para 673. Counts 1-5: Torture, other inhumane acts, cruel treatment and outrage upon persona dignity; Count 6: unlawful judgments and sentencing; Count 7: Attacks against protected property; Counts 8-12: sexual violence and other inhuman acts in the form of forced marriage; and count 13: persecution.
[696] *Al Hassan* Confirmation of Charges Decision (n 423) paras 677-680.
[697] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: interdiction de pratiques traditionnelles et culturelles (telles que le port de talismans ou d'amulettes et la pratique de la magie et de la sorcellerie), interdiction de pratiques religieuses et culturelles (telles que les prières sur les sites des mausolées et des tombeaux, ainsi que la manière de prier et la célébration de fêtes religieuses).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

of public secular schools and the imposition of education conform to ACMI's religious and ideological vision).[698] The Chamber further added restrictions on the freedom of association and movement, namely the prohibition of public gathering and of movement of non-married and unrelated men and women.[699] Included in these acts was the confiscation of private property, such as cigarettes and alcohol and, importantly, those private properties, such as amulets, that support culture's intangible, in this case spiritual beliefs.[700]

Next, the Pre-Trial Chamber considered these acts' connection with any other article 7(1) crimes as well as crimes within the ICC Statute. On the former, it found connections with article 7(f) torture, (g) sexual violence, and (k) other inhumane acts.[701] On war crimes, the Chamber found that the acts were connected to article 8(2)(c)(i), (ii) and (iv) and (e)(vi), that is violence to persons, outrage upon personal dignity, unlawful judicial sentencing, and sexual violence, respectively; and finally article 8(2)(e)(iv), ie attacks targeting culture's tangible.[702]

With the above established, the Chamber then grounded the persecution at hand on religion and gender.[703] On the latter, the Chamber referred to the objectification of women, which resulted from a series of measures ranging from forced marriage to the ACIM veiling cannon and, in case the veil was not covering them enough and/or looked "trop joli", undergoing sanctions such as detention and/or sexual violence.[704] This led to women's loss of social status and, in case of sexual violence, stigmatisation within both their families and society.[705]

iii. Relationship with other inhumane acts

Here, a brief reference should be made to CaH "other inhumane acts". Bassiouni has rightly noted the ambiguity of this crime's contours.[706] Likewise, in order to adhere to the principle of legality, the ICTY urged the exercise of "great caution" in their

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[698] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: […] le contrôle des libertés liées à l'éducation (interdiction de la mixité en classe, fermeture des écoles publiques laïques et imposition d'une éducation axée sur la vision de la religion et l'idéologie de l'organisation Ansar Dine/AQMI).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

[699] The original reads:

> La Chambre relève en outre les catégories d'actes suivantes portant atteinte aux libertés individuelles: […] l'imposition de restrictions quant à la liberté d'association et de circulation (interdiction des rassemblements publics, et interdiction pour des hommes et femmes non mariés ni apparentés de circuler ensemble).

See Al Hassan Confirmation of Charges Decision (n 423) para 683.

[700] *Al Hassan* Confirmation of Charges Decision (n 423) para 684.

[701] *Al Hassan* Confirmation of Charges Decision (n 423) paras 686-687and 707.

[702] *Al Hassan* Confirmation of Charges Decision (n 423) paras 686-687and 707.

[703] *Al Hassan* Confirmation of Charges Decision (n 423) para 707.

[704] *Al Hassan* Confirmation of Charges Decision (n 423) paras 697-700.

[705] *Al Hassan* Confirmation of Charges Decision (n 423) para 701.

[706] *See* Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406.

regard.[707] The ICTY-ICTR required that the conduct must (i) cause serious mental or physical suffering to the victim or constitute a serious attack upon human dignity; and (ii) be of equal gravity to the conduct enumerated in the ICTY Statute article 5 and the ICTR Statute article 3.[708] To do so, the ICTY found it necessary to assess all factual circumstances, such as the nature of the acts and their context, the situation of the victims, and the physical and/or mental effects on them.[709]

The ICC has also considered the ICC Statute article 7(1)(k) "Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The ICC has found that such acts constitute a "residual category" within article 7(1) and "must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity".[710] The ICC has further held that such acts "are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute".[711] As such, the ICC has found corporal acts, such as mutilation or throwing of acid, to fall within this category.[712]

Importantly, from an anthropo/heritage-centred standpoint, both the SCSL and the ECCC have considered as other inhumane acts forced marriages, albeit as acts conducted by rebels against women,[713] and "as a matter of State policy",[714] respectively. Specifically, the ECCC found that forced marriages under the Khmer rouges:

> were used as methods to weaken the traditional family structure and to guarantee the loyalty of the people of the Regime. By forcing people into random marriages the Khmer Rouge intended to obtain control over people's sexuality and to ensure that the

[707] *Prosecutor v Martić,* (ICTY) Judgment (12 June 2007) Case No IT-95-11-T, para 82 and *Blagojević & Jokić* Trial Judgment (n 49) paras 624–25.
[708] *See* eg *Kordić & Čerkez* Appeal Judgment (n 415) paras 117 and 671; and *Prosecutor v. Kayishema*, (ICTR) Judgment (21 May 1999) Case No ICTR-95-1-T, para 154.
[709] *See* eg *Martić* Trial Judgment (n 707) para 84; *Blagojević & Jokić* Trial Judgment (n 49) para 627. The ICTY found that the act of forcible transfer may amount to other inhumane acts. *See* eg *Kordić & Čerkez* Appeal Judgment (n 415) para 151. Both tribunals considered other anthropo-centred means such as sniping, shelling, *see* eg *Prosecutor v Galić*, (ICTY) Judgment (30 November 2006) Case No. IT-98-29-A, para 158; injuring prisoners of war and generating poor detention conditions, *see* eg, *Prosecutor v Naletilić & Martinović*, (ICTY) Judgment (3 May 2006) Case No IT-98-31-A, para 435 and *Krnojelac* Appeal Judgment (n 672) para 163;mutilation and other types of severe bodily harm; *see* eg, *Prosecutor v Kvočka*, (ICTY) Judgment (2 November 2001) Case No IT-98-30/1-A, para 435; sexual violence to a dead woman's body; *see* eg, *Prosecutor v Niyitegeka*, (ICTR) Judgment (16 May 2003), Case No ICTR-96-14-T, paras 465 and 693. *See* also Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406, explaining that a number of human rights and international instruments consider as "inhumane acts" offences such as Apartheid, torture and rape.
[710] *Al Hassan* Confirmation of Charges Decision (n 423) para 252, referring to *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, (ICC) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) ICC-01/09-02/11-382-Red, para 269.
[711] *Al Hassan* Confirmation of Charges Decision (n 423) para 252, referring to *Prosecutor v Katanga & Ngudjolo Chui,* (ICC) Pre-Trial Decision on the Confirmation of charges (30 September 2008) No ICC-01/04-01/07-717, para 448.
[712] *Al Hassan* Confirmation of Charges Decision (n 423) para 254.
[713] *Prosecutor v. Brima*, (SCSL) Judgment (22 February 2008) Case No SCSL-04-16-A, paras 197–203.
[714] *Civil Parties' Co-Lawyers' Request for Supplementary Preliminary Investigations*, (ECCC) Decision (9 February 2009) Case No 001/18–07-2007-ECCC/TC, para 29.

> reproductive function was managed by the state to produce more workers for the revolution.[715]

Later, In assessing the gravity of forced acts, the Chamber found that the severity of the mental suffering caused by forced marriage caused serious mental harm with lasting effects on the victims.[716] The Chamber found the conduct to be of similar gravity as other CaH. On the intent, authorities used threats to force individuals to marry, supplanted the family during wedding ceremonies and monitored sexual consumption.[717] While at the time of writing, ICR-based jurisdictions had considered other inhumane acts through corporal and often associated mental harm, they had also do so with acts such as forced marriage which, through the substitution of State apparatus for family environment, aimed at targeting culture. Thus, depending on the context, when combining forced marriage with the mens rea of CaH persecution, which is characterised by targeting the victims on discriminatory grounds, it is possible to conceive of persecution as a heritage-centred way of targeting culture which, by reason of the victims' identity is reminiscent of the IACtHR case law (Part I, Chapter 2.II.A).

3. Outcome

For the nearly half-a-century-long period stretching from the post-Second World War through to the end of the Cold War and the Détente, from the IMT to the ICC, the crime of persecution has kept evolving in terms of both its mens rea and its actus reus. From their decade-long exhaustive list, the mens rea's discriminatory grounds were turned into a non-exhaustive list by the ICC Statute. Thus, the political, racial and religious grounds expanded to encompass not only national, ethnic, cultural, religious and gender grounds, but also any other grounds "universally recognized as impermissible under international law". The judicial consideration of the quasi-totality of these grounds of persecution under the ICC Statute – not least "cultural" – will involve cultural considerations. This is so because their understanding is dynamic, like culture itself (general introduction). Moreover, the ICC Statute has provided that persecution is the targeting of either the victims by reason of their group or collective identity; or the group or collective, as such, both of which reminiscent of the IACtHR heritage-centred practice (Part I, Chapter 2.II.B and A, respectively).

In terms of the actus reus of the crime of persecution and attacking of culture, both the post-Second World War trials and post-Cold War ICR-based jurisdictions allow for such consideration from an anthropo-centred angle. With the crime of persecution not being defined, it will always fall on those jurisdictions to progressively clarify its elements. Among the jurisdictions that have had the opportunity to do so, the IMT and ICTY practice helps draw a relatively coherent picture of those elements in terms of the anthropo-centred actus rei of attacking culture. The ICTY did so through the so-called ethnic cleansing. Apart from early uses by the IMT, such as "cleansing the Eastern Occupied Territories of Jews", "ethnic cleansing" appeared mainly during the former Yugoslavia's collapse.[718] The ICTY wisely refrained from turning that concept into a

[715] *Civil Parties' Co-Lawyers* Decision (n 714) para 29.
[716] *Case 002/02* Trial Judgment (n 687) para 3692.
[717] *Case 002/02* Trial Judgment (n 687) para 3693.
[718] *See* IMT Judgment (n 490) pp 294-295; Letter from the Secretary-General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting Final Report of the

specific crime, as it does not appear as an underlying offence of CaH's existing international definitions. The *Kupreškić* Trial Chamber referred to ethnic cleansing as one of "those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide".[719] In *Sikirica*, the Chamber viewed ethnic cleansing as the more colloquial description of the crime of persecution.[720] Indeed, both the IMT's "cleansing" and the former Yugoslavia's "ethnic cleansing" understood it as a set of discriminatory acts that aimed to rid territories of certain categories of populations. These measures were both legislative and physical, with the latter often in application of the former. Through these measures, which targeted both natural persons and property, the perpetrators aimed at forcing the victims into displacement.[721] As is often the case, these measures resulted in the ultimate physical elimination of the victims. Ethnic cleansing represents in effect the various stages of the progressive unfolding of the crime of persecution to uproot – and in its most extreme case to physically eliminate – the persons discriminated against. Once again, this type of practice illustrates the anthropo-centred means of attacking culture, wherein attacking natural persons making up the sum of the collective pursues or results in the alteration of heritage. The IACtHR adopted this approach by linking the acts to ACHR violations (Part I, Chapter 2)

At the ICC, despite the ICC Statute and the ICC Elements of Crimes' specific requirements that there be a severe deprivation, of fundamental rights contrary to international law in connection with any act under article 7(1) or crimes with the ICC jurisdiction, judges will still need to proceed on a case-by-case basis to determine whether certain actus rei amount to the anthropo-centred means of attacking culture. As with the ICTY, the ICC has connected the aforementioned deprivations with other ICC crimes, since many of them could be used with the aim of attacking culture through heritage-centred means (Chapters 1 and 3 of this Part).[722] Eventually, it will be for the Chambers to make such determinations on a case-by-case basis, taking into account the specific circumstances of each case at hand.[723] Already, the ICC has shown its capacity

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Commission of Experts Established pursuant to Security Council Resolution 780 (1992), paras 129-150. UNGA, "Resolution on the Situation in Bosnia and Herzegovina" (7 April 1993) UN Doc AG/Res/47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide".

[719] *Kupreškić et al* Trial Judgment (n 624) para 606.

[720] *Prosecutor v Sikirica et al*, (ICTY) Judgment (3 September 2001) Case No IT-95-8-T, para 89.

[721] The *Karadžić* Trial Chamber viewed the normative measure as restrictive and discriminatory measures (eg freedom of movement limitations; employment dismissal, including from positions of authority; arbitrary home search; unlawful arrest and/or the denial of the right to judicial process; and denial of equal access to public services), *see Prosecutor v Karadžić*, (ICTY) Judgment (24 March 2016) Case No IT-95-5/18-T, para 536. For the physical/mental measures, *see Karadžić* Trial Judgment (n 721) paras 502 (killing); 505, 509-510, 511 and 514 (cruel and/or inhuman treatment – eg torture, beatings and physical and psychological abuse, rape and other acts of sexual violence, establishment and perpetuation of inhumane living conditions); 516 (forcible transfer and deportation); 521 (unlawful detention) and 523 (forced labour and the use of human shields).

[722] *See* Frulli (n 58) p 203.

[723] *See* also ICC Statute (n 54) art 7(1)(k) on "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." Under the ICC Elements of Crimes:

> The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
>
> 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. [Footnote 30: It is understood that "character" refers to the nature and gravity of the act.]

The *Katanga* Pre-Trial Chamber noted that:

to go beyond the ICTY's cautious steps by expanding the scope of persecution's actus reus to those targeting culture's intangible, one year only after the same approach was adopted by the ECCC.

D. Synthesis: crimes immersed in collective rights violations

From the IMT to the ICC, it took half a century to conceive and refine the definition of CaH, in terms of both the chapeau elements and underlying offences. While the first fifty years settled on the post-Second World War definition and practice, a post-Cold War five year fast-track process, from the 1993 ICTY Statute to the 1998 ICC Statute, finalised the twentieth century's development of CaH.

The IMT-IMTFE and CCL 10 models only contained early traces of the future chapeau, although they were connected with the offences themselves. These rudimentary fragments considered the civilian population as victims, together with an armed conflict nexus. After the Cold War's ICL hiatus, while the ICTY followed broadly the same model, it was the ICTR Statute that conceived the chapeau in both form and substance.[724] In contrast to the Second World War models, the ICTR chapeau elements required a series of general requirements within which the underlying offences of CaH needed to be committed. The common elements between the ICTY-ICTR chapeaux were the requirement of a (widespread or systematic) attack against any civilian population. They otherwise diverged, as they had each been prepared to reflect the factual matrix grounding each tribunal's creation. The ICTY Statute thus required an armed conflict nexus because it arose from a predominantly CaH-type situation during the former Yugoslavia's armed conflict. Rwanda's predominantly genocide-type situation resulted in the absence of an armed conflict nexus, and the addition of discriminatory grounds requirements.

On the basis of the above, and also the 1991 and 1996 ILC Reports, the ICC Statute chapeau would simply require a widespread or systematic attack against any civilian population, thereby conveying the idea of the targeting of a collective. For this study's purpose, this is a first step to consider attacks targeting culture through mass human rights violations (Part I, Chapter 2). This is further enhanced by the chapeau's relinquishing the armed conflict nexus, since attacking culture often occurs in times of trouble falling short of armed conflict (Part I). Within these parameters, attacks directed at culture could be effected through many of the underlying offences of CaH, such as enslavement; deportation or forcible transfer of populations; rape, sexual slavery,

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the Statute has given to "other inhumane acts" a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived "other inhumane acts" as a "catch all provision," leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action.

See Katanga & Ngudjolo Chui Confirmation of Charges Decision (n 711) para 450.

[724] For the ICTY-ICTR practice, *see* Guénaël Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda" (2002) 43 *Harvard International Law Journal* 237. For a broader discussion, *see* Guénaël Mettraux, "The Definition of Crimes Against Humanity and the Question of a "Policy" Element" *in* Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011).

enforced prostitution, enforced sterilisation; persecution; enforced disappearance; the crime of apartheid; or else other inhumane acts. As the actual victims of these offences would be the members of the collective, Part I, Chapter 2.II's comments will apply here.

Persecution can encompass all the other CaH underlying offences if accompanied by its requisite discriminatory intent which the ICC Statute expanded from their decade-long exhaustive list into a non-exhaustive one. Any judicial consideration of these grounds will always be subject to cultural considerations, at least implicitly, as their meaning will evolve spacio-temporarily, two defining features of culture. Notably, the ICC Statute also expanded the chapeau of earlier definitions of CaH by providing that persecution can focus not only on the victims by reason of their group or collective identity, but also, and innovatively, on the group or collective, as such, a scenario reminiscent of IACtHR jurisprudence (Part I, Chapter 2.II.A. and B, respectively). Accordingly, the same comments apply here.

Both post-Second World War and post-Cold War ICR-based jurisdictions have accepted that the actus reus of the crime of persecution may consist of anthropo-centred means of attacking culture. Absent a definition of the crime of persecution, this determination will always be made by the judges on a case-by-case basis. The IMT and ICTY contain a wealth of findings regarding the anthropo-centred actus rei, whether characterised as persecution or, more colloquially, as ethnic cleansing. In this situation, it is more the mens rea, rather than the actus reus that enables characterising persecution as a crime targeting culture. This is so because, from a heritage-centred viewpoint, persecution's legislative measures and (often) related bodily acts need not necessarily focus on culture, as such. Rather, persecution acquires almost automatically its cultural feature because of the discriminatory targeting of individuals as members of the collective. The actus rei thus become secondary as they need not be related to culture. In the case of deportation, for instance, what matters is the aim to geographically displace or potentially disperse, targeted victims on the grounds of their identity. Thus, legislatively undefined in terms of its actus reus, persecution's mens rea turns it into a cultural crime in terms of intent and consequence, no matter the means.

Notwithstanding the above, ICR-based jurisdictions have also found that certain actus rei could amount to persecution's heritage-centred means of attacking culture. As seen, this has been done by connecting the actus rei in question to other CaH and other crimes within the ICR-based jurisdictions' subject-matter. In this exercise, it is the fundamental nature of the human rights norms that enables characterising their violation as persecution. While understandably, like all pioneers, the ICTY cautiously changed the state of affairs, it still benefited from the post-Second World War's factually – albeit not always legally clear – enlightening descriptions. In turn the ECCC and ICC have benefited from the ICTY's practice to eventually adopt an expansive scope of the actus rei of CaH persecution. Accordingly, after a twenty years hiatus, both jurisdictions have accepted that the actus reus of persecution may be anthropo-centred insofar as attacks targeting culture are concerned. Accordingly, such attacks may either target human rights that are cultural rights or result in the violation of such rights. While the ECCC and ICC cases are subject to either appeal or trial, they have nonetheless pierced the taboo. In terms of actus reus, as will now be seen, ICR-based jurisdictions' practice has also allowed for considering persecution from a tangible-centred perspective.

III. The tangible-centred approach: the actus reus of the crime of persecution

A. Introduction

As just seen (II), CaH's underlying offences abound with anthropo-centred means (eg deportation) that may aim at adversely impacting heritage. In contrast, the CaH provisions of the IMT Charter, the IMTFE Charter, the ICTY Statute and the ICC Statute do not list tangible-centred underlying offences. Notwithstanding this, as will be shown, the IMT and CCL 10 would consider such destruction as falling within CaH, including, at times, persecution (B). Using partly these findings, the 1991 ILC Report and, importantly, the *Kupreškić* definition of persecution, the ICTY would consider the destruction of and damage to culture's tangible as ethnic cleansing's material aim, while referring to the means described in other ICTY provisions, such as war crimes, to explain such inclusion. As this Section will show, this may guide the ICC when the time comes for it to adjudicate cultural tangible damage as CaH persecution. (C).

B. The post-Second World War trials

The post-Second World War trials offer a limited, but in-depth analysis of damage to/destruction of culture's tangible. These would shape the ICTY's jurisprudence on the tangible-centred means of the crime of persecution. As seen, however, a closer review of the IMT and CCL 10 jurisprudence calls for caution since, while particularly detailed and informative on the facts, they were often vague regarding the legal characterisation of crimes, sometimes equating the same acts as genocide, an oddity since the Genocide Convention's draft had not yet been finalised. Notwithstanding this, the following will provide a brief analysis of selected IMT and CCL 10 jurisprudence addressing culture's religious (1) and secular (2) tangible. This is so given the ICTY's subsequent reliance on it.

1. Culture's religious tangible

As seen earlier, under the sub-section "Persecution of the Jews", the IMT Judgment explained the Nazi discriminatory policies against Jews, which it characterised as "persecution". While the analysis of those measures attempted to show how the legislative and physical measures could be adjudicated as anthropo-centred means of attacking culture (see II), other passages were unequivocally tangible-centred. Accordingly, in order to achieve "the complete exclusion of Jews from German life", the IMT explained that beyond its anthropo-centred means, the persecution of Jews extended to tangible-centred ones, which included "the burning and demolishing of synagogues".[725] This calls for no comment, evident as it is that the Nazis attacked Judaism's tangible. Like the first and second Temples' destruction by the neo-

[725] IMT Judgment (n 490) p 248.

Babylonians and Romans, respectively, the demolition of the said synagogue would be part and parcel of Jews' further Diasporic explosion.[726]

The tangible-centred attacks of culture would be however addressed in more details in *Greiser*. As seen (II), under the section "specific charges", the UNWCC dedicated mainly three headings to attacks targeting culture. However, like the indictment, these "specific charges" did not link the facts to any specific crimes. Only another sub-heading titled "Persecution of the Jewish population" described one such measure as the "Burning and destruction of synagogues and houses of prayer, often of artistic value, and defiling Jewish cemeteries".[727] No more information was given in this regard. It was in fact under "The Fight with religion", that the sub-heading "Churches, Cemeteries and Church Property" explained the targeting of culture's religious tangible. Both churches and cemeteries were thus subjected to legislative measures and material restrictions. The former concerned their closing down as well as regulations regarding property confiscation, transfer and despoliations of virtually any movable item. Material restriction consisted of the implementation of the legislative measures and of the overall destruction of the immovable.[728] Importantly, a passage also linked the said property to that of legal persons (foundations, associations, such as Caritas).[729] These exactions, which CCL 10 described as damage to "Polish culture", impacted on the tangible components of culture as both immovable and movable elements of a religious nature (general introduction).

2. Culture's secular tangible

On culture's secular tangible, the IMT convicted Rosenberg on Count Four ("War Crimes and Crimes against Humanity"), inter alia, for the plundering of museums and

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[726] Given that the IMT had ruled that it had no jurisdiction for CaH prior to the Second World War's outbreak, it intriguingly found Streicher "responsible" (as opposed to "guilty") "for the demolition on 10 August 1938, of the Nuremberg synagogue", though falling short of specifying whether this was persecution. *See* IMT Judgment (n 490) p 302. Referring to the same page of the IMT judgment, the *Blaškić* Trial Judgment (n 675) para 228 explained that the IMT had found Streicher "guilty of crimes against humanity inter alia for […] the fire at the Nuremberg synagogue". Not only did the ICTY mischaracterise the IMT Judgment's wording, but also it conflated that page with page 248 which, under the heading "persecution of Jews", viewed "the burning and demolishing of synagogues" as part of the pogroms organised by the Nazis against Jews.

[727] *Greiser* (n 656) p 94.

[728] *Greiser* (n 656) p 112, providing, inter alia:

> The churches closed were despoiled completely. […], money, foreign exchange, script, church books, documents, libraries, and other important written material […], chalices, montrances, candlesticks, candles and linen were removed from the churches. […].
> […], Greiser ordered the removal of all bells from Polish churches, both bronze and steel, and including those recognised as being protected by the law concerning ancient monuments and relics. […], all organs in churches whether closed or open, were sequestrated. Irreplacable losses were inflicted to Polish culture by the removal or destruction of church archives and libraries. […] the ownership of all confessional cemeteries [was transferred] to the local council. There were to be separate cemeteries for the Poles, or, if not, a separate area was to be fenced off in the German cemeteries for them and this was to have an entrance of its own. An order […], required all inscriptions on Polish gravestones to be removed. The insurgents' Memorial in Poznan cemetery was demolished […].

[729] *Greiser* (n 656) p 112, providing, that "Not only the property of the church itself was confiscated, but also that of church institutions and foundations [such as] "Caritas,"".

libraries and the confiscation of art treasures and collections.[730] Once again, however, these findings did not explain which war crimes and CaH were considered. As will be seen, however, the ICTY would refer to them when building its jurisprudence on damage to/destruction of culture's tangible as CaH persecution.

The *Greiser* indictment Section C(3) included the "[s]ystematic destruction of Polish culture, robbery of Polish cultural treasures" and the illegal seizure of public property.[731] However, these charges mentioned neither CaH nor, more specifically, CaH persecution. Under the section "specific charges", the UNWCC dedicated the heading "Measures against Polish Culture and Science" to secular tangible. Therein, the UNWCC described the "war against Polish culture".[732] The stunningly detailed description of the Nazi actions provides an almost exhaustive representation of culture's holism, which penetrates all fields of life. From this angle, the importance of culture's tangible to support the intangible becomes clear. Thus, it is explained that in addition of Poznan University's cultural centre, the university itself was closed and transformed into a German higher education institution and part-time crematorium; libraries were closed and sometimes destroyed; when not burnt, books and archives would be distributed to German universities or to paper-mills for pulping; museums' art collections would be confiscated; while Polish memorials, such as Chopin's, would be destroyed "in mockery and ridicule".[733] The Nazi enterprise to annihilate Polish culture was so systematic that it extended to the closure of publishing houses, theatres and music conservatories, and prohibition of selling French and English books "and even the sale of the music of Chopin and other Polish composers".[734] One last passage on this "war against Polish Culture" sums-up the holistic conception of culture:

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[730] IMT Judgment (n 490) p 297.

[731] *Greiser* (n 656) p 71.

[732] *Greiser* (n 656) pp 82-83.

[733] The passage reads, inter alia,

> The cultural centre of Poznan University was closed […]
> The buildings of Poznan University were taken over […] and used for various purposes [, including as] a crematorium in which eight thousand bodies were burned, […]. Gradually the entire organisation for higher education in Poznan ceased to exist, the German institutions were being set up in its place. […], a German university was opened in Poznan, […]
> All other cultural institutions suffered a fate similar to that of the university. […] Greiser laid […] the special duty of destroying all the libraries of the Society for People's Libraries, whose premises were demolished and the books burned and destroyed. Similarly school libraries were destroyed.
> […A] Book Collecting Point […] was organised […] to which close on two million […] volumes taken from public and private libraries […].These books were [… thereafter] distributed to various German institutions, while the others were sent to a paper-mill for pulping.
> The various archives met with a similar fate. […]. Museums and art collections [including private collections] were confiscated, […]; and also collections, in churches and cathedrals, […], [public and] private collections were destroyed […].
> Special care was devoted to the destruction of Polish memorials […, such as the] Chopin, […] monument. These monuments were destroyed in an especially insulting manner and the destruction was accompanied by mockery and ridicule. These acts were given great emphasis in the German Press.

See Greiser (n 656) pp 82-83.

[734] The passage reads, inter alia,

> The Polish Press and all Polish publishing was destroyed. Not one Polish paper appeared […], and the scientific periodicals were confiscated. All Polish printing works were confiscated and given to German undertakings. It was also forbidden to print any kind of

> War was even declared on Polish inscriptions not only of the streets, in tramcars, on shops and in public places, but even inside private houses on such things as letter-boxes, lavatories, bread bins or salt-tins. […] the removal of all Polish inscriptions [was ordered] […].[735]

This self-explanatory passage requires no additional comment, apart from the observation that "the war against Polish culture" encompassed the tangible components of "culture", whether movable, immovable, secular or religious, through confiscation, pillage and plunder as well as utter destruction.

Notwithstanding this, as seen (II), regardless of the absence of the crime of genocide in the indictment, the tribunal found Greiser guilty of, inter alia:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; *and by destruction of churches, cemeteries and the property of the church*;
> (c) Equally genocidal attacks on Polish culture and learning.[736] [emphasis added]

This passage, which appears to use the word genocide colloquially, reflects the limited value, from the viewpoint of CaH persecution, of the post-Second World War judgments on which the ICTY would later rely.

To further illustrate these uncertainties, it is important very briefly review how these trials considered the targeting of private property which included "the looting of Jewish businesses", seizure of their assets, as well as the imposition of one billion marks fine.[737] With respect to the latter, the IMT specifically found that Goring "persecuted the Jews", in order to exclude them from "economic life".[738] As regards individual property/businesses, the IMT found Streicher guilty of CaH.[739] However, noting that the CCL 10 crimes such as murder and extermination concern human beings, the later *Flick* trial held that "the catch-all words 'other persecutions' must be deemed to include only such as affect the life and liberty"; accordingly, "[c]ompulsory taking of industrial property, however reprehensible, is not in that category".[740] Unlike the IMT, *Flick* did not consider those private property crimes as persecution.[741] This begs the question of

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> books in Polish and all the 397 Polish bookshops […] were closed and their stocks of books confiscated. […] [T]he sale·of all French and English books, and even the sale of the music of Chopin and other Polish composers [was forbidden] and […] a list of forbidden Polish books [was published].
> All the Polish theatres […] were closed and their buildings and equipment put at the disposal of German theatres; Polish cinemas were transformed into German ones. The opera and the Music Conservatory in Poznan were put at the disposal of German institutions. Even choral societies were closed […].
> The broadcasting stations […] were made into German stations; all wireless receiving sets belonging to Poles were confiscated […].

See Greiser (n 656) pp 83-84.

[735] *Greiser* (n 656) pp 83-84.

[736] *Greiser* (n 656) p112.

[737] IMT Judgment (n 490) p 248.

[738] IMT Judgment (n 490) p 248.

[739] IMT Judgment (n 490) p 302.

[740] *United States of America v Friedrich Flick et al*, (United States Military Tribunal) Judgment (20 April and 22 December 1947) 9 LRTWC 1, pp 27-28.

[741] In *Eichmann* (n 651) the Jerusalem District Court held that:

whether public property crimes, specifically those targeting culture's tangible, could have been considered as CaH persecution under the CCL 10 scheme.

3. Outcome

As indicated throughout this sub-section, the post-Second World War trials are of a very limited value as regard the tangible-centred means of attacks targeting culture. As explained in Section II, from a legal viewpoint, CaH were born out of war crimes. This explains why, the IMT indictment offered separate counts for each of war crimes and CaH but that the judgment tended to consider them together, when focusing on the guilt of each accused. This explains also why, despite persecution's inclusion in the IMT Charter, the judgment referred to it at times colloquially and not always legally. But this confusion has been exacerbated by an anachronism as regards CCL 10. Therein, the UNWCC compiled and commented upon the CCL 10 judgments after the Genocide Convention's adoption, thereby referring to many of the CCL 10 crimes as genocide.

Be that as it may, the afore-analysed judgments are useful for two reasons. First, they help understand the subsequent ILC and ICTY approach with respect to the tangible-centred attack of culture. Second, they provide a wealth of factual information as regards the IMT and CCL 10 adjudicators' approach to the targeting of culture's tangible under persecution, well before legal commentators would add their stone to the edifice. Thus, it is clear that both jurisdictions considered the destruction of culture's tangible as CaH persecution, somewhere between war crimes and genocide. With the benefit of hindsight, but also thanks, in part, to the aforementioned anachronism, the post-Cold War legal and judicial settings will confirm that damage to and destruction of culture's tangible may constitute CaH persecution.

C. The post-Cold War international criminal jurisdictions

Both the 1991 and 1996 ILC Reports opined that persecution can be multi-fold.[742] The 1991 ILC Report specifically explained that it may, inter alia, consist of the:

> systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group.[743]

This, together with the post-Second World War jurisprudence, influenced the ICTY's local-national/national-international diptych oriented jurisprudence regarding the

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> the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the government of the Reich in accordance with legislative powers delegated to it by the Reichstag […] and of direct acts of violence organised by the regime against the persons and property of Jews. The purpose of these acts carried out in the first stage was to deprive the Jews of citizens' rights, to degrade them and strike fear into their hearts, to separate them from the rest of the inhabitants, to oust them from the economic and cultural life of the State and to close to them the source of livelihood.

See Eichmann (n 651) paras 56-57.

[742] 1991 ILC Report (n 425) p 104.

[743] 1996 ILC Report (n 594) p 268.

tangible-centred means of attacks targeting culture (1). Unlike the ICTY, a series of limitations placed by the ICC's definition of persecution and the ICC Elements of Crimes have made the ICC's task more challenging although the Court has gradually adopted the ICTY's approach (2).

1. The ICTY

As seen earlier (II), the *Blaškić* Appeals Chamber has held that it is not enough for the act(s) of persecution to have been committed discriminately; they must also "constitute a denial of or infringement upon a fundamental right laid down in international customary law", which reaches the same level of gravity as other article 5 CaH, thereby requiring a case-by-case approach.[744] The Chamber confirmed that the destruction of culture's tangible is a denial of basic or fundamental rights.[745] In its practice, the ICTY has adopted a tangible-centred approach regarding attacks targeting culture when considering CaH persecution in relation to its means (through war crimes) (a) and aims (as part of genocide) (b).

a. The means of attacking culture's tangible: relationship with war crimes

To assess whether damage to/destruction of culture's tangible could amount to CaH persecution, the ICTY had to assess whether in isolation or in conjunction with other acts, they reached the level of gravity of other CaH, and whether they infringed a fundamental right in international law. But, within the ICTY's ratione materiae competence, only war crimes provisions made reference to property crimes. Hence, the ICTY practice to charge the same facts, often under both war crimes and CaH, and for chambers to first establish the former before moving to the latter. Accordingly, in both *Blaškić* and *Kordić & Čerkez*, the Trial Chambers confirmed first that the destruction of sacred sites constituted war crimes.[746] With that finding secured, the *Blaškić* Trial Chamber held that beyond bodily and mental harm as well as violations of the individual freedom, the crime of persecution includes "acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind", such as "confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence".[747] The *Kordić & Čerkez* Trial Chambers did the same by holding that "This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity" of the collective.[748] The *Prlić* Trial Chamber adopted the same approach with respect to the destruction of the Old Bridge of Mostar.[749] Thus, by adding discriminatory grounds to the ICTY war crimes provisions, Chambers would establish CaH persecution.

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[744] *Blaškić* Appeal Judgment (n 496) para 138.
[745] *Blaškić* Appeal Judgment (n 496) para 145; *Kordić & Čerkez* Trial Judgment (n 505) para 206; and *Prosecutor v Stakić*, (ICTY) Judgment (31 July 2003) Case No IT-97-24-T, para 766.
[746] *Blaškić* Trial Judgment (n 412) para 234 and *Kordić & Čerkez* Trial Judgment (n 505) para 206.
[747] *Blaškić* Trial Judgment (n 412) para 227. *See also* Yaron Gottlieb, "Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC" (2005) 23(4) *Pennsylvania State International Law Review* 857, p 874.
[748] *Kordić & Čerkez* Trial Judgment (n 505) para 207.
[749] *Prlić et al* Trial Judgment (n 453) para 1713.

In practice, under the war crimes provisions, the ICTY considered the indirect and direct protection of culture's tangible. As regards the former, IHL's indirect protection considers culture's tangible as part of property located in cities, towns and villages (Chapter 1.II.B.). The *Kordić & Čerkez* Trial Chamber held that the combination of such attacks and discriminatory grounds "provides the factual matrix for most of the other alleged acts of persecution", like "the wanton and extensive destruction of property".[750] Later, the *Blaškić* Appeals Chamber, relying on customary international law, held that "indiscriminate attacks on cities, towns, and villages, may constitute persecutions".[751] This opened the possibility to consider tangible-centred damage as persecution, in these contexts. Here, it is important to refer to the ICTY jurisprudence on the relationship between persecution and attacks targeting private property. While not related to culture's tangible, this may be useful in drawing the possibilities and limits of characterising the latter's damage as persecution. In its discussion concerning private property the *Kordić & Čerkez* Trial Chamber held:

> If the ultimate aim of persecution is the "removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself", the widespread or systematic, discriminatory, destruction of individuals' homes and means of livelihood would surely result in such a removal from society.[752]

Later, when discussing the "destruction and plunder of property" as persecution, recalling IHL's plunder and pillage provisions and the post-Second World War cases (this Part, Chapter 1), the *Blaškić* Appeals Chamber echoed the CCL 10 *Flick*, by holding that "[t]here may be some doubt" as to whether plunder as such may reach CaH's level of gravity.[753] Accordingly, the Appeals Chamber held that "depending on [its] nature and extent", property destruction may constitute persecution of equal gravity to other article 5 crimes.[754] In this light, to assess whether discriminatory attacks targeting culture's tangible would result in the removal of individuals from society requires a case-by-case approach. In this regard, the IACtHR jurisprudence may provide some useful indicia (Part I, Chapter 2.I.A). Concretely, the *Karadžić* Trial Chamber provided a tangible-centred means of attacking culture, consisting of the plunder of property and wanton destruction of private and public property, including cultural monuments and sacred sites.[755]

Moving to IHL's direct protection, the *Kordić & Čerkez* Trial Chamber first noted that the destruction of culture's tangible as such was already part of the laws and customs of war under the ICTY Statute article 3(d) and had also been characterised as persecution by the IMT and the 1991 ILC Report.[756] The Chamber then held that:

> This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of

[750] *Kordić & Čerkez* Trial Judgment (n 505) para 203.
[751] *Blaškić* Appeal Judgment (n 496) para 159; see also *Kordić & Čerkez* Appeal Judgment (n 415) para 104.
[752] *Kordić & Čerkez* Trial Judgment (n 505) para 205.
[753] *Blaškić* Appeal Judgment (n 496) para 148.
[754] *Blaškić* Appeal Judgment (n 496) para 149; *Kordić & Čerkez* Appeal Judgment (n 415) para 108.
[755] *Karadžić* Trial Judgment (n 721) paras 527-529 and 531.
[756] *Kordić & Čerkez* Trial Judgment (n 505) para 206.

> the notion of "crimes against humanity", for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.[757]

The Trial Chamber thus addressed attacks against culture's tangible as a crime of persecution under the war crimes angle, although it also referred to the 1991 ILC Report. The Chamber further emphasised the gravity of the acts by considering them, at minimum, as a national-international diptych, by injuring humanity as a whole. In *Brđanin*, the Trial Chamber noted the relationship between the ICTY Statute article 3(d) and the tangible's military purpose use.[758] Thereafter, the Chamber concluded that, in the case at hand, destruction of and wilful damage to culture's secular and religious tangible occupy the same level of gravity as article 5's other underlying offences.[759] In *Deronjić*, the accused pleaded guilty to persecution for a number of acts which in terms of culture's tangible, included the destruction of one mosque.[760] The Trial Chamber entered a single conviction for persecution for those crimes.[761] However, as noted by Ehlers, it remains unclear whether the Chamber found the act of destruction to be of sufficient gravity or whether it considered it together with the other acts as part of the wider persecution.[762]

b. The aim of attacking culture's tangible: "memory-cide" and genocide

The *Karadžić & Mladić* Indictment Part I (Counts 1-2) charged the accused for genocide and CaH through a series of anthropo-centred means but also "appropriation and plunder of property", "destruction of property" and "destruction of sacred sites".[763] While the first two charges concerned private property, the charge of destruction of sacred sites encompassed Muslim and Catholic places of worship that were systematically and intentionally damaged and/or destroyed.[764] Counts 1-2 further alleged that those events "destroyed, traumatised or dehumanised most aspects of Bosnian Muslim and Bosnian Croat life".[765] For the purpose of the ICTY rule 61 review,[766] the Chamber heard an expert witness, Colin Kaiser, who had worked for both UNESCO and the Parliamentary Assembly of the Council of Europe. The latter's reports, as explained by Kaiser, always mentioned cultural cleansing alongside ethnic cleansing because, by destroying culture's tangible:

> [y]ou are eliminating the memory of having lived together [and] you are talking about the removal of the signposts of collective and individual life. In this way, we are talking about the spiritual impoverishment for people all over the country. [Thus], the destruction of a mosque is a destruction of something within a Serb or something within a Croat as well.

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[757] *Kordić & Čerkez* Trial Judgment (n 505) para 207.
[758] *Prosecutor v Brđanin*, (ICTY) Judgment (1 September 2004) Case No IT-99-36-T, paras 598-599.
[759] *Brđanin* Trial Judgment (n 758) para 1023.
[760] *Prosecutor v Deronjić*, (ICTY) Judgment (30 March 2004) Case No IT-02-61-S, para 117.
[761] *Deronjić* Trial Judgment (n 760) para 77.
[762] *See* Ehlert (n 442) p 167.
[763] *Karadžić & Mladić* Initial Indictment (n 408) paras 20-22; 23-24; 25; 26; 27-28; 29; and 30, respectively.
[764] *Karadžić & Mladić* Initial Indictment (n 408) paras 30 and 37.
[765] *Karadžić & Mladić* Initial Indictment (n 408) para 31.
[766] Pursuant to ICTY Rules (n 98) rule 61 ("Procedure in Case of Failure to Execute a Warrant"), when an arrest warrant has not been executed, a Trial Chamber could consider whether there were reasonable grounds to believe that the accused had committed any of the offences.

> Destruction of an Orthodox church is a memory that a Croat has. You are dealing, breaking down the whole identity with the destruction of this cultural heritage.[767]

Kaiser's words echo the local-national diptych developed in the general introduction. He further explained that the perpetrators perfectly realised "the significance of heritage as one of the bonds that holds together a society"[768] By seeking to obliterate the targeted group's cultural presence, the perpetrator thus seeks to rid their own group's identity of any cultural impurities. Although culture's tangible constituted the object of the ravage, the implication was heritage-centred. Kaiser further explained that "destruction or damaging a minaret is clearly a sign to a population"; as a means of "chasing the people".[769] This passage may explain why the Trial Chamber, as will be now seen, seemed to have considered that attacks targeting culture's tangible constituted relevant evidence of the genocidal intent.

Referring to the destruction, "in particular, [of] sacred sites", the Chamber noted a predominantly Serbian city, where the destroyed mosques' "ruins were then levelled and rubble thrown in the public dumps in order to eliminate any vestige of Muslim presence".[770] The Trial Chamber observed that this targeting manifested the perpetrators' desire to annihilate the targeted group's culture and religious sites.[771] Next, in analysing ethnic cleansing, the Chamber held that the widespread and systematic nature of the sacred sites' destruction was "part of a "memory-cide", a policy of "cultural cleansing […] aiming at eradicating memory".[772] Clearly, the Chamber linked the tangible-centred means of attacking culture to the broader heritage. In addressing the legal characterisation of offences, the Trial Chamber held that the targeted population was attacked on national or political grounds – a clear reference to some of CaH persecution's discriminatory grounds – in order to establish an ethnically pure new State.[773] The Trial Chamber held that the acts in question constituted "the means to implement the policy of ethnic cleansing", and that they could "more appropriately be characterised as a crime against humanity".[774] This contrasted with the UNGA which considered ethnic cleansing as "a form of genocide".[775] The Chamber's cautious approach flowed from the fact that, as explained in details in this Part's Chapter 3, the Genocide Convention discussions would eventually not retain genocide's tangible-centred means. Be that as it may, the Chamber accepted that attacks against culture's tangible may not only constitute persecution but also serve as evidence with respect to genocide's intent.

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[767] *Prosecutor v Karadžić & Mladić*, (ICTY) Transcript of Hearing (2 July 1996) Case No IT-95-5-R61 and IT-95-18-R61, p 54.
[768] *Karadžić & Mladić* Transcript of Hearing (n 767) p 55.
[769] *Karadžić & Mladić* Transcript of Hearing (n 767) p 57.
[770] *Prosecutor v Karadžić & Mladić*, International Arrest Warrant and Order for Surrender (11 July 1996) Case No IT-95-5-R61 and IT-95-18-R61, para 15.
[771] *Karadžić & Mladić* International Arrest Warrant (n 770) para 41.
[772] *Karadžić & Mladić* International Arrest Warrant (n 770) para 60.
[773] *Karadžić & Mladić* International Arrest Warrant (n 770) para 90.
[774] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 90-91. *See also Sikirica et al* Trial Judgment (n 720) para 89.
[775] UNGA, UN Doc AG/Res/47/121 (n 718).

2. The ICC

As seen earlier (II), the ICC Statute article 7(1)(h) and the ICC Elements of Crimes require, for the actus reus of persecution, that there be a severe deprivation of fundamental rights contrary to international law in connection with any act under article 7(1) or with crimes within the ICC's jurisdiction. The ICC Statute explains neither what these fundamental rights are, nor how to qualify their severe deprivation. While deciphering this is easier when considering the anthropo-centred actus rei of persecution, such as deportation, imprisonment or forced pregnancies, the matter is less obvious when conceiving the tangible-centred means. Here, the ICTY practice can serve as guidance, albeit limitedly. As seen, after reviewing the IMT jurisprudence, IHL-ICL instruments, and the 1991 and 1996 ILC Reports, the ICTY concluded that the destruction of culture's tangible amounted to a breach of customary/conventional international law. However, it was not always clear whether, and if so to what extent, the ICTY considered those breaches as a deprivation of fundamental rights.[776] Notwithstanding this, the IACtHR and ECtHR have made findings of IACHR and ECHR violations in relation to damage to the tangible, whether anthropical or natural (Part I, Chapter 2.II). These *human rights* violations could only enhance the aforementioned ICTY approach that destruction of/damage to culture's tangible may, depending on the circumstance, be characterised as CaH persecution. The question remains whether and how the ICC may consider similar charges as a "severe deprivation of fundamental rights contrary to international law".

On the required connection between persecution and other CaH or other ICC Statute crimes, only article 8 on war crimes expressly addresses crimes relating to culture's tangible and the natural environment (this Part, Chapter 1). Thus, a priori, persecution could apply to culture's tangible only during armed conflict. In this regard, the *Al Hassan* Pre-Trial Chamber has brought to an end twenty years of academic speculations. While the trial was ongoing at the time of writing, the related confirmed charges include, inter alia, the characterisation of the destruction of culture's tangible as persecution. To reach this conclusion, the Pre-Trial Chamber first confirmed the war crime charge of destruction of/damage to culture's tangible under the ICC Statute article 8(2)(e)(iv).[777] Once this was done, the Chamber also considered that these violations constituted the crime of persecution on, inter alia, religious grounds.[778] As seen in this Part, Chapter 1, the same destructions gave rise to war crimes charges and guilty plea in *Al Mahdi*. It remains to be seen whether, and if so to what extent, the *Al Hassan* trial and any subsequent appeals will process this.[779] Be that as it may, it is noteworthy that linking CaH persecution's actus reus to article 8 helped the *Al Hassan* Pre-Trial Chamber to characterise the destruction as CaH persecution. In other words, under this approach, there is still a conceptual relationship between persecution and war crimes, although, under article 7, CaH need not be committed during armed conflict. It would thus be interesting to see whether in future situations involving non-armed conflict cases of destruction of culture's tangible, the ICC will seek to characterise those violations as persecution by referring to provisions other than war crimes. To this effect,

[776] Ehlert (n 442) p 159.
[777] *Al Hassan* Confirmation of Charges Decision (n 423) pp 523-531and p 462.
[778] *Al Hassan* Confirmation of Charges Decision (n 423) pp 673-707and p 465.
[779] On how the destruction of Timbuktu's religious property could be considered a CaH persecution, *See* Sebastian Green Martínez, "Destruction of Cultural Heritage in Northern Mali" (2015) 13(5) *Journal of International Criminal Justice* 1073.

article 7(1)(k), ie CaH other inhumane acts, may provide for one such approach.[780] While both the ICTY and ICC have considered that the latter consists of bodily and its related mental harm, it is not excluded to characterise the destruction of culture's tangible as persecution in the form of other inhumane acts. This is so when considering the so-called indigenous/tribal cases, wherein the IACtHR found that the collectives' illness was caused by damage to their anthropical and natural tangibles (Part I, Chapter 2). Depending on the case at hand, this proposition is not unrealistic. Here, it should be recalled that, having held that the post-IMT-IMTFE customary international law no longer requires a link between CaH and war crimes, the *Kupreškić* Trial Chamber referred to the ICC Statute article 10, according to which:

> [n]othing in the Statute shall be interpreted as limiting or precluding in any way existing or developing rules of international law for purposes other than this Statute.[781]

It thus remains to be seen how the ICC will compare the ICC Elements of Crimes regarding articles 7(1)(h) and 10, and how it will approach this matter if and when it is called to address the question of the destruction of culture's tangible in a non-armed conflict context (for genocide, see this Part, Chapter 3). It may be assumed that this assessment will be conducted on the merits of each case.

3. Outcome

As demonstrated, the ICTY jurisprudence has viewed damage to and destruction of culture's tangible as persecution, provided that the mens rea requirements are met. As nowhere is its actus reus defined, persecution is essentially a mens rea-type crime. Hence the ICTY judges's cautious consideration of the destruction of culture's tangible. Thus, may amount to persecution, those destruction of or damage to culture's tangible that, at minimum, reach the same level of gravity as other ICTY Statute crimes protecting culture's tangible. In this regard, only the war crimes provisions expressly refer to property crimes, whether directly (article 3(d)) or indirectly, as part of objects and urban ensembles of a civilian character (article 3(b)). This type of persecution can be viewed as part of a "memory-cide", and contribute to the so-called ethnic cleansing.

The same can be said of the ICC, although with the nuance that the ICC Statute and the EoC have formally tightened the relationship between the persecution acts and other ICC Statute crimes. As seen, this would in essence mean some of the war crimes actus rei. In effect, this would be tantamount to reinstating the armed conflict nexus, decades after its elimination by the ICC Statute itself. Paradoxically, it is the "severe" character of fundamental rights' deprivation that helps bringing under the persecution umbrella the tangible-centred means of attacking culture. While the term "severe" places a high threshold on the deprivation of fundamental rights, the ECtHR-IACtHR have considered as such damage to or destruction of the collective's anthropical and natural tangible (Part I, Chapter 2). This said, the task will not be easy since, as seen, the *Al Mahdi* Trial Chamber has held that property crimes "are generally of lesser gravity" than crimes against persons (this Part, Chapter 1). It remains to be seen how the *Al*

[780] *See* also Bassiouni, *Crimes Against Humanity* (n 596) pp 405-406, explaining that war crimes include, as "inhumane", acts such as "desecrating religious symbols; and the seizure or destruction of public, religious, and cultural property".
[781] *Kupreškić et al* Trial Judgment (n 624) paras 577 and 580.

Hassan Trial Chamber will view the Pre-Trial Chamber's characterisation of destruction of and damage to culture's tangible as persecution.

More generally, persecution can address the uniqueness of culture's tangible. Hence the *Blaškić* Appeals Chamber's holding that although often comprising a series of acts, persecution could also be made through a single act.[782]

D. Synthesis: heritage-oriented attacks targeting culture's tangible

Both the post-Second World War and post-Cold War ICR-based proceedings have considered the tangible-centred means of attacks targeting culture through culture's religious components, as well as its movable and immovable elements. However, although the post-Second World War trials were detailed in the description of damage to/destruction of culture's tangible, they nonetheless lacked legal precision. It is often hard, if not impossible, to see whether such crimes were characterised as war crimes or CaH. But even when the judgments point to the latter, they do not always mention the crime of persecution. Even when they do, it is not clear whether the words "persecuted"/"persecution" were used legally or colloquially. What further complicates the matter is the fact that the judgments have referred to the same acts as genocide, at a time when the Genocide Convention had not been finalised.

The situation is different with the post-Cold War ICR-based jurisdictions, which benefited from the ILC's forty-fifty years metabolising of the post-Second World War cases. In this regard, the ICTY was first to properly explore the scope of the crime of persecution with regard to culture's tangible. The ICTY did so in connection with other ICTY Statute crimes, ie articles 2-3 on war crimes. Throughout, the ICTY linked this to the concept of ethnic cleansing; the haphazard use of which was turned by the ICTY into precise legal terms through the judicial interpretation of CaH persecution. This, it is argued, resulted in a tangible-centred approach, in that the ICTY viewed damage to/destruction of culture's tangible as a means of attacking culture through the crime of persecution. Like war crimes practice, however (Part II, Chapter 1), the ICTY regularly linked this to the concept of heritage, showcasing once again that attacking culture's tangible results in the alteration of identity, whether as a diptych (locally-nationally or nationally-internationally) or as a triptych (locally-nationally-internationally).

In the case of the ICC, suffices it to note that the ICC Statute has required that acts of persecution be committed in connection with acts under article 7(1) or other ICC Statute crimes, of which, only war crimes expressly address culture's tangible, whether expressly or by assimilation to objects and sites of a civilian character. While the ICC has finally adopted the ICTY's approach in the Al Hassan confirmation of charges decision, it is imperative to wait for the outcome of the trial. As time will go by, the ICC will be confronted with cases where attacks against culture's tangible will occur outside an armed conflict scenario. It will thus be up to the ICC to consider such attacks as other inhumane acts. To adopt such an innovative thinking, the ICC will benefit from

[782] *Blaškić* Appeal Judgment (n 496) paras 135 and 138, referring to *Prosecutor v Vasiljević*, (ICTY) Judgment (25 February 2004) Case No IT-98-32-A, para 113; and *Krnojelac* Appeal Judgment (n 672) paras 199 and 221.

the ICC Statute article 10 on the relationship between the ICC Statute provisions and "existing or developing rules of international law". In any event, the question of the crimes' characterisation will depend on the facts before the judges.

IV. Conclusion to Chapter 2: fundamental (cultural) rights violations – between war crimes and genocide?

CaH can address attacks targeting culture under both tangible-centred and anthropo-centred angles. CaH can further do so as a diptych or triptych, by combining culture's local, national, and international layers. This is so because CaH may address attacks that target culture, both in terms of aims and means. As seen, the terminology used to describe CaH is both culture-centred and culture-sensitive. From the very beginning, in 1915, CaH were conceptualised by British, French and Russian Euro-centred empires against an ailing, predominantly, Asian empire, the Ottomans. Christian civilisations went on to denounce, originally for their domestic consumption, the Christian victims of their decaying rival Muslim empire. Out of British pragmatism and French fear of its Muslim colonies, the original Russian terminology of "crimes committed by Turkey against Christianity and civilization" was secularised into "crimes of Turkey against humanity and civilization". Eventually, with the IMT and IMTFE Charters' deletion of the word "civilization", the word "humanity" came to represent both religion and civilisation, notions representative of culture, par excellence (general introduction). In other words, CaH are synonymous with crimes against civilisation/culture, as both are the cause and consequence of each other. This would be implicitly reflected in the chapeau of CaH (the targeting of a civilian population as a collective) and, explicitly, in the underlying offence of persecution (the discriminatory grounds).

From the 1945 IMT Charter to the 1998 ICC Statute, it took half a century to conceive and refine CaH's chapeau elements. The IMT-IMTFE and CCL 10 models in fact only contained fragments of the future chapeau – such as the civilian population as victims, together with an armed conflict nexus – albeit in relation to the various actus rei of CaH. It was only in the 1990s that the ICTY-ICTR models progressively built the chapeau, both formally and substantively. Departing from the IMT-IMTFE and CCL 10 models, the ICTR chapeau elements introduced the general requirements for CaH's underlying offences to be made. After the Cold War's four decades-long ICL hiatus, a five year fast-track process clarified the definition of CaH from the 1993 ICTY Statute to the 1998 ICC Statute, which, absent a CaH treaty, provides the most authoritative definition, as it was adopted by 120 States and counts even more States Parties after the ICC Statute's entry into force. The ICTY-ICTR chapeau shared the requirements for a (widespread or systematic attack) against any civilian population. Otherwise, they diverged, as they reflected the specific situations grounding their creation. As regards the definition of CaH, at the ICTY, the predominantly CaH-type situation during international and non-international armed conflicts in Yugoslavia prompted the adoption of an armed conflict nexus requirement. At the ICTR, a predominantly genocide-type situation in Rwanda resulted in the absence of an armed conflict nexus but the adoption of discriminatory grounds requirements. This explains the status of CaH: forever born to war crimes, in fact as an extension of them; yet linked to genocide.

Hence, the ICTY's adjudication of attacks targeting culture always navigated between these two crimes. Often grounding persecution's actus reus on war crimes as regards the culture's tangible, the ICTY regularly linked persecution to genocide, specifically for ethnic cleansing and the genocidal intent's evidence. Based on these experiences, States drafting the ICC Statute clarified the chapeau elements, which now simply require a widespread or systematic attack against any civilian population, omitting the armed conflict nexus requirement. This facilitates characterising the attacking of culture as CaH for two main reasons. First, such attacks may also occur during times of trouble falling short of an armed conflict (Part I). Second, the chapeau elements of CaH, as clarified by the ICC Statute, focus on the mass targeting ("widespread or systematic attack") of given collectives ("any civilian population"). Once these are met, it should be possible to criminalise those mass human rights violations that target culture, whether anthropo-centred or tangible-centred. Accordingly, regardless of CaH's underlying offences, the chapeau elements mean that it is the members of that collective who would constitute the actual victims of CaH's underlying offences. This places CaH in a situation similar to HRCts' practice which, as shown in Part I, Chapter 2.II.A, have always considered attacks targeting culture through the collective.

Moving to CaH's underlying offences, it has been shown that they are all anthropo-centred. However, persecution and possibly other inhumane acts are abstract enough to encompass the inanimate. Specifically, persecution may not only encompass those underlying acts, but also other crimes (in connection with the ICC Statute or otherwise in the case of the ICTY). From the IMT to the ICC, the crime of persecution kept evolving for nearly half-a-century, in terms of both its mens rea and actus reus. Characterised by its discriminatory grounds, the ICC Statute extended the mens rea of persecution's decade-long exhaustive list (political, racial or religious grounds) to a non-exhaustive one, to encompass national, ethnic, cultural, religious and gender grounds as well as any other grounds, when "universally recognized as impermissible under international law". These grounds – not least the "cultural" one – are such that their judicial consideration cannot escape cultural considerations, since their meaning will evolve in culture's time and space dimensions, thereby influencing the adjudicators' analytical lens. Most importantly, however, the cultural features of these discriminatory grounds turn persecution into a cultural crime. This is because the perpetrators' discrimination is based on grounds that define the identity of victims, in whole or in part. Thus by virtue of its mens rea alone, persecution is a cultural crime. Accordingly, the CaH of deportation or rape may not be cultural per se, but when committed on persecution's discriminatory grounds, they target the individual's identity. This targeting of heritage thus forms part of the targeting of culture.

Under this approach, the combined practice of both the post-Second World War and post-Cold War ICR-based jurisdictions allows for persecution's actus reus with respect to attacks that target culture to be considered from anthropo-centred and tangible-centred angles. Indeed, absent a definition of the crime of persecution's actus reus, it has fallen on judges to progressively define its actus rei. The anthropo-centred approach has mainly consisted of a series of legislative/regulatory restrictions (social, civic and professional) and their implementing physical acts (ranging from imprisonment to forced displacement). Referenced as "cleansing" or "ethnic cleansing", both have been the means to rid wide territories of the targeted victims, on the grounds of their identity. In its most extreme form, persecution eventually escalated into the extermination of the victims. As far as the ICC is concerned, its legal requirements have been more explicit,

in that the ICC Statute already described them as a severe deprivation of fundamental rights contrary to international law, in connection with any act under article 7(1) or crimes within the ICC jurisdiction. But the ICC judges will still need to adopt a case-by-case approach, in order to establish whether certain actus rei could characterise the anthropo-centred means of attacks targeting culture. As seen, the ICC (and the ECCC) has gone further than the ICTY by expressly considering that attacks against certain rights with respect to culture's intangible can constitute persecution.

Moving to persecution's tangible-centred actus reus, both the post-Second World War and post-Cold War ICR-based jurisdictions considered culture's tangible, whether secular or religious, movable or immovable. While detailed in their description of damage/destruction, the post-Second World War trials often lacked legal clarity in their characterisation of such acts as CaH persecution. An additional complication flowed from the then confusion that reigned between CaH/persecution and genocide. Forty-fifty years later, combining the post-Second World War jurisprudence and the ILC work, the post-Cold War ICR-based jurisdictions have properly explored the tangible-centred component of the crime of persecution. The ICTY did so by grounding attacks against culture's tangible in its war crimes provisions. For these are the only ICTY subject-matter provisions to address crimes involving the tangible, whether possessing a general civilian character or being expressly referenced as culture's tangible. The ICTY's tangible-centred approach of attacks targeting culture remained, however, confined to culture's tangible as the object – rather than victim – of the attacks. This is unsurprising given the fact that the ICTY did not foresee any participation status for victims (general introduction). Over twenty years after the ICTY's first such practice, the ICC has replicated the same approach, since the ICC Statute requires that acts of persecution be committed in connection with acts under the ICC Statute crimes, of which, only war crimes address culture's tangible both expressly and as part of objects of civilian character and/or urban ensembles. It is nonetheless interesting to see how the ICC will address attacks targeting culture in cases not involving armed conflicts. As explained, it should be possible, depending on the facts of the case, to consider such attacks as other inhumane acts committed on discriminatory grounds. In this regard, the ICC could be guided by the findings of the IACtHR in its so-called indigenous/tribal cases (Part I, Chapter 2). No doubt this will be challenged. One could bring forward the ICC Statute article 10 on the relationship between the ICC Statute and "existing or developing rules of international law". Furthermore, one should recall that under the ICC Rules rule 85, culture's tangible, when capable of acting as a legal person, may participate as a victim in ICC proceedings and seek reparations for damage to itself.

As seen, CaH in general and persecution in particular are linked to both war crimes and genocide. The former has been manifest in the way in which the ICTY and ICC have characterised their tangible-centred approach by linking attacks against culture's tangible to their war crimes provisions. Methodologically, even if CaH no longer require an armed conflict nexus, they may still require going through armed conflict violation provisions. On the other hand, persecution acts as a lower genocide crime. This is by virtue of both the ICTY's ethnic cleansing jurisprudence and, mainly, article 7(1)(h) that persecution may occur by targeting victims by reason of their collective identity flowing from their affiliation to the enumerated grounds as well as of the group or collective. Beyond a connection with the IACtHR practice (Part I, Chapter 2), this brings persecution very close to the crime of genocide (Chapter 3), in that it is capable of addressing the attacks that target culture, both in terms of aims and means.

CHAPTER 3: GENOCIDE

I. Introduction: an intrinsically anthropological crime

According to the ICJ, the principles contained in the Genocide Convention form part of customary international law and constitute an obligation erga omnes.[783] As it appears in the Genocide Convention, genocide occurs when any of its actus rei are "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[784] Traditionally, and especially in the practice of ICR-based jurisdictions, determining the mens rea has been the main challenge to prove the constitutive elements of this crime, since the material element is perceived as being relatively clearly enumerated in the Genocide Convention.

However, in reality, this perception does not reflect the complexities inherent to the crime of genocide.[785] There are instances where the material element of this crime poses as many problems as its mental element – in isolation and/or in combination with the latter. This Chapter's problematic consists of assessing the extent to which – if at all – "cultural genocide" may be considered an existing category of genocide, under either the mental or material elements. To date, this issue has remained blurred, and both the wording of the Genocide Convention and the practice of ICR-based jurisdictions have prevented the neat settlement of this issue.

Two main factors explain this uncertainty: the definition of the word "culture" and the discrimination made between tangible-centred and anthropo-centred crimes in the hierarchy of crimes. On the first factor, as seen in the general introduction, since any exact delimitation of the scope of the word culture will always result in controversies, attacks targeting culture are best viewed under both tangible-centred and anthropo-centred approaches. When applied to the Genocide Convention, the challenge is whether, in some situations, exactions of the collective's culture amount to genocide. That is, whether that collective constitutes a "group" under the convention and whether the cultural damage inflicted on that group may result in its destruction "in whole or in part", should the perpetrator have so intended.

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[783] For customary international law, *see Reservation on the Convention on the Prevention and Punishment of the Crime of Genocide,* (ICJ) Advisory Opinion (18 May 1951) ICJ Rep 1951 p 15, p 23. ICTY and ICTR judgments have relied on this case and the "Report of the Secretary-General" (n 108) to affirm that this customary international norm contains a jus cogens rule prohibiting States from committing genocide (for an exception, *see Sikirica et al* Trial Judgment (n 720) para 55). However, neither this case nor the report mention this. In fact, the report simply speaks of genocide as forming part of customary international law. *See* "Report of the Secretary-General" (n 108) para 45. *See* also generally Paola Gaeta, "On What Conditions Can a State Be Held Responsible for Genocide?" (2007) 18(4) *European Journal of International Law* 631. For obligations erga omnes, *see Barcelona Traction, Light and Power Company (Belgium v Spain)*, (ICJ) Judgment (5 February 1970) ICJ Rep 1970, p 4, paras 33-34.

[784] Genocide Convention (n 105) art 2.

[785] For an examination of the implications and complexities surrounding the crime of genocide more generally, *see* Akhavan (n 48).

The second factor explaining the uncertainty surrounding cultural genocide flows from the distinction between anthropo-centred and tangible-centred crimes. When referring to the crime of genocide, physical genocide first comes into mind, sometimes followed by biological genocide, but rarely by cultural genocide. This is because the first two categories of genocide are perceived as directly concerning the integrity of the individuals belonging to the targeted group. For example, torturing or sexually assaulting individuals belonging to the targeted group illustrates victims' suffering – either mental, physical or both. However, cultural genocide – should it exist – would constitute a different type of suffering: one that, a priori, does not penetrate the group's individual members as deeply as physical and biological genocide. The use of the words "a priori" is intentional, since the IACtHR has found that tribal/indigenous groups may actually experience illness as a result of cultural heritage attacks (Part I, Chapter 2).

These two factors shaped twentieth century discussions surrounding cultural genocide, which was notoriously conceptualised by Raphaël Lemkin in "Axis Rule in Occupied Europe".[786] The creator of the word "genocide" identified eight "fields" in which this crime could occur: cultural, biological, economic, moral, physical, political, religious and social.[787] With regard to culture, he explained that genocide could be perpetrated:

> by prohibiting or destroying cultural institutions and cultural activities; by substituting vocational education for education in the liberal arts, in order to prevent humanistic thinking, […] because it promotes national thinking.[788]

Although the above passage does not use the expression "cultural genocide", the means it refers to constitute an early conceptualisation of some of its actus rei, which Lemkin viewed as both tangible-centred (destruction of cultural institutions) and heritage-centred (change of modes of education). Considering the "immediate" destruction of the group through mass killings as one aspect of genocide, Lemkin saw the latter as:

> a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.[789]

This passage should be read in the context of the Second World War, including the conflation of the concepts of nationality and minority. While the scope of the group is narrower than that later defined in the Genocide Convention, Lemkin saw genocide as

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[786] During the 1933 Fifth International Conference for Unification of Penal Law, Lemkin proposed that certain acts aimed at the destruction of racial, religious or other groups be declared international crimes. Lemkin included the "barbarity" as "the extermination of social collectivities" and vandalism "consisting in destruction of cultural and artistic works of these groups". *See* Raphael Lemkin, "Genocide as a Crime in International Law" (1947) 41(1) *American Journal of International Law*146, which also refers to Raphael Lemkin, "Le Terrorisme" (1933) *Actes de la Vème Conférence pour l'unification du droit penal à Madrid* 14-20 X 1933 (1933), and its supplement entitled "Les Actes constituent un danger général (interétatique) considérés comme délits des droit des gens" (1933).
[787] Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law 1944), pp xi-xii and 79-90.
[788] Lemkin, *Axis Rule in Occupied Europe* (n 787) pp xi-xii.
[789] Lemkin, *Axis Rule in Occupied Europe* (n 787) p 79.

encompassing criminal acts in fields as diverse as culture, economics, politics, etc. Evidently, as seen in the general introduction, many of these, eg language and religion, are culture's constitutive elements. As regards culture, Lemkin explained that:

> [t]he world represents only so much culture and intellectual vigor as are created by its component national groups. Essentially the idea of a nation signifies constructive cooperation and original contributions, based upon genuine traditions, genuine culture and a well-developed national psychology. The destruction of a nation, therefore, results in the loss of its future contributions to the world.[790]

Lemkin thus adopted a heritage-centred approach of culture as a diptych/triptych, wherein the destruction of a nation results in world impoverishment. Pivotal to this Chapter is the idea that a nation – read "a group" – is a set of original contributions based on culture. Almost as if nation and culture were synonymous. This understanding, as later relayed by Lebanon and, most passionately by Pakistan during the Genocide Convention drafting (II) is key to this Chapter's approach to genocide. As will be seen, the definition of a group requires integrating a set of objective and subjective factors which, with the passing of time, often are perceived as stereotyping (eg racial groups). What is clear, is that groups are understood through cultural lenses which depend on two factors: geographic (where an idea is expressed) and temporal (when an idea is expressed). Eventually, therefore, groups are a set of cultural units since they are defined through cultural perceptions. Following the footsteps of Lemkin and countries such as Lebanon and Pakistan, this study will thus argue that genocide itself is cultural insofar as its intent and consequences are concerned. Hence cultural genocide is a tautology. However, as regards its means, genocide may be physical and biological and, as will be discussed, perhaps cultural. This dichotomy between intent, consequence and means constitutes this Chapter's foundation. As will be argued, if this had been and were systematically incorporated into international law actors' discourse, many of the issues surrounding the so-called cultural genocide would not (have) arise(n). As will be seen, ICR-based jurisdictions have considered that the Genocide Convention does not include cultural genocide, with Schabas suggesting, rightly, that no customary norm – which would fill the conventional gap – has emerged.[791] In contrast, and as noted by Novic, non-binding instruments, such as the 1982 UNESCO Declaration of San Jose consider cultural genocide as a crime under international law.[792]

The ultimate anthropological crime, genocide – as defined in the Genocide Convention article II – has continuously given rise to interpretative challenges, as the ordinary meaning of many of the expressions contained therein is equivocal. This has made it necessary to move from the Vienna Convention on the Law of the Treaties article 31(1),[793] to article 32.[794]

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[790] Lemkin, *Axis Rule in Occupied Europe* (n 787) p 91.

[791] Schabas, *Genocide in International Law* (n 15), p 189.

[792] *See* UNESCO, "Latin-American Conference, Declaration of San Jose" (11 December 1981) UNESCO Doc FS 82/WF32 (1982), equating "ethnocide" (an ethnic group's denial, often as mas human rights violations, of cultural and language development, enjoyment and transmission, individually and collectively) with cultural genocide. *See* also Novic (n 15) p 35.

[793] Art 31(1) ("general rule of interpretation") reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

See Vienna Convention on the Law of the Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

[794] Art 32 ("supplementary means of interpretation") reads:

Accordingly, the following section will turn to the travaux préparatoires of the Genocide Convention in order to provide an objective account of the discussions that shaped cultural genocide (II). Unlike most other scholarly commentaries or even the 1996 ILC Report, this study will proceed with a session by session account of the 1946-1948 negotiations of the Convention, so as to maximise the exposure of facts to the reader, minimise the author's margin of subjectivity and settle once for all the travaux préparatoires' ambiguities. This is important as it appears that, except for a few such as Novic and Schabas, most commentators have looked only at the travaux préparatoires' prominent documents or that they have espoused other commentators' points, by reference. However, as the author and Dr Philippa Webb had to proceed with a line-by-line reading of all available travaux préparatoires in order to generate their first ever compilation,[795] the author came to the realisation that the picture is far less clear than that proposed by commentators and international jurisdictions. Thereafter, a review of the latter's practice will help explain their mantra-like rejection of cultural genocide resulting from the conflation of the type of destruction contained in the chapeau of the definition of genocide and the means to effect that, ie the actus reus (III).

II. Drafting the Convention

A. Introduction

On 11 December 1946, the UNGA adopted, unanimously and without debate, Resolution 96(I), declaring genocide, "the denial of the right to existence of entire human groups", as homicide denies the right of existence of individuals.[796] Although UNGA Resolution 96(I) did not clarify the crime's scope, it adopted a heritage-centred approach by providing that genocide "results in great losses to humanity in the form of cultural and other contributions represented by these human groups".[797]

Thereafter, the UNSG drew-up a draft convention ("Secretariat Draft"), in consultation with Raphaël Lemkin, Henri Donnedieu de Vabres and Vespasian Pella, including all potential aspects of genocide, subject to their subsequent retention, modification or rejection by the following bodies. First, it would be transmitted to the ECOSOC ad hoc Committee ("Ad Hoc Committee"),[798] which would transmit its revised draft ("Ad Hoc

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> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) Leaves the meaning ambiguous or obscure; or
> (b) Leads to a result which is manifestly absurd or unreasonable.

See VCLT (n 793).

[795] Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6).

[796] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.

[797] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (n 6) p 34.

[798] UNGA, "Draft Convention on Genocide" (11 November 1947) UN Res 180(II) *in* Abtahi and Webb, *The Genocide Convention: The Travaux Préparatoires* (n 6) pp 467-468. The Ad Hoc Committee comprised China and Lebanon (the future Asia-Pacific Group ("APG")), Poland and the Soviet Union

Committee Draft") to the UNGA through the Sixth Committee.[799] In fact, following preliminary discussions on the Ad Hoc Committee Draft, it was decided that a drafting committee ("Drafting Committee") would consider the Ad Hoc Committee Draft as modified and adopted by the Sixth Committee.[800] The resolutions recommended by the Drafting Committee, including a final draft convention ("Drafting Committee Draft"), which reflected articles II and III of the Ad Hoc committee Draft, formed the basis for a second round of discussions in the Sixth Committee.[801]

As reflected in the travaux préparatoires, this very complex drafting process combined with the negotiators' confusion with respect to the mens rea, actus reus and motive of the crime does not facilitate the understanding of definition of genocide. In turn, the confusions of the 1940s' legislators with respect to cultural genocide have been transferred into the ILC's work, which has in turn been imported by adjudicatory bodies and not always refuted by legal scholars. The following section will demonstrate this and propose a different reading of the travaux préparatoires by providing an in-depth focus on the discussions during the drafting of the chapeau (A) and the actus rei (B) of genocide. On this basis, it will be proposed that even though the tangible-centred actus rei were excluded from the Genocide Convention, the crime of genocide embraces many cultural features that turn cultural genocide into a tautology.

(the future Eastern European Group ("EE")), Venezuela (the future Latin American and Caribbean Group ("GRULAC")) and France and the United States (the future Western European and others Group ("WEOG")). *See* ECOSOC, "Resolution of 3 March 1948" (3 March 1948) UN Res 117(VI), UN doc E/734 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 619 and ECOSOC, "Ad Hoc Committee on Genocide Ad Hoc Committee's Terms of Reference" (1 April 1948) UN Doc E/AC25/2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 643-645.

[799] ECOSOC, "Draft Convention on the Crime of Genocide ('Secretariat Draft')" (6 June 1947) UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 222-224.

[800] UNGA, "Sixty-Third Meeting: Consideration of the Draft Convention on Genocide" (30 September 1948) UN Docs A/C6/SR63 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1291-1299; UNGA, "Sixty-Fourth Meeting: Consideration of the Draft Convention on Genocide" (1 October 1948) UN Doc A/C6/SR64 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1301-1309; UNGA, "Sixty-Fifth Meeting: Consideration of the Draft Convention on Genocide" (2 October 1948) UN Doc A/C6/SR65 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1311-1321; UNGA "Sixty-Sixth Meeting: Consideration of the Draft Convention on Genocide" (4 October 1948) UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1324-1331.UNGA UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1329; UNGA, "Agenda Item 32: Motion Submitted by the Delegation of the Philippines" (2 October 1948) UN Doc A/C6/213 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1976. The Drafting Committee was composed of Egypt; the future Africa Group (AG); China and Iran (APG); Brazil and Cuba – later to be replaced by Uruguay (GRULAC); Czechoslovakia, Poland and the Soviet Union (EEG); Australia, Belgium, France, the United Kingdom and the United States (WEOG). *See* Nehemiah Robinson, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960), p 27.

[801] UNGA, "Hundred and Twenty-Eighth Meeting: Continuation of Consideration of the Draft Convention on Genocide" (29 November 1948) UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1864-1870; UNGA, "Agenda Item 32: Report of the Drafting Committee" (23 November 1948) UN Doc A/C6/288 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2010.

B. The Chapeau: genocide is cultural

This section will identify a series of conceptual confusions during the legislators' 1946-1948 discussions that have led adjudicators – unanimously – and legal scholars predominantly – not to realise that, under any shape and form, genocide is in fact cultural, in terms of both the chapeau's intent and motive (1) as well as its protected groups (2).

1. Intent and motive

The chapeau of the definition of genocide in the convention contains both the intent and motive for the commission of the crime. It does, however, not explain what destroying a group means. A review of discussions regarding the Secretariat Draft (a), the Ad Hoc Committee Draft (b), and the Sixth Committee (c) helps clarify cultural genocide's doctrinal and judicial misconstructions.

a. The Secretariat Draft

The Secretariat Draft article I(I) and (II), in combination, and with overlaps, defined the mens rea of genocide. Entitled "Protected Groups", article I(I) focused on the human groups' destruction, without defining the types of destruction.[802] Although titled "Acts qualified as Genocide", article I(II) in fact elaborated on a combination of motive and intent, ie "with the purpose of destroying [the groups] in whole or in part, or of preventing [its] preservation or development".[803] In fact, by providing that genocide was a crime "committed on religious, racial, political or any other grounds", UNGA Resolution 96(I) had already alluded to the motive of the crime.[804] This heritage-centred approach, which considered the group's preservation and development is noteworthy. Only once does The Commentary of the United Nations Secretary-General to the Secretariat Draft ("UNSG Commentary") refer to the group's physical destruction.[805] Later, in States' comments to the Secretariat Draft, the United States indicated that political groups should be included in the Genocide Convention if it consisted of the group's "physical destruction", without further elaborating on the latter's meaning.[806]

The Secretariat draft's lack of precision regarding the mens rea, actus reus and motive would shape the negotiations until the convention's adoption.

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[802] The text reads: "[t]he purpose of this Convention is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings", *see* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[803] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[804] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.
[805] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 231.
[806] ECOSOC, "Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat" (30 January 1948) UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 537.

b. The Ad Hoc Committee Draft

The Ad Hoc Committee discussions on the type of group destruction were often opaque, as it was not always clear whether delegates were contemplating the destruction of the group (mens rea) or of its individual members (actus reus).[807] At one point, the Soviet Union contemplated that genocide "essentially connotes the physical destruction of groups" and added a set of actus rei aimed at curtailing the group's cultural features.[808] Importantly, the United States confirmed – albeit proposing to further discuss it – Lebanon's understanding, which would also be agreed by Venezuela, that the verb "connotes" means that the destruction may also be otherwise.[809] By distinguishing "between the aim – the physical destruction of a group –" and its required actus reus, France was more clear, in terms of both the mens rea-actus reus distinction and its viewing the group's destruction as only physical.[810]

On motives, Lebanon was correct when it indicated that the group's destruction would be grounded on the "hatred of something different or alien, be it race, religion, language, or political conception, and acts inspired by fanaticism in whatever form".[811] Thus, genocide concerns the perpetrator's existential unease vis-à-vis everything represented by the group itself. Hence, the perpetrator must have intended "the destruction of the group, as such".[812] Genocide is thus grounded on the rejection of and is intended to result in the destruction of collectives, the definition and, importantly,

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[807] *See* eg, ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 736; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 836 and 843.

[808] The Soviet proposal read:

> II. genocide […] essentially connotes the physical destruction of groups of the population on racial and national (religious) grounds.
>
> III. […] genocide must also cover measures and actions aimed against the use of the national language or against national culture (so-called "national-cultural genocide"), e.g.:
>
> (a) the prohibition or restriction of the use of the national tongue in both public and private life; the prohibition of teaching in schools given in the national tongue;
>
> (b) the destruction or prohibition of the printing and circulation of books and other printed matter in the national tongues;
>
> (c) the destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture (or of religious worship).

See ECOSOC, "Ad Hoc Committee on Genocide Ad Hoc Committee's Terms of Reference" (7 April 1948) UN Doc E/AC25/7 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 696-697.

[809] For the United States, *see* ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (15 April 1948) UN Doc E/AC25/SR4 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 722. For Venezuela, *see* ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 726-727.

[810] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourth Meeting" (16 April 1948) UN Doc E/AC25/SR105 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 840 and 843.

[811] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Second Meeting" (5 April 1948) UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 691.

[812] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Tenth Meeting" (16 April 1948) UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.

perception of which is cultural. Despite the United States' support for the incorporation of Lebanon's phrase into a common chapeau to physical and cultural genocide,[813] the ensuing discussions resulted in having the motives expressly enumerated.

It is amidst these boisterous opinions that the Ad Hoc Committee eventually agreed to two distinct provisions dedicated to physical-biological genocide (article II) and cultural genocide (article III), in keeping with a United States proposal.[814]

> ARTICLE II ("Physical" and "biological" genocide)
> In this Convention genocide means any of the following deliberate acts committed with the intent to destroy a national, racial, religious or political group, on grounds of the national or racial origin, religious belief, or political opinion of its members:
> (1) killing members of the group;
> (2) impairing the physical integrity of members of the group;
> (3) inflicting on members of the group measures or conditions of life aimed at causing their deaths;
> (4) imposing measures intended to prevent births within the group.[815]

Article II's title reflects in fact the actus rei described in subparagraphs (1)-(4). In other words, the physical and/or biological destruction attach to the actus rei as opposed to the group. The chapeau further described both the intent ("with the intent to destroy") and the motives ("on grounds of").

On the other hand, and to cater for their emerging division with France and the United States, the delegations of China, Lebanon, Poland, the Soviet Union and Venezuela prepared a new cultural genocide draft, which initially read:

> In this Convention genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial or religious group on grounds of national or racial origin or the religious belief:
>
> 1) prohibiting the use of the language of the group in daily intercourse or in schools, or prohibiting the printing and circulation of publications in the language of the group;
> 2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[816]

The chapeau introduced a separate mens rea for cultural genocide, which focused on the destruction not of the group, but of its "language or culture". Paragraphs 1's actus reus was both anthropo-centred and tangible-centred while paragraph 2's actus reus was tangible-centred. Intriguingly, the forced transfer of children, the Secretariat Draft's only actus reus of cultural genocide which gathered all three experts' agreement, was

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[813] The text read: "In this convention, genocide means any of the following acts directed against a national, racial, religious or political group as such"; *see* ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Twelfth Meeting" (23 April 1948) UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 861.
[814] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.
[815] ECOSOC, "Ad Hoc Committee on Genocide, Draft Convention on the Prevention and Punishment of The Crime of Genocide (Drawn Up by the Committee)" (19 May 1948) E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1155-1156 and 1162. *See* also ECOSOC, UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 868.
[816] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 892.

omitted. The chapeau was then successfully amended (France and the United States voting against) by two Lebanese proposals,[817] so that the modified version, now article III, would read:

> ARTICLE III ("Cultural" genocide)
> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:
> (1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
> (2) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[818]

As now will be seen, these two definitions would constitute the backbone of all future controversies and misunderstandings surrounding the so-called cultural genocide.

c. The Sixth Committee

At the Sixth Committee, the United Kingdom suggested deleting the motive from the chapeau because "Once the intent to destroy a group existed, that was genocide", regardless of the perpetrators' motive.[819] One group of States, including Australia, Brazil, Norway, Panama and Venezuela supported this viewpoint.[820] The opposing group, consisting of Egypt, Iran, New Zealand, the Philippines, the Soviet Union, Turkey, and Yugoslavia, argued for maintaining the motive so as to distinguish genocide from other crimes, since some of the actus rei of genocide could be tantamount to, for example, war crimes.[821] This mélange des genres was eventually brought to an end with the adoption of Venezuela's compromise proposal to return to Lebanon's Ad

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[817] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 892.
[818] ECOSOC, "Ad Hoc Committee on Genocide, Draft Convention on the Prevention and Punishment of The Crime of Genocide (Drawn Up by the Committee)" (19 May 1948) E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1155-1156 and 1162. *See* also ECOSOC, UN Doc E/AC25/SR12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 868.
[819] UNGA, "Agenda Item 32: United Kingdom of Great Britain and Northern Ireland: Amendments to Articles II and III of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/222 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977; and UNGA, "Seventy-Fifth Meeting: Consideration of the Draft Convention on Genocide" (15 October 1948) UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1415.
[820] *See* UNGA, "Sixty-Ninth Meeting: Consideration of the Draft Convention on Genocide" (7 October 1948) UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1360-1361 (Norway); UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1417-1418 and UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1357 (Venezuela) and 1416 (Australia and Panama); and UNGA, "Seventy-Sixth Meeting: Consideration of the Draft Convention on Genocide" (16 October 1948) UN Doc A/C6/SR76 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1428 (Brazil).
[821] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1416-1417 (Egypt, Iran, Soviet Union), 1418 (New Zealand, Turkey, Yugoslavia) and 1419 (the Philippines).

Hoc Committee proposal, by substituting the words "as such" for any explicit enumeration of the motive.[822]

On the types of group destruction, earlier cacophonies continued, as best illustrated by France's position that ""physical destruction" corresponded exactly to the text of article II, which dealt solely with biological genocide".[823] Most important was a failed Soviet Union proposal to substitute "aimed at the physical destruction" for "committed with the intent to destroy" in order to "very clearly" distinguish article II actus rei from article III's.[824] This rejected proposal had the merit of showcasing the debates' confusion as regards the destruction of the group (ie the collective as the sum of its natural persons) and the means to achieve it (measure against natural persons making up the group). It is therefore unclear how, as will be analysed in this Chapter's Section II, while discussing cultural genocide, the ILC, ICTY and ICJ could affirm decades later that the destruction of the group is only physical (and biological).

What emerges from the Secretariat Draft, the Ad Hoc Committee Draft and the Sixth Committee discussions is a sense of conceptual confusion, with the likes of France and the United States viewing genocide's destruction as physical and at times – albeit in an unclear manner – biological, while others like the Soviet Union opposed this restriction.

During the article III discussion, Pakistan proposed to amend that provision as follows:

> In this Convention, genocide also means any of the following acts committed with the intent to destroy the religion or culture of a religious, racial or national group:
>
> 1. Systematic conversions from one religion to another by means of or by threats of violence.
> 2. Systematic destruction or desecration of places and objects of religious worship and veneration and destruction of objects of cultural value.[825]

By focusing on the destruction, not of the group, but of its culture (with religion as a sub-category), the chapeau reflected Pakistan's – and earlier on Lebanon's – position on genocide's mens rea, ie its essence; in other words, the destruction of what defines a group as a cohesive collective. Paragraphs 1-2's actus rei were anthropo-centred and tangible-centred, respectively, with a larger reliance on the religious aspects of the groups' culture rather than on its secular components.

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[822] UNGA, "Agenda Item 32: Venezuela Amendment to Article II of the Draft Convention on Genocide (E/794)" (13 October 1948) UN Doc A/C6/231 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1984; UNGA, "Seventy-Seventh Meeting: Consideration of the Draft Convention on Genocide" (18 October 1948) UN Doc A/C6/SR77 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1435.

[823] UNGA, "Seventy-Third Meeting: Consideration of the Draft Convention on Genocide" (13 October 1948) UN Doc A/C6/SR73 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1387. *See* also UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1410, wherein Sweden explained that the Ad Hoc Committee Draft article II "applied only to the most horrible form of the crime against a group, that of its physical destruction".

[824] UNGA, "Seventy-Third Meeting: Consideration of the Draft Convention on Genocide" (13 October 1948) UN Doc A/C6/SR73 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1386 and 1389.

[825] UNGA, "Agenda Item 31" (13 October 1948) UN Doc A/C6/229 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1983.

Earlier, when opening the article III discussions, Pakistan had explained that:

> [c]ultural genocide could not be divorced from physical and biological genocide, since the two crimes were complementary insofar as they had the same motive and the same object, namely the destruction of a national, racial or religious group as such, either by exterminating its members or by destroying its special characteristics.[826]

Instead of focusing on the very complex distinction between the type of the group destruction and it means, Pakistan placed the emphasis on the latter. Accordingly, the means of destroying the group could be the destruction of the collective's natural persons, a physical act, eg their extermination. But it could also consist of the destruction of the collective's defining features, which can be effected though tangible and intangible means, since culture is made of both. Pakistan then strengthened this heritage-centred approach by explaining that:

> cultural genocide represented the end, whereas physical genocide was merely the means. The chief motive of genocide was a blind rage to destroy the ideas, the values and the very soul of a national, racial or religious group, rather than its physical existence. Thus the end and the means were closely linked together; cultural genocide and physical genocide were indivisible. It would be against all reason to treat physical genocide as a crime and not to do the same for cultural genocide.[827]

In terms of criminal law, for Pakistan, the mens rea of genocide was to destroy a group, as such, with two sets of actus rei forming a whole: (i) the physical-biological elimination of its members; and (ii) the destruction of their specific characteristics. Both (i) and (ii) are committed in order to eliminate a group as such, ie for the mere fact of what it is. Under this heritage-centred approach, cultural genocide becomes a tautology, in that it is primarily the group, as a cultural collective, that is intended to be eliminated, regardless of whether this is achieved through (i) or (ii). This reasoning considers cultural genocide to be the crime's actual intent and motive.[828] It matters not how it is characterised, genocide is cultural. When killing the members of a group with the requisite mens rea, the target is that group, ie a collective that exists because of characteristic that are either cultural (eg religious/ethnic) or perceived through a cultural lens (eg racial/national) or, most often, both. But what does that group consist of?

2. Protected groups

Dropping the words "national" and "ethnical" from the original draft's exhaustive list of groups and adding "political" to a non-exhaustive list, UNGA Resolution 96(I) referred to the commission of genocide "[w]hen racial, religious, political and other

[826] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[827] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[828] This view was somewhat echoed by the Soviet Union and Czechoslovakia, which explained that "All those [Nazi] acts of cultural genocide had been inspired by the same motives as those of physical genocide; they had the same object – the destruction of racial, national or religious groups"; *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1516-1517.

groups have been destroyed, entirely or in part".[829] From then on, the groups were progressively defined during the Genocide Convention's various drafting stages. The travaux préparatoires show a heavily culturally influenced process, with cultural interconnections characterising the many overlaps between the groups (a) and a cultural evolution of their meaning then and now (b).

a. A cultural interconnection

Titled "Protected Groups", the Secretariat Draft article I(I) provided for the prevention of "the destruction of racial, national, linguistic, religious or political groups of human beings".[830] The UNSG Commentary explained that apart from the linguistic group, the other four had been mentioned in UNGA Resolution 96(I).[831] In fact, the UNSG Commentary must have meant the draft UNGA Resolution 96(I), since the actual resolution contained only racial, religious and political groups. In contrast to Lemkin's doubts about including political groups on the grounds that they "have not the permanency and the specific characteristics of the other groups", the United States supported their inclusion.[832] However, in order to prevent delaying the adoption of the convention, the Consultative Council of Jewish Organizations opposed this inclusion, suggesting, instead, "political as well as other grounds" in the Preamble.[833]

Except for political groups, the chapeau's protected groups were not debated during the Secretariat Draft and the Ad Hoc Committee Draft preparations. Only a handful of Sixth Committee sessions addressed, inter alia, the question of protected groups. What transpires is a culturally interconnected definition of the protected groups, as well as a generally outdated cultural understanding of those concepts.

i. National, racial and religious groups

At the Sixth Committee, the United Kingdom explained that national/religious groups were as unstable as political groups, since one was "as free to leave them as they were to join them".[834]

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[829] The draft text read, inter alia, "when national, racial, ethnical or religious groups have been destroyed, entirely or in part", *see* UNGA,UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.
[830] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 214 and 224.
[831] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 230.
[832] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 230; and UNGA, "Annex 3a to Draft Convention on Genocide, Communications Received by the Secretary-General" (27 September 1947) UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 373.
[833] ECOSOC, "Committee on Arrangements for Consultation with Non-Governmental Organisations: List of Communications received from Non-Governmental Organisations" (30 July 1947) UN Doc E/C2/49 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 469-470.
[834] UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1359.

While one group of States supported the inclusion of religious groups, another opposed it. Norway and Iran supported their inclusion as, according to them, it is difficult to leave a religious group.[835] At the other end of the spectrum were countries like Belgium, which found that including such groups would expand the concept of genocide,[836] and the Soviet Union, which saw religious groups as a sub-category of national and racial groups. Claiming that "persecution was always directed against national groups, even when it took the form of religious strife", and that "religious "motive had always been connected with other motives of a national or racial character" the Soviet Union explained that by seeking to exterminate religious groups the Nazis had aimed for "the destruction of national groups".[837] The Soviet Union thus saw any ravage inflicted upon religious groups as the destruction of national and, at times racial, groups.

Disagreeing with the Soviet Union, Egypt supported the inclusion of religious groups, recalling that Saint Bartholomew and "recent events in India, Pakistan and Palestine" concerned religious rather than racial or national groups.[838] Yugoslavia cited Serb-Croat massacres as "cases of genocide for religious motives within the same nation".[839]

Already at that stage, these discussions illustrated the artificiality of systematically distinguishing between national, sometimes racial, and religious groups. This is best showcased by the concept of religion. While one expects for it to have been settled in the mid-twentieth century, it gave rise to diverging interpretations, uniting countries such as Iran and Norway against the likes of the United Kingdom.

ii. National, ethnical and linguistic groups

During the Secretariat Draft discussions, the United States opposed the inclusion of "linguistic" groups since it believed that genocide would not occur because of "linguistic, as distinguished from […] racial, national or religious, characteristics".[840] Linguistic groups were therefore dropped without any significant discussions.

At the Ad Hoc Committee, Lebanon expressed doubt about the word "national", explaining that legal systems understood the concept of nationality differently and that

[835] UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1360 (Norway); and UNGA, "Seventy-Fourth Meeting: Consideration of the Draft Convention on Genocide" (14 October 1948) UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1392 (Iran).
[836] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1401.
[837] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1399; and UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[838] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1414.
[839] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1414.
[840] UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 373; ECOSOC, UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 537.

ethnic groups were included in national groups.[841] The United States proposed, unsuccessfully, combining "nationality" and "national origin" so as to cater for ethnic groups not belonging to the majority of the nationals.[842] Lebanon and the United States thus saw a relationship between ethnic and national groups.

At the Sixth Committee, when proposing to add "ethnical" after "national",[843] Sweden explained, inter alia, that a minority might be characterised by its language. Accordingly, if it did not fall under "a national group", "a linguistic group" could benefit from protection "as an ethnical group".[844] Sweden thus recognised that the group could be linguistic, although it linked language to ethnicity, partly echoing the United States' aforementioned opposition to include linguistic groups. Furthermore, Sweden delinked ethnic from national groups.

To the Soviet Union, as a smaller "sub-group of a national group", ethnical groups were "of benefit to humanity".[845] The Soviet Union considered ethnic groups through heritage, ie in a cultural manner.

iii. Ethnical and racial groups

The term "racial" gave rise to limited discussions, and mainly in relation to the word "ethnical". When discussing its aforementioned amendment proposal in the Sixth Committee, Sweden explained that since a given group's dominating characteristic was not always the "ill-defined" racial group, that given group should better be defined "by the whole of its traditions and its cultural heritage", which would best be characterised by the addition of ethnical groups.[846] Thus, already questioning the concept of race's understanding, Sweden saw the word ethnic as a more holistic concept, which captures a collective's culture and heritage.

Belgium and Egypt saw no major difference between "ethnical" and "racial" groups, with Belgium suggesting that "ethnical" would add nothing.[847] On the same grounds, Uruguay reached a different conclusion by proposing "ethnical" to be substituted for "racial".[848] However, noting that the "intermingling between races in certain regions" had made it no longer possible to consider them as races, Haiti affirmed that they would

[841] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 843-844.
[842] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 844.
[843] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1390
[844] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.
[845] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1400.
[846] UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.
[847] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1412-1413.
[848] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1412.

be better classified as ethnic groups.[849] Thus Haiti supported the inclusion of both racial and ethnical groups, which resulted in the adoption of Sweden's addition.[850]

The discussions thus showed a general sense of confusion wherein States understood the terms national, racial, ethnical and religious differently. Thus, already in 1946-1948, depending on States' historical experiences, controversies were in the making with respect to terms characterising the convention's groups. This makes the definition of groups, by any adjudicator of the crime, a cultural exercise at any moment in time. Indeed, not only the words national, racial, ethnical and religious were not understood uniformly by States in 1946-1948, but also their meaning has espoused cultural evolutions, whether locally-nationally or globally.

b. A cultural evolution

While the above-analysis shows the cultural interconnection in the debates surrounding the definition of groups, the following illustrates their cultural evolution. As will be seen, States used definitions that mainly reflected the 1940s' conceptions of national groups, race, culture and ethnicity, within the English language and among nations.

i. National groups

As rightly pointed out by Schabas, during the drafting of the Genocide Convention, national groups were synonymous with the European concept of "national minorities", which is broader than "nationality" as understood today and encompasses "racial, ethnic and religious groups as well".[851] It is also under this concept that the Soviet Union understood that of nationality. Other countries, such as Iran, which had never been a Western colony and whose State-centred foundation predated by a millennium that of Western countries, understood the concept in a manner very similar to the twenty-first century. Therefore, during the discussions, the understanding of the same word was dependent on each negotiator's background. In sum, nationality meant minority to some (as opposed to the country's majority) and a more regulated type of collective to others (ie nation State). The latter is how the word is understood today. For example, in *Akayesu* and based on the ICJ's *Nottebohm*, the Trial Chamber viewed national groups as a collective defined mainly through legal and administrative features, regardless of its biological and physiological features.[852]

Thus, when using the word "nationality" during the negotiations, different people meant different things. But in a 1940s' world still dominated by colonial powers and major European-minded countries, it was often associated with the word minority. But what was a minority? A race, an ethnicity, or a religion?

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[849] UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[850] Although with 18 votes to 17 and with 11 abstentions. *See* UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1413.
[851] Schabas, *Genocide in International Law* (n 15) p 118.
[852] *Akayesu* Trial Judgment (n 612) para 512: "a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".

ii. Racial groups

It is first important to see how the convention's drafters understood "race". The 1949 Oxford Dictionary provides three definitions of race. First as:

> Group of persons or animals or plants connected by common descent, posterity of (person), house, family, tribe or nation regarded as of common stock, distinct ethnical stock, genus or species or breed or variety of animals or plants, any great division of living creates […].[853]

Second, as "descent, kindred"; and third, as "class of persons with some common feature".[854] The term race thus conveyed the idea of a collective, ranging from the family unit to tribe and, further, nation. This collective is such because of common features or, as put by the dictionary, "ethnical stock". This 1949 definition is best illustrated by the 1942 Joint Declaration by the Members of the United Nations Against Extermination of the Jews, which referred to "persons of Jewish race".[855] Rejected by today's Western parlance, this terminology is linked to Nazi Germany's "racial antisemitism" which, motivated by racial eugenics, racialised Jews so as to proceed with their segregation, isolation and Final Solution.[856] Violating the Nürnberg Laws, particularly the "Law for the Protection of German Blood and German Honor", which was based on protecting the "purity of German blood [as] the essential condition for the continued existence of the German people", was considered *Rassenschande* otherwise known as "racial pollution" or "race disgrace".[857] Notably, in *Der Ewige Jude*, the narration concludes with the phrase "the eternal law of nature, to keep one's race pure".[858] By basing the legal definition of a Jew not on religious affiliation but rather on race – viewed though birth, blood and genealogy – the Nürnberg Laws captured a

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[853] HW Fowler, "Race" *in The Concise Oxford Dictionary of Current English* (3rd edn Oxford Clarendon Press 1949), p 954.
[854] "Race" *in* Fowler*, The Concise Oxford Dictionary* (n 853) p 954.
[855] UN, "Joint Declaration by Members of the United Nations Against Extermination of the Jews" (17 December 1942) <https://www.msz.gov.pl/resource/e7497fea-f446-4f82-80b1-169d609d697a:JCR> accessed on 14 April 2019. *See* "11 Allies Condemn Nazi War on Jews; United Nations Issue Joint Declaration of Protest on 'Cold Blooded Extermination'", *New York Times* (18 December 1942) <https://www.nytimes.com/1942/12/18/archives/11-allies-condemn-nazi-war-on-jews-united-nations-issue-joint.html>accessed on 14 April 2019.
[856] *See* "Antisemitism in History: Racial Antisemitism, 1875-1945" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945> accessed 14 April 2019; and Bianca Gubbay, "The Racialisation of Jews in Germany before WWI" (2012) CERS Working Paper <https://cers.leeds.ac.uk/wpcontent/uploads/sites/97/2013/05/Racialisation_of_Jews_in_Germany_Bianca_Gubbay.pdf> accessed 14 April 2019.
[857]*See* "Nürnberg Laws - Law for the Protection of German Blood and German Honor" (15 September 1935) 100/1935; and "Nuremberg Race Laws" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws> accessed 14 April 2019.
[858] *Der Ewige Jude*, dir. Fritz Hippler, Germany, Terra, 1940, [film]; Stig Hornshoj-Moller and David Culbert, "Der Ewige Jude: Joseph Goebbels' Unequaled Monument to Antisemitism" (1992) 12(1) *Historical Journal of Radio, Film and Television*, 67; Allison C Kirk, "Eugenics, race hygiene, and the Holocaust: Antecedents and consolidations" *in* Jonathan C Friedman (ed) The Routledge History of The Holocaust (Routledge 2011); Sarah Gordon *Hitler, Germans and the "Jewish Question"* (Princeton University Press, 1984), pp 100-101; and Benno Müller-Hill and George R Fraser, *Murderous science: Elimination by scientific selection of Jews, Gypsies, and others, Germany 1933-1945* (Oxford University Press, 1988, pp 182-183.

wider scope of persons, including those who had converted. Notwithstanding this, the IMT and the *Justice Case* found, respectively, the treatment of Jews to constitute "persecution on political and racial grounds" and "persecution on racial grounds".[859] The judgments thus reflected the then understanding of the term race, as reflected in the 1949 Oxford Dictionary and as perverted by those laws. This is illustrated by the IMTFE which, while unrelated to the Axis' European frontline, also referred to, with respect to the Axis' Pacific frontline, the prisoners of war's "racial needs", "racial habits" and "racial customs".[860]

To the Western educated readers, the aforementioned terminology and its use would sound obsolete. This is so given the 1950s' cultural turning point, as reflected in the 1950 UNESCO Race Question which, prepared by anthropologists, explained that:

> the term "race" designates a group or population characterized by some concentrations, relative as to frequency and distribution, of hereditary particles (genes) or physical characters, which appear, fluctuate, and often disappear in the course of time by reason of geographic and or cultural isolation.[861]

The first part of this explanation acknowledged certain scientific foundations for races. Notwithstanding its characterisation of race through the combination of genetics, territory and culture, the 1950 UNESCO Race Question then explained that:

> National, religious, geographic, linguistic and cultural groups do not necessarily coincide with racial groups: and the cultural traits of such groups have no demonstrated genetic connexion with racial traits.[862]

Here, genetics are disconnected from territory-culture. Reflecting on colonialism's atrocities, as justified by culture on the surface (but economic imperialism on the substance) and ultimate perversion by the Nazis, anthropologists appeared thus to have reached a turning point. Culture had to be separated from race once for all. Half a century later, the *Akayesu* Trial Chamber would confirm this by delinking "linguistic, cultural, national or religious" factors from the genetics-territory combination.[863] Finally, having explained the error of linking genetics to culture, the 1950 UNESCO Race Question went on to explain that:

> Because serious errors of this kind are habitually committed when the term "race" is used in popular parlance, it would be better when speaking of human races to drop the term "race" altogether and speak of ethnic groups.[864]

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[859] IMT Judgment (n 490) p 304; and *The Justice Case* (n 625) p 64.
[860] *United States of America et al v Araki et al*, (IMTFE) Judgment (12 November 1948) 49688 and 49712-49713, *in* Neil Boister and Robert Cryer (eds) *Documents on the Tokyo International Military Tribunal, Charter, Indictment and Judgments* (Oxford, 2008), pp 567 and 576.
[861] UNESCO, "UNESCO and its Programme: The Race Question" (1950) <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf> accessed 14 April 2019, para 4.
[862] UNESCO, "The Race Question" (n 861) para 6.
[863] *Akayesu* Trial Judgment (n 612) para 514, holding that "The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factor".
[864] UNESCO, "The Race Question" (n 861) para 6.

In 2020, the Oxford Dictionary defines "race" as "[e]ach of the major divisions of humankind, having distinct physical characteristics".[865] Having adhered to the aforementioned genetics-based understanding of the term "race", the dictionary goes on, however, to propose, as a sub-definition "A group of people sharing the same culture, history, language, etc.; an ethnic group".[866] Having thus established a relationship between culture and ethnicity, the dictionary explains, on the usage, that:

> In recent years, the associations of race with the ideologies and theories that grew out of the work of 19th-century anthropologists and physiologists has led to the use of the word race itself becoming problematic. Although still used in general contexts, it is now often replaced by other words which are less emotionally charged, such as people(s) or community.[867]

This culturally sensitive-driven approach likely explains why the Oxford Thesaurus proposes "ethnic group" as a synonym for "race".[868] Following the footsteps of the 1950 UNESCO Race Question, the early twentieth century English language has opted for a cultural understanding of collectives rather than a genetic one.

iii. Ethnical groups

The 1949 Oxford Dictionary defined "ethnical" as "Pertaining to race, ethnological"; and "ethnically" as "gentile, heathen [especially in relation to] *ethnos* [as] nation".[869] Apart from linking the word ethnic to "race" as well as to some loaded – if not prejudiced – words (gentile, heathen), the definition refers to its Greek etymology "ethnos", which means nation, tribe or race. Thus, when considering the 1940s' understanding of nationality as synonymous with minorities, the latter seem to be encompassed in the term ethnical which, by implication, must have encompassed the understanding of national minorities as cultural units.

In fact, in 2020, the Oxford Dictionary defines "ethnic" as "[r]elating to a population subgroup (within a larger or dominant national or cultural group) with a common national or cultural tradition".[870] This shows that apart from dropping the prejudiced components of the definition, the twenty-first century has simply further refined the more "benign" understanding of that term. As seen under the definition of race, ethnicity and culture share a strong link, reinforced by the following sub-definition: "[r]elating to national and cultural origins".[871] This explains why on the synonyms, the Oxford Dictionary provides, first: "racial, race-related, ethnological, genetic, inherited".[872] This set relates to the hereditary understanding of race. But the second set of synonyms consists of eminently heritage-centred concepts, ie "cultural, national, tribal, ancestral, traditional, folk".[873] This understanding has been espoused by

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[865] "Race" *in Oxford English Dictionary Online* (n 26) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.
[866] "Race" (n 865).
[867] "Race" (n 865).
[868] "Race" (n 865).
[869] "Ethnical" *in* Fowler, *The Concise Oxford Dictionary* (n 853) p 388.
[870] "Ethnic" *Oxford English Dictionary Online* (n 26).
[871] "Ethnic" (n 870).
[872] "Ethnic" (n 870).
[873] "Ethnic" (n 870).

Akayesu, where the Trial Chamber considered ethnic "as a group whose members share a common language or culture".[874] The *Kayishema* Trial Judgment used these terms verbatim, adding that, in the alternative, it can be a group based on self-identification or on identification by others.[875] On this, the 2020 Oxford Dictionary explains that:

> Ethnic is sometimes used in a euphemistic way to refer to non-white people as a whole, as in a radio station which broadcasts to the ethnic community in Birmingham. Although this usage is quite common, more specific terms such as 'black' or 'Asian' are preferable. Note that use of the word as a noun is often regarded as offensive, especially in British English, and is best avoided.[876]

This passage shows how, within the same culture, the term "ethnic" is constantly evolving so that at any given time, its meaning may not be universally understood.

Regardless of which of these subjective or objective approaches is prioritised, ethnicity is clearly linked to culture. Even when the ICTR cases mention culture and language, the latter is constitutive of the former. Thus, an ethnic group is a cultural collective. As Schabas rightly observes, the best course is to consider the word "ethnical" both "largely synonymous" with and "encompassing elements" of those groups, whether national, racial or religious.[877]

iv. Religious groups

As seen earlier, the travaux préparatoires do not show any specific consideration of religious groups other than that reflected fifty years later in *Akayesu*, wherein the Trial Chamber held that their "members share the same religion, denomination or mode of worship".[878] The 1999 Group of Experts on Cambodia proposed that the atrocities committed against the Monkhood could constitute genocide of a religious group, as evidenced by:

> the Khmer Rouge's policies to eradicate the physical and ritualistic aspects of the Buddhist religion; the disrobing of monks and abolition of the monkhood.[879]

By linking religion's tangible to its intangible, this passage confirms one of this study's propositions, ie to consider culture's tangible in relation to its intangible. Schabas has argued that the Khmer Rouge's acts aimed to destroy Buddhism as opposed to physically destroy its members[880] Alternatively, he explains, one could consider the "clergy itself as a religious group".[881]

In a very thought-provoking proposition, Lippman has considered that:

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[874] *Akayesu* Trial Judgment (n 612) para 513.
[875] *Kayishema* Trial Judgment (n 708) para 98: "An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".
[876] "Ethnic" (n 870).
[877] Schabas, *Genocide in International Law* (n 15) p 127.
[878] *Akayesu* Trial Judgment (n 612) para 515.
[879] UNGA, "Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135" (18 February 1999), para 64.
[880] Schabas, *Genocide in International Law* (n 15) p 129.
[881] Schabas, *Genocide in International Law* (n 15) p 129.

> [r]eligious groups encompass both theistic, non-theistic, and atheistic communities which are united by a single spiritual idea.[882]

This all-inclusive proposition is most interesting as it allows for considering religion as more than the organisation of theistic beliefs. Either way, it shows that religion's understanding, like that of race and ethnicity, is couched in cultural considerations.

3. Outcome: genocide's intent, motive and consequences are cultural

The Genocide Convention's chapeau would eventually read:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[883]

As seen, the travaux préparatoires do not offer much guidance to understand these words. However, they are helpful as they illustrates the delegations' conceptual, misunderstandings, whether anthropological – ie the understanding of the groups – or legal – ie the crime's mens rea, actus reus and motive.

As regards the former, the discussions regarding the protected groups was clearly influenced by cultural conceptions. Indeed, the prism through which the concepts of nationality, ethnicity, race, and religion were envisaged was debatable then, now and fifty years onward because, beyond any possible scientific precision, they are deeply rooted in both geographic and temporal settings. Geographic, because understanding the convention's groups varies from country to country, region to region. Temporal, because within any given country or region, the meaning of these notions will always evolve with time. These geographic and temporal criteria are precisely factors that make culture a dynamic concept. And this in turn impacts on the definition of the four groups. As Schabas observes, these terms:

> necessarily involve a degree of subjectivity because their meaning is determined in a social context. […] They are social constructs, not scientific expressions, and were intended as such by the drafters of the Convention.[884]

> To many of the delegates [in] 1948, Jews, Gypsies and Armenians might all have been qualified as "racial groups," language that would be seen as quaint and perhaps even offensive a half-decade later. Their real intent was to ensure that the Convention would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. […]
>
> The four terms […] not only overlap, they also help to define each other, operating much as four comer posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. […] The

[882] Matthew Lippman, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8(1) *Temple International and Comparative Journal* 1, p 29.
[883] Genocide Convention (n 105).
[884] William A Schabas, "Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda" (2000) 6 *ILSA Journal of International and Comparative Law* 375, p 384.

> drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.[885]

Challengingly enough, to define the groups is to define collective identities. This triggers the question as to the extent to which lawyers are well suited to define the highly complex question of identity, something that anthropologists, sociologists and ethnologists have been struggling with.

Moving to the strained discussions regarding intent and motives, it has also been seen that confusion reigned among many of the negotiators who lacked a criminal law background. Even for those familiar with criminal law, their understanding of intent and motive differed according to their legal systems. This also impacted on the understanding of the meaning of the destruction of group. As seen, many negotiators often conflated the destruction of the group (mens rea) and that of its members (actus reus). By implication, it is not always clear whether delegates' references to the concepts of physical, biological and cultural genocide were made with respect to the mens rea or the actus rei. Judiciously, Lebanon suggested the "destruction of a group, even though the individual members survived".[886] On the mens rea/motive nuance, Lebanon further observed that the group's destruction was based on the perpetrator's "hatred of something different or alien"; hence the intent to destroy "the group, as such".[887] Indeed, genocide is the rejection of cultural collectives, regardless of their denomination, because the perpetrator seeks to rid the world of their presence. As if an otherwise healthy body needed to be cured from those viruses. To the perpetrator's mind, genocide is thus an act of cleansing. Any collective whose presence alters the perpetrator's world conception, which is perceived through the perpetrator's cultural prism (whether secular or religious), may be destroyed. Once again, Lebanon best characterised this heritage-centred feature when it noted that UNGA Resolution 96(I) had condemned genocide because of "the loss likely to be suffered by humanity if it were deprived of the possible or actual cultural contribution of the group destroyed".[888]

Finally, it is noteworthy that many States mixed human rights law with ICL. A majority of opposing States considered cultural genocide as a human rights (minority rights) issue rather than ICL.[889] Suggesting that "the punishment of cultural genocide was

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[885] Schabas, "Groups Protected by the Genocide Convention" (n 884) p 385.
[886] ECOSOC, UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 690.
[887] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 842.
[888] ECOSOC, UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 690-691. While the convention (n 105) does not contain provisions on victims' participation and reparation, art XIII ("Reparations to Victims of Genocide") of the UNSG Commentary proposed as victims both the members of the protected group and the protected group itself. Reparations consisted of restitution and compensation for the former and, for the latter: "reconstitution of the moral, artistic and cultural inheritance of the group (reconstruction of monuments, universities, churches, etc. and compensation to the group for its collective needs"). *See* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 249-51.
[889] During the Human Rights Committee discussions on the Ad Hoc Committee Draft, some States such as the United Kingdom were already suggesting that cultural genocide was a minority rights rather than ICL issue. *See* UNGA, UN Doc E/SR218 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1224-25 and 1248; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Third Meeting" (13 April 1948) UN Doc E/AC25/SR3 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 701; ECOSOC, UN Doc E/AC25/SR10

logically related to the protection of human rights",[890] France was joined by a number of States, such as Canada and India.[891] Ignoring its pre-colonial culture, and in contrast to its twenty first century policy of multiculturalism, Canada specifically observed that as their "cultural heritage" was mainly composed of "a combination of Anglo-Saxon and French elements", Canadians would strongly resist undermining their influence in Canada.[892] Belgium, Brazil, the Netherlands, Sweden and the United States considered it more appropriate to cover the issue under minority rights.[893] Many of these States were concerned about accusations of cultural genocide for the treatment of their own minorities. For example, Sweden was concerned with accusations of cultural genocide in relation to the conversion "of the Lapps in Christianity".[894] Referring to the UN Trusteeship Council's opinion on Tanganyika that "the now existing tribal structure was an obstacle to the political and social advancement of indigenous inhabitants", New Zealand warned that the UN itself could be accused of cultural genocide if the latter were included in the convention.[895] South Africa warned against article III's misuse "where primitive or backward groups were concerned".[896] Denmark stated that if the convention's scope "were unduly extended" toward "the protection of minorities", the convention could become "a tool for political propaganda instead of an international legal instrument".[897] These States wanted to avoid risks arising from their national policies regarding their minorities, whether in the metropole or in colonies/territories. But Pakistan opposed the proposed transfer of the Genocide Convention discussion to the – then future – Universal Declaration of Human Rights ("UDHR") on the ground that the latter does not criminalise human rights breaches.[898] Pakistan was joined by

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in Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 727; ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighth Meeting" (17 April 1948) UN Doc E/AC25/SR8 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 811; ECOSOC, UN Doc E/AC25/SR14 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 889.

[890] UNGA, UN Docs A/C6/SR6 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1295.

[891] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1509-1510 and 1512. Adopted one day after the Genocide Convention, the UDHR did not cover the protection of minorities. The Sixth Committee delegations favouring cultural genocide's consideration by the Third Committee knew that the latter would not consider it, as evidenced by the United States' opposition in the Third Committee to such a provision. *See* Schabas, *Genocide in International Law* (n 15) p 186.

[892] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1510.

[893] UNGA, UN Docs A/C6/SR6 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1515-1516; UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1506-1507 and 1514.

[894] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1506.

[895] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1511-1512.

[896] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1513.

[897] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1508.

[898] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502, holding that the UDHR "could not declare cultural genocide to be a crime nor provide measures for its prevention and punishment". Pakistan did not dispute assimilation into a homogeneous unit, but warned of those cases where this policy was "a euphemism concealing measures of coercion designed to eliminate certain forms of culture"; *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1503.

Ecuador, the Byelorussian Soviet Socialist Republic, the Soviet Union,[899] and China, which argued that "Although it seemed less brutal", cultural genocide:

> might be even more harmful than physical or biological genocide, since it worked below the surface and attacked a whole population, attempting to deprive it of its ancestral culture and to destroy its very language.[900]

Interestingly, despite its exclusion from the groups, language was seen as a component of culture whose alteration impacted heritage, in the sense of group identity.

C. The actus rei: heritage-centred or tangible-centred?

The UNSG Commentary referred to Lemkin's distinction between:

> "physical" genocide (destruction of individuals), "biological" genocide (prevention of births), and cultural genocide (brutal destruction of the specific characteristics of a group).[901]

The UNSG Commentary asked whether all three actus rei or only the first two should be retained, already indicating tensions over cultural genocide.[902]

The UNSG Commentary viewed physical genocide (article II(I)(1)) as "Acts intended to "cause the death of members of a group, or injuring their health or physical integrity"".[903] It characterised biological genocide (article II(1)(2)) through acts intending the group's "extinction", through "systematic restrictions on births without which the group cannot survive"; by means ranging from sterilisation/compulsory abortions to the segregation of the sexes and imposing obstacles to marriage.[904] These explanations contemplate the physical and/or biological destruction of the *members* of the group (the word "extinction" being subject to multiple understanding) [emphasis added]. As regards cultural genocide, the UNSG Commentary explained that it:

> consists not in the destruction of members of a group nor in restrictions on birth, but in the destruction by brutal means of the specific characteristics of a group.[905]

The UNSG Commentary thus attached physical, biological and cultural genocide to the actus reus of the crime which targeted individuals, whether corporally-biologically,

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[899] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1512, 1515 and 1516.
[900] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1507.
[901] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 224 and 234.
[902] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 224.
[903] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 233.
[904] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[905] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.

mentally or else the practice of their customs. In contrast, delegates would often conflate the nature of the group destruction and the means to achieve it. The Genocide Convention legislators' confusion between intent (and often motive) on the one hand and the actus reus on the other hand has in turn impacted the international adjudicators and commentators' understanding of cultural genocide. Navigating through the convention's travaux préparatoires is complex. Understanding cultural genocide requires a sequential analysis of the travaux préparatoires. As this section will show, only a detailed review of the travaux préparatoires combined with this study's proposed heritage-centred and tangible-centred approach helps properly determine the fate of cultural genocide within the convention (1). However, since the ICJ would be asked in *Bosnia* and *Croatia* to rule on article II(b)-(c) in relation to cultural genocide, a brief analysis of discussions surrounding those sub-provisions will be conducted later on (2).

1. Provisions directly addressing cultural genocide

Discussions directly focusing on cultural genocide took place in two main stages: the first one favoured both heritage-centred and tangible-centred actus rei (a); and the second stage retained only one heritage-centred actus reus (b).[906]

a. Proposing both heritage-centred and tangible-centred actus rei

i. The Secretariat Draft

The Secretariat Draft Preamble adopted a heritage-centred approach in terms of the consequences of genocide, by providing, inter alia, that genocide:

> inflicts irreparable loss on humanity by depriving it of the cultural and other contributions of the group so destroyed.[907]

This passage echoed both UNGA Resolution 96(I) and "Axis Rule in Occupied Europe".[908] Article I(II)(3) provided that genocide could consist of "Destroying the specific characteristics of the group by":

> (a) Forced transfer of children to another human group; or
> (b) Forced and systematic exile of individuals representing the culture of a group; or
> (c) Prohibition of the use of the national language even in private intercourse; or
> (d) Systematic destruction of books printed in the national language, or of religious works, or prohibition of new publications; or

[906] *See* also Abtahi and Webb, "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention" (n 7).
[907] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 214.
[908] UNGA, UN Res 96(I) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 34.

> (e) Systematic destruction of historical or religious monuments or their diversion to alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.[909]

Paragraphs (d)-(e) were tangible-centred, as they addressed the destruction of culture's tangible, whether movable or immovable, secular or religious. They call for no comments additional to what has been explained throughout this study. However, paragraphs (a)-(c), which were anthropo/heritage-centred, require a brief explanation. The acts explained therein directly target the collective's members through intangible (language prohibition) and tangible measures. The latter, which consisted of the physical separation of individuals from the collective, were twofold: they concerned the children on the one hand and the adults on the other hand. According to the UNSG Commentary, under article I(II)(3)(a):

> the separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time.[910]

As regards article I(II)(3)(b), the UNSG Commentary referenced cultural, scientific and societal leaders without whom "the group is no more than an amorphous and defenceless mass", something that would be echoed decades later in the rulings of the IACtHR (Part I, Chapter 2) and ICTY (this Chapter, Section II).[911]

Supported by France and the United States, Donnedieu de Vabres and Pella opposed the inclusion of article I(II)(3) on the basis that cultural genocide was "an undue extension" of genocide, which "amounted to reconstituting the former protection of minorities (which was based on other conceptions)".[912] Translated into the 2020s' language, the bracketed part means that minority protections were a human rights issue whereas genocide was a criminal law one. However, this should be nuanced since, as seen in this study, human rights issues involving attacks targeting culture may be tantamount to crimes, eg in case of CaH persecution (Part I, Chapter 2). In contrast to Donnedieu de Vabres and Pella's position, Lemkin believed that cultural genocide should be included, arguing that without preserving its spiritual and moral unity, a

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[909] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 215.

[910] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235. The ICC Elements of Crimes provide that "forcible" ranges from physical to threat of force, through coercion (duress, psychological oppression or abuse of power). *See* ICC, "Elements of Crimes: Crimes Against Humanity, Deportation or Forcible Transfer of Population" (2011) art 7(1)(d).

[911] These were "chiefly, scholars, writers, artists, teachers and educators, ministers of religion, doctors of medicine, engineers, lawyers, administrators"; *see* ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235. For Lemkin, attacking the "three basics phases of life in a human group; physical existence, biological continuity (through procreation), and spiritual or cultural expressions [qualify] as physical, biological, or cultural genocide. […] By destroying spiritual leadership and institutions, forces of spiritual cohesion within a group are removed and the group starts to disintegrate. Religion can be destroyed within a group even if the members continue to subsist physically". *See* Raphael Lemkin, "Genocide as a Crime under International Law" (1948) 4(2) *United Nations Bulletin*, p 71, referred to in *United States of America v Ulrich Greifelt et al* ("RuSHA"), (United States Military Tribunal) Judgment (10 October 1947 and 10 March 1948) 13 LRTWC 1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 40.

[912] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.

"racial, national or religious group" would cease to exist.[913] Noting the groups' contribution "to civilization generally", he added that "[i]f the diversity of cultures were destroyed, it would be as disastrous for civilization as the physical destruction of nations".[914] From this heritage-centred approach regarding attacks targeting culture, Lemkin went on to provide the following nuanced but firm vision:

> Cultural genocide was much more than just a policy of forced assimilation by moderate coercion – involving for example, prohibition of the opening of schools for teaching the language of the group concerned, of the publication of newspapers printed in that language, of the use of that language in official documents and in court, and so on. It was a policy which by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings.[915]

Thus reiterating his "Axis Rule in Occupied Europe" vision, Lemkin remained cautious by linking the above-referred acts to "drastic methods" as opposed to "moderate coercion". Addressing this issue would thus be a case-by-case matter.

Intriguingly, despite opposing the inclusion of article I(II)(3), France and the United States agreed to include subparagraph (a), without any explanation.[916]

In subsequent discussions, Lebanon, Poland and Yugoslavia supported article I(II)(3).[917] On the other hand, the Netherlands and the United States agreed with Donnedieu de Vabres and Pella.[918] France simply opposed the inclusion of cultural genocide, stating that it was "unable to recognise any but physical genocide".[919] This was odd since France was not opposed to biological genocide. This inexplicable lack of distinction between physical and biological genocide requires a cautious reading of the travaux préparatoires with respect to the physical/biological/cultural genocide

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[913] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[914] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[915] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[916] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[917] UNGA, "One Hundred and Thirty-ninth Meeting at Lake Success, New York" (12 February 1948) UN Doc E/SR139 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 589 (Lebanon); UNGA Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 193; UNGA, "Forty-First Meeting at Lake Success, New York" (3 October 1947) UN Doc A/C6/SR41 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 395 (Poland); and UNGA, UN Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 167 (Yugoslavia).
[918]UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 374; ECOSOC, "Prevention and Punishment of Genocide Comments of Governments on the Draft Convention Prepared by the Secretariat (Document E/447)" (22 April 1948) UN Doc E/623/Add3 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 636, para 2.
[919] UNGA, "Committee on the Progressive Development of International Law and its Codification: Summary Record of the Twenty-Eighth Meeting" (24 June 1947) UN Doc A/AC10/SR28 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 164; UNGA, UN Doc A/401 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 383; ECOSOC, "Prevention and Punishment of Genocide: Historical Summary (2 November 1946 – 20 January 1948)" (26 January 1948) UN Doc E/621 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 527; ECOSOC, UN Doc E/623 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 538.

dichotomy. This gives credence to this section's proposition that postures were adopted as a matter of principle, for fear of accusation relating to colonialism's defects.

ii. The Ad Hoc Committee Draft

Initially, the Ad Hoc Committee decided, by six votes to one, that cultural genocide should, as a matter of principle, be included in the Genocide Convention.[920] Lebanon explained that UNGA Resolution 96(I)'s aforementioned heritage-centred approach had "made it a duty" for the Ad Hoc Committee to address cultural genocide".[921] For the United States, the convention resulted from the holocaust and genocide should encompass only "those barbarous acts committed against individuals, which, in the eyes of the public, constituted the basic concept of genocide".[922] Later, France stated that, although their mens rea was the same, physical and cultural genocide "were not exactly the same crime", since their actus rei were different.[923] Thus, even though referring to it as "cultural *genocide*" [emphasis added], France still considered it as a crime, albeit distinct from genocide. France probably meant property crime, since it explained that physical genocide concerned "life", while cultural genocide concerned acts targeting "objects and things".[924] Importantly, though, France continued to ignore biological genocide, something that would echo throughout the drafting process and in the constant rejection of cultural genocide by the ILC and ICTY-ICJ (Chapter 3.II).

Eventually, as seen, a distinct provision on cultural genocide (article III) was agreed:

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:
>
> (1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
> (2) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[925]

Paragraph 1's actus reus was both anthropo-centred (use of language) and tangible-centred (publications). Paragraph 2's actus reus was tangible-centred (destruction of/prevention to use secular and religious items). The forced transfer of children, the Secretariat Draft's only actus reus of cultural genocide which gathered all three experts' agreement, was omitted. However, the chapeau addition of the words "such as" turned paragraphs 1-2 into a non-exhaustive list of actus rei of cultural genocide.

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[920] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 731. The opposing vote presumably was the United States', which preferred a separate provision to "enable Governments to make reservations". *See* ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 837.
[921] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 730.
[922] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 727.
[923] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 839.
[924] ECOSOC, UN Doc E/AC25/SR10 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 839.
[925] ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.

b. Retaining only one anthropo-centred actus reus: the Sixth Committee

At the third and last stage, the divide between the supporters of and the opponents to the inclusion of cultural genocide came to a head.

i. Resuscitating the Secretariat Draft article I(II)(3)(a) under article II

The Sixth Committee's eighty-second session began oddly. When addressing article II titled "("Physical" and "biological" genocide)", Greece proposed adding a paragraph (e) on "forcibly transferring children of the group to another group" – originally the Secretariat Draft article I(II)(3)(a) on cultural genocide.[926] Greece rightly recalled that, as cultural genocide's only actus reus which had been agreed by all three experts, the forced transfer of children should not be opposed by France, as it was "an act far more serious and indeed more barbarous" than article I(II)(3)'s other actus rei.[927]

The ensuing discussion illustrates an eighty-second session marked by an incoherent set of exchanges, where conceptual ideas kept morphing back and forth. The proposed actus reus, added Greece, "had not only cultural, but also physical and biological effects"; since it imposed on the children "conditions of life likely to cause them serious harm or even death.[928] Thus, Greece saw this act as capable of consisting of any of the three forms of genocide, although it did not explain how it could be biological. Recalling that "Christian children were abducted and taken to the Ottoman Empire", Greece explained that the forcible transfer of children was:

> not primarily an act of cultural genocide. Although it could in certain cases be considered as such, it could be perpetrated rather with the intent to destroy or to cause serious physical harm to members of a group.[929]

Thus from an original consideration of that act as any of the physical-biological-cultural genocides, within minutes, Greece saw it mainly as the first two than the last one. Moments later, joined by the staunchest supporter of the inclusion of cultural genocide, the Soviet Union, Greece saw the proposal as physical rather than cultural genocide.[930]

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[926] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[927] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1492.
[928] Greece also recalled that, while opposed to cultural genocide, the United States had made an exception by considering the forcible transfer of children as a form of physical and biological genocide; *see* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1492-1493.
[929] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1495.
[930] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1496-1497.

For Belgium, Poland and the Netherlands, the Greek proposal was too vague; they preferred discussing it after article III.[931] This showed that they saw it as a cultural genocide-related actus reus. Iran agreed to the same sequencing, because it saw in the provision both cultural and physical genocide, as did Czechoslovakia, which found the placement under article II rather than III illogical.[932] Joining these two, Siam said that this actus reus "must involve their complete absorption by a new group" with the resultant loss of their former identity.[933] Yugoslavia agreed that the transfer "with a view to their assimilation into another group constituted cultural genocide".[934] These States saw the said transfer *primarily* as an actus reus of cultural genocide. For Uruguay, since measures to prevent births had been included, one should also include:

> measures intended to destroy a new generation through abducting infants, forcing them to change their religion and educating them to become enemies of their own people.[935]

Furthering this eighty-second session's cacophony, moments later, Uruguay argued that "there was no reason why such acts of physical genocide should be associated with cultural genocide".[936] In the meantime, the United States had stated that:

> the Greek amendment should stand on its own merits and *not be associated too closely* with cultural genocide. *Even if it were subsequently decided to include cultural genocide in the convention, a judge considering a case of the forced transfer of children would still have to decide whether or not physical genocide were involved*. […] In the eyes of the mother, there was little difference between measures to prevent birth half an hour before the birth and abduction half an hour after birth.[937] [emphasis added]

So even the United States did not radically reject the association of this actus reus with cultural genocide; rather it saw this actus reus as a combination of physical and cultural – if not biological – genocide, with the final determination being judicial.[938]

Eventually, the Greek amendment was adopted as part of article II.[939]

However, as seen, the debates were confused and paradoxical. This may be partly due to Greece's premature placement of its amendment since, as expressed by many States, it was necessary to discuss it under article III on cultural genocide. States advocating that course were all linking the Greek amendment to cultural genocide, given that,

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[931] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1495-1496 and 1498.
[932] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1496 1498.
[933] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[934] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.
[935] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1494.
[936] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1496.
[937] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1494.
[938] UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1496.
[939] By 20 votes to 13 (with 13 abstentions); *see* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1498.

except for minor editorial changes, it reproduced the Secretariat Draft article I(II)(3)(a) on cultural genocide. In fact, the majority of the States that took the floor linked the Greek amendment to cultural genocide. During the subsequent article III discussion, despite the fact that the forcible transfer had already been voted to be included in article II, Venezuela saw in the Secretariat Draft's forcible transfer of children the fact that:

> a group could be destroyed although the individual members of it continued to live normally without having suffered physical harm.[940]

For Venezuela, this provision was included because the forced transfer of children:

> to a group where they would be given an education different from that of their own group, and would have new customs, a new religion and probably a new language, was in practice tantamount to the destruction of their group, whose future depended on that generation of children. Such transfer might be made from a group with a low standard of civilization and living in conditions both unhealthy and primitive, to a highly civilized group as members of which the children would suffer no physical harm, and would indeed enjoy an existence which was materially much better; in such a case there would be no question of mass murder, mutilation, torture or malnutrition; yet if the intent of the transfer were the destruction of the group, a crime of genocide would undoubtedly have been committed.[941]

Reminiscent of the then recent Nazi's Germanisation practice (Chapter 3.II) as well as the future IACtHR's tribal/indigenous rulings (Part I), this passage illustrates the effects of the anachronistic voting of the Greek proposal before discussing article III.

Even Greece, the United States and Uruguay, which eventually considered the amendment as physical – if not biological – genocide, did so with great confusion. In essence, none of the States that viewed the provision as physical or biological genocide seemed to radically *not* consider it as cultural genocide.

The Sixth Committee's eighty-second meeting is a most incoherent session. This was the case from the start with Greece bringing back an actus reus of cultural genocide from the Secretariat Draft that had been left out of the Ad Hoc Committee. Given the fact that even Donnedieu de Vabres and Pella had agreed with Lemkin only on this actus reus of cultural genocide, Greece's resuscitating of the provision under article II which was titled "("Physical" and "biological" genocide) only further confused the issue. The line-by-line reading the travaux préparatoires proves that scholar and judicial assertions that cultural genocide was rejected from the convention must be based on either a partial reading of the travaux préparatoires or a teleological one. This will matter when reviewing the ICR-based jurisdictions' practice (this Chapter, Section II).

ii. Rejecting the Ad Hoc Committee Draft, article III

Having discussed article II, States discussed article III on cultural genocide. Among the opponents of article III on cultural genocide, positions varied. Peru and the United

[940] UNGA, "Eighty-Third Meeting: Consideration of the Draft Convention on Genocide" (25 October 1948) UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1504.
[941] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1504.

Kingdom recommended its deletion.[942] Iran, favoured a supplementary convention on cultural genocide.[943] Among the supporters of cultural genocide, Egypt and Syria proposed simplifying article III, given the fact that cultural genocide was "less heinous" than the other forms of group destruction, warranting different penalty.[944]

Focusing on cultural genocide's tangible-centred means, Pakistan observed that:

> Some representatives appeared to consider cultural genocide as a less hideous crime than physical or biological genocide. […] [F]or millions of men in most Eastern countries the protection of sacred books and shrines was more important than life itself; the destruction of those sacred books or shrines might mean the extinction of spiritual life. Certain materialistic philosophies prevented some people from understanding the importance which millions of men in the world attached to the spiritual life.[945]

For Pakistan, depending on cultures, some tangible components of a group's culture – be it sacred books/buildings or else – may matter so much to the targeted group that their violent and brutal loss may be felt by its members as targeting the group's cement. Venezuela proposed that cultural genocide be considered only for:

> violent and brutal acts which were repugnant to human conscience, and which caused losses of particular importance to humanity, such as the destruction of religious sanctuaries, libraries, etc.[946]

Referring to the burning of the synagogues, of Jewish libraries, or of the Louvain University and the destruction of the Reims Cathedral, Venezuela explained that:

> crimes against the culture or the religion of certain groups could shock human conscience in the same way as did crimes of physical genocide.[947]

From the travaux préparatoires, the hierarchy between property crimes and crimes against persons (see also *Al Mahdi*, this Part, Chapter1) seems one of the reasons why many States opposed cultural genocide. Denmark's remarks best encapsulated this:

> it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in gas chambers and the closing of libraries.[948]

Put in that way, Denmark's point undermined the inclusion of cultural genocide. However, cultural genocide was precisely not just meant to cover "closing the libraries". Indeed, this over-simplified statement skipped a whole array of nuances

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[942] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1513; and UN Doc A/C.6/222, 'Agenda Item 32', 7 October 1948, *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977.
[943] UNGA, UN Doc A/C6/SR66 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1325.
[944] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1508-1510.
[945] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Web, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.
[946] UNGA, UN Doc A/C6/SR65 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1312.
[947] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1505.
[948] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1508.

viewed by those favourable to the inclusion of cultural genocide. In fact, just two years after Denmark's statement, the very people who constituted the main target of the Nazi gas chambers passed Israel's Nazi and Nazi Collaborators (Punishment Law), 5710/1950, which would define crimes against the Jewish people by importing the Genocide Convention's definition of genocide quasi-verbatim, by substituting "Jewish people" or "Jews" for the convention's groups and adding the tangible-centred actus reus of "destroying or desecrating Jewish religious or cultural assets or values".[949]

Eventually, during the article-by-article examination, a majority of States rejected the cultural genocide draft article.[950] A majority retained political groups, notwithstanding the latter's lack of permanency.[951] This duality is noteworthy since the votes confirm the prevalence of ideological-geopolitical affiliations over reasoned Cartesian stance. Most of the States aligned themselves either with the United States (mainly the future Western European and others Group "WEOG") or with the Soviet Union (mainly the future Eastern European Group "EEG"). As Novic has argued, cultural genocide's fate was thus determined between the nascent Cold War and tensions regarding colonialism.[952] This is illustrated by the subsequent debates on political groups where,[953] "in a conciliatory spirit" and to maximise support for the convention, the United States agreed with a proposal by Egypt, Iran and Uruguay, to remove article II's reference to political groups "primarily for practical reasons".[954] Many of the States that had previously voted to keep political groups followed suit.[955]

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[949] The Nazi and Nazi Collaborators (Punishment Law), 5710/1950 defines, in Section I(b), provides:

> Crime against the Jewish people' means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
> (i) killing Jews;
> (ii) causing serious bodily or mental harm to the Jews;
> (iii) placing Jews in living conditions calculated to bring about their physical destruction;
> (iv) imposing measures intended to prevent births among Jews;
> (v) forcibly transferring Jewish children to another national or religious group;
> (vi) destroying or desecrating Jewish religious or cultural assets or values;
> (vii) inciting to hatred of Jews.

See "Law No 64 - Nazi and Nazi Collaborators (Punishment Law)" (passed on 1 August 1950) 5710/1950. This law differs from the Crime of Genocide (Prevention and Punishment) Law, 5710-1950, consequent to the Genocide Convention and passed by the Knesset on 29 March 1950. *See* "The Crime of Genocide (Prevention and Punishment) Law" (passed on 29 March 1950) 5710-1950.

[950] 25 votes to 16, with 4 abstentions (13 delegations absent); *see* UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1518.

[951] 29 votes to 13 with 9 abstentions. *See* UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1411-12. *See* also UNGA, UN Doc A/C6/SR69 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1355-60; UNGA, UN Doc A/C6/SR74 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1393. From beginning to end, a large part of the discussion consisted of the cultural genocide versus political genocide debate. *See* eg ECOSOC, "Ad Hoc Committee on Genocide: Corrigendum to the Summary Record of the Third Meeting at Lake Success, New York" (20 May 1948) UN Doc A/C25/SR4 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 717; and UNGA, UN Doc E/SR218 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1219-1239.

[952] Novic, (n 15) p 23-30.

[953] UNGA, UN Doc A/C6/288 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2012.

[954] UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1865-68.

[955] Australia, Canada, Denmark, India, Syria and the United Kingdom (deletion); and Cuba, France, Luxembourg, New Zealand, Norway and Sweden (abstention). The Soviet Union and its supporters abstained; *see* UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The*

Chart 9: UN Member States' votes per regional groups on the inclusion/exclusion of political groups and cultural genocide

UN Regional groups	The retention of political groups			The exclusion of cultural genocide		
	In favour	Against	Abstention	In favour	Against	Abstention
AG		Union of South Africa	Egypt, Ethiopia	Liberia, Union of South Africa	Egypt, Ethiopia	
APG	Burma, China, India, Philippines, Saudi Arabia, Siam, Syria, Yemen	Iran	Afghanistan, Lebanon, Pakistan	India, Iran, Siam	China, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria	Afghanistan
EEG		Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Soviet Union	Yugoslavia		Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, Soviet Union, Yugoslavia	
GRULAC	Bolivia, Chile, Cuba, Ecuador, Haiti, Panama, Paraguay, Salvador	Argentina, Brazil, Dominican Republic, Uruguay, Venezuela	Nicaragua, Peru	Bolivia, Brazil, Chile, Dominican Republic, Panama, Peru	Ecuador Mexico	Argentina, Cuba, Venezuela
WEOG	Australia, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States	Belgium	Greece	Australia, Belgium, Canada, Denmark, France, Greece, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, United Kingdom, United States		

Later, as the Sixth Committee was finalising the draft convention, a series of Soviet Union amendments during the UNGA debates on 9 December 1948 attempted to restore a modified version of the Ad Hoc Committee Draft article III on cultural genocide:

Travaux Préparatoires (n 6) p 1870. This change of heart is unclear from the travaux préparatoires. Nersessian has suggested that this may have resulted from negotiations regarding the jurisdiction to an international criminal court; *see* David Nersessian, *Genocide and Political Groups* (Oxford University Press 2010), p 110.This view is strengthened by the fact that, when the United States sought to re-introduce a reference to "a competent international penal tribunal", several references to this "conciliatory spirit" were made; *see* UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1874 and 1877; UNGA, "Hundred and Thirtieth Meeting: Continuation of the Consideration of the Draft Convention on Genocide" (30 November 1948) UN Doc A/C6/SR130 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1887 and 1893. For Schabas, political groups were excluded "for 'political' reasons rather than reasons of principle." *See* Schabas, *Genocide in International Law* (n 15) p 160.

> In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or religious origin, or religious beliefs such as:
>
> (a) Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
> (b) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[956]

The proposal was defeated on a roll-call vote, 31 votes to 14, with 10 abstentions.[957] By its resolution 260 A (III) of 9 December 1948, the UNGA approved and proposed for signature and ratification or accession the Genocide Convention.

Thus, in the end neither political groups nor article III of the Ad Hoc Committee Draft article III titled "cultural genocide" were included in the convention.[958] However, the Secretariat Draft's article I(II)(3)(a) ended in the convention under article II(e).

2. Provisions indirectly covering cultural genocide

Originally, the Secretariat Draft article I(II)(1) read:

> 1. Causing the death of members of a group or injuring their health or physical integrity by:
> […]
> (b) subjecting the conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion are likely to result in the debilitation or death of the individuals; or

[956]UNGA, "Agenda Item 32: USSR: Amendments to the Draft Convention on the Prevention and Punishment of Genocide proposed by the Sixth Committee (A/760)" (5 December 1948) UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; and UNGA, "Hundred and Seventy-Ninth Plenary Meeting: Continuation of the Discussion on the Draft Convention on Genocide, Amendments Proposed by the USSR to the Draft Convention and Amendment Proposed by Venezuela" (9 December 1948) UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 2079-2080.

[957] Against inclusion: India, Iran, and Siam (Asia); Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Honduras, Nicaragua, Panama, Paraguay and Peru (GRULAC); Australia, Belgium, Canada, Denmark, France, Greece, Iceland, Luxembourg, The Netherlands, New Zealand, Norway, Sweden, Turkey, the United Kingdom and the United States (WEOG). In favour of inclusion: Liberia (Africa); China, Lebanon, Pakistan, Philippines, Saudi Arabia and Syria (Asia); Byelorussian SSR, Czechoslovakia, Poland, Ukrainian SSR, the Soviet Union and Yugoslavia (EEG); Haiti (GRULAC). Abstention: Afghanistan, Burma and Yemen (Asia); Egypt, Ethiopia and Union of South Africa (Africa); and Guatemala and Venezuela (GRULAC). UNGA, UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; and UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080.

[958] UNGA, UN Doc A/766 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2039; UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080. *See also* UNGA, UN Doc A/C6/SR75 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1411-12; UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1518; UNGA, UN Doc A/C6/SR128 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1870; UNGA, UN Doc A/PV179 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2080.

(c) mutilations and biological experiments imposed for other than curative purposes.[959]

At the Ad Hoc Committee, changing both in order and substance, article I(II)(1)(b)-(c) was placed under the new article II. The following is a brief analysis of their development, since ICR-based jurisdictions have used these articles to consider aspects of cultural genocide (Chapter 3.II).

a. Article II(b): from physical impairment to mental harm

Article I(II)(1)(c) morphed into "any act directed against the corporal integrity of members of the group",[960] before becoming the Ad Hoc Committee Draft article II(2) "impairing the physical integrity of members of the group".[961] During the discussions, China failed to include the distribution of narcotic drugs so as to bring about collectives' "physical debilitation".[962] The Ad Hoc Committee explained that this provision covered acts other than killing, such as "[b]lows and wounds, torture, mutilation, harmful injections, biological experiments conducted with no useful end in view."[963]

At the Sixth Committee, China amended this purely physical-centred provision, by adding the word "mental" as follows: "impairing the physical or mental health of members of the group".[964] China explained that the proposed addition reflected acts such as the Japanese distribution of narcotics among the Chinese population during the Second World War.[965] One day later, a United Kingdom amendment proposal dropped the word "mental" so as to read "causing grievous bodily harm to members of the group".[966] In subsequent discussions, this United Kingdom's proposal, as amended by

[959] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 215.
[960] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Thirteenth Meeting" (20 April 1948) UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 879.
[961] ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.
[962] ECOSOC, E/AC25/SR.5 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 731.
[963] ECOSOC, "Ad Hoc Committee on Genocide Commentary on Articles Adopted by the Committee" (26 April 1948) UN Doc E/AC25/W1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 981.
[964] UNGA, "Agenda Item 32: China Amendment to the Draft Convention on Genocide (E/794)" (18 October 1948) UN Doc A/C6/232/Rev 1 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1976.
[965] UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1477-1478.
[966] UNGA, UN Doc A/C6/222 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1977. *See also* UNGA, "Eighty-First Meeting: Consideration of the Draft Convention on Genocide" (22 October 1948) UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1482. Other proposals included "impairing physical integrity"; *see* UNGA, "Agenda Item 32: Belgium Amendments to the Draft Convention on Genocide (E/794)" (5 October 1948) UN Doc A/C.6/217 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1973, and "the infliction of physical injury or pursuit of biological experiments"; *see* UNGA "Agenda Item 32: Union of Soviet Socialist Republics Amendments to Article II of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/223 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1978.

India, to add mental, was adopted as the Genocide Convention article II(b). It read: "causing serious bodily or mental harm to members of the group".[967]

Thus, an initially physical actus reus morphed into one that also included mental harm. As this study has already shown, the IACtHR has established in its so-called indigenous/tribal cases that the collective may suffer mental harm, including in the form of mental illness, through the disruption of its heritage as a result of attacks against its anthropical and natural environment (Part I, Chapter 2). Thus, there is potential for article II(b)'s mental harm to be used in such cases – with the existence of the requisite mens rea, as will be seen in Section II.

b. Article II(c): physical destruction of the group or slow death of its members?

The UNSG Commentary coined the concentration camps inclination of article I(II)(1)(b) as "slow death".[968] The actus reus indeed focused on life conditions, such as "lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion" that are likely "to result in the debilitation or death of the individuals".

At the Ad Hoc Committee, the above provision was first reworded as: "Subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group".[969] This proposal was intriguing as it imported partly the destruction of the group as envisaged in the Secretariat Draft's chapeau (article I(I)-(II)). But even more so, it emphasised that in such instances, the physical existence of the group would be the end result. Thereafter, a Soviet Union proposal read: "The premeditated infliction on these groups of such conditions of life which will be aimed at destroying totally or partially their physical existence".[970] The United States, however, proposed an amendment: "Subjecting members of a group to such physical conditions or measures as will cause their death or prevent the procreation of the group".[971] This was a more accurate definition of the actus reus as it avoided repeating the chapeau. As a consequence, it avoided entering into the conceptually complex and non-conclusive debate on the type of group destruction as opposed to the means to achieve it. The United States amendment was concerned with the group members' death or the prevention of its procreation. While the amendment failed to gather momentum, Venezuela successfully proposed an amended version of the Soviet Union text minus the chapeau, as the Ad Hoc Committee Draft article II(3): "Inflicting on the members of the group such measures or conditions of life which would be aimed

[967] UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1482-1483.
[968] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 233.
[969] ECOSOC, "Ad Hoc Committee on Genocide, Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China" (16 April 1948) UN Doc E/AC25/9 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 833.
[970] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 876.
[971] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 877.

to cause their deaths".[972] Thus, the amendment rightly focused on the type of actus reus as opposed to that of the destruction. The Ad Hoc Committee explained that this covered both the ghetto-type deprivation and the victims' denial of means of existence otherwise available to other inhabitants.[973]

At the Sixth Committee, however, the physical destruction of the group resurfaced. Titled "("physical" and "biological" genocide)", the Ad Hoc Committee Draft article II's chapeau simply referenced the "intent to destroy" the group. It specified neither the nature nor the scope of that destruction. First, a Belgian amendment proposal read: "Inflicting enforced measures or conditions of life, aimed at causing death".[974] A couple of days later, the Soviet Union brought back the chapeau's mens rea by proposing: "The deliberate creation of conditions of life for such groups as is aimed at their physical destruction in whole or in part".[975] As the Soviet Union agreed to substitute "as are calculated to bring about" for "as is aimed at", Belgium withdrew its amendment.[976] A further slight amendment to the Soviet Union text resulted in the text known as article II(c): "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".[977]

Article II(c) is the only actus reus of genocide to repeat part of the chapeau's mens rea and to specify the type of group destruction. According to the *Karadžić* Trial Chamber, under this provision, the perpetrator uses methods that do "not immediately kill the members of the group, but which, ultimately, seek their physical destruction".[978] This interpretation is thus about the *physical destruction of the members* of *the group*. The Chamber, however, added that article II(c) applies to acts that are:

> deliberately calculated to cause a *group's physical destruction* and, as such, these acts must be clearly distinguished from those acts designed to bring about the *dissolution of the group*.[979] [emphasis added]

Thus, the Chamber viewed the crime under article II(c) as the physical destruction of both the group and its members as opposed to its "dissolution". When it comes to the destruction of abstract entities, such as cultural units, it is hard to nuance between their physical destruction and their dissolution. In other words, what is the precise difference between, eg, the destruction and dissolution of Incas, not an individual, but as a group? Be that as it may, from the travaux préparatoires, it is not possible to ascertain why the

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[972] ECOSOC, UN Doc E/AC25/SR13 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 880.
[973] ECOSOC, UN Doc E/AC25/W1*in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 981-982.
[974] UNGA, (E/794) *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1972.
[975] UNGA, UN Doc A/C6/223 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1978.
[976] ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighty-Second Meeting" (23 October 1948) UN Doc E/AC25/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1487.
[977] UNGA, "Eighty-Second Meeting: Continuation of the Consideration of the Draft Convention on Genocide" (23 October 1948) UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1488.
[978] *Karadžić* Trial Judgment (n 721) para 546, citing *Akayesu* Trial Judgment (n 612) para 505. See *Stakić* Trial Judgment (n 745) paras 517-518.
[979] *Karadžić* Trial Judgment (n 721) para 547, citing *Brđanin* Trial Judgment (n 758) paras 692 and 694; and *Stakić* Trial Judgment (n 745) para 519.

Soviet Union used the formulation "physical destruction" of the group at the Ad Hoc Committee nor why it brought it back at the Sixth Committee. Given specifically the 1946-1948 negotiators' confusion surrounding the mens rea, actus reus and motive of genocide, no inordinate amount of attention should be placed on the odd import of the chapeau's "physical destruction" of the group in the article II(c) actus reus. For instance, could it be reasonably argued that article II(a) ("killing members of the group") is not concerned with its physical destruction merely on the basis that it does not refer to it? This question has been sophisticatedly posed by Judge Shahabuddeen in his *Krstić* Appeal Judgment partially dissenting opinion.[980] The *Karadžić* Trial Chamber's ruling may thus be an attempt to (i) explain this oddity; and/or (ii) distance the provision from cultural genocide which was often associated with the group's "dissolution". Implicit to this is the Chamber's further holding that in the absence of any direct evidence, judges will be guided by factors such as the characteristics of the group like its vulnerability.[981] This is important since a distinction must be drawn between targeting a protected group that is demographically minuscule and geographically focused (such as the IACtHR's indigenous/tribal cases as seen in Part I, Chapter 2), and that of a demographically large geographically dispersed group.

Accordingly, while this provision had no connection with cultural genocide, this brief review was required in order to better analyse the instances where the ICTY-ICJ have been seized of this provision to address cultural genocide (Chapter 3.II).

3. Outcome

Against the confusing background of the above-analysed back-and-forth discussions, the 1996 ILC Report has stated that:

> as clearly shown by the [travaux préparatoires], the *destruction in question is the destruction of a group either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group*. The national or religious element and the racial or ethnic element are not taken into consideration in the definition of *the word "destruction", which must be taken only in its material sense, its physical or biological sense*.[982] [emphasis added]

The first sentence's distinction between the destruction of the group (by physical/biological means) and the destruction of its defining features (national, linguistic, religious, cultural, etc.) accurately reflects the way in which the Ad Hoc Committee explicitly created two separate mentes reae for physical/biological genocide and cultural genocide, each. However, the next sentence lacks clarity. Does it mean that the *group's* destruction (i) can be only physical/biological; or (ii) can be only effected by physical and biological means against its individual members? Regardless of the

[980] *Prosecutor v Krstić*, (ICTY) Appeal Judgment (19 April 2004) Case No IT-98-33-A, partial dissenting opinion of Judge Mohamed Shahabuddeen, para 48; *see* also paras 49-50. *See* also *Stakić* Appeal Judgment (n 980) paras 20-24.
[981] *Karadžić* Trial Judgment (n 721) para 548, citing *Prosecutor v Tolimir*, (ICTY) Judgment (12 December 2012) Case No IT-05-88/2-T, para 742; *Prosecutor v Popović et al*, (ICTY) Judgment (10 June 2010) Case No IT-05-88-T, para 816; *Brđanin* Trial Judgment (n 758) para 906. *See also Prosecutor v Krajišnik*, (ICTY) Judgment (27 September 2006) Case No IT-00-39-T, para 863 and *Kayishema* Trial Judgment (n 708) para 548.
[982] 1996 ILC Report (n 594) p 46.

answer to the question, rather than factual, the ILC's second sentence is an opinion. If it refers to (i), then is not unequivocally supported by the travaux préparatoires. As seen, the drafting phases of the Genocide Convention show a great deal of confusion on the distinction between the mens rea, motives and actus reus on the one hand and the destruction of the group and that of its individual members on the other hand. It is recalled that the Secretariat Draft had considered physical, biological and cultural genocide, ie the destruction, in whole or in part, of the group, although the UNSG Commentary had explained that the actus rei of cultural genocide consisted of the destruction of the characteristics of a group. The 1996 ILC Report then explains that:

> It is true that [the Secretariat Draft and the Ad Hoc Committee Draft] contained provisions on "cultural genocide" covering any deliberate act committed with the intent to destroy the language, religion or culture of a group, such as prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group or destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.[983]

In fact, what the ILC cites here is not the Secretariat Draft, but the Ad Hoc Committee Draft article III. The Secretariat Draft was different. As seen, its article I(II)(3) contained both tangible-centred and heritage-centred actus rei, not least the forced transfer of children. Therefore, the passage attributed by the ILC to *both* the Secretariat Draft and the Ad Hoc Committee Draft does not present an accurate picture of the discussions. This creates confusion. As a consequence of its own reasoning, the 1996 ILC Report then goes on to explain that:

> However, the text of the Convention, as prepared by the Sixth Committee and adopted by the General Assembly, did not include the concept of "cultural genocide" contained in the [Secretariat Draft and Ad Hoc Committee Draft] and simply listed acts which come within the category of "physical" or "biological" genocide. *Subparagraphs (a) to (c) of the article list acts of "physical genocide" while subparagraphs (d) and (e) list acts of "biological genocide"*.[984] [emphasis added]

This paragraph is most intriguing as a close reading of the travaux préparatoires has provided a far more nuanced picture. First, and as seen before, unlike article II(a)-(b), article II(c) refers to the physical destruction of the group. If one followed the 1996 ILC Report, then paragraphs (a)-(b) should have also made this reference. But most importantly, as significantly analysed in this Section, the Secretariat Draft article I(II)(1)-(3) listed physical, biological and cultural genocide, respectively.[985] Article I(II)(3)(a) ("Forced transfer of children to another human group") was the only sub-provision under article I(II)(3) that both Donnedieu de Vabres and Pella – who otherwise opposed cultural genocide – and Lemkin – who favoured it – agreed should be included in the Genocide Convention.[986] As seen earlier, reference to the "forced transfer of children to another human group" was subsequently removed from the Ad Hoc Committee Draft, as transmitted to the Sixth Committee.[987] However, Greece

[983] 1996 ILC Report (n 594) p 46.
[984] 1996 ILC Report (n 594) p 46.
[985] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 228-234.
[986] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 235.
[987] UNGA, "Report of the Ad Hoc Committee on Genocide, Annex Draft Convention on The Prevention and Punishment of The Crime of Genocide" (24 May 1948) E/794, *in* Abtahi and Webb,

successfully brought back the Secretariat Draft article I(II)(3)(a) from the brink during the discussions on article II, which concerned physical and biological genocide. As further seen, the ensuing Sixth Committee discussions revealed a sense of confusion and uncertainty on the characterisation of that provision. The majority of those States taking the floor, including some of those that would eventually vote against the inclusion of the Ad Hoc Committee Draft article III on cultural genocide, found the discussion on the forcible transfer of children out of place as they saw it fit for discussions under article III. Moreover, the majority of States taking the floor linked the forcible transfer of children *also* to cultural genocide, even if some considered it to be physical/biological genocide *too*. Such was the confusion that even after the inclusion of the forcible transfer of children in article II, its characterisation as cultural genocide resurfaced during the article III discussion. Furthermore, observing that while the Ad Hoc Committee article III "dealing with "cultural Genocide"" was left out, Nehemiah Robinson, who closely followed the negotiations, has explained that:

> *Instead*, [the convention] included, on a Greek motion, point (e) dealing with forced transfer of children (as was envisaged in the Secretariat's draft) *as one of the acts of cultural genocide*.[988] [emphasis added]

In a more nuanced manner, Schabas has observed, in discussing the mental element of article II(e), that the provision:

> is somewhat anomalous, because it contemplates *what is in reality* a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide form the scope of the Convention. As a result, […] the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense.[989] [emphasis added]

Schabas has further called the forcible transfer of children "an exception to [the] general rule" of excluding cultural genocide from the Genocide Convention.[990]

The forcible transfer of children is the physical separation of children with cultural results, ie their cultural alienation from their group, with its harmful impact on both the children and the group as such. For this to be effective, the question of the child's age arises. As seen in Chapter 2, the Nazis believed that "racially valuable" Polish children must "not be over 8 to 10 years of age" since only up to that age would "a genuine ethnic transformation, that is, a final Germanization" be possible.[991] The pre-puberty age-limit here was of course not for reproductive purposes, but for the children's cultural malleability. Notably, both the Convention on the Rights of the Child and the ICC Elements of Crimes define "children" as persons under the age of eighteen.[992] This raises also the question as to how malleable a child aged seventeen could be. Were it to

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The Genocide Convention: *The Travaux Préparatoires* (n 6) p 1156. *See* also ECOSOC, E/AC25/12 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1162.

[988] N Robinson (n 800) p 64.

[989] Schabas, *Genocide in International Law* (n 15) pp 185, 187 and 245.

[990] William A Schabas, "Convention for the Prevention and Punishment of the Crime of Genocide" (United Nations Audiovisual Library of International Law, 2008) <http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf> accessed 14 April 2019, p 2.

[991] *RuSHA* (n 911) p 9.

[992] ICC, "Elements of Crimes: Genocide by Forcibly Transferring Children" (2011), art 6(e), and Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 1.

be a physical act with biological consequences – ie limiting reproduction within the group – then the age limit would have been set at puberty so that, individuals' forcible transfer would prevent them from engaging in reproductive functions within the group.

It is therefore inaccurate to suggest that, unlike physical and biological genocide, cultural genocide was not included in the Genocide Convention, particularly in light of the aforementioned Sixth Committee discussions to assimilate article II(e) to biological genocide.[993] Relying seemingly exclusively on the 1996 ILC Report, the ICTY *Krstić* Trial and Appeals Chambers have reached the same conclusion, as relayed not only by subsequent ICTY judgments,[994] but also by the ICJ (see this Chapter, Section II).[995]

That the ICTY and ICJ have followed the 1996 ILC Report stems from the fact that all three bodies appear to have analysed cultural genocide mainly through a tangible-centred approach. Accordingly, it would have been more accurate for them to state that while the Sixth Committee did not retain the tangible-centred actus rei of cultural genocide, as originally foreseen in the Secretariat Draft article I(II)(3)(d) and (e) and the Ad Hoc Committee Draft article III, it did so with one of the Secretariat Draft's anthropo-centred actus rei, ie article I(II)(3)(a) in the form of the forcible transfer of the children of the group to another group. This is incontestably cultural genocide, as it seeks to alter the cultural features of the youth, as confirmed in the post-Second World War trials and national cases.[996] However, depending on the circumstances, it is not excluded that the act also qualifies as biological genocide (Chapter 3, III) or physical genocide, as accurately suggested by the 1996 ILC Report:

> The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. […] Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).[997]

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[993] For an account confirming the authors' view, *see* N Robinson (n 800) pp 64-65. The votes of individual States were not recorded on this motion. However, despite earlier voting for the inclusion of cultural genocide, it appears that Czechoslovakia, Poland, the Soviet Union and Yugoslavia opposed this proposal. Conversely Syria, Uruguay and the United States expressed their intention to vote for the amendment. *See* UNGA, UN Doc A/C6/SR82 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) pp 1492-1498.

[994] *Prosecutor v Krstić*, (ICTY) Judgment (2 August 2001) Case No IT-98-33-T, paras 576 and 580 and *Krstić* Appeal Judgment (n 980) paras 24-25, *Karadžić* Trial Judgment (n 721) para 553.

[995] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 344 and 194.

[996] It is noteworthy that the Australian Human Rights and Equal Opportunities Commission concluded on Australia's violation of art II(e) on the basis that:

> [t]The predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture […] Removal of children with this objective in mind is genocidal because it aims to destroy the "cultural unit" which the Convention is concerned to preserve.

See Australian Human Rights and Equal Opportunities Commission, "Bringing Them Home: Report of the National Inquiry on the Separation of Aboriginal and Torres Strait Islander Children from their Families" <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf> accessed 14 April 2019, pp 270-275.

[997] 1996 ILC Report (n 594) p 46.

While it is correct to consider the forcible transfer of children also under article III(c), unfortunately, it only reemphasises the mantra that the convention only retained physical and biological genocide.

D. Synthesis: confusing genocide's tangible- and heritage-centred means

Among war crimes, CaH and genocide, the latter is the most opaquely defined crime. This is not surprising since the Genocide Convention was prepared and adopted in just two years, under the auspices of a nascent UN, immediately after the Second World War, the most globally devastating armed conflict, to date. This was, in and of itself, an incredible achievement, when considering subsequent treaty making processes.

Be that as it may, while one would want to rely on the literal meaning of the provisions contained in the Genocide Convention, the degree of subjectivity flowing from most of the phrases contained in both the mens rea and actus rei of article II leads one to proceed with a recurring exercise of interpretation of that provision in general and, specifically, in relation to the so-called cultural genocide. As seen, the 1996 ILC Report referred to the travaux préparatoires. The latter's very close study, however, offers a more nuanced picture insofar as cultural genocide is concerned, thus enabling to better interpret and apply the convention in this regard. As will be seen shortly, both the ICTY and the ICJ have rejected the concept of cultural genocide from the Genocide Convention, having based their findings on the ILC reading of the travaux préparatoires. This study's very close review of the travaux préparatoires on both the chapeau and the actus rei calls, however, for a more cautious and less assertive approach in this regard.

As seen, the travaux préparatoires do not offer much assistance in terms of understanding the intent, motive and protected groups. But they are useful in that they help understanding where the legislators were confused. Starting with the protected groups, the words national, ethnical racial and religious are deeply rooted in both geographic and temporal settings, which are two of the fundamental pillars of culture as an evolving concept. As Schabas observes, being "subjective", these terms are a "social construct", rather than scientific statements. The post-Second World War trials' referencing Jews as a race will be considered as loaded at the very least, to the early twenty-first century readers. In interpreting this social construct-based subjectivity across decades, State responsibility and ICR-based jurisdictions will thus necessarily conduct a cultural exercise. This is so because their understanding of the meaning of the protected groups will result from comparing and contrasting each judge member of the bench's fourfold cultural conceptions. These are (i) judicial legal systems (Common Law, Romano-Germanic Law and others, such a Sharia Law); (ii) professional (diplomatic, academic, criminal law background); (iii) social/societal (geographic, gender, religion, etc.); and (iv) linguistic. On the latter, the choice of the bench's working language will warp the outcome as even the literature used therein as a source will be culture-specific. Specifically, as the twenty-first century's lingua franca (anglica?), the English language will constitute, at best, the mother tongue of only a very small minority of the bench members. While these multicultural judicial settings do enrich the debate and lead to less subjective outcomes, the definition of the protected groups will never escape the judges' geographical and temporal cultural prism.

Moving more specifically to the somewhat inconclusive discussions on intent and motives, the above judicial cultural difference among many of the negotiators (let alone those who did not have criminal law background) distorted their understanding of intent and motive. This also resulted in many negotiators mixing the destruction of the group (mens rea) with that of its members (actus reus). This further confused the distinction between physical and cultural genocide wherein it was not always clear whether delegates' reference to those concept contemplated the mens rea or the actus rei. Be that as it may, Lebanon's Ad Hoc Committee remarks about the perpetrator's "hatred of something different or alien, be it race, religion, language, or political conception", ie his/her intent to destroy "the group, *as such*", showed that genocide was in fact a cultural aversion for the protected group.[998] Lebanon also pointed that the result of the application of that intent would be humanity's loss of the destroyed group's "possible or actual cultural contribution". [999]

Culture shapes the definition of the protected group and the intent/motive to destroy the group, as such. Culture also constitutes the victim of the destruction of the group. Thus, the chapeau elements are shaped by evolving cultural considerations. In a way, as Pakistan pointed out during the Sixth Committee's article III discussions, not only cultural hatred shapes genocide's intent/motive, but also genocide's outcome is cultural loss. Somehow, thus, cultural genocide is a tautology, since genocide *is* cultural, *regardless* of its actus rei, as Pakistan also stated.

Finally focusing on genocide's actus rei, as thoroughly explained, the Secretariat Draft considered cultural genocide to be made of heritage-centred and tangible-centred actus rei that shared their mens rea with physical and biological genocide. This changed expressly in the Ad Hoc Committee Draft which not only attributed to cultural genocide a distinct mens rea, but also simplified its actus rei by dropping, notably, the forcible transfer of children to another group. The latter was brought back at the Sixth Committee, but placed in article II, titled "("Physical" and "biological" genocide)", through a set of particularly confused and confusing discussions, on the basis of which it is not possible to rule out the cultural genocide character of the forcible transfer of children. Finally, article III, titled "("Cultural" genocide)" was rejected. Importantly, like all other provision of the Genocide Convention, article II bears no title.

A detailed analysis of the travaux préparatoires reveals that cultural genocide as an express set of tangible-centred actus rei was not retained in the convention. However, one of cultural genocide's heritage-centred actus rei, namely "forcibly transferring children of the group to another group", was included in the convention under article II(e). During that process, while most States that took the floor characterised that actus reus as cultural genocide, some saw in it both physical and cultural genocide. Only the United States characterised it as physical and biological genocide, although it too

[998] Schabas, *Genocide in International Law* (n 15) p 255.
[999] ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Second Meeting" (5 April 1948) UN Doc E/AC25/SR2 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 691. On motive and intent to commit genocide, *See* Hannah Arendt's position that individuals who commit mass atrocities may not harbour genuine hatred for the victims but rather out of "sheer thoughtlessness" of everyday bureaucrats who may "never realise what [they] were doing." Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006), p 287.

maintained its link with cultural genocide, while Greece and the Soviet Union characterised it as physical genocide.

Any failure to consider cultural genocide's heritage-centred component will reduce its scope to an exclusively tangible-centred one. This in turn results in the assertion that the destruction of the group can only be physical/biological. Accordingly, the 1996 ILC Report's conclusion that, on the basis of the Sixth Committee discussions, the forcible transfer of children should be characterised as biological genocide is therefore particularly unsettling. The travaux préparatoires do show that regardless of whether that provision is about physical or biological genocide, it primarily concerns cultural genocide. Unfortunately, turning opinions into facts and assimilating virtuality into reality have severely limited the adjudication of cultural genocide claims.

III. Practice of international criminal jurisdictions and the ICJ

A. Introduction: the group's physical/biological destruction – a questionable mantra

The practice of ICR-based jurisdictions reveals two trends: a heritage-centred approach, wherein attacks targeting culture could be envisaged through the Genocide Convention article II(b)-(c) (A); and a tangible-centred approach, wherein the attacks against culture's tangible may be indicative of the genocidal intent (B). While the ICJ is a State responsibility-based jurisdiction, its genocide cases will be considered here, not least because it has referred to the ICTY jurisprudence for many of its legal findings.

Throughout this analysis, it is important to bear in mind the travaux préparatoires' prevalent confusion between the chapeau's destruction (mens rea) and the means to achieve that (actus reus). As seen, this was perpetuated by the 1996 ILC Report. Later on, these coalesced in the *Krstić* Trial Judgment and Appeals Judgment. The travaux préparatoires-1996 ILC Report-*Krstić* confusion between mens rea and actus reus has become the foundation on which subsequent ICTY-ICJ reasoning has relied to reject cultural genocide. Before looking at their jurisprudence, it is therefore important to briefly consider *Krstić*. Having observed that one could conceive the destruction of a group by attacking its culture and identity, the Trial Chamber added that:

> [a]lthough the Convention does not specifically speak to the point, the preparatory work points out that *the "cultural" destruction of a group was expressly rejected* after having been seriously contemplated. The notion of cultural genocide was considered too vague and too removed from the physical or biological destruction that motivated the Convention.[1000] [emphasis added]

In the footnote to the first sentence, the Chamber pointed to the Sixth Committee's rejection of cultural genocide. However, it did not explain that that rejection concerned

[1000] *Krstić* Trial Judgment (n 994) paras 574 and 577.

the Ad Hoc Committee Draft article III, which did not include the Secretariat Draft's forcible transfer of children, which would morph into the Genocide Convention article II(e). Having referred to the 1996 ILC Report, the Chamber held that:

> *despite recent developments*, customary international law limits the definition of genocide to those acts seeking *the physical or biological destruction of all or part of the group*. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.[1001] [emphasis added]

Like the ILC, and later the ICJ, the Chamber found it necessary to mix the mens rea and actus reus in order to reject cultural genocide. However, the words "despite recent developments" left the door open for further evolutions.[1002] The *Krstić* Appeals Chamber did the same, since it held that the 1996 ILC Report "had examined closely the *travaux préparatoires*" so as "to elucidate the meaning of the term "destroy"" [emphasis in original].[1003] As seen however, the travaux préparatoires' *close* examination provides a more nuanced picture, given the negotiators' mens rea-actus reus confusion and the eventual inclusion of the forcible transfer of children (this Chapter 3, Section II.). A few years later, to counter the applicant's submission that the destruction of the group required under article II(b) and (e) need not be physical,[1004] the ICJ explained in *Croatia* that:

> even if it does not directly concern the physical or biological destruction of members of the group, [article II(b)] must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group, in whole or in part.[1005]

The ICJ did not explain how it reached this conclusion. It is not clear how inflicting mental pain on group members can result in the physical destruction of the group, even when the perpetrator so intends. With such enigmatic reasoning everything can become the group's physical destruction, whatever this term means. Perhaps the ICJ relied on the 1996 ILC Report which, without providing any explanation, characterised the actus reus contemplated in article II(b) as physical genocide. These only confirm one point: that the ICTY-ICJ appear to have pursued a teleological path when holding that the destruction of the group is only physical/biological. Along the same line of reasoning, Jeßberger has proposed that to find the "mere dissolution" of a group as cultural genocide would undermine the "drafters' clear decision not to include cultural

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[1001] *Krstić* Trial Judgment (n 994) para 580.

[1002] The Chamber here referred to a German Federal Constitutional Court interpretation of the Genocide Convention (n 105) art II, that the definition of genocide:

> defends […] the *social* existence of the group [...] the intent to destroy the group [...] extends beyond physical and biological extermination [...] The text of the law does not therefore compel the interpretation that the culprit's intent must be to exterminate physically at least a substantial number of the members of the group.

The Trial Chamber also referred to Violations of Human Rights in Southern Africa: Report of the Ad Hoc working Group of Experts, UN Doc. E/CN.4/1985/14, 28 January 1985, paras 56-57 as well as other declarations. *See Krstić* Trial Judgment (n 994) paras 575-577.

[1003] *Krstić* Trial Judgment (n 994) para 25, fn 39.

[1004] *Genocide (Croatia v Serbia)* (n 147) para 134.

[1005] *Genocide (Croatia v Serbia)* (n 147) para 136.

genocide".[1006] As seen, however, and as noted by Novic, the travaux préparatoires do not support this proposition.[1007]

Perhaps, it is Judge Shahabuddeen's partial dissenting opinion in *Krstić* that clarifies best the source of this confusion:

> The stress placed in the literature on the need for physical or biological destruction implies, correctly, that a group can be destroyed in non-physical or non-biological ways. It is not apparent why an intent to destroy a group in a non-physical or non-biological way should be outside the ordinary reach of the Convention […], provided that that intent attached to a listed act, this being of a physical or biological nature.[1008]

The forcible transfer of children is a physical act. But its consequences on the group may be both physical-biological (eg non-reproduction) but also cultural (non-transmission of the group's identity). There is no reason to consider these concepts as being antagonistic to each other.

B. Anthropo-centred violence through the Genocide Convention's actus rei

Both the ICTY-ICTR and the ICJ have addressed anthropo-centred attacks targeting culture under article II(b)-(c) (1) as well as II(e), ie the forcible transfer of children (2).

Before embarking on the above analysis, it is important to recall that often, in assessing evidence of mens rea with respect to charges under the ICTY Statute's equivalent of Genocide Convention article II(b)-(c),[1009] instead of considering the accused's intent to destroy a protected group through each of those actus rei, the Trial Chambers, eg in *Karadžić*, consider whether "all of the evidence, taken together", demonstrate the mens rea of genocide.[1010] Chambers have further held that absent direct evidence, the genocidal intent may be inferred from all the facts and circumstances.[1011] Thus, despite the foregoing's separation between article II(b)-(c) and (e), overlaps will often exist.

[1006] Florian Jeßberger, "The Definition and the Elements of the Crime of Genocide" *in* Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009), p 101

[1007] For a comprehensive discussions, see Novic (n 15) pp 50-95.

[1008] *Krstić* Appeal Judgment (n 980) partial dissenting opinion of Judge Mohamed Shahabuddeen, para 49.

[1009] These were detailed under art: 4(2)(a) (killings); 4(3)(b) (causing serious bodily or mental harm during detentions, where the members of the group were subjected to cruel or inhumane treatment; as well as in Srebrenica through, inter alia, the separation of men and boys from their families and the forcible removal of the women, young children and some elderly men from the enclave); and 4(3)(c) (detention of members under conditions of life calculated to bring about their physical destruction, namely through cruel and inhumane treatment, including torture, physical and psychological abuse, rape, other acts of sexual violence, inhumane living conditions, forced labour and the failure to provide adequate accommodation, shelter, food, water, medical care or hygienic sanitation facilities). *See Prosecutor v Karadžić*, (ICTY) Indictment (14 November 1995) Case No IT-95-5/18-T, para 40(a)–(c) (and Schedule C Detention Facilities) and 47(a)–(b) (and Schedule E Killing Incidents).

[1010] *Karadžić* Trial Judgment (n 721) para 550, referring to *Stakić* Appeal Judgment (n 980) para 55; *Karadžić* Trial Judgment (n 721) para 56. *See also Prosecutor v Tolimir*, (ICTY) Appeal Judgment (8 April 2015) Case No IT-05-88/2-A, paras 246-247.

[1011] These ranged from the general context, the scale of atrocities, the systematic targeting of victims, the repetition of destructive and discriminatory acts, the existence of a plan or policy, through to the display of intent through public speeches/meetings. *See Karadžić* Trial Judgment (n 721) para 550.

1. Physical genocide: article II(b)-(c)'s relationship with ethnic cleansing

As seen in this Parts' Chapter 2, ethnic cleansing is not a standalone concept. Rather, it consists of legislative (curtailed rights and oppressive obligations) and physical measures (bodily and psychological) that, in isolation or in combination, eventually lead to the forcible transfer of populations. The following will show how ICTY-ICTR and ICJ's jurisprudence can address some ethnic cleansing means that can be used in scenarios of attacks targeting culture through article II(b) (a) and (c) (b).

a. Article II(b)

As seen before, the travaux préparatoires do not offer much guidance on article II(b). The Preparatory Committee of the International Criminal Court has explained that mental harm under article II(b) means "more than the minor or temporary impairment of mental faculties.[1012] Around the same period, the *Kayishema* Trial Chamber held that more than "temporary unhappiness, embarrassment or humiliation", article II(b)'s mental harm should lead to "a grave and longterm disadvantage to a person's ability to lead a normal and constructive life".[1013] Noting that mental suffering need not result from physical harm, the Chamber concluded that it may be possible to hold an accused thus liable if, at the time of the commission of the acts, (s)he had an "intention to inflict serious mental harm" with a view to destroying a protected group.[1014] Accordingly, the Chamber found that mental and physical harm should be determined on a case-by-case basis, using a common sense approach.[1015] This is most useful in the adjudication of attacks targeting culture for two reasons. First, by considering that mental harm can be sustained independently from physical harm, there is a potential for addressing the targeting of culture, which is not connected to the body of victims. Second, the case-by-case common sense approach enables to consider the indigenous/tribal cases where the breakdown of the collective-anthropical-natural environment symbiosis leads to the illness of the individuals making up the group (Part I, Chapter 2).

Importantly, rape has also been considered as an instrument of genocide under article II(b) – with cultural dimensions. As noted by the *Akayesu* Trial Chamber:

> These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of

[1012] UNGA, Draft Statute for the International Criminal Court, Part 2. Jurisdiction, Admissibility, and Applicable Law, UN Doc. A/AC.249/1998/CRP.8, p 2.
[1013] *Kayishema* Trial Judgment (n 708) para 110; *Krstić* Trial Judgment (n 994) para 513; *Karadžić* Trial Judgment (n 721) para 543. In contrast, *see Akayesu* Trial Judgment (n 612) para 502, holding that The *Akayesu* Trial Chamber held that serious harm, whether bodily or mental, need not be permanent or irremediable. *See* also, eg *Tolimir* Trial Judgment (n 981) para 738; *Krstić* Trial Judgment (n 994) para 513; *Karadžić* Trial Judgment (n 721) para 543.
[1014] *Kayishema* Trial Judgment (n 708) paras 110 and 112.
[1015] *Kayishema* Trial Judgment (n 708) paras 110 and 113; *Prosecutor v Popović et al*, (ICTY) Judgment (13 January 2015) Case No IT-05-88-A, paras 811. *See also Blagojević & Jokić* Trial Judgment (n 49) para 646; *Krstić* Trial Judgment (n 994) para 513; and *Karadžić* Trial Judgment (n 721) para 545.

> destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[1016]

This description leaves no doubt whatsoever that beyond the individual's mental and physical harm, it is the collective that will be destroyed. Beyond the victims' reproductive limitations (biological consequences of the actus reus) flowing from their physical and psychological ordeal during and following rape, it is the consequences on what Novic has referenced as their "expanded victimhood" – ie their families and broader communities – that encapsulates the targeting the of victims' cultural unit.[1017] The Chamber confirmed this by noting the Interahamwe's words and acts that, "in order to display the thighs of Tutsi women", they made them run naked.[1018] The Chamber also referenced perpetrators' remarks during gang rapes "let us now see what the vagina of a Tutsi woman takes like" [sic], to which the accused would respond: "don't ever ask again what a Tutsi woman tastes like".[1019] The ICTR then held that:

> This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence *because* they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.[1020] [emphasis added]

This is a reminder of what this study has proposed by reference to Lebanon and Pakistan's stance during the travaux préparatoires, and which is found in the chapeau's "the group, as such". In other words, there is an intent to destroy the group *because* of what it is. This is based not only on the group's self-identification but also on how it is viewed by the perpetrator, which goes through his/her own cultural lens. The perpetrator's intent is based on his/her revulsion of that group. This intent aims at cleaning society of its infection, as propagated by the undesired group. Under this angle, no matter what type of actus is used, it is the chapeau that matters: genocide *is* cultural. Here parallels may be drawn with the societal impacts of rape victims within indigenous/tribal cases of the IACtHR (Part I, Chapter 2). The Trial Chamber found that those exactions were serious bodily and mental harm in the sense of article II(b).[1021]

The ICTY-ICTR have also included forcible transfer as one of the acts constitutive of article II(b)'s actus reus.[1022] Although they have held that it does not of itself constitute an act of genocide, the ICTR-ICTY have found it relevant in the overall factual assessment.[1023] In *Bosnia*, discussing intent and ethnic cleansing, the ICJ held that:

[1016] *Akayesu* Trial Judgment (n 612) para 731.
[1017] Novic (n 15) p 64.
[1018] *Akayesu* Trial Judgment (n 612) para 732.
[1019] *Akayesu* Trial Judgment (n 612) para 732.
[1020] *Akayesu* Trial Judgment (n 612) para 732.
[1021] *Akayesu* Trial Judgment (n 612) para 734.
[1022] Torture, inhumane or degrading treatment, sexual violence, interrogations with beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to the external or internal organs of members of the group; *see Prosecutor v Seromba*, (ICTR) Judgment (12 March 2008) Case No ICTR-2001-66-A, para 46; *Blagojević & Jokić* Trial Judgment (n 49) para 645; *Brđanin* Trial Judgment (n 758) para 690; *Krstić* Trial Judgment (n 994) para 513. *See also Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 319; *Karadžić* Trial Judgment (n 721) para 545.
[1023] *Tolimir* Appeal Judgment (n 1010) paras 209 and 212; *Blagojević & Jokić* Trial Judgment (n 49) paras 123 and 646; *Krstić* Trial Judgment (n 994) para 513; *Krstić* Appeal Judgment (n 980) paras 33 and 133, referring to *Stakić* Trial Judgment (n 745) para 519; *Blagojević & Jokić* Trial Judgment (n 49) para 123; and *Karadžić* Trial Judgment (n 721) paras 545 and 553.

> [n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to 'destroy, in whole or in part,' a particular group, and deportation or displacement of the members of a group, even if effected by force, *is not necessarily* equivalent to destruction of that group.[1024] [emphasis added]

This passage is symptomatic of the over-emphasis of the type of group destruction as opposed to the means to achieve it. Something that, should it be repeated, was not contemplated during the Genocide Convention drafting. The Secretariat Draft and the Ad Hoc Committee Draft used expressions such as physical and biological genocide to designate the means, or actus rei, to achieve the destruction of the group. Notwithstanding this, the last phrase encapsulates some oscillation, where the ICJ conceives that in some cases, forcible deportation or displacement may result in the group's destruction. This is reminiscent of the "mass displacements of populations from one region to another" which, as explained by the UNSG Commentary, does not constitute genocide, unless it was intended to cause the death of group members through exposure to starvation or other similar measures.[1025]

b. Article II(c)

As regards article II(c), citing a series of examples of "slow death", ranging from food-medical deprivation to excessive work, the *Karadžić* Trial Chamber specifically included: "systematically expelling members of the group from their homes".[1026] Akin to the Secretariat Draft's "slow death", these measures may also form part of ethnic cleansing. Here, not only the above-mentioned UNSG Commentary is recalled, but also Syria's unsuccessful Sixth Committee proposal to consider as a distinct actus reus "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment".[1027] In both *Bosnia* and *Croatia*, the ICJ examined, inter alia, the deportation and expulsion of the members of the group under article II(c).[1028] In *Bosnia*, the ICJ held that ethnic cleansing may constitute genocide under article II(c), if accompanied with the requisite mens rea, ie "with a view to the destruction of the group, as distinct from its removal from the region".[1029] In the case

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[1024] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 190, referring to *Stakić* Trial Judgment (n 745) para 519; *Tolimir* Trial Judgment (n 981) para 739; *Popović et al* Trial Judgment (n 981) para 813.

[1025] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 232.

[1026] *Karadžić* Trial Judgment (n 721) para 547, citing *Brđanin* Trial Judgment (n 758) para 691; *Stakić* Trial Judgment (n 745) para 517; *Prosecutor v Musema*, (ICTR) Judgment (27 January 2000) Case No ICTR-96-13-T, para 157; *Kayishema* Trial Judgment (n 708) paras 115-116; *Akayesu* Trial Judgment (n 612) para 506.

[1027] UNGA, "Agenda Item 32: Syria Amendment to Article II of the Draft Convention on Genocide (E/794)" (7 October 1948) UN Doc A/C6/234 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1946, as referred to *in* UNGA, UN Doc A/C6/SR81 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1479.

[1028] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 323; *Genocide (Croatia v Serbia)* (n 147) paras 373-377 and 386-390.

[1029] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 190. For a different position, *see* the 1996 ILC Report (n 594) according to which:

> The forcible transfer of children would have particularly serious consequences for the future viability of a group as such. Although [art II(e)] does not extend to the transfer of adults, this type

at hand, however, while finding that the evidence showed that such deportations and expulsions took place, the ICJ held that even if these "may be categorized as falling within" article II(c), their requisite mens rea could not be established in that instance.[1030] In *Croatia*, the ICJ simply found that the evidence did not permit to establish that the forced displacements fell under article II(c), without engaging in *Bosnia*'s legal consideration.[1031] Like article II(b), the ICJ has thus left the door open for a case-by-case approach. Depending on the collective's size and nature, it should be thus possible to consider a heritage-centred approach. For example, Lenzerini has proposed that the forcible displacement of and confrontation with Western style societies of the indigenous/tribal collectives could bring their members "to a physical and psychological decline that may eventually bring them to death", which could be covered by article II(b)-(c).[1032] Of course, this would require genocide's requisite mens rea.

2. Cultural genocide provision: article II(e)

A brief case analysis of CCL 10 will be included below in order to show how judicial instinct foresaw article II(e) while the Genocide Convention was barely in the making (a). Due to the nature of the cases before the ICTY-ICTR and ICJ, the former have not been expansive on the question (b), while the ICJ has done so remotely (c).

a. CCL 10

Before proceeding, it is important to warn against a methodological trap. When discussing the crime of genocide, the ICTY (and commentators) have referred to the post-Second World War trials, ie the IMT, IMTFE and CCL 10. Predating UNGA Resolution 96(I), neither the IMT Charter nor the IMTFE Charter included genocide in their competence ratione materiae.[1033] The IMT judgment was rendered before the issuance of the Secretariat Draft and the IMTFE judgment was rendered before the start of the Sixth Committee discussions. In the subsequent CCL 10, the *Greiser*, *Goeth* and *RuSHA* trials approached the concept of cultural genocide. However, the first two occurred before even UNGA Resolution 96(I) was issued, while *RuSHA* occurred

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of conduct in certain circumstances could constitute a crime against humanity under article 18, subparagraph (g) or a war crime under article 20, subparagraph (a) (vii). Moreover, the forcible transfer of members of a group, particularly when it involves the separation of family members, could also constitute genocide under subparagraph (c).

1996 ILC Report (n 594) p 46; and 1991 ILC Report (n 425) p 104.

[1030] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 334.

[1031] *Genocide (Croatia v Serbia)* (n 147) para 377.

[1032] Lenzerini Federico, "The Trail of Broken Dreams: the Status of Indigenous Peoples in International Law" *in* Lenzerini Federico (ed) *Reparations for Indigenous Peoples: International and comparative Perspectives* (Oxford University Press 2008), p 103.

[1033] Their competence ratione materiae consisted of Crimes against Peace, War Crimes ("Conventional War Crimes" in IMTFE Charter (n 488) art 5), and Crimes against Humanity. The prosecutor however referred to genocide in count three, under War Crimes, in the indictment of 6 October 1945. *See* IMT Judgment (n 490) pp 43-44, wherein the accused were charged with "deliberate and systematic genocide, *viz.*, the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others".

between the Secretariat Draft and Ad Hoc Committee Draft release. As these trials were compiled and commented in 1949 by the UNWCC, the latter's ex post facto characterisation of aspects of the crimes as genocide have further confused the debate.

Chart 10: Chronology of Second World War related trials and of the drafting of the Genocide Convention

1945	1946							1947			1948				
Nov. 20	May 3	June 21	July 7	August 27	Sept. 5	Oct.	Dec. 11	May	June 26	Oct.	March 10	May 24	Sept.	Nov. 4	Dec. 09
IMT (ended 01 Oct)															
	IMTFE														
		Greiser													
				Goeth											
						RuSHA (started 10 October)									
							UN res. 96(I)								
									Secretariat Draft						
												Ad Hoc Committee Draft			
													Sixth Committee Discussion		
															UNGA res. 260 A(III)

Throughout their existence, the ICTY-ICTR regularly referred to these, further exacerbating this legal anachronism that has characterised their methodological flaw. This has escaped the legal literature. The following analysis will thus be very brief and mainly in order to illustrate the fact that, even before its criminalisation under the Genocide Convention, and the ensuing doctrinal and judicial debates, the judges conceived the forcible transfer of children as a culturally oriented atrocity.

Starting with *Greiser*, the prosecution characterised the forcible transfer of Polish children as an act of persecution, and the judgment described "physical and spiritual genocide" which consisted of the "complete destruction of Polish culture and political thought" through the adults' deportation and mass extermination but also the Germanisation of "racially suited" Polish children.[1034] It is reasonable to propose that the terms "spiritual genocide" were, in the tribunal's mind, if not synonymous with cultural genocide, certainly a component of it. This is corroborated by the tribunal's holding that Greiser brought its "totalitarian genocidal attack" to countries' "rights […] to exist, and to have an identity and culture of their own".[1035] When placed within this context, the forcible transfer of children is understood to have cultural (and also physical) consequences. As seen above, however, due to its predating even UNGA Res 96(I), the above *Greiser* holding is useful only to the extent that it provides clues with respect to the judges' understanding of the cultural dimensions of the Germanisation of Polish children.

[1034] *Greiser* (n 656) p 114.
[1035] *Greiser* (n 656) p 114.

In *RuSHA*, the indictment alleged that the "Germanization program" was implemented in part by:

> (a) Kidnapping the children of foreign nationals in order to select for Germanization those who were considered of 'racial value';
> […]
> (c) Taking away, for the purpose of exterminating or Germanization, infants born to Eastern workers in Germany;[1036]

RuSHA took place before the Genocide Convention's adoption. Although the trial was concurrent with UNGA Res 96(I) and the Secretariat Draft, it did not benefit from the Ad Hoc Committee Draft, let alone the Sixth Committee discussions. Thus the legal value of the aforementioned passage in terms of genocide is anecdotal at best. Subsequently, the UNWCC viewed the *RuSHA* case as covering article II, particularly "the measures undertaken for forced Germanization, including the kidnapping and taking away of children and infants".[1037] However, the UNWCC did so after the Genocide Convention's adoption. Notwithstanding, this shows that the UNWCC too understood the forcible transfer of children's cultural dimensions.

b. The ICTY-ICTR

Article II(e) did not provide much of a factual basis for substantive ICTY-ICTR jurisprudence. It may, however, be obliquely relied on in *Krstić* and *Akayesu.* In the latter, the Trial Chamber held that:

> as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.[1038]

This does not provide much assistance other than this actus reus resulting in mental harm, perhaps taking it further away from its cultural dimensions.

Moving to *Krstić*, as seen in this Section's introduction, having observed that one could conceive the destruction of a group by attacking its culture and identity, the Trial Chamber added that, unlike the group's physical-biological destruction, the travaux préparatoires rejected its cultural destruction.[1039] As further seen, the *Krstić* Appeals Chambers confirmed this since, as it held, the 1996 ILC Report "had examined closely the *travaux préparatoires*" in order to clarify the term "destroy" [emphasis in original].[1040] The Appeals Chamber also cited Schabas – who actually was first to refer to the 1996 ILC Report.[1041] What the Appeals Chamber failed to notice is that the *close* examination of the travaux préparatoires does not substantiate this unequivocally nor did the Chamber mention that in his monumental work "Genocide in International

[1036] *RuSHA* (n 911) pp 3 and 9. The same document provide for Polish-German children to be educated in Germany and in German educational institutions with the exclusion of their parents' influence.
[1037] *RuSHA* (n 911) pp 39-40.
[1038] *Akayesu* Trial Judgment (n 612) para 509.
[1039] *Krstić* Trial Judgment (n 994) paras 574 and 577.
[1040] *Krstić* Trial Judgment (n 994) para 25, fn 39.
[1041] *Krstić* Trial Judgment (n 994) para 25, fn 39.

Law", about sixty pages after having espoused the 1996 ILC Report, Schabas had observed that article II(e):

> is somewhat anomalous, because it contemplates what is in reality a form of cultural genocide, despite the clear decision of the drafters to exclude cultural genocide form the scope of the Convention. As a result, […] the prosecution would be required to prove the intent 'to destroy' the group in a cultural sense rather than in a physical or biological sense.[1042]

Mettraux has illustrated these complications by not rejecting article II(e) as cultural genocide, conceptually, but by listing its rejection by ICR-based jurisdictions.[1043]

c. The ICJ

In *Bosnia*, the applicant proposed a new interpretation of article II(e), by claiming that:

> rape was used "as a way of affecting the demographic balance by impregnating Muslim women with the sperm of Serb males" or, in other words, as "procreative rape". […] children born as a result of these "forced pregnancies" would not be considered to be part of the protected group and considers that the intent of the perpetrators was to transfer the unborn children to the group of Bosnian Serbs.[1044]

Bosnia thus seemed to have characterised article II(e) as a mix of physical, biological and cultural genocide. Physical, as it was the demographic balance that was contemplated, biological as it addressed procreative rape, and cultural since the children conceived as a mixture of Serb male and Bosnian Muslim female genes would not be accepted as part of the Bosnian group. The ICJ found that the evidence did not permit to establish "that there was any aim to transfer children of the protected group to another group within the meaning of Article II(e)".[1045] Importantly, the ICJ seemed to dispute the proposition not legally, but on the basis of evidence. Once again, this leaves the door open for an evolution of the jurisprudence depending on the cases at hand.

As seen earlier, in *Croatia*, to address Croatia's submission that the destruction of the group required under article II(b) and (e) need not be physical,[1046] the ICJ replicated its *Bosnia* reasoning on cultural genocide, further explaining that:

> even if it does not directly concern the physical or biological destruction of members of the group, [article II(b)] must be regarded as encompassing only acts carried out with the intent of achieving the physical or biological destruction of the group […].[1047]

Again, the travaux préparatoires do not unequivocally support this holding, not only because of the negotiators' confusion during the Sixth Committee discussions of the forcible transfer of children, but also the fact that they often discussed the consequences of that actus reus rather than the intention behind it. Thus, according to the UNSG Commentary, the Secretariat Draft article I(II)(2) on biological genocide consists of:

[1042] Schabas, *Genocide in International Law* (n 15) pp 185, 187 and 245.
[1043] Mettraux, *International Crimes: Law and the Practice. Genocide, vol 1* (n 15) pp 282-285.
[1044] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 362.
[1045] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 367.
[1046] *Genocide (Croatia v Serbia)* (n 147) para 134.
[1047] *Genocide (Croatia v Serbia)* (n 147) para 136.

> [m]easures aimed at the extinction of a group of human beings by systematic restrictions on births without which the group cannot survive.[1048]

Moreover, this type of genocide was to include sterilisation and compulsory abortions, as well as the segregation of the sexes and obstacles to marriage, to prevent reproductive activities.[1049] If so, then the Secretariat Draft article I(II)(3)(a) must have meant that the forcible transfer of children was an act designed to do more than just preventing reproductive activities. Immediately after its reasoning, the ICJ held that article II(e):

> *can also* entail the intent to destroy the group physically, in whole or in part, since it can have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival.[1050] [emphasis added]

In light of the ICJ's firm stance that genocide may only be physical and biological, the words "can also" probably mean "can, *in addition to the biological destruction of the group*, entail the intent to destroy physically" [emphasis added].[1051] As explained earlier, the ICJ's refusal to consider article II(e) under the cultural genocide angle leads to the proposition that the ICTY-ICJ reasoning has been at least partly teleological. This is so because, both bodies have followed the ILC by conflating the chapeau's type of group destruction and the means of achieving it. Once again, they have all relied directly or indirectly on the travaux préparatoires which, as seen, do not unequivocally support this proposition. As explained, while a physical act, the forcible transfer of children will often have physical, biological and cultural repercussions on the group. This is how the Nazis saw it. This is how the CCL 10, untainted by subsequent doctrinal debates saw it. This is how many national bodies have seen it.[1052]

C. Tangible-centred violence indicative of genocidal intent

Despite the non-retention of article III of the Ad Hoc Committee Draft in the Genocide Convention, the destruction of culture's tangible has kept returning before the ICTY (1) and the ICJ (2), both of which have considered those acts as indicative of the genocidal intent rather than constitutive of genocide as such.

1. As part of ethnic cleansing: the ICTY's *Karadžić & Mladić* and *Krstić*

As seen in this Part, Chapter 2, in the *Karadžić & Mladić* Rule 61 Review, the Trial Chamber considered that the systematic destruction of the targeted population's cultural tangible was part of a "memory-cide", a policy of "cultural cleansing" which aimed at

[1048] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[1049] ECOSOC, UN Doc E/447 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 234.
[1050] *Genocide (Croatia v Serbia)* (n 147) para 136.
[1051] *Genocide (Croatia v Serbia)* (n 147) para 136.
[1052] For a comprehensive review of national practice, see Novic (n 15) pp 69-74.

"eradicating memory".[1053] Considering that these exactions amounted to ethnic cleansing, the Chamber legally characterised them as a CaH rather than genocide. On genocide, the Trial Chamber indicated that it was necessary to evaluate whether the pattern of conduct, ie ethnic cleansing, "taken in its totality" reveals a "genocidal intent" which may "be inferred":

> from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group – acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct.[1054]

The Trial Chamber cited three specific acts, the perpetration of which highlights the intent "to reach the very foundation of the group or what is considered as such".[1055] These were the systematic rape of women with the intent to procreate ethnically modified children (see earlier discussion); the humiliation and terror of the member of the targeted group; and:

> [t]he destruction of mosques or Catholic churches [which] is designed to annihilate the centuries-long presence of the group or groups; the destruction of the libraries [which] is intended to annihilate a culture which was enriched through the participation of the various national components of the population.[1056]

The Trial Chamber thus viewed this tangible-centred damage to encompass both secular and religious elements, thereby equating it to CaH persecution, in the context of ethnic cleansing. Like *Al Mahdi* years later (Part, Chapter 1), the Chamber linked these destructions to the collective's identity. In the ICTY case, this was viewed as a local-national diptych. The Chamber also found that this could evidence the perpetrator's genocidal intent. Hence, the Trial Chamber's holding that some of these acts "could have been planned or ordered with a genocidal intent".[1057] Although it is not clear what precisely those acts are, the *Karadžić & Mladić* Rule 61 Review leaned towards a tangible-centred approach.

A few years later, *Krstić* was charged, inter alia, with genocide for "intending to destroy in part the Muslim people as a national, ethnical or religious group" under the ICTY Statute, article 4(2)(a)-(b), ie killing members of the group and causing serious bodily or mental harm to members of the group.[1058] The Trial Chamber held that:

> where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[1059]

This passage reiterates the travaux préparatoires and the 1996 ILC Report's imprecision as regards the word "destruction". As seen, the destruction attaches to the mens rea

[1053] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 60 and 62.
[1054] *Karadžić & Mladić* International Arrest Warrant (n 770) paras 94-95.
[1055] *Karadžić & Mladić* International Arrest Warrant (n 770) para 94.
[1056] *Karadžić & Mladić* International Arrest Warrant (n 770) para 94.
[1057] *Karadžić & Mladić* International Arrest Warrant (n 770) para 95.
[1058] *Krstić* Trial Judgment (n 994) paras 21-26.
[1059] *Krstić* Trial Judgment (n 994) para 580.

whereas "physical" and "biological" attach to the means of achieving it, ie the actus rei. As explained before, this inordinate focus on the type of destruction is either the result of a partial reading of the travaux préparatoires or a teleological exercise to demonstrate that cultural genocide cannot be genocide. Be that is it may, joining the *Karadžić & Mladić* Rule 61 Review, the Trial Chamber held that the destruction of a defined group's cultural tangible, while not genocide, may be proof of the perpetrator's genocidal intent, provided that it accompanies physical/biological genocide.

In the subsequent *Karadžić* Trial Judgment, citing *Krstić*, the Trial Chamber made the same conflation of the destruction contemplated in the mens rea and the means to achieve that, ie the actus rei by holding that the Genocide Convention and customary international law prohibit only the physical and biological destruction of a group, not attacks on its cultural or religious property or symbols.[1060] Notwithstanding this, the Chamber held that "while such attacks may not constitute underlying acts of genocide, they may be considered evidence of intent to physically destroy the group".[1061] The Chamber did not elaborate further; it merely made a series of references to prior cases, each of which referred to a previous one, with their source, in terms of substance, being traced back to the *Krstić* judgments and the *Karadžić & Mladić* Rule 61 Review. In sum, the ICTY has, in line with the travaux préparatoires, rightly refused to consider the destruction of culture's tangible, whether secular or religious, as cultural genocide. This may be different from an anthropological viewpoint. But in law, it is a posture in conformity with the Genocide Convention discussions and the *Karadžić & Mladić* Rule 61 Review. On the positive note, however, rather than focusing on this limitation as such, the ICTY has used it as an opening by considering that genocidal intent may be inferred from attacks targeting culture's tangible.

As seen in Chapter 2, considering attacks targeting culture from a tangible-centred approach has enabled the ICTY to view the destruction of culture's tangible as part of ethnic cleansing which, in legal terms, translates as CaH persecution. Given the heightened mens rea of this "lower genocide", it is logical to consider that the destruction of culture's tangible may be a proof of genocidal intent.

[1060] *Karadžić* Trial Judgment (n 721) para 553, referring to *Krstić* Appeal Judgment (n 980) para 25.

[1061] *Karadžić* Trial Judgment (n 721) para 553; *Tolimir* Appeal Judgment (n 1010) para 230 (the Trial Chamber erred in considering that the mosques' destruction was an act of genocide under ICTY Statute (n 52) art 4(2)(c)); *Krstić* Trial Judgment (n 994) para 580. In contrast, Greiser was found guilty of:

> (b) Repression, genocidal in character, of the religion of the local population […] by restriction of religious practices to the minimum; and by destruction of churches, cemeteries and the property of the church;
>
> (c) Equally genocidal attacks on Polish culture and learning.

Greiser (n 656) p 112. Like *Greiser*, the *Goeth* Indictment did not refer to genocide. But the UNWCC dedicated a full section to it, observing that, beyond genocide's "physical and biological aspects and elements", the prosecution established its "other components […] such as its economic, social and cultural connotations", based on the *Goeth* judgement that "[t]he wholesale extermination of Jews and also Poles […] embraced […] the destruction of the cultural life of these nations." *See* Hauptsturmführer Amon Leopold Goeth was an Austrian member of the German National Socialist Workers' Party ("NSDAP") and a Waffen SS. *See Poland v Hauptsturmführer Amon Leopold Goeth*, (Supreme National Tribunal of Poland) Judgment (31 August and 5 September 1946) 7 LRTWC 1, pp 7-9.

In *RuSHA*, the indictment alleged that the "Germanization program" was implemented in part by:

> (h) Plundering public and private property in Germany and in the incorporated and occupied territories, *e.g.*, taking church property, real estate, hospital apartments, goods of all kinds, and even personal effects of concentration camp inmates [.]

See RuSHA (n 911) p 3.

2. As part of article II(c) claims: the ICJ practice

In both *Bosnia* and *Croatia*, the ICJ examined under article II(c), inter alia, the destruction of the protected group's cultural tangible.[1062] In *Bosnia*, the ICJ found that there was conclusive evidence establishing "the deliberate destruction of historical, religious and cultural property".[1063] However, it found that these fell outside article II more generally.[1064] In reaching this conclusion, the ICJ referred to the 1996 ILC Report and *Krstić* judgments.[1065] In *Croatia*, referring to *Bosnia*, the ICJ found it unnecessary to further examine whether the destruction of culture's tangible established the actus reus within the meaning of article II(c).[1066] In both *Bosnia* and *Croatia*, the ICJ held that such destruction of culture's tangible may be taken into account in order to establish intent to destroy the group physically.[1067]

Once again, like the ICTY, the ICJ relied on the 1996 ILC Report passage that speaks to the "material destruction" of the group which, unlike the ILC's claim, is not unequivocally supported by the travaux préparatoires. Unfortunately, the ICJ's further reliance on *Krstić* which conflated the destruction (mens rea) and actus rei (eg "physical" and "biological") did not simplify the matter. It would have been sufficient for the ICJ to first refer to the Sixth Committee's rejection of the Ad Committee Draft article III on cultural genocide which contained the tangible-centred means of attacking culture, as well as the Soviet Union's failed attempt to reintroduce a variation of it right before the adoption of the Genocide Convention. Second, the ICJ could have considered the drafting evolution of article II(c), which shows its association with the "slow death" ghetto scenario that was contemplated in the UNSG Commentary, which was reflected in the Ad Hoc Committee Draft. The idea behind the various draft proposals up until the adoption of the convention being that the actus reus in question was meant to result in the eventual death of the members of the group. As seen, article II(c)'s repetition of the chapeau is an oddity which is partly linked to the 1946-1948 negotiators' confusion surrounding the mens rea, actus and motive of genocide. But it may also be linked to the drafters' wish to enable as wide a scope as possible for the UNSG commentary's eventual "slow death" scenario. Otherwise, as seen earlier, the convention should have also imported "physical destruction", a fortiori, in article II(a).

Be that as it may, the ICJ cases concerned the more "urban" type scenarios. However, as discussed earlier, this is not necessarily the case in smaller collectives, like the IACtHR's indigenous/tribal cases where the breakdown of symbiotic relationship between the collective and its anthropical-natural environment can result in mental harm and shorter life expectancy. This illustrates the challenges of generalising legal findings instead of linking them to the facts of a case.

[1062] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 322; ICJ, *Genocide (Croatia v Serbia)* (n 147) paras 373-377 and 386-390.
[1063] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1064] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1065] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) para 344.
[1066] *Genocide (Croatia v Serbia)* (n 147) para 389.
[1067] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 344 and 186. *See also Genocide (Croatia v Serbia)* (n 147) paras 136 and 390.

D. Synthesis: ethnic cleansing's heightened mens rea

The ICTY-ICJ jurisprudence has rejected the proposition that cultural genocide may contain tangible-centred actus rei. On the other hand, it seems not to have ruled out the heritage-centred one, although short of referring to it as cultural genocide. On the mens rea, as detailed by Mettraux,[1068] the jurisprudence has systematically maintained that the destruction of the group may only be physical and biological, with the latter being sometimes viewed as a sub-category of the former. As explained in details in this Chapter, however, the reality is far more nuanced, inviting all to pause and reconsider this mantra which sometimes defies the obvious. Here, one should recall the prosecution's submission in *Krstić* that:

> what remains of the Srebrenica community survives in many cases only in the biological sense, nothing more. It's a community in despair; it's a community clinging to memories; it's a community that is lacking leadership; it's a community that's a shadow of what it once was.[1069]

Srebrenica concerned the killing of a significant number of the male members of the group under article II(a). From this vantage point, the physical destruction (the killing) of the members of the group perturbed the group's functioning and identity. By insisting that the type of group destruction can be only physical-biological in order to justify the exclusion of cultural genocide appears thus more of a teleological approach. Even so, it remains more of a theoretical discussion – bordering the impossible as it conflates mens rea and actus reus. It is also a perilous territory as it leads the adjudicator to the confines of group biology, race and other controversial – because non-universally agreed – considerations. One example illustrates why the aforementioned reasoning is not needed. Children A and B from group X are forcibly transferred at the age of 5 to group Y, never to see again group X. This actus reus is unequivocally physical. The ILC-ICTY-ICJ view destruction associated with it as only physical/biological. If A and B later have children together, have they reconstituted group X physically/biologically? Yes. But have they done so culturally? No since they have lost their identity. This is most prominently explained in Judge Shahabuddeen's *Krstić* Appeal Judgment his partially dissenting opinion:

> The proposition that the intended destruction must always be physical or biological is supported by much in the literature. However, the proposition overlooks a distinction between the nature of the listed "acts" and the "intent" with which they are done. From their nature, the listed (or initial) acts must indeed take a physical or biological form, but the accompanying intent, by those acts, to destroy the group in whole or in part need not always lead to a destruction of the same character. There are exceptions. Article 4(2)(c) of the Statute speaks of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," and an intent to cause physical or biological destruction of the group in whole or in part is also implied in the case of article 4(2)(d) proscribing "measures intended to prevent births within the group." However, *a contrario*, it would seem that, in other cases, the Statute itself does not require an intent to cause physical or biological destruction of the group in whole or in part.[1070]

[1068] Mettraux, *International Crimes: Law and the Practice. Genocide*, vol 1 (n 14) pp 173-178.
[1069] *Krstić* Trial Judgment (n 994) para 592.
[1070] *Krstić* Appeal Judgment (n 980) partial dissenting opinion of Judge Mohamed Shahabuddeen, para 48; *see* also paras 49-50. *See* also *Stakić* Appeal Judgment (n 980) paras 20-24.

This passage calls for no comments as it perfectly encapsulates the propositions developed in this Chapter. Beyond any doctrinal discussions, it is useful to refer to *RuSHA*, where the tribunal pointed to a Racial-Political Office of the Nazi Party Germanization document, according to which:

> a continuation of a national Polish cultural life is definitely out of question. The Polish orientated population, in as far as it cannot be assimilated, is to be deported, the remainder to be Germanized. Therefore, a basis for a national and cultural autonomous life must no longer exist. In future there will be no Polish schools in the Eastern territories. In general there will be only German schools. […]
> Any religious service in Polish is to be discontinued. The Catholic and even the Protestant religious service are only to be held by especially selected German–conscious German priests and only in German. […]
> In order to prevent any cultural or economic life, Polish corporations, associations and clubs cease to exist; Polish unions are also to be dissolved.
> Polish restaurants and cafés as centres of the Polish national life are to be closed down. Poles are not permitted to visit German theatres, variety shows, or cinemas. Polish theatres, cinemas and their places of cultural life are to be closed down. There will be no Polish newspapers, nor printing of Polish books nor the publishing of Polish magazines. For the same reasons Poles must not have radios and should not possess a phonograph. […]
> [Poles] are not to have any independent political parties, and associations which might provide a possible nucleus for a future national concentration must be forbidden. Non-political clubs should not be allowed either, or only from very special points of view. Cultural associations, for instance, vocal societies, clubs for the study of the home country, gymnastic and sports clubs, social clubs, etc., can by no means be regarded without misgivings, as they can easily promote nationalism amongst their members.[1071]

The Nazis conceived the destruction of the group in the broadest understanding of the notion of "culture". It included every aspect of the social life of the group, that is, any factor that could contribute to its cohesion and could emulate its sense of identity. Basically, Germanisation meant that "the final aim must be the complete elimination of the Polish national spirit".[1072]

Notwithstanding the above, the ICTY-ICJ have systematically held that the destruction of the group can only be physical/biological, contrary to the fact that the travaux préparatoires do not unequivocally support this. Furthermore, the ICTY-ICJ have made legal findings that they seem to hold as generic, whereas in reality they were related to the facts of the cases at hand. As seen, what stands for an urban-type scenario (the former Yugoslavia) may not necessarily apply to other instances, eg the indigenous/tribal groups as reviewed in Part I, Chapter 2.

On the other hand, however, the ICTY-ICJ jurisprudence has favourably entertained the relationship between ethnic cleansing and genocide. In *Sikirica*, the Trial Chamber explained what differentiates persecution from genocide is that the former targets individuals on discriminatory grounds, whereas genocide targets the group as the sum of its members, through exactions committed against them.[1073] This, as held by the Chamber, is what "establishes a demarcation between genocide and most cases of ethnic cleansing".[1074] Prospectively, one may refer to Fournet and Pégorier who have shown that many ICTY indictments have encompassed a system of charging the

[1071] *RuSHA* (n 911) pp 7-8 and 10.
[1072] *RuSHA* (n 911) p 9.
[1073] *Sikirica et al* Trial Judgment (n 720) para 89.
[1074] *Sikirica et al* Trial Judgment (n 720) para 89.

accused that escalates from persecution to genocide.[1075] As seen (Chapter 2), the ICTY's *Kupreškić* Trial Judgement has held that:

> the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. […] [P]ersecution [...] is an offence belonging to the same *genus* as genocide. […] In both categories what matters is the intent to discriminate […]. [F]rom the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution. […] [W]hen persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.[1076]

Novic has noted that a number of ICTY judgments have reflected this escalation by establishing first persecution and then finding that they had materialised as a genocide-related actus reus, such as article II(c).[1077] Could it thus be argued that if the persecutory mens rea were to evolve from its enumerated grounds towards the genocidal intent, then attacks targeting culture may fall under article II(b)-(c)'s actus rei? Referring to *Krstić*, Novic has noted the difficulty to establish the genocidal mens rea in a case where attacks against culture constituted a significant part of the evidence. On this basis, Novic argues that "if acts of physical persecution are likely to constitute the actus reus of genocide, acts of socio-cultural persecution may only be taken into account at the level of the mens rea".[1078] A literal approach would militate against the proposition that culture-based crimes may go "beyond temporary unhappiness, embarrassment or humiliation", and result in slow death or "in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life". However, in line with Pakistan's comments that there are societies where cultural features may be "more important than life itself",[1079] there may be situations like those addressed by the IACtHR, where the members of a group have, as a result of severe cultural curtailment experienced "deep anguish and despair" in that "spiritually-caused illnesses" would inter-generationally "affect the entire natural lineage" (Part I, Chapter 2). This would require a human rights-based "dynamic interpretation" combined with a case-by-case approach as to whether certain cultural violations of a group would qualify as "serious mental harm".

IV. Conclusion to Chapter 3: cultural genocide is a tautology

As seen, genocide may consist of attacking culture in a heritage-centred manner. But as analysed, a relationship may also exist between genocide and tangible-centred attacks targeting culture. Furthermore, the analysis of the travaux préparatoires has shown that the non-adoption of the aforementioned approach by the negotiators led to confusing debates that conflated human rights and criminal law. To understand this, it is noteworthy that, among the three crimes most commonly recognised internationally, ie war crimes, CaH and genocide, the latter has given rise to the widest possible margin of interpretation, speculation and controversy. This is so for three reasons.

[1075] Fournet and Pégorier (n 623) p 718.
[1076] *Kupreškić et al* Trial Judgment (n 624) para 636.
[1077] Novic (n 15) p 153.
[1078] Novic (n 15) p 153.
[1079] UNGA, UN Docs A/C6/SR83 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 1502.

First, genocide is the ultimate anthropological crime. Its foundation is laid on the abstract: genocide is not about the destruction of individuals. It is about the destruction of the group, even though it requires the former to prove the latter. This was definitely an avant-garde posture, since it would take, for example, the twenty first century for the IACtHR to recognise the rights of the collective as the sum of its natural persons (Part I, Chapter 2). Structurally, the crime is defined through its chapeau, which contains the requisite mens rea for the destruction of the protected groups, and five actus rei, which concern the way in which the protected group's destruction may be achieved, through exactions against its individual members. This has led to a vulgarisation of the crime of genocide, particularly at the hands of politicians who often use the term in an abusive manner, progressively depriving it of its object and purpose.

Second, the Genocide Convention was drafted in extreme circumstances, in only two years: 1946-1948. The words "extreme" and "only" are not to be taken lightly. The Second World War had just ended, with the dropping of Little Boy and Fat Man over Hiroshima and Nagasaki. The planet had experienced an unprecedented staggering death toll of over 70 million persons worldwide, and, in some cases, such as Poland and the Soviet Union, a population loss of around 17% and 13%, respectively. Specifically, the ashes of the Holocaust, which destroyed over half of European Jews, were still fresh. It is upon these ruins that States embarked on the construction of a new world order that they hoped would be just. One tool to achieve this was the then nascent UN, under whose auspices and embryonic bureaucracy the UDHR, a human rights instrument, and the Genocide Convention, a partly criminal law instrument were prepared.

Third, and as a result of the above, various features of the fabric of the international community were amalgamated into the process. In 1946, slightly less than 50% of the early twenty-first century's States existed, with the bulk of that deficit being borne by Africa, from where only Egypt, Ethiopia, Liberia and South Africa were present during the drafting and negotiation process. In Asia, some key States such as India, Israel and Pakistan were yet to gain independence or be created during the two-year negotiations of the convention. The gender factor was abysmal during the convention's negotiations, as State representatives were quasi-unanimously male. Of those present, many lacked a criminal law background and often mixed-up various criminal law concepts. Even among those who had solid criminal law practice/knowledge, many diverged on the understanding of criminal law concepts due to the specifics of their legal traditions. Both groups also often confused human rights and criminal law, particularly when discussing the inclusion/exclusion of the concept of cultural genocide.

The above three factors explain the multiple ambiguities, whether perceived or actual, in the convention's definition of the crime of genocide.

Rather than glossing over the specific technicalities of the definition of genocide, this Chapter attempted to explore whether, and if so, to what extent the concept of cultural genocide falls within the scope of article II. To do so, extensive recourse was had to the travaux préparatoires which, surprisingly, *do* shed light on the issue. As seen, cultural genocide first materialised in the Secretariat Draft as one of the three sets of actus rei, namely physical, biological and cultural genocide, to achieve the mens rea of part or total destruction of protected groups. As an actus reus, cultural genocide was then subdivided into both tangible-centred and anthropo-centred means, with the latter

including the forcible transfer of children to another group. Already at that early stage, disagreements on the inclusion of cultural genocide, except for the forcible transfer of children, were manifest. Matters however changed in article III of the Ad Hoc Committee Draft, where cultural genocide as an actus reus was simplified and endowed with its own mens rea, that is the destruction not of the protected group but of its features. The Ad Hoc Committee Draft article II kept the mens rea of destruction of the protected group, together with its actus rei of physical and biological genocide. At the Sixth Committee, however, while article III was rejected, the forcible transfer of children morphed into article II(e).

What transpires from the travaux préparatoires is the negotiating States' dual confusion, one that has continuously impacted both international jurisdictions and legal scholars. The first prong of this confusion lies within the chapeau. There, uncertainties prevailed throughout the drafting of the convention with regard to the destruction of the group, which was understood as physical, biological – sometimes perceived as a sub-category of the former – and, timidly cultural. The definition of the groups gave also rise to diverse interpretations. The understanding of racial, ethnical and religious –and to a lesser extent national – groups is cultural, in that they are evolving concepts, depending on cultural trends, both nationally and internationally. However, these terms also comprise a strong cultural component. For example, the word "ethnic" comprises elements such as language and spirituality, both of which are manifestations of culture. In other words, to destroy a racial, ethnical or religious group is to destroy collective cultural units. Furthermore, to destroy a racial, ethnical or religious group, *as such*, is to destroy them because of what they represent, ie the materialisation of humans' cultural diversity.

The second prong is that, within cultural genocide as an actus reus, a distinction was made, early on, between tangible-centred and anthropo-centred actus rei. The first, ie the destruction of the group's cultural tangible, was rather clearly rejected at the Sixth Committee. However, the second, which concerned the more anthropo-centred means such as language/religious restrictions or forcible transfer of individuals, was only partly rejected, since the Sixth Committee eventually decided to include the forcible transfer of children as article II(e) of the Genocide Convention. Although this happened when delegates were discussing article II of the Ad Hoc Committee which was on physical and biological genocide, most States that took the floor, regardless of their views on cultural genocide, found that it should be discussed under the Ad Hoc Committee Draft's article III, which had been left out by the Ad Hoc Committee itself. The premature nature of the discussion was manifest in the Sixth Committee, since most States were confused as to whether, and to what extent, the forcible transfer of children was *also* physical and/or biological genocide. Notwithstanding this, the forcible transfer of children was included as an actus reus accompanying the mens rea of destroying in whole or in part protected groups.

Therefore, as also observed by Novic, Stahn and Vrdoljak, the travaux préparatoires do not crisply support the ILC, ICTY-ICTR, ICJ and most legal scholars' mantra that the destruction of the protected group can only be physical or biological.[1080] The travaux préparatoires permit to conceive cultural genocide in two ways. The first is the actus

[1080] *See* Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019), p 47 and Vrdoljak, "Cultural Heritage in Human Rights and Humanitarian Law" (n 15) p 299; and Novic (n 15) pp 50-95.

reus of the forcible transfer of children to another group. The second, perceivably avant-garde, but in fact plainly factual, consists of considering the intent to destroy the groups as such as cultural genocide in and of itself. To attack groups for what they are, ie collective cultural units, is to attack culture. Under this understanding, cultural genocide becomes a tautology for, regardless of its actus rei, genocide, in both its intent and result, is simultaneously shaped culturally and by cultural rejection.

International judicial practice has rejected cultural genocide's tangible-centred actus rei, although it accepted it as indicative of the perpetrator's genocidal intent. Notwithstanding this, it remains to be seen whether, and if so to what extent, international courts are willing to consider the question of persecution's mens rea evolving toward genocidal mens rea, particularly under article II(b)-(c). As regards the heritage-centred understanding of cultural genocide, international courts are yet to fully address the question, for lack of relevant cases before ICR-based jurisdictions, such as the ICC, or claims before the ICJ. Once this happens, these jurisdictions may be able to determine whether article II(e) is cultural genocide alone or in combination with physical and biological genocide. Here, one may recall Judges Guerrero, McNair, Read, and Mo's joint dissenting opinion that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."[1081] By recognising article II(e) as cultural genocide, regardless of it being ruled also as physical or biological, the ICC and the ICJ would not even have to proceed with "the most generous interpretation". As Novic and Schabas have suggested, by focusing on the literal reading of the provision, the object and purpose of the convention, the dynamic interpretation of human rights instruments and, guided by the travaux préparatoires,[1082] they would merely need to transcend the questionable mantra that article II(e) is only physical/biological.

Had cultural genocide been unequivocally rejected during the negotiations, it would not have systematically come back both in the legal literature and in international judicial practice. For example, the ICC OTP's 2021 Draft Policy on Cultural Heritage provides:

> The Office recognises that children are the conduit of cultural heritage to future generations. If children are forcibly removed from a group, this will constitute an underlying act of genocide that will likely have a profound effect on the access to, practice of and continuation of a group's cultural heritage. In relation to the children themselves, the forcible transfer may create a severe dislocation from their cultural heritage."[1083]

By better understanding the broader context of the negotiations, one may place the crime of genocide in its proper anthropological context. Thus, it is noteworthy that a few hours before the UNGA adoption of the convention, Shaista Suhrawardy Ikramullah, the only prominent female representative among the fifty-eight States present at the Sixth Committee,[1084] observed in relation to cultural genocide and on behalf of her then just born Muslim Pakistan, that:

[1081] *Genocide* Advisory Opinion (n 783) p 36.
[1082] Schabas, *Genocide in International Law* (n 15) p 230; and Novic (n 15) pp 50-95.
[1083] OTP, "Draft Policy on Cultural Heritage" (22 March 2021) <https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf> accessed 2 April 2021, para 85.
[1084] Two of which were the Soviet Union's Byelorussian and Ukrainian Soviet Socialist Republics.

> It had been argued that such acts, heinous though they might be, were not so outrageous as physical genocide. It might be that some people regarded the destruction of religious edifices as a thing of little importance, but, for the majority of Eastern peoples, such an act was a matter of grave concern. In that part of the world, a far greater value was placed upon things of the spirit than upon mere material existence. Religious monuments were a source of inspiration to those peoples and a symbol of their spiritual personality.[1085]

Over seventy years later, this statement echoes as it did then, reminding of the need for genuine dialogue among civilisations. The crime of genocide was drafted in 1946-48. In interpreting and applying it, judicial bodies must take proper account of the pivotal role of culture in the concept of genocide. Thus, in its 2021 Draft Policy on Cultural Heritage, the ICC OTP explained that "Whenever charging genocide, the Office will ensure that its case accurately encapsulates all aspects of the crime [of genocide] that affect cultural heritage."[1086]

CONCLUSION TO PART III: INDIVIDUAL CRIMINAL RESPONSIBILITY'S PROMISING POTENTIAL

Both ICL and IHL, including when the latter forms part of the former, are capable of addressing attacks that target culture. Among this study's tripartite ICL crimes, war crimes were first to be recognised internationally, followed by CaH and genocide. Unlike war crimes' requirement of an armed conflict nexus, CaH and genocide apply regardless of the existence of armed conflicts. They are thus capable of addressing gross violations of human rights provided that they occurred within a widespread or systematic attack against any civilian population – for CaH – or with the intent to destroy in whole or in part any of the Genocide Convention's protected groups. Once these requirements have been met, war crimes, CaH and genocide may address attacks targeting culture, whether anthropo-centred or tangible-centred.

Perceivably, while war crimes are essentially tangible-centred, CaH and genocide are anthropo-centred. This is so because war crimes describe in astonishing details not only culture's tangible, whether anthropical or natural, secular or religious, movable or immovable; but also the modalities of its attack, ranging from destruction to pillage, through to its use and location. As a living corpus of law, which is regularly updated and complemented, the Hague and Geneva Law are deeply anchored in a tangible-centred foundation. International judicial practice has, however, progressively linked the tangible-centred means of attacks targeting culture to heritage. Both the ICTY and ICC have thus progressively, though naturally, linked attacks against culture's tangible to the broader inter-generation heritage alteration. In so doing, they have rendered moot the peacetime versus wartime debate regarding the applicability of international legal instruments protecting culture's tangible and, more limitedly, intangible. In so doing, it is the varying relationship between local-national-international manifestations of culture as a diptych or triptych that has been taken into account.

[1085] UNGA, "Hundred and Seventy- Eighth Plenary Meeting: Draft Convention on Genocide: Reports of ECOSOC and the Sixth Committee" (9 December 1948) UN Doc A/PV178.9 *in* Abtahi and Webb, *The Genocide Convention*: *The Travaux Préparatoires* (n 6) p 2050.
[1086] Draft Policy on Cultural Heritage (n 1083).para 86.

In contrast to war crimes' evolutionary codification, genocide is a crime legislatively frozen in time. Since 1948, States have systematically refused to "update" the Genocide Convention, specifically its definition of the crime. This is evidenced not only by the ILC attempts, but also by the statutes of ICR-based jurisdictions that have systematically imported a definition from 1948 that uses a somehow obsolete terminology, certainly within the Western civilisation's cultural codes of the early 21th century. As seen, this definition remains particularly opaque, both in terms of the mens rea and some actus rei of genocide. Otherwise, why have international judges and scholars felt the need to dedicate so much effort to repeatedly explain this or that aspect of the crime? Anyone involved in the drafting of genocide judgments will attest to the fact that this crime needs to be regularly deciphered. This ambiguity in the crime of genocide's definition has been such that it has resulted in feeling compelled to find ambiguities even in those parts of the definition that are not ambiguous. The prominent example relevant to attacks targeting culture concerns the characterisation of the forcible transfer of children to another group as cultural genocide or physical/biological genocide. In fact, an objective and non-teleological recourse to the travaux préparatoires shows both the legal chaos and clarity that surrounded the negotiations of the definition of genocide in 1946-1948. This explains why States have refused to revisit the definition since, in hindsight, the adoption of the Genocide Convention appears to have been in and of itself a miracle. So it has been felt that reopening the debates would risk opening the Pandora's box. A non-teleological recourse to the travaux préparatoires also invites for more humility when interpreting and applying the definition of genocide, specifically when it comes to attacks targeting culture. Thus, while the travaux préparatoires do indeed show that the negotiators rejected the tangible-centred actus rei of genocide, they do not permit to establish that the forcible transfer of children was rejected as a culture-oriented actus reus of genocide, despite the ILC's assertion to the contrary, as incorporated uncritically by the ICTY-ICJ. This is so because no attempt has been made by any of the aforementioned bodies to draw a distinction between the tangible-centred and anthropo-centred means of genocide (Chapter 3). Instead, it is the misleading expression of "cultural genocide" that the drafters of the Genocide Convention, the ILC, ICTY-ICJ, scholars and civil society have opted for. "Cultural genocide" is a tautology, for genocide *is* cultural. As seen, defining the groups listed in the chapeau is part and parcel of cultural understandings because their definition is subject to time and space, two fundamental pillars of culture. Furthermore, the grounds of genocide, as cryptically materialised in the words "as such", explain that the national, ethnical, racial or religious groups are attacked because of what they are. The perpetrator targets them because of an aversion for them. These alien collectives that have infected society's otherwise clean body must be eliminated in whole, or altered in part, so as to help the body regenerate itself. That body *is* culture, both intangible and tangible. Jews had to be eliminated from the Nazi aspirational society because they infected it economically, financially, scientifically and artistically. Shias had to be eliminated from the Daesh aspirational society because they infected Islam linguistically, cosmogonically and eschatologically.

Although second in terms of appearance in the ICL's tripartite corpus of crimes, CaH borrow elements from both war crimes and genocide. They resemble war crimes as they were legally conceptualised as an extension of war crimes. Like the latter, they have also gone through a series of transformations. However, war crimes have given rise to complementary legal instruments which have not questioned the fundamentals of the Hague and Geneva Law. In contrast, CaH have been constantly defined and redefined,

with the most authoritative definition being, in the absence of a convention specifically devoted to them, that of the ICC Statute, since it was adopted by 120 States in 1998. In this sense, CaH differ from the 1948 fixed definition of genocide. In terms of actus reus, CaH do not provide expressly for a tangible-centred approach to attacks that target culture. However, under the crime of persecution, the post-Second World War trials, the ICTY and the ICC have proven that persecution is capable of embracing both anthropo-centred and tangible-centred approaches. Persecution is a cultural crime by virtue of its mens rea, regardless of any accompanying actus reus. This is so because persecution discriminates against individuals on grounds that identify victims as part of collective cultural units. Thus, like genocide, CaH are concerned with the attacking of culture in terms of both intent and means. Beyond its mens rea, persecution's actus reus allows adopting both anthropo-centred and tangible-centred approaches. As regards the former, both the ECCC and ICC have, after a twenty year-long academic speculations, finally realised the inevitable. In other words, these jurisdictions have considered that some acts targeting culture's intangible may amount to persecution. With respect to the tangible-centred attacks targeting culture, both the ICTY and ICC have first considered such attacks as part of their war crimes provisions. Applying thereafter persecution's discriminatory grounds, these jurisdictions have thus characterised the said acts as persecution. In this sense, CaH remain connected to war crimes, even if they no longer need the armed conflict nexus.

This Part has thus shown that the full potential of the ICL tripartite crimes remains untapped with regard to the adjudication of attacks targeting culture. A properly defined scope of culture, as manifested through culture's local-national-international diptych and/or triptych is a first step. This will in turn assist in separating the virtual ambiguities from the actual ones, so as to focus on the latter with lucidity – dispensing with recourse to the HRCts' dynamic interpretation.

GENERAL CONCLUSION: EMERGING TRENDS AND FUTURE PROMISES

This study has gathered, compared and contrasted the work of international law actors, ie legislators, adjudicators and legal scholars with respect to the causes, means and consequences of attacks targeting culture. Like scientific modelling which conceptualises empirical phenomena and processes them in an ordained manner, this study's various propositions have sought to conceptualise a theoretical model designed to facilitate the adjudication of attacks targeting culture.

Having proposed a legal scope for the concept of culture in the form of a diptych/triptych (I), this study has argued that attacks targeting culture have been more comprehensively adjudicated than commonly thought. This has been done through what this study has called heritage-centred and tangible-centred means, in both converging (II) and osmotic (III) manners.

As demonstrated in an in-depth manner, international law actors have contributed to this convergence and osmosis substantively, but not formally. In other words, while in their interpretation and application of treaty law, both modes of responsibility jurisdictions have often reached the same conclusions when addressing attacks targeting culture, they have been limping formalistically when referring to the interplay between culture's tangible and intangible components. Indeed, anthropology's lack of a universally accepted definition of culture has impacted on international law actors' ability to structurally consider attacks that target culture. Furthermore, the recent revival of ICR – which dates back mainly to the very end of the twentieth century – as opposed to State responsibility – which has benefited from over one hundred years of scholarly reflection – means that legal scholars have, unintentionally, specialised in either of the two modes of responsibility, resulting in an inadvertent compartmentalised approach.

By incorporating this study's proposed model, international law actors can begin standardising their approach with respect to the analysis of judicial cases involving attacks targeting culture. Building on this, they could expand the scope of work to include customary international law and national practice which, as indicated in the general introduction, had to be omitted due to this study's already wide scope. Trial and error – in sum experience – will contribute to enhancing and refining the proposed model.

I. Introspection: culture as a heritage-centred and tangible-centred triptych

It is impossible to find a universal definition of culture, a concept that is "almost everything in a society".[1087] Nonetheless, this study has argued that culture is anthropo-centred: it exists not in isolation, but through human beings and the value they give to it (general introduction).[1088] In its widest understanding, culture, which is both tangible and intangible, anthropical and natural, may thus be viewed, as a metaphorical triptych made of local, national and international panels (A).[1089] While each of these panels may make sense in isolation, their true interdependence may only be considered when viewed together, as part of a legacy-oriented concept (B).

A. Culture as an anthropical and natural concept

The value and protection of culture's tangible and intangible features, as distinct concepts, is attested since antiquity, and at least since the 538 BCE Proclamation of Cyrus the Great.[1090] Civilisations materialise both tangibly and intangibly. They are represented by their movable (eg sculpture) and immovable (eg architecture) achievements, whether secular or religious. They also manifest themselves through, inter alia, language, politics and religion. Both of these tangible and intangible shape and are shaped by their ethnic, racial, national, gender and other types of human manifestations. These are in turn both constitutive of culture and understood through cultural lenses.[1091]

But culture is not exclusively anthropical. As reflected in some of the regional and international legal instruments adopted since the 1930s (general introduction), culture may also be natural in that it may encompass the fauna and flora. Even so, those instruments' terminology remains confusing. This is best reflected in the 1972 World Heritage Convention which considers both anthropical and natural elements as constitutive of heritage. Thus, that instrument's title confuses matters by aligning "Cultural and Natural Heritage". Indeed, for that instrument's purpose (as with many others reviewed in this study), natural elements are included because of their cultural significance. Accordingly, "Anthropical and Natural Heritage" would have been a more suitable combination of terms in the 1972 World Heritage Convention's title. This shows that international legislators are not more immune from the uncertainties of the scope of culture than anthropologists. Intriguingly, with exceptions such as Blake,[1092] legal scholarly output addressing cultural property/cultural heritage is more concerned with culture's anthropical than natural components, even though, for example, the 1935

[1087] Sider (n 45) p 6.
[1088] Abtahi, "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers" (n 3) p 55.
[1089] *See* also Blake, *International Cultural Heritage Law* (n 14) pp 12-22.
[1090] Abtahi, "Reflections on the Ambiguous Universality of Human Rights" (n 10).
[1091] Abtahi, "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers" (n 3) p 59.
[1092] Blake, *International Cultural Heritage Law* (n 14) pp 114-149.

Roerich Pact and the 1972 World Heritage Convention do expressly consider both. As seen (Part I, Chapter 2), human rights scholars have incorporated the IACtHR's determination regarding the symbiotic relationship between certain communities' natural environment and heritage. In contrast, ICR scholars have done little in that direction. Of course, some like Gillett have worked on the protection of the natural environment, but this remains largely unconnected to culture.[1093] Partly, this results from ICR-based jurisdictions' lack of case law addressing this problematic. This may in turn be explained by their jurisdictional limitations. For example, the factual context of each of the ICTY, ICTR, SCSL, ECCC and STL means that none of these jurisdictions had to addresses environmental crimes, let alone their relationship with culture. ICR scholars should view the ICC's open-ended mandate as an opportunity to explore the extent to which State responsibility jurisdictions' practice – and related commentaries – on the natural environment and culture may be processed by ICR-based jurisdictions. This would help transcending the 1977 Additional Protocols article 55 and ICC Statute's war crimes article 8(2)(b)(iv) as standalone provisions capable of addressing environmental crimes. As seen throughout this study, other crimes, such as CaH persecution and genocide may, depending on the case at hand, help connect environmental crimes to attacks targeting culture.

B. Culture as a legacy-oriented concept

Heritage is about inter-generational memory and value transmission. It is geared toward identity, which is shaped by culture. Attacking the culture of a people disfigures their past, present and future and warps their reality, which in turn depletes world heritage.[1094] In this sense, culture is endowed with the notion of memory and transmission. Hence the term "cultural heritage", which has come to encompass both the tangible – whether anthropical or natural – and intangible. Attacking culture may thus focus on both of these, alternatively or cumulatively.

To begin to properly adjudicate attacks targeting culture is to consider the above. It may seem that each case may require focusing on either the tangible or the intangible. However, in truth, they will almost always be interdependent. When the tangible and the intangible are altered, whether intentionally or collaterally, the consequence is heritage-centred. Any such cultural alteration is both subjective and objective. Two examples will illustrate this. After the seventh century's conquest of Persia by Arab Muslims, Iranians converted to Islam and Persian was transcribed in a modified version of the Arabic alphabet. Iranians' non-access to their pre-Islamic alphabet has necessarily impacted on their identity, including their pre-Islamic religion, Zoroastrianism. Moreover, the combination of Islam, a religion born in Arabia, and the Arabic alphabet means that non-Iranians will forever view Iranians as Arabs, despite Persian being a most ancient Indo-European language and Iranians not viewing themselves as Arabs. To make things easier to an English language reader, suffice it to imagine that Shakespeare's English language masterpieces would only be available as

[1093] Matthew Gillett, "Environmental Damage and International Criminal Law" *in* Sébastien Jodoin and Marie-Claire Cordonnier Segger (eds) *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).
[1094] Abtahi, "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers" (n 3) p 55.

transcribed in the Arabic alphabet. How would one view him? Shakespeare would see himself as an English and European writer (testimony to that would be his classical and Italianate comedies: Merchant of Venice, Richard II, Henri IV, Romeo and Juliet; and tragedies: Hamlet, Othello, King Lear, Macbeth). But how would others perceive him when his masterpieces' visual representation would be only in the Arabic Alphabet, albeit in the English language?

In linguistics, every generation produces its own phonology. For example, the 1920s' Received Pronunciation of the English language is different from that of the 2020s. The intangible may therefore evolve dynamically and organically. But what about the tangible? In the West, the 2020s' dress codes and architecture are different from that of the 1920s. But this dynamism is not organic. That is, unlike the 1920s' language transformation, a 1920s' Art Deco building does not "grow" into a 2020s' steel and glass building. The latter will be simply built next to the former or as part of a city's urban planning expansion. The static character of the tangible bears witness to the time it was built, the past. Thus, Venice's static culture, ie its anthropical and natural environment – the architecture and urban planning around the lagoon – are the tangible signposts of the Venetian Republic. Those tangibles, including the Doge's Palace and its paintings are the reminders of how Venice looked like and Venetians dressed like six hundred years ago. Such is the importance of the tangible to every civilisation throughout their often organic and sometimes forcible, but always inevitable, intangible alterations. The intangible changes, the tangible remains.

Thus, both "property" and "heritage" limit culture to a concept that is workable in practical terms. Cultural property's clear scope makes it suitable for legal considerations. However, even the tangible-centred legal instruments have linked the tangible to the more inclusive concept of cultural heritage. Most relevant international instruments have viewed the latter as a local-national-international triptych. While each of this triptych's three panels may be appreciated in isolation, the full meaning transpires only when all three are viewed together. Accordingly, cultural heritage's legacy-oriented nature may be better suited, in some circumstances, to assist a fuller consideration of attacks targeting culture under State responsibility and ICR schemes while a tangible-centred approach may enable focusing on the tangible exclusively or, better, addressing it through legal persons, when such opportunity exists.

Rather than engaging in terminological debates regarding cultural property and cultural heritage, international adjudicators should consider culture in substance, ie through its tangible and intangible components. Otherwise, matters can rapidly get unclear. In *Bosnia*, the ICJ did not explain why it had called the destroyed objects and sites "historical, religious and cultural property" as opposed to "cultural property" since, the latter comprises both secular and religious components (general introduction).[1095] Additionally, the French version of the judgment refers to "patrimoine historique, religieux et culturel", which translates as "historic, religious and cultural *heritage*" [emphasis added]. In *Croatia*, the matter was further complicated since the ICJ referred to the fact that "Serb forces destroyed and looted assets forming part of the *cultural heritage and monuments* of the Croats" [emphasis added].[1096] This is intriguing since from one judgment to the other, the ICJ moved from property to heritage while not

[1095] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146) paras 320, 322, and 335.
[1096] *Genocide (Croatia v Serbia)* (n 147) paras 361 and 386.

explaining how it linked cultural heritage and monuments. This time, however, the French version referred to "patrimoine culturel" and not "bien culturel".[1097] While seemingly minor issue is illustrative of international jurisdictions' uncertainties when it comes to culture's tangible and intangible, from both property and heritage viewpoints. In turn, this has not helped to draw a neat distinction between heritage-centred and tangible-centred crimes. If adopted systematically, this study's holistic approach to the concept of culture (both tangible and legacy-oriented) will assist international law actors – legislators, adjudicators and practitioners, scholars – to better address the causes, means and consequence of cases involving attacks targeting culture.

II. Retrospection: State responsibility and individual criminal responsibility's converging paths

This study has shown the converging paths of State responsibility and ICR-based jurisdictions with respect to attacks targeting culture. While this is not apparent in the first place, a systematic review of the practice of both modes of responsibility's adjudicatory mechanisms permits to establish their converging acceptance that attacking culture may be both tangible-centred and anthropo/heritage-centred, in terms of both typology of damage (A) and its victims (B). This study has sought to standardise this convergence.

A. The typology of cultural damage

The typology of cultural damage is dual: what instruments proscribe them and what the damages actually consist of. The former has been addressed by both State responsibility and ICR-based jurisdictions. Thus, both ISCMs and HRCts have adjudicated attacks targeting culture on the basis of States' breach of relevant treaty law, whether bilateral or regional (Part I, Chapters 1-2, respectively). As for the ICR-based jurisdictions, IHL-ICL instruments on war crimes are essentially tangible-centred in that they proscribe damage to culture's tangible, whether anthropical or natural. The ICTY has expanded this approach to CaH persecution insofar as the anthropical components are concerned. In contrast, international legislators expressly rejected the tangible-centred approach as an actus reus of genocide. Notwithstanding this, the Genocide Convention is the only tripartite international crime to expressly proscribe anthropo-centred attacks targeting culture in the form of the forcible transfer of the children, although both the ICJ and ICR-based jurisdictions have systematically contested even that. On the other hand, the ICTY has determined that CaH persecution criminalises anthropo-centred attacks targeting culture.

Moving to the typology of damage, culture may be attacked through its tangible – often referred to as cultural property. This targeting may range from pillage to destruction, whether total or partial. Since the end of the nineteenth century, international legislators have addressed in details this type of damage, whether through ICL-IHL instruments

[1097] *Genocide (Croatia v Serbia)* (n 147) paras 361 and 386.

or the so-called peacetime regime (general introduction and Part II, Chapter 1). On this basis, ISCMs and ICR-based jurisdictions have adjudicated attacks targeting culture's tangible (Part I, Chapter 1 and Part II, Chapters 1-2).[1098] Attacks targeting culture may also be heritage-centred. This will involve culture's intangible, such as language and religion, in isolation or in combination with its tangible components. For example, the restriction of religious practice may be effected through legislative measures and/or else materially, by closing down or destroying the places of worship. Importantly, more recently, the ECCC and ICC have also considered, as CaH persecution, fundamental (human) rights violations that focus on the intangible, such as religious-oriented restrictions. This type of violation will often occur in the context of mass human rights violations (mainly addressed by HRCts) or mass human rights crimes (mainly addressed by ICR-based jurisdictions) (Part I, Chapter 2 and Part II, Chapters 2-3, respectively).

While some of the above has been achieved through the principle of dynamic interpretation, often the literal reading of the applicable law will suffice.

B. The victims of cultural damage

The victims of attacks targeting culture can be tangible-centred but also anthropo-centred. Starting with the latter, a comparative analysis of both State responsibility and ICR jurisdictions' practice permits to identify a twofold convergence, specifically in cases of gross human rights violations – particularly mass cultural rights violations addressed by both HRCts (Part I, Chapter 2) and, more recently, ICR-based jurisdictions in the context of the CaH persecution and, to some extent, genocide (Part II, Chapters 2-3). Accordingly, and on the one hand, the IACtHR has ruled that individual natural persons as members of the collective may suffer mass human (cultural) rights violations. This approach is similar to that of gross human rights violations under CaH persecution, where individuals are targeted because they belong to a group (Part I, Chapter 2 and Part II, Chapter 2). On the other hand, the IACtHR has considered that the collective as the sum of natural persons may suffer the heritage-centred attacking of culture. This approach is akin to that of genocide, where it is the group, as such, that is targeted (Part I, Chapter 2 and Part II, Chapter 3). But natural persons can also claim to be the victims of attacks targeting culture's tangible. Beyond their intent to destroy the tangible for its intrinsic value, the perpetrators often, if not always, aim to damage the collective whose heritage includes the targeted cultural tangible.[1099] Whereas the destruction of private property in general affects the material possessions of individuals, the targeting of culture's tangible affects collective identity, ie ties, beliefs and the sense of belonging.[1100] This is when cultural property becomes tangible cultural heritage. In this context, natural persons as part of the collective or else the collective as the sum of natural persons become the victims of the destruction of culture's tangible.

But the victims of attacks targeting culture can also be viewed in a tangible-centred

[1098] For a review of the ICTY cases, *see* Roger O'Keefe, "Cultural Heritage and International Criminal Law" *in* Jodoin and Cordonnier Segger (n 1091).
[1099] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) pp 3 and 28.
[1100] Abtahi, "Does International Criminal Law Protect Culture in Times of Trouble?" (n 5) p 200.

manner. Treaty law, State responsibility and ICR-based jurisdictions have gradually granted legal persons standing in judicial proceedings. Therein, they can participate and seek reparations for harm sustained as a result of damage inflicted on their property. This becomes interesting for this study when the said property has consisted of culture's tangible. But international legislators have conceived an even more radical approach, starting as early as the 1874 Brussels Declaration, and through to the ICC Rules rule 85. This is when cultural tangible itself is endowed with legal personality. Evidently, this excludes cultural object such as statues, ornaments, manuscripts or else scientific instruments. However, it applies to institutions dedicated to religion, arts and sciences. For example, a museum may seek participation in judicial proceeding and demand reparations in two non-mutually exclusive ways. On the one hand, the museum may seek reparations for damage sustained to it, as a building (eg mortars fired at it and damaging its walls). One the other hand, the museum may claim damage as a result of looting of cultural tangible (statues, ornaments, books, scientific instruments) that it owns/administers. Evidently, this approach through legal persons has been more limited than that of natural persons: it is the latter who legislate and adjudicate, not legal persons. In practice, State responsibility adjudicators, whether ISCMs' State-centred and State-driven scheme or the ECtHR have been the forerunners of this approach, (Part I, Chapters 1-2). As regards ICR-based jurisdictions, legal persons have locus standi only before the ICC scheme-based ICR-based jurisdictions (ICC, SCPS, ECCC) while, in the ICC's case, they must have sustained direct harm (Part II). In contrast to State responsibility adjudicatory jurisdictions, however, ICR-based jurisdictions offer, thus far, virtually no such jurisprudence. Two reasons may explain this. First, the ICC Statute entered into force only in 2002, as opposed to ISCMs' century old and the ECtHR's half a century old practices. Thus, time may be required to address cases where culture's tangible and the legal person would be one and the same. Second, ICR-based systems are inherently anthropocentric, even if legal persons may be regarded as victims in the ICC scheme. Here, suffice it to recall the *Al Mahdi* Trial Chamber holding that property crimes "are generally of lesser gravity" than crimes against persons. Notwithstanding its limitations, the tangible-centred approach is a welcome path forward in the adjudication of attacks targeting culture.

In fact, as attacks targeting culture in practice often aim at or results in altering cultural identities, regardless of whether they are shaped by intangible or tangible manifestations, ICR-based jurisdictions have linked the tangible-centred targeting of culture to a heritage-centred one (Part II, Chapter 1.III.C, Chapter 2.III.A and Chapter 3.IV). This is why this study opted for the use of cultural property or culture's tangible instead of tangible cultural heritage, so as to better illustrate why and how the former is part of cultural heritage.

III. Prospection: State responsibility and individual criminal responsibility's osmotic paths

This study proposes that in law, there are no major obstacles for State responsibility and ICR-based jurisdictions to increase their interaction beyond what has been identified and analysed with regard to attacks targeting culture (A). To achieve this

osmosis, this study proposes to rely on three conceptual pillars so as to ask the right question as regards the said adjudications (B).

A. Towards a synergetic experience

Beyond converging in their consideration of attacks targeting culture, State responsibility and ICR-based jurisdictions have also borrowed from each other's practice, through a mutually beneficial synergy. Due to public international law's Westphalian foundation, chronologically, ISCMs pioneered the adjudication of attacks targeting culture, in the late nineteenth century. Because of this longevity but also their vast diversity, ie permanent courts (PCIJ-ICJ, ITLOS); UN-generated bodies (eg UNCC); and arbitral bodies (eg EECC); ISCMs have adjudicated a vast array of subject-matters. As such, ISCMs provide a wide range of cases that, if not always principally, at least accessorily, have addressed attacks targeting culture from both tangible-centred and heritage-centred approaches. Later on, HRCts consolidated this by tailoring attacks targeting culture to human rights violations, specifically when cultural rights are involved. With their mainly late twentieth century emergence, ICR-based jurisdictions have benefited from the practice of ISCMs and HRCts.

As the sole permanent ICR-based jurisdiction, the ICC will address ever evolving atrocity crimes scenarios, including on attacks targeting culture, that will require a case-by-case assessment.[1101] In so doing, the ICC will also refer to State responsibility and other ICR-based jurisdictions, at minimum, as interpretative guidance, mindful of the ICC Statute article 21.[1102] Since other ICR-based jurisdictions' factual matrix will always be limited by their ad hoc nature, the ICC will therefore also be guided by State responsibility practice insofar as parallels may be drawn between the latter and ICR. While the ICC could agree with or depart from State responsibility practice, depending on the circumstances, it will nonetheless continue to consider it. As seen, the ICC has already done so. In *Lubanga*, while not concerned with attacks targeting culture, the Trial Chamber took account of the "regional human rights courts and national and international mechanisms and practices" and international instruments since, as held by the Chamber, despite their inter-State nature, their "general concepts relating to reparations […] can provide useful guidance to the ICC".[1103] Most directly, for this study's purpose, the *Al Mahdi* Trial Chamber referenced the "disruption of culture" by

[1101] This paragraph imports, in part, Abtahi, "Types of Injury in Inter-State Reparation Claims" (n 8).

[1102] ICC Statute (n 54) art 21 provides that the ICC's applicable law shall be, in the following order: its own legal framework; "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflicts" where appropriate; and "failing that, general principles of law derived by the Court from national laws of legal systems of the world" provided that they are not inconsistent with the ICC Statute, international law and internationally recognised norms and standards.

[1103] The Trial Chamber also referred to the International Centre for Transitional Justice's recommendation that when facing ambiguities on harm and reparations, the ICC and the TFV could "take an innovative approach and […] learn from the practice of States". *See Lubanga* Reparations Decision (n 639) paras 32, 39, 65, 186 (fn 377) and 230 (fn 230). Later, the Appeals Chamber also considered ISCMs, albeit not in relation to the typology of harms, but on the standard of causation, and only by reference to hybrid criminal and human right courts. The Chamber noted the latter's "limited guidance", but only regarding the standard of causation – as those courts deal with State responsibility. Therefore, it did not exclude recourse to the typology of harm of ISCMs. *See Prosecutor v Lubanga*, (ICC) Appeal Judgment (3 March 2013) No ICC-01/04-01/06-3129, paras 127-128.

express reference to the IACtHR; while also welcoming an expert's reference to ISCMs by relying on the EECC's methodology to determine the amount of moral damage (Part II, Chapter 1).[1104] Over a longer period of time, ISCMs and HRCts will also benefit from the practice of ICR-based jurisdictions. This has already been the case with *Bosnia* and *Croatia*, where the ICJ abundantly referred to the findings of the ICTY.[1105]

Instrumental in achieving the above will be the legal scholars' appetite to overcome the State responsibility-ICR dichotomy. While this will not always be practical – methodology, semantics, consequences – it will rest on scholars to contribute to bringing together, as closely as possible, the two modes of responsibility. For, there are instances wherein ICL (eg persecution as CaH) and human rights (many HRCts cases) intersect (Part I, Chapter 2 and Part II Chapters 2-3).[1106]

B. The three pillars for the right question

Most importantly, if properly applied, this study's propositions will be valid regardless of which mode of responsibility addresses attacks targeting culture. This, however, will rest on acknowledging three main pillars and asking the right question.

The first pillar requires to keep in mind that the interpretation of treaty law – by international adjudicators and legal scholars – is in and of itself a cultural exercise. It is crucially noteworthy that, in an international setting, legislators, practitioners-adjudicators and legal scholars will each carry their cultural basis, that is their social background, legal system, language, gender, sexual orientation and other factors that

[1104] *Al Mahdi* Reparations Order (n 49) paras 85 and 132 (disruption of culture) and 131-132 (ISCMs).
[1105] *Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (n 146); *Genocide (Croatia v Serbia)* (n 147).
[1106] Among those scholars who have dedicated such focus, *see* eg Ben-Naftali (n 15); Gioia (n 15); Shany (n 15); and Scott Doucet, "The Inter-American Court of Human Rights and aggravated state responsibility: Operationalizing the concept of state crime" *in* Stahn and van den Herik (n 15). As explained by Chechi, some scholars have contemplated this synergetic experience through the creation of an international jurisdiction in charge of cultural heritage disputes; *see* Chechi (n 56) pp 204-218. In concrete terms, however, this proposition encounters a series of challenges, not least the procedural and process-based differences between the two modes of responsibility's jurisdictions (as opposed to substantive common denominators contemplated in this study). This is akin to merging the ICJ, the procedures of which are centred on judges and States, and the ICC, which is centred on judges and a prosecutor. Beyond this foundational challenge, there is a conceptual one. Accordingly, the legislator will have to agree on the contours of culture, a most challenging concept, as seen in this study. Will it be tangible-centred or intangible-centred or both, as this? Beyond these foundational and conceptual challenge, there are also other jurisdictional challenges. First, who could seize the jurisdiction (States, natural/legal persons, prosecutor?) and against whom (States, natural/legal persons?). Second, what the jurisdiction's temporal scope would be? Will States – the creators of international jurisdictions – be content to provide the latter with retroactive competence? Second, how will the competence ratione materiae be addressed? Will the jurisdiction address peacetime cases or, as analysed in this study, will it address attacks targeting culture? As if these were not enough challenges, one could recall the creation, under the ICJ Statute article 26(1), of a Chamber for Environmental Matters, which received no cases in its thirteen year-long existence (1993-2006). In fact, States preferred to seize the Court under its general competence, even when environmental issues where at least partly at stake. For example, in *Gabčikovo-Nagymaros Project*, which was presented under its environmental angle and economic development angle by Hungary and Slovakia, respectively; *see Case Concerning the Gabčikovo-Nagymaros Project* (*Hungary v Slovakia*) (ICJ) Judgment (25 September 1997), ICJ Rep 1997.

contribute to their identities as individual members of the collective. This will take an extra dimension when these same actors will consider cultural issues, which are constantly evolving, both spatially and temporally. Metabolising this will help adopting a transcultural (or pan-cultural?) posture, one filled with empathy and humility. This will help move to the next pillars.

Under the second pillar, and as just described above (II), international law actors should approach attacks targeting culture not from a formal standpoint but from a substantive one. This is so because the former will inevitably convey meanings that, instead of being factual, are opinion-based. For example, the use of the terminology cultural property and tangible cultural heritage will impact the outcome of a given adjudication since they will convey different notions. Cultural property will convey mercantile values. This may be suitable in, eg UNCC cases where privately owned collections had to go undergo valuation for reparations purpose (Part I, Chapter 1). But this may not be suitable in cases of desecration of, eg a river stream, as with the IACtHR's so-called indigenous/tribal cases. Tangible cultural heritage on the other hand may be suitable when addressing cultural tangible's destruction/damage from a legacy-oriented approach, which is by necessity anthropo-centred. But tangible cultural heritage may not be suitable when looking at cultural tangible's destruction/damage from a legal person's viewpoint. These varying terminologies are thus loaded with anthropological conceptions. In other words, they are infused with cultural preconceptions. Consequently, their uses will precondition the adjudicators' reasoning. The misleading consequences of this formalism can be attenuated by looking at culture substantively, ie by considering it as being made of tangible and intangible components. This will help considering attacks targeting culture under tangible-centred and heritage-centred approaches, in isolation or in combination. The former would be focused not only on damage to culture's tangible, but also, the relevant legal framework permitting, on legal persons who could also constitute the victims of attacks against the tangible. The heritage-centred approach would in turn focus on culture's intangible, although it could also combine that with the intangible. This is so because its victims will always be natural persons belonging to the collective or the collective as the sum of natural persons. If adopted, this proposition will help reduce the complexities of attacks targeting culture to manageable notions. This would avoid the many confusions pointed out in this study, not least the Genocide Convention negotiations with regard to the tautological cultural genocide and the related ensuing adjudicatory confusions and scholarly approximations (Part II, Chapter 2).

As for the third pillar, this study proposes to contemplate culture as a metaphorical triptych (or diptych), wherein culture's tangible and intangible are considered in any of their local-national-international combinations. The triptych is often apparent in international instruments. The diptych being so in regional instruments. Accordingly, keeping the diptych/triptych metaphor in mind helps to adjudicate attacks targeting culture more completely in terms not only of damage but also of victims. This is best illustrated in *Al Mahdi*, wherein the Trial Chamber considered the victims under each of the triptych's three layers. In this regard, Drumbl has pointed to the fact that the *Al Mahdi* Trial Judgment moved towards Merryman's cultural internationalism while the *Al Mahdi* Reparations Order tilted towards Merryman's cultural nationalism or, rather, what Drumbl calls a "localist vision", since most of the reparations went to Timbuktu's

population.[1107] This vision in fact corresponds to this study's proposed triptych, in terms of both culture's reach and its victims. However, one should not neglect the fact that the Trial Chamber referred to the third layer – the most abstract of the three – as the "international community", regardless of what these terms mean. As seen, this layer was represented by UNESCO (Part II, Chapter 1). While not further elaborated upon by the Trial Chamber, in this case a legal person (UNESCO) came to represent the international community in terms of reparations. Thus, because of ICC Rules rule 85, wherein both natural and legal persons can be the victims of harm and the beneficiaries of reparations, ICC reparations orders will always have a local-national component. Accordingly, *Al Mahdi*'s striking feature lays not in the triptych's local-national layer (which can be found in most HRCts reparations orders), but in the international one.

When the above three pillars have been processed and consolidated, the model proposed by this study requires asking one and only one question. But that question must be the right one. The wrong question is whether the destruction of monuments or limitations on the use of language should be equated with the murder of human beings. The right question is what effects do attacks targeting culture's tangible and intangible have on human collectives, whether locally, nationally or internationally.[1108] International legislators, adjudicators and scholars have gradually answered this by determining that this targeting depletes world heritage and warps future generations' identity. Under this approach, culture's tangible and intangible become heritage. It is only necessary to consider the ICC Statute preamble's broader anthropological approach to law, in order to recall that law is meant to be humane:

> Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.

This wording leaves no doubt as to the fact that, whether tangible-centred or anthropo-centred, attacks targeting culture always have heritage implications.[1109] Often implicitly recognised by State responsibility and ICR-based jurisdiction, an explicit recognition would only expand law's raison d'être: to serve and to protect civilisation.

[1107] Mark A Drumbl, "From Timbuktu to The Hague and Beyond – The War Crime of Internationally Attacking Cultural Property" (2019) 17 *Journal of International Criminal Justice* 77, p 82.
[1108] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) p 3.
[1109] Jacot (interview with Abtahi) (n 4).

BIBLIOGRAPHY

I. Primary sources

A. Instruments, Reports and Records

1. Binding Instruments

a. Regional

i. Africa

African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) Organization of African Unity, 21 ILM 58 (1982).

African Commission on Human and Peoples' Rights, Rules of Procedure (adopted 2 -13 February 1988, entered into force 12-26 May, 2010).

African Court on Human and People's Rights, Rules of Court (amended 2 June 2010) <http://en.african-court.org/images/Protocol-Host%20Agrtmt/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf>.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 8 June 1998, entered into force 25 January 2004).

ii. Americas

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36; 1144 UNTS 123.

Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador) (adopted 16 June 1976, entered into force 30 June 1978) OAS Treaty Series No 47.

Inter-American Convention on the Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OEA Doc AG/RES 1256 (XXIV-0/94).

Rules of Procedure of the Inter-American Court of Human Rights (adopted 16-25 November 2000) <http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf>.

Statute of the Inter-American Court of Human Rights (adopted 1 October 1979) Organisation of American States General Assembly Resolution No 448.

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (adopted 15 April 1935, entered into force 26 August 1935) (1935 Roerich Pact) 167 LNTS 289.

Treaty on the Protection of Movable Property of Historic Value (adopted 15 April 1935, entered into force 1 May 1936) OAS Treaty Series No 28.

iii. Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221; ETS No 5.

European Convention on Offences Relating to Cultural Property (opened for signature 23 June 1985, not in force) ETS No 119.

European Convention on Offences Relating to Cultural Property (adopted 3 May 2017, entered into force 1 September 2017) ETS No 221.

European Convention on the Protection of Archaeological Heritage (adopted 6 May 1969, amended 16 January 1992, entered into force 25 May 1995) ETS No 143.

European Convention for the Protection of the Architectural Heritage of Europe (adopted 3 October 1985, entered into force 1 December 1987) ETS No 121.

European Cultural Convention (adopted 19 December 1954, entered into force 5 May 1955) ETS No 018.

b. IHL

i. General

The Laws of War on Land, Oxford (adopted 9 September 1880).

ii. Geneva Law

Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85.

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, (adopted 10 December 1976, entered into force 05 October 1976).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

iii. Hague Law

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.

Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900).

Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910).

Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, (adopted 18 October 1907, entered into force 26 January 1910).

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague (adopted 26 March 1999, entered into force 9 March 2004) UNESCO Doc HC/1999/7.

c. ICL (and UNSC)

i. Second World War

Charter of the International Military Tribunal: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945).

Charter of the International Military Tribunal for the Far East (adopted 19 January 1946).

Control Council Law No 10, "Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity" (20 December 1945) 3 Official Gazette Control Council for Germany 50–55.

Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

ii. Ad hoc and hybrid jurisdictions

Extraordinary Chambers in Cambodia, Internal Rules <http://www.eccc.gov.kh/en/document/legal/internal-rules>.

ICTR, "Rules of Procedure and Evidence" (13 May 2015).

ICTY, "Rules of Procedure and Evidence" (8 December 2010) IT/32/Rev 45.

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001) Cambodia, (amended 27 October 2004) NS/RKM/1004/006.

Special Court for Sierra Leone, Rules of Procedure and Evidence (13 May 2012).

Special Tribunal for Lebanon, Rules of Procedure and Evidence (3 April 2014).

Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 138, UN Doc S/2002/246.

United Nations Transitional Administration in East Timor (UNTAET), "On the Authority of the Transitional Administration in East Timor" (27 November 1999) Regulation No 1999/1.

United Nations Transitional Administration in East Timor (UNTAET), "On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences" (6 June 2000) Regulation No 2000/15.

United Nations Transitional Administration in East Timor (UNTAET), "On the Organization of Courts in East Timor" (14 September 2001) Regulation No 2001/25.

UNSC, "Security Council Resolution 687 (1991)" (8 April 1991) UN Doc S/RES/687.

UNSC, "Security Council Resolution 692 (1991)" (20 May 1991) UN Doc S/RES/692.

UNSC "Security Council Resolution 808 (1993)" (3 May 1993) UN Doc S/25704.

UNSC, "Security Council Resolution 827 on the Adoption of the Statute of the International Tribunal for the Former Yugoslavia" (May 25 1993) (amended 7 July 2009), UN Doc S/RES/827,32 ILM 1159.

UNSC, "Security Council Resolution 955 (1994) on the Establishment of the International Criminal Tribunal for Rwanda" (8 November 1994) UN Doc S/RES/955 (1994).

UNSC, "Security Council Resolution 1272 (1999) on the Situation in East Timor" (25 October 1999), UN Doc S/RES/1272.

UNSC, "Security Council Resolution 1315 (2000) on the Establishment of a Special Court for Sierra Leone" (14 August 2000) UN Doc S/RES/1315.

UNSC, "Security Council Resolution 1664 (2006) on the Situation in the Middle East" (29 March 2006) UN Doc S/RES/1664.

UNSC, "Security Council Resolution 1757 (2007) on the Establishment of a Special Tribunal for Lebanon" (30 May 2007) UN Doc S/RES/1757.

iii. ICC

ICC, "Elements of Crimes: Crimes Against Humanity" (2011).

ICC, "Elements of Crimes: Genocide by Forcibly Transferring Children" (2011).

Regulations of the Trust Fund for Victims (adopted 3 December 2005) ICC-ASP/4/Res3.

Rules of Procedure and Evidence of the International Criminal Court (adopted 9 September 2002) ICC-ASP/1/3 at 10, UN Doc PCNICC/2000/1/Add.1 (2000).

The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF 183/9, 37 ILM 999 (1998).

d. UN

i. UNESCO

UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151, 11 ILM 1358 (1972).

UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1.

UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (adopted 2 November 2001, entered into force 2 January 2009) 41 ILM 40 (2002).

ii. UNGA

Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243.

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

International Covenant on Civil, Political and Cultural Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

iii. UNSC

UNSC, "Resolution on the Destruction and Trafficking of Cultural Heritage" (24 March 2017) UN Doc S/RES/2347.

e. UNIDROIT

UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (adopted 24 June 1995, entered into force 1 July 1998) 2421 UNTS 457.

f. Bilateral

Agreement Signed in Algiers on 12 December 2000 Between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (Eritrea-Ethiopia) (12 December 2000) <https://pcacases.com/web/view/71>.

"Exchange of Notes Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia Concerning the Losses Incurred by the Government of the United Kingdom and by British Nationals as a result of the Disturbances in Indonesia in September 1963" (Great Britain –Indonesia) (1 December 1966) Treaty Series No 34.

General Agreement on the Settlement of Certain ICJ and Tribunal Cases (9 February 1996), attached to *Joint Request for Arbitral Award on Agreed Terms*, Iran-US Claims Tribunal (1996) vol 32.

"General Declaration of the Government of the Democratic and Popular Republic of Algeria" (19 January 1981) <http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf>.

g. National

Instructions for the Government of Armies of the United States in the Field (adopted 24 April 1863).

"Law No 64 - Nazi and Nazi Collaborators (Punishment Law)" (passed on 1 August 1950) 5710/1950.

Nürnberg Laws – "Law for the Protection of German Blood and German Honor" (passed on 15 September 1935) 100/1935

"Nuremberg Race Laws" *in* Holocaust Encyclopedia <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws>.

"The Crime of Genocide (Prevention and Punishment) Law" (passed on 29 March 1950) 5710-1950.

2. Other instruments, reports and records

a. UN

UN, "Joint Declaration by Members of the United Nations Against Extermination of the Jews" (17 December 1942) <https://www.msz.gov.pl/resource/e7497fea-f446-4f82-80b1-169d609d697a:JCR>

i. ECOSOC

ECOSOC, "Ad Hoc Committee on Genocide Ad Hoc Committee's Terms of Reference" (1 April 1948) UN Doc E/AC25/2.

ECOSOC, "Ad Hoc Committee on Genocide Commentary on Articles Adopted by the Committee" (26 April 1948) UN Doc E/AC25/W1.

ECOSOC, "Ad Hoc Committee on Genocide: Corrigendum to the Summary Record of the Third Meeting at Lake Success, New York" (20 May 1948) UN Doc A/C25/SR4.

ECOSOC, "Ad Hoc Committee on Genocide, Draft Convention on the Prevention and Punishment of The Crime of Genocide (Drawn Up by the Committee)" (19 May 1948) E/AC25/12.

ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighth Meeting" (17 April 1948) UN Doc E/AC25/SR8.

ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Eighty-Second Meeting" (23 October 1948) UN Doc E/AC25/SR82.

ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Fourteenth Meeting" (27 April 1948) UN Doc E/AC25/SR14.

ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Second Meeting" (5 April 1948) UN Doc E/AC25/SR2.

ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Tenth Meeting" (16 April 1948) UN Doc E/AC25/SR10.

ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Third Meeting" (13 April 1948) UN Doc E/AC25/SR3.

ECOSOC, "Ad Hoc Committee on Genocide Summary Record of the Thirteenth Meeting" (20 April 1948) UN Doc E/AC25/SR13.

ECOSOC, "Ad Hoc Committee on Genocide, Summary Record of the Twelfth Meeting" (23 April 1948) UN Doc E/AC25/SR12.

ECOSOC, "Committee on Arrangements for Consultation with Non-Governmental Organisations: List of Communications received from Non-Governmental Organisations" (30 July 1947) UN Doc E/C2/49.

ECOSOC, "Draft Convention on the Crime of Genocide ('Secretariat Draft')" (6 June 1947) UN Doc E/447.

ECOSOC, "Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat" (30 January 1948) UN Doc E/623.

ECOSOC, "Prevention and Punishment of Genocide Comments of Governments on the Draft Convention Prepared by the Secretariat (Document E/447)" (22 April 1948) UN Doc E/623/Add3.

ECOSOC, "Prevention and Punishment of Genocide: Historical Summary (2 November 1946 – 20 January 1948)" (26 January 1948) UN Doc E/621.

ECOSOC, "Resolution of 3 March 1948" (3 March 1948) UN Res 117(VI), UN Doc E/734.

ECOSOC, "Resolution of the Economic and Social Council at the Forty Fifth Plenary Meeting" (23 July 1996) E/1996/14.

ECOSOC, "Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr. Theo van Boven Pursuant to Sub-Commission Decision 1995/117" (25 May 1996) E/CN 4/Sub 2/1996/17.

ECOSOC, "Standards and Norms in the Field of Crime Prevention and Criminal Justice (Commission on Crime Prevention and Criminal Justice)" (26 February 1996) E/CN15/1996/16/Add5.

ii. ILC

ILC, "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (November 2001) UN Doc A/56/10.

ILC, "Draft Code of Crimes against the Peace and Security Mankind with Commentary" (1954) 2 *Yearbook of the ILC*, UN Doc No A/CN.4/SER.A/1954/Add.l.

ILC, "Draft Statute for an International Criminal Court with Commentaries" (22 July 1994), (1994) 2(2) *Yearbook of the ILC*.

ILC, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (1950) 2(3) *Yearbook of the ILC*, UN Doc No A/1316 (A/5/12).

ILC, "Report of the International Law Commission on the Work of its Forty-Third Session" (1991) Supp No 10 (A/46/10).

ILC, "Report of the International Law Commission on the Work of Its Forty-Eighth Session" (1996) 2(17) *Yearbook of the ILC,* UN Doc A/CN4/SERA/1996/Add1 (Part 2).

ILC, "Reports of the Special Rapporteur on State Responsibility" (1988-2001) Roberto Ago, Willem Riphagen, Gaetano Arangio-Ruiz & James Crawford, <https://web.archive.org/web/20181130113841/http://legal.un.org/ilc/guide/9_6.shtml>.
ILC, "Second Report on State Responsibility" (9 and 22 June 1989) UN Doc A/CN4/425.

ILC, "Yearbook of the International Law Commission 1956 Volume II" (20 January 1956) UN Doc A/CN4/96.

ILC, "Yearbook of the International Law Commission 1993 Volume II" (3 May-23 July 1993) UN Doc A/CN.4/SER.A/1993/Add 1 (Part 2).

iii. UNCC

UNCC, "Category "C" Claims" <http://www.uncc.ch/claims>.

UNCC, “Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim (the “WBC Claim”)”, (15 November 1996) UN Doc S/AC26/1996/5/Annex.

iv. UNESCO

UNESCO, “Latin-American Conference, Declaration of San Jose” (11 December 1981) UNESCO Doc FS 82/WF32 (1982).

UNESCO, “Operational Guidelines for the Implementation of the World Heritage Convention” (2012) <http://whc.unesco.org/archive/opguide12-en.pdf>.

v. UNGA

UNGA, “Agenda Item 31” (13 October 1948) UN Doc A/C6/229.

UNGA, “Agenda Item 32” (5 December 1948) UN Doc A/766.

UNGA, “Agenda Item 32: Belgium Amendments to the Draft Convention on Genocide (E/794)” (5 October 1948) UN Doc A/C.6/217.

UNGA, “Agenda Item 32: China Amendment to the Draft Convention on Genocide (E/794)” (18 October 1948) UN Doc A/C6/232/Rev 1.

UNGA, “Agenda Item 32: Motion Submitted by the Delegation of the Philippines” (2 October 1948) UN Doc A/C6/213.

UNGA, “Agenda Item 32: Report of the Drafting Committee” (23 November 1948) UN Doc A/C6/288.

UNGA, “Agenda Item 32: Syria Amendment to Article II of the Draft Convention on Genocide (E/794)” (7 October 1948) UN Doc A/C6/234.

UNGA “Agenda Item 32: Union of Soviet Socialist Republics Amendments to Article II of the Draft Convention on Genocide (E/794)” (7 October 1948) UN Doc A/C6/223.

UNGA, “Agenda Item 32: United Kingdom of Great Britain and Northern Ireland: Amendments to Articles II and III of the Draft Convention on Genocide (E/794)” (7 October 1948) UN Doc A/C6/222.

UNGA, “Agenda Item 32: USSR: Amendments to the Draft Convention on the Prevention and Punishment of Genocide proposed by the Sixth Committee (A/760)” (5 December 1948) UN Doc A/766.

UNGA, “Agenda Item 32: Venezuela Amendment to Article II of the Draft Convention on Genocide (E/794)” (13 October 1948) UN Doc A/C6/231.

UNGA, “Annex 3a to Draft Convention on Genocide, Communications Received by the Secretary-General” (27 September 1947) UN Doc A/401.

UNGA, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (21 March 2006) UN Doc A/RES/60/147.

UNGA, “Committee on the Progressive Development of International Law and its Codification: Summary Record of the Twenty-Eighth Meeting” (24 June 1947) UN Doc A/AC10/SR28.

UNGA, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” (29 November 1985) UN Doc A/RES/40/34.

UNGA, “Draft Convention on Genocide” (11 November 1947) UN Res 180(II).

UNGA, “Eighty-First Meeting: Consideration of the Draft Convention on Genocide” (22 October 1948) UN Doc A/C6/SR81.

UNGA, “Eighty-Second Meeting: Continuation of the Consideration of the Draft Convention on Genocide” (23 October 1948) UN Doc A/C6/SR82.

UNGA, “Eighty-Third Meeting: Consideration of the Draft Convention on Genocide” (25 October 1948) UN Docs A/C6/SR83.

UNGA “Establishment of an International Criminal Court” (11 December 1995) UN Doc A/RES/50/46.

UNGA, “Forty-First Meeting at Lake Success, New York” (3 October 1947) UN Doc A/C6/SR41.

UNGA, “Hundred and Seventy- Eighth Plenary Meeting: Draft Convention on Genocide: Reports of ECOSOC and the Sixth Committee” (9 December 1948) UN Doc A/PV178.9.

UNGA, “Hundred and Seventy-Ninth Plenary Meeting: Continuation of the Discussion on the Draft Convention on Genocide, Amendments Proposed by the USSR to the Draft Convention and Amendment Proposed by Venezuela” (9 December 1948) UN Doc A/PV179.

UNGA, “Hundred and Thirtieth Meeting: Continuation of the Consideration of the Draft Convention on Genocide” (30 November 1948) UN Doc A/C6/SR130.

UNGA, “Hundred and Twenty-Eighth Meeting: Continuation of Consideration of the Draft Convention on Genocide” (29 November 1948) UN Doc A/C6/SR128.

UNGA, “Hundred and Twenty-Ninth Meeting: Continuation of the Consideration of the Draft Convention on Genocide” (30 November 1948) UN Doc A/C6/SR129.

UNGA, “One Hundred and Thirty-Ninth Meeting at Lake Success, New York” (12 February 1948) UN Doc E/SR139.

UNGA, “Report of the Ad Hoc Committee on Genocide, Annex Draft Convention on The Prevention and Punishment of The Crime of Genocide” (24 May 1948) E/794.

UNGA, “Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135” (18 February 1999).

UNGA, “Report of the International Law Commission Sixty-Ninth Session” (1 May-2 June and 3 July - 4 August 2017) UN Rep A/72/10.

UNGA, “Resolution on the Situation in Bosnia and Herzegovina” (7 April 1993) UN Doc AG/Res/47/121.

UNGA, “Seventy-Fifth Meeting: Consideration of the Draft Convention on Genocide” (15 October 1948) UN Doc A/C6/SR75.

UNGA, “Seventy-Fourth Meeting: Consideration of the Draft Convention on Genocide” (14 October 1948) UN Doc A/C6/SR74.

UNGA, “Seventy-Seventh Meeting: Consideration of the Draft Convention on Genocide” (18 October 1948) UN Doc A/C6/SR77.

UNGA, “Seventy-Sixth Meeting: Consideration of the Draft Convention on Genocide” (16 October 1948) UN Doc A/C6/SR76.

UNGA, “Sixty-Fifth Meeting: Consideration of the Draft Convention on Genocide” (2 October 1948) UN Doc A/C6/SR65.

UNGA, “Sixty-Fourth Meeting: Consideration of the Draft Convention on Genocide” (1 October 1948) UN Doc A/C6/SR64.

UNGA, “Sixty-Ninth Meeting: Consideration of the Draft Convention on Genocide” (7 October 1948) UN Doc A/C6/SR69.

UNGA “Sixty-Sixth Meeting: Consideration of the Draft Convention on Genocide” (4 October 1948) UN Doc A/C6/SR66.

UNGA, “Sixty-Third Meeting: Consideration of the Draft Convention on Genocide” (30 September 1948) UN Docs A/C6/SR6.

UNGA, “The Crime of Genocide” (11 December 1946) UN Res 96(I).

UNGA, “Two Hundred And Eighteenth Meeting at the Palais des Nations, Geneva” (26 August 1948) UN Doc E/SR218.

UNGA, “Violations of Human Rights in Southern Africa: Report of the Ad Hoc working Group of Experts” (28 January 1985) UN Doc E/CN4/1985/14.

UNGA, “Declaration on the Protection of All Persons from Enforced Disappearance” (adopted 28 February 1992) UNGA Res 47/133, UN Doc A/47/49.

vi. UNSC

UNSC, Letter from the Secretary-General to the President of the Security Council, May 24, 1994, U.N. Doc. S/1994/674 (1994), transmitting Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992).

UNSC, “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)” (3 May 1993) UN Doc S/25704.

vii. Human rights

Committee on Economic, Social and Cultural Rights, ‘General Comment No. 21: Right of Everyone to take part in Cultural Life (art. 15, para 1(a) of the International Covenant on Economic, Social and Cultural Rights)’ (21 December 2009), UN Doc E/C.12/GC/21.

Human Rights Council, ‘Report of the Independent Expert in the Field of Cultural Rights, Ms Farida Shaheed, Submitted Pursuant to Resolution 10/23 of the Human Rights Council’ (March 2010) UN Doc A/HRC/14/36.

Project of an International Declaration concerning the Laws and Customs of War, Brussels (adopted 27 August 1874).

Report of the Expert Group Meeting on the Development of Guidelines for the Integration of Gender Perspectives into the United Nations Human Rights Activities and Programmes UN ESCOR, Comm ‘n on Hum. Rts, 52nd Sess, Agenda Items 9,12, 13 UN Doc. E/CN.4/1996/105 (1995).

Report of the Fourth World Conference on Women, Beijing Declaration and Platform for Action, Conference Addendum Annex IV (4-15 September 1995), A/CONF.177/20/Rev.1.

UN Sub-Commission on the Promotion and Protection of Human Rights, “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and

fundamental freedoms: final report/submitted by Theo van Boven, Special Rapporteur"(2 July 1993) E/CN4/Sub2/1993/8.

UN Sub-Commission on the Promotion and Protection of Human Rights, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations" (1993) E/CN 4/Sub 2/1993/28.

b. ICC

OTP, "Draft Policy on Cultural Heritage" (22 March 2021) <https://www.icc-cpi.int/itemsDocuments/2021-03-22-otp-draft-policy-cultural-heritage-eng.pdf>.

OTP, "Policy Paper on Preliminary Examinations, the Office of the Prosecutor" (November 2013) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf>.

OTP, "Policy Paper on Sexual and Gender-Based Crimes, The Office of the Prosecutor" (June 2014) <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>.

Trust Fund for Victims, "Assistance & Reparations: Achievements, Lessons Learned, and Transitioning" TFV Progress Report (2015).

UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, "Report of the Working Group on Procedural Matters", (13 July 1998) A/CONF.183/C.1/WGPM/L.2/Add.7.

UNPCNICC "Proposal Submitted by Bahrain, Jordan, Kuwait, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tunisia and the United Arab Emirates" (13 June 2000) Preparatory Committee for the International Criminal Court, PCNICC/2000/WGRPE(2)/DP.4.

UNPCNICC, "Report of the Preparatory Commission for the International Criminal Court, Addendum" (12 July 2000) PCNICC/2000/INF/3/Add.1.

UNPCNICC, "Report of the Preparatory Commission for the International Criminal Court, International Seminar on Victims' Access to the International Criminal Court" (6 July 1999) PCNICC/1999/WGRPE/INF/2.

UNPCNICC, "Rule Q (Definition of victims)" PCNICC/2000/WGRPE/INF/1.

UNPCNICC, "Rule X (article 15) Definition of victim" (1999) PCNICC/1999/WGRPE/INF/2.

c. Europe

i. ECtHR

ECtHR, "Just Satisfaction Claims", Practice Direction Issued by the President of the European Court of Human Rights in Accordance with Rule 32 of the Rules of Court (28 March 2007).

European Court of Human Rights, Rules of the Court, (1 January 2020) (ECtHR Rules) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf>.

ECtHR, "The Pilot-Judgment Procedure: Information Note Issued by the Registrar" <https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf>.

ii. EU

European Commission, "Artificial Intelligence: Commission outlines a European approach to boost investment and set ethical guidelines" <http://europa.eu/rapid/press-release_IP-18-3362_en.htm>.

European Commission, "Shaping the Digital Single Market" <https://ec.europa.eu/digital-single-market/en/policies/shaping-digital-single-market>.

European Parliament, "European Parliament Resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL))" <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0051+0+DOC+XML+V0//EN#BKMD-12>.

d. National

Australian Human Rights and Equal Opportunities Commission, "Bringing Them Home: Report of the National Inquiry on the Separation of Aboriginal and Torres Strait Islander Children from their Families" <https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

e. Non-Governmental organisations

FIDH, "The New Letter of the FIDH", *Commentary and Recommendations for the Adoption of the Rules of Procedure and Evidence and the Elements of Crimes,* Preparatory Commission for the International Criminal Court (12-30 June 2000) No 294/2.

ICOMOS International Charter for the Conservation and Restoration of Monuments and Site (The Venice Charter 1964) <https://www.icomos.org/charters/venice_e.pdf>.

International Law Association, "Draft Declaration Conference Report" (2010) <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>.

REDRESS, "Seeking Reparation for Torture Survivors: Rules of Procedure and Evidence for the International Criminal Court, Recommendations to the Preparatory Commission Regarding Reparation and Other Issues Relating to Victims" (2000).

Women's Caucus for Gender Justice, "Recommendations and Commentary for the Elements of Crimes and Rules of Procedure and Evidence submitted to the Preparatory Commission for the International Criminal Court" (12-30 June 2000).

B. Cases

1. State responsibility

a. ISCMs

i. Arbitral and compensation mechanisms

Affaire Chevreau (France v United Kingdom), France-United Kingdom Claims Commission, Decision (9 June 1931) 2 RIAA 1113.

Affaire des forêts du Rhodope central (fond) (Greece v Bulgaria), Decision (29 March 1933) 3 RIAA 1405.

Affaire des Propriétés Religieuses (France, United Kingdom and Spain v Portugal), Decision (4 September 1920) 1 RIAA 7.

British Claims in the Spanish Zone of Morocco (Spain v United Kingdom), Decision (1 May 1925) 2 RIAA 615.

Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, Annex A: Statement of Claim (23 January 1979) 18 ILM 899.

Canada-Union of Soviet Socialist Republics: Protocol on Settlement of Canada's Claim for Damages Caused by 'Cosmos 954', Protocol (2 April 1981) 20 ILM 689.

Case Concerning the Difference Between New Zealand and France Concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 Between the two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v France) France-New Zealand Arbitration Tribunal, Decision (30 April 1990) 20 RIAA 215.

Desert Line Projects LLC v The Republic of Yemen, (ICSID) Award (6 February 2008) Case No ARB/05/17.

Di Caro Case (Italy v Venezuela), Italy-Venezuela Mixed Claims Commission, Decision (1903) 10 RIAA 597.

Dickson Car Wheel Company (US v United Mexican States), Mexico/US General Claims Commission, Judgment (July 1931) 4 RIAA 669.

Différend Dame Hénon Decision No 153, French-Italian Conciliation Commission, Decision (16 June 1953) 13 RIAA 243.

Différend Société Foncière Lyonnaise, Décision No 65, French-Italian Conciliation Commission, Decision (19 July 1950) 13 RIAA 217.

Final Award: Eritrea's Damages Claims (Eritrea v Ethiopia) (EECC) Judgment (17 August 2009) 26 RIAA 505.

Final Award: Ethiopia's Damages Claims (Ethiopia v Eritrea) (EECC) Judgment (17 August 2009) 26 RIAA 631.

Gage Case (US v Venezuela), US-Venezuela Mixed Claims Commission, Decision (1903-1905) 9 RIAA 226.

Heirs of Jean Maninat Case (France v Venezuela), France-Venezuela Mixed Claims Commission (31 July 1905) 10 RIAA 55.

Lusitania Cases (US v Germany), US-Germany Mixed Claims Commission, Administrative Decision No VI (30 January 1925) 7 RIAA 155.

Lusitania Cases (US v Germany), Gladys Bilicke, Individually and as Guardian of the Estate of Carl Archibald Bilicke, & Others (US) v Germany, US-Germany Mixed Claims Commission, Decision (24 September 1924) 7 RIAA 263

Lusitania Cases (US v Germany), US-Germany Mixed Claims Commission, Opinion (1 November 1923) 7 RIAA 32.

Report and Recommendations Made by the Panel of Commissioners Concerning Part Two of the First Installment of Individual Claims for Damages above $100,000 (Category "D" Claims), United Nations Compensation Commission (UNCC) Report (12 March 1998) S/AC.26/1998/3.

Trail Smelter Case (US v Canada), Trail Smelter Arbitral Tribunal, Decision (16 April 1938) 3 RIAA 1905.

William McNeill (Great Britain) v United Mexican States, British-Mexican Claims Commission, Decision No 46 (19 May 1931) 5 RIAA 164.

ii. PCIJ

Case Concerning the Factory at Chorzów (Germany v Poland) Merits (13 September 1928) PCIJ Rep Series A No 17.

Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v France) Judgment (7 June 1932) Rep Series A/B No 46.

Legal Status of Eastern Greenland (Denmark v Norway) Judgment (5 April 1933) PCIJ Rep Series A/B No 53.

Peter Pázmány University v The State of Czechoslovakia, Judgment (15 December 1933) Ser A/B No 61.

The Mavrommatis Palestine Concessions (Greece v United Kingdom), Judgment (30 August 1924) Ser B No 3.

iii. ICJ

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (8 July 1996) ICJ Rep 1996.

Aerial Incident of 3 July 1988 (Islamic Republic of Iran v the United States of America), Application Instituting Proceedings (17 March 1989) ICJ Rep 1989.

Aerial Incident of 3 July 1988 (Islamic Republic of Iran v the United States of America the United States of America), Order (22 February 1996) ICJ Rep 1996, *reprinted in* 35 ILM 550 (22 February 1996).

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Merits Judgment (30 November 2010) ICJ Rep 2010.

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo), Compensation Judgment (19 June 2012) ICJ Rep 2012.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) Judgment (26 February 2007) ICJ Rep 2007.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia) Judgment (3 February 2015) ICJ Rep 2015.

Barcelona Traction, Light and Power Company (Belgium v Spain), Judgment (5 February 1970) ICJ Rep 1970.

Case Concerning the Gabčikovo-Nagymaros Project (*Hungary v Slovakia*) (ICJ) Judgment (25 September 1997), ICJ Rep 1997.

Case Concerning the Temple of Preah Vihear (Cambodia v Thailand) Merits Judgment (15 June 1962), ICJ Rep 1962.

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Tehran) Judgment (24 May 1980) ICJ Rep 1980.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (9 July 2004) ICJ Rep 2004.

Partial Award Containing Settlement Agreement on the Iranian Bank Claims Against the United States and on the International Court of Justice Case Concerning the Aerial Incident of July 3, 1988, Iran-United States Claims Tribunal, Award Decision (22 February 1996) 35 ILM 553.

Reservation on the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion (18 May 1951) ICJ Rep 1951.

The Corfu Channel Case, Assessment of Amount of Compensation (United Kingdom v Albania), (ICJ) Judgment (15 December 1949) 15 XII 49.

iv. ITLOS

M/V Saiga (No 2) (St Vincent and the Grenadines v Guinea), Judgment (1 July 1999) Case No 2.

b. Regional human rights courts

i. ACtHPR

Beneficiaries of the Late Norbert Zongo et al v Burkina Faso, Judgment (28 March 2014) Application No 013/2011.

Lohé Issa Konaté v Burkina Faso, Judgment (5 December 2014) Application No 004/2013.

Tanganyika Law Society & Legal and Human Rights Centre & Reverend Christopher R. Mtikila v United Republic of Tanzania, Judgment (14 June 2013) App Nos 009/011/2011.

ii. ECtHR

Academy Trading Ltd & Others v Greece, Judgment (4 April 2000) No 30342/96.

Akkoç v Turkey, Merits and Just Satisfaction (10 October 2000) Nos 22947/93 and 22948/93.

Association "21 December 1989" & Others v Romania, Merits and Just Satisfaction (24 May 2011) No 33810/07.

Ayder & Others v Turkey, Judgment (8 January 2004) No 23656/94.

Broniowski v Poland, Friendly Settlement (28 September 2005) No 31442/96 28.

Catan & Others v Moldova and Russia, Judgment (19 October 2012) Nos 43370/04, 8252/05 and 18454/06.

Catholic Archdiocese of Alba Iulia v Romania, Judgment (25 September 2012) No 33003/03.

Centro Europa SRL & Di Stefano v Italy, Judgment (7 June 2012) No 38433/09.

Chapman v the United Kingdom, Judgment (18 January 2001) No 27238/95.

Comingersoll SA v Portugal, Judgment (6 April 2000) No 35382/97.

Cyprus v Turkey, Judgment (10 May 2001) No 25781/94.

Cyprus v Turkey, Just Satisfaction (12 May 2014) No 25781/94.

Dacia SRL v Moldova, Just Satisfaction (24 February 2009) No 3052/04.

Djavit An v Turkey, Judgment (20 February 2003) No 20652/92.

Estamirov & Others v Russia, Judgment (12 October 2006) No 60272/00.

Freedom and Democracy Party (ÖZDEP) v Turkey, Judgment (8 December 1999) No 23885/94.

Gorzelik & Others v Poland, Judgment (17 February 2004) No 44158/98.

Hasan & Eylem Zengin v Turkey, Merits and Just Satisfaction (9 October 2007) No 1448/04.

İrfan Temel & Others v Turkey, Judgment (3 March 2009) No 36458/02.

Isayeva, Yusupova & Bazayeva v Russia, Judgment (24 February 2005) Nos 57947/00, 57948/00 and 57949/00.

Kişmir v Turkey, Judgment (31 May 2005) No 27306/95.

Krone Verlag GmbH & Co KG v Austria, Judgment (26 February 2002) No 34315/96.

IAVGI Publishing And Press Agency SA & Karis v Greece, Judgment (5 June 2008) No 15909/06.

Lupeni Greek Catholic Parish & Others v Romania, Judgment (29 November 2016) No 76943/11.

Manifattura FL v Italy, Judgment (25 February 1992) No 12407/86.

Oyal v Turkey, Judgment (23 March 2010) No 3864/05.

Papamichalopoulos & Others v Greece (Article 50), Judgment (31 October 1995) No 14556/89.

Paroisse Gréco-Catholique Sâmbata Bihor c Roumanie, Judgment (12 January 2010; 12 April 2010) No 48107/99.

Paroisse Gréco-Catholique Sfantul Vasile Polona c Roumanie, Judgment (7 July 2009) No 65965/01.

Pressos Compania Naviera SA & Others v Belgium (Art 50), Judgment (3 July 1997) No 17849/91.

Rock Ruby Hotels Ltd v Turkey, Just Satisfaction (26 October 2010) No 46159/99.

Sovtransavto Holding v Ukraine, Judgment (25 July 2002) No 48553/99.

Stran Greek Refineries & Stratis Andreadis v Greece, Judgment (4 December 1994) No 13427/87.

Sunday Times v United Kingdom (No 2), Judgment (24 October 1991) No 50/1990/241/312.

Sunday Times v United Kingdom (Art. 50), Just Satisfaction (6 November 1980) No 6538/74.

Sunday Times v United Kingdom (No. 1), Merits (26 April 1979) No 6538/74.

Tinnelly & Sons, Ltd & Others and McElduff & Others v United Kingdom, Judgment (10 July 1998) No 62/1997/846/1052–1053.

Union Alimentaria Sanders SA v Spain, Judgment (7 July 1989) No 11681/85.

iii. IACtHR

Aloeboetoe et al v Suriname, Reparations and Costs (10 September 1993) Series C No. 15.

Cantos v Argentina, Merits, Reparations and Costs (28 November 2002) Series C No. 97.

Cantos v Argentina, Preliminary Objections (7 September 2001) Series C No. 85.

Chaparro Álvarez & Lapo Íñiguez v Ecuador, Preliminary Objections, Merits, Reparations and Costs (21 November 2007) Series C No. 170.

Contreras et al v El Salvador, Merits, Reparations and Costs (31 August 2011) Series C No. 232.

Ivcher Bronstein v Peru, Merits, Reparations and Costs (6 February 2001) Series C No. 74.

"Juvenile Reeducation Institute" v Paraguay, Preliminary Objections, Merits, Reparations and Costs (2 September 2004) Series C No. 112.

Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs (25 November 2015) Series C No. 309.

Kichwa Indigenous People of Sarayaku v Ecuador, Merits and Reparations (27 June 2012) Series C No. 245.

"Las Dos Erres" Massacre v Guatemala, Preliminary Objection, Merits, Reparations, and Costs (24 November 2009) Series C No. 211.

Loayza-Tamayo v Peru, Reparations and Costs (27 November 1998) Series C No. 42.

Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, Reparations and Costs (31 August 2001) Series C No. 79.

Mevopal, S.A. and Argentina, Petition, Report (11 March 1999) Report No 39/99.

Miguel Castro-Castro Prison v Peru, Merits, Reparations and Costs (25 November 2006) Series C No.160.

Moiwana Community v Suriname, Preliminary Objections, Merits, Reparations and Costs (15 June 2005) Series C No. 124.

Montero-Aranguren et al (Detention Center of Catia) v Venezuela, Preliminary Objection, Merits, Reparations and Costs (5 July 2006) Series C No. 150.

Norín Catrimán et al (Leaders, Members and Activist of the Mapuche Indigenous People) v Chile, Merits, Reparations and Costs (29 May 2014) Series C No. 279.

Perozo et al v Venezuela, Preliminary Objections, Merits, Reparations and Costs (28 January 2009) Series C No. 195.

Plan de Sánchez Massacre v Guatemala, Merits (29 April 2004) Series C No. 105.

Plan de Sánchez Massacre v Guatemala, Reparations (19 November 2004) Series C No. 116.

Río Negro Massacres v Guatemala, Preliminary Objection, Merits, Reparations and Costs (4 September 2012) Series C No. 250.

Saramaka People v Suriname, Preliminary Objections, Merits, Reparations and Costs (28 November 2007) Series C No.185.

Velásquez-Rodríguez v Honduras, Reparations and Costs (21 July 1989) Series C No.7.

Xákmok Kásek Indigenous Community v Paraguay, Merits, Reparations and Costs (24 August 2010) Series C No. 214.

Yakye Axa Indigenous Community v Paraguay, Merits, Reparations and Costs (17 June 2005) Series C No. 125.

c. UNHRC

Äärelä & Näkkäläjärvi v Finland, Communication No 779/1997 (7 November 2001) UN Doc CCPR/C/73/D/779/1997.

UNHRC, 'General Comment No 23: Article 27 (Rights of Minorities)' (8 April 1994) UN Doc CCPR/C/21/Rev1/Add5.

Howard v Canada, Communication No 879/1999 (4 August 2005) UN Doc CCPR/C/84/D/879/1999.

Länsman (Ilmari) et al v Finland, Communication No 511/1992(8 November 1994) UN Doc CCPR/C/52/D/511/1992.

Länsman (Jouni) et al v Finland, Communication No 671/1995 (22 November 1996) UN Doc CCPR/C/58/D/671/1995.

Länsman (Jouni) et al (II)) v Finland, Communication No 1023/2001 (15 April 2005) UN Doc CCPR/C/83/D/1023/2001.

Lovelace v Canada, Communication No 24/1977 (30 July 1981) UN Doc CCPR/C/13/D/24/1977.

Kalevi Paadar et al v Finland, Communication No 2102/2011 (5 June 2014) UN Doc CCPR/C/110/D/2102/2011.

Kitok v Sweden, Communication No 197/1985 (27 July 1988) UN Doc CCPR/C/33/D/197/1985.

Mahuika et al v New Zealand, Communication No 547/1993 (16 November 2000) UN Doc CCPR/C/70/D/547/1993.

Mavlonov & Sa'di v Uzbekistan, Communication No 1334/2004 (19 March 2009) UN Doc CCPR/C/95/D/1334/2004.

Ominayak (Lubicon Lake Band) v Canada, Communication No 167/1984 (26 March 1990) UN Doc CCPR/C/38/D/167/1984.

Poma Poma v Peru, Communication No 1457/2006 (24 April 2009) UN Doc CCPR/C/95/D/1457/2006.

Prince v South Africa, Communication No 1474/2006 (14 November 2007) UN Doc CCPR/C/91/D/1474/2006.

2. Individual criminal responsibility

a. Second World War

Trial of the Major War Criminals Before the International Military Tribunal, (IMT) Judgment (Nuremberg 14 November 1945-1 October 1946), published at Nuremberg, Germany, 1947.

Poland v Gauleiter Artur Greiser, Judgment (21 June and 7 July 1946) 13 LRTWC 70.

Poland v Hauptsturmführer Amon Leopold Goeth, Judgment (31 August and 5 September 1946) 7 LRTWC 1.

The Attorney General of the Government of Israel v Adolf Eichmann, Judgment (12 December 1961) (1968) 36 *International Law Report.*

United States of America et al v Araki et al, Judgment (12 November 1948).

United States of America v Friedrich Flick et al, Judgment (20 April and 22 December 1947) 9 LRTWC 1.

United States of America v Josef Altstötter et al ("The Justice Case"), Judgment (17 February and 4 December 1947) 6 LRTWC 1.

United States of America v Ulrich Greifelt et al, Judgment (10 October 1947 and 10 March 1948) 13 LRTWC 1.

b. Ad hoc and hybrid jurisdictions

i. ICTR

Prosecutor v Akayesu, Judgment (1 June 2001) Case No IT-96-4-A.

Prosecutor v Bagilishema, Judgment (7 June 2001) Case No ICTR-95-1A-T.

Prosecutor v Kayishema, Judgment (21 May 1999) Case No ICTR-95-1-T.

Prosecutor v Muhimana, Judgment and Sentence (28 April 2005) Case No ICTR- 95-1B-T.

Prosecutor v Musema, Judgment (27 January 2000) Case No ICTR-96-13-T.

Prosecutor v Muvunyi, Judgment and Sentence (12 September 2006) Case No ICTR-2000-55A-T.

Prosecutor v Niyitegeka, Judgment (16 May 2003), Case No ICTR-96-14-T.

Prosecutor v Seromba, Judgment (12 March 2008) Case No ICTR-2001-66-A.

ii. ICTY

Prosecutor v Blagojević & Jokić, Judgment (17 January 2005) Case No IT-02-60-T.

Prosecutor v Blaškić, Appeal Judgment (29 July 2004) Case No IT-95-14-A.

Prosecutor v Blaškić, Judgment (3 March 2000) Case No IT-95-14-T.

Prosecutor v Blaškić, Second Amended Indictment (25 April 1997) Case No IT-95-14-T.

Prosecutor v Brđanin, First Amended Indictment (14 March 1999) Case No IT-99-36.

Prosecutor v Brđanin, Judgment (1 September 2004) Case No IT-99-36-T.

Prosecutor v Deronjić, Judgment (30 March 2004) Case No IT-02-61-S.

Prosecutor v Galić, Judgment (30 November 2006) Case No. IT-98-29-A.

Prosecutor v Jelisić, Amended Indictment (19 October 1998) Case No IT-95-10.

Prosecutor v. Jokić, Judgment (18 March 2004) Case No IT-01-42/1.

Prosecutor v Jokić, Second Amended Indictment (27 August 2003) Case No IT-01-42/1.

Prosecutor v Karadžić, Indictment (14 November 1995) Case No IT-95-5/18-T.

Prosecutor v Karadžić, Judgment (24 March 2016) Case No IT-95-5/18-T.

Prosecutor v Karadžić & Mladić, Initial Indictment (24 July 1995) Case No IT-95-5.

Prosecutor v Karadžić & Mladić, International Arrest Warrant and Order for Surrender (11 July 1996) Case No IT-95-5-R61 and IT-95-18-R61.

Prosecutor v Karadžić & Mladić, Transcript of Hearing (2 July 1996) Case No IT-95-5-R61 and IT-95-18-R61.

Prosecutor v Kordić & Čerkez, First Amended Indictment (10 November 1995) Case No IT-95-14/2.

Prosecutor v Kordić & Čerkez, Appeal Judgment (17 December 2004) Case No IT-95-14/2-A.

Prosecutor v Kordić & Čerkez, Judgment (26 February 2001) Case No IT-95-14/2-T.

Prosecutor v Kovačević, First Amended Indictment (13 March 1997) Case No IT-97-24.

Prosecutor v Krajišnik, Judgment (27 September 2006) Case No IT-00-39-T.

Prosecutor v Krstić, Judgment (2 August 2001) Case No IT-98-33-T.

Prosecutor v Krstić, Appeal Judgment (19 April 2004) Case No IT-98-33-A.

Prosecutor v Krnojelac, Appeal Judgment (17 September 2003) Case No IT-97-25-A.

Prosecutor v Kunarac et al "Foča", Judgment (12 June 2002) Case No IT-96-23&23/1-A.

Prosecutor v Kupreškić et al, Judgment (14 January 2000) Case No IT-95-16-T.

Prosecutor v Kvočka, Judgment (2 November 2001) Case No IT-98-30/1-A.

Prosecutor v Ljubičić, Corrected Amended Indictment (2 August 2002) Case No IT-00-41, Count 12.

Prosecutor v Martić, Amended Indictment (18 December 2002) Case No IT-95-11.

Prosecutor v Martić, Judgment (12 June 2007) Case No IT-95-11-T.

Prosecutor v Milošević, Order Terminating Proceedings (14 March 2006) Case No IT-02-54-T.

Prosecutor v Milošević, Second Amended Indictment (28 July 2004) Case No IT-02-54-T.

Prosecutor v Naletilić, Indictment (21 December 1998) Case No IT-98-34-I.

Prosecutor v Naletilić & Martinović, Judgment (31 March 2003) Case No IT-98-31-T.

Prosecutor v Naletilić & Martinović, Judgment (3 May 2006) Case No IT-98-31-A.

Prosecutor v Popović et al, Judgment (10 June 2010) Case No IT-05-88-T.

Prosecutor v Popović et al, Judgment (13 January 2015) Case No IT-05-88-A.

Prosecutor v Prlić et al, Judgment (29 May 2013) Case No IT-04-74-T.

Prosecutor v Rajić, Amended Indictment (14 January 2004) Case No IT-95-12.

Prosecutor v Sikirica et al, Judgment (3 September 2001) Case No IT-95-8-T.

Prosecutor v Stakić, Judgment (31 July 2003) Case No IT-97-24-T.

Prosecutor v Stakić, Judgment (22 March 2006) Case No IT-97-24-A.

Prosecutor v Štrugar, Appeal Judgment (17 July 2008) Case No IT-01-42-A.

Prosecutor v Štrugar, Judgment (31 January 2005) Case No IT-01-42-T.

Prosecutor v Štrugar, Third Amended Indictment (10 December 2003) Case No IT-01-42-PT.

Prosecutor v Štrugar & Kovačević, Second Amended Indictment (17 October 2003) Case No IT-01-42/2.

Prosecutor v Štrugar, Jokić, Zec & Kovačević, Indictment (22 February 2001) Case No IT-01-42.

Prosecutor v Tadić, Appeal Judgment (27 February 2001) Case No IT-94-1-A.

Prosecutor v Tadić, Appeal Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) Case No IT-94-1.

Prosecutor v Tadić, Judgment (14 July 1997) Case No IT-94-1-T.

Prosecutor v Tadić, Judgment (15 July 1999) Case No IT-94-1-A.

Prosecutor v Tadić, Opinion and Judgment (7 May 1997) Case No IT-94-1-T.

Prosecutor v Tolimir, Appeal Judgment (8 April 2015) Case No IT-05-88/2-A.

Prosecutor v Tolimir, Judgment (12 December 2012) Case No IT-05-88/2-T.

Prosecutor v Vasiljević, Judgment (25 February 2004) Case No IT-98-32-A.

iii. ECCC

Case 002/02 Judgment, (ECCC) Trial Chamber Judgment (16 November 2018) Case No. 002/19-09-2007/ECCC/TC.

Civil Parties' Co-Lawyers' Request for Supplementary Preliminary Investigations, Decision (9 February 2009) Case No 001/18–07-2007-ECCC/TC.

Prosecutor v Kaing Guek Eav alias Duch, Trial Chamber Judgement (26 July 2010) No 001/18-07-2007/ECCC/TC.

iv. SCSL

Prosecutor v. Brima, Judgment (22 February 2008) Case No SCSL-04-16-A.

c. ICC

Prosecutor v Al Mahdi, Decision on the Confirmation of Charges (24 March 2016) No ICC-01/12-01/15.

Prosecutor v Al Mahdi, Judgment and Sentence (27 September 2016) No ICC-01/12-01/15.

Prosecutor v Al Mahdi, Reparation Order (17 August 2017) No ICC-01/12-01/15.

Prosecutor v Bemba, Judgment (21 March 2016) No ICC-01/05-01/08.

The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, (ICC) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012) ICC-01/09-02/11-382-Red

Prosecutor v Katanga & Ngudjolo Chui, Pre-Trial Decision on the Confirmation of charges (30 September 2008) No ICC-01/04-01/07-717.

Prosecutor v Lubanga, Appeal Judgment (3 March 2013) No ICC-01/04-01/06-3129.

Prosecutor v Lubanga, Decision Establishing Principles and Procedures to be Applied to Reparations (7 August 2012) No ICC-01/04-01/06-2904.

Prosecutor v Lubanga, (ICC) Judgment (14 March 2012) No ICC-01/04-01/06-2842.

Prosecutor v Lubanga, Decision on Victim's Participation (18 January 2008) No ICC-01/04-01/06.

Prosecutor v Lubanga, Judgment (11 July 2008) No ICC-01/04-01/06 OA9OA10.

II. Secondary sources

A. Journal articles

Abtahi Hirad, "The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia" (2001) 14(1) *Harvard Human Rights Journal.*

Abtahi Hirad, "From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes Against Civilization under the ICC Statute" (2004) 4(1) *International Criminal Law Review*.

Abtahi Hirad, "Does International Criminal Law Protect Culture in Times of Trouble? Defining the Scope" (2007) 2 *Brazilian Yearbook of International Law*.

Abtahi Hirad, "Reflections on the Ambiguous Universality of Human Rights: Cyrus the Great's Proclamation as a Challenge to the Athenian Democracy's Perceived Monopoly on Human Rights" (2007) 36(1) *Denver Journal of International Law and Policy*.

Abtahi Hirad, "Types of Injury in Inter-State Reparation Claims: A Guide for the International Criminal Court" (2015) 30(2) *Canadian Journal of Law and Society*.

Abtahi Hirad and Dawson Grant, "The Anatomy of the Milošević Trial (2001-2006)" (2016) 1(4) *Journal of International Humanitarian Action*.

Ahmad Yahaya, "The Scope of and Definition of Heritage: From Tangible to Intangible" (2006) 12(3*) International Journal of Heritage Studies*.

Altwicker-Hàmori Szilvia, Altwicker Tilmann and Peters Anne, "Measuring Violations of Human Rights, An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European

Convention on Human Rights" (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.*

Anaya S James and Grossman Claudio, "The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples" (2002) 19(1) *Arizona Journal of International and Comparative Law*.

Anzilotti Dionisio, "La responsabilité internationale des États à raison des dommages soufferts par les étrangers" (1906) 13 *Revue Générale de Droit International Public*.

Arbitral Award, In the Matter of the Claim Madame Chevreau Against the United Kingdom" (1933) 27 *American Journal of International Law* (English version).

Bachvarova Tatiana, "Victims' Eligibility before the International Criminal Court in Historical and Comparative Context" 2011 11(4) *International Criminal Law Review*.

"Bahamas et Cuba: Versement par le gouvernement cubain au gouvernement des Bahamas de l'indemnité dûe pour l'incident maritime du 10 mai 1980" (1981) 85 *Revue Générale de Droit International Public*.

Balasco Lauren Marie, "Reparative Development: Re-conceptualising Reparations in Transitional Justice Processes" (2017) 17(1) *Conflict, Security and Development*.

Bassiouni M Cherif, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32(3) *Cornell International Law Journal.*

Bierstedt Robert, **"**The Meanings of Culture" (1938) 5(2) *Philosophy of Science*.

Blake Janet, "On Defining the Cultural Heritage" (2000) 49(1) *International and Comparative Law Quarterly*.

Blumenthal Albert, "A New Definition of Culture" (1940) 42(4) *American Anthropologist*.

Boas Franz, "The Limitations of the Comparative Method of Anthropology" (1896) 4(103) *Science*.

Bostrom Nick, "Transhumanist Values" (2005) 30(1) *Journal of Philosophical Research*.

Brammertz Serge, Hughes Kevin C, Kipp Alison and Tomljanovich William B., "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY" (2016) 14(5) *Journal of International Criminal Justice*.

Brâncoveanu Romulus, "When Does 'Tangible' Meet 'Intangible'"? Some Reflections About the Relation between the Tangible and Intangible Cultural Heritage" (2018) 21 *Hermeneia: Journal of Hermeneutics, Art Theory & Criticism*.

Brown Michael F, "Can Culture Be Copyrighted?" (1998) 39(2) *Current Anthropology*.

Brozek Bartosz and Jakubiec Marek, "On the legal responsibility of autonomous machines" (2017) 25(3) *Artificial Intelligence and Law*.

Bryson Joanna J, Diamantis Mihailis E and Grant Thomas D, "Of, for, and by people: the legal lacuna of synthetic persons" (2017) 25(3) *Artificial Intelligence and Law*.

Bugnion François, "La genèse de la protection juridique des biens culturels en cas de conflit armé" (2004) 86(854) *International Review of the Red Cross*.

Cerka Paulius, Grigiene Jurgita and Sirbikyte Gintare, "Is it possible to grant legal personality to artificial intelligence software systems?" (2017) 33(5) *Computer & Security Review*.

Charlesworth Hilary, “Feminist Methods in International Law” (1999) 93(2) *American Journal of International Law.*

Clément Etienne and Quino Farice, “La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l’application de la Convention de La Haye de 1954” (2004) 86(854) *International Review of the Red Cross*.

Contreras-Garduño Diana and Rombouts Sebastiaan, “Collective Reparations for Indigenous Communities before the Inter-American Court of Human Rights” (2010) 27(72) *Merkourios: Utrecht Journal of International and European Law*.

Contreras-Garduño Diana, “Defining Beneficiaries of Collective Reparations: The Experience of the IACtHR” (2012) 4 (3) *Amsterdam Law Forum*.

Copelon Rhonda, “Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law” (2000) 46(1) *McGill Law Journal.*

Cossman Brenda, “Gender performance, sexual subjects and international law” (2002) 15(2) *Canadian Journal of Law & Jurisprudence.*

Crosby Alison, Lykes M Brinton and Caxaj Brisna, “Carrying a Heavy Load: Mayan Women’s Understandings of Reparation in the Aftermath of Genocide” (2016) 18(2/3) *Journal of Genocide Research*.

Davis Lisa, “Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes against Women and LGBTIQ persons” (2017) 24(3) *William & Mary Journal of Women and the Law*.

Di Giovine Michael A and Cowie Sarah, “The Definitional Problem of Patrimony and the Futures of Cultural Heritage” (2014) *Anthropology News*.

Donders Yvonne, “Do cultural diversity and human rights make a good match?” (2010) 61(199) *International Social Sciences Journal.*

Drumbl Mark A, “From Timbuktu to The Hague and Beyond – The War Crime of Internationally Attacking Cultural Property” (2019) 17 *Journal of International Criminal Justice*.

Duggan Colleen, Paz y Paz Bailey Claudia and Guillerot Julie, “Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru” (2008) 2(2) *The International Journal of Transitional Justice.*

Elewa Badar Mohamed and Higgins Noelle, “Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law” (2017) 17(3) *International Criminal Law Review*.

Emberland Marius, “Compensating Companies for Non-Pecuniary Damage: Comingersoll SA v Portugal and the Ambivalent Expansion of the ECHR Scope” (2003) 71(1) *British Yearbook of International Law*.

“Etats-Unis et Israël: Règlement de l’incident du Liberty (18 décembre 1980)” (1981) 85 *Revue Générale de Droit International Public.*
Fechner Frank G, “The Fundamental Aims of Cultural Property Law” (1998) 7(2) *International Journal of Cultural Property*.

Fenrick William J, “The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY” (2001) 32 *Netherlands Yearbook of International Law*.

Fournet Caroline and Pégorier Clotilde, “Only One Step Away From Genocide: The Crime of Persecution in International Criminal Law” (2010) 10(5) *International Criminal Law Review*.

Francioni Francesco, "Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity" (2004) 25(4) *Michigan Journal of International Law*

Frigo Manlio, "Cultural Property v. Cultural Heritage: A 'Battle of Concepts' in International Law?" (2004) 86(854) *International Review of the Red Cross*.

Frulli Micaela, "The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency" (2011) 22(1) *European Journal of International Law*.

Gaeta Paola, "On What Conditions Can a State Be Held Responsible for Genocide?" (2007) 18(4) *European Journal of International Law*.

Gottlieb Yaron, "Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC" (2005) 23(4) *Pennsylvania State International Law Review*.

Green Martínez Sebastian, "Destruction of Cultural Heritage in Northern Mali" (2015) 13(5) *Journal of International Criminal Justice*.

Hage Jaap, "Theoretical foundations for the responsibility of autonomous agents" (2017) 25(3) *Artificial Intelligence and Law*.

Haring Douglas G, "Is 'Culture' Definable?" (1949) 14(1) *American Sociological Review*.

Hornshoj-Moller Stig and Culbert David, "Der Ewige Jude: Joseph Goebbels' Unequaled Monument to Antisemitism" (1992) 12(1) *Historical Journal of Radio, Film and Television*.

Johannot-Gradis Christiane, "Protecting the Past for the Future: How Does Law Protect Tangible and Intangible Cultural Heritage in Armed Conflict?" (2015) 97(900) *International review of the Red Cross*.

Keesing Roger M, "Theories of Culture" (1974) 3(1) *Annual Review of Anthropology*.

Kritz Brian, "The Global Transgender Population and the International Criminal Court" (2014) 17 *Yale Human Rights & Development Law Journal.*

Kuruk Paul, "Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States" (2007) 34(3) *Pepperdine Law Review*.

Leich Marian Nash, "Contemporary Practice of the United States Relating to International Law" (1989) 83(3) *American Journal of International Law*.

Lemkin Raphael, "Le Terrorisme" (1933) *Actes de la Vème Conférence pour l'unification du droit pénal à Madrid 14-20 X 1933* (1933).

Lemkin Raphael, "Genocide as a Crime in International Law" (1947) 41(1) *American Journal of International Law*.

Lemkin Raphael, "Genocide as a Crime under International Law" (1948) 4(2) *United Nations Bulletin*.

Lippman Matthew, "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8(1) *Temple International and Comparative Journal*.

Lostal Marina, "The Misplaced Emphasis on the Intangible Dimension of Cultural Hertiage in the Al Mahdi Case at the ICC" (2017) 1(2) *The McGill Journal of International Law & Legal Pluralism*.

Loulanski Tolina, "Revising the Concept for Cultural Heritage: The Argument for a Functional Approach" (2006) 13(2) *International Journal of Cultural Property*.

Lowenthal David, "Natural and Cultural Heritage" (2005) 11(1) *International Journal of Heritage Studies*.

McKay Fiona, "Paris Seminar on Victims' Access to the ICC" (1999) 12 *The International Criminal Court Monitor*.

Mani Rama, "Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development" (2008) 2 *The International Journal of Transitional Justice.*

Merryman John Henry, "Two Ways of Thinking About Cultural Property" (1986) 80(4) *American Journal of International Law.*

Merryman John Henry, "The Public Interest in Cultural Property" (1989) 77 *California Law Review.*

Mettraux Guénaël, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda" (2002) 43 *Harvard International Law Journal*.

Mettraux Guénaël, *International Crimes: Law and the Practice. Genocide*, vol 1 (Oxford University Press 2019).

Mitchell Don, "There's No Such Thing as Culture: Towards a Reconceptualization of the Idea of Culture in Geography" (1995) 20(1) *Transactions of the Institute of British Geographers*.

Moore Charles Barrera, "Embracing Ambiguity and Adopting Propriety: Using Comparative Law To Explore Avenues for Protecting the LGBT Population under Article 7 of the Rome Statute of the International Criminal Court" (2017) 101(2) *Minnesota Law Review*.

Moore Omar Khayyam, "Nominal Definitions of 'Culture'", (1952) 19(4) *Philosophy of Science*.

O'Keefe Roger, "The "Right to Take Part in Cultural Life" Under Article 15 of the ICESCR" (1998) 47(4) *International and Comparative Law Quarterly.*

O'Keefe Roger, "World Cultural Heritage: Obligations to the International Community as a Whole?" (2004) 53(1) *International and Comparative Law Quarterly*.

O'Keefe Roger, "Cultural Property Protection and the Law of War Crimes" (2017) 38 *NATO Legal Gazette.*

Oosterveld Valerie, "The Definition of Gender in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice" (2005) 18 *Harvard Human Rights Journal.*

Oosterveld Valerie, "Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court" (2014) 16(4) *International Feminist Journal of Politics.*

Prott Lyndel V, "Problems of Private International Law for the Protection of the Cultural Heritage" (1989) 217 *Recueil des Cours*.

Prott Lyndel V and O'Keefe Patrick J, "'Cultural Heritage' or 'Cultural Property'?" (1992) 1(2) *International Journal of Cultural Property*.

Robinson Daryl, "Defining 'Crimes against Humanity' at the Rome Conference" (1999) 93(1) *American Journal of International Law*.

Rosenfeld Frederich "Collective Reparations for Victims of Armed Conflicts" (2010) 92(879) *International Review of the Red Cross*.

Rousseau Charles, "Chronique des faits internationaux" (1966) 70 *Revue Générale de Droit International Public.*

Rousseau Charles, "Chronique des faits internationaux"(1981) 85 *Revue Générale de Droit International Public*.

Rubio-Marín Ruth and Greiff Pablo de, "Women and Reparations" (2007) 1(3) *International Journal of Transitional Justice*.

Schabas William A, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit" (2017) 49(1) *Case Western Reserve Journal of International Law*.

Schabas William A, "Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda" (2000) 6 *ILSA Journal of International and Comparative Law*.

Solaiman SM, "Legal personality of robots, corporations, idols and chimpanzees: a quest for legitimacy" (2017) 25(2) *Artificial Intelligence and Law*.

Solum Lawrence B, "Legal Personhood for Artificial Intelligence" (1992) 70(4) *North Carolina Law Review*.

Van den Herik Larissa and Černic Jernej Letnar, "Regulating Corporations under International law: From Human Rights to International Criminal Law and Back Again" (2010) 8 *Journal of International Criminal Justice.*

Van den Herik Larissa and Dam-de Jong Daniëlla, "Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict" (2011) 15 *Criminal Law Forum.*

Van der Auwera Sigrid, "International Law and the Protection of Cultural Property in the Event of Armed Conflict: Actual Problems and Challenges" (2013) 43(4) *The Journal of Arts Management, Law, and Society*.

Venturini Gabriella, "International Law and Intentional Destruction of Cultural Heritage" (2017) *Sapere l'Europa, sapere d'Europa 4.*

Viaene Lieselotte, "Life is Priceless: Mayan Q'eqchi' Voices on the Guatemala National Reparations Program" (2010) 4(1) *The International Journal of Transitional Justice.*

Washburn John, "The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century" (1999) 11(2) *Pace International Law Review.*

Whelton Carmel, "The United Nations Compensation Commission and International Claims Law: A Fresh Approach" (1993) 85(3) *Ottawa Law Review*.

Wiersma Lindsey L, "Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims" (2005) 54(4) *Duke Law Journal*.

Woodhead Charlotte, "Art, Culture and Heritage: Law in Context" (2013) 18 *Art Antiquity & Law*.

B. Book chapters

Abtahi Hirad, "Le conflit armé du printemps 2003 en Irak et le sort du patrimoine culturel mésopotamien" *in* Bannelier Karine, Corten Olivier, Kristakis Théodore and Klein Pierre (eds) *L'intervention en Irak et le droit international* (Centre de droit international ULB 2004).

Abtahi Hirad, "Types of Injury in Inter-State Reparation Claims: Direct Injury to the State" *in* Crawford James, Koroma Abdul G, Mahmoudi Said and Pellet Alain (eds) *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill/Nijhoff 2017).

Abtahi Hirad and Webb Philippa, "Secrets and Surprises in the Travaux Préparatoires of the Genocide Convention" *in* deGuzman Margaret and Amann Diane Marie (eds) *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2017).

Arzt Donna E and Lukashuk Igor I, "Participants in International Legal Relations" *in* Ku Charlotte and Diehl Paul F (eds) *International Law: Classic and Contemporary Readings* (Westview Press 1998).

Cockburn Cynthia "The Continuum of Violence: A Gendered Perspective on War and Peace," *in* Giles Wenona and Hyndman Jennifer (eds) *Sites of Violence: Gender and Conflict Zones* (University of California Press 2004).

Donat-Cattin David, "Article 75 Reparations to Victims" *in* Triffterer Otto (ed) *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2nd edn CH Beck-Hart-Nomos 2008).

Doucet Scott, "The Inter-American Court of Human Rights and Aggravated state responsibility: Operationalizing the concept of state crime" *in* Stahn Carsten and van den Herik Larissa (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

Eide Asbjørn, "Cultural Rights as Individual Human Rights" *in* Eide Asbjørn, Krause Catarina and Rosas Allan (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001).

Fauteux Paul, "The Use of the Environment as an Instrument of War in Occupied Kuwait" *in* Schiefer Bruno (ed), *Verifying Obligations Respecting Arms Control and Environment: A Post-Gulf War Assessment* (Canadian Department of External Affairs: 1992).

Fernández de Gurmendi Silvia A, "Definition of Victims and General Principle" *in* Lee Roy SK and Friman Hakan (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Translational Publishers 2001).

Gillett Matthew, "Environmental Damage and International Criminal Law" *in* Jodoin Sébastien and Cordonnier Segger Marie-Claire (eds) *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).

Gioia Andrea, "The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict" *in* Ben-Naftali Orna (ed) *International humanitarian Law and International human rights Law* (Oxford University Press 2011).

Hall Christopher K, Powderly Joseph and Hayes Niamh, "Article 7 Crimes Against Humanity" *in* Ambos Kai and Triffterer Otto (eds) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd edn CH Beck-Hart-Nomos 2015).

Hausler Kristin, "Collective Cultural Rights in the Inter-American Human Rights System" *in* Jakubowski Andrjej (ed) *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016).

Jeßberger Florian, "The Definition and the Elements of the Crime of Genocide" *in* Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009).

Jorda Claude and de Hemptinne Jérôme, "The status and role of the victim" *in* Cassese Antonio, Gaeta Paola and Jones John RWD (eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol 2, Oxford University Press 2002).

Kirk, Allison C, "Eugenics, race hygiene, and the Holocaust: Antecedents and consolidations" *in* Friedman Jonathan C (ed) The Routledge History of The Holocaust (Routledge 2011).

Lenzerini Federico, "Suppressing and Remedying Offences against Culture" *in* Vrdoljak Ana Filipa (ed) *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

Lenzerini Federico, "The Tension between Communities' Cultural Rights and Global Interests: The Case of the Maori Mokomokai" *in* Borelli Silvia and Lenzerini Federico (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff 2012).

Lenzerini Federico, "The Trail of Broken Dreams: the Status of Indigenous Peoples in International Law" *in* Lenzerini Federico (ed) *Reparations for Indigenous Peoples: International and comparative Perspectives* (Oxford University Press 2008).

Lenzerini Federico, "The Safeguarding of Collective Cultural Rights through the Evolutionary Interpretation of Human Rights Treaties and Their Translation into Principles of Customary International Law", *in* Jakubowski Andrjej (ed) *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016).

Mettraux Guénaël, "The Definition of Crimes Against Humanity and the Question of a "Policy" Element" *in* Leila Nadya Sadat (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011).

Michl Fabian, "The Protection of Cultural Goods and the Right to Property Under the ECHR" *in* Lagrange Evelyne, Oeter Stefan and Uerpmann-Wittzack Robert (eds) *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer International Publishing 2018).

Morris Benjamin, "'Not Just a Place': Cultural Heritage and the Environment" *in* Anheier Helmut K and Isar Yudhishthir Raj (eds) *Heritage, Memory and Identity* (The Cultures and Globalization Series) (SAGE Publications Ltd 2011).

O'Keefe Roger, "Cultural Heritage and International Criminal Law" *in* Jodoin Sebastien and Cordonier Segger (eds) *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).

O'Keefe Roger, "Tangible Cultural Heritage and International Human Rights Law" *in* Prott Lyndel V, Redmond-Cooper Ruth and Urice Stephen K (eds) *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Builth Wells: Institute of Art and Law 2013).

O'Keefe Roger, "Cultural Heritage and International Humanitarian Law" *in* Francioni Francesco and Vrdoljak Ana Filipa (eds) *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020 Forthcoming).

Pentassuglia Gaetano, "Protecting Minority Groups through Human Rights Courts: The Interpretive Role of European and Inter-American Jurisprudence" *in* Vrdoljak Ana Filipa (ed) *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

Roht-Arriaza Naomi and Orlovsky Katharine, "A Complementary Relationship: Reparations and Development" *in* Pablo de Greiff and Roger Duthie (eds), *Transitional Justice and Development: Making Connections* (Social Science Research Council 2009).

Rubio-Marín Ruth "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression" *in* Ruth Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009).

Scovazzi Tullio, "The Definition of Intangible Cultural Heritage" *in* Silvia Borelli and Lenzerini Federico (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff 2012).

Shany Yuval, "Human Rights and Humanitarian Law as Competing Legal Paradigms for fighting Terror" *in* Ben-Naftali Orna (ed) *International humanitarian Law and International human rights Law* (Oxford University Press 2011).

Steins Cate, "Gender Issues" *in* Lee Roy SK (ed) *The International Criminal Court: The Making of the Rome Statute: issues, negotiations and result*s (Kluwer Law International 1999).

Urbinati Sabrina, "The Role for Communities, Groups and Individuals under the Convention for the Safeguarding of the Intangible Cultural Heritage" *in* Borelli Silvia and Lenzerini Federico (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff 2012).

Viejo-Rose Dacia, "Conflict and the Deliberate Destruction of Cultural Heritage" *in* Anheier Helmut K and Isar Yudhishthir Raj (eds) *Conflicts and Tensions* (SAGE Publications Ltd 2007).

Viejo-Rose Dacia, "Destruction and Reconstruction of Heritage: Impacts on Memory and Identity" *in* Anheier Helmut K and Isar Yudhishthir Raj (eds) *Heritage, Memory and Identity* (SAGE Publications Ltd 2011).

Vrdoljak Ana Filipa, "Cultural Heritage in Human Rights and Humanitarian Law" *in* Ben-Naftali Orna (ed) *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011).

Wiessner Siegfried, "Culture and the Rights of Indigenous Peoples" *in* Vrdoljak Ana Filipa (ed) *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

C. Books

Akhavan Payam, *Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime* (Cambridge University Press 2012).

Arendt Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006).

Bachvarova Tatiana, *The Standing of Victims in the Procedural Design of the International Criminal Court* (Brill Nijhoff 2017).

Bass Gary Jonathan, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000).

Bassiouni M Cherif*, Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge 2011).
Bevan Robert, *The Destruction of Memory: Architecture at War* (Reaktion Books Ltd 2006).

Blake Janet, *International Cultural Heritage Law* (Oxford University Press 2015).

Boas Gideon, Bischoff James L, Reid Natalie L and Taylor B Don, *International Criminal Law Practitioner Library Series: International Criminal Procedure*, vol 3 (Cambridge University Press 2011).

Bories Clémentine, *Les bombardements serbes sur la vieille Ville de Dubrovnik* (2005) 27 *CEDIN Paris X Perspectives Internationales.*

Buyse Antoine Christian, *Post-Conflict Housing Restitution: The European Human Rights Perspective, With a Case Study on Bosnia and Herzegovina* (Intersentia 2008).

Chechi Alessandro, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014).

Chicago Tribune, "*Simon to Skirt 'Nut' Meeting*" (16 July 1974) *cited by* Cooper Andrew Scott, *The Oil Kings: How the US, Iran, and Saudi Arabia Changed the Balance of Power in The Middle East* (Simon & Schuster 2011).

Chow Pok Yin Stephenson, *Cultural Rights in International Law and Discourse: Contemporary Challenges and Interdisciplinary Perspectives* (Brill Nijhoff 2018).

Contreras-Garduño Diana, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Repar*ations (Intersentia 2018).

Dörmann Knut, Doswald-Beck Louise and Kolb Robert, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (International Committee of the Red Cross Cambridge 2003).

Eagleton Clyde, *The Responsibility of States in International Law* (New York University Press 1928).

Ehlert Caroline*, Prosecuting the Destruction of Cultural Property in International Criminal Law, With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage* (Brill 2013).

Emberland Marius, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford University Press 2006).

García-Amador Francisco V and Sohn Louis B, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana Publications 1974).

Geertz Clifford, *The Interpretation of Cultures* (Basic Books 1973).

Gordon Sarah, *Hitler, Germans and the "Jewish Question"* (Princeton University Press 1984).

Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law*, vol 1 (International Committee of the Red Cross Cambridge University Press 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha>.

Johannot-Gradis Christiane, *Le patrimoine culturel matériel et immatériel : quelle protection en cas de conflit armé?* (Genève: Schulthess 2013), <http://archive-ouverte.unige.ch/unige:83307>.

Kroeber Alfred L and Kluckhohn Clyde, *Culture: A Critical Review of Concepts and Definitions* vol 47 (Harvard University Printing Office 1952).

Kuprecht Karolina, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (Springer 2014).

Leach Philip, *Taking a Case to the European Court of Human Rights* (Oxford University Press 2011).

Lemkin Raphael, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, Division of International Law 1944).

Lixinski Lucas, *Intangible Cultural Heritage in International Law* (Oxford University Press 2013).

Locke John, *Two Treatises of Government and A Letter Concerning Toleration* (first published 1689, Yale University Press 2003).

Lostal Marina, *International Cultural Heritage Law in Armed-Conflict: Case-studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge University Press 2017).

Mettraux Guénaël, *International Crimes: Law and the Practice. Genocide*, vol 1 (Oxford University Press 2019).

Moore John Bassett, *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State* vol 6 (AMS Press 1906).

Müller-Hill Benno and Fraser George R, *Murderous science: Elimination by scientific selection of Jews, Gypsies, and others*, Germany 1933-1945 (Oxford University Press, 1988).

Nersessian David, *Genocide and Political Groups* (Oxford University Press 2010).

Novic Elisa, *The Concept of Cultural Genocide: An International Law Perspective* (Oxford University Press 2016).

O'Keefe Roger, *The Protection of Cultural Property in Armed Conflict* (Cambridge University Press 2006).

Pasqualucci Jo M, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2013).

Prott Lyndel V, "International Standards for Cultural Heritage" *UNESCO World Culture Report* (UNESCO Publishing 1998).

Raynor William J, *The Dictionary of Artificial Intelligence* (Glenlake Publishing Company 1998).

Robinson Nehemiah, *The Genocide Convention: A Commentary* (Institute of Jewish Affairs 1960).

Rubio-Marín Ruth, *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge University Press 2009).

Schabas William A, "Article 75 Reparation to Victims" *The International Criminal Court, A* Commentary *on the Rome Statute* (Oxford 2010).

Schabas William A, *Genocide in International Law: the Crimes of Crimes* (Cambridge University Press 2000).

Schindler Dietrich and Toman Jiri, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher 1988).

Schweid Eliezer, *The Idea of Modern Jewish Culture* (Academic Studies Press 2008).

Sider Gerald M, *Culture and Class in Anthropology and History* (Cambridge University Press 1986).

Smith Adam, *The Wealth of Nations* (first published 1776, Penguin Classics 1982).

Stahn Carsten, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019).

Tylor Edward B, *Primitive Culture* (first published 1871, Harper Torchbooks 1958).

Whiteman Marjorie M, *Damages in International Law*, vol 1 (US Government Printing Office 1937).

D. Edited books

Abtahi Hirad and Webb Philippa (eds), *The Genocide Convention: The Travaux Préparatoires* (Brill Nijhoff 2008).

Anheier Helmut K and Isar Yudhishthir Raj (eds) *Conflicts and Tensions* (SAGE Publications Ltd 2007).

Anheier Helmut K and Isar Yudhishthir Raj (eds) *Heritage, Memory and Identity* (SAGE Publications Ltd 2011).

Bannelier Karine, Corten Olivier, Kristakis Théodore and Klein Pierre (eds) *L'intervention en Irak et le droit international* (Centre de droit international ULB 2004).

Ben-Naftali Orna (ed) *International humanitarian law and International human rights law* (Oxford University Press 2011).

Bohannan Paul and Glazer Mark (eds) *High Points in Anthropology* (2nd edn, McGraw-Hill 1988).

Boister Neil and Cryer Robert (eds) *Documents on the Tokyo International Military Tribunal, Charter, Indictment and Judgments* (Oxford, 2008).

Borelli Silvia and Lenzerini Federico (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Martinus Nijhoff 2012).

Cassese Antonio, Gaeta Paola and Jones John RWD (eds) *The Rome Statute of the International Criminal Court: A Commentary* (vol 2, Oxford University Press 2002).

Crawford James, Koroma Abdul G, Mahmoudi Said, and Pellet Alain (eds) *The International Legal Order: Current Needs and Possible Responses: Essays in Honour of Djamchid Momtaz* (Brill/Nijhoff 2017).

deGuzman Margaret M and Amann Diane Marie (eds) *Arcs of Global Justice: Essays in Honour of William A. Schabas* (Oxford University Press 2017).

Duedahl Poul (ed), *The History of UNESCO: Global Actions and Impacts* (Palgrave Macmillan 2016).

Eide Asbjørn, Krause Catarina and Rosas Allan (eds) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001).

Francioni Francesco and Vrdoljak Ana Filipa (eds) *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press 2020 Forthcoming).

Friedman Jonathan C (ed), *The Routledge History of the Holocaust* (Routledge 2011).

Gaeta Paola (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009).

Giles Wenona Mary and Hyndman Jennifer (eds) *Sites of Violence: Gender and Conflict Zonespeace* (University of California Press 2004).

Jakubowski Andrjej (ed), *Cultural Rights as Collective Rights: An International Law Perspective* (Brill 2016).

Jodoin Sébastien and Cordonnier Segger Marie-Claire (eds) *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013).

Lagrange Evelyne, Oeter Stefan and Uerpmann-Wittzack Robert (eds) *Cultural Heritage and International Law: Objects, Means and Ends of International Protection* (Springer International Publishing 2018).

Lee Roy SK and Friman Hakan (eds) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Translational Publishers 2001).

Pictet Jean (ed), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

Prott Lyndel V, Redmond-Cooper Ruth and Urice Stephen K (eds) *Realising Cultural Heritage Law: Festschrift for Patrick O'Keefe* (Builth Wells: Institute of Art and Law 2013).

Sadat Leila Nadya (ed), *Forging a Convention for Crimes against Humanity* (Cambridge University Press 2011).

Sandoz Yves, Swinarski Christophe and Zimmermann Bruno (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *International Committee of the*

Red Cross (Martinus Nijhoff Publishers 1987) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

Stahn Carsten and van den Herik Larissa (eds) *Future Perspectives on International Criminal Justice* (TMC Asser Press 2010).

Triffterer Otto (ed), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2nd edn CH Beck-Hart-Nomos 2008).

Triffterer Otto and Ambos Kai (eds) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (3rd edn CH Beck-Hart-Nomos 2015).

Van Woudenberg Nout and Lijnzaad Liesbeth (eds) *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (Martinus Nijhoff 2010).

Vrdoljak Ana Filipa (ed), *The Cultural Dimension of Human Rights* (Oxford University Press 2013).

E. Dissertations and papers

Aubry Sylvain and Henao-Trip Maria Isabel "Collective Reparations and the International Criminal Court" *Briefing Paper No. 2* (Reparations Unit, University of Essex 2011) <https://www1.essex.ac.uk/tjn/documents/Paper_2_Collective_Reparations_Large.pdf>.

Bissonnette Pierre André, "La satisfaction comme mode de réparation en droit international" (thesis, University of Geneva) (Imprimerie Grandchamp 1952).

Gubbay Bianca, "The Racialisation of Jews in Germany before WWI" (2012) CERS Working Paper <https://cers.leeds.ac.uk/wpcontent/uploads/sites/97/2013/05/Racialisation_of_Jews_in_Germany_Bianca_Gubbay.pdf>.

Mainetti Vittorio, "Des crimes contre le patrimoine culturel? Réflexions à propos de la criminalisation internationale des atteintes aux biens culturels" *ESIL-SEDI, Conférence inaugurale, 13-15 mai* (*European Society of International Law* 2004).

F. Dictionaries and Encyclopaedic entries

"Antisemitism in History: Racial Antisemitism, 1875-1945" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/antisemitism-in-history-racial-antisemitism-18751945>.

Boslaugh Sarah E, "Anthropocentrism" *in Britannica* <https://www.britannica.com/topic/anthropocentrism>.

Cambridge English Dictionary Online, <http://dictionary.cambridge.org/dictionary/british/culture_1>.

Cardona George, "Prakrit languages" *in Encyclopædia Britannica* (2013) <https://www.britannica.com/topic/Prakrit-languages>.

Cardona George, "Sanskrit language" *in Encyclopædia Britannica* (2013) <https://www.britannica.com/topic/Prakrit-languages>.

"Cultura" *in Enciclopedia Italiana di Scienze, Lettere ed Arti* <http://www.treccani.it/enciclopedia/cultura/>.

"Culture" *in Cambridge English Dictionary Online* (3rd edn Cambridge University Press) <https://dictionary.cambridge.org/dictionary/english/culture?q=culture_1>.

"Culture" *in Oxford English Dictionary* (3rd edn Oxford University Press 2008) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.

Enciclopedia Italiana di Scienze, Lettere ed Arti, <http://www.treccani.it/enciclopedia/cultura/>.

"Ethnic" *in Oxford English Dictionary* (3rd edn Oxford University Press 2008) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.

"فرهنگ" *in* Mackenzie DN, *A Concise Pahlavi Dictionary* (Oxford University Press 1971).

"Culture" *in* Fowler HW, *Pocket Fowler's Modern English Usage* (Oxford University Press 1999).

"Ethnical" *in* Fowler HW, *The Concise Oxford Dictionary of Current English* (3rd edn Oxford Clarendon Press 1949).

"Race" *in* Fowler HW, *The Concise Oxford Dictionary of Current English* (3rd edn Oxford Clarendon Press 1949).

Fowler HW, *The Concise Oxford Dictionary of Current English* (3rd edn Oxford Clarendon Press 1949).

"Nuremberg Race Laws" *in Holocaust Encyclopedia* <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws>.

Oxford English Dictionary (3rd edn Oxford University Press 2008) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.

Pocket Fowler's Modern English Usage (Oxford University Press 1999).

"Race" *in Oxford English Dictionary* (3rd edn Oxford University Press 2008) <https://www.oed.com/view/Entry/45746?rskey=C5kdJf&result=1>.

Rogers Kara, "Scientific modelling" *in Encyclopædia Britannica* (2012) <https://www.britannica.com/science/scientific-modeling>.

UNESCO, "Cultural Diversity" <http://webarchive.unesco.org/20151231042342/http://portal.unesco.org/culture/en/ev.php-URL_ID=34321&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

UNESCO, "Cultural Heritage" <http://webarchive.unesco.org/20161022002430/http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

UNESCO, "Old City of Dubrovnik" <http://whc.unesco.org/en/list/95/>.

UNESCO, "Timbuktu" <http://whc.unesco.org/en/list/119>.

UNESCO, "UNESCO and its Programme: The Race Question" (1950) <http://unesdoc.unesco.org/images/0012/001282/128291eo.pdf>.

G. Media, including films, newspapers and interviews

"11 Allies Condemn Nazi War on Jews; United Nations Issue Joint Declaration of Protest on 'Cold Blooded Extermination'", New York Times (18 December 1942) <https://www.nytimes.com/1942/12/18/archives/11-allies-condemn-nazi-war-on-jews-united-nations-issue-joint.html>.

2001: A Space Odyssey, dir. Kubrick Stanley, United Kingdom-United States, Metro-Goldwyn-Mayer, 1968, [film].

Adams, Tim, “Sir Peter Blake: all a country really has is its culture. The rest is all infrastructure” (The Guardian, 21 May 2017) <https://www.theguardian.com/lifeandstyle/2017/may/21/lunch-with-sir-peter-blake-mr-chow>.

BBC, *Panama’s General Manuel Noriega and His Fall from Grace* (11 December 2011) <http://www.bbc.com/news/world-latin-america-15853540>.

Der Ewige Jude, dir. Hippler Fritz, Germany, Terra, 1940, [film].

Jacot Martine (interview with Abtahi Hirad), “La Capacité des Nations face à la destruction du patrimoine” (Le Monde, March 2005) <https://www.lemonde.fr/culture/article/2005/03/16/la-capacite-des-nations-face-a-la-destruction-du-patrimoine_625752_3246.html>.

Schabas William A, “Convention for the Prevention and Punishment of the Crime of Genocide” (United Nations Audiovisual Library of International Law, 2008) <http://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf>.

UNESCO, Press Release (29 March 2021), “Mali and UNESCO to receive a “symbolic euro” in token reparation for the heritage of Timbuktu” <https://en.unesco.org/news/mali-and-unesco-receive-symbolic-euro-token-reparation-heritage-timbuktu>.

UNESCO, “Press Release No. 2001-40 (13 March 2001)”, *in* UNESCO, World Heritage Committee, “Twenty-Fifth Session: Item 4b of the Provisional Agenda; Acts constituting “crimes against the common heritage of humanity”” (22 November 2001) WHC-01/CONF.208/23 <https://whc.unesco.org/archive/2001/whc-01-conf208-23e.pdf>.

SAMENVATTING

HET BERECHTEN VAN AANVALLEN GERICHT OP CULTUUR

EEN REVISIE VAN DE AANPAK ONDER STAATSAANSPRAKELIJKHEID EN INDIVIDUELE STRAFRECHTELIJKE AANSPRAKELIJKHEID

Net zoals mensenlevens getroffen kunnen worden door nevenschade, zo kunnen ook de materiële elementen van cultuur aangetast worden. Dit is met name verwerpelijk wanneer die materiële elementen opzettelijk onder vuur genomen worden in een aanval op de identiteit van de tegenstander. Achter deze aanvallen echter, dreigt er immer het gevoel dat het immateriële verandert. Dit komt doordat het materiële zelf vaak onderdeel uitmaakt van het geheugen, iets dat de collectieve identiteit mede bepaalt. Daardoor heeft de verandering van het materiële een invloed op de collectieve identiteit, hetgeen ook immaterieel is. Op die manier zijn de materiële onderdelen van een cultuur (een tempel bijvoorbeeld) vaak een manifestatie van of een ondersteuning voor het immateriële ervan (bijvoorbeeld geloofsgebruiken). Een aanval die gericht is op het materiële is daarmee van invloed op het immateriële. Tevens is het mogelijk het immateriële te veranderen (bijvoorbeeld door middel van een verbod op geloofsgebruiken) zonder het materiële zelf te veranderen. Hoe vanzelfsprekend dit ook mag zijn, een en ander is door internationale wetgevers, arbiters/juristen of wetenschappers nooit op een systematische manier benaderd wanneer het gaat om het berechten van aanvallen op de cultuur.

Vandaar de primaire onderzoeksvraag van dit proefschrift: in hoeverre en op welke wijze hebben internationale arbitragemechanismen de oorzaken, middelen en gevolgen onderzocht van het opzettelijk aanvallen van de materiële en immateriële bestanddelen van cultuur; en hoe zouden deze twee afzonderlijke aspecten samengebracht kunnen worden.

Om deze vraag te beantwoorden, worden in dit proefschrift eerst relevante bepalingen in het verdragsrecht geanalyseerd om zo gemeenschappelijke kenmerken voor te stellen waarmee cultuur in een juridische mal kan worden gegoten. In dit proefschrift wordt niet ingegaan op vorm. De aandacht komt daarom niet te liggen op het door internationale rechtsmiddelen uiteenlopend en weinig zorgvuldig terminologisch gebruik van de termen 'cultureel eigendom' en 'cultureel erfgoed' en evenmin op de termen 'immaterieel cultureel erfgoed' en 'materieel cultureel erfgoed' zoals die gebruikt worden in de academische wereld. Dit proefschrift kiest voor inhoud wanneer het gaat over cultuur. Zo kan cultuur antropisch of natuurlijk van aard zijn, roerend of onroerend, seculier of religieus, en belangrijker nog, materieel of immaterieel. Dit helpt weer om cultuur in een gerechtelijke mal te gieten. Deze aanpak helpt niet alleen om te beoordelen hoe zowel natuurlijke en rechtspersonen een beroep kunnen doen op culturele schade in gerechtelijke procedures, maar ook hoe je de erkende rechtmatige

positie van cultuur zelf kunt laten meewegen wanneer die wordt vertegenwoordigd door rechtspersonen.

Vanuit dit perspectief wordt in dit proefschrift een vergelijking gemaakt tussen de arbitragemechanismen van staatsaansprakelijkheid en individuele strafrechtelijke aansprakelijkheid ten aanzien van de oorzaken, middelen en gevolgen van aanvallen gericht op cultuur. Dit proefschrift laat zien hoe in de meeste gevallen waarbij geweld gebruikt wordt, aanvallen gericht op cultuur een taboeonderwerp zijn. Hoewel vaak niet uitdrukkelijk als zodanig erkend, zien bovengenoemde rechtsgebieden evenwel de directe of indirecte aanval op de materiële en immateriële bestanddelen van cultuur als een effectief instrument om ofwel ongewenste cultuuruitingen direct uit te roeien, ofwel indirect angst te zaaien in de gelederen van de tegenstander.

In dit proefschrift wordt voor het eerst een formele en uitgebreide classificatie van het bovenstaande voorgesteld, waarbij alle gangbare misvattingen die mogelijk in de loop der jaren bij arbiters en academici zijn ontstaan, uit de weg worden geruimd. Hoewel de rechtsgebieden van staatsaansprakelijkheid en individuele strafrechtelijke aansprakelijkheid los van elkaar lijken te staan, zal in dit proefschrift worden aangetoond dat ze meer met elkaar overeenkomen dan verwacht, mits men de traditionele opvatting van het internationaal recht (of het gebrek daaraan) rond het begrip cultuur overstijgt en cultuur beschouwt als een erfgoeddrieluik bestaande uit lokale, nationale en internationale panelen. Elk afzonderlijk paneel kan onafhankelijk functioneren, maar ze zijn het best te begrijpen als ze in hun geheel worden bezien. Door middel van een systematisch onderzoek van de manier waarop de arbitragemechanismen van beide vormen van aansprakelijkheid functioneren, wordt in dit proefschrift vastgesteld dat beide vormen accepteren dat een aanval op cultuur gericht kan zijn op het materiële of op het antropische/immateriële wat betreft de typologie van de schade en de slachtoffers ervan.

De rechtsgebieden van staatsaansprakelijkheid en van individuele strafrechtelijke aansprakelijkheid gaan beide in op de typologie van culturele schade op basis van de schending van relevant verdragsrecht door staten of de schending van relevante statuten door natuurlijke personen. Sinds het einde van de negentiende eeuw hebben internationale wetgevers de typologie van schade beschreven die is toegebracht aan het tastbare van de cultuur, variërend van plunderingen tot vernielingen. Bij aanvallen op cultuur die gericht zijn op het erfgoed gaat het om het immateriële, zoals taal en geloof. Die aanvallen kunnen op zichzelf staan (beperkingen door middel van wetgevende maatregelen) of kunnen samengaan met aanvallen op de materiële onderdelen van cultuur (het sluiten van gebedshuizen). Dit type overtreding vindt vaak plaats in het kader van grootschalige schending van mensenrechten (meestal behandeld door mensenrechtentribunalen) of grootschalige misdaden tegen de mensenrechten (meestal behandeld door een rechtbank voor individuele strafrechtelijke aansprakelijkheid).

De aandacht voor slachtoffers van cultuurgerichte aanvallen kan materieelgericht of antropocentrisch zijn. Beginnend met het laatste constateert dit proefschrift dat de rechtsgebieden met betrekking tot staatsaansprakelijkheid en individuele strafrechtelijke aansprakelijkheid op twee manieren samenvallen. Zo hebben regionale mensenrechtentribunalen geoordeeld dat natuurlijke personen als leden van het collectief het slachtoffer kunnen worden van grootschalige schendingen van (culturele) mensenrechten. Deze aanpak is verwant aan die voor grove schendingen van de

mensenrechten onder de misdaad tegen de menselijkheid van vervolging, waarbij individuen het doelwit zijn omdat ze tot een bepaalde groep behoren. Maar regionale mensenrechtentribunalen zijn ook van mening dat het collectief, als het geheel aan natuurlijke personen, het slachtoffer kan zijn van erfgoedgerichte aanvallen op cultuur. Deze aanpak is verwant aan die voor genocide, waarbij het de groep zelf is die wordt aangevallen. Maar natuurlijke personen kunnen ook zeggen het slachtoffer te zijn van aanvallen op het materiële van de cultuur, wat invloed heeft op de collectieve identiteit. In deze context worden natuurlijke personen als onderdeel van het collectief, of wordt het collectief als het geheel van natuurlijke personen, het slachtoffer van de vernietiging van het materiële van de cultuur. Maar de slachtoffers van aanvallen gericht op de cultuur kunnen ook in een materieel licht worden gezien. Volgens deze aanpak kunnen rechtspersonen deelnemen aan gerechtelijke procedures en schadevergoeding eisen voor schade die zij hebben geleden als gevolg van schade aan hun eigendom. Dit wordt interessant wanneer dit eigendom bestaat uit tastbare cultuur. Zo kan een instelling gewijd aan religie, kunst of wetenschappen deelnemen aan gerechtelijke procedures en herstelbetalingen eisen op twee manieren die elkaar niet uitsluiten. Enerzijds kan een museum bijvoorbeeld herstel zoeken voor de schade die het als gebouw heeft opgelopen (beschadiging van de muren door mortieren). Anderzijds kan het museum schade claimen als gevolg van het plunderen van roerende culturele tastbare voorwerpen (ornamenten, boeken, wetenschappelijke instrumenten) die het bezit c.q. beheert. Arbiters op het gebied van staatsaansprakelijkheid zijn de voorlopers van deze aanpak die vervolgens verwezenlijkt werd in de statuten van sommige rechtssystemen die individuele strafrechtelijke aansprakelijkheid vervolgen, met name die van het Internationaal Strafhof.

Samenvattend zal dit proefschrift een reeks instrumenten voorstellen waarmee internationale wetgevers, arbiters en wetenschappers de beoordeling van de oorzaken, middelen en gevolgen van aanvallen op cultuur beter kunnen behandelen. Hierop voortbouwend kunnen ze hun werkterrein uitbreiden met internationaal gewoonterecht en de nationale rechtspraktijk.

Summary

ADJUDICATING ATTACKS TARGETING CULTURE

REVISITING THE APPROACH UNDER STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

That culture's tangible elements may be harmed as a collateral damage is no more questionable than human life being so affected. Particularly reprehensible, however, is when culture's tangible elements are intentionally targeted as part of attacking the enemy's identity. Behind these attacks, however, there always looms the feeling of the intangible's alteration. This is so because the tangible itself will often form part of memory, which also contributes to collective identity. Hence the alteration of the tangible will impact on collective identity, which is also intangible. Thus, culture's tangible components (eg a temple) are often a manifestation of or a support to its intangible (eg spiritual practice). Therefore, directing attack against the former will impact the latter. But it is also possible to alter the intangible (eg prohibition of spiritual practice) without altering the tangible. However obvious, these observations have not been systematically considered by international legislators, adjudicators/practitioners and scholars, when it comes to the adjudication attacks targeting culture.

Hence this thesis' primary research question: to what extent and how international adjudicatory mechanisms have considered the causes, means and consequences of intentionally attacking the tangible and intangible components of culture; and how should their separate practice be brought together.

To this end, this thesis first analyses relevant treaty law provisions in order to propose common denominators to place culture in a legal mould. This thesis will not focus on form. Thus, the emphasis will be placed neither on international legal instruments' varying and not so rigorous terminological use of the terms "cultural property" and "cultural heritage" nor on academia's use of "intangible cultural heritage" or "tangible cultural heritage". Instead, this thesis opts for substance, when addressing culture. Accordingly, the latter may be anthropical or natural, movable or immovable, secular or religious and, importantly, tangible or intangible. This helps, in turns, to place culture in a judicial mould. This approach assists not only to evaluate how cultural damage can be relied upon in judicial proceedings by both natural and legal persons, but also to consider the judicial locus standi of culture itself, when embodied by legal persons.

From this vantage point, this thesis then compares and contrasts the practice of State responsibility-based or individual criminal responsibility-based ("ICR-based") adjudicatory mechanisms, with respect to the cause, means and consequences of attacks

targeting culture. This thesis shows how, in most cases of use of violence, attacks targeting culture constitute "the elephant in the room". Often not expressly recognised as such, the aforementioned jurisdictions have, nevertheless, considered the direct or indirect targeting of culture's tangible and intangible components, as a potent tool to either directly aim at eradicating undesired manifestations of culture or to indirectly instil fear within the adversary's ranks.

This thesis proposes, for the first time, a formal and comprehensive categorisation of the above, dispelling any common misperceptions that may have been developed over the years by adjudicators and academics. This thesis will demonstrate that, while seemingly unrelated, State responsibility and ICR-based jurisdictions share more common denominators than expected, *if* one transcends international law's traditional view (or lack thereof) surrounding the concept of culture and considers culture as a legacy-oriented triptych made of local, national and international panels. While each of these panels makes sense in isolation, they are best understood when viewed together. Through a systematic review of the practice of both modes of responsibility's adjudicatory mechanisms, this thesis establishes their converging acceptance that attacking culture may be both tangible-centred and anthropo/heritage-centred, in terms of both typology of damage and its victims.

Both State responsibility and ICR-based jurisdictions have addressed the typology of cultural damage on the basis of States' breach of relevant treaty law or natural persons' violations of relevant statutes. Since the end of the nineteenth century, international legislators have detailed the typology of damage inflicted on culture's tangible, ranging from pillage to destruction. As for heritage-centred attacks targeting culture, they involve culture's intangible, such as language and religion. This can occur in isolation (limitations through legislative measures) or in combination with culture's tangible components (closing down places of worship). This type of violation often occurs in the context of mass human rights violations (mainly addressed by human rights courts) or mass human rights crimes (mainly addressed by ICR-based jurisdictions).

The consideration of victims of attacks targeting culture can be tangible-centred but also anthropo-centred. Starting with the latter, this thesis identifies a twofold convergence with respect to the practice of both State responsibility and ICR-based jurisdictions. Accordingly, regional human rights courts have ruled that natural persons as members of the collective may suffer mass human (cultural) rights violations. This approach is akin to gross human rights violations under the crime against humanity of persecution, where individuals are targeted because they belong to a group. But regional human rights courts have also considered that the collective as the sum of natural persons may suffer heritage-centred attacks targeting culture. This approach is akin to genocide, where it is the group, as such, that is targeted. But natural persons can also claim to be the victims of attacks targeting culture's tangible, which affect collective identity. In this context, natural persons as part of the collective or else the collective as the sum of natural persons become the victims of the destruction of culture's tangible. But the victims of attacks targeting culture can also be viewed in a tangible-centred manner. Under this approach, legal persons can participate in judicial proceedings and seek reparations for harm sustained as a result of damage inflicted on their property. This becomes interesting when the said property consists of culture's tangible. Thus, an institution dedicated to religion, arts and sciences may seek participation in judicial proceedings and demand reparations in two non-mutually exclusive ways. On the one

hand, for instance, a museum may seek reparations for damage sustained to it, as a building (mortars fired at it and damaging its walls). On the other hand, the museum may claim damage as a result of looting of movable cultural tangible (ornaments, books, scientific instruments) that it owns/administers. State responsibility adjudicators have been the forerunners of this approach, which subsequently materialised in the statutes of some ICR-based jurisdictions, specifically that of the International Criminal Court.

In sum, this thesis will propose a set of tools to enable international legislators, adjudicators and scholars to better process the adjudication of the causes, means and consequences of attacks targeting culture. Building on this, they could expand the scope of work to include customary international law and national practice.

CURRICULUM VITAE

Hirad Abtahi (diplôme d'études approfondies de droit international, Université de Strasbourg, France) has twenty-five years of experience in international criminal justice. Currently Chef de Cabinet at the Presidency of the International Criminal Court ("ICC"), he set-up and headed the Legal and Enforcement Unit of the Presidency for sixteen years. Previously, he acted as the Chief of the Registry Legal Advisory Services Section. Prior to joining the ICC, Hirad Abtahi served the Milošević trial chamber at the United Nations International Criminal Tribunal for the former Yugoslavia ("ICTY"). Earlier on, he worked for the International Commission of Jurists on questions relating to the conditions of detention of persons detained at the ICTY's United Nations Detention Centre, the enforcement of the ICTY's sentences of imprisonment and the relocation of ICTY witnesses in third countries.

Hirad Abtahi has widely lectured in English, French and Persian, including at The Hague Academy of International Law and at Sciences Po's Paris School of International Affairs. He is the author of many books, book chapters and articles on public international law, international criminal law, international human rights law and transitional justice, including a two volume book gathering the Genocide Convention's travaux préparatoires, co-authored with Dr Philippa Webb. Hirad Abtahi serves on the Boards of the International Criminal Law Review and the Forum for International Criminal and Humanitarian Law. He is a member of the Société Française pour le droit international and the European Society of International Law.