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

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ADJUDICATING ATTACKS TARGETING CULTURE

REVISITING THE APPROACH UNDER STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

Proefschrift

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de graad van Doctor aan de Universiteit Leiden,

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

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Hirad Abtahi

geboren te Teheran, Iran

in 1968

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Dr R.W. Heinsch

*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.....	11
ACKNOWLEDGEMENTS	13
TABLE OF ABBREVIATIONS.....	15
TABLE OF CHARTS.....	19
GENERAL INTRODUCTION: MAPPING ATTACKS TARGETING CULTURE	21
I. <i>Background and primary research question</i>	22
A. Treaty law and modes of responsibility: legal niches or anthropological uncertainty?.....	23
B. Academia: specialisation or compartmentalisation?	24
II. <i>Conceptualising attacks targeting culture</i>	26
A. Culture as a metaphorical triptych	26
B. Ways of attacking culture: tangible-centred or heritage-centred?.....	26
III. <i>Proposed framework and tools</i>	28
A. Placing culture in linguistics and anthropology.....	28
1. Linguistic heterogeneity: inter-language and intra-language variations	28
2. Anthropological heterogeneity: evolutionism, holism or relativism?.....	31
3. Common elements: a totalising anthropo-centred concept.....	33
B. Placing culture in a legal mould	34
1. Introduction: reducing culture’s tangible and intangible to law	34
2. The tangible-centred approach: culture’s tangible sometimes linked to legal persons	36
3. The heritage-centred approach: linking culture’s tangible to heritage.....	38
a. Culture’s tangible linked to anthropical and natural heritage.....	38
b. Culture’s tangible and intangible as heritage	42
4. Conclusion: a legal concept defined by anthropical and natural components.....	43
C. Placing culture in judicial proceedings.....	45
1. Modes of international responsibility’s adjudicatory mechanisms	45
a. State responsibility.....	46
b. Individual criminal responsibility	47
2. Culture’s locus standi before international adjudicatory bodies	48
a. The anthropo-centred approach: natural persons as victims of attacks targeting culture	49
b. The tangible-centred approach: legal persons’ locus standi as victims of attacks targeting	
cultural property	51
c. Synthesis	54
IV. <i>Roadmap</i>	55
PART I: STATE RESPONSIBILITY	57
INTRODUCTION: ATTACKS TARGETING CULTURE – A WESTPHALIAN FORESIGHT?	58
CHAPTER 1: INTER-STATE CLAIM MECHANISMS	59
I. <i>Introduction: the subject-matters of injury and terminological challenges</i>	59
II. <i>Legal persons: actual and prospective tangible-centred approach</i>	61
A. Direct injury to States.....	61
1. Introduction.....	61
2. Material injury: anthropical and natural property.....	62
3. Moral injury suffered by the State as a result of injury caused to it directly	64
B. Indirect injury to States: injury to States’ nationals – legal persons	65
1. Introduction.....	65
2. Material damage – property: loss, damage and expropriation	66
3. Moral injury	67
C. Synthesis: Westphalian avant-gardism regarding legal persons and cultural property	67
III. <i>Natural persons: a prospective heritage-centred approach?</i>	68
A. Direct injury: armed activities and peacetime.....	68
1. Personal (material and moral) injury	68
2. Material damage: property damage and confiscation	70
B. Indirect injury: material and moral injury to third parties.....	71
C. Synthesis: Westphalian avant-gardism regarding natural persons	73
IV. <i>Conclusion to Chapter 1</i>	73
CHAPTER 2: REGIONAL HUMAN RIGHTS COURTS.....	75
I. <i>Introduction: the subject-matters of damage and terminological challenges</i>	75
II. <i>Natural persons: the heritage-centred approach</i>	78
A. Natural persons as members of the collective.....	80
1. Direct victims	81
a. Pecuniary damage: human rights violations not directly related to cultural rights.....	81
b. Non-pecuniary damage: human rights violations directly related to cultural rights	83

2.	Indirect victims: pecuniary and non-pecuniary damage	84
3.	Outcome	85
B.	The collective as the sum of natural persons	86
1.	The collective regardless of its juridical personality	86
a.	Scope: injured party and beneficiary of collective reparations.....	86
b.	Non-pecuniary damage: the disruption of heritage	89
i.	Anthropical and natural heritage: communal lands.....	89
ii.	Knowledge: indigenous/tribal elders and women	91
iii.	Ethnicity/nationality: religion and language	93
2.	The collective with express juridical personality.....	94
a.	A narrow scope: the collective as injured party and beneficiary of reparations	94
b.	Non-pecuniary damage: disruption of heritage – the collective-land symbiosis breakdown 97	
3.	Outcome	99
C.	Synthesis: a heritage-centred approach grounded on damages’ typology and victims	100
III.	<i>Legal Persons: the tangible-centred approach</i>	101
A.	Tangible-centred approach: victims – Legal persons as such	102
1.	Private entities: from pecuniary to non-pecuniary damage.....	102
2.	Institutions dedicated to religion: pecuniary and non-pecuniary damage.....	104
B.	Tangible-centred approach: damage – Legal persons’ natural person members.....	106
C.	Synthesis: from legal persons to “living organisms”	108
IV.	<i>Conclusion to Chapter 2</i>	110
	CONCLUSION TO PART I: STATE RESPONSIBILITY’S GROUNDWORK FOR INDIVIDUAL CRIMINAL RESPONSIBILITY.....	112
	PART II: INDIVIDUAL CRIMINAL RESPONSIBILITY	115
	INTRODUCTION: ATTACKS TARGETING CULTURE – A TRIPARTITE CRIME MATTER?.....	116
	CHAPTER 1: WAR CRIMES.....	119
I.	<i>Introduction: crimes concerned with culture’s tangible only?</i>	119
II.	<i>The tangible-centred approach: IHL and ICL instruments</i>	120
A.	Introduction	120
B.	Direct protection: cultural property as such	120
1.	IHL-ICL instruments listing culture’s tangible	121
a.	Culture’s anthropical components.....	121
b.	Towards culture’s natural components?.....	124
2.	IHL-ICL instruments naming cultural property.....	125
a.	Direct reference: the 1954 Hague Convention and the 1954 Hague Convention 1999 Protocol	125
b.	Indirect reference: the 1977 Additional Protocols and the ECCC Law	126
3.	Outcome	127
C.	Indirect protection of culture’ tangible as movable and immovable of a civilian character.....	128
1.	Attack, bombardment, destruction, and devastation.....	129
a.	Culture’ tangible as part of the collective: urban ensembles	129
b.	Culture’s tangible as such: property and objects	130
2.	Seizure-appropriation and pillage-plunder	132
a.	Seizure and appropriation	132
b.	Pillage and plunder.....	133
3.	Outcome	134
D.	Synthesis: direct protection as <i>lex specialis</i> to indirect protection.....	136
III.	<i>Towards a heritage-centred approach: Dubrovnik and Timbuktu</i>	137
A.	Introduction	137
B.	IHL-ICL intersecting with peacetime instruments.....	138
1.	The sites and the 1972 World Heritage Convention.....	138
a.	Dubrovnik: culture’s secular and religious tangibles	138
b.	Timbuktu: culture’s religious tangible	139
2.	Choice of charges against the accused.....	139
a.	Within war crimes provisions	140
b.	Beyond war crimes provisions	140
C.	The collective and its anthropical environment	141
1.	Introduction.....	141
2.	The local population.....	142
a.	Victims.....	142
b.	Harm and reparations.....	143
i.	Material harm: individual and collective reparations.....	143
ii.	Moral harm: disruption of culture.....	144
3.	The national population and the international community	145

a.	Victims.....	145
b.	Harm and reparations.....	146
D.	Synthesis: blurring the distinction between the peacetime and non-peacetime legal regimes?....	147
IV.	<i>Conclusion to Chapter 1: tangible-centred means with heritage-centred (intent and consequences)</i>	149
CHAPTER 2:	CRIMES AGAINST HUMANITY	153
I.	<i>Introduction: crimes coined by the clash of civilisations</i>	153
II.	<i>The anthropo-centred approach</i>	155
A.	Introduction.....	155
B.	The chapeau elements: attacks against a collective	156
1.	A war crimes' by-product turned into a human rights crime	156
2.	A path toward genocide.....	159
3.	Outcome	160
C.	The underlying offences: the crime of persecution.....	160
1.	Mens rea: a collective identity-based crime	161
a.	The "lower genocide"	161
b.	The discriminatory grounds' cultural dimensions: the case of gender	163
2.	Actus reus: fundamental (human) rights violations	166
a.	The post-Second World War trials.....	166
i.	The IMT: mixed legal and colloquial use of the word "persecution"	167
ii.	CCL 10: Greiser's mixed use of persecution and genocide	168
b.	The post-Cold War trials: the scope of fundamental (human) rights.....	171
i.	Laying the foundation: the first twenty years' limited scope	171
ii.	The <i>Case 002/02</i> and <i>Al Hassan</i> turning points: expanding the scope.....	172
iii.	Relationship with other inhumane acts	174
3.	Outcome	176
D.	Synthesis: crimes immersed in collective rights violations.....	178
III.	<i>The tangible-centred approach: the actus reus of the crime of persecution</i>	180
A.	Introduction	180
B.	The post-Second World War trials	180
1.	Culture's religious tangible	180
2.	Culture's secular tangible.....	181
3.	Outcome	184
C.	The post-Cold War international criminal jurisdictions.....	184
1.	The ICTY	185
a.	The means of attacking culture's tangible: relationship with war crimes.....	185
b.	The aim of attacking culture's tangible: "memory-cide" and genocide	187
2.	The ICC.....	189
3.	Outcome	190
D.	Synthesis: heritage-oriented attacks targeting culture's tangible	191
IV.	<i>Conclusion to Chapter 2: fundamental (cultural) rights violations – between war crimes and genocide?</i>	192
CHAPTER 3:	GENOCIDE.....	195
I.	<i>Introduction: an intrinsically anthropological crime</i>	195
II.	<i>Drafting the Convention</i>	198
A.	Introduction	198
B.	The Chapeau: genocide is cultural.....	200
1.	Intent and motive.....	200
a.	The Secretariat Draft	200
b.	The Ad Hoc Committee Draft.....	201
c.	The Sixth Committee	203
2.	Protected groups.....	205
a.	A cultural interconnection.....	206
i.	National, racial and religious groups	206
ii.	National, ethnical and linguistic groups.....	207
iii.	Ethnical and racial groups.....	208
b.	A cultural evolution	209
i.	National groups.....	209
ii.	Racial groups	210
iii.	Ethnical groups	212
iv.	Religious groups	213
3.	Outcome: genocide's intent, motive and consequences are cultural.....	214
C.	The actus rei: heritage-centred or tangible-centred?	217
1.	Provisions directly addressing cultural genocide.....	218
a.	Proposing both heritage-centred and tangible-centred actus rei	218
i.	The Secretariat Draft.....	218

ii.	The Ad Hoc Committee Draft.....	221
b.	Retaining only one anthropo-centred actus reus: the Sixth Committee.....	222
i.	Resuscitating the Secretariat Draft article I(II)(3)(a) under article II.....	222
ii.	Rejecting the Ad Hoc Committee Draft, article III.....	224
2.	Provisions indirectly covering cultural genocide.....	228
a.	Article II(b): from physical impairment to mental harm.....	229
b.	Article II(c): physical destruction of the group or slow death of its members?.....	230
3.	Outcome.....	232
D.	Synthesis: confusing genocide's tangible- and heritage-centred means.....	236
III.	<i>Practice of international criminal jurisdictions and the ICJ</i>	238
A.	Introduction: the group's physical/biological destruction – a questionable mantra.....	238
B.	Anthropo-centred violence through the Genocide Convention's actus rei.....	240
1.	Physical genocide: article II(b)-(c)'s relationship with ethnic cleansing.....	241
a.	Article II(b).....	241
b.	Article II(c).....	243
2.	Cultural genocide provision: article II(e).....	244
a.	CCL 10.....	244
b.	The ICTY-ICTR.....	246
c.	The ICJ.....	247
C.	Tangible-centred violence indicative of genocidal intent.....	248
1.	As part of ethnic cleansing: the ICTY's <i>Karadžić & Mladić</i> and <i>Krstić</i>	248
2.	As part of article II(c) claims: the ICJ practice.....	251
D.	Synthesis: ethnic cleansing's heightened mens rea.....	252
IV.	<i>Conclusion to Chapter 3: cultural genocide is a tautology</i>	254
	CONCLUSION TO PART III: INDIVIDUAL CRIMINAL RESPONSIBILITY'S PROMISING POTENTIAL.....	258
	GENERAL CONCLUSION: EMERGING TRENDS AND FUTURE PROMISES.....	261
I.	<i>Introspection: culture as a heritage-centred and tangible-centred triptych</i>	262
A.	Culture as an anthropical and natural concept.....	262
B.	Culture as a legacy-oriented concept.....	263
II.	<i>Retrospection: State responsibility and individual criminal responsibility's converging paths</i> 265	
A.	The typology of cultural damage.....	265
B.	The victims of cultural damage.....	266
III.	<i>Prospection: State responsibility and individual criminal responsibility's osmotic paths</i> 267	
A.	Towards a synergetic experience.....	268
B.	The three pillars for the right question.....	269
	BIBLIOGRAPHY.....	273
I.	<i>Primary sources</i>	273
A.	Instruments, Reports and Records.....	273
1.	Binding Instruments.....	273
a.	Regional.....	273
i.	Africa.....	273
ii.	Americas.....	273
iii.	Europe.....	274
b.	IHL.....	274
i.	General.....	274
ii.	Geneva Law.....	274
iii.	Hague Law.....	274
c.	ICL (and UNSC).....	275
i.	Second World War.....	275
ii.	Ad hoc and hybrid jurisdictions.....	275
iii.	ICC.....	276
d.	UN.....	276
i.	UNESCO.....	276
ii.	UNGA.....	277
iii.	UNSC.....	277
e.	UNIDROIT.....	277
f.	Bilateral.....	277
g.	National.....	277
2.	Other instruments, reports and records.....	278
a.	UN.....	278
i.	ECOSOC.....	278
ii.	ILC.....	279
iii.	UNCC.....	279

iv.	UNESCO	280
v.	UNGA.....	280
vi.	UNSC	282
vii.	Human rights	282
b.	ICC.....	283
c.	Europe.....	283
i.	ECtHR	283
ii.	EU.....	284
d.	National.....	284
e.	Non-Governmental organisations	284
B.	Cases.....	284
1.	State responsibility.....	284
a.	ISCMs.....	284
i.	Arbitral and compensation mechanisms	284
ii.	PCIJ	286
iii.	ICJ	286
iv.	ITLOS.....	287
b.	Regional human rights courts.....	287
i.	ACtHPR.....	287
ii.	ECtHR	287
iii.	IACtHR.....	289
c.	UNHRC	290
2.	Individual criminal responsibility.....	290
a.	Second World War.....	290
b.	Ad hoc and hybrid jurisdictions	291
i.	ICTR.....	291
ii.	ICTY	291
iii.	ECCC.....	293
iv.	SCSL.....	293
c.	ICC.....	293
II.	<i>Secondary sources</i>	294
A.	Journal articles.....	294
B.	Book chapters	299
C.	Books.....	302
D.	Edited books	304
E.	Dissertations and papers	306
F.	Dictionaries and Encyclopaedic entries	306
G.	Media, including films, newspapers and interviews	307
	SAMENVATTING	309
	SUMMARY	312
	CURRICULUM VITAE	315

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

¹ Hiram 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 Hiram 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 Hiram 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 Hiram Abtahi), “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 Hiram Abtahi, “Does International Criminal Law Protect Culture in Times of Trouble? Defining the Scope” (2007) 2 *Brazilian Yearbook of International Law* 180.

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

⁷ Hiram 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	<i>Instructions for the Government of Armies of the United States in the Field</i>
1874 Brussels Declaration	<i>Project of an International Declaration concerning the Laws and Customs of War</i>
1880 Oxford Code	<i>The Laws of War on Land, Oxford</i>
1899 Hague Regulations II	<i>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</i>
1907 Hague Regulations IV	<i>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</i>
1907 Hague Regulations IX	<i>Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War</i>
1935 Pan American Treaty	<i>Treaty on the Protection of Movable Property of Historic Value</i>
1935 Roerich Pact	<i>Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments</i>
1948 OAS Charter	<i>Charter of the Organization of American States</i>
1949 Geneva Convention II	<i>Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</i>
1949 Geneva Convention IV	<i>Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War</i>
1950 ILC Nürnberg Principles	<i>Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal</i>
1954 Hague Convention	<i>Convention for the Protection of Cultural Property in the Event of Armed Conflict</i>
1954 Hague Convention 1999 Protocol	<i>Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999</i>
1969 European Archeological Heritage Convention	<i>European Convention on the Protection of Archaeological Heritage</i>
1970 Cultural Property Convention	<i>UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property</i>
1972 World Heritage Convention	<i>UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage</i>
1972 World Heritage in Danger List	<i>World Heritage in Danger List</i>
1972 World Heritage List	<i>World Heritage List</i>
1976 San Salvador Convention	<i>Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations</i>
1977 Additional Protocol I	<i>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts</i>
1977 Additional Protocol II	<i>Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts</i>
1985 European Convention	<i>European Convention on Offences Relating to Cultural Property</i>
1985 European Architectural Heritage Convention	<i>European Convention for the Protection of the Architectural Heritage of Europe</i>
1985 Victims Basic Principles	<i>UNGA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power</i>
1991 ILC Report	<i>Report of the International Law Commission on the Work of its Forty-Third Session</i>
1995 UNIDROIT Convention	<i>UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects</i>

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

IHL	International Humanitarian Law
IJCP	<i>International Journal of Cultural Property</i>
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMT Charter	<i>Charter of the International Military Tribunal</i>
IMTFE	International Military Tribunal of the Far East
IMTFE Charter	<i>Charter of the International Military Tribunal for the Far East</i>
ISCMs	Inter-State claim mechanisms
Montevideo Convention	<i>Montevideo Convention on the Rights and Duties of States</i>
OAS	Organization of American States
OASTS	<i>Organization of American States Treaty Series</i>
OTP	Office of the Prosecutor of the International Criminal Court
SCSL	Special Court for Sierra Leone
SCSL Rules	<i>Special Court for Sierra Leone Rules of Procedure and Evidence</i>
SCSL Statute	<i>Statute of the Special Court for Sierra Leone</i>
STL	Special Tribunal for Lebanon
UDHR	<i>Universal Declaration of Human Right</i>
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	<i>United Nations Treaty Series</i>
UN	United Nations
VCLT	<i>Vienna Convention on the Law of the Treaties</i>

TABLE OF CHARTS

- Chart 1: IHL and ICL instruments linking culture's tangible to legal persons
- Chart 2: IHL, ICL and peacetime instruments not linking culture's tangible to legal persons
- Chart 3: IHL, ICL and peacetime instruments referring to cultural property as such
- Chart 4: Culture as victims and/or object of harm before ICR-based jurisdictions
- Chart 5: IHL and ICL instruments listing culture's tangible
- Chart 6: IHL and ICL instruments naming cultural property
- Chart 7: IHL and ICL instruments indirectly protecting culture's tangible: prohibition of destruction, attack, bombardment and devastation of civilian objects
- Chart 8: IHL and ICL instruments indirectly protecting culture's tangible: prohibition of seizure-appropriation and pillage-plunder of civilian objects
- Chart 9: UN Member States' votes per regional groups on the inclusion/exclusion of political groups and cultural genocide
- Chart 10: Chronology of Second World War related trials and of the drafting of the Genocide Convention

