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

Abtahi, H.

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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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Galway, Ireland)

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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.

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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>

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