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

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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.