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

Abtahi, H.

PART I: STATE RESPONSIBILITY

INTRODUCTION: ATTACKS TARGETING CULTURE – A WESTPHALIAN FORESIGHT?

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

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

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

---

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

CHAPTER 1: INTER-STATE CLAIM MECHANISMS

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

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

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

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

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

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

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

---

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

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

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

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

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

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

[143] ARSIWA (n 93) art 36:

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

[144] ARSIWA (n 93) art 37:

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

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

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

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

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

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

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

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

A. Direct injury to States

1. Introduction

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

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

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

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

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

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

2. Material injury: anthropical and natural property

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

3. Moral injury

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

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

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

---

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

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

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

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

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

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

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

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

A. Direct injury: armed activities and peacetime

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

1. Personal (material and moral) injury

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

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

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

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

---

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

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

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

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

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

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

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

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

2. Material damage: property damage and confiscation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

C. Synthesis: Westphalian avant-gardism regarding natural persons

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

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

IV. Conclusion to Chapter 1

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

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

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

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

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

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

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