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

Abtahi, H.

CHAPTER 2: REGIONAL HUMAN RIGHTS COURTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. Natural persons: the heritage-centred approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Natural persons as members of the collective

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

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

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

1. Direct victims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Indirect victims: pecuniary and non-pecuniary damage

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

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

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

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

3. Outcome

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

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

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

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

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

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

B. The collective as the sum of natural persons

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

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

1. The collective regardless of its juridical personality

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

a. Scope: injured party and beneficiary of collective reparations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Non-pecuniary damage: the disruption of heritage

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

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

i. Anthropical and natural heritage: communal lands

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

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

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

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

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

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

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

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

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

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

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

ii. Knowledge: indigenous/tribal elders and women

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

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

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

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

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

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

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

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

iii. Ethnicity/nationality: religion and language

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

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

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

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

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

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

2. The collective with express juridical personality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Outcome

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

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

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

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

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

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

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

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

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

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

III. Legal Persons: the tangible-centred approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion to Chapter 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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