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

Abtahi, H.

PART II: INDIVIDUAL CRIMINAL RESPONSIBILITY

INTRODUCTION: ATTACKS TARGETING CULTURE – A TRIPARTITE CRIME MATTER?

Analysing the past and current reality of protecting culture in what the ICC Statute has referred to as the most serious crimes concerning the international community as a whole – namely war crimes, CaH and genocide – requires a common understanding of the word culture.[397] This has proven unusually difficult from a legal perspective; whereas normally terms are defined in statutes and similar legal instruments, whether national, regional or international – there is no single universally accepted definition of culture.[398] Undoubtedly, this is because the notion of culture is inherently personal – personal to individuals and to groups and societies. It can truly be said that this is "a word that means all things to all men".[399]

Having reviewed the ongoing century-long anthropological debates on the scope of culture and having analysed the diverging and unclear use of cultural property and cultural heritage in international legal instruments and among scholars, the general introduction proposed an interpretation of culture that is workable for legal analyses. This interpretation recognises that cultural heritage possesses both intangible and tangible components, with the latter being identified as cultural property. Rather than choosing between these concepts, this study has opted for considering them together or separately, as applicable. The tangible-centred approach is useful because it enables ICR-based jurisdictions to focus on the tangible elements of culture. On the other hand, by addressing culture's intangible elements, the heritage-centred approach enables the legacy-oriented or anthropo-centred understanding of culture.

All State responsibility mechanisms have addressed attacks that target culture under both their heritage-centred and tangible-centred approaches (Part I). So have the ICR-based jurisdictions. However, while they have recognised damage to and destruction of culture's tangible as war crimes (Chapter 1) or as CaH persecution (Chapter 2), they have been more vague regarding the heritage-centred means of attacking culture. Particularly in the case of the crime of genocide (Chapter 3), this vagueness can be explained for two reasons. First, as thoroughly demonstrated in the general introduction, both treaty-makers and ICR-based jurisdictions use interchangeably the expressions cultural property and cultural heritage when addressing attacks directed at culture. This in turn has led to a century-long misunderstanding that ICL may only address the tangible-centred means of attacks targeting culture even when treaty provisions, such as article II(e) of the Genocide Convention point, both literary and logically, to the contrary. On the other hand, this has led IHL and ICL, even in instances when the former forms part of the latter, to adopt an assertive stance on damage to and destruction of culture's tangible. While this development is welcomed, IHL and ICL have both remained cautious, at best, when addressing the heritage-centred attacks that target culture.

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[397] This is of utmost importance because, as the only multilateral treaty-founded ICR-based jurisdiction, the ICC draws its legitimacy from widespread negotiations among States and civil society.
[398] *See* Prott, "Problems of Private International Law for the Protection of the Cultural Heritage" (n 48) p 224.
[399] "Culture" (n 17) p 151.

An exegetic approach to ICL's treaty-making process and judicial practice shows a far more nuanced stance with respect to acknowledging the heritage-centred aspect of attacks targeting culture. In effect, mass atrocity crimes, specifically CaH and genocide, always perturb the transmission of culture. Consequently, while those crimes' heritage-centred means have rarely been formally recognised, they have, in reality, often constituted a major component of the thought process of international legislators and adjudicators.

This Part will show that both international legal instruments and ICR-based jurisdictions have addressed attacks targeting culture, whether heritage-centred or tangible-centred. By following the chronology of the recognition and application of the traditional tripartite ICL crimes, ie war crimes (Chapter 1), CaH (Chapter 2) and genocide (Chapter 3), this Part will shed light on ICL's missed opportunities, misunderstandings and innovations that display its full potential to address attacks that target culture.

CHAPTER 1: WAR CRIMES

I. Introduction: crimes concerned with culture's tangible only?

Armed conflicts and destruction are intrinsically intertwined. While the former always encompass the damaging of private or public property, at least collaterally, many belligerents have sought psychological advantage by directly attacking the enemy's tangible culture in the absence of military necessity.[400] War has thus always been the principal threat to culture's tangible and intangible.[401]

As will be seen, IHL-ICL instruments have adopted a tangible-centred approach, which considers culture's tangible, whether movable or immovable, secular or religious, and even anthropical and natural. This is done by focusing on culture's tangible either as such or by virtue of it being civilian property (II). Chronologically, it was IHL that first developed legal norms to protect the components of what would later be referred to as cultural property (general introduction). The post-Second World War advent of ICR-based jurisdictions incorporated into their statutes earlier IHL both as such and with modifications, thereby fusing IHL and ICL together. Unlike CaH and genocide (Part II, Chapters 2-3) this body of law contains a set of detailed conventions comprised mainly of The Hague and the Geneva Law as well as numerous ICR-based statutes, each of which deals at length and in details with elements of war crimes and their criminal proceedings. This detailed – if not often pristine – corpus sets a working framework for international adjudicators. But this corpus has also a serious drawback. Accordingly, the treaty-law formalism attached to it (signature, ratification, entry into force, etc) reduces the international adjudicators' much needed margin of manoeuvre in terms of innovation.

Notwithstanding the above, the practice of ICR-based jurisdictions shows an increased trend to link the tangible-centre approach to a heritage-centred one (III). Among the said jurisdictions, it is the ICTY that has, to date, focused mostly on attacks targeting culture. However, due to the nature of the former Yugoslavia's conflict, most ICTY cases focused on the destruction of culture's tangible, mainly in the form of local institutions dedicated to religion – and occasionally local secular(ised) objects. However, the ICTY, and in one case the ICC, have addressed more complex situations whereby IHL-ICL intersected with the so-called peacetime instruments (ie the 1972 World Heritage Convention) that formally grant sites the status of cultural property/cultural heritage. This trend has thus taken IHL-ICL from a strictly tangible-centred approach, in terms of the typology of damage, to a heritage-centred one, in terms of the consequences of those damages. The analysis of the two ICTY and ICC cases most representative of this dual approach, Dubrovnik and Timbuktu, will demonstrate how the intersection between IHL-ICL and peacetime instruments supports, almost organically, the ICR-based jurisdictions' dual tangible-centred and heritage-centred approach.

[400] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) p 1.
[401] Mainetti (n 15).

II. The tangible-centred approach: IHL and ICL instruments

A. Introduction

This Section will proceed with a comparative analysis of IHL-ICL instruments over their more than one hundred year-long development process. Due to the vast scope of this study, this Section will not consist of a thorough legal analysis of each relevant provision of the said instruments nor of a systematic analysis of ICR-based jurisdictions' practice, for example on the distinction and overlap between international and non-international armed conflicts. Legal literature abounds in this and any similar attempts by this study would produce a set of paraphrases, at best, of an excellent output that is already available.[402] Instead, through an evaluative narrative, this Section will demonstrate that two main trends characterise IHL-ICL instruments' protection afforded to culture's tangible. One is direct, by explicit reference to cultural property (A), the other is indirect, by assimilating culture's tangible to civilian objects (B). Accordingly, it will be argued that both trends are tangible-centred, since their typology of damage focuses on culture's tangible. Similarly, and as detailed at length in the general introduction and Chapter 1, IHL-ICL instruments following the 1874 Brussels Declaration path have, additionally, provided for instances where culture's tangible is a legal person. These instruments' approach may also be tangible-centred as regards the victims of their breaches. As with Part I, the aforementioned methodology proposes multiple entry-points for use by international adjudicators when approaching the targeting of culture as war crimes. Accordingly, this Section will not engage in a detailed assessment of the more technical details of IHL-ICL instruments and their interpretation and application by ICR-based jurisdictions. Evidently, where relevant, reference will be made to the said practice, but only when it points to the (mis)understandings of the concepts of culture in adjudicatory settings.

B. Direct protection: cultural property as such

IHL and ICR instruments contain fairly comprehensive provisions on the direct protection of culture's tangible.[403] As seen in the general introduction, this is done by

[402] For a detailed analysis of IHL-ICL instruments, see eg Dörmann, Doswald-Beck and Kolb (n 54); Mettraux, *International Crimes: Law and the Practice. Genocide, vol 1* (n 15); O'Keefe, *the Protection of Cultural Property in Armed Conflict* (n 52); Pictet Jean (ed), *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>; and Sandoz et al, *Commentary of 1987* (n 54).

[403] The Charter of the International Military Tribunal: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (adopted 8 August 1945) (IMT Charter) <https://ihl-databases.icrc.org/ihl/INTRO/350?OpenDocument> accessed 14 April 2019, the ICTR Statute (n 55)

referring to either some of culture's tangible (1) or cultural property as such (2).

1. IHL-ICL instruments listing culture's tangible

The Hague and Geneva Law, which have in part become customary international law,[404] as incorporated and expanded upon by the statutes of ICR-based jurisdictions, have addressed anthropical (a) and, to a much lesser extent, natural (b) components.

a. Culture's anthropical components

As seen (general introduction), The Hague Law prohibits damaging elements of culture's tangible, whether secular or religious. This prohibition is reinforced, inter alia, by the requirement for those components to be marked with visible signs when they are not being used for military purposes, or by listing them alongside buildings dedicated to charity, hospitals and places where sick and wounded are collected.[405] In terms of result requirements, some instruments require taking preventive measures so as "to spare as far as possible" culture's tangible, whereas others prohibit actual "seizure, destruction or willful damage".[406]

As seen in the general introduction, the ICTY Statute article 3(d) and the ICC Statute article 8(2)(b)(ix) and (e)(iv) – as imported verbatim by the SPSC regulation 6, enumerate culture's tangibles, whether secular or religious, movable or immovable, as the case may be. The ICTY Statute article 3(d) prohibits the "seizure of, destruction or willful damage done to" culture's tangible, whether inanimate or as a legal persons.[407] Many ICTY indictments have charged the accused with damage to the former (both secular and religious), although not to the latter.[408] The ICTY has also established that article 3 reflects customary international law and is applicable in international and non-

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and the SCSL Statute (n 101) do not mention culture's tangible. On the efficiency of IHL-ICL instruments protecting culture's tangible, *see* Van der Auwera (n 58).

[404] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, (ICJ) Advisory Opinion (8 July 1996) ICJ Rep 1996, p 226, paras 81-82, as regards the Hague Regulations.

[405] See also 1907 Hague Regulations IV (n 50) regulation 56, prescribing legal proceedings in cases of its breach. *See* also the 1899 Hague Regulations II (n 50) art 27 and the 1907 Hague Regulations IX (n 50) art 5. The 1935 Roerich Pact (n 52) should also be noted.

[406] For the former, *see* 1899 Hague Regulations II (n 50) art 27, 1907 Hague Regulations IX (n 50) art 5, and 1935 Roerich Pact (n 52). For the latter, *see* 1907 Hague Regulations IV (n 50) art 56.

[407] ICTY Statute (n 52).

[408] For "widespread and systematic damage to and destruction of sacred sites", *see Prosecutor v Karadžić & Mladić*, (ICTY) Initial Indictment (24 July 1995) Case No IT-95-5, Count 6. For "destruction or wilful damage done to institutions dedicated to religion", *see Prosecutor v Brđanin*, (ICTY) First Amended Indictment (14 March 1999) Case No IT-99-36, Count 12; *Prosecutor v Naletilić*, (ICTY) Indictment (21 December 1998) Case No IT-98-34-I, Count 22; *Prosecutor v Martić*, (ICTY) Amended Indictment (18 December 2002) Case No IT-95-11, Count 13. For "destruction or wilful damage of institutions dedicated to religion or education", *see Prosecutor v Kordić & Čerkez*, (ICTY) First Amended Indictment (10 November 1995) Case No IT-95-14/2, Counts 43 and 44; *Prosecutor v Blaškić*, (ICTY) Second Amended Indictment (25 April 1997) Case No IT-95-14-T, Count 14; *Prosecutor v Ljubičić*, (ICTY) Corrected Amended Indictment (2 August 2002) Case No IT-00-41, Count 12.

international armed conflicts.[409]

Regarding the elements of the crime, unsurprisingly there must be a nexus between the alleged crimes and the armed conflict.[410] The provision's wording also suggests a result requirement. The *Štrugar* Trial Chamber held that article 3(d) "explicitly criminalises only those acts which result in damage to, or destruction of, such property".[411] Therefore, the Chamber considered that actual damage or destruction is an element of the crime, in contrast to the ICC Elements of Crimes (see further below). In 2000, the *Blaškić* Trial Chamber held that the intentional damage must have been inflicted on those religious or educational institutions that (i) could "clearly be identified" as such; (ii) were not used for military purposes during the acts and (iii) were not "in the immediate vicinity of military objectives".[412] The ensuing jurisprudence, however, departed from *Blaškić*. The *Naletilić & Martinović* and *Štrugar* trial chambers required (i) both an intent and a result requirements and (ii) the non-use of culture's tangible for military purposes at the time of the commission.[413] The third requirement remained unclear. While *Naletilić & Martinović* required the institution to be simply "dedicated to religion", thereby adopting a literal reading of article 3(d), *Štrugar* required that it constitute "the cultural or spiritual heritage of peoples", thereby replicating the wording of the 1977 Additional Protocols.[414]

The ICTY has, however, held that elements enumerated in article 3(d) are not always constitutive of cultural property. The *Kordić* Appeals Chamber reproduced verbatim the ICRC Commentary of 1987 that, in AP I 1977 article 53:

> cultural or spiritual heritage […] covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.[415]

Although the phrase "transcends geographical boundaries" is unclear, it may suggest that culture's tangible are considered not in isolation, but as part of a diptych/triptych. If so, as held by the Appeals Chamber, the Trial Chamber erred in considering that "'educational institutions are undoubtedly immovable property of great importance to

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[409] For an overview of ICTY jurisprudence on cultural heritage, *see* Serge Brammertz, Kevin C. Hughes, Alison Kip and William B. Tomljanovich, "Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY" (2016) 14(5) *Journal of International Criminal Justice*; *See Tadić* Jurisdiction Decision (n 88) paras 98 and 127; *Prosecutor v Štrugar*, (ICTY) Judgment (31 January 2005) Case No IT-01-42-T, para 230.

[410] Even not necessarily "causal to the commission of the crime", the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed". *See Prosecutor v Kunarac et al "Foča"*, (ICTY) Appeal Judgment (12 June 2002) Case No IT-96-23&23/1-A, para 58. *See* also *Prosecutor v Tadić*, (ICTY) Judgment (14 July 1997) Case No IT-94-1-T, para 573, holding that the crimes need not be "part of a policy or of a practice officially endorsed or tolerated" by the belligerents; and *Tadić* Jurisdiction Decision (n 88) para 89, holding that art 3 "is a general clause covering" all IHL violations not falling under arts 2 and 4-5.

[411] *Štrugar* Trial Judgment (n 409) para 308.

[412] *Prosecutor v Blaškić*, (ICTY) Judgment (3 March 2000) Case No IT-95-14-T, para 185.

[413] *Prosecutor v Naletilić & Martinović*, (ICTY) Judgment (31 March 2003) Case No IT-98-31-T, paras 604-605; *Štrugar* Trial Judgment (n 409) para 310.

[414] *Naletilić & Martinović* Trial Judgment (n 413) paras 604-605; *Štrugar* Trial Judgment (n 409) para 310.

[415] *Prosecutor v Kordić & Čerkez*, (ICTY) Appeal Judgment (17 December 2004) Case No IT-95-14/2-A, para 91.

the cultural heritage of peoples'".[416] The Chamber thus adopted a formalistic stance on the question of cultural property, even though it did not clarify the "heritage" and "objects" relationship. The Commentary of 1987 addresses this ambiguity as follows:

> the adjective "cultural" applies to historic monuments and works of art, while the adjective "spiritual" applies to places of worship. However, this should not stop a temple from being attributed with a cultural value, or a historic monument or work of art from having a spiritual value. The discussions in the Diplomatic Conference confirmed this.[417]

As seen in the general introduction, the anthropological and linguistic (mis)understanding of the concept of culture naturally impacts on its legal understanding by both international legislators (Diplomatic Conference) and adjudicators (ICTY). Thus, the Chamber considered that, to the extent that they are not protected as cultural property, buildings dedicated to religion, education, art, science or charitable purposes enjoy no special protected status, although they generally enjoy protection as civilian objects.[418] What the Chamber failed to note is the commentary's explanation that given the "subjectivity" of these expressions, where in doubt, "reference should be made in the first place to the value or veneration ascribed to the object by the people whose heritage it is",[419] somehow echoing the 1972 World Heritage Convention's position that the non-inclusion of a property in its lists does not mean that it does not have an outstanding universal value.

The ICC statute article 8(2)(b)(ix) and (e)(iv) ("War crime of attacking protected objects") provides for "other serious violations of the laws and customs applicable to" international and non-international armed conflicts, respectively. The corresponding ICC Elements of Crimes require, in addition to the armed conflict nexus and the perpetrator's awareness of factual circumstances surrounding the armed conflict, that (i) the components in question not be military objectives; and that (ii) the perpetrator who directed the attack must have "intended [those components] to be the object of the attack", thereby excluding the ICTY result requirement.[420] In *Al Mahdi*, the Trial Chamber held that article 8(2)(b)(ix) and (e)(iv) governs "the directing of attacks against special kinds of civilian objects, reflecting the particular importance of international cultural heritage".[421] Schabas has disputed this by explaining that as there was no armed conflict nexus at the time of the commission of the acts, the act of destruction of the mausoleums did not constitute an attack under war crimes.[422] Notwithstanding this proposition, the Pre-Trial Chamber confirmed in *Al Hassan* that there was a reasonable basis to believe that the demolition of mausoleums with pick, axes, hammers and iron bars met all of the ICC article 8(2)(e)(iv)'s elements of crime, including those religious and historical buildings not being military objectives, and that the perpetrators meant to target and cause their demolition.[423]

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[416] *Kordić & Čerkez* Appeal Judgment (n 415) para 92.
[417] Sandoz et al, *Commentary of 1987* (n 54) para 2065.
[418] *Kordić & Čerkez* Appeal Judgment (n 415) para 92. *See* also Cassese, Gaeta and Jones (n 108) p 410.
[419] Sandoz et al, *Commentary of 1987* (n 54) para 2065.
[420] The necessary intent is "wilfully" directing attacks, ie both direct and indirect intent as well as recklessness. *See* Dörmann, Doswald-Beck and Kolb (n 54) pp 146-147 and 215.
[421] *Al Mahdi,* Trial Judgment (n 49), para 17.
[422] Schabas William A, "Al Mahdi Has Been Convicted of a Crime He Did Not Commit" (2017) 49(1) *Case Western Reserve Journal of International Law*.
[423] *Prosecutor v Al Hassan*, (ICC) Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (13 November 2015) ICC-01/12-01/18-461-Corr-Red 13-11-2019, paras 529-531 and 976-987.

b. Towards culture's natural components?

As seen in the general introduction, many international instruments, other than IHL-ICL, list not only culture's anthropical components, but also the natural environment in isolation or in combination with anthropical structures as part of humanity's heritage. IHL-ICL instruments do not do so. However, one IHL and one ICL instruments address the natural environment. The 1977 Additional Protocol I article 55 ("Protection of the natural environment") provides that:

> 1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. […][424]

While protective of the natural environment, this provision requires a very high threshold, made of three cumulative elements (widespread, long-term and severe damage) for that breach to occur. Furthermore, it links the protection to that of natural persons. The ICRC Commentary of 1987 further confirms this anthropo-centred stance by explaining that while article 35 ("Basic rules") concerns the methods of warfare, article 55 focuses on the population's survival.[425] It further explains that the omission of "civilian" after "population" was deliberate in order to prevent environmental damage that may be long-lasting and would concern all the population without distinction.[426] The said commentary furthers this anthropo-centred approach by understanding the natural environment:

> in the widest sense to cover the biological environment in which a population is living. It does not consist merely of the objects indispensable to survival mentioned in [article 54 of the 1977 Additional Protocol I] – foodstuffs, agricultural areas, drinking water, livestock – but also includes forests and other vegetation mentioned in the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, as well as fauna, flora and other biological or climatic elements.[427]

Thus, notwithstanding this link to humans, the commentary considers the natural

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[424] 1977 Additional Protocol I (n 59), art 55. Para 2 prohibits "Attacks against the natural environment by way of reprisals".

[425] Sandoz et al, *Commentary of 1987* (n 54) para 2133. For the meaning of "widespread, long-term and severe damage", *see* ILC, "Report of the International Law Commission on the Work of its Forty-Third Session" (1991) Supp No 10 (A/46/10), p 106. *See also* Paul Fauteux, "The Use of the Environment as an Instrument of War in Occupied Kuwait" *in* Schiefer Bruno (ed), *Verifying Obligations Respecting Arms Control and Environment: A Post-Gulf War Assessment* (Canadian Department of External Affairs: 1992).

[426] "Health" concerns measures that jeopardise both the survival of the population and congenital defects, degenerations or else deformities. *See* Sandoz et al, *Commentary of 1987* (n 54) paras 2134-2135.

[427] Sandoz et al, *Commentary of 1987* (n 54) para 2126. According to the 1991 ILC Report (n 425) p 106, the natural environment covers "the environment of the human race and where the human race develops, as well as areas the preservation of which is of fundamental importance in protecting the environment. These words therefore cover the seas, the atmosphere, climate, forests and other plant cover, fauna, flora and other biological elements".

environment with a very significant width and depth, in terms of its components. This is partly reminiscent of the IACtHR practice which considered the natural environment as a whole, in symbiosis with humans (Part I, Chapter 2). It is also useful to read this provision together with the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques (also known as ENMOD).[428]

Among ICL instruments, the ICC Statute article 8(2)(b)(iv) considers as war crime:

> Intentionally launching an attack in the knowledge that such attack will cause […] widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[429]

This provision does not include any result requirement.[430] Otherwise, comments similar to those concerning the 1977 Additional Protocol I apply here, as the current provision is derived from them.

2. IHL-ICL instruments naming cultural property

Two IHL instruments name cultural property as such (a) and two IHL-ICL instruments name cultural property by reference to the 1954 Hague Convention (b).

a. Direct reference: the 1954 Hague Convention and the 1954 Hague Convention 1999 Protocol

As seen in the general introduction, both the 1954 Hague Convention and the 1977 Additional Protocols seek to protect cultural property's secular and religious components. The 1954 Hague Convention and the 1954 Hague Convention 1999 Protocol provide for general, special and enhanced protections of cultural property. Under the general protection, all cultural property must be protected, safeguarded and respected.[431] This means that cultural property should not be used for any purposes which would expose it to destruction or damage during armed conflict, including reprisals, subject to imperative military necessity.[432] But the 1954 Hague Convention is not only concerned with the destruction of cultural property. Article 4(3) prohibits "any form of *theft, pillage or misappropriation* of, and any acts of *vandalism* directed against cultural property" as well as "*requisitioning* movable cultural property" located in another party to the instrument.[433] It is unclear whether so many words were used as

[428] Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, (adopted 10 December 1976, entered into force 05 October 1976), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=2AC88FF62DB2CDD6C12563CD002D6EC1&action=openDocument> accessed 14 April 2019. As of April 2019, 78 States were parties to ENMOD.
[429] ICC Statute (n 54).
[430] Dörmann, Doswald-Beck and Kolb (n 54) p 162.
[431] 1954 Hague Convention (n 56) arts 2-3.
[432] 1954 Hague Convention (n 56) art 4.
[433] 1954 Hague Convention (n 56) arts 4(3) and 14(1).

a matter of style or nuance. As will be seen in the next subsection, international adjudications have not clarified this terminology. Under the special protection regime, States may request that refuges sheltering movable cultural property and/or "centres containing monuments and other immovable property of great importance" be placed in the International Register of Cultural Property under Special Protection ("International Register").[434] But placing cultural property on this list may be hindered by treaty-law formalities. Under the Khmer Rouge and the ensuing civil war, cultural property was both targeted and subjected to international trafficking in illicit art.[435] Having requested assistance from the 1954 Hague Convention States Parties, Cambodia failed to place several monuments on the International Register, as States did not consider the "State authorities" making the request in 1972 to represent Cambodia.[436]

Moving to the 1954 Hague Convention 1999 Protocol, its enhanced protection regime safeguards (i) "cultural heritage of the greatest importance to humanity"; (ii) that is already protected by domestic measures; and (iii) not used for military purposes, as confirmed by the controlling party.[437] Property on the accompanying List of Cultural Property under Enhanced Protection loses its protection only if one of the three criteria is no longer met or if it has, through its use, become a military objective.[438]

b. Indirect reference: the 1977 Additional Protocols and the ECCC Law

As seen in the general introduction, both the 1977 Additional Protocols and the ECCC use the terms "cultural property" by reference to the 1954 Hague Convention. The former prohibit "acts of hostility" and reprisals against culture's secular and religious tangible and their use for military purposes, thereby excluding a result requirement.[439] Importantly, and as testimony to the importance of cultural property, under article 85 ("Repression of breaches of this Protocol"), a violation of article 53 may amounts to a grave breach and thus, a war crime.[440] As for the ECCC Law, it establishes jurisdiction,

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[434] 1954 Hague Convention (n 56) art 8(1)(a), requires that the shelter/centre be "at an adequate distance" from major industrial centres or military objectives and not be used for military purposes, subject, however, to two exceptions. Under art 8(2), the refuge for movable cultural property may benefit from special protection regardless of its location if its construction will prevent it from bomb damage "in all probability". Under art 8(5), cultural property placed near a military objective may still benefit from special protection if the requesting State undertakes, in the event of armed conflict, to make no use of the objective and particularly, divert all traffic it is a port, railway station or aerodrome.

[435] Roger O'Keefe, "World Cultural Heritage: Obligations to the International Community as a Whole?" (2004) 53(1) *International and Comparative Law Quarterly* 189, p 192. *See* Etienne Clément and Farice Quino, "La protection des biens culturels au Cambodge pendant la période des conflits armés, à travers l'application de la Convention de La Haye de 1954" (2004) 86(854) *International Review of the Red Cross* 389, pp 395-396.

[436] Clément and Quino (n 435) pp 391 and 393.

[437] 1954 Hague Convention 1999 Protocol (n 58).

[438] 1954 Hague Convention 1999 Protocol (n 58) arts 13(1)(a)-(b) and 14. Under art 13(2), an attack may be directed if it is the only means of terminating the use of the property and all feasible precautions have been taken in the choice of means and methods of attack, with a view to terminating such use and avoiding, or in any event minimising, damage to cultural property.

[439] 1977 Additional Protocol I (n 59) art 53 and 1977 Additional Protocol II (n 59) art 16.

[440] Specifically, art 85(4)(d) considers as a grave breach "when committed willfully" in violation of the 1949 Geneva Conventions and 1977 Additional Protocol I, making "the object of attack which results in extensive destruction, "the clearly-recognized historic monuments, works of art or places of worship

inter alia, over five crimes in international law, including article 7 which accounts for "the destruction of cultural property during armed conflict pursuant to the [1954 Hague Convention]".[441] At the time of writing, the ECCC has not yet addressed such crimes.[442]

3. Outcome

As seen above, a number of IHL and ICL instruments provide for the direct protection of culture's tangible during armed conflicts.[443] These are useful in the adjudication of attacks targeting culture's tangible insofar as they provide clear designation of its movable and immovable as well as secular and religious components. One set, composed mainly of the early IHL instruments, and followed up by ICR-based jurisdictions, lists the said tangible but also at times endows it with legal personality.

Chart 5: IHL and ICL instruments listing culture's tangible

	Spared as far as possible/ respected and protected	Directing an attack/ commit act of hostility directed at	Intention to damage	Wilful damage/ destruction/ seizure	Property use	Property location	Military necessity	No Reprisals	Property marking
Anthropical									
1899 Hague Regulations II art 27	X				X				X
1907 Hague Regulations IX art 5	X				X				X
1907 Hague Regulations IV art 56				X					
1935 Roerich Pact					X				X
ICTY Statute art 3(d)		X	X	X	X				
ICC Statute art 8(2)(b)(ix) and (e)(iv)		X	X						
Natural									
1977 Additional Protocol I art 55	X							X	
ICC Statute art 8(2)(b)(iv)		X	X						

Another set, initiated in the post-Second World War IHL and followed-up by the ECCC Law refers to culture's tangible as cultural property.

which constitute the cultural or spiritual heritage of peoples", which enjoy special protection and is not located in the immediate proximity of military objectives.

[441] ECCC Law (n 102).

[442] Caroline Ehlert*, Prosecuting the Destruction of Cultural Property in International Criminal Law, With a Case Study on the Khmer Rouge's Destruction of Cambodia's Heritage* (Brill 2013), p 200.

[443] *Note* "Resolution on the Destruction and Trafficking of Cultural Heritage" (24 March 2017) UN Doc S/RES/2347, is the first to address the protection of cultural heritage in an armed conflict (as opposed to the protection of cultural heritage in relation to counter-terrorism). This resolution calls for brining to justice those "directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments".

Chart 6: IHL and ICL instruments naming cultural property

		Spared as far as possible/ respected and protected	Directing an attack/ commit act of hostility directed at	Intention to damage	Property damage	Property use	Property location	Military necessity	No Reprisals	Property marking
1954 Hague Convention	art 4		X			X	X	X	X	X
	art 8		X			X	X (with exception)	X		X
1954 Hague Convention 1999 Protocol	art 10		X			X				X
1977 Additional Protocol I	art 53		X			X			X	
	art 85		X			X			X	
1977 Additional Protocol II	art 16		X			X				
ECCC Law	art 7		X			X	X	X	X	X
			X			X	X (with exception)	X		X

Most of the protections are applicable during both international and non-international armed conflicts, even though the latter provides occasionally a lower level of protection (compare the 1977 Additional Protocols).

These instruments enumerate culture's secular and religious tangible components. While only some instruments expressly mention the movable, the latter are most likely implicitly encompassed by the others, as suggested in the general introduction. These instruments attach a multi-fold importance to the protection of culture's tangible. First, by listing its components alongside places devoted to charity, hospitals and places where the wounded are collected, these instruments grant them a high level of protection. Second, the majority of these instruments do not accept military necessity,[444] they do not require the tangible's destruction and/or damage as such,[445] nor do they consider the property to be a military objective through its location, as opposed to its use.[446] Finally, it is noteworthy that the 1977 Additional Protocol I article 55 and the ICC Statute article 8(2)(b)(iv) protect the natural environment, as a number of international instruments, including the 1972 World Heritage Convention, consider it a part of world heritage, alone or in combination with anthropical heritage.

C. Indirect protection of culture' tangible as movable and immovable of a civilian character

IHL-ICL instruments contain the general prohibition of attacking movable and immovable of a civilian character, which stems from the customary international law

[444] For the exception, *see* 1954 Hague Convention (n 56) arts 4 and 8.
[445] For the exception, *see* 1907 Hague Regulations IV (n 50) art 56 and ICTY Statute (n 52) art 3(d).
[446] For the exception, *see* 1954 Hague Convention (n 56) arts 4 and 8.

principle of distinction.[447] Provisions derived from this principle offer an indirect protection to culture's tangible, not because of its cultural importance, but as a specific category of movable and immovable of a civilian character. The following will review this through prohibitions regarding the tangible's destruction and damage (1) and seizure and pillage/plunder (2).

1. Attack, bombardment, destruction, and devastation

In IHL, the 1907 Hague Regulations IV laid the foundation for the protection of movable and immovable of a civilian character from damage – destruction, attack and bombardment – which the Geneva Law expanded and clarified – destruction and attack. The IMT Charter, ICTY Statute and ICC Statute have borrowed and adapted most of the Hague and Geneva Law's terminology with respect to such damage to civilian objects, ie attack, bombardment, destruction and devastation. The indirect protection of culture's tangible through these provisions may be achieved through the civilian character vested in urban ensembles (a), and in property and objects (b).

a. Culture' tangible as part of the collective: urban ensembles

Damage to culture's tangible may be indirectly addressed through damage to movable and immovable of a civilian character located in a collective setting, ie urban ensembles. The 1907 Hague Regulations IV article 25 prohibits "The attack or bombardment" of undefended "towns, villages, dwellings, or buildings".[448] Bombardment is in and of itself an attack.[449] The choice of words by the 1907 Hague Regulations IV leaves no doubt as to the damaging nature of the acts in question. Article 25 thus captures culture's tangible, whether movable or immovable, secular or religious, either as part of towns, villages or dwellings, or as buildings.

Moving to ICL, the IMT Charter article 6(b)'s violations of the laws or customs of war, which combines and enhances the 1907 Hague Regulations IV articles 23(g) and 25, criminalises the "*wanton destruction of cities, towns or villages*, or devastation not justified by military necessity" [emphasis added].[450] This provision is imported verbatim by the ICTY Statute article 3(b) ("violations of the laws or customs of war").[451] This provision is capable of protecting culture's tangible, whether movable or immovable, when it is located in or is part of an urban setting. This path is also reflected in the ICTY article 3(c) and the ICC Statute article 8(2)(b)(v), which either import the

[447] The parties to the conflict must distinguish at all times between civilians-combatants and civilian objects-military objectives, and to direct attacks only against combatants and military objectives. *See* Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (International Committee of the Red Cross Cambridge University Press 2005) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha>. accessed 14 April 2019, pp 25-37
[448] 1907 Hague Regulations IV (n 50).
[449] *See* 1977 Additional Protocol I (n 59) art 49(1), characterising "attack" as "acts of violence against the adversary, whether in offence or in defence".
[450] IMT Charter (n 403).
[451] ICTY Statute (n 52) art 3(b).

1907 Hague Regulations IV article 25 or build upon it,[452] dispensing with any additional comments. ICR-based jurisdictions have already charged the accused for damage to culture's tangible as part of their broader urban settings. Such was the case in *Prlić*, where the accused was charged under the ICTY Statute article 3(b) for the destruction of the Old Bridge of Mostar. The Trial Chamber found that "at the time of the attack, the Old Bridge was a military target".[453] Nevertheless, the Chamber found that the destruction of the bridge isolated the residents with psychological impact on Mostar's Muslim population.[454] It thus concluded that the destruction was "disproportionate to the concrete and direct military advantage" sought.[455] The Appeals Chamber, however, found that as it "offered a definite military advantage", the destruction could not be viewed, "in and of itself, as wanton destruction not justified by military necessity".[456]

b. Culture's tangible as such: property and objects

Another set of IHL-ICL provisions permits assimilating culture's tangible to civilian property and objects, regardless of their urban settings. This approach enables addressing damage to culture's tangible in isolation, for example a statute or a structure located on a road, away from a dwelling. The 1907 Hague Regulations IV article 23(g) forbids "To destroy […] the enemy's property", subject to military necessity.[457] The use of the term "property" is wide enough to consider culture's tangible, whether movable or immovable, secular or religious. As for the meaning of "destroy", it may consist of, inter alia, arson and damage.[458] Within the 1949 Geneva Conventions system of protections, which the ICJ has held to be customary international law,[459] the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War ("1949 Geneva Convention IV") article 53 ("Prohibited destruction") carries over article 23(g)'s "property" destruction. Thus, it prohibits, subject to military necessity, the occupying power's destruction:

> of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations.[460]

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[452] ICTY Statute (n 52) art 3(b) prohibits "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings". For Indictments charging under ICTY Statute article 3, *see* *Brđanin* First Amended Indictment (n 408) Count 11; *Martić* Amended Indictment (n 408) Count 12; *Prosecutor v Rajić*, (ICTY) Amended Indictment (14 January 2004) Case No IT-95-12 Count 10; or else *Blaškić* Second Amended Indictment (n 408) Coun4; *Kordić & Čerkez*, First Amended Indictment (n 408), Counts 4 and 6 ("unlawful attack on civilian objects"). ICC Statute (n 54) art 8(2)(b)(v) prohibits "Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives". The difference with the 1907 Hague Regulations IV is the addition of military objectives. For a comprehensive discussion, *see* Dörmann, Doswald-Beck and Kolb (n 54) pp 177-184, noting that The ICC Elements of Crimes require that the attacks and bombardments must have concerned non-defended localities that were not military objectives.

[453] *Prosecutor v Prlić et al*, (ICTY) Judgement (29 November 2017) Case No IT-04-74-A, Vol 1, para 1582.

[454] *Prlić et al* Trial Judgment (n 453) para 1583.

[455] *Prlić et al* Trial Judgment (n 453) para 1584.

[456] *Prlić et al* Trial Judgment (n 453) para 411.

[457] 1907 Hague Regulations IV (n 50).

[458] Dörmann, Doswald-Beck and Kolb (n 54) p 83.

[459] *Nuclear Weapons* Advisory Opinion (n 404) paras 81-82.

[460] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (1949 Geneva Convention IV), art 53.

As seen in Part I, Chapter 2, real property, which consists of immovable property such as land, buildings and fixtures, can encompass culture's immovable tangible and any components affixed to it. Importantly, the provision considers collectively owned property, and also that of the State, its agencies and organisations, echoing the scenarios envisaged in Part I. The ICRC Commentary of 1958 links this provision to the 1907 Hague Regulations IV articles 46 and 56, which describe, inter alia, some components of culture's tangible.[461] Most importantly, article 147 ("Grave breaches") classifies as a grave breach, the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".[462] According to the ICRC Commentary of 1958, while "extensive" is to be opposed to an isolated act, case-by-case determinations are required as it would be hard to argue that only one hospital's destruction does not amount to an offence under article 147.[463] Two reasons support analogising this with culture's tangible. First, the Hague Law references some of culture's tangible alongside hospitals, a testimony to the former's importance. In parallel, as seen in Part I Chapter 2, depending on the cases, culture's tangible may represent such unique value to their people that their loss, as a unique object, may be analogised with the destruction of a single hospital.[464] Reflecting their titles or chapeau ("Grave breaches of the Geneva Conventions of 1949"), respectively, the ICTY Statute article 2(d) and the ICC Statute article 8(2)(a)(iv) import verbatim the 1949 Geneva Convention IV article 147.[465] The comments regarding the latter apply here.[466]

Moving to the 1977 Additional Protocol I, Part IV's Chapter III ("Civilian objects") article 52 ("General protection of civilian objects") prohibits attacks and reprisals against civilian objects, ie those that are not military objectives.[467] This provision's focus is thus on "objects", while the ICRC Commentary of 1987 explains it as "something that is visible and tangible".[468] Importantly, however, article 52(3) provides for the presumption of civilian use in cases of doubt regarding the military use of "an object which is normally dedicated to civilian purposes, such as a place of worship […] or a school".[469] The reference to places of worship as an illustrative example of civilian

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This is repeated verbatim in the Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (1949 Geneva Convention II), art 51 ("Grave breaches").

[461] Pictet, *Commentary of 1958* (n 402).

[462] 1949 Geneva Convention IV (n 460) art 147.

[463] Pictet, *Commentary of 1958* (n 402) p 601, *cited in Blaškić* Trial Judgment (n 412) para 157.

[464] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) p 16.

[465] ICTY Statute (n 52) art 2(d) and ICC Statute (n 54) art 8(2)(a)(iv) as imported verbatim by the SPSC Regulation No 2001/25 (n 54) Regulation 6; *See also* the ECCC Law's art 9 reference to grave breaches of the 1949 Geneva Conventions, ECCC Law (n 102). *See* also *Tadić* Jurisdiction Decision (n 88) para 80. For art 2(d) charges, *see Karadžić & Mladić* Initial Indictment (n 408) Count 7 ("destruction of property"); *Blaškić* Second Amended Indictment (n 408) Count 11 ("extensive destruction of property"); *Karadžić & Mladić* Initial Indictment (n 408) Count 8; *Rajić* Amended Indictment (n 452) Count 7 ("appropriation of property"); and *Brđanin* First Amended Indictment (n 408) Count 10; *Rajić* Amended Indictment (n 452) Count 9; *Prosecutor v Kovačević*, (ICTY) First Amended Indictment (13 March 1997) Case No IT-97-24, Count 15 ("unlawful and wanton extensive destruction and appropriation of property not justified by military necessity").

[466] For the relationship with the Hague Law, *see* Dörmann, Doswald-Beck and Kolb (n 54) pp 81-96.

[467] 1977 Additional Protocol I (n 59) art 52. *See* also Sandoz et al, *Commentary of 1987* (n 54) paras 2021-2022, defining military objective by the object's location (must either be seized; or from which the enemy must retreat); purpose (intended future use of the object); and use (present function).

[468] *See* also Sandoz et al, *Commentary of 1987* (n 54) paras 2007-2010.

[469] 1977 Additional Protocol I (n 59) art 52(3).

objects reinforces the civilian character of culture's tangible. No equivalent provision exists under the 1977 Additional Protocol II.[470] Deriving from this provision, the ICC Statute article 8(2)(b)(ii) sets out a blanket prohibition on "intentionally directing attacks against civilian objects, that is, objects which are not military objectives".[471] This provision does not refer to military necessity.[472]

2. Seizure-appropriation and pillage-plunder

IHL-ICL impose a number of prohibitions that concern seizure-appropriation, (a) and pillage-plunder (b) of movable and immovable of a civilian character. When assimilated to these, culture's tangible may be indirectly protected.

a. Seizure and appropriation

The 1907 Hague Regulations IV article 23(g) forbids to "seize the enemy's property" subject to imperative military necessity.[473] The ICC Statute article 8(2)(b)(xiii) imports this provision quasi-verbatim.[474] As explained by the ICC Elements of Crimes, the crime requires the actual seizure of civil and public property protected under IHL and not justified by military necessity.[475] As IHL does not define the words seize/seizure,[476] guidance may be provided by the 1907 Hague Regulations IV article 55, which requires the occupying State to act only "as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates".[477] There is no reason for these civilian immovable, whether anthropical or natural, not to contain culture's tangible. In such cases, the provision further provides that the occupying State "must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".[478] In other words, it must account for any profits that may have been generated from eg visits to a museum or a 1972 World Heritage List natural site.

Derived from article 23(g), the 1949 Geneva Convention IV article 147 considers as a grave breach the "extensive […] appropriation of property", subject to military necessity, as imported by the ICC Statute article 8(2)(a)(iv).[479] The main difference

[470] Finally, a violation of art 52(2) can amount to a grave breach under the 1977 Additional Protocol I art 85(3)(b); *See* 1977 Additional Protocol I (n 59) art 85(3)(b). *See* also R O'Keefe, *The Protection of Cultural Property in Armed Conflict* (n 52) pp. 202-207.
[471] ICC Statute (n 54) art 8(2)(b)(ii).
[472] As with the ICC Statute (n 54) art 8(2)(b)(ix) and (e)(iv), it is the act of intentionally directing an attack against civilian objects – as opposed to damage requirements – that constitutes the crime. *See* Dörmann, Doswald-Beck and Kolb (n 54) pp 148-149.
[473] 1907 Hague Regulations IV (n 50).
[474] ICC Statute (n 54) art 8(2)(b)(xiii) and, for non-international armed conflicts, art 8(2)(e)(xii).
[475] Dörmann, Doswald-Beck and Kolb (n 54) pp 250-251.
[476] Dörmann, Doswald-Beck and Kolb (n 54) pp 251, 257-258.
[477] 1907 Hague Regulations IV(n 50) art 55.
[478] 1907 Hague Regulations IV(n 50) art 55. *See* also 1907 Hague Regulations IV (n 50) art 53, according to which occupying powers "can only take possession" of public "movable property", such as "cash, funds" and "depots of arms". *See* further 1907 Hague Regulations IV (n 50) art 56, and the 1954 Hague Convention (n 56) arts 4(3) and 14(1) on public movable property.
[479] 1949 Geneva Convention IV (n 460) art 147 and ICC Statute (n 54) art 8(2)(a)(iv).

with article 23(g) is the use of the term "appropriation" instead of "seizure", and the requirement that it be extensive, wanton and unlawful.[480] Here again, the term "appropriation" holds many meanings, including withholding, requisition, theft, spoliation and plunder.[481] As seen in the ICRC Commentary of 1958, article 147 requires that the property be in occupied territory, and that the appropriation be extensive, rather than isolated.[482] As with the extensive destruction, this prohibition can encompass culture's tangible immovable and movable, anthropical and natural.

b. Pillage and plunder

The 1907 Hague Regulations IV articles 28 and 47 prohibit pillage, including that "of a town or place", as does the 1949 Geneva Convention IV article 33.[483] The ICC Statute article 8(2)(b)(xvi) and (e)(v) imports the 1907 Hague Regulations IV article 28.[484] According to the ICRC Commentary of 1958, the 1949 Geneva Convention IV article 33 does not apply to "requisition or seizure".[485] The commentary further explains that the 1949 Geneva Convention IV article 33 applies to "all types of property, whether they belong to private persons or to communities or the State".[486] Dörmann, Doswald-Beck and Kolb have noted that the ICC Elements of Crimes were drafted so as not to limit private property, despite the suggestion of several delegations.[487] This could encompass culture's tangible immovable and movable, anthropical and natural.

Unlike the above, the IMT Charter article 6(b), as imported verbatim by the ICTY Statute article 3(e), considers the "plunder of public or private property" as a violation of the laws or customs of war.[488] Building upon the 1907 Hague Regulations IV articles 28 and 47, this provision does not explain the meaning of "plunder". Linguistically, this word means acquiring property illegally, during armed conflicts, and is synonymous with pillage.[489] Judicially, however, things have not been pristine. At the IMT, the indictment's "Count Three – War Crimes (Charter, Article 6, especially 6 (b)" contained, as an underlying offence, the heading "(E) Plunder of public and private property".[490] Therein, it was alleged that, in the Western countries, the Nazis destroyed "industrial cities, cultural monuments, scientific institutions, and property of all types".[491] The subheading "*Looting* and Destruction of Works of Art" alleged that many museums were "*looted*" and many private art collections were "*stolen*" [emphasis added].[492] Thus, while count three focused on the IMT Charter article 6(b), it appears

[480] Dörmann, Doswald-Beck and Kolb (n 54) pp 251-252.
[481] Dörmann, Doswald-Beck and Kolb (n 686) p 83.
[482] Pictet, *Commentary of 1958* (n 402) p 601.
[483] 1907 Hague Regulations IV (n 50) arts 28 and 47; and 1949 Geneva Convention IV (n 460) art 147.
[484] ICC Statute (n 54) art 8(2)(b)(xvi) and (e)(v).
[485] Pictet, *Commentary of 1958* (n 402) p 227.
[486] Pictet, *Commentary of 1958* (n 402) pp 226-227.
[487] Dörmann, Doswald-Beck and Kolb (n 54) p 272-273.
[488] IMT Charter (n 403) art 6(b) and ICTY Statute (n 52) art 3(e). The Charter of the International Military Tribunal for the Far East (adopted 19 January 1946) (IMTFE Charter) art 5(b) simply referred to "conventional war crimes: namely, violations of the laws or customs of war".
[489] *Oxford English Dictionary* (n 26).
[490] *Trial of the Major War Criminals Before the International Military Tribunal*, (IMT) Judgment (Nuremberg 14 November 1945-1 October 1946), published at Nuremberg, Germany, 1947, <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf> accessed 23 January 2021, p 55.
[491] IMT Judgment (n 490) p 56.
[492] IMT Judgment (n 490) p 58.

to have used many words as synonym for "plunder". The IMT found that Rosenberg and his Einsatzstab "*plundered* museums and libraries, *confiscated* art treasures and collections, and *pillaged* private houses" [emphasis added].[493] The IMT added that "Jewish homes were *plundered* in the West, […], and it took 26,984 railroad cars to transport the *confiscated* furnishings to Germany. As of 14 July 1944, more than 21,903 art objects including famous paintings and museum pieces, had been *seized* by the Einsatzstab in the West".[494] The judgment appears to have considered plunder, pillage, confiscation and seizure interchangeably. Rosenberg was convicted on all four counts of the indictment, including count three, although as often with the IMT judgment, the exact relationship between facts and law is not clear.[495] At the ICTY, the *Blaškić* Appeals Judgment did not simplify the matter by noting that plunder includes the act of pillage.[496] On plunder's definition, the Chamber took note of the Trial Chamber's definition of plunder as "the unlawful, extensive and wanton appropriation of property", implying a contrario that appropriation may also be legal.[497]

Thus, and as also noted by Dörmann, Doswald-Beck and Kolb, IHL-ICL's understanding of the terms pillage and plunder (and looting, sacking and confiscation and seizure) remains unclear and varies depending on international jurisprudence.[498] This issue remains relevant also in the case of IHL instruments directly referencing "cultural property". As seen in the previous subsection, the 1954 Hague Convention article 4(3) prohibits "theft, pillage or misappropriation […] and […] vandalism*"* as well as "requisitioning movable cultural property".[499] Notwithstanding this opacity, the pillage/plunder of culture's tangible as civilian objects falls within this prohibition.

3. Outcome

Based on the foregoing, IHL-ICL can indirectly encompass culture's anthropical and natural movable and immovable, whether secular or religious, by assimilating them to civilian objects. This protection is twofold. The first type of protection consists of prohibiting the civilian objects' destruction, attack, bombardment and devastation. IHL-ICL use these words in both an overlapping and disjunctive manner. While the judicial nuances between these words depend on the case at hand, in contrast to the prohibition of destruction and devastation's subjection to military necessity, that of attack and bombardment is absolute. Attack is an act, bombardment is a means, and destruction and devastation are an aim and/or a result. Beyond the legislators' specific purpose, military necessity appear to be linked to its progressive import into IHL-ICL

[493] IMT Judgment (n 490) p 295.
[494] IMT Judgment (n 490) p 295.
[495] IMT Judgment (n 490) p 297.
[496] *Prosecutor v Blaškić*, (ICTY) Appeal Judgment (29 July 2004) Case No IT-95-14-A, para 147.
[497] *Blaškić* Appeal Judgment (n 496) para 144; *Blaškić* Trial Judgment (n 412) para 234, further adding "belonging to a particular population, whether it be the property of private individuals or of state or "quasi-state" public collectives". *See Karadžić & Mladić* Initial Indictment (n 408) Count 9; *Kordić & Čerkez*, First Amended Indictment (n 408) Counts 39 and 42; *Prosecutor v Jelisić*, (ICTY) Amended Indictment (19 October 1998) Case No IT-95-10, Count 44.
[498] Dörmann, Doswald-Beck and Kolb (n 54) pp 273-280. On "pillage", *see* Larissa van den Herik and Daniëlla Dam-de Jong, "Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict" (2011) 15 *Criminal Law Forum* pp 237-273.
[499] 1954 Hague Convention (n 56) arts 4(3) and 14(1).

instruments. Otherwise, a logical stance would require the subjection to military necessity of attacks and bombardment instead of destruction of devastation. Be that as it may, this scheme indirectly encompass culture's tangible, as movable and immovable of a civilian character, whether as part of an urban setting or as property/objects.

Chart 7: IHL-ICL instruments indirectly protecting culture's tangible: prohibition of destruction, attack, bombardment and devastation of civilian objects

		Attack	Bombardment	Destruction	Devastation	Military necessity	Urban settings
1907 Hague Regulations IV	art 23(g)			X		X	
	art 25	X	X				X
1949 Geneva Conventions	art 53			X		X	
	art 147			X		X	
1977 Additional Protocol I	art 52	X					
	art 85(3)(b)	X					
IMT Charter	art 6(b)			X	X	X	X
ICTY Statute	art 2(d)			X		X	
	art 3(b)			X		X	X
	art 3(c)	X	X				X
ICC Statute	art 8(2)(a)(iv)			X		X	
	art 8(2)(b)(ii)	X					
	art 8(2)(b)(v)	X	X				X
ECCC Law	art 9			X		X	

The second form of protection consists of the prohibition of seizure-appropriation and pillage-plunder; and qualified possession and administration of the enemy's civilian objects. While the prohibition of seizure-appropriation is subject to military necessity, that of pillage-plunder is (almost) absolute. Unfortunately, and as just analysed, both international legislators and adjudicators have used these terms incoherently, despite scholars' attempts for clarification.

Chart 8: IHL and ICL instruments indirectly protecting culture's tangible: prohibition of seizure-appropriation and pillage-plunder of civilian objects

		Seizure	Appropriation	Pillage	Plunder	Administrator/ usufructuary	Possession	Military necessity
1907 Hague Regulations IV	art 23(g)	X						X
	art 28			X				
	art 47			X				
	art 53						X	
	art 55					X		
1949 Geneva Conventions	art 33			X				
	art 147		X					X
IMT Charter	art 6(b)				X			
ICTY Statute	art 3(e)				X			
ICC Statute	art 8(2)(a)(iv)		X					X
	art 8(2)(b)(xiii) and (e)(xii)	X						X
	art 8(2)(b)(xvi) and (e)(v)			X				

D. Synthesis: direct protection as lex specialis to indirect protection

IHL-ICL protect culture's tangible, whether secular or religious, movable or immovable, during both international and non-international armed conflict – even though the latter occasionally provides a lower level of protection.[500] Accordingly, breaches of these protective norms can amount to war crimes. IHL-ICL are thus tangible-centred insofar as the typology of damage is concerned. But they are also so in terms of the victims of damage, when culture's tangible is a legal person.

IHL-ICL protect culture's tangible both directly and indirectly. Legal instruments that address the former may either name cultural property, or enumerate culture's tangibles, whether secular and religious. While most of these instruments expressly mention the immovable, some also refer to the movable. The latter may be otherwise implied as being part of the immovable. These instruments grant a high degree of protection to culture's tangible, as they list its components together with hospitals and places where the wounded are collected. Equally, only a minority accepts military necessity;[501] or expressly refers to cultural property as such;[502] or considers the property to be a military objective through its location, as opposed to its use.[503] Importantly, some IHL-ICL instruments also consider as a war crime damage to the natural environment, thereby enabling to transcend culture's anthropical components.[504]

However, IHL-ICL also provide for two forms of indirect protection of culture's tangible, whether movable and immovable, secular or religious, when considered as part of civilian objects. This is twofold: prohibiting the civilian objects' destruction, attack, bombardment and devastation; but also the prohibition of seizure, pillage, appropriation, plunder, and aspects of possession and administration of the enemy's civilian objects. Both the first form and, to a lesser degree, the second form of indirect protection are subject to military necessity. This is so given the fact that, unlike the direct protection afforded to culture's tangible, indirect protection applies not because of its special value, but owing to its characterisation as a civilian object. Accordingly, the direct protection is likely to be lex specialis to the indirect protection, as applicable.

When adjudicating attacks targeting culture as war crimes, damage inflicted on culture's tangible may be charged in two non-mutually exclusive manners. On the one hand, provisions that directly prohibit such damage could be used for the said acts. On the other hand, provision prohibiting the movable and immovable of a civilian character could encompass culture's tangible. The aforementioned paragraphs set-up the advantages and draw-backs for each of these two modes of charging the crime. In case of conflict, the former approach would normally be lex specialis. For example, in *Kordić & Čerkez*, the Trial Chamber noted that unlike the 1907 Hague Regulations IV article 56's absolute prohibition of destruction of culture's tangible, article 23(g) subjects the destruction of civilian property to imperative military necessity.

[500] *For example,* compare 1977 Additional Protocol I (n 59) and 1977 Additional Protocol II (n 59).
[501] *See* eg 1954 Hague Convention (n 56) art 4(2).
[502] 1954 Hague Convention (n 56), 1954 Hague Convention 1999 Protocol (n 58), 1977 Additional Protocol I (n 59), 1977 Additional Protocol II (n 59) and ECCC Law (n 102).
[503] 1954 Hague Convention (n 56) arts 4 and 8.
[504] *See* 1977 Additional Protocol I (n 59) art 55 and ICC Statute (n 54) art 8(2)(b)(iv).

Accordingly, the Chamber held that article 56 must be lex specialis.[505] But the issue would be more intriguing when the general protection is more favourable than the special protection. For example when the 1954 Hague Convention article 4(3) which subjects the prohibition of pillage to military necessity and the ICC Statute article 8(2)(b)(xvi) and (e)(v) which does not. Here, one could argue for the application of the latter on grounds of the most favourable treatment.

The interaction between the direct and indirect protection of culture's tangible acquires a different dimension when it extends to the so-called peacetime regime instrument. This facilitates moving from the tangible-centred to a heritage-centred approach.

III. Towards a heritage-centred approach: Dubrovnik and Timbuktu

A. Introduction

As seen, IHL-ICL instruments provide a detailed set of protections for movable and immovable of a civilian character in general, and for culture's tangible in particular. The parallel development of peacetime instruments (general introduction) means that culture's tangible that is attacked during armed conflict is also frequently protected by peacetime instruments.

To date, Dubrovnik and Timbuktu are the two ICTY and ICC cases that encapsulate best the intersection between IHL-ICL norms and the 1972 World Heritage Convention, as regards damage to and/or destruction of culture's tangible (A). It will be argued that not only both courts have viewed culture's tangible as (im)movable of a civilian character, but also, and most importantly, they have linked it to cultural heritage (B). As a consequence, it will be shown that this conceptualisation has impacted on the assessment of the gravity of the crime (C). It will transpire from this analysis that ICR-based jurisdictions have adopted a tangible-centred approach insofar as the typology of damage is concerned and an anthropo/heritage-centred approach with regard to the damage's victims and consequences. As will be demonstrated, it is the recourse to the 1972 World Heritage Convention that has made this linkage possible. Insofar as war crimes adjudications are concerned, this confirms the interconnection between culture's tangible and intangible, between material culture and heritage. This is so, notwithstanding terminological challenges with respect to what appears to be an interchangeable use, in the judgments, of the terms cultural property, cultural heritage and heritage.

[505] *Prosecutor v Kordić & Čerkez*, (ICTY) Judgment (26 February 2001) Case No IT-95-14/2-T, para 361. See also *Kordić & Čerkez* Appeal Judgment (n 415) paras 89-90; noting "two types of protection for cultural, historical and religious monuments ", ie "general protection" and "special protection".

B. IHL-ICL intersecting with peacetime instruments

The placement of Dubrovnik and Timbuktu on the 1972 World Heritage List (1) meant that choices had to be made on war crimes charges directly prohibiting the destruction of culture's tangible and/or those that indirectly do so by assimilating those sites to tangible of a civilian character (2).

1. The sites and the 1972 World Heritage Convention

a. Dubrovnik: culture's secular and religious tangibles

Located on Croatia's Dalmatian coast and founded in the seventh century, Dubrovnik experienced the rules of the Byzantines, Venetians, Ottomans and Austro-Hungarians. The old town of the city ("Old Town") offers an architectural mixture of gothic, renaissance and baroque styles.[506] In 1979, the Old Town was placed on the 1972 World Heritage List.[507] The Old Town is thus a collection of culture's tangible movable and immovable so intrinsically interconnected and spread that a whole site, in the sense of the urban setting of a civilian character described earlier, characterises it. During the 1991-1998 breakup of the former Yugoslavia, the Old Town was added to the 1972 World Heritage in Danger List.[508] During the armed conflict, the Yugoslav People's Army attacked Dubrovnik from land and sea. Heavily shelling the Old Town resulted in the total destruction of six buildings and damage to hundreds more.[509] Among the four persons indicted for these attacks, only Štrugar and Jokić were eventually tried.[510] Jokić pleaded guilty, inter alia, to the ICTY Statute article 3(d),[511] while Štrugar went

[506] *See* UNESCO, "Old City of Dubrovnik" <http://whc.unesco.org/en/list/95/> accessed 14 April 2019.
[507] *See* UNESCO, "Old City of Dubrovnik" (n 506).
[508] *See* UNESCO, "Old City of Dubrovnik" (n 506).
[509] *Prosecutor v Štrugar, Jokić, Zec & Kovačević*, (ICTY) Indictment (22 February 2001) Case No IT-01-42, paras 20 and 30-31; *Prosecutor v Štrugar*, (ICTY) Third Amended Indictment (10 December 2003) Case No IT-01-42-PT, paras 12-13 and 22-23; *Prosecutor v Jokić*, (ICTY) Second Amended Indictment (27 August 2003) Case No IT-01-42/1, paras 7-9, 18 and 27; *Prosecutor v Štrugar & Kovačević*, (ICTY) Second Amended Indictment (17 October 2003) Case No IT-01-42/2, paras 14-15 and 26-27; and *Prosecutor v Milošević*, (ICTY) Second Amended Indictment (28 July 2004) Case No IT-02-54-T, para 78.
[510] These were Slobodan Milošević (indicted in 2002 and 2004), who was the elected President of the Republic of Serbia in 1989-1997 and President of the FRY in1997-2000. The *Milošević* trial was unfinished due to the accused's death; *see Prosecutor v Milošević*, (ICTY) Order Terminating Proceedings (14 March 2006) Case No IT-02-54-T. For a full review of the indictments, *see* also Hirad Abtahi and Grant Dawson, "The Anatomy of the Milošević Trial (2001-2006)" (2016) 1(4) *Journal of International Humanitarian Action*, https://jhumanitarianaction.springeropen.com/articles/10.1186/s41018-016-0004-x accessed 14 April 2019. The others were all indicted in 2001. In 1991, Pavle Štrugar was the Commander of the Dubrovnik military campaign. Miodrag Jokić commanded one of the formations subordinated to Štrugar. As for Vladimir Kovačević, he did not have the capacity to enter a plea and to stand trial; *see Prosecutor v Kovačević*, (ICTY) Decision on Fitness to Stand Trial (12 April 2006) Case No IT-01-42/2-I.
[511] *Prosecutor v Jokić*, (ICTY) Judgment (18 March 2004) Case No IT-01-42/1, paras 74-78.

through a full trial. With respect to the Old Town, which it referenced as "World Cultural Heritage", the *Jokić* Trial Chamber noted that its "architectural ensemble" illustrated the development of "human history".[512] Consequently, as held by the Chamber, the attacks concerned both "the history of the region" and "the cultural heritage of humankind".[513] The Old Town's national and international importance are evident since they are a prerequisite for any site's inclusion on the 1972 World Heritage List. But the Chamber's reference to the importance of the site to the region adds a third layer, turning the Old Town into a local-national-international triptych.

b. Timbuktu: culture's religious tangible

Founded in the fifth century, Timbuktu reached its cultural heights in the fifteenth and sixteenth centuries, as an important centre for the dissemination of Islam. It housed a major Koranic university, schools and thousands of students. Timbuktu was also a commercial (given the trade of gold, salt and other goods) and cultural (given the provision of manuscripts) crossroad.[514] Following the 2012 armed conflict in Mali, Ansar Dine and Al-Qaeda in the Islamic Maghreb ("AQIM") took over Timbuktu, establishing an Islamic tribunal and police force, a media commission and a morality brigade.[515] Heading the latter, Al Mahdi sought to prohibit the community's prayer and pilgrimage in ten mosques and mausoleums in Timbuktu.[516] Eventually, attacks were conducted against them, resulting in their near total destruction.[517] Al Mahdi pleaded guilty to the charges under the ICC Statute article 8(2)(e)(iv) with intentionally directing attacks against sites "of a religious and historical character" in Timbuktu.[518] Like *Dubrovnik*, *Al Mahdi* represented the intersection between the 1972 World Heritage Convention and IHL-ICL. Similarly, the Trial Chamber used the same conception of culture as a triptych. Noting the function of the mausoleums and mosques in Timbuktu's "cultural life" and the inclusion of all but one on the 1972 World Heritage List, the Chamber held that the latter "reflects their special importance to international cultural heritage".[519]

2. Choice of charges against the accused

Before proceeding with this section's broader heritage-centred analysis, or perhaps as part of the latter, it is necessary to make a brief observation with respect to the choice of criminal charges within each of the ICTY and ICC war crimes provisions (a) as well as beyond as regards the 1972 World Heritage Convention (b).

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[512] *Jokić* Trial Judgment (n 511) para 51.
[513] *Jokić* Trial Judgment (n 511) para 51.
[514] *See* UNESCO, "Timbuktu" <http://whc.unesco.org/en/list/119> accessed 14 April l2019.
[515] *Al Mahdi* Trial Judgment (n 49) para 31.
[516] Born in the region of Timbuktu in a family greatly knowledgeable in Islam, Ahmad Al Faqi Al Mahdi received Koranic education and lectured as an expert on religious matters, before joining Ansar Dine in April 2012. *See Al Mahdi* Trial Judgment (n 49) para 9.
[517] *Al Mahdi* Trial Judgment (n 49) paras 31, 35 and 78.
[518] *Al Mahdi* Trial Judgment (n 49) paras 10 and 63. *See also* para 39 holding that the attacked mausoleums and mosques were "both religious buildings and historic monuments".
[519] *Al Mahdi* Trial Judgment (n 49) paras 39 and 46.

a. Within war crimes provisions

As just seen, both *Jokić* and *Štrugar* were charged for war crimes directly relating to culture's tangible. However, the accused were also charged for the destruction of tangibles of a civilian character. For this indirect prohibition of damage to/destruction of culture's tangible, the accused were charged for violations of the ICTY Statute article 3(b) as devastation not justified by military necessity. Curiously, the charge dropped the other phrase within that provision, ie "wanton destruction of cities, towns or villages". This deliberate omission shows that the ICTY opted for considering culture's tangible's as object/property rather than as part of an urban settings. This is intriguing to say the least, especially in light of the fact that, by virtue of being placed on the 1972 World Heritage List, the Old Town, including its residential buildings, enjoyed protection, as held in *Jokić*.[520]

While in *Al Mahdi*, the accused was only charged under the ICC Statute article 8(2)(e)(iv), the Trial Chamber noted that the accused was not charged with nor had any argument been raised with respect to the appropriateness of the destruction of civilian property under article 8(2)(e)(xii) on "Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict".[521] Thus, even in the alternative or in addition to the ICC Statute's more cultural tangible specific war crime provision, the ICC considered the destructions as those of objects/property rather than those of the urban ensembles.

Whether due to the standard of proof or elements of crimes, this is a path worth exploring in future cases involving large sites placed on the 1972 World Heritage List.

b. Beyond war crimes provisions

These cases present an interesting characteristic, ie while charging the accused with war crimes provisions, they emphasise the sites' links to the 1972 World Heritage Convention. In Dubrovnik, the indictments specifically mentioned that the totality of the Old Town was on the 1972 World Heritage List while certain buildings and the towers on the city walls were marked with the 1954 Hague Convention symbols.[522] In *Al Mahdi*, according to the decision confirming the charges, at the time of the facts, Timbuktu's cemeteries, including the Buildings/Structures within them, as well as 16 mausoleums were protected sites pursuant to the 1972 World Heritage Convention and, because of the conflict in Mali, on the 1972 World Heritage in Danger List.[523] Both sites were urban ensembles, as opposed to single movable or immovable of a civilian character. As will now be seen, this will have implications on the way the ICTY and ICC would make their findings which would be both tangible-centred in terms of damage and, importantly, heritage-centred in terms of the consequences on the victims.

For now, references to the *Jokić* Trial Judgment will illustrate the purpose. Therein, the Chamber held that directing attacks against "an especially protected site" is "a crimes

[520] *Jokić* Trial Judgment (n 511) para 51.
[521] *Al Mahdi* Trial Judgment (n 49) para 12.
[522] *See Milošević* (n 509) para 78.
[523] *Prosecutor v Al Mahdi*, (ICC) Decision on the Confirmation of Charges (24 March 2016) No ICC-01/12-01/15, para 36.

of even greater seriousness" than that of attacking "civilian buildings", as the former also includes the latter.[524] Thereafter, the Chamber noted Jokić's awareness of the Old Town's relationship with the 1972 World Heritage List and the 1954 Hague Convention.[525] By referring to a heightened legal protection provided to civilian objects that constitute cultural property, the Trial Chamber emphasised the gravity of attacks against it.[526] Later, the *Štrugar* Appeals Judgment concurred with the Trial Chamber's conclusion that, given the 1972 World Heritage List status of the "entire Old Town", and also the visibility of UNESCO emblems, article 3(d) applied to "each structure or building in the Old Town".[527] This passage leaves no doubt as to the organic relationship that the ICTY viewed between ICL and the 1972 World Heritage Convention.

C. The collective and its anthropical environment

In part I, Chapter 2, this study analysed the IACtHR's case law on the heritage-related implications of the destruction of the symbiosis between the collective and its natural environment. This subsection will propose that the ICR-based jurisdictions have replicated the same scheme, with the difference that the symbiosis will concern the collective and its anthropical environment. After formulating its scope (1), the proposition's implications on the typology of victims, whether locally (2) or nationally and internationally (3) will be analysed.

1. Introduction

A major implication of bringing the 1972 World Heritage Convention into the realm of IHL-ICL is to humanise the inanimate. In other words, to recognise not only the intrinsic value of culture's tangible, but also its contribution to the collective's identity.

In *Jokić*, by qualifying the Old Town as "a "living city"" whose "population was intimately intertwined with its ancient heritage",[528] the Trial Chamber viewed the site as more than a museum of inanimate tangibles. Attacking the city was to target its amalgamated population. This is reminiscent of the IACtHR practice, which considered the collective as the victim of the breakdown of its symbiotic relationship with its natural environment (Part I, Chapter 2). To attack the latter was to hurt the former. In Dubrovnik, the collective was the victim of attacks targeting the anthropical environment, both secular and religious. A strict analogy between the IACtHR and the ICTY cases is not possible. The IACtHR addressed the more isolated type of indigenous/tribal collectives with their system of belief; while the ICTY addressed that of a post-Socialist urban population. Notwithstanding these differences, the ICTY did

[524] *Jokić* Trial Judgment (n 511) para 53.
[525] *Jokić* Trial Judgment (n 511) para 23.
[526] However, the Trial Chamber found that the special status of the Old Town formed part of the assessment of the gravity of the crime and therefore should not be additionally considered as an aggravating factor. *See Jokić* Trial Judgment (n 511) para 67.
[527] *Prosecutor v Štrugar*, (ICTY) Appeal Judgment (17 July 2008) Case No IT-01-42-A, para 279.
[528] *Jokić* Trial Judgment (n 511) para 51.

view one such relationship, all proportions considered.

Clearly, this linking of the collective to its cultural anthropical environment is intertwined with the typology of victims, harms and reparations. As seen in the general introduction, in contrast to the ICTY, the ICC provides for a detailed reparations scheme. Therefore, most of the following will focus on *al Mahdi*. Therein, the trial judgment and reparations order allow making the proposition that victims may be viewed as a triptych. As seen throughout this study (specifically the general introduction), the metaphoric use of the triptych encapsulates, almost formulaically, the inter-connectedness between – yet independence from each other of – culture's local, national and international layers. Accordingly, the following will analyse the victims in the form of the local population (2) as well as the national population and the international community (3). For each of these, the types of harm and forms of reparations will be reviewed. This analysis will make the proposition that the ICC adopted a heritage-centred approach insofar as the consequences of the damage on the victims were concerned.[529]

2. The local population

In *Al Mahdi*, most of the attention of both judgment and reparations orders was dedicated to the population of Timbuktu which was considered as the largest victim (a) of the destructions and beneficiary of their related reparations (b).

a. Victims

The *Al Mahdi* Trial Judgment noted that, as "a common heritage for the community", the saints' mausoleums and mosques "are an integral part of the religious life of [Timbuktu's] inhabitants".[530] The mausoleums reflected the "commitment to Islam" of "the people of Timbuktu", as evidenced by the actual and symbolic maintenance of the sites of Timbuktu community of all ages and genders.[531] These passages illustrate the Chamber's viewing the collective as the sum of its natural persons. Interestingly, in evaluating the gravity of the crime, the *Štrugar* Trial Chamber held that the crimes had "grave consequences" on the victims, since they were ""people", rather than any particular individual".[532]

Furthermore, the Trial Chamber also viewed the collective and the sites as an integrated whole. Importantly, the Chamber held that the mausoleums "played a psychological role to the extent of being perceived as protecting" the Timbuktu population. This association of the collective's spiritual relationship with its religious tangible echoes to

[529] The Trial Chamber considered legal persons (together with natural persons) ordinarily residing in or very closely related to Timbuktu as victims. However, given the fact that the Reparations Order did not publicly disclose the identity of legal persons, it is unclear where and how the Chamber considered the type of harm they sustained, nor the related reparations. The legal person a/35140/16 appear not to be related to the destroyed tangible, as it acted as counsel the people of Timbuktu. *See Al Mahdi* Reparations Order (n 49) paras 56 and 92.
[530] *Al Mahdi* Trial Judgment (n 49) para 34.
[531] *Al Mahdi* Trial Judgment (n 49) para 78.
[532] *Štrugar* Trial Judgment (n 409) para 232.

some degrees the IACtHR's findings on the relationship between the collective's spirituality and its natural environment (Part II, Chapter 2).[533] While multiple nuances may be pointed out between the types of collectives, eg indigenous/tribal versus urban, unquestionable parallel trends emerge. And that is the existence of a collective as a victim of attacks targeting its tangible – religious in *Al Mahdi*. The Chamber would take this relationship between the collective and its cultural tangible of a religious and spiritual character into account for the evaluation of the gravity of the crime. This was so as, being among the "most cherished buildings" by the population of Timbuktu who attached "symbolic and emotional value" to them, the destruction "aimed at breaking the people of Timbuktu".[534]

b. Harm and reparations

On the basis of the *Al Mahdi* Reparations Order, it is possible to distinguish between material harm with its corresponding collective – and individual – reparations measures (i). Importantly, though, like the IACtHR, the Trial Chamber granted collective reparations for moral harm, ie the "disruption of culture" (ii).

i. Material harm: individual and collective reparations

The Trial Chamber identified two types of material harm: one focusing on the destructions as such and another on their consequences. As regards the former, noting the emotional and spiritual value accorded by the population to the destroyed buildings, the Trial Chamber found collective reparations to be most appropriate.[535] As for the modalities, noting UNESCO's renovation work, the Chamber determined that the most appropriate form of reparations was the rehabilitation of sites combined with guarantees of non-repetition.[536] Intriguingly, it is not clear how the latter operate in an ICR-based context. In State responsibility, combining State continuity and the fact that States are the bearer of responsibility, it is logical that they provide guarantees of non-repetition, as seen in the ISCMs and HRCts practice (see Part I). In ICR-based modes of responsibility, natural persons are the sole bearers of ICL violations. Unlike States, natural persons – mortals – evidently do not undergo "individual continuity". Therefore, while it is normal to expect a natural person to provide guarantees of non-repetition, their durability in time is not sustainable – since their effects are linked to the convicted person's life-span. Perhaps it is in recognition of this conundrum that the Chamber indicated that such guarantees (presumably by Al Mahdi) could be provided in consultation with Malian authorities, as necessary – even though the ICC Statute article 75 and it forms of reparations are linked to the convicted person.[537] The Chamber further ordered the video and transcript release of Al Mahdi's aforementioned apology in Timbuktu's primary languages.[538] These measures typically reflected the IACtHR practice regarding pecuniary damages and collective reparations (Part I, Chapter 2).

[533] *Al Mahdi* Trial Judgment (n 49) para 78.
[534] *Al Mahdi* Trial Judgment (n 49) paras 72 and 78-80.
[535] *Al Mahdi* Reparations Order (n 49) paras 60, 67 and 104.
[536] *Al Mahdi* Reparations Order (n 49) paras 67 and 104.
[537] *Al Mahdi* Reparations Order (n 49) para 67.
[538] *Al Mahdi* Reparations Order (n 49) paras 71 and 104.

The Chamber also considered the second type of harm, ie economic harm, as the consequence of the destructions.[539] Accordingly, considering that the buildings' destruction affected the victims' livelihood directly (eg the mausoleums' guardians and maçons) and indirectly (eg losses to the tourism industry), the Chamber noted the foreseeability of the economic impact of such attacks given the buildings' "prominent community role".[540] This analysis of economic loss reflects the practice of ISCMs, in that the Chamber referred, inter alia, to the EECC (Part I, Chapter 1). Having found that the harm sustained was primarily collective, the Chamber proceeded with an approach akin to that proposed in this study's Part I, Chapter 2. In so doing, it identified both the members of the collective as well as the collective as such, as the recipients of reparations for the attacks. The former resulted in individual reparations, in the form of financial compensation, to those whose livelihoods exclusively depended on the buildings.[541] As for collective reparations for the Timbuktu community as a whole, ie the collective as the sum of its individual members, it consisted of rehabilitation measures, such as:

> community-based educational and awareness raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a 'microcredit system' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.[542]

Showcasing its inter-connection with State responsibility, the Chamber thus ordered measures akin to those adopted by the IACtHR (Part I, Chapter 2).

ii. Moral harm: disruption of culture

The *Al Mahdi* Trial Chamber characterised moral harm as "mental pain and anguish" suffered in two manners. This concerned, first, those whose family members' burial places had been damaged.[543] For these, the Chamber ordered that individual reparations be addressed through financial compensation.[544] Not only was this measure akin to that for economic harm, but also, an importantly, it was reminiscent of the IACtHR practice. Indeed, cemeteries can be said to have formed part of culture's anthropical tangible. The dead remain among the alive mentally. But they also do so through their burial remains, thus contributing to identity and heritage.

This leads to the second type of harm identified by the Chamber, ie mental pain and anguish suffered by "the Timbuktu Community as a whole", also for the "disruption of culture", by express reference to the IACtHR.[545] Once again, the Chamber reflected the practice of the IACtHR. First, it considered the collective as the sum of its natural persons members. Second, it borrowed from the IACtHR the notion of "disruption of

[539] *Al Mahdi* Trial Judgment (n 49) para 108.
[540] *Al Mahdi* Reparations Order (n 49) paras 73, 75 and 104.
[541] *Al Mahdi* Reparations Order (n 49) paras 76, 83 and 104.
[542] *Al Mahdi* Reparations Order (n 49) paras 76, 83 and 104.
[543] *Al Mahdi* Reparations Order (n 49) para 90. *See* also *Al Mahdi* Trial Judgment (n 49) para 108.
[544] *Al Mahdi* Reparations Order (n 49) paras 90 and 104.
[545] *Al Mahdi* Reparations Order (n 49) paras 90 for *Plan de Sánchez Massacre v Guatemala* Reparations (n 208) paras 85 and 132. *See* also *Al Mahdi* Trial Judgment (n 49) para 108.

culture" which, although not used terminologically by the IACtHR, is broader than damage to the tangible. Accordingly:

> The attack […] not only destroyed and damaged physical structures. Its impact 'rippled out into the community and diminished the link and identity the local community had' with such valuable cultural heritage.[546]

Noting that "the inherently irreplaceable nature of historical buildings cannot be remedied by reconstruction",[547] the Chamber awarded, like the IACtHR, collective reparations, for the disruption of culture, to the Timbuktu community as a whole, in the form of rehabilitation and symbolic public measures, such as memorials, commemorations or forgiveness ceremonies.[548] Finally, in seeking to quantify the moral harm in question, the Trial Chamber used, as a methodological starting point, the EECC's financial quantification of the Stela Matara due to its "unique cultural significance" (Part I, Chapter 1).[549] Throughout the aforementioned, the Chamber thus established common grounds between State responsibility jurisdictions and ICR-based jurisdictions.

3. The national population and the international community

The *Al Mahdi* Trial Judgment and Reparations Orders did identify as victims both Mali's broader national population as well as the international community (a), with its sustained harm and related reparations, although to a lesser degree than Timbuktu's population (b).

a. Victims

In the *Al Mahdi* Trial Judgment, noting that all the sites but one were on the 1972 World Heritage List, the Chamber found the attacks to be of "particular gravity" since, beyond Timbuktu's inhabitants, the destruction affected the Malian population and "the international community".[550] Specifically, noted the Chamber, the Malian population "were indignant to see these acts".[551] Accordingly, beyond their use for prayer, the mausoleums were a pilgrimage centre and, together with the manuscripts, reflected Timbuktu's "crucial role in the expansion of Islam".[552] Intriguingly, Al Mahdi himself shared this vision, when he expressed remorse for the damage caused, inter alia, to "his community in Timbuktu, his country and the international community".[553] In the

[546] *Al Mahdi* Reparations Order (n 49) para 19.
[547] *Al Mahdi* Reparations Order (n 49) para 129.
[548] *Al Mahdi* Reparations Order (n 49) paras 90 and 104.
[549] *Al Mahdi* Reparations Order (n 49) paras 131-132.
[550] *Al Mahdi* Trial Judgment (n 49) para 80.
[551] *Al Mahdi* Trial Judgment (n 49) para 80. Having found of relevance the discriminatory religious motive invoked for the destruction of the sites in its assessment of the gravity of the crime, the Chamber concluded that Al Mahdi's crime was of significant gravity, although it did not consider the number of victims or the attack's religious nature as aggravating the crime's impact. *See Al Mahdi* Trial Judgment (n 49) paras 81-82 and 87-88.
[552] *Al Mahdi* Trial Judgment (n 49) paras 34 and 78.
[553] *Al Mahdi* Trial Judgment (n 49) para 103, considering the mitigating circumstances.

Reparations Order, the Trial Chamber concurred with an expert that victims were in Timbuktu (the guardian families responsible for the sites' maintenance as well as the faithful); in Mali (the general population); and consisted also of the "international community".[554]

The Chamber did not explain the latter. While the Malian "population" (whether locally or nationally) are clearly natural persons, what does the international community entail: UN/UNESCO Member States (since Timbuktu is on the 1972 World Heritage List) or the world population? In a West-centric narrative, the international community conveys the idea of Berlin, London, Paris and Washington DC, with an occasional inclusion of Beijing and Moscow. The rest of the planet being just a footnote. Accordingly, the word "international" in the expression "international community" can be understood as "inter-State" (a collective made of non-natural persons), rather than "inter-national" (collectives made of natural persons). In contrast, to the ICC Trial Chamber, as well as the expert, when read in context, the international community is at minimum "inter-national". Here, reference should also be made to Dubrovnik. Where assessing the gravity of the crime, noting that certain Old Town buildings were marked with the 1954 Hague Convention symbols,[555] the *Jokić* Trial Chamber observed that the violation of the ICTY Statute article 3(d) "represents a violation of values especially protected by the international community."[556] The *Štrugar* Trial Chamber added that the property in question was of "great importance to the cultural heritage of every people", recalling, like *Jokić*, that the Old Town was on the 1972 World Heritage List.[557]

b. Harm and reparations

Back to the *Al Mahdi* Reparations Order, the Chamber fully accepted that by addressing the specific harm to Timbuktu's population, their related reparations would also address the general harm suffered by the broader Malian population and the international community, even though the destructions varyingly affected the triptych, both in terms of degree and nature of harm.[558] For example, the Chamber linked its collective reparations measures to "the moral suffering endured" by the Malian population and the international community".[559] These are one of the clearest illustrations of the benefits of using the metaphorical triptych, wherein one affected panel impacts on the proper understanding of the three panels as a whole.[560] Accordingly, although focusing on the Timbuktu community, and notwithstanding the absence of reparations applications on behalf of the national and international communities, the Chamber ordered one symbolic euro to be granted to both Mali and the international community, through UNESCO.[561]

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[554] *Al Mahdi* Reparations Order (n 49) paras 52 and 55.
[555] *Jokić* Trial Judgment (n 511) para 23.
[556] *Jokić* Trial Judgment (n 511) para 46.
[557] *Štrugar* Trial Judgment (n 409) paras 232 and 461.
[558] *Al Mahdi* Reparations Order (n 49) paras 52 and 54.
[559] *Al Mahdi* Reparations Order (n 49) paras 91 and 104.
[560] *Al Mahdi* Reparations Order (n 49) para 52.
[561] *Al Mahdi* Reparations Order (n 49) paras 106-107. *See* also UNESCO, Press Release (29 March 2021), "Mali and UNESCO to receive a "symbolic euro" in token reparation for the heritage of Timbuktu" <https://en.unesco.org/news/mali-and-unesco-receive-symbolic-euro-token-reparation-heritage-timbuktu> accessed 10 April 2021.

Regardless of the international community's scope (natural persons, States, etc), it is noteworthy that UNESCO – a legal person – becomes the recipient of reparations for damage suffered by the international community. Accordingly, it can be argued that UNESCO acts as a mere trust fund that centralises financial compensation. But it can also be argued that UNESCO acts as a legal person that, as the custodian of the 1972 World Heritage List and 1972 World Heritage in Danger List, "absorbs" any damage inflicted on their anthropical and natural sites. This may be a bold, but plausible proposition, wherein the legal person acts as a proxy for the world by sustaining any damage suffered by the latter. Only time will tell the extent to which this proposition is capable of materialising.

What transpires, is that each of the triptych's three panels consisted as a collective made of the sum of its natural person.

D. Synthesis: blurring the distinction between the peacetime and non-peacetime legal regimes?

In 2001, UNESCO pointed out that the ICTY decision to prosecute Dubrovnik's destruction of cultural property was "the first time" since the IMT and IMTFE "that a crime against cultural property has been sanctioned by an international tribunal".[562] In reality, the ICTY had already convicted individuals for crimes involving property not categorised as cultural tangible by the 1972 World Heritage Convention or even by the 1954 Hague Convention.[563] While these sites were not formally recognised as cultural property, it was not excluded that they were viewed as such by the local and/or national population. In fact, rather than using the word "cultural property", the ICTY Statute article 3(d) merely lists some of its movable and immovable components. Nonetheless, as seen earlier, the ICTY has even held that the said components are not necessarily cultural property and that they will require a case-by-case determination. This is explained in part by the fact that ICTY cases initially centred on religious or educational property, due to the ethnic nature of the conflict in the former Yugoslavia.

What, however, distinguished Dubrovnik and Timbuktu from the aforementioned is attacks against sites that were also included in the 1972 World Heritage List. The ICTY and the ICC charged the accused under war crimes provisions. In the former's case, focus was placed on war crimes regarding the violations of damage to/destruction of culture's tangible as such, or indirectly by assimilating the sites to tangibles of a civilian character. While these provisions are part of IHL and ICL, the two jurisdictions also had to consider the 1972 World Heritage Convention, since the damaged and/or destroyed sites were on the 1972 World Heritage List. This combination blurred the distinction between the so-called peacetime and non-peacetime legal regimes. In fact, neither jurisdiction even discussed this.[564] IHL is essentially based on the principles of

[562] *See* UNESCO, "Press Release No. 2001-40 (13 March 2001)", *in* UNESCO, World Heritage Committee, "Twenty-Fifth Session: Item 4b of the Provisional Agenda; Acts constituting "crimes against the common heritage of humanity"" (22 November 2001) WHC-01/CONF.208/23 <https://whc.unesco.org/archive/2001/whc-01-conf208-23e.pdf> accessed 14 April 2019, p 9.
[563] Abtahi, "The Protection of Cultural Property in Times of Armed Conflict" (n 1) fn 180.
[564] *See* also Lostal, *International Cultural Heritage Law in Armed-Conflict* (n 15) p 69, suggesting that

necessity, proportionality and distinction. However, these are just minimum standards. International human rights instruments continue to apply during armed conflicts, unless they provide otherwise. According to the ICJ, the ICCPR continues to apply during armed conflicts except by operation of its article 4 derogations, meaning that assessing whether an article 6 deprivation of life is arbitrary during armed conflict is to be done through an IHL lens, which constitutes lex specialis.[565] Transposing this to culture's tangible, not only does the 1972 World Heritage Convention not foresee any exception to its applicability, but it also creates a special protection regime and creates the 1972 World Heritage List and the 1972 World Heritage in Danger List, applicable during peacetime and "times of danger", respectively.[566] The second derives from the 1972 World Heritage Convention article 11(4), pursuant to which the 1972 World Heritage in Danger List protects sites that are "threatened by […] the outbreak or the threat of an armed conflict.[567] However, as suggested by Bories, even if the sites were not on the 1972 World Heritage in Danger List, the convention cannot be disregarded because of the uncontested psychological effect of the 1972 World Heritage List.[568]

But the ICTY and ICC references to the 1972 World Heritage Convention also establish another proposition argued in this study, which is the organic interplay between the collective as the sum of natural persons and its anthropical (and also natural, in the IACtHR's case) heritage. Thus, while war crimes offer a tangible-centred approach, their combination with the 1972 World Heritage Convention enables a heritage-centred approach, where the object is both considered as such and immersed in its contextual whole (see also general introduction). This was specifically demonstrated in the *Al Mahdi* reparations order, where the Trial Chamber viewed the victims as a triptych; with its accompanying definition of material and moral harm; as well as its individual and collective types of harm and forms of reparations (as with State responsibility practice Part I). In comparison, in *Prlić et al*, the Chamber noted that the indictment placed the Old Bridge's destruction under count 21, which referred to the violation as "destruction or wilful damage to institutions dedicated to religion or education", thereby omitting article 3(d)'s "historic monuments".[569] The Chamber held that the Old Bridge was a "historic monument of major historical and symbolic value, in particular for the Muslim community".[570] It also viewed the Old Bridge as a local-national diptych of "exceptional character" and of "historical and symbolic nature", since it "symbolised the link between the communities".[571] Consequently, its "destruction had a very significant psychological impact" on Mostar's Muslims.[572] Had the Old Bridge been on the 1972 World Heritage List, then it would have automatically acquired the triptych's international and third layer.

"if the protection of cultural property in armed conflict were reoriented around the World Heritage Convention, the field would finally constitute a coherent and comprehensive legislative framework".

[565] *Nuclear Weapons* Advisory Opinion (n 404) para 25. *See also Wall* Advisory Opinion (n 174) para 106.

[566] Bories (n 15) p 71.

[567] During the 2003 Iraq conflict, only the ruins of Hatra were considered as world heritage, even though Iraq submitted an "indicative list" to UNESCO in 2000, pointing at Ur, Wasit, Ukhaidhir, Samarra, Achour, Nimroud and Ninive. *See* Abtahi, "Le conflit armé du printemps 2003 en Irak et le sort du patrimoine culturel mésopotamien" (n 2) pp 204-205.

[568] Bories (n 15) p 68.

[569] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1611.

[570] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1611.

[571] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1282.

[572] *Prlić et al* Trial Judgment (n 453) Vol 2 para 1584.

Accordingly, this Chapter has shown that State responsibility adjudicatory mechanisms (specifically the IACtHR) and ICR-based jurisdictions (specifically the ICTY-ICC) have considered the relationship between the collective and its anthropical and/or natural environment through a heritage-oriented lens. Therein, damage to the collective's cultural tangible adversely impacts on the collective's identity, which contributes to its heritage. This is so because the tangible supports the expression of the intangible. Contrast this with Al Mahdi's remark during an attack, that:

> Those UNESCO jackasses […] think that this is heritage. Does 'heritage' include worshipping cows and trees?[573]

At that time, Al Mahdi understood heritage as encompassing only the intangible ("worshipping") to the exclusion of the tangible ("cows and trees"). This rigorist interpretation of religious texts which excludes the physical representation of the divine often results in razing any tangible elements that the collective associates with it spirituality. But Al Mahdi's initial position evolved to the point where he offered to one of the mosques' imam to reimburse the cost of a destroyed door.[574] This is so even though the Trial Chamber held that property crimes "are generally of lesser gravity" than crimes against persons.[575]

Sites like Timbuktu are thus attacked not *despite* the fact that they are heritage but *because* they are so.

IV. Conclusion to Chapter 1: tangible-centred means with heritage-centred (intent and) consequences

When adjudicating attacks targeting culture through the prism of war crimes, it is that corpus of law's tangible-centred features that first come to mind. For the destruction and pillage of culture's tangible is what all relevant international legal instruments proscribe. However, behind ravages inflicted on culture's tangible, there often looms a heritage-centred consequence, if not intent. The distinction between the tangible-centred and heritage-centred approaches is not easily discernible nor does it always exist. This may be explained by the lack of clarity of, inter alia the belligerents' intentions when culture's tangible is ravaged, or the relationship between peacetime and non-peacetime legal instruments. These factors have in turn impacted on the findings of ICR-based jurisdictions as well as scholarly writings. This Chapter has sought to clarify this, by proposing a standardised approach.

Beginning with the tangible-centred approach, both IHL and ICL provide for the protection of culture's tangible during international and, more limitedly, non-

[573] *Al Mahdi* Trial Judgment (n 49) para 46.
[574] *Al Mahdi* Trial Judgment (n 49) para 104.
[575] *Al Mahdi* Trial Judgment (n 49) para 77. Referring to an expert witness' reliance on para 11 of the Report of the Special Rapporteur in the Field of Cultural rights, UN Doc A/71/317 (2016), The Chamber required that the reparations order be implemented "in a gender and culturally sensitive manner". *See Al Mahdi* Reparations Order (n 49) para 105.

international armed conflicts. This protection can be both direct and indirect. Under the former, the relevant instruments protect culture's tangible either by listing some of its movable and immovable components, whether secular or religious, or by referencing legal persons owning and/or administering them. Interestingly, some IHL and ICL instruments prohibit damaging the natural environment, an important feature for those instances where culture's tangible comprises natural feature. But some of these instruments also directly refer to the concept of cultural property itself. Either way, this category provides a very high level of protection to culture's tangible, the components of which it lists alongside, eg hospitals. As for the protection per se, these instruments prohibit damage, destruction and seizure of the property in question, while occasionally accepting the exception of military necessity. The second category provides a dual indirect protection to culture's tangible by enabling to consider the latter as part of tangibles of a civilian character, ie urban ensembles or property/objects. First, the protection consists of prohibiting destruction, attack, bombardment and devastation, with most of them being subjected to military necessity. Second, it prohibits the seizure, pillage, appropriation and plunder, as well as qualified possession and administration of the enemy's civilian property/objects, with some recourse to military necessity. As indicated earlier, the indirect protection of culture's tangible may be invoked not because of its special value, but because of the principle of distinction, which would characterise culture's tangible as civilian. This explains why the concept of military necessity is more permitted under indirect protection than under direct protection. While these layers of protection are complementary to each other, ie the direct and indirect protections should not be seen as an "either or" protections, the former is the lex specialis to the latter, as also noted by Bugnion and R O'Keefe.[576] These instruments are thus tangible-centred since their violation results in damaging culture's tangible.

The ICTY and ICC have addressed two scenarios of damage to culture's tangible. The one that comes to mind more readily is that which concerns the tangible that received treaty law's formal unction by means of recognition of their world importance. In these scenarios, the ICTY and ICC have had to combine IHL-ICL with a so-called peacetime instrument, ie the 1972 World Heritage Convention, thereby altering the very meaning of "peacetime". Under this scenario, the placement of culture's tangible on the 1972 World Heritage List automatically transforms the tangible into a local-national-international triptych for this is what the placement mechanism require. Consequently, the local and national population as well as the international community become the interested parties in such protection. In sum, both the object of the destruction (cultural property) and its victims (the collective as the sum of natural persons) are considered as a local-national-international triptych, each. Under the second scenario, the ICTY has considered damage to religious and educational institutions that, while important locally, have not gone through the aforementioned formal process of recognition as world cultural property. As a consequence of this lack of formalistic internationalisation of the tangible, both the object and the victims constitute at minimum a local-national diptych. Rather than a ceiling, however, this is a floor. Indeed, as seen before, the 1972 World Heritage Convention provides that the non-inclusion of a property on the 1972 World Heritage List or the 1972 World Heritage in Danger List does not mean that it does not have an outstanding universal value.[577]

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[576] François Bugnion, "La genèse de la protection juridique des biens culturels en cas de conflit armé" (2004) 86(854) *International Review of the Red Cross* 313, p 321. *See* also Roger O'Keefe, "Cultural Property Protection and the Law of War Crimes" (2017) 38 *NATO Legal Gazette* pp 2-6.
[577] World Heritage Convention (n 81) art 12.

In practice, thus, and as seen, when a site or an object is included on the aforementioned lists, it becomes inevitable for ICR-based jurisdictions to adjudicate their damage beyond the prism of war crimes provisions. Two main reasons explain this. First, the 1972 World Heritage in Danger List triggers its application during armed conflicts. Second, and most importantly, even when the site or object is not included in the former, its inclusion on the 1972 World Heritage List is also testimony to the tangible's importance to humanity as a whole. In fact, it is so important a matter that, like the right to life, it cannot be easily dismissed during armed conflicts. This approach has expanded war crimes' tangible-centred approach – in terms of typology of damage – towards the larger heritage-centred one, wherein focus is placed on the heritage-based consequences of the damage to the victims. In other words, this approach concerns not only the importance of the tangible as a local-national-international triptych, but also its interaction with the collective, which contributes to the latter's identity, memory and conscience. In other words, as seen in Dubrovnik and Timbuktu, the collective as the sum of its natural persons defines itself, inter alia, through its tangible environment. This may be anthropical, whether secular or religious or both. But it may also be natural, as with the IACtHR cases. Other disciplines underscore this reasoning. According to heritage and memory studies, destroying culture's tangible as a means of warfare shapes memory in various ways; it adds memories, new meanings, associations, discourses and contexts, since "the memory of a siege becomes part of the fabric of a city, its inhabitants, its memorials, and its ruins".[578] Neuroscience and cognitive studies reveal that beyond the details of traumatic events (such as the bombing of a cultural site), individuals remember their meaning, which showcases how memories are constructed and deconstructed, in turn generating a distinct narrative and impacts on the collective heritage.[579] Attacks directed at culture's tangible perturbs the collective's identity, memory and heritage, with the perpetrator's aim of creating a blank canvass in order to rewrite history.[580] Bevan, an architect, posits that in this "war against architecture":

> the erasure of the memories, history and identity attached to architecture and place – enforced forgetting – is the goal itself. These buildings are attacked not because they are in the path of a military objective: to their destroyers they *are* the objective.[581] [emphasis in the original]

Thus, attacks targeting culture's tangible aim at the intangible, ie the collective's memory, heritage and identity. They aim and/or result in the disruption of culture.

As echoed by the ICTY-ICC jurisprudence, this reasoning helps assessing the gravity of the crime and the determination of victims, natural and/or legal persons, and the assessment of the types of harms and forms of reparations, as with the ECtHR and IACtHR (Part I, Chapter 2).

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[578] Dacia Viejo-Rose, "Destruction and Reconstruction of Heritage: Impacts on Memory and Identity" *in* Anheier and Isar *Memory and Identity* (n 355) pp 3 and 9.

[579] Attacking cultural property may be grounded on, "striking an enemy by destroying what is held most dear to him; obliterating any historic trace of the Other; erasing reminders of a painful and contested past; eliminating perceived symbols of oppression to assert self-determination". *See* Dacia Viejo-Rose "Conflict and the Deliberate Destruction of Cultural Heritage" (n 155) pp 6 and 8.

[580] Viejo-Rose, "Conflict and the Deliberate Destruction of Cultural Heritage" (n 155) p 7. For a different view, s*ee* Lostal, "The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case (n 15) pp 45-58.

[581] *See* Robert Bevan, *The Destruction of Memory: Architecture at War* (Reaktion Books Ltd 2006), p 8.

In sum, when adjudicating attacks targeting culture as war crimes, the following methodology may be used. The tangible-centred approach provides a variety of possibilities to qualify the damages, given the vast body of war crimes provisions available. The heritage-centred approach will help understand the intent and/or consequence of such targeting by considering the relationship between culture's tangibles and natural persons, ie the collective. Both of these can be viewed as either a triptych or diptych, depending on whether or not so-called peacetime instruments are involved. In Part I Chapter 2, this methodology was successfully proposed for State responsibility's HRCts pillar. In the present Chapter, it has also been shown that ICR-based jurisdiction have used elements of this methodology, by even referencing ISCMs and, importantly, the IACtHR, eg for the disruption of culture. This study will now explore the applicability of the proposed methodology to CaH (Chapter 2) and genocide (Chapter 3), the other two pillars of ICR's tripartite crimes.