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

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Summary

ADJUDICATING ATTACKS TARGETING CULTURE

REVISITING THE APPROACH UNDER STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY

That culture's tangible elements may be harmed as a collateral damage is no more questionable than human life being so affected. Particularly reprehensible, however, is when culture's tangible elements are intentionally targeted as part of attacking the enemy's identity. Behind these attacks, however, there always looms the feeling of the intangible's alteration. This is so because the tangible itself will often form part of memory, which also contributes to collective identity. Hence the alteration of the tangible will impact on collective identity, which is also intangible. Thus, culture's tangible components (eg a temple) are often a manifestation of or a support to its intangible (eg spiritual practice). Therefore, directing attack against the former will impact the latter. But it is also possible to alter the intangible (eg prohibition of spiritual practice) without altering the tangible. However obvious, these observations have not been systematically considered by international legislators, adjudicators/practitioners and scholars, when it comes to the adjudication attacks targeting culture.

Hence this thesis' primary research question: to what extent and how international adjudicatory mechanisms have considered the causes, means and consequences of intentionally attacking the tangible and intangible components of culture; and how should their separate practice be brought together.

To this end, this thesis first analyses relevant treaty law provisions in order to propose common denominators to place culture in a legal mould. This thesis will not focus on form. Thus, the emphasis will be placed neither on international legal instruments' varying and not so rigorous terminological use of the terms "cultural property" and "cultural heritage" nor on academia's use of "intangible cultural heritage" or "tangible cultural heritage". Instead, this thesis opts for substance, when addressing culture. Accordingly, the latter may be anthropical or natural, movable or immovable, secular or religious and, importantly, tangible or intangible. This helps, in turns, to place culture in a judicial mould. This approach assists not only to evaluate how cultural damage can be relied upon in judicial proceedings by both natural and legal persons, but also to consider the judicial locus standi of culture itself, when embodied by legal persons.

From this vantage point, this thesis then compares and contrasts the practice of State responsibility-based or individual criminal responsibility-based ("ICR-based") adjudicatory mechanisms, with respect to the cause, means and consequences of attacks

targeting culture. This thesis shows how, in most cases of use of violence, attacks targeting culture constitute “the elephant in the room”. Often not expressly recognised as such, the aforementioned jurisdictions have, nevertheless, considered the direct or indirect targeting of culture’s tangible and intangible components, as a potent tool to either directly aim at eradicating undesired manifestations of culture or to indirectly instil fear within the adversary’s ranks.

This thesis proposes, for the first time, a formal and comprehensive categorisation of the above, dispelling any common misperceptions that may have been developed over the years by adjudicators and academics. This thesis will demonstrate that, while seemingly unrelated, State responsibility and ICR-based jurisdictions share more common denominators than expected, *if* one transcends international law’s traditional view (or lack thereof) surrounding the concept of culture and considers culture as a legacy-oriented triptych made of local, national and international panels. While each of these panels makes sense in isolation, they are best understood when viewed together. Through a systematic review of the practice of both modes of responsibility’s adjudicatory mechanisms, this thesis establishes their converging acceptance that attacking culture may be both tangible-centred and anthropo/heritage-centred, in terms of both typology of damage and its victims.

Both State responsibility and ICR-based jurisdictions have addressed the typology of cultural damage on the basis of States’ breach of relevant treaty law or natural persons’ violations of relevant statutes. Since the end of the nineteenth century, international legislators have detailed the typology of damage inflicted on culture’s tangible, ranging from pillage to destruction. As for heritage-centred attacks targeting culture, they involve culture’s intangible, such as language and religion. This can occur in isolation (limitations through legislative measures) or in combination with culture’s tangible components (closing down places of worship). This type of violation often occurs in the context of mass human rights violations (mainly addressed by human rights courts) or mass human rights crimes (mainly addressed by ICR-based jurisdictions).

The consideration of victims of attacks targeting culture can be tangible-centred but also anthropo-centred. Starting with the latter, this thesis identifies a twofold convergence with respect to the practice of both State responsibility and ICR-based jurisdictions. Accordingly, regional human rights courts have ruled that natural persons as members of the collective may suffer mass human (cultural) rights violations. This approach is akin to gross human rights violations under the crime against humanity of persecution, where individuals are targeted because they belong to a group. But regional human rights courts have also considered that the collective as the sum of natural persons may suffer heritage-centred attacks targeting culture. This approach is akin to genocide, where it is the group, as such, that is targeted. But natural persons can also claim to be the victims of attacks targeting culture’s tangible, which affect collective identity. In this context, natural persons as part of the collective or else the collective as the sum of natural persons become the victims of the destruction of culture’s tangible. But the victims of attacks targeting culture can also be viewed in a tangible-centred manner. Under this approach, legal persons can participate in judicial proceedings and seek reparations for harm sustained as a result of damage inflicted on their property. This becomes interesting when the said property consists of culture’s tangible. Thus, an institution dedicated to religion, arts and sciences may seek participation in judicial proceedings and demand reparations in two non-mutually exclusive ways. On the one

hand, for instance, a museum may seek reparations for damage sustained to it, as a building (mortars fired at it and damaging its walls). On the other hand, the museum may claim damage as a result of looting of movable cultural tangible (ornaments, books, scientific instruments) that it owns/administers. State responsibility adjudicators have been the forerunners of this approach, which subsequently materialised in the statutes of some ICR-based jurisdictions, specifically that of the International Criminal Court.

In sum, this thesis will propose a set of tools to enable international legislators, adjudicators and scholars to better process the adjudication of the causes, means and consequences of attacks targeting culture. Building on this, they could expand the scope of work to include customary international law and national practice.