

NOTES

SHORT AND QUICKLY DELIVERED, YET QUITE FULL OF MEANING: THE INTERNATIONAL CRIMINAL COURT JUDGMENT ABOUT THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE IN TIMBUKTU

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Abstract

The judgment rendered by the International Criminal Court (ICC) on 27 September 2016 in the case *Al Faqi Al Mahdi* was much awaited for and – for better or for worse – will be remembered as the first decision of an international criminal tribunal in a case completely dedicated to acts directed at cultural heritage¹. The Nuremberg Tribunal and the International Criminal Tribunal for ex Yugoslavia (ICTY) included in their judgments very important findings about acts directed at cultural properties, evaluating them in connection with other kinds of charges, they never handed down, though, a sentence solely on those grounds².

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¹ International Criminal Court, Trial Chamber VIII, Judgment and Sentence in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Situation in the Republic of Mali), 27 September 2016 (No. ICC-01/12-01/15).

² The Charter of the International Military Tribunal of Nuremberg included the plunder of public or private property among war crimes; Alfred Rosenberg was sentenced to death for, *inter alia*, the systematic plunder of cultural objects (see A. Chechi, *The Settlement of International Cultural Heritage Disputes* (2014) 268). The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has more than once taken into consideration attacks directed at cultural heritage, as relevant in the assessment of crimes against humanity, particularly as elements of the crime of persecution and evidence of the *mens rea* of genocide, and *per se* as war crimes (see specifically the Tadić case, the Kordić & Cerkez case, the Jokić case and the Krstić case, F. Mucci, *La diversità del patrimonio e delle espressioni culturali nell'ordinamento internazionale. Da ratio implicita a oggetto diretto di protezione* (2012) 289).

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1. The crime charged

Since the suspect has admitted guilt and cooperated with the Prosecutor, this concise ICC decision – barely fifty pages – has come just one year after the opening of the case and after only three days of trial³. The choice of the ICC Prosecutor to charge a brigade commander – not the highest echelons of Ansar Dine⁴ – ‘only’ with committing the attacks at the monuments, while there could be reason to believe that Al Mhadi also committed sexual crimes, could be criticised⁵. On the other hand, thanks to the huge amount of evidence of the facts (the destructions and related declarations had been filmed and facts were agreed by the defense and the Prosecutor) and to the transferral of Al Mahdi by the authorities of Niger into the custody of the ICC, this choice has led to a quick judgment, adopted at the same time as the sentence, that has immediately been executed. Considering that crimes of attacking cultural properties undoubtedly constitute a contemporary emergency, this result is extremely significant and «the decision of the International Criminal Court is a landmark in gaining recognition of the importance of heritage for humanity as a whole and for the communities that have preserved it over the

³ The warrant of arrest was issued on 18 September 2015, Al Mahdi was transferred to The Hague on 26 September 2015, the decision on the confirmation of charges was adopted on 24 March 2016 and the trial was concluded in three days (22-24 August 2016).

⁴ A. Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, in *Just Security*, 29.9.2015, at <https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/>.

⁵ V.V. Suhr, *The ICC's Al Mahdi verdict on the destruction of cultural heritage: two steps forward, one step back?*, in *Wölkerrechtsblog*, 5.11.2016, at <https://voelkerrechtsblog.org/the-iccs-al-mahdi-verdict-on-the-destruction-of-cultural-heritage-two-steps-forward-one-step-back/>.

centuries. (...) [It] is a crucial step to end impunity for the destruction of cultural heritage»⁶.

2. The sentence and the facts

Al Mahdi is convicted of the war crime of attacking protected objects as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the ICC Statute, his sentence is to nine years of imprisonment, to which the time already spent in detention will be deducted. The destroyed protected cultural objects are, as reknown, nine mausoleums and the door of the Sidi Yahia Mosque in Timbuktu, Mali. They were attacked between 30 June 2012 and 11 July 2012 upon decision of the leaders of two armed groups (Ansar Dine and Al-Qaeda in the Islamic Maghreb) that had taken control of Timbuktu following the retreat of Malian armed forces. The destruction was decided to stop the frequent visits of the residents to the mausoleums, commonly perceived as places of prayer and, for some, places of pilgrimage. Such practices of the Timbuktu population were unacceptable, according to the fundamentalist religious approach of the armed groups that were administering the territory. Al Mahdi was the leader of the morality brigade "Hesbah"; though agreeing on the theoretical reasons prohibiting any construction over a tomb, he had recommended not destroying the mausoleums, so as to maintain relations between the population of Timbuktu and the occupying groups, but he then conducted the attacks without hesitation when the instruction was issued.

3. Specific elements of interest

Several reasons concur to convey the attention of the international community on this case: the acts at issue are of wilful, programmed destruction; the destroyed cultural sites are of recognised outstanding universal value (OUV), since most of them

⁶ UNESCOPRESS, Timbuktu Trial: «A major step towards peace and reconciliation in Mali», 27.09.2016, at http://www.unesco.org/new/en/media-services/single-view/news/timbuktu_trial_a_major_step_towards_peace_and_reconciliati/#.V-xp0CgrKUI

are inscribed in the well known UNESCO List of World Cultural and Natural Heritage; the accused has admitted guilt and cooperated with the Prosecutor during the whole trial, spontaneously expressing remorse for his acts and calling on people not to become involved in the same acts “because they are not going to lead to any good” for humanity.

The interest of this case is evident, particularly considering that similar acts of wilful destruction of OUV cultural sites have been perpetrated in Syria and in Iraq and, to a lesser extent, in Libya by other fundamentalists, thus it is perceived as a possible leading case. Even though Iraq, Syria and Libya haven’t ratified the ICC Statute, a sufficient precondition to the exercise of jurisdiction by the Court is that the State of which the person accused of the crime is a national is a Party to the ICC Statute⁷. Hence, foreign fighters having the nationality of a Party to the Statute could be submitted to the jurisdiction of the Court even if the State where the facts occurred is not a Party, unless, in compliance to the principle of complementarity, the case is being investigated or prosecuted by a State which has jurisdiction over it.

4. Main issues in the reasoning of the Court

A first substantial part of the judgment is about the procedural peculiarities following from the admission of guilt and subsequent cooperation of Al Mahdi. His spontaneous admissions have helped to allow a swift resolution of the case. In the Agreement regarding the admission of guilt, in fact, the Prosecutor and the defense have included a common document, presenting the factual basis of the admission of guilt⁸. It touches on all the elements to be proven, namely: that Al Mahdi directed an attack, that the object of the attack was one or more buildings dedicated to religion or historic monuments which were not military objectives, that Al Mahdi intended such buildings to be the object of the attack, that the conduct took place in the context of and was associated with an armed conflict not of an

⁷ ICC Statute, Article 12; one of the two preconditions – ratification by the State where the fact has happened and ratification by the State of which the person accused is a national – is sufficient to establish jurisdiction by the Court. Syria has signed the Statute, but then never ratified it.

⁸ ICC-01/12-01/15, February 2016, Annex A.

international character and that Al Mahdi was aware of factual circumstances that established the existence of an armed conflict.

The Court, in its reasoning, recalls some crucial steps that have led to the adoption of the Rome Statute, reminding how article 65 on the proceedings on an admission of guilt is the result of intense technical negotiations, that have taken into consideration both common and civil law approaches. The Court considers the final text of the article “not dissimilar to the traditional common law ‘guilty plea’”, since the accused is afforded an opportunity to make an admission of guilt at the commencement of the trial, but also “more analogous to a summary or abbreviated procedure traditionally associated with civil law systems”, because it requires the Chamber to conclude that the admission is “supported by the facts of the case”, specifically requiring it to consider both the admission of guilt “together with any additional evidence presented”⁹. Al Mahdi’s admission of guilt (a pilot case at the ICC, hence of great interest) together with his cooperation and spontaneous declaration, could hopefully have an amplified deterrent effect in relation to other acts of intentional destruction of cultural heritage and more generally encourage other subjects to cooperate with the Court.

Not only the facts were not contested (on the contrary, several circumstances could be better ascertained thanks to the cooperation of the accused), Al Mahdi had also accepted that all charged modes of liability (co-perpetration, soliciting and inducing, aiding and abetting and contributing in any other way) were established. The Court considered that the accused could be convicted of only one of the modes of principal liability (i.e. those listed in Article 25(3)(a) of the Statute), otherwise he would be punished twice for the commission of the same crime. It also added that to conclude otherwise “contributes little to the fair labelling of the responsibility of the accused”. So co-perpetration was chosen as it best reflected Al Mahdi’s criminal responsibility¹⁰.

Another interesting part of the judgment is about the evaluation of the gravity of the crime. The Court found five mitigating individual circumstances and no aggravating one,

⁹ On art. 65 see paras. 21-28 of the Judgment and Sentence.

¹⁰ See paras. 29-63 of the Judgment and Sentence.

mainly because it had already evaluated the aggravating elements when assessing the gravity of the crime, as indicated by Article 78 of the ICC Statute¹¹. On one hand, the crime is deemed to be of lesser gravity than crimes against persons, on the other hand, it is anyway deemed to be “inherently grave”, by reason of the extent of the damage caused and the nature of the unlawful behaviour.

With regard to the fact that the crime has been deemed to be less grave than crimes against persons, just as if it were a ‘simple’ crime against property, scholars have highlighted that “cultural heritage has been relegated to a subset of property offences”, suggesting that “destroying a cultural heritage site that has stood for centuries, and is an important part of a group’s social glue, is about as bad as destroying a modern hospital”, not considering that “while both buildings play important roles, one is much harder to replace than the other”¹². In fact, this is a consequence of the “retrograde attitude” taken by the ICC Statute to crimes against cultural heritage, following a ‘civilian-use approach’ instead of the more innovative and appropriate ‘cultural-value oriented approach’¹³. On the other hand, though, the Court clearly states that, being all the sites but one UNESCO World Heritage sites, “their attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community”¹⁴.

In a way, it seems that the Court has thus tried to re-balance its assessment of the gravity of the crime. A similar effort of re-balancing could be inferred from other circumstances assessed by

¹¹ The Chamber correctly notes that it “cannot “double-count” any factors assessed in relation to the gravity of the crime as aggravating circumstances and vice versa” (see para. 70 of the Judgment and Sentence).

¹²See L. Lixinski and S. Williams, *The ICC’s Al-Mahdi ruling protects cultural heritage, but didn’t go far enough*, 19th October 2016, at <http://www.law.unsw.edu.au/news/2016/10/icc%E2%80%99s-al-mahdi-ruling-protects-cultural-heritage-didn%E2%80%99t-go-far-enough>.

¹³ The more innovative approach is followed in the Second Protocol to the 1954 The Hague Convention on the Protection of Cultural Property in Times of Armed Conflict; see M. Frulli, *The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: the Quest for Consistency*, in *European Journal of International Law*, 203-217, 210 (2011).

¹⁴ See para. 80 of the Judgment and Sentence.

the Court. The fact that the discriminatory religious motive invoked for the destruction of the sites has been deemed to be “undoubtedly relevant” as a circumstance increasing the gravity of the crime is particularly interesting, considering that the discriminatory intent is a typical element of some crimes against humanity (namely, persecution and genocide). Establishing this ‘conceptual link’ could be *per se* considered as an indication of ‘upgrading’ of this crime, if it is true that crimes against humanity are more serious than war crimes¹⁵. In addition to this, the Court also “considers that the fact that the targeted buildings were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed”, so admitting that attacking those cultural heritage sites was tantamount to attacking the identity, the dignity and the feelings of the people of Timbuktu¹⁶.

5. What the judgment doesn't say and possible future developments

In spite of its very limited length, the judgment touches on several interesting issues, such as the significance of the admission of guilt and the gravity of the crime, briefly commented above. On at least two intertwined main issues, though, it is limited to apodictical statements and cryptical hints.

The first is the applicability of the war crime when the attack is carried out after an armed group has taken control of a territory. The Court does not spell out the reason for this conclusion. It says that the Statute makes no distinction as to whether the attack was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group and that the jurisprudence of the ICTY is of limited guidance on this issue. The only substantial reason to which it makes reference before concluding that what is required by the Elements of

¹⁵ See M. Frulli, *Are Crimes Against Humanity More Serious than War Crimes*, in *Eur. J. Intr'n'l L.*, 329-350 (2001).

¹⁶ The people of Timbuktu, it is to be remembered, are the direct – not the only – victims of the crime, since the whole international community is affected by the destruction of the sites.

Crimes¹⁷ “is not a link to any particular hostilities but only an association with the non-international armed conflict more generally” is that the Statute “reflects the special status of religious, cultural, historical and similar objects”, and that ‘special status’ is the reason why “international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it”¹⁸.

This ‘special status’ is the reason why cultural heritage must be protected from intentional destruction both in time of peace and of war, and independently of the exact legal qualification of the conflict, as spelled out in the 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage. The most effective way of doing so under international criminal law would be to add the conduct of attacking cultural properties to the list of crimes against humanity. Voices have been raised both in doctrine and at the institutional level to call for such an inclusion¹⁹. The European Parliament, in a resolution of 30 April 2015, explicitly requested to add not properly ‘cultural genocide’ but ‘cultural cleansing’ to the list of crimes against humanity of the ICC Statute (“calls on the European Union to take the necessary steps, in collaboration with UNESCO and the International Criminal Court, to extend the international law category of crimes against humanity so that it encompasses acts which wilfully damage or destroy the cultural heritage of mankind on a large scale”).

The next review conference of the Rome Statute of the ICC is due in 2017; it could engage in this issue and offer new elements to infer that “the development of the rules of customary international law as also affirmed by the relevant case-law, related to the protection of cultural heritage in peacetime as well as in the event of armed conflict”²⁰ has progressed. The establishment, in

¹⁷ Namely, that “the conduct took place in the context of and was associated with an armed conflict not of an international character”.

¹⁸ See paras. 15-18 of the Judgment and Sentence. This conclusion may be controversial when referred to non-international conflicts; see R. O’Keefe, *Protection of Cultural Property*, in A. Clapham and P. Gaeta, *The Oxford Handbook of International Law in Armed Conflict* (2014) 516.

¹⁹ Cfr. F. Francioni-J. Gordley (ed.), *Enforcing International Cultural Heritage Law* (2013), 63. A. Green Martínez, *Destruction of Cultural Heritage in Northern Mali: A Crime Against Humanity?*, *J. Intn’l Criminal Justice*, 1073-1097 (2015).

²⁰ In the words of the 2003 UNESCO Declaration.

2016, of UNESCO 'task forces', mechanisms for the rapid mobilization of national experts within the *Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict*, is already a relevant development in international practice, together with action directed to the protection of cultural heritage included in Security Council resolutions adopted on the basis of Chapter VII of the Charter²¹. This judgment is another step forward in that direction.

²¹ Resolutions about Iraq (2003), and Iraq and Syria in connection with international terrorism (2015), tackle with the specific issue of international traffic of cultural objects and the mandate of the UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) included since its inception, in April 2013, the support for cultural preservation; see F. Mucci, *Intentional destruction of cultural heritage by ISIS: the reaction of the International Community against this specific aspect of the aggression to peace and human rights*, in *Peace Processes Online Rev.*, 1-15 (2016).