



### OSSERVATORIO SUI TRIBUNALI INTERNAZIONALI PENALI N. 3/2019

#### 1. THE PROTECTION OF CULTURAL HERITAGE UNDER THE FRAMEWORK OF THE ICC STATUTE: THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI

##### 1. *The Al Mahdi Judgment*

Between June and July 2012, Mr. Al Mahdi took part in the destruction of mausoleums of saints and mosques in Timbuktu (Mali). This conduct took place at a time where Timbuktu was under the control of the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb. Among other political and religious measures, these groups established a morality brigade called the Hesbah. Mr. Al Mahdi was appointed as the leader of such a brigade, which was tasked with controlling the morality of the population of Timbuktu and suppressing what was perceived as vice. In this context, the leader of Ansar Dine (Mr. Ag Ghaly) decided to destroy the mausoleums of Timbuktu in condemnation of the practices of the local population of visiting these sites to pray. Mr. Al Mahdi initially advised against this decision, but then agreed to carry out the destruction and was directly involved in the attacks to ten sites of religious and historical significance (nine of which also enjoyed the status of protected UNESCO World Heritage sites). In particular, Trial Chamber VII (“the Chamber”) of the International Criminal Court noted that Mr. Al Mahdi had exercised joint control over the attacks and was «fully implicated in its execution» (International Criminal Court, Trial Chamber VII, *In the Case of The Prosecutor V. Ahmad Al Faqi Al Mahdi, Judgment and Sentence*, 27 September 2016, para 40).

On the grounds of Mr. Al Mahdi’s admission of guilt and of the evidence examined, the Chamber convicted him as a co-perpetrator of attacks against protected objects and found him in breach of Art. 8(2)(e)(iv) of its Statute. The latter, in particular, defines as war crimes intentional attacks against, among other things, buildings dedicated to religion, education or art purposes as well as historic monuments, provided that they are not military objectives. In reaching this conclusion, the Chamber observed that the attacked mausoleums and mosques were in fact both religious buildings and historic monuments. Indeed, they played a role in the cultural life of the city and their «special importance to international cultural heritage» was implied in their status as UNESCO World Heritage.

##### 2. *The Reparations Order*

Already in the judgments on merits, the Chamber took into great consideration the special significance of the destroyed sites as well as the attachment of the local population to them in order to assess the gravity of Mr. Al Mahdi’s offence and to determine an appropriate

sentence. With this respect, it observed that the people of Timbuktu were greatly attached to the mausoleums for their religious significance, that the symbolic value of the mausoleums also had psychological implications (since they were perceived as protecting the citizenry) and that the local population was collectively involved in their maintenance. Therefore, the Chamber held that the buildings «were not only religious buildings but had also a symbolic and emotional value for the inhabitants of Timbuktu» (para 79). Moving from the local to the global dimension, the Chamber also noted that the destruction of the sites impacted not only the people of Timbuktu but all Malians as well as the international community. For all this reason, the Chamber considered that the discussed offence had been of significant gravity, and condemned Mr. Al Mahdi to 9 years of imprisonment.

In its judgment on reparations of 17 August 2017 (International Criminal Court, Trial Chamber VII, *In the Case of The Prosecutor V. Ahmad Al Faqi Al Mahdi*, Reparations Order, 17 August 2017) it is notable that the Chamber considered not only the people of Timbuktu but also the people of Mali and the international community as a whole to be victims of the discussed crime. However, the ICC distinguished between these subjects on the grounds of the harm suffered, arguing that the local communities of Timbuktu were the main victims, since they had suffered «disproportionately more harm» (para 52). Furthermore, the ICC noted that focusing its assessment of the harm caused by the destruction of the sites on its effects on the local population would maximise the effects of the reparation measures, since it is precisely the local population the one that is best placed in relation the preservation of cultural heritage. For all these reasons, without undermining the value of cultural heritage for all mankind, the ICC chose to focus on its special significance for local populations and to recognise a special value to their role in the preservation of such heritage.

The local and collective dimension of the damage caused by Mr. Al Mahdi was also acknowledged in relation to the types of reparation awarded. Because the destruction of the mausoleums was felt by the whole community of Timbuktu, the Chamber assessed that it would be appropriate to award collective reparations in relation to both the damage suffered by the protected buildings themselves and to the moral harm caused by their destruction. In relation to the latter, it is particularly noteworthy that the collective reparations ordered by the Chamber concerned all the subjects affected by the destruction – from the local community of Timbuktu to the Malian State and the international community. However, because of the recognition that the greatest harm had been suffered by the people of Timbuktu, the Chamber awarded them specific reparations consisting in the rehabilitation of the sites (which in the meantime had been restored by UNESCO) and of «collective rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Buildings» (para 104). As for the State of Mali and the international community, the Chamber deemed appropriate to award a symbolic reparation of one Euro.

The Chamber's focus on the inhabitants of Timbuktu as the main victims of the attacks to the protected buildings was not challenged by the subsequent appeal brought against the reparations order by the Legal Representative of the Victims (LRV). The appeal hinged on two main questions. The latter concerned, respectively, whether the Chamber had erred in limiting individual reparations for economic harm to those inhabitants whose livelihoods exclusively depended on the protected buildings and in delegating the Trust Fund for Victims with the power to make determinations on individual victims' applications. The appeal also raised issues of confidentiality for victims who did not wish to disclose their identity to Mr. Al Mahdi. As a result of the appeal, the Appeals Chamber amended its reparations order on 8 March 2018 to ensure anonymity to victim applicants and to clarify that the administrative screening carried out by the Trust Fund for Victims can be reviewed by the Trial Chamber either *proprio motu* or at the request of victim applicants (International Criminal Court, Appeals

Chamber, *In the Case of The Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgment on the appeal of victims against the “Reparations Order”*, 8 March 2018. For a reflection on the broader implications of the appeals judgment on victims’ access to justice during reparations proceedings, see S. SHUN MING YAU, *The Katanga and Al Mahdi Appeals Judgments and the Right of Access to Justice for Victims: Missed Opportunity?*, in *EJIL:Talk!*, 9 April 2018, available [here](#).

### 3. Comment

The judgment under review attracted both praise and criticism. On the one hand, this case was seen as an important occasion to foster the repression of crimes against cultural heritage under international criminal law and jurisprudence (K. WIERCZYŃSKA and A. JAKUBOWSKI, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, in *Chin. Jour. Int. Law*, 2017, p. 695 ff.) On the other hand, it has been noted that the choice to classify the conducts of Mr. Al Mahdi as war crimes rather than as crimes against humanity prevented a full understanding of the harm suffered by victims, and of the seriousness of attacks against cultural property as encompassing an attack to persons (P. ROSSI, *The Al Mahdi Trial before the International Criminal Court: Attacks on Cultural Heritage Between War Crimes and Crimes Against Humanity*, in *Dir. um. dir. int.*, 2017, p. 87 ff.). An alternative qualification of the destruction of cultural property as a crime against humanity would indeed be possible under Art. 7(1)(h) whenever such acts are carried out as part of a widespread or systematic attack against civilian populations and encompass the intentional and severe deprivation of fundamental rights of the targeted group (P. ROSSI, *The Al Mahdi Trial*, cit., pp. 91 – 93. See also M. V. VLASIC and H. TURKU, *Blood Antiquities: Protecting Cultural Heritage beyond Criminalization*, in *Jour. Crim. Just.*, 2016, p. 1175 ff., pp. 1189 – 1191).

The Chamber’s judgment in the *Al Mahdi* case has also received much criticism in relation to the matter of the identification of victims of the destruction of cultural heritage. Interestingly, such criticism has considered the Chamber’s approach alternatively as too universalist or as too relativist. As for the former critique, it has been argued that in its assessment of the gravity of the crime under review, the Chamber relied excessively on its impact on humanity as a whole, rather than focusing on its effects on local communities. According to this view, the Chamber’s main focus in this context was on the qualification of the destroyed buildings as World Heritage Sites by UNESCO (P. CASALY, *Al Mahdi before the ICC: Cultural property and World Heritage in International Criminal Law*, in *Jour. Crim. Just.*, 2016, p. 1199 ff.). The latter critical analysis, on the other hand, has concerned the ostensibly anthropocentric character of the Chamber’s assessment of the gravity of the destruction of the protected buildings. Proponents of this view argue that the Chamber’s heavy reliance on the value of the destroyed buildings for local communities for the purpose of establishing the gravity of Mr. Al Mahdi’s conduct overshadowed the question of the intrinsic value of cultural heritage in itself. This interpretative approach is criticized as one that undermines the possibility of future prosecutions before the ICC for the destruction of cultural heritage of no specific relevance for local communities’ identity (see M. LOSTAL, *The Misplaced Emphasis on the Intangible Dimension of Cultural Heritage in the Al Mahdi Case at the ICC*, in *Inter Gentes*, 2017, p. 45 ss., and more broadly M. A. DRUMBL, *From Timbuktu to The Hague and Beyond The War Crime of Intentionally Attacking Cultural Property*, in *Jour. Crim. Just.*, 2019, 1 ff.).

Both of these scholarly critiques do not appear to be entirely convincing. On the one hand, it is quite clear that the Chamber chose to measure the gravity of the damage inflicted to protected buildings not merely on the grounds of their qualification as World Heritage Sites but also by looking at their specific significance for local populations. This approach was even more visible in the reparations order, where the impact of the destruction of the

buildings on the inhabitants of Timbuktu gained central stage. Nonetheless, even in the reparations order the idea that the destruction of the sites also affected the international community as a whole as well as the entire nation of Mali was not entirely set aside. In fact, the Chamber's award of a symbolic compensation of one Euro to each constituted in itself a form of acknowledgment of victimhood, and thus a form of reparation in itself (F. CAPONE, *An Appraisal of the Al Mahdi Order on Reparations and Its Innovative Elements Redress or Victims of Crimes against Cultural Heritage*, in *Jour. Crim. Just.*, 2018, p. 645 ff., pp. 651 – 653).

More broadly, the so-called universalist and relativist approach seem to peacefully coexist in the Chamber's assessment of the *Al Mahdi* case. In particular, its choice to highlight the universal value of cultural heritage in its judgment and sentence and to focus on the impact of the discussed crimes on local communities in its reparations order do not appear as incoherent. Rather, such choices may be read simply as a reflection of the multi-faceted and complex nature of cultural heritage both as a public good, whose preservation is a shared interest of all humankind, and as a reflection of the values and beliefs of local communities. These views do not seem incompatible, but rather complement each other and encourage a holistic and multi-level approach to the protection of cultural heritage under international criminal law (for a broader analysis of the human dimension of the international protection of cultural heritage, see F. FRANCONI, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in *Michigan Journal of International Law*, 2004, p. 1209, and F. FRANCONI, *Human Rights and Cultural Pluralism: What Role for International Law*, in *Dir. um. dir. int.*, 2018, p. 307 ff.). It remains to be seen whether and to what extent the ICC will further develop its jurisprudence on attacks to cultural heritage, and whether this twofold understanding of cultural heritage as having a universal and relative value will continue to be upheld in its judicial reasoning.

FULVIA STAIANO