

THE DESTRUCTION OF CULTURAL PROPERTIES AS A WAR CRIME: SOME CRITICAL REMARKS ON THE ICC'S AL MAHDI CASE

In its rather short life since its establishment - 2018 marking the 20th anniversary of the adoption of its founding treaty - the International Criminal Court (hereinafter: ICC) has had the chance to trial and convict, for the time being, just three people. However limited its action might appear considering only its final results, all its delivered convictions have raised a number of important questions, appearing to already establish some issues for the ICC's future jurisprudence.

This is also the case of its latest judgment in *The Prosecutor v Ahmad Al Faqi Al Mahdi* case (hereinafter: *Al Mahdi* case): following the equally controversial *Lubanga* (2012) and *Katanga* (2014) cases, Al Mahdi's conviction is certainly set to open discussion on some unprecedented and fundamental matters, as follows.

On 27 September 2016, Trial Chamber VIII found Mr Al Mahdi guilty of the war crime punished under Art. 8(2)(e)(iv) ICC Statute as a co-perpetrator in the conducts that took place in Timbuktu (Mali), between June and July 2012, which ultimately led to the destruction of ten historic monuments and buildings dedicated to religion, nine of which were listed as UNESCO protected cultural-heritage sites. Furthermore, a reparation order was issued on 17 August 2017, which became final on 8 March 2018, when confirmed in the appeal judgment raised by the Legal Representative of the Victims; such order is currently undergoing its implementation through a plan for reparations, which is still in the drafting stage.

The situation in Mali, referred to the Office of the Prosecutor (hereinafter:

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OTP) by the Government itself, pursuant to Art. 13(a) ICC Statute, was investigated starting January 2013, and benefitted since its earliest stages from the full cooperation and disclosure of the events by Mr Al Mahdi, who was later arrested on 26 September 2015. Moreover, in an unprecedented submission before the ICC, Mr Al Mahdi reached a plea agreement with the OTP and subsequently took full responsibility for his actions and made an admission of guilt at the trial's opening, thus prompting an almost instantaneous verdict by the Chamber, which sentenced him to nine years of imprisonment.

As for the reparations order, the ICC assessed Mr Al Mahdi's liability as amounting to 2.7 million euros for the reparations owed to the Timbuktu community.

Mr Al Mahdi, regarded as an expert of Islam and of the Koran, joined the Ansar Dine group in April 2012. Such a group has been considered by the U.N. as a local Islamic terrorist organization since 2013 and has taken a significant role in the undisputed non-international armed conflict that has spread throughout the whole country starting in January 2012.

The defendant has been charged with the war crime of attacking protected objects, as punished by Art. 8(2)(e)(iv) ICC Statute, which considers the intentional attacks directed against, *inter alia*, religious buildings and historical monuments, "provided that they are not military objectives".

This crime was jointly considered by Mr Al Mahdi and the OTP as a more adequate characterization than the one set forth in the more general crime sanctioned under Art. 8(2)(e)(xii) ICC Statute, particularly regarding the *mens rea* element.

When considering the circumstances of the present case, special relevance shall be accorded to Art. 16 of the 1977 Additional Protocol II to the 1949 Geneva Conventions, applicable to non-international armed conflicts, which poses a general prohibition of committing hostilities against cultural objects and places of worship "which constitute the cultural or spiritual heritage of peoples". Nine of the ten buildings destroyed with the participation of Mr Al Mahdi had been listed as UNESCO protected, thus triggering their protection as cultural properties under Art. 16. For the tenth building, a mausoleum that was not a UNESCO-listed property, the issue should have arisen as to its qualification for safeguarding, because its destruction is not therefore necessarily deemed by the ICC as inherently of "particular gravity," thus constituting a war crime.

However, it must be noted that the Trial Chamber's decision provided no explanation of any kind as to why it ruled that even the destruction of this unlisted mausoleum was a war crime. An exhaustive definition of objects that require special protection is however provided by the Second Protocol to the 1954 Hague Convention

for the Protection of Cultural Property in the Event of Armed Conflict, on which the Chamber appears to rely entirely. Particular notice shall be given to the Chamber's interpretation of the contextual element established by Art. 8(2)(e) ICC Statute of an armed conflict of non-international character. Indeed, the ICC, without contemplating any further examination nor considering any jurisprudence of the ad hoc international criminal tribunals, satisfies itself by regarding the conduct punished under Art. 8(2)(e) (iv) ICC Statute as self-sufficient, notwithstanding "a link to any particular hostilities but only an association with the non-international armed conflict more generally". While such a characterization is not to be rejected per se, it is certainly unsettling to find a criminal court relying on a self-explanatory definition and employ locutions such as "more generally" to describe the contextualisation of the conducts.

The already mentioned unprecedented application of Art. 65 ICC Statute, and the subsequent proceedings founded on an admission of guilt, wisely led the Chamber to an exhaustive explanation as to the rationale behind such institution, with adequate weight given both to the Statute's travaux préparatoires and to a comparison between Civil and Common Law legal systems on such matter.

No such clarity pertains however to the *in concreto* considerations therefrom provided by the Trial Chamber. Art. 65(1)(c) ICC Statute requires any admission of guilt to be "supported by the facts of the case": such an element is indisputably present in the Al Mahdi case, as underlined by the Chamber itself. In considering, the ICC affirms that in the present case there were "no viable affirmative defences": this assertion constitutes quite a puzzling reflection, as the defendant, while entering an admission of guilt, waived his right to "raise defences and grounds for excluding criminal responsibility, and to present admissible evidence at a full trial".

Furthermore, and in light of said requirement posed by Art. 65(1)(c) ICC Statute, which appears to demand that the facts of the case to support the entirety of the defendant's admission, it is yet again bewildering to have a criminal court affirm that "[t]he Chamber has been able to independently corroborate almost all of Mr Al Mahdi's account with the evidence before the Chamber, *strongly indicating* that the entire account is true" (emphasis added).

As for the punishment handed to Mr Al Mahdi, the Trial Chambers first recognizes how the Statute's Preamble "establishes retribution and deterrence as the primary

objectives of punishment at the ICC”, affirming then vehemently how “reintegration into society [...], in particular in the case of international criminal law, [...] cannot be considered to be primordial and should therefore not be given any undue weight”. It is quite difficult not to argue that such approach is, indeed, primordial, as the educational purpose of criminal penalties is recognized worldwide by courts of law and constitutions.

The Chamber’s line of thought becomes even more confusing as it admits Mr Al Mahdi’s attitude as “likely to successfully reintegrate into society”, accordingly considering such a circumstance as mitigating for the final decision upon his punishment.

Furthermore, the Chamber considers Mr Al Mahdi’s initial reluctance to destroy the historic and religious sites to be a mitigating circumstance “of some relevance”, as he reportedly affirmed that “it would be preferable not to destroy the mausoleums so as to preserve good relations with the population of Timbuktu”. However, the Chamber itself recognizes that the defendant “fully endorsed” the attack and was “fully implicated in [its] execution”. This certainly raises some perplexity as to the ICC’s reasoning: indeed, Mr Al Mahdi admittedly overcame his initial hesitation, thus demonstrating the strongest intention of carrying out the incriminated conduct. Such firm resolve, developed in a rather short time, is hardly congruous with the rationale behind the application of mitigating circumstances.

The *Al Mahdi* case may prove to be a landmark decision as for a number of issues unprecedented in the ICC’s jurisprudence, regarding both the crime sanctioned by the Trial Chamber and the relevance of an admission of guilt by a fully cooperative defendant.

As to the crime, it is simple to imagine for instance that, should the situation of the Syrian Civil War ever be referred to the Court by the United Nations Security Council, the ICC could certainly apply the reasoning behind the *Al Mahdi* decision in trying those responsible for the well-known destruction of UNESCO sites occurred therein. Nevertheless, some perplexities and uncertainties that the Trial Chamber generated shall necessarily find a solution in the near future, by considering in particular those general principles of criminal law to which the ICC is bound.