

Protection of the cultural property under the international criminal court: a case study

Abstract

Recently, in Prosecutor v. Ahmad Al Faqi Al Mahdi case, the International Criminal Court (hereinafter ICC) convicted a member of a Malian jihadist organization for the war crime of “intentionally directing attacks against 10 buildings of a religious and historical character in Timbuktu, Mali” during conflict there in 2012. But even though this conviction for the sole crime of intentionally targeting cultural heritage — the first of its kind by the ICC — has rightly been lauded as a victory for the court and for cultural heritage law, it is likely to ring rather hollow as a precedent, in that the opinion provides only minimal guidance for future cases. The ICC’s reluctance to define the scope of the Rome Statute’s protection for cultural heritage more broadly, or alternatively to sound the alarm regarding certain inadequacies in its coverage, renders the symbolic and precedential value of the case less potent than it might have been. Although, the ICC deals with the protection of the Cultural Property which is also a protected property under the International Humanitarian Law still in the case, AL Mahdi was charged with “the destruction of irreplaceable historic monuments and these attacks are a callous assault on the dignity and identity of entire populations, and their religious and historical roots.” This paper explains the definition of cultural property under the modern international law and also the analytical study of the AL Mahdi case, appended with the challenges of ICC in future.

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Introduction

International Criminal Court is a court (ICC) which prosecutes the most heinous crimes committed by an Individual. It is based on the Principle of Legality, i.e., the *Ne Bis in Idem* and the *Nullum Crimen Sine lege*.¹ Moreover, the Jurisdiction also can be triggered by the State Party,² by the office of the Prosecutor and the United Nations Security Council’s Chapter VII, by passing of a resolution. Moreover, the ICC is a treaty based statute, so the jurisdiction³ can be triggered as per the Rome Statute and moreover, the admissibility⁴ has to be decided by the International Criminal Court. ICC deals with the protection of the Cultural Property which is also a protected property under the International Humanitarian Law.

Recently on September 27, 2016 nine years sentence in prison has been given to Ahmad Al Faqi Al Mahdi for directing an attack intentionally against the ten buildings of a religious and historical character in Timbuktu, Mali”. It has also shown a respect and care for the cultural property as this attack amounts to an assault on the dignity and identity of entire populations, and their religious and historical roots. Although the predecessor courts of the ICC i.e., International Criminal Tribunal for the former Yugoslavia (ICTY), has also prosecuted the perpetrators, who have destructed the cultural and heritage buildings, however, this is the first time the destruction of cultural property has been considered as a separate or independent crime to punish the perpetrator instead of making it as an ancillary crime to a more heinous crime. No doubt Syria and Iraq are still out of the reach of ICC, still It is progressive step of ICC to step in the destruction of cultural property. Some critics are also of the view that it was more convenient case so they have taken it. However, let us discuss what constitutes Cultural Property.

¹Principle of Legality²Jurisdiction under Article 12-15 of the Rome Statute³Article 13 of the Rome Statute⁴Article 17 of the Rome Statute

What is cultural property?

The wartime pillage and destruction of structures and objects with cultural significance collectively referred to as “cultural property” or “cultural heritage” date back to ancient times. The Rome Statute, 1998 which established the International Criminal Court (ICC) at The Hague, confronts “the most serious crimes of concern to the international community as a whole and prohibits intentional attacks against buildings dedicated to religion and historic monuments during armed conflict. Nonetheless, such attacks have become endemic in parts of the world during the twenty-first century, as evidenced most vividly by the Islamic State’s protracted assaults against the ancient city of Palmyra in Syria. But even though this conviction for the sole crime of intentionally targeting cultural heritage — the first of its kind by the ICC — has rightly been lauded as a victory for the court and for cultural heritage law, it is likely to ring rather hollow as a precedent, in that the opinion provides only minimal guidance for future cases. The ICC’s reluctance to define the scope of the Rome Statute’s protection for cultural heritage more broadly, or alternatively to sound the alarm regarding certain inadequacies in its coverage, renders the symbolic and precedential value of the case less potent than it might have been.”⁵

The charges brought against Al Mahdi dealt with “the destruction of irreplaceable historic monuments, and they were about a callous assault on the dignity and identity of entire populations, and their religious and historical roots.”

Historical background

Since the beginning of the society, the destruction of cultural heritage is considered as consequences of war. If we take an example of Assyrian destruction of Babylon’s religious temples and palaces to the destruction of the First and Second Temples in Jerusalem, ancient history is full of examples. Although, in the ancient civilizations

⁵For further see, Lostal, *The first of its kind: the ICC opens the case against Ahmad Al Faqi Al Mahdi for the destruction of cultural heritage in Mali*, 2015.

there were no provisions in place to ensure the protection of cultural property from pillaging and destruction, however, still some kind of properties were protected, these included the religious and artistic structures etc.⁶

As early as 480 B.C., the Greek historian Herodotus expressed his criticism of the destruction of Babylonian, Greek, and Egyptian religious centers at the hands of the Persian Empire. In the 16th and 17th centuries, moral theologians and philosophers began having meaningful conversations about and formulating rules to regulate the looting and destruction of cultural property in conflict.¹⁵ The prevailing view among cultural elites was that religious, historical, and artistic buildings should be spared from damage and destruction. Yet, “the balance of evil and good” was informed “by reference to the doctrine of necessity:” in waging war for a just cause, all necessary means to achieve that end were considered permissible, including the destruction of enemy monuments and works of art.¹⁶

Facts of the case

The case has been made against Ahmad Al Faqi Al Mahdi, who was responsible for destroying the cultural heritage sites. He belongs to a family that is known in his community for having extensive knowledge of Islam. Al Mahdi joined the armed group Ansar Dine at the beginning of April 2012. For relevance, Ansar Dine was formed in 2011 by Iyad Ag Ghali, who partook in the 1990 rebellion in Mali. The fusion of Ag Ghali and Ifoghas Tuareg gained the backing of al-Qaeda in the Islamic Maghreb (AQIM).⁷ Al Mahdi was also in direct contact with the leaders of AQIM. Al Mahdi returned to Mali to provide help to these armed movements as an expert on matters of religion. He was also asked to lead the Hesbah. He wrote a document on the role of the Hesbah, which was entrusted with regulating the morality of the people of Timbuktu.⁸ The mausoleums of saints and mosques of Timbuktu were an integral part of the religious life of its inhabitants and represented a common heritage for the community. The mausoleums were a popular place for the residents as a place of prayer and, for some, places of pilgrimage. The AQIM administration was interested in raising awareness among the population to stop such practices and, as the case may be, to prohibit them from pursuing them. Al Mahdi was asked to monitor the cemeteries visited by the residents.

Mali became host to a Tuareg insurgency against the government in January 2012, which following the downfall of Muammar Gaddafi. The rebels were led by the National Movement for the Liberation of Azawad (NMLA), a secular Tuareg group seeking to establish an independent state in Northern Mali for all the ethnic groups in the region.⁹ However, the NMLA was able to make considerable strides. Eventually, the two Islamist groups managed to assert their primacy over the NMLA, forcing a form of hard-edged Islamic rule onto the population and driving many residents to flee in fear.⁶ Hesbah, a morality brigade led by Ahmad Al Faqi Al Mahdi.⁷ Al Mahdi returned to Mali from Algeria at the beginning of April 2012 to provide support to Ansar Dine and AQIM. As a religious expert, he was highly involved in the administration of both groups, and worked as the leader of the Hesbah from its inception until September 2012.

“In this capacity, Al Mahdi was responsible for monitoring and sanctioning the mores and customs of the local population, including their reverence for the mausoleums of saints in the old city of Timbuktu. Islamist rebels considered these local practices to be tantamount to heresy, idolatry, and superstition, and as such sought to prohibit the residents of Timbuktu from pursuing them. In June 2012, group leaders decided to destroy the mausoleums. Al Mahdi initially advised against the destruction of the mausoleums, as he believed this would strain the relationship between the groups and the local population. However, when instructed to do so, he agreed to carry out the attacks without hesitation, personally determining the sequence of the attacks, writing and delivering the sermon justifying them, and overseeing and partaking in the razing.”

On September 18, 2015, upon request by the Prosecutor, the Court issued an arrest warrant for Al Mahdi. He was surrendered by the authorities of the Republic of Niger a week later and transferred to The Hague, where he made his first appearance before the ICC on September 30, 2015. The Prosecutor charged Al Mahdi under Article 8(2) (e) (iv) of the Rome Statute for intentionally directing an attack against buildings dedicated to religion and historic monuments which were not military objectives.⁸

Laws available on protection of cultural property

If we discuss the modern laws on the protection of the Cultural property, it is mentioned in the Lieber Code¹⁰ had outlined the measures to be taken for the protection of cultural property in conflict. It further provided that cultural property should not be destroyed and “if such works of art, libraries, collections, or instruments” could be removed without damaging them, “the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation,” but under no circumstances were they to be sold or given away, nor wantonly destroyed or injured. The ultimate ownership would be settled by the ensuing peace treaty. It means that the cultural property may not be sold at any point of time. Moreover, further the article 34 provides the protection to general property.¹¹ Even Pillaging and sacking was prohibited.¹² In Brussels Conference, 1874 and the Peace Conferences in the Hague had also carried some provisions for the protection of the cultural property.¹³ Moreover, the Provisions under both the 1899 and 1907 conventions provided for the protection of cultural property under Article 56 of the 1899 Convention.¹⁴ Similarly under Article 27 of the 1907 Convention also provided the protection of cultural property in sieges and bombardment.¹⁵

In the year of 1954, cultural property was defined and widened its scope to all armed conflicts rather than just full-scale wars,

⁶Benjamin R. Foster & Karen Polinger Foster, CIVILIZATIONS OF ANCIENT IRAQ (2009), Hersh Goldwurm, HISTORY OF THE JEWISH PEOPLE: THE SECOND TEMPLE ERA, 1982.

⁷Mapping Armed Groups in Mali and the Sahel, European Council on Foreign Relations, 2023.

⁸Prosecutor v. Al Mahdi, ICC-01/12-01/15

⁹id

¹⁰Article 35 of the Code provides that “classical works of art, libraries, scientific collections, or precious instruments” had to be secured “against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded

¹¹Belonging to churches, to hospitals, or other establishments of an exclusively charitable character.

¹²Article 44 provided that destruction or damage not authorized by the commanding officer, including pillaging and sacking, was “prohibited” under penalty of death, or other severe punishment

¹³These Conventions prohibited invading forces from destroying and looting cultural property, and required them to abide by the civil laws of the conquered territory.

¹⁴prohibited all seizure of, destruction, or intentional damage “done to such institutions, to historical monuments, works of art or science,” and made noncompliance subject to proceedings

¹⁵All necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not used at the time for military purposes.”

and designated a blue and white shield as an international symbol for protected cultural property, to be placed as an insignia on sites or flown in flag form. Finally, the 1954 Convention created an International Register of Cultural Property under Special Protection. The lack of response to calls for implementation of the instrument, coupled with the outbreak of new conflicts in the 1980s and 1990s and with changes in the law of armed conflict and of cultural property, led to the proposal of a new Protocol in 1999. The Protocol provided additional protection to cultural property, and also offered assistance in the interpretation of the 1954 Convention, thus facilitating its enforcement.

Practical implementation on the laws of protection of cultural property

Although, after having these many laws, in the World War I and World War II, the destruction of the cultural property was witnessed. Therefore after two week conference in London between November 1 and 16, 1945, 37 countries founded the United Nations Educational, Scientific and Cultural Organization (UNESCO). These efforts culminated in the “Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict,” which met at The Hague from April 21 to May 14, 1954.

AL Mahdi case: intentional attack

On August 22, 2016, Al Mahdi admitted to intentionally attacking the mausoleums and Sidi Yahia mosque in Timbuktu and became the first defendant to ever plead guilty at the International Criminal Court.⁹ Pleas of guilty at the ICC are regulated by Article 65 of the Rome Statute.¹⁰ Article 65(5) of the Rome Statute also implicitly authorizes conversations between the accused and the prosecution corresponding to plea agreements in common law legal systems, but makes them non-binding. To assess whether Al Mahdi’s guilty plea was supported by the facts of the case, the Chamber heard three witnesses and considered hundreds of documents submitted as evidence, paying particular attention to whether the evidence could establish the facts independently of Al Mahdi’s admissions.

The Chamber found Al Mahdi’s admissions to be both credible and reliable and further the Chamber thus found “beyond reasonable doubt that the admission of guilt. Having determined that Al Mahdi was responsible for the execution phase of the destruction of the mausoleums and mosques, the Trial Chamber necessarily found that his conduct constituted a violation of Article 8(2)(e)(iv) of the Rome Statute. The provision covers intentional attacks “against buildings dedicated to religion, education, art, science or charitable purposes” as “serious violations of the laws and customs applicable in armed conflicts not of an international character.”¹¹ The Chamber found that the mausoleums and mosques “all qualified as both religious buildings and historic monuments. Consequently, the Chamber convicted Al Mahdi as a co-perpetrator for attacking nine mausoleums and the doorto the Sidi Yahia mosque in Timbuktu between approximately June 30, 2012 and July 11, 2012 and sentenced him to nine years’ imprisonment.

In addition to the prison sentence, the Chamber ordered Al Mahdi to pay reparations pursuant to Article 75(1) of the Rome Statute. On September 29, 2016, the Chamber set a reparations phase calendar and received a total of 139 reparations applications. On January 19, 2017, the Chamber appointed four experts to assist in the determination of reparations. The Chamber then ordered reparations for the damage to the protected buildings, for the consequential economic loss suffered by the city of Timbuktu.

Destruction of cultural property can be considered as a “crime against humanity”

If analysis can be made then it can be said that this case may fit within the larger narrative of The Hague Conventions and of the jurisprudence of the ad hoc tribunals in that it not only reiterates the importance of international cultural heritage, but it takes an active step towards protecting it. There are two ways, however, in which the Al Mahdi case diverges from the jurisprudence of the ICTY. This is because while Article 8(2) of the ICC Statute regulates “attacks”,¹⁶ Article 3 of the ICTY Statute covers only “seizure of, destruction or willful damage.”¹⁷ The Al Mahdi Chamber interpreted the latter to be narrower, requiring actual damage or destruction to the cultural property, and therefore not applicable to their analysis.

A second, more substantial difference lies in the ICC’s failure to consider Al Mahdi’s conduct as being encompassed by crimes against humanity as well as war crimes. In Prosecutor v. Blaskic, after finding the defendant guilty of war crimes under Article 3(d) for ordering the destruction of religious buildings belonging to the Muslim Bosnian population, the Blaskic Chamber also considered the destruction as a modality of perpetration of the crime against humanity of persecution under Article 5(h).

ICTY further developed this proposition in Prosecutor v. Kordic & Cerkez, where the Trial Chamber noted that, when perpetrated with the requisite discriminatory intent, destruction of cultural heritage “amounts to an attack on the very religious identity of the people,” and constitutes “a nearly pure expression of the notion of ‘crimes against humanity,’ for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects.

Conclusion

Although this is a historic judgment where the crime against humanity of persecution could have resulted in a failure to secure his guilty plea, as Al Mahdi might not have been inclined to readily accept responsibility for a crime that carried the potential for a higher sentence and increased stigma. Moreover, choosing to move forward and take the case to trial might have instead proved counterproductive, as the Trial Chamber might have found that, on these facts, the victimized group was not identifiable enough. On the one hand, as Al Mahdi had been accused of other heinous crimes in addition to the destruction of the mausoleums, including overseeing “the systematic torture, rape, and sexual enslavement of women under the militants’ control,” commentators found the charges issued to be unsatisfactory. On the other hand, critics maintained that the ICC was wasting its limited resources on the prosecution of a property crime, that Al Mahdi was a relatively smallplayer in the conflict, and that the OTP should have focused its attention on more important issues and defendants. Given the nature of international prosecutions, however, it can prove difficult to hold all the perpetrators accountable for all their alleged crimes in each situation; investigations are often hampered by difficulty in gaining access to the relevant territory, as well as displacement and intimidation of witnesses, destruction of evidence, and situations.

On the other hand, it is pertinent to note that ICC has shown a positive attitude towards the protection of cultural property, still it has missed the other situation of same nature in Syria or Iraq. It is unfortunate to see that ICC does not look towards the other destructions of heritage buildings, which shows a limitation of ICC.

¹⁶Rome Statute of the International Criminal Court, 1998. p. 1–63, 2187 U.N.T.S 90 (entered into force).

¹⁷Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia) Feb. 26, 2001).

The gaps in the International Criminal Court's Jurisdiction may make risk to the Cultural Property in future during warfare or otherwise.

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None.

Conflicts of interest

The author declares there is no conflict of interest.