

INTERNATIONAL DECISIONS

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International Criminal Court—Rome Statute—war crimes—destruction of cultural property—UNESCO designation—co-perpetration—guilty plea

PROSECUTOR V. AHMAD AL FAQI AL MAHDI. Case No. ICC-01/12-01/15. Judgment and Sentence. At https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF. International Criminal Court, Trial Chamber, September 27, 2016.

On September 27, 2016, the Trial Chamber (Chamber) of the International Criminal Court (ICC or tribunal) rendered its judgment in *Prosecutor v. Ahmad Al Faqi Al Mahdi*,¹ wherein the defendant was convicted of the war crime of intentionally directing attacks on protected cultural objects. It is the ICC's first such conviction and the first time that an accused has entered a guilty plea at the tribunal pursuant to Article 65 of the Rome Statute (Statute). Al Mahdi pled guilty to co-perpetrating attacks on protected objects pursuant to Article 8(2)(e)(iv) of the Statute for his role in the attack on, and destruction of, ten mosques and mausoleums in Timbuktu.² The Trial Chamber sentenced him to nine years in prison.

In January 2012, an armed conflict began in Mali between several armed groups and the Malian armed forces. The armed groups, Ansar Dine and Al Qaeda in the Islamic Maghrib (AQIM), took control of Timbuktu in April 2012 and imposed religious and political rule over the territory until January 2013. They installed a local government that included an Islamic tribunal, police force, media commission, and morality brigade (*Hesbah*). Al Mahdi arrived in Mali in April 2012, and from April to September 2012 he served as the head of the *Hesbah*, consulting with the Islamic tribunal as an expert in religious matters. At the request of the Ansar Dine and AQIM leadership, he monitored the mausoleums and cemeteries of Timbuktu to take note of local inhabitants' behavior at the sites and to raise awareness of the recent prohibition of their practices (paras. 31–35).

In late June 2012, the Ansar Dine and AQIM leadership made the decision to destroy the mausoleums and it communicated these instructions to Al Mahdi. Although he initially argued against the plan, he later facilitated its implementation by procuring tools and machinery, arranging logistics, determining the sequence of actions, supervising the execution of

¹ Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), at https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [hereinafter Judgment].

² Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, Art. 8(2)(e)(iv) (this article criminalizes “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”).

those actions, and actively participating in the destruction of mausoleums on five occasions. Moreover, he publicized the attack by giving a sermon prior to the attack and by speaking to journalists during the course of the attack (paras. 36–37).

The attack on Timbuktu’s mosques and mausoleums was carried out between June 30 and July 11, 2012 and resulted in the destruction of “ten of the most important and well-known sites in Timbuktu”³ (para. 38). The Chamber determined that it took place during a non-international armed conflict that met the “minimum level of intensity to be distinguished from mere internal disturbances and tensions” and that both Ansar Dine and AQIM qualified as organized armed groups, based on their “military capacity to displace the Malian army, capture Timbuktu and exercise some form of government over it for approximately nine months” (para. 49).

The ICC issued a warrant for Al Mahdi’s arrest on September 18, 2015, and following his capture by the authorities of Niger, he was transferred to The Hague on September 26, 2015.⁴ On December 17, 2015, the ICC Office of the Prosecutor filed charges against him under Article 8(2)(e)(iv) for “intentionally directing attacks” against ten buildings of “religious and historical character in Timbuktu, Mali” between June 30, 2012 and July 11, 2012 (para. 10).

The parties reached a plea agreement on February 18, 2016. The trial was held in The Hague from August 22 until August 24, 2016, and the Chamber’s judgment was issued on September 27, 2016.

Based on Al Mahdi’s statements and the evidence presented in the case, the Chamber found that as head of the *Hesbah*, Al Mahdi was responsible for: (1) executing a deliberate attack with a “common *modus operandi* . . . from common tools to armed guards protecting the attackers”; and (2) a stated purpose of destroying ten sites that qualified as “religious buildings and historic monuments” based on their “role in the cultural life in Timbuktu” and their recognition as UNESCO World Heritage sites (paras. 46–48). Noting that Article 25(3)(a) of the Statute distinguishes between liability as “a principal” and liability as “an accessory,” the Chamber determined that Al Mahdi’s role in the attack best fit the former because he had made an essential contribution to the crime by participating directly in the planning, preparation, and logistical coordination of the attack, identifying the sequence of the attack, and then publicly justifying it. Because he did so pursuant to an agreement with others, the Chamber found him liable as a co-perpetrator.⁵

³ The ten sites were: the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum (in the Sidi El Mokhtar Cemetery); the Alpha Moya Mausoleum (in the Alpha Moya Cemetery); the Sheikh Mouhammad El Mikki Mausoleum; the Sheikh Abdoul Kassim Attouaty Mausoleum; the Sheikh Ahmed Ben Amar Arragadi Mausoleum; the door of the Sidi Yahia Mosque which had not been opened in five hundred years (according to legend); and two mausoleums adjoining the Djingareyber Mosque—the Ahmed Fulane Mausoleum, and the Bahaber Babadié Mausoleum (para. 38).

⁴ Summary of the Judgment and Sentence in the Case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, at <https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf>; see also ICC, Press Release, Situation in Mali: Ahmad Al Faqi Al Mahdi Surrendered to the ICC on Charges of War Crimes Regarding the Destruction of Historical and Religious Monuments in Timbuktu (Sept. 26, 2015).

⁵ Judgment, para. 54. The Chamber noted that other accessory forms of liability pursuant to Article 25(3)(b)–(d)—including soliciting and inducing, aiding and abetting, and contributing in any other way—had been confirmed and that there is no hierarchy between the various modes of liability set forth in Article 25(3)(a); however, an accused may only be convicted of one form of liability for each incident of criminal conduct. *Id.*, para. 60.

The Chamber also noted that Al Mahdi's position in the *Hesbah* and his communications with the leadership of Ansar Dine and AQIM meant that he could have frustrated the commission of the crime (but did not do so) (para. 53). Given his direct participation in the crime, the Chamber determined that Al Mahdi's actions met the subjective elements of the crime charged (para. 55). While not strictly relevant to its findings under Article 8(2)(e)(iv), the Chamber also considered the extent of destruction of some of the sites. For example, the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum had been "razed . . . to the ground," the door of the Sidi Yahia Mosque, which according to legend had been closed for five hundred years, was forcibly opened, and the Sheikh Mouhamad El Mikki and Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleums were "completely destroyed" (para. 38).

With regard to sentencing, the Chamber recognized the need to balance the requirements of Rome Statute Article 78(1) (gravity of the crime) with ICC Rules of Procedure and Evidence 145(1)(c) and (2) (calling for consideration of mitigating or aggravating circumstances) in arriving at a sentence that satisfied the requirements of retribution and deterrence, while also remaining proportionate to the crime and circumstances of the case (paras. 65–74). On this issue, it drew a distinction between crimes against persons and crimes against property, noting that "even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons" (para. 77). In Al Mahdi's case, the Chamber found it relevant that the buildings had held religious, symbolic, and emotional value for the people of Timbuktu and that nine out of ten locations had been listed as UNESCO World Heritage sites, which meant that their destruction affected not only the Malian people, but also the international community more broadly (paras. 78–80).

In assessing the gravity of Al Mahdi's crime, the Chamber took into consideration the "discriminatory religious motive" and the level of planning behind the attack, as well as the facts that the impact of the attack "was heightened [because] it was relayed in the media" and that most of the sites had been "completely destroyed" (paras. 78, 81). It reiterated Al Mahdi's "essential role" in executing the attack, including arranging the logistics, supervising and determining the sequence of the attack, and providing the necessary tools, as well as his direct participation in and public justifications of the attack (paras. 84–85). However, it rejected the prosecution's argument that he had abused his power as head of the *Hesbah* in conducting the attack, and it did not agree that Al Mahdi's commission of the crime in his official capacity, the effect of the crime on multiple victims, or the religious nature of the crime were aggravating circumstances, since the Chamber had already considered these factors in evaluating the elements and gravity of the crime (paras. 86–87).

The Chamber noted that Al Mahdi's initial reluctance to destroy the sites was "of some relevance" as a mitigating circumstance, as was the fact that (except for the Djingareyber Mosque) he had "advised against using a bulldozer at all other sites so as not to damage the graves . . . and made sure that the attackers showed respect for the constructions next to the mausoleums while carrying out the attack" (paras. 89–91). However, it rejected the defense's arguments that Al Mahdi's participation in the destruction as part of a group or his lack of preparation prior to assuming his role as the head of *Hesbah* should constitute mitigating circumstances (paras. 90, 92).

The Chamber refrained from giving consideration to Al Mahdi's age, economic background, status as a scholar and expert in religious matters, prior positive role in the

community, or lack of prior convictions. However, it did note his “irreproachable” behavior while in detention. The most significant mitigating factors in its view were Al Mahdi’s admission of guilt, his cooperation with the Chamber (specifically that he took responsibility early and cooperated to facilitate the Chamber’s work), and that his cooperation enabled the prosecution to corroborate information for a speedy resolution in his case, even though the Chamber was mindful that Al Mahdi’s admissions were made in the context of “overwhelming evidence” of his guilt (paras. 96–102). In addition, it noted that he had expressed “genuine remorse for his acts” and “sentiments of empathy towards the victims” of his crimes (paras. 103–05).

Thus, the Chamber concluded that Al Mahdi’s crime was of significant gravity, that there were no aggravating circumstances, and that there were five mitigating circumstances (including his admission of guilt, cooperation with the tribunal despite increased danger toward his own family, remorse and empathy for victims, initial reluctance to commit the crime and steps taken to limit damage, and good behavior in detention). The Chamber sentenced Al Mahdi to nine years of imprisonment, noting that this was sufficient punishment, and added that no fine or order of forfeiture would be imposed, as it was not requested (paras. 109–10).

* * * *

The judgment is notable for two main reasons: it is the first time that an accused has entered a guilty plea at the ICC, and the first time the tribunal has convicted an individual for the crime of intentionally directing attacks against protected cultural objects. Given the increased visibility of the cultural destruction caused by ISIS/ISIL’s attacks on sites in Iraq and Syria, this case presented the ICC with a unique opportunity to prosecute a crime that has almost always accompanied armed conflict, but has seldom been tried at an international tribunal.

Al Mahdi’s guilty plea had an obvious impact on the length of the proceedings against him: only seven months elapsed between the confirmation of charges and the issuance of a judgment. The Chamber acknowledged the impact of Al Mahdi’s cooperation on the prosecution’s work, allowing it to “corroborate [and] clarify” information it had obtained elsewhere, and credited his plea and subsequent cooperation as a mitigating circumstance in the sentencing phase of the proceedings (paras. 100–01). In particular, it noted that Al Mahdi’s admission “was made early, fully and appear[ed] to be genuine” and that it “contributed to the rapid resolution of this case, thus saving the Court’s time and resources and relieving witnesses and victims of . . . [a potentially] stressful burden of giving evidence in Court” (para. 100). It also highlighted the symbolic value of Al Mahdi’s confession as it acknowledged the significance of the harm caused (*id.*).

The case provided the ICC an opportunity to showcase its procedures for guilty pleas (of which this was the first). While the long-term import of the Chamber’s approach may be limited because of the unique facts of the proceeding (for instance, the relative ease with which the prosecution was able to corroborate Al Mahdi’s account independently), it nevertheless provides a helpful template for future prosecutions where such a plea may be appropriate. Because Al Mahdi’s admission of guilt was made pursuant to Article 65 of the Statute (which the Chamber described as a “‘third avenue’ between the traditional common law and civil law approaches” to the issue of guilty pleas), the Chamber considered it along

with “any additional evidence presented” so as to ensure that the plea was “supported by the facts of the case” (paras. 27–28). Thus, the Chamber corroborated Al Mahdi’s written Agreement Regarding Admission of Guilt⁶ with testimony from witnesses and evidence presented by the prosecution—paying particular attention to whether the evidence presented could establish the facts of the case independently from the admissions of the accused (para. 29). It found Al Mahdi’s admissions to be “both credible and reliable in full,” based on the “extensive detail” that he provided, including “volunteering specific information not strictly necessary,” and it “independently corroborate[d] almost all of Mr. Al Mahdi’s account with the evidence . . . strongly indicating that the entire account is true” (para. 44).

Significantly, the judgment marks the first time that the ICC has charged an individual with directing attacks on protected cultural objects and one of the few times a crime against cultural property (or cultural heritage more broadly) has been prosecuted in any international tribunal. The Chamber was mindful that the relatively sparse case law on attacks against civilian populations offers insufficient guidance, and that jurisprudence from the International Criminal Tribunal for the Former Yugoslavia (ICTY) was of limited help because its applicable law did not govern *attacks* against cultural objects, instead punishing only their *destruction* or *willful damage* (para. 16 and n. 29). The dearth of jurisprudence dealing with this subject means that only an incomplete analytical framework is available for prosecuting crimes involving attacks on, or destruction of, cultural property. The Al Mahdi judgment therefore paves the way for the evolution of the protection of cultural heritage during armed conflict.

Cultural property and places of worship have been formally protected during armed conflict since the 1907 Hague Regulations, and the special protections afforded to objects of cultural or religious significance have been recognized in the Geneva Conventions and Additional Protocols I and II, the Second Protocol to the Hague Convention of 1954, and the ICTY Statute. In a more generalized form, of course, cultural property has been afforded varying levels of protection in the statutes of all international tribunals.⁷ Except in cases where a site may be listed with UNESCO or otherwise recognized as a world heritage site, however, existing legal instruments and previous decisions provide scant detail on how a court or tribunal might determine whether an object qualifies for protection. In the relevant ICTY cases, individuals were charged pursuant to Article 3(d) of the ICTY Statute for damage to the old town of Dubrovnik, which was listed as a UNESCO World Heritage site,⁸ and the destruction of the Mostar Bridge, which had been recognized as a “UN World Heritage site” although not formally listed with UNESCO until 2005.⁹

Yet the Al Mahdi judgment does not provide a complete or precise analytical framework for a future application of Article 8(2)(e)(iv), or its corollaries, in international humanitarian law.

⁶ Prosecutor v. Al Mahdi, ICC-01/12-01/15, Annex 1: Agreement Regarding Admission of Guilt (public redacted) (Feb. 2016), at https://www.icc-cpi.int/RelatedRecords/CR2016_05666.PDF [hereinafter Agreement].

⁷ See Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT’L LAW 203 (2011).

⁸ See, e.g., Prosecutor v. Strugar, Case No. IT-01-42, Judgment, paras. 21, 327, 329 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005); Prosecutor v. Jokić, Case No. IT-01-42/1, Judgment, paras. 23, 55, 66 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

⁹ Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, vol. 2, para. 1283 and n. 3215 (Int’l Crim. Trib. for the Former Yugoslavia May 29 2013).

In its removal of doubt regarding the significance of the buildings in question (especially the non-UNESCO building), Al Mahdi's guilty plea meant that the tribunal was not required to define what makes a particular site historically or religiously significant. The Chamber treated the buildings as protected by Article 8(2)(e)(iv) without a detailed discussion of legal thresholds that would have provided a future court with the means to confirm the existence of such protection where the facts were more ambiguous. The facts that nine out of the ten sites attacked were UNESCO World Heritage Sites and that the historic significance of the monuments and mausoleums of Timbuktu had already been recognized likely also contributed to the Chamber's decision not to provide this framework.

While the Statute does not require UNESCO recognition of a building for it to qualify for protection, courts and tribunals have often used recognition by UNESCO as an indicator of such protection. As early as the Confirmation of Charges, the Pre-Trial Chamber had noted that the religious and historic significance of the buildings and sites was not in question.¹⁰ The Chamber was therefore not called upon to engage in a detailed analysis of the legal provisions or the manner in which a court might evaluate whether an object not recognized by UNESCO nevertheless qualified for protection.¹¹ Despite this, the judgment did identify details regarding the history and use of the sites that made them culturally significant and which may be of use to future implementation of cultural heritage protection provisions, if only by analogy.

It is noteworthy that in considering the status of the destroyed buildings, the Chamber relied on the testimony of two witnesses (a Malian expert in cultural matters and a UNESCO witness) who characterized Timbuktu as "an emblematic city with a mythical dimension" that had both historic significance (because of its role in the expansion of Islam in the region) and continued religious significance (in part due to the manuscripts and mausoleums that had survived to the present day) (para. 78). The Chamber described the mausoleums of saints and mosques of Timbuktu as an "integral part of the religious life of its inhabitants" constituting a "common heritage for the community" (para. 34). By way of example, the Chamber noted that the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum (located in the Sidi El Mokhtar Cemetery) was "visited by pilgrims from and outside Mali" (para. 38(iii)). The Alpha Moya Mausoleum (located in the Alpha Moya Cemetery) was "visited in order to pray and make offerings" (para. 38(iv)). The Sheikh Mouhamad El Mikki Mausoleum was "a place of spiritual retreat and reflection, located in the Three Saints Cemetery" (para. 38(v)). The Sheikh Abdoul Kassim Attouaty Mausoleum was "built in the sixteenth century" (para. 38(vi)). The door of the Sidi Yahia Mosque, according to legend, had not been opened for five hundred years and that legend claimed that the opening of the door would bring about the Day of Resurrection (para. 38(viii)).¹² The Ahmed Fulane Mausoleum and the Bahaber Babadié Mausoleum

¹⁰ Prosecutor v. Al Mahdi, ICC-01/12-01/15, Decision on the Confirmation of Charges (public redacted), para. 41 (Mar. 24, 2016), at https://www.icc-cpi.int/CourtRecords/CR2016_02424.PDF.

¹¹ See generally Agreement, *supra* note 6 (providing details on the historic and religious significance of the mausoleums and monuments in question).

¹² Quoting Al Mahdi as stating that: "Over time, a myth took hold, claiming that the Day of Resurrection would begin if the door were opened. We fear that these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that this is the truth. So we decided to open it" (para. 38(viii)).

were “especially visited on Mondays and Fridays and for important religious celebrations” (para. 38 (ix)). The Chamber noted that, in addition to their historic importance, the mausoleums played a continuing role in the life of the inhabitants of Timbuktu, who maintained the buildings through periodic symbolic maintenance events and considered the buildings a protective force over the community (para. 78). It therefore concluded that “[a]ll these sites were dedicated to religion and historic monuments, and were not military objectives,” and (except for the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) “all these buildings had the status of protected UNESCO World Heritage sites” and were worthy of protection (para. 39).

The Al Mahdi judgment not only sets an important substantive and procedural precedent, it also ensures that there is at least some accountability for the attack on Mali’s cultural heritage that took place in 2012. However, the Chamber’s approach to the central issues falls short of providing a clear legal framework for future prosecutions in cases where the status of the cultural objects may be disputed or ambiguous. Since the relative importance of cultural property is inherently subjective, the identification of objective criteria independent of UNESCO designation is a critical next step. The development of a more sophisticated analytical framework for prosecuting attacks on (or the destruction of) cultural heritage therefore falls to a future prosecution at the ICC or elsewhere. To be sure, the Chamber’s effort in this case is an admirable and necessary first step. But only when future cases are brought before the ICC that present more ambiguous facts or controversy regarding the qualification of culturally significant objects will it have an opportunity to parse the requirements of Article 8(2)(e)(iv) of the Statute and cultural heritage protections in international humanitarian law more generally.

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International criminal law—contempt—interference with prosecution—liability of corporate entities—definition of “person”

IN RE AKHBAR BEIRUT & AL AMIN. STL-14-06/S/CJ. At <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06>.

Special Tribunal for Lebanon, August 29, 2016.

On August 29, 2016, the Special Tribunal for Lebanon (Tribunal) sentenced a corporate media enterprise and one of its employees for contemptuously interfering with the Tribunal’s proceedings in *Ayyash*, a prosecution concerning the February 2005 terrorist attack that killed former Lebanese Prime Minister Rafiq Hariri.¹ The contempt decision is significant for two reasons: (1) it adopts an expansive definition of the crime of contempt to restrict a journalist’s freedom of expression; and (2) it is the first international judicial decision to hold a corporate entity criminally responsible.

¹ See In re Akhbar Beirut & Al Amin, Case No. STL-14-06/S/CJ, Reasons for Sentencing Judgment (Spec. Trib. Leb. Sept. 5, 2016), at <https://www.stl-tsl.org/en/the-cases/contempt-cases/stl-14-06/filings-stl-14-06/other-filings-stl-14-06/5190-f0265>. Documents concerning *Ayyash* are available at <https://www.stl-tsl.org/en/the-cases/stl-11-01>.