

A crime against cultural heritage in the aspect of the intangible value of a monument

Judgement of the International Criminal Court from 27 September 2016
in the case of *Prosecutor v. Ahmad al Faqi al Mahdi*, ICC-01/12-01/15

The Chamber 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. Furthermore, all the sites but one (the Sheikh Mohamed Mahmoud Al Arawani Mausoleum) were UNESCO World Heritage sites and, as such, 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.

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Commentary

1. On 27 September 2016, Trial Chamber VIII of the International Criminal Court (ICC) found Ahmad al-Fahdi al-Mahdi guilty of a war crime under art. 8 para. 2 subpara. (e) point (iv) of the Rome Statute. The crime was intentionally to direct attacks against ten buildings dedicated to religion and/or historical monuments in Timbuktu, Mali,¹ between approximately 30 June 2012 and 11 July 2012.²

The mausoleums of Sufi holy men and scholars (who lived in the fourteenth and the fifteenth centuries) and the mosques of Timbuktu played a very significant role in the spiritual life of the local people. Moreover, the mausoleums and mosques of

¹ From 1 July 2002 onwards, the ICC may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Mali or by its nationals. Mali ratified the Rome Statute on 16 August 2000 and referred the situation on its territory since January 2012 to the ICC.

² International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, *Judgement and Sentence*, 27 September 2016, https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF (accessed: 21.12.2020).

Timbuktu constitute a common heritage and represented values that identified the local community socially and culturally.

2. The attacks were directed against: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door; and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum.

In this matter, it is necessary to emphasize that the attack was conducted according to a pre-established plan. At the time, Ahmad al Faqi al Mahdi was “head of Hesba, one of the four command structures of the Ansar Dine group which was linked to al Qaeda in the Islamic Maghreb (AQIM) and had occupied northern Mali in 2012”.³ Having defeated fighters of the National Movement for the Liberation of Azawad, the Hesba began the occupation of Timbuktu. Its mission “was to ‘promote virtue and prevent vice’”,⁴ the Hesba considered profane the ways in which the faithful in the Timbuktu shrines prayed, especially that those buildings were situated on burial grounds, over tombs.⁵ Ahmad al Faqi al Mahdi undertook to demolish the buildings (the order to destroy them came from a higher level of command, from the leader of Ansar Dine, Iyad Ag Ghali) in order to eradicate superstitions, heresy, and all things or subterfuges which could, according to the Hesba, lead to idolatry.

3. At the same time, it is important to underline the fact that the buildings which were destroyed (including those which had been built on burial grounds) were pilgrimage destinations, places of spiritual retreat and reflection; what is more, the rituals performed there were considered crucial from a religious point of view. Therefore, the exact aim of the crime was the destruction of certain manifestations of spirituality as well as the monuments which served as sites of such manifestations. The attack was also directed at the door of the Sidi Yahia Mosque, which had particular religious significance: “legend had it that this door had not been opened for 500 years and that opening it would lead to the Last Judgment”.⁶ Those buildings were not military objectives; they were dedicated to religion and constituted historic monuments. Additionally, each of these buildings, except for the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, had had the status of protected UNESCO World Heritage sites since 1988, and in 2012 they were included in the List of World Heritage in Danger.

³ A. Al Faqi Al Mahdi: “I plead guilty,” Interview by Anissa Barrak, *The Unesco Courier*, October–December 2017, <https://en.unesco.org/courier/2017-october-december/ahmad-al-faqi-al-mahdi-i-plead-guilty> (accessed: 21.12.2020).

⁴ *Ibidem*.

⁵ *Ibidem*.

⁶ International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, P- 38, pp. 20–23.

Al-Mahdi pleaded guilty and cooperated with the ICC, which had an impact on the severity of the punishment. He was sentenced by the ICC to nine years imprisonment.⁷

After the judgement was pronounced, the convict, aware of the gravity of his crime, said that he felt "remorseful about what [he had] caused to the international community as a whole".⁸ He also admitted that he had known "that those sites were historic and sacred".⁹ Thus, he was, indisputably, aware that the conservation of cultural heritage has great significance among all nations in the world, and his in-depth knowledge of Muslim theology¹⁰ all the more accounted for his full understanding of the act that he had committed, which was aimed at the destruction of monuments of such great significance. Not only were they internationally protected, but also important in terms of their intangible value to the local community.

4. In my opinion, it is worth looking at the judgement of the ICC in relation to protection of the intangible value of monuments. The intangible value of a monument is based on the connection between the monument's tangible form and its related intangible dimension of an ideational or spiritual nature. Therefore, the intangible value of a monument, which is the focal point of the case being analysed, is not only expressed through its artistic or historic value, but it also consists of the spiritual heritage connected to the destroyed religious buildings. Thus, the process of creation of intangible values is two-fold: first is the materialisation stage, i.e. the design, the imagination of the creator; the second stage is the lifetime of the monument, which is understood as the bearer of the encoded intangible value. So striking is the significance of such a value that it may be considered superior to the conceptual scope of the intangible monument itself, and may even begin to be considered a monument of its own. The buildings destroyed by Ahmad al Mahdi were carriers of intangible values decipherable and comprehensible to the people of Timbuktu and Mali and to the international community alike. The order to destroy them caused not only the obliteration of monuments of a tangible nature, but also the eradication of intangible monuments as expressed in religion and rituals, and, in consequence, it was a crime that undermined the expression of the identity of a specific social group. Undeniably, it caused a measurable loss to all of humanity. As the victim of the crime,¹¹ humanity could lose its ability to pass on its intangible values to future generations.

⁷ In a separate judgement from 17 August 2017, Trial Chamber VIII of the ICC issued a reparations order, "concluding that Ahmad Al Faqi Al Mahdi is liable for €2.7 million in expenses for individual and collective reparations for the community of Timbuktu for intentionally directing attacks against religious and historic buildings in that city"; International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, *Judgement and Sentence*, 17 August 2017, https://www.icc-cpi.int/CourtRecords/CR2017_05117.PDF (accessed: 21.12.2020).

⁸ A. Al Faqi Al Mahdi, "This was the first and last wrongful act I will ever commit," 22 August 2016, <https://en.unesco.org/news/ahmad-al-mahdi-was-first-and-last-wrongful-act-i-will-ever-commit> (accessed: 21.12.2020).

⁹ A. Al Faqi Al Mahdi, "I plead guilty..."

¹⁰ "Al Mahdi has a thorough knowledge of the Koran and gave lectures as an expert on religious matters"; International Criminal Court, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, P- 9, p. 6, more: Statement by Al Mahdi, MLI-OTP-0033-4511, 4523-25.

¹¹ K. Zeidler highlights the context of disservice to entire nations in the situation of loss of national and cultural heritage in: *idem*, K. Zeidler, "Prawa człowieka a normatywne podstawy ochrony

The basis for conviction by the ICC was the perpetration of a war crime within the scope of a serious violation of laws and regulations in respect of international law applicable to armed conflicts which are not international in nature: namely, intentionally directing attacks against buildings dedicated to religion and/or historical monuments (art. 8 para. 2 subpara. (e) point (iv) of the Rome Statute).

5. This judgement marked the first instance in which the ICC exclusively addressed intentional attacks against cultural heritage. This case can be considered groundbreaking, leading the way towards a more effective enforcement of international law in connection with offences related to cultural heritage.¹² Undoubtedly, it is necessary to analyse this judgement (especially in that it was pronounced by the ICC) in terms of the international protection of cultural heritage and individual criminal responsibility in relation to cultural genocide as affecting the identity of a group.¹³

At the same time, the protection of the destroyed buildings by UNESCO regulations illustrates the buildings' special importance for international cultural heritage; hence, the attack on the mausoleums and mosques was a violation of basic values, directed against cultural human rights as well.¹⁴

6. The international protection of monuments is predominantly focused on the formulation of a comprehensive system of heritage protection, and this tendency is attracting increasing public attention at present. In this regard, the role is notable of the Convention for the Safeguarding of the Intangible Cultural Heritage, adopted by UNESCO in 2003,¹⁵ and the commentary on art. 15 of the International Covenant on Economic, Social and Cultural Rights.¹⁶

Additionally, it is necessary to underline that, having in mind the need to strengthen the protection of intangible cultural heritage, UNESCO has reflected on the role that intangible cultural heritage possesses in so-called emergencies. During the meeting which took place at the UNESCO headquarters between 21 and 22 May 2019, the op-

dziejstwa kultury" [in:] *idem, Zabytki. Prawo i praktyka*, Gdańsk – Warszawa 2017, p. 108 (originally published by: *Gdańskie Studia Prawnicze* 2005, vol. 13).

¹² K. Wierczyńska, A. Jakubowski, "Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case", *Chinese Journal of International Law*, December 2017, vol. 16, issue 4, pp. 695–721, <https://doi.org/10.1093/chinesejil/jmx029> (accessed: 22.12.2020).

¹³ For more on this topic, see: H. Schreiber, "Cultural genocide – ludobójstwo kulturowe – kulturobójstwo: niedokończony czy odrzucony projekt prawa międzynarodowego?" [in:] *Kultura w stosunkach międzynarodowych*, vol. 1, *Zwrot kulturowy*, eds. H. Schreiber, G. Michałowska, Warszawa 2013, pp. 252–274.

¹⁴ K. Wierczyńska, A. Jakubowski, "Individual Responsibility...", p. 699.

¹⁵ UNESCO, *Basic Texts of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage*, 2008, https://ich.unesco.org/doc/src/2003_Convention_Basic_Texts-_2018_version-EN.pdf (accessed: 22.12.2020).

¹⁶ United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (accessed: 22.12.2020).

erational principles and modalities were adopted for strengthening UNESCO's efforts to safeguard and promote intangible cultural heritage during emergencies (i.e. armed conflict and natural disasters).¹⁷ As was emphasized within the framework of those principles, intangible cultural heritage only exists when it is realized by the communities which practice it and pass it on. It constitutes an inseparable value which manifests itself in the daily, cultural, and economic life of those communities. The protection of intangible cultural heritage should be given the same level of importance as the protection of the life and welfare of the members of those communities.¹⁸ Nevertheless, while the protection of intangible cultural heritage is required in times of emergency, it is also necessary to establish modalities which will allow for the harnessing of "intangible cultural heritage to support preparedness, response and recovery processes".¹⁹

7. This intangible cultural heritage, passed down from generation to generation, is continuously relived and re-enacted by communities and groups in their relations with the environment, with forces of nature, and with their history, and provides them with a sense of identity and continuity, thereby contributing to an increasing respect towards cultural diversity and human creativity (art. 2(1) of the UNESCO Convention 2003). Pursuant to art. 15 of the International Covenant on Economic, Social and Cultural Rights, each State Party is liable to respect and protect cultural heritage in all its forms, in peacetime and wartime alike. Cultural heritage must be preserved, developed and passed down from generation to generation as evidence of human experiences and achievements, while each community has the right of access and the possibility to benefit from its own heritage.²⁰

Importantly, that includes the heritage that is central to everyday rituals, which form part of cultural identity in its intangible form. This approach is a tendency stemming from the ICC judgement commented on above. The approach is worth examining in the context of the above analysis of the ICC judgement.

Literature

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¹⁷ UNESCO, Item 13 of the Provisional Agenda: Intangible cultural heritage in emergencies, LHE/19/14.COM/13 Rev. Paris, 5 December 2019, p. 8.

¹⁸ *Ibidem*, p. 3.

¹⁹ *Ibidem*.

²⁰ K. Prążmowska, "Sprawa Al Mahdiego przed Międzynarodowym Trybunałem Karnym: przełomowy wyrok czy stracona szansa?", *Studia Prawnicze KUL* 2019, no. 2, p. 308.

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Summary

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A crime against cultural heritage in the aspect of the intangible value of a monument

It is worthwhile to look at the present judgement in the aspect of the protection of the intangible value of monuments. The buildings destroyed by Ahmad al Mahdi represented intangible values decipherable and comprehensible to the people of Timbuktu and Mali, and to the international community alike. Their destruction resulted in the obliteration of not only monuments of tangible nature, but also of intangible monuments which are expressed in religion and rituals; in consequence, it was a crime that undermined the expression of identity of a specific social group. Therefore, the intangible value of monuments, underlined in the case being analysed, is not only expressed through its artistic or historic value, but it also consists of the spiritual heritage connected to the destroyed religious buildings.

Keywords: the intangible value of a monument, the spiritual heritage, the international community

Streszczenie

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Zbrodnia przeciwko dziedzictwu kultury w aspekcie niematerialnej wartości zabytku

W ramach komentowanego orzeczenia warto zwrócić uwagę na aspekt ochrony niematerialnej wartości zabytku. Zniszczone przez Ahmada al Mahdiego budynki stanowiły o czytelnych i zrozumiałych (zarówno dla ludności Timbuktu i Mali, jak i społeczności międzynarodowej) wartościach niematerialnych. Zniszczenie ich spowodowało unicestwienie nie tylko zabytków w sensie materialnym, ale także w sensie niematerialnych wartości, które one niosły, wyrażających się w religii i obrzędach. Co za tym idzie, była to zbrodnia dotycząca wyrazu tożsamości określonej grupy społeczeństwa. Wartość niematerialna zabytku, co jest wprost akcentowane w analizowanej sprawie, nie wyraża się zatem wyłącznie w wartości artystycznej czy historycznej, ale składa się na nią także dziedzictwo duchowe, którego nośnikiem były zniszczone budynki religijne.

Słowa kluczowe: niematerialna wartość zabytku, duchowe dziedzictwo, społeczność międzynarodowa