

Mali, Accountability for the Destruction of Cultural Heritage

INTRODUCTORY TEXT: *Pre-Trial Chamber I of the International Criminal Court confirmed certain charges concerning the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments under article 8(2)(e)(iv) of the Rome Statute. At trial, the accused made an admission of guilt. The Trial Chamber found the defendant guilty. It classified the conflict as non-international, argued that cultural objects are protected in IHL both in conduct of hostilities and after the objects are under the control of a Party to the conflict. To classify the destruction of religious buildings and historic monuments as an “attack” in the sense of article 8(2)(e)(iv) of the Rome Statute, the Court considered sufficient the presence of a general nexus to the armed conflict, without requiring “a link to any particular hostilities”.*

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Case prepared by Juliette Praz, Master student at the Graduate Institute of International and Development Studies and Silvia Scozia, LL.M. student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

A. ICC DECISION ON THE CONFIRMATION OF CHARGES AGAINST AHMAD AL FAQI AL MAHDI

[Source: ICC, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, No. ICC-01/12-01/15, Pre-Trial Chamber I, 24 March 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_02424.PDF (footnotes omitted)]

II. PRELIMINARY AND PROCEDURAL MATTERS

A. Nature and purpose of the present decision

14. In the present decision, the Chamber renders its determination under article 61(7) of the Statute as to whether there is sufficient evidence to establish substantial grounds to believe that Ahmad Al Faqi Al Mahdi committed the crime with which he is charged.

[...]

III. FINDINGS

[...]

A. Armed conflict in Mali and occupation of Timbuktu

30. The facts alleged in the charge took place in the town Timbuktu between about 30 June 2012 and about 11 July 2012. [...] Evidence submitted by the Prosecutor, including documents issued by the Malian Ministry of Defence, as well as reports from the UN and media, also support the allegations that an armed conflict of a non-international character broke out in Mali in January 2012 and that this armed conflict was still ongoing at the time of the facts referred to in the charge.

31. It is also [...] apparent in light of other evidence [...], that between early April 2012 and January 2013 the town of Timbuktu was under the control of the armed groups Al-Qaeda in the Islamic Maghreb ("AQIM") and Ansar Dine, a Tuareg movement associated with AQIM, and that those two groups jointly set up an administrative structure of the city. The administrative structure included among others, the Islamic policy, the Islamic tribunal, and the *Hisbah* or "*Brigade des mœurs*", as well as a media commission.

[...]

B. Destruction of and damage to buildings in Timbuktu

[...]

34. The evidence shows that the targeted Buildings/Structures included:

- (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 door of the Sidi Yahia Mosque;
- (ix) the Bahaber Babadié Mausoleum and
- (x) the Ahmed Fulane Mausoleum, both adjoining the Djingareyber Mosque.

35. Seven of the mausoleums were situated in four sites, namely the Sidi Mahamoud, Sidi El Mokhtar, Alpha Moya, and *Trois Saints* cemeteries.

36. The Buildings/Structures were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali. The community in Timbuktu was involved in their maintenance and used them for their religious practices. At the time of the destruction, all cemeteries in Timbuktu, including the Building/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO, and as many as 16 mausoleums situated in Timbuktu were also themselves protected sites pursuant to the 1972 Convention concerning the protection of the world cultural and natural heritage. Furthermore, as of 28 June 2012, the conflict in Mali as a whole and Timbuktu in particular led UNESCO, upon request of the Malian authorities, to include the city in its entirety on the list of world heritage in danger. It is also apparent from the evidence that the Buildings/Structures did not constitute military objectives.

37. The material illustrates that the Buildings/Structures were destroyed by individuals, some armed with weapons, with a variety of tools, including pickaxes and iron bars.

38. As a consequence of these actions, all of the Buildings/Structures were either completely destroyed or severely damaged.

39. The unanimous outcry of the international community and individuals concerned substantiates the Prosecutor's allegation as to the seriousness of the acts. The evidence submitted by the Prosecutor confirms that the Buildings/Structures played an important role in the life of the inhabitants of Timbuktu and that their destruction was considered as a serious matter and regarded by the local population as an aggression towards their faith. [...]

40. The crime proscribed by article 8(2)(e)(iv) of the Statute, as further elaborated in the Elements of Crimes, requires that the object of the attack be "one or more buildings dedicated to religion, [...] historic monuments, [...] which were not military objectives".

41. It is not in dispute that the Buildings/Structures were dedicated to religion and constituted historic monuments because of their origins and significance, and that none of them constituted a military objective.

42. Further, the evidence is univocal in showing that the Buildings/Structures were specifically identified, chosen and targeted by the perpetrators as objects of their attack, precisely in light and because of their religious and historical character.

43. The wording of the provision, which constitutes *lex specialis* to the war crime of intentionally attacking civilian objects, makes it clear that the prohibition attaches to the attack *per se*, irrespective of the fact that such attack may or may not result in the destruction, whether partial or total, of the targeted building.

Accordingly, they constitute “attacks” within the meaning and for the purposes of article 8(2)(e)(iv) of the Statute also in respect of those acts which did not bring about the complete destruction of the targeted Building or Structure. [...]

44. The Chamber is satisfied that the (partial or total) destruction of the Buildings/Structures as outlined above took place in the context of the non-international armed conflict, and more specifically, in the context of, and in association with, the particular part of this conflict, which constituted the occupation of the town of Timbuktu by AQIM and Ansar Dine, as described above. The Chamber is thus satisfied that the objective contextual and specific elements of the war crime of attacking protected objects under article 8(2)(e)(iv) of the Statute are met.

C. Ahmad Al Faqi Al Mahdi’s role in the context of Timbuktu’s occupation and the destruction of the Buildings/Structures

45. [...] it emerges that:

(i) Ahmad Al Faqi Al Mahdi was an eminent scholar and expert of religious affairs; the most competent and prominent person in Timbuktu when it came to being knowledgeable in religious matters;

(ii) Ahmad Al Faqi Al Mahdi acted in strict cooperation with the leadership of both occupying groups and played an active role within the context of the institutions established by them;

(iii) Ahmad Al Faqi Al Mahdi participated in meetings with the leadership of AQIM and Ansar Dine, and had direct relations with leaders of the armed groups including Abou Zeid, Yahia Abou Al Hammam, Abdallah Al Chinguetti, and Iyad Ag Ghaly; he appears to have belonged to the circle of individuals from the local population chosen by the leaders of the occupying groups to discuss pending matters;

(iv) Ahmad Al Faqi Al Mahdi played a key role with regard to the *Hisbah*: he established the *Hisbah* himself at the beginning of April 2012, became its first head upon appointment by Abou Zeid, the governor of Timbuktu at the time of the occupation, and held this position until September 2012; he became a member of Ansar Dine at the moment he accepted to become head of the *Hisbah*;

(v) Ahmad Al Faqi Al Mahdi, because of his religious knowledge, was closely associated with the work of the Islamic tribunal, including by being consulted prior to its creation, by attending the court and participating in the enforcement of its decisions.

46. The mission of the *Hisbah* was to prevent apparent vice and to promote virtue as well as to carry out charitable tasks; [...]

47. As such, it fell within the scope of the mission of the *Hisbah* to deliberate on the fate of the mausoleums which had been erected upon the tombs in Timbuktu, as well as the door at the Sidi Yahia Mosque: the prevention of anything that can be considered as worshipping the tombs, such as building the dome over the tomb fell within the scope of its competences. Ahmad Al Faqi Al Mahdi was the author of the sermon given on the Friday before the destruction of the Buildings/Structures started [...].

48. The evidence demonstrates that after initial attempts undertaken also by Ahmad Al Faqi Al Mahdi to discourage the population from following their established practices concerning the mausoleums, the decision to proceed with their destruction was taken by Iyad Ag Ghaly, in consultation with Abou Zeid, Abdallah Al Chinguetti and Yahia Abou Al Hammam.

49. The evidence also supports the allegation that Ahmad Al Faqi Al Mahdi, in his capacity as head of the *Hisbah*, played a crucial role in implementing the decision to destroy the Buildings/Structures. Ahmad Al Faqi Al Mahdi publicly declared that the decision to destroy the Buildings/Structures was deliberately taken: “*nous agissons ainsi parce que nous voulons la demolition des dômes*”. He stated that the destruction of the domes had been ordered by “*le Messenger*” and not prohibited by the relevant texts consulted by him.

50. Once the occupying groups had determined that the destruction was necessary, it fell upon the *Hisbah* to decide the modalities in which the destruction of the Buildings/Structures would be carried out and to provide the financial and operational means which would be necessary to carry out their destruction. Ahmad Al Faqi Al Mahdi decided the order [...] in which the Buildings/Structures were to be destroyed [...].

51. In addition to the role played by Ahmad Al Faqi Al Mahdi in the administrative structures as detailed in paragraph 45 above, Ahmad Al Faqi Al Mahdi personally participated in or assisted to the material execution of the destruction of several of the Buildings/Structures. He participated in some instances using a pickaxe and was involved in the destructions at all four cemeteries concerned by supervising the work, giving advice and “preparing drinks and supervising the work, as well as providing the tools [...] including the pickaxes”. He provided the means for the destruction of the door at the Sidi Yahia Mosque and contributed in pulling out the door, and finally approved of the destruction of the domes adjacent to the Djingareyber Mosque, in which he participated himself at the beginning using a pickaxe and later approved the use of a bulldozer.

52. The evidence shows that Ahmad Al Faqi Mahdi was present at all relevant sites of destruction, namely the Sidi Mahamoud cemetery, the Sidi El Mokhtar cemetery, the Alpha Moya cemetery, the *Trois Saints* cemetery, the Sidi Yahia Mosque, and the Djingareyber Mosque.

53. Importantly, it also appears from the evidence that Ahmad Al Faqi Al Mahdi actively took part in the (partial) destruction of:

- (i) the Alpha Moya Mausoleum;
- (ii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum;
- (iii) the door of the Sidi Yahia Mosque;
- (iv) the Ahmed Fulane Mausoleum and
- (v) the Bahaber Babadié Mausoleum, both adjacent to the Dingareyber Mosque.

[...]

55. In light of evidence outlined above, the Chamber is satisfied that Ahmad Al Faqi Al Mahdi is individually criminally responsible for the crime charged by the Prosecutor. Ahmad Al Faqi Al Mahdi was directly and personally involved in all stages of the (partial) destruction of the Buildings/Structures. He was part of the

planning phase – as religious expert and prominent personality in the context of the occupation of Timbuktu – as well as of the preparatory and implementation phase – as head of the *Hisbah*.

56. Ahmad Al Faqi Al Mahdi's significant and manifold contribution to the destruction of the Buildings/Structures was supported by the requisite intent and knowledge. The evidence univocally shows his full awareness both of the factual circumstances establishing the existence of an armed conflict and of the relationship between this conflict and the destruction of the Buildings/Structures. Further apparent from the evidence are Ahmad Al Faqi Al Mahdi's awareness of the historic and non-military nature of the Buildings/Structures, as well as of his prerogatives and powers as head of the *Hisbah* and of the role played in this capacity in the context of the (partial) destruction. [...]

57. Ahmad Al Faqi Al Mahdi acted in full awareness of the protected status of the Buildings/Structures [...].

IV. CONCLUSION

58. In light of the above, the Chamber finds that there are substantial grounds to believe that Ahmad Al Faqi Al Mahdi committed the war crime of intentionally directing attacks against buildings dedicated to religion and historic monuments under article 8(2)(e)(iv) of the Statute, and therefore confirms the charge brought by the Prosecutor against Ahmad Al Faqi Al Mahdi [...].

[59] FOR THESE REASONS, THE CHAMBER

CONFIRMS the charge against Ahmad Al Faqi Al Mahdi as follows:

1. Ahmad AL FAQI AL MAHDI ("AL MAHDI"), born in Agoune (Mali), and of between thirty and forty years old, is criminally responsible for having intentionally committed in Timbuktu between around 30 June 2012 and around 11 July 2012 the war crime of attacking buildings dedicated to religion and historic monuments, pursuant to and prohibited by, article 8(2)(e)(iv) of the Rome Statute ("the Statute").

[...]

4. From January 2012, a non-international armed conflict broke out in the territory of Mali, and led to different armed groups taking control of the north of the country. Thus, in early April 2012, the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) took control of Timbuktu. They occupied the city until mid-January 2013, when they fled in the face of the advance of the Malian Army supported by the French forces of Operation Serval.

5. During these approximately 10 months, the members of Ansar Dine and AQIM imposed their will in Timbuktu, through a local government, which included an Islamic tribunal, a morality brigade (*Hisbah*), and an Islamic police force. These structures exercised control over the population and significantly restricted and violated the rights and freedoms of the people of Timbuktu.

[...]

17. The attack against these buildings/monuments took place within the geographic and temporal context of the non-international armed conflict in Mali. The attack was closely connected with the conflict.

[...]

B. ICC TRIAL JUDGMENT IN THE CASE OF THE PROSECUTOR AGAINST AHMAD AL FAQI AL MAHDI

[Source: ICC, Judgment and Sentence, The Prosecutor v. Ahmad Al Faqi Al Mahdi, No. ICC-01/12-01/15-171, Trial Chamber VIII, 27 September 2016, available at: https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF (footnotes omitted)]

[...]

I. INTRODUCTION

A. Procedural History

[...]

7. The trial was held between 22 and 24 August 2016. Mr Al Mahdi made an admission of guilt. [...]

[...]

II. JUDGMENT

A. Applicable Law

1. Crime Charged

11. The only confirmed charge in this case is the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute, which punishes the following act: 'Intentionally 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.' The parties jointly submit that this is the proper characterisation of the crime committed in this case. Accordingly, this is the crime with which the Prosecution has charged the defendant and to which the defendant has admitted guilt.

12. The Chamber notes that the Prosecution did not charge the defendant with the more general crime of destruction of civilian property under Article 8(2)(e)(xii), which punishes the following acts: 'Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the

necessities of the conflict.’ No arguments have been raised that Article 8(2)(e)(xii) would have been a more appropriate charge and the Chamber sees no reason to consider any legal recharacterisation, noting in particular that the specific intent of the defendant to attack protected objects meets squarely the *mens rea* requirement of Article 8(2)(e)(iv).

[...]

13. [...] Considering that this is the first case in which the Court is applying Article 8(2)(e)(iv), the Chamber will proceed to interpret this crime and its elements.

14. The special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations and to the 1919 Commission on Responsibility, which identified ‘wanton destruction of religious, charitable, educational, and historic buildings and monuments’ as a war crime. The Geneva Conventions also recognised the need for special protection of objects – like hospitals – which are already protected as civilian objects. Subsequent international instruments reflect the enhanced protection of cultural property, including Additional Protocols I and II to the Geneva Conventions and the Second Protocol to the Hague Convention of 1954.

15. The Chamber considers that the element of ‘direct[ing] an attack’ encompasses any acts of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group. The Statute makes no such distinction. This reflects the special status of religious, cultural, historical and similar objects, and the Chamber should not change this status by making distinctions not found in the language of the Statute. Indeed, international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.

16. Moreover, existing case-law from other cases pertaining to attacks against civilian populations does not offer guidance. The Statute protects persons and cultural objects differently. Persons are protected by many distinct clauses that apply during hostilities, after an armed group has taken control, and against various and specific kinds of harm. However, cultural objects in non-international armed conflicts are protected as such, not generically as civilian objects, only in Article 8(2)(e)(iv), which makes no distinction between attacks made in the conduct of hostilities or afterwards. Lastly, the jurisprudence of the ICTY is of limited guidance given that, in contrast to the Statute, its applicable law does not govern ‘attacks’ against cultural objects but rather punishes their ‘destruction or wilful damage’. The legal contexts thus differ.

17. Article 8(2)(e)(iv) is the non-international armed conflict analogue of Article 8(2)(b)(ix), applicable in international armed conflict and with nearly identical elements. Both provisions govern the directing of attacks against special kinds of civilian objects, reflecting the particular importance of international cultural heritage. Article 8(2)(e) sets forth a contextual component, namely that it applies to armed conflicts not of an international character that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups.

18. The parties submit jointly, and the Chamber has received evidence, that there was an armed conflict not of an international character in Mali during the relevant period. The Chamber notes that one element of the

crime is that the 'conduct took place in the context of and was associated with an armed conflict not of an international character.' The Chamber understands that the 'conduct' is the attack on cultural objects, and what this element requires is not a link to any particular hostilities but only an association with the non-international armed conflict more generally.

[...]

B. Established facts of the case

[...]

1. Context

31. In January 2012, armed violence took place in the territory of Mali and led to different armed groups taking control of the north of the country. Around early April 2012, following the retreat of Malian armed forces, the groups Ansar Dine and Al-Qaeda in the Islamic Maghreb ('AQIM') took control of Timbuktu. From then until January 2013 Ansar Dine and AQIM imposed their religious and political edicts on the territory of Timbuktu and its people. They did so through a local government, which included an Islamic tribunal, an Islamic police force, a media commission and a morality brigade. This morality brigade was called the *Hesbah*.

32. After living briefly in Algeria, Mr Al Mahdi returned to Mali around the beginning of April to provide support to these armed movements. Mr Al Mahdi was in direct contact with the leaders of Ansar Dine and AQIM, including [...] Abou Zeid (the 'Governor' of Timbuktu under the armed groups) [...]. Mr Al Mahdi was viewed as an expert on matters of religion, and was consulted in this capacity, including by the Islamic tribunal. Mr Al Mahdi was very active in aspects of the Ansar Dine and AQIM administration.

33. Abou Zeid asked Mr Al Mahdi to lead the *Hesbah*, and he did so from its creation in April 2012 until September 2012. He wrote a document on the role of the *Hesbah* and its objectives, which was then distributed to the other government structures put in place. The *Hesbah* was entrusted with regulating the morality of the people of Timbuktu, and of preventing, suppressing and repressing anything perceived by the occupiers to constitute a visible vice.

2. Decision to attack the mausoleums and mosques

34. The mausoleums of saints and mosques of Timbuktu are an integral part of the religious life of its inhabitants. Timbuktu's mausoleums and mosques constitute a common heritage for the community. These mausoleums are frequently visited by the residents – they are places of prayer and, for some, places of pilgrimage.

[...]

37. Despite his initial reservations, Mr Al Mahdi agreed to conduct the attack without hesitation on receipt of

the instruction. He was conscious of the object of the common plan to attack these sites. [...] He personally determined the sequence in which the buildings/monuments were to be attacked.

3. *The attack and Mr Al Mahdi's responsibility*

38. The attack itself was carried out between around 30 June 2012 and 11 July 2012. Ten of the most important and well-known sites in Timbuktu were attacked and destroyed by Mr Al Mahdi and other individuals adhering to the same common plan [...].

39. All these sites were dedicated to religion and historic monuments, and were not military objectives. With the exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, all these buildings had the status of protected UNESCO World Heritage sites.

40. Mr Al Mahdi knew that he exercised joint control over the attack and was fully implicated in its execution. [...]

C. FINDINGS

[...]

1. *Findings on Article 8(2)(e)(iv) of the Statute*

45. The facts of the case demonstrate that Mr Al Mahdi, in his capacity as head of the *Hesbah*, was put in charge of the execution phase of destroying the 10 mausoleums and mosques specified in the previous subsection. Mr Al Mahdi and the attackers accompanying him directed an attack on these buildings, resulting in destruction or significant damage to all of them.

46. These mausoleums and mosques all qualify as both religious buildings and historic monuments, as evidenced by their role in the cultural life in Timbuktu and the status of nine of these buildings as UNESCO World Heritage sites. UNESCO's designation of these buildings reflects their special importance to international cultural heritage, noting that 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern'. Attacking these mausoleums and mosques was clearly an affront to these values [...].

47. These mausoleums and mosques were also clearly the object of the attack, as the evidence establishes the deliberate manner in which the attackers went from one building to the next in a relatively short time period.

[...]

49. The Chamber is satisfied that these acts took place in the context of and were associated with a non-international armed conflict between Malian Government forces and groups including Ansar Dine and AQIM. The evidence demonstrates that Ansar Dine and AQIM qualified as organised armed groups at the relevant

time, with the Chamber noting in particular their military capacity to displace the Malian army, capture Timbuktu and exercise some form of government over it for approximately nine months. With respect to the requirement that the armed violence must meet a certain minimum level of intensity to be distinguished from mere internal disturbances and tensions, the Chamber notes that the fact that these groups exercised control over such a large part of Mali for such a protracted period – with the resulting effect on the civilian population concerned – clearly demonstrates a sufficient degree of intensity of the conflict. It would not have been possible for these armed groups to carry out the attack without their conquest of Timbuktu, and the justifications stated during the attack were the same as those advanced by the armed groups for taking over Timbuktu and Northern Mali more generally.

50. The Chamber also notes that there is no evidence in the record of any foreign intervention in opposition to the Malian forces in the relevant time period, nor have the parties claimed that there was any involvement by another State that could potentially affect the classification of the conflict. This means that there is no evidence that the armed conflict became internationalised or should have been classified as international from the outset.

[...]

D. CONCLUSION

62. In the light of the admission of guilt, the hearings held and the evidence brought forward, the Chamber is satisfied beyond reasonable doubt that all the essential facts of the crime charged are proven.

63. Pursuant to Articles 8(2)(e)(iv), 25(3)(a) and 65(2) of the Statute, the Chamber convicts Mr Al Mahdi as a co-perpetrator for attacking the following protected objects in Timbuktu, Mali between around 30 June 2012 and 11 July 2012: [...]

III. SENTENCE

64. Having concluded that Mr Al Mahdi is responsible for intentionally attacking the above-mentioned protected objects as a co-perpetrator, the Chamber will now turn to the determination of the appropriate sentence. [...]

[...]

B. ANALYSIS

[...]

1. Gravity of the crime

76. In addressing the gravity of the crime committed, the Chamber considered, in particular, the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time,

place and manner.

[...]

78. With regard to the extent of the damage caused, the Chamber recalls that most of the 10 sites were completely destroyed. Moreover, the attack was carefully planned and lasted approximately 10 days. Additionally, the impact of the attack on the population was heightened by the fact that it was relayed in the media. The Chamber also notes the testimony of [witnesses], who explained that Timbuktu was an emblematic city with a mythical dimension and that it played a crucial role in the expansion of Islam in the region. Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints. The mausoleums reflected part of Timbuktu's history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu. [...] [P]eople of Timbuktu were collectively ensuring that the mausoleums remained in good condition in the course of symbolic maintenance events involving the entire community – women and elderly and young people. The mausoleums were among the most cherished buildings of the city and they were visited by the inhabitants of the city, who used them as a place for prayer while some used them as pilgrimage locations.

79. Thus, 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.

80. 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. [...] [A] witness testified that destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place. Moreover, P-151 described how the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.

[...]

C. DETERMINATION OF THE SENTENCE

[...]

109. The Chamber finds that the crime for which Mr Al Mahdi is being convicted is of significant gravity. This said, the Chamber has found no aggravating circumstances and five mitigating circumstances, namely: (i) Mr Al Mahdi's admission of guilt; (ii) his cooperation with the Prosecution; (iii) the remorse and the empathy he expressed for the victims; (iv) his initial reluctance to commit the crime and the steps he took to limit the damage caused; and (v), even if of limited importance, his good behaviour in detention despite his family

situation. [...]

[...]

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

CONVICTS Mr A1 Mahdi of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute;

SENTENCES Mr A1 Mahdi to 9 years of imprisonment;

[...]

Discussion

I. Classification of the Conflict and Applicable Law

1. (*Document A, paras 30 – 31, 44, [59]; Document B, paras 31, 49 – 50*)

a. How would you qualify the situation in Mali? What is the applicable law? Is the threshold for the application of Additional Protocol II met? Why? Did the same rules apply before, during and after the occupation of Timbuktu by the armed groups? Can armed groups be said to “occupy” territory? In para. 44 of Document A, the Pre-Trial Chamber refers to the “occupation” of Timbuktu. Does the term in this sense have the same meaning as in an international armed conflict? (GC I-IV, Art. 3; P II, Art. 1; Hague Regulations, Art. 42)

b. (*Para. [59]*) According to the Pre-Trial Chamber, the attack perpetrated by Ahmad Al Faqi Al Mahdi against Timbuktu’s cultural property “took place within the geographic and temporal context” of a non-international armed conflict. What is the geographical and temporal scope of IHL? Can it cover acts that occurred outside the territory of the State party to the NIAC? Would IHL have applied if Ansar Dine had destroyed cultural property located in neighbouring Niger or Burkina Faso? (See ICTY, *The Prosecutor v. Duško Tadić*, Decision on jurisdiction, 1995, para.70)

c. Which indicative factors does the Trial Chamber consider for the assessment of the level of organization of Ansar Dine and AQIM? And for the assessment of the intensity of the armed violence? In your opinion, does the fact that “these groups exercised control over such a large part of Mali for such a protracted period”, as the Trial Chamber states in para. 49 of Document B, “clearly” demonstrate “a sufficient degree of intensity of the conflict”? Why? (ICTY, *The Prosecutor v. Duško Tadić*, Decision on jurisdiction, 1995, para.70; See ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Judgment, Trial Chamber, 2008, paras. 49, 60)

d. How would the intervention of a foreign State have changed the classification of the conflict, if its armed forces had intervened in support of the Malian Government? If the foreign State had sent troops in support of Ansar Dine and AQIM without the consent of the Malian Government? If the foreign State had overall control of Ansar Dine and AQIM?

II. Protection of Cultural Heritage in Armed Conflicts

2. (*Document A, paras 34 – 36, 39, 41 – 42; Document B, paras 14 – 18, 34*)

a. What is cultural heritage? What is the difference between cultural heritage and cultural property? What kinds of objects and sites constitute cultural property? Is it defined in IHL? How can it be identified? Were the

mausoleums that were destroyed by Ahmad Al Faqi Al Mahdi cultural property? The manuscripts? Why? (Hague Convention for the Protection of Cultural Property, Art. 1; P I, Art. 53; P II, Art. 16)

b. What is the relationship between the protection of cultural heritage in Protocols I and II and in the 1954 Hague Convention? (P I, Art. 53; P II, Art. 16)

c. Are Protocols I and II (Art. 9) to the Hague Convention on the Protection of Cultural Property applicable to our case? (Protocol for the Protection of Cultural Property in the Event of Armed Conflict; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 9)

3. (*Document A, para. 36; Document B, paras 39, 46, 78-79*)

a. What significance does the listing of cultural heritage on the UNESCO World Heritage list have under IHL? Is cultural heritage protected even if it is not included in the UNESCO World Heritage list?

b. Malian authorities had requested the entire city of Timbuktu be placed on UNESCO's list of cultural heritage in danger. What, if any, consequences does that have under IHL? Does it mean that nothing in Timbuktu is a legitimate military objective? Or that legitimate military objectives may only be targeted after certain measures are taken? Do you think this is a realistic measure to take in armed conflict?

4. How is cultural heritage protected in times of armed conflicts? Does it benefit from the general protection afforded to civilian objects? Does it benefit from special protection under IHL? In both types of armed conflicts? Why is cultural heritage specially protected? Which rules are armed groups bound to respect with regards to the protection of cultural heritage? (Hague Regulations, Arts 27 and 56; Hague Convention for the Protection of Cultural Property, Arts 4 and 19; P I, Arts 52(2) and 53; P II, Art. 16; CIHL Rules 8, 38, 39 and 40)

5. (*Document A, paras 43, 45 – 58; Document B, paras 12 – 18*)

a. Is an attack against cultural property a war crime? In what circumstances? Must the attack result in the destruction – either total or partial – of the property in question? According to the Pre-Trial Chamber, does an attack on cultural property have to result in damage in order for the provision to be violated? (ICC Statute, Arts 8(2)(b)(ix), 8(2)(b)(xiii), 8(2)(e)(iv) and 8(2)(e)(xii))

b. (*Document B, para.12*) In your opinion, why did the Prosecutor not charge the crime under Article 8(2)(e)(xii) of the Rome Statute? To whom did the mausoleums belong? Could they have been considered “property of an adversary”? Even if the armed group controlled the territory? (ICC Statute, Art. 8(2)(e)(xii))

c. (*Document B, paras 49, 79*) Which elements does the Trial Chamber consider when assessing the *nexus* of the acts with the armed conflict? What do you think of the following statement cited by the Chamber: “destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu”? Could this psychological component on its own serve as the requisite *nexus* between an act and an armed conflict? What, in your view, are the advantages and disadvantages of adhering to such a view?

d. (*Document B, paras 15, 18*) Was the cultural property in this case destroyed by attacks? Although Timbuktu was under control of those who destroyed the cultural property? How is an attack defined in IHL? Is the definition in the ICC Statute different? Do you agree with the Trial Chamber's interpretation that the crime of attacking cultural objects does not require “a link to any particular hostilities but only an association with the non-international armed conflict more generally”? In the light of Article 22(2) of the Rome Statute? Is the destruction of cultural property by other means than attacks prohibited by IHL? Is it a war crime? (Hague Convention for the Protection of Cultural Property, Arts 4 and 19; P I, Arts 49(1) and 53; ICC Statute, Art. 22(2); CIHL Rules 8, 38, 39 and 40)

e. (*Document B, paras 15, 18*) Does it matter under IHL or the ICC Statute whether cultural heritage was destroyed by those who controlled it or in the conduct of hostilities? Which additional conditions must be

fulfilled in the second case but not in the first case? (GC IV, Art. 53; P I, Arts 52 and 53; CIHL Rules 8, 9, 38, 40, and 50; Hague Convention for the Protection of Cultural Property, Arts 4 and 19; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property, Art. 6; ICC Statute, Art. 8(2)(e)(iv) and (xii)) f. (*Document A, para. 43*) Do you agree with the Pre-Trial Chamber's assertion that the rule establishing the war crime of intentionally targeting cultural property is the *lex specialis* to the rule establishing the war crime of intentionally targeting civilian objects? Why/Why not?

6. (*Document A, para.41; Document B, para.39*) Can cultural property become a military objective? In what circumstances? If cultural property is considered a military objective, is any attack lawful under IHL, or must it be required by imperative military necessity? What is meant by "imperative military necessity"? Can you think of any example of circumstances in which the destruction of cultural property under the control of an armed group can be required by "imperative military necessity"? (Hague Convention for the Protection of Cultural Property, Art. 4(2))

7. (*Document A, paras 40-42; Document B, para.39*) The Trial Chamber confirmed the finding of the Pre-Trial Chamber that the buildings/structures were not military objectives. If we assume, however, that they were being used for military purposes, how do you think this would have affected the Chamber's reasoning? Could anything in Timbuktu constitute a military objective for – and therefore a legitimate object of attack by – those who controlled Timbuktu? (P I, Art. 52(2); CIHL Rules 8 and 50)