



Protection of cultural heritage by the ICC

OBJECTIVES OF THE PRESENTATION - a chronological overview

- Crimes against and affecting cultural heritage have always been a priority
- 2015-2016: the *Al Mahdi* case
- 2016: the Policy paper on case selection and prioritisation
- 2018-2023: the *Al Hassan* case
- 2021: the Policy paper on cultural heritage
- Intersectional approach in the protection of cultural heritage

THE PREAMBLE OF THE ROME STATUTE

“The States Parties to this Statute,

Conscious that all peoples are united by common bonds, *their cultures pieced together in a shared heritage*, and concerned that this delicate mosaic may be shattered at any time [...]”

2015-2016: THE *AL MAHDI* CASE

PROCEDURAL BACKGROUND

- **13 July 2012** - referral of the situation to the court and opening of an investigation **on 16 January 2013**
- **7 September 2015** - application of an arrest warrant – issued by the Pre-Trial Chamber **on 18 September 2015**
- **26 September 2015** - transfer to the seat of the court
- **1 March 2016** - confirmation of charges hearing - **on 24 March 2016** Pre-Trial Chamber confirmed the charges
- **22-24 August 2016** – trial – guilty plea
- **27 September 2016** - sentence

FACTUAL BACKGROUND

- In March/April 2012, organised armed groups took control of the north of Mali, including major cities such as Timbuktu, Kidal and Gao.
- In Timbuktu, known as the city of 333 saints, Al-Qaeda in the Islamic Magreb (AQIM) and Ansar Dine imposed their own strict interpretation of Islamic law on the local population.
- They created their own system of administration, including the *Hesbah*, the Islamic Police, and the Islamic Tribunal, which were in charge of enforcing new rules and restrictions related to cultural, social or religious practices.
- In that context, they systematically attacked and destroyed many mausoleums of saints.

THE CHARGE

CRIME: Article 8 (2)(e)(iv) of the Rome Statute, namely in the context of an non international armed conflict for having “intentionally direct[ed] attacks against buildings dedicated to religion [and] historic monuments [which were] not military objectives”.

MODE OF LIABILITY:

- Initially charged under article 25(3)(a) (perpetration and co-perpetration); article 25(3) (c) (aiding, abetting or otherwise assisting) or article 25(3) (d) (contributing in any other way).
- Sentenced as direct and perpetrator and co-perpetrator under article 25(3)(a).

THE EVIDENCE

TESTIMONIAL EVIDENCE: three Prosecution witnesses who testified about: 1) the investigations conducted by the Office; 2) the status of world heritage of the destroyed mausoleums, inscribed on the UNESCO List of World Cultural Heritage since 1988, 3) the reaction of the international community and of local communities to the destructions of the mausoleums, 4) the value at one time cultural, religious and historical which such monuments had not only for local communities in Timbuktu but also for Malians.

DOCUMENTARY EVIDENCE:

- videos contemporaneous to the events - geolocated in-house by the Office,
- UNOSAT satellite imagery,
- photographs of the mausoleums before and after their destruction,
- drone and ground imagery of the affected areas - 360 degrees presentations - interactive presentations compounding all the above evidence in one visual tool: <http://icc-mali.situplatform.com/>

LEGAL FINDINGS

THE INTERPRETATION OF THE TERM “ATTACK” REFERRED TO IN ARTICLE 8 (2)(E)(IV) OF THE ROME STATUTE

- The PROSECUTION: Article 8(2)(e)(iv) has an autonomous and broader meaning than other provisions under article 8: it is a war crime to direct **any act of violence** against cultural objects even when: a) **they are in the possession of the party to the conflict to which the accused is affiliated** and b) outside the conduct of hostilities.
- TRIAL CHAMBER VIII - ICC-01/12-01/15-171, para. 15: “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. [...] This reflects the special status of religious, cultural, historical and similar objects, [...] international humanitarian law protects cultural objects as such from crimes committed both in battle and out of it.”

2016: POLICY PAPER ON CASE SELECTION AND PRIORITISATION

Para. 45: “The Office will aim to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure [...] that *the most serious crimes* committed in each situation do not go unpunished [...] *the charges chosen will constitute, whenever possible, a representative sample of the main types of victimisation* and of the communities which have been affected by the crimes in that situation”.

Para. 46: “[The Office] will pay particular attention to attacks against cultural, religious, historical and other protected objects” (Para. 46).

2018-2023: THE *AL HASSAN* CASE

PROCEDURAL BACKGROUND

- **20 March 2018** - application of an arrest warrant– issued by the Pre-Trial Chamber on **27 March 2018**
- **4 April 2018** - initial appearance
- **8 to 17 July 2019** - confirmation of charges hearing - on **30 September 2019** Pre-Trial Chamber confirmed the charges
- Trial:
 - **30 September 2019** – opening submission
 - **September 2020/9 March 2023** - evidentiary phase. 52 *viva voce* witnesses and 17 witnesses under rule 68(2)(b) and (c) of the Rules of Procedure and Evidence (“The Rules”) for the Prosecution . 2 victims presented their views and concerns before the court. 22 *viva voce* witnesses and 14 witnesses under rule 68(2)(b) and (c) of the Rules for the Defence.

THE CHARGES

- **Torture** both as a war crime (art. 8(2)(c) (i)) and crime against humanity (article 7(1)(f)). The war crimes of: **cruel treatment** (article 8(2)(c)(i)), **outrages upon personal dignity** (article 8(2)(c)(ii)), **one incident of mutilation** (article 8(2)(c)(i)) and **other inhumane acts** as crime against humanity of (article 7(1)(f)). Mode of responsibility: article 25(3)(a) and/or 25(3)(c) for some incidents and article 25(3)(d).
- The war crime of **passing sentence without due process** (article 8(2)(c)(iv)). Mode of responsibility: article 25(3)(c) and/or (d).
- **Rape** and **sexual slavery** both as a crime against humanity (article 7(1)(g)) and war crime (article 8(2)(e)(iv)) and **forced marriage** as an other inhumane act (article 7(1)(f)). Mode of responsibility: article 25(3)(d).
- **Gender persecution** as a crime against humanity (article 7(1)(h)). Mode of responsibility: article 25(3)(d).

CHARGES AGAINST CULTURAL HERITAGE

- **Article 8 (2)(e)(iv)** in the context of a non **international** armed conflict for having “intentionally direct[ed] **attacks** against buildings dedicated to religion [and] historic monuments [which were] not military objectives”. **Interpretation of the attack in Ntaganda.**

- **Religious persecution as a crime against humanity under article 7(1)(h):**
 - Prohibition of any faith other than the Muslim faith
 - Prohibition of certain religious celebrations or practices
 - Control over the way of praying, including the prohibition of prayers at mausoleums and subsequent destruction thereof
 - Prohibition of traditional practices, including the use of talismans and amulets
 - Prohibition and destruction of statue, masks, statuettes, portrayal
 - Prohibition of cultural practices like listening to music or watching the television
 - Prohibition of various social practices
 - Prohibition of secular and co-education.

2021: POLICY PAPER ON CULTURAL HERITAGE

THE OBJECTIVES:

- (i) **provide clarity and guidance to OTP staff in the application and interpretation** of the Statute and the Rules of Procedure and Evidence at all stages of the Office's work **in order to effectively investigate and prosecute** crimes against or affecting cultural heritage;
- (ii) **help strengthen the protection and the prevention of harm** to cultural heritage;
- (iii) **promote the work of, and to support, partners, including States, with a view to creating networks and synergies to coordinate efforts to protect** cultural heritage, and to prevent and prosecute related crimes globally;
- (iv) **contribute to the ongoing development of international jurisprudence** regarding crimes against or affecting cultural heritage; and
- (v) **raise awareness** regarding the importance of the protection of cultural heritage, including by supporting genuine national proceedings.

PROVISIONS OF THE ROME STATUTE APPLICABLE TO CULTURAL HERITAGE

- Provisions most directly applicable: war of attacks against protected objects which are not military objectives: a) in international armed conflicts - article 8(2)(b)(ix)) and b) in in non-international armed conflicts (article 8(2)(e)(iv)).

- War Crimes
 - Intentional directing of attacks against civilian objects (articles 8(2)(b)(ii))
 - Attack causing excessive incidental damage to civilian objects (article 8(2)(b)(iv))
 - Extensive destruction/seizure of property of the enemy/adversary (articles 8(2)(a)(iv), 8(2)(b)(xiii) and 8(2)(e)(xii))
 - Pillaging (articles 8(2)(b)(xvi) and 8(2)(e)(v))

- Crimes Against Humanity
 - Persecution on cultural grounds that are universally recognized as impermissible under international law (article 7(1)(h))

INTERSECTIONAL APPROACH IN THE PROTECTION OF CULTURAL PROPERTY

POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES -
20 June 2014

POLICY ON CHILDREN - 15 November 2016

POLICY PAPER ON CULTURAL HERITAGE – June 2021:

Para. 29 *The Office will, in the analysis of crimes against or affecting cultural heritage, apply a child-sensitive and gender-intuitive approach* that appreciates that certain types or aspects of cultural heritage may be targeted specifically because they hold a special value to a specific group, such as a particular sex, gender or age group.

CRIMES PRONE TO AN INTERSECTIONAL APPROACH

War crimes

- *Many forms of sexual or gender-based crimes may be designed to affect the cultural heritage of a community.* Individuals may be targeted for sexual slavery, or subjected to the crime of forced pregnancy, because of their shared cultural heritage, or because of their personal importance to the cultural heritage of that group, e.g., as religious or spiritual leaders. Violence specifically committed against the women of a community could produce a cultural vacuum, because these women are the oral transmitters of the community's culture, and the crimes were committed in order to ensure the loss of its oral cultural knowledge.

Crimes Against Humanity

- *Sexual and gender-based crimes: articles 7(1)(g) and 7(1)(h).* As above. The POLICY ON THE CRIME OF GENDER PERSECUTION (7 December 2022)
- *Persecution 7(1)(h).* Shared cultural heritage will usually include at least one defining feature of a persecuted group and can be used by the perpetrators to identify that group, which may include the elderly, the disabled, **women** and **children**.

...AND

Genocide

- *Causing serious bodily or mental harm to members of the group: article 6(b).* Sexual and gender-based crimes may play “an integral part of the process of destruction”, [...] a group’s shared cultural heritage may specifically motivate sexual and gender-based genocide, and sexual and gender-based crimes may be motivated in part to offend the victim group’s cultural heritage.
- *Forcibly transferring children of the group to another group: article 6(e) .* Children are the conduit of cultural heritage to future generations. If children are forcibly removed from a group, this will constitute an underlying act of genocide that is likely to have a profound effect on the access to, practice of, and continuation of a group’s cultural heritage. In relation to the children themselves, the forcible transfer may create a severe dislocation from their cultural heritage.