

The contribution of international courts and tribunals to the methodology of international law

OC - (ILA-14158) - THE AL MAHDI CASE : RETHINKING THE RELATION BETWEEN LEX SPECIALIS AND LEX GENERALIS

Rémi Fuhrmann (Canada)¹

1 - University of Quebec of Montreal

Rémi Fuhrmann

As a LLM student in International law, I mostly worked on the protection of cultural property in International humanitarian law and on the cultural heritage law. My LLM thesis, under the direction of Alejandro Lorite Escorihuela, explores the different dimensions of cultural heritage protection in event of armed conflict.

I participated in the 2019 Pictet competition with my university and reached the semi-finals. I also gave a conference about the protection of cultural property in event of armed conflict during the summer school of the University of Sherbrooke in May. My interests also go toward international criminal law, which brought me to work on the Special Tribunal for Lebanon.

Abstract

On 27 September 2016, the International Criminal Court (ICC) sentenced Ahmad Al Faqi Al Mahdi to nine years in jail for the destruction of cultural property in Timbuktu. By pledging guilty, Al Mahdi allowed the ICC to quickly close a case. However, this does not remove the significance of the case. First, it is important as the first international criminal law case that solely deal with destruction of cultural property. In addition, the judgment and the reparation order may lead us to rethink the *lex specialis* principle established by the International Court of Justice (ICJ) in the advisory opinion *Legality of the Threat or Use of Nuclear Weapons*. If the case is obviously significant from a symbolic view to fight the impunity around the destruction of heritage, it also offers important insights in the field of legal interpretation.

If the interpretive principle of *lex specialis* of the ICJ has often been seen as a panacea, the ICC perhaps demonstrates that another way should be explored. The ICJ stated that the *lex generalis* must be interpreted into the light of the *lex specialis* when both of them are applicable. The International Law Commission (ILC), under the presidency of Martti Koskeniemi, confirmed that view in its report on the fragmentation of international law, pointing out that the *lex specialis* has precedence on *lex generalis*. By establishing *lex specialis derogat lege generali* as an international law orthodoxy, the ICJ and the ILC may have had limited legal interpretation possibilities. However, although the relation between human rights and international humanitarian law (IHL) in the event of armed conflict has been used as a concrete example to illustrate the ICJ position, human rights regional courts such as the Inter-American and the African courts tried to explore this relation beyond the ICJ position. The *Al Mahdi* case could also be read as a manner to consider the relation between *lex specialis* and *lex generalis* in event of armed conflict.

In this case, at least three legal regimes can be identified: international criminal law, IHL and human rights law. Nevertheless, considering the fragmentation of international law, the international cultural heritage law could be seen as an autonomous legal regime too. But the interesting relation here is still between IHL and human rights (with cultural heritage law). Indeed, the international criminal law (the Rome Statute here) as a criminalisation of IHL violations makes obvious the relation between them. Yet here we are not before a

human rights court and the aim of the ICC is to determine if *Al Mahdi* violated the IHL and made himself guilty of a war crime. We also leave the famous ICJ example of the interpretation of the human right to life into the light of what could be considered as an arbitrary privation of life under IHL. The human rights and cultural heritage law are used here as a manner to interpret IHL and more particularly to interpret what does the protection of cultural property mean in IHL and what is a cultural property. Then, we can consider the *Al Mahdi* case as a shift toward an overtaking of the *lex specialis* as a tool to interpret the *lex generalis* to the reverse.

The reference to human rights and cultural heritage law (the *lex generalis*), is not always direct. But even without mentions of particular provisions of these regimes, the discourse of the ICC in the judgment and the reparation order makes the reference to those really clear. First, as a specific protection under the general protection of civil property in IHL, the protection of cultural heritage is specified and the use of *lex generalis* served the purpose of the judges: the cultural property as part of the heritage means a lot for individuals, groups and peoples and the protection does not only protect property but also persons. To do this, the court used a discourse which is very close to the discourse of the special rapporteur on cultural rights. As the rapporteur, the judges insisted on the importance of cultural heritage for the cultural rights of individuals, especially the right to take part in cultural life. By doing this, the court shows that the protection of cultural property in IHL should not be only seen as an application of the distinction between civil property and military objective, but also as a provision that protect individuals and rights attached to them.

Speaking about cultural rights is not harmless as it is not an IHL important concern. By referencing to human rights through the importance of heritage for individuals and to establish the gravity of the crime, the court seems to enlarge the scope of the IHL concerning cultural property. Indeed, with the developments of the court, it appears that IHL has concern with cultural rights, and the human rights are hence necessary to interpret IHL in this way.

It is even more evident during the reparation stage. By according collective reparations to three different groups for the harms resulting of the destructions, the court appropriated the discourse of the UNESCO on cultural heritage. Indeed, these reparations clarify the holders of the Timbuktu heritage: the Timbuktu community, the Malian community and the international community. These latter reflect the UNESCO normative production which alternates between national, universal and local approaches of heritage. Moreover, the observations that UNESCO has submitted as an *Amicus Curiae* have been mentioned several times by the court. The use of international cultural law to determine the holders of the Timbuktu heritage and to determine the gravity of the crime too (the majority of buildings were on the world heritage list) shows again that the protection of cultural property under IHL must be interpreted into the light of the *lex generalis*.

Indeed, despite the fact that *Al Mahdi* was sentenced formally for a crime against property, human rights and cultural heritage law are indispensable to reflect the human dimension of heritage, which is not obvious in IHL and in its criminalisation in international criminal law.

Palavras-chave : *lex specialis*, *lex generalis*, cultural heritage law