FROM THE HAGUE TO TIMBUKTU: THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI; A CONSEQUENTIAL CASE OF FIRSTS FOR CULTURAL HERITAGE AND FOR THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

This Note presents a wide-ranging legal, political, and strategic examination of the International Criminal Court and its successful landmark prosecution of Ahmad Al Faqi Al Mahdi in late 2016. The unprecedented Al Mahdi case furthers the mission and power of the international community to protect cultural heritage, prevent crimes against humanity, and prevent war crimes, particularly cultural genocide. This war crime prosecution is especially significant within its contemporaneous context of turmoil in the Middle East and North Africa, where the global community has lost significant sites of cultural and human heritage at an alarming rate. Al Mahdi demonstrates the International Criminal Court’s competence to prosecute this matter, incentivizes domestic prosecution, and strengthens relevant customary international law—despite the differing approaches of various international legal regimes. Al Mahdi thus opens doors (and dockets) to possible prosecution for the gravest violators which have seemed beyond the reach of the law, and in nations that are not party to the Rome Statute. This Note also argues that Al Mahdi marks a significant shift in prosecutorial strategy, illustrates the effectiveness and soft power of the Court’s prosecutorial discretion, and is an important early step by the Court’s new Chief Prosecutor to combat past and current criticism of the Court. Al Mahdi thus serves to combat impunity and strengthen the International Criminal Court as an institution in a time of jeopardy and controversy, a crucial task amidst contemporaneous challenges to the liberal international legal order. Within the confines of the Court and the Rome Statute, this Note also examines Al Mahdi for the valuable legal precedent that it generates, including the Court’s first-ever admission of guilt.
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## I. INTRODUCTION

On September 27, 2016, the International Criminal Court (ICC) delivered a guilty verdict in a case of firsts. *The Prosecutor v. Ahmad Al Faqi Al Mahdi* was the first international trial focused solely on the destruction of the “irreplaceable” asset of cultural heritage; the first international prosecution of an Islamic extremist militant; the first admission of guilt at the ICC; and the first completed case of the

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2. Id.


ICC’s recently appointed chief prosecutor, who is only the second individual in this position to lead the young Court. The charges arose from the June and July 2012 destruction of ten sites in the ancient and fabled city of Timbuktu during the occupation of Northern Mali by Islamic militant groups Ansar Dine and al-Qaeda in the Islamic Maghreb. Nine of these ten sites were United Nations Educational, Scientific, and Cultural Organization (UNESCO) World Heritage Sites, indicating their extraordinary significance to the whole of humanity. The destruction of these sites collectively represented the loss of more than 1% of all cultural World Heritage Sites. Despite the successful prosecution, the Court has faced criticism for not prosecuting an individual in higher leadership, and for not pursuing the prosecution of additional war crimes and crimes against humanity that Ahmad Al Faqi Al Mahdi is alleged to have committed. Since the case closed, Al Mahdi has been subject to rote review, and even dismissed as a case lacking jurisprudential and customary significance. This Note


10. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Pre-Trial Chamber 1, ¶¶ 34, 36, (Mar. 24, 2016) (“At the time of the destruction, all cemeteries in Timbuktu, including the Buildings/Structures within those cemeteries, were classified as world heritage and thus under the protection of UNESCO”).

11. See infra note 12 and accompanying text (describing countries’ dedication to preserving these World Heritage sites).


13. Many critics have expressed frustration at the supposedly narrow prosecution and decision. Notably, some legal commentators have argued that the Chamber should have expounded upon the Rome Statute’s weaknesses and gaps, arguing for expansion. This analysis misconstrues the authority vested in the Chambers by the Rome Statute, misunderstands invocable sources of law within this context, and forgets that the Court may only prosecute crimes specifically defined by the Rome Statute. See, e.g., International Criminal Law — Rome Statute — International Criminal Court Imposes First Sentence For War Crime of Attacking Cultural Heritage. — Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment & Sentence (Sept. 27, 2016), 130 HARVARD L. REV. 1978, https://harvardlawreview.org/wp-content/uploads/2017/05/1978-1985_Online.pdf (stating on page 1982, for example, that “[rather than the trailblazer that some envisaged, Al Mahdi is more appropriately characterized as an example of arrested jurisprudential development.”). Indeed, Article 74(2) of the Rome Statute prohibits a Trial Chamber decision from contemplating any matters beyond the confirmed charges, and the evidence and circumstances presented in trial.
argues that the prosecution of Al Mahdi is not only a landmark case for the protection of cultural heritage, but also a landmark case for the workings and trajectory of the ICC itself. With this case, attacks on cultural heritage are no longer crimes committed with impunity, and the ICC has demonstrated a new prosecutorial strategy—both of which establish a new era of relevance for the Court, which has never been as ineffective or problematic as its detractors usually claim. In addition, this Note demonstrates and documents many practical lessons, rules, and matters of precedent generated by Al Mahdi.

This Note will extract, frame, and catalog the elements examined and rules established by Al Mahdi, and matters of relevance to each. This Note will further examine Al Mahdi and its impact in the context of history, relevant international legal regimes, and legal strategy at the ICC. Additionally, this Note will examine the processes and future role of the ICC, as ascertainable by the implications of Al Mahdi.

Part I will continue with a brief discussion of the history of the ICC, and then of cultural heritage generally and in armed conflict. Part II will provide a clear picture of the facts and procedural history of the Al Mahdi case, as well as the overall situation in Mali which the ICC was tasked to investigate. Part III will examine the Chamber’s legal analysis, including an examination of the case’s more compelling features: admission of guilt; mode of liability; culpability; and any rules to be gleaned. To frame the analysis presented, Part IV will first establish the contemporary context of this case and the ICC as an institution, and provide an analysis which counters typical criticism of the Court. Part IV will then present an interpretive and prognostic examination of Al Mahdi, including: the Chamber’s decision and reasoning; the Court’s prosecutorial discretion; the case’s impact on future ICC cases; and the case’s implications for the protection of cultural heritage in armed conflict.

A. The International Criminal Court

Prior to the establishment of the International Criminal Court, “serious violations of international human rights and humanitarian law” would often occur with complete impunity because there was no court willing or able to try them. In the second half of the twentieth century, ad hoc international tribunals were created to address the most egregious crimes committed during specific armed conflicts.16

Rome Statute, infra note 25, art. 74(2).


16. See Understanding the International Criminal Court, supra note 14, at 3 (“Some of the most heinous crimes were committed during the conflicts which marked the twentieth century. Unfortunately, many of these violations of international law have remained unpunished. The Nuremberg and Tokyo tribunals were established in the wake of the Second World War.”).
For example, the Nuremberg Trials tried Germans for war crimes committed during World War II, and the International Criminal Tribunal for the former Yugoslavia (ICTY) tried criminals on both sides of the Serbian and Bosnian conflict of the 1990s. The scope of these tribunals was limited to the places and times of those conflicts. The ICC is a realization of the needs highlighted by these and other preceding international tribunals, and is the only permanent body with broad global jurisdiction on these matters. First envisioned as early as 1872, the ICC is central to the international goals of peace, justice, and legal order, a system first theorized by pioneers of international law, Grotius, Vitoria, and Vattel.

Established by the Rome Statute in 2002, the ICC operates under a
prescribed hybrid justice system\textsuperscript{26} and statutorily defined crimes. The ICC is a court of last resort, existing to “end impunity” by prosecuting the most serious crimes of international concern which other courts cannot, or will not.\textsuperscript{27} A case may reach the ICC when a domestic issue is referred to the ICC by a member state (territoriality), a crime is committed by a citizen of a member state (active nationality), or if the United Nations Security Council (U.N.S.C.) makes a referral of any State or situation (universality).\textsuperscript{28} The ICC will first ensure jurisdiction and engage in a preliminary examination; then it will undertake an in-depth investigation of a situation when warranted, assessing crimes and possible wrongdoers; and then it will request a Chamber issue warrant(s) of arrest.\textsuperscript{29} Once a warrant is issued, the ICC depends upon member and friendly states to arrest and transfer the suspect to The Hague.\textsuperscript{30} The ICC will then hold a fair and independent trial before making a decision and sentencing.\textsuperscript{31} A trial verdict may be appealed to the ICC Appeals Chamber, where five judges who did not hear the trial will confirm, amend, or reverse results.\textsuperscript{32} The last stage is the determination of reparations to victims of the crime, if and when appropriate.\textsuperscript{33}

Following the conclusion of \textit{Al Mahdi}, as of January 2017, the ICC had brought 23 cases—12 of which had been or currently were at the trial phase—and delivered verdicts for 10 individuals.\textsuperscript{34} As of September 2017, the Rome Statute had 124 state parties, and an additional 31 signatory states.\textsuperscript{35} Notably absent are

\begin{footnotesize}
\begin{enumerate}
\item See \textit{About}, Int’l Crim. Ct., https://www.icc-cpi.int/about (last visited Oct. 27, 2017) (The ICC, “is participating in a global fight to end impunity.”).
\item See \textit{What does the International Criminal Court Do?}, BBC News (June 25, 2015), http://www.bbc.com/news/world-11809908 (“The ICC has no police force of its own to track down and arrest suspects. Instead it must rely on national police services to make arrests and seek their transfer to The Hague.”).
\item See \textit{Understanding the International Criminal Court}, Int’l Crim. Ct., https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf, 10 (last visited Oct. 29, 2017) (“A Trial Chamber’s primary function is to ensure that trials are fair and expeditious and are conducted with full respect for the rights of the accused and due regard for the protection of the victims and the witnesses. It also rules on the participation of victims at the trial stage.”).
\item \textit{Id.}; see also Rome Statute, supra note 25, art. 75 (“The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”).
\item Email from Fadi El Abdallah, Spokesperson & Head of Public Affairs Unit, Int’l Crim. Ct., to author (Jan. 24, 2017, 03:44 EST) (on file with author); Int’l Crim. Ct., \textit{The Court Today} (2016) (listing investigations and cases); see also \textit{About}, Int’l Crim. Ct., https://www.icc-cpi.int/about (last visited Oct. 05, 2017).
\item UN General Assembly, \textit{Rome Statute of the International Criminal Court} (Signatory
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several political and economic powerhouses: the United States, China, and India. In late 2016, the ICC also saw the withdrawal of Russia’s signatory status, and the memberships of South Africa and Burundi—withdrawals based upon claimed reasons that are effectively red herrings. Early 2017 saw the African Union call for en masse African exodus from the ICC. As an institution under intense criticism in a changing global political landscape, every move that the ICC makes is consequential. Al Mahdi provides insight into the effectiveness, future, and strategy of the ICC in confronting these challenges and trends.

B. Cultural Heritage

Some say “cultural heritage is the mirror of humanity,” Cultural heritage is made up of the tradition and history that defines a people as distinct, which is both unknowable and evidentiary in nature. The laws at issue in this Note address only physical manifestations of cultural heritage. Broadly defined, physical cultural heritage is “cultural property...[sic]that has some special relationship with a particular culture or nation state.” The 1954 Hague Convention for the Protection of the Cultural Property in the Event of Armed Conflict (Hague 1954) defines cultural property as:

[I]Irrespective of origin or ownership:
(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites: groups of

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36. See Statement by the Russian Foreign Ministry, THE MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FED’N (Nov. 16, 2016, 2:15 PM), http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2523566. (“The work of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council. It is worth noting that during the 14 years of the Court’s work it passed only four sentences having spent over a billion dollars.”).

37. See infra Section IV.A. (exploring the politics of Court membership and withdrawal); see also African Union Backs Mass Withdrawal from ICC, BBC (Feb. 1, 2017), http://www.bbc.com/news/world-africa-38826073 (“South Africa and Burundi have already decided to withdraw, accusing the ICC of undermining their sovereignty and unfairly targeting Africans.”).


buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; . . . .

Two basic, influential arguments for the protection of cultural heritage property are (1) the bond with the past and dignity that this property provides to its people(s), and (2) that cultural property has scholarly and aesthetic value that depends on preservation of its context.

1. Cultural Heritage in Armed Conflict

In antiquity, the destruction of cultural heritage served to destroy the identity and history of a conquered people—to erase evidence they ever existed. In ancient times, this practice was accompanied by the war booty theory, which entitled a victorious power to the treasures of the defeated power. World history is rife with destruction and pillaging by conquerors.

In modern times, most military powers have determined that the elimination of cultural heritage makes the recovery and assimilation of an attacked population much more difficult and unsuccessful in the long term. In addition, recognition has evolved over time to place importance on all cultural heritage, not just the prevention of cultural genocide, because all cultural heritage belongs collectively to humanity. This change from “war booty” to “human heritage” occurred throughout the sixteenth and eighteenth centuries, and underwent rapid change and legitimation in the nineteenth century. For example, during the War of 1812, a

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42. See Posner, supra note 40, at 222–24 (“[A] particular people has a right to possession of its cultural property because possession of cultural property is important to the dignity of a people...Cultural property...has scholarly and aesthetic value...[which] depends greatly on its careful handling.”).


45. See id. (“The looting and destruction of monuments, buildings, and objects with cultural and religious significance during times of armed conflict, have a long history going back to ancient times.”).


47. See Gerstenblith, supra note 44, at 679–82 (discussing the historical transition of cultural sites and objects from legitimate war booty to protected property through sixteenth and nineteenth centuries); see also Neeru Chadha, Protection of Cultural Property During Armed
British Judge ordered the Royal Navy to return seized art works to the United States of America because they “are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.”

“Cultural Genocide” is a form of genocide included in the draft of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, but not included in the final agreement. Today, cultural genocide has received legal recognition by the international community, specifically through codification of the Rome Statute and the work of the ICTY. Briefly, cultural genocide may be understood as follows:

Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group’s language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated.

Most countries have signed international agreements aimed at protecting cultural heritage and at preventing cultural genocide. The first modern code

Conflict: Recent Developments, 1 ISIL Y.B. INT’L HUMAN & REFUGEE L. 219, 219 (2001) (“[T]he 1874 Declaration of Brussels, the 1880 Oxford Code, Regulations Respecting the Laws and Customs of War on Land (1899 Hague Conference), Fourth Hague Convention on Laws and Customs of War and the Ninth Hague Convention concerning Bombardment by Naval Forces in times of war (1907) carried forward these principles prohibiting inter-alia bombardment or willful damage to historical monuments or works of art”).

51. See Gerstenblith, Destruction of Cultural Heritage, supra note 49, at 343–44 (“The International Criminal Tribunal for the former Yugoslavia (ICTY) used cultural heritage destruction during the Balkan Wars as a method of establishing the genocidal intent of the Serbs against the Bosnian Muslims.”).
53. See id. (“[A]n individual right to cultural existence was recognized in the 1948 Universal Declaration of Human Rights and subsequently affirmed in the International Covenant on Economic, Social and Cultural Rights. And to accommodate the erosion of traditional geographic and economic boundaries, more recent treaties such as the Charter of the European Union and the Council of Europe’s Framework Convention for the Protection of National Minorities contain anti-assimilation language and create express obligations to respect cultural
recognizing and requiring the preservation of cultural heritage during wartime came about during the American Civil War. The President of the United States of America directed Columbia Law School Professor Francis Leiber to draft a code for the armed forces. Amongst other provisions protecting cultural tangibles, Article 35 of the “Leiber Code” included the directive that “[c]lassical works of art, libraries, scientific collections, or precious instruments, …[sic] as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.” The first penal code to protect cultural heritage was developed for an intra-national conflict, where the military powers in opposition were actually part of the same nation and thus shared (1) joint cultural heritage and (2) mutual goals for long-term prosperity and peace. The Leiber Code provided a direct model for subsequent international agreements, to which varying and overlapping coalitions of countries are party.

The Hague Conventions and subsequent protocols form the most encompassing prohibitions regarding cultural heritage during armed conflict in place today. The Hague Convention of 1899 and Hague Convention of 1907 prohibited the destruction of real and personal property of an occupied state or person(s), except where militarily necessary, and the 1907 convention specifically safeguarded historic monuments and “buildings dedicated to religion, art, science, or charitable purposes.” The Hague Convention of 1954 (Hague 1954) is of diversity. Culture is also protected through such specific-purpose instruments as the European Cultural Convention and the Convention for the Protection of Cultural Property in the Event of Armed Conflict.”


55. See id. (“[The Lieber Code was] drafted at the request of U.S. President Abraham Lincoln for the U.S. Army by Francis Lieber, a professor at Columbia University.”).

56. Id. at 28.


58. See id. at 26–31 (listing various international agreements that have different nations as signatories).

59. See Chadha, supra note 47, at 219 (listing the first five international agreements that prohibited the “bombardment or wilful [sic] damage to historical monuments or works of art.”).

60. See Gerstenblith, Protecting Cultural Heritage in Armed Conflict, supra note 44, at 681–83 (noting that these two international conventions concerning the protection of cultural property during armed conflict ratified by the United States and the United Kingdom.”).

paramount importance, and enjoys broad global subscription. Hague 1954 sets out mechanisms and requirements for protection incumbent on both domestic and foreign parties to conflict, but does not provide provisions for enforcement. Hague Protocol I (Hague 1977) and Hague Protocol II (Hague 1999) provide for enforcement, but fewer countries are party to them than Hague 1954. Hague 1999 requires states to prosecute crimes or to extradite those that commit them to a country or institution that can and will prosecute, effectively producing universal jurisdiction. Hague 1999 also requires countries to have domestic penal laws regarding the destruction of cultural heritage.

The greatest shortcomings of these agreements, though well intentioned, are that low-level actors within conflicts are often unaware of these protections, and the protection of cultural heritage is often a low priority for state action taken in response to unanticipated attacks. Increasing international recognition and codification culminated in inclusion of these crimes within the Rome Statute as grave war crimes, providing the basis for the ICC’s momentous Al Mahdi case.
2. The Role of UNESCO

UNESCO was formed by the international community in 1945 “in order to respond to the firm belief of nations, forged by two world wars in less than a generation that political and economic agreements are not enough to build a lasting peace[, . . .] because peace must be established on the basis of humanity’s moral and intellectual solidarity.” UNESCO is the foremost international governmental body concerned with matters of cultural heritage. UNESCO serves many important roles, but among the most relevant to Al Mahdi is the work of its Committee for the Protection of Cultural Property in the Event of Armed Conflict (CPCPEAC) and its World Heritage Committee (WHC).

Hague 1999 established CPCPEAC. Outside of resolutions of the U.N.S.C. and United Nations General Assembly, the CPCPEAC and UNESCO itself are the most prominent world bodies with the authority to call for protection of and cessation of attack on cultural heritage. More concretely, it has the power to grant, suspend, and cancel a status of “enhanced protection” for a site. CPCPEAC also administers the Fund for the Protection of Cultural Property in the Event of Armed Conflict, which may assist with the restoration of damaged sites of significance.

The WHC was established by the 1972 Convention Concerning the Protection of the World Cultural Heritage and Natural Heritage (World Heritage Convention), and is composed of twenty-one members elected from the convention’s state parties. This organization has the authority to designate sites of outstanding universal value as landmark World Heritage Sites, which provides high-level publicity, awareness, and protection. This designation is often highly sought for the scholarly and tourist attention that it will attract, increasing the cachet and contemporary value of a designee, and thereby theoretically protecting it from

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damage by any party or force. Indeed, designation obligates the territorial possessor to invest in and safeguard the protected entity. Like the CPCPEAC, the WHC also has a correlated fund, the World Heritage Fund.

When the attacks in Al Mahdi began on June 30, 2012, there were only 725 cultural sites in the world designated by the WHC as World Heritage Sites. The acts at trial before the Court in Al Mahdi destroyed more than 1% of those World Heritage Sites. Before the attacks took place, UNESCO and the WHC raised alarm within the international community, and placed Timbuktu sites on their “List of World Heritage in Danger.” These efforts led in part to the U.N.S.C.’s adoption of three resolutions condemning the destruction of Mali’s cultural heritage, and urging their protection. Immediately after their destruction, WHC and UNESCO began building a coalition to support restoration and reconstruction. After visitation was safe, UNESCO and its partners were on the ground assessing damage and providing expert assistance. Cultural rehabilitation work began in January 2013, including the “safeguarding of manuscripts,” which represent Timbuktu’s legacy as one of the greatest intellectual centers the world has ever known. Notably, these manuscripts

76. Id.; See Roger O’Keefe, World Cultural Heritage: Obligations to the International Community As a Whole?, 53 INT’L & COMP. L Q. 1, 189 (Jan. 2004) (“each State Party to the Convention, by virtue of Article 4, recognizes its’ duty of ensuring the identification, protection, conservation, presentation and transmission to future generations’ of cultural heritage situated on its territory, ‘cultural heritage’ being defined as monuments, groups of buildings and sites ‘of outstanding universal value.’”).
77. Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 38.
79. 9 of 725 sites is 1.24%.
87. Charlie English, The Book Rustlers of Timbuktu: How Mali’s Ancient Manuscripts were
possibly lack coverage within the Rome Statute. Reconstructed of destroyed and damaged sites began in March 2014, and was concluded in September 2016 with the assistance and cooperation of Mali, UNESCO, and various international state parties.

II. THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI

A. Northern Mali in 2012

Accounts differ, but the following set of facts is common among them. During March 21 and 22, 2012, a military coup occurred a few days before scheduled presidential elections, displacing the civilian government of Mali.

88. See supra Section IV.C.1.
91. Given the international nature of the proceedings, the many interested parties, and many overlapping legal regimes, a full accounting of every procedural step, motion, filing, statute, party, and conclusion would realize the meaning of ad nauseam. This Note focuses on the most relevant matters of interest in Al Mahdi, and on the most revelatory issues and principles within the case itself.
From January through March 2012, an armed rebellion occurred in Northern Mali, and the Malian Armed Forces withdrew by April 1, 2012, ceding the region. This armed rebellion was first undertaken primarily by Tuareg separatist rebels under the name of the National Movement for the Liberation of Azawad (NMLA), who have been seeking an independent Azawad state since 1960. The initial rebellion resulted in the entrance of numerous militia forces into the Northern Mali conflict, including al-Qaeda in the Islamic Maghreb (AQIM) and Ansar Dine (an emergent Islamic jihadist group). After the region was ceded, the non-governmental forces fought for control, and Ansar Dine, allied with AQIM, established control and imposed their brand of Sharia law, from April through December 2012. It was in this region and at this time that the events in the Al Mahdi trial took place.

Meanwhile, bowing to external pressure, the military of Mali handed nominal power to an interim civilian government in April 2012. Bowing to internal unrest, a new unity government was formed in August 2012, and a new succession of top leadership occurred yet again in December 2012. From January through February 2013, French and Malian armed forces successfully re-took the territory from all other parties. In July 2013, a peace deal was signed with the NMLA Tuareg rebels, which has had limited success, as the unrest in the region between Mali and the rebels continued for years afterward.

B. Facts

Ahmad Al Faqi Al Mahdi (hereinafter Mr. Al Mahdi) was born in approximately 1975, in Agoune, 100 kilometers west of Timbuktu, Mali. Mr. Al
Mahdi was regarded as an expert on religious matters.\textsuperscript{103}

From April 2012 to January 2013, Ansar Dine and AQIM controlled northern Mali and Timbuktu. During this time, they imposed religious Sharia law. Their governance of the region and people included a morality brigade, called the Hesbah,\textsuperscript{104} which Mr. Al Mahdi led until September 2012.\textsuperscript{105} Mr. Al Mahdi created the organizational documents of the Hesbah, including its role and objectives.\textsuperscript{106}

In June 2012, the leadership of Ansar Dine and AQIM was determined to destroy the mausoleums and other significant sites of Timbuktu.\textsuperscript{107} Mr. Al Mahdi was consulted and initially recommended against destruction to maintain good relations between the occupiers and the general population.\textsuperscript{108} However, Mr. Al Mahdi agreed to conduct the attack when instructed by superior authorities.\textsuperscript{109}

The attacks took place roughly around June 30, 2012 to July 11, 2012.\textsuperscript{110} Mr. Al Mahdi wrote a sermon explaining the need for this destruction, which was delivered at Friday prayer prior to the attacks.\textsuperscript{111} Mr. Al Mahdi decided the manner and order of attacks, arranged logistics, personally supervised and supported each attack, and personally participated in at least five of the ten attacks.\textsuperscript{112} Mr. Al Mahdi also explained and promoted these attacks to media present on the scene while they were occurring under his supervision.\textsuperscript{113}

None of the targeted objects were military objectives, and all were dedicated to religion and historic monuments.\textsuperscript{114} Nine out of the ten sites were listed as protected UNESCO World Heritage Sites,\textsuperscript{115} and all ten were included on the List of World Heritage in Danger.\textsuperscript{116} The destroyed sites were of incredible significance to both the world and local\textsuperscript{117} citizenry.\textsuperscript{118}

\textsuperscript{103} See Al Mahdi, ICC-01/12-01/15-171, Judgment, \( \S \) 9, 32 (stating Al Mahdi had studied the Koran, gave lectures on religious matters, and was considered an expert on religious matters.).

\textsuperscript{104} Throughout most Al Mahdi documents, this is spelled “Hisbah,” but the Judgment and Sentencing order uses “Hesbah.”

\textsuperscript{105} Al Mahdi, ICC-01/12-01/15-171, Judgment, \( \S \) 33.

\textsuperscript{106} Id.

\textsuperscript{107} See id. \( \S \) 36 (“In late June 2012, Ag Ghaly made the decision to destroy the mausoleums, in consultation with Al Chinguetti and Al Hammam.”).

\textsuperscript{108} Id.

\textsuperscript{109} See id. \( \S \) 37.

\textsuperscript{110} See id. \( \S \) 38.

\textsuperscript{111} See id. \( \S \) 37.

\textsuperscript{112} See id.

\textsuperscript{113} See Al Mahdi, ICC-01/12-01/15-171, Judgment, \( \S \) 41 (Mr Al Mahdi was interview by the press during the course of an attack).

\textsuperscript{114} Id. \( \S \) 39.

\textsuperscript{115} See id. (“With the exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, all these buildings had the status of protected UNESCO World Heritage sites.”).


\textsuperscript{117} See Sebastian Green Martinez, The ICC Dropped the Ball on Analysing the Impact of Cultural Destruction on Timbuktu’s Population, INT’L JUST. TRIB. (Oct. 28, 2016), https://www.justicetribune.com/blog/iccdroppedballanalysingimpactculturaldestructiontimbuktus-
C. Procedural History

In *Al Mahdi*, the ICC was tasked with determining the guilt of Mr. Al Mahdi for the war crime of intentionally directing attacks against ten protected objects, pursuant to Article 8(2)(e)(iv) of the Rome Statute,\(^\text{119}\) roughly around June 30, 2012, to July 11, 2012.\(^\text{120}\) Article 8(2)(e)(iv) specifically 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.”\(^\text{121}\)

Mr. Al Mahdi was tried under various modes of liability for each affected site: direct perpetrator or co-perpetrator under Article 25(3)(a); soliciting and inducing the crime under Article 25(3)(b); facilitating the crime under Article 25(3)(c); and contributing to the crime’s commission by a group acting with common purpose under Article 25(3)(d).\(^\text{122}\) Including the judgment and sentencing, the Trial Chamber rendered nineteen “written decisions, 12 oral decisions and 37 e-mail decisions in the course of the trial proceedings.”\(^\text{123}\)

1. Referral and Investigation

The events in Northern Mali did not happen beyond the gaze of the international community, and official statements emanated from many bodies and authorities highlighting the grave situation in the region.\(^\text{124}\) The highest profile relevant notice came from U.N.S.C. Resolution 2056 on July 5, 2016, which emphasized that attacks on cultural heritage may violate the Rome Statute, but was

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118. These cites 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 Sidi Yahia Mosque door and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 10.


122. See *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 57 (“The Chamber notes that the Pre-Trial Chamber confirmed co-perpetration along with other modes of liability in the alternative, namely: (i) Article 25(3)(b) (soliciting and inducing); (ii) Article 25(3)(c) (aiding and abetting) and (iii) Article 25(3)(d) (contributing in any other way). Mr Al Mahdi accepts that all charged modes of liability, including co-perpetration, are established.”).


not an official referral of the situation to the ICC. The Malian situation procedurally arrived at the ICC because the Malian Minister of Justice invoked Article 15 of the Rome Statute on July 13, 2012, requesting the ICC Office of the Prosecutor (OTP) “investigate the situation in Mali since January 2012 [to present] with a view to determining whether one or more persons identified [by the investigation] should be charged . . .” and brought to justice where Mali’s courts are unable to prosecute or try those persons. The Minister specified that there were serious crimes against humanity and war crimes committed in the northern territory which the ICC has jurisdiction to try under Articles 7 and 8 of the Rome Statute.

Due to this referral, the OTP conducted a preliminary examination of the Mali situation. The results were released as an Article 53(1) Report on January 16, 2013, the same day when Chief Prosecutor Fatou Bensouda announced that the ICC would open a formal investigation into crimes committed. Noting that “[t]he international crimes committed in Mali have deeply shocked the conscience of humanity,” Bensouda determined that the following existed:

. . . reasonable basis to believe the following crimes were committed: (i) murder; (ii) mutilation, cruel treatment and torture; (iii) intentionally directing attacks against protected objects; (iv) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court; (v) pillaging, and (vi) rape.

On February 13, 2016, Mali and the ICC signed a cooperation agreement for the investigation, required by Section IX of the Rome Statute.

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125. Id. ¶ 19 (“On 5 July 2012, the Security Council adopted resolution 2056 based on Chapter 7 of the UN Charter, in which it stressed that attacks against buildings dedicated to religion or historic monuments can constitute violations of international law which may fall under Additional Protocol II to the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court.”).


127. The Minister of Justice specified the following allegations: “The summary executions of the soldiers of the Malian army, the rapes of women and girls, the massacres of civilian populations, the enrollment of child soldiers, torture, general looting of property belonging to the State as well as individuals, forced disappearances, destruction of the Symbols of the State, Buildings, Hospitals, of the Tribunals; Town Halls, Schools, the Headquarters of NGOs and International Assistance Organization, the Destruction of Churches, Mausoleums and Mosques.” Id.

128. See SITUATION IN MALI, supra note 92.


130. Id.

131. See FIDH, supra note 92 (“[I]t is imperative for national authorities to respect Article 46 of the Peace and Reconciliation Agreement in Mali, which was negotiated through the Alger Initiatives and signed by all parties on 15 May and 20 June 2015. This agreement excludes all
Article 53(1) of the Rome Statute requires the Prosecutor to (1) evaluate available information; (2) identify reasonable basis to believe a statutory crime exists; (3) evaluate admissibility; and (4) weigh the crime’s gravity and the victims’ interests.\(^1\)\(^3\) The Article 53(1) report includes a thorough analysis of the situation, preliminary findings, and legal context of each allegation and finding.\(^1\)\(^3\) In the report, general jurisdiction was established by (1) Mali’s ratification of the Rome Statute on August 16, 2000, providing jurisdiction over statutory crimes committed in Mali or by its nationals; and (2) Mali’s referral to the ICC and the absence of pending proceedings in “Mali or any other State against individuals who appear to bear the greatest responsibility for the most serious crimes,”\(^1\)\(^3\)\(^4\) invoking the ICC’s authority and jurisdiction as a court of last resort.\(^1\)\(^3\)\(^5\) Each of the crimes Bensouda alleged were examined at length by the report, including a measure of each crime’s “impact,”\(^1\)\(^3\)\(^6\) a measure which factors into the gravity of the crime, and therefore influences the strength of the interest of justice in its selection for prosecution by the ICC.\(^1\)\(^3\)\(^7\) The only crime to have a documented impact exceeding a local scope was the destruction of cultural heritage, and the report noted that “[t]he destruction of religious and historical World Heritage sites in Timbuktu appears to have shocked the conscience of humanity.”\(^1\)\(^3\)\(^8\)

Thus far, the crime of the destruction of cultural heritage is the only crime for which a warrant of arrest has been issued, though the OTP’s investigation is still open and ongoing. In late 2016, the jurisdictional mandate of the ICC was lessened by Mali’s complementary trial of Amadou Haya Sanogo for his leadership of

\(^1\)\(^2\) Rome Statute, supra note 25, art. 53(1).
\(^1\)\(^3\) See \textsc{Situation in Mali}, supra note 92.
\(^1\)\(^4\) \textsc{Situation in Mali}, supra note 92, ¶ 5, 174.
\(^1\)\(^5\) \textsc{Int’l Crim. Ct., \textsc{Situation in the Republic of Mali: Article 53(1) Report}}, https://www.icc-cpi.int/mali (last visited Oct. 6, 2017); \textit{See also} \textsc{About the ICC}, ICC, https://www.icc-cpi.int/about (last visited Oct. 27, 2017) (saying the ICC is a court of last resort).
\(^1\)\(^6\) \textit{See \textsc{Situation in Mali}}, supra note 92, ¶¶ 143, 147, 152, 157, 164, 169 (listing each crime Bensouda alleged throughout the report).
\(^1\)\(^8\) \textit{See \textsc{Situation in Mali}}, supra note 92, ¶ 157; The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-139-Red, Public redacted version of “Prosecution’s submissions on sentencing,” ¶ 29 (July 22, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_05672.PDF (citing condemnation from the UNSC, Economic Community of West African States, African Union, UNESCO, and numerous States and organizations); \textit{See also} World Heritage Committee Calls for End to Destruction of Mali’s Heritage and Adopts Decision for its Support, UNESCO (July 3, 2012), http://whc.unesco.org/en/news/907 (reporting that committee called for an end of “repugnant acts” of destruction of mausoleums); \textsc{UNESCO Director-General of UNESCO Calls for a Halt to Destruction of Cultural Site in Timbuktu}, UNESCO (June 30, 2012), http://whc.unesco.org/en/news/901/ (reporting that the Director General of UNESCO stated that there is “no justification for the wanton destruction” of World Heritage sites in Timbuktu).
Mali’s military coup and subsequent human rights abuses in 2012. Mali’s courts were unable to hear this case when Mali referred its internal situation to the ICC in July 2012 because its courts could not operate or take on these cases at the time, creating broad jurisdiction at the ICC as a court of last resort.

2. Arrest, Trial, Judgment, and Sentencing

On September 18, 2015, the ICC Pre-Trial Chamber I issued an arrest warrant under seal for Mr. Al Mahdi. In Niger’s custody at the time, Mr. Al Mahdi was transferred to the ICC in The Hague on September 26, 2015. Subsequently, the defense, prosecution, and Court undertook discovery, procedural matters, and filings. On March 24, 2016, the ICC Pre-Trial Chamber I confirmed the charges against Mr. Al Mahdi as being “sufficiently supported by the available evidence and . . . clear and properly formulated,” moving the proceedings into the trial phase. The arrest warrant and confirmation of charges both carefully detail the charges and evidence against Mr. Al Mahdi, which ensures justice and transparency for all interested parties.

The trial took place August 22–24, 2016, at which time submissions of evidence were made and the testimony of three witnesses was heard. Trial Chamber VIII released their judgment and sentence in the case on September 27, 2016. Mr. Al Mahdi has not appealed the decision of the Trial Chamber, nor has the Prosecutor. Today, Mr. Al Mahdi remains incarcerated.


140. Id; see also About the ICC, Int’l Crim. Ct., https://www.icc-cpi.int/about (last visited Oct. 27, 2017) (saying the ICC is a court of last resort).


143. Al Mahdi, Decision on the confirmation of charges, supra note 120, ¶¶ 6, 8, 10.

144. Id. ¶ 17.

145. See id; see also Mandat d’Arrêt à l’Encontre d’Ahmad Al Faqi Al Mahdi, supra note 101; Abadir M. Ibrahim, The International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms, 7 Eyes on the ICC 157, 187 (2010-2011).


3. Reparations

Under Article 75, the ICC Trial Chamber may order reparations to victims, as was the case in *Al Mahdi*. A calendar for these proceedings was issued, with a final preliminary matter filing deadline of February 10, 2017. In accordance, on October 20, 2016, the Registry of the ICC placed a call for experts to assist in the reparations phase of *Al Mahdi*. A Reparation Order was issued on August 17, 2017, placing liability for 2.7 million euros on Mr. Al Mahdi, based upon “three categories of harm: damage to the attacked historic and religious buildings, consequential economic loss, and moral harm.” Reparations are determined through their own proceedings and are distinct from punitive fines that could be ordered in a trial judgment. The Reparations Order was made almost eleven months after the conclusion of *Al Mahdi*’s criminal trial.

4. Admission of Guilt

The ICC system of justice established by the Rome Statute does not provide for guilty pleadings. This is because the ICC system is a negotiated hybrid of the common law and civil law systems. Defendants may instead make an “admission of guilt,” which, by statute, is taken into consideration by the Chamber, along with the facts and evidence of the case.

On February 18, 2016, Mr. Al Mahdi indicated to the Prosecution that he accepted responsibility for his actions and would provide a detailed accounting of

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148. *Question and Answers, supra* note 32.


150. *Call by the Registry of the ICC for Experts on Reparations for Victims, Int’l Crim. Ct.* (Oct. 20, 2016), https://www.icc-cpi.int/Pages/item.aspx?name=161020callforexperts (This call requested experts on: “(a) the importance of international cultural heritage generally and the harm to the international community caused by its destruction; (b) the scope of the damage caused, including monetary value, to the ten mausoleums and mosques at issue in the case; and (c) the scope of the economic and moral harm suffered, including monetary value, to persons or organisations as a result of the crimes committed.”).


153. *See id.* (describing the process in brief).

154. *See id.* (stating that the Reparations Order was issued on Aug. 17, 2017, and the trial Judgment and Order was issued on Sept. 27, 2016).

155. *See Emilia Justyna Powell & Sara Mitchell, The Creation and Expansion of the Int’l Crim. Ct.: A Legal Explanation, U. OF IOWA DEP’T OF POL. SCI. PUBLICATIONS, May 2008, at 13–14* (noting that during the ICC negotiations process, “it soon became evident that the concept of the guilty plea was the ‘test case’ for the Preparatory Committee’s ability and willingness to arrive at solutions which accommodated concepts from both the common law and the civil law legal systems”).

156. *Id.* at 3.

facts. During the confirmation of charges hearing on March 1, 2016, Mr. Al Mahdi expressed this intention to the Chamber. On the first day of trial, Mr. Al Mahdi made an admission of guilt to all charges and alleged modes of liability, and he expressed “deep regret and great pain.” In exchange, and in consideration of all appropriate factors, the Prosecution recommended to the Trial Chamber that Mr. Al Mahdi’s prison sentence should be nine to eleven years.

III. CHAMBER’S ANALYSIS

The Rome Statute defines four legally distinct categories of “core crimes:” (1) the crime of genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression. The acts at trial in Al Mahdi are defined as war crimes. Mr. Al Mahdi was convicted of all counts as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute, and he was sentenced to nine years of imprisonment, with time already spent in detention at the ICC deducted. The Chamber concluded that Mr. Al Mahdi’s participation was essential to the commission of these crimes. The judges of the Trial Chamber delivered a unanimous decision.

This section will examine related law; the charge itself (actus reus, mens rea, and mode of liability); admission of guilt; sentencing; and subsequent critical commentary, which have been primarily targeted toward the prosecution’s merits and the ICC as an institution. These matters are discussed and analyzed at length in Al Mahdi’s documents and hearings (including analysis of sundry mandatory and persuasive case law), but holdings, reasoning, reliances, and precedential determinations presented in this section will necessarily be derived exclusively from the Chamber’s judgment and sentence order.

A. Prior and Related Law

Regarding the charged crimes, in dicta on the development of law leading to Article 8(2)(e)(iv), the Trial Chamber decision points to the 1907 Hague Regulations, the 1919 Commission on Responsibility, the Geneva Conventions, the Hague Convention of 1954, Additional Protocols I and II to the Geneva Convention, and the Second Protocol to the Hague Convention. The Trial Chamber acknowledges that there is no prior ICC case law to draw from in

158. Summary of Judgment, supra note 146, ¶ 5.
159. Question and Answers, supra note 32.
160. Summary of Judgment, supra note 146, ¶¶ 9, 62.
161. Id. ¶ 66; see also The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Anx1-Red2, Agreement regarding admission of guilt, ¶ 19(a) (Feb. 2016) (signing admission of guilt); Al Mahdi, Prosecution’s submissions on sentencing, supra note 138, ¶ 3 (July 22, 2016).
166. Summary of Judgment, supra note 146, ¶ 30.
application of Article 8(2)(e)(iv), and acknowledges that ICTY jurisprudence provides “limited guidance,” partly because the Rome Statute punishes “attacks,” whereas the ICTY Statute only prosecutes completed “destruction or willful damage.” For example, the decision’s text did not invoke the ICTY’s Strugar case—a prosecution of the ICTY Statute’s analogous crime—even though it is the most closely related prosecution in international jurisprudence, and even though the case was mentioned during trial hearings, because Strugar did not provide any illuminating jurisprudence for the Chamber to consider. Simply put, because Al Mahdi was unprecedented, appropriate legal precedents did not exist.

While the Trial Chamber concludes that there is no case law applicable to judging and sentencing Mr. Al Mahdi for this crime, the decision cites to the ICC cases of Lubanga, Bemba, and Katanga in supporting and interpreting the ICC sentencing process and considerations required by the Rome State and ICC Rules of Procedure and Evidence. The unique structure of Rome Statute guilty pleadings also means that there is no jurisprudence for the Chamber to draw from regarding Mr. Al Mahdi’s unprecedented admission of guilt, except for its international legitimacy as a mitigating factor.

Though investigation, prosecution, and trial proceedings and documents suggested applying definitions from outside case law, customary law, or non-binding treaty law to bring clarity to terms in the Rome Statute, the Chamber’s decision does not rely upon these sources for terms such as the meaning of

168. Id. ¶ 13.
169. Id. at 16.
171. See Vlastic & Turkus, supra note 24, at 11-14 (providing a comparative analysis of Strugar and other ICTY cases).
174. See Prosecutor v. Dyilo, ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶ 569 (Mar. 14, 2012) (citing the elements of Rome Statute Article 8(2)(c)(viii)).
175. See generally Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009) (analyzing Rome Statute Article 61(7)(a) and (b)).
176. See Prosecutor v. Katanga, ICC-01/04-01/07 OA 7, Judgment (Nov. 26, 2008) (“[judgment made] on the appeal of the Prosecutor against the ‘Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules’ of Pre-Trial Chamber I’”).
178. See id. ¶¶ 21-28 (discussing the history of how the Court came to blend common law and civil law theories of guilty pleadings in the Rome Statute).
179. Id. ¶ 100.
“attack,” or of a religious, historic, or cultural resource.\textsuperscript{181}

In an instructive passage, the Court’s decision distinguishes Article 8(2)(e)(iv)’s charges from other similar Rome Statute charges. Article 8(2)(b)(ix) is nearly identical but applies to international conflicts; whereas Article 8(2)(e)(iv) applies to non-international armed conflicts.\textsuperscript{182} Article 8(2)(e)(xii) is a more general charge applying to the destruction of civilian property in armed conflict.\textsuperscript{183} Each of these articles provide an exception for military necessity.\textsuperscript{184} The Chamber also emphasizes that ICC case law establishes that “crimes against property are generally of lesser gravity than crimes against people.”\textsuperscript{185}

Due to the ICC’s standards for transparency\textsuperscript{186} and the unprecedented nature of \textit{Al Mahdi}, the Chamber takes care to walk through its reasoning and findings in the written judgment and procedural decisions,\textsuperscript{187} though it avoids promulgating narrow meanings and interpretations for the terms discussed and defined at length in the documents and proceedings related to investigation, charging, prosecution, and trial. The narrowness of its decision, and glaring absence of references, are due to the requirements of Articles 74(2) and 74(5), which state:

\begin{enumerate}
\item The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision \textit{shall not exceed the facts and circumstances} described in the charges and any amendments to the charges. The Court \textit{may base its decision only on evidence submitted and discussed before it at the trial.}
\item The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.\textsuperscript{188} [emphasis added]
\end{enumerate}

The lack of reliance on other law is also due to Article 21 “Applicable Law,” sections (1) and (2), which establish Rome Statute primacy,\textsuperscript{189} and require in practice that reliance on outside sources of law and precedent be minimal, employed only where necessary, and as an option of last resort. These sections require:

1. The Court shall apply:

   (a) In the \textit{first} place, this Statute, Elements of Crimes and its Rules of

\begin{itemize}
\item \textit{Al Mahdi}, ICC-01/12-01/15-171, Judgment, \textsuperscript{181} ¶ 16.
\item \textit{Id.} \textsuperscript{182} ¶ 17.
\item \textit{Id.} \textsuperscript{183} ¶ 12.
\item Rome Statute, \textit{supra} note 25.
\item \textit{Al Mahdi}, ICC-01-12-01/15-171, Judgment, \textsuperscript{184} ¶ 77.
\item \textit{Second Ct.’s Rep. on the Dev. of Performance Indicators for the Int’l Crim. Ct. Int’l Crim. Ct.}, Nov. 11, 2016, \textsuperscript{185} ¶¶ 41–47.
\item \textit{Al Mahdi}, ICC-01-12-01/15-171, Judgment, \textsuperscript{186} ¶ 13.
\item Rome Statute, \textit{supra} note 25, art. 74.
\end{itemize}
Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.  

B. Article 8(2)(e)(iv)

This is the first case within both global and ICC jurisprudence to consider the specific crime detailed by Article 8(2)(e)(iv). Therefore, in order to set proper precedent and to explain its reasoning to a global audience, the Chamber carefully explains its analysis. The text of the statute 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.” The required elements of the crime are:

1. The perpetrator directed an attack.

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

190. Rome Statute, supra note 25; see also Bitti, supra note 189; Volker, supra note 189 (analyzing the role of precedent and applicable law at the ICC).


192. See id. ¶ 13 (providing the elements required to prove the crime charged).


1. Attendant Circumstances

Element 2 of Article 8(2)(e)(iv) defines which types of objects apply. In Al Mahdi, this element was satisfied by overwhelming international designation of the targets as religious buildings and historic monuments, supported by witness testimony, and the words of Mr. Al Mahdi during the attack: “It’s probably the oldest mosque here in town, and is considered a heritage site […] a World Heritage Site.” Element 2 provides an exception for military objectives, a possibility excluded by the Chamber’s consideration because Timbuktu was controlled exclusively by the occupiers during this time, and, therefore, the sites could not have been military objectives.

Element 4 creates three specific requirements: (1) conduct occurs within context of and associated with (2) non-international (3) armed conflict. The decision clarifies that the conduct is the attack itself and explains that there is no requirement for “a link to any particular hostilities but only an association with the non-international armed conflict more generally.” Mr. Al Mahdi’s and the attackers’ roles and associations with the armed group occupiers, Ansar Dine and AQIM, satisfied Requirement 1. The many relevant reports and additional evidence of the role and actions of Ansar Dine and AQIM as armed forces engaging in conflict within Mali satisfied Requirement 3. The decision notes that this element requires a “certain minimum level of [conflict] intensity to be distinguished from mere internal disturbance and tensions.” This was sufficiently satisfied by the long-held exclusive control accomplished by the armed occupiers against the Malian army. Requirement 2 was satisfied by the internal sources of these groups, and the absence of any evidence or assertions that foreign intervention against Mali in this conflict occurred. The decision notes that evidence of international involvement may have required reclassification of the charged crime to the international conflict analogue. Together, requirements 2 and 3 are clarified as “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.”

195. See id. ¶¶ 34, 39, 46–48 & n.88 (determining that certain types of buildings qualify as religious and historical monuments, and concluding that Mr. Al Mahdi played an active role in their attack).
196. Id. ¶ 23 n.88.
197. Id. ¶ 46 & n.101 (quoting Mr. Al Mahdi during the Djingareyber Mosque attack).
198. Id. ¶ 49.
199. Id. at 23, n.88; see also Al Mahdi, Decision on the confirmation of charges, supra note 120, at 31, 42.
201. See, e.g., id. ¶ 49.
202. Id. ¶¶ 31–32.
203. Id. ¶ 49.
204. Id.
205. Id. ¶ 50.
207. Id. ¶ 17.
2. Actus Reus

Even though element 1 is the most succinct, it is central to defining the act criminalized. The decision determines that “‘direct[ing] an attack’ encompasses any acts of violence against protected objects.” The Chamber’s analysis of modes of liability also demonstrates that “direct[ing]” an attack does not require a position of command or responsibility, though this may be suggested by the meaning(s) of “direct,” and may be required by the mode charged. Therefore, the Chamber’s interpretation means that merely “directing” an attack towards protected objects/sites, regardless of the attack’s success or the attacker’s hierarchical role, is a crime under the Rome Statute. The admission of guilt, testimony, and contemporary documentation satisfied element 1.

The Chamber notes that ICC cases Ntaganda and Katanga offer no guidance on the meaning of “attacks” here, because those cases regard attacks on civilian populations, and persons and cultural objects are afforded different protections by the Rome Statute. The Chamber also asserts that ICTY jurisprudence is irrelevant because the ICTY statute requires actual harm to the target.

3. Mens Rea

Within the ICC, the “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances,” though the Chamber does not make note of this standard in its judgment. The Rome Statute’s standards for intent and knowledge are:

208. Id. ¶ 15.

209. The Chamber’s treatment and interpretation of the meaning of these words implies the Chamber’s interpretation. In addition, the Chamber’s analysis and application of the Rome Statute confirm the interpretation. The Chamber’s analysis does not assess Mr. Al Mahdi’s leadership role in assessing whether the “direct[ing]” element has been established. See id. ¶ 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.” (emphasis added)); id. ¶ 45 (“Mr[,] Al Mahdi and the attackers accompanying him directed an attack on these buildings, resulting in destruction or significant damage to all of them.” (emphasis added)).

210. See The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-T-7-ENG, Transcript of Judgment and Sentencing Hearing, 10 (Sept. 27, 2016) (noting “that the statute differentiates between principal, which is 25(3)(a), and accessorial, which is 25(3)(b) to (d) liability, with principals bearing more blameworthiness ’generally speaking and all other things being equal.’”).

211. Id. ¶¶ 38, 40.

212. See generally Prosecutor v. Ntaganda, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, ¶ 45 (June 9, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_04750.PDF.


214. Id.

With regard to one’s own conduct, one’s own act or omission, a suspect has intent if he or she means to engage in the relevant conduct. With regard to consequences, intent is present where the person either means to cause the consequence, or is aware that it will occur in the ordinary course of events. Knowledge, meanwhile, means awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.216

The Chamber affirmed that Mr. Al Mahdi’s acts meet the mens rea of element 3, which requires that the accused specifically intended to attack protected objects.217 This is demonstrated by Mr. Al Mahdi’s purposeful identification, planning, and execution of attacks on religious and cultural targets.218 During one attack, Mr. Al Mahdi publicly explained “we have destroyed the cemeteries . . . as a preventive measure in order to not allow people to take these cemeteries as idols.”219 During another attack, he explained that he and the other attackers were “eradicating superstition, heresy and all things or subterfuge which can lead to idolatry.”220 Like element 2, element 3 provides an exception for military objectives.221 Statements of Mr. Al Mahdi and witnesses confirmed that their intended targets were not related to military objectives.222

Mr. Al Mahdi acknowledged the mens rea requirement in element 5 that the accused be aware of the factual existence of armed conflict.223 Element 5 was also satisfied to the Chamber by the inference that since Ansar Dine was an armed occupying force, and Mr. Al Mahdi and others “worked pursuant to Ansar Dine’s administration[,]” they were necessarily aware of this condition.224

4. Mode(s) of Liability

Mr. Al Mahdi was charged by the prosecutor under the five following modes of liability, and each were confirmed for trial by the Pre-Trial Chamber:

[For each attack:] as a direct co-perpetrator under article 25(3)(a) of the Statute; for soliciting and inducing the commission of such a crime under article 25(3)(b) of the Statute; for facilitating the commission of such a crime by aiding, abetting or otherwise assisting in its commission under article 25(3)(c) of the Statute; [. . .] for contributing in any other way to the commission of such a crime by a group of persons acting with a common purpose under article 25(3)(d) of the Statute [. . . and] as a direct perpetrator under article 25(3)(a) of the Statute for physically taking part in the attack against at least half of the targeted buildings

216. Al Mahdi, Decision on the confirmation of charges, supra note 120, ¶¶ 14–19.
217. Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶¶ 12–14, 47.
218. Id. ¶¶ 34–37; see also Al Mahdi, Prosecution’s submissions on sentencing, supra note 138, ¶¶ 30–33, 41–42, 62–63 (indicating the statement of a witness and agreed upon facts).
221. Id. ¶ 13(3).
222. Id. at 23 n.88; see also Al Mahdi, Decision on the confirmation of charges, supra note 120, ¶ 56.
223. See Al Mahdi, Admission agreement, infra note 226, ¶ 28 (signing admission of guilt); Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 18.
detailed to religion and historic monuments.\textsuperscript{226} Mr. Al Mahdi admitted and agreed to each of these modes of liability before the trial.\textsuperscript{226} The OTP asserted that Mr. Al Mahdi’s crimes fit all of the alleged modes of responsibility, but believed that “direct co-perpetration . . . is the mode which most accurately reflects the totality of the suspect’s contribution.”\textsuperscript{227} If the Chamber did not agree, it would have to determine Mr. Al Mahdi’s particular liability for each attack\textsuperscript{228} and consider the requirements that would satisfy the crime’s elements under each differing findings’ mode.\textsuperscript{229}

Mr. Al Mahdi was convicted of all counts as a co-perpetrator under Article 25(3)(a). The requirements to prove Article 25(3)(a) co-perpetration were set forth by the ICC in \textit{Lubanga}, deriving in part from customary international law:\textsuperscript{230}

1. The person makes an essential contribution with the resulting power to frustrate the commission of the crime.
2. The person’s contribution is made within the framework of an agreement with others which led to the commission of the crime.
3. The person satisfies the subjective elements of the crime.\textsuperscript{231}

The Chamber was satisfied by the evidence that Mr. Al Mahdi fulfilled this mode of liability.\textsuperscript{232} Mr. Al Mahdi met requirement 1 by leading or being involved in the planning, preparation, execution, and public justification of the acts.\textsuperscript{233} Requirement 2 was met by Mr. Al Mahdi’s leadership role, his obedience of his superiors’ orders to attack, his sermon, and his executed plan.\textsuperscript{234} Requirement 3 was

\textsuperscript{225} The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-70-AnxA-Corr, Charge brought by the Prosecution against Ahmad Al Faqi Al Mahdi, ¶¶ 2–3 (Dec.17, 2015); \textit{Al Mahdi}, Decision on the confirmation of charges, \textit{supra} note 120, at 22.

\textsuperscript{226} The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Red2, Dépôt de l’Accord sur l’avou de culpabilité de M. Ahmad Al Faqi Al Mahdi, ¶ 4 (Aug. 19, 2016) \textcolor{gray}{([hereinafter \textit{Al Mahdi}, Filing of admission agreement]).}

\textsuperscript{227} \textit{Al Mahdi}, Transcript of Confirmation of Charges Hearing, \textit{supra} note 180, ¶¶ 14–17, at 81; \textit{The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Transcript of Trial Hearing,} ¶¶ 11–16, at 39 (Aug. 22, 2016) (noting that “it is his responsibility as co-perpetrator that fully represents Mr[.] Al Mahdi’s participation and commission of the crime.”).

\textsuperscript{228} \textit{Al Mahdi}, Trial Hearing Aug. 22, \textit{supra} note 172, ¶¶ 6–15, at 40 (Aug. 22, 2016) (determining that alternative theories of liability would have to be determined by the Chamber); \textit{see also \textit{Al Mahdi}, Transcript of Confirmation of Charges Hearing,} \textit{supra} note 180, ¶ 18, at 81 (referencing the Chamber’s Practice Manual (Int’l Crim. Ct., Chambers Practice Manual, 18 (2016)) requirement to confirm the modes of liability).

\textsuperscript{229} \textit{See \textit{Al Mahdi}, Transcript of Confirmation of Charges Hearing,} \textit{supra} note 180, ¶¶ 6–5, at 81–95 (outlining charges and what would be necessary for liability); \textit{see also \textit{Al Mahdi}, Trial Hearing Aug. 22, \textit{supra} note 172, ¶¶ 6–15, at 40 (outlining alternative theories of liability); \textit{Al Mahdi, ICC-01/12-01/15-171, Judgment,} ¶¶ 57–58 (declaring findings on liability).

\textsuperscript{230} \textit{Al Mahdi, ICC-01/12-01/15-171, Judgment,} ¶ 19 & nn.32–34 (Sept. 27, 2016) (referencing \textit{Lubanga} for standards); \textit{see generally Steffen Wirth, \textit{Co-Perpetration in the Lubanga Trial Judgment,} 10 J. Int’l CRIM. JUST. 971, 971 (2012).

\textsuperscript{231} \textit{Al Mahdi, ICC-01/12-01/15-171, Judgment,} ¶ 19.

\textsuperscript{232} \textit{See id.} ¶ 56 (concluding elements of liability established).

\textsuperscript{233} \textit{See id.} ¶ 53 (noting Al Mahdi’s involvement in planning the attack).

\textsuperscript{234} \textit{Id.} ¶ 54.
satisfied by Mr. Al Madhi’s direct participation and role as media spokesperson.\textsuperscript{235}

The Chamber admitted that current ICC jurisprudence has generated a dispute as to whether the “contribution must be to the ‘crime’ itself or the ‘common plan,’” but declined to address this controversy because the distinction would make no difference in the outcome of this case.\textsuperscript{236}

The Chamber determined that there is no indication in jurisprudence or statute of a hierarchy between perpetration or co-perpetration in Article 25(3)(a), and yet a selection must be made in judgment.\textsuperscript{237} The Chamber held that when all variations within a discrete mode of liability are proven, “the [a]ccused can be convicted of only one form[,]” and the Chamber “must elect which mode of responsibility best reflects the full scope of the Accused’s individual criminal responsibility.”\textsuperscript{238} While direct perpetration is proven for five of the attacks, co-perpetration is the mode of liability the Chamber applied, because it is the most accurate reflection of Mr. Al Madhi’s responsibility.\textsuperscript{239}

The Chamber concluded that because the other alleged and admitted forms of liability are accessorial, they are of lower blameworthiness than the already proven co-perpetrator’s principal mode of liability, and their consideration was, therefore, unnecessary.\textsuperscript{240}

\textbf{C. Agreement and Admission of Guilt}

Per Article 65, Mr. Al Madhi entered an admission of guilt.\textsuperscript{241} In conjunction, Mr. Al Madhi and the prosecution submitted an agreement of facts, charges, and a sentencing recommendation.\textsuperscript{242} According to Article 65(5), an admission of guilt or any penalty agreement is not binding on the Chamber.\textsuperscript{243} Article 65(1)(c) and (2) require the Chamber to conclude the admission is supported by the facts, considering both the admission itself and the additional evidence presented.\textsuperscript{244} In \textit{Al Madhi}, the admission was weighed along with testimony and 714 other pieces of evidence.\textsuperscript{245}

\textsuperscript{235} \textit{Id.} \textsuperscript{¶} 55.
\textsuperscript{236} \textit{Id.} at 11 n.31 (indicating that the ICC’s split in case law and its irrelevance in this case).
\textsuperscript{237} \textit{See Al Madhi,} ICC-01/12-01/15-171, Judgment, \textsuperscript{¶} 60 (holding that even when all modes of responsibility are determined, defendants can only be convicted of one).
\textsuperscript{238} \textit{Id.} \textsuperscript{¶} 60.
\textsuperscript{239} \textit{See id.} \textsuperscript{¶} 59, 61 (holding that despite his direct participation, Al Madhi’s position of authority provides the most appropriate responsibility).
\textsuperscript{240} \textit{See id.} \textsuperscript{¶} 57–58 (noting the differentiation in the Statute between principal and accessorial liability, with principal liability “bearing more blameworthiness ‘generally speaking and all other things being equal[,]’”).
\textsuperscript{241} \textit{Id.} \textsuperscript{¶} 30(ii); \textit{Al Madhi,} Admission agreement, \textit{supra} note 226, \textsuperscript{¶} 4.
\textsuperscript{242} \textit{See Al Madhi,} Admission agreement, \textit{supra} note 226.
\textsuperscript{243} \textit{Id.} \textsuperscript{¶} 11, 24.
\textsuperscript{244} \textit{See Al Madhi,} Trial Hearing Aug. 22, \textit{supra} note 172, \textsuperscript{¶} 24–25, at 40–41 (outlining how guilty plea would be handled).
\textsuperscript{245} \textit{Second Ct.’s Rep. on the Dev. of Performance Indicators for the Int’l Crim. Ct,} supra note 186, at 37; \textit{see also Al Madhi,} ICC-01/12-01/15-171, Judgment, \textsuperscript{¶} 29 (stating “for each of the established facts, the Chamber has relied upon: (i) the admissions of the Accused; (ii) the}
The Chamber found that the charge was proven beyond a reasonable doubt by the agreed facts, admission, and additional evidence presented. In making his admission, Mr. Al Mahdi also waived a cluster of rights, so it was essential that the Chamber, in the interest of justice, determined that the admission was voluntary and its consequences were understood. The Chamber also noted that Mr. Al Mahdi provided detailed information; provided further information beyond the scope of the charges, and that the Chamber considered the agreed facts and admission to be “credible and reliable in full . . . [and almost completely] independently corroborate[d].”

The OTP recommended to the Chamber a lenient sentence of nine to eleven years for the crime. This was specifically agreed to by the defense and prosecution, as laid out in both the agreement document and the prosecution’s sentencing recommendation. This agreement and recommendation is not binding on the Chamber, and the decision makes no reference to the prosecution’s agreement on sentencing.

In this decision, the Chamber established that “an admission of guilt is undoubtedly a mitigating circumstance” at the ICC, building upon previous ICC dicta, and the “well-established” standards of other international tribunals. Though made in the face of overwhelming evidence, the Chamber gives this admission “substantial weight” as a mitigating factor in this case, because the admission was made early, fully and appears to be genuine, led by the real desire to take responsibility for the acts he committed and showing honest repentance. This admission of guilt undoubtedly contributed to the rapid resolution of this case, thus saving the Court’s time and resources and relieving witnesses and victims of what can be a stressful burden of giving evidence in Court. Moreover, this admission may also further peace and reconciliation in Northern Mali by alleviating supplementary material presented by the Prosecution and accepted by the Accused; and (iii) the testimony of the witnesses who appeared before this Chamber.”

247. Id. ¶ 30(iii) (confirming the waiver of rights due to making an admission of guilt); see also Al Mahdi, Admission agreement, supra note 226, ¶ 21 (outlining the consequences of an admission of guilt).
248. See Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 42 (confirming the voluntary nature of the admission of guilt and Al Mahdi’s understanding of the nature and consequences); see also Al Mahdi, Judgment and Sentencing Hearing, supra note 210, ¶¶ 22–4 at 8–9 (concluding Al Mahdi understood “the nature and consequences of the admission of guilt and that the admission was made voluntarily . . .”).
249. Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 44.
250. Id. ¶ 106; Al Mahdi, Prosecution’s submissions on sentencing, supra note 138, ¶¶ 64–70.
251. Al Mahdi, Admission agreement, supra note 177, ¶ 19; Al Mahdi, Prosecution’s submissions on sentencing, supra note 138, ¶ 70.
253. Id. ¶ 100.
254. Id. at 44 n.166.
255. Id. ¶ 100.
the victims’ moral suffering through acknowledgement of the significance of the destruction. Lastly, such an admission may have a deterrent effect on others tempted to commit similar acts in Mali and elsewhere.256

D. Sentencing257

The maximum sentence the Court could impose for these charges is 30 years.258 Per the agreement of the OTP and Mr. Al Mahdi, and in light of other factors, the prosecutor recommended a sentence of nine to eleven years imprisonment.259 The prosecutor’s recommendation is not binding on the Chamber,260 and the Chamber must make its own determination.

Prior ICC jurisprudence,261 Articles 23, 76, 77, and 78, and Rule 145 formed the legal basis for the Chamber’s sentencing analysis.262 In practice, this means the Chamber considered gravity, mitigating, and aggravating circumstances.263 The Chamber also considers “retribution and deterrence [. . . to be] the primary objectives of punishment at the ICC.”264 In this decision, the Chamber clarifies that retribution at the ICC expresses the “international community’s condemnation[,]” acknowledges harm to victims; promotes peace and reconciliation; and is not in pursuance of revenge.265 The function of deterrence at the ICC is meant to provide specific and general deterrence for these grave crimes and eliminate their impunity.266 While the Chamber is granted “considerable discretion” in imposing a sentence,267 it must be proportionate to the crime, and “in light of the particular circumstances of the case [. . . the sentence] must, therefore, reflect the gravity of the crime charged.”268 For this reason, the Chamber must weigh the gravity of each crime269 and analyze the mitigating and aggravating circumstances as required by Rule 145(2).270

Mitigating and aggravating circumstances were considered for both the culpability of the crime and the individual circumstances of Mr. Al Mahdi.271 The Chamber frames its analysis with the caveat that it cannot consider an aggravating

256. Id.
257. See generally id. ¶ 64-111 (listing the entire sentence and the Chamber’s rationale).
258. Al Mahdi, Prosecution’s submissions on sentencing, supra note 138, ¶ 5.
259. Id. ¶¶ 64–70.
260. Rome Statute, supra note 25, art. 65(5).
262. Id. ¶ 65–69.
263. Id. ¶ 35, 75.
264. Id. ¶ 66.
265. Id. ¶ 67.
266. Id. ¶¶ 66–67.
267. Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 68 (discussing deterrence is not predicated on “a desire for revenge,” but an “imposition of proportionate sentence”).
268. Id. ¶ 71.
269. Id. ¶ 72.
circumstance (1) anything that was assessed for gravity (this would be “double-
count[ing]”);272 (2) anything that was a legal element of the crime or mode of
liability;273 or (3) the absence of a mitigating circumstance.274 These circumstances
require the evidentiary standard of “beyond reasonable doubt[,]”275 and are subject
to “a considerable degree of [the Chamber’s] discretion[,]”276

While not mentioned in Article 78 (determination of sentence), the additional
factors listed in Rule 145(1)(c) of the rules are embraced by the Court, a few of
which were considered in this decision as well:277

In addition to the factors mentioned in article 78, paragraph 1, give
consideration, inter alia, to the extent of the damage caused, in particular
the harm caused to the victims and their families, the nature of the
unlawful behaviour and the means employed to execute the crime; the
degree of participation of the convicted person; the degree of intent; the
circumstances of manner, time and location; and the age, education,
social and economic condition of the convicted person.278

1. Gravity279

The Chamber concluded that the crime perpetrated was of “significant
gravity.”280 In this determination, “the Chamber considered, in particular, the extent
damage caused, the nature of the unlawful behaviour and, to a certain extent, the
circumstances of the time, place and manner.”281 The Chamber’s determined the
following:

- This crime against property is less grave than crimes against people.282
- The criminal act(s) completely destroyed most of the ten sites, with
impact on the population heightened by purposeful and solicited media
coverage.283
- The sites were very historically, culturally, and religiously significant,
causing great psychological damage to the population.284
- The sites were of international importance, causing international
suffering.285

272. Id. ¶ 70.
273. Id.
274. Id. ¶ 73.
275. Id.
276. Id. ¶ 74.
278. Rules of Procedure and Evidence 145(1)(c) (ICC-ASP/1/3) (Part II.A) (Sept. 10,
2002).
280. Id. ¶ 82.
281. Id. ¶ 76.
282. Id. ¶ 77.
283. Id. ¶ 78.
284. Id. ¶¶ 78–80.
• The crime was committed with a discriminatory religious motive.286

2. Culpability

Examining Mr. Al Mahdi’s culpable conduct, the Chamber “considered the following Rule 145(1)(c) criteria: his degree of participation, his degree of intent and, to a certain extent, the means employed to execute the crime.”287

The Chamber found Mr. Al Mahdi had an essential role and a clear intent,288 and in addition determined the following:

• There were no aggravating circumstances.289
  o The crime’s religious discrimination and impact upon many victims (advocated by the OTP) could not be considered aggravating circumstances, because they were already considered regarding gravity.290
  o ICC jurisprudence prevented the Chamber from recognizing Mr. Al Mahdi’s office and use of power as an aggravating circumstance (advocated by the OTP).291

• Reluctance and method are mitigating circumstances.
  o Mr. Al Mahdi’s initial reluctance to destroy the site.292
  o Mr. Al Mahdi advised against the use of a bulldozer at 9 of the 10 sites, to respect adjacent graves and prevent collateral damage to nearby constructions.293
  o Due to lack of support, the Chamber rejected the Defense’s argument that “Mr[.] Al Mahdi’s alleged lack of preparation for assuming responsibilities as head of the Hesbah” is a mitigating circumstance.294
  o The Chamber also rejected the Defense’s argument that Mr. Al Mahdi committed this “crime as part of an organized group” because his participation and approval were fully established.295

3. The Circumstances of the Individual

The judgment also assessed “all relevant circumstances that are not directly related to the crime committed or to Mr Al Mahdi’s culpable conduct.”296 The Chamber determined that there were no aggravating circumstances297 and gave no mitigating or aggravating weight to:

286. Id. ¶ 81.
287. Id. ¶ 83.
288. Id. ¶ 84.
289. Id. ¶ 109.
290. Id. ¶¶ 87–88.
292. Id. ¶ 89.
293. Id. ¶ 91.
294. Id. ¶ 92.
295. Id. ¶ 90.
296. Id. ¶ 94.
• Mr. Al Mahdi’s status as a religious expert.298
• Mr. Al Mahdi’s age and economic background.299

Based upon considerable evidence and analysis, the Chamber determined the following were mitigating circumstances:
• Admission of guilt.300
• Cooperation with the OTP and the court.301
• Sincere expressions of remorse for the crimes and empathy for victims.302

The Chamber denied the Defense’s submission that an absence of prior convictions is mitigating,303 noting that this absence “is a fairly common feature among individuals convicted by international tribunals.”304

4. The Sentence

The Chamber sentenced Mr. Al Mahdi to nine years imprisonment,305 minus time already served in connection with an order from the ICC, and time served elsewhere in connection with the criminal conduct convicted, in accordance with Article 78(2).306 The Chamber could have sentenced Mr. Al Mahdi to a maximum of 30 years in prison, pursuant to Article 77(1) of the Rome Statute and Rule 145(3) of Procedure and Evidence.307

In determination of this sentence, the Chamber considered the crime’s significant gravity, the absence of aggravating factors, and five mitigating factors.308 In its conclusion, the Chamber lumped together Mr. Al Mahdi’s reluctance and methods into one mitigating circumstance, and extracted an additional, free-standing mitigating circumstance “of limited importance, [of] his good behaviour in detention despite his family situation.”309 The Chamber declined to impose a fine or forfeiture, because none of the parties or participants requested such punishment under Article 77(2), and Rules 146 and 147.310

The Chamber noted it considered the detailed sentencing recommendations and justifications of the Legal Representative of Victims (LRV) (“severe and exemplary”), the Prosecution (nine to eleven years), and the Defense,311 but made no actual reference to the nine- to eleven-year agreement between the Defense and
OTP. The Chamber also determined that the facts and precedential nature of this case rendered the sentencings in past ICC or similar international tribunal cases to be irrelevant, because they “were based on vastly different circumstances, including the applicable modes of liability and sources of law.”

**E. Critical Commentary**

The *Al Mahdi* decision has been greeted by the international community with general approval and acclamation.\(^{312}\) However, there has been pronounced criticism of the OTP’s narrow prosecution and some critical commentary on the reasoning of the Chamber’s decision.

Of course, the LRV could criticize the Chamber for not incorporating its arguments in its decision. Specifically, that the punishment was not severe enough, and that the decision gave too much weight to Mr. Al Mahdi’s admission of guilt (confronted with overwhelming evidence, and therefore unlikely to be genuinely remorseful). However, international commentary has not focused on these matters, though victims in Timbuktu have expressed disappointment in the lenient sentencing.\(^{314}\) Some citizens of Timbuktu have also expressed a feeling that *Al Mahdi* is primarily symbolic and for the international community’s benefit, because criminals responsible for other notorious and damaging crimes walk free among the population.\(^{315}\)

In the early stages of the case, the OTP was criticized for not investigating the Mali situation for violation(s) of the crime against humanity of persecution.\(^{316}\) After charging and judgment, major international and local civil society groups, including Amnesty International, International Federation for Human Rights, and the Malian NGO Women in Law and Development have all expressed dissatisfaction that the OTP did not bring charges against Mr. Al Mahdi for sex and gender-based crimes, including rape, sexual slavery, and forced marriage, for which they feel there is significant evidence.\(^{317}\) The criticism of this failure—

\(^{312}\) Id. ¶ 107.


\(^{315}\) Id.


Despite evidence—was strengthened by contrast to the ICC’s April 2016 prosecution of Congolese Vice President Jean-Pierre Bemba and his conviction of rape as a crime against humanity, and the OTP’s recently announced focus on gender and sexual crimes. Civil society has additionally criticized the Court for not yet bringing forward charges against any party for torture, extrajudicial executions, and enforced disappearances. The ICC has also been criticized for not focusing on other individuals and those higher up within the command chain who could be prosecuted for the same crime as Mr. Al Mahdi.

Some have criticized the decision and its text for emphasizing that the destruction of property is of lesser gravity than human lives, and thereby supposedly not recognizing the significant role that cultural heritage plays in defining and providing humanity. However, this criticism ignores the complete deliberation of the Chamber, and most commentators and civil society have heralded the judgment as a significant and timely landmark development for the protection of cultural heritage in armed conflict.

The process of the prosecution of Mr. Al Mahdi has also been criticized for seemingly violating the complementarity principle of the ICC’s work. This of the Al-Mahdi decision).


322. Lixinski, supra note 3.

323. Al Mahdi, ICC-01/12/01/15-171, Judgment, ¶¶ 14, 46. (discussing the history of cultural property and special protections international law has applied since 1907 and the importance of UNESCO World Heritage sites).


325. See generally What is Complementarity? National Courts, the ICC, and the Struggle Against Impunity, INT’L CRIM. CT. FOR TRANSNAT’L CRIM., supra note 1, ¶ 11.

criticism is based on the fact that Mr. Al Mahdi was held in Niger on charges of terrorism in 2015, but was transferred to ICC custody after the OTP indicated they would prosecute him.\footnote{327}

IV. INTERPRETATIVE ANALYSIS

*Al Mahdi* is potentially a case of great importance for the ICC, and within international criminal justice. *Al Mahdi* demonstrated how the ICC will judge an Article 8(2)(e)(iv) crime. Until *Al Mahdi*, scholarship on this category of Rome Statute crime was theoretical, and foresaw heavy reliance on law outside the Rome Statute and ICC jurisprudence,\footnote{328} which was not how the Chamber decided the case. *Al Mahdi* also generated valuable precedent for how the ICC will handle admission of guilt, sentencing, and matters of precedent. In addition, *Al Mahdi* may have significant policy impact upon global prevention of cultural heritage destruction, and the strategy and standing of the ICC itself. These impacts will be analyzed in the remainder of this Note, and preceded by a vignette providing a contemporaneous international political context.

A. Contextual Framing; Caveat on Global Trends

Escalating controversy over African bloc ICC membership\footnote{329} and contemporary shifts in dedication to the international legal order\footnote{330} require acknowledgement and examination to fully analyze the impact of *Al Mahdi*. This context is necessary because it not only colors commentary regarding the Court and its cases, but also affects the priorities, reasoning, and strategy\footnote{331} of the OTP and ICC Assembly of State Parties (ASP). Such a discussion is beyond the scope of a typical case note, but assessment is required to reconcile a complete and


\footnote{329. Patrick Wintour, African Exodus from ICC Must Be Stopped, Says Kofi Annan, GUARDIAN (Nov. 18, 2016), https://www.theguardian.com/world/2016/nov/18/african-exodus-international-criminal-court-kofi-annan.}


\footnote{331. In small part, this is demonstrated by OTP press releases and official statements, which are appended by this statement, “The Office is also conducting preliminary examinations relating to the situations in Afghanistan, Colombia, Georgia, Guinea, Honduras, Iraq (alleged abuses by UK forces), Nigeria, Palestine and Ukraine[,]” challenging an alleged exclusive focus on Africa. See generally Statement, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS, Int’l Crim. Ct. (Apr. 8, 2015), available at https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1 (last visited Oct. 27, 2017).}
accurate understanding of Al Mahdi.

Beginning in mid-2016, South Africa,332 Gambia,333 and Burundi334 indicated their intention to withdraw from the ICC, a process which takes one year.335 Under their leadership, the African Union passed a non-binding resolution calling for the withdrawal of all African countries from the Rome Statute,336 and met to formulate their collective strategy for doing so.337 The cited reasons for departure center around long-alleged institutional bias against the continent of Africa, and, accordingly, alleged systemic racial bias as well.338 Other African countries,339 and Ghanaian former UN Secretary General, Kofi Annan, continue to advocate openly for the African bloc’s continued commitment to the ICC.340

Since 2015, mutually assured global stability has decreased as nationalist and protectionist dispositions have swept across some of the world’s greatest powers, including Western democracies.341 Hostility towards international cooperation and engagement with international bodies of law has increased in response.342 This


335. Rome Statute, supra note 25, art. 127.


340. Ndow, supra note 337; Wintour, supra note 329.


realist trend is demonstrated by the success of the Brexit campaign in the UK, the election of “America First” Donald Trump to the Presidency of the United States of America, and China’s bold claims and island-building in the South China Sea. The ICC and long-established international organizations alike are under increasing attack. Sensing opportunity, China, Russia, and other powers have asserted greater reach and pursued independent priorities, often with impunity. In this context, Russia has withdrawn their signatory status from the Rome Statute, labelling the Court as “ineffective.” These trends of aggressive self-interest undermine systems of global cooperation everywhere and, therefore, global peace and global justice, a purposeful project of the international community pursued over the last century, and achieved, in part, by the establishment of the ICC.

These state acts undermine many international interests, but most importantly,
withdrawals from the ICC threaten the universal interest in justice. Despite withdrawals, the ICC still retains universal jurisdiction through the U.N.S.C. However, the permanent members wield sometimes problematic veto power over referrals, and it is difficult to prosecute without state cooperation. Many procedures and practices leading up to prosecution require state cooperation. The ICC is limited when states refuse to cooperate because it is weary of infringing on state sovereignty and does not possess unilateral authority to perform necessary functions, including referrals, investigations, arrests, transfers, and incarceration.

1. ICC Criticism in Context

Many African states and leaders feel that the ICC is a racist institution, and a tool of continued Western colonialism. Gambia has cleverly pilloried the ICC as the “international caucasian court,” used to protect Western wrongdoers, and for the persecution and humiliation of people of color, especially Africans. On the surface, the numbers seem to speak for themselves: nine out of the ten ICC investigations are in Africa, and all completed “prosecutions” are of Africans. In addition, out of the five permanent members of the U.N. Security Council, only two of these veto-wielding world powers are parties to the ICC. This situation suggests that the ICC is politically partial, and the tool of a powerful and prosecution-immune West to punish and control weaker and poorer states.

The ICC pushes back on the hemispheric conclusions and critiques made, pointing to another set of figures. Currently—as of September 2017—there are seven preliminary examinations ongoing on four continents other than Africa. Nine of the ten current investigations were referred to the ICC by the investigated parties.


351. Many procedures and practices leading up to prosecution require state cooperation since the ICC does not possess unilateral authority to perform them, including referrals, investigations, arrests, transfers, and incarceration.


354. See Cropley, supra note 338 (describing current cases and why African nations see them as negative).

355. See Ibrahim, supra note 145, at 200 (hypothesizing about more U.N.S.C. states joining, and considering the effect on encouraging other states to join or rejoin the ICC).

356. See id. at 185-86 (describing perception of ICC).

357. Questions and Answers, supra note 32.

358. Id.
African nations themselves, and two investigations came to the ICC through U.N.S.C. referral, with strong support from the African bloc.\textsuperscript{359}

The ICC openly recognizes the indispensable role Africa plays in its success,\textsuperscript{360} and has begun deliberate outreach to the continent.\textsuperscript{361} The African Union (AU) has called on African states to reduce deference to the ICC by strengthening enforcement of human rights violations and accountability through domestic courts, and through the African Court of Justice and Human Rights.\textsuperscript{362} While a tactic of backlash, this proposal fits into the complementary design of the ICC. For example, one reason why many European cases never reach the ICC is because they can instead be adjudicated by the European Court of Human Rights, the European Court of Justice, domestic courts, or specialized tribunals.\textsuperscript{363}

Unlike at the ICC,\textsuperscript{364} state leaders would enjoy immunity at the African Court of Justice and Human Rights (ACJHR).\textsuperscript{365} Therefore, the ICC retains ultimate jurisdiction over actors who would receive African immunity. The AU and some members of the ASP’s African bloc have endorsed such an immunity provision at the ICC as well.\textsuperscript{366} Official immunity at the ACJHR does not advance the interests of justice and peace,\textsuperscript{367} nor would official immunity at the ICC.\textsuperscript{368} In fact, the debate over this provision illuminates one of the more nefarious motivations of ICC criticism.

\textsuperscript{359} See Wintour, supra note 329 (describing where ICC cases come from).

\textsuperscript{360} See Questions and Answers, supra note 32, at 2 (“African countries made great contributions to the establishment of the Court and influenced the decision to have an independent Office of the Prosecutor.”).


\textsuperscript{362} See Ndow, supra note 337 (reporting a joint strategy, created in a closed-door meeting, for African states to pull out of the ICC due to a perceived discrimination against Africans).


\textsuperscript{364} Rome Statute, supra note 25, art. 27 (noting the “irrelevance of official capacity”).


\textsuperscript{367} See Miriam Abaya, No Place for Impunity: The Arguments Against the African Criminal Court’s Article 46BIS, 30 Temp. Int’l & Comp. L.J. 189, 221 (2016) (noting the interests of justice cannot be served under the immunity clause).

\textsuperscript{368} See Brown, supra note 341, at 169 (noting immunity would give license to African leaders to commit international crimes with “impunity”).
Documented developments make it clear that the countries which have withdrawn, or that have attempted to do so, have in reality chosen to do so primarily for either, or both, of the following motivations: (1) using the ICC as a scapegoat for domestic political trouble;369 (2) avoiding investigation and persecution for crimes under the Rome Statute.370 This is why ICC proponents emphasize its role in ending impunity, protecting populations, and providing an appropriate judicial forum.371 Through examination, the complementary nature of the ICC and its dependence upon cooperation372 demonstrate that criticisms claiming the Court is ineffective or inappropriate are actually a criticism of the international community, and of domestic judicial and political systems. As the preamble of the Rome Statute states, “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”373 Despite this analysis, the ASP and OTP are taking proactive measures to enhance the standing, strategy, and perceived effectiveness of the Court,374 because perceptions and politics have an outsized

369. See Benjamin Duerr, Quitting the ICC: International Scapegoat for Domestic Trouble?, INT’L JUST. TRIB. (Oct. 24, 2016), https://www.justicetribune.com/blog/quittingicc-internationalscapegoatdomestictrouble (discussing that other states were poised to follow Burundi and South Africa and scapegoat the ICC by withdrawing); see also Ibrahim, supra note 145, at 190–91 (describing the human rights record and commitment of countries most likely to ratify the Rome Statute, and most and least cooperate with the ICC).

370. See Terrence Chapman & Stephen Chaudoin, People Like the International Criminal Court – as Long as it Targets Other Problems in Other Countries, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/people-like-the-international-criminal-court-as-long-as-it-targets-other-problems-in-other-countries/ (discussing how less developed states are less likely to support ICC investigations directed at them); see also Cropley, supra note 338 (discussing African leader’s use of rhetoric that include “Caucasian” court as a tool to justify their leaving the ICC); see also Bowcott, supra note 348 (highlighting efforts to prevent South Africa from leaving the ICC).

371. See Kofi Annan, State Impunity is Back in Fashion – We Need the International Court More than Ever, GUARDIAN (Nov. 18, 2016, 5:11PM), https://www.theguardian.com/commentisfree/2016/nov/18/state-impunity-international-criminal-court-african (discussing why Africa should continue to support the ICC and why major western powers should support it).


effect on voluntary cooperation and ICC success.

2. Measures of ICC Effectiveness

It is important to recognize that the ICC is a court of last resort, and designed to prosecute the gravest crimes only when they cannot be tried elsewhere. The OTP has received more than “12,022 article 15 communications since July 2002[,]” which are examined for jurisdiction and whether investigation is warranted.375 As of May 2017,376 the ICC has achieved the following official actions: 10 investigations; 10 preliminary investigations; 29 arrest warrants; 9 summonses to appear; custody of 6 persons; and 23 cases before the Court.378 Today, thirteen suspects are at large, three have died before arrest, nine individuals have been found guilty, and one has been acquitted.379 In addition, about 86% of charges alleged by the OTP have been confirmed in pre-trial Chamber proceedings, and 100% of accused persons have had charges against them confirmed.380

Employing the methodology of Professor Eric Posner’s 2005 study of the effectiveness of international courts and tribunals, ICC performance can be understood by these metrics, derived from data available in January 2017:381

<table>
<thead>
<tr>
<th>Years</th>
<th>Cases Filed</th>
<th>Subject States</th>
<th>Cases / Year</th>
<th>Cases / State-Years</th>
<th>Compliance Reputations</th>
<th>Full Compliance Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>23</td>
<td>124</td>
<td>1.7</td>
<td>0.016</td>
<td>Mixed on arrests.</td>
<td>Verdicts / Investigation: 100%</td>
</tr>
<tr>
<td></td>
<td>Individ. Verdicts (92 initially)</td>
<td>Individ. Verdicts per Year</td>
<td>Individ. Verdicts / State-Years</td>
<td>Good on compliance and charges.</td>
<td>Warrants Fulfilled: 54%</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>0.77</td>
<td>0.007</td>
<td></td>
<td></td>
<td>Judgments Complied: 100%</td>
<td></td>
</tr>
</tbody>
</table>

While the sample period and size is relatively small, by measures of usage,
the ICC is as effective as the International Court of Justice overall. By comparing the compliance rate, the ICC is more effective than: the International Court of Justice’s compulsory judgments; the panel system of the General Agreements on Tariffs and Trade; and the Inter-American Court of Human Rights. By the same measure, the ICC is almost as effective as the World Trade Organization, and may be considered more effective than the European Court of Justice, and the European Court of Human Rights. Note also that the success of warrants and cases depends upon the cooperation of the international community because the ICC has no mechanism to force the appearance or take custody of wanted individuals, and it will not try a case in the absence of the defendant.

In addition, the deterrence, complementarity, and justice-enabling goals of the ICC are realistic and operative, as evidenced by a 2015 study. The study determined that ICC investigations significantly increase domestic human rights prosecutions in the nation under investigation, further demonstrating the effectiveness of the Court.

B. Processes and Reasoning

This section will analyze Al Mahdi’s practical effects on ICC processes, reasoning, and decision-making. While stare decisis is not a principal of law at the ICC, the Chamber’s careful reasoning in Al Mahdi was thorough and conclusive enough to provide any interested party valuable, credibly incontrovertible guidance on the Court’s decision-making and the application of certain rules and statutes. Admission of guilt, sentencing, and the role of precedent will be examined at length.

Presented below in brief bullets are additional noteworthy conclusions that will not receive in-depth exploration. These conclusions are distilled from the case’s impact, consideration of Article 8(2)(e)(iv), related statutory terms, crimes, and methods of interpretation:

- The absence of prior criminal convictions is not a mitigating circumstance.
- Crimes against property are of lesser gravity than crimes against

383. See Posner & Yoo, supra note 381, at 53–54.
384. See id.
385. See id. (discussing other international tribunals).
387. Id.
388. See supra Section III.A.; infra Section IV.B.3.
389. See supra Section III.D.3.
people. However, the targets in *Al Mahdi* were of great historical, cultural, and religious significance, causing great psychological damage to the population. So although these crimes were attacks on objects, the objects defined people; thus, these crimes were also attacks on people, and the gravity of these crimes is more elevated than otherwise.

- Admissible and substantive evidence that an object is a religious building or historic monument include international and official designation(s), witness testimony, and defendant testimony.

- *Directing* an attack is synonymous with *targeting* an attack, but not with *supervising* or *ordering* an attack—the meaning of “directing” is limited to its directional (orientation) meaning. This “encompasses any acts of violence against protected objects.” It is a crime regardless of the success of the attack, or the accused’s role in a hierarchy. It is also a crime regardless of whether the acts were “carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.”

- A minimum level of conflict intensity is required to satisfy the requirement of non-international armed conflict, which must be distinguishable from “mere internal disturbance and tensions.” This was satisfied here by the armed occupation of anti-government forces.

- When multiple modes of liability are proven, the Chamber must elect the mode which is the most accurate reflection of the guilty party’s responsibility.

- In this decision, the Chamber declined to address, and thereby preserves, current controversy within ICC case law as to whether co-perpetration requires contribution to (a) the crime itself, or (b) the common plan. Mr. Al Mahdi was found to have participated in both manners, so any distinction was irrelevant to the case’s outcome, and therefore unnecessary to determine.

### 1. Admission of Guilt

*Al Mahdi* is the first case before the ICC in which a defendant provided an admission of guilt. Beyond the possible benefits to the victims and Mr. Al Mahdi

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390. See supra Section III.A.
392. *Id.*
393. See supra Section III.B.a.
395. *Supra* Section III.B.b.
397. *Id.* ¶ 49.
398. *Supra* Section III.B.a.
399. *Supra* Section III.B.b.
400. *Supra* Section III.B.d.
401. See Statement, Office of the Prosecutor, Following Admission of Guilt by the Accused in Mali War Crime Case: “An Important Step for the Victims, and Another First for the ICC,”
for peace and reconciliation, this admission set a new precedent to be examined and considered by future defendants and Trial Chambers. Specifically, Al Mahdi established that admission of guilt is a mitigating factor that greatly accelerates trial, and established a model for future Trial Chambers considering admission of guilt.

As provided by Article 65, the ICC system of justice, established by the Rome Statute, does not provide for guilty pleadings, nor plea bargaining. Defendants may instead make “an admission of guilt.” This unique arrangement is a result of the negotiated hybrid of the common law and civil law systems, which the Rome Statute and ICC system of justice were built upon. Under the Statute, proposals for modification of charges or penalties which accompany an admission of guilt are not binding on the Court. Such common law plea bargaining is regarded with suspicion, and of dubious legitimacy by civil law systems. The hybrid “admission of guilt” aims to ensure the pursuit of justice, document events fully, and prevent possible chicanery where a guilty plea and bargain may effectively be involuntary, untrue, or undermine justice.

In Al Mahdi, the accused admitted to all charges and accepted all evidence submitted by the Prosecution. This admission provided a foundation for the findings of the case, as it was submitted with agreed-upon facts, beyond the

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402. See supra Section III.C.
403. See Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 25.
404. Rome Statute, supra note 25, art. 65.
406. Lee, supra note 26, at 223.
407. Rome Statute, supra note 25, art. 65(5).
408. In common law systems, a plea bargain often operates to reduce consequences for the accused, and to reduce the court’s and prosecution’s dockets. Critics of this system assert that the motivations to reduce dockets or reduce charges has been shown to inappropriately encourage plea bargains in many situations of actual innocence, lack of evidence, or lack of adequate representation for the defendant. Consequently, reduced punishments for those that are guilty may also reduce justice for the victim(s), or plea bargains may decrease justice for both the victim(s) and those wrongly accused. See William Schabas, Commentary, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS VOL. VIII 1078, 1080-81 (André Klip & Göran Sluiter eds., 2005).
409. Id. (annotating leading cases of international criminal tribunals).
410. See Lee, supra note 26, at 242.
411. See Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 30(iv).
413. See The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Anx1-Red2,
implications of additional evidence. Statutorily, the Chamber may accept agreed facts as proven, unless justice requires further evidence.\(^{414}\) If the Chamber believed the admission and evidence did not support a finding of guilt, the Chamber would have ignored the admission and proceeded under ordinary trial procedures.\(^{415}\) In addition, Article 65(4) provides that the Chamber may acknowledge the admission, but still order the testimony of witnesses, presentation of additional evidence, and/or proceeding as an ordinary trial, if the Chamber believes doing so is “required in the interests of justice.”\(^{416}\) Neither of these provisions were invoked during \textit{Al Mahdi}, likely because victim testimony and additional evidence were presented by the Prosecution anyway, therefore pre-empting such concerns. In this case of overwhelming evidence, the Chamber adhered to the minimal evidentiary support requirements of Articles 65(1)(c) and (2).

Articles 65(1)(c) and (2) require that the admission be supported by facts derived from materials and charges brought by the Prosecutor and accepted by the accused, and from any other evidence brought by either the Prosecutor or the accused. In its analysis of this review, the Chamber stated that (1) it was not bound by a “corroboration requirement when assessing evidence,”\(^{417}\) but (2) it nonetheless “paid particular attention to whether evidence could establish the facts independently of the Accused’s admissions.”\(^{418}\) This methodology is facially in self-conflict, and is therefore a crucial piece of Chamber reasoning to analyze and comprehend. This distinction made by the Chamber likely served as a precautionary clarification, meant to explain and navigate the apparent conflict in support standards between Article 65(1)(c)—requiring evidentiary “support” separate from the admission—and Rule 63(4) that “a Chamber shall not impose a legal requirement that corroboration is required.” In practice, this conflict led the Chamber to acknowledge the legal conundrum, and to examine the case under the more demanding standard.

Therefore, through \textit{Al Mahdi}, it may be seen that in practice an admission of guilt will usually require the Chamber to fully determine and establish the defendant’s guilt, regardless and independent of the defendant’s admission(s). This decision suggests that the ICC is cognizant and respectful of civil law’s opposition to guilty pleadings,\(^ {419}\) and is highly reticent to find guilt without independent

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\(^{414}\) Rule of Evidence and Procedure, \textit{supra} note 270, at 24 (explaining “the Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims”).

\(^{415}\) Rome Statute, \textit{supra} note 25, art. 65(3) (discussing the proceedings on admission of guilt).

\(^{416}\) \textit{Id.} art. 65(4).

\(^{417}\) \textit{Al Mahdi}, ICC-01/12-01/15-171, Judgment, ¶ 29 (citing Rule of Evidence and Procedure, \textit{supra} note 270 at 21, § 63(4)).

\(^{418}\) \textit{Id.}

\(^{419}\) \textit{Id.} ¶ 27 (explaining the countervailing influences of guilt and admission pleadings in civil and common law systems on the formation and operation of the Rome Statute’s Article 65).
evidentiary review. This is true even in the case of overwhelming evidence and complete admission, and despite statutory permission for the Chamber to delve no deeper than the facts alleged by the Prosecution and accepted by the accused.

Practically, the admission meant that this trial proceeded quickly,\textsuperscript{420} contributing to \textit{Al Mahdi} being the speediest case ever decided by the ICC.\textsuperscript{421} The admission and agreed-upon facts allowed the Prosecution to focus on a narrower set of evidence in trial,\textsuperscript{422} and a reduced slate of witness and victim testimony at trial.\textsuperscript{423} The inclusion of witnesses in \textit{Al Mahdi}’s proceedings is also of note, because it demonstrates the strength of the ICC’s commitment to victims,\textsuperscript{424} even when not required,\textsuperscript{425} as in admission of guilt trial proceedings.\textsuperscript{426} In fact, victim testimony was quoted and relied upon in much of the Chamber’s judgment and sentencing.

Sentencing in \textit{Al Mahdi} made no reference to the Prosecution and Defense’s joint recommendation of nine to eleven years imprisonment—embodying the

\begin{itemize}
  \item See id. ¶ 28 (explaining that an admission of guilt can lead to a swifter resolution of the case).
  \item \textit{Swift Justice for Timbuktu Tomb Raider Who Pleased Guilty at the ICC}, JOURNALISTS FOR JUST. (Sept. 20, 2016), http://www.jfjustice.net/ShkkZ_icc/cases/swift-justice-for-timbuktu-tomb-raider-who-pleaded-guilty-at-the-icc (stating that the \textit{Al Madhi} case would be the fastest case ever to be concluded by the ICC, with a duration of only six months).
  \item \textit{Al Mahdi}, ICC-01/12-01/15-171, Judgment, ¶ 100 (discussing the lack of necessity for witness testimony and evidence production due to an admission of guilt).
  \item The Rome Statute—specifically Articles 68(3) and 43(6)—was purposefully crafted to provide a central and accessible role for victims as an independently represented party to proceedings and considerations of the Court, a feature unique to the ICC in international criminal justice. \textit{The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court 12–13} (UC Berkeley Human Rights Center, 2015) (regarding the UNGA Declaration); see also Rome Statute, supra note 25, art. 68(3), 43(6). The victims’ stake in international criminal justice has at times been controversial, but was formally adopted as an ideal international principle of justice by the U.N. General Assembly in 1985, with the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power; their inclusion advances retributive and restorative justice. See Paulina Vega González, \textit{The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court}, SCIÉLO (Dec. 2006), http://www.scielo.br/scielo.php?pid=S1806-64452006000200003&script=sci_arttext&tlng=en (regarding the controversial role of victims); HUM. RTS. CENTER, \textit{The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court 12–13} UC BERKELEY SCHOOL OF LAW (2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (regarding the UNGA Declaration); Song, supra note 372 (addressing the relationship between victim participation and justice).
  \item Article 65(1)(c) and (2) does not require the testimony of witnesses or victims for conviction from an admission of guilt. Rome Statute, supra note 25, art. 65(1)(c) and 65(2); \textit{Following Admission of Guilt by the Accused in Mali War Crime Case: “An Important Step for the Victims, and Another First for the ICC.”} supra note 5 (explaining that Mr. \textit{Al Mahdi}’s admission of guilt was made during the confirmation of charges in pre-trial proceedings, before the solicitation and participation of victims, which occurs during trial chamber proceedings).
\end{itemize}
requirement that an agreement is not binding. This demonstrates that Trial Chambers will not explicitly refer to, or rely upon, negotiated penalty modifications under an admission of guilt. However, we can reasonably conclude that this recommendation may have been on the minds of the Chamber’s judges, because their sentence of nine years and zero fines is within the agreed recommendation. Regardless of the additional proper justifications and reasoning provided, this suggests the Chamber recognizes Mr. Al Mahdi’s cooperation provided great value to justice and the proceedings. This is a strong reflection of the “substantial weight” that was afforded to the admission in sentencing, and the Chamber’s determination that an admission of guilt is a mitigating circumstance.

Finally, note the overall assessment included within the judgment on the benefits of admissions of guilt generally:

Such admissions, when accepted by the Chamber, can have a multitude of benefits to the Court and the interests of justice more generally. An admission of guilt can lead to a swifter resolution of a case, giving much needed finality in an otherwise unmatchable timeframe. While there may be victims who prefer to testify, others may wish to be spared the stress of having to testify to their personal tragedies and being exposed to cross-examination. Accused admitting guilt pursuant to an agreement to testify in subsequent trials can contribute to the search for the truth as insider witnesses in cases against others. Perhaps most importantly, the speed at which cases can be resolved following admissions of guilt saves the Court both time and resources, which can be otherwise spent advancing the course of international justice on other fronts.

2. Sentencing

Mr. Al Mahdi faced a maximum sentence of thirty years imprisonment and fines. However, he was sentenced to nine years, with time already in custody credited towards the sentence to be served. Even in consideration of the many mitigating circumstances, and the total absence of aggravating circumstances, this sentence may strike a shocked conscience as very lenient. The crimes for which Mr. Al Mahdi has been convicted outraged the world, gutted Timbuktu’s ancient heritage, and the local population does not feel sufficient justice has been served by this punishment.

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428. Id.
429. Id. ¶ 28.
432. Supra Sections III.D.2–3.
433. See Al Mahdi, Admission agreement, supra note 226 (citing condemnation from the UNSC, Economic Community of West African States, African Union, UNESCO, and numerous States and organizations); Ansar Dine Destroy More Shrines in Mali, supra note 92 (Al-Qaeda-linked group Ansar Dine destroy more shrines in Timbuktu mosques).
434. See Tharoor, supra note 8 (indicating the international outrage towards Islamist’s destruction of Timbuktu’s heritage).
435. Malians Dissatisfied with Light Sentence for Islamist who Desecrated Timbuktu, supra
While the Chamber did not explain how it arrived upon the specific term of nine years, hints and conjecture may be hypothesized from the trial records. The sentencing decision took the Prosecution recommendation very seriously, as most courts do, and the sentence fell within their recommended range of nine to eleven years. This deference to the Prosecution’s assessment is surely strengthened—and perhaps justified—by Mr. Al Mahdi’s confidential cooperation with the OTP in other matters that may come before the Court in the future.

Mr. Al Mahdi’s sentence may be framed within overall sentencing data from other prominent international criminal tribunals, regardless of crime or category. At the ICTY, the mean term is 14.3 years, and the median is 12 years; at the East Timor Special Panels, the mean term is 9.9 years, and the median is 8 years; at the ICTR, almost half of all sentences are life terms. By these figures, Mr. Al Mahdi’s sentence is on the lower end of international law prosecutions. Thus, insomuch as it feels less severe than justified, the punishment may be a reflection of general patterns within international criminal prosecution. In fact, for the most part, punishment for extraordinary international crimes is “as severe to less severe than for a single serious common crime” prosecuted in a domestic court. This pattern is problematic, but as the victims and the author feel here, it may be “reality that the massive nature of atrocity cannot be [fully] reflected” by any punishment.

The Chamber could have considered the Defense’s reporting on penalties others have faced at the ICTY for similar crimes. For example, Strugar was sentenced to eight years, eventually having most of that sentence dismissed; and Jokić was sentenced to only seven years for destroying fifty buildings and killing

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note 314. 436. Perhaps wisely, as such an analysis could bind future Trial Chambers, or at a minimum require greater justification for deviation by future Trial Chambers.

437. ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS VOL. VIII 1081 (André Klip & Göran Sluiter eds., 2005).

438. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-171, Trial Hearing 44, ¶ 4-5 (Sept. 27, 2016); Al Mahdi, ICC-01/12-01/15-171, Agreement Regarding Admission of Guilt 2.


440. Id. at 15.

441. Id.


444. INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, Miodrag Jokić, UNITED NATIONS (last visited Oct. 27, 2017), http://www.icty.org/en/content/miodrag-joki%C4%87 (describing Miodrag Jokić as a former commander in the Yugoslav Navy, who voluntarily surrendered after soldiers under his command shelled historic buildings, killing two civilians, and wounding others).
and injuring people in a heritage area.\footnote{Id.} However, the Chamber explicitly considered these sentences “irrelevant [because] . . . they were based on vastly different circumstances, including the applicable modes of liability and sources of law.”\footnote{Al Mahdi, Trial Hearing Aug. 22, supra note 226, ¶ 107.} Nevertheless, these ICTY sentences for cultural crimes would make Mr. Al Mahdi’s nine years for a possible thirty year sentence seem quite severe by comparison, and thus more befitting than critics may feel.

The sentence would have undoubtedly been higher if the Chamber did not consider Mr. Al Mahdi’s admission or remorse mitigating. Non-mitigation was encouraged by the LRV, which emphasized that Mr. Al Mahdi had nothing to lose by his admission (due to overwhelming evidence), and did not offer any actual remorse until after the pre-trial hearings.\footnote{Id. ¶ 3–11.} It seems clear that the Chamber rewarded Mr. Al Mahdi’s admission, cooperation, and later expressed remorse, by significantly lowering what would have otherwise been a much higher sentence. Given the unique circumstances of Al Mahdi, two significant conclusions are apparent: (1) a cooperative admission of guilt may have “substantial weight” as a mitigating circumstance,\footnote{Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 100} significantly affecting sentencing in favor of the convicted; and (2) future prosecutions of this crime are unlikely to be sentenced so leniently, because they are likely to lack the circumstances of Al Mahdi.

Nonetheless, the Court should not provide great deference to a sentencing recommendation related to an admission of guilt agreement. To do so would violate the explicit terms of the Rome Statute, and undermine the retributive value of punishments,\footnote{Drummbl, supra note 439, at 16.} one of the primary objectives of punishment at the ICC.\footnote{Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 66.} To assure independence,\footnote{Both reputational and actual independence.} and to avoid the pitfalls of weakened retribution and problematic guilty pleading that are common among other international tribunals,\footnote{Drummbl, supra note 439, at 16.} the Court should use discretion and care to not establish a pattern of fulfilling—thus legitimizing and enforcing—the sentencing terms of admission agreements. Future Chambers may avoid this quandary by more carefully and thoroughly explaining the independent reasoning that led to their sentencing order, especially if it falls within a term recommended pursuant to an admission of guilt.

3. Sources of Law and the Role of Precedent at the ICC

As the tenth verdict delivered by the ICC, Al Mahdi presents an appropriate opportunity to examine how the role of prior and related law has developed in practice at the ICC. This matter has been an open question of interest for practitioners and scholars alike.\footnote{See Volker Nerlich, THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 310 (Cartsen Stahn & Göran Sluiter eds., 2009) (“In the proceedings before [the] ICC thus far, both the filings of the participants and the decisions of the Chambers often contain references to the jurisprudence of the two ad hoc tribunals of the United Nations.”).} As explored earlier,\footnote{Id.} the Al Mahdi sentence and
judgment is narrow, and mostly devoid of reference to outside law and previous ICC case law.\textsuperscript{459} This is largely due to Articles 21(1)–(2),\textsuperscript{460} 74(2),\textsuperscript{460} and 74(5).\textsuperscript{460}

While the decision does not rely upon external authorities or past ICC cases, motions and testimony submitted to the Chamber consistently reference external authorities and precedent throughout. In their decision, the Chamber concluded that the facts and unprecedented nature of this case renders the sentencing of past ICC or similar international tribunal cases to be irrelevant, because they “were based on vastly different circumstances, including the applicable modes of liability and sources of law.”\textsuperscript{460} Nevertheless, in order to support and interpret particular assertions, they were examined, referenced, and presented to the Chamber during the proceedings. As the Supreme Court of the United States observed long ago, non-applicable “works [on international law] are resorted to by judicial tribunals . . . for trustworthy evidence of what the law really is.”\textsuperscript{460} Such consideration is not prohibited by the Trial Chamber, but it is greatly discouraged by the text of Articles 21(1)–(2), 74(2), and 74(5).

Thus, Al Mahdi demonstrates that while ICC judicial bodies will entertain internal precedent and related external law in hearings and submissions, the basis of decisions will strictly apply only law and precedent with very close correlation and foundations to the circumstances of the case and law(s) under consideration by the Chamber(s), and where the outside sources are helpful in addressing a gap in the Rome Statute or the ICC interpretative precedent. The appropriate role of outside law and precedent has caused confusion and consternation within the international legal community,\textsuperscript{461} so Al Mahdi is a clarification that may be

\begin{itemize}
\item[454.] Supra Section III.A.
\item[455.] Supra Section III.A.
\item[456.] Article 21 instructs the Court to apply: “(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.” Rome Statute, supra note 25, art. 21(1). Furthermore, “The Court may apply principles and rules of law as interpreted in its previous decisions.” Id.
\item[457.] Id. art. 74(2) (“The Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.”).
\item[458.] Id. art. 74(5) (“The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber’s decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.”).
\item[459.] Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 107.
\item[460.] The Paquete Habana, 175 U.S. 677, 700 (1900).
\item[461.] J. Verhoeven, Article 21 of the Rome Statute and the Ambiguities of Applicable Law, in 33 Netherlands Yearbook of International Law 3 (T.M.C. Asser Instituut ed., 2002);
regarded as a strengthening of previously observed patterns,\textsuperscript{462} and may be regarded as emerging precedent.

This fidelity illustrates that the ICC bench is cognizant and protective of the new, unique form and implications of the Rome Statute. Thus, the Rome Statute is treated by the ICC judges as a self-contained, positivist\textsuperscript{463} body of law. This approach is fully consistent with Article 21(1)(a), which provides primacy to the “Statute, Elements of Crimes and its Rules of Procedure and Evidence[;]” Article 21(2), which permits—but does not require—Chamber reliance upon “principles and rules of law as interpreted in its previous decisions[;]” and ICC Article 21(1)(c), which allows tertiary, last-resort reliance upon “general principles of law derived by the [the assessment of the] Court[.].”\textsuperscript{464} In practice, this means that decisions will avoid citing any external cases or law, because Rome Statute interpretation is being enforced as amenable to little or no outside reliance or influence. In effect, this also means that Rome Statute interpretation remains open, unadulterated, and unrestricted by external influences, systems, and precedents of law. This practice preserves the intentions and powers of the Assembly of State Parties, and those negotiating parties that formed the Rome Statute. This structure is also worth noting because it insulates the ICC and the interpretation—and thereby enforcement—of the Rome Statute from consideration of developments within customary international law.\textsuperscript{465} Likewise, the Rome Statute prohibits the Court from exercising jurisdiction over any acts not specified and defined as crimes within the treaty,\textsuperscript{466} which prevents the prosecution of acts which may be considered to be crimes within international law, but not explicitly stated within the Rome Statute itself.

C. Policy Impact

\textit{Al Mahdi} represents a turning point for both the ICC and the international protection of cultural heritage. During a time when so much cultural heritage was in peril, surrounded and targeted by conflict,\textsuperscript{467} it seems apparent that the soft

\begin{itemize}
  \item Id. at 23–5, 29–32.
  \item Id. at 23–4.
  \item Rome Statute, \textit{supra} note 25, art. 21(1)(c).
  \item See generally Viebig, \textit{supra} note 461 (discussing the impact and development of legal sources applicable to ICC proceedings).
  \item Mehmet Zülfi ÖNER, \textit{The Principle Of 'Universal Jurisdiction' In International Criminal Law}, 12 L. & JUST. R. 173, June 2016, at 192–205. (explaining universal jurisdiction at the ICC, and the crimes covered by the Rome Statute). The ICC is prohibited from prosecution of the crime of aggression “unless and until the parties to the ICC Statute have agreed to both a definition of the crime and the conditions under which the Court may exercise its jurisdiction.” \textit{Id.}
\end{itemize}
power of an ICC prosecution was deliberated pursued for this crime. Regardless of whether commentators or practitioners can agree that this was a targeted prosecution, *Al Mahdi* has undeniable impact upon global heritage concerns. This section will analyze the impact of *Al Mahdi* upon global heritage protections, including its implications for contemporary conflicts.

Likewise, this prosecution sets a new course for the ICC in a time of challenge. Specifically, *Al Mahdi* is the first case of the ICC’s burgeoning second era, under new Chief Prosecutor Bensouda. This section will analyze what conclusions about ICC and OTP strategy and purposes can be drawn from *Al Mahdi*, which helps reveal the future of the Court.

*Al Mahdi* is also significant in prosecuting the misdeeds of an Islamic militant extremist. Mr. Al Mahdi was the first Islamic militant radical to ever be prosecuted by the ICC, and was a leader within the non-state governing power occupying Northern-Mali. Thus, *Al Mahdi* demonstrates that international justice and the ICC can reach those actors who have abandoned national associations in favor of associations with primarily quasi-state or non-state actors, including Islamic jihadists.

1. **Cultural Heritage**

As *crimina juris gentium*, and a crime where the victim is humanity as whole, the challenge and gravity of cultural heritage crimes is great. The challenge of this crime is also urgent, as demonstrated by perilous situations across the globe which regularly shock the world anew. The majority of commentators recognize *Al Mahdi* as a landmark case for the protection of cultural heritage.

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469. Non-Mali.

470. Gerstenblith, *Destruction of Cultural Heritage* *supra* note 41, at 364.


consensus that, “[b]y choosing to prosecute Al-Mahdi’s case, the ICC is highlighting the gravity of cultural destruction as a war crime.”475 In addition, and in general, “[a]s with all war crimes prosecutions, holding offenders to account stigmatises their behaviour, vindicates victims and their rights, and serves to enforce humanitarian law and combat impunity for international crimes.”476 Thus, *Al Mahdi* is an important step towards the protection of cultural heritage as *jus cogens*. The elevation of cultural heritage protection to *jus cogens* is an advocated goal shared by international scholars, politicians, and officials.477 This elevation will help protect heritage where the workings of justice cannot reach, and where previous international conventions and custom have failed to do so.478

*Al Mahdi* is not the only relevant development in this elevation—in fact, the past fifteen years have seen a “growing recognition.”479 Nonetheless, *Al Mahdi* crowns the current apotheosis of these efforts, and stands as the most prominent and effective deterrent to such criminal acts. The Court is undoubtedly aware that their efforts with *Al Mahdi* will advance the protection of cultural heritage, “much the way the *Lubanga* case . . . brought new attention to the crime of using child soldiers.”480 Chief Prosecutor Bensouda herself expressed “hopes that such efforts will deter the commission of similar crimes in the future.”481 This prosecution puts would-be violators on notice, and tells the international community that justice will be done and prosecuted, signaling an end to impunity,482 and providing an

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478. See id. at 389–93, 413–14 (illustrating how elevation will provide protection).

479. See Gerstenblith, *Destruction of Cultural Heritage*, *supra* note 49, at 382–89 (outlining the slow build in cultural protection law up to the ICC’s Mali investigation).


482. See Shoamaneh & Dutertre, *supra* note 474 (calling the international community into action to use the ICC to fight against the impunity for the destruction of cultural artifacts).
international response beyond public shaming by UNESCO and other parties or persons.

Even if Al Mahdi does contribute to jus cogens recognition for cultural heritage protection, the statutory reach of the Rome Statute and this specific precedent does have some limitations. For example, Mr. Al Mahdi also directed the burning of the priceless manuscripts and scrolls of Timbuktu, part of Timbuktu’s legendary and irreplaceable library. The scrolls are part of the cultural heritage of Mali, Africa, and humanity. They are arguably more important than the structures targeted by Mr. Al Mahdi, because they contain much more information, and provide context and specific significance to Timbuktu’s structures and people. However, their destruction was not punished by this prosecution. This is because the protections of Articles 8(2)(e)(iv) and 8(2)(b)(ix) only criminalize the targeting of buildings and structures, not the cultural property within. The destroyed scrolls are offered possible statutory coverage only by Article 8(2)(e)(xii), which applies to the destruction of civilian property in armed conflict.

On the other hand, the Chamber’s interpretation of Article 8(2)(e)(iv) broadens the possible application of this crime. According to the decision, these non-international acts are also a crime regardless of whether the acts were “carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.” This interpretation is broader than the protections afforded by prior conventions, which primarily protect cultural heritage during military hostilities, and the explicit text of the Rome Statute. By implication, Article 8(2)(e)(iv) also applies to quasi-state actors, and actors which have established control over an area, provided that they engaged in armed conflict with the rightful state power at some point prior to the act in question and the Rome Statute can provide jurisdiction over those actors in some manner. For example, this would

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483. See Gottlieb, supra note 328, at 883 (outlining the limits of the Rome Statute’s cultural heritage crimes).
486. See Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶ 12 (discussing limits and applicability of Article 8(2)(e)(xii)).
487. Id. at ¶ 15.
489. The Rome Statute defines “war crimes” as “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts…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.” Rome Statute, supra note 25, art. 8(2)(e)(iv).
490. See Al Mahdi, ICC-01/12-01/15-171, Judgment, ¶¶ 17–18 (outlining court’s findings on armed conflict requirement); infra Sections II.A–B., III.A–B.
mean that Article 8(2)(e)(iv) applies to the acts of Islamic militants (such as ISIS) committed in countries party to the Rome Statute, or by nationals of those state parties, even if they have established long-term control. The new precedent of Al Mahdi means that if the Rome Statute had been in force when the Taliban infamously destroyed the Bamiyan Buddhas, even though in an area under Taliban control, their destruction would undoubtedly be criminal, and could be prosecuted.

The call-to-arms for cultural heritage represented by Al Mahdi has been applied and compared to the attacks on cultural heritage in Syria and Iraq, which have shocked the conscience of the world as well. Chief Prosecutor Bensouda specifically made this comparison during the trial. The OTP and international observers have noted that Al Mahdi creates hope for protecting heritage under siege in regions in Syria, Iraq, and Yemen, but that this hope is infected by impunity because these countries are not party to the Rome Statute. Barring voluntary and situation-specific ad hoc self-referral, the most likely path for justice in these conflicts is through a U.N.S.C. referral to the ICC, but this is unfortunately unlikely, despite international agreement on the emergency and crisis they represent. Syria and Iraq are caught between international politics, with relevant U.N.S.C. resolutions invariably being vetoed by an interested world power. The magnitude of overcoming this challenge is illustrated by other efforts

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492. Kayton, supra 477, at 414 (discussing how the Taliban’s destruction of the Bamiyan Buddhas can be used to study the destruction of the ancient city of Aleppo).


495. INT’L CRIMINAL COURT, ICC Prosecutor Bensouda On the Alleged Crimes Committed by ISIS (discussing, under Rome Statute, that Bensouda is ready to play her part in the prosecution of the ISIS if jurisdiction is conferred on the ICC pursuant to the Rome Statute).

496. ERASMUS, The Slow Acceptance that Destroying Cultural Heritage is a War Crime, THE ECONOMIST (Sept. 29, 2016, 10:08 PM), http://www.economist.com/blogs/erasmus/2016/09/cultural-patrimony-and-laws-war (discussing how the imprisonment of Mr. Al Mahdi in the Hague may serve as a warning to others who would destroy cites of heritage).

497. Ibrahim, supra note 145, at 175 (discussing one source of the ICC’s authority “to states not party to the Rome Statute” is through an ad hoc referral).

498. See generally INT’L CRIMINAL COURT, ICC Prosecutor Bensouda On the Alleged Crimes Committed by ISIS (describing that although the ICC could not get involved at that point, the U.N.S.C. could confer jurisdiction).

at the U.N.S.C. to intervene in Syria. “In 2013, 58 countries sent a letter to the UN Security Council requesting that the ICC begin an investigation into war crimes in Syria (referring to human rights abuses, not cultural war crimes)[,]” but even this sensible measure was blocked by a permanent member veto.\textsuperscript{500} This is illustrative of the problems caused by veto power\textsuperscript{501} over ICC referrals, and the roadblocks to future legal proceedings where they are most needed, despite the universal jurisdiction of the ICC.

In those locations where the ICC cannot reach, the local population and global community can rely upon strengthened \textit{jus cogens}, world advocacy, and relevant domestic laws. In these cases, interested scholars or practitioners should assess the domestic laws of non-parties to the Rome Statute, and analyze what relevant international treaties or conventions may provide avenues for coverage or relief.\textsuperscript{502}

It must also be noted that the ICC is preparing for its next foray into cultural heritage protection, perhaps satisfied that they made a strong statement with \textit{Al Mahdi}. The Court believes that “[t]here is no hierarchy in mass atrocities. These grave [cultural heritage] crimes must be pursued with the same vigour as other atrocity crimes.”\textsuperscript{503} As a result of this case, the OTP is preparing a “comprehensive policy paper on protected cultural property under the Rome Statute[,]” which will aid the OTP in future prosecutions of these crimes, and “serve as a helpful reference document to assist prosecutions at the national level.”\textsuperscript{504}

\section{2. Strategy of the OTP, and Standing of the ICC}

The Court is highly cognizant of the ICC’s deterrent role\textsuperscript{505} and practical limitations.\textsuperscript{506} Some of the goals and limits discussed in the preceding section are reflected in this statement from the Senior Special Assistant to Bensouda:

The Court is a crucially important judicial mechanism that, through its work, can highlight the severity of these crimes, and by holding perpetrators accountable, deter the commission of similar crimes in the future. In other words, the ICC is critical to the fight against impunity for the destruction of cultural heritage in this new century. In order for the Court to have more of an impact, universal jurisdiction is of course crucial. More states are encouraged to ratify the Rome Statute to join the

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\item[500.] Emma Cunliffe et al., \textit{The Destruction of Cultural Property in the Syrian Conflict: Legal Implications}, 23 \textit{INT’L J. CULTURAL PROL.} 1, 18 (2016).
\item[501.] \textit{See}, e.g., Pace & Ghany, supra note 350 (discussing the UN’s inability to respond to major international atrocities due to their outdated Code of Conduct’s reference to terms like genocide, crimes against humanity, or war crimes).
\item[503.] Sam Sasan Shoamanesh & Dutertre, supra note 474. Sam Sasan Shoamanesh is the Senior Special Assistant to the Prosecutor of the ICC, having assumed this post in September 2013. \textit{Id.}
\item[504.] \textit{Id.}
\item[505.] \textit{See} Ibrahim, supra note 145, at 187 (discussing how the ICC relies on deterrence and understands that publicity is necessary to amplify the accomplishment of this function).
\item[506.] \textit{See supra} Sections IV.A.1. and IV.C.1.
\end{enumerate}
\end{footnotesize}
IC... by doing so, benefit from the legal protections it provides.\footnote{507}

Likewise, the ICC is aware that its standing is inextricably linked to its successes and effectiveness,\footnote{508} which is in turn linked inextricably to the OTP’s strategy and success.\footnote{509} Strengthening the ICC’s standing is crucial to its success overall and to prospects for international cooperation on cases and investigations, which are current issues of grave concern.\footnote{510} The ICC’s first case, for example, has hampered and lowered the reputation of the ICC because it was unable to bring the accused high-level official to justice, or elicit cooperation from nations in prosecuting the matter.\footnote{511} This case was pursued by the ICC’s troubled first prosecutor, a litigator of great controversy, and a Chief Prosecutor that hindered more than helped achieve the ICC’s mission.\footnote{512} In fact, during his time at the ICC, the Court issued thirty arrest warrants, but only generated one successful conviction.\footnote{513}

Today the OTP is under new leadership, presenting the Court opportunity for corrections and growth in stature and effectiveness. Chief Prosecutor Bensouda has led since June 2012, and \textit{Al Mahdi} is the first case she has brought from origination

\footnote{507} Shoamanesh & Dutertre, \textit{supra} note 474. Sam Sasan Shoamanesh is the Senior Special Assistant to the Prosecutor of the ICC, having assumed this post in September 2013. \textit{Id.}


\footnote{510} \textit{See} \textit{STRATEGIC PLAN}, \textit{supra} note 380, at 3 (outlining goals to promote cooperation and support among the Court, States, and international organizations).


to prosecution.\footnote{514} Already, Bensouda’s approach has been markedly different,\footnote{515} and she has highlighted\footnote{516} and begun enforcing previously neglected sections of the Rome Statute, such as cultural heritage in Al Mahdi. Bensouda seems determined to ensure that the ICC is effective, broad, and embraced by international governance and civil society.\footnote{517}

In the prosecution of the Al Mahdi case, a new prosecutorial strategy is observable at the Court. First, we see the Court taking on a case nobody expected,\footnote{518} and thereby signaling an end to general and specific impunity. This proves the Court’s willingness and ability to prosecute grave crimes that the world is resigned to not effectively prosecuting or preventing. Second, Bensouda spoke out and signaled the Court’s jurisdiction and interest in prosecuting the attacks in real time,\footnote{519} adeptly responding to international outrage.\footnote{520} These statements and subsequent follow-through demonstrate that the Court is responsive to the world. However, the OTP’s strategy is broader and more sophisticated than simply heeding global concern or trying new cases under un-prosecuted statutes.

It has been observed that “[t]he ICC only has the resources to prosecute a few


518. See, e.g., Ishaan Tharoor, \textit{Timbuktu’s Destruction: Why Islamists Are Wrecking Mali’s Cultural Heritage}, \textit{TIME} (July 2, 2012), http://world.time.com/2012/07/02/timbuktu-destruction-why-islamists-are-wrecking-malis-cultural-heritage/ (“But beyond scolding the Islamists of the Sahel, there’s little anyone can do to stop this wretched bout of iconoclasm. History is littered with the debris of toppled temples and smashed idols.”).

519. See Julia Sane, \textit{supra} note 476 (“On 1st July 2012, Fatou Bensouda, the ICC’s newly appointed Prosecutor, declared that the destruction of Sufi shrines in Timbuktu constituted a war crime under the Rome Statute.”); \textit{see also} Carol J. Williams, \textit{Islamist Rebels in Mali Destroy Timbuktu Historic Sites}, \textit{LA TIMES BLOGS} (July 2, 2012, 11:03 AM), http://latimesblogs.latimes.com/world_now/2012/07/radical-islamic-rebels-in-mali-destroying-timbuktu-treasures.html (“In radio and television interviews from Senegal, the newly appointed chief prosecutor of the International Criminal Court, Fatou Bensouda, warned the rebels that destruction of religious and cultural heritage could lead to war crimes charges.”).

520. See William, \textit{supra} note 350 (discussing the ICC’s response to the outrage of various U.N. associates and terrorists themselves regarding the destruction of cultural heritage sites in Mali).
cases from each situation, and must therefore be strategic in the cases it chooses.\textsuperscript{521} While fair, this “limited resource” analysis dismisses the institutional functions and competency of the ICC. The OTP gives substantial deference to the findings of preliminary examinations and investigations, which highlighted the cultural heritage situation in Mali as the most urgent and grave crime.\textsuperscript{522} Commentators have also observed that “case selection is part strategy and part opportunity. . . [I]t may be that after three years of investigation [in Mali], it was the strongest case that presented itself.”\textsuperscript{523} This is possibly true, but deeper examination reveals that the motivations of Bensouda were far cleverer than those theories allow. After all, out of the many crimes committed, the ICC did prosecute the most notorious crime to occur, not just any of the crimes.\textsuperscript{524} Regardless, finding a significant victory out of a difficult three-year investigation is a success in and of itself.

In reality, Bensouda has pursued a new theory of searching for and building justice at the ICC. Officially, the \textit{Al Mahdi} prosecution is, first and foremost, guided by the situation report conclusions and prosecutorial discretion. The OTP approach to prosecutorial discretion was outlined in September 2016 by their “Policy Paper on Case Selection and Prioritisation,”\textsuperscript{525} which was developed contemporaneously with the prosecution of Mr. Al Mahdi. Court observers would be well advised to familiarize themselves with this document. For the purposes of this discussion, note the following matters (emphasis added):

- “Gravity is the predominant case selection criteria[.].\textsuperscript{526} However, in consideration of the “deterrent role of the Court[,]” gravity should not be assessed as a legal bar in an “overly restrictive” manner.\textsuperscript{527}
- Regarding “cases not selected for investigation or prosecution, . . . [recall] that the goal of the Statute to combat impunity and prevent the recurrence of violence, . . . is to be achieved by combining the activities of the Court and national jurisdictions within a complementory system of criminal justice.”\textsuperscript{528}
- Case prioritization flows from the Statute, “takes into account the practical realities faced” by the OTP and Court, “takes into consideration . . . strategic case prioritisation[,]” and considers “the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes[,]”\textsuperscript{529} Prioritization will also consider “the potential to secure the appearance of the suspects

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521. Whiting, supra note 6.
522. See supra Section II.C.1.
523. Whiting, supra note 6.
524. Id.
525. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, supra note 137.
526. Id. ¶ 6.
527. Id. ¶ 32.
528. Id. ¶ 7.
529. Id. ¶ 49.
\end{flushleft}
before the Court[]."

• The OTP acknowledges that its limited resources limit the number of cases it can simultaneously prosecute. Prosecution will focus on those most responsible, and “may entail the need to consider the investigation and prosecution of a limited number of mid- and highlevel [sic] perpetrators in order to ultimately build the evidentiary foundations for case(s) against those most responsible.”

The targeting of a suspect already held in confinement squares with the prioritization of suspects that may be apprehended. While this may seem to undermine goals of complementary justice, the crimes prosecuted at the ICC were more significant than the potential charges against Mr. Al Mahdi in Niger. Mr. Al Mahdi’s captivity was certainly attractive as a convenient case for the Court—beyond the potential for justice—because the Court needs to maintain relevance, and establish success under new leadership. The transfer and prosecution of Mr. Al Mahdi was never a foregone conclusion, and not the OTP’s top priority. In fact, the significance of this case in reflecting new strategies and thinking for the Court is reflected in the last-minute warrant for his arrest on narrow charging, issued one week before his scheduled release from detention. Such prioritization is a smart and effective strategy, which should only be criticized if it truly generates results that achieve less justice overall or less than otherwise possible. As demonstrated, this criticism does not apply to Al Mahdi, because Mr. Al Mahdi was most responsible for these charged crimes, and would have escaped prosecution for them otherwise.

Even the trial proceedings reveal a new approach to prosecutions, meant to elevate the standing of the ICC. This was the fastest case ever decided by the ICC, and not just because of Mr. Al Mahdi’s admission of guilt. The Court fast-tracked the proceedings, building on past lessons, and setting a path for the future. Al Mahdi’s fast-track counters criticisms of the Court’s proceedings as inefficient and negatively lengthy.

While Bensouda’s predecessor pursued the top of the food chain, Bensouda is willing to start lower down within the hierarchy. O’Campo’s prosecutorial strategy was a recognition of the Court’s mandate to pursue those most responsible, but proved problematic in the context of the ICC because targeted suspects’ great

530. Id. ¶ 51(d).
531. Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, supra note 137.
532. Id. ¶ 42.
533. Id. ¶ 51(d).
534. Donovan, supra note 512.
536. Id.
political power frustrated the Court’s need for cooperation, as exemplified by the Kenyatta\(^\text{538}\) and Al Bashir\(^\text{539}\) cases. It is not disputed that Al Mahdi prosecuted the individual most responsible for cultural heritage crimes, but Mr. Al Mahdi is not the most responsible for many of the other most egregious crimes observed in Mali. Thus Mr. Al Mahdi is simultaneously high-level and low-to-mid-level. In contrast to “headhunting,” first prosecuting the bottom rungs of actors not only brings justice more quickly, but finds leads and builds cases for future domestic and ICC prosecutions of individuals higher up the chain of command or hierarchy of culpability. This “flipping” strategy,\(^\text{540}\) and the assertion of its use in Al Mahdi, is supported by explicit statements from Bensouda, expressed hopes for future prosecutions built off this case, and the confidential informant role Mr. Al Mahdi is documented to have played. Bensouda’s employment of “flipping” is reflective of the OTP’s new policy document on prioritization.\(^\text{541}\) Commentators and scholars of international criminal justice have lamented the inability of the Court to implement this method,\(^\text{542}\) and advocated for prosecutorial strategy shifts.\(^\text{543}\) Al Mahdi thus stands as a testament to the Court’s necessary evolution, and, along with the OTP prioritization paper, is a seminal accomplishment in Bensouda’s drive to broaden the reach, standing, and prosecutorial effectiveness of the Court.

Mr. Al Mahdi’s admission of guilt makes his role as a “flipper” for the OTP’s work in Mali even stronger. The cooperation of this high-level official within Ansar Dine led to the revelation of many important details and facts, which could lead to future ICC prosecutions.\(^\text{544}\) However, this pivotal cooperation was made much easier by his voluntary assistance, and apparent regret for participation with these extremist groups.\(^\text{545}\) Through this information, the OTP and domestic courts

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538. Verini, supra note 511 (likening the prosecution process of well-endowed Kanyatta to the prosecution of entrenched organized crime).

539. Somini Sengupta, Omar al-Bashir Case Shows International Criminal Court’s Limitations, N.Y. TIMES (June 15, 2015), https://www.nytimes.com/2015/06/16/world/africa/sudan-bashir-international-criminal-court.html (“[the court] has been set up in such a way that the world’s most powerful countries were able to keep themselves—and their allies (like Al Bashir)—out of its reach.”).


541. Office of the Prosecutor, supra note 129.


543. See Jacob Foster, A Situational Approach to Prosecutorial Strategy at the International Criminal Court, 47 GEO. J. OF INT’L L. 439 (2016) (arguing that the ICC must change its prosecutorial strategies by encouraging states to address atrocities and adopting a broader approach to prosecutions).

544. Al Mahdi, Decision on the Confirmation of Charges, supra note 120, ¶ 6–7; Al Mahdi, Admission agreement, supra note 226 ¶ 4–5 (interpreting the presence of redacted information) (suggested by the presence of redacted information); Al Mahdi, Hearing Transcript Aug. 24, supra note 172, ¶ 44–44.

are developing stronger cases against other suspects, with information they would not have otherwise had. These cases may be brought forward at the ICC or within Mali, with the ICC providing supporting information. In December 2016, Mali opened a case, which Bensouda hailed as representative of this complementary potential.  

Perhaps the most publicly damaging criticisms of Al Mahdi are those based on the ICC’s lack of charges against Mr. Al Mahdi for alleged sexual and gender based crimes, for which many advocacy groups assert there is ample evidence. Even if Mr. Al Mahdi was demonstrably guilty for these crimes as well, the investigation found that these crimes were not of the same public priority as those cultural heritage charges brought. Bringing additional charges against Mr. Al Mahdi would likely have made the trial more difficult, inspired less cooperation, and weakened Al Mahdi’s soft-power role in deterrence and retribution for the global community. This is not to say that sexual crimes are unworthy of pursuit. This is instead recognition of the facts and contexts of the Mali situation, including the world’s priorities for conviction. Sexual and gender based crimes were reportedly widespread and committed by many, but the destruction of cultural heritage was narrow and specific, rendering them a more appropriate conviction for the ICC. Here, Bensouda has stressed the gravity of the cultural heritage crimes, the stronger evidence for these crimes than sexual crimes, and the proper role of complementarity—that it is not the ICC’s proper role to take on every criminal charge that occurs within a state, saying “The court and my Office cannot be expected to try all the cases that arise from a conflict... [T]here must be attempts at the national level to also try others who are involved in the conflict, and who have been suspected of committing crimes. That is the only way we have of closing the impunity gap”. There is nothing to stop Mali from prosecuting Mr. Al Mahdi, and many others, for additional crimes that may have been committed. To be sure, the Court and Bensouda are committed to combating sex and gender based crimes—Bensouda has outlined this as a distinct priority for the ICC. Given the limited resources of the Court, it is best to bring forward the strongest subject-matter cases, with the greatest potential impact, in each trial. This is, again, more evidence of strategy at play.

546. On the Occasion of the Opening of the Trial Against Amadou Haya Sanogo and Other Suspects Before the Malian Judicial System: “Complementarity is Central to the Rome Statute System, supra note 139.

547. Marie Forestier, ICC to War Criminals: Destroying Shrines Is Worse Than Rape, FOREIGN POL’Y (Aug. 22, 2016), http://foreignpolicy.com/2016/08/22/icc-to-war-criminals-destroying-shrines-is-worse-than-rape-timbuktu-mali-al-mahdi/ (noting that “What won’t be litigated are the more than 100 allegations of sexual violence and rape that occurred during the same 10-month reign of terror in 2012 and 2013”).

548. Massarenti, supra note 515.

V. CONCLUSION

The International Criminal Court’s successful prosecution of Ahmad Al Faqi Al Mahdi is a landmark case that furthers the mission and power of the international community to protect cultural heritage and prevent war crimes. In addition, Al Mahdi demonstrates the ICC’s competence to prosecute this matter and strengthens relevant customary international law. Al Mahdi thus opens doors (and dockets) to possible prosecution for the gravest violators which seem beyond the reach of the law, and in nations that are not party to the Rome Statute.

With this case, attacks on cultural heritage are no longer crimes committed with impunity, and the ICC has strengthened jus cogens considerations of cultural property and cultural genocide. ICC pronouncements also make it clear that Al Mahdi is intended to be the first case that marks a new approach to cultural heritage law for the Court—in official and complementary capacities.

Al Mahdi also strengthened the ICC as an institution in a time of jeopardy and controversy. This case demonstrated the soft power and effectiveness of the ICC’s prosecutorial discretion and is an important first step of the ICC’s new chief prosecutor in combatting past and current criticism of the Court.

Regarding matters before the ICC and interpretation of the Rome Statute, Al Mahdi represents a shift in prosecutorial strategy and provided important first lessons regarding how the Court will handle admissions of guilt.