

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 verdict¹ in a case of firsts. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*² was the first international trial focused solely on the destruction of the “irreplaceable” asset of cultural heritage;³ the first international prosecution of an Islamic extremist militant;⁴ the first admission of guilt at the ICC;⁵ and the first completed case of the

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1. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, (Sept. 27, 2016) [hereinafter: *Al Mahdi*, ICC-01/12-01/15-171, Judgment].

2. *Id.*

3. Lucas Lixinski and Sarah Williams, *The ICC's Al-Mahdi Ruling Protects Cultural Heritage, but Didn't Go Far Enough*, THE CONVERSATION (Oct. 18, 2016, 10:33 AM), <http://theconversation.com/the-iccs-al-mahdi-ruling-protects-cultural-heritage-but-didnt-go-far-enough-67071>.

4. Krishnadev Calamur, *Repenting for the Cultural Destruction of Timbuktu*, THE ATLANTIC (Aug. 22, 2016), <https://www.theatlantic.com/news/archive/2016/08/the-timbuktu-trial/496838/>.

5. 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,” Int'l Crim. Ct. (Mar. 24, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi>; *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 21–22.

ICC's recently appointed chief prosecutor,⁶ who is only the second individual in this position to lead the young Court.⁷ The charges arose from the June and July 2012 destruction of ten sites in the ancient and fabled city⁸ of Timbuktu⁹ 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,¹⁰ indicating their extraordinary significance to the whole of humanity.¹¹ The destruction of these sites collectively represented the loss of more than 1% of all cultural World Heritage Sites.¹² 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.¹³ This Note

6. Alex Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, JUST SECURITY (Sept. 29, 2015, 9:24 AM), <https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/>.

7. Marlise Simmons, *Gambian Will Lead Prosecution in Hague*, N.Y. TIMES (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/world/europe/fatou-bensouda-becomes-lead-prosecutor-at-international-criminal-court.html>.

8. Ishaan Tharoor, *Timbuktu's Destruction: Why Islamists are Wrecking Mali's Cultural Heritage*, TIME (July 2, 2012), <http://world.time.com/2012/07/02/timbuktus-destruction-why-islamists-are-wrecking-malis-cultural-heritage/>.

9. See *Timbuktu*, UNESCO WORLD HERITAGE CTR., <http://whc.unesco.org/en/list/119> (describing the significance of Timbuktu) (last visited Oct. 7, 2017).

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).

12. 9 of 725 sites is 1.24%. *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list>, archived on Internet Archive, <https://web.archive.org/web/20120629152505/http://whc.unesco.org/en/list> (providing an archived record of the World Heritage List website as it appeared on June 29, 2012, 03:15:05 PM).

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 miscomprehends 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 "[r]ather 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*¹⁴

Prior to the establishment of the International Criminal Court, “serious violations of international human rights and humanitarian law”¹⁵ 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).

14. For further introductory information on the ICC, see *Understanding the International Criminal Court*, INT'L CRIM. CT., <https://www.icc-cpi.int/resource-library/Documents/UICCEng.pdf> (last visited Oct. 29, 2017). For in-depth doctrinal and procedural ICC documents, see *Information Products*, INT'L CRIM. CT., <https://www.icc-cpi.int/resource-library#informational-brochures> (last visited Oct. 29, 2017).

15. *Core Crimes Defined in the Rome Statute of the International Criminal Court*, COAL. FOR THE INT'L CRIM. CT., <http://www.iccnw.org/documents/FS-CICC-CoreCrimesinRS.pdf> (last visited Oct. 7, 2017).

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,¹⁷ and the International Criminal Tribunal for the former Yugoslavia (ICTY) tried criminals on both sides of the Serbian and Bosnian conflict of the 1990s.¹⁸ 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 other¹⁹ preceding international tribunals,²⁰ and is the only permanent body with broad global jurisdiction²¹ on these matters. First envisioned as early as 1872,²² the ICC is central to the international goals of peace, justice, and legal order, a system first theorized by pioneers of international law, Grotius,²³ Vitoria, Vattel.²⁴

Established by the Rome Statute²⁵ in 2002, the ICC operates under a

17. Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, FOREIGN AFF. (January 1, 1947), <https://www.foreignaffairs.com/articles/1947-01-01/nuremberg-trial-landmark-law>.

18. See *About the ICTY*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/about> (last visited Oct. 7, 2017).

19. See David Kaye, *Who's Afraid of the International Criminal Court?: Finding a Prosecutor Who Can Set it Straight*, FOREIGN AFF. (Apr. 18, 2011), <https://www.foreignaffairs.com/articles/2011-04-18/whos-afraid-international-criminal-court> (last visited Oct. 7, 2017) (discussing the history of the ICC's creation); see generally *The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/nuremberg> (providing information on Tokyo trials' influence on ICC); *United Nations Mechanism for International Criminal Tribunals*, U.N. INT'L CRIM. TRIBUNAL FOR RWANDA, <http://unictr.unmict.org/> (for further information on the ICTR's influence on the ICC); See generally *The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone*, RSCSL.org, <http://www.rscsl.org/> (for further information on the Residual Special Court for Sierra Leone's influence on the ICC) (last visited Oct. 7, 2017).

20. See Aaron Fichtelberg, *Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy*, 28 CRIM. JUST. ETHICS 1, 5 (2009) (listing the names of criminal tribunals preceding the ICC).

21. See generally, B.C. Nirmal, *Jurisdiction of the International Criminal Court*, 3 ISIL Y.B. INT'L HUMAN. & REFUGEE L. 116 (2003) (“[The Rome Statute] provides for the establishment of “an independent permanent international criminal court (ICC) in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.”).

22. See *The International Criminal Court on Trial: A Conversation with Fatou Bensouda*, FOREIGN AFF. (Feb. 10, 2017), <https://www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial#> (“The quest for a permanent global court to try perpetrators of the world’s worst crimes began as early as 1872.”).

23. See *Hugo Grotius*, STAN. ENCYCLOPEDIA OF PHIL. (July 28, 2011), <https://plato.stanford.edu/entries/grotius/#Inf> (describing the philosophy of Grotius, which “conceives of states as existing . . . in an international society governed by a system of norms.”).

24. See Mark V. Vlasic & Helga Turku, *Blood Antiquities: Protecting Cultural Heritage beyond Criminalization*, J. OF INT'L CRIM. JUST. 1, 6 (2016) (discussing the philosophies of Swiss philosopher Emer de Vattel); see generally Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?*, 10 J. OF THE HIST. OF INT'L L. 181, 181–82 (2008) (providing an in-depth analysis of the philosophies of the pioneers of international law).

25. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

prescribed hybrid justice system²⁶ 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.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).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.²⁹ Once a warrant is issued, the ICC depends upon member and friendly states to arrest and transfer the suspect to The Hague.³⁰ The ICC will then hold a fair and independent trial before making a decision and sentencing.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.³² The last stage is the determination of reparations to victims of the crime, if and when appropriate.³³

Following the conclusion of *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.³⁴ As of September 2017, the Rome Statute had 124 state parties, and an additional 31 signatory states.³⁵ Notably absent are

26. See THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS, 220–24 (Roy S. Lee ed., 1999) (elaborating on the process and methods of creating the ICC justice system).

27. See *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.”).

28. Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. CRIM. JUST. 38, 40 (2004).

29. See *Office of the Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp> (last visited Oct. 7, 2017) (describing the steps the Office of the Prosecutor takes to initiate cases).

30. See *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.”).

31. See *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.”).

32. *Questions and Answers: Situation in the Republic of Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, INT'L CRIM. CT., https://www.icc-cpi.int/iccdocs/PIDS/AlMahdiQA17August2016_Eng.pdf (last visited Oct. 7, 2017) [hereinafter *Questions and Answers*].

33. *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.”).

34. 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., THE COURT TODAY (2016) (listing investigations and cases); see also *About*, INT'L CRIM. CT., <https://www.icc-cpi.int/about> (last visited Oct. 05, 2017).

35. UN General Assembly, *Rome Statute of the International Criminal Court (Signatory*

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,³⁶ and the memberships of South Africa and Burundi—withdrawals based upon claimed reasons that are effectively red herrings.³⁷ Early 2017 saw the African Union call for en masse African exodus from the ICC.³⁸ 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.”³⁹ 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.”⁴⁰ The 1954 Hague Convention for the Protection of the Cultural Property in the Event of Armed Conflict (Hague 1954) defines cultural property as:

[I]rrespective 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

Parties), 17 July 1998, 2187 U.N.T.S. 3, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited Oct. 7, 2017).

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.”).

38. See *African Union Backs Mass Withdrawal from ICC*, *supra* note 37; see also *African Leaders Plan Mass Withdrawal from International Criminal Court*, GUARDIAN, <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> (“African leaders have adopted a strategy calling for a collective withdrawal from the international criminal court. The non-binding decision came behind closed doors near the end of an African Union summit.”).

39. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following the Transfer of the First Suspect in the Mali Investigation: “Intentional Attacks Against Historic Monuments and Buildings Dedicated to Religion are Grave Crimes”*, INT'L CRIM. CT. (Sept. 26, 2015), <https://www.icc-cpi.int/legalAidConsultations?name=otp-stat-26-09-2015>.

40. Eric A. Posner, *The International Protection of Cultural Property: Some Skeptical Observations*, 8 CHI. J. OF INT'L L. 213, 213 (2007).

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;⁴¹

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.⁴²

1. Cultural Heritage in Armed Conflict⁴³

In antiquity, the destruction of cultural heritage served to destroy the identity and history of a conquered people—to erase evidence they ever existed.⁴⁴ In ancient times, this practice was accompanied by the war booty theory, which entitled a victorious power to the treasures of the defeated power.⁴⁵ World history is rife with destruction and pillaging by conquerors.⁴⁶

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 legitimization in the nineteenth century.⁴⁷ For example, during the War of 1812, a

41. United Nations Educational, Scientific and Cultural Organization [UNESCO], *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, Art. 1, (1954) <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/text/>.

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.”).

43. See Jiří TOMAN, *THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT: COMMENTARY ON THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT AND ITS PROTOCOL, SIGNED ON 14 MAY, 1954 IN THE HAGUE, AND ON OTHER INSTRUMENTS OF INTERNATIONAL LAW CONCERNING SUCH PROTECTION* (1996) (providing an in-depth historical and legal examination of cultural heritage in armed conflict prior to 1996).

44. Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 *CARDOZO PUB. L. POL’Y & ETHICS J.* 677, 677–78 (2009).

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.”).

46. See PATRICK J. BOYLAN, *REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT* 23–24 (1993) (discussing the fate and treatment of cultural property in times of war and armed civil conflicts).

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.”⁴⁸

“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.⁴⁹ Today, cultural genocide has received legal recognition by the international community, specifically through codification of the Rome Statute⁵⁰ and the work of the ICTY.⁵¹ 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.⁵²

Most countries have signed international agreements aimed at protecting cultural heritage and at preventing cultural genocide.⁵³ 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”).

48. Gerstenblith, *supra* note 44, at 680.

49. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime against Property or a Crime against People*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 342–45 (2016) [hereinafter Gerstenblith, *Destruction of Cultural Heritage*]

50. *But see Core Crimes Defined in the Rome Statute of the International Criminal Court*, COAL. FOR THE INT’L CRIM. CT., <http://www.iccnw.org/documents/FS-CICC-CoreCrimesinRS.pdf> (last visited Oct. 29, 2017) (indicating that the Rome Statute categorizes the cultural destruction prosecuted in *Al Mahdi* as a war crime, not as the crime of genocide).

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.”).

52. David Nersessian, *Rethinking Cultural Genocide Under International Law*, CARNEGIE COUNCIL FOR ETHICS IN INT’L AFFAIRS (Apr. 22, 2005), https://www.carnegiecouncil.org/publications/archive/dialogue/2_12/section_1/5139.

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.⁵⁴ The President of the United States of America directed Columbia Law School Professor Francis Lieber to draft a code for the armed forces.⁵⁵ Amongst other provisions protecting cultural tangibles, Article 35 of the “Lieber 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.”⁵⁶ 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 Lieber Code provided a direct model for subsequent international agreements,⁵⁷ to which varying and overlapping coalitions of countries are party.⁵⁸ International codification began with the 1874 Declaration of Brussels and the 1880 Oxford Manual, which primarily prohibit damaging monuments or works of art during wartime.⁵⁹

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,⁶⁰ and the 1907 convention specifically safeguarded historic monuments and “buildings dedicated to religion, art, science, or charitable purposes.”⁶¹ The Hague Convention of 1954 (Hague 1954)⁶² 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.”).

54. See Patty Gerstenblith, *The Protection of Cultural Heritage during Armed Conflict*, 20 INT'L L. STUDENTS ASS'N Q. 27, 28 (2012) (“The first codification of principles for the protection of cultural property during armed conflict is found in the Lieber Code”).

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.

57. See Patrick J. Boylan, REVIEW OF THE CONVENTION FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 25–26, UNESCO (1993) <http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf> (“[N]either Brussels, 1874, nor Oxford, 1880, were formally ratified as international treaties. The first formal international treaty providing some protection for cultural property was that produced by the first (1899) Hague Conference, which adopted the Brussels/Oxford principles”).

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 agreements remain, “the only international conventions concerning the protection of cultural property during armed conflict ratified by the United States and the United Kingdom.”).

61. *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Art.* 27, ICRC, <https://ihl->

paramount importance, and enjoys broad global subscription.⁶³ 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.⁶⁴ Hague Protocol I (Hague 1977) and Hague Protocol II (Hague 1999) provide for enforcement, but fewer countries are party to them than Hague 1954.⁶⁵ 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.⁶⁶ Hague 1999 also requires countries to have domestic penal laws regarding the destruction of cultural heritage.⁶⁷

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.⁶⁸ Increasing international recognition and codification culminated in inclusion of these crimes within the Rome Statute as grave war crimes,⁶⁹ providing the basis for the ICC's momentous *Al Mahdi* case.

databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=3C43C56CFC87D4E3C12563CD005167AA (last visited Oct. 26, 2017).

62. See generally Boylan, *supra* note 46 (providing an in-depth examination).

63. *Id.* at 45.

64. *Id.* at 44.

65. See *Treaties, State Parties, and Commentaries: Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954*, ICRC, [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=400)

databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=400 (last visited Oct. 26, 2017) (listing 129 state parties to the Hague Convention of 1954); see also *Treaties, State Parties, and Commentaries: Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999*, ICRC, [https://ihl-](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=590)
databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPAGES_NORMStatesParties&xp_treatySelected=590 (last visited Oct. 26, 2017) (listing 73 states as parties to the Hague Protocol II in 1999); see also *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999, Art. 15 & 16*, ICRC, <https://ihl-databases.icrc.org/ihl/INTRO/590?OpenDocument> (last visited Oct. 27, 2017).

66. See Techera, *supra* note 52, at 14–15 (stating that violators may be prosecuted or extradited).

67. See *id.* at 13 (“‘Enhanced protection’ of cultural property will be granted in the following circumstances: The cultural heritage must be of ‘the greatest importance to humanity’, it must be protected by domestic legislation that recognises [sic] its cultural and historical value ensuring the highest level of protection and it must not be used for military purposes or to shield military sites.”).

68. See Techera, *supra* note 52 (exploring this history and trend); Boylan, *supra* note 46 (exploring this history and trend). *But see* Aparna Tandon, *Introduction: Developing the courses, in PROTECTING CULTURAL HERITAGE IN TIMES OF CONFLICT* (Simon Lambert & Cynthia Rockwell, eds., 2012) (“Consequently, ICCROM engaged in a careful design process that involved a cross-disciplinary team of conservation professionals, military personnel, humanitarian-aid specialists, legal experts and conflict-resolution specialists. The result was an intensive course programme divided into three key themes: Culture and Conflict; First Aid to Cultural Heritage; and Communication, Logistics and Planning.”).

69. See generally Rome Statute, *supra* note 25, art. 8 (providing a definition of war crimes);

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 p]eace must be established on the basis of humanity’s moral and intellectual solidarity.”⁷⁰ 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.⁷¹ 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.⁷² 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.⁷³

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.⁷⁴ 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.⁷⁵ 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

Lee, *supra* note 26 (providing a history of the drafting of the Rome Statute).

70. *UNESCO: Building Peace in the Minds of Men and Women*, UNESCO, http://en.unesco.org/70years/building_peace (last visited Oct. 3, 2017).

71. *Committee for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, http://www.unesco.org/eri/committees/Committees_and_Organs_GC.asp?code=+2+76&language=E (last visited Oct. 27, 2017).

72. *Committee for the Protection of Cultural Property in the Event of Armed Conflict: Eleventh Meeting*, UNESCO (Dec. 1, 2016), <http://unesdoc.unesco.org/images/0024/002466/246667E.pdf>.

73. *See The Fund for the Protection of Cultural Property in the Event of Armed Conflict*, UNESCO, <http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/protection/protection-of-cultural-heritage-in-armed-conflict/fund/> (last visited Oct. 27, 2017) (“The Committee for the Protection of Cultural Property in the Event of Armed Conflict. . .decides on how the Fund is to be used.”).

74. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, in force, 27 U.S.T. 37, 1037 U.N.T.S. 151; *See also The World Heritage Convention*, UNESCO, <http://whc.unesco.org/en/convention/> (last visited Oct. 4, 2017) (outlining what the convention contains and means); *The World Heritage Convention*, AUSTRAL. GOV'T DEP'T. OF ENV'T & ENERGY, <https://www.environment.gov.au/heritage/about/world/world-heritage-convention> (last visited Oct. 4, 2017) (explaining role and responsibilities of participating nations).

75. *The World Heritage Convention*, UNESCO, *supra* note 74.

damage by any party or force. Indeed, designation obligates the territorial possessor to invest in and safeguard the protected entity.⁷⁶ Like the CPCPEAC, the WHC also has a correlated fund, the World Heritage Fund.

When the attacks in *Al Mahdi* began on June 30, 2012⁷⁷, there were only 725 cultural sites in the world designated by the WHC as World Heritage Sites.⁷⁸ The acts at trial before the Court in *Al Mahdi* destroyed more than 1% of those World Heritage Sites.⁷⁹ Before the attacks took place, UNESCO and the WHC raised alarm within the international community,⁸⁰ acted to safeguard heritage,⁸¹ and placed Timbuktu sites on their “List of World Heritage in Danger.”⁸² 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.⁸³ Immediately after their destruction, WHC and UNESCO began building a coalition to support restoration and reconstruction.⁸⁴ After visitation was safe, UNESCO and its partners were on the ground assessing damage and providing expert assistance.⁸⁵ Cultural rehabilitation work began in January 2013, including the “safeguarding of manuscripts,”⁸⁶ which represent Timbuktu’s legacy as one of the greatest intellectual centers the world has ever known.⁸⁷ 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.

78. *World Heritage List*, UNESCO, <http://whc.unesco.org/en/list>, archived on Internet Archive, <https://web.archive.org/web/20120629152505/http://whc.unesco.org/en/list> (providing an archived record of the World Heritage List website as it appeared on June 29, 2012, 03:15:05 PM).

79. 9 of 725 sites is 1.24%.

80. *UNESCO Director-General Expresses Concern About the Situation in Mali*, UNESCO (Apr. 2, 2012), <http://whc.unesco.org/en/news/865/>; *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/>.

81. *Government of Mali and UNESCO Move to Protect Timbuktu and Other Heritage Sites in the North of Mali*, UNESCO (May 24, 2012), <http://whc.unesco.org/en/news/877/>.

82. *Heritage Sites in Northern Mali Place on List of World Heritage in Danger*, UNESCO (June 28, 2012), <http://whc.unesco.org/en/news/893/>.

83. *The Director-General of UNESCO Urges Military Forces to Protect Cultural Sites in Mali during Air Raids and Ground Interventions*, UNESCO (Jan. 14, 2013), <http://whc.unesco.org/en/news/975/>.

84. *Creation of a Special Fund for the Safeguarding of Mali’s World Heritage Sites*, UNESCO (July 25, 2012), <http://whc.unesco.org/en/news/913/>; *UNESCO Director-General Irina Bokova in Mali to Spearhead UNESCO’s Commitment to Safeguard and Rebuild Mali’s Extraordinary Cultural Heritage*, UNESCO (Feb. 2, 2016), <http://whc.unesco.org/en/news/978/>.

85. *UNESCO Expert Mission Evaluates Damage to Mali’s Cultural Heritage*, UNESCO (June 9, 2013), <http://whc.unesco.org/en/news/1022/>.

86. *UNESCO Welcomes Restoration of Sacred Gate of Sidi Yahia in Timbuktu*, UNESCO (Sept. 20, 2016), <http://whc.unesco.org/en/news/1557/>.

87. Charlie English, *The Book Rustlers of Timbuktu: How Mali’s Ancient Manuscripts were*

possibly lack coverage within the Rome Statute.⁸⁸ Reconstruction of destroyed and damaged sites began in March 2014,⁸⁹ and was concluded in September 2016 with the assistance and cooperation of Mali, UNESCO, and various international state parties.⁹⁰

II. THE PROSECUTOR V. AHMAD AL FAQI AL MAHDI⁹¹

A. Northern Mali in 2012⁹²

Accounts differ, but the following set of facts is common among them.⁹³ During March 21 and 22, 2012, a military coup occurred a few days before scheduled presidential elections, displacing the civilian government of Mali.⁹⁴

Saved, GUARDIAN (May 23, 2014), <https://www.theguardian.com/world/2014/may/23/book-rustlers-timbuktu-mali-ancient-manuscripts-saved>.

88. See *supra* Section IV.C.1.

89. *Reconstruction of World Heritage Mausoleums Starts in Timbuktu (Mali)*, UNESCO (Mar. 14, 2014), <http://whc.unesco.org/en/news/1112/>; *Director-General Praises the People of Timbuktu for the Reconstruction of the City's Mausoleums*, UNESCO (July 19, 2015), <http://whc.unesco.org/en/news/1324/>.

90. Cultural recovery efforts were supported by the assistance and cooperation of Mali, UNESCO, Andorra, Bahrain, Croatia, the European Union, France, Mauritius, Norway, Switzerland, and the United Nations Multidimensional Integrated Stabilization Mission in Mali. *UNESCO Welcomes Restoration of Sacred Gate of Sidi Yahia in Timbuktu*, UNESCO (Sept. 20, 2016), <http://whc.unesco.org/en/news/1557/>; *Reconstruction of World Heritage Mausoleums Starts in Timbuktu (Mali)*, UNESCO (Mar. 14, 2014), <http://whc.unesco.org/en/news/1112/>; *Director-General Praises the People of Timbuktu for the Reconstruction of the City's Mausoleums*, UNESCO (July 19, 2015), <http://whc.unesco.org/en/news/1324/>.

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.

92. See generally INT'L CRIM. CT., SITUATION IN MALI: ARTICLE 53(1) REPORT 4 (2013), https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf (reporting the ICC's commentary on the situation in Mali for the purpose of determining whether it should "proceed with an investigation"); Gerstenblith, *Destruction of Cultural Heritage*, *supra* note 49, at 256; *Al-Qa'ida In The Lands Of The Islamic Maghreb (Aqim)*, NAT'L COUNTERTERRORISM CTR., <https://www.nctc.gov/site/groups/aqim.html> (last visited Oct 3, 2017); *Mali: The hearing of Al Mahdi before the ICC is a victory, but charges must be expanded*, INT'L FED'N FOR HUM. RIGHTS [FIDH], <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/mali-the-hearing-of-abou-tourab-before-the-icc-is-a-victory-but> (last visited Oct. 3, 2017); *Ansar Dine Destroy More Shrines In Mali*, ALJAZEERA (July 10, 2012), <http://www.aljazeera.com/news/africa/2012/07/201271012301347496.html>; *Mali And Tuareg Rebels Sign Peace Deal*, BBC NEWS AFRICA (June 18, 2013), <https://web.archive.org/web/20150321062328/http://www.bbc.co.uk/news/world-africa-22961519>; *Ahmad al-Faqi al-Mahdi: The vandal of Timbuktu*, BBC NEWS (Sept. 27, 2016), <http://www.bbc.com/news/world-africa-37438360>.

93. See generally *id.*; *Ansar Dine Destroy More Shrines In Mali*, ALJAZEERA (July 10, 2012), <http://www.aljazeera.com/news/africa/2012/07/201271012301347496.html> (providing a summary of the series of events that lead to the destruction of cultural sites in Mali).

94. See *The Trial of Amadou Haya Sanago Opens in Mali: A Crucial Step Forward in the Fight Against Impunity*, INT'L FED'N FOR HUM. RIGHTS [FIDH], <https://www.fidh.org/en/region/Africa/mali/the-trial-of-amadou-haya-sanago-opens-in-mali-a->

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 Tuareg⁹⁵ 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 2012.⁹⁶ Bowing to internal unrest, a new unity government was formed in August 2012,⁹⁷ and a new succession of top leadership occurred yet again in December 2012.⁹⁸ 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.⁹⁹

B. Facts¹⁰⁰

Ahmad Al Faqi Al Mahdi (hereinafter Mr. Al Mahdi)¹⁰¹ was born in approximately 1975, in Agoune, 100 kilometers west of Timbuktu, Mali.¹⁰² Mr. Al

crucial-step-forward (last visited Oct. 3, 2017) (outlining background of coup).

95. Timbuktu was originally founded by Tuareg tribes around the 11th or 12th centuries. *Destruction of Timbuktu Sites Shocked Humanity, Prosecutor Tells ICC*, GUARDIAN (Mar. 1, 2016 2:08 PM), <https://www.theguardian.com/law/2016/mar/01/destruction-of-timbuktu-sites-shocked-humanity-prosecutor-icc>.

96. See Bate Felix, *Mali Rebels Declare Independent 'Azawad'*, REUTERS (April 6, 2012), <https://www.reuters.com/article/ozatp-mali-20120406-idAFJ0E83500820120406> (“The nomadic people has nurtured the dream of a Saharan homeland since Mali’s independence in 1960 . . .”).

97. *Mali Forms New Unity Government Under PM Diarra*, BBC NEWS (Aug. 21, 2012), <http://www.bbc.com/news/world-africa-19327916>.

98. See *Mali’s Prime Minister Resigns After Arrest, Muddling Plans to Retake North*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/world/africa/malis-prime-minister-arrested-by-military.html> (stating that Prime Minister resigned after an arrest which resulted in Mali’s interim president, Dioncounda Traoré, naming Django Sissoko as prime minister).

99. *Deploring Ongoing Violence, UN Rights Expert Urges Malian Parties to Work Together Towards Lasting Peace*, U.N. NEWS CTR. (Mar. 10, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50289#.WJeZ8PkrKUI> (last visited Oct. 3, 2017) (noting unrest ongoing).

100. See *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 29–40 (providing the Chamber’s determined facts).

101. Mr. Al Mahdi may be referred to by many names and variations of such. See *Le Procureur c. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15, Mandat d’arrêt à l’encontre d’Ahmad AL FAQI AL MAHDI (Sept. 18, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_18211.PDF.

102. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15 Case Information

Mahdi was regarded as an expert on religious matters.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,¹⁰⁴ which Mr. Al Mahdi led until September 2012.¹⁰⁵ Mr. Al Mahdi created the organizational documents of the Hesbah, including its role and objectives.¹⁰⁶

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

The attacks took place roughly around June 30, 2012 to July 11, 2012.¹¹⁰ Mr. Al Mahdi wrote a sermon explaining the need for this destruction, which was delivered at Friday prayer prior to the attacks.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.¹¹² Mr. Al Mahdi also explained and promoted these attacks to media present on the scene while they were occurring under his supervision.¹¹³

None of the targeted objects were military objectives, and all were dedicated to religion and historic monuments.¹¹⁴ Nine out of the ten sites were listed as protected UNESCO World Heritage Sites,¹¹⁵ and all ten were included on the List of World Heritage in Danger.¹¹⁶ The destroyed sites were of incredible significance to both the world and local¹¹⁷ citizenry.¹¹⁸

Sheet, (Oct. 7, 2016), <https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>.

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

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

105. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 33.

106. *Id.*

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

108. *Id.*

109. *See id.* ¶ 37.

110. *See id.* ¶ 38.

111. *See id.* ¶ 37.

112. *See id.*

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

114. *Id.* ¶ 39.

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.”).

116. *See Heritage Sites in Northern Mali Placed on List of World Heritage in Danger*, UNESCO WORLD HERITAGE CTR. (June 28, 2012), <http://whc.unesco.org/en/news/893/> (noting UNESCO adding Timbuktu and the Tomb of Askia to the list).

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,¹¹⁹ roughly around June 30, 2012, to July 11, 2012.¹²⁰ 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.”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).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.”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.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

population (quoting victim testimony at trial detailing the importance of ancient buildings to the community at large as centers of their culture).

118. These sites 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.

119. Rome Statute, *supra* note 25, art. 8(2)(e)(iv).

120. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-84-Red, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ¶¶ 30–33 (Mar. 24, 2016); *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 38.

121. Rome Statute, *supra* note 25, art. 8(2)(e)(iv).

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.”).

123. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 8.

124. *See, e.g.*, INT’L CRIM. CT., SITUATION IN MALI: ARTICLE 53(1) REPORT 4 (2013), https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf (reporting the ICC’s commentary on the situation in Mali for the purpose of determining whether it should “proceed with an investigation”). [hereinafter SITUATION IN MALI].

not an official referral of the situation to the ICC.¹²⁵ 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.¹²⁶ 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.¹²⁷

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, 2013,¹²⁸ the same day when Chief Prosecutor Fatou Bensouda announced that the ICC would open a formal investigation into crimes committed.¹²⁹ 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.¹³⁰

On February 13, 2016, Mali and the ICC signed a cooperation agreement for the investigation, required by Section IX of the Rome Statute.¹³¹

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.”).

126. Lettre de Le Ministre de la Justice Malick Coulibaly à Madame La Procureure Pres La Cour Penale Internationale [Letter from The Minister of Justice Malick Coulibaly to Madam Prosecutor of The International Criminal Court], No. 0076/MJ-SG (July 13, 2012), available at <http://www.icc-cpi.int/NR/ronlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>

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.

129. Press Release, Office of the Prosecutor, ICC Prosecutor Opens Investigation into War Crimes in Mali: “The Legal Requirements Have Been Met. We Will Investigate,” Int’l Crim. Ct. Press Release ICC-OTP-20130116-PR869 (Jan. 16, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=pr869&ln=en>.

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.¹³² The Article 53(1) report includes a thorough analysis of the situation, preliminary findings, and legal context of each allegation and finding.¹³³ 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,"¹³⁴ invoking the ICC's authority and jurisdiction as a court of last resort.¹³⁵ Each of the crimes Bensouda alleged were examined at length by the report, including a measure of each crime's "impact,"¹³⁶ 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.¹³⁷ 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."¹³⁸

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

impunity for those responsible for international crimes.").

132. Rome Statute, *supra* note 25, art. 53(1).

133. See SITUATION IN MALI, *supra* note 92.

134. SITUATION IN MALI, *supra* note 92, ¶¶ 5, 174.

135. INT'L CRIM. CT., SITUATION IN THE REPUBLIC OF MALI: ARTICLE 53(1) REPORT, <https://www.icc-cpi.int/mali> (last visited Oct. 6, 2017); see *About the ICC*, ICC, <https://www.icc-cpi.int/about> (last visited Oct. 27, 2017) (saying the ICC is a court of last resort).

136. See SITUATION IN MALI, *supra* note 92, ¶¶ 143, 147, 152, 157, 164, 169 (listing each crime Bensouda alleged throughout the report).

137. OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION, INT'L CRIM. CT., ¶ 33 (2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy-Case-Selection_Eng.pdf; see also Susana SaCouto & Katherine Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. INT'L L. REV., 807 (2007) (examining the depth the role of gravity and impact at the ICC).

138. See 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); 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); *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 2012.¹³⁹ 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.¹⁴⁰

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.¹⁴¹ In Niger's custody at the time, Mr. Al Mahdi was transferred to the ICC in The Hague on September 26, 2015.¹⁴² Subsequently, the defense, prosecution, and Court undertook discovery, procedural matters, and filings.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

The trial took place August 22–24, 2016, at which time submissions of evidence were made and the testimony of three witnesses was heard.¹⁴⁶ Trial Chamber VIII released their judgment and sentence in the case on September 27, 2016.¹⁴⁷ Mr. Al Mahdi has not appealed the decision of the Trial Chamber, nor has the Prosecutor. Today, Mr. Al Mahdi remains incarcerated.

139. Office of the Prosecutor, *Statement of the ICC Prosecutor Mrs. Fatou Bensouda, 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,"* INT'L CRIM. CT. (Dec. 1, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=161201-otp-stat-mali> [hereinafter ICC Prosecutor Statement]; see Elisa Buchanan, *Who is Amadou Haya Sanogo, Leader of March 2012 Military Coup in Mali, Going to Trial?*, IB TIMES, (Nov. 29, 2016, 12:14 PM), <http://www.ibtimes.co.uk/who-amadou-haya-sanogo-leader-march-2012-military-coup-mali-going-trial-1593990> (detailing Amadou Haya Sanogo's role in the coup against the Malian government).

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).

141. *La Procureur c. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-1-Red, Mandat d'Arrêt à l'Encontre d'Ahmad Al Faqi Al Mahdi (Sept. 18, 2015).

142. Office of the Prosecutor, *Statement of the Prosecutor of the Int'l Crim. Ct., Fatou Bensouda, Following the Transfer of the First Suspect in the Mali Investigation: "Intentional Attacks Against Historic Monuments and Buildings Dedicated to Religion are Grave Crimes,"* INT'L CRIM. CT. (Sept. 26, 2015), <https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-26-09-2015>.

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).

146. Int'l Crim. Ct., *Summary of the Judgment and Sentence in the Case of "The Prosecutor v. Ahmad Al Gaqi Al Mahdi,"* ¶ 8, <https://www.icc-cpi.int/itemsDocuments/160926Al-MahdiSummary.pdf> [hereinafter *Summary of Judgment*].

147. *Al Mahdi*, ICC-01/12-01/15-171, Judgment.

3. Reparations

Under Article 75, the ICC Trial Chamber may order reparations to victims, as was the case in *Al Mahdi*.¹⁴⁸ A calendar for these proceedings was issued, with a final preliminary matter filing deadline of February 10, 2017.¹⁴⁹ 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*.¹⁵⁰ A Reparation Order¹⁵¹ 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.”¹⁵² Reparations are determined through their own proceedings¹⁵³ 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.¹⁵⁴

4. Admission of Guilt

The ICC system of justice established by the Rome Statute does not provide for guilty pleadings.¹⁵⁵ This is because the ICC system is a negotiated hybrid of the common law and civil law systems.¹⁵⁶ 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.¹⁵⁷

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

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

149. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-172, Reparations Phase Calendar, ¶ 2(vi) (Sept. 29, 2016).

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.”).

151. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-236, Reparations Order, (Aug. 17, 2017).

152. Press Release, Int’l Crim. Ct., Al Mahdi Case: ICC Trial Chamber VIII Issues Reparations Order, Int’l Crim. Ct. Press Release ICC-CPI-20170817-PR1329 (Aug. 17, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1329>.

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.

157. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 27.

facts.¹⁵⁸ During the confirmation of charges hearing on March 1, 2016, Mr. Al Mahdi expressed this intention to the Chamber.¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹

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.¹⁶² The acts at trial in *Al Mahdi* are defined as war crimes.¹⁶³ 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.¹⁶⁴ The Chamber concluded that Mr. Al Mahdi’s participation was essential to the commission of these crimes.¹⁶⁵ The judges of the Trial Chamber delivered a unanimous decision.¹⁶⁶

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.¹⁶⁷ 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).

162. Coalition for the Int’l Crim. Ct., *supra* note 15.

163. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 11.

164. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, at 49.

165. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 61.

166. *Summary of Judgment, supra* note 146, ¶ 30.

167. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 14.

application of Article 8(2)(e)(iv),¹⁶⁸ 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.”¹⁶⁹ For example, the decision’s text did not invoke the ICTY’s *Strugar*¹⁷⁰ case—a prosecution of the ICTY Statute’s analogous crime—even though it is the most closely related prosecution in international jurisprudence,¹⁷¹ and even though the case was mentioned during trial hearings,¹⁷² 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,¹⁷³ the decision cites to the ICC cases of *Lubanga*,¹⁷⁴ *Bemba*,¹⁷⁵ and *Katanga*¹⁷⁶ in supporting and interpreting the ICC sentencing process and considerations required by the Rome State and ICC Rules of Procedure and Evidence.¹⁷⁷

The unique structure of Rome Statute guilty pleadings¹⁷⁸ 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.¹⁷⁹

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 terms¹⁸⁰ such as the meaning of

168. *Id.* ¶ 13.

169. *Id.* at 16.

170. Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement, (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

171. See Vlastic & Turku, *supra* note 24, at 11-14 (providing a comparative analysis of *Strugar* and other ICTY cases).

172. See The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-T-4-Red-ENG, Transcript of Trial Hearing, 54, 55, 59 (Aug. 24, 2016) (comparing the relevant facts of the *Strugar* case in comparison to the *Al Mahdi* case).

173. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 13.

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)(e)(vii)).

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”).

177. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 64–70 & nn.106–19.

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.

180. See generally The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-T-2-Red-ENG, Transcript of Confirmation of Charges Hearing, 73–77 (Mar. 1, 2016) (exhibiting trial proceeding references to suggested outside legal references and precedent).

“attack,” or of a religious, historic, or cultural resource.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.¹⁸² Article 8(2)(e)(xii) is a more general charge applying to the destruction of civilian property in armed conflict.¹⁸³ Each of these articles provide an exception for military necessity.¹⁸⁴ The Chamber also emphasizes that ICC case law establishes that “crimes against property are generally of lesser gravity than crimes against people.”¹⁸⁵

Due to the ICC’s standards for transparency¹⁸⁶ and the unprecedented nature of *Al Mahdi*, the Chamber takes care to walk through its reasoning and findings in the written judgment and procedural decisions,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:

(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.*

(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.¹⁸⁸

[emphasis added]

The lack of reliance on other law is also due to Article 21 “Applicable Law,” sections (1) and (2), which establish Rome Statute primacy,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 *first* place, this Statute, Elements of Crimes and its Rules of

181. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 16.

182. *Id.* ¶ 17.

183. *Id.* ¶ 12.

184. Rome Statute, *supra* note 25.

185. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 77.

186. *Second Ct.’s Rep. on the Dev. of Performance Indicators for the Int’l Crim. Ct.*, INT’L CRIM. CT., Nov. 11, 2016, ¶¶ 41–47.

187. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 13.

188. Rome Statute, *supra* note 25, art. 74.

189. For an analysis of the role of precedent and applicable law at the ICC, see Gilbert Bitti, *Article 21 of the Statute of the Int’l Crim. Ct. and the Treatment of Sources of L. in the Jurisprudence of the ICC*, in THE EMERGING PRACTICE OF THE INT’L CRIM. CT. 285, 285 (Carsten Stahn & Göran Sluiter eds., 2009); Volker Nerlich, *The Status of the ICTY and ICTR Precedent in Proc. Before the ICC*, in THE EMERGING PRACTICE OF THE INT’L CRIM. CT. 305, 305-25 (Carsten Stahn & Göran Sluiter eds., 2009).

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.¹⁹⁰

[emphasis added]

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

This is the first case within both global and ICC jurisprudence¹⁹¹ 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.¹⁹² 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.”¹⁹³ 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.¹⁹⁴

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).

191. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 13.

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

193. Rome Statute, *supra* note 25, art. 8(2)(e)(iv).

194. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 13 & n.21 (quoting *Elements of Crimes*, INT’L CRIM. CT. 36 (2011) <https://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf>).

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,¹⁹⁵ supported by witness testimony,¹⁹⁶ 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.”¹⁹⁷ 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.¹⁹⁸

Element 4 creates three specific requirements: (1) conduct occurs within context of and associated with (2) non-international (3) armed conflict.¹⁹⁹ 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.”²⁰⁰ Mr. Al Mahdi’s and the attackers’ roles and associations with the armed group occupiers, Ansar Dine and AQIM, satisfied Requirement 1.²⁰¹ 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 3.²⁰² The decision notes that this element requires a “certain minimum level of [conflict] intensity to be distinguished from mere internal disturbance and tensions.”²⁰³ This was sufficiently satisfied by the long-held exclusive control accomplished by the armed occupiers against the Malian army.²⁰⁴ 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.²⁰⁵ The decision notes that evidence of international involvement may have required reclassification of the charged crime to the international conflict analogue.²⁰⁶ 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.”²⁰⁷

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.

200. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 18.

201. *See, e.g., id.* ¶ 49.

202. *Id.* ¶¶ 31–32.

203. *Id.* ¶ 49.

204. *Id.*

205. *Id.* ¶ 50.

206. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 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.”²⁰⁸ 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,’²⁰⁹ and may be required by the mode charged.²¹⁰ 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 1.²¹¹

The Chamber notes that ICC cases *Ntaganda*²¹² 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.²¹³ The Chamber also asserts that ICTY jurisprudence is irrelevant because the ICTY statute requires actual harm to the target.²¹⁴

3. *Mens Rea*

Within the ICC, the “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances,”²¹⁵ 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.

213. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 16.

214. *Id.*

215. *Elements of Crimes*, *supra* note 194, ¶ 3.

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).

219. *Al Mahdi*, Prosecution's submissions on sentencing, *supra* note 138, ¶ 31.

220. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 38(viii).

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.

224. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 51.

dedicated to religion and historic monuments.²²⁵

Mr. Al Mahdi admitted and agreed to each of these modes of liability before the trial.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."²²⁷ If the Chamber did not agree, it would have to determine Mr. Al Mahdi's particular liability for each attack²²⁸ and consider the requirements that would satisfy the crime's elements under each differing findings' mode.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 *Lubanga*, deriving in part from customary international law: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.²³¹

The Chamber was satisfied by the evidence that Mr. Al Mahdi fulfilled this mode of liability.²³² Mr. Al Mahdi met requirement 1 by leading or being involved in the planning, preparation, execution, and public justification of the acts.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.²³⁴ Requirement 3 was

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); *Al Mahdi*, Decision on the confirmation of charges, *supra* note 120, at 22.

226. The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Red2, Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi, ¶ 4 (Aug. 19, 2016) [hereinafter *Al Mahdi*, Filing of admission agreement].

227. *Al Mahdi*, Transcript of Confirmation of Charges Hearing, *supra* note 180, ¶¶ 14–17, at 81; 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.").

228. *Al Mahdi*, Trial Hearing Aug. 22, *supra* note 172, ¶¶ 6–15, at 40 (Aug. 22, 2016) (determining that alternative theories of liability would have to be determined by the Chamber); *see also Al Mahdi*, Transcript of Confirmation of Charges Hearing, *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).

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

230. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 19 & nn.32–34 (Sept. 27, 2016) (referencing *Lubanga* for standards); *see generally* Steffen Wirth, *Co-Perpetration in the Lubanga Trial Judgment*, 10 J. INT'L CRIM. JUST. 971, 971 (2012).

231. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 19.

232. *See id.* ¶ 56 (concluding elements of liability established).

233. *See id.* ¶ 53 (noting Al Mahdi's involvement in planning the attack).

234. *Id.* ¶ 54.

satisfied by Mr. Al Madhi's direct participation and role as media spokesperson.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.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.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."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 Mahdi's responsibility.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.²⁴⁰

C. Agreement and Admission of Guilt

Per Article 65, Mr. Al Mahdi entered an admission of guilt.²⁴¹ In conjunction, Mr. Al Mahdi and the prosecution submitted an agreement of facts, charges, and a sentencing recommendation.²⁴² According to Article 65(5), an admission of guilt or any penalty agreement is not binding on the Chamber.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.²⁴⁴ In *Al Mahdi*, the admission was weighed along with testimony and 714 other pieces of evidence.²⁴⁵

235. *Id.* ¶ 55.

236. *Id.* at 11 n.31 (indicating that the ICC's split in case law and its irrelevance in this case).

237. *See Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 60 (holding that even when all modes of responsibility are determined, defendants can only be convicted of one).

238. *Id.* ¶ 60.

239. *See id.* ¶¶ 59, 61 (holding that despite his direct participation, Al Mahdi's position of authority provides the most appropriate responsibility).

240. *See id.* ¶¶ 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[.]'").

241. *Id.* ¶ 30(ii); *Al Mahdi*, Admission agreement, *supra* note 226, ¶ 4.

242. *See Al Mahdi*, Admission agreement, *supra* note 226.

243. *Id.* ¶¶ 11, 24.

244. *See Al Mahdi*, Trial Hearing Aug. 22, *supra* note 172, ¶¶ 24–25, at 40–41 (outlining how guilty plea would be handled).

245. *Second Ct.'s Rep. on the Dev. of Performance Indicators for the Int'l Crim. Ct.*, *supra* note 186, at 37; *see also Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 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.²⁴⁶ In making his admission, Mr. Al Mahdi also waived a cluster of rights,²⁴⁷ so it was essential that the Chamber, in the interest of justice, determined that the admission was voluntary and its consequences were understood.²⁴⁸ 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].”²⁴⁹

The OTP recommended to the Chamber a lenient sentence of nine to eleven years for the crime.²⁵⁰ This was specifically agreed to by the defense and prosecution, as laid out in both the agreement document and the prosecution’s sentencing recommendation.²⁵¹ This agreement and recommendation is not binding on the Chamber, and the decision makes no reference to the prosecution’s agreement on sentencing.²⁵²

In this decision, the Chamber established that “an admission of guilt is undoubtedly a mitigating circumstance” at the ICC,²⁵³ building upon previous ICC dicta, and the “well-established” standards of other international tribunals.²⁵⁴ Though made in the face of overwhelming evidence,²⁵⁵ 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.”)

246. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 42–43.

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.

252. *See Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 106–111 (describing sentence without reference to agreement).

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 caveats 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).

261. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 67-69; *see generally id.* at 32-37 n.106-30.

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.

270. Rules of Procedure and Evidence 145(2) (ICC-ASP/1/3) (Part II.A) (Sept. 10, 2002).

271. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 73.

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 of 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.

277. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 69.

278. Rules of Procedure and Evidence 145(1)(c) (ICC-ASP/1/3) (Part II.A) (Sept. 10, 2002).

279. *See Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 36–39.

280. *Id.* ¶ 82.

281. *Id.* ¶ 76.

282. *Id.* ¶ 77.

283. *Id.* ¶ 78.

284. *Id.* ¶¶ 78–80.

285. *Al Mahdi*, ICC-01/12-01/15-171, Judgment ¶ 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
 - 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
 - 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.
 - Mr. Al Mahdi's initial reluctance to destroy the site.²⁹²
 - 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
 - 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
 - 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.

291. *Al Mahdi*, ICC-01/12-01/15-171, Judgment ¶ 86.

292. *Id.* ¶ 89.

293. *Id.* ¶ 91.

294. *Id.* ¶ 92.

295. *Id.* ¶ 90.

296. *Id.* ¶94.

297. *Al Mahdi*, ICC-01/12-01/15-171, Judgment ¶ 109.

- 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

298. *Id.* ¶ 96.

299. *Id.*

300. *Id.* ¶ 100.

301. *Id.* ¶ 101.

302. *Id.* ¶¶ 103–04.

303. *Al Mahdi*, ICC-01/12-01/15-171, Judgment ¶ 96.

304. *Id.* ¶ 96.

305. *Id.* ¶ 109.

306. *Id.* ¶ 111.

307. *Al Mahdi*, Prosecution's submissions on sentencing, *supra* note 138, ¶ 5.

308. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 109.

309. *Id.*

310. *Id.* ¶ 110.

311. *Id.* ¶ 106.

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.”³¹²

E. Critical Commentary

The *Al Mahdi* decision has been greeted by the international community with general approval and acclamation.³¹³ 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.

313. See Mark Kersten, *The al-Mahdi Case is a Breakthrough for the International Criminal Court*, JUSTICE IN CONFLICT (Aug. 25, 2016), <https://justiceinconflict.org/2016/08/25/the-al-mahdi-case-is-a-breakthrough-for-the-international-criminal-court/>.

314. *Maliens Dissatisfied with Light Sentence for Islamist who Desecrated Timbuktu*, DEUTSCHE WELLE (Sept. 28, 2016), <http://www.dw.com/en/maliens-dissatisfied-with-light-sentence-for-islamist-who-desecrated-timbuktu/a-35912148>.

315. *Id.*

316. Sebastian Green Martinez, *The ICC Dropped the Ball on Analysing the Impact of Cultural Destruction on Timbuktu’s Population*, JUST. TRIB. (Oct. 28, 2016), <https://www.justicetribune.com/blog/icc-dropped-ball-analysing-impact-cultural-destruction-timbuktus-population>.

317. See FIDH, *supra* note 92; Benjamin Duerr, *ICC Prosecutor Stress Psychological Harm of Timbuktu Destruction*, INT’L JUST. TRIB. (Mar. 1, 2016), <https://www.justicetribune.com/articles/iccprosecutorstressespsychologicalharmtimbuktu-destruction; Mali: ICC Trial Over Destruction of Cultural Property in Timbuktu Shows Need for Broader Accountability>, AMNESTY INT’L (Aug. 22, 2016), <https://www.amnesty.org/en/latest/news/2016/08/mali-icc-trial-over-destruction-of-cultural-property-in-timbuktu-shows-need-for-broader-accountability/> (providing examples of criticisms

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,³¹⁸ and the OTP’s recently announced focus on gender and sexual crimes.³¹⁹ Civil society has additionally criticized the Court for not yet bringing forward charges against any party for torture, extrajudicial executions, and enforced disappearances.³²⁰ 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.³²¹

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.³²² However, this criticism ignores the complete deliberation of the Chamber,³²³ 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.³²⁴

The process of the prosecution of Mr. Al Mahdi has also been criticized for seemingly violating the complementarity principle³²⁵ of the ICC’s work.³²⁶ This

of the *Al-Mahdi* decision).

318. *The ICC’s New Precedent for Sexual Violence as a War Crime*, COUNCIL ON FOREIGN RELATIONS (April 4, 2016), <http://blogs.cfr.org/women-around-the-world/2016/04/04/the-iccs-new-precedent-for-sexual-violence-as-a-war-crime/>.

319. See Rosemary Grey, *Gender-based Persecution on the International Criminal Court’s Radar*, INTLAWGRRLS (Jan. 6, 2017), <https://ilg2.org/2017/01/06/gender-based-persecution-on-the-international-criminal-courts-radar/> (“In March 2016, the Court handed down its first conviction for rape, and in December, its first trial to feature charges of forced pregnancy and forced marriage began.”).

320. *ICC Convicts Al-Mahdi of War Crime for Destroying Cultural Sites*, INT’L JUS. RES. CTR. (Oct. 5, 2016), <http://www.ijrcenter.org/2016/10/05/icc-convicts-al-mahdi-of-war-crime-for-destroying-cultural-sites/>.

321. Benjamin Dürr, *Is the ICC Prosecuting the Wrong Man in Mali?*, ICC OBSERVER 1, 1 (2016).

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).

324. See Ian Lilley, *Friday Essay: War Crimes and the Many Threats to Cultural Heritage*, THE CONVERSATION (Oct. 13, 2016), <http://theconversation.com/friday-essay-war-crimes-and-the-many-threats-to-cultural-heritage-65957>; *Al Mahdi Sentenced to Nine Years at ICC: Explanation and Reaction to Timbuktu Destruction Trial*, COALITION FOR THE ICC (Oct. 3, 2016), <https://ciccglobaljustice.wordpress.com/2016/10/03/al-mahdi-sentenced-to-nine-years-at-icc-explanation-and-reaction-to-timbuktu-destruction-trial/> (describing the landmark nature of the *al-Mahdi* case).

325. See generally *What is Complementarity? National Courts, the ICC, and the Struggle Against Impunity*, INT’L CTR FOR TRANSNAT’L JUST., <https://www.ictj.org/sites/default/files/sites/complementarity-icc/> (last visited Oct. 7, 2017); *Informal Expert Paper: The Principle of Complementarity in Practice*, INT’L CRIM. CT. OFF. OF THE PROSECUTOR (2003) (defining complementarity at the ICC).

326. Akshan de Alwis, *Is the ICC Fishing in the Right Pool?*, DIPLOMATIC COURIER (Feb. 6, 2017), <https://www.diplomaticcourier.com/2017/02/06/icc-fishing-right-pool/>.

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.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,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 membership³²⁹ and contemporary shifts in dedication to the international legal order³³⁰ 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 strategy³³¹ 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

327. *Id.*; Benjamin Dürr, *Ahmad Al Mahdi: Who is the First Alleged Islamist at the ICC?*, JUST. HUB (Feb. 29, 2016), <https://justicehub.org/article/ahmad-al-mahdi-who-first-alleged-islamist-icc>.

328. See Roger O'Keefe, *Protection of Cultural Property Under Int'l Criminal Law*, 11 MELB. J. INT'L L. 339 (2010); Vlastic, *supra* note 24; Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC*, 23 PENN. ST. INT'L L. REV. 857 (2004-2005) (discussing state of international law prior to *Al Mahdi*).

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>.

330. See David Tolbert, *Human Rights Movement Must Come Together in Face of Dystopian Agenda*, COALITION FOR THE INT'L CRIM. CT. (Jan. 30, 2017), <http://www.coalitionfortheicc.org/news/20170130/human-rights-movement-must-come-together-face-dystopian-agenda> (discussing the need to resist powers that seek to undermine the modern international law infrastructure).

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

332. Jason Burke, *South African Judge Blocks Attempt to Withdraw from ICC*, GUARDIAN (Feb. 22, 2017), <https://www.theguardian.com/world/2017/feb/22/south-african-judge-blocks-attempt-to-withdraw-from-international-criminal-court>.

333. Merrit Kennedy, *Under New Leader, Gambia Cancels Withdrawal from International Criminal Court*, NPR (Feb. 14, 2017, 05:23 PM), <http://www.npr.org/sections/thetwo-way/2017/02/14/515219467/under-new-leader-gambia-cancels-withdrawal-from-international-criminal-court> (indicating that Gambia has rescinded its withdrawal from the ICC).

334. *Burundi Politicians Back International Criminal Court Withdrawal*, GUARDIAN, <https://www.theguardian.com/world/2016/oct/12/burundi-politicians-back-international-criminal-court-icc-withdrawal> ("Politicians in Burundi have overwhelmingly voted in support of a plan to withdraw from the international criminal court in what would be an unprecedented move for any country.").

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

336. *African Union Backs Mass Withdrawal from ICC*, BBC (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073> ("The African Union has called for the mass withdrawal of member states from the International Criminal Court (ICC).").

337. Musa Ndow, *African Leaders Adopt Strategy on ICC Pullout*, DAILY OBSERVER (Feb. 6, 2017), <https://observergm.com/african-leaders-adopt-strategy-on-icc-pullout/> ("The African leaders adopted a strategy for their collective withdrawal at the 28th African Union (AU) summit").

338. Ed Cropley, *ICC's Toughest Trial: Africa vs. 'Infamous Caucasian Court'*, REUTERS (Oct. 28, 2016, 10:44 AM), <http://www.reuters.com/article/us-africa-icc/iccs-toughest-trial-africa-vs-infamous-caucasian-court-idUSKCN12S1U3?il=0> (indicating that the Hague-based institution has been criticized for "perceived anti-African bias" and "Caucasian justice").

339. Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?_r=0 ("South Africa has become the second African country to announce that it plans to leave the International Criminal Court").

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

341. Victor Chauvet, *Towards a New World Order*, DIPLOMATIC COURIER (Feb. 10, 2017), <http://www.diplomaticcourier.com/towards-new-world-order/>; Adam Gopnik, *Are Liberals on the Wrong Side of History?*, THE NEW YORKER, Mar. 20, 2017, at 88, 88, 93; Bartram S. Brown, *The International Criminal Court in Africa: Impartiality, Politics, Complementarity and Brexit*, 31 TEMP. INT'L & COMP. L.J. 145, pt. V. (2017).

342. See Stephen M. Walt, *The Collapse of the Liberal World Order*, FOREIGNPOLICY.COM (June 26, 2016), <http://foreignpolicy.com/2016/06/26/the-collapse-of-the-liberal-world-order->

realist³⁴³ trend is demonstrated by the success of the Brexit campaign in the UK,³⁴⁴ the election of “America First” Donald Trump to the Presidency of the United States of America,³⁴⁵ and China’s bold claims and island-building in the South China Sea.³⁴⁶ 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.”³⁴⁷ 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.³⁴⁸

These state acts undermine many international interests, but most importantly,

european-union-brexit-donald-trump/.

343. See Rizwan Asghar, *Realism is Not Obsolete*, THE NEWS INT’L (Mar. 7, 2017), <https://www.thenews.com.pk/print/190650-Realism-is-not-> (defining “modern realism”); Gideon Rose, *Introduction*, FOREIGN AFF. (Mar. 6, 2017), <https://www.foreignaffairs.com/articles/2017-03-06/introduction> (introducing the anthology: *What was the Liberal Order?*); Robert Kagan, *The Twilight of the Liberal World Order*, BROOKINGS (Jan. 24, 2017), <https://www.brookings.edu/research/the-twilight-of-the-liberal-world-order/> (examining the contemporary risks to liberal world order); Niall Ferguson, *Donald Trump’s New World Order*, THE AM. INTEREST (Nov. 21, 2016), <https://www.the-american-interest.com/2016/11/21/donald-trumps-new-world-order/> (presenting a realist assessment of contemporary world affairs).

344. Jeffrey D. Sachs, *Brexit Is a Symptom of Globalization’s Deeper Ills*, THE BOSTON GLOBE (June 27, 2016), <https://www.bostonglobe.com/opinion/2016/06/27/brexit-symptom-globalization-deeper-ills/BY8fKiVi8BdpnZHCu3lv4I/story.html> (indicating Britain’s vote to leave the European Union).

345. Stewart M. Patrick, *Trump and World Order: The Return of Self-Help*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/articles/world/2017-02-13/trump-and-world-order> (“U.S. President Donald Trump has promised a foreign policy that is nationalist and transactional”).

346. See Katie Hunt, *South China Sea: What’s at Stake*, CNN (Feb. 19, 2017, 11:29 PM), <http://www.cnn.com/2017/02/19/asia/south-china-sea-explainer/index.html> (“[China] has repeatedly defended its right to build both civil and defensive facilities on the islands it controls.”); Euan Graham, *The Hague Tribunal’s South China Sea Ruling: Empty Provocation or Slow-Burning Influence?*, COUNCIL OF COUNCILS (Aug. 18, 2016), https://www.cfr.org/councilofcouncils/global_memos/p38227 (indicating that even though the “ruling by a tribunal at the Permanent Court of Arbitration (PCA) on the dispute brought by the Philippines against China has earned its place in maritime legal annals . . . whether it will influence China is open to question”).

347. *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 (indicating that “the President of the Russian Federation signed the Decree *On the intention not to become a party to the Rome Statute of the International Criminal Court*”).

348. See Owen Bowcott, *Rising Nationalism Leaves International Criminal Court at Risk*, GUARDIAN (Dec. 29, 2016), <https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-international-criminal-court-at-risk> (“Three African states have begun withdrawing from its jurisdiction, raising fears that a succession of others will follow suit.”); Ibrahim, *supra* note 145, at 157–58 (realizing that “we are still faced with the reality that the ICC is not a magic bullet that will bring an end to all massive violations”).

withdrawals from the ICC threaten the universal interest in justice.³⁴⁹ 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,³⁵⁰ and it is difficult to prosecute without state cooperation.³⁵¹ 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.³⁵² 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.³⁵³ 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.³⁵⁴ 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.³⁵⁵ 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.³⁵⁶

The ICC pushes back on the hemispheric conclusions and critiques made, pointing to another set of figures.³⁵⁷ Currently—as of September 2017—there are seven preliminary examinations ongoing on four continents other than Africa.³⁵⁸ Nine of the ten current investigations were referred to the ICC by the investigated

349. See *Invited Experts on Withdrawal Question*, ICC FORUM, <http://iccforum.com/withdrawal> (showing further discussion on the issue on withdrawal from ICC).

350. See William Pace & Fadel Abdul Ghany, *Curbing Security Council Vetoes*, ICRTOP (Oct. 22, 2015, 02:36 PM), <https://icrtopblog.org/2015/10/22/curbing-security-council-vetoes/> (“A veto scuttles the chances for any collective and legal international action to address situations which concern all of humanity”).

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.

352. Brown, *supra* note 341; see Mary Kimani, *Pursuit of Justice or Western Plot?*, AFR. RENEWAL ONLINE (Oct. 2009), <http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (explaining why many think of the ICC as an imperialist, Western institution).

353. Agence France-Presse, *Gambia is Latest African Nation to Quit International Criminal Court*, GUARDIAN (Oct. 26, 2016), <https://www.theguardian.com/world/2016/oct/26/gambia-becomes-latest-african-nation-to-quit-international-criminal-court>.

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.³⁵⁹

The ICC openly recognizes the indispensable role Africa plays in its success,³⁶⁰ and has begun deliberate outreach to the continent.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.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.³⁶³

Unlike at the ICC,³⁶⁴ state leaders would enjoy immunity at the African Court of Justice and Human Rights (ACJHR).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.³⁶⁶ Official immunity at the ACJHR does not advance the interests of justice and peace,³⁶⁷ nor would official immunity at the ICC.³⁶⁸ In fact, the debate over this provision illuminates one of the more nefarious motivations of ICC criticism.

359. See Wintour, *supra* note 329 (describing where ICC cases come from).

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.”).

361. See *International Criminal Court Holds Retreat with African States Parties in Addis Ababa*, INT'L CRIM. CT. (Dec. 7, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=PR%201263> (reporting ICC held a retreat “to enhance communication and outreach” toward African states).

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).

363. Solomon T. Ebobrah, *Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations*, 22 EUR. J. INT'L L. 663, 663–88 (2011).

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

365. See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 46A*bis*, May 15, 2014; Monica Mark, *African Leaders Vote Themselves Immunity from New Human Rights Court*, GUARDIAN (July 3, 2014), <https://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court> (reporting African leaders “stripped” the ACJHR of the power to prosecute “sitting leaders and senior officials”).

366. See ICC ASSEMBLY OF STATE PARTIES, REPORT OF THE WORKING GROUP ON AMENDMENTS, No. ICC-Asp/13/31, (Dec. 7, 2014) (calling for an immunity amendment to Article 27 of the Rome Statute); See also African Union, Assembly Dec. Ext/Assembly/AU/Dec.1(Oct.2013), *Decision on Africa's Relationship with the International Criminal Court (ICC)* (Oct. 12, 2013) (presenting grievances and proposing solutions to Africa's relationship with the ICC, including active head of state immunity).

367. See Miriam Abaya, *No Place for Immunity: 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).

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-international-scapegoat-domestic-trouble> (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).

372. See Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRONICLE (Dec. 2012), <https://unchronicle.un.org/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law> (highlighting that the ICC depends upon the states to investigate any crimes, and enforce violations under the Rome Statute).

373. Rome Statute, *supra* note 25, at Preamble.

374. See discussion *infra* Section IV.A.1.; see also Press Release, Int’l Crim. Ct., International Criminal Court Holds Retreat with African States Parties in Addis Ababa, Int’l Crim. Ct. Press Release ICC-CPI-20161207-PR1263 (Dec. 7, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=PR%201263> (reporting ICC held a retreat “to enhance communication and outreach” toward African states); see also ICC ASSEMBLY OF STATES PARTIES, REPORT OF THE BUREAU ON THE PLAN OF ACTION OF THE ASSEMBLY OF STATES PARTIES FOR ACHIEVING UNIVERSALITY AND FULL IMPLEMENTATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 9 (Nov. 16-24, 2016) (noting the ICC’s efforts to “enhance [its] effectiveness” in encouraging states to join the Rome Statute); see *e.g.*, ICC

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[,]”³⁷⁵ which are examined for jurisdiction and whether investigation is warranted.³⁷⁶ As of May 2017,³⁷⁷ 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,³⁸¹ ICC performance can be understood by these metrics, derived from data available in January 2017:³⁸²

Years	Cases Filed	Subject States	Cases / Year	Cases / State-Years	Compliance Reputation	Full Compliance Rate
13 (from date of first referral, 2004)	23	124 (92 initially)	1.7	0.016	Mixed on arrests. Good on compliance and charges.	Verdicts / Investigation: 100% Verdicts / Case: 43% Warrants Fulfilled: 54% Judgments Complied: 100%
	Individ. Verdicts		Individ. Verdicts per Year	Individual Verdicts / State-Years		
	10		0.77	0.007		

While the sample period and size is relatively small, by measures of usage,

ASSEMBLY OF STATES PARTIES, REPORT OF THE BUREAU ON THE STRATEGIC PLANNING PROCESS OF THE INTERNATIONAL CRIMINAL COURT 3 (Nov. 16-24, 2016).

375. OFF. OF THE PROSECUTOR, INT’L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 6 (2016).

376. OFF. OF THE PROSECUTOR, INT’L CRIM. CT., REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (JUNE 2003–JUNE 2006) 9–10 (2006).

377. As of Jan. 23, 2017.

378. See THE COURT TODAY, *supra* note 34 (listing investigations and cases).

379. See *id.* (listing whereabouts of defendants); see also Email from Fadi el Abdallah, *supra* note 34 (confirming statistics).

380. See OFF. OF THE PROSECUTOR, INT’L CRIM. CT., STRATEGIC PLAN 2016–2018 54 (2015), https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf (showing OTP’s performance under the Strategic Plan from June 2012-2015).

381. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 3-72 (2005) (outlining methodology in full article).

382. For the data that formed the bases of these calculations, see Email from Fadi El Abdallah, *supra* note 34 (confirming ICC statistics); see also THE COURT TODAY, *supra* note 34 (providing court statistics).

the ICC is as effective as the International Court of Justice overall.³⁸³ 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.³⁸⁴ 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.³⁸⁵ 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.³⁸⁶ The study determined that ICC investigations significantly increase domestic human rights prosecutions in the nation under investigation,³⁸⁷ 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,³⁸⁸ 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.³⁸⁹
- 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).

386. See generally GEOFF DANCY & FLORENCIA MONTAL, UNINTENDED POSITIVE COMPLEMENTARITY: WHY INTERNATIONAL CRIMINAL COURT INVESTIGATIONS INCREASE DOMESTIC HUMAN RIGHTS PROSECUTIONS (2015), <https://www2.tulane.edu/liberal-arts/political-science/upload/Dancy-Montal-IO-2014.pdf>.

387. *Id.*

388. See *supra* Section III.A.; *infra* Section IV.B.3.

389. See *supra* Section III.D.3.

people.³⁹⁰ However, the targets in *Al Mahdi* were of great historical, cultural, and religious significance, causing great psychological damage to the population.³⁹¹ 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.³⁹²

- 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.³⁹³
- *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.”³⁹⁴ It is a crime regardless of the success of the attack, or the accused’s role in a hierarchy.³⁹⁵ 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.”³⁹⁶
- 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.”³⁹⁷ This was satisfied here by the armed occupation of anti-government forces.³⁹⁸
- 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.³⁹⁹
- 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.⁴⁰⁰ 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.⁴⁰¹ Beyond the possible benefits to the victims and Mr. Al Mahdi

390. *See supra* Section III.A.

391. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 78–80.

392. *Id.*

393. *See supra* Section III.B.a.

394. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 15.

395. *Supra* Section III.B.b.

396. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 15.

397. *Id.* ¶ 49.

398. *Supra* Section III.B.a.

399. *Supra* Section III.B.d.

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 factor⁴⁰² 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.⁴⁰³ Defendants may instead make “an admission of guilt.”⁴⁰⁴ This unique arrangement is a result of the negotiated hybrid⁴⁰⁵ of the common law and civil law systems, which the Rome Statute and ICC system of justice were built upon.⁴⁰⁶ Under the Statute, proposals for modification of charges or penalties which accompany an admission of guilt are not binding on the Court.⁴⁰⁷ Such common law plea bargaining is regarded with suspicion, and of dubious legitimacy by civil law systems.⁴⁰⁸ The hybrid “admission of guilt” aims to ensure the pursuit of justice,⁴⁰⁹ document events fully,⁴¹⁰ 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 charges⁴¹¹ and accepted all evidence submitted by the Prosecution.⁴¹² This admission provided a foundation for the findings of the case, as it was submitted with agreed-upon facts,⁴¹³ beyond the

Int'l Crim. Ct. (Mar. 24, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi> (reporting that Mr. Al Mahdi “expressed his intention to plead guilty”); *see also Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶¶ 21–22 (discussing that the guilty plea will require the Chamber to apply Article 65 for the first time at the ICC).

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.

405. *See* Emilia J. Powell & Sara M. Mitchell, *The Creation and Expansion of the International Criminal Court: A Legal Explanation*, U. IOWA RES. ONLINE (Apr. 1, 2008), http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1002&context=polisci_pubs.

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).

412. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-171, Agreement Regarding Admission of Guilt, at 40–41 (Sept. 27, 2016); *see also The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-T-4-Red-ENG, Transcript of Trial Hearing, ¶¶ 24–25, at 40, ¶¶ 1–3, at 41 (Aug. 22, 2016) (discussing Mr. Al Mahdi’s guilty plea did not mitigate the crime).

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 *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 *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

Agreement regarding admission of guilt, ¶ 5–8 (Feb. 18, 2016).

414. Rule of Evidence and Procedure, *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, *supra* note 25, art. 65(3) (discussing the proceedings on admission of guilt).

416. *Id.* art. 65(4).

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

418. *Id.*

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

Sentencing in *Al Mahdi* made no reference to the Prosecution and Defense's joint recommendation of nine to eleven years imprisonment—embodying the

420. *See id.* ¶ 28 (explaining that an admission of guilt can lead to a swifter resolution of the case).

421. *Swift Justice for Timbuktu Tomb Raider Who Pleaded 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 *Al Mahdi* case would be the fastest case ever to be concluded by the ICC, with a duration of only six months).

422. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-T-4-Red-ENG, Transcript of Trial Hearing, ¶ 4–12 (Aug. 22, 2016).

423. *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).

424. 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. *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, *The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court*, SCIELO (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, *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).

425. Rome Statute, *supra* note 25, art. 68 (Article 68 does not specifically require victim and witness participation in every trial proceeding).

426. 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); *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. 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).

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"⁴²⁷ that was afforded to the admission in sentencing, and the Chamber's determination that an admission of guilt is a mitigating circumstance.⁴²⁸

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.⁴²⁹

2. Sentencing

Mr. Al Mahdi faced a maximum sentence of thirty years imprisonment and fines.⁴³⁰ However, he was sentenced to nine years, with time already in custody credited towards the sentence to be served.⁴³¹ Even in consideration of the many mitigating circumstances, and the total absence of aggravating circumstances,⁴³² this sentence may strike a shocked conscience as very lenient. The crimes for which Mr. Al Mahdi has been convicted outraged the world,⁴³³ gutted Timbuktu's ancient heritage,⁴³⁴ and the local population does not feel sufficient justice has been served by this punishment.⁴³⁵

427. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 100.

428. *Id.*

429. *Id.* ¶ 28.

430. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15-78-Anx1-Red2, Agreement regarding admission of guilt, ¶ 5 (Feb. 18, 2016).

431. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 111.

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. *Maliens 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,⁴³⁶ hints and conjecture may be hypothesized from the trial records. The sentencing decision took the Prosecution recommendation very seriously, as most courts do,⁴³⁷ 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.⁴³⁸

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.⁴³⁹ By these figures, Mr. Al Mahdi's sentence is on the lower end of international law prosecutions. Thus, inasmuch 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.⁴⁴⁰ 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.⁴⁴¹

The Chamber could have considered the Defense's reporting on penalties others have faced at the ICTY for similar crimes.⁴⁴² For example, Strugar⁴⁴³ was sentenced to eight years, eventually having most of that sentence dismissed; and Jokic⁴⁴⁴ was sentenced to only seven years for destroying fifty buildings and killing

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.

439. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 11 (2007).

440. *Id.* at 15.

441. *Id.*

442. *Al Mahdi*, ICC-01/12-01/15-171, Trial Hearing 58, ¶¶ 3-11.

443. Press Release, Int'l Crim. Tribunal for the Former Yugoslavia, Press Release: Judgment in the Case the Prosecutor v. Pavle Strugar Sentenced to Eight Years' Imprisonment, U.N. Press Release CT/P.I.S./932e (Jan. 31, 2005), <http://www.icty.org/en/press/judgement-case-prosecutor-v-pavle-strugar-pavle-strugar-sentenced-eight-years%E2%80%99-imprisonment> (describing Pavle Strugar as a former Lieutenant-General of the Yugoslav Peoples' army, who was charged with war crimes for unjustified devastation in the course of unlawful artillery shelling).

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.⁴⁴⁵ 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.”⁴⁴⁶ 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.⁴⁴⁷ 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,⁴⁴⁸ 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,⁴⁴⁹ one of the primary objectives of punishment at the ICC.⁴⁵⁰ To assure independence,⁴⁵¹ and to avoid the pitfalls of weakened retribution and problematic guilty pleading that are common among other international tribunals,⁴⁵² 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.⁴⁵³ As explored earlier,⁴⁵⁴ the *Al Mahdi* sentence and

445. *Id.*

446. *Al Mahdi*, Trial Hearing Aug. 22, *supra* note 226, ¶ 107.

447. *Id.* ¶¶ 3–11.

448. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 100

449. DRUMBL, *supra* note 439, at 16.

450. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 66.

451. Both reputational and actual independence.

452. DRUMBL, *supra* note 439, at 16.

453. 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.”).

judgment is narrow, and mostly devoid of reference to outside law and previous ICC case law.⁴⁵⁵ This is largely due to Articles 21(1)–(2),⁴⁵⁶ 74(2),⁴⁵⁷ and 74(5).⁴⁵⁸

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.”⁴⁵⁹ 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.”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,⁴⁶¹ so *Al Mahdi* is a clarification that may be

454. *Supra* Section III.A.

455. *Supra* Section III.A.

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.*

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.”).

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.”).

459. *Al Mahdi*, ICC-01/12-01/15-171, Judgment, ¶ 107.

460. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

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,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, positivist⁴⁶³ 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[.]”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.⁴⁶⁵ Likewise, the Rome Statute prohibits the Court from exercising jurisdiction over any acts not specified and defined as crimes within the treaty,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

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,⁴⁶⁷ it seems apparent that the soft

Petra Viebig, *Legal Sources and Legal Methodology Under the ICC Statute*, in 4 ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT 11, 27–28 (T.M.C. Asser Instituut ed., 2016).

462. *Id.* at 23–5, 29–32.

463. *Id.* at 23–4.

464. Rome Statute, *supra* note 25, art. 21(1)(c).

465. See generally Viebig, *supra* note 461 (discussing the impact and development of legal sources applicable to ICC proceedings).

466. Mehmet Zülfü ÖNER, *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.” *Id.*

467. See John Goldie, *The Destruction of Cultural Heritage in the Middle East and North Africa*, *YOUNG AUSTRALIANS IN INTERNATIONAL AFFAIRS* (Aug. 3, 2017), <https://www.youngausint.org.au/single-post/2017/08/04/The-destruction-of-cultural-heritage-in-the-Middle-East-and-North-Africa> (detailing contemporaneous destruction of cultural sites in the Middle East and North Africa).

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,⁴⁶⁸ and was a leader within the non-state⁴⁶⁹ 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,⁴⁷⁰ including Islamic jihadists.⁴⁷¹

1. Cultural Heritage

As *crimina juris genbium*, and a crime where the victim is humanity as whole, the challenge and gravity of cultural heritage crimes is great.⁴⁷² The challenge of this crime is also urgent, as demonstrated by perilous situations across the globe which regularly shock the world anew.⁴⁷³ The majority of commentators recognize *Al Mahdi* as a landmark case for the protection of cultural heritage.⁴⁷⁴ There is a

468. Calamur, *supra* note 4.

469. Non-Mali.

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

471. *Contra* Elinor Fry, *The ICC's Problematic Jurisdiction over Foreign IS Fighters*, CTR. FOR INT'L CRIM. JUSTICE (Jan. 10, 2015), <https://cicj.org/2015/01/the-iccs-problematic-jurisdiction-over-foreign-islamic-state-fighters/> (indicating that "those at the top end of the IS [(Islamic State)] hierarchy are not from countries falling under ICC jurisdiction.").

472. Whitney Bren, Note, *Terrorists and Antiquities: Lessons from the Destruction of the Bamiyan Buddhas, Current ISIS Aggression, and a Proposed Framework for Cultural Property Crimes*, 34 CARDOZO ARTS & ENT. L. J. 215, 244 (2016).

473. *See* CULTURE UNDER THREAT TASK FORCE, RECOMMENDATIONS FOR THE U.S. GOVERNMENT 6 (2016), <http://taskforce.theantiquitiescoalition.org/wp-content/uploads/2015/01/Culture-Under-Threat-Task-Force-Report-Complete-Docment-.pdf> (describing world's shock at destruction of artifacts in the levant); *see also* Vlastic & Turku, *supra* note 24, at 2 (describing destruction of UNESCO world heritage sites); *see also* Andrew Curry, *Here are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2016), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syriaarchaeology.html> (describing in depth sites ISIS has destroyed). [be sure to check *supra* for second source]

474. *See* Edmund Moukala, *Timbuktu Trial: "A Major Step Towards Peace and Reconciliation in Mali,"* UNESCO WORLD HERITAGE CTR. (Sept. 27, 2016), http://www.unesco.org/new/en/media-services/single-view/news/timbuktu_trial_a_major_step_towards_peace_and_reconciliati#.V_J3DP196M8 (recognizing the importance of judgement in the *Al Mahdi* case); *see also* Melik Kaylan, A

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

Landmark Precedent to Protect Cultural Heritage, WALL ST. J. (Aug. 30, 2016), <http://www.wsj.com/articles/alandmarkprecedenttoprotectculturalheritage1472590560> (outlining why the case is a landmark in this field of law); see also Sam Sasan Shoamanesh & Gilles Dutertre, *The ICC and Cultural Property*, INT’L CRIM. JUST. TODAY (Jun. 22, 2016), <https://www.international-criminal-justice-today.org/arguendo/the-icc-and-cultural-property/> (explaining why ICC is so important in protecting cultural artifacts); see also Irina Bokova, *At Last, The Destruction of Heritage Has Been Recognized as a Weapon of War*, GUARDIAN (Sept. 28, 2016, 9:38 AM), https://www.theguardian.com/global-development/2016/sep/28/destruction-of-heritage-weapon-of-war-timbuktu-shrines-irina-bokova?CMP=share_btn_tw (expressing hope for prevention of future acts like this); see also NY Times Editorial Board, *Cultural Destruction as a War Crime*, N.Y. TIMES (Oct. 7, 2016), <http://www.nytimes.com/2016/10/08/opinion/cultural-destruction-as-a-war-crime.html> (explaining that this ruling gives teeth to the law); see also *A Historic Ruling To Protect Culture*, JAPAN TIMES (Oct. 13, 2016), <https://www.japantimes.co.jp/opinion/2016/10/13/editorials/historic-ruling-protect-culture/#.WfBswRNSzow> (lauding ICC for labeling such destruction a war crime, and pointing to a better future because of the ICC’s protection of culture).

475. Vlasic, *supra* note 25, at 23.

476. Julie Sane, *Prosecuting Crimes Against Cultural Property in Northern Mali: Why it Matters*, JUST. IN CONFLICT (Aug. 21, 2012), <https://justiceinconflict.org/2012/08/21/prosecuting-crimes-against-cultural-property-in-northern-mali-why-it-matters/>.

477. Quincy Kayton, *Cultural Preservation in Areas of Military Conflict: Interpreting The Shortcomings and Success Of International Laws*, 34 B.U. INT’L L.J. 383, 386 (2016).

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).

480. Whiting, *supra* note 6.

481. *Statement of the Prosecutor of the International Criminal Court*, *supra* note 39.

482. See Shoamanesh & 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 Statute⁴⁸³ 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.⁴⁸⁴ 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.⁴⁸⁵ 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.⁴⁸⁶

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."⁴⁸⁷ This interpretation is broader than the protections afforded by prior conventions, which primarily protect cultural heritage during military hostilities,⁴⁸⁸ and the explicit text of the Rome Statute.⁴⁸⁹ 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 question⁴⁹⁰ and the Rome Statute can provide jurisdiction over those actors in some manner. For example, this would

483. See Gottlieb, *supra* note 328, at 883 (outlining the limits of the Rome Statute's cultural heritage crimes).

484. See Ruth Maclean, *Islamic Extremist's Trial Over Timbuktu Cultural Destruction to Open at the Hague*, GUARDIAN (Aug. 21, 2016, 5:29 AM), <https://www.theguardian.com/world/2016/aug/21/ahmad-al-mahdi-trial-the-hague-timbuktu-cultural-destruction> (describing the context of the situation and the context of the crimes).

485. See Gottlieb, *supra* note 328, at 864–66 (outlining the limits of 8(2)(e)(iv) and 8(2)(b)(ix) of the Rome Statute).

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.

488. Gerstenblith, *supra* note 51, at 686.

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,⁴⁹¹ 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 Syria⁴⁹² and Iraq,⁴⁹³ which have shocked the conscience of the world as well. Chief Prosecutor Bensouda specifically made this comparison during the trial.⁴⁹⁴ The OTP⁴⁹⁵ 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.⁴⁹⁶ Barring voluntary and situation-specific *ad hoc* self-referral,⁴⁹⁷ the most likely path for justice in these conflicts is through a U.N.S.C. referral to the ICC,⁴⁹⁸ 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.⁴⁹⁹ The magnitude of overcoming this challenge is illustrated by other efforts

491. See Luke Harding, *Taliban Blow Apart 2,000 Years of Buddhist History*, GUARDIAN (Mar. 3, 2001, 1:27 PM), <https://www.theguardian.com/world/2001/mar/03/afghanistan.lukeharding> (reporting on the Taliban's destruction of 2,000-year-old Buddha statues with military artillery).

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).

493. See Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), <http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/> (discussing ISIS militants destroying Iraq's Mosul Museum).

494. Katherine Chin, *Cultural Destruction: A Crime Against Humanity*, BROWN POL. REV. (Oct. 25, 2016), <http://www.brownpoliticalreview.org/2016/10/cultural-destruction-crime-humanity/>.

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 sites 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).

499. See Daniel R. DePetris, *Syria Shows that Realism Still Dominates Global Politics*, HUFFPOST (last visited Oct. 6, 2017), http://www.huffingtonpost.com/daniel-r-depetris/syria-shows-that-realism-_b_12474334.html (explaining that Russia's veto power eliminates the Security Council's options to move the Syria conflict to the ICC).

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.⁵⁰⁰ This is illustrative of the problems caused by veto power⁵⁰¹ 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 *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.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 *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.”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.”⁵⁰⁴

2. Strategy of the OTP, and Standing of the ICC

The Court is highly cognizant of the ICC’s deterrent role⁵⁰⁵ and practical limitations.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

500. Emma Cunliffe et al., *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications*, 23 INT’L J. CULTURAL PROP. 1, 18 (2016).

501. 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).

502. See *supra* Section I.B.1.; e.g., Arturo J. Carrillo & Annalise K. Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes against Humanity and Extraterritorial Jurisdiction*, 46 GEO. WASH. INT’L L. REV. 481, 530 (2013–2014) (showing a table of thirty-four states with “per se” Crimes Against Humanity laws).

503. 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. *Id.*

504. *Id.*

505. 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).

506. See *supra* Sections IV.A.1. and IV.C.1.

ICC family, and by so doing, benefit from the legal protections it provides.⁵⁰⁷

Likewise, the ICC is aware that its standing is inextricably linked to its successes and effectiveness,⁵⁰⁸ which is in turn linked inextricably to the OTP's strategy and success.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.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.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.⁵¹² In fact, during his time at the ICC, the Court issued thirty arrest warrants, but only generated one successful conviction.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 *Al Mahdi* is the first case she has brought from origination

507. 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. *Id.*

508. See generally INTERNATIONAL CRIMINAL COURT STRATEGIC PLAN, TRICOM (July 24, 2015), https://www.icc-cpi.int/iccdocs/registry/Strategic_Plan_2013-2017__update_Jul_2015.pdf [hereinafter STRATEGIC PLAN] (discussing the content and purpose of the ICC's Strategic Plan, particularly the wording of Goal 3.2).

509. STRATEGIC PLAN 2016-2018, *supra* note 380 ¶ 26.

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

511. See James Verini, *The Prosecutor and the President*, N.Y. TIMES MAG. (June 22, 2016), <https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html> (discussing the ICC's difficulties in charging Jomo Kenyatta with five counts of crimes against humanity, inciting murder, rape, forcible transfer of people, persecution and inhumane acts) (internal quotes omitted); Marlise Simons & Jeffrey Gettleman, *International Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html> (reporting ICC case dropped against Ruto, because of witness interference and intolerable political meddling) (internal quotes omitted).

512. See David Kaye, *Who's Afraid of the International Criminal Court?*, FOREIGN AFF. (May/June 2011), <https://www.foreignaffairs.com/articles/20110418/whosafraidinternational-criminalcourt> (discussing what skills are required to be a successful ICC prosecutor); see also Dan Donovan, *International Criminal Court Successes and Failures*, INT'L POL'Y DIG. (Mar. 23, 2012), <http://intpolicydigest.org/2012/03/23/international-criminal-court-successes-and-failures/> (stating the blame for the ICC's lack of success and waste of funds "must fall on the chief prosecutor's shoulders."); Ibrahim, *supra* note 145, at 169–79 (discussing chief prosecutor of ICC's behavior contributing to "negative publicity," and the public's views on his professionalism); Sven Becker et al., *A Former ICC Chief's Dubious Links*, SPIEGEL ONLINE (Oct. 5, 2017, 2:51 PM), <http://www.spiegel.de/international/world/ocampo-affair-the-former-icc-chief-s-dubious-libyan-ties-a-1171195.html> (assessing the prosecutor's performance, and detailing a recently unearthed ethics scandal).

513. Sven Becker et al., *A Former ICC Chief's Dubious Links*, SPIEGEL ONLINE (Oct. 5, 2017, 2:51 PM), <http://www.spiegel.de/international/world/ocampo-affair-the-former-icc-chief-s-dubious-libyan-ties-a-1171195.html>.

to prosecution.⁵¹⁴ Already, Bensouda's approach has been markedly different,⁵¹⁵ and she has highlighted⁵¹⁶ 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.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,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,⁵¹⁹ adeptly responding to international outrage.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

514. Alex Whiting, *The First Case for the ICC Prosecutor: Attacks on Cultural Heritage*, JUST SECURITY (Sept. 29, 2015), <https://www.justsecurity.org/26453/mali-icc-attacks-cultural-heritage/>.

515. Joshua Massarenti, *Exclusive. Fatou Bensouda: "The Threat of Withdrawal from ICC is a Regression for the Continent"*, AFRONLINE (May 20, 2016, 2:46 PM), <https://www.afronline.org/?p=41792>.

516. See generally John Vidal & Owen Bowcott, *ICC Widens Remit to Include Environmental Destruction Cases*, GUARDIAN (Sept. 15, 2016), <https://www.theguardian.com/global/2016/sep/15/haguecourtwidensremittoinclude-environmentaldestructioncases>; Rosemary Grey, *Gender-Based Persecution on the International Criminal Court's Radar*, INTLAWGRRRLS (Jan. 6, 2017), <https://ilg2.org/2017/01/06/gender-based-persecution-on-the-international-criminal-courts-radar/> (discussing the ICC's agenda new focus on issues like rape and forced marriage.)

517. See Stuart Reid, *The International Criminal Court on Trial: A Conversation with Fatou Bensouda*, FOREIGN AFF. (Jan./Feb. 2017), <https://www.foreignaffairs.com/interviews/2016-12-12/international-criminal-court-trial> (discussing with Bensouda her vision of the ICC, despite challenges).

518. See, e.g., Ishaan Tharoor, *Timbuktu's Destruction: Why Islamists Are Wrecking Mali's Cultural Heritage*, TIME (July 2, 2012), <http://world.time.com/2012/07/02/timbuktus-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, *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."); see also Carol J. Williams, *Islamist Rebels in Mali Destroy Timbuktu Historic Sites*, 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, *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.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.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.”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.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 *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,”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[.]”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.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 **complementary system** of criminal justice.”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**[.]”⁵²⁹ Prioritization will also consider “the **potential to secure the appearance of the suspects**

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.

before the Court[.]”⁵³⁰

- The OTP acknowledges that its limited resources limit the number of cases it can simultaneously prosecute.⁵³¹ 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.**”⁵³²

The targeting of a suspect already held in confinement squares with the prioritization of suspects that may be apprehended.⁵³³ 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.⁵³⁴ 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,⁵³⁵ issued one week before his scheduled release from detention.⁵³⁶ 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.⁵³⁷ *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.

535. *Contra* Janet H. Anderson & Sofio Natsvlshvili, *The International Criminal Court: A Double-Edged Sword for Georgia?*, INT’L JUST. TRIB. (Oct. 15, 2015), <https://www.justicetribune.com/articles/icc-double-edged-sword-georgia>.

536. *Id.*

537. *Mali: ICC to Expedite Proceedings in al Faqi Case*, COALITION FOR THE INT’L CRIM. CT. (Oct. 5, 2015), <http://www.coalitionfortheicc.org/news/20151005/mali-icc-expedite-proceedings-al-faqi-case>.

political power frustrated the Court's need for cooperation, as exemplified by the *Kenyatta*⁵³⁸ and *Al Bashir*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,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.⁵⁴¹ Commentators and scholars of international criminal justice have lamented the inability of the Court to implement this method,⁵⁴² and advocated for prosecutorial strategy shifts.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.⁵⁴⁴ However, this pivotal cooperation was made much easier by his voluntary assistance, and apparent regret for participation with these extremist groups.⁵⁴⁵ Through this information, the OTP and domestic courts

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.").

540. MICHAEL D. LYMAN & GARY W. POTTER, ORGANIZED CRIME 492, (Prentice Hall, 2nd ed. 2000).

541. Office of the Prosecutor, *supra* note 129.

542. Kate Cronin-Furman & Amanda Taub, *The Ashgate Research Companion to International Criminal Law: Lions and Tigers and Deterrence, Oh My: Evaluating Expectations of International Criminal Justice*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES KATE 440–44 (William A. Schabas, Yvonne McDermott, & Niamh Hayes, eds., 2016).

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 Madhi*, Hearing Transcript Aug. 24, *supra* note 172, ¶¶ 44–4.

545. Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/21-01/15, Trial Hearing, 14 (Aug. 24, 2016).

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 Bendsouda hailed as representative of this complementary potential.⁵⁴⁶

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.⁵⁴⁷ 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, Bendsouda 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”.⁵⁴⁸ 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 Bendsouda are committed to combatting sex and gender based crimes—Bendsouda has outlined this as a distinct priority for the ICC.⁵⁴⁹ 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.

549. Fatou Bendsouda on the International Criminal Court and Gender-Based Crimes, COUNCIL ON FOREIGN REL. (Oct. 27, 2017), <https://www.cfr.org/event/fatou-bendsouda-international-criminal-court-and-gender-based-crimes>.

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.