

**Viorel CHIRICIOIU\***

## **Two ‘Firsts’ at the International Criminal Court: The *Al Mahdi* Case and Its Implications**

### **I. Introduction**

On 27 September 2016, the International Criminal Court (‘the ICC’ or ‘the Court’) passed its judgment and sentence against Mr Ahmad Al Faqi Al Mahdi<sup>1</sup>, the first (and so far, the only) individual investigated and convicted in connection to the Situation in Mali.

The respective case presents two ‘firsts’ in the history of international criminal law. As such, Al Mahdi is the first individual to be *exclusively* charged with and convicted for the war crime of unlawful attacking cultural property, pursuant to Article 8(2)(e)(iv) of the Rome Statute<sup>2</sup>. Throughout the decades, other individuals have also been convicted for this crime, but only as an auxiliary charge accompanying other acts violating international law (murder, persecution, attacks against civilian population etc.).

In addition, *Al Mahdi* represents another first for international criminal law, as the suspect decided, for the first time in the history of the ICC, to plead guilty as charged.

The present article will thus seek to analyse the factual and legal elements directly relevant to Al Mahdi’s case and the importance of the two mentioned events in the development of international criminal law.

Section II of the article will offer a summarised view into the facts of the case, as well as the relevant reactions of international bodies. Section III provides a perspective of the legal proceedings before the International Criminal Court. Section IV discusses the substance of the sole charge against Al Mahdi – destroying cultural property in a non-international armed conflict, while Section V summarises the Court’s discussion of the various modes of liability involved. Lastly, Section VI discusses the procedural aspects of Al Mahdi’s admission of guilt and Section VII concludes the paper.

### **II. Factual Background of the Case<sup>3</sup>**

#### *The Mali Civil War*

A non-international armed conflict broke out in Northern Mali around 16-17 January 2012 between the Governmental forces and several organised armed groups. These groups included

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\* PhD Candidate, University of Bucharest  
Email: viorel.chiricioiu@drept.unibuc.ro  
Manuscript received on 27 February 2017.

<sup>1</sup> ICC, Trial Chamber VIII, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 (‘*Al Mahdi* Judgment’).

<sup>2</sup> Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, in force 1 July 2002 (‘the Rome Statute’ or ‘the Statute’).

<sup>3</sup> The following sections present the facts as established by the ICC in its September 2016 Judgment.

the Tuareg-nationalist *Mouvement national de libération de l'Azawad* (MNLA), *al-Qaeda in the Islamic Maghreb* (AQIM), *Ansar Dine* and the *Movement of Oneness and Jihad in West Africa* (MOJWA).

By early April 2012 (in the context of the *coup d'état* leading to President Touré's ousting), the Malian State army had mostly retreated from the Northern part of the country, culminating with their loss of the city of Timbuktu to the rebels on April 1st.

Following these events, a second phase of the conflict commenced, consisting of numerous clashes and battles between the different armed groups involved (the independence-seeking nationalists of the MNLA and the Sharia-imposing Islamist militants of AQIM, Ansar Dine and MOJWA), each trying to control as much territory as possible. During these armed confrontations, the city of Timbuktu fell under the control of Ansar Dine and AQIM. This occupation lasted until January 2013, with the groups setting up their own administrative system over the city.

The activities of Ansar Dine and AQIM in Timbuktu were coordinated through a local government, which included several institutions imposed by these groups such as an Islamic tribunal, an Islamic police force and a 'morality brigade' (the *Hisbah*) whose task was to 'regulate' the morality of the people in Timbuktu by suppressing and repressing anything perceived as a vice and combating indecency.

These armed groups ruled over Timbuktu by instituting a regime of fear, radicalism, repression and coercion, as evidenced by numerous witness reports, video evidence and extreme sentences handed down by the Sharia courts.

According to numerous media reports, Islamist fighters from Ansar Dine deliberately targeted and destroyed numerous historical and cultural sites in Timbuktu, mainly consisting of shrines of Muslim saints<sup>4</sup>, between 30 June and 10 July 2012.

The attackers viewed the religious and cultural monuments as visible vices, contradicting their principles and ideology. Consequently, the *Hisbah* was charged with their destruction and the restoration of 'morality' in the region.

#### *Reactions of the international community*

The attacks against cultural and historical heritage were expressly 'condemned strongly' by the UN Security Council<sup>5</sup>, which also noted (acting under Chapter VII of the UN Charter)<sup>6</sup> such acts might qualify as violations of international law, falling under the scope of Additional Protocol II to the 1949 Geneva Conventions<sup>7</sup> and of the Rome Statute. As such, all parties involved in the Malian conflict were directly urged to take all measures to ensure the protection of Mali's cultural heritage.

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<sup>4</sup> 'Prosecutor's Statement on Mali', 1 July 2012, published in OTP Briefing Issue #126, 20 June-3 July 2012.

<sup>5</sup> S/RES/2056 (2012); S/RES/2071 (2012); S/RES/2085 (2012); S/RES/2100 (2013).

<sup>6</sup> S/RES/2056 (2012), para. 16.

<sup>7</sup> Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977, in force 7 December 1978 ('Additional Protocol II').

The UN Secretary-General, addressing the Security Council in August 2012, drew attention to the acts committed against protected sites in Timbuktu, viewing them as ‘part of the indivisible heritage of humanity’<sup>8</sup>.

The Economic Community of West African States (ECOWAS) urged the armed groups to ‘immediately halt’ the destruction of the cultural heritage sites in Timbuktu, while encouraging the establishment of a special fund for their restoration and preservation<sup>9</sup>.

The African Union also condemned in strong terms the ‘senseless and unacceptable destruction’ of the protected cultural and historical sites, viewing it as a violation of international law and urging that the perpetrators be brought to justice<sup>10</sup>.

In an unprecedented move, the Security Council expressly entrusted the newly-established Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) with the specific task of assisting the Malian authorities in protecting the cultural heritage sites from attacks, in collaboration with UNESCO<sup>11</sup>, for which purpose it could ‘use all necessary means’<sup>12</sup>. MINUSMA itself was reminded to proceed with caution when operating near cultural and historical sites<sup>13</sup>.

### III. Proceedings before the International Criminal Court

The Government of Mali referred the situation to the Court in July 2012, alleging various crimes against humanity and war crimes had been committed on its territory ‘since January 2012’<sup>14</sup>.

Based on this referral, the Office of the Prosecutor (‘the OTP’) proceeded to conduct a preliminary examination of the situation under Article 53 of the Rome Statute and eventually decided on 16 January 2013 to formally open an investigation into the Situation in Mali<sup>15</sup>.

The OTP considered it had enough grounds and reasonable evidence to suspect the commission of certain war crimes in Mali, such as: murder [under Article 8(2)(c)(i) of the Statute]; mutilation, cruel treatment and torture [under Article 8(2)(c)(i)]; the passing of sentences and the carrying out of executions without due process [under Article 8(2)(c)(iv)]; intentionally directing attacks against protected objects [under Article 8(2)(e)(iv)]; pillaging

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<sup>8</sup> UN Secretary-General, ‘Secretary-General’s remarks to the Security Council on Mali’, 8 August 2012, available online at <https://www.un.org/sg/en/content/sg/statement/2012-08-08/secretary-generals-remarks-security-council-mali> [last visited 13 February 2017].

<sup>9</sup> ECOWAS Press Release 191/2012, 9 July 2012, available online at <http://news.ecowas.int/presseshow.php?nb=191&lang=en&annee=2012> [last visited 13 February 2017].

<sup>10</sup> African Union, ‘Solemn Declaration on the Situation in Mali’, 15-16 July 2012.

<sup>11</sup> S/RES/2100 (2013), para. 16(f); S/RES/2164 (2014), para. 14(b); S/RES/2227 (2015), para. 14(h).

<sup>12</sup> S/RES/2100 (2013), para. 17.

<sup>13</sup> S/RES/2100 (2013), para. 32; S/RES/2164 (2014), para. 19; S/RES/2227 (2015), para. 25.

<sup>14</sup> ICC, Referral letter by the Government of Mali (13 July 2012), available online at <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf> [last visited 13 February 2017].

<sup>15</sup> ICC, ‘Situation in Mali – Article 53(1) Report’ (16 January 2013), available online at [https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53\\_1PublicReportENG16Jan2013.pdf](https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf) [last visited 13 February 2017], para. 14 (‘Article 53 Report’).

[under Article 8(2)(e)(v)]; rape [under Article 8(2)(e)(vi)]<sup>16</sup>. There have yet been no reasons to suspect the commission of any crimes against humanity in Mali.

Upon the Prosecution's request, an arrest warrant was issued on 18 September 2015 for Ahmad Al Faqi Al Mahdi<sup>17</sup>, an important Tuareg member of Ansar Dine who was allegedly responsible for committing the war crime of intentionally directing attacks against protected cultural property in Timbuktu, between 30 June and 10 July 2012. Al Mahdi had been detained by the Republic of Niger for arms trafficking and he was subsequently transferred to the ICC on 26 September 2015.

Ahmad Al Mahdi had joined the Ansar Dine-imposed institutional framework in Timbuktu, being appointed head of the *Hisbah* and supervising its 'vice-repressing' activities for several months in 2012. In addition, Al Mahdi was very active in the numerous religious activities of Ansar Dine, including within its Islamic tribunal (assisting the judges and conducting legal research), being viewed as an expert scholar on legal and religious matters. Very influential and trustworthy, he had often been consulted by the leaders of Ansar Dine and AQIM before the destruction of the monuments, as the head of the *Hisbah* and a respected religious authority. Al Mahdi was, both as an individual and as part of a group, directly involved in the attacks directed against these sites.

Al Mahdi's first appearance before the Court was on 30 September 2015, when he was informed of the charges against him and of his rights<sup>18</sup>.

Originally scheduled for 18 January 2016, the confirmation of charges hearing was postponed for 1 March 2016 upon the Defence's request<sup>19</sup>. During the hearing, in a closed session subsequently made public, Al Mahdi made an admission of guilt<sup>20</sup>, confirming an Agreement he had concluded with the Prosecution in February 2016<sup>21</sup>.

On 24 March 2016, the Pre-Trial Chamber of the ICC confirmed the charge against Al Mahdi and committed him to Trial Chamber VIII for trial on the respective charge<sup>22</sup>. The Pre-Trial Chamber found substantial grounds to believe Al Mahdi had committed the war crime of intentionally directing attacks against cultural property in Timbuktu between 30 June and 11 July 2012<sup>23</sup>, being criminally responsible as a direct perpetrator and direct co-perpetrator, as well as for soliciting and inducing the commission of the crime, for facilitating the

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<sup>16</sup> Ibidem, para. 7.

<sup>17</sup> ICC, *Mandat d'arrêt à l'encontre d'Ahmad AL FAQI AL MAHDI*, 18 September 2015, ICC-01/12-01/15-1-Red.

<sup>18</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of the Initial Appearance, 30 September 2015, ICC-01/12-01/15-T-1-ENG.

<sup>19</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision concerning the Defence request to postpone the confirmation of charges hearing, 13 January 2016, ICC-01/12-01/15-72-Red.

<sup>20</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of the Confirmation of Charges hearing, 1 March 2016, ICC-01/12-01/15-T-2-Red2-ENG.

<sup>21</sup> ICC, Annex 1 to the *Version publique expurgée du «Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi»*, 25 février 2016, ICC-01/12-01/15-78-Conf-Exp, 25 February 2016, ICC-01/12-01/15-78-Anx1-Red2.

<sup>22</sup> ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, 24 March 2016, ICC-01/12-01/15-84-Red ('*Al Mahdi* Confirmation of charges').

<sup>23</sup> Ibidem, para. 58.

commission of the crime by aiding, abetting or assisting and for contributing to the commission of the crime by a group of persons acting with a common purpose.

Al Mahdi's trial was, as expected, extremely short, lasting for only two days, between 22 and 24 August 2016. On 27 September 2016, the Trial Chamber unanimously found Al Mahdi guilty beyond all reasonable doubt as a co-perpetrator for the war crime of intentionally directing attacks against cultural property, sentencing him to nine years of imprisonment (with the deduction of the time spent in detention, exactly one year).

#### **IV. The First *First*: Convicting Exclusively for the War Crime of Intentionally Directing Attacks against Protected Cultural Property**

The *only* charge against Ahmad Al Faqi Al Mahdi was the war crime of intentionally attacking historical and religious monuments in Timbuktu, crime provided by Article 8(2)(e)(iv) of the Rome Statute<sup>24</sup>.

Though the unlawful attack against cultural property as a war crime had been discussed before in the case law of various international criminal tribunals, this represents the first time the crime has been investigated by the ICC, as well as the first time in the history of international criminal law when an individual has been charged *exclusively* with this crime.

Being a war crime, the relevant provisions become applicable within the framework of international humanitarian law, by referring to acts committed during an armed conflict, the factual circumstances of which the perpetrator(s) must be aware of<sup>25</sup>.

The armed conflict in Mali was a non-international one, which has been described by various international criminal tribunals as a state of hostilities either between the Government and organised armed groups or between such organised armed groups themselves, with the confrontations exceeding the level of isolated acts of violence, internal disturbances and riots<sup>26</sup>. For the latter purpose, two conditions must be met: (i) the armed confrontation must be above a minimum level of intensity and (ii) the parties to the conflict must show a minimum degree of organisation.

In its January 2013 Report, the OTP examined the factual elements of the situation in Mali and reached the conclusion that, indeed, a non-international armed conflict was taking place there<sup>27</sup>, with the confrontations and their effects being severe, advanced and heavily condemned by the international community. This was also the conclusion reached by the Court in its Judgment, which expressly characterised the conflict as a non-international one by analysing the factual and legal context and circumstances<sup>28</sup>.

Firstly, with regard to the required minimum threshold of intensity (above mere internal tensions and disturbances), the Court noted the involved armed groups (particularly AQIM

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<sup>24</sup> ICC, *Chef d'accusation retenu par l'Accusation contre Ahmad AL FAQI AL MAHDI*, 17 December 2015, ICC-01/12-01/15-62.

<sup>25</sup> ICC, Elements of Crimes, Article 8.

<sup>26</sup> ICC, *The Prosecutor v. Jean-Pierre Bemba Gumbo*, Decision Pursuant to Article 61(7)(a) and (b), 15 June 2009, ICC-01/05-01/08-424, para. 229; ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

<sup>27</sup> ICC, Article 53 Report, para. 58.

<sup>28</sup> ICC, *Al Mahdi* Judgment, para. 49.

and Ansar Dine) had exercised extensive control over a large part of Malian territory for a long time (approximately nine months)<sup>29</sup>.

Secondly, all parties involved possessed a high degree of organisation<sup>30</sup>, and the rebel groups had the proven military ability to defeat the Malian state army, capture the city of Timbuktu and exercise various aspects of local government over it.

There were no records or allegations of any foreign power intervening in the confrontations in favour of one of more of the parties potentially affecting the classification of the conflict (*i.e.* the armed conflict was clearly not an international or ‘internationalised’ one).

Pursuant to Article 8(2)(e)(iv) of the Rome Statute, it is a war crime to deliberately attack cultural property (‘buildings dedicated to religion, education, art, science or charitable purposes, historic monuments’), so far as the buildings are not military objectives.

The war crime of unlawfully attacking cultural property has long been recognised by the case law of international criminal tribunals<sup>31</sup>. As such, the Nuremberg International Military Tribunal charged Ribbentrop and Bormann with the crime<sup>32</sup>. The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) convicted those responsible for the 1991 bombardment of the Old Town of Dubrovnik, a UNESCO World Heritage Site, pointing that cultural property is protected both in international and non-international armed conflicts<sup>33</sup>, an approach embraced by the Rome Statute as well.

Pursuant to the ICC Elements of Crimes, in order for an attack against cultural property to be classified as a war crime under the Rome Statute, five conditions must be met: (1) the perpetrator must have directed an attack, (2) against a building of cultural value which was not a military objective, (3) with the intention for that building to be the object of the attack, (4) in the context of and in association with a non-international armed conflict, (5) the factual circumstances of which were known to the perpetrator<sup>34</sup>.

The relevant *actus reus* of the war crime regulated by Article 8(2)(e)(iv) of the Rome Statute refers to attacking ‘buildings dedicated to religion, education, art, science or charitable purposes, historic monuments’ which are not military objectives<sup>35</sup>. The prohibition relates to attacks as such, irrespective of whether those attacks result in the destruction, in whole or in part, of the protected building<sup>36</sup>.

It might be useful to note that the provisions of the Rome Statute only criminalise attacks directed against buildings and monuments, therefore not covering the destruction of cultural heritage such as movable or intangible property<sup>37</sup>.

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<sup>29</sup> Ibidem.

<sup>30</sup> ICC, Article 53 Report, paras. 76–83.

<sup>31</sup> See *Roger O’Keefe*, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, 2010, p. 343.

<sup>32</sup> International Military Tribunal (Nuremberg), Judgment of 1 October 1946.

<sup>33</sup> ICTY, *Prosecutor v. Pavle Strugar*, Trial Judgment of 31 January 2005, IT-01-42-T, para. 230.

<sup>34</sup> ICC, Elements of Crimes, Article 8(2)(e)(iv).

<sup>35</sup> Rome Statute, Article 8(2)(e)(iv).

<sup>36</sup> ICC, *Al Mahdi* Confirmation of charges, para. 43; ICC, *Al Mahdi* Judgment, para. 59.

<sup>37</sup> For a background on this, see *Daniela-Anca Deteșeanu*, *Crima internațională. Abordări convenționale și dezvoltări jurisprudențiale*, Universul Juridic, Bucharest, 2016, pp. 195-196.



As observed in the Court's *Al Mahdi* judgment, the *mens rea* requirement of the crime is the perpetrator's specific intent to attack protected objects precisely because of what they represent<sup>38</sup>.

These provisions reflect the protection awarded to cultural property in armed conflicts by international regulations, beginning with the 1907 Hague Regulations<sup>39</sup>, and continuing with the 1949 Geneva Conventions and their Additional Protocols. Article 16 of Additional Protocol II (applicable to non-international armed conflicts) prohibits any direct attacks against 'historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples'.

Attacks against protected cultural property may only be lawful (and even then, it would be decided on a case-by-case basis) if such property made an effective contribution to military action by way of its location, purpose etc. *and* its destruction or neutralisation offered a definite and concrete military advantage<sup>40</sup>.

The requirement of a 'nexus' with an armed conflict (as the case with all war crimes in international criminal law<sup>41</sup>) was interpreted by the Court as covering events both within and outside of battle (*i.e.* the direct aftermath of an armed conflict), as long as the unlawful conduct is associated with the armed conflict 'more generally'<sup>42</sup>.

The city of Timbuktu, founded in the 5th century, came to be one of the world's most important centres of Islamic culture and education with over 180 Quranic schools, as well as an important marketplace and trade hub. Its three main mosques and *madrasahs* (the Djingareyber Mosque and the Sankoré Mosque, dating from the 14th century, and the Sidi Yahia Mosque, built in the 15th century), as well as sixteen mausolea and cemeteries, were included in 1988 by UNESCO on its World Heritage List<sup>43</sup> under criteria (ii)<sup>44</sup>, (iv)<sup>45</sup> and (v)<sup>46</sup> of the Operational Guidelines for the Implementation of the World Heritage Convention<sup>47</sup>.

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<sup>38</sup> ICC, *Al Mahdi* Judgment, para. 12.

<sup>39</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, done at The Hague, 18 October 1907, Articles 27 and 56.

<sup>40</sup> O'Keefe, *supra* note 30, p. 344.

<sup>41</sup> See Antonio Cassese, 'The Nexus Requirement for War Crimes', 10(5) *Journal of International Criminal Justice* (2012), p. 1395.

<sup>42</sup> ICC, *Al Mahdi* Judgment, paras. 15 and 18. Note that the Court does not develop further on the requirement of the 'more general' association with an armed conflict.

<sup>43</sup> UNESCO, 'Report of the World Heritage Committee', CONF 001 XIV.A, December 1988.

<sup>44</sup> 'exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design'.

<sup>45</sup> 'an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history'.

<sup>46</sup> 'an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change'.

<sup>47</sup> UNESCO, Operational Guidelines for the Implementation of the World Heritage Convention, WCH.15/01, latest revision 8 July 2015.

Since 2012, Timbuktu has also been on UNESCO's List of World Heritage in Danger, pursuant to Article 11(4) of the World Heritage Convention<sup>48</sup>, because of the threat posed by the armed conflict in the region, as well as the general state of degradation of the site<sup>49</sup>. The monuments are also protected under Malian national law, as representative of an entire culture's identity, history and tradition.

Timbuktu's mosques and holy places have been essential in the early spread of Islam throughout the African continent, bearing witness to the rise and fall of dynasties and to centuries of commercial, spiritual and cultural activities in the trans-Saharan region. Their cultural, religious and historical significance led to Timbuktu being called 'The Pearl of the Desert', a capital of Islamic intellectual, cultural and spiritual life, not to mention its utter importance in the spread of education throughout the region given the large number of libraries, schools and universities it hosted. According to various witness testimonies before the ICC, Timbuktu was 'an emblematic city of mythical dimension'.

A large number of monuments are dedicated to various Muslim saints believed to predict the future and carry out miracles, being an important centre of pilgrimage. These saints played noteworthy roles in the development of the region a few centuries ago, by preaching and teaching theology, law, grammar, as well as by reportedly having healing powers.

The unique role and value of these mausolea and monuments are deeply rooted in the public conscience of the local population, who consider them representative of their faiths, history and society, viewing them as places of absolute faith and piety. As such, rituals such as making offerings, praying, meditating, reading verses of the Quran or simply having spiritual retreats there play a regular and important part of the local population's lives. The community has always been involved in the regular maintenance of the monuments, preserving and even plastering the sites.

In the case of Radoslav Brđanin, the ICTY considered that buildings such as mosques, monasteries and minarets did indeed fall under the protection offered by international law to cultural and religious sites during an armed conflict<sup>50</sup>.

Members of several of the armed groups involved, such as Ansar Dine and AQIM, intentionally and repeatedly directed their attacks against at least 9 of the 16 mausolea, 2 of the 3 mosques and several other historical monuments in the protected city of Timbuktu up to July 2012, viewing them as 'vices' affecting the people's morality. The attacks were carried out with vehicles, weapons and tools such as pickaxes and iron bars.

These elements led the OTP to conclude there was a reasonable basis to investigate the commission of the war crime of attacking protected cultural property which did not represent military objectives<sup>51</sup>. The circumstances and the perpetrators' *modus operandi* also allowed the Court to conclude in its Judgment that their clear and express intention was to directly attack the buildings specifically because of what they stood for<sup>52</sup>.

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<sup>48</sup> UNESCO, Convention concerning the Protection of the World Cultural and Natural Heritage, adopted in Paris on 16 November 1972, in force 17 December 1975.

<sup>49</sup> UNESCO, Decision 36 COM 7B.106, 2012.

<sup>50</sup> ICTY, *Prosecutor v. Radoslav Brđanin*, IT-99-36-T, Trial Judgment of 1 September 2004.

<sup>51</sup> ICC, Article 53 Report, para. 111.

<sup>52</sup> ICC, *Al Mahdi* Judgment, para. 48.



The door of the Sidi Yahia mosque was also destroyed by the armed groups. The door had not been opened for over 500 years and it was full of significance for the people of Timbuktu, who believed the opening of the door would bring war, droughts and famine.

Some of the affected monuments have since been reconstructed, while others have been replaced with symbols of their past existence. In total, ten of the cultural sites in Timbuktu (mausolea and mosques) were attacked and destroyed or heavily damaged during the period in question, nine of which were protected UNESCO World Heritage sites.

The inclusion of a site on UNESCO's Heritage Lists is indicative of<sup>53</sup> – but not required for<sup>54</sup> – its protection under the rules of international humanitarian law and international criminal law.

The ICC viewed the special status awarded by UNESCO to the attacked sites as reflecting their 'special importance to international cultural heritage'<sup>55</sup>. However, views diverge as to what exactly the designation of a site as UNESCO World Heritage signifies. As such, the Prosecutor considered that such designation was representative for the importance of those sites as 'mirror of humanity', the destruction of which affected 'humanity as a whole'<sup>56</sup>.

On the other hand, the Pre-Trial Chamber in its Confirmation of charges affirmed that the UNESCO protection awarded to the sites represented their importance for the local cultural heritage, playing an 'important role in the life of the inhabitants of Timbuktu', their destruction heavily affecting 'the local population'<sup>57</sup>.

In its Judgment, the Trial Chamber borrows the arguments brought in the Confirmation of charges, noting the sites constituted 'common heritage for the community'<sup>58</sup>, being 'of great importance to the people of Timbuktu'<sup>59</sup> and of 'symbolic and emotional value for the inhabitants of Timbuktu'<sup>60</sup>. However, the Judgment points out to the World Heritage status of nine of the sites, stating that this special status represents the sites' 'special importance to international cultural heritage'<sup>61</sup>. The Judgment in fact quotes *expressis verbis* the preamble of the UNESCO Constitution, stressing it is the duty of all nations to protect and diffuse culture<sup>62</sup>.

In assessing the gravity of a case, the Regulations of the Office of the Prosecutor provide four factors to be taken into consideration: the scale, nature, manner of commission and impact of the crimes alleged<sup>63</sup>. It is interesting to note that the Prosecutor uses the UNESCO

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<sup>53</sup> ICTY, *Strugar* Judgment, *supra* note 33; ICTY, *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Judgment of 18 March 2004.

<sup>54</sup> ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-T, Judgment of 29 May 2013.

<sup>55</sup> ICC, *Al Mahdi* Judgment, para. 46.

<sup>56</sup> ICC, *Statement of the Prosecutor at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi*, 1 March 2016, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-01-03-16> [last visited 13 February 2017].

<sup>57</sup> ICC, *Al Mahdi* Confirmation of charges, paras. 36 and 39.

<sup>58</sup> ICC, *Al Mahdi* Judgment, para. 34.

<sup>59</sup> *Ibidem*, para. 78.

<sup>60</sup> *Ibidem*, para. 79.

<sup>61</sup> *Ibidem*, para. 46.

<sup>62</sup> For a more comprehensive discussion, see Roger O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?', 53(1) *The International and Comparative Law Quarterly* (2004), p. 189.

<sup>63</sup> ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regulation 29(2).

World Heritage designation of the attacked sites as indicative for three of the four mentioned factors.

First, considering the *scale* of the events, the Prosecution notes (on a purely quantitative basis) that nine out of the 16 mausolea and two of three mosques listed as World Heritage Sites were attacked<sup>64</sup>. Second, regarding the *nature* of the crimes, the unique importance of the buildings is regarded by the Prosecution as being reflected in their World Heritage designation<sup>65</sup>. Lastly, the Prosecution considers the *impact* of the events is shocking, particularly as the destroyed buildings were World Heritage sites<sup>66</sup>.

The Court noted that, even if all crimes under its jurisdiction represent grave breaches of international law of serious concern to the international community as a whole, not all crimes have the same gravity<sup>67</sup>. The ICC expressly stated that crimes against property (thus including the destruction of cultural property), while grave and serious, ‘are generally of lesser gravity than crimes against persons’<sup>68</sup>, thus developing and extending the Court’s earlier *dictum* in the *Katanga* Sentencing Decision<sup>69</sup>. It may be possible that this statement of the Court might question the effectiveness of future prosecutions before the ICC for offences against property, as the Court appeared to somehow set a gravity threshold, which was not further developed.

### V. A Brief Discussion on the Modes of Liability

Al Mahdi was accused of having intentionally directed attacks against these protected religious, historical and cultural sites. He had been actively involved in the destructive activities of the armed groups. He had studied the local population’s beliefs and practices, discussed with local religious leaders and tried to force them to cease their traditional rites. The *Hisbah* could not accept the practices of worshipping the tombs and the mausolea, including building structures such as domes over them.

Al Mahdi had publicly preached on the ‘vitiating’ influence of the monuments and incited on their destruction, specifically planning which monuments should be targeted and in what order, precisely because of their religious and cultural character. He had also justified the attacks in interviews given to the local media as well as during his sermons, considering however that good relations should be maintained between the local population and the occupying groups.

Furthermore, Al Mahdi participated in the attacks directed against the cultural sites by providing financial and material support as well as moral encouragement, by planning, overseeing and supervising the attacks and by personally engaging in destructive activities himself with pickaxes. He was present at all the relevant sites, directly supervising and issuing orders and in some instances even committing attacks himself.

Al Mahdi was investigated by the ICC under multiple (alternative) modes of responsibility provided by the Rome Statute: for directly perpetrating and co-perpetrating, for soliciting and

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<sup>64</sup> ICC, Article 53 Report, para. 154.

<sup>65</sup> *Ibidem*, para. 155.

<sup>66</sup> *Ibidem*, para. 157.

<sup>67</sup> ICC, *Al Mahdi* Judgment, para. 72.

<sup>68</sup> *Ibidem*, para. 77.

<sup>69</sup> ICC, *The Prosecutor v. Germain Katanga*, Decision on Sentence, 23 May 2014, ICC-01/04-01/07-3484, para. 43.

inducing the commission of a crime, for aiding and abetting the commission of a crime and for contributing to the commission of a crime by a group of persons acting with a common purpose – pursuant to the provisions of Article 25(3)(a)–(d) of the Rome Statute<sup>70</sup>. Directly perpetrating and co-perpetrating a crime are both variants of principal liability under Article 25(3)(a) of the Statute (committing a crime), while the other modes are different accessorial forms of liability (contributing to the commission of a crime by another person).

However, in its Judgment, the Court only convicted Al Mahdi as a co-perpetrator<sup>71</sup>. By establishing the defendant's principal liability under Article 25(3)(a) of its Statute, the Court considered it did not need to analyse the other, accessorial forms<sup>72</sup>, thus upholding the Appeal Chamber's decision in the *Lubanga* case which affirmed that principal liability is of 'more blameworthiness' than any accessorial mode of liability<sup>73</sup>.

An interesting discussion arose when the Court had to deal with the two variants of principal liability, *id est* direct perpetration and co-perpetration, as both had been confirmed by the Pre-Trial Chamber and both were reflected in the facts<sup>74</sup>. An individual can only be convicted of one of the principal forms of liability for two reasons: first, the perpetrator's criminal responsibility must be fairly and correctly established, and second, the *non bis in idem* principle must be upheld. The Court noted that neither its Statute nor its jurisprudence provided any hierarchy between the two, however such a hierarchy was not required and not appropriate.

Instead, the Trial Chamber stated that, when different variations of principal liability are applicable, it must pick the one best reflecting 'the full scope of the Accused's individual criminal responsibility', which, in this case, was co-perpetration<sup>75</sup>. Co-perpetration, observed the Court, included both Al Mahdi's physical, direct participation in the attacks and his position of authority and command over the other perpetrators.

For his actions and involvement in the attacks, given the applicable provisions of international law, Ahmad Al Mahdi thus became the first individual in international criminal law history to be exclusively charged with and convicted for the war crime of intentionally and unlawfully attacking protected cultural property.

## VI. The Second *First*: Pleading Guilty before the ICC

During the Confirmation of Charges hearing on 1 March 2016, Ahmad Al Mahdi announced he fully understood the charge against him and, without any pressure and fully aware of his action, wished to admit his guilt<sup>76</sup>, thus setting an important milestone in the history of the International Criminal Court, which thoroughly discussed it in its Judgment of September 2016.

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<sup>70</sup> ICC, *Al Mahdi* Confirmation of Charges, paras. 23-24.

<sup>71</sup> ICC, *Al Mahdi* Judgment, paras. 53-56.

<sup>72</sup> *Ibidem*, para. 58.

<sup>73</sup> ICC, Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, 1 December 2014, ICC-01/04-01/06 A5, para. 462.

<sup>74</sup> ICC, *Al Mahdi* Judgment, para. 60.

<sup>75</sup> *Ibidem*, paras. 60-61.

<sup>76</sup> ICC, Transcript of the Confirmation of Charges hearing 1 March 2016, *supra* note 20, p. 70.

This represents the first time in the history of the ICC when a suspect has decided to plead guilty, though not the first time a suspect pleads guilty before an international criminal tribunal – in fact, a similar situation had arisen before the ICTY also in connection with the war crime of unlawfully attacking cultural property (the Old Town of Dubrovnik)<sup>77</sup>.

The admission of guilt before the ICC (one of the most controversial provisions in its Statute<sup>78</sup>) is covered by Article 65 of the Rome Statute (a provision borrowing aspects from both common law and civil law procedures), which stipulates that, in order for a guilty plea to have legal effect, it must be offered before the Trial Chamber (*not* the Pre-Trial Chamber<sup>79</sup>), which has to ascertain a number of procedural issues: that the accused fully understands his plea and its consequences, that it is offered voluntarily, that the plea is supported by sufficient facts and evidence.

In order to ensure that a guilty plea has been entered into voluntarily and with full knowledge of its consequences, the ICTY, for example, appointed experts to evaluate the defendant's mental health in *Erdemović*, which was also the Tribunal's first conviction<sup>80</sup>.

If the Chamber finds all these matters are fulfilled, it will take into consideration the admission of guilt as evidence. If not, the plea will automatically be replaced with one of 'not guilty' and the trial will continue under the ordinary procedures, with the possibility of the case being remitted to another Trial Chamber to preserve the impartiality of the proceedings. In this aspect, the ICC seemingly adopts the civil law view of criminal procedure, according to which a confession is seen merely as another piece of evidence left to the judges' assessment, which has to be corroborated with all other existing evidence before allowing, eventually, for simplified trial procedures<sup>81</sup>.

If, however, the Trial Chamber is not satisfied with the evidence it has, and for the interests of justice, it may request the presentation of additional evidence or order the trial to proceed under ordinary trial procedures<sup>82</sup>, after listening to the views of the Prosecution and the Defence<sup>83</sup>.

It is worth mentioning that the ICC does not envision the negotiation of a specific penalty between the Prosecution and the Defence in case the defendant enters a guilty plea. The Court is the only one able to impose a sentence.

Given the straightforward circumstances of the case and the suspect's guilty plea, the proceedings were envisioned from the beginning as relatively clear, benefitting everyone involved – victims, witnesses, the Court and the suspect himself, who was able to obtain a judgment in a relatively short time and in a relatively favourable manner<sup>84</sup>. All interested

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<sup>77</sup> ICTY, *Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Judgment of 18 March 2004.

<sup>78</sup> See the *Al Mahdi* judgment, paras. 22-26, for a historical background of the admission of guilt.

<sup>79</sup> *Antonio Cassese* (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2012, p. 1239.

<sup>80</sup> ICTY, *Prosecutor v. Dražen Erdemović*, IT-96-22-Tbis, Sentencing Judgment of 5 March 2008.

<sup>81</sup> *R. Cryer et al.*, *An Introduction to Criminal Law and Procedure*, 3rd ed., Cambridge University Press, 2014, p. 471.

<sup>82</sup> Article 65(4) of the Rome Statute.

<sup>83</sup> Rule 139 of the ICC Rules of Procedure and Evidence.

<sup>84</sup> ICC, Statement of the Office of the Prosecutor, 24 March 2016, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi> [last visited 11 February 2017].

parties had to co-operate in order to analyse this new situation and properly apply the law to the facts of the case<sup>85</sup>, obtaining a rapid resolution of the situation.

In its September 2016 Judgment, the Court declared itself satisfied with Al Mahdi's admission of guilt, found it duly supported by the facts and considered the charged war crime proved beyond reasonable doubt<sup>86</sup>.

Coming to the Accused's sentencing, the Court reiterates the scheme and procedure used by the Appeals Chamber in the *Lubanga* case<sup>87</sup> – identifying and assessing the relevant factors (including the gravity of the crime, individual circumstances related to the person and the facts, mitigating and aggravating circumstances etc.), balancing them by pronouncing a fair sentence and deducting time spent by the accused in detention.

In analysing Al Mahdi's individual circumstances, the Court gave great value to his admission of guilt, which was 'undoubtedly' seen as a mitigating circumstance<sup>88</sup>, contributing in a large amount to the speed of the trial, the evidence given by witnesses and victims, the whole reconciliation process in Mali and also to the deterrence effect on other people. Al Mahdi also fully cooperated with the Court, expressing his remorse and empathy.

In sentencing Al Mahdi, the Trial Chamber observed that the crime he had committed was 'of significant gravity', with no aggravating circumstances and no less than five mitigating ones applicable, thus sentencing him to nine years of imprisonment, with the deduction of the time spent in the Court's detention (which was exactly one year). It is worth mentioning that the sentence applied was the minimum suggested by the Prosecution.

## VII. Conclusions

The *Al Mahdi* case gives rise to important achievements and developments in international criminal law.

For the first time in history, an individual was charged with and convicted exclusively for the war crime of perpetrating direct attacks against cultural and religious sites. The deliberate and unlawful destruction of mosques, monuments, tombs and mausolea in Timbuktu harmed the local population's ancient rituals, old beliefs and historical heritage. The attacks affected their cultural and social identity. The serious and irreplaceable effects of those acts have left their mark on the city, the region and indeed on the entire world, on the history of past generations and on the identity of future ones.

As very suggestively stated by the ICC Prosecutor in March 2016, 'what is at stake here is not just walls and stones. The destroyed mausoleums were important, from a religious point of view, from an historical point of view, and from an identity point of view. Such an attack [...] destroy[s] the roots of an entire people and profoundly and irremediably affect[s] its social practices and structures'<sup>89</sup>.

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<sup>85</sup> William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 780.

<sup>86</sup> ICC, *Al Mahdi* Judgment, paras. 42-43.

<sup>87</sup> ICC, Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Sentence, 1 December 2014, ICC-01/04-01/06-3122.

<sup>88</sup> ICC, *Al Mahdi* Judgment, para 100.

<sup>89</sup> ICC, *Statement of the Prosecutor*, *supra* note 56 [last visited 11 February 2017].

Also for the first time before the ICC, constituting a real milestone in its history, a suspect pleaded guilty. This offers a perspective for the victims, for all those involved in the proceedings and for the suspect himself, whose trial might be faster, more effective and more efficient.

This stands to prove an emerging trend in international law to combat the heinous attacks and crimes done by extremist groups all around the world, a trend the ICC Office of the Prosecutor has vowed to uphold as much as possible, particularly given the scourge of atrocities still being committed in and around ancient protected sites in Syria, Iraq, Yemen etc. International law can offer the necessary instruments for preventing and punishing such acts.

However, the Court's reasoning that offences against property are 'generally of lesser gravity than crimes against persons' leaves the door open for further interpretation and analysis insofar as the investigation of future crimes against cultural property by the ICC are concerned. Since the Court appeared to use the designation of UNESCO World Heritage Sites as indicative for the gravity of the offences committed against the cultural heritage, difficulties may arise when acts of violence are directed against places of utmost importance and value (be it cultural, religious, educational etc.) for the local communities, but not inscribed on UNESCO's lists.

These issues may tend to re-emerge on the agenda of the ICC given the current geopolitical and security tensions and this practice may once again become relevant in the near future. For these reasons, international criminal law must prove itself flexible and adaptable, in order to prevent and prosecute any activities contrary to the lawful conduct of hostilities.