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Individual Criminal Responsibility for the Destruction of Religious and Historic Buildings: The Al Mahdi Case

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INDIVIDUAL CRIMINAL RESPONSIBILITY FOR THE DESTRUCTION OF RELIGIOUS AND HISTORIC BUILDINGS: THE AL MAHDI CASE

*Milena Sterio**

Ahmad Al Faqi Al Mahdi, also known as Abou Tourab, was a member of the radical Islamic group Ansar Eddine, serving as one of four commanders during its brutal occupation of Timbuktu in 2012. The International Criminal Court (ICC) indicted Al Mahdi on several charges of war crimes, for intentional attacks against ten religious and historic buildings and monuments. All the buildings which Al Mahdi was charged with attacking had been under UNESCO protection, and most had been listed as world heritage sites.

The case against Al Mahdi at the ICC unfolded relatively quickly and efficiently, from the official Malian referral of the case to the ICC until the end of the trial when the defendant, who had pled guilty, was sentenced. Al Mahdi's initial arrest caught many by surprise. While he was detained in a prison in Niger, ICC authorities issued a sealed warrant for his arrest, sent representatives to meet with Niger government officials, and transferred him to the ICC detention facility at The Hague. In addition, Al Mahdi's arrest and prosecution at the ICC have sparked controversy because of the court's decision to pursue a little-known defendant for a relatively insignificant crime. Others, however, have applauded the ICC's prosecution of Al Mahdi as a

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victory for the institution and a ground-breaking legal precedent. This article analyzes the Al Mahdi case and argues that his conviction will not only constitute an important precedent for the ICC, but also contribute toward the tribunal's overall legitimacy.

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I. INTRODUCTION AND FACTUAL BACKGROUND

Ahmad Al Faqi Al Mahdi, also known as Abou Tourab, was a member of the radical Islamic group Ansar Eddine, a Malian armed jihadist group linked to al-Qaeda in the Islamic Maghreb (AQIM).¹ Al Mahdi was born in a city called Agoune, approximately 100 kilometers west of Timbuktu in Mali.² Al Mahdi served as head of the Islamic Police in Timbuktu, and was one of the four commanders of Ansar Eddine during its brutal occupation of Timbuktu in 2012.³ A Tuareg armed rebellion erupted in the north of Mali in January 2012, when the so-called National Liberation Movement of Azawad launched an offensive.⁴ Other Islamist groups present in the geographic area, including Ansar Eddine, quickly joined the offensive.⁵ Various hostilities took place during this time, most in flagrant violation of international

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1. *Q & A: The Al Mahdi case at the ICC*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS: WORLDWIDE MOVEMENT FOR HUMAN RIGHTS (Aug. 17, 2016), <https://www.fidh.org/en/region/Africa/mali/q-a-the-al-mahdi-case-at-the-icc> [<http://perma.cc/5V4A-XYXD>] [hereinafter WORLDWIDE MOVEMENT].
 2. *Id.*
 3. *Id.*; see also The Prosecutor v. Ahmad Al Faqi Al Mahdi, No. ICC-01/12-01/15, Warrant of Arrest, ¶ 7 (Sept. 18, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc2068383.pdf> [<https://perma.cc/Q23L-XZ73>] [hereinafter Al Mahdi Arrest Warrant].
 4. See Baz Lacocq & Greg Klute, *Tuareg Separatism in Mali*, 68 INT'L J. 424 (2012-2013) (describing Tuareg history, the offensive launched in 2012, and the resulting insurgencies in the region).
 5. WORLDWIDE MOVEMENT, *supra* note 1.

humanitarian law.⁶ Several northern cities were captured by the rebelling groups from early April 2012 until January 2013, when French and Malian troops intervened to suppress the rebellion.⁷ Between June 2012 and July 2012, Timbuktu came under the control of Ansar Eddine and another Islamist group.⁸ During this time, Al Mahdi worked closely with the leaders of all the armed groups in the area, and, according to the allegations asserted against Al Mahdi, played an active role in the occupation of Timbuktu.⁹

The International Criminal Court (ICC) indicted Al Mahdi on several charges of war crimes, specifically intentional attacks against ten religious and historic buildings and monuments.¹⁰ Article 8.2(e)(iv) of the Rome Statute of the International Criminal Court provides that war crimes include “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.”¹¹ All the buildings which Al Mahdi was charged with attacking had been under UNESCO protection, and most had been listed as world heritage sites.¹²

The Al Mahdi case at the ICC unfolded relatively quickly and efficiently, from the official Malian referral of the case to the ICC until the end of the Al Mahdi trial.¹³ The Malian government itself referred the situation in Mali to the court in 2012.¹⁴ The Office of the Prosecutor (OTP) then opened an official investigation into alleged crimes committed in Mali in January 2013, and in February 2013, the Malian government and the ICC signed a cooperation agreement in accordance

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6. WORLDWIDE MOVEMENT, *supra* note 1.
 7. WORLDWIDE MOVEMENT, *supra* note 1.
 8. WORLDWIDE MOVEMENT, *supra* note 1.
 9. Al Mahdi Arrest Warrant, *supra* note 3, at ¶¶ 6–7.
 10. WORLDWIDE MOVEMENT, *supra* note 1.
 11. Rome Statute of the International Criminal Court, art. 8.2, Jul. 1, 2002, U.N. Doc. A/CONF.183/9, available at https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [<https://perma.cc/52Y8-RZZC>] [hereinafter Rome Statute].
 12. Al Mahdi Arrest Warrant, *supra* note 3, at ¶ 6.
 13. WORLDWIDE MOVEMENT, *supra* note 1; see also *Case Information Sheet: Situation in the Republic of Mali: The Prosecutor v. Ahmad Al Fiqi Al Mahdi*, INT’L CRIM. CT. (last updated Aug. 24, 2016), <https://www.icc-cpi.int/iccdocs/PIDS/publications/AlMahdiEng.pdf> [<https://perma.cc/S634-2943>] [hereinafter *Case Information*] (describing the expediency of the trial proceedings).
 14. *Case Information*, *supra* note 13.

with Section IX of the Rome Statute.¹⁵ On September 18, 2015, the ICC Pre-Trial Chamber I issued an arrest warrant against Al Mahdi.¹⁶ On September 26, 2015, he was transferred to ICC authorities by the government of Niger.¹⁷

Al Mahdi's arrest caught many by surprise. While he was detained in a prison in Niger, the ICC authorities issued a sealed warrant for his arrest, sent representatives to meet with Niger government officials, and transferred the defendant to the ICC detention facility at The Hague.¹⁸ On March 24, 2016, charges against Al Mahdi, consisting of war crimes constituted by attacks against religious and cultural sites, were confirmed by Pre-Trial Chamber I.¹⁹ In addition to the ICC's charges against Al Mahdi, human rights groups accused Al Mahdi of other crimes, and have encouraged the OTP to consider credible allegations of Al Mahdi's involvement in crimes committed against civilians, including rape, sexual slavery, and forced marriage.²⁰ Al Mahdi indicated that he would plead guilty on March 1, 2016; his trial opened on August 22 and concluded within a single week.²¹ The court sentenced Al Mahdi on September 27, 2016.²²

While some have applauded the ICC prosecution of Al Mahdi as a victory for the institution and as a ground breaking legal precedent, others have criticized the court's decision to go after a relatively little-

15. *Case Information*, *supra* note 13.

16. Al Mahdi Arrest Warrant, *supra* note 3.

17. WORLDWIDE MOVEMENT, *supra* note 1.

18. 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/> [<https://perma.cc/25MT-GFV5>] [hereinafter *Breakthrough*].

19. WORLDWIDE MOVEMENT, *supra* note 1.

20. *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/> [<https://perma.cc/27EX-GF8P>] [hereinafter AMNESTY].

21. *Questions and Answers: Situation in Mali: The Prosecutor v. Ahmad Al Faqi Al Mahdi*, INT'L CRIM. CT. (Aug. 17, 2016), https://www.icc-cpi.int/iccdocs/PIDS/AlMahdiQA17August2016_Eng.pdf [<https://perma.cc/ZX82-8J78>].

22. *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, No. ICC-01/12-01/15-171, Judgment and Sentence (Sept. 27, 2016), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/12-01/15-171> [<https://perma.cc/7WGA-3B2Z>].

known defendant, for a relatively insignificant crime.²³ The two sections below address these arguments.

II. AL MAHDI: A BIG VICTORY FOR THE ICC?

Commentators have applauded the Al Mahdi case and called it a big victory for the ICC.²⁴ This section will provide a brief summary of the main arguments in favor of the Al Mahdi case as a victory for the ICC.

First, Al-Mahdi's trial was short and efficient, "which is important for a court that has been hobbled by inexcusably long proceedings."²⁵ The ICC has a small budget, and completing an efficient trial without expending many resources represents an important legal accomplishment for the tribunal and will arguably free up the ICC to pursue other cases and alleged criminals.²⁶ Al Mahdi is the first ever defendant in the ICC to plead guilty.²⁷ From the start of his case, he promised to cooperate with the ICC—in exchange, perhaps, for a lenient sentence.²⁸ Thus, prosecuting Al Mahdi, while knowing in advance that the defendant would plead guilty and cooperate with prosecutors, and also perhaps provide information about other future cases, would appear to have been a particularly efficient use of the ICC's limited resources.

Second, the ICC has been perceived as a largely inefficient institution, as cases against other alleged criminals have languished:

Sudanese President Omar al-Bashir has been free since becoming the first person charged by the ICC for genocide. Joseph Kony, the notorious leader of the Lord's Resistance Army, continues to wreak havoc in Central Africa, 10 years after being indicted. The trials of Kenyan President Uhuru Kenyatta and Deputy President William Ruto collapsed as a result of a lethal combination of shoddy case construction by ICC prosecutors and Kenyan political interference.²⁹

23. See AMNESTY, *supra* note 20 (noting that other crimes perpetrated in Mali, including more violent crimes, have gone unpunished).

24. Mark Kersten, *Some Thoughts on the al Mahdi Trial and Guilty Plea*, JUSTICE IN CONFLICT (Aug. 24, 2016), <https://justiceinconflict.org/2016/08/24/some-thoughts-on-the-al-mahdi-trial-and-guilty-plea/> [<https://perma.cc/28EZ-URXS>] [hereinafter *Some Thoughts*].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Breakthrough*, *supra* note 18.

Securing a conviction against an Islamic terrorist, such as Al Mahdi, will send the right message that the ICC is efficient and capable of arresting individuals and successfully completing trials within a reasonable time period.

Third, Al-Mahdi's surrender to the ICC was accomplished through the cooperation of both Niger and Mali, two African states.³⁰ This cooperation may help the ICC to counter criticism of bias against the African continent and the perception that African states are somehow against the institution.³¹

Fourth, al-Mahdi's evidence and testimony could be of use during future prosecution; as mentioned above, he has proven to be more than willing to cooperate with ICC investigators and prosecutors.³² Al Mahdi may have been targeted by the ICC because of this promise, as the ICC may have believed that al Mahdi's cooperation and eventual testimony would potentially help in bringing other perpetrators in Mali to account.³³ As one commentator observed, "[i]f al-Mahdi provides solid testimony and evidence of other crimes, he could emerge as an extremely useful resource not only for the ICC but for accountability in Mali more generally."³⁴ This possibility may also help to alleviate the skeptics' concern that the ICC should not be focusing on the destruction of property, but should instead focus on violence committed against populations and individuals.³⁵

Fifth, Al Mahdi's conviction may bolster the court's image as a relevant institution seen as prosecuting crimes that shock the conscience of mankind, such as the destruction of UNESCO sites. Because of its limited jurisdictional reach, the ICC has been unable to prosecute individuals responsible for the destruction of cultural sites in places such as Palmyra or Bamiyan.³⁶ Securing a conviction against an individual accused of similar destruction in an ICC member state, where the court does have jurisdiction, signals that the destruction of cultural heritage is a war crime of legitimate concern to the international community. In other words, "[t]he ICC showed that

30. *Some Thoughts, supra* note 24.

31. *Some Thoughts, supra* note 24.

32. *Some Thoughts, supra* note 24.

33. *Some Thoughts, supra* note 24.

34. *Some Thoughts, supra* note 24.

35. *Some Thoughts, supra* note 24.

36. *Breakthrough, supra* note 18; *see also Some Thoughts, supra* note 24 (noting that because of limited jurisdictional reach, the ICC was unable to exert authority in Syria and Afghanistan to punish (1) the destruction of cultural relics in Palmyra by ISIS; and (2) Taliban violence against the Bamiyan Buddhas).

accountability for cultural crimes is possible.”³⁷ The court’s action also signaled other shifts:

Most crucially . . . , the court tapped into global outrage about the destruction of cultural heritage sites. While the court has no jurisdiction in Syria or Iraq, where Islamic State fighters have wantonly obliterated historic sites, it could do something about the destruction of Timbuktu shrines. In prosecuting Mr. al-Mahdi, the ICC joined with UNESCO to form a new front line against the violent destruction of culture.³⁸

While many have pointed out the limitations of the Al Mahdi precedent in terms of deterring future war criminals tempted to destroy other cultural sites,³⁹ the Al Mahdi case does demonstrate that the international community cares about the protection of buildings and monuments and is willing to expend focus and energy on this issue.

Sixth, the Al Mahdi case is a “first” of many kinds. This case marks the first time that the destruction of cultural sites has been prosecuted as a war crime at the ICC.⁴⁰ It is also the first time that an Islamic radical has been prosecuted at the ICC.⁴¹ Finally, it is the first time that an ICC defendant has pleaded guilty.⁴²

III. AL MAHDI: AN IMPROPER USE OF ICC RESOURCES?

Critics have pointed out that the case may not be such a welcome development in international criminal law.⁴³ For example, scholars have criticized the Al Mahdi case as stretching the limits of the ICC “to a breaking point” because the case fails to respect two core principles of the ICC: gravity and complementarity.⁴⁴

37. *Breakthrough*, *supra* note 18.

38. *Breakthrough*, *supra* note 18.

39. *Some Thoughts*, *supra* note 24.

40. *Some Thoughts*, *supra* note 24.

41. *Some Thoughts*, *supra* note 24.

42. Marieke de Hoon, *The ICC’s Al Mahdi case is (also) a political trial, and that’s fine!*, EJIL: TALK! (Aug. 31, 2016), <http://www.ejiltalk.org/the-iccs-al-mahdi-case-is-also-a-political-prial-and-thats-fine/> [<https://perma.cc/TJ82-E4ZJ>].

43. *See, e.g.*, Eva Vogelvang & Sylvain Clerc, *The Al Mahdi Case: Stretching the Principles of the ICC to a Breaking Point?*, JUSTICE HUB (Aug. 29, 2016), <https://justicehub.org/article/al-mahdi-case-stretching-principles-icc-breaking-point> [<http://perma.cc/MD4J-49SW>].

44. *Id.*

A. *Gravity*

The ICC was established to exercise its jurisdiction over persons for the most serious crimes of international concern.⁴⁵ Article 17(1)(d) of the Rome Statute provides that a case is inadmissible before the ICC if the case is not of sufficient gravity to justify further action by the court.⁴⁶ The Prosecutor has stated, in the context of the Al Mahdi case, that “attacks against religious buildings are so grave that they warrant action by the international community.”⁴⁷ One has to wonder, however, whether the destruction of buildings should qualify as one of the most serious crimes of international concern. In another recent case, the so-called Flotilla incident, where Israeli special forces killed ten activists on board a vessel that had been about to breach the Israeli naval blockade of Gaza, the ICC OTP held the case was not sufficiently grave and the court would therefore not investigate.⁴⁸ The OTP defined the principle of gravity as:

- (i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and
- (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.⁴⁹

Subsequently, the OTP defined the elements that are to be taken into account when assessing the gravity of the crimes, namely, the “scale, nature, manner of commission of the crimes and their impact.”⁵⁰

The OTP weighed these considerations in the Flotilla case and decided that the investigation should not proceed, because (1) it would not be directed against those most responsible for the crime; (2) the

45. Rome Statute, *supra* note 11, at Preamble.

46. Rome Statute, *supra* note 11, at art. 17(1)(d) (providing that the court will find a case inadmissible if it “is not of sufficient gravity to justify further action by the Court”).

47. *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”*, INTERNATIONAL CRIMINAL COURT (Sept. 26, 2015) <https://www.icc-cpi.int/pages/item.aspx?name=otp-stat-26-09-2015> [<https://perma.cc/882U-H5AS>].

48. Prosecutor of the International Criminal Court, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, INTERNATIONAL CRIMINAL COURT ¶ 3 (Nov. 6, 2014), [https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53\(1\)-report-06nov2014eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov2014eng.pdf) [<http://perma.cc/YHY9-X3XY>].

49. *Id.* at ¶ 135.

50. *Id.* at ¶ 135.

scale and nature of the crimes were of insufficient gravity; and (3) insufficient evidence was available to establish that the impact of the crimes went beyond the direct victims.⁵¹

With this precedent in mind, it is important to address two questions: whether Al Mahdi bears the greatest responsibility for the alleged crimes, and whether the crimes themselves are of sufficient gravity.

First, it is unclear whether Al Mahdi is indeed the most responsible for the crimes. While it is likely that he had been involved in the destruction of the religious buildings, it is equally likely that other members of the Islamic groups were equally involved in the planning and commission of these crimes.⁵² It has been suggested that Al Mahdi is on trial because all of the other leaders of the various extremist militia groups that operated in the region have been killed or otherwise escaped.⁵³ This suggestion would indicate that Al Mahdi was selected for prosecution for pragmatic reasons, which had little to do with the gravity principle.

Second, it is uncertain whether the war crime of destruction of cultural property is grave enough to warrant prosecution in the ICC. Despite the Rome Statute's prohibitions against "the destruction of religious buildings . . . , one must assume that the drafters envisaged that these crimes would only be prosecuted once committed in combination with other crimes that qualify as a war crime."⁵⁴ For example, in the current trial of Bosco Ntaganda, the defendant is facing twelve war crimes charges and five charges of crimes against humanity, in addition to the destruction of cultural and religious property.⁵⁵ Thus, the Ntaganda case seems to pass the gravity threshold more easily than the Al Mahdi case. Although the destruction of cultural and religious buildings may constitute an attack on humanity as a whole, as recent ISIS-perpetrated attacks on the cultural heritage of Syria may demonstrate,⁵⁶ this does not automatically lead to the conclusion that the ICC should prosecute the perpetrators. The gravity threshold imposes a limitation on the court: in light of its limited resources, the

51. *Id.* at ¶ 136.

52. Vogelvang & Clerc, *supra* note 43.

53. Vogelvang & Clerc, *supra* note 43.

54. Vogelvang & Clerc, *supra* note 43.

55. Prosecutor v. Ntaganda, ICC-01/04-02/06, Alleged Crimes, (Jun. 9, 2014), <https://www.icc-cpi.int/drc/ntaganda/pages/alleged-crimes.aspx> [http://perma.cc/B2WB-WM88].

56. See Marina Lostal, *Syria's World Cultural Heritage and Individual Criminal Responsibility*, INT'L REV. L., 2015:3, at 1 ("Recent reports have confirmed damage to five of the six Syrian world heritage sites during the current armed conflict as well as extensive looting of several of its archaeological sites on the Syrian Tentative List of world heritage.").

court should focus on the prosecution of those most responsible for serious crimes.⁵⁷ It may be argued that Al Mahdi's alleged crimes are not grave enough.

B. Complementarity

It is questionable whether the Al Mahdi prosecution satisfies the principle of complementarity. The ICC is not supposed to interfere with national prosecutions, and the court should only prosecute suspects if a state is not able or willing to prosecute.⁵⁸ According to Article 17(1)(a) of the Rome Statute, a case is inadmissible when it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution.⁵⁹ In other words, if a state is able and willing to prosecute an individual, that state should be given the opportunity to do so, and the ICC should step away. Al Mahdi had already been indicted on terrorism charges in Niger, before the ICC issued its arrest warrant.⁶⁰ When Niger was informed that the ICC wanted to prosecute Al Mahdi, Nigerois authorities transferred Al Mahdi and relinquished jurisdiction over the case.⁶¹ Niger never stated that it was unwilling or unable to prosecute Al Mahdi, and the ICC authorities themselves never bothered with the complementarity issue.⁶² Thus, it seems that the ICC decision to prosecute al Mahdi is contrary to the complementarity principle, and, in light of the fact that the case may not pass the gravity threshold, one has to wonder whether Al Mahdi's prosecution should have remained in the hands of Niger authorities.

IV. CONCLUSION

While the Al Mahdi case may be applauded as a precedent-setting victory for the ICC as an institution and for international criminal law in general, the case can also be criticized as an improper use of the court and of its limited resources, to prosecute a lesser-known defendant for relatively insignificant crimes. The case remains relevant, however, for another reason: it demonstrates that the ICC may function properly if cases are carefully selected and referring states actively cooperate in

57. MEGUMI OCHI, GRAVITY THRESHOLD BEFORE THE INTERNATIONAL CRIMINAL COURT 2-3 (2016).

58. INT'L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 1.

59. Rome Statute, *supra* note 11, at art. 17(1)(a) (providing that the court will find a case inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution").

60. Vogelvang & Clerc, *supra* note 43.

61. Vogelvang & Clerc, *supra* note 43.

62. Vogelvang & Clerc, *supra* note 43.

the defendant's arrest and prosecution. It may be better for the ICC to pursue lesser-known defendants if the OTP determines that a conviction can likely be secured with limited resources, than to issue arrest warrants against defendants who are unlikely to find their way to The Hague. Limited justice may be better than no justice at all.