

2017

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Recommended Citation

Jayaraman, Shiva, "The Destruction of Cultural Property at the International Criminal Court : the Prosecutor v. Al Mahdi" (2017).
International Immersion Program Papers. 50.
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The Destruction of Cultural Property at the International Criminal Court: *The Prosecutor v. Al Mahdi*

I. INTRODUCTION

On September 27, 2016, the International Criminal Court (“ICC” or “Court”) sentenced Ahmad Al Faqi Al Mahdi (“Al Mahdi”) to nine years in prison.¹ The case—*Prosecutor v. Al Mahdi*—is unlike any other that has come before the ICC. For the very first time in the Court’s history, a defendant was charged with committing a war crime for destroying a protected object or site of cultural importance in a non-international armed conflict—a violation of Article 8(2)(e)(iv) of the Rome Statute.² Specifically, Al Mahdi was alleged to have attacked, among other property, a number of UNESCO World Heritage Sites in Timbuktu, Mali, including several shrines and mausoleums, within the context of a non-international armed conflict in Northern Mali.³ This was the first case before the ICC where a defendant pled guilty and received a reduced prison sentence.⁴ As part of such a plea agreement, Al Mahdi cooperated with the Office of the Prosecutor in the ongoing ICC investigation in Mali.⁵

Al Mahdi’s conviction was a significant legal development in international criminal law for a number of reasons. First, it demonstrated the Office of the Prosecutor’s interest in identifying and bringing cases in which cultural property was deliberately targeted and destroyed by combatants.⁶ The indictment and conviction of Al Mahdi signals that the ICC will hold future

¹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgement and Sentence, ¶ 109 (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [hereinafter “Al Mahdi”].

² Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, art. 8 (July 17, 1988) [hereinafter “Rome Statute”].

³ Al Mahdi, *supra* note 1, at ¶ 10.

⁴ See *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL & CULTURAL RIGHTS, <https://www.escri-net.org/caselaw/2016/prosecutor-v-ahmad-al-faqi-al-mahdi>.

⁵ Al Mahdi, *supra* note 1, at ¶¶ 101–02.

⁶ See also *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Mr Ahmad Al-Faqi Al Mahdi*, International Criminal Court (ICC) (Aug. 22, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-al-mahdi-160822>.

perpetrators of such acts accountable and will vigorously prosecute similar attacks on cultural property.⁷ Since cultural property is being destroyed at an alarmingly high rate in armed conflicts across the world (such as in the Syrian Civil War), this may set an important precedent for ICC action in future cases.⁸ Second, the case was the first time in which a prosecution concerning the destruction of cultural property was before the ICC, and it may offer insights into the substantive international criminal law in this area.⁹ The Court's Judgment and Sentence offers insight into how it interprets the relevant provisions of the Rome Statute and other sources of law in constructing the elements of a "war crime" in the context of destruction of property with cultural, religious, educational, scientific, or other significance.¹⁰ Third, the defendant pled guilty in exchange for a reduced prison sentence. Though the facts of *Al Mahdi* are somewhat idiosyncratic, it is interesting to consider how an admission of guilt, a showing of remorse for the damage caused, and subsequent cooperation with the Prosecutor in a broader investigation will affect the Court's sentencing.¹¹ In future cases, *Al Mahdi* may be instructive as to how the Court approaches possible plea agreements and sentencing for those defendants who admit their guilt to the tribunal.

However, some have questioned whether the Prosecutor should have even charged Al Mahdi in the first place.¹² While the destruction of cultural property is lamentable and an

⁷ See Marina Aksenova, *The Al Mahdi Judgment and Sentence at the ICC: A Source of Cautious Optimism for International Criminal Justice*, EUROPEAN JOURNAL OF INTERNATIONAL LAW: TALK! (Oct. 13, 2016), <https://www.ejiltalk.org/the-al-mahdi-judgment-and-sentence-at-the-icc-a-source-of-cautious-optimism-for-international-criminal-justice/>.

⁸ See Marina Lostal, *Prosecutor v. Al Mahdi: A Positive New Direction for the ICC?*, OPINIO JURIS (Oct. 26, 2016), <http://opiniojuris.org/2016/10/26/prosecutor-v-al-mahdi-a-positive-new-direction-for-the-icc/>.

⁹ *Id.*

¹⁰ *Id.*; see also Aksenova, *supra* note 7.

¹¹ See Aksenova, *supra* note 7.

¹² See, e.g., Fatouma Harber, *Why the ICC has the wrong man on trial over invasion of Timbuktu*, THE GUARDIAN (Sept. 30, 2015), <https://www.theguardian.com/world/2015/sep/30/icc-mali-timbuktu-invasion-trial>; Mark Kersten, *Big Fish or Little Fish — Who Should the International Criminal Court Target?*, JUSTICE IN CONFLICT (Sept. 1, 2016), <https://justiceinconflict.org/2016/09/01/big-fish-or-little-fish-who-should-the-international-criminal-court-target/>; Eva Vogelvang & Sylvain Clerc, *The Al Mahdi Case: Stretching the Principles of the ICC to a Breaking*

indisputably terrible act, it is arguable that the ICC “wasted” its relatively scarce resources focusing on the prosecution of Al Mahdi.¹³ Prosecutions for the destruction of property should remain an ancillary charge in an indictment for graver acts which implicate human life or, in the alternative, simply left to domestic authorities.¹⁴ Instead, the investigation in the Situation in Mali should have centered on other atrocities committed during this conflict, focusing on the many crimes committed against individuals.¹⁵ As of April 2017, there have been no other ICC prosecutions in the Mali conflict, despite the fact that grave human rights abuses are known to have occurred.¹⁶ Moreover, the prosecution of Al Mahdi, some argue, will do little to deter future violators. Finally, as the defendant was already in custody by authorities in Niger on suspected terrorism charges, it appears as if he was incapacitated and unable to commit similar future acts.

Proponents of the decision to prosecute Al Mahdi contend that it sends a strong and welcome signal that the international community will not tolerate the destruction of cultural property in armed conflict and will hold perpetrators accountable.¹⁷ The destruction of cultural property, in some sense, seeks to erase the collective heritage and experiences of a people. Therefore, it poses a sufficiently grave act to warrant the attention of the ICC. Moreover, the lack of deterrence argument can be said of nearly all ICC prosecutions, and it is too early to analyze

Point?, JUSTICE HUB (Aug. 29, 2016), <https://justicehub.org/article/al-mahdi-case-stretching-principles-icc-breaking-point>.

¹³ See Kersten, *supra* note 12.

¹⁴ See Vogelvang & Sylvain Clerc, *supra* note 12.

¹⁵ *Id.*

¹⁶ See INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL & CULTURAL RIGHTS, *supra* note 4.

¹⁷ See, e.g., *Al Mahdi sentenced to nine years at ICC: Explanation and reaction to Timbuktu destruction trial*, #GLOBALJUSTICE (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/>; See, e.g., Jason Burke, *ICC ruling for Timbuktu destruction 'should be deterrent for others'*, THE GUARDIAN (Sept. 27, 2016), <https://www.theguardian.com/world/2016/sep/27/timbuktu-shrines-icc-sentences-islamic-militant-nine-years-destruction-ahmad-al-faqi-al-mahdi>.

whether the decision may have any deterrence effect in ongoing conflicts. Finally, since the scope of the ICC mandate is so broad, many of the prosecutions of the tribunal will be of symbolic importance—the symbolism of this conviction was critical to the continued success of the Court.

This paper will examine and present the *Al Mahdi* in greater detail, analyzing the decision to charge and prosecute Al Mahdi. It proceeds as follows: Section II discusses the background of *Al Mahdi* in greater detail, concentrating on the factual circumstances of the Situation in Mali. Section III analyzes the arguments for and against the decision to charge Al Mahdi.

II. BACKGROUND

A. Factual Background of the Conflict in Northern Mali

The ICC opened a formal investigation, The Situation in Mali, in response to an insurgency waged against the government of Mali in Northern Mali beginning in January 2012.¹⁸ The insurgents, who were significantly comprised of Tuareg and Arab nomads, organized themselves under the authority of the National Movement for the Liberation of Azawad (MNLA).¹⁹ The MNLA sought independence for the Azawad region in Northern Mali.²⁰ The organization was supported by Islamist groups operating in the region, including Ansar Dine, Al-Qaeda in the Islamic Maghreb (“AQIM”), and the Movement for Oneness and Jihad in West Africa (a splinter group from AQIM), who found a common enemy in the government of Mali.²¹

¹⁸ See generally *Situation in the Republic of Mali, Article 51(3) Report*, ICC-01/12, INTERNATIONAL CRIMINAL COURT [hereinafter “Article 51(3) Report”].

¹⁹ *Id.* at 9–10.

²⁰ *Id.* at 4.

²¹ *Id.*

In early 2012, MNLA and its allies were successful in seizing several northern cities in Mali and drove government forces southwards and out of parts of Azawad.²²

In March 2012, soldiers in the Malian Army staged a coup against then-President Amadou Toumani Touré.²³ Various factions in the military were frustrated over Touré's handling of the rebellion, which was the driving impetus behind the coup.²⁴ In the weeks following the military takeover, disorder and disorganization was cited as a major contributor towards major MNLA advances and victories in Northern Mali. By the end of March, rebels captured Timbuktu, which was the last major city in Northern Mali then under government control.²⁵ This was a major victory for the rebels—by seizing Timbuktu, they established their dominance in the region and were able to dislodge government and military officials from their last major foothold in the area.²⁶ On the heels of this victory, the MNLA declared the independence of Northern Mali on April 06, 2012.²⁷ The international community, however, refused to recognize the MNLA and its *de facto* authority in this region.²⁸

The union, however, between the MNLA and Islamist groups such as Ansar Dine and AQIM was always uneasy and began to quickly splinter. The MNLA desired an independent and secular homeland in Northern Mali, consistent mostly of the Azawad region.²⁹ Islamist groups,

²² *Mali Crisis: Key Players*, BBC (Mar. 12, 2013), <http://www.bbc.com/news/world-africa-17582909>; *Tuareg rebels attack fifth town in Mali*, ALJAZEERA (Jan. 26, 2012), <http://www.aljazeera.com/news/africa/2012/01/201212614823523986.html>.

²³ *Renegade Mali soldiers announce takeover*, BBC (Mar. 22, 2012), <http://www.bbc.com/news/world-africa-17462111>.

²⁴ *Id*; *Renegade Mali soldiers say seize power, depose Toure*, REUTERS (Mar. 22, 2012), <http://af.reuters.com/article/topNews/idAFJOE82L00620120322>.

²⁵ *See Mali Tuareg rebels control Timbuktu as troops flee*, BBC (April 2, 2012), <http://www.bbc.com/news/world-africa-17576725>.

²⁶ *See Mali Tuareg rebels declare independence in the north*, BBC (April 6, 2012), <http://www.bbc.com/news/world-africa-17635437>.

²⁷ *Id*.

²⁸ *Id*.

²⁹ *See Mali Islamists Reopen Talks with Tuareg Rebels*, VOICE OF AMERICA (June 2, 2012), <http://www.voanews.com/a/mali-islamists-reopen-talks-with-tuareg-rebels/1146352.html>.

including Ansar Dine, were focused on creating an Islamic state in Mali and imposing sharia law.³⁰ The uneasy alliance between the MNLA and Islamist groups came to end in May 2012, when plans to merge MNLA and Ansar Dine were abandoned. The tension between the MNLA and Islamists erupted into armed conflict in late June 2012.³¹ MNLA and Islamist fighters were fighting over major northern cities, including Gao and Timbuktu, which were seized and firmly controlled by Ansar Dine by July 2012.³²

The conflict exacted a heavy toll on Mali. Apart from the many killed in the actual fighting, hundreds of thousands civilians were internally displaced or were forced to flee the conflict as refugees.³³ Many human rights groups, including Human Rights Watch, Amnesty International, and the International Federation for Human Rights published reports indicating that fighters had recruited numerous child soldiers, summarily executed enemy combatants, and engaged in a campaign of rape, among other war crimes.³⁴

B. Al Mahdi

Ahmad Al Faqi Al Mahdi was a member of the Ansar Dine in Northern Mali, having returned to Mali to support the group following a brief period in Algeria.³⁵ He maintained close ties to Ansar Dine's senior leadership.³⁶ After the Malian Army was driven from Timbuktu,

³⁰ *Id.*

³¹ *See, e.g.,* Zoe Flood, *Trouble in Timbuktu as Islamists extend control*, THE TELEGRAPH (June 29, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/mali/9365390/Trouble-in-Timbuktu-as-Islamists-extend-control.html>.

³² *Id.* *See also* Tiemoko Diallo & Adama Diarra, *Islamists declare full control of Mali's north*, REUTERS (June 28, 2012), <http://www.reuters.com/article/us-mali-crisis-idUSBRE85R15720120628>.

³³ *See, e.g.,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *Operations Portal: Mali Situation*, <https://data2.unhcr.org/en/situations/malisituation> (last visited April 24, 2017).

³⁴ *See, e.g.,* HUMAN RIGHTS WATCH, *Mali*, <https://www.hrw.org/africa/mali> (last visited April 24, 2017); MALI: FIVE MONTHS OF CRISIS, ARMED REBELLION AND MILITARY COUP, AMNESTY INTERNATIONAL, AFR 37/001/2012 (May 1, 2012); INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *War Crimes in North Mali*, <https://www.fidh.org/IMG/pdf/mali592ang.pdf> (last visited April 24, 2017).

³⁵ Al Mahdi, *supra* note 1, at ¶ 32.

³⁶ *Id.*

Ansar Dine and the MNLA took control of the city at the end of March 2012.³⁷ When the alliance between Ansar Dine and the MNLA deteriorated and fighting broke out among the groups, Ansar Dine quickly expelled the MNLA from Timbuktu. Al Mahdi was, at this point, already a part of Ansar Dine's senior administration.³⁸

Under Ansar Dine's occupation of Timbuktu, Islamic militants imposed and enforced a strict version of sharia law.³⁹ An Islamic tribunal was established and police were empowered to enforce religious law, complemented by a special "morality brigade," or *hisbah*.⁴⁰ Given Al Mahdi's religious background and training, Ansar Dine tasked him with managing the *hisbah*.⁴¹ Al Mahdi organized the *hisbah* and drafted its objectives, which principally included regulating the moral conduct of the inhabitants of Timbuktu.⁴²

After taking command of the *hisbah*, Al Mahdi attempted to stop local residents from worshipping at the many mausoleums located in the city, which are "integral" sites of pilgrimage and worship for locals.⁴³ Al Mahdi observed, for several weeks, the practices of local residents and attempted to persuade local religious leaders that such forms of religious observance was improper.⁴⁴ In late June, Al Mahdi's superiors in Ansar Dine ordered him to destroy a number of religious and cultural sites, which locals were continuing to visit as part of their religious worship.⁴⁵ Ansar Dine considered this practice to be idolatrous and a "visible vice."⁴⁶ While Al Mahdi was initially hesitant to carry out the order, he quickly agreed to destroy the mausoleums,

³⁷ See *supra* note 32.

³⁸ Al Mahdi, *supra* note 1, at ¶ 32.

³⁹ *Id.* at ¶¶ 31, 49 & n. 102.

⁴⁰ *Id.* at ¶ 32.

⁴¹ *Id.* at ¶ 33.

⁴² *Id.*

⁴³ *Id.* at ¶¶ 34–35.

⁴⁴ Al Mahdi, *supra* note 1, at ¶¶ 34–36.

⁴⁵ *Id.* at ¶¶ 36–37.

⁴⁶ See, e.g., *id.* at ¶ 81.

created a plan and sequence to attack them, and later composed a sermon dedicated to their destruction.⁴⁷

Between June 30 and July 11, 2012, Al Mahdi, Ansar Dine, and members of AQIM destroyed the following sites: the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum, the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum, the Alpha Moya Mausoleum, the Sheikh Mouhamad El Mikki Mausoleum, the Sheikh Abdoul Kassim Attouaty Mausoleum, the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum, and the door of the Sidi Yahia Mosque.⁴⁸ All of these sites had religious and cultural importance to the people of Timbuktu and Mali and to pilgrims who travel to Mali to view these sites.⁴⁹ All of these mausoleums were, with the exception of the Sheikh Mohamed Mahmoud Al Arawani Mausoleum, protected UNESCO World Heritage Sites under the 1972 World Heritage Convention.⁵⁰

These sites, according to the Court's statement of facts, were not military targets.⁵¹ Moreover, Al Mahdi had operational control over the campaign to destroy these sites.⁵² He planned and supervised the *hisbah* and other attackers, purchased and distributed the necessary tools (including crowbars), was present at all of the attacks and actively encouraged the attackers, and personally participated in the destroying five of the sites.⁵³ Al Mahdi also communicated news of the destruction of these sites to journalists.⁵⁴

⁴⁷ Al Mahdi, *supra* note 1, at ¶¶ 36–41.

⁴⁸ Al Mahdi, *supra* note 1, at ¶ 32.

⁴⁹ *Id.* at ¶ 78.

⁵⁰ *Id.* at ¶ 39; *see also* United Nations Educational, Scientific and Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 [hereinafter World Heritage Convention].

⁵¹ Al Mahdi, *supra* note 1, at ¶ 39.

⁵² *Id.* at ¶ 40.

⁵³ *Id.*

⁵⁴ *Id.* at ¶ 40–41.

C. ICC Referral and Proceedings

The government of Mali requested that the ICC open an investigation into possible international criminal acts during the conflict and violations of the Rome Statute on July 13, 2012.⁵⁵ The Office of the Prosecutor opened a full investigation, following a preliminary investigation, on January 16, 2013.⁵⁶ The ICC issued an arrest warrant for Al Mahdi—the charge was the war crime of intentionally attacking sites of cultural and religious heritage on September 18, 2015.⁵⁷ Authorities in Niger, who had already taken Al Mahdi into custody on suspicion of terrorism charges, surrendered him to the Court on September 26, 2015.⁵⁸ Al Mahdi made a preliminary appearance on September 30, 2015, where the Court informed him about the charges and his rights before the tribunal.⁵⁹

The war crime charge was confirmed on March 24, 2016, and the trial began on August 22, 2016.⁶⁰ Al Mahdi entered a guilty plea at the beginning of trial.⁶¹ The Prosecutor presented its evidence and called three witnesses.⁶² Later, the Defense and Legal Representative of the Victims also presented arguments. The Court unanimously found Al Mahdi guilty on September 26, 2016 and sentenced him to nine years imprisonment.⁶³

III. THE CHARGING DECISION

⁵⁵ Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ¶ 3 (March. 24, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02424.PDF [hereinafter “Confirmation of Charges”].

⁵⁶ *Case Information Sheet: The Prosecutor v. Ahmad Al Faqi Al Mahdi*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/mali/al-mahdi/Documents/AlMahdiEng.pdf>.

⁵⁷ Al Mahdi, *supra* note 1, at ¶ 1.

⁵⁸ *Case Information Sheet: The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 56.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

The Prosecutor’s decision to charge Al Mahdi with a war crime for his actions in the conflict was somewhat surprising. Some have criticized the Office of the Prosecutor for “wasting” its resources in prosecuting Al Mahdi.⁶⁴ Indeed, this case is somewhat unlike those that usually come before the ICC, which represent some of the most heinous acts committed by mankind—genocide, crimes against humanity, crimes of aggression, and war crimes. Often, these acts involve the slaughter of innocent civilians, horrific treatment of enemy combatants, the use and forced recruitment of child soldiers, mass campaigns of sexual violence, and other atrocities committed against *people*.

By contrast, *Al Mahdi* is the first time the Court has prosecuted someone, not for crimes committed directly against human beings, but rather for the destruction of property. Indeed, other notable instances in which individuals have been prosecuted for the destruction of cultural property, such as the *Strugar*,⁶⁵ *Jokić*,⁶⁶ and *Prlić*⁶⁷ cases before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the charge has been ancillary to other war crimes or crimes against humanity directed at humans.⁶⁸ Given the fact that other heinous acts against people, perhaps even constituting war crimes and crimes against humanity, were perpetrated during the Northern Mali conflict, it is somewhat surprising that Al Mahdi has been the only individual prosecuted so far in this conflict. Since Al Mahdi, according to the Prosecutor’s

⁶⁴ See *supra* note 12.

⁶⁵ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgement (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>.

⁶⁶ Prosecutor v. Jokić, Case No. IT-01-42/1-S, Judgement (Int’l Crim. Trib. for the Former Yugoslavia March 18, 2004), http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf.

⁶⁷ Prosecutor v. Prlić, Case No. IT-04-74-T, Judgement Vol. 1 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013), <http://www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf>.

⁶⁸ See also *The Prosecutor v. Ahmad Al Faqi Al Mahdi: Cultural Property and World Heritage in International Criminal Law*, available at

<http://www.culturalheritagelaw.org/resources/Pictures/The%20Prosecutor%20v.%20Ahmad%20Al%20Faqi%20Al%20Mahdi.pdf> (last visited April 24, 2017) [hereinafter Cultural Property and World Heritage in International Criminal Law].

allegations, did not personally physically harm or displace individuals nor destroy or appropriate civilian property, the focus of the Office of the Prosecutor on the destruction of the mausoleums and shrines in Timbuktu is interesting in light of the broader conflict in the region. This has drawn some commentary, both positive and negative, of this decision. This Section will outline some of the arguments against and in favor of charging Al Mahdi.

A. Background

Article 17 of the Rome Statute governs the admissibility of cases brought before the Court—a case must be “of sufficient gravity to justify further action by the Court” in order to be admissible.⁶⁹ The threshold determination must ultimately be made by the Court, but in practice, the Office of the Prosecutor must independently assess whether a possible cases is sufficiently important to bring to the attention of the Court.⁷⁰

There has only been one instance in which the ICC has reviewed the “gravity” threshold requirement—the Situation in Comoros.⁷¹ In that case, the Office of the Prosecutor declined to prosecute a case referred to the Court by the government of Comoros.⁷² The referral concerned an Israeli raid on a flotilla of ships, bearing the flag of Comoros, which were bringing aid to Palestine.⁷³ The ICC Pre-Trial Chambers found that the Prosecutor’s decision to not investigate the matter further, pursuant to Article 53, was entirely reviewable by the Court.⁷⁴ It held that no deference is owed to the Prosecutor’s decision and a sufficiency determination under Article 17

⁶⁹ Rome Statute, *supra* note 2, at art. 17; *see also* Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 27–30.

⁷⁰ *See* Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 27–30.

⁷¹ Situation in Comoros, ICC Case No. ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation (July 16, 2015) [hereinafter Situation in Comoros]; Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 28–29.

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.*

is examined *de novo* by the Court. The Court ordered the Office of the Prosecutor to reconsider its decision to not further investigate the case.⁷⁵

In general, however, the Office of Prosecutor has seemingly wide discretion to make Article 17 determinations as to whether a case is sufficient to bring before the Court.⁷⁶ The Rome Statute does not provide any guidance on this matter, and the drafting history is equally silent.⁷⁷ However, the Regulations of the Office of the Prosecutor are somewhat instructive, requiring that the Prosecutor consider, among other factors, the “the scale, nature, manner of commission of the crimes, and their impact.”⁷⁸

In bringing the *Al Mahdi* case, the Office of the Prosecutor stated that the defendant’s actions “appear[] grave enough to justify further action by the Court.”⁷⁹ Specifically, the Prosecutor pointed to the fact that the majority of the destroyed sites were UNESCO World Heritage Sites, and the designated mausoleums constituted over half of the mausoleums on the World Heritage List. Therefore, the actual scale of the destruction of cultural property was enormous. Moreover, the sites themselves were of extreme importance to the cultural and spiritual identity to the people of Timbuktu and Mali. Their rapid and wholesale destruction was a tremendous social cost to Mali and the world, and the destruction of these ancient monuments and shrines “shocked the conscience of humanity.”⁸⁰ For these reasons, the Prosecutor found merit to bringing the action against Al Mahdi and that the case satisfied the Article 17(1) threshold of the Rome Statute.

⁷⁵ *See id.*

⁷⁶ Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 27–29.

⁷⁷ *See id.*

⁷⁸ *See id.* (quoting Situation in Mali: Article 53(1) Report, INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, pg. 29 (January 16, 2013)).

⁷⁹ Situation in Mali: Article 53(1) Report, INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, pg. 32 (January 16, 2013)

⁸⁰ *Id.* at 32. *See also* Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 30.

B. Arguments against Prosecution

Given the resources constraints on the Prosecutor and the limited number of cases brought before the ICC, some have criticized the decision to charge Al Mahdi. While the destruction of cultural property is indisputably an incredible social evil, one could argue that the ICC should perhaps focus on even more heinous acts, focusing on crimes more directly implicating human life. Next, since the defendant was already in custody on terrorism charges, the need to incapacitate him by having the ICC arrest, detain, and try him was considerably reduced. Finally, the prospect of *Al Mahdi* actually having any real deterrent effect on future violators is likely very marginal. This Section will briefly consider each of these arguments in turn.

First, one could argue whether there are “bigger fish” to prosecute in this conflict. As a number of human rights reports have pointed out, other grave war crimes likely occurred in Mali.⁸¹ For example, the MNLA and Islamist groups allegedly recruited child soldiers, summarily executed some captured enemy combatants, and engaged and tolerated widespread sexual violence. The decision to prosecute an individual for the destruction of cultural property, while undeniably an admirable aim, ought to be weighed against prosecutions for the other harms and crimes occurring in the region.⁸² A mass campaign of sexual violence or the use of child soldiers, if proven, are arguably more heinous acts than the destruction of the sites in Timbuktu. Therefore, some argue that the Office of the Prosecutor should focus its investigation and prosecutions on the most odious acts, leaving crimes such as the destruction of cultural or

⁸¹ See *supra* note 34.

⁸² See *supra* note 12.

religious property as an ancillary charge, or, alternatively, relying on domestic authorities to apprehend and prosecute perpetrators.⁸³

Moreover, authorities in Niger had already apprehended and detained the defendant on suspected terrorism charges. While Niger or Mali may have lacked the national capacity to prosecute Al Mahdi for this type of war crime, is the Office of the Prosecutor's time better spent investigating cases other, possibly more grave, instances of war crimes in this conflict? If Al Mahdi was in custody, albeit on other charges, he would already be incapacitated and unable to continue destroying other property or committing other war crimes.

Finally, others may argue that while the destruction of cultural and religious property is lamentable, the prosecution of Al Mahdi will ultimately do little to deter future violations. For example, it seems unlikely that an ISIL fighter in Syria will stop to consider the international legal ramifications of his actions before destroying a cultural site. Indeed, when the Taliban destroyed the Buddhas of Bamiyan in Afghanistan,⁸⁴ the threat of criminal prosecution before an international tribunal would likely not have stopped them. While *Al Mahdi* is certainly an interesting legal development, it will not restore the damage to these sites and the harm to those who viewed these places as important to their religious beliefs. It will not stop others from committing similar acts in the future.

C. Arguments in Favor of Prosecution

However, these critiques are somewhat unconvincing. Aside from the Prosecutor's justifications for bringing the case before the ICC, commentators have argued that the destruction of cultural property is a crime of such gravity to warrant special attention by the

⁸³ *Id.*

⁸⁴ *C.f.* Paul Williams & C. Danae Paterson, *Tear It All Down: The Significance Of The al-Mahdi Case And The War Crime Of Destruction Of Cultural Heritage*, THE HUFFINGTON POST (Sept. 26, 2016), <http://www.huffingtonpost.com/entry/57e93786e4b09f67131e4b52?timestamp=1474905389301/>.

Court, that the destruction of cultural property in this case is particularly invidious and devastating, and that it is still too early to cast judgment on whether or not it will have a deterrent effect. This Section will present these arguments.

First, though the destruction of cultural property is arguably not as devastating as other crimes under the jurisdiction of the ICC, it is nonetheless important to police and prosecute such behavior. In the context of an armed conflict, the intentional destruction of sites or objects of cultural or religious significance is often done to destroy the cultural history and identity of a particular group. More specifically, these objects often allow generations of individuals from a particular ethnic or cultural group to rally around a common or shared sense of identity.⁸⁵ By destroying sites or objects of cultural property, which may be irreplaceable, the attacker is, in some sense, attacking the very identity of an entire people.⁸⁶ If he succeeds in his attacks, he may be “erase” the cultural memory of the group by destroying the places and things which are most important to them.⁸⁷ In some sense, this destruction complements attacks on civilian populations—by destroying the populations’ most important cultural objects and places, the attackers destroy not only the people but their collective memory and heritage.

The scope of the destruction of cultural property in this particular case was quite severe and invidious. As previously discussed, Al Mahdi and those under his authority attacked and intentionally destroyed a number of ancient mausoleums and other shrines, many of which were recognized as sites of cultural value by the World Heritage Committee as UNESCO World Heritage Sites. They held great spiritual and religious importance to the people of Mali, and many residents and visitors to Timbuktu would visit these sites as part of their religious

⁸⁵ *Id.*

⁸⁶ *Id.*; see also Cultural Property and World Heritage in International Criminal Law, *supra* note 68, at 30–34.

⁸⁷ Williams & Paterson, *supra* note 84.

practices. The wholesale destruction of these ancient sites were not mere attacks on sites of great culture importance, but rather, they were intended to also impede the religious practices of those who find these sites important as part of their religion. Ansar Dine and Al Mahdi's attack, to enforce their version of Islam on the people of Timbuktu, destroyed these sites as a method of social and religious control and domination.

Therefore, while the prosecution of Al Mahdi is only one of many instances of the destruction of cultural or religious property in the context of an armed conflict, it is a step in the right direction. At the very least, it signals to would-be attackers that such destruction, which can be more lasting than the destruction of civilian property, will not be tolerated by the international community. Specifically, the destruction of such sites, as a means to destroy a particular cultural, ethnic, or religious group, is a heinous international criminal act. More broadly, it also demonstrates a commitment by the global community that sites of cultural, historical, and religious value are not valuable to just the particular community to which it bears cultural significance or religious importance, but to all people across the world. In other words, the sites in Timbuktu are important not just to the people of Mali, but to all mankind as they comprise an essential part of human culture. Therefore, the destruction of these sites constitutes "damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."⁸⁸

Finally, the criticism that *Al Mahdi* lacks any real deterrent effect can be said of nearly any prosecution before the ICC. Commentators have long argued that the deterrence effect of international criminal tribunals have been marginal and have not significantly reduced the scope

⁸⁸ Convention for the Protection of Cultural Property in the Event of Armed Conflict, preamble, May 14, 1954, 249 U.N.T.S. 215.

of violence in conflicts and reducing the number of humanitarian crises worldwide.⁸⁹ However, recent studies actually suggest that the presence of the ICC and the threat of criminal prosecution may have a demonstrable dampening effect on human rights abuses that fall under the Court's jurisdiction.⁹⁰ In light of these studies, there needs to be some sort of empirical or causal explanation for why the ICC's prosecution for destruction of cultural property as a war crime somehow deters violators less than other crimes under the Court's jurisdiction. Moreover, given the fact that *Al Mahdi* is so recent, it will take time to measure whether there is deterrent effect for these types of crimes. If the Court remains committed to prosecuting instances of destruction of cultural property, going forward, it stands to reason that there would be a similar deterrence effect unless it can be empirically or causally explained otherwise.

IV. CONCLUSION

The *Al Mahdi* case is an interesting development in the field of international criminal law. As a case of first instance before the ICC, it will help shape the Court's jurisprudence on war crimes for the destruction for cultural property in future cases. Indeed, even the decision to charge Al Mahdi is significant—it signals that the destruction of important sites during armed conflict, whether international or non-international in nature, will not go unnoticed by the Prosecutor. Given the fact that in recent years the destruction of cultural property has sharply risen, the need to protect cultural property and sites of religious, cultural, or social importance is at a critical point. Despite some questions of whether the ICC should have focused on Al Mahdi in its investigation, the Court does have a role to play in protecting cultural property. The

⁸⁹ See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777 (2006); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORD. INT'L L. J. 473 (1999).

⁹⁰ See, e.g., Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016); Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT'L INTERACTIONS 616 (2016).

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indictment and prosecution of Al Mahdi was a good first step, but much work remains to be done.