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AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION
INTERNATIONAL CRIMINAL COURT COMMITTEE

THE FIRST CULTURAL HERITAGE & AL QAEDA CASE
BEFORE THE INTERNATIONAL CRIMINAL COURT

QUESTIONS & ANSWERS

On September 27, 2016, Trial Chamber VIII (“Chamber”) of the International Criminal Court (“ICC”) issued its judgment and sentence in *Prosecutor v. Ahmad Al Faqi Al Mahdi* (“Al Mahdi”).¹ The judgment and sentence came at the conclusion of evidence presented by the Prosecutor, Defendant, and representatives of the victims.² As part of the proceedings, Al Mahdi entered a plea of guilty to the charges of war crimes under Article 8(2)(e)(iv) of the Rome Statute.³ During presentation of evidence, the Prosecutor offered evidence relating to the crimes committed in the Timbuktu region of Mali, Al Mahdi’s involvement in the planning and execution of the acts of destruction that formed the crux of the crimes, and the cultural and religious importance of the cultural heritage sites destroyed.⁴ Evidence was also given as to Al Mahdi’s character and standing in the Timbuktu community before and after the acts of destruction, and his contrition.⁵

WHAT IS THE SIGNIFICANCE OF THE AL MAHDI JUDGMENT AND SENTENCE?

The *Al Mahdi* judgment and sentence are significant for several reasons. This case was the first in which issues of crimes against cultural heritage under the Rome Statute were adjudicated. As a member of Ansar Dine/Al Qaeda in the Islamic Maghreb (“Ansar Dine/Al Qaeda”), Al Mahdi was also the first member of Al Qaeda to come before the ICC. Additionally, *Al Mahdi* was the first case at the ICC in which a defendant entered a guilty plea and the Trial Chamber was required to make an assessment of what is required to enter into a guilty plea under the Rome Statute.

* This document is primarily the work of the Drafting Subcommittee, consisting of Alexandra Harrington and Jennifer Trahan. This document does not necessarily represent the views of the American Branch of the International Law Association as a whole. One committee member chose not to be associated with the document.

¹ Situation in the Republic of Mali in the Case of Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016).

² *Id.* at para. 7.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at paras. 94–97, 103–105.

WHY DOES THE ICC HAVE JURISDICTION OVER CRIMES IN MALI?

The matter was referred to the ICC under Article 14 of the Rome Statute in 2012 by the government of Mali—a State Party to the Rome Statute since 2000—regarding acts committed during 2012.⁶

WHAT IS THE *AL MAHDI* CASE ABOUT?

In 2012, Mali was the site of noninternational conflict between governmental forces and Ansar Dine/Al Qaeda in the Islamic Maghreb in the northern portion of the country, including Timbuktu.⁷ The Timbuktu region of Mali has historically been home to many important cultural and religious sites.⁸ As part of its efforts to strengthen control in the area, Ansar Dine/Al Qaeda reached out to respected members of local communities, such as Al Mahdi. Members of these communities joined the newly formed “Hesbah” morality brigade and Al Mahdi became the leader of Hesbah under the authority of the governing Ansar Dine/Al Qaeda coalition.⁹

Once in this position, Al Mahdi was required to monitor the local population and the shrines and other holy sites in and around Timbuktu. In June 2012, Al Mahdi was ordered to oversee the destruction of these shrines and other holy sites because they were believed to be unholy in Ansar Dine/Al Qaeda’s construction of Islam. The sites destroyed were “(i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the Sidi Yahia Mosque door and the two mausoleums adjoining the Djingareyber Mosque, namely (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum.”¹⁰ The majority of these sites had previously been classified as UNESCO World Heritage sites and were also of cultural and religious significance to the nation of Mali as well as those in the area in and around Timbuktu.¹¹

Al Mahdi was described as reluctant to carry out these orders; however, he ultimately complied and both facilitated and oversaw the destruction.¹² This included videotaping acts of bulldozing and explanations on camera as to why the acts were being undertaken as well as procuring members of the Hesbah to commit the destruction.¹³

⁶ *Id.* at art. 13(a).

⁷ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 31.

⁸ *Id.* at para. 34. As the Trial Chamber noted, “the mausoleums of saints and mosques of Timbuktu are an integral part of the religious life of its inhabitants. Timbuktu’s mausoleum and mosques constitute a common heritage for the community.” *Id.*

⁹ *Id.* at paras. 31, 33.

¹⁰ *Id.* at para. 38.

¹¹ *Id.* at para. 10.

¹² *Id.* at para. 36–37.

¹³ *Id.* at paras. 38–41.

Once Ansar Dine/Al Qaeda was ousted from control of the Timbuktu region, the government of Mali referred Al Mahdi's situation to the ICC for potential prosecution.

WHO IS AL MAHDI?

Ahmad Al Faqi Al Mahdi is a native of the Timbuktu region of Mali.¹⁴ Although his exact age is not known, it is estimated that at the time of the trial he was between 30 and 40 years old.¹⁵ Prior to the acts in question, Al Mahdi was regarded as an expert in Islam in the area.¹⁶ In this capacity, he was viewed as an authoritative member of the Timbuktu Muslim community. According to the Trial Chamber, Al Mahdi became a member of Ansar Dine/Al Qaeda in the Islamic Maghreb in 2012.

HOW DOES THE ROME STATUTE ADDRESS CULTURAL HERITAGE CRIMES?

Cultural heritage crimes are found under several sections of the Rome Statute relating to war crimes.

For noninternational armed conflicts, war crimes under Article 8(2)(e)(iv) 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.”¹⁷ Additionally, as the Trial Chamber pointed out in the *Al Mahdi* judgment, there could be a possibility of charging cultural heritage crimes under Article 8(2)(e)(xii), which classifies the following as war crimes “[d]estroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.”¹⁸

For international armed conflicts, war crimes under Article 8(2)(b)(ii) include “[i]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives,”¹⁹ and, under Article 8(2)(b)(ix), “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”²⁰

The *Al Mahdi* case dealt exclusively with acts committed in noninternational armed conflict. To date, there has been no ICC jurisprudence on cultural heritage crimes committed in international armed conflict.

HOW DID THE ICC DEFINE CULTURAL HERITAGE?

Rather than providing an original definition of cultural heritage, the Trial Chamber used a combination of historical references to support the use of the definition of cultural

¹⁴ *Id.* at para. 9.

¹⁵ *Id.* at para. 9.

¹⁶ *Id.* at para. 32.

¹⁷ Rome Statute, *supra* note 6, at art. 8(2)(e)(iv).

¹⁸ *Id.* at art. 8(2)(e)(xii).

¹⁹ *Id.* at art. 8(2)(b)(ii).

²⁰ *Id.* at art. 8(2)(b)(ix).

heritage as used by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”)

The Trial Chamber noted that the concept of “special protection of cultural property in international law” stems from the 1907 Hague Conventions, followed by the 1919 Commission on Responsibility of the Authors of War, and the 1949 Geneva Conventions.²¹ In this context, the Trial Chamber highlighted the importance of protecting cultural heritage as part of a larger protection of the interests of humanity as well as of the local population.²² The Trial Chamber held that “UNESCO’s designation of these buildings reflects their special importance to international cultural heritage, noting that ‘the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all nations must fulfil in a spirit of mutual assistance and concern.’”²³ In this way, the Trial Chamber looked to UNESCO for the definition of cultural heritage, which is a general definition that can incorporate a number of different forms of heritage.

WHAT IS THE ICC’S PROCEDURE FOR ACCEPTING A GUILTY PLEA?

Al Mahdi is the first ICC defendant to enter a guilty plea.²⁴ Under Article 65 of the Rome Statute, a defendant has the ability to enter a plea of guilty; however, the Trial Chamber is still obligated to hear statements verifying that “(a) [t]he accused understands the nature and consequences of the admission of guilt; (b) [t]he admission is voluntarily made by the accused after sufficient consultation with defence counsel; and (c) [t]he admission of guilt is supported by the facts of the case that are contained in: (i) [t]he charges brought by the Prosecutor and admitted by the accused; (ii) [a]ny materials presented by the Prosecutor which supplement the charges and which the accused accepts; and (iii) [a]ny other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.”²⁵ In addition, in the context of guilty pleas it is possible to examine other information presented by the parties or deemed to be of assistance in assessing guilt.²⁶

The Trial Chamber highlighted that this series of requirements was an attempt at bridging the common law system’s ability for the accused to plead guilty with the civil law system’s requirement that the court review the surrounding facts around the case and the alleged act in order to make sure that there is support for the case regardless of whether the accused is willing to enter a guilty plea.²⁷ The Trial Chamber also noted that there is a

²¹ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 14 (citing Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land, The Hague (1907), arts. 27, 56; Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibility of the Authors of War and Enforcement of Penalties (1919); Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (1977)).

²² *Id.* at para. 15.

²³ *Id.* at para. 46.

²⁴ *Id.* at para. 21.

²⁵ Rome Statute, *supra* note 6, at art. 65(1).

²⁶ *Id.* at art. 65(2).

²⁷ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, *supra* note 1, at para. 27.

balance of benefits offered through the accused having the opportunity to plead guilty, particularly to the victims of the crimes and the affected communities as well as to the defendant and the international community.²⁸

In this case, the Trial Chamber was satisfied as to the credibility and reliability of Al Mahdi's plea and statements detailing his crimes. In particular, the Trial Chamber emphasized that witnesses and others were able to attest to the veracity of Al Mahdi's admissions and that Al Mahdi's confession was more extensive than necessary.²⁹

HOW DID THE ICC ADDRESS THE ISSUE OF CO-PERPETRATION UNDER ARTICLE 25(3)(a)?

The issue of co-perpetration was raised before the ICC because Al Mahdi did not act alone in ordering or carrying out the destruction of the monuments although he was the only person to be charged and tried for them.³⁰ Based on his admissions and evidence from the Prosecution and witnesses, the Trial Chamber found that Al Mahdi acted as a co-perpetrator under the Rome Statute due to his direction of the demolitions, recruitment of those involved in the demolitions, purchase of the supplies needed to carry out the demolitions, active participation in several acts of destruction, and publicity of these activities.³¹

WHAT SENTENCE WAS IMPOSED BY THE ICC?

At the end of trial proceedings, the Prosecutor and defense presented the Trial Chamber with an agreed upon plea arrangement under which the Prosecutor recommended that Al Mahdi be sentenced from 9–11 years in prison.³² The Trial Chamber was under no obligation to comply with the terms of this arrangement if it was deemed inappropriate. However, the Trial Chamber agreed with the essential terms of the plea arrangement and sentenced Al Mahdi to 9 years in prison for his crimes, including time already served prior to sentencing.³³

WHAT WAS THE ICC'S RATIONALE FOR THE SENTENCE?

The Trial Chamber explained that there was no established punishment term for the crime but that, by using the terms of the preamble of the Rome Statute to provide additional background and guidance, the punishment was determined through considerations of retribution and deterrence.³⁴

The Trial Chamber held that retribution in this context is “not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes, which, by way of imposition of a proportionate sentence, also acknowledges the harm to the victims and promotes the restoration of peace and reconciliation.”³⁵ Part of these considerations involve balancing specific deterrence for

²⁸ *Id.* at para. 28.

²⁹ *Id.* at para. 44.

³⁰ *Id.* at para. 40.

³¹ *Id.*

³² *Id.* at para. 106.

³³ *Id.* at paras. 106–111.

³⁴ *Id.* at para. 66.

the person involved in the crime and general deterrence to ensure that the international community be put on notice of the ramifications of pursuing similar crimes.³⁶

Additionally, retribution in sentencing at the ICC “must be proportionate to the crime and the culpability of the convicted person.”³⁷ The Trial Chamber held that gravity in this context is “to be assessed in concreto, in light of the particular circumstances of the case. The sentences to be imposed must, therefore, reflect the gravity of the crimes charged.”³⁸

WHAT WAS THE ICC’S JUDGMENT IN THE CASE? HOW DID IT BALANCE AGGRAVATING AND MITIGATION CIRCUMSTANCES?

The Trial Chamber found Al Mahdi guilty of war crimes under Article 8(2)(e)(iv) as a co-perpetrator.³⁹

In evaluating aggravating and mitigating factors, the Trial Chamber stated that it cannot “‘double count’ any factors assessed in relation to the gravity of the crime as aggravating circumstances and vice versa.”⁴⁰ The standard for finding aggravating circumstances at the ICC is beyond a reasonable doubt.⁴¹ In the context of assessing aggravating circumstances, it is necessary that the determination “must relate to the crimes of which a person was convicted or to the convicted person himself.”⁴² Further, the Trial Chamber emphasized that “the absence of a mitigating circumstance does not serve as an aggravating circumstance.” The standard for mitigating circumstances is the balance of probabilities.⁴³ In this context, “[m]itigating circumstances need not be directly related to the crimes and are not limited by the scope of the charges or the Judgment. They must, however, relate directly to the convicted person.”⁴⁴

In this instance, the Trial Chamber found that there were no aggravating circumstances;⁴⁵ however, it was willing to consider Al Mahdi’s initial reluctance to order the destruction of the sites as a mitigating circumstance.⁴⁶ Similarly, the Trial Chamber found Al Mahdi’s good behavior once in custody and his admission of guilt to be mitigating circumstances,⁴⁷ as were Al Mahdi’s statements of remorse and acknowledgments of the wrongfulness of his conduct and pledging not to repeat it.⁴⁸

³⁵ *Id.* at para. 67.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at para. 71.

³⁹ *Id.* at para. 62–63.

⁴⁰ *Id.* at para. 70.

⁴¹ *Id.* at para. 73.

⁴² *Id.*

⁴³ *Id.* at para. 74.

⁴⁴ *Id.*

⁴⁵ *Id.* at para. 88.

⁴⁶ *Id.* at para. 93.

⁴⁷ *Id.* at para. 100.

⁴⁸ *Id.* at para. 105.

IN EVALUATING GRAVITY, HOW DID THE ICC BALANCE THE IMPORTANCE OF THE DESTROYED SITES TO THE LOCAL POPULATION AND TO THE INTERNATIONAL COMMUNITY?

The Trial Chamber found that “Timbuktu is at the heart of Mali’s cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints. The mausoleums reflected part of Timbuktu’s history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them. They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu.”⁴⁹

In addition to the damage to the people of Timbuktu, the Trial Chamber found that since the majority of the sites destroyed were UNESCO World Heritage sites, the “attack appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful inhabitants of Timbuktu, but also people throughout Mali and the international community.”⁵⁰ Further, the Trial Chamber found particular significance in the religious aspects of the case and the persecution of beliefs that was encompassed by the destruction of the sites, stating that it “considers that the discriminatory religious motive invoked for the destruction of the sites is undoubtedly relevant to its assessment of the gravity of the crime.”⁵¹

The Trial Chamber acknowledged the significance of both local and international interests in and connections to the Timbuktu sites that were destroyed by Al Mahdi. However, it placed the greatest emphasis for the gravity of its ruling on the intimate intersection between the shrines and mausoleums as cultural heritage sites and as religious sites.⁵² The ways in which the Trial Chamber valued the primacy of the sites as having religious importance suggests that the connection between cultural heritage and religion was of importance when determining the impact of cultural crimes under Article 8(2)(e)(iv).

However, the Trial Chamber nonetheless created a sentencing distinction between the gravity of crime and sentence appropriate for actions against persons and for actions against property.⁵³ Regardless, the Trial Chamber found that both forms of crime had sufficient gravity to merit punishment and a finding of guilt of war crimes at the international level.⁵⁴

HOW DID THE ICC HANDLE THE DIFFERENCE BETWEEN DAMAGE TO CULTURAL PROPERTY COMMITTED DURING ACTIVE HOSTILITIES AND IN THE POST-HOSTILITIES SETTING?

The Trial Chamber asserted that there is no difference in the protections owed to cultural heritage property during active armed conflict compared to the post-hostilities setting.⁵⁵

⁴⁹ *Id.* at para. 78.

⁵⁰ *Id.* at para 80.

⁵¹ *Id.* at para. 81.

⁵² *Id.* at para. 79–81.

⁵³ *Id.* at para. 72.

⁵⁴ *Id.* at para. 77.

⁵⁵ *Id.* at para. 15.

This is particularly the case where the direct hostilities have ceased, but the area in question is under the control of occupying forces.⁵⁶ The Trial Chamber noted that “the element of ‘direct[ing] an attack’ encompasses any act of violence against protected objects and will not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group.”⁵⁷ Further, Article 8(2)(e)(iv) was found not to require “a link to any particular hostilities but only an association with the non-international armed conflict more generally.”⁵⁸

IS THE ICC'S PROSECUTION OF CULTURAL HERITAGE SIGNIFICANT PRECEDENT GOING FORWARD?

Yes. Cultural heritage crimes have featured prominently in recent and ongoing armed conflicts, for example, in Afghanistan,⁵⁹ Iraq,⁶⁰ Libya,⁶¹ and Syria.⁶² With this in mind, the United Nations Security Council issued Resolution 2199 in 2015 in order to highlight the dangers of cultural heritage destruction, focusing on Syria and Iraq in particular. UNESCO and Interpol have also taken an interest in cultural heritage crimes, increasing awareness of them and evidence available to support their prosecution in the future.⁶³

Further, international conflicts, such as those involving the so-called Islamic State of Iraq and Syria (“ISIS”),⁶⁴ have been identified by the United Nations as creating a threat to peace and security and a specific threat to cultural heritage sites.⁶⁵ Although the *Al Mahdi* decision dealt with cultural heritage crimes in noninternational armed conflict, it established the groundwork for a definition of cultural heritage and for the punishment of acts of destruction that take into account the impact of the cultural heritage sites in

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at para. 18.

⁵⁹ Perhaps the most symbolic act of cultural heritage site destruction in Afghanistan came from the Taliban’s demolition of the Buddhas of Bamiyan. See UNESCO, *Cultural Landscape and Archaeological Remains of the Bamiyan Valley*, at <http://whc.unesco.org/en/list/208> (last visited Oct. 30, 2016).

⁶⁰ Key examples of cultural heritage sites being destroyed as part of concerted conflict planning in Iraq include the Nineveh site itself and the Mosul library. See Oriental Institute, *Oriental Institute Statement on Cultural Destruction in Iraq*, at <https://oi.uchicago.edu/about/statement-cultural-destruction-iraq> (last visited Oct. 30, 2016).

⁶¹ In Libya, the culturally and religiously vital Sufi shrines located throughout the country have been destroyed as a part of recent conflicts. See UNESCO, *UNESCO Director-General Calls on All Parties to Protect Libya’s Unique Cultural Heritage*, available at <http://icorp.icomos.org/index.php/news/29-unesco-director-general-calls-for-an-immediate-halt-to-destruction-of-sufi-sites-in-libya> (last visited Oct. 30, 2016).

⁶² In Syria, there are numerous examples of intentional destruction and looting of cultural heritage sites as part of a coordinated plan of attack on the local population and to assert territorial control, such as the destruction of sites in Palmyra and Aleppo. See Syrian Cultural Heritage: APSA-report – April, May and June 2015, available at http://en.unesco.org/syrian-observatory/sites/syrian-observatory/files/Syrian_Cultural_Heritage_APSA-report-April-May-and-June-2015-.pdf (last visited Oct. 30, 2016).

⁶³ SC Res. 2199 (Feb. 12, 2015).

⁶⁴ ISIS is also varyingly known as the “Islamic State in Iraq and the Levant” (“ISIL”) and *Da’esh*.

⁶⁵ See United Nations Security Council, Report of the Secretary-General on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat, S/2016/92 (Jan. 29, 2016), at http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/92 (last visited Oct. 30, 2016).

question on the local and international populations. Given this, the *Al Mahdi* case will likely be an important guide for understanding the development of a core body of ICC law relating to cultural heritage crimes at the international level in the future.

To the extent that states either have the crime of destruction of cultural heritage already in their national laws, or have it by virtue of having incorporated Rome Statute crimes into their domestic legislation, there is also potential for prosecution of these crimes at the national level.

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