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The Situation in Mali

13.1 REFLECTION: THE SITUATION IN MALI

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INTRODUCTION

This chapter reflects on the Mali situation and the cases before the ICC, including the reimagined judgments. It first offers background to the conflict in Mali, before outlining the ICC proceedings relating to 'the situation in the Republic of Mali at the ICC. It then briefly introduces the original ICC cases in in this situation, the *Al Hassan* and *Al Mahdi* cases. The focus in on the *Al Hassan* judgment, sentencing decision[1], and reparations order[2], and the *Al Hassan* arrest warrant decision.[3]

The chapter then considers the feminist reimagining of select judgments and decisions. It first outlines the key facts and conclusions of each real decision, then considers how those decisions have been re-imagined from a feminist perspective in this book by authors Ameera Mahomed Ismail, Melissa McKay, Laura Graham, Annika Jones, Sarah Zarmsky and Emma Irving. This is followed by critical reflection on each rewritten decision.

The discussion closes by reflecting on what is needed to achieve more gender-just outcomes at the ICC and ponders whether this can only be achieved by going beyond existing rules.

[1] Judgment and Sentence, *Al Faqi Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016 (hereafter Al Mahdi Judgment and Sentence).

[2] Public Reparations Order, *Al Faqi Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017 (hereafter Al Mahdi Public Reparations Order).

[3] Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Situation in the Republic of Mali*, Public Redacted Version (ICC-01/12-01/18-35-Red2-tENG), Pre-Trial Chamber I, 22 May 2018 (hereafter Al Hassan Arrest Warrant Decision).

BACKGROUND TO THE CONFLICT

In January 2012, a non-international armed conflict arose in the West African Republic of Mali when the armed rebel group *Mouvement national de libération de l'Azawad* (National Movement for the Liberation of Azawad, MNLA) attacked the Malian armed forces military base in Menaka, a town in the north of Mali.[4] In April 2012, the Malian armed forces withdrew from Mali's north and armed groups subsequently took control of the area. From this point on, the conflict mostly concerned confrontations between different alliances trying to gain territorial control of the north including government forces, including government forces, the MNLA, al-Quaeda in the Islamic Maghreb (AQIM), Ansar Dine, *Le Mouvement pour l'unicité et le jihad en Afrique de l'Ouest* (Movement for Oneness and Jihad in West Africa, MUJAO), and 'Aran militias'.[5] As of the time of writing in June 2023, the conflict is ongoing.

After a military coup d'état in March 2012, the groups Ansar Dine and AQIM took control of the city of Timbuktu from early April 2012 until January 2013, imposing their religious and political stance on the local population. During the occupation, crimes against humanity and war crimes, including the destruction of historical and religious sites in Timbuktu, have been reported.

THE SITUATION IN THE REPUBLIC OF MALI BEFORE THE ICC

The Malian government referred the situation to the International Criminal Court (ICC) in July 2012. In 2013, the ICC Office of the Prosecutor (OTP) commenced an investigation into the alleged crimes carried out in Mali since January 2012, and concluded that there was a reasonable basis to believe that war crimes had been committed, including murder, the passing of sentences and the carrying out of executions without due process, cruel treatment and torture, intentionally directing attacks against protected objects, pillaging, and rape.[6] The situation in Mali was subsequently assigned to Pre-Trial Chamber I in 2013.

Thus far two cases exist within the situation in Mali. The first is the *Ahmad Al Faqi Al Mahdi* case (*Al Mahdi* case), concerned with war crimes relating to the destruction of protected objects. The case was heard by Trial Chamber VIII and resulted in the 2016 conviction of the defendant, who had pleaded guilty, and was sentenced to a nine-year term of imprisonment. In 2017, Trial Chamber VIII issued a reparations order for victims in this case. At the time of writing in June 2023, the second case, the *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* case (*Al Hassan* case), concerned with war

[4] ICC (OTP), 'Situation in Mali, Article 53(1) Report' (16 January 2013) 4, available at https://www.icc-cpi.int/sites/default/files/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf.

[5] *Ibid.*

[6] *Ibid.*

crimes and crimes against humanity, was being heard by Trial Chamber X *[Editors' note: in 2024 Al Hassan was convicted of certain crimes, but notably, not gender-based persecution. The judgment will not be appealed. That same year, the Court unsealed documents showing that the (then) Prosecutor had in 2017 initiated a third Mali case against the leader of Ansar Dine, with gender persecution among the charges].*

BACKGROUND TO THE ICC CASES CONCERNING THE SITUATION IN MALI

The below briefly introduces and provides background to the original ICC decisions within the situation in Mali, the *Al Mahdi* and *Al Hassan* cases, selected aspects of which have been reimagined in the coming chapters.

Prosecutor v. Ahmad Al Faqi Al Mahdi *Judgment and Sentence*

The 2016 ICC *Al Mahdi* judgment and sentence[7] concerned Al Mahdi's 2012 involvement in the war crime of intentionally directing attacks against buildings of a religious and historical character in Timbuktu, Mali, by armed forces between June and July 2012, pursuant to Article 8(2)(e)(iv) of the Rome Statute.[8] The buildings comprised nine mausoleums as well as one mosque. Most of the buildings were protected as UNESCO World Heritage sites. In 2015, Pre-Trial Chamber I issued a warrant for Al Mahdi's arrest for the aforementioned crime. After the confirmation of charges by Pre-Trial Chamber I in March 2016, Trial Chamber VIII was allocated the case, which was ultimately tried in August 2016. Al Mahdi admitted guilt in relation to the charged war crime and signed a plea agreement with the prosecution ahead of the confirmation of charges.

In September 2016, Al Mahdi was found guilty of attacking the respective protected sites as a war crime according to Article 8(2)(e)(iv), in the capacity of a principal within the meaning of Article 25(3)(a), and was sentenced to nine years' imprisonment. In the context of sentencing considerations, the Court pointed out that the charge was unique, in that Al Mahdi had been charged with crimes against property only and not with crimes against persons.[9] It should be noted that this case marks the first ICC judgment concerned with war crimes in the form of destruction of monuments and buildings. On 25 November 2021, Al Mahdi's sentence was reduced by two years.[10]

[7] Al Mahdi Judgment and Sentence, *supra* note 1.

[8] ICC Case Information Sheet, *Situation in the Republic of Mali, Prosecutor v. Ahmad Al Faqi Al Mahadi*, ICC-01/12-01/15 last updated January 2022, available at www.icc-cpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf (hereafter Case Information Sheet). All articles without further reference to legislation are those of the Rome Statute.

[9] Al Mahdi Judgment and Sentence, *supra* note 1, at § 77.

[10] Case Information Sheet, *supra* note 8.

Prosecutor v. Ahmad Al Faqi Al Mahdi *Reparations Order*

After the 2016 judgment and sentence in the *Al Mahdi* case, in August 2017, Trial Chamber VIII handed down a Public Reparations Order (Reparations Order) holding Al Mahdi liable for €2.7 million in individual and collective reparations associated with the above crime.[11] The Reparations Order became final in March 2018.[12]

Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

In 2018, ICC Pre-Trial Chamber I was tasked with deciding on the issuance of a warrant for Al Hassan's arrest, which marks the commencement of the second Malian case before the ICC.

On 20 March 2018, an application for the arrest of Al Hassan was filed by the Prosecutor.[13] The Prosecutor submitted that reasonable grounds existed to believe that Al Hassan was criminally liable for crimes against humanity, including torture, rape, sexual slavery, persecution on religious and gender grounds, and other inhumane acts carried out in Timbuktu between April 2012 and January 2013. In addition, there were reasonable grounds to believe that Al Hassan was criminally responsible for war crimes, including violence to persons, rape and sexual slavery, as well as intentionally directing attacks against buildings dedicated to religion and historic monuments.[14] On 27 March 2018, Pre-Trial Chamber I issued a warrant for the arrest of Al Hassan. Al Hassan was surrendered to the ICC by the Malian authorities and arrived at the Court's detention centre in the Netherlands on 31 March 2018.[15]

After the decision by Pre-Trial Chamber I on the Prosecutor's application for the issuance of a warrant in the *Al Hassan* case (re-imagined by Zarmsky and Irving in this volume), on 30 September 2019, Pre-Trial Chamber I committed Al Hassan to trial, making him the first person to sent to trial for gender-based persecution in the ICC. Charges against him were subsequently partially modified on 23 April 2020 and the trial commenced before Trial Chamber X on 14–15 July 2020. Trial Chamber X declared the closure of the submission of evidence on 8 February

[11] Al Mahdi Public Reparations Order, *supra* note 2, at § 134.

[12] ICC Press Release, 'Al Mahdi Case: Reparations Order Becomes Final' (8 March 2018), available at www.icc-cpi.int/news/al-mahdi-case-reparations-order-becomes-final.

[13] Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Situation in the Republic of Mali* (ICC-01/12-01/18-1-Secret-Exp), 20 March 2018.

[14] Al Hassan Arrest Warrant Decision, *supra* note 3, at § 2.

[15] ICC Case Information Sheet, *Situation in the Republic of Mali*, *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (ICC-01/12-01/18), last update February 2022, available at www.icc-cpi.int/sites/default/files/CaseInformationSheets/al-hassanEng.pdf.

2023 and heard closing statements in May 2023.[16] At the time of writing in June 2023, the Chamber's judgment has not yet been pronounced [*Editors' note*: in 2024 Al Hassan was convicted of certain crimes, but notably, not gender-based persecution].

FEMINIST REIMAGINING OF SELECT JUDGMENTS AND DECISIONS

This section considers the feminist reimagining of select judgments and decisions from the Mali situation.

Judge Ameera Mahomed Ismail: 'Cultural Heritage in Mali'

Original Decision

As per the established facts of the 2016 *Al Mahdi* judgment and sentence,[17] Al Mahdi had been a member of Ansar Dine since April 2012. During their occupation of northern Mali, Ansar Dine and AQIM established a local government, which included an Islamic tribunal and a morality brigade called Hesbah, tasked with preventing and supressing all things considered vices by the government. Al Mahdi headed up the morality brigade between April 2012 and September 2012 and was also involved in consulting for the Islamic tribunal, due to being recognised as a religious expert.[18]

The mausoleums and mosques held great religious importance for the people of Timbuktu. Especially the mausoleums, which were frequently visited to perform prayers, with some people considering them places of pilgrimage.

In his role as a religious expert and head of Hesbah, Al Mahdi, together with other Islamic jurists, unanimously opined that constructions over tombs were prohibited.[19] On this basis, at the end of June 2012, the leader of Ansar Dine instructed him as head of Hesbah to destroy the mausoleums. Even though Al Mahdi harboured initial reservations about this order, based on not wanting to upset relations between the occupiers and the local population, he, together with other individuals, executed the attacks between 30 June 2012 and 11 July 2012. Overall, he was involved in the destruction of ten of the most important sites in Timbuktu dedicated to religion and historic monuments, nine of which were considered UNESCO World Heritage sites. In his role, he organised the attacks and sourced the required equipment, which he distributed to brigade members during the relevant attacks.[20] He was personally present during the destruction of each site and supervised and directed perpetrators. He was actively involved in the destruction of a minimum of five sites.[21]

[16] See Situation in the Republic of Mali, Al Hassan Case – Summary, available at www.icc-cpi.int/mali/al-hassan.
[17] Al Mahdi Judgment and Sentence, *supra* note 1.
[18] *Ibid*, at § 33.
[19] *Ibid*, at § 36.
[20] *Ibid*, at §§ 37–40.
[21] *Ibid*, at § 53.

Reimagined Decision

In her reimagined decision, Judge Mahomed Ismail points out that the original 2016 judgment and sentence in the *Al Mahdi* case is largely free of reference to the relationship between women and the destroyed cultural property. She therefore reimagines the decision by analysing the significance of the mausoleums in Timbuktu to women, and how women have been impacted by their destruction.

Firstly, the rewritten decision differs significantly from the original as it provides in-depth contextualisation of the importance of the impacted mausoleums and mosques, by highlighting how they form an integral part of the religious lives of the local community.

Secondly, Judge Mahomed Ismail identifies a mismatch between the seemingly gender-neutral war crime of intentionally directing attacks against buildings,[22] which is traditionally interpreted to relate only to tangible objects, and the 'realities of cultural heritage and its destruction, which is that when tangible cultural heritage is destroyed, there is often a corresponding destruction of intangible cultural heritage'.[23] The judge defines intangible cultural heritage in line with the Report of the Special Rapporteur in the field of cultural rights as 'traditions, customs and practices, aesthetic and spiritual beliefs, vernacular or other languages, artistic expressions and folklore'.[24] The reimagined decision highlights that 'women, in particular, are central to the maintenance and vitality of cultural heritage worldwide and that this is often through women's roles in relation to intangible heritage'.[25] Consequently, Judge Mahomed Ismail points out that they would have liked to consider whether the intangible cultural heritage of Mali 'is so intertwined with the mausoleums and mosques that it should be considered as falling within the definition' of a war crime.[26] Judge Mahomed Ismail concludes, however, that they are currently prevented from broadening said definition due to the provision's clear wording. Subsequently, the judge calls upon state parties 'to consider the need to expand the current understanding of cultural heritage to better ensure that decisions, sentences, and reparations are commensurate with the entirety of cultural loss, not merely that which is "tangible"'.[27]

In the rewritten sentencing considerations, the question of the gravity of the crime is addressed. The decision highlights the particular importance of mausoleums for women, noting that a woman 'might seek solace or pray at a mausoleum if she cannot have children'.[28] Further, in the context of the gravity of the crime, Judge

[22] Article 8(2)(e)(iv) Rome Statute.
[23] Ameera Mahomed Ismail, Reimagined Decision, at § 24.
[24] *Ibid*, at § 20.
[25] *Ibid*, at § 25.
[26] *Ibid*, at § 26.
[27] *Ibid*, at § 27.
[28] *Ibid*, at § 93.

Mahomed Ismail highlights that an example of intangible heritage in this context is the plastering of the mosque, also referred to as *crépissage*, which must occur annually to preserve the buildings. Especially women and elderly persons are tasked with preparing the clay balls on the ground level which are then passed up to males to attach to the sides of the mosque.

Critical Reflection

Judge Mahomed Ismail's reimagined decision takes the opportunity to highlight how traditional judicial interpretations of seemingly gender-neutral war crimes can exclude the lived experiences of women from ICC decisions. By shining a light on the relationship between women and the destroyed cultural property, especially in relation to intangible property, She convincingly demonstrates that women's lived experiences are not always appropriately reflected in traditional interpretations of war crimes. Continuing to rely on a narrow interpretation and application of the law, which in this case focuses on tangible objects only, may mean missing opportunities for gender-sensitive judging at the ICC.

Her statement that would have liked to interpret cultural heritage in a more gender-sensitive way than is currently permitted by law emphasises the shortfalls of the current definition of cultural heritage in relation to the special circumstances of women. What would be required to overcome this issue and allow for more holistic assessments would be the broadening of the current conventional narrow definition of cultural property.

Despite being unable to move beyond this restriction rooted in current law, the judge calls upon state parties to create change regarding this situation, thus providing a clear example of what makes this judgment feminist.

Judge Melissa McKay: 'Al-Mahdi, Sentencing'

The subsequent rewriting, also concerned with the *Al Mahdi* case, turns its focus exclusively to the sentencing decision.

Original Decision

In the original sentencing decision, the Court found that retribution and deterrence are the primary objectives of punishment at the ICC.[29] To determine the relevant sentence, the Chamber subsequently considered the gravity of the crime, Al Mahdi's culpable conduct, and his individual circumstances.[30] The Chamber noted that while 'crimes against property are generally of lesser gravity than crimes against persons',[31] the damage Al Mahdi caused made the crime significant in this case

[29] Al Mahdi Judgment and Sentence, *supra* note 1, at § 66.
[30] *Ibid*, at § 75.
[31] *Ibid*, at § 77.

based on the following: ten sites (nine of which were UNESCO heritage sites) were completely destroyed, the attacks were carefully planned, and their impact on the population was intensified due to media reporting.[32] The Court did not find aggravating circumstances and saw mitigating circumstances in the fact that Al Mahdi was initially reluctant to destroy the respective sites and did not recommend using a bulldozer for their destruction.[33] Furthermore, he admitted his guilt,[34] cooperated with the prosecution,[35] expressed remorse and empathy for the victims,[36] and displayed good behaviour in detention.[37] On this basis, the Court sentenced Al Mahdi to nine years' imprisonment.

Reimagined Decision

In the rewritten sentencing decision, Judge McKay identifies a third purpose of sentencing, being the rehabilitation of the convicted person and their reintegration into society. This stands in contrast to the original decision, which considers retribution and deterrence as the primary objectives of punishment at the ICC. This third purpose is informed by restorative and transformative justice concepts, which focus on the offender taking responsibility for their actions as well as the provision of restitution to victims.

In the rewritten decision, Judge McKay, through treaty interpretation, clarifies that Article 77 provides the Court with discretion as to what type of penalty it can apply, and that penalties are not limited to custodial sentences. This marks a departure from traditional interpretations of Article 77, which seem to suggest that the ICC penalties regime does not allow for non-custodial sentences.[38] In support of this wider interpretation, however, Judge McKay draws on the Tokyo Rules, an international instrument designed to 'promote greater community involvement in the management of criminal justice',[39] in support of non-custodial sentences at the ICC. After providing an overview of domestic legal traditions and the imposition of 'alternative' sentences, the rewritten sentencing decision concludes that imposing alternative sentences is in accordance with the Rome Statute and that the Chamber has the authority to consider whether an alternative sentence is appropriate in this case.

Judge McKay outlines the respective mitigating circumstances, namely: (1) admission of guilt; (2) cooperation with prosecution; (3) remorse and empathy expressed to

[32] *Ibid*, at § 78.
[33] *Ibid*, at § 93.
[34] *Ibid*, at §§ 98–100.
[35] *Ibid*, at §§ 101–102.
[36] *Ibid*, at §§ 103–104.
[37] *Ibid*, at § 97.
[38] See Dejana Radisavljevic, 'ICC Commentary (Article 77)', Case Matrix Network (last updated 20 August 2020), available at https://cilrap-lexsitus.org/clicc/clicc/77/77; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford: Oxford University Press, 2016) 1159.
[39] Melissa McKay, Reimagined Judgment, at § 71.

the victims; (4) initial reluctance to commit the crimes; and (5) good behaviour in detention, then departs from the original decision by also focusing on Al Mahdi's rehabilitative potential and capacity for him to give back to the harmed community.

Consequently, the sentence imposed in the rewritten judgment does not exclusively rely on incarceration, as the original decision does, but sentences Al Mahdi to seven years of custodial imprisonment along with 3,765 hours of community service in the Trust Fund for Victims (TFV), UNESCO, or, pending Court and community approval, another similar organisations focused on culturally relevant and appropriate activities. Judge McKay points out that while the focus of this community service must be 'on rebuilding what Mr Al Mahdi helped destroy', the work undertaken in the context of the community service may also focus more broadly 'on building respect for religious diversity'.

Critical Reflection

Judge McKay finds a gap in the interpretation of sentencing objectives at the ICC which traditionally do not focus on rehabilitation. The conventional narrow interpretation of the purpose of sentencing excludes the possibility for offenders to make amends with victims and communities in the context of international criminal law. The rewritten decision seeks to close this gap by making the case for imposing non-carceral sentences at the ICC, thus calling into existence a new sentencing pathway. Such a novel approach requires not only an offender who is willing to undertake community service but also a harmed community which is willing to accept the service provided by the offender. While the formal structure of sentencing decisions limits the reimagined decision in commenting on this tension in depth, the decision does touch on balancing potentially competing interests by ordering the community service to be undertaken at the same time as the imprisonment. Consequently, the offender will not perform community service directly in the impacted community but serve it in the TFV or similar. Imposing non-carceral sentences at the ICC, although not without opposition, has the potential to positively impact both victims and offenders in future and marks a departure from the traditional focus on punishment in sentencing.

Through the rewrite of the *Al Mahdi* sentencing decision, Judge McKay builds on ideas from the feminist abolitionist movement. The rewritten decision emphasises the need to move away from the traditional, punitive interpretation of sentencing objectives and towards integrating rehabilitative approaches within sentencing at the ICC, if making amends with harmed communities and individual victims is to be taken seriously. That traditional punishment and mass incarceration does not necessarily have the potential to prevent crime against women[40] has long been

[40] See C. Maxwel and J. Garner, 'The Crime Control Effects of Criminal Sanctions for Intimate Partner Violence' 3(4) *Partner Abuse* (2012) 469–500.

noted in the national context by the anti-carceral feminist movement.[41] This movement challenges traditional punitive criminal responses to gendered violence, instead pointing to alternatives such as transformative and restorative justice.[42] Through the reimagined decision, Judge McKay ultimately advances these national reflections to the sentencing level at the ICC. Yet, and while acknowledging its structural constraints, the reimagined decision could have taken this further by emphasising the link to a greater extent, thereby strengthening the decision's feminist approach.

Laura Graham and Annika Jones: 'Reparations for Destruction of Cultural Property in Mali'

Judges Graham and Jones focus on rewriting the 2017 reparations order handed down in the Al Mahdi case.

Original Decision

In its 2017 Public Reparations Order decision in the *Al Mahdi* case, Trial Chamber VIII highlighted the importance of international cultural heritage,[43] noting that the attacks on protected buildings in this case had 'not only destroyed and damaged the physical structures',[44] but heavily impacted the identity of the local population. The decision identified that the reparations in the case at hand were designed 'to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed by Mr Al Mahdi, enable victims to recover their dignity and deter future violations'. The Chamber concluded that reparations could also assist in 'promoting reconciliation between the victims of the crime, the affected communities and the convicted persons'.[45] The order defined cultural heritage in line with its importance to the local community, here the people of Timbuktu, as well as its importance to humanity in general.[46]

The Chamber ordered reparations for three kinds of harm. Firstly, it noted that for the damage caused to the protected buildings, the reparations should be 'aimed at rehabilitating the Protected Sites with effective measures to guarantee

[41] See discussion in C. Taylor, 'Anti-Carceral Feminism and Sexual Assault – A Defense: A Critique of the Critique of the Critique of Carceral Feminism' 34 *Social Philosophy Today* (2018) 29–49.

[42] See, for example, discussion in M. Kim, 'Transformative Justice and Restorative Justice: Gender-Based Violence and Alternative Visions of Justice in the United States' 27(2) *International Review of Victimology* (2021) 162–172; C. McGlynn, 'Challenging Anti-Carceral Feminism: Criminalisation, Justice and Continuum Thinking' 93 *Women's Studies International Forum* (2022) 1–8, at 1.

[43] Al Mahdi Public Reparations Order, *supra* note 2, at § 13.

[44] *Ibid*, at § 19.

[45] *Ibid*, at § 28.

[46] *Ibid*, at § 51.

non-repetition of the attacks directed against them'.[47] The liability was set at €97,000.[48] Secondly, for consequential economic loss from the attacks, it ordered individual reparations, in the form of compensation, to address the losses suffered by those 'whose livelihoods *exclusively* depended upon the Protected Buildings'. This included, for example, businesses selling holy sand from the respective sites.[49] Moreover, as consequential economic losses also existed for the community of Timbuktu as a whole, the Chamber ordered collective reparations in the form of rehabilitation to address the economic harm to the community. The liability was set at €2.12 million.[50] Thirdly, the Chamber ordered individual reparations to compensate for the moral harm suffered by those whose ancestors' grave sites had been damaged by the attacks. In addition, it ordered collective reparations for the disruption of the culture of the Timbuktu community and the causing of mental pain and anguish, in the form of 'collective rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Building'.[51] The liability was set at €438,000.[52]

Reimagined Decision

In their rewritten reparations order, Judges Graham and Jones argue that the original Trial Chamber's findings as to which victims could receive individual damages for economic loss discriminated against women. On this basis, the judges reimagine the decision by incorporating a feminist perspective.

In contrast to the original reparations order, the rewritten order refers to traditional gender roles when contemplating the impact of economic harm. It highlights that women's economic links to mausoleums are more likely indirect as they are only allowed inside once they reach a certain age. In the rewritten order, Judges Graham and Jones caution that in order to avoid entrenchment of discrimination, there should not be a distinction between direct and indirect economic losses in relation to the destruction of the protected buildings. Rather, the focus should be on the extent to which victims were impacted by their destruction.

In the original reparations order, the Chamber did not consider Al Mahdi's crime as the proximate cause of property loss incurred when victims fled Timbuktu in the aftermath of the attacks.[53] In stark contrast, however, the rewritten decision does recognise economic losses suffered in this context. It highlights that this loss should be included in the reparations to ensure that particularly women and children are

[47] *Ibid*, at § 67. The buildings had already been restored at the time the Order was made.
[48] *Ibid*, at § 118.
[49] *Ibid*, at § 81.
[50] *Ibid*, at § 128.
[51] *Ibid*, at §§ 90, 104.
[52] *Ibid*, at § 133.
[53] *Ibid*, at § 102.

not negatively affected by an otherwise exclusive focus on the economic losses of business owners.

Comparable to the original decision, in the rewritten reparations order the judges award collective reparations for the community of Timbuktu as a whole. However, departing from the original, the rewritten order suggests, inter alia, that collective reparations could include programmes or actions designed to assist women, youth, and others towards generating income, as well as initiatives which promote the training of women and 'fostering discussions of the issue of non-discrimination in access to cultural heritage sites as a means of guaranteeing non-repetition of the abuses in this case'.[54]

The original decision simply ordered that Al Mahdi make necessary individual reparations for the mental pain and anguish of those whose ancestors were buried in the mausoleums damaged in the attacks.[55] Applying a feminist perspective to this aspect, Judges Graham and Jones in the rewritten order identify that male victims are more readily able to establish this connection due to the patrilineal method of family record keeping. As a consequence, the judges emphasise the importance of recognising 'female-based lines of ancestry', in the context of identifying groups which have a 'strong emotional connection to the destroyed sites', and orders individual reparations for 'those with a stronger emotional connection to the destroyed sites than the rest of the Timbuktu population'.[56]

Based on the above, the rewritten decision expands the award of individual reparations for consequential economic losses from only those 'whose livelihoods exclusively depended upon the Protected Buildings',[57] to also include those 'whose livelihoods were significantly affected by their destruction' and 'those who otherwise suffered significant personal economic loss as a consequence of their destruction, such as the loss of their homes as a result of displacement'. The Chamber concludes that this is warranted as 'their loss relative to the rest of the community is more acute and exceptional'.

The reimagined order also goes beyond the original in the context of implementation, noting that 'women's views are ordinarily only heard in certain conditions, such as "when they are old and considered wise"', thus cautioning that care must be taken to ensure that women are included in the process of developing a reparation scheme and as victims wishing to access the scheme. The Chamber remarks that this is particularly the case as the wife is subordinate in the 'Malian traditional family structure' and that women may therefore struggle to access the reparation schemes. The Chamber thus calls upon the TFV to introduce a process designed to allow women to increase their recognition and involvement in the development of a reparations scheme.

[54] Laura Graham and Annika Jones, Reimagined Decision, at § 89.
[55] Al Mahdi Public Reparations Order, *supra* note 2, at § 90, as well as collective reparations for the disruption of culture of the Timbuktu community as a whole.
[56] Graham and Jones, *supra* note 54, at § 97.
[57] Al Mahdi Public Reparations Order, *supra* note 2, at § 104.

Critical Reflection

Judges Graham and Jones identify parts of the original decision in which the Chamber failed to consider traditional gender roles. The original decision interprets economic harm extremely narrowly. The economic losses of business owners, who are more likely to be male than female, with women having more indirect economic links to the mausoleums, are considered economic harm. Yet the original Chamber refused to recognise the loss of personal property, including, for example, household items of persons fleeing Timbuktu, as consequential economic loss. The narrowness of the interpretation has the potential to negatively impact women and children as the loss of household items, livestock, and store wares will primarily impact females, who, in the traditional Malian family setting, are largely responsible for domestic tasks. By applying a feminist lens, Judges Graham and Jones demonstrate how the original decision discriminates against women by failing to consider their unique circumstances and the existence of power relationships.

In addition, the narrow definition of eligible victims qualifying for reparations for moral harm as only those persons whose ancestors had been buried in the destroyed mausoleums largely excludes women unable to prove this connection due to traditional record keeping. The judges clearly demonstrate that reliance on narrow interpretations, which fail to consider notions of privilege, discrimination, and gender roles, more likely exclude women from reparations schemes and hinder them from recuperating their losses. Judges Graham and Jones plausibly outline how the law could have been applied to avoid disadvantaging women and sketch convincing avenues of how women can be included to a greater extent in the process of developing and carrying out reparation schemes.

The rewritten order highlights the importance for ICC judicial decisions to be more mindful of traditional gender roles and how these roles may impact a particular situation.

Sarah Zarmsky and Emma Irving: 'Digital Evidence'

While the previous rewritten decisions all focused on the *Al Mahdi* case, Judges Zarmsky and Irving deal with aspects of the *Al Hassan* case.

Original Decision

Pre-Trial Chamber I decided on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan on 27 March 2018. It provided the analysis of the evidence and other information submitted by the Prosecutor separately on 22 May 2018.[58] The Pre-Trial Chamber's decision to issue a warrant for the arrest of Al Hassan is based on the following considerations.

[58] Al Hassan Arrest Warrant Decision, *supra* note 3.

Firstly, Al Hassan was a member of Ansar Dine and de facto chief of the Islamic police, playing a significant role and providing essential contributions between May 2012 and January 2013 in northern Mali. He was also involved in the work of the Islamic tribunal in Timbuktu and participated in executing its decisions. As part of his role, he participated in the destruction of mausoleums through the Islamic police.[59]

In its decision, the Pre-Trial Chamber found that there were reasonable grounds to believe that Al Hassan, as a co-perpetrator, had committed crimes against humanity against civilians as per Article 7 and war crimes according to Article 8.[60] The Chamber noted that evidence submitted by the Prosecutor inter alia included videos showing public whippings ordered by the Islamic tribunal, some of which were carried out by Islamic police and Hesbah.[61] The evidence particularly showed that women 'were insulted, beaten and whipped relentlessly, sometimes until they bled, at the market and in their homes, for reasons such as that they were not sufficiently covered'.[62]

Reimagined Decision

In their reimagined decision, Judges Zarmsky and Irving depart from the original decision concerning the issuance of a warrant of arrest for Al Hassan by providing additional remarks on the use of video evidence and its evidentiary value before the Court. The first part of the additional remarks is concerned with the importance of the use of video evidence in the context of offences pertaining to violence against women, while the second part focuses on what impact crime recordings posted on internet platforms can have on victims.

After pointing out that the application by the Prosecutor in this case contains more than seventy mentions of the term 'video' in relation to various submissions, Judges Zarmsky and Irving note the increasing significance of video evidence in front of the ICC. This includes the *Al Mahdi* case, where video evidence was introduced at trial showing the accused destroying, and participating in the destruction of, protected buildings. The judges identify that video evidence appears to be traditionally used for crimes occurring in public spaces, such as the destruction of protected buildings in the *Al Mahdi* case, as opposed to crimes frequently occurring in private settings, including sexual and gender-based violence. The judges therefore note 'with satisfaction' that the use of video evidence in the Al Hassan case departs from this traditional approach as it is also used to support arguments relating to violence against women and girls. The judges call for an end to considering video evidence unsuitable in these cases and suggest that its value in establishing sexual and gender-based violence crimes should not be overlooked.

[59] *Ibid*, at §§ 172–178.
[60] *Ibid*, at § 14.
[61] *Ibid*, at § 73
[62] *Ibid*, at § 72.

Judges Zarmsky and Irving then turn to the posting of recorded crimes on the internet by perpetrators and others and contemplate the question of additional harm arising from this conduct. They conclude that the posting should be considered as an aggravating circumstance in the context of assessing the gravity of the crime in relation to the threshold that a case must meet to be admissible before the ICC. In the case at hand, Ansar Dine publicly posted videos of crimes on the internet, including executions and whippings. The judges argue that this conduct increases the gravity of the crime as victims are likely to experience additional harm through posts about their ordeal on internet platforms, which greatly widens the audience of their suffering. The harm may also be more severe in this case as unsuspecting relatives may come across the videos on the internet, thus leading to additional suffering. The sharing of videos via the internet, which is difficult to end, and which may continue for decades, may particularly impact female victims. The Chamber points out that stigma continues to be associated with certain offences which women frequently experience. Therefore, women may be haunted by these videos shared on the internet for the rest of their lives. With reference to domestic trials in which the posting of war crime videos on the internet was found to be a war crime itself, the Chamber leaves open the possibility for similar findings in future at the ICC under Article 8.

Critical Reflection

Judges Zarmsky and Irving offer unique insights into the importance of not overlooking the value of video evidence for establishing sexual and gender-based violence crimes as appears to have been standard practice at the ICC in the past. In addition, they apply a feminist lens when contemplating the consequences for victims of posted video recordings of crimes. It may not be legally plausible that judges at the ICC provide 'additional remarks' on issues they consider particularly important. Nevertheless, Judges Zarmsky and Irving's rewritten decision generally highlights the scope for gender-sensitive analysis when using digital evidence at the ICC.

The rewritten decision begins where the original decision ends. It reflects on the importance of video technology and what it means, especially for women, to have war crimes against them broadcast on the internet. The narrow and traditional use of video evidence in practice means that it is frequently considered unsuitable in cases concerning sexual and gender-based violence and is not relied upon. In addition, the rewritten decision calls attention to the fact that the posting of videos can have particularly severe and long-lasting consequences for female victims as stigma remains for certain offences frequently committed against women and girls. Yet the ICC has not given due consideration to this aspect in past decisions – in the context of the gravity threshold a case must meet to be admissible before the ICC or in considering the posting of respective videos as a war crime itself. Changing the above approaches may increase the use of video evidence in proceedings concerned

with domestic and sexual violence offences, possibly increasing conviction rates. It may also lead to a more appropriate reflection in ICC judgments of the suffering and stigma women can experience when crimes against them are broadcast on the internet.

After considering the original and reimagined decisions and pondering what makes them feminist, the below reflects on what would be needed to achieve more gender-just outcomes in ICC cases.

IMAGINING GENDER JUSTICE BEYOND EXISTING RULES?

Some may argue that law reform and going beyond existing rules is required to enhance gender-justice principles at the ICC. However, to effect change and improve a particular situation it is important to firstly identify any underlying issues. The feminist judgments relating to the situation in Mali have done precisely that. The four rewritten decisions focus on different aspects of ICC proceedings. Each shines a feminist light on gaps and spaces in the original decisions, where the situation and experiences of girls and women could and should have been considered, but where the Court failed to do so or did not do so holistically. As such, all rewritten decisions begin where the original decisions stop short. In addition, all rewritten decisions apply the law in a more gender-sensitive way than the original, thus showing what would have been possible in this context or how the law could be applied in future cases.

Without the feminist judgments relating to the situation in Mali, the gaps and blank spaces each rewritten decision identifies may have gone undetected. Illuminating these omissions and rewriting how they could have been addressed in a more meaningful gender-sensitive way offers exciting new perspectives on how gender can be taken more seriously in the context of ICC judicial decisions.

The point of feminist judgment writing is to demonstrate how the law can be applied in a gender-sensitive way within the existing legal system as opposed to focusing on how the law could be changed to achieve more gender justice. The novel perspectives offered in the rewritten judgments have the potential to influence and inspire ICC judges to strengthen their commitment to gender-sensitive judging. As such, the judgments are not only an important aspect of identifying shortfalls but also vital examples of how a gender-sensitive approach to judging at the ICC could look in future.

While law reform, including, for example, reform of the Rome Statute, may be one approach to achieve gender justice, this does not mean that change cannot be accomplished without such law reform. The feminist judgment project has the potential to inspire an attitudinal and behavioural change regarding gender justice at the ICC which may offer greater benefits than law reform could in this context. It remains to be seen whether more judges at the ICC will adopt a gender-sensitive perspective and, relatedly, whether gender justice will become an integral part of ICC processes.

13.2 CULTURAL HERITAGE IN THE AL MAHDI JUDGMENT AND SENTENCE

Ameera Mahomed Ismail

In 2016, Trial Chamber VIII handed down the judgment and sentence in the case of Mr Ahmad Al Faqi Al Mahdi.[63] Mr Al Mahdi pleaded guilty to the Article 8(2)(e)(iv) war crime of intentionally directing attacks against buildings dedicated to religion, committed during the occupation of Timbuktu by Ansar Dine in 2012. As part of a common plan, Mr Al Mahdi help to destroy ten of the most well-known and important mosques and mausoleums in Timbuktu. Trial Chamber VIII sentenced Mr Al Mahdi to nine years' imprisonment and the reparations order[64] required him to pay €2.7 million in individual and collective reparations.

Ameera Mahomed Ismail confirms the judgment and sentencing decision of the Trial Chamber, but considers the shortcomings of Article 8(2)(e)(iv), which permits a sole focus on tangible cultural heritage, and how Article 65 can result in the Court not hearing from marginalised victims. In doing so, Mahomed Ismail comments that 'hidden' labour, often undertaken by women, can only then be considered at the sentencing and reparations stage rather than forming part of the judgment itself. Mahomed Ismail's work discusses the current international norms and understanding of culture and asks that the ICC's jurisprudence be broadened when addressing this specific crime and plea agreements.

No.: ICC-01/12-01/15
Date: 27 September 2016

Original: English

TRIAL CHAMBER VIII(B)

Before: Judge Ameera MAHOMED ISMAIL

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF THE *PROSECUTOR v. AHMAD AL FAQI AL MAHDI*

Public

Judgment and Sentence

TRIAL CHAMBER VIII(B) (Chamber) of the International Criminal Court (Court or ICC) issues the following judgment and sentence, in the case of the *Prosecutor v. Ahmad Al Faqi Al Mahdi*, having regard to Articles 8(2)(e)(iv), 23, 25(3)

[63] Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016.
[64] Reparations, *Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017.

(a), 65 and 76 to 78 of the Rome Statute (Statute) and Rules 139 and 145 of the Rules of Procedure and Evidence (Rules).

INTRODUCTION ...

The Accused and the Charge

9. Mr Ahmad Al Faqi Al Mahdi (Mr Al Mahdi), also known as Mr Abu Turab, was born in Agoune in the region of Timbuktu, Mali,[65] to a family recognised in his community for having a particularly high knowledge of Islam.[66] He is a Touareg from the Ansar Touareg tribe and the son of a marabout (a Muslim religious leader and teacher)[67] who has a thorough knowledge of the Quran.[68] He is between thirty and forty years old.[69] In April 2012, Mr Al Mahdi joined Ansar Dine.[70]

10. Mr Al Mahdi is charged with intentionally directing attacks against ten buildings of a religious and historical character in Timbuktu, Mali, between around 30 June 2012 and 11 July 2012: (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 Mouhammed Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamed 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, being (ix) the Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum.

JUDGMENT

Applicable Law

Crime Charged

11. The war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute punishes the following act: '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.'

12. This is the charge to which the defendant has admitted guilt.

13. In order to prove the crime charged, the prosecution must show that:

[65] Public redacted version of ICC-01/12-01/15-78-Conf-Exp-Anx1-tENG, *Al Mahdi* (ICC-01/12-01/15), Prosecution, 9 September 2016, § 39 (hereafter Agreement).
[66] T-6, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_05729.PDF, at 39–40.
[67] T-4, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_05767.PDF, at 31.
[68] T-6, *supra* note 66, at 40.
[69] T-2, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_01929.PDF, at 4.
[70] T-6, *supra* note 66, at 13.

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[71] ...

19. The conventional understanding of cultural heritage is that it is made up of both tangible and intangible aspects. Nonetheless Article 8(2)(e)(iv) reflects the twentieth-century understanding of culture as solely constituting tangible objects. For example, Article 1 of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict defines 'cultural property' as 'a) movable or immovable property of great importance to the cultural heritage of every people ... b) buildings whose main and effective purpose is to preserve the movable or cultural property ... c) centers containing a large amount of cultural property'. This 'tangible objects' approach continued in the 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, where 'cultural heritage' was defined in Article 1 as being confined to 'monuments', 'groups of buildings', and 'sites'.

20. On the other hand, intangible cultural heritage is made up of 'traditions, customs and practices, aesthetic and spiritual beliefs, vernacular or other languages, artistic expressions and folklore'.[72]

21. Intangible cultural heritage is defined in Article 2 of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage as 'the practices, representations, expressions, knowledge, skills ... that communities, groups and, in some cases, individuals recognize as part of their cultural heritage'. Article 2 notes that intangible cultural heritage 'is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity'.

22. Further, the Preamble to that Convention considers 'the importance of the intangible cultural heritage as a mainspring of cultural diversity' and 'the *deep-seated interdependence between the intangible cultural heritage and the tangible cultural*

[71] War crime of attacking protected objects, Article 8(2)(e)(iv), Elements of Crimes.
[72] *Report of the Special Rapporteur in the Field of Cultural Rights*, A/HRC/31/59, 3 February 2016, § 49.

and natural heritage' (emphasis added). It also recognises 'that communities . . . play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity'.

23. Earlier this year, the Special Rapporteur in the field of cultural rights reported that both tangible and intangible cultural heritage 'should be understood in broad and holistic terms'.[73] The Special Rapporteur's report pointed out that there is a significant overlap between tangible and intangible heritage, and that attacks on each are interconnected.[74]

24. Article 8(2)(e)(iv) of the Statute is therefore in conflict with the realities of cultural heritage and its destruction, which is that when tangible cultural heritage is destroyed, there is often a corresponding destruction of intangible cultural heritage. In fact, some say that tangible and intangible cultural heritage are two sides of the same coin.[75]

25. The Chamber also recognises that women, in particular, are central to the maintenance and vitality of cultural heritage worldwide and that this is often through women's roles in relation to intangible heritage.[76]

26. Here, the Chamber would have liked to consider whether the intangible cultural heritage of Mali is so intertwined with the mausoleums and mosques that it should be considered as falling within the definition of Article 8(2)(e)(iv). However, the Chamber is currently unable to do so due to the clear wording of Article 8(2)(e)(iv).

27. The Chamber therefore urges state parties to the Statute to consider the need to expand the current understanding of cultural heritage to better ensure that decisions, sentences, and reparations are commensurable to the entirety of cultural loss, not merely that which is 'tangible'. This would allow the Court to consider the destruction of cultural property from a holistic perspective. . . .

Article 65 of the Statute . . .

30. As this is the first time Article 65 has been applied at this Court, the Chamber will briefly address some relevant matters relating to this provision. . . .

37. Pursuant to Articles 64(8)(a) and 65 of the Statute, an accused may make an admission of guilt at the commencement of the trial. However, Article 65 requires the Chamber to conclude that the admission is 'supported by the facts of the case',

[73] *Ibid*, § 49.
[74] *Ibid*, § 77.
[75] M. Bouchenaki, 'Editorial', 56 *Museum International* (2004) 10.
[76] UNESCO, *Synthesis Report. Activities in the Domain of Women and Intangible Heritage: International Editorial Meeting and Future Activities in the Domain*, June 2001, available at https://ich.unesco.org/doc/src/00160-EN.pdf, at 2.

such that the admission of guilt must be considered 'together with any additional evidence presented'.[77]

38. The Chamber acknowledges the Separate Opinion of Judge Péter Kovács,[78] in particular Judge Kovács' concern that Pre-Trial Chamber I's majority opinion 'gives the impression that it rests on mere assumptions due to the lack of support from the evidence presented to the Chamber'. It is unlikely that Judge Kovács' concerns would have been valid if Mr Al Mahdi had pleaded not guilty.

39. While this Chamber does not arrive at the same conclusion as Judge Kovács, it concedes that plea negotiations might necessarily confine the issues and truncate the court process. However, the process by which the prosecution and defence make oral submissions by way of evidence, from the bar table, may not foster an environment such that the Chamber can deliver a decision that presents a 'full account of the relevant facts and law in order to reveal the transparency of the judicial process and guarantee a considerable degree of persuasiveness'.[79] This is notwithstanding the fact that the Chamber can access freely all evidence relevant to the case without the requirement that evidence must be tendered through a witness.[80]

40. Furthermore, the Chamber acknowledges that victim participation can be lost when the prosecution and defence enter into plea negotiations rather than the case proceeding to a contested trial. This means that the Chamber cannot be certain that it has heard from a diverse range of witnesses, in particular marginalised categories of victims.

41. Lastly, the Chamber acknowledges the view that international criminal courts establish 'an accurate and publicly accessible historical record'.[81] The convenience of an admission of guilt must weigh against this, and other factors.

Established Facts of the Case

42. The Chamber now turns to the established facts of the case.

43. The Chamber notes that Mr Al Mahdi's decision to plead guilty has the unfortunate effect of limiting the types of evidence that the Chamber was presented with, namely the views of victims and a consideration of the types of harm that the crime engages with. . . .

[77] Article 65(1)(c) and (2) of the Statute.

[78] Separate Opinion of Judge Péter Kovács, *Al Mahdi* (ICC-01/12-01/15), Pre-Trial Chamber I, 9 May 2016.

[79] Separate Opinion of Judge Péter Kovács, *Situation in Georgia* (ICC-01/15), Pre-Trial Chamber I, 27 January 2016, § 12.

[80] Article 65 of the Statute.

[81] R. E. Rauxloh, 'Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining' 10 *International Criminal Law Review* (2010) 739–770, at 739.

Context

45. Mali has a diverse cultural heritage,[82] and Timbuktu is at the centre of this. The residents of Timbuktu are diverse,[83] and Islam is the common denominator that brings together the city's residents.[84]

46. Timbuktu played an important role in the early dissemination of Islam, and became a centre of training and education in the West African region due to the existence of scholars, universities, and the city's status as a centre of trade.[85] Most of these scholars became saints.[86] Timbuktu is also known as 'the City of 333 Saints'.[87]

CONTEXTUALISING THE MAUSOLEUMS AND MOSQUES

47. The mausoleums of these saints and the mosques were an integral part of the religious lives of the city's residents, who frequently visited them as places of worship and pilgrimage.[88] They reflected the people's commitment to Islam and provided psychological safety nets, to the extent that they were viewed as protection.[89]

48. The Sheikh Sidi El Mokhtar Ben Sidi Mouhammed Al Kabir Al Kounti Mausoleum was visited by the people of Timbuktu to pray if they were faced with a dilemma or important decision.[90] Locals attended the Alpha Moya Mausoleum to make offerings, and to pray on Tabaski and in Ramadan.[91] Many worshippers prayed at the tomb of Sheikh Sidi Ahmed Ben Amar Arragadi, including pilgrims of Kunti origin from Morocco, Algeria, Niger, Libya, Mali, and Tunisia.[92] Worshippers would go to the Sheikh Mouhamed El Mikki Mausoleum for spiritual retreats.[93] The Sidi Yahia Mosque door had not been opened for 500 years, and, according to legend, opening it would lead to the Last Judgment.[94] The Ahmed Fulane and Bahaber Babadié Mausoleums adjoined the western wall of the Djingareyber Mosque, located at the heart of Timbuktu; many people visited them on Mondays and Fridays, as well as during major religious festivals.[95]

[82] T-5, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_05772.PDF, at 77.
[83] Agreement, *supra* note 65, at § 26.
[84] *Ibid*, at § 26.
[85] T-5, *supra* note 82, at 78.
[86] *Ibid*, at 78.
[87] Agreement, *supra* note 65, at § 105.
[88] Ibid, at § 26.
[89] T-5, *supra* note 82, at 80.
[90] Agreement, *supra* note 65, at § 67.
[91] *Ibid*, § 73.
[92] *Ibid*, § 82.
[93] *Ibid*, § 85.
[94] *Ibid*, § 89.
[95] *Ibid*, § 96.

THE ROLE OF THE COMMUNITY

49. The Chamber can gather from the material before it that the mausoleums and mosques were 'cherished by the community'.[96] The population of Timbuktu itself was involved in the upkeep of the monuments through the process of *crépissage*, or the plastering of the mosque.[97] At the neighbourhood level, materials are collected and meetings are held.[98] The event brings together the community as a whole.[99]

50. The Chamber considers this further in its analysis of the gravity of the crime.

Decision to Attack the Mausoleums and Mosques …

The Attack and Mr Al Mahdi's Responsibility

54. The attack was carried out between 30 June 2012 and 11 July 2012.[100] Mr Al Mahdi and other individuals adhering to the same common plan destroyed ten of the most well-known and important sites in Timbuktu.

55. These sites were all dedicated to religion and historic monuments, and none were military objectives. Except for the Sheikh Mohamed Mahmoud Al Arwani Mausoleum, all of the buildings were protected UNESCO World Heritage Sites.[101] …

Findings

72. In view of these findings, the Chamber considers that all of the elements for the war crime of attacking protected objects are established. …

Conclusion

74. The Chamber is satisfied beyond reasonable doubt that all of the essential facts of the crime charged are proven, having regard to the admission of guilty, the hearings held, and the evidence brought forward.

SENTENCE

75. Having concluded that Mr Al Mahdi is responsible for intentionally attacking the above-mentioned objects as a co-perpetrator, the Chamber will now turn to the determination of the appropriate sentence. The submissions made by the parties and participants are addressed in the course of the analysis. …

[96] T-2, *supra* note 69, at 6, 19, 21.
[97] *Ibid*, at 25.
[98] T-4, *supra* note 67, at 18.
[99] *Ibid*, at 18.
[100] Agreement, *supra* note 65, at § 30.
[101] *Ibid*, § 33; T-5, *supra* note 82, at 53.

Applicable Law

Analysis

84. In order to determine the appropriate sentence, the Chamber will consider: (i) the gravity of the crime; (ii) Mr Al Mahdi's culpable conduct; and (iii) his individual circumstances. Rule 145(1)(c) factors and aggravating and mitigating circumstances are discussed in the course of the analysis when relevant. . . .

Gravity of the Crime

88. Mr Al Mahdi has been charged with crimes against property. Although this may be considered of lesser gravity than crimes against persons,[102] this crime has 'hit and harmed the people in question at all levels, intellectually, spiritually, and at the very core of their being'.[103]

89. The legal representative for victims, Mr Mayombo Kassongo, provided valuable assistance to the Chamber in determining the gravity of the crime. He submitted that 'heritage is not something frivolous or a luxury item, heritage is part of whom we are, it is an extension of ourselves . . . if heritage is destroyed we are like a traveller without any belongings, like beings without a soul, history or memory'.[104]

90. The Chamber also accepts the Prosecutor's assertion that 'culture is who we are. Our ancestors created paintings, sculptures, mosques, temples and other forms of cultural possessions all around us. They put their hearts and souls into the creation of such cultural heritage so that it represents the cultural identity of their times and is passed on for the benefit of future generations'.[105]

91. The impact of the destruction had a calamitous effect on the citizens of Timbuktu. During the destruction of the mausoleums, an inhabitant of Timbuktu cried out in desperation that 'Timbuktu is about to lose its soul . . . Timbuktu has on its throat the sharp knife of coldblooded assassins'.[106] Another inhabitant said, '[t]hey have destroyed everything we have'.[107] The Minister of Culture of Mali called the destruction 'an attack on the lifeblood of our souls, on the very quintessence of our

[102] Decision on Sentence Pursuant to Article 76 of the Statute, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 23 May 2014, §§ 42–43; Observations de la Défense sur les principes devant gouverner la peine et les circonstances aggravantes et/ou atténuantes en la cause, en conformité avec l'ordonnance ICC-01/12-01/15-99 de la Chambre (ICC-01/12-01/15-141-Conf), *Al Mahdi* (ICC-01/12-01/15), Defence, 20 September 2016, §§ 121–123, 127–128; T-6, *supra* note 66, at 52–58.

[103] T-6, *supra* note 66, at 8.

[104] *Ibid*, at 6.

[105] T-4, *supra* note 67, at 19.

[106] T-2, *supra* note 69, at 12.

[107] *Ibid*, at 12.

cultural values. Their purpose was to destroy our past … our identity and, indeed, our dignity'.[108]

92. It is clear that the mausoleums and mosques are important to the people of Mali and the international community. They are not merely walls and stones.[109] At a national level, the mausoleums and mosques have important religious, cultural, and social significance.[110] At the international level, they stand as symbols of Timbuktu's intellectual and spiritual past.[111] In fact, the Chamber heard evidence that Timbuktu is considered to match the role that the city of Florence played in Renaissance Europe as a centre of intellectual and religious life and teaching.[112] In that way, the mausoleums and mosques were the embodiment of Malian history in tangible form.[113]

93. In some Muslim countries such as Mali, mausoleums are used by the community when they find themselves in a position of weakness and an inability to find solutions to the problems themselves.[114] The community then looks to the saints, who are perceived to be close to God, and pleads with them.[115] For example, a woman might seek solace or pray at a mausoleum if she cannot have children.[116]

94. According to UNESCO Witness P-151, the population is extremely attached to both their tangible heritage, being the mosques and mausoleums, and intangible heritage.[117] One example of intangible heritage is *crépissage*, or the plastering of the mosque. Due to climatic events that erode the plastering, *crépissage* must be done annually to preserve the structures.[118] Witness P-151 testified that *crépissage* is a collective effort done by the population.[119] Women and the elderly prepare balls of clay at the bottom, which are passed up to the males hanging on the sides of the mosque.[120]

95. The practice of *crépissage* is not merely technical. Rather, it corresponds with a ritual found in many African societies which aims to ward off bad luck and to ensure good rains.[121] This link is important; the belief that blessings will be received (good rains) makes the task of *crépissage* more attractive.[122]

[108] *Ibid*, at 15–16.
[109] *Ibid*, at 13.
[110] Agreement, *supra* note 65, § 27.
[111] *Ibid*, § 27.
[112] T-5, *supra* note 82, at 44.
[113] T-4, *supra* note 67, at 17.
[114] T-6, *supra* note 66, at 41.
[115] *Ibid*, at 41.
[116] *Ibid*, at 41.
[117] T-5, *supra* note 82, at 39.
[118] *Ibid*, at 39.
[119] *Ibid*, at 39.
[120] *Ibid*, at 39–40.
[121] MLI-OTP-0028-0598, *Rapport d'expertise sur l'état inteérieur et extérieur des mausolées, mosques et autres monuments situés à Tombouctou et sa region*, 27 February 2015, available at www.icc-cpi.int/sites/default/files/Evidence/MLI-OTP-0028-0586_redacted.pdf, at 12–13.
[122] *Ibid*, at 12–13.

DEFENCE SUBMISSIONS ON GRAVITY

96. The defence, in their oral submissions, outlined how different schools of thought within Islam were created.[123] They submitted that Ansar Dine considered that it followed the Wahhabi school, which totally forbade people from building tombs.[124]

97. Mr Kassongo confirmed that the notion of seeking assistance from saints has become a debated issue within Islam. He submitted that the Maliki sect, prominent in North Africa and some sub-Saharan regions, has allowed for Sufism to find a place for seeking this assistance.[125] This is in contrast to the Wahhabi sect, which prohibits and condemns these practices.[126]

98. While the Chamber considers this to be a relevant factor, it does not consider it to be a mitigating or aggravating factor.

FURTHER EVIDENCE THE CHAMBER MAY HAVE CONSIDERED

99. The Chamber appreciates that it has received evidence regarding the views of the community. However, the Chamber reiterates its view that given the circumstances of this matter, it has not had the benefit of being presented the views of further victims and a consideration of the types of harm that results from such a crime, specifically with respect to women and other minority groups.

100. As this is the first time this Chamber has considered the application of Article 8(2)(e)(iv) of the Statute, it may have benefited from submissions regarding the destruction of cultural heritage at a national level.

101. In a similar fashion, commencing in October 2011, several Sufi shrines, tombs, and libraries were desecrated or destroyed in Libya.[127]

102. Earlier this year in Tasmania, Australia, ochre stencils on a cave wall were destroyed. Indigenous Australian traditional owners said the hand stencils were made during large clan gatherings between 800 and 8,000 years ago. The chairman of the Tasmanian Land Council, Clyde Mansell, reported that 'what makes it sacred is the way in which it was used, and the process that went into making those hand stencils … It's not just a hand stencil, it's the story that goes with the hand stencils that turns it into a sacred site. If we can't protect that hand stencil, then we can't keep it in our interpretation for generations to come'.[128]

[123] T-6, *supra* note 66, at 41–42.
[124] *Ibid*, at 41.
[125] *Ibid*, at 41–42.
[126] *Ibid*, at 42.
[127] UN, 'UN Independent Experts Condemn Destruction of Sufi Religious Sites in Libya', UN News, 10 September 2012, available at https://news.un.org/en/story/2012/09/419122#:~:text=In%20August%2C%20several%20sites%20were,and%20libraries%20were%20also%20targeted.
[128] C. Wahlquist, 'Aboriginal sacred site up to 8,000 years old destroyed by "cultural vandals"', *The Guardian*, 3 June 2016, available at www.theguardian.com/australia-news/2016/jun/03/aboriginal-sacred-site-up-to-8000-years-old-destroyed-by-cultural-vandals.

103. An understanding of how the destruction of cultural heritage affects communities at large would have benefited the Chamber in its determination of the sentence. . . .

Determination of the Sentence

110. The Chamber finds that the crime for which Mr Al Mahdi is being convicted is of significant gravity. The Chamber has considered the aggravating and mitigating factors. Taking into account all of these factors, the Chamber sentences Mr Al Mahdi to nine years of imprisonment.

111. The Chamber notes that none of the parties or participants requests the imposition of a fine or order of forfeiture under Article 77(2) of the Statute and Rules 146 and 147 of the Rules. As such, the Chamber finds that imprisonment is a sufficient penalty.

112. Pursuant to Article 78(2) of the Statute, Mr Al Mahdi is entitled to have the time he has spent in detention deducted from his sentence, in accordance with an order of this Court.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

CONVICTS Mr Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under Articles 8(2)(e)(iv) and 25(3)(a) of the Statute;

SENTENCES Mr Al Mahdi to nine years of imprisonment;

ORDERS the deduction of the time Mr Al Mahdi has spent in detention, pursuant to an order of this Court, from his sentence; and

INFORMS the parties and participants that reparations to victims pursuant to Article 75 of the Statute shall be addressed in due course.

Done in both English and French, the English version being authoritative.

Judge Ameera Mahomed Ismail, Presiding Judge
Dated 27 September 2016
At the Hague, The Netherlands

13.3 SENTENCING AL MAHDI

Melissa McKay

In 2016, Trial Chamber VIII sentenced Mr Ahmad Al Faqi Al Mahdi to nine years' imprisonment after he pleaded guilty to the Article 8(2)(e)(iv) offence of intentionally directing attacks against buildings dedicated to culture and religion in Mali, Timbuktu, in 2012.[129]

[129] Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016.

In this rewritten sentence, Melissa McKay disrupts the notion that Articles 77 and 78 of the Rome Statute restrict the ICC to imposing sentences of imprisonment. Using principles of restorative justice and placing a strong focus on the objective of rehabilitation, McKay explores how non-carceral sentences are available at the ICC due to the use of the permissive language of 'may' rather than the directive language of 'shall'. She notes that such a sentence should only be considered where the situation of the crime and the affected community permit such a sentence to be delivered. McKay places the convicted offender as part of the global community that the preamble of the Rome Statute professes to advocate for, noting that while each person will have a different rehabilitative potential, the gains from such an approach are evident through domestic jurisprudence.

In applying this approach, McKay sentences Mr Al Mahdi, with the support of the community of Timbuktu and Mr Al Mahdi himself, to seven years of custodial imprisonment with 3,765 hours of community service to be served concurrently. In doing so, McKay provides a framework for future judicial officers to examine the possibilities available to them in sentencing applications and appeals.

No.: ICC-01/12-01/15
Date: 27 September 2016

Original: English

TRIAL CHAMBER VIII(B)

Before: Judge Melissa MCKAY

SITUATION IN THE REPUBLIC OF MALI
IN THE CASE OF THE *PROSECUTOR v. AHMAD AL FAQI AL MAHDI*

Public

Judgment and Sentence

SENTENCE

1. Having concluded that Mr Al Mahdi is responsible for intentionally attacking the above-mentioned protected objects as a co-perpetrator, the Chamber will now turn to the determination of the appropriate sentence. The submissions made by the parties and participants are addressed in this analysis.[130]

Applicable Law

2. For the purposes of determining the sentence, the Chamber has considered, inter alia, Articles 21, 23, 76, 77, and 78 of the Statute and Rules 143–148 of the Rules.

[130] The Chamber would like to thank Aicha Raeburn-Cherradi and Genevieve Westrope for their invaluable research support, without which this judgment would not be complete.

Purposes of Sentencing

3. Articles 77 and 78 of the Statute do not specify the purpose of sentences at the Court.

4. Deterrence is one objective of sentencing, as is denunciation, or the 'expression of society's condemnation of the criminal act and of the person who committed it'.[131] A third objective is the rehabilitation of the convicted person and the promotion of their reintegration into society.[132] Rehabilitation of the perpetrator is crucial where criminal sentences seek to incorporate concepts of restorative and transformative justice, which have, in the past few decades, become increasingly common elements of domestic criminal law while also gaining international prominence.[133]

5. The Chamber understands restorative justice to focus on the provision of restitution to the victims, the perpetrator taking responsibility for their actions, and the role of a sentence in contributing to reconciliation.[134] In essence, it focuses on repairing the broader harm caused by criminal behaviour, ideally through an inclusive and cooperative process.[135] In placing a greater emphasis on restorative justice, a sentence may assist in repairing harms suffered by individual victims and the community as a whole, as well as developing a more meaningful opportunity for the convicted person to take responsibility for their actions. A correct application of restorative justice approaches will consider the needs of the victim, the community, and the perpetrator, which necessitates an analysis of their rehabilitative potential.[136]

6. The Chamber notes the unique circumstances of the present case, where Mr Al Mahdi has pleaded guilty to the crime with which he has been charged, and considers that a 'guilty plea is accepted as a first step to rehabilitation of the perpetrator and a positive factor towards reconciliation of the offended community'.[137]

7. The Chamber views this as an opportune moment to provide further guidance on the sentencing objective of rehabilitation.

[131] Decision on Sentence, *Katanga* (ICC-01/04-01/07), Trial Chamber, 23 May 2014, § 38 (hereafter Katanga Sentence).

[132] See, for example, *ibid*, at § 38. Referred to by this Chamber as simply 'rehabilitation'.

[133] In 2005, it was estimated that 80–100 countries were using some form of restorative justice in addressing crime, see D. Van Ness, *An Overview of Restorative Justice around the World*, Eleventh United Nations Congress on Crime Prevention and Criminal Justice: Workshop 2: Enhancing Criminal Justice Reform, Including Restorative Justice, April 2005, 1, 5–15. In the international context, see for example, *Handbook on Restorative Justice Programmes* (1st ed., New York: UNODC, 2006).

[134] Supreme Court of Canada, *R v. Gladue*, [1999] 1 SCR 688, judgment of 23 April 1999 (hereinafter *Gladue*), at § 43; ECOSOC Res. 2000/12, 13 August 2002, section I, §§ 2–4.

[135] Van Ness, *supra* note 133, p. 3.

[136] GA Res. 45/110, 14 December 1990 (hereafter Tokyo Rules), Rules 1.4 and 1.5.

[137] Sentencing Judgment – Separate Opinion of Judge Mumba, *Deronjić* (IT-02-61-S), Trial Chamber, 30 March 2004, § 2 (hereafter Deronjić Separate Opinion of Judge Mumba).

8. Regrettably, the rehabilitative objective has not been judicially examined in earnest by this Court, as the *Katanga* sentencing decision simply stated that rehabilitation was to be accorded limited weight.[138] There, without reference to jurisprudence or any other sources, the *Katanga* Chamber held that the objective of easing the convicted person's reintegration into society 'cannot be considered to be primordial as the sentence on its own cannot ensure the social reintegration of the convicted person'.[139] The *Katanga* Chamber provided no further analysis on this point.

9. With respect to the *Katanga* Chamber's suggestion that, for an objective of sentencing to be primordial the sentence must, on its own, ensure the objective is achieved, this Chamber disagrees. Were the *Katanga* Chamber's statement true with respect to rehabilitation then, likewise, neither deterrence nor denunciation could be primordial objectives of sentencing. A sentence cannot *ensure on its own* that an individual, or the general public for that matter, is deterred from committing a crime.[140] Nor can a sentence be said to satisfy every party to the process, or global observer for that matter, in terms of denunciation – it is trite to say that the appropriateness of a sentence, for either being too harsh or too lenient, is an oft-debated topic, in both domestic and international criminal law.

10. Sentencing, at its core, is about judging another human being – a member of our global community, with whom we share common bonds. It is a delicate science, guided by the law of this Court as well as general criminal legal principles, where judges are tasked with imposing sentences that best reflect each objective in light of all the circumstances of the individual and the crime in question. Though it is the intention of any criminal court to impose a sentence that achieves its objectives, the law is subject to the practical limitations of reality: 'Justice is the aspirational application of law to life.'[141] A court, on its own, cannot ensure any single objective;

[138] Katanga Sentence, *supra* note 131, at § 38.

[139] *Ibid*, at § 38.

[140] It is long-acknowledged that individual sanctions may not result in a sufficient deterrent ('I am too well aware of the weaknesses of juridical action alone to contend that in itself your decision under this Charter can prevent future wars. Judicial action always comes after the event. Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible.' 'Second Day, Wednesday, 11/21/1945, Part 04', in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945–11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947, 98–102). Further, the Chamber takes note of academic literature that has consistently demonstrated that neither general nor specific deterrence is so straightforward that recidivism is reduced through the application of a criminal sanction, see M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007); M. Mennecke, 'Punishing Genocidaires: A Deterrent Effect or Not?' in S. Totten (ed.), *The Prevention and Intervention of Genocide* (New York: Routledge, 2008) 319–339.

[141] Supreme Court of Canada, *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, judgment of 14 May 2015 (hereinafter *Yukon Francophone School Board*), at § 34.

a court can only impose a just and appropriate sentence that is mindful of each of its objectives, and enforceable pursuant to its law.

11. Acknowledging life outside the legal corridors through which we tread, including the reality that sentences pronounced in a courtroom are subject to limitations in terms of their practical impact, is not to say that the sentencing process and its underlying objectives are moot. Rather, it is to acknowledge the complexities of the overarching context, and that the criminal trial process is but one avenue through which justice, accountability, and healing are pursued.

12. In the international criminal context, certain perpetrators may be prosecuted as the relevant conflict rages on, while others may appear before a court decades after the fact. Each of these scenarios, and those existing between the two ends of that spectrum, present challenges in crafting appropriate sentences.

13. The existence of such challenges, combined with the apparent tension between the objective of rehabilitation and a traditionally punitive approach to sentencing, have regrettably served to sideline the rehabilitative component of sentencing in the international criminal context.

14. Turning to the consideration of rehabilitation at the ad hoc and hybrid tribunals, the Chamber considers the *Čelibići* Trial Chamber's general reference to the objective of rehabilitation, where it noted the following:

> The factor of rehabilitation considers the circumstances of reintegrating the guilty accused into society. This is usually the case when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to reintegrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, [their] circumstances, [their] ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard.[142]

15. In a separate opinion, Judge Mumba expanded on rehabilitation: international justice 'is not about unfair retribution; if that were the case, humanity should forget about reconciliation'.[143] Judge Mumba further cautioned against an overemphasis on vengeance, which could manifest through harsh sentences following guilty pleas, and opined that 'rehabilitation, after turmoil, may serve to reduce the incidence of political instability and conflict'.[144]

[142] Judgment, *Mucić et al.* (IT-96-21), Trial Chamber, 16 November 1998 (hereafter Čelebići TJ), § 1233.
[143] Deronjić Separate Opinion of Judge Mumba, *supra* note 137, § 3.
[144] *Ibid*.

16. Generally, ad hoc tribunals have supported access to rehabilitative programming,[145] but, as in *Katanga*, have held the objective itself subject to an 'undue weight' caveat.[146] For example, the *Čelibići* Appeals Chamber considered that:

> Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a *predominant* role in the decision-making process . . . Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight.[147]

17. The jurisprudence from the ad hoc tribunals has not, however, provided guidance on the threshold for undue weight in balancing any sentencing objective.[148] Though rehabilitation has typically been accorded lesser weight, judges have equally held that deterrence 'must not be accorded undue prominence in the overall assessment of the sentences to be imposed'.[149] In fact, the *Čelibići* Appeals Chamber further held that it was erroneous for a trial chamber to state that deterrence was the most important factor to consider.[150]

18. Meanwhile, domestic sources of law suggest that, for certain crimes, though the objectives of deterrence and denunciation may be more prominent, this does not negate the rehabilitative component of the sentence.[151] Domestic law

[145] Judgment, *Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, (hereafter Furundžija TJ), § 291.

[146] See, for example, Judgment, *Mucić et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001 (hereafter Čelebići AJ), § 806; Sentencing Judgment, *Brima et al.* (SCSL-04-16-T), Trial Chamber, 19 July 2007 (hereinafter *Brima* SJ), §§ 14–17; Judgment, *Kordić & Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004 (hereafter Kordić & Čerkez AJ), §§ 1073–1083.

[147] Čelebići AJ, *supra* note 146, at § 806.

[148] In several cases where an appellant has alleged 'undue weight' has been placed in one of the sentencing objectives, Chambers have dismissed the appeal ground for the appellant's failure to adequately articulate the error. See, for example, Čelebići AJ, *supra* note 146, at § 803; Judgment in Sentencing Appeals, *Tadić* (IT-94-1-A & IT-94-1-A *bis*), Appeals Chamber, 26 January 2000 (hereafter Tadić Sentencing AJ), § 48.

[149] Tadić Sentencing AJ, *supra* note 148, at § 48. See also Čelebići AJ, *supra* note 146, at §§ 801–803; Judgment, IT-95-14/1-A), Appeals Chamber, 24 March 2000 (hereinafter Aleksovski AJ), § 185.

[150] Čelebići AJ, *supra* note 146, at §§ 801, 803. See also Kordić & Čerkez AJ, *supra* note 146, at § 1078; Judgment on Sentencing Appeal, *Dragan Nikolić* (IT-94-2A), Appeals Chamber, 4 February 2005 (hereafter Dragan Nikolić SAJ), § 46; Aleksovski AJ, *supra* note 149, at § 185; Tadić Sentencing AJ, *supra* note 148, at § 48.

[151] These are generally violent crimes against vulnerable populations, in line with the fundamental principle of proportionality and the degree of responsibility of the perpetrator. See, for example, Finland, Criminal Code Chapter 2(c), ss. 11 and 12 (for certain crimes and where the sentence exceeds three years, the court may, on request of the prosecutor, order the convicted person to serve the entire sentence in prison; however, after being ordered to serve the entire sentence in prison, that person will be released after serving five-sixths of their sentence or once they have been deemed no longer dangerous); Canada, Criminal Code, ss. 718.01–718.04

additionally suggests that rehabilitation is to be considered for all perpetrators, not simply those who are subject to personal or social disadvantages.[152]

19. Given the gravity of the crimes before the Court, the Chamber is of the view that victims, including both the specifically harmed community and the global community, are owed sentences that have a strong emphasis on denunciation and deterrence.

20. The Chamber, however, also views the first line of the Preamble to the Statute as a significant directive, and considers that all parties are likewise owed sentences that attempt to contribute to the healing of the 'common bonds' and 'shared heritage' through which *all* people, including the convicted person, are united.[153]

21. The Preamble's acknowledgement that international crimes may shatter the 'delicate mosaic' of humanity is reminiscent of the way in which certain indigenous communities view crimes as a tear in the 'community fabric', which may be repaired through restorative justice mechanisms.[154] In this regard, the Chamber considers that a more a deliberate emphasis on rehabilitation is required in its sentencing practices.

22. In considering how the Court can more effectively incorporate the rehabilitative objective, it is important to examine how the sentencing objectives intersect.

23. The Chamber first notes the long-standing principle in criminal law that it is the certainty rather than severity of punishment that more effectively deters criminality.[155] Perpetrators serving longer prison sentences may, in fact, be *more likely* to reoffend, due to the negative impact of being removed from factors that promote rehabilitative potential.[156] The Chamber thus views the imposition of lengthy sentences as fulfilling, primarily, the denunciatory objective.

24. With respect to deterrence, it appears as though sentences focusing on an individual's rehabilitative potential through initiatives such as job and education

(crimes against children, participants of the justice system, certain animals, and vulnerable people), 718(d), 718.2(d), and 718.2(e) (nevertheless they articulate rehabilitation and alternative sentences as ongoing considerations); Australia (New South Wales), Crimes (Sentencing Procedure) Act 1999 No. 92, s. 5(1) (articulates imprisonment as a last resort).

[152] Supreme Court of South Australia, *Vartzokas v. Zanker* (1989) 51 SASR 277, judgment of 5 July 1989, at 3–4.

[153] Preamble, ICCSt.

[154] A. W. Blue and M. A. Blue, 'The Case for Aboriginal Justice and Healing: The Self Perceived through a Broken Mirror' in M. L. Hadley (ed.), *The Spiritual Roots of Restorative Justice* (New York: SUNY Press, 2001) 57–79.

[155] C. Beccaria, 'Dei delitti e delle pene (Crimes and Punishment)', 1766 ed., § XXVII, Venturi (ed.), 1965, p. 59. For a modern approach, see, for example, S. Durlauf and D. Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' 10(1) *Criminology & Public Policy* (2011) 13–54; V. Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, The Sentencing Project, November 2010, available at www.antoniocasella.eu/nume/Wright_2010.pdf.

[156] Wright, *supra* note 155, at 6–8.

training, therapeutic treatment, and social connections are more likely to reduce recidivism.[157]

25. Additionally, these sentences benefit the perpetrator through various outcomes, including the acquisition of knowledge and skills, strengthened self-perception, and greater self-understanding.[158] It is suggested that rehabilitative programming may allow an individual to transform their perspectives to become more inclusive, open, and reflective, thereby gaining greater control over their lives as socially responsible, clear-thinking decision-makers.[159]

26. The Chamber thus notes the potential for a positive impact on the convicted person themselves through a sentence emphasising rehabilitation. Not only does such a sentence aim to protect the community by reducing recidivism; it also has the additional benefit of allowing the perpetrator the opportunity to take meaningful accountability for their crimes, and to possibly return to the community at some point in the future as a contributing member who is better equipped to make decisions with the entire community in mind.

27. The Chamber further views that the rehabilitation of the perpetrator is an inextricable component of deterrence and, indeed, opines that without considering *how* the convicted person can be rehabilitated, specific deterrence is entirely unmet. The objectives of deterrence and rehabilitation are distinct, yet indivisible, as meaningful deterrence requires rehabilitation, and the aim of that rehabilitation is to allow the perpetrator the opportunity to make better, non-destructive choices in the future, thereby deterring future criminal activity.

28. Finally, the Chamber considers the way in which sentences that incorporate aspects of restorative justice, such as rehabilitation, may contribute to a community's sense of peace and justice. Overall, restorative justice programming in domestic

[157] C. J. Smith et al., *Correctional Industries Preparing Prisoners for Re-entry: Recidivism & Post-Release Employment*, US Dept. of Justice Report No. 214608 (2006), available at www.ojp.gov/pdffiles1/nij/grants/214608.pdf; C. Uggen, 'Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism' 65(4) *American Sociological Review* (2000) 529–546; E. Gunnison et al., 'Correctional Practitioners on Reentry: A Missed Perspective' 2(1) *Journal of Prison Education and Reentry* (2015) 32–54; J. Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (New York: Oxford University Press, 2003); L. M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults* (Santa Monica, CA: RAND Corporation, 2013).

[158] Uggen, *supra* note 157; Davis et al., *supra* note 157; N. Ronel and E. Elisha, 'A Different Perspective: Introducing Positive Criminology' 55(2) *International Journal of Offender Therapy and Comparative Criminology* (2011) 305–325; B. B. Roth et al., 'The Relationship between Prisoners' Academic Self-Efficacy and Participation in Education, Previous Convictions, Sentence Length, and Portion of Sentence Served' 3(2) *Journal of Prison Education and Reentry* (2016) 106–121.

[159] C. Calleja, 'Jack Mezirow's Conceptualisation of Adult Transformative Learning: A Review' 20 (1) *Journal of Adult and Continuing Education* (2014) 117–136; D. Patton, 'The Need for New Emotionally Intelligent Criminal Justice & Criminological Approaches to Help End the "War on Terror"' (September 2016), available at https://ssrn.com/abstract=2860881.

settings, which includes a focus on rehabilitation in sentencing, appears to result in increased victim and perpetrator satisfaction with the overall process, greater fear reduction for victims, and the development of increased empathy in the convicted person.[160] The Chamber notes that, depending on the status of the conflict at issue, outcomes in the international criminal context may differ significantly. Nevertheless, the Chamber considers that at least some of these outcomes may result.

29. Based on the above, the Chamber is of the mind that there is no implicit hierarchy between denunciation, deterrence, and rehabilitation. In other words, no one objective of sentencing is determinative, but rather each objective is relevant to the balancing test that sentencing judges must perform. These objectives are fulfilled through the imposition of a just and appropriate sentence, which 'reflects the degree of culpability while contributing to the restoration of peace and reconciliation in the communities concerned'.[161]

30. Each perpetrator will have a different rehabilitative potential. A trial chamber has broad discretion in determining an appropriate sentence considering all the unique circumstances of the individual and case,[162] and equally holds such discretion in assessing how the sentence properly fulfils each objective.

31. The sentence should make its objectives plain. To do so, the sentence must simply speak to each objective in the context of the case. This is distinct from articulating a particular objective as primordial or assigning a hierarchy amongst the objectives. It is sufficient that the sentence reflects each of the objectives logically and accessibly. This is a fact-specific analysis, and, as such, there may be some cases where a certain objective is more relevant than another. It is the context of the specific case before it that will determine the weight a chamber attributes to each objective in delineating the sentence.

32. Based on the inclusion of rehabilitation as an equal objective of sentencing, the Chamber, in undertaking to pronounce a just, appropriate, and individualised sentence within the context of this case, turns to consider the types of sentences that may be imposed upon convicted persons at this Court.

[160] Van Ness, *supra* note 133, at 5–6, 13; M. Umbreit et al., 'The Impact of Restorative Justice Conferencing: A Multinational Perspective' 1(2) *British Journal of Community Justice* (2002) 21–48, at 22–28 (satisfaction with process), 32–37 (recidivism), 44–45.

[161] Katanga Sentence, *supra* note 131, at § 38, referring to Rule 145(1)(a).

[162] Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the Decision on Sentence pursuant to Article 76 of the Statute, *Lubanga* (ICC-01/04-01/06-3122), Appeals Chamber, 1 December 2014 (hereafter Lubanga Sentence Appeal), §§ 36–46 and all the citations therein; Judgment, *Duch* (Case 001-F28), Supreme Court Chamber, 3 February 2012 (hereafter *Duch* AJ), § 354; Judgment, *Nuon Chea and Khieu Samphân* (Case 002/01-F36), Supreme Court Chamber, 23 November 2016 (hereafter Case 002/01 AJ), § 1107. See further Judgment and Sentence, *Kambanda* (ICTR 97-23-S), Trial Chamber, 04 September 1998 (hereafter Kambanda Sentence), § 30; Judgment (IT-98-29/1) *Milošević (Dragomir)* (IT-98-29/1), Appeals Chamber, 12 November 2009 (hereafter Milošević (Dragomir) AJ), § 297; Čelebići AJ, *supra* note 146, at §§ 725, 780, 787 and the citations therein.

Applicable Penalties

33. At the outset, the Chamber notes the principle of *nulla poena sine lege*,[163] which prevents the arbitrary imposition of criminal sanctions and ensures legal certainty.

34. The Chamber considers the text of Article 77 of the Statute, which states that the Court *may* impose one of the following penalties: imprisonment for a specified number of years[164] or life imprisonment.[165] In addition to imprisonment, the Court *may* order a fine and/or a forfeiture of proceeds, property, and assets derived from the crime.[166]

35. This Chamber first notes that the text of the Statute employs the permissive language of '*may* impose' but does not state that the Court '*shall* impose' those penalties. Both Articles 77(1) (setting out terms of imprisonment) and 77(2) (setting out pecuniary penalties) employ this permissive language. This is distinct from Article 78, which prescribes factors the Court '*shall* … take into account'[167] in determining a sentence, and further states that the Court '*shall* deduct'[168] previous time spent in detention.[169]

36. International jurisprudence has interpreted that the statutory inclusion of 'shall' prescribes a mandatory directive,[170] while 'may' has been interpreted to confer a discretionary power.[171] This interpretation likewise appears in domestic jurisprudence.[172]

[163] Art. 23, ICCSt.
[164] Art. 77(1)(a), ICCSt.
[165] Art. 77(1)(b), ICCSt.
[166] Art. 77(2), ICCSt.
[167] Art. 78(1), ICCSt (emphasis added).
[168] Art. 78(2), ICCSt (emphasis added).
[169] This language is also reflected in the French version of the Statute, where Article 77 states 'la Cour *peut* prononcer' (emphasis added) while similar permissive language is absent from Article 78 (for example, 'la Cour tient compte'; 'la Cour en déduit le temps'; 'la Cour prononce').
[170] See, for example, Decision on *Amicus Curiae*'s Appeal against the Order Referring a Case to the Republic of Serbia, *Petar Jojić and Vjerica Radeta* (MICT-17-111-R90), Appeals Chamber, 12 December 2018, § 11.
[171] Judgment, *Nyiramasuhuko et al.* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, §§ 69–71; Appeal Decision on Joinder, *Gotovina et al.* (IT-03-73-AR73.1), Appeals Chamber, 25 October 2006, §§ 16–17; Decision on Vinko Pandurević's Interlocutory Appeal against the Decision on Joinder, *Pandurević & Trbić* (IT-05-86-AR73.1), Appeals Chamber, 24 January 2006, § 7, with each case considering Rule 48 of the ICTY Rules on Joinder, which state that 'persons … *may* be jointly charged and tried' (emphasis added). See further Judgment, *Bagosora* (ICTR-98-41-A), Appeals Chamber, 14 December 2011, § 533 ('there is nothing in Rule 54 of the Rules that makes it mandatory for the Trial Chamber to issue a subpoena', where the text of Rule 54 reads 'a Trial Chamber *may* issue' (emphasis added)).
[172] See, for example, Judgment, *Rajendar Mohan Rana & Ors vs Prem Prakash Chaudhary & Ors* (2011 8 AD (DELHI) 153, LPA 554/2011), Delhi High Court (Appeals Chamber), 1 September 2011, §§ 7–10; Review of a Decision of the Court of Appeal, *Heritage Farms, Inc. v. Markel Insurance Company* (2012 WI 26), Supreme Court of Wisconsin, 16 March 2012, § 32.

37. To be clear, the Chamber is not of the view that the drafters of the Statute intended to create a situation wherein *no* penalty would be imposed – this would produce an unreasonable result and run contrary to the Preamble's determination to end impunity – but rather that flexibility in what the judges *may* impose in terms of 'imprisonment' was contemplated.[173]

38. The *travaux préparatoires* further illuminate the level of judicial discretion in sentencing. For example, mandatory minimum periods of imprisonment were contemplated,[174] but ultimately not included in the Statute. The drafters considered mandating the imposition of the highest penalty provided for by the law of the state of which the convicted person was a national, the state where the crime was committed, or the state which had jurisdiction over the accused;[175] such requirement, likewise, was not included.

39. Conditionally suspended sentences were also contemplated,[176] as was probation in limited circumstances.[177] Though these were not explicitly included in the Statute, certain documents from the *travaux préparatoires* suggest that judges could have recourse to sentencing practices and provisions from certain states.[178] This aligns with the final text of the Statute, which includes general principles of domestic legal systems as a source of law.[179]

40. Finally, it is noteworthy that the drafters of the Statute considered it to be a living document, that could be revisited and reassessed as the number and types of cases grew,[180] and of further relevance that the application and interpretation of the law at the Court must be consistent with internationally recognised

[173] This is supported, for example, by International Commission of Jurists, *The International Criminal Court: Third ICJ Position Paper*, August 1995 (hereafter Third ICJ Position Paper), 61, 62 ('The ICJ recognises that it is important for the Court to have discretion in sentencing in order to tailor specific sentences to specific cases').

[174] See, for example, Draft Statute for an International Criminal Court, Prepared by a Committee of Experts, July 1995 (hereafter 1995 Siracusa Draft), 72–74 (suggesting the language of the Statute include 'imprisonment for a time not less than one year' because 'the minimum sentence should be no less than one year'); Working Group on Penalties, *Penalties*, UN Doc. A/AC.249/1997/CRP.1, 13 August 1997 (hereafter August 1997 Penalties Draft), 3; Working Group on Penalties, *ILC Draft Articles 46(2) and 47 – Applicable Penalties*, UN Doc. A/AC.249/1997/WG.6/CRP.1, 2 December 1997, 2; *Identification of the Main Issues Pertaining to Methods of Proceedings* (Informal paper prepared by an open ended Working Group under the chairmanship of Mr Gerard Hafner), UN Doc. UD/A/AC.244/1995/IP.4, 4 April 1995 (hereafter April 1995 Informal Paper), 12; *Summary of the Proceedings of the Ad Hoc Committee during 3–13 April 1995*, Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/AC-244/2, § 113, Annex II, 2(vi).

[175] August 1997 Penalties Draft, *supra* note 174, at 5.

[176] 1995 Siracusa Draft, *supra* note 174, at 57; April 1995 Informal Paper, *supra* note 174, at 12, § 59.

[177] 1995 Siracusa Draft, *supra* note 174, at 73 (Draft Article 47 a (3)).

[178] 1995 Siracusa Draft, *supra* note 174, at 74.

[179] Article 21(1)(c), which allows the Court, in certain circumstances, to apply national principles of law if they are not in conflict with the Rome Statute or international law.

[180] 1995 Siracusa Draft, *supra* note 174, at 13.

human rights[181] – a field of law that continues to evolve through the inclusion of more diverse voices and legal approaches.

41. Sentencing judges thus have significant discretion regarding all aspects of the penalty imposed upon a perpetrator, including the *type* of penalty. This corresponds with the need for an individualised sentence, and the fundamental principles underlying the discretion of a sentencing judge.[182] Sentencing discretion is nevertheless limited by the requirement that the punishment be appropriate to the crime while maintaining consistency with internationally recognised human rights,[183] and that the punishment respect the Statute and the Rules of the Court.

42. As for the types of penalty that judges may impose, the Chamber notes that 'imprisonment' is not defined in the Statute or the Rules and has not been judicially interpreted at this Court. It further does not appear as though the meaning of 'imprisonment' has been judicially examined in the hybrid or ad hoc tribunals, though there has been flexibility in the types of sentences imposed.

43. In contempt proceedings, for example, international chambers have imposed sentences that are variations on those specifically articulated in the relevant Statute and/or Rules.[184] Further, the Special Court for Sierra Leone (SCSL) held that, when the relevant texts provide that certain punishments may be imposed by setting out a maximum sentence without reference to a minimum sentence, sentencing judges have 'an inherent power to impose a sentence other than a fine or imprisonment … [including] a conditional discharge … subject to the particular circumstances of the case'.[185]

44. This Chamber has difficulty imagining a scenario outside a contempt proceeding where a conditional discharge would be appropriate in this jurisdiction; however, the Chamber views this jurisprudence as reinforcing the significant discretionary power of sentencing judges in terms of the *type* of sentence imposed. The Chamber also considers that the omission of a mandatory period of imprisonment is indicative of the high discretionary authority to craft an appropriate sentence without necessarily resorting to a custodial sentence.[186]

[181] Art. 21(3), ICCSt.

[182] There is broad discretion in determining a sentence, and there exists a high threshold to appeal these decisions. See Lubanga Sentence Appeal, *supra* note 162, at §§ 36–46 and the citations therein; Duch AJ, *supra* note 162, at § 354; Case 002/01 AJ, *supra* note 162, at § 1107; Milošević (Dragomir) AJ, *supra* note 162, at § 297.

[183] Art. 21(3), ICCSt.

[184] Decision in Proceedings for Contempt with Orders in lieu of an Indictment, *Akhbar Beirut S.A.L. Ibrahim Mohamed Al Amin* (STL-14-06/I/CJ), Contempt Judge, 31 January 2014, §§ 9–13; Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, *Dusko Tadić* (IT-94-1-A-R77), Appeals Chamber, 31 January 2000, §§ 165–172.

[185] Sentencing Judgment in Contempt Proceedings, *Margaret Fomba Brima et al.* (SCSL-2005-02), 21 September 2005, § 35. See further § 19.

[186] This is consistent with domestic jurisprudence, which suggests that where there is no mandatory minimum sentencing regime, non-custodial sentences are a valid option; see, for example,

45. There are several international instruments that support the use of non-custodial measures, perhaps most notably the Tokyo Rules, which predate this Court, having been adopted by the United Nations General Assembly in 1990. The Tokyo Rules serve as 'a set of basic principles to promote the use of non-custodial measures' and are 'intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of perpetrators, as well as to promote among perpetrators a sense of responsibility towards society'.[187]

46. Rule 2.1 requires the rules to be applied to *all persons* subject to prosecution, at all stages of the administration of justice, and Rules 1.5 and 2.4 encourage the development of new non-custodial measures. Possible non-custodial measures are enumerated in Rule 8.2, including, inter alia: conditional discharge; economic sanctions; restitution orders; suspended sentences; judicial supervision; community service orders; and house arrest.

47. The more recently pronounced Doha Declaration additionally calls upon States to 'adopt comprehensive and inclusive … criminal justice policies and programmes that fully take into account … the root causes of crime, as well as the conditions conducive to its occurrence', to 'implement and enhance policies for prison inmates that focus on education, work, medical care, rehabilitation, social reintegration and the prevention of recidivism', and to 'create[e] opportunities for community service and support … the social reintegration and rehabilitation of perpetrators'.[188]

48. Domestically, there exist multiple flexible sentencing regimes that can be tailored to individual circumstances and to the gravity of the crime. Such sentences include conditional or community-based sentences, where an individual serves their sentence in the community subject to strict rules;[189] intermittent sentences, where an individual serves the custodial portion of their sentence intermittently while being subject to conditions when not in custody;[190] or suspended sentences, where an individual's sentence is deferred, subject to their following the conditions of release and not reoffending.[191]

Sentence Judgment, *S v. Dikqacwi and Others* (SS49/2012), High Court of South Africa [2013] ZAWCHC 67, 15 April 2013 (hereafter Sentence Judgment, *S v. Dikqacwi*), § 28.

[187] Tokyo Rules, *supra* note 136, at Rules 1.1 and 1.2.

[188] GA Res. 70/174 (Doha Declaration), 8 January 2016, Arts. 5(a), (j), (k), 10(d), (k). See further ECOSOC Res. 2017/19, §§ 1–2.

[189] South Australia, Sentencing Act (hereafter South Australia Sentencing Act), s. 25(4); Canada, Criminal Code, s. 742.1; Finland, Criminal Code (780/2005), Chapter 2(c), s. 5; Ireland, Criminal Justice Act, 2006, s. 101; Queensland, Penalties and Sentences Act, 1992, s. 32; United Kingdom, Sentencing Act 2020, ss. 200–202.

[190] Canada Criminal Code, s. 732; United States, New York Consolidated Laws, Penal Law, Part II, § 85.00.

[191] South Australia Sentencing Act, *supra* note 189, at s. 25(4); Canada, Criminal Code, s. 731(1)(a); Ireland, Criminal Justice Act, 2006, ss. 99–100; Japan, Penal Code (Act No. 45 of 1907), 2017, s. 25; Russian Criminal Code, Article 73; United Kingdom, Sentencing Act 2020, s. 277; Denmark, Penal Code, Articles 56–60.

49. Domestic legislation has further included more substantive definitions of 'imprisonment', and jurisprudence addressing these regimes has considered its meaning extensively. For example, the Irish Criminal Justice Act defines imprisonment to include detention in 'places other than prisons',[192] and the South Australian Sentencing Act includes community-based custodial sentences and suspended sentences under the 'sentence of imprisonment' umbrella.[193] The Canadian Criminal Code expressly names community-based sentences as 'conditional sentences of imprisonment'.[194]

50. The Supreme Court of Canada has also articulated that a conditional sentence is a term of imprisonment.[195] South African courts have used the term 'direct imprisonment' to distinguish sentences that involve time spent in prison, while taking care to note that these are not necessarily more lenient sentences,[196] and Australian courts have imposed sentences of imprisonment to be served in the community[197] while explicitly stating that these are sentences of imprisonment.[198] Zimbabwean jurisprudence has articulated community service as a form of imprisonment,[199] while the Supreme Court of India has held that 'sentenced to imprisonment' does not equate to 'condemned to prison upon conviction'.[200] Courts in the United Kingdom, meanwhile, have defined a term of imprisonment as 'an order of restriction of freedom on the perpetrator',[201] and held that 'every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house'.[202]

[192] Ireland, Criminal Justice Act, s. 98, referring to the Prisons Act, 1970, s. 2.

[193] South Australia Sentencing Act, s. 25(3)(a)(i). Further, the Queensland (Australia) Penalties and Sentences Act, 1992, ss. 111–113 sets out 'intensive correction orders:, whereby an individual convicted of a crime 'serve[s] the sentence of imprisonment by way of intensive correction in the community'.

[194] Canada, Criminal Code, s. 742.1.

[195] Supreme Court of Canada, *R v. Proulx*, 2000 SCC 5, judgment of 31 January 2000, at § 29.

[196] Constitutional Court of South Africa, *S v. M* (CCT 53/06) [2007] ZACC 18, judgment of 26 September 2007, at §§ 58–63; Sentence Judgment, *S v. Dikqacwi*, *supra* note 186, at §§ 25–28.

[197] Supreme Court of the Australian Capital Territory (Court of Appeal), *Samani v. The Queen* [2016] ACTCA 48, judgment of 12 September 2016, at §§ 32–38, 42–47; Court of Criminal Appeal, *R v. Pogson*, *R v. Lapham*, *R v. Martin* [2012] NSWCCA 225, decision of 22 October 2012, at §§ 96–98, 105–111.

[198] Court of Criminal Appeal, *supra* note 197, at, at § 109 ('An ICO deprives a perpetrator of his or her liberty in a real and not merely fictional sense').

[199] Bulawayo High Court, *S v. Sibanda* (CRB G 440/10) and Another (CRB G 440-1/10), [2011] ZWBHC 79, review judgment of 21 April 2011 ('both accused persons have already served *4 months imprisonment in the form of community service*' (emphasis added)). See also Denmark, Criminal Code (Order No. 909, 2005), Arts. 62–64 (where a custodial sentence may be suspended on the condition that a convicted person undertakes community service); South Australia Sentencing Act, *supra* note 189, at Art. 25(3)(b)(iii).

[200] Supreme Court of India, *State of Maharashtra v. Chandrabhan Tale* (1983 AIR 803, 1983 SCR (3) 327), judgment of 7 July 1983, at 348–350.

[201] England and Wales Court of Appeal (Criminal Division), *R v. Wiles* [2004] EWCA Crim 836, judgment of 4 March 2004, at §§ 14–15.

[202] England and Wales High Court (Queen's Bench), *Bird v. Jones* [1845] EWHC QB J64, judgment of 11 January 1845.

51. Generally, the appropriateness of these 'alternative' sentences is guided by legislation, which may restrict their use based on the severity of the crime, the vulnerability of the victims, or the length of a maximum sentence. Domestic courts, however, and in some cases domestic legislation itself, have further articulated that carceral imprisonment is a last resort, and should only be used in the absence of suitable non-custodial sentences,[203] particularly when a convicted person is themself a victim of systemic inequality.[204]

52. Domestically, alternative forms of imprisonment have been imposed upon individuals convicted of violent offences, including killings and attempted killings;[205] sexual assaults, including where the victim is a minor;[206] other physical assaults, including spousal violence, instances where the victim was strangled, and where there was intent to injure;[207] death threats;[208] and kidnapping,[209] among others.[210]

[203] Bulawayo High Court, *S v. Majaya* (Case No. HC 168/2003) [2003] ZWBHC 15, review judgment of 29 January 2003, at §§ 3–4; *Gladue*, *supra* note 134, at §§ 36, 40; Supreme Court of Canada, *R v. Ipeelee*, 2012 SCC 13, judgment of 23 March 2012, at §§ 47–48, 50–51, 68. Criminal Code of Canada, s. 718.2(e); Crimes (Sentencing Procedure) Act 1999 (New South Wales), s. 5(1). This is also reflected in the Tokyo Rules, *supra* note 136, at Rule 1.5, which requires member states to provide options other than incarceration, taking into account the rehabilitative needs of the perpetrator, and is further reflected in the European Prison Rules (Council of Europe, June 2006), Chapter 1 ('no one shall be deprived of liberty save as a measure of last resort').

[204] Criminal Code of Canada, s. 718.2(e); *Gladue*, *supra* note 135, at §§ 37, 61, 65, 68; *Ipeelee*, *supra* note 203, at §§ 64–79.

[205] High Court of South Africa (Gauteng), *Mosikili v. State* (A339/2017) [2018] ZAGPPHC 813, Appeals Chamber, judgment of 3 May 2018, §§ 5–16; Western Cape High Court (South Africa), *S v. Lakay* (A 724/2010) [2012] ZAWCHC 14, Appeals Chamber, judgment of 2 March 2012, §§ 21–31; South Africa Supreme Court of Appeal, *S v. Potgieter* 1994 (1) SACR 61 (A), judgment of 29 November 1993, pp. 83–90; South Africa Supreme Court of Appeal, *S v. Ingram* 1995 (1) SACR 1 (A); High Court of New Zealand, *R v. Hodgson* (CRI 2009-044-10450 [2010] NZHC 1750), judgment of 28 September 2010, §§ 20–22; High Court of Justice (Trinidad & Tobago), *State v. Ramkay Gayah for Manslaughter*, [2002] TTHC 12, judgment of 4 June 2002; Supreme Court of New South Wales (Australia), *R v. MB* [2017] NSWSC 619, §§ 73–79. Japan: The Kyoto District Court sentenced a woman who strangled her son to death to a suspended sentence, see 'Woman gets suspended sentence for killing mentally disabled son', *Japan Today*, 15 December 2021, available at https://japantoday.com/category/crime/woman-gets-suspended-sentence-for-killing-mentally-disabled-son.

[206] Canada: *R v. Stewart* 1999 CarswellSask 404, [1999] S.J. No. 413, 42 W.C.B. (2d) 546; *R v. C.R. P.* (2001) O.J. No. 1595; *R v. L. (R.)* 2004 CarswellOnt 5856 [2004] O.J. No. 3502; South Africa: *S v. Mambila* (SH796/03) [2008] ZAGPHC 465 (22 September 2008).

[207] British Columbia Court of Appeal (Canada), *R v. Reid* (2002) B.C.J. No. 845, judgment of 24 April 2002; Ontario Court of Appeal (Canada), *R v. Veenhof* 2011 ONCA 195, judgment of 7 March 2011; Court of Appeal of New Zealand, *Mason v. R* [2021] NZCA 185, judgment of 14 May 2021; High Court of New Zealand, *Colvin v. R* [2021] NZHC 400, judgment of 5 March 2021; Supreme Court of the Northern Territory (Australia), *R v. Ebatarintja* [2010] NTSC 6, judgment of 11 March 2010.

[208] Supreme Court of Canada, *R v. Middleton* 2009 SCC 21, judgment of 22 May 2009.

[209] Sentence Judgment, *S v. Dikqacwi*, *supra* note 186.

[210] For example, one particular restorative justice youth diversion programme in the United States prioritises serious offences, with 62 per cent of their restorative case conferences involving felonies,

53. In imposing non-custodial sentences, the involvement of the community is essential, to rehabilitate the perpetrator as well as to ensure that meaningful reconciliation is considered.[211]

54. The Chamber recalls that it may, in certain circumstances, apply national principles of law if they are not in conflict with the Rome Statute or international law.[212] The Chamber finds that the imposition of 'alternative' sentences, a widespread practice in domestic legal traditions, is in line with international law, as evidenced by the Tokyo Rules and the European Prison Rules. The Chamber further finds that imposing alternative sentences does not conflict with the Rome Statute.

55. Finally, the Chamber notes that each case must be carefully considered in light of all the relevant circumstances before finding an alternative sentence is appropriate, with attention to each of the sentencing objectives, the gravity of the crime, the circumstances of the accused, and the input of the victims.

56. The Chamber holds that it has the legal authority to consider whether an alternative sentence is appropriate in this case.

Factors to Be Considered pursuant to the Statute and Rule 145

57. To determine the appropriate sentence, the Chamber will consider: (i) the gravity of the crime; (ii) Mr Al Mahdi's culpable conduct; and (iii) his individual circumstances. Rule 145(1)(c) factors and aggravating and mitigating circumstances are discussed when relevant.

[The author relies on paragraphs 76–105 of the original judgment.]

Determination of the Sentence

58. The prosecution submits that Mr Al Mahdi's sentence should be between nine and eleven years.[213] The defence made extensive submissions on the adequate assessment of the gravity of the crime charged, the absence of aggravating circumstances and the importance of the mitigating circumstances in this case.[214] The

such as robberies, battery causing great bodily injury, assaults with a deadly weapon, sexual battery, arson, and crimes involving the exhibition of a deadly weapon besides a firearm, see S. Baliga, S. Henry, and G. Valentine, *Restorative Community Conferencing: A Study of Community Works West's Restorative Justice Youth Diversion Program in Alameda County*, Impact Justice, available at https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf, at 7–8.

[211] Tokyo Rules, *supra* note 136, at Rule 1.2. See also GA Res. 40/34, 29 November 1985 (UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power), Art. 6(b).

[212] Art. 21(1)(c), ICCSt.

[213] Public redacted version of Prosecution's submissions on sentencing, 22 July 2016, ICC-01/12-01/15-139-Conf, § 3.

[214] Observations de la Défense sur les principes devant gouverner la peine et les circonstances aggravantes et/ou atténuantes en la cause, en conformité avec l'ordonnance ICC-01/12-01/15-99 de la Chambre ICC-01/12-01/15-141-Conf, 20 September 2016, ICC-01/12-01/15-141-Corr-Red 20-09-2016 1/28 RH T, §§ 131–201.

victims' legal representative (LRV) requests that the sentence handed down to Mr Al Mahdi be severe and exemplary, without specifying a sentencing range.[215]

59. The Chamber stresses that sentencing an individual for crimes that they committed is a unique exercise for which comparison with different cases can be of only very limited relevance, if any.

60. As set out above, the Chamber must balance all the relevant factors, including any mitigating and aggravating circumstances, and consider the circumstances of both the convicted person and the crime. To sufficiently and adequately reflect the moral and economic harm suffered by the victims of the present case and fulfil the objectives of sentencing, the Chamber must impose a sentence that is proportionate to the gravity of the crime and the individual circumstances and culpability of Mr Al Mahdi.

61. The Chamber finds that the crime for which Mr Al Mahdi is being convicted is of significant gravity. That said, the Chamber has found no aggravating circumstances and five mitigating circumstances, namely: (i) Mr Al Mahdi's admission of guilt; (ii) his cooperation with the prosecution; (iii) the remorse and the empathy he expressed for the victims; (iv) his initial reluctance to commit the crime and the steps he took to limit the damage caused; and (v), even if of limited importance, his good behaviour in detention despite his family situation.

62. The Chamber additionally notes the defence submissions regarding Mr Al Mahdi's profession and 'good character'.[216] Though not mitigating, the Chamber views these as positive factors in assessing Mr Al Mahdi's rehabilitative potential, as well as determining *how* Mr Al Mahdi's sentence could incorporate his education and skills to allow him to give back to the harmed community, while also allowing him the opportunity to rebuild his positive life skills.

63. The Chamber further considers that the defence submissions regarding Mr Al Mahdi's background, in terms of the social context in which he was raised,[217] are pertinent to the sentence.

64. As noted above,[218] there is life outside these processes, as well as a broader context to consider when judging a fellow human. Though the criminal process serves a strict purpose in determining guilt or innocence and the penalty for convicted persons, such determinations should not occur in a void: 'Judges should be encouraged to experience, learn and understand "life" – their own and those whose lives reflect different realities.'[219]

65. Mr Al Mahdi grew up as an ethnic minority, a Tuareg, in northern Mali, a region that has suffered from political and economic exclusion, ethnic conflicts, and

[215] Observations des victimes tendant à la fixation d'une peine exemplaire pour crimes de guerre, 22 July 2016, ICC-01/12-01/15-135 28-09-2016 1/13 EK T, §§ 46–50.

[216] Observations de la Défense sur les principes devant gouverner la peine et les circonstances aggravantes et/ou atténuantes en la cause, en conformité avec l'ordonnance ICC-01/12-01/15-99 de la Chambre, *Al Mahdi* (ICC-01/12-01/15-141-Corr-Red 20-09-2016 1/28), Trial Chamber, 20 September 2016 (hereafter Al Mahdi Defence Submissions), §§ 131–136.

[217] Al Mahdi Defence Submissions, §§ 137–149.

[218] *Supra* § 11.

[219] *Yukon Francophone School Board*, *supra* note 141, at § 34.

violence, as well as environmental hardships.[220] Mr Al Mahdi was further educated with a strict interpretation of Sharia,[221] and does not appear to have previously had the opportunity to effectively challenge that interpretation. Given his background, it is perhaps not all that surprising that Mr Al Mahdi engaged in destructive behaviour and extremist methods.

66. To be clear, Mr Al Mahdi's background is not an excuse for his actions, which were manifestly criminal. The Chamber further rejects the defence submissions that Mr Al Mahdi's motive is mitigating.[222] So-called good intentions are no excuse for the crimes under this Court's jurisdiction, and a stated motivation or goal that is not inherently criminal, if it nevertheless involves the commission of crimes to achieve it, cannot mitigate a convicted person's actions. As articulated by the LRV, 'to attack the culture and heritage of a people is to attack its soul and its roots', which is precisely what Mr Al Mahdi did.[223]

67. Nevertheless, the Chamber considers his background and overarching social context as relevant in considering Mr Al Mahdi's rehabilitative potential, as it provides greater understanding of how and why Mr Al Mahdi made the choices that led him to this Court.

68. Finally, in considering Mr Al Mahdi's rehabilitative potential, the Chamber again notes his genuine remorse for his actions.

69. Considering all these factors, the Chamber departs from the Court's traditional reliance on incarceration as the sole form of punishment, and sentences Mr Al Mahdi to seven years of custodial imprisonment, along with an additional 3,765 hours of community service.[224]

70. The hours of community service will be served in the Trust Fund for Victims, UNESCO, or, with approval of the Court and in consultation with relevant stakeholders from the harmed community, another similar organisation focused on culturally relevant and appropriate activities. The work undertaken as part of his community service must focus on rebuilding what Mr Al Mahdi helped destroy, but can be contemplated in broader terms that the work could, for example, focus on building respect for religious diversity. A panel of relevant stakeholders from the harmed community as well as the above-named organisations will be assigned to

[220] T-4-Red-ENG, Trial Chamber, www.icc-cpi.int/sites/default/files/Transcripts/CR2016_05767.PDF, at 31; 'Minorities and Indigenous Peoples in Mali – Tuareg', Minority Rights Group International, available at https://minorityrights.org/minorities/tuareg/.

[221] T-4-Red-ENG, *supra* note 220, at, at 31–34, 43–44, 59–60, 102–108.

[222] Al Mahdi Defence Submissions, *supra* note 216, at §§ 147–148 (wherein the defence submits that the motive was to test a new political and religious experiment with the goal of improving the economic and social situation in northern Mali).

[223] Observations des victimes tendant à la fixation d'une peine exemplaire pour crimes de guerre (ICC-01/12-01/15-135 28-09-2016 1/13), *Al Mahdi*, Trial Chamber, 22 July 2016, §§ 23–24, 27–31.

[224] The number of hours was calculated based on a commitment of engaging in community service activities for a seven-and-a-half-hour working day, with a five-day work week, over a period of two years (7.5 hours x 251 days x 2 years = 3,765 hours total).

monitor Mr Al Mahdi's work to ensure it is relevant, assess his contributions, and provide updates to the Court.

71. While performing his community service hours, Mr Al Mahdi will not have any access to the internet or a cell phone. Any tasks that require access to a computer or phone will be supervised to ensure that he does not send any communications.

72. The hours of community service are to be completed concurrently, while Mr Al Mahdi is serving his custodial sentence.

73. The Chamber notes that it did not hear submissions from any party with respect to a prospective imposition of community service, and given the impact that this sentence will have on Mr Al Mahdi's time in custody, considers it appropriate to allow Mr Al Mahdi to respond. Mr Al Mahdi is to file a written response to this decision within thirty days, indicating whether he wishes to participate in the community service sanction. If Mr Al Mahdi is unwilling to engage in community service as part of his sentence, for whatever reason, the community service portion of the sentence, equivalent to two years, will be applied as an additional two-year period of incarceration, bringing his sentence to nine years of incarceration.

74. If Mr Al Mahdi fails to complete the hours of community service by the end of the seven-year custodial sentence, the outstanding balance will be converted into a custodial period.

75. For clarity, notwithstanding this directive, all parties, including Mr Al Mahdi, retain the right to appeal this decision through the regular channels and procedures.

76. Lastly, noting that none of the parties or participants requests the imposition of a fine or order of forfeiture under Article 77(2) of the Statute and Rules 146 and 147 of the Rules, the Chamber finds that this term of imprisonment and community service is a sufficient penalty.

77. Pursuant to Article 78(2) of the Statute, Mr Al Mahdi is entitled to have deducted from his sentence the time he has spent in detention in accordance with an order of this Court, namely since his arrest pursuant to the warrant of arrest issued on 18 September 2015.

Judge Melissa McKay

13.4 DESTRUCTION OF CULTURAL PROPERTY ON THE AL MAHDI REPARATIONS ORDER

Laura Graham and Annika Jones

In 2017 Trial Chamber VIII issued the reparations order for Mr Ahmad Al Faqi Al Mahdi,[225] a decision that was confirmed on appeal in 2018.[226] The order required

[225] Reparations, *Al Mahdi* (ICC-01/12-01/15-236), Trial Chamber VIII, 17 August 2017.

[226] Judgment on the Appeal of the Victims against the Reparations Order, *Al Mahdi* (ICC-01/12-01/15-259-Red2), Appeals Chamber, 8 March 2018.

Mr Al Mahdi to pay €2.7 million in individual and collective reparations to the victims of the destruction of cultural heritage in Mali, Timbuktu, in 2012. This order found that those who could demonstrate direct economic loss from the destruction would be eligible for consequential economic loss reparations, without considering the informal economy operating from the sites, mainly managed by women and girls. The order also focused on the patrilineal succession lines marking ancestral connection to the sites, again overlooking the moral connections of women and girls.

In this rewritten reparations order, Laura Graham and Annika Jones emphasise the cultural underpinnings that may result in women's harm being indirect rather than direct and how that aspect needs to be considered in the distribution of reparations. They also critique traditional implementation and application methods used to identify victims, noting that cultural and social norms may impact women and girls applying. As a practical way to counter these issues, Graham and Jones support matrilineal as well as patrilineal ancestral mapping, and recognition of the impact on the informal economy, in the allocation of individual reparations; include initiatives focusing on marginalised communities as part of collective reparations; and emphasise the importance of including women in the implementation of the order.

No.: ICC-01/12-01/15
Date: 17 August 2017

Original: English

TRIAL CHAMBER VIII(B)

Before: Judge Laura GRAHAM

Judge Annika JONES

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF THE *PROSECUTOR v. AHMAD AL FAQI AL MAHDI*

Public

Reparations Order

PRINCIPLES ON REPARATIONS AND APPLICABLE LAW …

Harm Suffered, Types of Reparations and Modalities

Harm

42. To be eligible for reparations, a victim must have suffered harm as a result of the commission of the crime of which Mr Al Mahdi was convicted. …

45. As the 'First Expert Report' rightly notes, this is the first engagement of the 'ICC' with the situation in Mali and it is, therefore, essential that the Chamber

understands the harms that flow from this crime in the context of the wide range of abuses that were carried out during the occupation and the ideology that informed the attacks.[227]

46. The Chamber has noted that the destruction of the protected buildings was ordered because the attackers considered them to be sites of vice.[228] Mr Al Mahdi, as head of the *Hesbah* morality brigade, was entrusted with regulating the morality of the people of Timbuktu, and of preventing, suppressing, and repressing anything perceived by the occupiers to constitute a visible vice.[229] These visible vices included freedom of dress and freedom of movement, especially for women.[230] Mr Al Mahdi has personally referenced 'not wearing the veil, revealing one's physical appearance [and] gender mix[ing]' as examples of vice suppressed by *Hisbah*.[231] The *Hesbah* organised patrols to make sure that women complied with the dress codes imposed by the armed groups.[232] In addition, women were subjected to a range of abuses, including rape and sexual assaults, which escalated as the attackers were mobilised.[233]

47. It is within this context that the war crime of attacking the Protected Buildings occurred. Therefore, while the reparations order must focus on compensation for the effects of Mr Al Mahdi's crimes, the Chamber notes the importance of taking a gender-sensitive approach to reparations in this case,[234] ensuring that the losses and harms experienced by women are not further marginalised by this reparations order, or through its implementation. . . .

Consequential Economic Loss

72. When pronouncing Mr Al Mahdi's sentence, the Chamber concluded that Mr Al Mahdi caused economic harm.[235]

73. The victims have requested compensation for the effect that the attacks on the protected buildings had on their livelihood. The tourist economy was decimated as a result of the attacks.[236] Prior to the destruction of the protected buildings, people

[227] Brief by Ms. Karima Bennoune, UN Special Rapporteur in the Field of Cultural Rights, *Al Mahdi* (ICC-01/12-01/15-214-AnxI-Red3), Trial Chamber VIII, 27 April 2017, at 25 and 33 (hereafter First Expert Report).

[228] Judgment and Sentence, *Al Mahdi* (ICC-01/12-01/15-171), Trial Chamber VIII, 27 September 2016, §81 (hereafter Al Mahdi Judgment).

[229] *Ibid*, § 33.

[230] Transcript of Confirmation of Charges Hearing, *Al Mahdi* (ICC-01/12-01/15-T-2-Red2-ENG), Pre-Trial Chamber I, 1 March 2016, at 39.

[231] *Ibid*, at 46.

[232] *Ibid*.

[233] First Expert Report, *supra* note 227, at 24–25.

[234] As suggested in *ibid*, at 35.

[235] Al Mahdi Judgment, *supra* note 228, § 108.

[236] Submissions of the Legal Representative of Victims on the principles and forms of the right to reparation, *Al Mahdi* (ICC-01/12-01/15-190-Red-tENG), Trial Chamber VIII, 3 January 2017, § 66 (hereafter First LRV Submissions).

came from all over the world to see the mausoleums and to pray to the saints.[237] On given days, people would visit the mausoleums to offer monetary donations or sacrifice animals (mostly in the case of women, who could not enter the mausoleums).[238] The destruction of the protected buildings was understood by the community as destroying the souls and spirits of the saints.[239] Without the belief that the saints might listen to the prayers and grant their wishes, visitors have become rare.[240] According to one victim, 'the damage sustained by the Timbuktu area is incommensurable. It will take generations for the situation to return to how it was before 2012'.[241]

74. The Chamber notes three overlapping categories of economic losses. There is no hierarchy between these categories. Instead, the losses incurred by the victims should be understood on their own merits. This is important given that women, children, and the elderly are unlikely to be included in the first category and should not be disadvantaged in the implementation of the reparations order.

75. The first category comprises those victims whose livelihoods exclusively depended upon the protected buildings. These include the guardians of the mausoleums, the *maçons* tasked with prominent responsibilities in maintaining them,[242] and people whose businesses could not exist without the protected buildings. The victims' legal representative (LRV) has drawn attention to the particular harm suffered by this category of victims.[243]

76. The second category includes victims whose livelihoods have been indirectly harmed, including as a result of the losses of tourism and economic activity in the years following the attack.[244] Consequential economic loss falling into this category has been detailed in the 'Second Expert Report'.[245]

77. The Chamber notes that traditional gender roles may have an impact on the way the economic harm is felt. Individuals who are restricted from entering into the mausoleums, including women under a certain age,[246] are more likely to suffer

[237] *Ibid*, § 67.
[238] Public redacted version of Corrigendum with one explanatory annex: Final submissions of the Legal Representative on the implementation of a right to reparations for 139 victims under Article 75 of the Rome Statute, *Al Mahdi* (ICC-01/12-01/15-224-Corr-Red-tENG), Trial Chamber VIII, 14 July 2017, § 31 (hereafter Final Submissions of the LRV).
[239] *Ibid*.
[240] *Ibid*.
[241] First LRV Submissions, *supra* note 236, at § 66.
[242] The LRV defines a '*maçon*' (mason) as 'a pivotal figure in the historical and religious shrine. He alone is the embodiment of expertise in the building of the shrine and its bequeathal to the next generation. He is greatly skilled in the substantial aspects of the mausoleum and oversees building and burials. He is selected in a unique and fitting process by the prominent family of the descendants of the mausoleum' see First LRV Submissions, *supra* note 236, at § 25(f).
[243] *Ibid*, § 67.
[244] *Ibid*, §§ 65–71.
[245] Expert Report – Reparations Phase: Dr Marina Lostal, *Al Mahdi* (ICC-01/12-01/12-214-AnxII-Red2), Trial Chamber VIII, 3 May 2017, §§ 80–84 (hereafter Second Expert Report).
[246] *Ibid*, at § 86.

indirect harm as a result of their destruction. Attacks on the informal economy are also likely to have a particularly strong impact on some sectors of the population, including women and girls. These economic losses are more difficult to quantify because of the absence of accounting records. Nonetheless, as the LRV has observed, the effect of the destruction has been no less real for the victims.[247] It is important that distinctions are not drawn between direct and indirect economic loss when assessing the impact of the destruction of the protected buildings on victims for the purpose of allocating reparations. This is to ensure that reparations do not contribute to the entrenchment of discrimination and, to the extent that it is possible, play a role in disrupting pre-existing inequalities and patterns of structural discrimination.[248]

78. The third category of economic losses comprises those resulting from the abandonment of property as a result of fleeing Timbuktu in the wake of the destruction out of fear that 'Mr Al Mahdi and his co-perpetrators would turn their attention to people after striking stone and mortar'.[249] In fleeing, victims 'were forced to abandon not only their property, livestock and money, but their occupations and businesses as well'.[250] This economic loss should be included in reparations to ensure that affected victims, including women, children, and the elderly, are not excluded by a narrow focus on loss of business owners alone.

79. The Chamber is satisfied that Mr Al Mahdi's crime is both the actual and proximate cause of these three categories of economic harm. It was reasonably foreseeable that attacking cultural property integral to the community in Timbuktu would have a lingering economic impact. Indeed, the protected buildings were targeted in large part because of their prominent community role.[251]

80. As noted in the Second Expert Report,[252] the general consequential economic loss caused by the attack reverberated across the entire community in Timbuktu. The Chamber considers that the harm caused by Mr Al Mahdi's actions is primarily collective in character. It is much larger and of a different nature than the harm suffered by the 139 applicants grouped together. Aggregating their losses and prioritising their compensation would risk dramatically understating and misrepresenting the economic loss actually suffered.

81. Nevertheless, the LRV argues that compensation should be given to all reparations applicants who suffered financial losses, and that a further €250 be granted to each victim applicant to address their collective harm.[253]

[247] Final Submissions of the LRV, *supra* note 238, at § 38.
[248] First Expert Report, *supra* note 227, at § 46.
[249] First LRV Submissions, *supra* note 236, at § 69.
[250] Final Submissions of the LRV, *supra* note 238, at § 37.
[251] Al Mahdi Judgment, *supra* note 228, at §§ 34–37.
[252] Second Expert Report, *supra* note 245, §§ 80–84.
[253] Final Submissions of the LRV, *supra* note 238, at 37.

82. When focusing on the extent of compensation, the Chamber considers it more equitable to use individual reparations to compensate victims on the basis of the extent of the harm suffered or sacrifice made, whether as part of the formal or informal economy, directly or indirectly, rather than solely on whether a victim had applied for reparations. To do otherwise would exacerbate gender-based discrimination faced by women who may, in this cultural context, be less likely to make individual applications.

83. The Chamber notes that reparations applicants in the present case already obtain several procedural advantages which are not necessarily available to other members of the Timbuktu community who suffered similar harm. By virtue of having already prepared applications and supporting materials, the applicants can take part in the screening procedure, specified later in the present order, without significant additional effort. The applicants provided information considered by the Chamber in tailoring the reparations award, giving them more influence over the parameters set in the present order. The applicants also continue to avail themselves of the assistance of the LRV, a Court-appointed lawyer who receives legal assistance to represent their interests and advocate for them. Furthermore, inclusion and participation in the reparations process has been understood to provide reparation in itself, insofar as it restores agency to victims.[254]

84. Compensating the applicants – to the exclusion of similarly harmed people – beyond these procedural advantages puts undue emphasis on the filing of applications rather than on the extent of the harm suffered or the sacrifice made by the victims. Doing so may exacerbate gender-specific disadvantages where women's voices have not been heard as part of these applications. There is no reason to believe that the reparations applicants, simply by virtue of applying, suffered to a different degree compared with the rest of the Timbuktu community. It is important to ensure that a broader range of victims, including women, children, and the elderly, benefit from the reparations process to promote their agency and challenge their previous exclusion. As noted by the LRV, there is a high risk of frustration in awarding reparations only to those who have reparations applications pending before the Chamber.[255] The Second Expert Report also recommends that reparations in the present case should be 'awarded on a collective basis as far as possible'.[256]

85. Accordingly, the Chamber awards individual reparations for consequential economic loss only to those (i) whose livelihoods exclusively depended upon the protected buildings, including those whose livelihood was to maintain and protect those buildings; (ii) whose livelihoods were significantly affected by their destruction; or (iii) those who otherwise suffered significant personal economic loss as a consequence of their destruction, such as the loss of their homes as a result of

[254] First LRV Submissions, *supra* note 236, at § 111.
[255] Final Submissions of the LRV, *supra* note 238, at §§ 87–91.
[256] Second Expert Report, *supra* note 248, at § 125.

displacement. An individualised response is more appropriate for them, as their loss relative to the rest of the community is more acute and exceptional.

86. The Chamber considers that the number of victims and the scope of the consequential economic loss make a collective award more appropriate for those beyond these identified groups. This is not to say that other individual businesses and families beyond these three categories could not receive financial support in the implementation of these collective reparations, but rather that the Chamber considers a collective response is more appropriate to adequately address the harm suffered. As indicated by the Appeals Chamber, 'the decision not to award reparations on an individual basis does not prejudice the individuals who filed individual reparations requests with respect to their eligibility to participate in any collective reparations programme'.[257]

87. The Chamber therefore considers that the economic harm caused by Mr Al Mahdi necessitates: (i) individual reparations for those whose livelihoods exclusively depended upon the protected buildings, who were significantly affected by their destruction, or who otherwise suffered significant personal economic loss as a consequence of their destruction; and (ii) collective reparations for the community of Timbuktu as a whole.

88. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation to address the financial losses suffered. The modalities for collective reparations should be aimed at rehabilitating the community of Timbuktu to address the economic harm caused. Collective measures in this regard may include: community-based educational and awareness-raising programmes to promote Timbuktu's important and unique cultural heritage; return/resettlement programmes; the development of actions or programmes aimed at assisting women, youth, and others towards generating income; a 'microcredit system' that would assist the population to generate income; a school/university; a project that would generate jobs not only for the women, but for youth and others; or other cash assistance programmes to restore some of Timbuktu's lost economic activity.[258]

89. Moreover, a fully gender-sensitive approach to the protection of cultural heritage and to combating its destruction is essential.[259] As recommended in the First Expert Report, such reparations could include initiatives such as promoting training for women and fostering discussions of the issue of non-discrimination in

[257] Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, *Lubanga* (ICC-01/04-01/06-3129), Appeals Chamber, 3 March 2015, § 155 (hereafter Lubanga Reparations Appeals Judgment).

[258] *See* First Expert Report, *supra* note 245, at 46; PUBLIC Redacted Annex I to Registry's observations pursuant to Trial Chamber VIII's Decision ICC-01/12-01/15-172 of 29 September 2016, *Al Mahdi* (ICC-01/12-01/15-193-AnxI-Red), 5 December 2016, § 44 (hereafter Registry's Observations).

[259] First Expert Report, *supra* note 245, at 46.

access to cultural heritage sites as a means of guaranteeing non-repetition of the abuses in this case.[260] As the First Expert Report notes, 'if there was no specific provision made for reparations for women, women will be unlikely to be beneficiaries of the reparations. The reparations process can afford an opportunity to strengthen their recognition and involvement in the protection, care and transmission of cultural heritage'.[261]

Moral Harm

90. When pronouncing Mr Al Mahdi's sentence, the Chamber concluded that Mr Al Mahdi had caused moral harm.[262]

91. Every victim applicant before the Chamber alleges some sort of moral harm as a result of the attack on the protected buildings. The Chamber considers that the victims established the following forms of moral harm to the requisite standard: (i) mental pain and anguish, including losses of childhood, opportunities, and relationships among those who fled Timbuktu because the protected buildings were attacked and (ii) disruption of culture.[263]

92. The Chamber has also received other information describing the emotional distress and harm suffered across the Timbuktu community. In particular, the protected buildings were widely perceived in Timbuktu as being the protectors of the community from outside harm. The attack on the protected buildings not only destroyed cherished monuments, but also shattered the community's collective faith that they were protected.[264] Collective events at the mausoleums also brought members of the community together; the *crépissage*, or plastering of the mosques, is done collectively, with women and the elderly at the base and young men at the top.[265]

93. In relation to moral harm stemming from the disruption of culture, the Chamber has acknowledged in its sentencing judgment the particular loss of intangible cultural heritage that women have faced in their ritual of cleaning the

[260] *Ibid.*
[261] *Ibid.*
[262] Al Mahdi Judgment, *supra* note 228, at § 108.
[263] Forms of moral harm related to disruption of culture have been recognised in international human rights jurisprudence. Judgment (Reparations), *Plan de Sánchez Massacre v. Guatemala* (IACHR Series C No. 116), Inter-American Court of Human Rights (IACtHR), 19 November 2004, §§ 77, 85–88; Judgment (Merits, Reparations and Costs), *Yakye Axa Indigenous Community v. Paraguay* (IACHR Series. C. no 125), IACtHR, 17 June 2005, §§ 154, 203.
[264] RAPPORT Rédigé par un college d'Experts, *Al Mahdi* (ICC-01/12/01-15-214-AnxIII-Red2), Trial Chamber VIII, 4 August 2017, at 146–149 (hereafter Third Expert Report); Second Expert Report, *supra* note 245, § 65; First Expert Report, *supra* note 227, at 29.
[265] Transcript of Trial Hearing, *Al Mahdi* (ICC-01/12-01/15-T-5-Red-ENG), Trial Chamber VIII, 23 August 2016, at 39–40.

shrines.[266] Women were the most frequent visitors to the mausoleums, even though they were unable to enter the protected buildings.[267] They often prayed at these buildings, making wishes to have children, or wishing for the success of their children.[268] Having acknowledged the particular links that women have with the mausoleums, the First Expert Report stresses the significance of including a 'gender specific component of the reparations that recognizes women's connections to the cultural heritage that was targeted, their suffering during the jihadist occupation and the [REDACTED] in countering the fundamentalist ideology that inspired the destructions'.[269]

94. The Chamber is satisfied that Mr Al Mahdi's crime is both the actual and proximate cause of this moral harm. It was reasonably foreseeable that attacking cultural property integral to the community in Timbuktu would cause these kinds of distress.

95. The LRV argues at length that the moral harm suffered is best addressed by giving compensation to the applicants as individual and collective reparations.[270] For the same reasons provided when discussing consequential economic loss, the Chamber considers such a compensation-centric approach for the benefit of the reparations applicants to be problematic. The Chamber again emphasises that it considers that such a course understates the variety of other information proving that Timbuktu's community at large – and not only the victim applicants – suffered moral harm.

96. The Registry has noted that documentary evidence of harm, proving a victim was 'faithful' or was harmed by the destruction of the buildings, and quantifying moral harm would prove difficult for most victims.[271] The defence argues in its submissions that psychological harm in the present case can be proven *only* by asking for a direct kinship between the people claiming the harm and the deceased whose mausoleums were attacked.[272] The Chamber agrees with the defence – and LRV,[273] for that matter – that those whose ancestors' burial sites were damaged in the attack (such as the 'descendants of the saints') have a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population. However, it considers that the community-wide impact of moral harm is minimised by sole reliance on direct kinship as a means of proving moral harm. Furthermore, given that male victims are more likely to be able to prove a connection with the 'descendants of the saints', due to the patrilineal way that familial records are kept,

[266] M. McKay, Reimagined Mali Sentencing Decision, Chapter 13.3 above.
[267] First Expert Report, *supra* note 227, at 22.
[268] *Ibid*, at 21.
[269] *Ibid*, at 46.
[270] Final Submissions of the LRV, *supra* note 238, §§ 44–59.
[271] Registry's Observations, *supra* note 258, at 13.
[272] General Defence Observations on Reparations, *Al Mahdi* (ICC-01/12-01/15-191-tENG), at 23 (hereafter First Defence Submissions).
[273] First LRV Submissions, *supra* note 236, § 77.

narrowly interpreting this moral harm could reinforce structural and material exclusion of women.

97. With this in mind, the Chamber stresses the importance of recognising female-based lines of ancestry alongside 'descendants of the saints' when identifying groups that have a particularly strong emotional connection to the destroyed sites. The Chamber considers that individual reparations through compensation are necessary to address the mental pain and anguish that these victims suffered. But the remainder of the reparations awarded to the entire community of Timbuktu must be collective in character and should prioritise collective opportunities for sections of the population who may be marginalised in the distribution of individual reparations.

98. The Chamber therefore orders that the moral harm caused by Mr Al Mahdi necessitates: (i) individual reparations for the mental pain and anguish of those with a stronger emotional connection to the destroyed sites than the rest of the Timbuktu population, including those whose ancestors' burial sites were damaged in the attack and (ii) collective reparations for the mental pain/anguish and disruption of culture of the Timbuktu community as a whole.

99. As for the modalities, the Chamber considers that individual reparations are to be implemented through compensation and collective reparations through rehabilitation to address the emotional distress suffered as a result of the attack on the protected buildings. These collective reparations can also include symbolic measures – such as a memorial, commemoration, or forgiveness ceremony – to give public recognition of the moral harm suffered by the Timbuktu community and those within it. As noted by the LRV, the implementation of reparations must not result in any discrimination – including gender-based discrimination – among victims.[274] It is important, therefore, that all victims, including women, children, and the elderly, be included in decisions around collective reparations. . . .

IMPLEMENTATION

135. The Chamber has concluded that Mr Al Mahdi is liable for €2.7 million in expenses for individual and collective reparations. The Chamber has also ordered some symbolic measures. . . .

137. The LRV has suggested that the reparation scheme should involve local traditional and religious leaders to ensure communication with and inclusion of communities in decision making.[275] It is recognised that some methods of reparation 'could unintentionally strengthen the dominant group, and leave the marginalised members of the community worse off'.[276] The Chamber notes, in particular,

[274] Final Submissions of the LRV, *supra* note 238, § 97.
[275] First LRV Submissions, *supra* note 236, § 22.
[276] Second Expert Report, *supra* note 245, § 124.

evidence in the Second Expert Report that women's views are ordinarily only heard in certain conditions, such as when 'they are old and considered wise … [where they] do not expose themselves in public … [or where they play a] role of counsellor … [to] their husbands'.[277] The report also notes that women are at a disadvantage in relation to property rights given that male descendants receive twice as much as female descendants and widows are only entitled to one-eighth of the property of their deceased husband.[278] With this in mind, the Trust Fund for Victims (TFV) must ensure that the involvement of community leaders does not further the exclusion of women, but rather that women's inclusion both in the process of developing the scheme and as victims using the scheme is facilitated.

138. It is not the Chamber's responsibility at this time to give detailed information about the implementation component of the reparations phase. However, the Chamber will advance the following preliminary considerations to guide the implementation of its order. …

140. Second, the Chamber notes that the modalities of reparations it has ordered mutually reinforce each other. In other words, addressing the discrete moral harm may have residual effects that ameliorate the discrete forms of economic harm and vice versa. Care must be taken, however, to avoid any assumption that addressing economic harms to a family unit, which is traditionally headed by a man, does not supersede reparations for moral harms to other members of the family, including women and children, who occupy a vulnerable and submissive position in society.[279] The TFV is not limited to the Chamber's intermediate liability calculations when designing an implementation plan; the TFV is limited only by the Chamber's final determination on the defendant's liability.

141. Third, specific provisions must be made in the implementation phase to ensure equitable distribution of reparations to women.[280] Women may find it difficult to make individual claims for reparations because of the Malian traditional family structure and subordination of the wife. The TFV should consider a process that affords an opportunity for women to strengthen their involvement in developing an appropriate reparations scheme, which ensures adequate financial reparation and inclusive participation.

142. Fourth, the Chamber notes that it has received only 139 applications during the reparations phase, despite determining that collective harm was suffered across Timbuktu (a city of approximately 70,000 people around the time of the attack).

[277] *Ibid*, § 115.
[278] *Ibid*, § 114.
[279] Second Expert Report, *supra* note 245, § 114.
[280] The LRV have emphasised the importance of equal treatment of victims regardless of gender and the need to need to ensure that '[f]emale victims … [are] able to receive directly, and under the same conditions as male victims, any reparations awarded to them' in order to avoid gender-based discrimination in the implementation of reparations. See Final Submissions of the LRV, *supra* note 238, § 97.

The LRV acknowledges that 'the victims whom he met on his assignment in Mali represent just a fraction of the victims in the case'.[281] The Chamber notes the potential for these applications to be gendered because of the effect of conservative social values that curtail women's ability to negotiate or advocate for themselves in legal processes.[282] The Chamber also notes the information received that the security situation in Timbuktu makes travelling there or contacting victims difficult,[283] a situation exacerbated for women. For these reasons, the Chamber considers that the names of all the victims meeting its parameters for individual reparations are simply not known and considers that it would be impracticable for the Chamber to attempt to identify and assess them all itself.

143. As recognised by the Appeals Chamber,[284] the regulations of the TFV explicitly contemplate individual reparations for unidentified beneficiaries.[285] This is in juxtaposition to the TFV regulations governing individual reparations in cases where the Court identifies each beneficiary.[286] When the Court does not identify the beneficiaries, it falls to the TFV to establish a verification procedure to determine that any persons who identify themselves to the TFV are in fact members of the beneficiary group.[287] The Chamber considers that proceeding in this manner is an alternative to an application-based process, whereby the Chamber assesses the reparation requests of identifiable beneficiaries filed pursuant to Rule 94 of the ICC Rules of Procedure and Evidence.

144. For the reasons above, the Chamber considers that the impracticability of identifying all those meeting its individual reparations parameters justifies an eligibility screening during the implementation phase. The Chamber therefore considers it best that individual reparations be awarded on the basis of an administrative screening by the TFV.[288] However, the TFV should recognise that because of the patrilineal nature of familial records, the particular role of women in the informal economy, and the submissive position of women in society, these verification procedures must be such that they do not reinforce exclusion.

145. The Chamber notes that given the particular role of the descendants of the saints in guarding and maintaining the protected buildings, it is likely that many of those identified as suffering economic loss and moral harm will be the same individuals. Bearing this in mind, the Chamber considers that one screening for

[281] First LRV Submissions, *supra* note 236, § 54.
[282] Second Expert Report, *supra* note 245, § 114.
[283] See First LRV Submissions, *supra* note 236, § 129; Final Submissions of the LRV, *supra* note 238, §§ 14–15.
[284] First LRV Submissions, *supra* note 236, §§ 142, 167.
[285] Regulations 60–65 of the Regulations of the TFV.
[286] Regulation 59 of the Regulations of the TFV.
[287] Regulations 62–65 of the Regulations of the TFV.
[288] The TFV has made submissions confirming its capacity to conduct administrative screenings. See First TFV Submissions, *Al Mahdi* (ICC-01/12-0/15-187), Trial Chamber VIII, 2 December 2016, §§ 56–63.

both categories is sufficient for these applicants. It is also emphasised at the outset that anyone not participating in the screening can still participate in collective reparations programmes – the screening process concerns only individual reparations.

146. This screening process itself must respect the rights of both the victims and the convicted person.[289] The Chamber considers that the full details of this screening are to be determined by the TFV, but it can already set out the following general parameters:

(i) Reasonable efforts must be made to identify individuals who may be eligible under the screening process, within a timeframe to be proposed by the TFV. These efforts must ensure the inclusion of eligible women, and identify and ameliorate difficulties for women in meeting eligibility criteria.

(ii) Individuals who wish to be considered for the screening process are to provide a reparations application and any supporting documents. It is noted in this regard that this step has already been taken by the reparations applicants in the present case, and these persons should be considered first by the TFV if they apply to be screened. However, it must also be recognised that in the provision of reparations this must not prioritise those who have already made applications, as that would have an indirect effect of reinforcing exclusion of marginalised groups.

(iii) Both the applicant, on their own or through a legal representative, and the defence must be given an opportunity to make representations before the TFV assesses any applicant's eligibility. In assessing eligibility, the TFV may base itself only on information made available and to which the defence has had an opportunity to access and respond. Recognition must be made that the informal economy and patriarchal family registration means that women in particular may be reliant on informal documentation or accounts to support their eligibility. For instance, to demonstrate that they are descendants of the saints, women may be more likely to rely upon oral testimony and statements rather than registration documents.

. . .

147. Fifth, the Chamber has received conflicting information about the extent to which traditional justice mechanisms should be used in implementing the Chamber's order. Some note the paramount role these play in Timbuktu's culture and how the validity of any reparations order depends on using them.[290] Others

[289] Rule 97(3) of the ICC Rules of Procedure and Evidence.

[290] See Second Expert Report, *supra* note 245, at §§ 89, 103, 112–113, 119, 121–123. See also Third Expert Report, *supra* note 264, at 136–142; First LRV Submissions, *supra* note 236, § 133; Final Submissions of the LRV, *supra* note 238, §§ 74, 98.

emphasise that certain traditional justice mechanisms in Timbuktu have a history of discrimination, especially against neglected groups such as women, children, and slaves, and that care should be taken in relying upon them.[291] Given this conflicting information, and the Chamber's commitment to equitable distribution of reparations, the Chamber will not require that traditional justice mechanisms be part of the implementation of its award.

148. Lastly, the Chamber emphasises that implementation of the present order must be responsive to local conditions while being consistent with the Court's reparations principles, including the principle of non-discrimination. The TFV is expected to devise a draft implementation plan bearing this dichotomy in mind, consulting all relevant stakeholders – including the parties – and recommending any implementation measures it considers appropriate.[292] The parties will also be given an opportunity to file written submissions on the draft implementation plan proposed. As emphasised above, the TFV's discretion in drafting the implementation plan will be subject to approval by way of a second decision of the Chamber.

Judge Laura Graham and Judge Annika Jones

13.5 DIGITAL EVIDENCE IN THE AL HASSAN WARRANT

Sarah Zarmsky and Emma Irving

In 2018, Pre-Trial Chamber I issued a Warrant of Arrest for Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud.[293] In this rewritten decision, Sarah Zarmsky and Emma Irving provide additional remarks on the aspect of digital evidence that is intended to come before the Chamber at trial.

Zarmsky and Irving explore how the benefit of digital evidence is also the disadvantage, namely that the violence can be shared globally and never completely eradicated. Zarmsky and Irving note that the digital aspect of the evidence compounds the harm experienced by victims while also providing a clear portrayal of the violence and thereby greatly assisting the Court. They highlight the safeguards that should be enacted to protect victims but note that as digital evidence becomes more frequently used, the lack of such evidence, notably in regard to sexual and gender-based crimes, should not act as a barrier to conviction and should still enjoy proper and thorough investigatory practices.

[291] Second Expert Report, *supra* note 245, at §§ 89, 114–118, 124; First Expert Report, *supra* note 227, at 48–49.

[292] *As requested in* Final Submissions of the LRV, *supra* note 238, §§ 101, 110.

[293] Warrant of Arrest, *Al Hassan* (ICC-01/12-01/18-35-Red2-tENG), Pre-Trial Chamber I, 22 May 2018.

No.: ICC-01/12-01/18
Date: 22 May 2018

Original: French

PRE-TRIAL CHAMBER I

Before: Judge Sarah ZARMSKY
Judge Emma IRVING

SITUATION IN THE REPUBLIC OF MALI

IN THE CASE OF THE *PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG MAHMOUD*

Public Redacted Version

Decision on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud

ADDITIONAL REMARKS

1. Having found reasonable grounds to believe:
(a) That crimes against humanity and war crimes were committed in Timbuktu, Mali, between April 2012 and January 2013;
(b) That Mr Al Hassan has incurred individual criminal responsibility under Articles 25(3)(a) and (b) of the Rome Statute for these crimes; and
(c) That the conditions under Article 58(1)(b) of the Rome Statute for arresting Mr Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud are satisfied,

the Chamber sees fit to issue some additional remarks on two subjects that it considers pertinent to the present case and to future cases in which similar conditions arise.

2. The first subject is that of video evidence and its evidentiary value before this Court. The second subject concerns the additional gravity considerations which arise due to the fact that the crimes committed were filmed and posted online.

The Use of Video Evidence

3. The Chamber notes the Prosecutor's inclusion of a number of videos in the evidence supporting her application for the present arrest warrant. In said application, the term 'video' is mentioned seventy-four times in support of a range of submissions.[294] This conspicuous use of video material reflects the growing

[294] Version publique expurgée de la 'Requête urgente du Bureau du Procureur aux fins de délivrance d'un mandat d'arrêt et de demande d'arrestation provisoire à l'encontre de M. Al Hassan Ag ABDOUL AZIZ Ag Mohamed Ag Mahmoud', 20 March 2018, ICC-01/12-54-Secret-

importance that video evidence – as well as digital evidence more generally – is coming to play in international criminal accountability. For this reason, the Chamber considers it opportune to issue some remarks on the subject of video evidence.

4. Videos have played a role in International Criminal Court (ICC) proceedings since its first case, when videos depicting child soldiers were shown in the courtroom during the trial the *Prosecutor v. Thomas Lubanga Dyilo*.[295] Since that time, two cases have come before this Court in which video evidence was a significant part of the case.

5. The first such case was the *Prosecutor v. Ahmad Al Faqi Al Mahdi*. On 27 September 2016, Mr Al Mahdi was found guilty as a co-perpetrator of the war crime of intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in 2012. The evidence presented to Trial Chamber VIII included a large number of videos that, among other things, depicted the accused taking part in the destruction of protected buildings and giving instructions and moral support to others to do the same.[296]

6. The second such case was the *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*. In 2017 and 2018 respectively, two warrants of arrest were issued for Mr Al-Werfalli for both directly committing and ordering the commission of murder as a war crime.[297] The alleged murders took place in the context of eight incidents, seven of which were captured on video and uploaded to social media sites. The total number of alleged murder victims is forty-three, corresponding to the number of individuals whose death is purportedly depicted in the videos. At the time the present arrest warrant was issued, Mr Al-Werfalli was still at large, and reported by some sources as deceased.

7. In both above cases, the Prosecutor limited her charges to one war crime: in *Al Mahdi* the intentional directing of attacks against religious and historic buildings, and in *Al-Werfalli* murder. This narrow focus fed into and reinforced (and was possibly a consequence of, though that is not for this Chamber to say) a commonly held belief that video evidence is predominantly of use for a certain category of crimes only. These are crimes that take place in public or semi-public spaces, such as the very public destruction of buildings in Mali or executions on the street in Libya. This stands in contrast to crimes more often perpetrated in private and

Exp, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mohmoud* (ICC-01/12-01/18), Pre Trial Chamber I, 20 March 2018 (hereafter Prosecutor's Arrest Warrant Application).

[295] For an overview of the use of video in the Lubanga case, see Witness, 'From the DRC to the ICC: The Prosecutor v Lubanga: The Role of Video in the Criminal Justice Process', available at https://vae.witness.org/portfolio_page/role-of-video-in-the-criminal-justice-process/.

[296] See Judgment and Sentence, *Ahmad Al Faqi Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 27 September 2016, § 40 (hereafter Al Mahdi Judgment and Sentence).

[297] Warrant of Arrest, *Mahmoud Mustafa Busayf Al-Werfalli* (ICC-01/11-01/17), Pre-Trial Chamber, 15 August 2017; Second Warrant of Arrest, *Mahmoud Mustafa Busayf Al-Werfalli* (ICC-01/11-01/17), Pre-Trial Chamber, 4 July 2018.

frequently stigmatised, in particular sexual and gender-based violence crimes (SGBV).

8. In addition to noting the extensive use of video evidence in the Prosecutor's application for the present arrest warrant, the Chamber notes with satisfaction that video is used to support a range of submissions, including arguments relating to violence against women and girls.[298] This marks a move away from the approach seen in *Al Mahdi* and *Al-Werfalli* and gives force to the idea that video evidence can play a larger evidentiary role than hitherto thought.

9. On the basis of the evidence presented by the Prosecutor in her application, including videos, the Chamber has made a number of findings in this arrest warrant. While these are addressed in detail elsewhere in this decision, the Chamber will draw attention to a few points that pertain to the use of video evidence in submissions related to SGBV.

10. First, in establishing – as a contextual element of crimes against humanity – that Ansar Dine and al-Qaeda in the Islamic Maghreb (AQIM) had a policy of attacking the civilian population, the Chamber takes note of videos showing how the armed groups wished to impose their authority and new religious order on the civilian population. Under this policy, those who failed to demonstrate the necessary religiosity, in particular women and girls, were to be punished.[299]

11. Second, video evidence played a part in establishing reasonable grounds to believe that torture and persecution as crimes against humanity took place in Timbuktu, Mali, and that women and girls were particular targets. With respect to the crime of torture, the Prosecutor submitted video evidence of women being subjected to whipping at the market and in their homes.[300] The reasons given for this conduct included not being sufficiently covered or wearing colourful clothes.[301] With respect to the crime of persecution, the Prosecutor referenced videos showing that under the pretext of enforcing Ansar Dine and AQIM's religious vision, women were harassed in the street, in hospitals, in schools, and in their own homes;[302] they were subjected to daily abuse, searches, and detention.[303] In one video referenced by the Prosecutor, Ansar Dine/AQIM preacher Abou Al Baraa declares that women 'must not speak seductively and softly; and they must not make tingling sounds when they walk; and they must not embellish themselves'.[304]

12. These findings illustrate that some categories of SGBV crimes can take place in public spaces and that video recordings capturing elements of these crimes do

[298] See sections 72 and 73 of the present arrest warrant.
[299] Section IV(A)(1) of the present arrest warrant.
[300] See sections 72 and 73 of the present arrest warrant.
[301] Video, *Al Jazeera*, 'Frances calls for Mali peace talks' (31 January 2013), cited in Prosecutor's Arrest Warrant Application, *supra* note 294, n. 316.
[302] *Ibid*, § 121.
[303] *Ibid*, n. 330.
[304] Prosecutor's Arrest Warrant Application, *supra* note 294, at § 110.

exist and can have evidentiary value. It is time, therefore, for a shift in mindset away from viewing video evidence as limited in utility, and in particular away from viewing video evidence as unhelpful in proving crimes against women and other victims of SGBV crimes.

13. The Chamber does not deny that some SGBV crimes are more difficult than others to establish using video evidence. Notably, the Chamber finds reasonable grounds to believe that the crimes against humanity of rape, sexual slavery, and forced marriage as an inhumane act, and the war crime of rape, were committed in Timbuktu, Mali; however, the Chamber does not cite video evidence as supporting evidentiary material for these findings.

14. Recent research shows, however, that while direct video evidence of sexual violence being perpetrated is rare,[305] video evidence has a valuable role to play in corroborating and supporting other forms of evidence. Alexa Koenig and Ulic Egan found through interviews with practitioners that digital open-source information (including video evidence) can be useful in establishing contextual elements of international crimes, for example by documenting television statements made in the lead-up to an attack, or recording troop and vehicle movements.[306] Furthermore, digital evidence can capture more 'visible' conflict-related phenomena that correlate with sexual violence. That way, the 'visible phenomena can act as a signal that evidence of sexual violence may be nearby'.[307] Events such as village burnings, forcible transfers, the use of detention centres, slave labour, and the presence of large groups of armed men are often indicators that sexual violence could have taken place.[308] Koenig and Egan recommend that investigators work creatively when looking for SGBV-related evidentiary material and that they take into account the fact that evidence of this category of crimes may not be labelled as such[309] and may be reported in different ways than other crimes.[310] When carrying out investigations online, they found that SGBV-related material was often hidden on the dark web, and therefore more challenging to find.[311]

15. The Chamber has been keen to express its support for widening the understanding of the role that video evidence can play in proceedings before this Court and in other accountability fora. In an age when videos are so easily made on

[305] But not unheard of. As described by Sellers and Kestenbaum, ISIS is said to have carefully documented the sale of Yazidi women and girls, registering their names, ages, marital statuses, along with photos and purchase prices. P. V. Sellers and J. G. Kestenbaum, 'Missing in Action: The International Crime of the Slave Trade' 18 *Journal of International Criminal Justice* (2020) 517–542, at 524–525.

[306] A. Koenig and U. Egan, 'Power and Privilege: Investigating Sexual Violence with Digital Open Source Information' 19 *Journal of International Criminal Justice* (2021) 55–84.

[307] *Ibid*, 73.

[308] *Ibid*, 73.

[309] *Ibid*, 75.

[310] *Ibid*, 64.

[311] *Ibid*, 65.

smartphones and other digital devices, and so easily shared through social media and communication apps, to overlook the value of this source of evidence for establishing SGBV crimes risks rendering such crimes more invisible than they already are. The digital age provides a wealth of tools for investigators and lawyers that should be put to work to address marginalisation and silence. That being said, there are two cautionary notes that these additional remarks on video evidence will conclude with.

16. First, where there is video evidence of SGBV crimes, especially direct evidence of the perpetration of such crimes, a strong and robust ethical framework is needed to ensure victims' rights and the safety of the individuals who captured the video.

17. Second, in cases where video evidence simply does not exist, caution should be exercised to ensure that SGBV crimes are still given the proper investigatory attention. There are a range of reasons why video evidence may be scarce, including that the internet was cut off during the conflict, a lack of digital infrastructure in the conflict-affected area, unequal access to technology between men and women/young and old/rural and city dwellers, unequal (digital) literacy, the existence of domestic legislation that makes reporting SGBV crimes difficult, a lack of services, and so on. Crimes where the perpetrator is captured on video directly perpetrating or ordering the crime are attractive from an investigative and prosecutorial standpoint, but the relative ease of prosecuting these crimes should not mean that other crimes, and in particular the often difficult to prosecute SGBV crimes, should escape investigation and accountability.

Gravity Considerations

18. In addition, with the development of smartphones and the accessibility of the internet around the globe, it is now common for individuals to post footage of atrocities to social media. This phenomenon occurs for multiple reasons; sometimes bystanders may begin recording as an instinctual mechanism to deal with the shock of seeing a crime, or witnesses may post footage to try and raise awareness about a particular event or conflict. However, sharing videos of crimes may not always be done with the purest of intentions, as terrorist organisations and other perpetrators now frequently use social media to distribute footage for purposes of spreading propaganda, instilling fear, and further humiliating the victims and their families.[312]

19. When footage of crimes is shared on social media, this element of publication can aggravate the gravity of the crimes. As the Pre-Trial Chamber stated in the case

[312] See for instance A. Barr and A. Herfroy-Mischler, 'ISIL's Execution Videos: Audience Segmentation and Terrorist Communication in the Digital Age' 41 *Studies in Conflict & Terrorism* (2018) 946–967; S. Sandberg and T. Ugelvik, 'Why Do Offenders Tape Their Crimes? Crime and Punishment in the Age of the Selfie' 57 *British Journal of Criminology* (2017) 1023–1040.

against Mr Al-Werfalli, 'the posting on social media of the videos depicting executions' and 'the manner in which the crime was committed and publicized was cruel, dehumanizing, and degrading'.[313] This Chamber considers that the publication element should have been further discussed in the case against Mr Al-Werfalli when assessing gravity. Focus should have been placed on the additional harm suffered by the victims from having their suffering posted to public online platforms, which extended the audience of this suffering far beyond the group of onlookers on the street that day.

20. Returning to the present case, the Prosecutor submits in her application that one of the reasons the attacks against the population of Timbuktu can be considered widespread and systematic is 'the mode of executions, in public and in the presence of the population summoned for this purpose'.[314] The Prosecutor argues that the executions were 'brutal and public' in order to 'instil fear in the population'.[315] Further, the Prosecutor emphasises that the public nature of the executions rendered them particularly humiliating for the victims.[316] These elements of the application add to this Chamber's view that the way in which offences were committed publicly and posted online aggravate the seriousness of the crimes.

21. Further, in her application the Prosecutor makes frequent reference to videos of the executions, some of which were posted to social media platforms such as YouTube by Ansar Dine.[317] The Prosecutor submits that these videos 'show the victims bent over in pain. The repetition of the blows contributes to accentuate their suffering, perceptible through their cries and their groans. Some have bloodstains, others have their private parts exposed for all to see, contributing to a sense of public humiliation'.[318]

22. The Chamber considers that the posting of videos of executions to social media platforms such as YouTube by Ansar Dine itself demonstrates a desire to further degrade the victims before a widespread audience. It is the Chamber's view that this factor aggravates the offence and should be noted in considering the gravity of the crimes committed. When footage of crimes is posted to the internet, those depicted are victimised even further through the humiliation of their suffering being shared globally and the fear of not knowing how far the footage will be circulated. Once a video is posted online, it is extremely difficult to remove it completely and stop it from being continuously shared, which can leave victims feeling helpless and humiliated for much longer than if the crime was not filmed and shared. It is also

[313] Warrant of Arrest, *Mahmoud Mustafa Busayf Al-Werfalli* (ICC-01/11-01/17), Pre-Trial Chamber, 15 August 2017, § 29; Second Warrant of Arrest, *Mahmoud Mustafa Busayf Al-Werfalli* (ICC-01/11-01/17), Pre-Trial Chamber, 4 July 2018, § 31.
[314] Prosecutor's Arrest Warrant Application, § 130 (translated from French).
[315] *Ibid*, § 80 (translated from French).
[316] *Ibid*, § 136 (translated from French).
[317] *Ibid*, § 228, n. 626 (translated from French).
[318] *Ibid*, § 304 (translated from French).

important to note that in instances where footage of crimes is posted to social media, women and girls may likely be affected disproportionately to men. This is due to the fact that the stigma surrounding being victims of certain crimes may be worse for women and girls, and can continue to haunt them throughout their lives.

23. The Chamber also considers that the public nature of the executions and the fact that they were circulated online adds to the harm experienced by those close to the victims, such as friends and family members, who may come across the footage and be unable to escape the reality of what has happened to their loved ones. The mental toll of seeing crimes perpetrated on relatives of victims was considered by the Chamber in the cases of the *Prosecutor v. Moinina Fofana and Allieu Kondewa* at the Special Court for Sierra Leone and the *Prosecutor v. Miroslav Kvočka et al.* at the International Criminal Tribunal for the Former Yugoslavia. For example, in *Fofana and Kondewa*, the Trial Chamber stated that 'a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends … the Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others'.[319] Further, in *Kvočka*, the Trial Chamber found that 'the mental suffering caused to an individual who is forced to watch severe mistreatment inflicted on a relative would rise to the level of gravity required under the crime of torture'.[320]

24. Thus, in both the aforementioned cases, the Court decided that the harm caused by viewing a crime committed against others could constitute the level of gravity needed to constitute its own crime. In the present case, the additional element of posting of crimes to social media could have potentially increased the number of family members or friends of the victims who bore witness to the heinous acts committed against them. Therefore, the Chamber considers this elevated risk of vicarious victimisation as well in its assessment of the gravity of the acts charged.

25. In addition, the publication of footage of international crimes can also harm not just the victims and those close to them, but the community and broader population as well. This was noted by the Trial Chamber in the case against Mr Al Mahdi, in which it was found that 'the impact of the attack on the population was heightened by the fact that it was relayed in the media'.[321] When making this finding, the Trial Chamber referred to the Office of the Prosecutor's (OTP's) submissions on sentencing, in which the OTP argued that publicity was used 'as a tool in the attack', and that this 'intentionally "high-profile" nature of the attack heightened the suffering of the people of Timbuktu and allowed the armed groups to reach, and thus to victimise, a broader audience'.[322] The Chamber considers that

[319] Judgment, *Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T), Trial Chamber I, 2 August 2007, § 153.
[320] Judgment, *Miroslav Kvočka et al.* (IT-98-30/1-T), 2 November 2001, § 149.
[321] Al Mahdi Judgment and Sentence, *supra* note 296, at § 78.
[322] Public redacted version of Prosecution's submissions on sentencing, *Ahmad Al Faqi Al Mahdi*, (ICC-01/12-01/15) Trial Chamber VIII, 21 August 2016, § 35.

this argumentation may be applied to the present case, in which social media was used to publicise the executions.

26. Further, it is commonly known that terrorist and armed groups such as Ansar Dine and AQIM utilise social media to spread fear and political messages to a global audience.[323] The Chamber is thus of the view that in posting execution videos online, members of Ansar Dine intended not only to degrade the victims depicted in the footage, but to harm other internet users who may have stumbled across the content. Notably, in its sentencing judgment for the *Prosecutor v. Bosco Ntaganda* case, Trial Chamber VI considered that crimes 'irreversibly impacted not only the direct victims but also those who witnessed them'.[324] The Chamber therefore submits that this should also be factored into the assessment of gravity, as by sharing videos to platforms like YouTube, Ansar Dine expanded its range of victims outside of those executed and in the direct vicinity of the crimes to include virtually any internet user as well.

27. The Chamber notes that the posting of executions online has been acknowledged as a separate crime and charged as an outrage on the dignity of the deceased in domestic trials. For example, in The Netherlands, a man was convicted for the war crime of assault on personal dignity for posting a photo to Facebook of himself posing next to a man who was executed and tied to a cross.[325] Months later, another man was convicted for the same crime for posting to YouTube footage of him kicking and spitting on dead bodies.[326] In both instances, the Hague Court ruled that the footage posted to social media constituted the level of humiliating and degrading treatment necessary to be considered a war crime.[327] Similar cases have occurred in Finland, Germany, and Sweden, in which individuals were sentenced to imprisonment for war crimes for sharing videos of dead bodies and crimes being

[323] See for instance E. Vermeersch, J. Coleman, M. Demuynck, and E. Dal Salto, *The Role of Social Media in Mali and Its Relation to Violent Extremism: A Youth Perspective*, International Centre for Counter-Terrorism The Hague and United Nations Interregional Crime and Justice Research Institute, March 2020, available at www.icct.nl/sites/default/files/import/publication/Social-Media-in-Mali-and-Its-Relation-to-Violent-Extremism-A-Youth-Perspective.pdf.

[324] Sentencing Judgment, *Bosco Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 7 November 2019, § 52.

[325] ECLI:NL:GHDHA:2021:103, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2021:103, at 2.

[326] ECLI:NL:RBDHA:2021:3998, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:3998. See para. 5.4.2.3 of the judgment, translated from Dutch to English: 'All of this behavior was subsequently filmed and this film was distributed through a public YouTube channel, continuing the humiliation and dishonor by allowing a large audience to learn about it. In the opinion of the court, these humiliating and degrading behaviours – certainly viewed in conjunction with each other – are of such a nature that one can speak of an assault on personal dignity.'

[327] ECLI:NL:GHDHA:2021:103, *supra* note 325, at 26; ECLI:NL:RBDHA:2021:3998, *supra* note 326, at 41.

committed to the internet.[328] The Chamber leaves open the possibility of applying the same analysis at the ICC, which has jurisdiction over the war crimes listed under Article 8 of the Rome Statute.[329]

28. Further, regarding the consideration of other victims outside those directly affected by the executions, such as online users, the Chamber notes that other crimes under the jurisdiction of the Court take into account victimisation outside of those in the immediate vicinity of the crimes. For instance, in its Policy on Cultural Heritage, the OTP notes that '[t]he victims of crimes against or affecting cultural heritage may include persons affected both directly and indirectly . . . The impact of an attack on cultural heritage may transcend the socio-geographical space it occupies, resulting in a global impact'.[330]

29. Including this element in the gravity consideration renders visible harms perpetrated through digital means important in all cases where violence is published online. This will be particularly significant in cases involving sexual and gender-based violence, where the additional stigma involved in the violence being made public requires recognition as part of what renders the crimes particularly grave.

Conclusion

30. The digital age is changing how international crimes are committed and how accountability for crimes is pursued before criminal courts, both international and domestic. These additional remarks have drawn attention to two issues that will be important going forward and to which attention must be paid by actors in the accountability space, from lawyers to investigators. First, video evidence will continue to grow in importance and its potential should be viewed more broadly than has been the case until now. Second, there is an additional harm that takes place when a recording of a crime is posted to social media, and this harm should be acknowledged and factored into an assessment of the gravity of the crime.

Judge Sarah Zarmsky and Judge Emma Irving

[328] For example, in Finland, two men were convicted for posting on Facebook images of themselves holding decapitated heads – one was convicted for desecrating the corpse of the dead fighter, and the other was convicted for an outrage upon the personal dignity of the deceased. In Germany, one man was prosecuted for posing with severed heads of enemy combatants impaled on metal rods and uploading the photos to Facebook 'with limited privacy settings', and another was convicted on similar grounds for recording himself mutilating the bodies of dead soldiers. In Sweden, a man was convicted for posing next to multiple severed heads and posting the photos on Facebook. See Eurojust, 'Prosecuting war crimes of outrage upon personal dignity based on evidence from open sources – Legal framework and recent developments in the Member States of the European Union' (The Hague, February 2018) 7–10.

[329] Article 8(2)(b)(xxi) includes the war crime of 'outrages upon personal dignity; in particular humiliating or degrading treatment'.

[330] The Office of the Prosecutor, Policy on Cultural Heritage, June 2021, § 27.