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Citation: Badar, Mohamed and Higgins, Noelle (2017) Discussion Interrupted: The Destruction and Protection of Cultural Property under International Law and Islamic Law - the Case of Prosecutor v. Al Mahdi. *International Criminal Law Review*, 17 (3). pp. 486-516. ISSN 1567-536X

Published by: Brill

URL: <https://doi.org/10.1163/15718123-01731383> <<https://doi.org/10.1163/15718123-01731383>>

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**Discussion Interrupted: The Destruction and Protection of Cultural Property under international law and the case of *Prosecutor v Al Mahdi***

*'The awareness of beauty will save the world'*

Nicholas Roerich<sup>1</sup>

Abstract

*Al Mahdi* was the first case before the International Criminal Court (ICC) which focused on the destruction of cultural property, and indeed, the first case before an international criminal tribunal which had the destruction of cultural property as the sole charge against a *jihadi*. Despite the many legal sources which seek to regulate attacks on cultural property, the exact contours of the offence are unclear, especially with regard to the rationales for protection and prosecution. Some international instruments seek to prohibit attacks on cultural property because such property constitutes civilian property, while other instruments highlight the need to protect cultural property as a result of its importance to humanity. In addition, the case of *Al Mahdi* also opened up the issue of justifications for attacks on cultural property as Al Mahdi was a member of the *Hisbah*, or 'morality brigade' in Timbuktu, which had justified the attacks in accordance with Islamic law. In this context, the question arises if membership of the *Hisbah* could have been seen as a justification for the attacks on cultural property in Mali? This case note first addresses the international legal framework on the protection of cultural property in Section 2. Section 3 then assesses the concept of *Hisbah* and its operation, including the reasons why the *Hisbah* group in Mali destroyed cultural property. The next section considers the facts of the *Al Mahdi* case. Section 5 highlights the shortfalls in the Trial Chamber's consideration of the rationales for the protection and destruction of cultural property, before the note concludes in Section 6.

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<sup>1</sup> See Nicholas Roerich Museum website, available at: <<http://www.roerich.org/roerich-pact.php>>.

## I Introduction

The case of *Prosecutor v Al Mahdi*, centring on charges of directing attacks against cultural property<sup>2</sup> in Mali, has recently been completed before the ICC. One of the hallmarks of the Malian conflict was the destruction of cultural landmarks, including internationally protected cultural property in the historic city of Timbuktu, by Islamist extremist groups.<sup>3</sup> *Al Mahdi* was the first case before the ICC which focused on the destruction of cultural property, and indeed, the first case before an international criminal tribunal which had the destruction of cultural property as the sole charge against a *jihadist*. The international legal framework concerning the protection of cultural property is contained in a variety of international legal instruments and has been elaborated on in decisions of international criminal tribunals. In addition, attacks on cultural property are also prohibited by customary international law. Despite the many legal sources which seek to regulate attacks on cultural property, the exact contours of the offence are unclear, especially with regard to the rationales for protection and prosecution. Some international instruments seek to prohibit attacks on cultural property because such property constitutes civilian property, while other instruments highlight the need to protect cultural property as a result of its importance to humanity. In addition, the case of *Al Mahdi* also opened up the issue of justifications for attacks on cultural property as Al Mahdi was a member of the *Hisbah*, or ‘morality brigade’ in Timbuktu, which had justified the attacks in accordance with Islamic law. Al Mahdi himself believed he was doing what is right and that he was under a divine obligation to forbid wrong. While some view the present case will deter other Islamist extremism groups in Syria, Iraq and Libya who systematically have begun destroying historic shrines and cultural property others view such destruction as simply a different “vision” of “good over evil”. Al Mahdi defence lawyer went further arguing that the present case reflects an emerging ‘clash between two world views, part of a broader struggle over the meaning of Islam.’ It was hoped that this case would allow for an in-depth discussion of these issues, however, Al Mahdi pleaded guilty to the charges against him and thus the trial was truncated. The Trial Chamber undertook only a very superficial consideration of the relevant legal framework and did not dwell on the issue of the *Hisbah* in any depth, leaving numerous questions concerning the protection of cultural

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<sup>2</sup> For a discussion of the distinction between cultural property and cultural heritage, see Manlio Frigo, ‘Cultural property v cultural heritage: A ‘battle of concepts’ in international law?’ (2004) 86 *IRRC* 367.

<sup>3</sup> The conflict ‘is a complex and multidimensional mixture of long-term fundamental grievances by diverse actors and groups’ for which there was no one single cause. See David J. Francis, ‘The regional impact of the armed conflict and French intervention in Mali’ (2013) Report for the Norwegian Peacebuilding Resource Centre, 2.

property in international law, including the rationales for its protection and destruction, unanswered. The decision was, therefore, unsatisfactory on many counts. This article first addresses the international legal framework on the protection of cultural property in Section 2. Section 3 then assesses the concept of *Hisbah* and its operation, including the reasons why the *Hisbah* group in Mali destroyed cultural property. The next section considers the facts of the *Al Mahdi* case. Section 5 highlights the shortfalls in the Trial Chamber's consideration of the rationales for the protection and destruction of cultural property, before the article concludes in Section 6.

## II The Protection of Cultural Property under International Law

### *A International Law Approaches to the Protection of Cultural Property*

One may ask why is cultural property protected under international law and why do attacks on cultural property fall within the remit of the ICC? A review of the relevant legal provisions seems to provide different answers to these questions.

The requirement to protect cultural property in international law can be traced back to 19<sup>th</sup> century instruments such as the Lieber Code 1863,<sup>4</sup> the 1874 Declaration of Brussels,<sup>5</sup> the 1880 Oxford Code,<sup>6</sup> and the Hague Regulations 1899.<sup>7</sup> In the twentieth century, Articles 27

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<sup>4</sup> Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863. Article 34 states: 'As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.'

<sup>5</sup> Project of an International Declaration concerning the Laws and Customs of War, signed at Brussels, 27 August 1874. On military authority over hostile territory. Article 8 states: 'The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.'

<sup>6</sup> The Laws of War on Land, Manual published by the Institute of International Law (Oxford Manual), adopted by the Institute of International Law at Oxford, September 9, 1880. Article 53 states: 'The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized. All destruction or wilful damage to institutions of this character, historic monuments, archives, Works of art, or science, is formally forbidden, save when urgently demanded by military necessity.'

<sup>7</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899. Article 56 states: 'The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property. All seizure of and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.'

and 56 of the 1907 Hague Regulations of 1907<sup>8</sup> were adopted, also seeking to protect cultural property. Furthermore, the 1919 Commission on Responsibility identified ‘wanton destruction of religious, charitable, educational, and historic buildings and monuments’ as a war crime.<sup>9</sup> The rationale for the protection of cultural property in all of these instruments is the status of cultural objects as non-military or civilian objects and the basic international humanitarian law principle of distinction requires that civilian objects not be the subject of attack.<sup>10</sup> In these instruments the protection of cultural property is paralleled with the protection of other civilian objects, such as hospitals and religious sites.

However, other international instruments reflect a different rationale for the protection of cultural property,<sup>11</sup> and recognise that a requirement for the protection of such property is incumbent upon the international community due to its importance to humanity. This approach is clearly seen in the Hague Convention of 1954, whose Preamble states that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind.’<sup>12</sup> This Convention was updated by means of two

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<sup>8</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Articles 27 and 56.

<sup>9</sup> Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, (1920) *AJIL* 14, 95, 115.

<sup>10</sup> International Committee of the Red Cross Customary IHL Rule 7 states: ‘The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.’ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary Humanitarian Law. Volume I: Rules* (ICRC/Cambridge University Press, 2005). See Customary IHL Database, available at: <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

<sup>11</sup> While the Roerich Pact does not set out a rationale for the protection of cultural property, the previous work of the initiator, Nicholas Roerich, in bringing States together to protect such property illustrates his belief that ‘the cultural heritage of each nation is in essence a world treasure.’ See Nicholas Roerich Museum website, available at: <http://www.roerich.org/roerich-pact.php>. The Roerich Pact was signed in the White House, in the presence of President Franklin Delano Roosevelt, on April 15, 1935, by all the members of the Pan-American Union. It was later signed by other countries also.

<sup>12</sup> Preamble, Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague, 1954. Article 1 of this instrument defines cultural property as ‘any movable or immovable property of great importance to the cultural heritage of all people, such as monuments of architecture or history, archaeological sites, works of art, books or any building whose main and effective purpose is to contain cultural property.’ However, the Convention also focused on the nature of cultural property as civilian property and provided that cultural property could only be attacked in case of ‘imperative military necessity’. In 1977, Additional Protocol I to the Geneva Conventions modified this approach and provided that only military objectives should be made the object of attack. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 53; See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 16. Both of these protocols make reference to an earlier 1954 Hague Convention. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, adopted at The Hague, 14 May 1954, Article 4. Note that the issue of cultural property did not feature in the Geneva Conventions of 1949.

protocols,<sup>13</sup> strengthening the emphasis on contribution of cultural property to humanity. Instruments on cultural property adopted by UNESCO also highlight the need to protect such property because of its importance to all of humankind.<sup>14</sup>

Thus, as stated by Frulli, we can appreciate two ways of understanding attacks on cultural property in international instruments; the first is the ‘civilian use’ approach and the second is the ‘culture-value’ approach.<sup>15</sup> International customary law recognises both approaches, with IHL Customary Rule 38 stating:

- A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.
- B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.<sup>16</sup>

While customary international law recognises both protection rationales, practice on this issue from international criminal tribunals<sup>17</sup> has illustrated a blurring of this binary protective framework. This can be clearly seen at the International Criminal Tribunal for the Former Yugoslavia (ICTY), as the Tribunal has broadened its discussion on this issue from a civilian use approach to a culture-value approach over time. Article 3(d) of the ICTY Statute includes among the violations of the laws or customs of war in respect of which the Tribunal has jurisdiction ‘seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’,<sup>18</sup> thus indicating a civilian use approach. However, in practice, the Tribunal has taken a much broader approach, focusing on the inextricable connection between a people and its culture. For example, it equated destruction of places of worship with persecution as a

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<sup>13</sup> First Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, adopted at The Hague, 14 May 1954 and Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, adopted at The Hague, 26 March 1999.

<sup>14</sup> See UNESCO instruments on cultural property, available at: <[http://portal.unesco.org/en/ev.php-URL\\_ID=13649&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=13649&URL_DO=DO_TOPIC&URL_SECTION=-471.html)>.

<sup>15</sup> Michaela Frulli, ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency’ (2011) 22(1) *The European Journal of International Law* 22(1), 203.

<sup>16</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary Humanitarian Law. Volume I: Rules*, ICRC/Cambridge University Press, 2005. See Customary IHL Database, available at: <https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>.

<sup>17</sup> The Statute of the International Criminal Tribunal for Rwanda (Art. 4(f)) and the Statute of the Special Court for Sierra Leone (Art. 3(f)) mentions only pillage as a war crime related to cultural property. Article 7 of the Law on the Extraordinary Chambers of Cambodia provides for prosecution pursuant to the provisions of the 1954 Hague Convention.

<sup>18</sup> Updated Statute of the International Criminal Tribunal of the Former Yugoslavia, adopted 25 May 1993 by Resolution 827, as amended 7 July 2009 by Resolution 1877.

crime against humanity because it amounted to ‘an attack on the very religious identity of a people’.<sup>19</sup> Furthermore, in the case of *Kristić*, the Tribunal considered that the destruction of mosques showed an attempt to erase the identity of the group and, as such, that it constituted ‘evidence of an intent to physically destroy the group’.<sup>20</sup> Thus, attacks against cultural property have been viewed as both crimes against humanity and as evidence of genocide by the ICTY, not just as war crimes as envisioned by its Statute. Martínez concludes that ‘the ICTY has consistently included the destruction of cultural and religious heritage within the facts constituting the widespread and systematic attack against civilian populations. Regarding the crime of persecution, the destruction or damage of the cultural heritage must be related to the intent to discriminate and, when the destroyed or damaged heritage is exclusively valuable for one specific population, the ICTY has consistently affirmed that such destruction is de facto discriminatory.’<sup>21</sup>

In addition to broadening out attacks on cultural property to the realm of crimes against humanity and genocide, the ICTY also broadened out the categories of cultural property to be protected. Brammertz, Hughes, Kipp and Tomljanovich Abst, discussing the cases of *Prlić and Others*<sup>22</sup> and *Hadžihasanović and Kubura*,<sup>23</sup> point out that ‘while conventional humanitarian law recognizes two categories of protection, international criminal law appears to recognize three.’<sup>24</sup> In addition to protecting cultural property due to its nature as civilian property, the ICTY also sought to protect ‘institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’, as well as cultural property of ‘great importance’. Therefore, the categories of cultural property deserving protection under international criminal law remains unclear and in need of clarification. Given that *Al Mahdi* was the first case to be heard before an international criminal tribunal focusing exclusively on the protection of cultural property, it was hoped that some clarification on this issue would be forthcoming.

### B *The Protection of Cultural Property and the Rome Statute*

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<sup>19</sup> *Prosecutor v Kordić and Čerkez*, IT-95-14/2-A, Appeals Chamber Judgment, 17 December 2004, para. 207.

<sup>20</sup> *Prosecutor v Kristić* IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 508.

<sup>21</sup> See Sebastián A Green Martínez, ‘Destruction of Cultural Heritage in Northern Mali’ (2016) 13(5) *Journal of International Criminal Justice* 1, 14.

<sup>22</sup> (IT-04-74-T), Trial Chamber, 29 May 2013, Vol. I, para. 172

<sup>23</sup> *Hadžihasanović and Kubura* Trial Judgment, paras. 57-64.

<sup>24</sup> Serge Brammertz, Kevin C. Hughes, Alison Kipp and William B. Tomljanovich Abst, ‘Attacks against Cultural Heritage as a Weapon of War. Prosecutions at the ICC’ (2016) 14 *Journal of International Criminal Justice* 14(5), 1143, 1154.

Despite the use of the culture-value approach in the 1954 Hague Convention and the customary law rule on the destruction of cultural property, the Rome Statute limits itself to “a civilian use rationale” for the protection of cultural property. According to Article 8(2)(e)(iv), ‘[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives’ in non-international armed conflicts is a war crime. The destruction of cultural property in international armed conflicts is also classified as a war crime under Article 8(2)(b)(ix). However, as stated above, despite the wording of its Statute, the ICTY took a culture-value approach to the protection of cultural property in its jurisprudence. A similar broad interpretative approach from the ICC would be welcome as we will discuss below.

### III The *Hisbah* under Islamic Law

#### *A Al Mahdi and the Hisbah*

The destruction of cultural property in Mali was undertaken under the auspices of the *Hisbah*, a morality police charged with eradicating vice in Mali set up by Islamist extremist groups, of which Al Mahdi was the leader. During its preliminary examination of the Situation in Mali the Office of the Prosecutor (OTP) reported that as of around 17 January 2012, a non-international armed conflict was ongoing in the territory of Mali between the government forces and a number of organised armed groups, including the Mouvement National de Libération de l’Azawad (National Movement for the Liberation of Azawad, MNLA), al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and the Mouvement pour l’unicité et le jihad en Afrique de l’Ouest (Movement for Oneness and Jihad in West Africa, MUJAO) and ‘Arab militias’.<sup>25</sup>

It is thought that Al Mahdi, also known as Abu Turab, was born in Timbuktu in Mali.<sup>26</sup> His family is recognised for having an expertise in Islam<sup>27</sup> and he himself received Qur’anic

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<sup>25</sup> Other Islamist groups, such as Boko Haram, are also active in the region according to some reports. ICC Office of the Prosecutor, Situation in Mali, Article 53(1) Report, 16 January 2013, at para 29. Available at: <[http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53\\_1PublicReportENG16Jan2013.pdf](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/Documents/SASMaliArticle53_1PublicReportENG16Jan2013.pdf)>.

<sup>26</sup> It is also thought that he is currently between 30 and 40 years of age. First Agreed Facts, ICC-01/12-01/15-54-Conf-AnxA, p. 3 (fact 10).

<sup>27</sup> Defence witness statement, MLI-DEF-0001-0001, 0002.

education since his childhood and gave lectures as an expert on religious matters.<sup>28</sup> He joined Ansar Dine<sup>29</sup> in April 2012.<sup>30</sup> During the Trial, it was held that, until September 2012, he was the head of the *Hisbah*, and that he was involved in various ways in the destruction of valuable cultural property. The Pre-Trial Chamber found that the mission of the *Hisbah* was ‘to prevent apparent vice and to promote virtue as well as to carry out charitable tasks.’<sup>31</sup> It therefore fell to the *Hisbah* in Mali to deliberate on the fate of the religious sites subsequently attacked in Timbuktu. The *Hisbah* was tasked with ‘the prevention of anything that can be considered as worshipping the tombs, such as building the dome over the tomb.’<sup>32</sup> In this context, the question arises if membership of the *Hisbah* could have been seen as a justification for the attacks on cultural property in Mali?

The concept of *Hisbah* is derived from the Qur’anic verse 3:104 which instructs Muslims to command good and forbid evil (al-amr bi’l-ma’ruf wa’l-nahy ‘an al-munkar) and is considered as ‘a cardinal Qur’anic principle which lies at the root of many Islamic laws and institutions.’<sup>33</sup> According to Al-Ghazali what amounts exactly to good (ma’ruf) or evil (munkar) is to be determined with reference to Shari‘a, ‘in particular to those rules that pertain to the protection of the five values, namely, life, faith, intellect, property and lineage.’<sup>34</sup> The Mīlikī jurist, al-Qarāfī set out the following three conditions which must be observed in the implementation of *hisbah* and are considered the basic guidelines governing the activity of the *muhtasib* (the person who bids good or forbids evil). (i) The *muhtasib* must act from a position of knowledge, since an ignorant individual who is not sure of his grounds may neither enjoin good nor forbid evil. (ii) The *muhtasib* must be reasonably sure that their attempts at prevention do not give rise to a greater evil. (iii) The *muhtasib* must act on the basis of an overwhelming probability (al-zann al-ghalīb) that the attempt to enjoin good or forbid evil is likely to achieve the direct result.<sup>35</sup> Element (ii) above restricts the

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<sup>28</sup> Statement by Al Mahdi, MLI-OTP-0033-4511, 4523-25; Defence witness statement, MLI-DEF-0002-0001, 0001-02.

<sup>29</sup> Ansar Dine is a mainly Tuareg movement associated with Al Qaeda in the Islamic Maghreb ‘AQIM’.

<sup>30</sup> First Agreed Facts, ICC-01/12-01/15-54-Conf-AnxA, pp. 2 and 3 (facts 3-13).

<sup>31</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 46.

<sup>32</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 47.

<sup>33</sup> Mohammad Hashim Kamali, *Freedom of Expression in Islam*, (Cambridge: Islamic Texts Society 2010) 28. The principle of ‘enjoining what is right and forbidding what is wrong’ is reiterated in verse 3:110.

<sup>34</sup> Muhammad Abū Hāmid Al-Ghazālī, *Ihyā’ ‘Ulūm al-Dīn*, vol. II (2<sup>nd</sup> edn., Cairo: Dār al-Fikr, 1980) 324 cited in Kamali, *Freedom of Expression in Islam* *ibid*, 33.

<sup>35</sup> Shihāb al-Dīn Al-Qarāfī, *Kitāb al-Furūq* vol. IV (Cairo: Matba‘at Dār Ihyā’ al-Kutub al-‘Arabiyyah, 1346 A.H) 255 cited in Kamali, *Freedom of Expression in Islam* 33.

implementation of *hisbah* to situations where the evil conduct and crimes are being committed so that ‘the *muhtasib* is in a position to prevent it, or to bring about a change to an on-going situation.’<sup>36</sup> If one of either of the first two conditions is absent, according to al-Qarafi, this would render *hisbah* illegitimate. On the other hand, the absence of the last condition downgrades *hisbah* from an obligation (wājib/an obligation or duty arising from the decisive injunctions of the Quran and Sunnah) into a mere permissibility (mubāh).<sup>37</sup>

A further debate that has preoccupied the early Muslim jurists (‘*ullama*) was whether *hisbah* is a collective duty (*fard kafā’ī*), or an individual obligation (*fard ‘aynī*) which should be performed by every Muslim. According to Ibn Kathir, verse 3:104 asserts that although *hisbah* is incumbent on each member of the *Ummah*, i.e. the Muslim community or society as a whole, to the extent of one’s ability, this task should be fulfilled by a specific segment of the *Ummah*.<sup>38</sup> It has been argued that *hisbah* becomes an individual obligation and the personal responsibility of the individual concerned only in one situation ‘when there is only one person in the entire community, or when a single individual witnesses evil being committed.’<sup>39</sup> In all other situations/capacities, it remains a collective duty of the community as a whole.

The dual characterisation of *hisbah* as both rights and duties are recognised in the 1981 Universal Islamic Declaration of Human Rights (UIDHR) under Article 4 ‘The Right to Justice.’<sup>40</sup> Paragraph (c) of this provision explicitly defines *hisbah* as ‘the right and duty of every person to defend the rights of any other person and the community in general’. As noted by Kamali, ‘whether collective or individual, *hisbah* has been generally characterised as an obligation.’<sup>41</sup>

According to the following *hadīth* (oral traditions attributed to Prophet Muhammad), believers are encouraged to carry out *hisbah* in accordance with their ability and to the extent that circumstances permitted in at least three ways: ‘Whoever among you sees an evil action,

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Mohammad Hashim Kamali, *Freedom of Expression in Islam*, (Cambridge: Islamic Texts Society 2010) 28.

<sup>36</sup> Mohammad Hashim Kamali, *The Right to Life, Security, Privacy and Ownership in Islam* (Cambridge: Islamic Texts Society 2008) 183.

<sup>37</sup> Ibid.

<sup>38</sup> Ibn Kathir, *Tafsir ibn Kathir*, Vol., 2, p. 233

<sup>39</sup> Kamali, *Freedom of Expression in Islam* 29.

<sup>40</sup> Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah* 1401 available online at [http://hrlibrary.umn.edu/instreet/islamic\\_declaration\\_HR.html](http://hrlibrary.umn.edu/instreet/islamic_declaration_HR.html)

<sup>41</sup> Kamali, *Freedom of Expression in Islam* 29

let him change it with his hand (by taking action); if he cannot, then with his tongue (by speaking out); and if he cannot, then with his heart (by hating it and feeling it is wrong), and that is the weakest of faith.<sup>42</sup> It is clear that the hadith commands physical action, and it is not this part of literal interpretation by groups such as Ansar Dine or ISIS which is problematic. What is problematic is the broad interpretation of what is considered ‘evil’, combined with jihadists’ interpretation ‘which turns *use of the hand* into a strict ideology of hisbah applied to all spheres of life, especially public piety’.<sup>43</sup> If “evil” were interpreted as, for example, an attack on an innocent person, then preventing that physically would pose no problem. However, when “evil” is interpreted as any deviation from moral rules, even when affecting only the person itself, it goes beyond the idea of God’s judgement in such matters. For example, physical punishment of someone for not wearing the ‘right’ length of trousers is clearly interpreting “evil” too broadly.

It has been argued that putting things right (*taghyir*) with the hand is the prerogative of political authorities, with the tongue of scholars and in (or with) the heart for the common people.<sup>44</sup> ‘This elitist interpretation’ according to Cook and Meijer ‘confirms the state’s monopoly of force and the ‘natural’ hierarchical structure of society.’<sup>45</sup>

As a function of the state, *hisbah* was instituted from early Abbasid Caliphate, whereby the caliph or sultan would appoint a *muhtasib*, i.e. the chief of municipal administration and policing with three main functions: policing of markets; monitoring the state of the roads and buildings in the city; and enforcement of public morals.<sup>46</sup> The *muhtasib* stood between the *qadi* and the police<sup>47</sup> and generally had to be ‘a *faqih* [someone with an understanding of *fiqh* (Islamic jurisprudence)], aware of the rules of Islamic law so as to know what to order and what to forbid’.<sup>48</sup> They were able to force debtors to honour their debts and to take other actions that did not require formal hearings or verdicts.<sup>49</sup>

<sup>42</sup> Muslim, *Sahīh Muslim*, Vol, 1, no, 177, pp.143-144.

<sup>43</sup> Chaplain (Maj.) Seth H. George, U.S. Army, “Commanding the Right: Islamic Morality and Why It Matters” in *Military Review*, September-October 2016, p. 63.

<sup>44</sup> Michael Cook, *Forbidding Wrong in Islam* (Cambridge University Press, 2003), 3-4, 11-12.

<sup>45</sup> Roel Meijer, ‘Commanding Right and Forbidding Wrong as Principle of Social Action: The Case of the Egyptian al-Jama‘a al-Islamiyya’ in Roel Meijer (ed.) *Global Salafism: Islam’s New Religious Movement* (Columbia University Press 2009) 191 citing Cook, *ibid*.

<sup>46</sup> Sami Zubaida, *Law and Power in the Islamic World*, (London, New York: I.B. Tauris, 2003), 59

<sup>47</sup> Knut S. Vikor, *Between God and the Sultan: a Historical Introduction to Islamic Law* (London: Hurst, 2004), 197.

<sup>48</sup> ‘Abd al-Rahmān b. Nasr al-Shayzarī, *The Book of the Islamic Market Inspector: Nihayat al-Rutba fi Talab al-Hisbah (the Utmost Authority in the Pursuit of Hisbah)*, translated with an introduction and notes by R. P. Buckley (Oxford and New York: Oxford University Press, 1999), 28.

<sup>49</sup> Ibn Khaldun, *supra* note 23 at vol. 1, 463.

The term *hisbah* was mentioned in the Qur'an only in the meaning of a volunteer and it is thus fair to say that by making it an official religious post, the Abbasside Caliph transformed the concept into a political tool to get rid of any potential enemies and to portray himself as a defender of the faith.<sup>50</sup> Enforcing *hisbah* should not involve greater mischief than the one that is to be prevented.<sup>51</sup> There can be little doubt that widespread accusations, persecutions, pillaging and killing based on peoples' beliefs or purported lack thereof brings unparalleled harm to a society as well as the religion itself. The Qur'an clearly states in verse 2:256 that there is no compulsion in religion, therefore forcing it on people through violent intimidation goes directly against this.

### B The Current Use of Hisbah

There are numerous examples of *hisbah* being used by states, extremist groups and courts to impose apostasy sentences such as the one declared by the Supreme Shari'a Court of Sudan against al-Amin Da'ud Mohammed Taha. The point of interest here is that the litigants used *hisbah* as the grounds for their legal action against Taha, calling successfully on the court to declare Taha's *rida* (apostasy) or to consider him as a *murtad* (apostate).<sup>52</sup>

A similar example of a court's use of *hisbah* was a 1995 Egyptian case involving Nasr Hamid Abu Zayd, an Arabic literature lecturer at Cairo University. Abu Zayd's promotion was blocked by Dr. 'Abd al-Sabur Shahin, a member of the review committee, who issued a declaration of apostasy stating that Zaid's work offended Islam.<sup>53</sup> Dr. Shahin's counsel argued that on the basis of the concept of *hisbah* they could file a lawsuit against Zayd.<sup>54</sup> The court deemed that society had a 'direct interest in filling a *hisbah* suit'.<sup>55</sup>

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<sup>50</sup> Ahmed Mansour, 'Hisbah: A Historical Overview', Ahl AlQuran, International Quranic Center, [http://www.ahl-alquran.com/English/show\\_article.php?main\\_id=125](http://www.ahl-alquran.com/English/show_article.php?main_id=125) (accessed 12 October 2016).

<sup>51</sup> Kamarudin bin Ahmad, 'Wilayat Al-Hisbah; A Means to Achieve Justice and Maintain High Ethical Standards in Societies', 6 *Mediterranean Journal of Social Sciences* 4 (2015), 205.

<sup>52</sup> Mohamed A. Mahmoud, *Quest For Divinity: a Critical Examination of the Thought of Mahmud Muhammad Taha* (Syracuse, N.Y.: Syracuse University Press, 2007), 22.

<sup>53</sup> Susanne Olsson, 'Apostasy in Egypt: Contemporary Cases of Hisbah', 98 *The Muslim World* (2008), 95-115, 104.

<sup>54</sup> Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: The University of Chicago Press, 2012), 46.

<sup>55</sup> Cairo Court of Appeals, case no. 287 (1995) in Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: The University of Chicago Press, 2012), 49.

*Hisbah* was considered a significant obligation by the Egyptian terrorist group al-Jama‘a al-Islamiyya/Tanzim al-jihad (the Jama‘a) and an effective tool to ‘change reality’.<sup>56</sup> The Jama‘a took the interpretation of what is ‘changing the forbidden/reprehensible’ (*taghyir al-munkar*) from the medieval scholar Ibn Taymiyya.<sup>57</sup> In extreme cases, according to Ibn Taymiyya it was the right of every subject to exert *hisbah* and to use force without the sanction of the state.’<sup>58</sup> The Jama‘a was also influenced by the work of the classical scholar al-Nawawai who asserted that *hisbah* is not merely confined to the Islamic authority (*al-sulta al-muslima*) but also those who are legally responsible (*mukallaf*) have the right to exert *hisbah*.<sup>59</sup> When the Jama‘a linked *hisbah* with the necessity to completely submit to God’s sovereignty (the concept of *tawhid al-rubibiyya*) it became an activist programme of changing evil by force.<sup>60</sup> Their adherence to the concept of *hakimiyya* ‘which made it imperative to rise up in revolt against the ruler who does not rule in accordance with the revelation’ was the main imperative to declare Sadat an unbeliever and subsequently assassinate him.<sup>61</sup>

Likewise, the self-declared Islamic State (ISIS/Da‘esh) considers declarations of *takfir* (‘accusing someone, especially a fellow Muslim, of *kufir* [unbelief]: holding or expressing deviant views or committing actions indicative of unbelief that may be tantamount to apostasy (*ridda*, *irtidād*) and can result in his excommunication from the fold of Islam or even execution’)<sup>62</sup> to fall within its list of duties. ISIS has its own Islamic police force (Diwan al-Hisbah)<sup>63</sup> to ensure compliance with *hisbah*’s requirements, which include investigating reports of drug or alcohol use and seizing such forbidden items as musical instruments or polytheistic idols.<sup>64</sup> ISIS has also made extensive use of *hisbah* against those they deem to be apostates. They hold that although faith amounts to an act of obedience, it is in and of itself insufficient and must be followed by action.<sup>65</sup> As with the 7<sup>th</sup> century Khawarij sect, ISIS

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<sup>56</sup> Meijer, ‘Commanding Right and Forbidding Wrong as Principle of Social Action’, n. 45, 205

<sup>57</sup> *Ibid.*, 194.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 205

<sup>60</sup> *Ibid.*, 194.

<sup>61</sup> *Ibid.*, 196.

<sup>62</sup> Camilla Adang et al. (eds.), *Accusations of Unbelief in Islam: A Diachronic Perspective on Takfir*, (Leiden, Boston: Brill, 2016) 1.

<sup>63</sup> Hussein Solomon, *Islamic State and the Coming Global Confrontation*, (London: Palgrave, 2016) 4

<sup>64</sup> Andrew F. March and Mara Revkin, ‘Caliphate of Law’, *Foreign Affairs* (15<sup>th</sup> April 2015), available at <https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law> (accessed 21 September 2016).

<sup>65</sup> ISIS claims that even reciting the *shahadah* (There is no god but Allah, Muhammad is his messenger) is not enough: ‘Speech will not benefit you without action, for there is no faith without action.’ See *supra* note 3 at ‘A New Audio Message by Abu Bakr al-Baghdadi ~ March Forth whether Light or Heavy’.

believes that unbelievers' blood and property can be taken away with impunity.<sup>66</sup> Such misuse of *hibah* by ISIS was condemned by a wide assortment of scholars from the Middle East in a recent letter addressed to al-Baghdadi.<sup>67</sup>

### *C Visitation of Mausoleums (Ziyara): Is it Prohibited under Islamic Law?*

As mentioned, one of the activities which the *Hisbah* in Mali focused on was the destruction of cultural property. In this context, the concept of *ziyara*, (literally 'visitation', an act which encompasses the visitation of such places as tombs, mausoleums and shrines) under Islamic law must be analysed. The act of *ziyara* is a controversial practice amongst Muslims. While it is a strong tradition among Shi'ite Muslims to go on pilgrimages to Al-Najaf and Karbala where the graves of Ali ibn Abi Talib (600 – c.661) and of Husayn ibn Ali (624-680) are respectively located, the Wahhabis have consistently denounced the veneration of saints due to its overtones of polytheism, going so far as to destroy these shrines in the 19<sup>th</sup> century. The difference of opinion regarding *ziyara* stems partly from the lack of Qur'anic sources and partly from ambiguous Prophetic Traditions (*hadiths*) which intermittently condemn<sup>68</sup> and advocate *ziyarat al-qubur* (visitation of graves).<sup>69</sup> Regarding the specific issue of images and idols depicted by the Qur'an as a 'means by which people have been led astray'<sup>70</sup>, none of its 6,236 verses actually prescribe the destruction of idols. However, verses 21:56-57 narrate, without condemning, the actual breaking of idols by Abraham in order to guide his people to the oneness of God.<sup>71</sup> As to the Prophet's deeds, while he first forbade this practice at a time when the principle of *tawhid* (Oneness of God) was not yet solidly established and visiting tombs was associated with the widespread *jahiliyya*<sup>72</sup> practice of worshipping idols as well as Christian and Jewish rites, he is reported to have then encouraged his followers to

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<sup>66</sup> *The Sea of Precious Virtues (Bahr al-Fava'id): a Medieval Islamic Mirror for Princes*, translated from the Persian, edited and annotated by Julie Scott Meisami (Salt Lake City: University of Utah Press, 1991), 106; Jamaal al-Din M. Zarabozo, *Commentary on the Forty Hadith of Al-Nawawi* (Dar Dawat al-Basheer for Publications, 1999), 168; W. Montgomery Watt, 'Conditions of Membership of the Islamic Community', 21 *Studia Islamica* 21 (1964):5-12, 7.

<sup>67</sup> Open Letter to Al Baghdadi, available at <http://www.lettertobaghdadi.com>

<sup>68</sup> Such as when, according to hadiths recorded by Muslim and al-Tirmidhi, the Prophet ordered 'Ali to destroy elevated graves.

<sup>69</sup> *ziyarat al-qubur* specifically refers to the visitation of graves.

<sup>70</sup> Y. Mirza, 'Abraham as an iconoclast: Understanding the destruction of 'images' through Qur'anic exegesis' (2005) 16 *Islam and Christian-Muslim Relations*, 427.

<sup>71</sup> *Ibid.*, 416-417.

<sup>72</sup> Literally, 'ignorance', the term refers to the Pre-Islamic period.

visit tombs as a reminder of death and the afterlife.<sup>73</sup> Thus it became not only permissible (*mubah*), but recommended (*mustahab*).<sup>74</sup>

The authenticity of the *hadiths* recommending the visitation of tombs is nevertheless undermined by some scholars and debates have ensued concerning issues such as the height to which a grave may be erected or whether it was permissible for a woman to visit one. Controversies triggered after the Prophet's death regarding the appropriate means and place of burial show that even from the early days of Islam, this issue was contentious.<sup>75</sup> The main points of contention were the practice of praying at a gravesite and the levelling of graves to the ground (*taswiyat al-qubur*).<sup>76</sup>

Examples from classical Islamic history exist of tombs being destroyed for political motivations, e.g. the desecration of Umayyad tombs by the early Abbasids,<sup>77</sup> and of Abu Hanifa's and Abu Yusuf's tombs by the Safavids<sup>78</sup> in the early 16<sup>th</sup> century. As pointed out by Emily Jane O'Dell, '[m]uch like suicide terrorism, "sacrificial" terrorism that targets heritage serves as an act of necropower against the state, as an act of resistance against the necropolitics of foreign intervention, and as an existential attack against the perceived power of the already dead—and even death itself. Waging war on the already dead attacks the heritage of the past, terrorizes the psyches of the living in the present, and restricts the rituals of the future.'<sup>79</sup>

Scholarly reasoning and justifications of tomb destructions can be traced back to Ibn Taymiyya (1263-1328),<sup>80</sup> a Syrian Hanbalite jurist and theologian, who condemned the widespread practice and went so far as to be detained until his death for issuing a *fatwa* (legal opinion) in which he stated that visiting graves, and specifically the Prophet's grave,

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<sup>73</sup> Sahih Bukhari, *Jana'iz*, 2, Ahkam II; Sahih Muslim, *Jana'iz*, 15.

<sup>74</sup> According to a *hadith*, the Prophet is reported to have said 'I had prohibited visiting graves for you. From now on you can visit graves' (Sahih Muslim, vol. 4, p. 73, book of *jana'iz*). It is useful to note that under Islamic law, deeds are classified into five categories, namely obligatory (*wajib*), permitted (*mubah*), recommended (*muhtasab*), disapproved of but not unlawful (*makruh*) and forbidden (*muharram*).

<sup>75</sup> O. Beranek, P. Tupek, 'From Visiting Graves to Their Destruction: The Question of *Ziyara* through the eyes of Salafis' (2009) Brandeis University, Crown Center for Middle East Studies, Crown Paper 2, 7

<sup>76</sup> According to Creswell, the principle of *taswiyat al-qubur* was observed until the third century of the *Hijra* when the *Qubbat al-Sulaibiyya* was built in Samarra; see K. A. C. Creswell, *The Muslim Architecture of Egypt* (Hacker Art Books, 1979), vol. 1, 111.

<sup>77</sup> Hugh Kennedy, *The Early Abbasid Caliphate, A political History* (Routledge, 2016), 48

<sup>78</sup> Saïd Amir Arjomand, *Sociology of Shi'ite Islam: Collected Essays* (Brill, 2016), 311

<sup>79</sup> E. J. O'Dell, 'Waging War on the Dead: The Necropolitics of Sufi Shrine Destruction in Mali' (2013) 9 *Journal of the World Archaeological Congress* 518.

<sup>80</sup> J. Schacht, *An Introduction to Islamic Law*, (Clarendon Press, 2002) 63, 66, 72, 81

amounted to an innovation (*bid'a*).<sup>81</sup> Indeed he feared that new religions would arise from the worship of tombs. He thus challenged the authenticity of the *hadiths* that encouraged the visitation of graves. According to Ibn Taymiyya, the fact that it was not recommended to travel for the sole purpose of worship except for three places necessarily implied that it was forbidden.<sup>82</sup> This view was not shared by other Hanbali scholars, such as Abd al-Ghani al-Maqdisi, a prominent traditionalist *hadith* master, who held that the absence of an explicit recommendation to travel for the sole purpose of worship did not necessarily entail that it was forbidden.<sup>83</sup>

Ibn Taymiyya's legacy ultimately influenced the cleric 'Abd al-Wahhab (1703-1792), founder of Wahhabism, a puritanical doctrine which advocated a return to the practice of the earliest generations of Islam (*salaf al-salih*). Going beyond the mere forbiddance of the visitation of tombs, the Wahhabi doctrine entailed physically ridding the Islamic world of all shrines and tombs which were considered to embody and sanction polytheism (*shirk*). Though this view did not find widespread adherence in the Arabian Peninsula, it was widely supported by Muhammad Ibn Sa'ud (1710-1765) who backed the 'Abd al-Wahhab militarily. The latter's absolute dedication to *tawhid* left no place for worship of anyone or anything other than God. Thus he undertook the destruction not only of Sufi or Shi'ite shrines, but of all shrines without distinction, as is portrayed by the demolition of the monument over Zayd ibn al-Khattab's tomb (one of the Prophet's Companions and the brother of the second Sunni Caliph Umar ibn al-Khattab) which had been widely worshipped due to its connection to the early Muslims. In doing so, he sought to prevent the veneration of those buried in the tombs as he believed that it amounted to a violation of *tawhid*.

Since then, the Wahhabis have been notorious for destroying tombs, such as that of Husayn ibn Ali<sup>84</sup> in 1802. Although the Ottoman-Wahhabi war (1811-1818) led to the defeat of the Wahhabis by Muhammad Ali Pasha's dynasty, Abd al-Aziz bin Sa'ud (r. 1926-1953) revived the Wahhabi-Saudi state and destroyed the shrines and tombs of the Jannat al-Baqi and Jannat

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<sup>81</sup> Ibn Rajab, *al-Dhayl 'ala tabaqat al-hanabila* (al-Riyad: Maktabat al-'Ubaykan, 2005), vol. 4., p. 518.

<sup>82</sup> Ibn Taymiyya, *Fatawa*, vol. 4, p. 170; according to the hadith, the three places of worship were the Prophet's mosque in Medina, the Haram mosque and the al-Aqsa mosque. For more on this tradition and its interpretation, see M. J. Kister, "You Shall Only Set Out for Three Mosques", *Le Muséon*, LXXXII (1969).

<sup>83</sup> Ibn Taymiyya, *Fatawa*., vol. 20, p. 29

<sup>84</sup> Grandson of the Prophet and son of 'Ali ibn Abi Talib.

al-Mu'alla cemeteries situated respectively in Medina and Mecca, where the Prophet's family members and companions were buried.

The destruction which have been recently witnessed in Syria, Mali and countless other places show that the impact of Wahhabism goes well beyond the sole borders of the Arabian Peninsula. In Mali the Salafist-Jihadist group Ansar Dine sought to forcibly establish an Islamic State based on strict Shari'a precepts. This included, in the view of the group's spokesman Sanda Ould Boumama, the demolition of every mausoleum in the city of Timbuktu, considered as *haram* (forbidden) and idolatrous in that they represented the local Sufi version of Islam.<sup>85</sup>

Depending on which theologian's arguments an authoritative body decides to follow, the *Hisbah* may either legalise mausoleums and the veneration of tombs, or forbid such practices and hence destroy them. In Mali Ansar Dine clearly followed the puritanical Wahhabi interpretation which entailed respecting the principle of *taswiyat al-qubur* or levelling of tombs to the ground. However, as noted above, this issue was neglected by the Trial Chamber in *Al Mahdi*. While this may be justified as a guilty plea had already been made, a discussion of Islamic defences could have, perhaps, placated a number of States who view the Court as a Western imperialist institution. A discussion of the rationale for the destruction of the cultural property from the Islamic perspective could indeed have also enlightened the discussion on the rationales for the protection of cultural property mentioned above. It is clear that in the present case, cultural property was destroyed, not because it was civilian and therefore, non-military property, but rather because it represented a certain religion / culture. Thus, the destruction had a culture-value rationale. It is submitted that a culture-value rationale for the protection of such property therefore makes sense as the rationale for the potential destruction can be linked to the rationale for protection.

#### IV The Case of *Prosecutor v Al Mahdi*

##### *A Case Facts*

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<sup>85</sup> See: <<http://www.bbc.com/news/world-africa-18657463>>.

The Malian government, which had ratified the Rome Statute in 2000, referred the ‘situation in Mali since January 2012’ to the OTP which began a preliminary examination of the Situation in Mali on 13 July 2012.<sup>86</sup> An arrest warrant was issued against Al Mahdi on 18 September 2015<sup>87</sup> in respect of the intentional directing of attacks against historic monuments and/or buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, between about 30 June 2012 and 10 July 2012 and he was surrendered to the ICC by the Republic of Niger on 26 September 2015. He made his initial appearance before the Court on 30 September 2015<sup>88</sup> and the Document containing Charges was filed by the Prosecutor on 17 December 2015,<sup>89</sup> containing a single charge alleging that Al Mahdi was responsible for the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute.<sup>90</sup> The Confirmation of Charges hearing took place in March 2016 and the charges were confirmed on March 24 with Al Mahdi being committed to trial.<sup>91</sup> During this hearing he informed the Court of his intention to plead guilty to the charges.<sup>92</sup> The trial was held between 22 and 24 August 2016,<sup>93</sup> during which he made an admission of guilt. The judgment was issued on 27 September and Al Mahdi was sentenced to 9 years in prison.<sup>94</sup>

### *B The Destruction of Cultural Property in Timbuktu*

The incidents of which Al Mahdi was found guilty took place in the city of Timbuktu between 30 June 2012 and 11 July 2012. The city had been under the control of a number of fundamentalist Islamic groups, including AQIM and Ansar Dine, between early April 2012 and January 2013.<sup>95</sup> These groups had set up administrative structures in the town, including

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<sup>86</sup> See letter of referral from the Malian Minister for Justice to the Prosecutor, 13 July 2013. Available at: <http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

<sup>87</sup> Arrest Warrant, Al Faqi Al Mahdi, ICC-01/12-01/15-1-Red, Pre-Trial Chamber I, 18 September 2015.

<sup>88</sup> ICC-01/12/01/15-T-1-ENG.

<sup>89</sup> ICC-01/12-01/15-62, ICC-01/12-01/15-63 and –AnxA (Arabic translation); ICC-01/12-01/15-70 and –AnxA-Corr (English translation).

<sup>90</sup> Chef d’accusation retenu par l’Accusation contre Ahmad AL FAQI AL MAHDI, 17 December 2015, ICC-01/12-01/15-62.

<sup>91</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016.

<sup>92</sup> See ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following admission of guilt by the accused in Mali war crime case: ‘An important step for the victims, and another first for the ICC’’, 24 March 2016, available at: <<https://www.icc-cpi.int/Pages/item.aspx?name=160324-otp-stat-al-Mahdi>>.

<sup>93</sup> ICC-01/12-01/15-T-4-Red-ENG, ICC-01/12-01/15-T-5-Red-ENG, ICC-01/12-01/15-T-6-ENG.

<sup>94</sup> *The Prosecutor v Al Mahdi*, Verdict and Sentence, ICC-01/12-01/15-171, 27 September 2016.

<sup>95</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 3-5; Video of Ouman Ould Hamaha speaking about Ansar Dine’s control of Timbuktu, MLI-OTP-0018-0352, from 00:00:00 to 00:00:41, MLI-OTP-0033-5448 (full French transcript); Video of Ansar Dine at Timbuktu airport, MLI-OTP-0018-0345; Video of Ansar Dine’s flag at Timbuktu airport, MLI-OTP-0018-0195; Video of interview with Ansar Dine’s member from the airport of Timbuktu, MLI-OTP-0018-0197 (Transcript, MLI-OTP-0033-5436); Statement by P-65, MLI-OTP-0020-0019-R01, 0059-0063; Statement by P-66, MLI-OTP-0019-0296-R01, 0299, 0304-06.

Islamic police, an Islamic tribunal, the *Hisbah*,<sup>96</sup> and a media commission.<sup>97</sup> Al Mahdi was involved in various aspects of the Ansar Dine and AQIM administration and was in direct contact with the leaders of these groups, including Iyad Ag Ghaly (Ansar Dine leader), Abou Zeid (who governed Timbuktu under the armed groups), Yahia Abou Al Hammam (an AQIM chief) and Abdullah Al Chinguetti (a religious scholar and member of AQIM). He was regarded as an expert in the field of religion and was consulted by these groups on religious issues, and also contributed to the Islamic tribunal.<sup>98</sup> His main role, however, was as head of the *Hisbah* from its foundation in April 2012 until September 2012.<sup>99</sup> In this position, he wrote a document outlining the role and objectives of the *Hisbah* which was then distributed among the other occupying structures.<sup>100</sup> According to the Trial Chamber, the *Hisbah* ‘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.’<sup>101</sup>

In June 2012 Ag Ghaly, after consultation with other Islamic leaders in the region, decided to destroy the mausoleums in Timbuktu.<sup>102</sup> While Al Mahdi put forward the proposition that all Islamic jurists agree on the prohibition of any construction over a tomb, he nevertheless recommended to not destroy the mausoleums in order to maintain a good relationship between the occupying groups and the local population.<sup>103</sup> In spite of this advice Ag Ghaly gave orders to proceed with the destruction of mausoleums to Abou Zeid, and he in turn informed Al Mahdi in his role as head of the *Hisbah*.<sup>104</sup> According to the Plea Agreement between the OTP and the Counsel for the Defence, despite Al Mahdi’s initial reservations about these attacks he nevertheless acquiesced immediately once he received the order to

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<sup>96</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 7; First Agreed Facts, ICC-01/12-01/15-54-Conf-AnxA, pp. 4 and 5 (facts 14-20); Statement by P-65, MLI-OTP-0020-0019-R01, 0050; Sahara Media press article, MLI-OTP-0015-0406.

<sup>97</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 31.

<sup>98</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 6-7, 18-19; Statement by P-65, MLI-OTP-0020-0019-R01, 0050-53, para. 163; Statement by P-65, MLI-OTP-0024-3096-R01, 3109-12; Video, MLI-OTP-0009-1749, from 00:09:40:00 to 00:10:19:00.

<sup>99</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 8, 11; Statement by P-65, MLI-OTP-0020-0019-R01, 0050, para. 151.

<sup>100</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 11; Statement by Mr Al Mahdi, MLI-OTP-0033-4833, 4852; MLI-OTP-0033-4598, 4606.

<sup>101</sup> *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15, 27 September 2016, at para. 33.

<sup>102</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 38.

<sup>103</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 37; Second Agreed Facts, ICC-01/12-01/15-83-Conf-AnxA, p. 2 (fact 51).

<sup>104</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 24, 38-40.

destroy them.<sup>105</sup> He thus wrote a sermon on the destruction of the mausoleums which was read out at Friday prayer<sup>106</sup> and devised the order of destruction of these structures.<sup>107</sup> He declared publicly that the decision to attack the sites was purposefully taken, stating ‘nous agissons ainsi parce que nous voulons le demolition des dômes.’<sup>108</sup> He also proclaimed that the destruction of the domes had been ordered by ‘le Messenger’ and that the destruction was not prohibited by the religious sources which he had consulted.<sup>109</sup> The *Hisbah* also decided on the modalities of destruction and provided the financial and operational resources to carry out the attacks. Al Mahdi even decided the order in which the sites were to be attacked.<sup>110</sup> He also personally participated in the attacks and / or facilitated the attacks. In some attacks he used a pickaxe to undertake destruction himself while at other sites he supervised the attacks, providing tools and preparing drinks for others.<sup>111</sup>

In all, 10 of the most important cultural sites in Timbuktu were attacked and destroyed by Al Mahdi and others as part of the same common plan. These were:

- (i) The Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum.<sup>112</sup>
- (ii) The Sheikh Mohamed Mahmoud Al Arawani Mausoleum.<sup>113</sup>

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<sup>105</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 40.

<sup>106</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 44; Second Agreed Facts, ICC-01/12-01/15-83-Conf-AnxA, p. 3 (fact 54); Video, MLI-OTP-0018-0358 (Translated transcript, MLI-OTP-0025-0330, 0332).

<sup>107</sup> Agreement ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 45, 54. Second Agreed Facts, ICC-01/12-01/15-83-Conf-AnxA, p. 3 (fact 57); Statement by Mr Al Mahdi, MLI-OTP-0033-4645, 4659-60, 4666, 4726.

<sup>108</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 49.

<sup>109</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 49.

<sup>110</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 50.

<sup>111</sup> Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, 24 March 2016, para 51. The Pre-Trial Chamber stated: ‘In addition to the role played by Ahmad Al Faqi Al Mahdi in the administrative structures ... [he] personally participated in or assisted to the material execution of the destruction of several Buildings/Structures. He participated in some instances using a pickaxe and was involved in the destructions at all four cemeteries concerned by supervising the work, giving advice, and ‘preparing drinks and supervising the work, as well as providing the tools [...] including the pickaxes.’ He provided the means for the destruction of the door at the Sidi Yahia Mosque and contributed in pulling out the door, and finally approved of the destruction of the domes adjacent to the Djingareyber Mosque, in which he participated himself at the beginning using a pickaxe, and later approved the use of a bulldozer.’

<sup>112</sup> This was destroyed on 30 June 2012, with Mr Al Mahdi in attendance at the site. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 61-63; Statement by P-65, MLI-OTP-0020-0019-R01, 0066-68 (Videos MLI-OTP-0018-0354, MLI-OTP-0018-0360, MLI-OTP-0018-0363, MLI-OTP-0018-0375); Statement by P-66, MLI-OTP-0019-0296-R01, 0333-34 (Videos MLI-OTP-0012-1782, MLI-OTP-0012-1784), 0344-45 (Videos MLI-OTP-0001-6926, MLI-OTP-0001-7037 at 00:45:17 to 00:45:26); Report of Expert Witness P-75, MLI-OTP-0033-0140, 143-46, 0166-68, 0183-84; Statement by P-125, MLI-OTP-0023-0004-R01, 0018.

<sup>113</sup> This was destroyed on 30 June 2012. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 64-65; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0761-67; Statement by P-65, MLI-OTP-0020-0019-R01, 0068; Video, MLI-OTP-0018-0353; Report of Expert Witness P-75, MLI-OTP-0033-0140, 0165-66; Video, MLI-OTP-0018-0353; UNESCO’s Study on the mausoleums of Timbuktu, MLI-OTP-0015-0081, 0086.

- (iii) The Sheik Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum.<sup>114</sup>
- (iv) The Alpha Moya Mausoleum.<sup>115</sup>
- (v) The Sheik Mouhamad El Mikki Mausoleum.<sup>116</sup>
- (vi) The Sheik Abdoul Kassim Attouaty Mausoleum.<sup>117</sup>
- (vii) The Sheik Sidi Ahmed Ben Amar Arragadi Mausoleum.<sup>118</sup>
- (viii) The door of the Sidi Yahia Mosque.<sup>119</sup>

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<sup>114</sup> Mr Al Mahdi supervised its destruction on 30 June 2012. While he was at the site he informed journalists that ‘if a tomb is higher than the others, it must be levelled [...] we are going to rid the landscape of anything that is out of place.’ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 66-72; Photograph, Malian Government, MLI-OTP-0009-1526; Malian Government’s illustrated list of mausoleums and cemeteries, MLI-OTP-0001-7116, 7118; Statement by P-114, MLI-OTP-0023-0344-R01, 0364; Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1196-99; Malian Government’s Intelligence Bulletin on security situation in northern Mali, MLI-OTP-0012-0462, 0463-64; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0676-82; Statement by P-125, MLI-OTP-0023-0004-R01, 0018-19, 0041; Video, MLI-OTP-0011-0459, from 00:00:00 to 00:00:08; UNESCO Director-General calls for a halt to destruction of cultural heritage sites in Timbuktu, MLI-OTP-0001-1944.

<sup>115</sup> This was destroyed on 30 June 2012 with the direct participation of Mr Al Mahdi. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 73-78; Malian Government’s illustrated list of mausoleums and cemeteries, MLI-OTP-0001-7116; Photographs, Malian Government, MLI-OTP-0009-1508, MLI-OTP-0009-1509, MLI-OTP-0009-1513; Statement by P-125, MLI-OTP-0023-0004-R01, 0043; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0685-95; Statement by P-66, MLI-OTP-0019-0296-R01, 0334-36; Videos, MLI-OTP-0012-1792, MLI-OTP-0012-1793, MLI-OTP-0012-1787, MLI-OTP-0012-1789; Second Agreed Facts, ICC-01/12-01/15-83-Conf-AnxA, page 4 (fact 69); Video, MLI-OTP-0001-7037 from 00:45:01:19 to 00:45:07:16; Report of Expert Witness P-75, MLI-OTP-0033-0140, 0146, 0184-85; Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1187-95.

<sup>116</sup> This was destroyed on 1 July 2012. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 85-86; Photographs, Malian Government, MLI-OTP-0009-1495, MLI-OTP-0009-1562; Malian government’s illustrated list of mausoleums and cemeteries, MLI-OTP-0001-7116; Statement by P-114, MLI-OTP-0023-0344-R01, 0365-66, paras. 78-80; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0657-67; Video, MLI-OTP-0012-1811; Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1165-68; Photographs, MLI-OTP-0006-2243 to MLI-OTP-0006-2258.

<sup>117</sup> This was destroyed on 1 July 2012. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 87-88; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0647-56; Photograph, Malian Government, MLI-OTP-0009-1498; Statement by P-114, MLI-OTP-0023-0344-R01, 0366; Statement by P-66, MLI-OTP-0019-0296-R01, 0337-39; Video, MLI-OTP-0012-1801; Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1169-72.

<sup>118</sup> This was destroyed on 1 July 2012 with the direct participation of Mr Al Mahdi. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 82-84; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0637-46; Malian Government’s illustrated list of mausoleums and cemeteries, MLI-OTP-0001-7116; Statement by P-125, MLI-OTP-0023-0004-R01, 0021, 0029-40; Videos, MLI-OTP-0018-0366, MLI-OTP-0018-0374; Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1173-77.

<sup>119</sup> This was destroyed on 2 July 2012. A legend attached to this door to the effect that opening it would lead to the Last Judgment and it had not been opened in 500 years. Mr Al Mahdi went to the site with pickaxes, bought with *Hisbah* funds, to open the door. While the destruction was taking place Mr Al Mahdi explained to journalists:

‘What you see here is one of the ways of eradicating superstition, heresy and all things or subterfuge which can lead to idolatry. We heard about a door in the ancient mosque of Sidi Yahya. If it is opened, the Day of Resurrection will begin. Following an investigation, we discovered that it was a condemned door in the courtyard of an old mosque. The door was condemned and bricked up. Over time, a myth took hold, claiming that the Day of Resurrection would begin if the door were opened. We fear that these myths will invade the beliefs of people and the ignorant who, because of their ignorance and their distance from religion, will think that this is the truth. So we decided to open it.’ Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 89-95; Malian government’s communication, MLI-OTP-0012-0259; Malian government’s Intelligence Bulletin on the situation in Timbuktu, MLI-OTP-0012-0260; Report of Expert Witness P-104, MLI-OTP-0024-0537, 0557-65;

(ix) The Bahaber Babadié Mausoleum and (x) The Ahmed Fulane Mausoleum, both adjoining the Djingareyber Mosque.<sup>120</sup>

These sites were either fully or partially destroyed by individuals using a variety of weapons, including pickaxes and iron bars. All but one site was classified as world heritage and protected by the UNESCO 1972 Convention on the Protection of the World Cultural and Natural Heritage.<sup>121</sup>

The Court found beyond reasonable doubt that Al Mahdi's admission of guilt, together with the additional evidence presented, satisfied the essential facts to prove the crime charged. In this regard the Chamber found that the Plea Agreement and Al Mahdi's admissions were 'both credible and reliable in full.'<sup>122</sup> Al Mahdi was thus convicted, pursuant to Articles 8(2)(e)(iv), 25(3)(a) and 65(2) of the ICC Statute, as a co-perpetrator for attacking 10 projected objects in Timbuktu between around 30 June 2012 and 11 July 2012. The Chamber then sentenced him to 9 years in prison.<sup>123</sup>

## V Analysis

Despite the fact that Article 8 of the ICC Statute contains "a civilian use approach" in respect of the rationale for the protection of cultural property, the OTP and the Chamber frequently referred to the importance of cultural property to humanity throughout various stages of the

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Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1151-57; Statement by P-125, MLI-OTP-0023-0004-R01, 0022-23, 0031-35; Statement by P-65, MLI-OTP-0020-0019-R01, 0070-71; Statement by P-66, MLI-OTP-0019-0296-R01, 0340-41; Videos, MLI-OTP-0012-1918, MLI-OTP-0012-1919; Report of Expert Witness P-75, MLI-OTP-0033-0140, 0160-61, 0190-93; Video, MLI-OTP-0018-0212; Statement by P-65, MLI-OTP-0020-0019-R01, 0071-72; Video, MLI-OTP-0018-0149 (Translated transcript, MLI-OTP-0024-2954, 2958-59), Video, MLI-OTP-0018-0209 (Translated transcript, MLI-OTP-0033-5439, 5441).

<sup>120</sup> These were destroyed on or around 10-11 July 2012. Mr Al Mahdi was asked to attack these mausoleums by Mr Al Chinguetti and he oversaw the attacks, deciding at one point that a bulldozer should be used to aid destruction. Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, paras. 96-103; Malian Government's illustrated list of mausoleums and cemeteries, MLI-OTP-0001-7116, 7118; Photographs, MLI-OTP-0009-1478, MLI-OTP-0009-1483; Report of Expert Witness P-104, MLI-OTP-0028-0586, 0729-39; Statement by P-125, MLI-OTP-0023-0004-R01, 0036; Video, MLI-OTP-0018-0148, especially 00:04:11:00-00:04:55:00, 00:07:35:00-00:08:28:00; First Agreed Facts, ICC-01/12-01/15-54-Conf-AnxA, page 6 (fact 36); Statement by P-65, MLI-OTP-0020-0019-R01, 0073-74; Videos, MLI-OTP-0018-0334, MLI-OTP-0018-0336, MLI-OTP-0018-0341; Report of Expert Witness P-75, MLI-OTP-0033-0140, 0163-65; Video, MLI-OTP-0012-1815; Statement by P-66, MLI-OTP-0019-0296-R01, 0343; Second Agreed Facts, ICC-01/12-01/15-83-Conf-AnxA, p. 4 (fact 73); Report of Expert Witnesses P-55 and P-57, MLI-OTP-0029-1138, 1158-64; Photograph, MLI-OTP-0018-2281.

<sup>121</sup> Agreement, ICC-01/12-01/15-78-Anx1-tENG-Red, para. 33; UNESCO's World Heritage Convention Nomination Documentation, MLI-OTP-0004-0321; UNESCO's World heritage sites in Mali, MLI-OTP-0013-3630, 3715-26; Report of the World Heritage Committee, MLI-OTP-0006-3298, 3314; UNESCO's international experts meeting for the safeguarding of Mali's cultural heritage, MLI-OTP-0006-3459; P-151 testimony, ICC-01/12-01/15-T-5-Red-ENG, p. 53, line 17, to p. 55, line 23; Statement by P-151, MLI-OTP-0029-0843-R01, 0861.

<sup>122</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 44.

<sup>123</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 109.

case. The Prosecutor's discussion of cultural property illustrates "a culture-value approach" as to why attacks on cultural property should be criminalised, i.e. because such attacks are essentially an attack on cultural identity and on the people to which the culture belongs. For example, at the Confirmation of Charges hearing, the Prosecutor commented that: '[t]he destruction of such monuments constitutes the annihilation of structures that had survived the ravages of time and which stood as testimony to Timbuktu's glorious past and important place in history and to its people over generations.'<sup>124</sup>

The Chamber took a similar approach in its Judgment. It focused on the status of 9 of the attacked sites as UNESCO World Heritage sites and found that destruction of sites of this status 'appears to be of particular gravity as their destruction does not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people throughout Mali and the international community.'<sup>125</sup> In this context the Chamber recalled evidence given by the Malian expert in cultural matter who had testified that 'destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu.'<sup>126</sup> The Chamber also recalled a UNESCO expert's testimony that 'the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.'<sup>127</sup> The Chamber thus concluded that targeted sites were not simply religious buildings 'but had also a symbolic and emotional value for the inhabitants of Timbuktu is relevant in assessing the gravity of the crime committed,'<sup>128</sup> thus emphasising both the civilian use and culture-value characteristics of the property.

While Article 8 prohibits attacks on cultural property as a war crime as a result of its civilian use nature, the Chamber implies that its culture-value nature will be an issue to be analysed in the context of gravity, which can be taken into consideration in respect of admissibility and sentencing. This further confuses the already uncertain legal framework concerning the rationales for protection of cultural property. However, given the fact that Al Mahdi had pleaded guilty, the nature of the offence did not garner a lot of attention in the Trial Chamber. Indeed, the Chamber did not seek to clarify previous jurisprudence on this point from the Yugoslavia Tribunal, commenting that it 'is of limited guidance given that, in contrast to the

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<sup>124</sup> Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of the confirmation of charges hearing in the case against Mr Ahmad Al-Faqi Al Mahdi, 1 March 2016.

<sup>125</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 80.

<sup>126</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 80.

<sup>127</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 80.

<sup>128</sup> *The Prosecutor v Al Mahdi*, Judgment and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 79.

Statute, its applicable law does not govern ‘attacks’ against cultural objects but rather punishes their ‘destruction or wilful damage’. The legal contexts thus differ.’<sup>129</sup>

Thus, clarification in the area is still awaited. A number of scholars have commented on how the ICC might deal with the issue of cultural property in the future. Frulli comments, in the context of the ICC Statute, that ‘a more specific cultural-value oriented approach to the criminalization of acts against cultural property committed in times of armed conflict would be coherent with the overall developments in the field of international criminal law, constantly evolving into a more sophisticated body of law.’<sup>130</sup> In a similar vein, seeking to broaden the prosecution base for attacks on cultural property to include crimes against humanity, Martínez states that ‘[e]ven though the definition of the crime against humanity of persecution does not make explicit reference to cultural property, it can be applied to sanction the destruction of cultural property, it can be applied to sanction the destruction of cultural property...’<sup>131</sup> In this vein, the International Law Commission has stated that ‘[p]ersecution may take many forms, for example, a prohibition on practicing certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national language even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group.’<sup>132</sup> The acceptance of the destruction of cultural property as a crime against humanity would, of course, most importantly, allow for the prosecution of such destruction during peace time. It is submitted that this broader understanding of attacks on cultural property is to be preferred to the very narrow “civilian use approach” incorporated into the text of the ICC Statute. It is also submitted that future ICC cases would need to clarify both the rationales for protection of cultural property in addition to the potential status of attacks on cultural property as a crime against humanity or an element of genocide in order to bring much needed clarification to this issue.

Connected to the issue of rationales for the protection of cultural property is the rationale for the destruction of cultural property, however, the Chamber gave this issue scant attention in

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<sup>129</sup> Situation in the Republic of Mali in the Case of *The Prosecutor v Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, No.: ICC-01/12-01/15, 27 September 2016, para. 16.

<sup>130</sup> Micaela Frulli, ‘The Criminalization of Offences against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency’ (2011) 22(1) *European Journal of International Law*, 203, 216.

<sup>131</sup> See Sebastián A Green Martínez, ‘Destruction of Cultural Heritage in Northern Mali’ (2016) 15(4) *Journal of International Criminal Justice*, 1, 7.

<sup>132</sup> *Yearbook of the International Law Commission*, UN Doc. No. A/CN.4/SER.A/1991.V.I (1991), at 294.

its judgment and refrained from examining the Islamic concept of *hisbah*, a term which was employed 48 times in the Confirmation of Charges by the prosecution, the defendant and judges themselves.<sup>133</sup> While Al Mahdi pleaded guilty and apologised for his actions prior to the Trial, his Defence Team had made statements providing justifications for his actions in directing these attacks and had hinted that Al Mahdi's actions were of a political rather than a criminal nature. His lawyer, Jean-Louis Gilissen, stated that Al Mahdi 'was concerned about the common good and concerned about doing what is right, wanted to make a contribution to introducing what he was taught and what he had understood was the divine message, concerned with doing what is right...'<sup>134</sup> Gilissen went on to comment that '[w]e're talking about two visions of the world that are in contradiction.'<sup>135</sup> However, given the guilty plea, the Defence did not identify any grounds for excluding criminal responsibility under Article 31 of the Statute. The Chamber also found that there are no viable affirmative defences.<sup>136</sup> However, the Chamber could have opted to analyse in greater depth the possibility of raising and applying cultural defences before the Court or indeed could have assessed Al Mahdi's actions as a potential mistake of law, giving that he was acting pursuant to Islamic law which called for the destruction of cultural property. Rather, the Chamber noted that religious motivations were behind the destruction of the sites, stating that '[t]he creation of the *Hesbah*, which was headed by Al Mahdi, was meant precisely to eradicate any visible vice it identified in Timbuktu.'<sup>137</sup> The Chamber thus found that the discriminatory religious motivations underpinning the destruction of the sites was a relevant factor in its assessment of the gravity of the crime.

The question which was ignored by the Chamber and will definitely arise in future cases before the ICC was whether the defendant had any justifications for the attacks under Islamic law, the legal system to which he was subject at the time? In this context, it could be argued that the concepts of *ziyara* and *hisbah* justified the destruction of cultural property at least from the defendant perspective.

## VI Conclusion

Given the current extensive destruction of cultural property by various Islamist extremist groups, a broader understanding of cultural property, its importance to humanity, and a robust

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<sup>133</sup> Confirmation of Charges Hearing, ICC-01/12-01/15-T-2-Red2-ENG WT 01-03-2016 1/100 SZ PT.

<sup>134</sup> Confirmation of Charges Hearing, ICC-01/12-01/15-T-2-Red2-ENG WT 01-03-2016 1/100 SZ PT, 16-21.

<sup>135</sup> Confirmation of Charges Hearing, ICC-01/12-01/15-T-2-Red2-ENG WT 01-03-2016 1/100 SZ PT, 18.

<sup>136</sup> *The Prosecutor v Al Mahdi*, Verdict and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 43.

<sup>137</sup> *The Prosecutor v Al Mahdi*, Verdict and Sentence, ICC-01/12-01/15-171, 27 September 2016, para. 81.

international criminal law response to attacks on such property is needed. Furthermore, additional attention on why cultural property is targeted by Islamist extremist groups is needed in order to offer it better protection. Unfortunately, the Trial Chamber missed an opportunity in *Al Mahdi* to pay adequate attention to this issue or to seek clarification on the subject from an Islamic law expert. While Al Mahdi was found guilty of violating Article 8 of the ICC Statute which incorporates a civilian use understanding of cultural property, the Chamber focused a lot of attention on the culture-value nature of cultural property when discussing the gravity of the crime committed and failed to discuss ICTY jurisprudence on attacks on cultural property as crimes against humanity or as evidence of genocide. Therefore, further clarification on these issues is needed in future ICC cases on this topic.

In respect of the failure to address the issues of *hisbah* and Islamic justifications for destruction of cultural property, perhaps this is a more understandable omission, given the fact that Al Mahdi pleaded guilty. However, there have been many legitimate condemnations of the western origins and nature of international (criminal) law and its application by international criminal courts and tribunals, particular the ICC. The question thus arises, in what way can other legal systems be recognized by the Court, or what can be the contribution of the knowledge on these systems for the international legal community? Unfortunately, the answer to this question is still pending, as the discussion of the protection and destruction of cultural property by *Al Mahdi* was incomplete.