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TRIAL CHAMBER VIII

Before: Judge Raul C. Pangalangan, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Bertram Schmitt

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

PUBLIC

**with
Confidential Annex A**

**Public redacted version of "Prosecution's submissions
on sentencing", 22 July 2016, ICC-01/12-01/15-139-Conf**

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Introduction

1. As in every criminal case, determination of an appropriate sentence in this case requires a careful balancing of all relevant factors. The Prosecution submits that the war crime of directing an attack against buildings dedicated to religion and historic monuments is by its very nature serious. The attack in this case was particularly grave, given the religious, historical, and cultural significance of the buildings attacked and the perpetrators' motivation of religious discrimination. It is also clear that Ahmad AL FAQI AL MAHDI ("Mr AL MAHDI" or "the Accused") played an essential role in the commission of the crime, acting with full intent and knowledge. All this merits a significant sentence of imprisonment.
2. At the same time, the Accused has accepted responsibility for his actions, has agreed to make an admission of guilt, and has already admitted the facts of his crime in detail. He has provided [REDACTED] cooperation [REDACTED]. These circumstances undoubtedly warrant mitigation of his sentence.
3. On balance, for the reasons set forth below and without prejudice to the Prosecution's oral submissions at trial, the Prosecution submits that the relevant factors call for a sentence of between nine and eleven years of imprisonment, to be further specified during the hearings scheduled for the week of 22 August 2016.

Confidentiality

4. Pursuant to regulation 23bis of the Regulations of the Court, the present submissions (with Annex A, a hyperlinked list of non-ICC authorities relied upon) are filed confidentially because they refer, *inter alia*, to the still-confidential agreement between the Parties regarding the Accused's admission of guilt. A public redacted version will be filed on 22 August 2016.

Applicable Law

A. Maximum penalties

5. Pursuant to article 77(1) of the Rome Statute (“the Statute”) and rule 145(3) of the Rules of Procedure and Evidence (“the Rules”), the maximum sentence of imprisonment in this case is thirty years. Pursuant to article 77(2) and rules 146 and 147, the Chamber may also order a fine or forfeiture, or both.

B. Sentencing factors

6. Article 78(1) of the Statute requires the Chamber, when determining the sentence, to “take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” Rule 145 of the Rules further mandates that the total sentence “must reflect the culpability of the convicted person,” and that the Chamber must “balance all the relevant factors” in determining the sentence.
7. Rule 145(1)(c) provides a non-exhaustive list of factors for the Chamber’s consideration. Several of those factors logically relate to the gravity of the crime,¹ namely the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; and the circumstances of manner, time and location. Other factors listed in rule 145(1)(c) logically relate to the individual circumstances of the accused, namely the degree of participation of the convicted person; the degree of intent; and the age, education, social and economic condition of the convicted person.
8. In addition to those factors, rule 145(2) provides that the Court shall take into account any mitigating or aggravating circumstances, and provides a non-exhaustive list of both. Of relevance to this case are the convicted person’s

¹ The Statute and Rules are not entirely clear regarding the intended interaction between the factors listed in rule 145(1)(c) and those listed in article 78(1). The Appeals Chamber has indicated that several approaches are possible. What matters is that all relevant factors must be considered. *See* ICC-01/04-01/06-3122, para. 61-66.

conduct after the act, including any cooperation with the Court (mitigating); abuse of power or official capacity (aggravating); commission of the crime where there were multiple victims (aggravating); and commission of the crime for a motive involving discrimination on one of the grounds referred to in article 21(3) (aggravating).

9. To avoid improper double-counting, any factors that are taken into account in the determination of the gravity of the crime or the individual circumstances of the accused may not also be considered as aggravating or mitigating circumstances, and *vice versa*.²

C. Standard of proof

10. Aggravating factors must be established beyond reasonable doubt, while mitigating circumstances are to be established on a balance of probabilities.³

D. Purposes of sentencing

11. Articles 76 to 78 of the Statute and rule 145 do not expressly address the purposes of sentencing. However, previous Trial Chambers have found that the two primary purposes of sentencing at this Court are retribution and deterrence.⁴ With regard to retribution, sentencing serves not only to express society's condemnation of the perpetrator and his or her actions, but also as an acknowledgment of the suffering of the victims.⁵ With regard to deterrence, an appropriate sentence should make it less likely that the accused will reoffend in the future (specific deterrence), and also dissuade others from committing similar crimes (general deterrence).⁶

² ICC-01/04-01/06-2901, para. 35; ICC-01/04-01/07-3484, para. 35; ICC-01/05-01/08-3399, para. 14.

³ ICC-01/04-01/06-2901, para. 33-34; ICC-01/04-01/07-3484, para. 34.

⁴ ICC-01/05-01/08-3399, para. 10; ICC-01/04-01/07-3484, para. 37.

⁵ ICC-01/05-01/08-3399, para. 11; ICC-01/04-01/07-3484, para. 37. *See also Prosecutor v. Nikoli*, IT-02-60/1, Trial Judgement, 2 December 2003, para. 86.

⁶ ICC-01/05-01/08-3399, para. 11; ICC-01/04-01/07-3484, para. 37-38. *See also Prosecutor v. Nikoli*, IT-02-60/1, Trial Judgement, 2 December 2003, para. 86; *Prosecutor v. Joki*, Sentencing Judgement, 18 March 2004, para. 33-34.

12. An appropriate sentence may also contribute to peace and reconciliation.⁷ The punishment of crimes gives victims (and society at large) greater knowledge of the past and a sense of justice needed to rebuild societies weakened by conflict.⁸ Particularly with regard to crimes involving discrimination, punishment allows both the convicted person and the victims to understand that the victim group has an equal right to justice and to the protection of their human rights.⁹
13. Rehabilitation is another recognised purpose of sentencing,¹⁰ although it should not be given undue weight, particularly where very serious crimes have been committed.¹¹ Persons who admit guilt, in particular, demonstrate a willingness to confront the wrongfulness of their acts and the harm they have caused. They are, therefore, more likely to benefit from the rehabilitative opportunities of imprisonment and to successfully reintegrate into society when released.¹²
14. Finally, because admissions of guilt can make an important contribution to societal reconciliation, individual rehabilitation, and judicial efficiency, sentencing which takes them into account as mitigating circumstances may also serve the purpose of encouraging such admissions.¹³

Determination of an appropriate sentence in this case

15. Pursuant to article 78 of the Statute and rule 145 of the Rules, an appropriate sentence must reflect the gravity of the crime, the individual circumstances of this Accused, and any mitigating and aggravating circumstances.

⁷ ICC-01/04-01/07-3484, para. 38.

⁸ *Id.*; *Prosecutor v. Nikolić*, IT-02-60/1, Trial Judgement, 2 December 2003, para. 93.

⁹ *Prosecutor v. Nikolić*, IT-02-60/1, Trial Judgement, 2 December 2003, para. 93.

¹⁰ ICC-01/05-01/08-3399, para. 11; *Prosecutor v. Jokić*, IT-01-42/1, Sentencing Judgement, 18 March 2004, para. 35, 36.

¹¹ ICC-01/05-01/08-3399, para. 11.

¹² *See Prosecutor v. Jokić*, IT-01-42/1, Sentencing Judgement, 18 March 2004, para. 35, 36.

¹³ *Prosecutor v. Jokić*, IT-01-42/1, Sentencing Judgement, 18 March 2004, para. 36, 76; *Prosecutor v. Bešlić*, IT-95-10/1, Sentencing Judgement, 11 March 2004, para. 28; *Prosecutor v. Mrković*, IT-02-59, Trial Judgment, 31 March 2004, para. 19; *Prosecutor v. Rajić*, Trial Judgment, IT-95-12, 8 May 2006, para. 71

A. Gravity of the offence

16. The Prosecution submits that the nature of the crime, the long history of the prohibition on cultural destruction, the extent of the damage caused by the crime, and the circumstances of manner, time and location all demonstrate the seriousness of the crime in this case.

1. *Nature of the crime*

17. If this Chamber proceeds to sentencing, Mr AL MAHDI will have been convicted of directing an attack against ten of the most important and best-known cultural sites in Timbuktu: nine mausoleums of Muslim saints and an ancient door of the Sidi Yahia Mosque. These buildings dedicated to religion, which were also historic monuments, did not constitute military objectives. Their destruction had no military or security rationale whatsoever; it was a direct attack on the religious, historical, and cultural identity of the people of Timbuktu.

18. The intentional destruction of cultural property is by nature a serious crime, aimed at erasing the cultural identity and heritage of a population. As stated by Witness P-0431: “The best way to take someone down is to strike him in the cultural and religious aspect, at everything that is important to him.”¹⁴ The Malian Minister of Culture perceived the attack in Timbuktu as “an attack on what fuels our soul, on the very essence of our cultural values. Their objective was to destroy our past, our culture, our identity, and in fact our dignity.”¹⁵

19. The destruction in this case was particularly grave, moreover, because the attackers targeted buildings of such significance that all but one were listed on UNESCO’s World Heritage List.¹⁶ As the Director of UNESCO aptly noted in

¹⁴ Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0020, para. 29 (unofficial internal translation).

¹⁵ Malian Ministry of Culture, «*Projet de discours de Monsieur le Ministre de la Culture à l’occasion de l’ouverture de la journée de solidarité pour le Mali*», MLI-OTP-0004-0292, p. 0294 (unofficial internal translation).

¹⁶ Statement of Witness P-0151, MLI-OTP-0029-0843, p. 0861, para. 99-100.

the context of these very destructions in Mali: “when a World Heritage Site is destroyed [...] it is the whole of humanity that suffers from the deprivation of a part of itself.”¹⁷ As described below, the targeted buildings were also of great significance to the people of Timbuktu and Mali as a whole.

20. Destruction of cultural property during armed conflict is not only inherently very serious; it is also an issue of current and ongoing concern. The desecration of ancient sites in Syria and Iraq is only the most recent reminder that cultural heritage remains at risk, particularly in conflict zones. Hence the need for a sentence in this case that furthers general as well as specific deterrence.

2. *The international legal prohibition on destruction of cultural property*

21. Since the beginning of the 20th century, international law has recognised cultural property¹⁸ as invaluable to humanity as a whole and has prohibited attacks against it.¹⁹ This long-standing legal protection of cultural property during armed conflict underlines the gravity of this crime.²⁰

¹⁷ UNESCO, « *Projet – Discours de la Directrice générale de l’UNESCO Irina Bokova, à l’occasion de la cérémonie d’ouverture de la Réunion internationale d’experts pour la sauvegarde du patrimoine culturel malien* », 18 February 2013, MLI-OTP-0004-0279, p. 0280.

¹⁸ For the definition of cultural property, see, e.g., *Prosecutor v. Kordi et al.*, IT-95-14-2/A, Appeals Judgement, 17 December 2004, para. 91: “cultural or spiritual heritage covers objects whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people.”

¹⁹ See Regulations annexed to The Hague Convention Respecting the Laws and Customs of War on Land, 187 CTS 227 (1901), art. 27, 56; The Hague Convention Concerning Bombardment by Naval Forces in Time of War, 205 CTS 345 (1907), art. 5; Convention for the Protection of Cultural Property during Times of Armed Conflict, 249 UNTS 240 (1954) (note that a Second Protocol to the 1954 Hague Convention was created on 26 March 1999, 2253 UNTS 212, and entered into force 26 March 2004, which brings it up to date with developments in the law since 1954); Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (1977), art. 53, 77(2), 85(4)); Additional Protocol to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (1977), art. 16. The International Court of Justice (ICJ) has also recognised the gravity of destruction of historical, cultural and religious heritage. In 2007, in the context of the crime of Genocide, the ICJ recognised that cultural destruction “is directed to the elimination of all traces of the cultural or religious presence of a group.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 26 February 2007, ICJ Reports 2007, para. 344.

²⁰ The inclusion of similar prohibitions in international treaties, and the historic objectives underlying those prohibitions, has been taken into account by the Appeals Chamber when assessing gravity. See ICC-01/04-01/06-2901, para. 37-38.

22. More recently, cultural destruction has become a subject of international criminal law. In the Sentencing Decision in *Jokić*,²¹ the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the shelling of the Old Town of Dubrovnik amounted to the crime of destruction or wilful damage to cultural property²² and “represent[ed] a violation of values especially protected by the international community.”²³ Referring to the status of the Old Town of Dubrovnik as a protected UNESCO World Heritage Site, the Trial Chamber determined that “the shelling attack on the Old Town was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.”²⁴

3. *Extent of the damage caused*

23. Rule 145(1)(c) directs Chambers to give consideration, *inter alia*, “to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime.”²⁵

a. Harm to the victims

24. The harm caused by the destructions in this case goes to the heart of religion, history, and culture, and to the very identity of the people of Timbuktu. The ten

²¹ The accused, Miodrag Jokić, pleaded guilty and was sentenced to seven years of imprisonment. *See Prosecutor v. Jokić*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 116. The Appeals Chamber has observed that the “obligation to individualise the sentence means that ‘it is frequently impossible to transpose the sentence in one case *mutatis mutandis* to another,’” and consequently “previous sentencing practice is but one factor among a host of others which must be taken into account when determining the sentence.” ICC-01/04-01/06-3122, para. 76-77.

²² Namely “institutions dedicated to religion, charity and education, the arts and sciences, historic monuments, and works of art and science.” *See* Statute of the ICTY, art. 3(d).

²³ *Prosecutor v. Jokić*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 46.

²⁴ *Prosecutor v. Jokić*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 51. *See also Prosecutor v. Strugar*, IT-01-42-T, Trial Judgment, 31 January 2005, para. 232 (finding destruction of cultural property to be a serious violation of international humanitarian law). Although there is no automatic correlation between a monument or site being included on the World Heritage List and its protected status under international criminal or humanitarian law, the Prosecution submits that a World Heritage listing is strong evidence that the object is legally protected and its destruction of particular seriousness.

²⁵ Trial Chambers I and II have observed that the damage for purposes of sentencing is not limited to damage caused directly or immediately by the crime, but may also include long-term and collateral damage. *See* ICC-01/04-01/07-3484, para. 50, 55, 56; ICC-01/04-01/06-2901, para. 41.

sites attacked were all, save one,²⁶ recognised as being of “outstanding universal value,”²⁷ and all of them were of significant importance to the people of Timbuktu.²⁸ As noted in the context of their inscription on the UNESCO World Heritage List, the sites were evidence of Timbuktu’s golden age, as an intellectual and spiritual capital and a centre for the propagation of Islam throughout Africa in the 15th and 16th centuries.²⁹

25. The mausoleums also represent the great value attributed to the Muslim saints of Timbuktu.³⁰ The mausoleums are seen as the saints’ “last home” and are important places of worship.³¹ Before the attack, people regularly visited the mausoleums to pray,³² to read verses from the Quran,³³ to make oblations or for spiritual retreats.³⁴ For some, the mausoleums were even a destination of pilgrimage.³⁵ The mausoleums were also places for rituals, such as circumcision or the celebration of Maouloud, the commemoration of the birth of the Prophet Muhammad.³⁶ It was also part of the people’s tradition to go to the mausoleums and make wishes.³⁷ [REDACTED] explained that the sites “are

²⁶ The Sheikh Mohamed Mahmoud Al Arawani Mausoleum is not included on the UNESCO World Heritage List.

²⁷ UNESCO, The Criteria for Selection, MLI-OTP-0021-0275, p. 0275 (criterion iv).

²⁸ Statement of Witness P-0431, MLI-OTP-0037-0013, p.0020, para.29; [REDACTED]

[REDACTED] Statement of Witness P-0151, MLI-OTP-0029-0843, p. 0855, para. 70, and p. 0857, para. 79.

³⁰ Mr AL MAHDI himself recognised during his September 2015 interview that the scholars buried in the mausoleums were saints. Transcript of P-0150 Interview, MLI-OTP-0037-0479, l. 322-326.

³¹ Statement of Witness P-0431, MLI-OTP-0037-0013, p.0020, para. 29; [REDACTED]

[REDACTED] Transcript of P-0150 Interview, MLI-OTP-0033-4645, p. 4652, l. 223.

See, e.g., Expert Report of P-0104, MLI-OTP-0028-0586, p.0729-0730; World Heritage Committee Nomination Documentation for Timbuktu, MLI-OTP-0004-0321, p. 0347; [REDACTED]

³⁴ [REDACTED]

See UNESCO, Reconstruction of Timbuktu mausoleums nears completion, MLI-OTP-0028-0375, p. 0376.

³⁶ [REDACTED]

³⁷ For example, according to tradition, the saint Cheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti could accomplish miracles and predict the future. [REDACTED]

[REDACTED] For this reason, the local population would go to this mausoleum when an important decision had to be taken. [REDACTED]

very important in the daily life of the people.”³⁸ Witness P-0431 similarly stated that: “These prayers are important for the balance, the morale, and the manifestation of faith; they allow us to express a vision of the world and to free tensions.”³⁹ It is worth noting that, as soon as they could do so, the people of Timbuktu went back to the sites of the mausoleums, still in ruins, to pray again.⁴⁰

26. The mausoleums and the great mosques of Timbuktu (including Sidi Yahia) also played an integral part in maintaining the social cohesion of Timbuktu.⁴¹ Timbuktu is a living city and the existence of its population is intimately intertwined with its ancient heritage. The whole community participates in the preservation of traditional buildings.⁴² The masons’ guild – the authority in charge of preserving the integrity and authenticity of the buildings – has been named a “living human treasure” by the Minister of Culture of Mali.⁴³ The buildings were cherished by the community and were carefully transmitted from one generation to the next.⁴⁴ They also represented an important source of

[REDACTED]; Expert Report of P-0104, MLI-OTP-0028-0586, p. 0685. Similarly, people would visit Alpha Moya on Mondays and Fridays to request its “*baraka*” (blessing) during periods of drought. Expert Report of P-0104, MLI-OTP-0028-0586, p. 0685. According to common belief, the white sand of the Bahaber Babadjié Mausoleum could cure all sorts of diseases. Expert Report of P-0104, MLI-OTP-0028-0586, p. 0729.

³⁸

[REDACTED]

Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0020-0021, para. 30.

⁴⁰ Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0025, para. 50. *See also* MLI-OTP-0037-0139, p. 0139-0141 (photographs of a person praying in front of the ruins of a mausoleum).

⁴¹ Notably with the practice of the coating of the wall (“*crépissage*”, in French). *See* Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0019-0020, para. 25-27.

⁴² Statement of Witness P-0151, MLI-OTP-0029-0843, p. 0855, para. 7; Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0019, para. 25: “The city is constantly mobilised to preserve its cultural heritage [...] The communities do everything they can to preserve the integrity and authenticity of Timbuktu’s cultural heritage [...] The communities also wish to ensure the transmission to future generations of their tangible and intangible heritage.” (unofficial internal translation).

⁴³ Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0019-0020, para. 26.

⁴⁴ The importance of this heritage was also expressed by the Minister of Culture of Mali, who stated in 2012: “It is our ancestors who have left to us, handed to us this heritage” and “the call I make is to show future generations the importance of cultural heritage, to preserve the country’s collective memory.” *See* Video, MLI-OTP-0001-6945, from 00:01:48:00 to 00:02:06:00 (unofficial internal translation).

income for the city, through tourism.⁴⁵ In so many ways, their destruction was an invaluable loss for the people of Timbuktu.

27. In short, the mausoleums of Timbuktu were a symbol of the town itself, a physical manifestation of the identity of the local inhabitants. Witness P-0431, for example, stated that the destructions harmed the “very soul” of Timbuktu, known as the “City of 333 Saints,” and critically compromised the town’s exceptional universal value.⁴⁶
28. It is noteworthy, as well, that the harm caused by this crime is in important ways irreparable. Structures can be rebuilt – and, in the case of Timbuktu, the mausoleums have been rebuilt – but their inherent value as original and historic constructions is forever altered.⁴⁷ The emotional and psychological well-being of the victims, meanwhile, may be more difficult to fully restore than the mausoleums themselves.
29. The reaction of the international community further demonstrates the important value of these sites and the impact of the destructions. The UN Security Council,⁴⁸ ECOWAS,⁴⁹ the African Union,⁵⁰ as well as numerous States

⁴⁵ Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0025, para. 49.

⁴⁶ Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0020, para. 28-29. *See also* the statement of an inhabitant of Timbuktu at the time of the attack: “Timbuktu is about to lose its soul, Timbuktu is under the threat of outrageous vandalism, Timbuktu has the sharp knife of a cold-blooded killer at its throat.” Video, MLI-OTP-0001-6939, from 00:00:50 to 00:01:08, and its transcript, MLI-OTP-0030-0108, p. 0109, l. 31-33 (unofficial internal translation).

⁴⁷ The *Joki* Trial Chamber further emphasised that, while restoration is possible, the buildings can never return to their original state: the “inherent value of the buildings” is affected “because a certain amount of original, historically authentic, material will have been destroyed”, which restoration cannot recover. *Prosecutor v. Joki* , IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 52.

⁴⁸ UNSC Resolution 2056, S/RES/2056 (2012), MLI-OTP-0006-2722, p. 2723; UNSC Press Release, MLI-OTP-0001-1431, p. 1433; Statement by the UN Secretary General on 8 August 2012, MLI-OTP-0001-1474, p. 1475; Report of the UN Secretary-General on the Situation in Mali of 29 November 2012 at MLI-OTP-0001-2113, p. 2115; UNSC Resolution 2071, S/RES/2071 (2012), MLI-OTP-0001-1924, p. 1925; UNSC Resolution 2085, S/RES/2085 (2012), MLI-OTP-0006-2732, p. 2732; Video, MLI-OTP-0001-6956, at 00:01:09:19. Note that the United Nations Security Council specifically highlighted the World Heritage status of sites in its condemnation of the attack.

⁴⁹ *See, e.g.*, ECOWAS, Regional Committee condemns destruction of cultural monuments in Mali, 2 July 2012, MLI-OTP-0001-0893.

⁵⁰ *See, e.g.*, African Union, *Déclaration solennelle sur la situation au Mali*, MLI-OTP-0020-0465, p. 0467; African Union, *Communiqué* / The African Union strongly condemns the destruction of religious mausoleums in Timbuktu, Mali, MLI-OTP-0001-0841.

and organisations, condemned the destruction. As eloquently put by the chairperson of UNESCO's Africa Group, "It is not only Mali which is affected by the destruction of heritage sites in that country. Mali's heritage sites are Africa's heritage sites and they are also the world's heritage sites."⁵¹ This was a loss for the whole world.

b. Nature of the unlawful conduct

30. Regarding the nature of the unlawful conduct, the Prosecution considers it essential to recognise that the motivation for the attack was fundamentally based on religious discrimination. In *Katanga*, the Appeals Chamber specifically referred to the discriminatory dimension of crimes to determine their gravity.⁵² Similarly, at the ICTY, in *Kordić and Čerkez*, the Trial Chamber held that an attack against protected cultural property amounted to an attack on the very religious identity of a people when perpetrated with discriminatory intent, hence elevating its gravity.⁵³
31. The attack in this case was committed – and publicly justified – in the name of the armed groups' self-proclaimed religious ideology. In one interview given at a destruction site, the Accused explained: "we have destroyed the cemeteries [...] as a preventive measure in order to not allow people to take these cemeteries as idols."⁵⁴ One witness stated: "They wanted to change the minds of the people of Tombouctou in an attempt to divert them from their traditional

⁵¹ Speech by H.E. Solomon Jason Mbuzi, the Chair of the Africa Group: Safeguarding of Mali's Cultural Heritage, UNESCO, 13 August 2013, MLI-OTP-0004-0296, p. 0298-0299.

⁵² ICC-01/04-01/07-3484, para. 44.

⁵³ *Prosecutor v. Kordić et al.*, IT-95-14/2-T, Trial Judgement, 26 February 2001, para. 206-207; *see also Prosecutor v. Blaškić*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 235; *Prosecutor v. Stakić*, IT-97-24-T, Trial Judgement, 31 July 2003, para. 766-768; *Prosecutor v. Mulinović et al.*, IT-05-87-T, Trial Judgement, 26 February 2009, para. 205.

⁵⁴ Video, MLI-OTP-0025-0174. [REDACTED]

see also ICC-01/12-01/15-54-Conf-AnxA-

ways of thinking [...].”⁵⁵ Another witness explained that, when members of the armed groups attacked the buildings, they called the people of Timbuktu miscreants.⁵⁶

32. The attack also consciously and flagrantly targeted objects of special significance for the people of Timbuktu, for Malians, and for the international community. Just a few days before the attack, Timbuktu had been placed on UNESCO’s List of World Heritage in Danger,⁵⁷ an action mocked by the spokesperson of Ansar Dine in an interview with *Radio France Internationale* at the time of the attack.⁵⁸ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁹

33. It is also important to emphasise that this attack was carefully planned. Abdallah AL CHINGUETTI – an AQIM religious authority, member of the Presidency in occupied Timbuktu, and member of the common plan – prepared a document entitled “Fath Al-Shukur on the Duty to Level Structures over Graves to the Ground” in which he advocated the need to destroy the mausoleums.⁶⁰ In advance of the attack, imams and religious experts (including Mr AL MAHDI) were consulted,⁶¹ and various steps were taken to dissuade or

⁵⁵ [REDACTED]

⁵⁶ [REDACTED]

⁵⁷ See UNESCO, Heritage sites in Northern Mali placed on List of World Heritage in Danger, MLI-OTP-0001-1942; Statement of Witness P-0151, MLI-OTP-0029-0843, p. 0855, para. 67-68 ; Jeune Afrique, ‘Mali: poursuite de la destruction des mausolées à Tombouctou, malgré le tollé International’, MLI-OTP-0001-3771.

⁵⁸ See Skynews interview with Sanda Bouamama, MLI-OTP-0011-0223 (audio in Arabic) and the translation of the transcript at MLI-OTP-0034-0395 (Sanda Ould BOUMAMA: “Our reference is not to international law, nor the United Nations, nor UNESCO ... So telling me that the United Nations and international bodies ... these bodies don’t concern us, and for us their indignation is an atonement ... What is the value of these walls?” (unofficial internal translation); see also RFI, “Mali: la destruction des mausolées de Tombouctou par Ansar Dine sème la consternation”, MLI-OTP-0007-0228, and the transcript of the audio at MLI-OTP-0020-0584, p. 0585, l. 3-5.

⁵⁹ [REDACTED]

[REDACTED] MLI-OTP-0002-0757 and its translation, MLI-OTP-0034-1363.

⁶¹ [REDACTED]

prevent people from conducting religious practices at the mausoleum sites.⁶² On the Friday immediately before the attack, a sermon prepared by the Accused was disseminated by the groups regarding the necessity to raze the mausoleums to the ground,⁶³ and members of the armed groups went to the cemeteries to tell people not to worship the mausoleums.⁶⁴ During the attack, members of the armed groups were deployed to the various sites both to provide security and to participate in the actual destructions.⁶⁵ The Accused, as head of the *Hisbah*, organised and oversaw the destructions, and the leadership of the armed groups attended to encourage the perpetrators.⁶⁶ In short, this was not a spontaneous or opportunistic attack, but rather a premeditated assault on the religious buildings and historic monuments in question.

c. Means employed

34. With the exception of a bulldozer used to complete the destruction outside the Djingareyber Mosque, most of the mausoleums and the ancient door of the Sidi Yahia Mosque were destroyed manually, using pickaxes, crowbars, shovels, and men's bare hands. The Accused himself participated in this way at several sites, the most immediate and personal participation possible.
35. The attackers also used publicity as a tool in the attack. Journalists were called in advance to report on the destructions, and members of the armed groups, notably Mr AL MAHDI, made statements before the cameras to justify the destructions while they were being committed. Scenes of the destructions were

⁶² Statement of Witness P-0431, MLI-OTP-0037-0013, p. 0020, para. 30; [REDACTED]

[REDACTED] Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0479, l. 344-368, p. 0482, l. 422-451.

⁶³ [REDACTED]

⁶⁴ [REDACTED]

⁶⁵ [REDACTED]

Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0488, 0509, 0610, 0615.

widely broadcasted.⁶⁷ 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.

4. *Circumstances of manner, time and location*

36. Finally with regard to gravity, rule 145(1)(c) directs the Chamber to give consideration to the “circumstances of time, manner and location.”
37. With regard to time, the Prosecution emphasises that the attack was perpetrated in broad daylight on several days over the span of nearly two weeks. Not only does this demonstrate the purposefulness and premeditated nature of the crime, but the drawn-out nature of the attack also prolonged the suffering of the affected population, which was forced to witness the destruction of additional sites even as they grieved for sites destroyed in previous days. Similarly with respect to location, the attack against public buildings in full view of the population ensured that the destructions had the maximum impact.
38. The manner in which the crime was committed is partially addressed above, with respect to the means employed to carry out the destructions and the use of public statements to justify the attack and maximise its impact. It is also relevant that the destruction of the buildings was in most cases complete, leaving only ruins. The two mausoleums attached to the Djingareyber Mosque best exemplify this; afterwards it was as if the mausoleums never existed.⁶⁸
39. Finally, the Prosecution recalls that the attack was systematic, premeditated, and targeted ten of the best known and cherished sites in Timbuktu.

⁶⁷ For examples of public documentaries on the attacks, see Video (*Enquête Exclusive*), MLI-OTP-0001-7037; Video (France 2), MLI-OTP-0009-1749; Video (France 24), MLI-OTP-0001-6956; Video (TV5 Monde), MLI-OTP-0001-6945; Video (France 2), MLI-OTP-0001-6926; Video (France 2), MLI-OTP-0001-6927; Video (Al Jazeera), MLI-OTP-0011-0177.

⁶⁸ Expert Report of P-0104, MLI-OTP-0028-0586, p. 0734, 0736.

B. Individual circumstances of the Accused

40. Trial Chamber II has observed that the individual circumstances of the accused must be determined *in concreto* on the basis of the specific legal and factual conclusions of the Chamber on the specific individual.⁶⁹

1. *Degree of participation and intent of the Accused*

41. The agreed facts and evidence in this case make plain that the Accused acted with the intent to attack the protected buildings listed in the Document Containing the Charges (“DCC”)⁷⁰ and that his participation in the crime was of critical importance to its success. Because the evidence on these two related issues substantially overlaps, the Prosecution addresses them together.

42. Mr AL MAHDI, in his capacity as head of the *Hisbah*, was actively involved in all the phases of the attack. To summarise, the accepted evidence demonstrates that the Accused:

- a. identified sites where people were carrying out cultural and religious practices forbidden by the occupiers;⁷¹
- b. brought such practices to the attention of the leaders of the armed groups;⁷²
- c. accepted and implemented the order to destroy the mausoleums;⁷³
- d. determined the order of the destructions, starting at Sidi Mahmoud Cemetery in the north of Timbuktu;⁷⁴
- e. was present at every site;⁷⁵

⁶⁹ ICC-01/04-01/07-3484, para. 61.

⁷⁰ ICC-01/12-01/15-66-Conf.

⁷¹ ICC-01/12-01/15-66-Conf, para. 111; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0479, l. 344-349; MLI-OTP-0037-0519, p. 0538, l. 632-648.

⁷² ICC-01/12-01/15-66-Conf, para. 111, 303; Transcript of P-0150 Interview, MLI-OTP-0037-0519, p. 0539, l. 661.

⁷³ ICC-01/12-01/15-66-Conf, para. 113; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0480, l. 369-383; p. 0483, l. 480-481.

⁷⁴ ICC-01/12-01/15-66-Conf, para. 114, 309, 359; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0489, l. 673-704; MLI-OTP-0037-0500, p. 0501, l. 26 *et seq.*

- f. supervised the perpetrators (including his own *Hisbah* members and others, totalling as many as 60 men at one site)⁷⁶ and divided the work between them;⁷⁷
- g. provided shovels and pickaxes for the destructions;⁷⁸
- h. used *Hisbah* funds to purchase additional equipment when necessary;⁷⁹
- i. provided food and drinks to the perpetrators;⁸⁰
- j. participated physically in at least five of the destructions, personally destroying and/or taking bricks away when they fell;⁸¹
- k. determined the manner in which the mausoleums would be destroyed, for instance, deciding to use a bulldozer to complete the destruction of the two mausoleums annexed to the Djingareyber Mosque;⁸²
- l. provided moral support to the perpetrators⁸³; and
- m. spoke to the media to justify the destructions.⁸⁴

43. As stated in its submissions in support of conviction under article 65(2) of the Statute, the Prosecution maintains that direct co-perpetration under article

⁷⁵ ICC-01/12-01/15-66-Conf, para. 145-227.

⁷⁶ Transcript of P-0150 Interview, MLI-OTP-0037-0500, p. 0514, l. 463.

⁷⁷ ICC-01/12-01/15-66-Conf, para. 118, 310-314, 358; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0488, l. 651-662, p.0566, l. 375.

⁷⁸ ICC-01/12-01/15-66-Conf, para. 115, 311; Transcript of P-0150 Interview, MLI-OTP-0037-0500, p. 0504, l. 121 ; MLI-OTP-0037-0519, p. 0525, l.183.

⁷⁹ ICC-01/12-01/15-66-Conf, para. 116, 312; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0498, l. 1002-1003.

⁸⁰ ICC-01/12-01/15-66-Conf, para. 116, 359; Transcript of P-0150 Interview, MLI-OTP-0037-0519, p. .0525, l. 187.

⁸¹ ICC-01/12-01/15-66-Conf, para. 121, 315-317, 359; Transcript of P-0150 Interview, MLI-OTP-0037-0500, p. 0505-0506.

⁸² ICC-01/12-01/15-66-Conf, para. 117; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0493, l. 816.

⁸³ ICC-01/12-01/15-66-Conf, para. 319-322.

⁸⁴ ICC-01/12-01/15-66-Conf, para. 122, 323-326, 359; Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0490, l. 732; MLI-OTP-0037-0506, l. 176-180.

25(3)(a) is the mode of liability which best reflects Mr AL MAHDI's overall participation.⁸⁵

44. In *Lubanga*, Trial Chamber I emphasised Lubanga's role "as a co-perpetrator who made an essential contribution to the common plan," noting, among other things, his coordinating role, involvement in planning operations, and provision of logistical support.⁸⁶ The Accused's contribution here is comparable to Lubanga's. Mr AL MAHDI too was a co-perpetrator who made an essential contribution to the common plan, and as described above he was directly and actively involved in all phases of the attack. It is fair to note that he told investigators he initially counselled against the attack.⁸⁷ However, as he concedes, once a decision to destroy the sites had been taken, he accepted it and became the principal implementer of the decision.⁸⁸ He organised and supervised the attack, he personally participated in the destruction at several sites, and he was effectively the public face of the attack, explaining and justifying it to the direct perpetrators, the local population, and the world. These facts make clear that Mr AL MAHDI bears a significant degree of culpability, which should be reflected in his sentence.
45. The facts and evidence also demonstrate that the Accused acted with full knowledge and intent. The fact that he is a native of Timbuktu, coupled with his personal monitoring of religious practices at local cemeteries prior to the

⁸⁵ ICC-01/12-01/15-120-Conf, para. 29-31. If the Trial Chamber finds that Mr AL MAHDI's criminal responsibility for direct co-perpetration has not been established beyond reasonable doubt, then it should assess the different conduct described in paragraphs 18-20 of the charges in light of the most appropriate mode of liability and, if necessary, enter a conviction on the basis of more than one mode, to reflect the totality of his conduct. In such case, the Trial Chamber should explain which acts and omissions are relevant for each mode of liability.

⁸⁶ ICC-01/04-01/06-2901, para. 52. In *Katanga*, although the accused was convicted only under article 25(3)(d) of the Statute, Trial Chamber II similarly emphasised its conclusion that the contribution of the accused had considerable influence on the perpetration and manner of perpetration of the crimes, and underscored the significance of his providing logistical resources and the necessary means to carry out an attack. *See* ICC-01/04-01/07-3484-tENG-Corr, para 65.

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Transcript of P-0150 Interview, MLI-OTP-0037-0922, p. 0926, l.105-108; MLI-OTP-0037-0469, p .0481, l. 414-440.

⁸⁸ Transcript of P-0150 Interview, MLI-OTP-0037-0555, p. 0565, l. 310-332.

attack and his research into related legal questions, leave no doubt that he knew these buildings were used for religious purposes, a point which he confirmed during his September 2015 interview.⁸⁹

46. The attack, meanwhile, took place over the course of nearly two weeks at several different sites; the Accused had ample opportunity to withdraw from or try to stop the operation if he had second thoughts or was unclear about its objectives. Instead, before the destruction of the ancient door of the Sidi Yahia Mosque, the Accused rejected the pleas of ██████████ ██████████⁹⁰ and he subsequently told investigators that he “did not think twice” to destroy the last two mausoleums outside the Djingareyber Mosque⁹¹. The Accused’s own public statements at the time, moreover, recognising and justifying the destructions, also demonstrate his knowledge and intent. The simple fact, which Mr AL MAHDI accepts, is that he knew exactly what he and his co-perpetrators were doing and acted intentionally.

2. *Age, education, social and economic condition of the Accused*

47. Rule 145(c) also directs the Chamber to consider the “age, education, social and economic condition” of the Accused. The Prosecution submits that the Accused’s age and economic condition do not significantly affect his culpability.
48. The Accused’s level of education aggravates, rather than minimises, his culpability. As in *Lubanga*, where Trial Chamber I found the accused’s intelligence and education to show that he understood the seriousness of his crimes,⁹² Mr AL MAHDI is a well-educated man entirely capable of comprehending the consequences of his conduct. Mr AL MAHDI is a scholar of

⁸⁹ Transcript of P-0150 Interview, MLI-OTP-0037-0469, p. 0479, l. 322-326.

⁹⁰ ██████████ ██████████

⁹¹ Transcript of P-0150 Interview, MLI-OTP-0037-0519, p. 0549, l. 1001-1005.

⁹² ICC-01/04-01/06-2901, para. 55-56.

Islam.⁹³ He was a school teacher⁹⁴ and a director in schools in or nearby Timbuktu.⁹⁵ His reputation as a scholar is perhaps best exemplified by the fact that leaders of the armed groups sought him out when they arrived in Timbuktu⁹⁶ and consulted him regarding the establishment of the *Hisbah* and the Islamic tribunal.⁹⁷ The extent of the Accused's knowledge in religious matters is apparent from a press interview he gave in 2013⁹⁸ as well as his September 2015 interview with the Prosecution.⁹⁹

49. With regard to social condition, the Prosecution notes that the Accused is married and has several children. In this regard, his circumstance is generally comparable to other accused whose family situations have had little¹⁰⁰ or no effect¹⁰¹ on their sentence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰² [REDACTED]

[REDACTED]¹⁰³

⁹³ ICC-01/12-01/15-54-Conf-AnxA-tENG, Agreed Fact 11; *Procès-verbal d'interrogatoire d'AL FAQI* (Niamey), MLI-OTP-0024-2182, p. 2185. [REDACTED]

Transcript of P-0150 Interview, MLI-OTP-0037-0297, p. 0311, l. 472-476. [REDACTED]

Procès-verbal d'interrogatoire d'AL FAQI (Niamey), MLI-OTP-0024-2182, p. 2185; Transcript of P-0150 Interview, MLI-OTP-0037-0297, p. 0311, l. 459; [REDACTED]

Transcript of P-0150 Interview, MLI-OTP-0037-0335, p. 0354, l. 639, 660.

⁹⁷ Transcript of P-0150 Interview, MLI-OTP-0037-0335, p. 0364, l. 978-1024.

⁹⁸ Video, MLI-OTP-0025-0010, at 00:05:32, and translation of the transcript of the video, MLI-OTP-0033-5488, p. 5492, l. 103-110.

⁹⁹ Transcript of P-0150 Interview, MLI-OTP-0037-0297, p. 0316, l. 624- 660; MLI-OTP-0037-0335, p. 0342, l. 224-238.

¹⁰⁰ ICC-01/04-01/07-3484, para. 84-85, 88.

¹⁰¹ ICC-01/05-01/08-3399, para. 77-78. Trial Chamber III in *Bemba* noted that “[f]amily circumstances are accorded little, if any weight, in sentencing, unless exceptional.” *Id.* para. 78 & n.243.

¹⁰² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Mitigating circumstances

50. Cases from this Court and others have recognised at least three distinct types of post-offence conduct which constitute mitigating circumstances and are present in this case: 1) the entering of a guilty plea or admission of guilt, 2) cooperation with the Prosecution, and 3) a sincere expression of remorse.

1. *Admission of guilt*

51. Trial Chamber II in *Katanga* recognised that a guilty plea constitutes a mitigating circumstance.¹⁰⁴ This was also the settled practice of the ICTY, which recognised that a guilty plea may, depending on the circumstances, “demonstrate repentance, honesty, and readiness to take responsibility; help establish the truth; contribute to peace and reconciliation; set an example to other persons guilty of committing crimes; relieve witnesses from giving evidence in court; and save the [court’s] time and resources.”¹⁰⁵

52. As further discussed below, Mr AL MAHDI signalled his intention to speak honestly and to accept responsibility for his actions on his first day of contact with the Prosecution in September 2015. He entered into an agreement regarding admission of guilt early in these proceedings, prior to confirmation of the charge. That Agreement includes a recognition and acceptance of the Accused’s criminal responsibility for the charged crime, and a full factual account of the crime (in the annexed factual narrative¹⁰⁶). This early and full acceptance of responsibility should allow these proceedings to come to a relatively prompt close, without the need for a lengthy and expensive trial or for witnesses to put themselves at personal risk (or submit to relocation in order to safely testify). It should also, hopefully, promote peace and

¹⁰⁴ ICC-01/04-01/07-3484, para. 32.

¹⁰⁵ *Prosecutor v. Joki*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 76 (and cases cited therein); *see also Prosecutor v. Nikoli*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 49 (noting and implicitly affirming the Trial Chamber’s assessment of similar reasons for the mitigating effect of a guilty plea).

¹⁰⁶ ICC-01/12-01/15-78-Conf-Anx1-Red.

reconciliation in Mali.¹⁰⁷ In the Prosecution's view, Mr AL MAHDI is undoubtedly entitled to mitigation in this regard.

2. Cooperation

53. A further mitigating circumstance exists where an accused cooperates with the Court or the Prosecution. Rule 145(2)(a)(ii) specifically characterises cooperation with the Court as a mitigating circumstance. Substantial cooperation with the Prosecution was also accepted as a mitigating circumstance at the ICTY.¹⁰⁸ At this Court, Trial Chamber II in *Katanga* held that cooperation may be taken into consideration even where not "substantial," although it suggested that more substantial cooperation would have greater mitigating effect.¹⁰⁹
54. The Prosecution recognises that Mr AL MAHDI has demonstrated cooperation with the Prosecution from the first day he was contacted in September 2015. When informed of the Prosecution's interest in interviewing him, and after consultation with article 55(2) duty counsel, he promptly agreed to speak with investigators and ultimately was interviewed for five days, during which he discussed a range of topics, including his own participation in crimes. In the Prosecution's view, the September 2015 interview alone constitutes significant cooperation.

55. [REDACTED]

¹⁰⁷ Cf. *Prosecutor v. Plavsi*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, para. 73-81 (discussing evidence that the accused's guilty plea and expression of remorse would promote reconciliation).

¹⁰⁸ See, e.g., *Prosecutor v. Joki*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004, para. 95-96; *Prosecutor v. Babi*, IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005, para. 69-70 (affirming Trial Chamber's decision to attach "substantial mitigating weight" to the accused's substantial cooperation with the Prosecution).

¹⁰⁹ ICC-01/-04-01/07-3484, para. 32, 126-128. See also *Prosecutor v. Nikoli*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 66 (stating that a Trial Chamber has discretion to assess the importance to be given to cooperation as a mitigating factor, and to give no weight, modest weight, or substantial weight in mitigation).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹¹⁰ [REDACTED]

[REDACTED]

3. *Sincere expression of remorse*

56. Settled jurisprudence recognises a sincere statement of remorse as a mitigating circumstance.¹¹¹ A sincere expression of remorse in the context of an admission of guilt can bring an important measure of recognition and closure to victims, and promote peace and reconciliation.¹¹² Expressions of compassion or regret (without accepting responsibility or blame) are not considered mitigating circumstances, although they may warrant some consideration.¹¹³
57. The Agreement contains no provision regarding a statement of remorse by the Accused. If he does elect to make such a statement, however, the Prosecution would recognise it as an additional mitigating circumstance.

D. Aggravating circumstances

58. Rule 145(2)(b) lists a number of specific aggravating circumstances, several of which have potential application in this case.

1. *Abuse of power or official capacity (Rule 145(2)(b)(ii))*

¹¹⁰ [REDACTED]

¹¹¹ See, e.g., ICC-01/04-01/07-3484, para. 32, 117 (and the ICTY cases cited therein); see also *Prosecutor v. Nikoli*, IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005, para. 59 (affirming the Trial Chamber's consideration of remorse as one of several mitigating circumstances that justified a substantial reduction in sentence).

¹¹² See *Prosecutor v. Plavsi*, IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003, para. 73-81 (discussing evidence that the accused's guilty plea and expression of remorse would promote reconciliation).

¹¹³ See, e.g., ICC-01/04-01/07-3484, para. 32, 117 (and the ICTY cases cited therein).

59. The Prosecution submits that the Accused abused his power and official capacity within the meaning of rule 145(2)(b)(ii). As explained by the Appeals Chamber in *Lubanga*, the mere holding of a position of power or authority does not warrant a higher sentence; however, “a person who abuses or wrongly exercises power deserves a harsher sentence.”¹¹⁴
60. There is no dispute that the Accused used his authority as head of the *Hisbah* to further the charged attack on protected buildings.¹¹⁵ Even as a native of Timbuktu who understood the religious, historical, and cultural significance of the attacked buildings, the Accused acquiesced in the decision to destroy the mausoleums and the door of the Sidi Yahia Mosque, and he used his authority to organise and implement the attack and to publicly justify it. His participation as a respected religious authority and head of the *Hisbah* provided moral support to the perpetrators. In sum, the Accused’s conduct goes beyond the mere holding of authority to constitute a wrongful exercise of power, and the Chamber should consider it an aggravating circumstance.

2. *Commission of the crime where there were multiple victims (Rule 145(2)(b)(iv))*

61. There is no question that the Accused’s crime affected multiple victims. In addition to the victims already participating in these proceedings, who have identified concrete impacts of the crime suffered by them,¹¹⁶ the evidence referenced in the Prosecution’s submissions in support of the DCC also demonstrates the profound effects of the crime on the community as a whole.¹¹⁷ In addition, as noted above, the historical, religious, and cultural value of the attacked sites was such that their destruction affected people throughout Mali,

¹¹⁴ ICC-01/-04-01/06-3122, para. 82.

¹¹⁵ As discussed above, the Prosecution considers the official capacity of the Accused and other perpetrators, as well as the official and systematised manner in which the crime was perpetrated, to be directly relevant to the gravity of the crime, the degree of participation of the Accused, and the circumstances of manner, time and location, under article 78(1) and rule 145(1)(c). The Chamber should avoid double-counting any aspect of the Accused’s position or use of authority.

¹¹⁶ [REDACTED]

¹¹⁷ ICC-01/12-01/15-66-Conf, para. 228-34.

Africa, and indeed the world. It will also affect future generations, who will never know the original centuries-old structures. In short, while the Accused's crime was nominally directed at buildings, its true target was a people and their culture and identity, and it had profound and far-reaching impacts.

3. *Commission of the crime for a motive involving religious discrimination (Rule 145(2)(b)(v))*

62. Finally, of particular relevance to the facts of this case, rule 145(2)(b)(v) directs the Chamber to take into account the commission of a crime for any motive involving discrimination on any ground referred to in article 21(3) of the Statute, including "religion or belief." Whether the Chamber chooses to address this issue in connection with the gravity of the crime, or as an aggravating circumstance, the Prosecution submits that the religious motivation of this crime is fundamental to assessing the culpability of the Accused.
63. It is undisputed that the mausoleums at issue were targeted specifically because of their religious use by members of the local population of Timbuktu. Leaders of the armed groups considered the construction of the mausoleums and the practice of praying to the saints buried therein to be prohibited.¹¹⁸ To many in Timbuktu, however, the mausoleums and their saints were sacred, and praying at the shrines was an important manifestation of religious faith.¹¹⁹ The destructions of the mausoleums (and the door of the Sidi Yahia Mosque) were, at their core, acts of religious intolerance designed to forcibly impose the views of the occupiers and render physically impossible the continued religious practices of the local population. There should be no question that the discriminatory nature of this crime heightens its seriousness and calls for a correspondingly higher sentence.

¹¹⁸ ICC-01/12-01/15-78-Conf-Anx1-Red, p. 19-20, para. 34-37; ICC-01/12-01/15-66-Conf, para. 98-104; Transcript of P-0150 Interview, MLI-OTP-0037-0479, l. 314-339 [REDACTED]

ICC-01/12-01/78-Conf-Anx1-Red, p. 8-9, para. 26-33; ICC-01/12-01/15-66-Conf, para. 83-89.

E. Observations on paragraphs 19(a) and (b) of the Agreement

64. In footnote 3 of its Order requesting sentencing submissions,¹²⁰ the Chamber directed the parties to provide “detailed observations on paragraphs 19(a) and (b) of ICC-01/12-01/115-78-Conf-Exp.” Those paragraphs of the Parties’ agreement regarding admission of guilt provide, in principal part, that the Prosecution will recommend a sentence of between nine and eleven years of imprisonment, and that the Prosecution will not appeal any sentence within that range.¹²¹
65. In paragraph 19(a) of the Agreement, the Prosecution has agreed to recommend a sentence within a particular range – nine to eleven years of imprisonment. That range was the result of consideration by the Prosecution of all the various sentencing factors discussed in this filing, and was intended to reflect the Prosecution’s assessment of the overall culpability of the Accused in light of all known circumstances.
66. In broad terms, the sentencing range in paragraph 19(a) reflects the Prosecution’s view:
- that the war crime of attacking protected objects under article 8(2)(e)(iv) of the Statute is inherently serious;
 - that the attack in this case was particularly serious, given the religious, historical, and cultural significance of the buildings attacked and the manner of the attack, and particularly in light of the motivation of religious discrimination; and
 - that the Accused played an essential role in the commission of the crime; but also

¹²⁰ ICC-01/12-01/15-99, p. 3, n.3.

¹²¹ ICC-01/12-01/15-78-Conf-Anx1-Red, para. 19.

- that the Accused deserves substantial credit for promptly accepting responsibility, making an admission of guilt, admitting in detail the facts of the crime, and providing substantial cooperation with the Prosecution's ongoing investigation of the Mali situation.

67. Paragraph 19(a) sets forth a range, rather than a specific number of years, primarily to account for two main variables unknown or partially unknown at the time the Agreement was signed: [REDACTED]

[REDACTED] and whether or not (and to what extent) the Accused may make a statement of remorse. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] With regard to the second variable, the Prosecution expects some expression of remorse or compassion from the Accused before sentencing, although it has not received (nor sought) any detailed information regarding such a statement. Partly as a consequence of this uncertainty, the Prosecution intends to reserve its final sentencing recommendation (a specific number of years within the range) until an appropriate time during the hearings scheduled for the week of 22 August 2016.

68. Paragraph 19(b), meanwhile, states that the Prosecution will not appeal any sentence imposed by the Chamber within the range specified in paragraph 19(a), i.e., between nine and eleven years of imprisonment. The Prosecution agreed to forego appeal in these relatively narrow circumstances in order to provide greater finality, certainty, and efficiency to the proceedings. As implied in paragraph 19(b), the Prosecution retains the discretion to appeal any sentence higher or lower than the range specified in paragraph 19(a).

69. The Prosecution fully accepts that paragraphs 19(a) and (b) are not binding on the Chamber.

Conclusion

70. For the reasons stated above, and subject to the Prosecution's oral submissions at trial, the Prosecution urges the Court to impose a sentence of between nine and eleven years of imprisonment. The Prosecution will make a more specific recommendation at an appropriate time during the hearings scheduled to begin on 22 August 2016.



Fatou Bensouda, Prosecutor

Dated this 22nd day of July 2016

At The Hague, The Netherlands