

The Historiography of International Criminal Justice through the Prism of *Al Mahdi*, the Protection of Cultural Heritage and the Preservation of Memory

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Abstract

This article examines the role that international criminal justice plays, firstly in creating history, and secondly in protecting history. With regards to the former function, history, in terms of historical truths and narratives are frequent casualties of war and so the first major thread of this discussion outlines the historiography of international criminal law through the prism of the illustrative case of *Al Mahdi* before the International Criminal Court. In other words this paper aims to set out an overview of the methods, processes and policies by which international criminal justice develops historico-legal narratives that attempt to get at the truth and protect the past from false or distorted narratives. With regards to the latter function, history, in terms of cultural heritage may often be destroyed in order to destroy the identity and even the existence of a people. Accordingly, the second major thread of this discussion is that when it comes to memorialising the significance of cultural property and the impact of its destruction for the benefit of our collective memory as a basis for punishing criminal acts of destroying cultural property, deterring future criminal acts, and providing victims with reparations, *Al Mahdi* represents a careful balance between legal pragmatism and legal principle, and furthermore that international criminal justice is an important stakeholder in the reparations and restorations process.

Keywords

International criminal law; international criminal procedure; war crimes; crimes against humanity; cultural heritage; historical record; collective memory.

Introduction: the International criminal process as a commemorative act.

Post-conflict restoration of peace and security may be served by transitional justice initiatives such as international criminal trials. This paper argues that whilst international criminal trials often have as their primary focus the respective functions of individual retribution and deterrence, arguably they may also increasingly attempt to contribute to the emotional and economic recovery of victims through what may be described as a process of historical fact-finding. From the point of view of victims, this function may provide closure by validating the destruction and losses arising from atrocities as well as acknowledging the impact they have had on the victims.

This paper critiques the ‘historiography’ of the general international criminal law process. Namely, within the context of international criminal trials, ‘commemoration’ may be achieved through the process of gathering and testing evidence vis-à-vis competing narratives in a relatively rigorous and credible fashion, and then producing a detailed account of the organisations behind the atrocities, the individuals behind the organisations and the motivations behind the individuals. Having an authoritative account in this regard may serve to foster post-conflict reconciliation between victim and perpetrator groups as well as preventing any subsequent historical revisionism and distortions.

However, this paper suggests that a consequence of the pragmatism and procedural propriety associated with the criminal trial process may be that crime-base evidence is not comprehensively established and criminal acts are not labelled to the satisfaction of all victims. As this paper will go on to argue, this is because justice and the historical record may only see what is absolutely necessary to determine liability for specific criminal acts beyond reasonable doubt. Where questions of command responsibility for the indirect perpetrators are concerned, weight will necessarily be given to high level insider witnesses who can attest to atrocities being committed through seemingly hidden structures of power rather than eye-witness testimony of the acts committed by the direct perpetrators. In this way, rules of criminal law and procedure combined with fiscal constraints mean that the international criminal justice process may not be wholly commemorative of the wide-ranging voices of victims.

Whilst victim communities may justifiably perceive that genocide or crimes against humanity have been perpetrated against them, the evidentiary difficulties, and thus the risk of acquittal, associated with respectively proving beyond reasonable doubt genocidal intent or a

widespread and systematic pattern and policy of persecution may preclude the labelling, prosecution and thus commemoration in such terms. To increase the likelihood of a conviction, and thus an authoritative judgment that establishes at least some of the facts against a broader historical backdrop, prosecuting lawyers may press charges for what may be perceived as less serious war crimes. War crimes tend to focus more narrowly on relatively isolated criminal activities such as killing or destroying protected objects. From the standpoint of victims, this approach may not reflect the perceived reality that they faced systematic annihilation or persecution on account of their particular group identity.

Where *realpolitik* allows, transitional justice serves to demonstrate the power of the law to comprehend and reintroduce order into spaces evacuated of legal and moral sense. This helps victims to move forward, especially where justice is delivered to its constituencies through adequate outreach initiatives which are capable of avoiding the pitfalls of fostering of the very divisions and grievances that transitional justice seeks to reconcile and deter, and allowing the commemorative legal process to be politically hijacked or misrepresented.

Memorialising the significance of cultural property: a careful balance between principle and pragmatism

International criminal law generally regards crimes against protected persons as being more serious than crimes against protected property.¹ This is consistent with Hersch Lauterpacht's approach to the scope of legal protection. Namely, that the law should focus on protecting the individual, irrespective of the group to which they belong.² This perspective is reflected in the argument that in war 'lives are lost and with them often times their greatest achievements.'³ This contrasts with Raphael Lemkin's approach to protection. Namely that the law should go further and focus on the protection of groups. According to this perspective, to provide adequate protection, legal approaches should understand and reflect the reality that for most individuals in most wars, individuals are not persecuted on account of their individual qualities, but because of they belong to particular group with a distinct identity, culture and history.⁴ This perspective is reflected in the argument that '[y]ou can wipe out an entire generation, you can burn their homes to the ground and somehow they'll

¹ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-171, Judgment and Sentence, (Trial Chamber VIII), 27 September 2016, para. 76.

² Phillippe Sands, *East West Street*, Weidenfeld & Nicolson, 2016, p.291.

³ *Ibid.* The Monuments Men (2014).

⁴ P. Sands, above n.2, p.291.

still find their way back, but if you destroy their history, you destroy their achievements and it's as if they never existed'.⁵ Indeed, Lemkin argued that social groups may exist by virtue of their common culture, and so in addition to destroying a group physically by killing its members, the culture and way of life of a group may be destroyed to such an extent that it disintegrates and its members 'must either become absorbed into other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction'.⁶ For Lemkin, 'derived needs', i.e. the cultural life of a group, are 'just as necessary to their existence as the basic physiological needs' and these needs 'find expression in social institutions' such as its cultural heritage.⁷

Echoing this approach, UNESCO Director-General Irina Bokova stated that 'the deliberate destruction of heritage is a war crime' and that 'it has become a tactic of war to tear societies over the long term, in a strategy of cultural cleansing. This is why defending cultural heritage is more than a cultural issue, it is a security imperative, inseparable from that of defending human lives'.⁸ Furthermore, Security Council Resolution 2347 and the International Criminal Court (ICC) Judgment and Sentence in *Prosecutor v Al Mahdi* are important in showing recognition that international criminal law has an important role to play in protecting cultural property given its role in preserving the memory of people's historical roots as well as cultural diversity.

When atrocities are committed against people as well as 'the cultural life of a group' in the form of its 'social institutions', then both present and future generations have an interest in knowing about the criminal organisations that committed atrocities as well as the individuals who lie behind the organisations and the motivations that lie behind the individuals.⁹ Arguably, this is one of the legacies of the Nuremberg trials, and the schism which arose between Lauterpacht and Lemkin during the course of these trials, which, it is suggested, can still be felt today, and concerns the question of how we deal pragmatically with the legacy of mass atrocities caused by organisations and individuals with ideological or political motivations. One approach, rooted in the Nuremberg legacy, can be found at the

⁵ The Monuments Men (2014).

⁶ A. Dirk Moses, "Empire, Colony, Genocide: Keywords and the Philosophy of History" in A. Dirk Moses (ed.) *Empire, Colony, Genocide - Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn, New York, Oxford, 2009, p.12.

⁷ *Ibid.* 12.

⁸ UNESCO, "UN Security Council adopts historic resolution for the protection of heritage", 24 March 2017, available at: <http://en.unesco.org/news/security-council-adopts-historic-resolution-protection-heritage>.

⁹ The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22, p.447: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

ICC, which was established to end impunity and deter crimes that are regarded as the most serious crimes of concern to the international community as a whole, namely, and in order of supposed gravity genocide, crimes against humanity and war crimes.

Some of the overarching ICC objectives include ensuring that proceedings are expeditious and that desired results are achieved with minimal resources.¹⁰ Therefore, one of the central questions is, pragmatically, how wide and how deep do we cast the net when it comes to gathering and interpreting facts for the purposes of retribution and deterrence. Accordingly, when one looks the litany of crimes reasonably believed to have been committed against protected persons by different sides to the series of non-international armed conflicts occurring in Mali since January 2012, it is surprising that *Al Mahdi*, the sole case to come out of the situation in Northern Mali, concerns just one individual faced with just one charge of the war crime of attacking protected objects, namely for destroying mausoleums and mosques in Timbuktu. *Al Mahdi* is the first case of its kind in that contrasts with ICTY cases such as *Blaškić, Naletilić & Martinović*, and *Kordić* where more serious crimes against humanity were charged and where persecution was manifest through a range of offences against both persons and property, not merely the destruction of cultural and religious heritage. This is despite the fact that the role *Al Mahdi* played in destroying cultural heritage was that of a mid-level leader/perpetrator within a network of organised armed groups who had a common criminal plan that had serious religious persecution at its core and which could be linked to the commission of other crimes.

For instance, the Office of the Prosecutor's 2013 Report entitled the 'Situation in Mali' found a reasonable basis to believe that, *inter alia*, the following crimes had been committed: murder, mutilation, cruel treatment and torture, rape, using, conscripting and enlisting children, and sentencing or execution without due process.¹¹ In view of the preambular declaration in the ICC Statute that 'the most serious crimes of concern to the international community as a whole must not go unpunished',¹² it is also surprising to find that more senior figures involved in the common plan to eradicate the heart of Mali's cultural heritage seem unlikely to be on the receiving end of indictments, arrest warrants or judicial

¹⁰ International Criminal Court, *Office of the Prosecutor, Report on Prosecutorial Strategy*, 14 September 2006, p.4.

¹¹ International Criminal Court, Office of the Prosecutor, *Situation in Mali - Article 53(1) Report*, 16 January 2013, paras. 89 -124.

¹² Rome Statute of the International Criminal Court, above no.10, Preamble, para. 4.

proceedings in the foreseeable future.¹³ Nevertheless, despite its focus on the legal protection of cultural property by prosecuting one mid-level perpetrator, the Judgment and Sentence in *Al Mahdi* may be regarded as an emblematic case for an emblematic city, and in any case, this may have been exactly what the Government of Mali wanted when it referred the situation to the ICC in July 2012.

Al Mahdi reveals some of the tensions and constraints that international criminal justice faces as it struggles to achieve its primary objectives of retribution and deterrence.¹⁴ Broadly speaking, these constraints are substantive, procedural and institutional in nature and all revolve around this central and contested issue of legal pragmatism. At one end of the spectrum there is the pragmatic trial strategy perspective that international criminal trials are solely concerned with delivering justice through individual retribution and they should be as expeditious and as cost-effective as possible. At the other end of the spectrum there is the perspective that whilst being pragmatic in these regards, an important principle of international criminal trials is that they can and should contribute to transitional justice by establishing and documenting the truth for the historical record and collective memory.¹⁵

International criminal trials are suited for this purpose as they produce trial records that provide narratives and interpretations of events which are based on carefully scrutinised materials such as witness statements and testimony, exhibits, investigative reports, and written legal arguments. As a byproduct of criminal trial proceedings, these materials may also serve as valuable educational and historical resources that help to shape and preserve collective memory of events so serious that they have reverberations at local, national and international levels because of the existential threat that such crimes pose to individuals and groups.¹⁶

This discussion outlines the historiography of international criminal law through the prism of *Al Mahdi*, or in other words the methods and processes by which we develop historico-legal narratives, and goes on to argue that when it comes to memorialising the significance of cultural property and the impact of its destruction for the benefit of our collective memory, *Al Mahdi* represents a careful balance between legal pragmatism and legal principle.

¹³ International Criminal Court, Assembly of State Parties, *Proposed Programme Budget for 2017 of the International Criminal Court*, ICC-ASP/15/10, paras. 135 – 139. International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para. 78.

¹⁴ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para. 66.

¹⁵ Nevenka Tromp, *Prosecuting Slobodan Milošević – The Unfinished Trial*, Routledge, London and New York, 2016, p.18.

¹⁶ *Ibid.* p.20.

The aims of international criminal justice: preserving memory through historical fact-finding and public education?

This section starts the discussion by discussing whether protecting cultural property, preserving the memory of people's historical roots as well as memorialising the significance of cultural property and the impact of its destruction have a place within the overarching aims of international criminal justice. In other words, does international criminal justice play a role in historical fact-finding, and, associated with this, public education? Some of the broad goals of international criminal justice which can be identified from the practice of international criminal tribunals in the 20th and 21st Centuries include:

- (a) Re-establishing the rule of law and restoring peace and security by ending cycles of violence;
- (b) Ending impunity for violations of the laws and customs of war through individual penal repression and punishment for violations of the laws and customs of war, especially for senior political and military leaders;
- (c) Deterring the future commission of such crimes;
- (d) Providing fair and expeditious trials;
- (e) Enforcing, interpreting and developing the rules of international criminal law and procedure;
- (f) Providing a sense of justice and closure for victims; providing a safe forum for victims to tell their stories; ending cycles of violence;
- (g) Creating an accurate historical record - one that can prevent later deniers and revisionists;
- (h) Providing the general public education with a detailed account of the crimes committed such as the causes and the nature of the crimes committed as well as particular patterns involved in the commission of crimes, and establishing the truth;
- (i) Providing a forum for restitution and reparations;

(j) Reintegrating convicted persons into society.¹⁷

Whilst this unranked typology of objectives gives recognition to the historical and educational aims of international criminal justice for protecting and conveying memory, it is questionable as to whether this broad range of aims accords with the express aims of international criminal justice as espoused by the ICC in its statute, case law, rules of procedure and evidence as well as its own internal policy documents.

Aims of the ICC: ICC Statute

It may be argued that aims outlined at (a) to (d) are generally reflected in the Preamble to the ICC Statute, which indicates that the goals of the ICC are ‘to put an end to impunity for the perpetrators’¹⁸ for ‘the most serious crimes of concern to the international community’¹⁹ because ‘such grave crimes threaten the peace, security and well-being of the world’.²⁰ Therefore, these crimes ‘must not go unpunished’ and so must be repressed through ‘effective prosecution’²¹ with the aim of contributing ‘to the prevention of such crimes’.²² This reflects goals (a) to (f) above. Although goals (g) and (h) are not expressly mentioned in the Preamble *per se*, it may be suggested that they are a side-effect of aims (a) to (f), which, as will be discussed further below, are reflected in the ICC Statute (ICCS), its Rules of Procedure and Evidence (RPE) and its internal policy.

Nevertheless, with regard to aims (a) to (d) above, the Preamble indicates that the ICC should be ‘[d]etermined to these ends’ both in themselves ‘and for the sake of present and future generations’.²³ At this stage of the discussion, one may read into this that ‘present and future generations’ should not only be deterred from the commission of such crimes on account of their being contrary to international law and subject to individual penal repression, but should also be informed about what happened, who was responsible, where it happened, when it happened, why it happened, and so on. Accordingly, aims reflected in (g) and (h)

¹⁷ Minna Schrag, “Lessons Learned from the ICTY Experience” (2004) 2 *Journal of International Criminal Justice*, 427, 429. Albin Eser, “Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY” in B.Swart, A. Zahar, and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p.110 – 116.

¹⁸ Rome Statute of the International Criminal Court, above no.10, Preamble, para. 5.

¹⁹ *Ibid.* para. 4.

²⁰ *Ibid.* para. 3.

²¹ *Ibid.* para. 4.

²² *Ibid.*

²³ *Ibid.* para. 9.

above will be described as concomitant aims, or aims which naturally accompany or follow the express aims reflected in (a) to (f) above. This gives rise to a major theme of this discussion, which will be discussed in further detail below, namely the historical fact-finding function of international criminal proceedings, and their value as an educational and historical resource. Reparations are not discussed in this paper, but rather form the basis to the follow-up to this paper.

Methods for achieving the aims of international criminal justice

Arguably, this historical fact-finding role is not only reflected in, but also bolstered by the various functions, powers and obligations conferred on the Prosecutor and the Trial Chamber by provisions of the ICCS as supplemented by its RPE and internal policy. These documents set out the methods by which aims (a) to (f) above are achieved at the level of individual criminal proceedings, and, concomitantly aims (g) and (h) above. Accordingly, the discussion will give a brief overview and assessment of the methods by which concomitant aims (g) and (h) may be realised, as these represent the historiography of international criminal law in contradistinction to other disciplines and processes that aim to pursue historical truth and preserve collective memory.

In short, the historiography, or the methods, of international criminal law comprise comparatively strict substantive and procedural rules of law, which, from the point of view of pursuing historical truth and preserving memory, constitute a double-edged sword. On the one hand, they aim to ensure that criminal proceedings on set charges are conducted in a fair, impartial and expeditious manner.²⁴ To this end, they aim to examine forensically testimony and exhibits in order to reconstruct events with a high degree of accuracy in order to determine whether the established facts contravene the criminal charges pressed against the accused in the indictment. In this way, criminal proceedings can provide a comprehensive and accurate narrative of events. On the other hand, in doing this, the substantive and procedural rules of criminal proceedings have the effect of sifting out information that is deemed to be irrelevant for the purposes of determining whether the accused should be convicted of those particular criminal charges, or information that is otherwise inadmissible, for example, because it was obtained unlawfully such as through torturing or bribing a witness.

²⁴ Rome Statute of the International Criminal Court, above no.10, Art. 64(1)-(3).

Thus, while the historiography of international criminal law embodies standards that are advantageous in that they arguably require higher standards of rigour, fairness and impartiality than other historical disciplines, its hands are tied by those same standards whereas other historical disciplines are not. Potentially this gives those seeking ‘historical truth’ rather than ‘courtroom truth’ comparatively more academic freedom to pursue broader historical narratives and broader factual matters of public interest as well as greater interpretative licence when it comes to inferring mindsets and motivations.

Historiographic standards, methods and policy of international criminal law: ICC investigations and prosecutions

International criminal justice does not grant its practitioners the academic freedom to inquire into whatever situation they think matters. At the outset, what can be subject to an investigation is constrained. For there to be an investigation, and thus the possibility of historical fact-finding, the ICC Prosecutor must first be satisfied that there is a reasonable factual and legal basis to proceed. The Prosecutor’s ‘academic freedom’ or discretion in this regard is constrained by only being able to investigate matters that are within the jurisdiction of the court, *ratione temporis, loci, personae, materiae*. The matter must then be admissible within the terms of the ICCS, e.g. it is not being investigated and prosecuted by a State, it must be sufficiently serious, and it must be in the interests of justice to investigate.²⁵

After an investigation has been initiated, then the Prosecutor has the discretion to decide whether or not to commence a prosecution. By this stage, we start to have situation reports that outline in very general terms important factual information useful to historical analysis and which may be subject to further examination in the context of trial proceedings. However, the situation, or aspects of this situation, will not proceed to further judicial examination where the Prosecutor finds, *inter alia*, that there is an insufficient legal or factual basis to seek a warrant or summons, or the case is generally inadmissible, for instance because the case is being prosecuted at the national level, or it is of insufficient gravity to warrant an ICC investigation.²⁶ International criminal investigations and prosecutions are held to what may be regarded as high historiographical standards, and this may be considered a comparative advantage that international criminal law has over other forms of transitional justice. For example, Prosecutors are not only duty bound to perform effective investigations

²⁵ Rome Statute of the International Criminal Court, above no.10, Arts. 12, 17, 53(1).

²⁶ *Ibid.* Article 53(2)

and prosecutions, but they are also duty bound to establish the truth. In this regard the Prosecutor is required by law to ensure that investigations cover all facts and evidence relevant to an assessment of whether or not there is criminal responsibility.²⁷ To this end, the ICC Investigations Division and Prosecution Division must investigate incriminating and exonerating factors equally, and, in doing so, they may collect and examine evidence, call and question persons being investigated, victims and witnesses and seek the cooperation of any state or intergovernmental organisation.²⁸ This requirement to gather incriminating or inculpatory factors which go towards an accused's guilt as well as exonerating or exculpatory factors which go towards an accused's innocence promotes the pursuit of a balanced narrative account of the situation rather than a one-sided picture.

Opportunities and threats to effective ICC investigations and prosecutions

Investigative capabilities

Having the duty to establish the truth is predicated on having the capacity and capabilities to do so. In terms of capabilities to gather all incriminating and exonerating factors, the ICC Investigation Division, which, through the Investigations Analysis Section, seeks to employ innovative procedures, tools and methodologies in order to ensure that investigative activities conform to current standards of best practice and helps the Prosecution Division meet its strategic goals by providing it with diverse forms of support, including a range of science and technology based evidence.²⁹ The Investigation Division is run as an Integrated Team comprising investigative teams, which are made up of investigators, analysts and data management personnel. These teams focus their activities on collecting evidence on victimisation, crimes, suspects and the links between them by pursuing lines of inquiry into matters such as a suspect's role within a structure or organisation as well as the knowledge and intent behind the crimes.³⁰ The Investigation Division also includes specialised sections such as the Forensic Science Section which provides the Integrated Team with expertise and evidence in areas such as cyber investigation and crime scene investigations.³¹ *Prima facie*,

²⁷ Rome Statute of the International Criminal Court, above no.10, Article 54.

²⁸ *Ibid.*

²⁹ International Criminal Court, Assembly of State Parties, Proposed Programme Budget for 2017 of the International Criminal Court, above n.15, paras 326 and 328.

³⁰ *Ibid.*

³¹ International Criminal Court, Assembly of State Parties, *Proposed Programme Budget for 2017 of the International Criminal Court*, above n.15, para 327.

the Investigation and Prosecution Divisions have the mandate and the capabilities, but, as we shall see below, not necessarily the capacity to ‘establish the truth’ for the historical record. They may be able to go directly to the sources of information, such as those being investigated, victims and witnesses ranging from eye witnesses to expert witnesses and insider witnesses, all of whom may have first-hand knowledge of key people and events involved in the commission of crimes. Investigators may also have direct access to a range of raw audio, visual and written documentary evidence before it has been subjected to analysis and processing for the purpose of pre-trial and trial proceedings. *Al Mahdi* is also an example of the advantages and disadvantages of the global information environment when it comes to prosecuting war crimes. On the one hand, there is a proliferation, of often self-incriminating, evidence, such as photographs and videos that posted to social media platforms, often by the perpetrators themselves, that clearly identifies who is doing what and why they are doing it. This will often create outrage together with demands and expectations that those responsible face justice. However, this type of evidence may often be insufficient for evidencing the criminal responsibility of senior leaders within complex and diffuse organisational structures.

Overall, the availability of highly probative evidence is usually dependent on the cooperation of states, victims and witnesses and perpetrators themselves as well as the time and resources available. Nevertheless, where there is cooperation, then the historical record will be enriched by the materials gathered during investigations, but only where as much is released into the public domain as is possible or otherwise admitted to the trial record in the course of trial proceedings.

Strategic imperatives: the art of the possible

The ICC’s overarching strategic objectives are, *inter alia*, to ensure quality of justice by conducting fair and expeditious public proceedings and ³² to act as a model for public administration by excelling in achieving desired results with minimal resources through streamlined structures and processes.³³ The ICC’s overarching strategic objectives feed directly into prosecution strategy which, *inter alia*, is to conduct impartial, independent, high-quality, and efficient preliminary examinations, investigations and prosecutions.³⁴

³² International Criminal Court, Office of the Prosecutor, Report on Prosecutorial Strategy, 14 September 2006, page.4: Overarching ICC objectives 1-5 and 21-22.

³³*Ibid.*: Overarching ICC objectives 10-20 and 27-30.

³⁴ International Criminal Court, Office of the Prosecutor, OTP strategic plan June 2012 – 2015, p.7.

The prosecutor's legal duty to establish the truth by covering all facts and evidence relevant to an assessment of whether or not there is criminal responsibility is thus conditioned by prosecution strategy that feeds into the ICC's overall strategic objectives and plans. Prosecution strategy currently requires investigations to be in-depth and open-ended whilst at the same time maintaining focus in order that they be conducted efficiently and are prevented from over-expanding. Pre-trial investigations and situation reports may, therefore, on the basis of what has been discussed above, establish reasonably comprehensive historical and legal appraisals of a situation, as indicated by the OTP's 'Situation in Mali Article 53(1) Report'.³⁵ Such reports are accessible to the public and provide chronological accounts of events and serious crimes together with details of the individuals and organisations suspected to have been involved in their commission.

Nevertheless, as we shall explore further below, here we begin to see a slight tension or contradiction between an 'upstream' policy of in-depth and open-ended investigations whilst 'maintaining focus' for prosecutions 'downstream' and this comes down to budgetary considerations. As we shall explore further below, the ICC has a limited budget, and so on paper at least, this strategy is pragmatic in the sense that it intended to make prosecutions more efficient and cost-effective by front-loading resources at the investigations stage. Indeed, in terms of efficiency, judges want prosecution cases to be trial ready by the time of confirmation of charges hearings so that proceedings can move forward expeditiously, and if they do not, then it involves more court time, and thus may not be as cost-effective as it could be. To promote efficiency and cost-effectiveness of trial proceedings, current prosecution strategy is to expand and diversify the collection of evidence during investigations so that prosecution cases are backed-up by a stronger range of evidence and to apply multiple case theories or narratives, both incriminating and exonerating, throughout investigations.³⁶ Furthermore, in pursuit of efficiency and cost-effectiveness, the OTP has a policy of 'gradually building upwards'. This means that, despite the policy of in-depth and open ended investigations, initial investigations and prosecutions may be focused on a limited number of mid-level perpetrators.

Purportedly, this strategy is aimed at overcoming the challenges associated with proving the criminal responsibility of senior leadership figures to the required evidentiary standard. Indeed, the OTP has noted that understanding the roles and functions within the complex, decentralised and diffuse organisational structures used by non-state actors is a

³⁵ https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf

³⁶ International Criminal Court, Office of the Prosecutor, Strategic Plan 2012 – 2015, 11 October 2013, para.23.

challenge, especially where specialised investigative techniques associated with surveilling organised crime networks such as infiltration, informants and voice and communications intercepts cannot be used because of the security environment and resource limitations, or because there is an absence of cooperation from States.³⁷ Accordingly, focusing on mid-level perpetrators is a strategy not only intended to enable a realistic prospect of successfully prosecuting those most responsible for the crimes at a later stage,³⁸ but, in another way, it is more ‘cost-effective’ to have successful prosecutions against mid-level perpetrators than having charges dismissed or acquittals of those most responsible for the crimes, yet have remained at many arm’s length from their direct perpetration.³⁹

Strategic imperatives at play in Al Mahdi

We see prosecution strategy in operation in *Al Mahdi* when it comes to the policy-based approaches of ‘maintaining focus’ and ‘gradually building upwards’ in order to ensure effective and cost-efficient investigations and prosecutions. Firstly, with regard to ‘maintaining focus’, the prosecutor's choice of law was indeed focused, as in narrow, and arguably so for valid strategic reasons. This is significant for present purposes as any given set of facts may give rise to war crimes, crimes against humanity or genocide, either as freestanding charges or cumulative charges, and so an important consideration is whether it matters to the historical record what legal framework is applied to a given set of circumstances. For instance, would charging Al Mahdi for a crime against humanity rather than a war crime have produced significantly better outcomes in terms of retribution, in the form of judgment and sentencing, and also as a side effect of this, a more comprehensive trial record that could serve as a historical source for preserving memory of what happened in Timbuktu? Or, in other words, do we now have an impaired historical narrative of what happened in Timbuktu that can impair our collective memory of what happened because of the prosecutor’s decision to have the situation assessed within the framework of a war crimes analysis? ⁴⁰ In *Al Mahdi*, the prosecutor proceeded with an investigation for war crimes

³⁷ *Ibid.* para. 19.

³⁸ Strategic Plan 2012 – 2015, above no.38, paras 19 and 22.

³⁹ *Ibid.* para 22.

⁴⁰ Théo Boutruche, “Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice”, *Journal of Conflict and Security Law*, Vol. 16, No.1, 2011, p.118 – 119 and 123-124.

rather than crimes against humanity, as at the time, the information available did not provide a reasonable basis to conclude that crimes against humanity had been committed.⁴¹

By opting for this strategic decision, the Prosecutor opted for a legal framework, which in terms of the legal and factual issues that have to be established for a conviction, is comparatively narrower and arguably less complex and contentious than crimes against humanity or even genocide proceedings.

For the war crime of attacking protected objects, all the prosecutor had to establish was that Al Mahdi intended to direct an attack at buildings dedicated to religion or historic monuments and that this took place within the context of a non-international armed conflict and that the accused was aware of the factual circumstances of this context.⁴² For the crime against humanity of persecution, the Prosecutor would need to have established, *inter alia*, that widespread and systematic attacks had been committed against the civilian population by an organisation as part of an overall organisational plan or policy and that Al Mahdi knew that the conduct was part of, or intended the conduct to be part of such a widespread or systematic attack. Additionally, the Prosecutor would need to have demonstrated that such conduct was committed in connection with any other crime against humanity or any other crime within the jurisdiction of the court.⁴³ If we want to go as far as discussing genocide, then the Prosecutor would need to have demonstrated that Al Mahdi had the specific intent to destroy a group in whole or in part. As it currently stands within international criminal law, this would have been impossible if the destruction merely involved cultural property, unless this was, for instance, deliberately calculated by Al Mahdi to inflict conditions to bring about the physical destruction of an identifiable religious group. Whilst either of these latter two labels may have been true for what occurred in Timbuktu, as we shall discuss below, proving that they are true within the context of international criminal proceedings is a different matter.

Sebastián Martínez took issue with the Prosecutor for discarding crimes against humanity in favour of pursuing war crimes allegations on the basis that the protection of cultural property may be better advanced by the former.⁴⁴ Indeed, Martínez went as far as to argue that the prosecutor at the time should have acted ‘as a diligent organ of justice’ and used the discretion and resources available to her in order to investigate crimes against

⁴¹ Situation in Mali - Article 53(1) Report, above no.12, para 8.

⁴² Rome Statute of the International Criminal Court, above no.10, Art 8 (2) (e) (iv).

⁴³ International Criminal Court, Elements of Crimes, 2011, Art 7 (1) (h).

⁴⁴ Sebastian Green Martinez, “Destruction of Cultural Heritage in Northern Mali, A Crime Against Humanity?” *Journal of International Criminal Justice*, Vol.13 No.5, 2015, p.1074, 1078.

humanity, and on this basis submit cumulative charges for both war crimes and crimes against humanity.⁴⁵ However, apart from stating that crimes against humanity can ‘be applied to sanction the destruction of cultural property and, unlike war crimes, is applicable to peacetime’, Martínez does not set out any further arguments as to why we should favour proceedings for crimes against humanity over war crimes given some of the constraints presently under discussion, and which can only really be remedied by States heeding the demands of the ICC to be provided with the resources that it needs to meet demands and expectations that it faces, without sacrificing the quality of its work.⁴⁶ Indeed, as will be discussed further below, any advantages associated with using, for example, the legal framework of crimes against humanity to gather and interpret testimony and evidence have to be weighed against the concomitant risks associated with such a trial strategy. To outline just a few, there were legal and factual uncertainties as well as strategic complications associated with investigating and prosecuting crimes against humanity in *Al Mahdi*, namely:

- Pragmatically, did the Investigation and Prosecutions Division have the resources to pursue such a trial strategy, and, related to this, was it in accordance with ICC and OTP strategy, given their commitments to other ongoing situations?
- Does the definition of the crime against humanity of persecution cover the destruction of cultural heritage or cultural property, given that no express mention of this is made in the ICC Elements of Crimes?
- To what extent is it necessary to demonstrate that the destruction of cultural heritage amounts to a violation of a fundamental right because of its cultural value to the population under attack and how is its cultural value assessed?
- Without being connected to other acts such as murder, severe deprivation of liberty or torture, is the destruction of cultural property alone sufficient to constitute a freestanding crime against humanity?
- In relation to the destruction of cultural property in one city, what level or type of evidence is needed to demonstrate that there is a ‘widespread and systematic’ attack?
- Is there compelling and straightforward evidence going towards the Al Mahdi’s knowledge or intention that such conduct was part of a widespread and systematic attack?

⁴⁵ *Ibid.* p.1089.

⁴⁶ *Ibid.* p.1079.

- Is there sufficient evidence to indicate that the targeted group had the necessary identifiable characteristics and coherence in order to constitute a protected group?
- If Al Mahdi was charged with the more serious crime against humanity of persecution, would that have facilitated his admission of guilt, cooperation with the court, and as an outcome of this, a set of agreed and established facts going towards the responsibility of more senior figures and their role in organisations pursuing common criminal plans?
- Crimes against humanity are seen as being more serious than war crimes because they are ‘widespread and systematic’ in nature and persecute civilians. Generally this is borne out in more severe sentences for crimes against humanity.⁴⁷ However, given that *Al Mahdi* concerned crimes against property rather than crimes against people, would a charge for a crime against humanity have resulted in a greater sentence, especially in view of the mitigating circumstances of the case?
- Given that there was insufficient information reasonably to believe that crimes against humanity had been committed at the investigation stage, was this fatal to the ability of an investigation and prosecution for war crimes to gather important information for the trial record?
- To what extent can and should the ICTY’s jurisprudence on persecution and discriminatory intent influence the interpretation of crimes against humanity under the ICC statute?

Given these legal and factual uncertainties, concerns with prosecuting Al Mahdi for the freestanding crime against humanity of persecution may have been as follows:

- Not having the charge confirmed by the trial chamber because of insufficient evidence;
- Taking into account the legal and factual uncertainties as well as strategic issues outlined above and below, a lengthier and more costly investigation, as well as a contentious trial and appellate proceedings, with a concomitantly increased risk of acquittal;

⁴⁷ Kimi L King and James D Meernick, “Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice” in B.Swart, A. Zahar, and G. Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford University Press, 2011, p.21, 22.

- The increased likelihood of securing a quick conviction or an admission of guilt on a smaller war crimes charge rather than risk an acquittal after lengthy proceedings for the bigger crime against humanity charge is in the best interests of the victims;
- A war crimes analysis is sufficient to capture key issues regarding the motivations, activities and organisations of the perpetrators, as well as acknowledging the harm caused to victims and delivering this to the court's global constituency as quickly as possible;
- Lengthy trial and appellate proceedings taking resources away from other investigations and prosecutions into mass atrocities.

Secondly, in terms of 'gradually building up', the prosecutor focused on Al Mahdi as a mid-level perpetrator responsible for both planning and executing the crimes in question. The court found that Al Mahdi was co-perpetrator in the destruction of cultural heritage in Timbuktu. In other words, he was not the sole person responsible, but he made an essential contribution to the destruction of mausoleums and mosques within the framework of a common plan devised by more senior figures.⁴⁸ In particular, the court found that during the conflict and occupation of Northern Mali, the armed Islamist groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (AQIM) seized control of Timbuktu and imposed their religious and political edicts, and then committed war crimes, through intermediary organisations such as *Hesbah*, a religious 'morality brigade'.⁴⁹ The so-called 'Governor' of Timbuktu under these armed groups was Abou Zeid who asked Al Mahdi to be the leader of *Hesbah*. Abou Zeid tasked Al Mahdi with the role of regulating the morality of people in Timbuktu, in part by preventing, suppressing and repressing anything the leadership of these groups perceived to be a vice according to their interpretation of Islamic teachings, such as using mausoleums as places of prayer and pilgrimage.⁵⁰ The plan went from this repression of religious practice to the destruction of institutions of religious practice when the leader of Ansar Dine, Iyad Ag Ghaly, together with AQIM leader Yahia Abou Al Hammam, and AQIM religious scholar Abdallah Al Chinguetti made the decision to destroy ten of the most important and well known religious sites in Timbuktu.⁵¹ Accordingly, the destruction came about by Ag Ghaly instructing Abou Zeid to proceed with the plan, who in turn instructed Al

⁴⁸ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para 19.

⁴⁹ *Ibid.* paras. 33 - 33.

⁵⁰ *Ibid.* paras. 33 - 34. .

⁵¹ *Ibid.* paras 32, 36, 38.

Mahdi to operationalise and execute the plan which Al Mahdi proceeded to do through *Hesbah*.⁵²

General budgetary obstacles: the political economics of truth and fact-finding

The ICC's Proposed Programme Budget for 2017 indicates that the ICC continues to struggle to fulfil its mandate in view of the budgetary constraints that it faces, and it remains the case the OTP will continue to struggle to meet the challenges and demands facing the court and to perform high quality preliminary examinations, investigations and prosecutions without a substantial increase in resources. To cope, the OTP intends to continue to pursue quality over quantity of work.⁵³ Indeed, in 2011 the Parliament of the European Union reported that the ICC's budget was insufficient to carry out its mandate.⁵⁴ Key areas of the ICC's work, namely the Registry, the Investigations Division and the Prosecution division are all under-resourced and understaffed, meaning that they are just about managing to cope with existing levels of work and ensuring that trials receive the support that they need. In areas such as the Registry and the Investigations Division, because they operate below the necessary capacity to provide investigative and judicial support this is severely affecting their ability to work adequately and is putting existing staff under a lot of pressure and creating operational gaps in some areas.⁵⁵

Budgetary constraints at play in the situation in Mali

The Investigations Division carried out investigations into a wider range of war crimes in Mali in order to gather evidence which could demonstrate links with other perpetrators in the common plan of which Al Mahdi was a part. However, in view of the aforementioned budgetary constraints combined with the dire security situation in Mali which makes it 'the deadliest active operation', the ICC foresees very limited further activities and no further judicial proceedings following the conviction of Al Mahdi. Indeed, the Investigations Division appears to have completed ongoing investigation activities related to other war

⁵² *Ibid.* paras 37, 53, 54.

⁵³ Strategic Plan 2012 – 2015, above no.38, p.6, 8. International Criminal Court, Office of the Prosecutor, Strategic Plan 2016 – 2018, 6 July 2015, para.9, 18, 44.

⁵⁴ Bertram Kloss, *The Exercise of Prosecutorial Discretion at the International Criminal Court – Towards a More Principled Approach*, WF Herbert Utz Verlag, München, 2016, p. 101.

⁵⁵ International Criminal Court, Assembly of State Parties, *Proposed Programme Budget for 2017 of the International Criminal Court*, above n.15, paras. 28, 325, 335, 336, 337, 378, 379, 421, 422.

crimes in Mali ‘in the light of the existing demand for the OTP’s intervention in other situations’ and the OTP has stated that the resource limitations that it is facing means that there is ‘a gap between needs and means’ and this has damaged its ability to respond to the evolving situation in Mali.⁵⁶ The *Al Madi* proceedings as a whole can therefore be seen as an exercise in efficiency and cost-effectiveness in a way that need not act as an impediment to the aims (a) to (f) as well as (g) and (h) above.

Historiographic standards, methods and policy of international criminal law: ICC trial proceedings as a historical source.

Proving the truth beyond reasonable doubt: an all or nothing approach to historical fact-finding?

The preceding sections examined some of the pre-trial rules and policies that may advance but also obstruct in-depth and open-ended inquiries into the truth. To further this aim, arguably we need more criminal trials that can provide forensic examination of competing narratives and the testimony and evidence adduced to support them. However, to get to this stage, already having passed through pre-trial jurisdictional and admissibility hoops, the prosecutor will proceed with arrest warrants and summons to appear only if there is a reasonable evidential basis to proceed and be trial ready within a reasonable time frame.⁵⁷ The risk of an acquittal dictates that proceeding without a reasonable evidential basis will not be an efficient and cost-effective use of its limited resources.

Whilst the Investigations Division and Prosecution Division can be a lot more liberal in their inquiry into the truth at the pre-trial stages, i.e. in-depth and open-ended inquiries into both inculpatory and exonerating factors, if the case manages to get to trial, then the Prosecutor’s approach becomes much more constrained in terms of the scope and content of the narratives that they can present during trial proceedings. This is because the Prosecutor’s role at trial now becomes proving to the Trial Chamber that the accused is guilty beyond reasonable doubt, and therefore the Trial Chamber can only convict if it is sufficiently certain about the truth narrative presented by the prosecution.⁵⁸ This is a high evidential threshold to meet, and if the Trial Chamber is not sufficiently certain about the truth of the prosecution’s

⁵⁶ *Ibid.* paras.135 - 138. Strategic Plan 2016 – 2018, above no.55, para.44.

⁵⁷ Strategic Plan 2012 – 2015, above no.38, para 23.

⁵⁸ Rome Statute of the International Criminal Court, above no.10, Art. 66.

narrative, then it must acquit the accused. If this is the case, then even though we are left with a trial record and a judgment combined with pre-trial materials that have value as a historical source, they may carry less weight as they leave the public in doubt as to what actually happened. This high evidential threshold can limit what is presented and taken into account within trial proceedings and judgment because, to paraphrase former ICTY Chief Prosecutor Louise Arbour, what must be proved beyond reasonable doubt in the context of legal proceedings is not ‘general knowledge’ or ‘what everybody ostensibly knows’ but rather ‘an indictment for crimes listed in the Statute that will withstand the test before the court’.⁵⁹ In other words, the narratives that can be established outside a courtroom are a lot broader than the narratives that can be established within a courtroom, as the latter is subject to greater constraints on what is admissible, relevant and practicable.

Adversarial proceedings: adjudicating competing narratives

International criminal proceedings are said to be generally based on an adversarial model, whereby proceedings are a contest between two parties, namely prosecution and defence, to have their case theory or narrative accepted by the tribunal of fact on the basis of evidence that they themselves select, rather than an inquisitorial model whereby all parties to the proceedings seek to contribute to the determination of the facts of the case, or ‘the truth’ of the matter, under the direction of a judge or judges. Whilst the former is traditionally said to be concerned with guaranteeing the fairness of proceedings, the latter is said to be concerned with the truth and expediency.⁶⁰ The former seeks to ensure fairness by excluding evidence that may have a prejudicial effect upon the tribunal of fact because, *inter alia*, it is not relevant to the specific charges in question or it has been obtained improperly.

In very general terms, the two models may differ on the issue of the effects of a guilty plea. Under the adversarial model, generally speaking, if there is an admission of guilt, there is thus nothing to contest between the parties, and the proceedings may go straight to sentencing without first having to establish the facts. If there is no admission of guilt, then both parties must attempt to present their competing case theory or narrative to the tribunal of fact through opening and closing speeches, and examining witnesses who support their narrative, and using this to adduce testimony and exhibits. As we shall see below, although there are rules on disclosure of exculpatory materials that apply to the prosecutor, parties

⁵⁹ N. Tromp, above n.17, p.41.

⁶⁰ A. Eser, above n.19, p.118, 123.

need only present the minimum amount of evidence going towards the charges that supports their case.

From a historiographical point of view, these factors may be considered to be fatal, or at least a significant obstacle to historical fact-finding and preserving memory. Trial lawyers for both prosecution and defence must fight for their client and assist the tribunal of fact by cross-examining their opponent's witnesses, generally with the aim of adducing testimony that supports their case and/or impeaching them, or in other words, calling into question their credibility by demonstrating evidence on matters such as bias, dishonesty, inconsistent statements and faulty perception or memory. Under the inquisitorial model, regardless of whether or not there has been a guilty plea, there still has to be an assessment of the dossier of evidence gathered during the investigation in order to establish the facts in open court, similar to a public inquiry, and so, for this reason, this model maybe considered to be more suited for mass atrocities trials.⁶¹ Although based on adversarial proceedings, the ICC benefits from what may be regarded as 'inquisitorial' features that promote its search for the truth.

Some miscellaneous truth-seeking aspects of criminal proceedings

Although some of the following aspects of ICC proceedings may not have been directly applicable in *Al Mahdi* because his admission of guilt meant that the proceedings went straight to judgment and sentencing stages, it is worth briefly noting some of the duties imposed on judges in the course of trial proceedings that promote a truthful and accurate trial record, which in turn increase its value as a historical source. Firstly, judges are obliged to ensure that they produce a complete trial record which accurately reflects the proceedings and that this trial record is maintained and preserved by the ICC. ⁶² To this end, and to counteract any deficiencies in the presentation of competing narratives by prosecution and defence lawyers, judges may, *inter alia*, order the disclosure of documents or information, they may order the attendance and testimony of witnesses and other evidence, and they may make decisions on whether or not evidence is admissible or relevant.⁶³ Secondly, witnesses have to declare that they will speak 'the truth, the whole truth and nothing but the truth' before giving

⁶¹ N. Tromp, above n.17, p.8.

⁶² Rome Statute of the International Criminal Court, above no.10, Art. 64.

⁶³ *Ibid.*

viva voce (oral) testimony.⁶⁴ If a sworn witness is suspected of giving false testimony or presenting evidence that they know to be false or forged, then they themselves face separate criminal proceedings for an offence against the administration of justice.⁶⁵ The power to impose criminal sanctions for perjury is a strong incentive to testify to the truth so that trial proceedings bear witness to the truth. Thirdly, judges must ensure that there is a fair public hearing which is conducted impartially, according to fair trial guarantees and in full equality.⁶⁶

Adversarial proceedings tempered by inquisitorial methods for pursuing ‘the truth’

Article 65 ICCS: establishing the facts for the record

Article 65 ICCS is just one example of how the ICC Statute incorporates aspects of the inquisitorial model into proceedings that are otherwise adversarial in nature. Under Article 65 the Trial Chamber is required to ensure that any admission of guilt is supported by established facts that are brought by the Prosecutor and admitted by the accused as well as any materials that supplement the charges or any other evidence such as witness testimony. Therefore, the admission of guilt does not preclude the gathering and assessment of facts of the case, as this is necessary pursuant to Article 65 *per se*, as well as for the purposes of sentencing in order to ensure that the punishment is proportionate to the crime and the culpability of the convict pursuant to Articles 78 and 145 of the ICC Rules of Procedure and Evidence. In this way, *Al Mahdi* is important in providing various stakeholders, ranging from the direct victims of the crimes to the people of Mali, and then the wider international community with the following: (a) a narrative that acknowledges that serious crimes have been committed and that reflects the emotional, moral and economic harm suffered through the destruction of specially protected cultural property, (b) a forensic account of the unlawful activities that led to the destruction of the cultural property and (c) to a certain extent, general background information pertaining to other actors, organisations and alleged criminal activity linked to the commission of the present unlawful activities. Whilst the Article 65 analysis established the facts at a micro level, i.e. the individuals behind the organisations that ordered Al Mahdi to destroy mausoleums and mosques in Timbuktu, which mausoleums and

⁶⁴ International Criminal Court, Rules of Procedure and Evidence, Rule 66.

⁶⁵ Rome Statute of the International Criminal Court, above no.10, Art. 70.

⁶⁶ *Ibid.* Art. 67.

mosques he destroyed and the details of how his organisation *Hesbah* destroyed them, the Trial Chamber's Article 68 ICCS and Rule 145 RPE analyses mentioned below were able to extend out into the meso and macro levels of analysis as far as they could for the benefit of the historical record.

Article 68 ICCS: getting the voices of victims on the record

Under Article 68 ICCS and Rules 89 to 93 RPE, victims can apply to the court to participate in all stages of the proceedings in order to have included on the trial record their views, concerns as well as distinct interests taken into account where appropriate. Victims may choose legal representatives for this purpose, or, where there are a number of victims or particular groups of victims, the Trial Chamber may facilitate this by appointing a common legal representative or representatives. Forms of participation may include making opening and closing statements, questioning witnesses, experts or the accused as well as leading or challenging evidence.⁶⁷ In *Al Mahdi*, the Trial Chamber appointed a Legal Representative of Victims and eight victims participated in the trial proceedings and this helped to establish for the record the impact that the crimes had on psychological and emotional well-being of individuals, and the impact upon the community.

Articles 77-78 ICCS and Rule 145 RPE: assessing the gravity of the crime, impact and beyond

In terms of retribution, *Al Mahdi* indicates that judgment and proportionate sentencing for indicted crimes is not a means of exacting revenge, but rather an 'expression of the international community's condemnation of the crimes', which 'acknowledges the harm to the victims' and 'promotes the restoration of peace and reconciliation'.⁶⁸ Therefore, in addition to the court having to establish the facts pursuant to Article 65 ICCS, the court had to set out the agreed facts and their sources in order assess the gravity of crime through reference to 'the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner' in addition to aggravating and mitigating circumstances going towards *Al Mahdi's* culpable conduct and individual

⁶⁷ International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1432, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 17 July 2008, para.3. B. Kloss, above no.56, p.194.

⁶⁸ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para 67.

circumstances.⁶⁹ These are useful standards for setting out a micro-level narrative that has reverberations at a broader macro-level.

In this way the reasoning in both the judgement and sentence was able to take into account a range of testimony and exhibits that acknowledged both what was destroyed as well as the significance of its destruction from a range of perspectives for the benefit of the historical record and collective memory.⁷⁰ Using expert witnesses on cultural property from UNESCO and Mali as well as residents of Timbuktu, the court was able to establish that the destroyed cultural heritage was at the heart of cultural life in Mali and Timbuktu, and that the buildings that were destroyed had great symbolic and emotional value for the inhabitants of Timbuktu.⁷¹ In this regard, witnesses testified that the buildings contributed to the psychological and emotional well-being of individuals at a local, national and international levels, and that their destruction was ‘a war activity aimed at breaking the soul of the people of Timbuktu’.⁷² Indeed the court found that this destruction was committed for persecutory religious reasons whereby Ansar Dine and AQIM went from seeking to impose their religious edicts on the population of Timbuktu to seeking to eradicate other forms of religious belief and practice by destroying the religious buildings and sites at their heart.⁷³ In this way, it was unfortunate that the Prosecutor could not go further and connect this directly with other war crimes and crimes against humanity so that observers could get a broader narrative of the crimes that were committed by Ansar Dine and AQIM, as well as other parties to the series of conflicts in Mali since 2012, in pursuit of their ideological and political aims.

Nevertheless, it suggested that outside establishing the facts for the purposes of Article 65 ICCS, a liberal reading of the sentencing reasoning in *Al Mahdi* pursuant to Rule 145 RPE suggests that the Trial Chamber recognised the reality of the conflict and violence in Mali as well as the true motives and intent behind the persecution witnessed in Timbuktu by implicitly incorporating the language and logic of both crimes against humanity and cultural genocide within the substantive constraints of a narrow war crimes prosecution and conviction, constrained as it was by rules of criminal procedure and evidence well as resource limitations that, no doubt, affected strategic decision-making at investigation and prosecution stages.

⁶⁹ *Ibid.* paras, 75-76.

⁷⁰ *Ibid.* para. 100.

⁷¹ *Ibid.* para. 78.

⁷² *Ibid.* paras 78 and 80.

⁷³ *Ibid.* para. 80.

The fact-finding and interpretation in this regard serve to acknowledge, validate and label more fairly what happened to the direct victims as well as the psychological and economic harm that it caused them, as sufficiently and adequately as possible within the constraints facing the OTP and the ICC.⁷⁴ Coming back to the earlier discussion of Lauterpacht and Lemkin, it is suggested that this embodies the schism between principle and pragmatism in international criminal law, and indicates how the Trial Chamber in *Al Mahdi* carefully sought to balance the two: on the one hand achieving an expeditious conviction on a narrow charge focusing on cultural property, and, on the other hand, establishing for the historical record and collective memory the individuals behind the organisations and the ideology behind the individuals that sought to persecute and then destroy the cultural life of a group.

Conclusions: ‘no peace without justice [and] no justice without truth’⁷⁵

Arguably, the Judgment and Sentence in *Al Mahdi* together with pre-trial materials have both legal value in pursuing aims (a) to (f) above, as well as extra-legal value in achieving the broader goals listed under (g) and (h). It is suggested that, all things considered, *Al Mahdi* indicates that there need not be a contradiction or tension between these two sets of goals, but rather they may complement each other.⁷⁶ However, this is premised on the understanding that they have been carefully balanced in view of surrounding constraints which makes the limitations of *Al Mahdi* justifiable.⁷⁷ In short it is suggested that although the court appears to prioritise investigative, prosecutorial and judicial economy in terms of increasing cost-effectiveness, productivity, quality and efficiency, *Al Mahdi* indicates, within the resource constraints affecting the court, that a balance is struck between having a focused and expeditious process on the one hand, and on the other, establishing a reasonably full account of the facts for the trial record without sacrificing quality.

In *Al Mahdi*, we see that different aspects of the criminal process accommodate and then in various ways communicate to audiences at the regional, national and international levels the importance of cultural heritage in providing stories, memories and narratives that in turn keep the cultural life of a community, a nation and an international community alive and flourishing. *Al Mahdi* shows us how the embodiments of these stories, memories and

⁷⁴ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para 108.

⁷⁵ A. Eser, above n.19, p. 115.

⁷⁶ N. Tromp, above n.17, p.19.

⁷⁷ *Ibid.* p.20. A. Eser, above n.19, p.114 – 115.

narratives, namely the destroyed cultural heritage of Timbuktu, have in turn become memorialised in what may be regarded as an authoritative trial record. In particular, in *Al Mahdi* we have a trial record that, despite its limitations and surrounding constraints, attests to Timbuktu's historical role in the expansion of Islam, as expressed through its cultural heritage, followed by the rise of salafist-jihadist religious-political ideology and militancy and then the crimes committed in its wake during the occupation of northern Mali in the 21st century - crimes committed against inhabitants of occupied territory who were perceived as being non-Muslim and crimes which attempted to change the social, religious and political fabric of northern Mali, first through repression, and then through attacks that sought to eradicate symbols and practices of cultural life in Mali. Expert witnesses on Mali's history and culture from UNESCO and Mali were able to testify to the significance of the cultural property that was destroyed and its role in the day to day cultural life in Mali. In addition to their testimony being put on the trial record, there were photographs, videos, satellite imagery, and details of manuscripts that help to preserve collective memory of the myth and reality of what was destroyed.

Although the *Al Mahdi* Judgment and Sentence itself does not offer a broader macro account of how these crimes were potentially part of a broader common plan leading to widespread crimes in the region, as this was not directly relevant to the charge the accused faced, the court did allude to the wider strategic context in passing when it noted that 'the justifications stated during [the attacks against cultural heritage in Timbuktu] were the same as those advanced by the armed groups for taking over [...] Northern Mali more generally'.⁷⁸ *Al Mahdi*, due to its micro-level focus on the war crime of destroying specially protected buildings helps us understand just one of the litany of crimes committed in Mali since 2012 in the name of a particular ideology that does not tolerate religious freedom and pluralism. Arguably it would have been in the interests of justice to have pursued the senior figures responsible for these crimes, as well as other crimes connected to them, but understandably the Prosecutor had to work within the limits of her capabilities and resources and so it was not feasible to present and support this broader narrative within the context of these specific criminal proceedings. Nevertheless, extra trial materials, such as the OTP Article 53(1) Report on the Situation in Mali can serve as one of a number of starting points for understanding the strategic or macro level factors at play in the conflict.

⁷⁸ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para 49.

Broader reflections on historiography of international criminal law: the light side

There are differences between the aims of domestic criminal proceedings, which are arguably focused on retribution, deterrence and reintegration convicts into society vis-a-vis comparatively smaller-scale, albeit serious criminal offences, and international criminal justice, which is designed to deal with mass atrocities, and therefore the most serious crimes of concern to the international community: war crimes, crimes against humanity and genocide. Criminal justice at the international level arguably has a broader mandate than criminal justice at the domestic level which, if feasible and fully realised, may legitimately enable it to pursue the broader goals of historical fact-finding and public education, albeit within the budgetary and political constraints in which it operates.

In a context where there are greater and more varied expectations from a global constituency made up of a diverse range of stakeholders, whose interests may frequently be diametrically opposed, a court with an international mandate can purport to act in the interests of the international community and provide narratives that may be perceived as being more authoritative and credible than those from bodies and individuals without such a mandate. However, to do so may require that various stakeholder narratives and interests are accommodated in the context of trial proceedings. This also requires innovative and sustained outreach activities. As far as possible, international criminal justice should try to deliver justice equally, i.e. for past wrongs committed by all sides to a conflict. *Al Mahdi*, by focusing on one mid-level perpetrator, may fall foul of this latter principle of equality which has so plagued the ICTY by regional nationalists within its constituency.⁷⁹

As discussed above, there are a number of methods and standards that mean that international criminal proceedings at this level have the capability to get at the truth in a reasonably credible and authoritative fashion. Through the inherent fact-finding and interpretative capabilities of international criminal proceedings, they may as a consequence be able to gather and interpret materials that have a broader historical and educational value. However, this is different from saying that they have the capacity, e.g. the resources and support, to pursue these historical and didactic roles, let alone the primary goals of retribution and deterrence. Endorsing this view that criminal proceedings ‘undeniably contribute to the

⁷⁹ B. Kloss, above no.56, p.173. .

establishing of historical fact' by way of 'judicial verdicts' which 'come as close as anything to what may be called historical truth',⁸⁰ historian Peter Steinbach stated that:

'[W]e owe our knowledge of the violent crimes committed by the Nazis mainly to the work of the Zentrale Stelle and the expert witnesses who were involved in the investigations and the various Nazi proceedings. It is certainly appropriate to note that the science of history alone would have hardly examined this darkest chapter of the German history - or of modern history anywhere - with the rigour that is necessarily innate to our public criminal proceedings and jurisprudence. The prosecutors, expert witnesses and judges in those Nazi trials had to reconstruct the crimes, establish historical facts and thereby set the preconditions for justiciable 'truth-finding'. Numerous reports, document folders, case records and investigation reports epitomise for all intents and purposes an achievement of historical science that is possibly without comparison, but certainly one of a kind'.⁸¹

Steinbach's assessment suggests that even though investigators, prosecution and defence lawyers and judges are not trained historians or journalists, this does not necessarily matter. Investigators, analysts, researchers, prosecution lawyers, defence lawyers and judges usually have decades' worth of practical experience within domestic and/or international criminal justice, law enforcement systems, military, and intelligence communities. At the preliminary examination and pre-trial investigation stages of criminal proceedings, training and experience in this field enable such criminal justice practitioners to apply standardised investigative, analytical and legal skills, capabilities and powers to gather, forensically examine and test exhibits and testimony that go towards understanding the personnel, organisations, activities and motivations that lie behind alleged criminal offences. ⁸² Although investigations are not subject to the same evidentiary standards as trial proceedings, and so for that reason may not be used at trial, there is still a requirement, as we have seen, to carry out in-depth and open-ended investigations which gather potential incriminatory and exculpatory evidence in order to assess whether there is a reasonable factual basis to proceed further. ⁸³ Pre-trial investigations may also produce a surfeit of evidence beyond the minimum amount needed to reach a conviction, and so for that reason a large body of

⁸⁰ *Ibid.* p.171. A. Eser, above n.19, p.147.

⁸¹ Peter Steinbach, *Nationalsozialistische Gewaltverbrechen: Die Diskussion in d. dt. Öffentlichkeit Nach 1945*, Colloquium Verl, 1981, p.49.

⁸² B. Kloss, above no.56, p.195.

⁸³ Rome Statute of the International Criminal Court, above no.10, Art. 53.

evidence may be unused at trial. The results of such pre-trial fact-finding, both used and unused at trial, and where available to the public, are of immense importance for both present and future generations in that they provide raw audio, visual and written documentation together with investigative and analytical reports that may be reasonably accurate and reliable but which may often require further scrutiny and corroboration.⁸⁴ Even if a case does not go to trial, or if certain evidence is unused at trial, then where it is available to the public, such ‘extra-trial’ material can help to shape collective memory and opinion in a reasonably balanced and measured fashion.⁸⁵

At the trial stage of proceedings, trial lawyers have the training and experience to evaluate and synthesise a broad range of sources in order to support and present their competing case theories or narratives as coherently and as plausibly as possible in order to be accepted by a tribunal of fact, i.e. highly qualified and experienced judges, whose job it then is to test the probative value of the evidence presented to them by these parties, and weigh this against any prejudicial effect that it may cause, such as creating unfounded assumptions or bias.⁸⁶ Rules of procedure and evidence applicable in criminal trials demand rigorous and standardised methods to scrutinise and verify information as well as ensure fairness. This can result in findings which, although not constituting a definitive account due to exclusionary rules, nevertheless strive for a high degree of accuracy, relevance and completeness.⁸⁷ Judges then compile the ‘established facts’ in a judgment on culpability, which produces, as a side-effect, a record that sets out and interprets events involving serious crimes. The findings on the trial record are likely to benefit from evidence direct from the source rather than having to make inferences from indirect or circumstantial evidence. Trial lawyers and judges may be more likely than historians to have access not just to circumstantial evidence, but to documents that can incriminate or exculpate an accused; judges are more likely to have access not just to such documents, but to whole archives of documents - materials which may otherwise be inaccessible to researchers and the public; they may not have to rely on hearsay, but can compel and examine *viva voce* testimony from eyewitnesses, insider witnesses and expert witnesses, including journalists and historians themselves.⁸⁸

If we are open to the possibility of international criminal proceedings transcending their direct aims of justice through retribution, and playing a role in historical justice through

⁸⁴ N. Tromp, above n.1, p. 23.

⁸⁵ *Ibid.* B. Kloss, above no.56, p.171. A. Eser, above n.19, p.147.

⁸⁶ N. Tromp, above n.17, p.20.

⁸⁷ A. Eser, above n.19, p.147.

⁸⁸ N. Tromp, above n.17, p.22.

fact-finding and documentation, this allows present and future generations to know, understand and remember past crimes, which in this context may often involve oppression, persecution, and even forms of annihilation. Where the perpetrators of 20th and 21st century atrocities are still alive, then we have many opportunities for the type of forensic accounting that international criminal justice can provide. Complete and accurate trial records serve to acknowledge and preserve this memory for the benefit of present and future generations at local, national and international levels and may serve to guard against any subsequent distortions or denials over what happened as well as intercommunal or sectarian tensions arising out of what would otherwise be heavily controversial and contested historical events.⁸⁹ With this knowledge and understanding, present and future generations are better equipped to understand and label, from a forensic point of view, the motivations and mechanisms behind serious crimes involving persecution and so deter the commission of future crimes. This process has been termed ‘didactic legality’ whereby international criminal trials blur the boundary between justice through retribution and justice through showing ‘the world the facts of an astonishing crime’ and demonstrating ‘the power of the law to reintroduce order into the space evacuated of legal and moral sense’.⁹⁰ This ‘public reckoning’ with the past promotes peace and reconciliation.

Broader reflections on the historiography of international criminal law: the dark side

International criminal justice, as we have seen, is an imperfect mechanism for arriving at the truth, and in any case may be regarded as just one of a number different types of processes and mechanisms that are associated with transitional justice, a concept defined by the UN Security Council as ‘society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.⁹¹ Such mechanisms may include truth and reconciliation commissions, public inquiries, and litigation before human rights courts.

Like all of these mechanisms, international criminal justice does not operate by default, and may only come into operation where the political, jurisdictional and admissibility ‘prerequisites’ are favourable and satisfied. Indeed, if we were to rely solely on international criminal justice for our history, then there would have been a black-spot of half a century

⁸⁹ B. Kloss, above no.56, p.173. A. Eser, above n.19, p.147.

⁹⁰ N. Tromp, above n.17, p.19.

⁹¹ United Nations Security Council, The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General, S/2004/616, 23 August 2004, p. 4.

between Nuremberg and the establishment of the *ad hoc* Yugoslavia and Rwanda tribunals and the International Criminal Court. If history only sees what justice seizes, then we will have many blind spots.

As international criminal proceedings are primarily aimed at determining questions of individual criminal responsibility rather than delivering historical truth, the issue of whether records and exhibits created during investigation and trial stages of criminal proceedings should be regarded as historical sources of information, or whether they should be in any way directed towards this end, is contentious. Indeed, many criminal lawyers dealing with international crimes may, in all likelihood, balk at the notion of international criminal proceedings transcending their direct aims of justice through retribution and overtly using them to explore and document historical fact in order to compile it into a record, or grand narrative, that can be used as a historical source.⁹²

Pursuing history in the courtroom does risk creating a palpable tension between this extralegal aim and the primary legal aim of individual criminal responsibility.⁹³ Tromp suggests, with reference to the Milošević case, that pursuing historical background information in the courtroom may not only be desirable, but even essential for the purpose of demonstrating how ideology and motivations behind plans leading to the commission of crimes are rooted in a broader historical framework involving historical political events as well as preventing defendants from reframing this historical background information in support of their own narrative.⁹⁴ However, broad or open-ended historical inquiries, whilst serving to provide useful background or explanatory information, may often be regarded as being tangential, beyond the scope, or simply not relevant to the charges being pressed in the indictment against the accused. Allowing arguments and materials relating to broader historical issues from both prosecution and defence risks opening the door to political and historical grandstanding which can serve to exacerbate existing intercommunal or sectarian tensions, which not only detract from the direct facts in issue before the court, but may also undermine the perceived legitimacy of the process amongst particular stakeholders and constituents together with its ability to promote peace and reconciliation. Within adversarial proceedings, there is the risk that diametrically opposed historical narratives are created that turn one group into victims and another into aggressors. This is potentially divisive and risks

⁹² A. Eser, above n.19, p.147.

⁹³ N. Tromp, above n.17,p.20.

⁹⁴ *Ibid.* p.21.

undermining the impartiality of criminal proceedings if the Prosecutor or Trial Chamber is perceived as siding with the victims' narrative or the aggressors' narrative.

Tendering arguments and materials relating to broader historical issues may also be unfeasible within the budgetary and time constraints that necessarily have to be imposed within international criminal proceedings, both in the interests of justice and also because of the stark resource limitations that the ICC faces. Long and complex 'historical' cases are not something that fits within the ICC's strategic and operational plans. However, it is suggested that this is not necessarily fatal to its ability to produce legal and extra-legal materials as part of trial proceedings that may constitute valuable historical sources. In relation to this point, pursuing grand overarching political and historical narratives in the courtroom, whilst having the potential to be of great benefit to collective memory in terms of forensically detailing, from a macro to a micro level, how atrocities were the outcome of plans executed in pursuit of ideology and geopolitical strategies, such divergent approaches risk making trial proceedings unmanageable because every aspect of the final narrative needs reasoning and supporting evidence from both sides that must be forensically examined in court from multiple perspectives. This risks causing cases to collapse under their own weight or otherwise being left unfinished, as in the case against Slobodan Milošević, that began as three separate indictments for the wars in Bosnia, Croatia and Kosovo, but which were later conjoined into a single indictment as part of a new trial strategy of demonstrating these three wars were actually part of one war, or joint criminal enterprise, which was driven by a 'Greater Serbia' ideology and integrating three separate teams that were pursuing different strategies. Thus rather than having three consecutive trials that were short and expeditious, and which could have resulted in at least one conviction before his death, due to Milošević's death before the conjoined proceedings were completed, the case was closed and the trial unfinished. Nevertheless, rather than having a 'historical' judgment and sentence, present and future generations are still left with important testimony, documents and reports, used and unused during trial, that can serve to address important questions about how and why crimes were committed and who and what was responsible for their commission.

When it comes to the truth, what we hold to be true about the world depends on what we take into account, and what we take into account depends on what we think matters. Furthermore, even if we have broad and deep conceptions of what matters, this is entirely predicated, in this context at least, on the support and cooperation of States and international governmental organisations in giving clearance to insider witnesses and access to documents or archives, which may not be forthcoming if they feel legally and politically exposed.

Therefore, in this context and in general terms, truth is understood to be an accurate and reliable record of what can be gathered and presented in the context of criminal trial proceedings regarding ‘the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner’.⁹⁵ Admittedly, this definition is full of qualifications in that it only concerns cases that are admissible and within the jurisdiction of the court, and information within those cases that can be gathered and then admitted as evidence.

The implication of this for collective memory and historical understanding is that only certain information that is deemed relevant and admissible may be filtered and processed through the ~~the~~ prism of individual criminal proceedings at this level and then recorded for history. Those who pursue ‘historical truth’ rather than ‘legal truth’, i.e. fact-finding and narrative formation outside of criminal trial proceedings, have the advantage of academic freedom in the sense that they do not have their hands tied by comparatively strict rules of procedure and evidence that can exclude or limit what can and cannot be spoken and presented in a courtroom. Whilst historical truth can accommodate and evaluate information that may be considered important background or explanatory information that can help to contextualise and understand the immediate events in question and to shape collective memory and opinion, such information may be excluded from the legal or courtroom truth. However, this applies in so far as trial proceedings and the resulting trial record are concerned.⁹⁶ Therefore, by no means can or should international criminal proceedings be viewed as definitive interpretations of history but they are certainly one of the best mechanisms that we have for recording it in a rigorous and authoritative fashion.⁹⁷

⁹⁵ International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, above n.1, para 76.

⁹⁶ N. Tromp, above n.17, p.21.

⁹⁷ *Ibid.* p.20.