

The Situation in Mali

13.1 REFLECTION: THE SITUATION IN MALI

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INTRODUCTION

This chapter reflects on the Mali situation and the cases before the ICC, including the reimagined judgments. It first offers background to the conflict in Mali, before outlining the ICC proceedings relating to ‘the situation in the Republic of Mali at the ICC. It then briefly introduces the original ICC cases in in this situation, the *Al Hassan* and *Al Mahdi* cases. The focus is on the *Al Hassan* judgment, sentencing decision¹, and reparations order², and the *Al Hassan* arrest warrant decision.³

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

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

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

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

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

BACKGROUND TO THE CONFLICT

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

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

THE SITUATION IN THE REPUBLIC OF MALI BEFORE THE ICC

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

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

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

⁵ *Ibid.*

⁶ *Ibid.*

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

BACKGROUND TO THE ICC CASES CONCERNING THE SITUATION IN MALI

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

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

The 2016 ICC *Al Mahdi* judgment and sentence⁷ concerned Al Mahdi's 2012 involvement in the war crime of intentionally directing attacks against buildings of a religious and historical character in Timbuktu, Mali, by armed forces between June and July 2012, pursuant to Article 8(2)(e)(iv) of the Rome Statute.⁸ The buildings comprised nine mausoleums as well as one mosque. Most of the buildings were protected as UNESCO World Heritage sites. In 2015, Pre-Trial Chamber I issued a warrant for Al Mahdi's arrest for the aforementioned crime. After the confirmation of charges by Pre-Trial Chamber I in March 2016, Trial Chamber VIII was allocated the case, which was ultimately tried in August 2016. Al Mahdi admitted guilt in relation to the charged war crime and signed a plea agreement with the prosecution ahead of the confirmation of charges.

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

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

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

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

¹⁰ Case Information Sheet, *supra* note 8.

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

After the 2016 judgment and sentence in the *Al Mahdi* case, in August 2017, Trial Chamber VIII handed down a Public Reparations Order (Reparations Order) holding Al Mahdi liable for €2.7 million in individual and collective reparations associated with the above crime.¹¹ The Reparations Order became final in March 2018.¹²

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

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

On 20 March 2018, an application for the arrest of Al Hassan was filed by the Prosecutor.¹³ The Prosecutor submitted that reasonable grounds existed to believe that Al Hassan was criminally liable for crimes against humanity, including torture, rape, sexual slavery, persecution on religious and gender grounds, and other inhumane acts carried out in Timbuktu between April 2012 and January 2013. In addition, there were reasonable grounds to believe that Al Hassan was criminally responsible for war crimes, including violence to persons, rape and sexual slavery, as well as intentionally directing attacks against buildings dedicated to religion and historic monuments.¹⁴ On 27 March 2018, Pre-Trial Chamber I issued a warrant for the arrest of Al Hassan. Al Hassan was surrendered to the ICC by the Malian authorities and arrived at the Court's detention centre in the Netherlands on 31 March 2018.¹⁵

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

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

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

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

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

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

2023 and heard closing statements in May 2023.¹⁶ At the time of writing in June 2023, the Chamber's judgment has not yet been pronounced [*Editors' note: in 2024 Al Hassan was convicted of certain crimes, but notably, not gender-based persecution*].

FEMINIST REIMAGINING OF SELECT JUDGMENTS AND DECISIONS

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

Judge Ameera Mahomed Ismail: 'Cultural Heritage in Mali'

Original Decision

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

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

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

¹⁶ See Situation in the Republic of Mali, Al Hassan Case – Summary, available at www.icc-cpi.int/mali/al-hassan.

¹⁷ Al Mahdi Judgment and Sentence, *supra* note 1.

¹⁸ *Ibid*, at § 33.

¹⁹ *Ibid*, at § 36.

²⁰ *Ibid*, at §§ 37–40.

²¹ *Ibid*, at § 53.

Reimagined Decision

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

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

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

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

²² Article 8(2)(e)(iv) Rome Statute.

²³ Ameera Mahomed Ismail, Reimagined Decision, at § 24.

²⁴ *Ibid.*, at § 20.

²⁵ *Ibid.*, at § 25.

²⁶ *Ibid.*, at § 26.

²⁷ *Ibid.*, at § 27.

²⁸ *Ibid.*, at § 93.

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

Critical Reflection

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

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

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

Judge Melissa McKay: 'Al-Mahdi, Sentencing'

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

Original Decision

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

²⁹ *Al Mahdi Judgment and Sentence*, *supra* note 1, at § 66.

³⁰ *Ibid*, at § 75.

³¹ *Ibid*, at § 77.

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

Reimagined Decision

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

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

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

³² *Ibid.*, at § 78.

³³ *Ibid.*, at § 93.

³⁴ *Ibid.*, at §§ 98–100.

³⁵ *Ibid.*, at §§ 101–102.

³⁶ *Ibid.*, at §§ 103–104.

³⁷ *Ibid.*, at § 97.

³⁸ See Dejana Radisavljevic, 'ICC Commentary (Article 77)', Case Matrix Network (last updated 20 August 2020), available at <https://cilrap-lexsis.org/clicc/clicc/77/77>; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd ed., Oxford: Oxford University Press, 2016) 1159.

³⁹ Melissa McKay, Reimagined Judgment, at § 71.

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

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

Critical Reflection

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

Through the rewrite of the *Al Mahdi* sentencing decision, Judge McKay builds on ideas from the feminist abolitionist movement. The rewritten decision emphasises the need to move away from the traditional, punitive interpretation of sentencing objectives and towards integrating rehabilitative approaches within sentencing at the ICC, if making amends with harmed communities and individual victims is to be taken seriously. That traditional punishment and mass incarceration does not necessarily have the potential to prevent crime against women⁴⁰ has long been

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

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

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

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

Original Decision

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

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

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

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

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

⁴⁴ *Ibid.*, at § 19.

⁴⁵ *Ibid.*, at § 28.

⁴⁶ *Ibid.*, at § 51.

non-repetition of the attacks directed against them'.⁴⁷ The liability was set at €97,000.⁴⁸ Secondly, for consequential economic loss from the attacks, it ordered individual reparations, in the form of compensation, to address the losses suffered by those 'whose livelihoods *exclusively* depended upon the Protected Buildings'. This included, for example, businesses selling holy sand from the respective sites.⁴⁹ Moreover, as consequential economic losses also existed for the community of Timbuktu as a whole, the Chamber ordered collective reparations in the form of rehabilitation to address the economic harm to the community. The liability was set at €2.12 million.⁵⁰ Thirdly, the Chamber ordered individual reparations to compensate for the moral harm suffered by those whose ancestors' grave sites had been damaged by the attacks. In addition, it ordered collective reparations for the disruption of the culture of the Timbuktu community and the causing of mental pain and anguish, in the form of 'collective rehabilitation to address the emotional distress suffered as a result of the attack on the Protected Building'.⁵¹ The liability was set at €438,000.⁵²

Reimagined Decision

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

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

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

⁴⁷ *Ibid*, at § 67. The buildings had already been restored at the time the Order was made.

⁴⁸ *Ibid*, at § 118.

⁴⁹ *Ibid*, at § 81.

⁵⁰ *Ibid*, at § 128.

⁵¹ *Ibid*, at §§ 90, 104.

⁵² *Ibid*, at § 133.

⁵³ *Ibid*, at § 102.

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

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

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

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

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

⁵⁴ Laura Graham and Annika Jones, Reimagined Decision, at § 89.

⁵⁵ Al Mahdi Public Reparations Order, *supra* note 2, at § 90, as well as collective reparations for the disruption of culture of the Timbuktu community as a whole.

⁵⁶ Graham and Jones, *supra* note 54, at § 97.

⁵⁷ Al Mahdi Public Reparations Order, *supra* note 2, at § 104.

Critical Reflection

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

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

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

Sarah Zarnsky and Emma Irving: 'Digital Evidence'

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

Original Decision

Pre-Trial Chamber I decided on the Prosecutor's Application for the Issuance of a Warrant of Arrest for Al Hassan on 27 March 2018. It provided the analysis of the evidence and other information submitted by the Prosecutor separately on 22 May 2018.⁵⁸ The Pre-Trial Chamber's decision to issue a warrant for the arrest of Al Hassan is based on the following considerations.

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

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

In its decision, the Pre-Trial Chamber found that there were reasonable grounds to believe that Al Hassan, as a co-perpetrator, had committed crimes against humanity against civilians as per Article 7 and war crimes according to Article 8.⁶⁰ The Chamber noted that evidence submitted by the Prosecutor inter alia included videos showing public whippings ordered by the Islamic tribunal, some of which were carried out by Islamic police and Hesbah.⁶¹ The evidence particularly showed that women 'were insulted, beaten and whipped relentlessly, sometimes until they bled, at the market and in their homes, for reasons such as that they were not sufficiently covered'.⁶²

Reimagined Decision

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

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

⁵⁹ *Ibid*, at §§ 172–178.

⁶⁰ *Ibid*, at § 14.

⁶¹ *Ibid*, at § 73.

⁶² *Ibid*, at § 72.

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

Critical Reflection

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

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

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

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

IMAGINING GENDER JUSTICE BEYOND EXISTING RULES?

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

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

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

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