

Accountability for Crimes against Cultural Heritage

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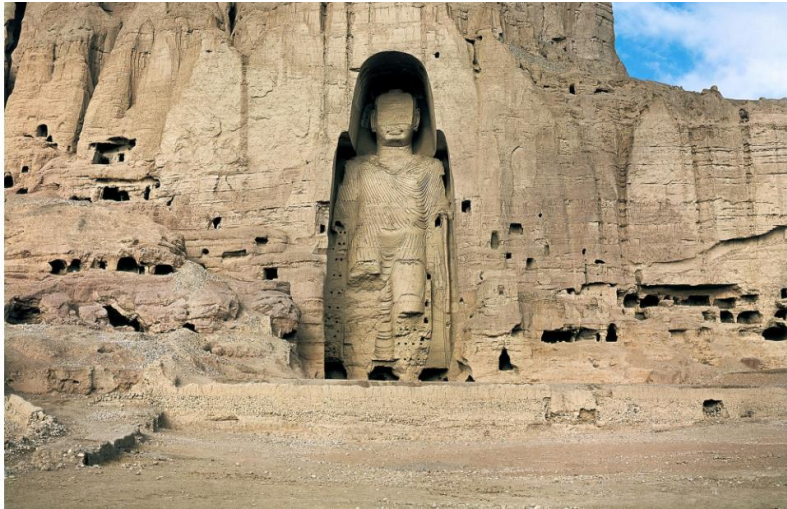
OUTLINE



- Legal Context
- Al Mahdi Case
- Significance and gravity
- Investigation and Prosecution Steps
- Limits

Context

- Destruction of the Bamiyan Buddhas (Afghanistan, 2001)



(Source: <https://www.nbcnews.com/news/world/should-afghanistan-s-bamiyan-buddhas-be-rebuilt-n822781>)

Context (Cont'd)

□ Desecration of Palmyra (Syria, 2015)



A picture showing the Temple of Bel before it was destroyed by ISIS in September 2015 in the ancient Syrian city of Palmyra. The structure dated back to 32AD | © Joseph Eid / AFP

Source: <https://cicglobaljustice.wordpress.com/2016/08/18/ten-instances-of-cultural-destruction-during-conflict/>

Destruction of Mausoleums (Mali, 2012)



AFRICA ICC: Mali fighter jailed for destroying Timbuktu sites



Source: <https://www.aljazeera.com/news/2016/09/icc-mali-fighter-jailed-destroying-timbuktu-sites-160927093507739.html>



LEGAL CONTEXT

Legal Context

- The special protection of cultural property in international law can be traced back to:
 - Articles 27 and 56 of the 1907 Hague Regulations
 - Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Articles 27 and 56 (Article 27 provides: 'In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes'). For an even earlier national codification of this prohibition, see also Instructions for the Government of Armies of the United States in the Field (Lieber Code), 1863, Articles 35 and 36.
 - The 1919 Commission on Responsibility, which identified 'wanton destruction of religious, charitable, educational, and historic buildings and monuments' as a war crime.
 - Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 The American Journal of International Law 95 (No. 1-2, 1920), p.115.
 - The Geneva Conventions also recognised the need for special protection of objects – like hospitals – which are already protected as civilian objects.
 - Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, 12 August 1949, Articles 19-23; Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, 12 August 1949, Articles 22, 23, 34-35; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Articles 14, 18 and 19.
 - Subsequent international instruments reflect the enhanced protection of cultural property, including
 - Additional Protocols I and II to the Geneva Conventions
 - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 53; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 16. Both these protocols make reference to an earlier 1954 Hague Convention. See Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, The Hague, 14 May 1954, Article 4.
 - Second Protocol to the Hague Convention of 1954.
 - Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Article 15.

Rome Statute (ICC)

Preamble to ICC Statute

- The States Parties to this Statute :
 - **Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,**
 - Mindful that during this century millions of children, women and men have been **victims of unimaginable atrocities that deeply shock the conscience of humanity,**
 - Recognizing that such grave crimes threaten the peace, security and well-being of the world,...
 - Affirming that the most serious crimes of concern to the international community as a whole **must not go unpunished** and that their **effective prosecution** must be ensured by taking measures at the national level and by enhancing international cooperation...

Crimes

- ▣ **War Crime under Article 8(2)(e)(iv):**

1. The perpetrator directed an attack;

2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.

3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict (Not of International Character).

Crimes (Cont'd)

- Similar War Crime under Article 8(2)(b)(ix) where conflict is of international character.

Crimes (Cont'd)

□ Crimes against Humanity- Persecution

■ Article 7(1)(h)

- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
- in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- Acts committed as part of a widespread or systematic attack against any civilian population.

Crimes (Cont'd)

- Crime against Humanity – Article 7(1)(k)
 - ▣ Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.



AL MAHDI CASE

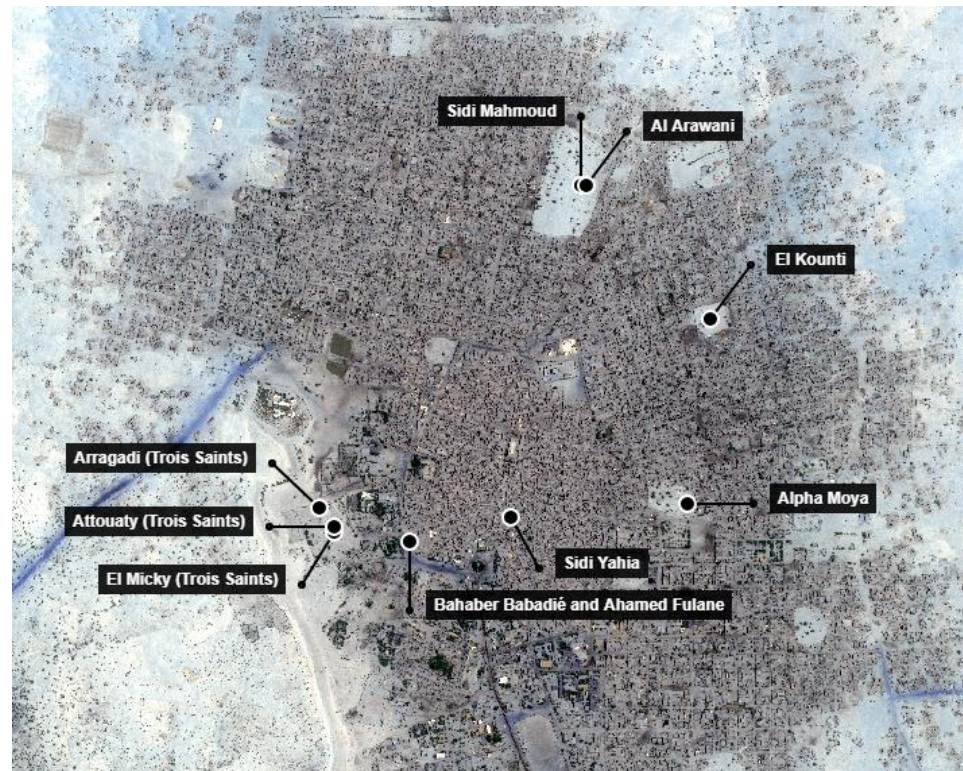
Prosecutor v Al Mahdi (ICC)

- Charges against Mr Al Mahdi, who acted as the head of the *Hesbah*, the morality brigade, which carried out the attacks on 9 mausoleums and one mosque in the ancient city of Timbuktu.
- Most of them were UNESCO world heritage sites.
- This case focused *exclusively* on the war crime of intentionally directing attacks against ‘cultural property’.
- The destroyed mausoleums and mosque were important from a religious point of view, from a historical point of view and from an identity and human rights point of view.

Nature of evidence

- Witness testimonies
- Video Evidence (Open-source)
- Satellite imagery and Geolocation
- Expert evidence on the different mausoleums and their religious and cultural importance
- Evidence on local and international importance of the mausoleums
- Evidence on the occupation of the town and armed conflict

Overview of Open-Source evidence



<https://situ.nyc/research/projects/icc-digital-platform-timbuktu-mali>

<http://icc-mali.situplatform.com/>



SIGNIFICANCE & GRAVITY

Not a victimless crime

- The attack against the Protected Buildings not only destroyed and damaged physical structures.
- Its impact rippled out into the community and diminished the link and identity the local community had with such valuable cultural heritage.

Importance for Timbuktu

- Timbuktu was an emblematic city with a mythical dimension and that it played a crucial role in the expansion of Islam in the region.
- Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints.
- The mausoleums reflected part of Timbuktu's history and its role in the expansion of Islam. They were of great importance to the people of Timbuktu, who admired them and were attached to them.
- They reflected their commitment to Islam and played a psychological role to the extent of being perceived as protecting the people of Timbuktu.
- The people of Timbuktu were collectively ensuring that the mausoleums remained in good condition in the course of symbolic maintenance events involving the entire community – women and elderly and young people.
- The mausoleums were among the most cherished buildings of the city and they were visited by the inhabitants of the city, who used them as a place for prayer while some used them as pilgrimage locations.

Not just locals

- The destruction did not only affect the direct victims of the crimes, namely the faithful and inhabitants of Timbuktu, but also people **throughout Mali** and the **international community**.
- The evidence showed that the people of Timbuktu protested against the destruction and refused to see the mausoleums razed to the ground.
- A witness testified that destroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu.
- Evidence on how the **entire international community** suffered as a result of the destruction of the protected sites.

Gravity of the Crime

- The Chamber considered that the **discriminatory religious motive** invoked for the destruction of the sites was undoubtedly relevant to its assessment of the gravity of the crime.
 - During the period they ruled over the territory of Timbuktu, Ansar Dine and AQIM took measures to impose their religious edicts on the population.
 - The creation of the Hesbah, which was headed by Mr Al Mahdi, was meant precisely to eradicate any visible vice it identified in Timbuktu.
 - When the leaders of Ansar Dine discovered the practices of the inhabitants of Timbuktu, they led a campaign explaining what should and should not be done with the mausoleums.
 - In the end they decided to destroy the sites in order to stop these prohibited practices.

Sentence and Reparations

- On 27 September 2016, Mr Ahmad Al Faqi Al Mahdi, pleaded guilty to the war crime of intentionally directing attacks against religious and historic buildings and was found guilty by the Trial Chamber.
- Mr Al Mahdi was sentenced to nine years' imprisonment.
- On 17 August 2017, Trial Chamber issued a Reparations Order concluding that Mr Al Mahdi was liable for 2.7 million euros in expenses for individual and collective reparations for the community of Timbuktu.

Sentence and Reparations- Cont'd

Apology – Symbolic measure

□ The Chamber decided...

... as a symbolic measure to ensure that all victims have access to **Mr Al Mahdi's apology**, the Chamber orders **the Registry to produce an excerpt of the video of Mr Al Mahdi's apology** and post it on the Court's website with the corresponding transcript translated into the primary languages spoken in Timbuktu. If any of the victims wish to receive **a hard copy of the apology** in a language they fully understand and speak, the Registry shall make this available to them upon request...

Excerpt of Apology

- Ladies and gentlemen, it is with deep regret and with great pain I had to enter a guilty plea and all the charges brought against me are accurate and correct.
- I am really sorry. I am really remorseful and I regret all the damage that my actions have caused. I regret what I have caused to my family, my community in Timbuktu, what I have caused my home nation, **Mali, and I'm really remorseful about what I had caused the international community as a whole.**
- **My regret is directly -- or, is directed particularly to the generations, the ancestors of the holders of the mausoleums that I have destroyed.**
- I would like to seek their pardon, I would like to seek the pardon of the whole people of Timbuktu, I would like to make them a solemn promise that this was the first and the last wrongful act I will ever commit.



INVESTIGATION & PROSECUTION

Investigation and Prosecution (steps)

- Consideration of such crimes from the earliest stages of an investigation.
- The best tools, technology and means of documentation at early stages of cases.
- Diversification of the evidentiary sources:
 - ▣ including ways of assessment of damage done to buildings,
 - ▣ testimonial evidence,
 - Eye-witnesses
 - Experts (local, regional, and international expertise in various relevant fields, including satellite data, imagery, forensic, geolocation, architecture, history, theology, anthropology)
 - ▣ use of technology (e.g. satellite imagery, 360 degree pictures, 3D crime scene reconstructions), documentary and video evidence;

...steps (Cont'd)

- Encouraging and facilitating quality of documentation from various sources regarding the damage and destruction to cultural property - “before” and “after” imagery.
- Collection of evidence is done in accordance with applicable national laws and local customs.
- Adequate preservation of evidence.
- Pragmatic approach to adducing evidence and not calling witnesses and exposing them unless necessary.
- Ameliorating the Presentation of evidence in courtroom through use of technology (when evidence is voluminous)



LIMITS

Limits

- Jurisdiction
- Admissibility
- Obtaining Evidence

Jurisdiction

- ICC jurisdiction may be triggered:
 - ▣ State party referral [article 13(a)]
 - ▣ Referral by the Security Council [article 13(b)]
 - ▣ *Proprio motu* [article 13(c)]
- Crime occurs on territory of Non-state party
 - ▣ No jurisdiction
 - Unless Referral by Security Council
 - Non-State Party accepts jurisdiction [article 12(3)]

Admissibility

- A case is not admissible if not of **sufficient gravity** to justify further action by the Court (Article 17(1)(d))
- **“the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case”**
(Abu Garda, ICC)
- **Not an issue in Al Mahdi but a relevant consideration in all cases before coming to ICC**

Obtaining Evidence

- Lack of documents on the condition of the sites prior to the attack
- Lack of or limited access to the sites and buildings, due to e.g. on-going conflict, remote locations, no cooperation, etc.
- Identifying destroyed sites
- Reconciling data obtained from different sources, with the potential for inaccuracies and inconsistencies
- The preservation of evidence - passage of time between the commission of crimes and investigations

Obtaining Evidence – Cont'd

- Challenges tied to establishing the role and importance of the destroyed sites for the community affected
- Local sensitivities and Engaging local communities
- Limitations of technology: i.e. satellite imagery cannot capture damage that is made on the side of a building and is not live.
- Identifying criminal groups or networks is also a recurring challenge.
- The court does not have an enforcement arm. Successful Investigations and Prosecutions depend on cooperation with States.



Conclusion

Three takeaways

- Not a victimless crime
- Context is important to highlight significance and gravity
- Investigations and Prosecutions can make use of diverse types of evidence (conventional witnesses, experts and technology).

Lemkin



“If the culture of a group is violently undermined, the group itself disintegrates and its members must either become absorbed in other cultures which is a wasteful and painful process or succumb to personal disorganization and, perhaps, physical destruction.”

Raphael Lemkin, ‘The Concept of Genocide in Anthropology’,

Questions



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