

# International Criminal Law and Cultural Property

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# What is cultural property/cultural heritage?

Artifacts, monuments, a group of buildings and sites, museums that have a diversity of values including symbolic, historic, artistic, aesthetic, ethnological or anthropological, scientific and social significance.

(United Nations Educational, Scientific and Cultural Organization (UNESCO))

# What is Cultural Property / Cultural Heritage

Raphael Lemkin, 1933, “Vandalism”

1954 Convention for the Protection of Cultural Property in the Event of an Armed Conflict (The Hague) and Two Protocols thereto

# Story of a Trial: Al Mahdi



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Timbuktu, Mali: an emblematic city, trading *entrepôt* in the 15<sup>th</sup> and 16<sup>th</sup> centuries; a major crossroads that housed libraries and manuscripts; an evocative city

Beginning in 2012, armed violence erupts between the Government of Mali and Al Qaeda in the Islamic Maghreb together with Ansar Dine ('defenders of faith').

Insurgents want to establish a new Sharia country, Azawad

# Story of a Trial: Al Mahdi



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In 2012 and 2013 rebels take control of Timbuktu

Impose Sharia rule

Islamic Police – *Hesbah* (the ‘manners brigade’) to enforce morality

Al Mahdi head of the *Hesbah* until September 2012

Enforced Sharia court decisions

War is then lost; Al Mahdi arrested in Niger by French troops, sent to the Hague; Government of Mali self-refers the internal war to the ICC (another emergent practice)



# Story of a Trial: Al Mahdi

Destroyed Sufi shrines/mausoleums dedicated to Sufi saints (located above tombs) in the name of radical Salafism. These were made of mud and brick. UNESCO recognized nearly all of them as world heritage sites. Al Mahdi also ordered a renowned door on a mosque (Sidi Yahia) to be destroyed

Pled guilty as a co-perpetrator, sentenced to nine years' imprisonment on 27 September 2016

Reparations ordered (2017, 2.7 million Euros)

# Story of a Trial: Al Mahdi

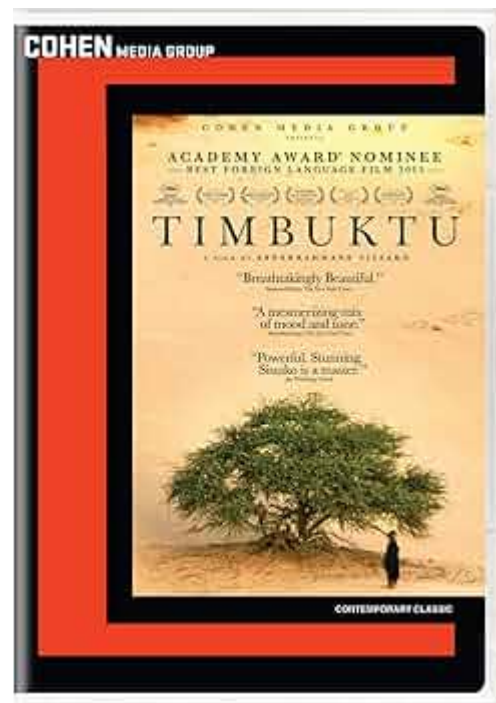
Although initially hesitant, Al Mahdi ended up supervising the attacks and coordinating them; he was present at the attack sites where he gave advice and moral support

Was aware of the religious value of the shrines to local Sufi populations

Razed the sites publicly and with great force, bulldozed, justified the attacks to journalists

*Hesbah* funds used for weapons of destruction which Al Mahdi distributed

# Story of a Trial: Al Mahdi



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Court emphasized the symbolic value, religious salience, and affective attachment generated by the Sufi Shrines

Discriminatory religious motive

# Story of a Trial: Al Mahdi

Applied for early release after 7 years' imprisonment in a Scottish prison (common practice)

Was granted in late 2021

Released on 18 September 2022, location undisclosed

# Cultural Property Destruction: Criminal Law

In international and non-international armed conflict, it is a war crime to:

Intentionally direct attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, provided they are not military objectives

Arts. 8(2)(b)(ix) and 8(2)(e)(iv) (Rome Statute International Criminal Court)

# Cultural Property Destruction: Criminal Law

Whatever one thinks of the jurisdiction of the ICC, its legitimacy etc., these are separate conversations, for this presentation the substantive law it enforces matches the content of international criminal law and largely matches domestic and military law. This substantive law is not much contested, what is contested is the ICC's institutional legitimacy in enforcing the law.

# Cultural Property Destruction: Criminal Law

Cases prosecuted in the former Yugoslavia and in France following World War II

Al Hassan, charged but acquitted on charges of attacking protected objects in Timbuktu (convicted on other charges)

Many other international treaties in this area.

Basic confluence of the law to criminalize the intentional destruction of cultural property and promote its protection/preservation



# Cultural Property Destruction: Criminal Law

## Actus Reus:

The act must involve an attack *against* buildings dedicated to religion, education, art, science or charitable purposes, historic monuments.

This requirement is satisfied if an attack is thusly directed

# Cultural Property Destruction: Criminal Law

## Actus Reus:

The buildings that are the object of the attack must *not be military objectives*

-- this is a broader requirement in international humanitarian law (art 52(2) API GC, 'objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage')

-- principle of distinction to protect civilian objects (challenge of illicit dual use)

# Cultural Property Destruction: Criminal Law

Mens Rea:

The author must have intentionally directed the attack against protected structures

Both intent and knowledge must be shown

# Cultural Property Destruction: Criminal Law

Mens Rea:

The author must have been aware of the factual circumstances that established the existence of an armed conflict (international or noninternational) of some systematicity

This is a *chapeau* requirement to all war crimes

Differentiation from crimes against humanity

# Broader Questions

Internationalist or Nationalist?

Gravity: Centrality of Human Use, and what Kind of Use? (Sufi Shrines vs Bamiyan Buddhas)

Gravity: UNESCO Lists?

Gravity: Holograms

# Broader Questions

Deterrence?

What cultural property merits protection? Who decides? The politics of the Al Mahdi case were easy, yet it is not always so

Tension between Protection (required by penal and military law) and Destruction (at times central to transitional justice and political liberation)