

# Case Comment: Reparations for the Destruction of the Precious Past

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**By: James Hendry**

This article will explore the procedures and principles applied by the International Criminal Court (ICC) in ordering reparations for damage done to World Heritage sites. The case is remarkable because it was the first international trial concerning the destruction of historical and religious monuments alone and reparations for a war crime that was aimed at damage to such buildings and economic loss flowing from it, and not to victims of personal violence.[1] It was also the first ICC case where the defendant admitted guilt.

Al Mahdi was allegedly a member of Ansar Eddine, an organization associated with Al Qaeda in the Islamic Maghreb that worked with these two groups. He was also allegedly the head of the “Hisbah”, an organization set up to enforce Islamic values until September of 2012. He worked with the Islamic Court of Timbuktu to execute its decisions.

**Procedure**

Ahmad Al Faqi Al Mahdi pleaded guilty to the war crime of destroying the Protected Buildings of the kind identified in art. 8(2)(e)(iv) of the Rome Statute of the International Court, 1998[2] that included 9 mausoleums and a mosque door in Timbuktu, Mali in late June and early July, 2012 as a co-perpetrator under art. 25(3(a).

On September 27, 2016 Trial Chamber VIII of the ICC (the Court) sentenced him to 9 years of imprisonment.[3]

The Court later made an Order for individual and collective reparations for damage done to the Protected Buildings under art. 75 of the Rome Statute. Al Mahdi was indigent and the Court considered the role of UNESCO and the Trust Fund for Victims (TFV) established under art. 79 in its reparations decision. The Court accepted and considered submissions from the TFV, UNESCO, the Legal Representative for Victims (LRV), the Defence, the Prosecutor and Registry under art. 75(3) and some 139 applications for reparations made by numerous individuals and 2 organizations, redacted versions of which were provided to the Defence (so the victims could not be identified). The Court appointed 4 experts to assist it after hearing from the LRV, Defence and Prosecution, and awaited their reports which were made available to the parties (LRV and Defence on the issue of reparations) for final submissions (by the LRV, Defence and TRV).

**The Loss of Cultural Heritage**

The Court commenced its reasons for judgment by recognizing the importance of tangible and intangible cultural heritage to the present and future of communities. It noted the international community had condemned the destruction of heritage objects in various instruments, including the Rome Statute that provided for the punishment for such attacks and for reparations for their loss. Timbuktu had been on the World Heritage List since 1988 because its mosques and holy places had been essential to the spread of Islam and a repository of ancient knowledge and scholarship. The Court wrote that the destruction of international heritage creates terror and helplessness and is an “irreplaceable loss that negates humanity”.[4]

**Principles for Reparations**

Article 75 of the Rome Statute requires the Court establish principles for reparation including restitution, compensation and rehabilitation and apply them to the scope of the damage done in the case before them, either on request or on its own motion. The Court has established principles of general application for assessment based on the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the UN Basic Principles on Reparations for Victims.[5] The Court here treated crimes against cultural heritage as it would other war crimes. In this case, reparations were designed to relieve suffering, repair the consequences of Al Mahdi’s crimes, enable victims to recover their dignity, deter future violations and perhaps reconcile the criminal and the community. Victims were entitled to equal information and rights to participate in the proceedings as the parties. They were entitled to reparations proportional to their loss, whether or not they participated in the hearings. They were to be treated without discrimination, with dignity and assurance of safety. They were to receive adequate and prompt reparations. Customary practices that the Court found relevant to the assessment of reparations would be applied in a gender-sensitive way bearing in mind the differences in the harms suffered by various victims. Reparation programs should be self-sustaining and moneys held to be owing should be paid by periodic payment rather than lump sum. The Court’s Order would not exonerate States from their duties towards their citizens. States Parties have a duty to cooperate

with the Court. The Order must respect the accused's rights. The Appeals Chamber[6] has held that a reparations Order must contain 5 elements:

- Be directed at the convict
- Inform the convict of his liability
- Provide reasons for the type of reparations
- Define the harm to direct and indirect individual victims of the crime[7] and the way the Order will deal with the harms
- Identify the victims or the means for identifying the victims based on proximate cause and reasonable foreseeability of harm.

Persons may receive both individual or collective reparations or a combination of both. An organization may also receive reparations through the TVF.[8] Art. 75 provides a non-exhaustive list of 'modalities' or specific methods for addressing harms including restitution, compensation (usually money) and rehabilitation (to restore victims and communities, including economic development or social, medical or legal services). Reparations may include symbolic awards.

**Analysis**

**(a) The Victims**

The Court first identified the victims of Al Mahdi's crime and the degree and nature of harms they suffered. The destruction here directly affected the guardians of the sites, the faithful and inhabitants of Timbuktu (of which only a small number made application for reparations), but also the cultural heritage of the people of Mali and the international community because most buildings were UNESCO World Heritage Sites. However, the Court held that reparations to Timbuktu and its inhabitants in respect of the Protected Buildings would address the broader claims of Mali and the international community and would maximize their effect.

**(b) The Harms**

The Court next identified the kinds of harms to be assessed, noting that it was not bound by admissible evidence[9] but could mine any relevant material in the applications and its expert reports for assistance in its assessment. The Court recognized that its had to work within the realities of local customary practices that limited the number of official and business records of life in Timbuktu. The Court rejected the Defence arguments that reparations had to be limited to specific victims who had made applications (a small portion of the populations of Timbuktu). It reasoned that the TFV regulations contemplate reparations even where specific individuals are not identified and because the Defence argument would limit the ability of the Court to assess collective reparations for victims who did not file applications, but who still suffered loss from the crime.

**(i) Property Damage**

Al Mahdi was liable for the destruction he caused to the Protected Buildings, notwithstanding their restoration by UNESCO, but not to certain graves adjacent to them for which applications and precise causal and restorative information were lacking. There was evidence that Al Mahdi made efforts to avoid this collateral damage. The Court held that the modalities of these reparations had to be collective and, now that the Protected Buildings were restored, were best addressed by measures for rehabilitation and non-repetition, in consultation with relevant governments. The Court found Al Mahdi's apology to be genuine, categorical and empathetic and sufficient, though some victims disagreed. The Court ordered the Registry post a video of the apology on its website with appropriate translations and that it provide those wishing a hard copy with one in their language with further dissemination to be considered.

**(ii) Economic Harms**

The Court then considered the reasonably foreseeable economic harms caused by Al Mahdi's crime to those whose livelihoods depended on the Protected Buildings, for example to the guardians of the mausoleums and those who sold sand perceived as holy from the sites of the Protected Buildings. It also considered the effect of the damage to the Protected Buildings on the reduction in numbers of pilgrims coming to Timbuktu and the consequent loss of donations. The Court noted that a collective remedy was needed to recognize the harm done to the applicants alone and similarly placed individuals was less than the collective harm done to the entire community.

In keeping with the Court's view that reparations are most equitably made on an individual basis and for all individuals suffering similar harms, it would not prioritize applicants over any other individual who suffered because of the crime. Thus, the extent of reparations should be based on the harm suffered by individuals and not simply because they had made an application, though the information supplied in the applications assisted the Court in setting the parameters for the awards for all affected individuals. The Court then awarded individual reparations generally to those whose livelihoods exclusively depended on the Protected Buildings. The parameters of the award – the means of identifying which individuals deserved an individual award – would be dealt with later in the Court's reasons.

The Court also awarded collective reparations to other members of the community who suffered from the consequential loss beyond the members of the group compensated on an individual basis. These collective reparations would be aimed at rehabilitating the community of Timbuktu as a whole to address economic harm that may include educational and awareness programmes to promote Timbuktu's heritage, resettlement programs, a 'microcredit system' to assist the population to generate income or other cash programmes to restore economic activity. Those who received an individual award could also share in the benefits of the collective reparations.

**(iii) Moral Harm**

The Court held that the victims established that Al Mahdi had caused them the moral harms of mental pain and anguish and a disruption of their culture. The Court also noted that the destruction of the

Protected Buildings shattered the community's collective faith that they were protected by these structures. Individual compensation for moral harm though was appropriate only for those whose ancestors were interred in the mausoleums, because of their special emotional attachment to the sites. But the Court held that collective rehabilitation for the community should include symbolic measures, such as ceremonies recognizing the moral harm done to the people of Timbuktu. The Court was of the view that these collective measures at the same time would address the moral suffering of the people of Mali and the international community resulting from the crime.

**(iv) Bodily Harm**

Though some victims alleged bodily harm, Al Mahdi was convicted only of damage to the Protected Buildings. The Court thus refused to order reparations on this ground for lack of information of who was responsible and because it was not part of the crime for which Al Mahdi was convicted. The Court concluded that any such harm was not a reasonably foreseeable result of the crime.

**(v) Other Property Damage**

The Court held that it did not have sufficient causal evidence of harm to other property suffered during the attack or resulting from the flight of individuals from the attacks to support reparations against Al Mahdi. Nor had he been convicted of causing such damage.

The Court reiterated that the reparations must be made without discrimination, in a gender and culturally sensitive manner.

The Court finally ordered that Al Mahdi pay 1 euro to the Malian State as a symbolic gesture for the harm done to its cultural heritage and another 1 euro to UNESCO as a representative of the international community. The Court encouraged the TFV to provide general assistance to those in Mali for human rights violations not caused by Al Mahdi.

**(c) Scope of Liability**

The Court then had to decide the extent of Al Mahdi's liability for the harms he caused that was proportionate to the harm and his participation in his crime in the circumstances of the case. Here, Al Mahdi was convicted as a co-perpetrator, the organizer of the attack on the Protected Buildings and a direct participant in five of the attacks. The principle of proportionality of reparations would reflect only his liability and not the total value of the harm done in the attacks on the Protected Buildings.[10] The Court refused to accept the Defence argument that the resources that the TVF had to spend on the reparations were relevant to Al Mahdi's liability. Further, the Court also held that the fact that Al Mahdi is indigent was also irrelevant to the assessment. The Court reasoned that taking into account the fact he could not pay would eliminate a great many reparation awards. Last, the Court also rejected the Defence argument that Al Mahdi was liable to a claim for reimbursement to the TFV only during the period of his incarceration, because it was he, and not the TFV, that was liable for the crime and reparations flowing from it.

### (i) Damage to the Protected Buildings

UNESCO spent over 2.53 million euros rebuilding the mausoleums, mosques and restoring library manuscripts. However, the actual cost of restoring the Protected Buildings that Al Mahdi was convicted of damaging was close to 96,600 euros. The Court heard other evidence resulting in a liability of 97,000 euros.

### (ii) Consequential Economic Loss

The best estimate of Timbuktu's economic loss until restoration was finished in 2015 was 44.6 million euros. But the Court found that the causes of the economic losses were many, including a tourism drop, transportation problems, security concerns and population flight. This figure also included economic loss to the City of Bamako, which the Court excluded because it had earlier determined that losses to Mali and the international community were met by making good the individual and collective losses to the community of Timbuktu. The Court accepted expert opinion that 10% of the estimated amount of economic loss was due to Al Mahdi's attacks and that that percentage should be the starting point for calculating the amount of reduction in Timbuktu's economy for the 2012-2015 period attributable to the loss of the Protected Buildings. The Court reduced this percentage further because the estimate included loss related to other historic buildings. The Court could not be sure whether tourists were spending their money on the Protected Buildings or other historic and religious sites. It concluded that Al Mahdi's liability for damages resulting from his crime should be set at 2.12 million euros.[11]

### (iii) Moral Harm

The Court noted that moral harm was hard to assess. Dignity cannot be fully replaced. Nor can historic buildings that cannot be restored with historic building materials. The Court held that economic loss was not the proper analogy to moral damages because of the incommensurability of moral and economic harm. However, the Court was attracted to a precedent amount for other damaged historic property and revised the earlier figure awarded to reflect the number and World Heritage designation of the Protected Buildings, as a starting point for assessing the relevant mental pain and anguish established in this case, increased for inflation, and the disruption of culture suffered.[12] Liability was set at 483,000 euros.

### Implementation

Al Mahdi owed a total of 2.7 million euros. The TFV is the implementing agency. The Court noted that the next step in the process of reparation was for TFV to propose a draft implementation plan to achieve the objectives, outcomes and necessary activities that corresponded to the modalities of the Court's Order. Once the Court approved the plan, the TFV would implement it with the help of partners of its choosing. The Court would be the final arbiter of the implementation plan allowing it to approve the selected projects in a final decision.

Notwithstanding the transfer of the details of implementing the Order to the TFV, the Court advanced some considerations for it to bear in mind. First, given Al Mahdi's indigence, the TFV was encouraged to complement the awards made by the Court to the extent possible and to engage in fundraising to achieve the totality of the awards. Second, on the assumption that the measures the TFV applies may complement each other, some adjustment to the Court's calculations on individual modalities might be appropriate to the extent that addressing the moral harm might ameliorate economic loss, as long as Al Mahdi's total liability set by the Court is respected. Third, the TFV should prioritize individual reparations over collective as long as the latter are not compromised. Fourth, the Court suggested that the TFV should develop a screening process for identifying individual victims, given the difficulty the Court would have in doing so: the Court received only 139 applications for reparations, while the population of Timbuktu was 70,000.[13] The Court noted that those whose livelihoods depended on the Protected Buildings and those whose ancestors burial sites were damaged could probably be dealt with in one screening process as they were likely the same group of people.

The Court noted that the screening process should provide for reasonable efforts to be made to identify victims, obtain applications from those seeking to be screened in to obtain an award, the applicant and the Defence should be able to make representations on eligibility, applicants must identify themselves to TFV and Defence, the results of the screening should be sent to applicant and Defence (with no appeal from a positive eligibility decision because the screening process has no bearing on the overall liability of Al Mahdi set by the Court). Fifth, the Court held that traditional justice mechanisms were not to be part of the implementation process because of the possibility of discrimination, especially against women. Finally, to make the implementation plan responsive to local conditions as well as the Court's principles, including non-discrimination, the TFV must consult "all relevant stakeholders", and draft a plan "bearing this dichotomy in mind", allow for LRV and Defence representations and then submit it for Court approval.[14]

**Conclusion**

The Court's reparations Order treads a fine line between compensation for the destruction of World Heritage sites that are intimately tied to the values of the community attacked and the international community that benefits from the reverence due to ancient knowledge gatherers and keepers, and the realities of modern non-state fighters who commit war crimes but have no means to pay for the damage they cause. It did this here by assessing damages for damage and consequent carefully limited to the Protected Buildings that were the targets of the war crime for which conviction led to a 9-year sentence for Al Mahdi. It also ensured the result that the damages assessed will likely be borne by UNESCO in having repaired the Protected Buildings and by "encouraging" the TFV to make good on the assessment through its funds and fundraising activities.[15] Though submissions were made to the Court that some individuals had suffered bodily harm, the Court held that it was neither proved nor part of the crime for which Al Mahdi was convicted. Thus, the Order reflected only the complexities of determining reparations where the war crime was the result of an attack on buildings protected by the Rome Statute.

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References

1. See https://www.youtube.com/watch?v=csYGUWU62B0 for a You Tube video on this case.
2. References are to the articles of the Rome Statute of the International Criminal Court, 1998. References to the Rules are to The Rules of Evidence and Procedure of the International Criminal Court.
3. References are to the paragraphs of the Reparations Order of the Court ICC-01/12-01/15.
4. Para. 22.
5. Para. 24 referring to UN Doc. A/RES/40/34 and UN Doc. A/RES/60/147.
6. *Lubanga* reparations AJ, ICC-01/04-01/06-3129.
7. The Rules allow for reparations to organizations and institutions only for direct harms: Rule 85(b).
8. Rule 98(4).
9. Para. 57 referring to *Lubanga*, para. 185.
10. Para. 111.
11. Paras. 126-128.
12. Paras. 131-132.
13. Para. 143. The Court held that this was consistent with the TFV Regulations 60-65 as an alternative to the situation where the Court identifies individual victims.
14. Para. 148.
15. Para. 138.