

Case Comment: Reparations Principles in the Al Mahdi Appeal

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By: James Hendry

The Appeal Chambers of the International Criminal Court held that the Trial Chamber had the power to create categories of reparation victims and to delegate to the Trust Fund for Victims the power to screen Applicants according to these categories, while retaining ultimate control of the issues of eligibility and security for the Applicants in the process.

On March 8, 2018, the Appeals Chamber of the International Criminal Court (ICC) released its decision in the appeal brought by the victims of the attacks on various historic buildings in Timbuktu of the reparations decision of Trial Chamber VIII based on the conviction of Al Mahdi of war crimes for the attacks.[1] Though the decision deals with the specifics of the reparations order within the institutional context of the ICC, the Appeal Chamber can be seen to be dealing with some of the unique issues of assessing reparative orders in war crimes, where full information about how many and who the victims are is lacking and where potential threats to their well-being might follow in the wake of the order

Background

Al Mahdi was convicted on his own admission of guilt as a co-perpetrator of the war crime of attacking protected objects in Timbuktu in 2012 and was sentenced to nine years imprisonment.

The Trial Chamber then held hearings on reparations.[2] It decided that reparations for economic harm – and the war crimes were in respect of buildings alone – required individual reparations for victims whose livelihoods "exclusively depended" on the protected buildings; collective reparations for economic loss to the whole community of Timbuktu (including monetary and programmatic relief); individual compensation for moral harm to those whose ancestors' burial sites were damaged and collective reparations for the moral harm to the community of Timbuktu and Mali generally.

The Trial Chamber noted that the Trust Fund for Victims (TFV) was the implementing agency of the reparations order and held that the reparation process would be in three parts: the first, the assessment of 2.7M euros in total against Al Mahdi; the second, approval of a draft implementation plan prepared by the TFV; and the third, the approval of the TFV's choice of projects to implement the award.

The Trial Chamber also provided parameters for the process: because Al Mahdi was indigent, the TFV should "complement" the awards (through fundraising); the TFV could revise the liability calculations in designing its plan within the total envelope of the amount awarded by the Trial Chambers; individual reparations should have priority; the TFV would carry out screening procedures for individual victims entitled to compensation who were potentially too numerous for the Trial Chambers to do it. The screening procedures were to respect the rights of the victims and the Defence and generally were to be based on applications identifying the claimant (with their consent) and "any supporting documents" to the TFV, with the right of the Defence to make representations on the applicant's eligibility, to ensure accuracy of the screening and make up for the lack of the Trial Chamber's decision on eligibility for every victim. The Defence was not entitled to a review of a "screening in" because this would create a judicial procedure and would not affect his overall liability in any event.

The Appeal

The victims' appeal was filed by the Legal Representative of Victims (LRV). First, he argued that the Trial Chamber erred in limiting individual economic loss to those whose livelihoods "exclusively depended" on the protected buildings. Second, he argued that the Trial Chamber had delegated a judicial power to the TFV to screen those entitled to these reparations.

Standard of Review

The Appeal Chamber first considered the constraints on their power to review the Trial Chamber's discretion in awarding damages consequent on a conviction. Based on their ruling in the *Kenyatta*[3] case, the Trial Chamber had to be correct on issues of law; reasonable in its conclusions of fact (no clear error in assessing the facts, taking irrelevant considerations into account, or failing to consider relevant facts); and judicial in its use of discretion by using it unfairly or unreasonably.

Was the category of individual recipients of reparations too narrow?

The LRV submitted that the category of individual compensation for economic loss only for individuals who could prove that their livelihood "exclusively depended" on the protected buildings was

unreasonably narrow. He made three related arguments.

The LRV first argued that the distribution of donations to family and to others from the protected buildings was actually broader in Timbuktu culture than encompassed by the narrow basis of "exclusive dependency" recognized by the Trial Chamber.[4] The LRV tried to lead expert evidence that the custodians had a broader notion of obligation than the one that stood as the premise for the award and that this expanded notion should expand the category of individual direct compensation. The Appeals Chamber rejected the new evidence on the basis that the LRV did not explain why it was not entered before the Trial Chamber, while noting that all was not lost – the TFV might still consider the information in its screening of victims entitled to compensation.

The Appeals Chamber concluded that the Trial Chamber had not acted unreasonably in respect of individual reparations. It noted the broad discretion that the Trial Chamber had to make individual and collective or both kinds of awards constrained only by the "scope and extent of any damage, loss and injury."[5] The Experts consulted by the Trial Chambers found that the loss from the attacks was primarily collective and suffered by the whole Timbuktu community leading to the conclusion that collective reparations were the most important and that only a limited number of individuals were concerned.[6] These should be identified by the degree of harm suffered and not only by whether they had filed an application for reparations. This is how the Trial Chamber chose the category of "exclusively depended" on the protected buildings because their loss, compared to the rest of the community, was more "acute and exceptional": thus, a distinction between direct and indirect harm. The Appeals Chamber thought this reasonable because the 139 applicants had provided evidence of this acuteness by limiting their requests to livelihoods that "exclusively depended" on the protected buildings backed up by the parties and Expert submissions and, interestingly, the LRV, whose position before the Appeals Chamber seems to have arisen from later-acquired evidence.[7]

The Appeals Chamber also rejected the LRV's further argument that the Trial Chamber's award excluded so many individual victims that it had breached national or international law contrary to art. 76(6) of the Rome Statute: ("Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."). These were victims who had to flee Timbuktu, business owners who suffered the loss of the tourism trade, victims who earned only part of their livelihood from the protected buildings and family members of those who "exclusively depended" on the protected buildings. The Appeals Chamber determined that some of these victims may well be able to show they fall within the "exclusively depended" category and those who do not will benefit from the collective reparations.

The Appeals Chamber also rejected the LRV's argument that the evidentiary proof required to show "exclusively dependency" was unreasonable. It noted that the Trial Chamber had not specified how the "exclusive link" was to be proved in its parameters, except by application and "any supporting documents." This was left to the screening process to be set up by the TFV which was required by regulations to accept documents suiting the "prevailing circumstances." The Appeals Chamber noted that its own jurisprudence and the Trial Chamber in this case had specified that the circumstances in

which documentary evidence was required had to be taken into account, with the Trial Chambers specifically recognizing that customary practices in Timbuktu led to “fewer official and business records”.

Improper delegation of judicial power?

The Appeal Chamber rejected the LRV’s argument that assigning the screening of victims for individual reparations was an unreasonable delegation of judicial power to the TFV.

In a problem that will likely be common to ICC reparations orders, the Appeal Chambers noted that the Trial Chambers found that it did not have full information about all the victims potentially entitled to individual reparations, nor was it practical for it to engage in this investigation itself. Accordingly, the Trial Chambers held that the Regulations of the TFV contemplated that because the Trial Chambers could not identify all individual victims, the TFV would establish screening tools to do this for individual reparations, consistent with parameters set by the Trial Chambers and the procedural rights of the parties including the right of the Defence to make representations about an applicant’s eligibility. The parameters did not allow the Defence to challenge the screening in of a victim, nor did they provide victims a right to have their exclusion by the TFV reviewed.

The Appeal Chambers held that the Trial Chamber acted reasonably when it delegated the screening process for individual applicants to the TFV. First, the Trial Chamber properly decided who would get reparations. In the face of uncertainty about the number of victims, the Trial Chamber understandably requested the TFV to screen applicants who fit the parameters of the category of eligible victims. The creation of that category and the capacity of victims to appeal it, as in this case, was the main task of the Trial Chamber, which would be followed up in the two further steps it set up for the reparations phase. The Appeals Chamber thought that this was delegation of a “relatively limited task”. Rule 98(2) provides that that a reparations order can be deposited with the TFV where it is impossible or impracticable to make individual awards to each victim. Though the Appeals Chamber noted that technically no reparations order had been deposited with the TRV here, the actions of the Trial Chamber was analogous to this situation it because the TRV will ultimately make payments to the victims due to Al Mahdi’s indigence on which the Trial Chambers would have to rely for the effectiveness of the reparations.[8] The Appeal Chambers also thought that the fact that an individual victim did not have a right to reparations, that this (somehow) supported the delegation of the screening process. It is interesting that the Appeal Chambers referred to a decision of the Inter-American Court of Human Rights where that court requested States, through official mechanisms, to assist in identifying a class of reparation beneficiaries ordered by the court – the next of kin of victims of a massacre, some of whom had not yet been identified in the circumstances – after its judgment that identified the victims, but not all of the potential next of kin.[9] The Appeals Chamber also emphasized that the Trial Chamber retained control over the reparations process.

The Appeals Chamber rejected the argument that the failure to create a means to allow a victim to review a screening-out was unreasonable. The Appeals Chamber held that the Trial Chamber’s three step reparation process gave it control over the screening process and thus the review of the TFV’s

decisions on eligibility, either at the request of the victim or by itself. This meant that the Trial Chamber retained final control on individual eligibility.

The identity of the applicants for reparations

The Appeals Chamber also dealt with a sub-issue about the TFV screening process: the LRV was concerned that the identity of an applicant for individual reparations would be given to the parties including the Defence, which had the right to make representations about entitlement, out of respect for the rights of the parties to the process. The LRV was concerned about the security of the Applicants.

The Appeals Chamber noted that the Trial Chambers ordered that no identity of an Applicant may be transmitted to the TFV or Al Mahdi without consent (presumably this meant that their application would not be processed by the TFV). One of the Trial Chamber's Experts advised against this procedural point. The Appeal Chambers referred to a confidential submission on reparations by the Registrar that stated that the Field mission found serious and well-founded fears for the security of individuals thought to be collaborators with "the foreign power".[10]

The Appeals Chamber concluded that the Trial Chambers had erred in its discretion on this point when it ordered victims to reveal their identity to the Defence as a precondition for entering the TFV screening process. The Rome Statute requires a Trial Chamber to consider the safety of victims and witnesses when ordering redactions, balanced with fair trial concerns. The Rules make revealing the identity of the victims discretionary. The jurisprudence of the Appeals Chamber has provided factors for the balancing: the danger disclosure might cause, least intrusive protective measures, and that protective measures not prejudice the accused's fair trial.[11] Trial Chambers have not provided the identity to the Defence in other reparation cases.[12] The TFV Regulations do not require this disclosure and the Registrar had been providing redacted copies of victim Applications to the Defence. In the view of the Appeals Chamber, the Trial Chamber had exercised its discretion too favourably to the Defence and had not properly listened to the victims on this point. The Appeals Chamber reasoned that the lack of victims' identities would not affect the Defence because his total liability was already set and so granting this information was disproportionate. In other words, the Trial Chambers had not shown why the victims should be put to the choice of their security or reparations. It ruled that disclosure of identities to the Defence was not necessary to participate in the screening. On the other hand, the TFV needed this information, but disclosure of identity was still subject to the victim's consent and reparations would remain contingent on disclosure to the TFV but the information will remain confidential.[13]

Conclusion

The Appeal Chambers decision in this case makes the reparations power more useful to individual victims in a number of ways. War crimes by their nature will involve uncertainty about victims: how many and who they are. By allowing the Trial Chambers to create categories of victims and delegate to the TFV the duty to establish a screening mechanism to maximize the effectiveness of the

reparations process in situations of uncertainty, the Appeals Chamber has recognized the exigencies of the process. The Trial Chamber will have to properly create categories of victims entitled to reparations before delegating, retain ultimate control, such as determining the eligibility of applicants in the screening process either on request of the applicant or on its own initiative.

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References

1. No. ICC-01/12-01/15, March 8, 2018, at https://www.icc-cpi.int/CourtRecords/CR2018_01623.PDF.
2. ICC-01/12-01/15-236, August 17, 2017. See James Hendry, “Reparations for the Destruction of the Precious Past” (2017) 1 PKI Global Just J 10.
3. Para. 24 referring to Prosecutor v. Uhuru Muigai Kenyatta, “Judgment on the Prosecutor’s appeal against Trial Chamber V(B)’s ‘Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute’”, 19 August 2015, ICC-01/09-02/11-1032(OA 5), paras. 22-25.
4. Para. 19.
5. Para. 34, referring to art. 75 of the Rome Statute and rule 97(1).
6. Para. 35.
7. Paras. 36-37, 19 (from a later meeting with the victims in conjunction with the TFV).
8. Para. 62.
9. Para. 66 the Appeals Chamber refers in footnote 179 the to *Mapiripán Massacre v. Colombia*, “Judgment of September 12, 2005 (Merits, Reparations, and Costs)”, 15 September 2005, Series C, no. 134.

10. Para. 84.
11. Para. 90.
12. Para. 91.
13. Para. 96.