

Restoration of protected buildings can never return them to their original brilliance and originality

Trial Chamber VIII of the International Criminal Court in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order of the International Criminal Court of 17 August 2017, ICC-01/12-01/15

Reparations orders are supposed to demonstrate that even though perpetrators have not been punished for damaging protected buildings on the national level, this does not mean that they will not be punished for crimes on the international level.

Olivia Koperska

Gdańsk

olivia.koperska@gmail.com

ORCID: 0000-0002-8342-7629

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Commentary

1. The analysis of the International Criminal Court's judgement, which has inspired the writing of this commentary, requires an outline of the facts on which the reparations order was based. With the judgment of 27 September 2016, Trial Chamber VIII (Chamber) of the International Criminal Court (ICC or Court) convicted Ahmad Al Faqi Al Mahdi of the war crime of attacking protected buildings as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Rome Statute (Statute).¹ After his admission of guilt, the Chamber sentenced Al Mahdi to nine years of imprisonment. The destruction of the protected buildings occurred in Timbuktu, Mali, between approximately 30 June 2012 and 11 July 2012 and the following buildings were either completely destroyed or severely damaged: (i) the Sidi Mahamoud Ben Omar Mohamed Aquit Mausoleum; (ii) the Sheikh Mohamed Mahmoud Al Arawani Mausoleum; (iii) the Sheikh Sidi El Mokhtar Ben Sidi Mouhammad Al Kabir Al Kounti Mausoleum; (iv) the Alpha Moya Mausoleum; (v) the Sheikh Mouhamad El Mikki Mausoleum; (vi) the Sheikh Abdoul Kassim Attouaty

¹ Judgement and Sentence of the International Criminal Court of 27 September 2016, ICC-01/12-01/15-171.

Mausoleum; (vii) the Sheikh Sidi Ahmed Ben Amar Arragadi Mausoleum; (viii) the door of the Sidi Yahia Mosque; and the two mausoleums adjoining the Djingareyber Mosque, namely the (ix) Ahmed Fulane Mausoleum and (x) the Bahaber Babadié Mausoleum. One of the Chamber's appointed experts explained why the protected buildings were so unique was because the city of Timbuktu was inscribed on the UNESCO World Heritage List in 1988 because of its essential role in the early spread of Islam in Africa. Timbuktu also has three great mosques that were restored in the sixteenth century that are of significant historical value.² The protected buildings were regarded as a significant part of the cultural heritage in both Timbuktu and Mali. The community in Timbuktu protected these buildings and performed daily maintenance. The protected buildings were also religious objects, including cemeteries and the sacred shrines of ancestors. At the time of the attack, all cemeteries and all the buildings located within them in Timbuktu were classified as world heritage under the protection of UNESCO. Moreover, after the conflict in Mali broke out, UNESCO included the whole of the city of Timbuktu on the List of World Heritage in danger.³ In justification of the actions undertaken by the ICC, it is worth mentioning that in 2012 the Malian authorities submitted a self-report to the Court providing it with serious allegations of crimes being committed in Mali as of January 2012.

2. After a preliminary examination of this information, the ICC prosecutor eventually decided to initiate pre-trial proceedings since no criminal proceedings in this matter had been initiated under national jurisdiction in Mali. After issuing the judgment, the Chamber set a reparations phase calendar and after almost a year the Chamber received final submissions on reparations. The reparations were received only from the local community of Timbuktu, and no application was submitted solely for the interests of either the national or international communities. On 17 August 2017 under art. 75(1) of the Statute, the Court issued the Reparations Order of International Criminal Court of 17 August 2017 (ICC-01/12-01/15; hereinafter: Reparations Order) concluding that Al Mahdi was liable for €2.7 million in expenses for individual and collective reparations (para. 135 Reparations Order). The Chamber also imposed symbolic fines in amount of €1 for the Malian State and the international community represented by UNESCO (paras. 106, 107 Reparations Order). In accordance with the provision of art. 75(1) of the Statute "the Court shall establish principles relating to reparations (...) including restitution, compensation and rehabilitation (...) Court may determine the scope and extent of any damage, loss and injury (...)"

3. The Chamber distinguished three kinds of harm suffered from the attacks on the protected buildings. First, the Chamber concluded that Al Mahdi was responsible for irreversible damage to the protected buildings. The Chamber considered that the most appropriate way to address the damage would be collective reparations that

² Second Expert Report, ICC-01/12-01/15-214-AnxII-Red2, para. 41.

³ Pre-Trial Chamber I of International Criminal Court of 24 March 2016, ICC-01/12-01/15, para. 36.

further should be tailored individually to each of the protected buildings according to each one's requirements (para. 67 Reparations Order). The Chamber set Al Mahdi's liability for this damage at €97,000 (para. 118 Reparations Order). The destruction of the protected buildings also influenced the daily lives of the inhabitants of Timbuktu, some of who were partially or exclusively dependent on the protected buildings. The attacks deprived them of their livelihoods and the means necessary for life. The Chamber concluded that the Al Mahdi crime caused losses of tourism and economic activity that resulted in economic harm that the Chamber estimated at €2.12 million (para. 128 Reparations Order). The Chamber again considered that, as a general rule, collective reparations would be the most appropriate (para. 82 Reparations Order). Lastly, the Chamber considered the damage to the protected buildings as moral harm to the community of Timbuktu, and also within this scope the Chamber concluded that collective reparations would be the most appropriate (para. 89 Reparations Order). The moral harm was not less important than the economic loss, and, therefore, Al Mahdi's liability was set at €483,000 (para. 133 Reparations Order).

4. The main issue in the case is whether the reparations imposed were adequate to the crime committed. The damage and demolition of the protected buildings was concluded to be a violation of art. 8(2)(e)(iv) of the Statute. This crime was an intentional, direct attack against buildings of significant value to Timbuktu, Mali, and the international community. Furthermore, these buildings were not used for military objectives, so it was not accidental destruction, which would be partially included in military losses. The protected buildings were recognized as religious, educational, historical buildings that were much favored and cherished by the local community. When issuing its reparations order, the Chamber made a fair distinction between the three kinds of harm inflicted and awarded monetary reparations for each of them separately. The Chamber decided to impose a penalty of €97,000 for the damage to the protected buildings based on the report obtained from UNESCO in which it was presented how much was spent on reconstruction. According to UNESCO's report, the actual cost of the restoration work of the protected buildings was about €96,600 (para. 116 Reparations Order). On this point, the Chamber's reasoning was appropriate, as the imposed amount was actually a one-to-one sum. The situation is different with regard to the second kind of harm that was consequential economic loss. The imposed amount of €2.12 million is certainly a significant amount, yet it is still worth going back to the original proposal of the Chamber's appointed experts, who estimated the economic harm to be over €46.6 million. The Chamber noted reasonably that this would be an excessive amount of loss for which Al Mahdi might be held liable. The €44.6 million included losses to another damaged city, Bamako, and the harm suffered by the international community, but this event was beyond the scope of the case.

5. Assessing Al Mahdi's liability for economic loss was most challenging for the Chamber, which had to determine the basis for equitable punishment that would be proportional to the extent of the damage to the protected buildings. The remarkable part

of assessing Al Mahdi's liability is the fact that the Chamber recognized the convicted person's indigence as relevant to the case. This should not be a factor affecting whether reparations are imposed or enforced. If the convicted person's indigence was recognized, then the Chamber would have had to set Al Mahdi's liability to almost zero (para. 113 Reparations Order). However, indigence can affect how reparations are enforced, e.g., by payment in installments (para. 114 Reparations Order). The appointed experts also estimated that economic activity in Timbuktu decreased after the war and the damage to the protected buildings. The Chamber found this to be a reasonable starting point in setting Al Mahdi's liability for economic harm. The reason why tourism decreased in Timbuktu was not only because of the attack on the protected buildings; the decrease was also affected by a number of other factors that were beyond the scope of the case. Eventually, the Chamber set Al Mahdi's liability for consequential economic loss at €2.12 million, which the Chamber considered satisfied the scope of the destruction of the protected buildings. Whether this was really the case and whether this was a sufficient amount of money to cover the economic losses is difficult to determine. The economic loss was nothing more than the economic activity in Timbuktu, which dropped by 10% because of the attack. This happened because tourists were afraid of visiting Timbuktu in wartime. When tourism disappears, many people in numerous branches of business lose their incomes. In the reparations order the Chamber relied upon several decisions on reparations, yet the determining liability system was not indicated. The assessment of liability in this specific scope was actually the Chamber's discretionary decision. Nevertheless, awarding compensation for economic loss or compensation for damage to protected buildings was not surprising, but awarding compensation for moral harm might have been unusual in relation to damage to buildings on an international level.

6. However, the Chamber decided that moral harm should be measured even though the restoration of the buildings could never return them to their original their brilliance and originality since historically authentic features had been lost forever. The Chamber noted that there was not enough information to assess this at the same level as the economic losses (para. 130 Reparations Order). The Chamber sought another benchmark. With the assistance of the appointed experts, they referred to a similar case, in which the compensation awarded for a damaged object was \$23,000.⁴ Subsequently, the experts revised this amount so that the compensation corresponded to the number of the protected buildings and eventually the experts came up with the amount of \$437,000. The Chamber was satisfied with the experts' approach and considered that it would be a justifiable starting point for determining the approximate amount for compensation. The Chamber advised that the amount should be adjusted for inflation and then converted it into euros. The ultimate amount of compensation for moral harm was estimated to be €483,000. It is worth emphasizing one thing here;

⁴ See: Permanent Court of Arbitration in the Hague, Eritrea-Ethiopia Claims Commission, *The State of Eritrea v. The Federal Democratic Republic of Ethiopia*, case number 2001-02.

although the Chamber did not know how to assess liability for moral harm with the amount of evidence gathered, it did note the importance and necessity of determining Al Mahdi's liability for moral harm. While it is straightforward to measure and determine the extent of liability for damaged buildings or the loss of economic benefits, it is more complicated to determine liability for moral harm. It might seem that the Chamber took the easy route as it recalculated the compensation from another case, but with all the evidence that the Chamber gathered, it was the best decision. Even though the compensation for moral harm would not fully compensate for the harm suffered, the Chamber indicated that the modalities of reparations mutually reinforced each other (para. 139 Reparations Order).

7. The fact that collective reparations should prevail over individual reparations was essential for the Chamber in determining Al Mahdi's liability. The Chamber awarded individual compensation only for those whose livelihoods depended on the damaged protected buildings and for those whose ancestors' burial sites were destroyed in the attacks (para. 145 Reparations Order). Except for reparations for those who were the most affected by the attack, the Chamber decided, with respect to the exceptional nature of the protected buildings to award collective reparations in the first place. Since the protected buildings were the heritage of the entire international community, the actions undertaken by the Chamber were justified. Undoubtedly, the reparations order was influenced by the practice of the International Criminal Tribunal for the former Yugoslavia.

8. The destruction of cultural heritage continues to provoke outrage from the international community, and although international law provides ineffective tools to stop these kinds of attacks, rulings such as the one discussed here might contribute to preventing further destruction and discouraging prospective perpetrators. Reparations orders are supposed to demonstrate that even though perpetrators have not been punished on a national level, this does not mean that their crimes will go unpunished on an international level. The intentional destruction of cultural heritage is prohibited by international law today. This provided for, *inter alia*, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict along with the Geneva Conventions of 1949 and their Additional Protocols. In addition to the protection of cultural heritage under international law, the statutes of international criminal tribunals, including ad hoc tribunals, have also provided liability for the destruction of cultural heritage. In Al Mahdi's case, the prosecutor pointed out that the attacks were against historical objects that were places of religious worship and that this affected the entire international community. The decision to bring Al Mahdi's case to the Court proved the great determination of the prosecutor since charges were made based on the violation of one single provision of the Statute. There was no guidance on legal considerations since this is the first judgment of its kind, and the Court had never dealt with such a case before. I respectfully agree with the reasoning of the Court as the Court carefully considered all available information at the time. Certainly, the methods

adopted in this judgment and reparations order will influence future judgments on the protection of cultural heritage.

9. In conclusion, the total amount of the reparations was not only to satisfy the international community for non-pecuniary damages, but it was also meant to be a nuisance to Al Mahdi. Criminal law has other functions to fulfil. For instance, the protective function is prospective as the role of criminal law is to protect legal interests such as life, freedom, health, property, and assets of substantial value. The guarantee function determines which acts are forbidden under penalty and what the rules are of criminal liability. Thus, by assumption, criminal law assures that a person who has not committed a crime will not be held liable. The role of the compensatory function of criminal law has been emphasized for quite some time. The compensatory function is intended to have an impact on the perpetrator and on society while the court is exercising the applicable law. It seems that the Chamber in its ruling was primarily based on the compensatory function of criminal law with an emphasis on protection of society, because, after all, Al Mahdi was sentenced to nine years imprisonment, and his liability was set at €2.7 million. This proves that the Chamber recognized the importance of cultural heritage. There is no doubt that cultural heritage defines communities regardless of their location. Cultural heritage helps communities identify with their past and traditions that have been passed down in them for generations. The demolition of the cultural heritage of the community of Timbuktu was not restricted only to the damage to the protected buildings, it also damaged their identity. Whether the judgment and reparations order will deter others from destroying cultural heritage objects, will definitely be discussed in the future. With all certainty, the Chamber has laid the foundations for further rulings that will not be restricted to the international level.

Summary

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The destruction of cultural heritage continues to outrage the international community, and although the tools of international law are ineffective in stopping such attacks, rulings such as the one discussed in this commentary might provide a chance to prevent further destruction and discourage prospective perpetrators. Reparations orders are supposed to demonstrate that even though the perpetrators have not been punished at the national level, this does not mean that they will not be punished for crimes on the international level. Beyond any doubt, cultural heritage defines communities regardless of location and helps communities identify with their past and traditions that have been passed down in them for generations. In the case discussed below, for the community of Timbuktu the demolition of cultural heritage did not mean only the damage to protected buildings, it also damaged their identity.

Keywords: cultural heritage, International Criminal Court, protected buildings, reparations

Streszczenie

Olivia Koperska

Odbudowa zniszczonych chronionych budynków nie przywróci im nigdy dawnego blasku ani oryginalnego wyglądu

Zniszczenia dziedzictwa kultury wciąż wywołują oburzenie wśród społeczności międzynarodowej i chociaż prawo międzynarodowe jest nieskuteczne w powstrzymaniu takich ataków na obiekty chronione, to komentowane orzeczenie daje szansę i nadzieję na zapobieżenie podobnym atakom w przyszłości. Ma ono na celu zniechęcenie potencjalnych sprawców, a także uświadomienie, że nawet jeśli sprawca nie zostanie pociągnięty do odpowiedzialności na poziomie krajowym, to nie oznacza to, że nie będzie odpowiadać na poziomie międzynarodowym. Nie ulega wątpliwości, że dziedzictwo kultury stanowi tożsamość danego społeczeństwa i pomaga w identyfikowaniu się z przeszłością oraz tradycjami przekazywanymi od pokoleń. Dla społeczności Timbaktu zniszczenie jej dziedzictwa nie oznaczało jedynie zniszczenia chronionych budynków, ale przede wszystkim zniszczenie ich tożsamości.

Słowa kluczowe: dziedzictwo kultury, Międzynarodowy Trybunał Karny, obiekty chronione, odszkodowanie