

The ICC's Reparations Order in *re Al Mahdi* – Three Remarks on Its Relevance for the General Discussion on Reparations

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On 17.8.2017, the International Criminal Court (ICC) issued its reparations order in the case against *Abmad al Faqi al Mahdi*.¹ *Al Mahdi* had been convicted in 2016 for attacking historic and religious, mostly United Nations Educational, Scientific and Cultural Organization (UNESCO)-protected buildings during the armed conflict in Mali 2012. At the reparations stage, the ICC ordered different individual, collective and symbolic reparations. The following remarks focus and comment on three details of the order which may bear relevance for the general discussion on reparations for international law violations in armed conflict situations.²

I. “Activist Judicial Restraint” on the Customary Law Question?

Given its well-defined mandate to try individuals, the ICC cannot be expected to provide authority on the question whether and to what extent *States* are under an obligation to grant reparations to individuals for armed conflict-related international law violations by means of customary international law. A routine passage in the *Al Mahdi* order, in which the ICC makes explicit the legal boundaries of its jurisprudence, nevertheless merits attention: In para. 36, the ICC states that

“the present order does not exonerate States from their separate obligations, under domestic law or international treaties, to provide reparations to their citizens”.

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¹ ICC, *The Prosecutor v. Abmad al Faqi al Mahdi*, Reparations Order of 17.8.2017, ICC-01/12-01/15.

² See for a discussion of some of these and other points also *S. Starrenburg*, EJIL: Talk!, 25.8.2017; *A. Balta/N. Banteka*, *Opinio Juris*, 25.8.2017.

A similar “without-prejudice-clause” is contained in para. 323 of the *Katanga* reparations order of 24.3.2017.³ In neither of these passages, the ICC mentions customary law as among the potential sources of reparations obligations by States towards individuals (which cannot be prejudiced by its order). As it had already done in the *Lubanga* order,⁴ the ICC could have chosen to simply refer to “reparations obligations under domestic and international law”. Such a – neutral – formulation would have mirrored Art. 75 para. 6 Rome Statute (the “legal basis” for the ‘without-prejudice-clauses’).⁵

The ICC’s more specific reference to “treaties” may have different reasons. One could be that the ICC intended to eschew, with a view to Art. 38 para. 1. d.) International Court of Justice (ICJ) Statute, any impression whatsoever that its reparations order could be construed as presupposing the existence of customary law obligations (and corresponding rights of individuals) that States must grant reparations to individuals in regard of certain armed conflict-related international law (i.e. human rights or humanitarian law) violations. Such a (possible) “judicial restraint” with regard to any matter outside the ICC’s mandate might be deemed essential for the Court’s reputation and successful functioning. But the ICC’s over-cautiousness could also have a “soft” negative “quasi-precedential” effect in that it might influence States’ legal analyses when forming a potential *opinio iuris* on reparations law. It might be instrumentalised, in discussions on the sources of reparations obligations, as an ostensible *obiter dictum* against the existence or potential evolution of customary law-based reparations obligations and rights in legal contexts where the existence of such obligations and rights is not unequivocally clear. Hence, the ICC’s specificity at this point could be detrimental to the further development of a more universal law of reparations.

³ ICC, *The Prosecutor v. Germain Katanga*, Reparations Order of 24.3.2017, ICC-01/04-01/07.

⁴ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement on the Appeals against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7.8.2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, 3.3.2015, ICC-01/04-01/06-3129, para. 9 of the Amended Order.

⁵ Likewise, Art. 25 para. 4 Rome Statute refers to international law generally and not only treaty law.

II. Moral Damages: Quantification Quandaries and Inter-Contextual Equality

As mentioned by the ICC in *Al Mahdi*, an obvious and much-discussed trouble spot of moral damages is their quantification.⁶ On the one hand, the calculation of moral damages must do justice to the individual circumstances of the case. On the other hand, a universal understanding of human suffering requires a certain quest for equality in the quantification of the same type of harm suffered in different regional contexts of armed conflict. In the latter sense, the ICC in *Katanga* had de-contextualised the quantification of moral damages from the regional economic background of the affected communities.⁷ Implementing this maxim, the Court had sought orientation from domestic and international case-law on damages granted for different types of harm suffered.⁸ In *Al Mahdi*, the ICC expressly confirmed this approach.⁹ It took the amount awarded in a case of destructed cultural sites decided by the Eritrea Ethiopia Claims Commission as a basis. The ICC thereby ensured (albeit without expressly mentioning inter-contextual equality) that at least with regard to the *starting point* for the quantification of harm, the destruction of cultural sites in Mali was not treated differently, in principle, from the destruction of cultural sites in Eritrea.¹⁰

The ICC's approach was developed in open departure from the European Court of Human Rights' (ECtHR's) jurisprudence, which does take into consideration the local economic situation of the victims.¹¹ Among other things, this disparity could reflect an extended perspective on the rationales of reparations at the ICC in comparison to those at the ECtHR.¹² The latter mainly focusses on individual relief.¹³ For reparations to achieve the same "relieving effect" in comparable cases, the different local economic circumstances should be factored in because the value of a certain sum of money is

⁶ *Al Mahdi* Order (note 1), para. 129; see on the following also *S. Starrenburg* (note 2).

⁷ *Katanga* Order (note 3), para. 189.

⁸ *Katanga* Order (note 3), paras. 227 et seq.

⁹ *Al Mahdi* Order (note 1), para. 43.

¹⁰ *Al Mahdi* Order (note 1), paras. 131 et seq.

¹¹ See *S. Altwicker-Hámori/T. Altwicker/A. Peters*, *Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights*, *ZaöRV* 76 (2016), 1 et seq., 19 et seq., 39, 41 to which the ICC (via a Trust Fund submission) in para. 186 of the *Katanga* order, referred.

¹² See *S. Altwicker-Hámori/T. Altwicker/A. Peters* (note 11), 10, 41.

¹³ *S. Altwicker-Hámori/T. Altwicker/A. Peters* (note 11), 10.

obviously different, depending on the economic context.¹⁴ Reparations at the ICC (including for immaterial damage), by contrast, may serve individual-centred objectives *as well as* – possibly – general societal objectives, including deterrence.¹⁵ (General) deterrence transcends the conflict and situation under review and aims at forestalling future violations of international law in other armed-conflict situations. This *inherently* requires a *de-localised* and *internationalised* approach to the quantification of moral reparations because – simply put – the deterrent effects of “lower” reparations reflecting the economic circumstances of a poor region on possible perpetrators of a comparatively wealthy region will be less incisive.¹⁶ Certainly, calculating reparations with a view to their deterrent effects can be criticised as distracting from the harm suffered by victims.¹⁷ However, factoring in – amongst other aspects – the potential of reparations to *generally* deter international law violations (i.e. also in wealthy States) could also have the effect of pushing up the amounts of awarded reparations in many cases, which would be beneficial for victims.

Perhaps more practically relevant for the ICC, a de-contextualised quantification process – based on cross-referencing and “judicial dialogue” – may bolster the *perceived* legitimacy of international reparations and their communicability to victims: It demonstrates that the international community appraises – in absolute terms – certain types of harm suffered in a generally equal fashion – even if the individual relief effects of a reparation vary, depending on local economic circumstances. Leaving the latter out of the quantification process may also prevent imprecisions and possible disagreement on how to evaluate local economic situations, thereby avoiding, from the outset, possible distortions of the positive effects of reparations. Moreover, reparations should not contribute to a cementation of economic differences between the regions and States. This would, however, inevitably be the case if the poverty or wealth of a region was reflected in the amounts of reparations granted.

¹⁴ S. Altwicker-Hámori/T. Altwicker/A. Peters (note 11), 20.

¹⁵ *Al Mahdi* Order (note 1), para. 28; Amended *Lubanga* Order (note 4), para. 71; *A. Balta/N. Banteka* (note 2).

¹⁶ See *A. Balta/N. Banteka* (note 2).

¹⁷ *A. Balta/N. Banteka* (note 2).

III. Trial Transparency as Reparation

As regards the modalities of reparations, the ICC in *Al Mahdi inter alia* ordered the re-publication of a video and transcript of *Al Mahdi's* apology as recorded during the trial hearing.¹⁸ It thereby generally joined the ranks of other courts such as the Inter-American Court of Human Rights (IACtHR) or the Extraordinary Chambers in the Courts of Cambodia (ECCC) which have both ordered different means of transparency of the original trial as part of (symbolic) reparations orders. This developing international practice holds obvious advantages: Most importantly, by ordering targeted transparency measures as reparations, international courts may bolster and steer the reception of the main trial and judgement in affected communities with a possible transformative effect and thereby provide satisfaction to victims.

Still, questions remain, i.e. as to the truly “reparative” character of such orders, at least in cases where the procedural law of a court already stipulates trial publicity *in any case*. Certainly, there appears to be no rule that reparations (especially of a symbolic nature), must, to be qualified as such, have a constitutive content, i.e. exceed what is in any case granted by law, or, that they must encompass some form of material or symbolic extra for the victims. Nevertheless, reparations which merely repeat or re-order an already existing legal or factual position might have a detrimental effect on the perceived legitimacy and added value of the reparations procedure.

In the case of *Al Mahdi*, the footage containing the apology had in any case and in accordance with the ICC's outreach activities been publicly available since 22.8.2016 on the ICC's YouTube channel. However, possibly in order to avoid the negative effects described above, the court apparently made efforts to construct an (albeit as such not easily graspable) “legal extra” by ordering that an excerpt of the footage containing the apology *must* be published *on the ICC's website*. Arguably, neither the ICC's Statute, Rules (i.e. Rule 15), Regulations (i.e. Regulations 8, 21 sub-regulations 1, 9) nor its Registry Regulations (i.e. Regulations 6, 17 or 41 et seq.) contain an *unequivocal obligation* that hearing footage, let alone edited excerpts thereof, *must* be proactively and always (i.e. not only upon request or special decision) *kept available on the ICC's webpage*. Similar considerations apply to the Court's order that the transcript be made available in the primary languages spoken in Timbuktu – this could be deemed to exceed what is stipulated by Rule 15 sub-rule 1, 2nd sentence ICC Rules (which guarantees

¹⁸ *Al Mahdi* Order (note 1), para. 71.

the public availability of information “on” the case database [generally only] in the working languages of the ICC; this may apply, *a minori ad maius*, to materials contained *in* the records).

Generally speaking, to avoid disappointing the expectations of victims, courts should be particularly cautious and pay special heed to the victims’ opinions when they consider ordering reparations with none or only a limited actual or perceived “extra value” compared to the legal or factual *status quo*. That this is done by the ICC could also be observed in *Katanga*: Here, the victims had expressly deemed a (re-)broadcasting of the original trial inappropriate or futile. Hence, the ICC had refrained from further discussing, let alone ordering any such reparations.¹⁹

¹⁹ See *Katanga* Order (note 3), para. 301.