Reparations for international crimes and the development of a civil dimension of international criminal justice

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REPARATIONS FOR INTERNATIONAL CRIMES AND THE DEVELOPMENT OF A CIVIL DIMENSION OF INTERNATIONAL CRIMINAL JUSTICE

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ABBREVIATIONS

ACHR	American Convention on Human Rights
AC	Appeals Chamber
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECnHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
IACnHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICTs	International Criminal Courts and Tribunals
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
OTP	Office of the Prosecutor
RPE	Rules of Procedure and Evidence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
TFV	Trust Fund for Victims
UN	United Nations

INTRODUCTION

The concept of justice, in all its dimensions[1], is one of the most ancient and complex notions that surround humanity. Yet, crimes and mass atrocities have accompanied mankind from the beginning of times. Criminal conduct has been met with different responses, taking various forms, most of which are claimed to fit within the concept of "justice". Theories of justice have emerged as rationales behind responses to mass crimes, each bearing consequences on the architecture of different legal systems[2].

The search for justice in the context of international crimes and mass human rights violations has gained much attention in international legal scholarship in recent decades[3]. In large part, this scholarship has been underpinned by a conceptual dichotomy between punishment of offenders on the one hand, and reparation[4] for victims on the other: the dominant assumption has been that human rights law encompasses redress for victims of human rights violations[5] while international criminal law has traditionally focused on the

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[1] See e.g. Amartya Sen, "Global Justice: Beyond International Equity", in I. Kaul (ed.), Global Public Goods: International Cooperation in the 21st Century, New York, UNDP, 1999 (for the concept of justice as a global public good). Other guiding works on the notion of justice include: D.D. Raphael, *Concepts of Justice,* Oxford University Press, 2003; Judith N. Shklar, *The Faces of Injustice,* Yale University Press, 1992; John Rawls, *A Theory of Justice*, Harvard University Press, 1971.

[2] See inter alia, Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, pp. 12-17.

[3] See generally, Steven Ratner, Jason Abrams, and James Bischoff, *Accountability for Human Rights Atrocities in International Law: beyond the Nuremberg Legacy*, Oxford University Press, 2009, 3rd ed.; William Driscoll et al., *The International Criminal Court: Global Politics and the Quest for Justice*, International Debate Education Association, 2004. See also, Steven R. Ratner et al., *Accountability for Human Rights Atrocities in International Law*, Oxford University Press, 1997; Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", *European Journal of International Law* 9 (1998), p. 2.

[4] Reparations include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition", see Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 U.N. Doc. A/RES/60/147 (Mar. 21, 2006). See also, ICJ, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo),* Judgment, 30 November 2010, Separate Opinion of Judge Cançado Trindade, paras 209-212. The terms "redress" and "reparation" will be used interchangeably throughout this dissertation.

[5] See Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", 46 *Columbia Journal Of Transnational Law* 351 (2008) (examining the jurisprudence of the Inter-American Court of Human Rights and European Court of Human Rights and noting that human rights mechanisms concern obtaining

criminal liability and the punishment of perpetrators[6]. The dichotomy between criminal dimensions– including the criminal process, prosecution and punishment of the accused – and civil dimensions – including civil remedies and reparations for victims – has traditionally been present in international justice.

Dealing with the aftermath of conflicts and mass victimisation imposes difficult questions regarding the kind of response one ought to give to these crimes. In international criminal law, the guiding notion of justice (as in 'international criminal justice') has undergone a noteworthy refinement process. At its inception, the concept of justice involved the notion of accountability and punishment of the offender. More recently, international criminal law discourse embraces the notion of 'justice for victims' as a goal of international criminal justice[7]. Scholars have claimed that 'justice for victims' is one of the tenets of the international criminal justice enterprise[8]. Similarly, victims were said to be "both the reason for and objective of international criminal justice"[9]. But what is the meaning and scope of "justice for victims" of international crimes, and are criminal prosecution and punishment of perpetrators sufficient to deliver justice for victims?

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reparation from States and not from criminal offenders). See also, Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 2nd ed., 2005.

[6] See generally Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press (2007).

[7] See e.g. ICTY Annual Report to the General Assembly, A/50/365-S/1995/728, 1995, paras. 198-199; *Statement of the ICC Deputy Prosecutor in the opening of the Prosecutor's case in Katanga and Chui*, "ICC Cases and Opportunity for Communities in Ituri to Come Together and Move Forward", ICC-OTP-20080627-PR332), 27 June 2008.

[8] Luke Moffett has recently written extensively on the notion of "justice for victims" and reparations for international crimes. His work has been inspirational for the analysis of this thesis, see *inter alia* Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014; Luke Moffett, "Meaningful and Effective? Considering Victims Interests Through Participation at the International Criminal Court", *Criminal Law Forum*; vol. 26 (2), 2015, 255-289; Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court : Beyond Rhetoric and The Hague", *Journal of International Criminal Justice*, vol. 13 (2), 2015, 281-311; Luke Moffett, "Realising justice for victims before the International Criminal Court", *International Crimes Database*, 2014; Luke Moffett, "Reparative Complementarity : ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court", *International Journal of Human Rights*, vol. 17 (3), 2013, 368-390.

[9] Cited in Emily Haslam, "Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience", in D. McGoldrick (ed.), *The Permanent International Criminal Court*, Hart, 2004, 315-334, p. 316 (statement of former French Minister of Justice Elizabeth Guigou).

New developments in international law, both at the international level and in the domestic sphere, have begun to blur the apparent normative, doctrinal and practical civil/ criminal divide between the prosecution and punishment of individual perpetrators of international crimes on the one hand, and civil remedies including reparation for victims of those crimes, on the other. In relation to international crimes and mass atrocities, this divide has been characterized by the total separation of criminal processes and remedies (pursued in the international plane by international or hybrid criminal tribunals), and civil claims and remedies (pursued *inter alia* through inter-State agreements, mass claims processes, human rights mechanisms or civil claims before domestic courts[10]). Thus the criminal/ civil separation meant that international justice equated with international (or hybrid) criminal tribunals pursuing the criminal process (through the prosecution and eventual punishment of perpetrators), completely divorced of notions of non-criminal claims, such as civil remedies and reparations, and excluding victims redress from the equation.

In the international plane, the advent of the *Rome Statute for the International Criminal Court*[11] brought about a change in the traditional conception of international justice, and in the role of victims therein. More specifically, the Statute provides for the possibility, within the same proceedings in a given case, both for a criminal dimension – investigation, prosecution and the eventual punishment of perpetrators of international crimes[12] (encompassing retribution, accountability and the fight against impunity) - and also a civil dimension – encompassing civil remedies through reparation for victims[13] (embracing the concept of restorative and reparative justice)[14].

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[10] See generally on the topic of reparations, Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, 3rd ed. 2015.

[11] *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 was adopted on July 17, 1998. It came into force on July 1st, 2002 (hereinafter: "Rome Statute" or "ICC Statute") and it established the International Criminal Court (hereinafter: "ICC").

[12] The jurisdiction of the ICC over international crimes is limited to genocide, crimes against humanity, war crimes and the crime of aggression, see Rome Statute, art. 8. The definition of international crimes for the purpose of this thesis is further defined in the 'Introduction'.

[13] See Rome Statute, art. 75. See also, Claude Jorda & Jerome de Hamptinne, "The Status and Role of the Victims", in *The Rome Statute of the International Criminal Court: A Commentary,* Antonio Cassese et al. (ed.), Oxford University Press, 2002, pp. 1387-1388.

[14] For a discussion on the inclusion of this principle within the ICC, see Linda M. Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations", *Thomas Jefferson Law Review* 29 (2006-2007), p. 189. See also, Claude Jorda & Jerome de Hemptinne, *ibid.*

At the domestic level, in additional to civil claims for reparations brought before domestic courts, claims for civil remedies on the basis of the doctrine of universal jurisdiction have also been pursued as an avenue for bridging the gap between the criminal and civil dimensions of justice for international crimes. The scope of the doctrine of universal criminal jurisdiction is still in the process of formation[15], and this development "advances in the face of crimes which affect the 'essence of humanity' and call for repression and justice"[16]. Similarly, while victims' right to reparation for crimes he/she suffered is well-established under international law[17], as will be further discussed in this study, and whereas in most domestic systems, a perpetrator of a crime will often not only be subject to criminal proceedings, but may also face civil action brought by the injured party (through a tort system or another form of civil liability system), the civil dimension of universal jurisdiction is still in early stages of development under international law[18].

Against this backdrop, this dissertation focuses on the development of reparations for victims in international criminal law and thus looks into the emerging civil dimension of international criminal justice. The conception of "civil dimension" in this study includes reparation or redress to victims of international crimes and it is juxtaposed to a criminal dimension in the sense of criminal investigations and prosecutions. This study considers whether international criminal justice should be concerned with a civil dimension concerning reparations for victims. It also asks what features make it a "civil" dimension as opposed to a "criminal" or "public/administrative"? Importantly, it raises questions as to the usefulness and implications of adding a civil dimension to international justice (e.g. burden proof, procedural status, duties of Judges). Ultimately, are we moving towards a blend of the two dimensions in international criminal procedure, or a *sui generis* model

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[15] See e.g. with regard to the realm of crimes for which universal jurisdiction can be exercised: Africa Legal Aid, *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences* (2002), where it is affirmed that, in addition to crimes currently recognised under international law for the application of universal jurisdiction, other crimes having major economic, social, or cultural consequences should also be subject to universal jurisdiction.

[16] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Nijhoff, 2010, p. 385.

[17] See Chapters I and II.

[18] See Donald Francis Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction", *American Journal of International Law* 100 (2006), p. 142. . See also a deeper discussion under chapter 5 of the present study.

altogether? The research also explores how this civil dimension is best shaped and how it should further develop. These questions underlie the whole analysis of this study, and are addressed directly in the chapters of this thesis or implicitly.

To discuss the theme of reparations for victims of international crimes, and related questions described above, this dissertation analyses various systems operating at the national and international levels, as well as their approach to victims' reparation for international crimes. Based on international and domestic experiences, case studies and general criminal law theories, this study provides an original approach to the study of reparation in international criminal law and a fresh analysis of the reparations system at the ICC.

This study frames the analysis on a specific paradigm: individuals versus individuals; that is, it focuses on the development of a duty of individual perpetrators (who are the object of international criminal justice) to give reparations to victims of international crimes. Any other concepts falling outside this paradigm are not the main focus of this study and may only be addressed in passing to support an argument.

The theme underlying this study is particularly broad – reparations for international crimes - and cuts across diverse research questions, methodologies, disciplines, and fields of law. The goal of this study is not to address every single legal question related to the overall theme of reparations for international crimes, and through every singles methodology or angle. Choices had to be made to craft the research and analysis contained in this dissertation, and to give it a unique voice. As such, this project has specific purposes, addresses precise research questions and follows a focused paradigm, as described in the next sections. Many related concepts and issues might have thus been excluded from the scope of this study. Each chapter of this dissertation attempts to contribute to the overall research objectives, and focuses on one (or more) research question(s) that connect through the thematic fabric to address the research aims. In sum, this thesis attempts to engage with the problem statement of the thesis and the research questions, which are further elaborated in the next section; it does not propose answers to all questions referring to reparations to victims, but rather provides a lens through which some of these questions can be examined. The author also acknowledges that this is an area of law in constant development and that the analysis contained in this thesis address the

state of knowledge in the field from one particular angle. Finally, the subject of justice, victimization, and reparation for mass atrocities and heinous crimes is a very sensitive one and present complex dimensions that go beyond the scope of this thesis.

I. RESEARCH QUESTIONS AND CLAIMS

In general terms, the purpose of this research is to inquire into the emerging civil dimension of international criminal law both at national and international levels.

By civil dimension, it is meant the dimension that concerns civil remedies relating to international crimes and more specifically reparation for victims of those crimes. The main distinctions between the "civil" and the "criminal" dimensions for purposes of this study is that a criminal dimension focuses on criminal processes and remedies whereas a civil dimension focuses on reparations for victims.

On further elaboration, underlying this thesis is also the question of whether an individualized approach to reparations for international crimes is always preferable to the state-based approach that has historically existed to deal with reparations for international crimes. In this sense, this dissertation questions whether such an individualized approach to reparations could be a mismatch with the collective nature of international crimes. International criminal law rests on the premise that individuals should be held criminally accountable for international crimes they commit, but should this approach be transposed when it comes to reparations for victims? In other words, should the individualized approach that international criminal law proposes for reparations for victims be adopted, and what is the legal basis for imposing duties of reparations directly on individuals? If international criminal justice is to place a duty of reparation directly on individuals, what is the content of this duty (which may be different from state duties to repair), and how can it be operationalized?

In this vein, this dissertation attempts to examine the following overarching research inquiry:

- ❖ Should international criminal justice be concerned with reparation for victims of international crimes? Specifically, is the blend of civil and criminal dimensions a desirable model in international criminal law, and if so, why?

This overarching research inquiry also presents a number of additional related research questions, which are generally addressed in specific chapters of this study that build upon each other and connect together to provide the analytical fabric of this thesis. The related sub-questions are as follows:

1. What is the legal basis of a legal duty of reparation on individual perpetrators? Is the individualized approach to reparation always better and more progressive than a State-based approach to reparation? Which justice theory(s) can provide the theoretical framework for the development of a civil dimension of international criminal justice? *Chapter one* of this study overviews different theories of justice and how they can inform the civil dimension of international criminal law. This chapter also traces the evolution of different dichotomies the legal duty to provide reparations and the right to reparation: from perspectives of State versus State, to State versus individual, to individual versus individual. This chapter also traces the development of a duty to repair for individual perpetrators alongside States' duty to repair.

2. What is the content and scope of a duty to repair for individuals? To what extent can principles and the case law on the duty of States to provide reparations inform the duty to repair for individuals? *Chapter two* attempts to address these questions through the lens of a case study of the jurisprudence on reparations of the Inter-American Court of Human Rights and how it can inform the development of the content of a duty to repair for individuals.

3. Are international criminal trials compatible with the adjudication and awards of reparation for international crimes? Should international criminal trials encompass a civil dimension for victims? How do different international/hybrid courts and tribunals compare and contrast in regards to reparations for victims? How can the civil dimension of international criminal justice operationalize within the setting of international criminal tribunals?

Chapter three dwells upon the operationalization of the civil dimension of international criminal justice within different international criminal tribunals.

4. Should reparations for international crimes be dealt with by another mechanism, such as an international administrative mechanism (linked with a judicial mechanism)? What role can international administrative mechanisms play in relation to reparations for victims of international crimes? *Chapter four* examines these questions through the lens of the ICC Trust Fund for Victims ("TFV") as a case study.

5. Are domestic courts better placed to deal with reparations for international crimes? What role should domestic courts play in relation to reparations for victims of international crimes? Can the doctrine of universal jurisdiction that may justify domestic prosecution of international crimes include a civil dimension of reparation for victims? *Chapter five* addresses the role of domestic courts in the adjudication and award of reparations through examples and case studies, including a discussion of the principle of universal civil jurisdiction.

This study fits within a wider range of related themes and inquiries concerning victimhood and critical analysis of criminal justice reparations for victims. In pursuing my analysis, I will look at some tangential questions such as: what other effects may adding a civil dimension to international criminal justice have on current trends? For instance, can it counterbalance the prioritization of victims? We currently see that there are certain archetypes of victims, such as children and sexual violence victims, particularly women. Is it proper to differentiate and prioritize and how does the civil dimension of criminal justice influence these dynamics? Further in this vein, some overarching themes present in my analysis concern the collective versus the individual and perceptions/constructions of victimhood.

In discussing the operationalization of this duty of reparation in the international criminal law context, this dissertation also engages with critical scholarship pertaining to the detrimental effects that criminal justice may produce for victims. For instance, although guarantees of non-repetition, the right to reparation and the right to truth may apply to the

ICC as an institution, they may need to be applied in a differentiated manner in concrete trials given that there are competing rights of the defence and the potential of further victimization. This dissertation accordingly dwells upon whether the differentiated application of victims' rights in criminal contexts might ultimately be an argument against mixing criminal with civil processes. This dissertation concludes with a summary of the analysis of the research questions and related inquiries, bringing together the key themes discussed in the different chapters, and offers some recommendations.

Throughout the analysis contained in the dissertation, it is posited that the architecture of international criminal justice cannot be grounded solely on a criminal dimension concerning the trial and punishment of the *offender,* without attaching a role for victims. Such vision of international criminal justice rests upon a synergy of efforts at international and national levels. The chapters of this thesis attempt to reflect on and justify these claims.

II. RESEARCH GOALS

The main purpose of this research project is to launch an inquiry into the emerging civil dimension of international criminal law (which as stated above, in contrast to the criminal dimension, focuses on reparation for victims) both at national and international levels. There may be other aspects of the "civil" dimension, in addition to reparation for victims; however, such aspects are not focus of this study, and will not be dealt with in this dissertation. The ultimate goal of this project is to address how international criminal justice should develop in relation to civil redress for victims of international crimes.

There are two conceptual parameters within this project which guide its direction and inform its analysis: first, this project concerns international criminal law, thus, conceptually, proceedings against *individuals*, and *not* States; secondly, it concerns the *civil* dimension (i.e. reparation/ redress for victims, or "damages" in domestic courts terminology, see further below) of international criminal justice. As such, criminal accountability and criminal prosecutions will not be the main focus of this project. In saying this, it will draw upon the rich literature that exists in this field to inform the analysis herein.

For this purpose, this study will examine, compare and contrast three analytical frameworks for the adjudication of the civil dimensions of international crimes. The analysis starts the first framework from a theoretical and conceptual discussion of theories of justice grounding the right of victims to reparation juxtaposed with the development of a duty of reparation imposed directly on individuals. In order to build the theoretical foundations for the examination that will then follow, it will be necessary to address a theoretical question concerning the dichotomy between criminal punishment and reparation within the notion of justice. I address the relationship between punishment and reparation and their impact on victims, offenders and societies in general, in a theoretical perspective. The theoretical foundation of this thesis is pursued mainly in the first two chapters: *chapter one* discusses theories of justice and inquires upon the legal basis of the duty of reparation for individuals; and *chapter two* discusses the contents of a duty to repair for individuals, as well as the extent to which case law pertaining to the contents of duties to repair for States can be transposed[19].

After this theoretical discussion, the first framework concerns the adjudication of civil claims within the international criminal process and deals with the evolving approaches to reparations before international criminal courts and tribunals. For this purpose, this dissertation studies international criminal justice institutions, not with a view to purely describe each institution but rather to compare their models (i.e. international criminal trials with only a criminal function and the international criminal process encompassing a civil dimension). Thus, *chapter three* addresses the operationalization of duties to repair within the setting of international criminal courts and tribunals.

In the second analytical framework, beginning at *chapter four*, I propose to examine the contribution of administrative mechanisms at the international level, which are linked to legal processes. This will be done through the lens of the Trust Fund for Victims (linked to the ICC), which is a relevant model, to examine whether similar models could be applied in the international criminal law context. In this part, I examine the advantages and disadvantages of concentrating civil redress claims in administrative mechanisms. I will also posit whether a novel administrative mechanism should be created at the international level to deal with civil claims resulting from international crimes.

[19] This inquiry will be carried out through a case study of the experience of the Inter-American Court of Human Rights.

The third analytical framework of this research concerns the civil dimension of international criminal law at the national level and is developed in *chapter five*. It looks at an alternative model for claims for reparations for victims of international crimes: before domestic courts on the basis of an extension of the doctrine of universal civil jurisdiction to encompass civil suits. In this framework, the dissertation examines selected transnational tort litigation that focuses on *individual versus individual* and questions whether a transnational torts litigation model provides an alternative avenue, and discusses a critical perspective on including a civil dimension to universal jurisdiction. In this part, I examine the role that national courts play in the adjudication of civil claims relating to international crimes. I also consider the possibilities that exist for civil litigation pertaining to international crimes within domestic courts.

At the conclusion of this project, I hope to be able to critique a purely criminal function of international justice with respect to international crimes. In this manner, I hope to be able to sustain the claim that international criminal justice should encompass a civil dimension in addition to its criminal function. Nevertheless, it may be pondered that the focus for the progressive development of this civil dimension should be on the building of a stronger domestic civil litigation framework pertaining to reparation for international crimes, and further development (or empowerment) of international administrative mechanisms linked to legal processes. This study differentiates between post-conflict context, armed conflict context, and peace time context in the conclusion.

In sum, the research goals are to analyse and critique a purely criminal function of international criminal justice and examine possibilities of a greater emphasis on victim reparation for international crimes through alternative avenues such as national courts and administrative mechanisms entertaining civil claims pertaining to international crimes.

III. METHODOLOGY AND ANALYTICAL FRAMEWORKS

This study applies a number of methodologies in analysing the research questions. Overall, this dissertation uses descriptive, theoretical, comparative and normative approaches to examine the research questions and propose different paths in which international criminal justice should develop as regards reparations for victims of international crimes.

More specifically, the present study first relies on descriptive and theoretical methodologies to examine theories of justice and the role of reparation in criminal justice systems. It also relies on a doctrinal analysis of the right to reparation and the legal basis of a duty of reparation imposed on individuals in international criminal law. Then, descriptive and comparative methodologies are employed to compare and contrast the models of justice devised by different international criminal tribunals and the approach to reparations for international crimes taken by domestic systems at the national level.

To analyse the research questions proposed above, and in line with the research goals herein described, this project is organized and divided into three analytical frameworks as already outlined above. The frameworks contribute to the overall aim of the project which, as stated above, consists of examining the civil dimension of international criminal justice. While a more complete description of each chapter is provided below, the three main frameworks are:

1) *Civil dimension of international criminal justice within the international criminal process:* After discussing the legal basis and the contents of a legal duty to repair imposed on individuals, this analytical framework examines the approach of different international criminal jurisdictions on a spectrum view in relation to their approach to victims' reparation. In this view, this study focuses on the permanent International Criminal Court, the *ad hoc* international criminal tribunals (for the former Yugoslavia and Rwanda), the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), and other hybrid mechanisms. This analytical framework compares and contrasts the ways in which each of the criminal jurisdictions analysed treats the question of victim reparation, from a minimalist approach, at one end of the spectrum, to an approach where victims have a right to reparation within the process, at the other end of the spectrum.

2) *Civil dimension of international criminal justice as part of administrative procedures linked to legal processes:* The second analytical framework on which this study focuses refers to claiming reparation for international crimes as part of administrative procedures linked with judicial processes. In this regard, it uses the primary example of the Trust Funds for Victims at the ICC as a case-study. The purpose of this analytical framework is to examine the pioneering mechanism of the Trust Fund linked to the ICC judicial

procedures and to assess whether this is a normatively compelling way forward in the pursuit of reparations for victims of international crimes. This analytical framework will be specific in that it is focused on the Trust Fund for Victims as a case-study, but it will also serve as a window into broader questions.

3) *Civil dimension of international criminal law in domestic civil litigation of international crimes:* In this analytical framework, the study will examine the role of domestic courts in the award of reparations for victims of domestic crimes. In this respect, the present research first looks into the architecture of the two main legal systems by which one may seek reparations for international crimes (i.e. only in civil proceedings or also as part of criminal proceedings) and the role of victims in each model. It then focuses on a case study of national courts and mechanisms in Bosnia and Herzegovina, in the aftermath of the Balkans war, to analyse the potential role of national courts in reparations proceedings. It also looks into the concept of universal civil jurisdiction as a means to counter the jurisdictional challenges of bringing claims of reparations in domestic courts.

IV. DEFINITION OF KEY TERMS AND SCOPE OF DISSERTATION

It is important to explain and define some key concepts and terms on which the thesis is premised that surface throughout the project. As already explained, this research is concerned solely with reparations in international criminal law, which in this study is articulated through the lens of the "civil dimension of international criminal justice".

1. Key concepts

1. ***"Civil dimension"*** in this project is juxtaposed to criminal dimension and includes: civil liability of the accused, as opposed to criminal liability, reparation for victims of international crimes, as opposed to criminal mechanisms aimed at the investigation, prosecution and punishment of accused persons. It encompasses the concepts of redress or reparation[20], including the procedures regarding reparation (i.e. civil litigation, civil proceedings, etc.). Importantly, "civil dimension" is broader than only reparations; however this dissertation is focused on the reparations aspect of a civil dimension" of international justice; thus other aspects that may fall under a civil dimension

[20] See below discussion of reparations for the purpose of this study.

of international justice are outside the scope of this study. "Civil dimension" is a lens through which this dissertation looks at the question of reparations in international criminal justice.

The terms "civil redress", "reparation" and "redress" are used interchangeably in this project. Throughout this dissertation, this central concept will underpin discussions be further elaborated upon and developed. The features that make the "civil" dimension are the focus on reparation and civil claims rather than criminal processes and remedies, and the process by which victims can claim reparations for international crimes perpetrated by individuals.

Why does this distinction matter in the context of this study? The analysis in this study concerns reparations for victims within international criminal justice, and through the inclusion of reparation in international criminal justice, there comes a development of a civil dimension alongside a criminal dimension of international criminal justice. In other words, the question of reparation adds a new layer in international justice, one that this study treats as a "civil dimension". The distinction between a civil and a criminal dimension is useful when juxtaposing the types of process, the burden of proof, the duties of the judges, the remedies, the enforcement of remedies, and the role of victims and the accused. The civil dimension will be treated in this study through three different frameworks: before international courts (with the ICC as the primary example), through administrative mechanisms (the ICC Trust fund for Victims will be the focus of the analysis) and before national courts.

2. ***"International crimes"*** in this project refers to the core crimes defined in the ICC Statute, that is: genocide, war crimes and crimes against humanity. This study does not focus on torture[21] as it does not have the collective dimension of the international crimes and is not an independent crime as such recognized by the ICC. Transnational crimes[22] as

[21] See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85.

[22] Transnational crime is understood as "offences whose inception, prevention and/or direct or indirect effects involved more than one country", UN Doc. A.CONF. 169/15/Add.1 (1995). The crimes listed in the UN document include *inter alia*: money laundering, terrorist activities, theft of art and cultural objects, theft of intellectual property, illicit arms trafficking, aircraft hijacking, sea piracy, insurance fraud, computer crime, environmental crime, trafficking in persons, trade in human body parts, illicit drug trafficking, fraudulent bankruptcy, infiltration of legal business, corruption and bribery of public or party officials. See also, Neil Boister & Robert J. Currie, *Routledge Handbook of Transnational Criminal Law*, Routledge, 2014; Philip Reichel & Jay S.

well as aggression are also excluded as different rules and regimes apply to them. This study proceeds on the basis of the conscious decision to focus on international crimes, acknowledging that such analysis is limited and inherently selective, leaving out many other mass atrocities and human rights violations that do not fall within the definition of international crimes.

3. ***"International criminal law"*** and ***"international criminal justice"*** are treated as, respectively, a doctrine and system; and therefore are not limited to the examination of one particular institution (e.g. the ICC). Rather, they encompass the fabric of numerous procedures, institutions and mechanisms which address international criminal conduct and reparation thereof. This study encompasses the civil dimension of both international criminal law and international criminal justice.

4. ***"Victims"*** in the context of this project means: victims of international crimes (see definition of international crimes above). This concept is further elaborated in the dissertation (e.g. definition of victims, direct and indirect victims). The project takes a broad approach to the meaning of victims and goes beyond the definition of victim within one specific institution or framework (e.g. the concept of victim in the ICC).

5. ***"Reparations"*** include: "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"[23]. The focus of this study is on the right to reparation, and a corresponding legal duty to reparation. While this study will not discuss the right to remedy, such right includes: "(*a*) Equal and effective access to justice; (*b*) Adequate, effective and prompt reparation for harm suffered; (*c*) Access to relevant information concerning violations and reparation mechanisms"[24].

6. ***"Justice for victims"*** is widely referred to in this study. The aim of this dissertation is not to provide a conclusive definition of justice for victims of international crimes, or how to attain it. The notion of justice for victims in the aftermath of

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Albanese, *Handbook of Transnational Crime and Justice*, Sage Publications, 2nd ed., 2014.

[23] *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* G.A. Res. 60/147 U.N. Doc. A/RES/60/147 (March 21, 2006) ("Basic Principles"), Article 18.

[24] *Ibid.,* Article 11.

international crimes is complex and open to debate as to its scope. It is acknowledged that justice for victims encompasses much more than reparations[25]. This notion is used in the present dissertation in a limited way, linked solely to reparations.

2. Exclusions from the scope of this study

In addition to defining key concepts and terms, it is also important to delineate the scope of the research and analysis in the thesis, and to establish what is *excluded* from the scope of the dissertation and the reasons for such exclusions. It is important to note at the outset that the law in this field is very fluid; this dissertation takes into account key developments in law and jurisprudence, that are important to develop this study, up to beginning of October 2016. Conceptual exclusions from this study include:

a) State responsibility:

This project concerns civil dimensions of international criminal law, thus, State responsibility is conceptually excluded as international criminal law does not concern the responsibility of States, but rather of individuals. This study examines individual *civil* liability towards victims of international crimes. Although the study does refer to State responsibility in the first part concerning theoretical dimensions, this will be done purely in a complementary, informative and comparative manner without it being the main focus of the study. State responsibility will be looked at in order to assess whether an individualized approach to a civil dimension (i.e. seeking reparations from individuals rather than the State) is well-suited for international criminal justice and dealing with redress for international crimes. It also examines to what extent principles and case law on State responsibility for reparation can inform the content of an individual legal duty to repair.

b) International/regional human rights mechanisms:

Similarly, because they deal with *State* responsibility for *human rights* violations (as opposed to a focus on international crimes), and have a different set of rules, the detailed study of human rights mechanisms is outside the scope of this research project. This project overviews the jurisprudence of a regional human rights court purely to inform the analysis of principles of reparation in international criminal law.

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[25] For an excellent study of the conceptualization of justice for victims of international crimes, see Luke Moffett, *Justice for Victims before the International Criminal Court,* Routledge, 2014.

c) Domestic (transnational) human rights litigation:

In a similar vein, the focus of this project will not be on all (transnational) human rights civil litigation in domestic courts. Although some civil litigation of this nature may be referenced to inform the analysis of the civil dimensions of international criminal law at the domestic level, the focus will primarily centre on the possibilities of civil redress for international crimes (and not for all kinds of human rights violations) in domestic proceedings.

d) Truth and reconciliation commissions:

The focus of this study is on legal processes. Truth and reconciliation mechanisms are not usually based on legal processes. Moreover, they are distinct mechanisms to international criminal law in dealing with the aftermath of armed conflicts. Studying truth and reconciliation commissions would shift the focus away from the study of international criminal justice, which is the main theme of the research project.

e) Mass claims and processes:

This project does not focus on mass claims and processes as they relate to State responsibility for international crimes and they are based on a different paradigm: State versus individual or State versus State.

V. APPROACH AND CONTRIBUTION TO LEGAL SCHOLARSHIP

With this research project, I hope to engage in the ongoing academic dialogue about developing trends in this field and to be able to contribute an informative analysis to the development of scholarship in this area. This study wishes to contribute to existing legal scholarship by engaging in a broader analysis of whether international criminal justice should encompass a civil dimension and how reparations for victims should develop in international criminal justice. This dissertation surveyed and was informed by a number of significant studies concerning reparations for victims of international crimes which have been both influential and inspiring[26]. The present study builds upon seminal pieces in the

[26] Influential studies that have guided and informed the analysis contained in this dissertation include, *inter alia,* Luke Moffett, *Justice for Victims before the International Criminal* Court, Routledge, 2014 (analysing the ICC system of reparation through the creation of a theory of justice for victims and drawing on field research); Brianne McGonigle Eyh, *Procedural Justice? Victims*

field and proposes an analysis of the question of reparations for international crimes from a broader perspective, one that takes into account three frameworks, rather than focusing solely on the system at the ICC. As such, the present study both contributes to scholarly discussions in the field as well as adds a new parameter to such discussions.

It is submitted that a study focused on reparation within international criminal law as a doctrine (rather than focusing only on the ICC, for example) is an important addition to existing scholarship in this field, and is of great theoretical and practical relevance in light of recent developments in international criminal law. This project aims to provide an informative fresh analysis on the role of reparations at the ICC. I believe the contribution of this project lies in the fact that it takes a step back and questions the inclusion of civil redress within international criminal justice from doctrinal and normative frameworks within the broader inquiry as to what the goals of international criminal justice are and how it should develop. In this sense, the contribution of this project relies both on its specificity, and the fact that it is a gateway to broader questions.

The originality of this project may well lie first in the fact that most previous studies dealing with similar questions of reparations for international crimes were mostly theoretical concerning the award of reparation in international criminal law. This study looks at the development of reparation decisions in practice and critically assesses the outcome against a theoretical discussion. Furthermore, the project is original in its proposal to study reparations within international criminal law at the broader international (including the ICC, but also other courts and tribunals within international criminal law) and national levels (by the study of how the application of international criminal law should develop at the national level).

Participation in International Criminal Proceedings, Intersentia, 2011 (focusing on procedural justice analysed through the lens of victim participation at the ICC); Eva Dwertmann, *The Reparation System of the International Criminal Court,* (Martinus Nijhoff, 2010) and Connor McCarthy, *Reparations and Victim Support in the International Criminal Court,* Cambridge University Press, 2012 (both analysing the ICC system of reparation); Ernesto Kiza, Corene Rathgeber, and Holger Rohne, *Victims of War: War-Victimization and Victims' Attitudes towards Addressing Atrocities*, Hamburger Edition, 2006 (analysing empirical data from a survey of 991 victims of international crimes on their views of justice); Thorsten Bonacker and Christoph Johannes Maria Safferling, *Victims of International Crimes: An Interdisciplinary Discourse*, Intersentia, 2013.

One of the challenges of this project is the fact that the conceptual and empirical bases of this study are currently under development. This is however also one of its highlights: this is a timely project which sets itself apart from previous studies undertaken when reparation was still an ideological endeavour in international criminal law, or where the ICC had not yet delivered any concrete decisions against which to assess the system.

The bigger challenge however is the richness of the topic of reparations and its interconnectedness with other topics and areas of law which make a focused analysis difficult. This study attempts to provide a discussion that has pulled out some aspects of the theme of reparations as defined by the research questions. It is not meant to be an exhaustive discussion of reparations for international crimes and some selections and exclusions were inherently necessary.

With this study, I hope to engage in the rich academic debate that already exists concerning questions of the development of international criminal justice. this dissertation acknowledges that the topics of mass victimization and reparations are very complex and sensitive. The analysis and recommendations contained in this study are made with the utmost respect for victims and their suffering. This study has trailed with the caution that is warranted by the topic. This study does not purport to be a revolutionary analysis of the theme; rather more humbly, it aims to add to existing voices, by presenting a perspective which the author hopes to be useful for reflection on such a complex and important topic, which is also close to the author's heart. With this dissertation the author pays tribute to the victims who have suffered due to international crimes and mass human rights violations.

CHAPTER 1: PUNISHMENT AND REPARATION: CONSTRUING THE LEGAL BASIS OF A DUTY TO REPAIR FOR INDIVIDUAL PERPETRATORS

This study starts with a theoretical inquiry into theories of justice, victim reparation and punishment. This chapter will lay the foundation for the study of reparations in international criminal justice. In this light, this chapter examines how justice theories – mainly retributive and restorative/reparative justice theories – have provided some bases for the architecture of international criminal law and justice[27].

The aim of this chapter is to provide an overview of justice theories relevant to the study of international criminal law, from its inception to its contemporary application. Additionally, the theoretical dichotomy of punishment and reparation will be considered in relation to the criminal and civil dimensions of international criminal justice.

This chapter also sets out some theoretical foundations that will guide the examination of central questions of this study. As such, this chapter attempts to answer the following research sub-questions:

- Which justice theories provide the theoretical framework for the civil dimension of international criminal justice?
- What is the legal basis of a legal duty of reparation on individual perpetrators?
- Is the individualized approach to reparation always better and more progressive than a State-based approach to reparation?

This chapter will start addressing the above questions by overviewing different theories of justice and how they can inform the civil dimension of international criminal justice. This chapter also traces the evolution of the development of the right to reparation under international law and different dichotomies in relation to the duty and the right to reparation: starting from a relationship between States, to State versus individual, to individual versus individual. This chapter also examines the development of the duty to repair for individual perpetrators alongside States' duty to repair. Furthermore, this chapter

[27] The purpose of this chapter is not to provide a thorough analysis of different theories of justice, but rather to trace the genesis and evolution of international criminal justice through the prism of how principles of different theories of justice shape international criminal justice.

also discusses the different dimensions of reparations and whether the adoption of an individualized approach to reparations (as opposed to a State-based approach) is desirable, and if so, whether there is a legal basis for such a duty.

This chapter starts by looking at punishment and reparation through an analysis of the interplay between retributive and restorative or reparative justice theories[28]. Importantly, these main justice theories bear relevance to the shaping of international criminal law, from its inception to its contemporary form. I then examine the different duties and rights in relation to reparation for international crimes: the State's duty to repair, the development of an individual right to reparation and the construction of an individual duty to repair.

I. A THEORETICAL INQUIRY INTO PUNISHMENT AND REPARATION: AN OVERVIEW OF RETRIBUTIVE AND RESTORATIVE JUSTICE THEORIES

In order to understand how punishment of the offender and reparations for victims of international crimes fit into the fabric of modern international criminal justice, and how the latter is shaped by different justice theories, one needs to first discuss justice theories that inform international criminal law.

As is widely known, the aftermath of international crimes can be dealt with in different forms of post-conflict justice, for example, with criminal trials, truth and reconciliation processes, amnesties, and peace accords (which often have a provision for State-based reparations)[29].

In contrast to other responses to mass atrocities, punishment and retributive justice theory have provided an important model for international criminal justice. Responding to

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[28] For an excellent account of these two theories in criminal law, see Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?", *The Modern Law Review* 57 (1994), pp. 228-250.

[29] This important question goes beyond the scope of this chapter. See generally on this topic, Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court", *European Journal of International Law* 14 (2003), p. 3; Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet", *Emory Law Journal* 49 (2000), p. 205; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, 1998.

criminal conduct with criminal prosecution represents a commitment to the rule of law and the recognition that alleged perpetrators should be held accountable for their crimes[30]. International criminal trials represent an opportunity to seek the truth, they generate a historical account of events, they produce retribution for criminal conduct, and they may provide deterrence[31]. Furthermore, punishment and international criminal trials may also be seen in the light of their expressive roles[32].

1. Crime and punishment

There are a few different rationales that underpin the idea of punishment as a response to criminal conduct. It is often claimed that punishment may deter future criminal conduct. Members of a given society, knowing that a certain conduct entails a given punishment, might abstain from pursuing that conduct. This idea finds support in the writings of authors throughout the centuries, among whom Plato, who stated that "…he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again. He punishes for the sake of prevention"[33]. As such, inflicting punishment in relation to a given criminal conduct can be regarded as a way to prevent future crimes. In modern international criminal justice, this deterrent role is often debatable as some scholars question whether international criminal law as applied by international courts actually has a deterrent role[34].

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[30] Martha Minow, *ibid.*, p. 25.

[31] But see Brianne N. McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Retorative Justice Principles", *Leiden Journal of International Law* 22 (2009), p. 129, who claims that there is no empirical evidence that criminal trials have a deterrent effect. See also generally, Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95 (2001), p 12.

[32] See generally in this regard, Anthony Duff, "Authority and Responsibility in International Criminal Law" in *The Philosophy of International Law*, Samantha Besson & John Tasioulas, Oxford University Press, 2010; Bill Wringe, "Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment", *Law and Philosophy* 25 (2006), p. 159.

[33] Plato, "Protagoras", in *Works of Plato*,Irwin Edman, The Modern Library,1956, pp. 193, 211, 12.

[34] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), p.12; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", *American Journal of International Law* 95 (2001).

In the same vein, another theoretical justification for punishment as a response to criminal conduct is the rehabilitation of the criminal; the proponents of this justification focus on punishment for the *criminal,* as opposed to a focus on the *crime*[35]. The goal of punishment, so the theory goes, is to effect a change in the behaviour of the criminal so as to decrease the likelihood of the commission of a crime in the future[36]. In this sense, it is based on the premise that punishment can change behaviour. For Hart, "announcing certain standards of behavior and attaching penalties for deviating … [leaves] individuals to choose. This is a method of social control which maximizes individual freedom within the framework of the law"[37].

A further theoretical rationalization of punishment is retribution[38]. Responding to international crimes with criminal trials and punishment follows the model of retributive justice theory. In classical retributive justice theory, a crime is responded to by punishing the perpetrator in a way that is proportional to the crime committed. The focus in this kind of response is not on the individual victim(s); the crime is seen to have been committed against the State as a whole. A crime is first and foremost a violation of a law, a legal norm enacted by the State. The affected community and the victim are represented by the State.

Retributive theorists' view of punishment is that it produces a proper response to crime because it "cancels out" the crime, restoring the proper balance in society[39]. To Kant, punishment

> "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime.* For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality"[40].

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[35] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 49.

[36] George Whitecross Patton, *A Textbook of Jurisprudence*, George Whitecross Patton & David P. Derham (4th ed.), Clarendon Press, 1972, p. 360.

[37] H.L.A. Hart, *Punishment and Responsibility*, Clarendon Press, 1968, p. 23.

[38] Anthony Platt, "The Meaning of Punishment", *Issues in Criminology* 2 (1966), p.79.

[39] David Dolinko, "Punishment" in *The Oxford Handbook of Philosophy of Criminal Law,* John Deigh & David Dolinko, Oxford University Press, 2011, p. 406.

[40] Immanuel Kant, *The Metaphysics of Morals*, translation by Mary Gregor, Cambridge University Press, 1996, p. 105.

In this light, the focus of retributive justice theory is on finding guilt and imposing blame. The offender is seen as a danger to society as a whole. As such, the offender is believed to deserve punishment once guilt is found, and is often times taken out of society. This kind of justice is based on the premise that punishment is an effective response to a crime.

Retribution theory has a long history. Retributive justice is illustrated in the *lex talioni,* where reciprocity should equate the crime committed. In ancient history, the Code of Hamurabi recognized retributive justice. Retribution has been a form of justice for centuries ever since. As a consequence of the centralization of the State, sustained attention was given to the punishment of the offender and retribution, which brought about a proliferation of criminal codes and penalties[41]. The focus on retribution, and the marginalised role of victims in the administration of justice lasted until the end of the eighteenth century. It was at this time that victims began playing a more active role in the administration of justice[42].

Retribution, from the inception of international criminal law in the XXth century, has been a leading justification for punishment of offenders in international law[43]. As one author has put it "[r]etribution, …, though not historically a significant part of the evolutionary trends of international criminal law, was a definite component of at least the punishments awarded by the International Military Tribunal at Nuremberg"[44]. The idea of fighting impunity, which is symbolic of international criminal justice and the establishment of international and *ad hoc* criminal tribunals, speaks to the justification of punishment as a form of retribution.

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[41] Ilaria Bottigliero, Redress for Victims of Crimes under International Law, Nijhoff, 2004, p. 24.

[42] Lucia Zedner, "England", in *Reparation in Criminal Law: International Perspectives*, Albin Eser & Susanne Walther (vol. 1), Iuscrim, Max-Planck Institute Für Ausländisches und International Strafrecht, 1996, pp.109-227.

[43] For thorough review of the goals and functions of punishment in international criminal law, see Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007.

[44] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 55.

It can be argued that at a moment of global recovery following the horrors of the war, an international criminal trial pours the rule of law back again in the international legal order. Setting up an international tribunal to try and punish the alleged offenders re-establishes law and order in a world devastated by war. At the end of the Second World War, when the world became aware of the atrocities that were committed by Nazi forces, something needed to be done against those who perpetrated acts that shocked the conscience of humankind. One of the most famous statements emanating from the Nuremberg trials refers specifically to the idea that those crimes could not go unpunished due to the their nature and level of gravity: "… by punishing individuals who commit such crimes can the provisions of international law be enforced"[45].

Be that as it may, retribution is not the only justification for trying and punishing criminals. One of the claimed underlying rationales for punishment of offenders in international criminal law is deterrence[46]. If a criminal is punished, as the theory goes, others will know that act is wrongful under international law which entails consequences, thus deterring others from taking the same course of action. Deterrence and prevention of future crimes seem to have been justifications for inflicting punishment on those found responsible for the crimes committed by Nazi Germany[47]. This is illustrated by the famous statement of Justice Jackson: "It is high time that we act on the juridical principles that aggressive war-making is illegal and criminal … so as to make war less attractive to those who have governments and the destinies of people in their power"[48].

Punishment is said to aide in the maintenance of the international legal order[49]. One author has posited in regard to this justification for punishment that "[j]ust as the general welfare of citizens and the supreme need for maintaining the social order in the domestic

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[45] *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

[46] See generally, Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), pp. 48 et seq.

[47] *Ibid.* at p. 50.

[48] *Report to the President by Mr. Justice Jackson*, 6 June 1945, "International Conference on Military Trials", pp. 42, 52-53. See also, Robert Jackson, *The Case against the Nazi War Criminals*, Alfred A. Knopf, Inc., 1946.

[49] See generally, Cesare Beccaria cited in Elio Monachesi, "Pioneers in Criminology IX: Cesare Beccaria (1738-1794)", *Journal of Criminal Law, Criminology & Political Science* 46 (1955), p. 445.

scene are considered paramount, the need for ensuring the sanctity of the most fundamental values of the international community also demands that potential violators be forewarned from committing breaches of the international legal order"[50].

In the international legal order, where there are no central enforcing institutions or agencies, punishment could be seen as a manner in which international rules are enforced. This said, it is difficult to grasp precisely whether international criminal law and the punishment with which individual perpetrators are being sentenced actually fulfil the role of retribution or deterrence. There is a growing debate as to whether punishment of individuals actually contributes to the prevention of future crimes[51]. It is also premature at this point of international criminal justice to understand whether, and if so how, punishment can influence and modify individuals' conduct.

As international criminal law developed, however, retribution began to lose its importance as a justification for inflicting punishment on offenders[52]. Whether or not punishment can truly promote deterrence in relation to international crimes cannot yet be fully assessed. Many claim that international criminal law (and punishment) is not producing the magnificent effect that its proponents were hoping for[53].

Given the less important role of retribution as a justification for punishment in this context, it is understandable how victim redress could make its way into international criminal law. In a framework where reparation does not take the form of punitive damages, but rather comes from the concern with victims' justice, it is difficult to reconcile how reparation for victims would contribute to retributive justice theory[54]. Retribution provides

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[50] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 56.

[51] See generally, David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), pp. 473, 488; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", *American Journal of International Law* 95 (2001).

[52] See generally, Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 56.

[53] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), pp. 473, 488.

[54] On the question of the dichotomy between reparation and retribution, see Charles F. Abel & Frank H. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the*

no justification for including reparation within the realm of international criminal law remedies. Reparations in international criminal law are not equated to punishment; they are not punitive in nature. This is confirmed, at least within the ICC framework, by the negotiating history of the Rome Statute and the reparation provisions within the Statute[55].

Beyond the issue of the driving rationale for including reparation within international criminal justice, an interesting question is whether reparation could contribute to the main goals with which trial and punishment are concerned, that is, prevention and deterrence, thus reinforcing its role in international criminal law[56].

The relationship between reparation and deterrence is closely linked with the forms of reparation that can be awarded within the realm of international criminal justice and the involvement of the offender in the reparation process. If reparation is pursued as compensation through a sum of money from the accused, this may provide a degree of deterrence similar to that of criminal liability - the possibility of having to face a criminal trial as well as having to pay compensation for the victims may deter individuals from committing a crime.

Perhaps, however, the most significant way in which reparation or victim redress may impact the prevention of future atrocities can be evaluated in a more holistic way. The integration of victims' concerns in the international criminal justice process may affect the way in which criminal conduct is dealt with. Including victims in the process, and

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Criminal, Greenwood Press, 1984; Ezzat A. Fattah, "From a Guilt Orientation to a Consequence Orientation: A Proposed New Paradigm for the Criminal Law in the 21st Century", in *Beitraege zur Rechtswissenschaft*, Wilfried Küper & Jürgen Welp, C.F. Mueller Juristischer Verlag, 1993, pp. 771- 792. See also, David Watson et al., "Reparation for Retributivists", in *Mediation and Criminal Justice: Victims, Offenders and Community*, Martin Wright & Burt Galaway, Sage Publications, 1989, cited in Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?", *Modern Law Review 57* (1994), p. 228.

[55] See on this point, Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), pp. 361-362.

[56] In this chapter, I do not intend to dwell on the following questions: whether reparation for victims within international criminal proceedings, and at the ICC as its main example, is compatible with the traditional goals of international criminal justice, whether it is appropriate and how it should develop. These are questions that will be addressed in the following chapters of this study. The inquiry at this juncture fits within the broader discussion of theories of justification for punishment in international criminal justice.

implementing reparation-based awards (i.e. where the offender will have to face the victim and respond to his/her actions), as opposed to treating crime as a public matter, might contribute to the preventive effect that punishment is intended to have.

Thus, looking solely through the retributive justice lens, international criminal justice would have a purely criminal dimension, focusing mainly on the perpetrator, the crime, and the degree of punishment. A civil dimension, that is, a dimension which includes reparation for victims, does not fit within this paradigm. Thus, including a civil dimension in international criminal justice requires another theoretical underpinning.

2. Victims, reparation and restorative justice theory

Similar to retributive justice, restorative justice has been known to many civilizations. Since the Roman law period, there were possibilities for remedies for a wrongful conduct[57]. The shift to retribution as a way to respond to criminal conduct seems to have occurred between the 12th and 13th centuries. When a wrongful act was committed against the State, retribution demanded that the interests of society as a whole be emphasized above and beyond those of individual victims.

Restorative justice[58], to the contrary of retributive justice, focuses on the needs of victims and seeks to provide forms of redress. It is concerned with bringing victims and offenders together. The perpetrator is encouraged to make amends and repair the harm caused to the victim. Thus, restorative justice has a distinct forward-looking approach.

John Braithwaite, a leading author in restorative justice theory, has defined restorative justice as:

> "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It

[57] Arlette Lebigre, Quelques Aspects de la Responsabilité Pénale en Droit Romain Classique, Presses Universitaires de France, 1967.

[58] See e.g. Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", *International Journal of Transitional Justice* 3 (2009).

follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process"[59].

As far as reparations are concerned, it has been noted that "[restorative justice] places particular emphasis on the principles and aims of human dignity, strong relationships and morality [which] allows a more holistic approach to reparations", to the extent that "restorative justice provides a persuasive theoretical rationale for reparations"[60].

An important concern of restorative justice is whether the criminal justice process addresses the full complexity of the criminal conduct. Under this theory, criminal conduct is not a wrong committed against some abstract community but instead, should be dealt with as a dispute between the offender and the victim[61].

In this light, reparations to victims of international crimes are more in line with the premises of restorative justice. The question that remains is whether a blend of retributive and restorative justice theories makes sense in international criminal law. Similarly, the leading question of this study is whether a mixture of criminal and civil dimensions, and thus influences from diverse justice theories, is desirable in international criminal justice. These are the inquiries I turn to in the following sections.

II. THE GENESIS OF INTERNATIONAL CRIMINAL LAW AND THE SHIFT FROM STATE RESPONSIBILITY TO INDIVIDUAL ACCOUNTABILITY

To understand the theoretical framework that guided the development of the doctrinal foundations of international criminal law, one needs to place international criminal law within the broader context of international law at the time of its inception.

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[59] John Braithwaite, "Restorative Justice and De-Professionalization", *The Good Society* 13 (2004), pp. 28–31.

[60] Antonio Buti, "The Notion of Reparations as a Restorative Justice Measure", in One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, Jorge Costa Oliveira & Paulo Cardinal, Springer, 2009, p. 198.

[61] Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", *International Journal of Transitional Justice* 3 (2009), p. 253.

Modern international criminal law developed as a response to the atrocities committed during the Second World War. In the aftermath of the war, it became clear that the international crimes committed during the war needed to be accounted for and that the punishment of individual perpetrators was crucial for the reestablishment of the international legal order. Making the State, an abstract entity, solely responsible, without reaching those who individually perpetrated mass atrocities was no longer desirable, acceptable, and was a disconnect with domestic criminal law systems. At the wake of the end of the Second World War, the framework for allocating responsibility in the international legal order was focused on the State. Importantly, the development of international criminal law represented a shift from a State-centred approach[62]. For many centuries, international law was concerned solely with inter-State matters, and the idea of individuals being a (passive) subject of international law, standing trial and being inflicted with punishment, would have been inconceivable within the traditional framework of international law[63].

In this sense, it can be said that the mere advent of international criminal law represents a turning point in the conceptual framework of international law. This paradigm is well illustrated by the famous statement of the International Military Tribunal at Nuremberg whereby "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[64]. This statement also demonstrates that, since its inception, international criminal law has focused on the trial and punishment of perpetrators as a means to enforce international law. It is perceived that individual accountability and punishment informed the formative stages of international criminal law. This can be explained by the need to hold individual perpetrators accountable for their crimes, thus making the shift from State-based responsibility for international wrongs to individual accountability for international crimes, which marks the modern development of

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[62] See generally, Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", *British Yearbook of International Law* 21 (1944), p. 58.

[63] See e.g. the 1912 edition of the Lassa Oppenheim treatise on international law, stating that "…the Law of Nations is a law between States, and … individuals cannot be subjects of this law", Lassa Oppenheim, *International Law: A Treatise*, Longmans, Green and Co., 2nd ed., 1912, p. 367, 368. The later edition was modified to take into account the growing position of individuals as subjects of international law.

[64] *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

international criminal law in parallel with the regime of State responsibility. This shift from a State-based framework was not however complete in dealing with the aftermath of conflicts. Although individual perpetrators were held criminally accountable, civil redress for victims of the crimes perpetrated during the War was left to be resolved by inter-State agreements[65].

Holding individual perpetrators accountable for international crimes, rather than the States for which they acted, has put the focus on prosecution and punishment of the offender, while moving away from victims and civil redress. International criminal law at its inception was concerned with addressing the limitations that the system based on State responsibility afforded. The idea of redress for victims of international crimes was thus not present at the developmental stage of international criminal law[66] and, as we shall see in later chapters, only gained relevance in the international criminal justice discourse more recently and more prominently with the advent of the ICC.

As such, international criminal law, in its first phase, solidified the foundation of a system based on individual accountability and punishment, as opposed to collective responsibility. This dichotomy was explained by Hans Kelsen in the following terms:

> "the difference between the punishment provided by national law and the specific sanctions of international law… consists of the fact that punishment in criminal law constitutes individual responsibility, whereas the specific sanctions of international law constitute collective responsibility"[67].

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[65] Indeed, according to Ariel Colonomos and Andrea Armstrong: "[t]raditionally, reparations were part of the framework of relations between nations following a conflict and obligated the losing State to compensate damages incurred by its opponents during the course of the war", Ariel Colonomos & Andrea Armstrong, "German Reparations to the Jews after World War II:A Turning Point in the History of Reparations", in *Handbook of Reparations*, Pablo de Greiff, Oxford University Press, 2006, p. 390. See also Pierre d'Argent, *Les Réparations de Guerre en Droit International Public*, LGDJ, 2002; Richard Lillich et al., *International Claims: Their Settlement by Lump-Sum Agreement*, University Press of Virginia, vol. 1, 1975.

[66] See Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 359, where the author concludes that "international criminal law was conceptualized as a system of law little concerned with victims but rather one which was concerned with perpetrators and the enforcement of the rules of international law itself."

[67] Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", *California Law Review* 31 (1943), p. 530.

The focus on the criminal accountability of individual perpetrators, as opposed to a framework that included criminal accountability and victim redress (or a mix of criminal and civil dimensions), in the shaping of the architecture of international criminal law at its formative stages can be understood in the context of the position of the individual as a subject of international law. The battle of that time was to pierce the veil of the State, in order to be able to put on trial the individuals responsible for the atrocities of the Second World War[68]. Thus, at its inception, international criminal justice was focused on a criminal dimension.

In that sense, Hersch Lauterpacht warned of the risks of continuing to hold a purely State-centred approach: "[t]here is little hope for international law if an individual, acting as an organ of the state, can in violation of international law, effectively shelter behind the abstract and artificial notion of the state"[69]. The idea that individuals should not be shielded by the State's responsibility for certain acts, which were ultimately performed by individuals, was the necessary rationale to shift from mere State responsibility to a system that includes individuals' accountability for international crimes, thus sometimes creating a system of concurrent State responsibility and individual criminal liability for certain international acts[70]. Thus, the focus on retribution and punishment of the perpetrator, in contrast with reparations, at this early stage of international criminal law can be explained

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[68] Even prior to the Second World War, John Westlake had stated that "the same tone of thought will again be evil if it allows us to forget that … the action of our State is that of ourselves", John Westlake, *The Collected Papers of John Westlake on Public International Law*, Lassa Oppenheim, Cambridge University Press, 1914, p. 411.

[69] Hersch Lauterpacht, "Règles générales du droit de la paix", *Recueil des Cours* 62 (1937), p. 351 (translation).

[70] In fact, there is relevant scholarship that discusses the concurrence between State responsibility and individual accountability for international crimes. For examples of when such concurrent responsibility may occur, see Andre Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52 (2003), pp. 615-640, who cites emerging work in this field: Pierre-Marie Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State", in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese et al., Oxford University Press, 2002, pp. 1085-1100; Hazel Fox, "The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to States", in *Liber Amicorum Judge Shigeru Oda*, Nisuke Ando et al., Kluwer Law International, 2002, p. 147; Marina Spinedi, "State Responsibility *v* Individual Responsibility for International Crimes: *Tertium Non Datu"*, *European Journal of International Law* 13 (2002), p. 895; Malcolm Evans, "International Wrongs and National Jurisdiction", in *Remedies in International Law: The Institutional Dilemma*, Malcolm Evans, Hart Publishing, 1998, p. 173; Otto Triffterer, "Prosecution of States for Crimes of State", *Revue Internationalede Droit Penal* 67 (1996), p. 341.

by the idea that "[individual] punishment, in contrast to [interstate] reparation, satisfies … the need for guarantees against future infractions of the law"[71].

As it can be seen, the dogma of State sovereignty remained as far as reparations for victims were concerned: if there was any claim for reparation from an individual victim, it was for the sovereign State to "represent" their interests, and reparations for international crimes were to be sought from States; in other words, victim redress for international crimes was centred on a State-based approach[72].

In sum, with the advent of international criminal law, individuals could be criminally prosecuted on their personal capacity. This was a passive role for individuals in international law as they were the object of prosecutions; at this point in history (at the wake of the Second World War and the development of international criminal law in the XXth century) individuals could not yet play an active role, separate from their State of origin, to claim reparations for himself/herself in international law. As Connor McCarthy sums it up, "international criminal law was concerned primarily with perpetrators and the enforcement of the rules of international law itself"[73].

Thus, international criminal law, as it was originally developed, was concerned with a criminal dimension; the civil dimension, that is the dimension concerning reparation for victims, was not included. As it shall be further developed next, reparation for victims followed a State-based approach.

This paradigm that had been in effect since the conception of international law raises the questions: does a mixture of criminal and civil dimensions make sense at the international level? Is it working, is it a desirable model and if so, why? The following sections of this chapter, and following chapters, unpack these considerations.

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[71] Hersch Lauterpacht, "Règles générales du droit de la paix", *Recueil des Cours* 62(1937), p. 352, (translation).

[72] Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews after World War II:A Turning Point in the History of Reparations", in *Handbook of Reparations*, Pablo de Greiff , Oxford University Press, 2006, p. 390.

[73] Conor McCarthy, Reparations and Victim Support in the International Criminal Court, Cambridge University Press, 2012, p. 43.

III. PAVING THE WAY TO REPARATIONS FOR MASS CRIMES: OVERVIEW OF THE LEGAL DUTY OF REPARATIONS IN OTHER FIELDS OF INTERNATIONAL LAW

Reparations for victims of international crimes rely on two premises: the right of victims to obtain reparation and the legal duty to provide reparation. Two questions underpin this analysis: who bears the legal duty of reparation (i.e. the State, the individual, both?) and to whom is the reparation owed (i.e. to individuals and/or to the State)?

In relation to the latter, a question to be addressed is whether the individual (i.e. the victim) has a legal right to reparation under international law. And importantly, does this by implication create an international obligation on *individuals* rather than *States* concerning reparation? As it shall be further discussed, the individual's right to reparation developed under international law creating a legal duty on States to repair. Modern international criminal law, in some cases as shall be discussed, proposes an individualized approach to reparations, which creates a legal duty for individuals to provide reparation. Is this not a mismatch with the collective nature of international crimes? This study claims that it is not necessarily so. Just like in a criminal dimension, State responsibility and individual criminal accountability are not mutually exclusive, in a civil dimension, State responsibility and individual liability concerning reparations need not necessarily be either.

Alongside the development and solidification of international criminal law procedures, victim redress mechanisms have developed in other fields of international law, slowly giving rise to an individual *right* to reparation for international wrongs, including human rights violations and international crimes. In order to better understand the shift from a purely retribution-oriented international criminal justice to a system which has a more active role for victims[74], including the right to seek reparations within the international criminal proceedings, it is crucial to review the wider legal framework[75] and the development of a right to reparation under international law. There are two areas in

[74] The question of the inclusion of reparation within international criminal proceedings will be reviewed in a later chapter of this study.

[75] Theoretical questions pertain to the genesis of the right to reparation under the different fields of international law and the purpose of reparation to the victims. Normative questions relate to how civil redress should develop in areas of international law that pertain to the regulation of the conduct of individuals (international humanitarian law) or the unlawful consequences thereof (international criminal law). Practical questions relate to the enforcement of the right to reparation.

particular that are closely linked to international criminal law which relate to the duty of reparation imposed on the State rather than the individual): international human rights law and international humanitarian law. While this study is primarily concerned with the paradigm of the individual *vis-à-vis* the individual (i.e. individual victims seeking reparation from individual perpetrators), evaluating the State-based approach to reparations will inform the construction of a legal basis of a duty to repair imposed on the individual, and the contents of this duty.

In this prism, this section first dwells upon the broad and somewhat abstract question of the purpose of reparations, as well as the right to reparation in relation to a State's duty to provide reparations under international law. Then I briefly overview the right of reparation in fields of international law closely linked with international criminal law, to then finally engage in a theoretical discussion of the relationship between theories of punishment and reparation. This analysis will focus on a review of systems only in the *international* legal system since later in this study attention is given to the role of *national* courts in the award of redress for victims of international crimes (see chapter 5).

1. The purpose of reparations

It goes without saying that reparations may serve varied purposes and thus be based on different theoretical underpinnings[76]. A common purpose of reparations is that of remedial justice, in order to correct the wrong done and rectify injustice by restoring the *status quo ante*. As Professor Dinah Shelton puts it, this rationale "appears to be the basis for most international decisions on reparations, including the *Chorzów Factory* case"[77].

Reparations may also serve as a form of retribution, to punish the offender and deter the wrong conduct[78]. Under this theoretical explanation, the form and extent of reparations could bring about a deterrent factor in future wrongdoing. In this sense, reparations can include a form of punitive damages and in a way, could bridge criminal (sanctions) and

[76] This chapter is not aimed at examining or discussing the purpose of reparations specifically in international criminal law. This topic will be addressed in following chapters.

[77] See generally, Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002).

[78] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Nijhoff, 2010, p. 371.

civil (restoration) dimensions. Another purpose of reparation speaks to restoration of victims and affected communities. The goal in this perspective would be to reconcile and restore, as well as induce positive future behaviour[79].

Some aspects of this overview of theories and purposes of reparations are worth emphasizing. First, it may be noted that the system of reparations could be different depending on its context (i.e. the society where it is applied or the purpose it is devised to achieve). These questions shed light on the interconnectedness between victims and offenders, and the community in which they may belong. When a wrongful act is committed (e.g. a crime), various relationships are broken, values shattered and the situation that existed before the wrongful conduct is no longer in place.

Thus, the theoretical framework of the purpose of reparations evidences, in my view, the tight relationship between crimes (a wrongful conduct) and civil redress (reparation), offenders and victims, the past and the future. It also exposes the weaknesses of a nuclear treatment of international law, the compartmentalised study of different doctrines, in parallel, and with different aims, even though in essence they often pertain to the same conduct.

In the same line of reasoning, a broader question pertains to the consideration of international law and international justice: if different disciplines of international law do not interact and feed off of each other, in a synergetic communication, the ultimate goal of justice may not be fully achieved. As Judge Cançado Trindade puts it,

> "While an international tribunal of human rights (such as the European and Inter-American Courts, and more recently, the African Court) cannot determine the international criminal responsibility of the individual, and an international criminal tribunal (such as the ad hoc International Criminal Tribunals for the Former Yugoslavia [ICTFY] and for Rwanda [ICTR], and the ICC) cannot determine the responsibility of the State, impunity is

[79] See generally on theories of restorative justice: Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice*, Routledge, 2nd ed., 2002; Nigel Bigger, *Burying The Past: Making Peace And Doing Justice After Civil Conflict*, Georgetown University Press, 2003; Heather Strang & John Braithwaite, *Restorative Justice And Civil Society*, Cambridge University Press, 2001; Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates*, Willan, 2002.

> most likely bound to persist, being only partially sanctioned by one and the not other"[80].

In this section, the multifaceted purposes of reparation were only briefly overviewed in general terms in order to set the stage for the next chapters.

2. The multifaceted dimensions of reparation

Recently, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Dr. Pablo de Greiff, prepared a report focusing on reparations for mass violations of human rights and international humanitarian law. His report focused on the challenges of reparation including implementation, exclusion of certain "categories of victims on the basis of political considerations … and the gender insensitivity of a majority of reparation programmes, which results in too few victims of gender-related violations receiving any reparation"[81].

Significantly for the purpose of this study, the Special Rapporteur discusses in his report discusses different dimensions of reparation awards. In particular, he warns against looking at reparations from a singular dimension and posits that:

> "to count as reparation and to be understood as a justice measure, it has to be accompanied by an acknowledgment of responsibility and needs to be linked with other justice initiatives such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence"[82].

In a similar vein, he adds that "[o]ffering reparations to victims should not be part of an effort, for example, to make impunity more acceptable"[83].

This discussion is crucial to the present study as it is argued, precisely as the Special Rapporteur does, that reparation is a complement to the criminal liability of perpetrators of international crimes. In other words, they are not mutually exclusive and

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[80] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Nijhoff, 2010, p. 371.

[81] United Nations, General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", A/69/518, 14 October 2014.

[82] *Ibid.*, para. 83.

[83] Ibid.

should work together as two facets of international criminal justice: the criminal and civil dimensions of international justice complement one another. The conclusion of the Special Rapporteur's report is thus a guiding chart throughout this study.

Finally, the report makes another important point concerning the different dimensions of reparation. It calls on those responsible, rightly so it is argued, to design

> "reparation programmes to consider the great advantages of distributing benefits of different kinds and to not reduce reparation to a single dimension, be it material or symbolic. The great harms that reparation is supposed to redress require a broad array of coherently organized measures"[84].

This report, and the guidelines provided therein, are useful for the development of a conception of a civil dimension for victims of international crimes and provide some insight for the analysis in the present study.

3. State responsibility and the duty of reparation in international law

The duty of reparation in relation to an internationally wrongful act is a well-established principle of international law[85]. While much has been written on the right of States to obtain reparation[86], the focus of this study rests on victims of international crimes and thus on reparation to the benefit of individuals.

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[84] *Ibid.,* para. 84.

[85] See e.g. on the duty to reparation for wrongful conduct under international law, Paul Fauchille, *Traité de Droit international public*, vol. I Part I, Paris, Libr. A. Rousseau Éd., 1922, p. 515; Ladislas Reitzer, *La réparation comme conséquence de l'acte illicite en Droit international*, Paris, Libr. Rec. Sirey, 1938, p. 30 ; Jean Personnaz, *La réparation du préjudice en Droit international public*, Paris, Libr. Rec. Sirey (1939), pp. 53-60; Hildebrando Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des Cours de l'Académie de Droit International de La Haye* 96 (1953), p. 415.

[86] See e.g., Christian Dominicé, *Observations sur les droits de l'Etat victime d'un fait internationalement illicite*, dans : Droit international 2, par C. Dominicé, Paris : Pedone, 1982, p. 1-70 ; Francisco V. García-Amador, *The changing law of international claims*, New York [etc.]: Oceana, 1984. Francisco V. García Amador, *Principios de derecho internacional que rigen la responsabilidad: análisis crítico de la concepción tradicional,* Madrid: Escuela de funcionarios internacionales, 1963.

The principle underlying the legal duty to make reparation is that every breach of an international obligation carries with it a duty to repair the harm caused by the breach[87]. This has been confirmed in a number of international instruments and jurisprudence of international and regional courts[88]. It has been crystallized in an often-cited passage by the Permanent Court of International Justice, in the *Charzów Factory* Judgment, wherein it is stated that:

> "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law"[89].

It is further stated in the same case that: "It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation … Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself"[90].

This traditional conception of reparation has been applied in the jurisprudence of many international courts and tribunals such as the International Court of Justice[91], other

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[87] See Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002), p. 835.

[88] This study examines the question of reparation from the perspective of the victims' right to obtain reparation and not the State or the offender's duty to provide reparation.

[89] *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, *P.C.I.J.*, Series A, no. 17, p. 29.

[90] *Ibid.*; see also PCIJ Statute, Article 36, which states that "the States Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: … (d) the nature or extent of the reparation to be made for the breach of an international obligation". Article 36 of the ICJ Statute is written similarly.

[91] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184; ICJ, Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; ICJ, Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 59, para. 119; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 198, para. 152; ICJ, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.

international courts[92], including regional human rights courts and other human rights bodies[93], arbitral tribunals[94] and claims tribunals and commissions[95].

The principle of a State's duty of reparation for international wrongful acts (including international crimes) has also been explicitly recognized in Article 31 of the 2001 International Law Commission Articles, which reads as follows: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"[96].

The State's duty of reparation for a wrongful act has also been explained in numerous works of learned jurists. As Anzilotti posed it : "La violation de l'ordre juridique

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Uganda), Judgment, I.C.J. Reports 2005, p. 257, para. 259; ICJ, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, pp. 232-233, para. 460; Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 77, paras. 273-274; ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p. 48, para. 161.

[92] See, for example, *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, I.T.L.O.S. Reports 1999, para. 170.

[93] See, for example, IACtHR, *Velásquez-Rodríguez* v. *Honduras*, Merits Judgment, 29 July 1988, para. 174; see also *Papamichalopoulos and Others* v. *Greece*, Application No. 14556/89, Judgment, 31 October 1995, E.Ct.H.R., Series A, No. 330-B, para. 36.

[94] See, for example, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc*. v. *Argentine Republic*, Case No. ARB/02/1, Award of 25 July 2007, I.C.S.I.D., available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&caseId=C208 (accessed 15 February 2012), para. 31; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, Award of 2 October 2006, I.C.S.I.D., para. 484.

[95] See, for example, Final Award, *Eritrea's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, Eritrea-Ethiopia Claims Commission, available athttp://www.pca-cpa.org/upload/files/ER%20Final%20Damages%20Award%20complete.pdf (accessed 12 January 2012), pp. 7-8, para. 24; Final Award, *Ethiopia's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, Eritrea-Ethiopia Claims Commission,availableathttp://www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf (accessed 12 January 2012), p. 8, para. 24; *Amoco International Finance Corporation* v. *The Islamic Republic of Iran et al*., Partial Award No. 310-56-3 of 14 July 1987, 15 Iran-United States Claims Tribunal Reports 189, paras. 189-206.

[96] Paragraph 2 of Article 31 defines "injury" as: "any damage, whether material or moral, caused by the internationally wrongful act of a State".

international commise par un État soumis à cet ordre donne ainsi naissance à un devoir de réparation, qui consiste en général dans le rétablissement de l'ordre juridique troublé"[97].

In a similar vein, Fauchille explained that:

> "A quelles règles est soumise la responsabilité juridique internationale des Etats? Les règles auxquelles cette responsabilité est assujettie se résument dans l'idée de droit naturel que tout fait qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer. Cette idée est appliquée en droit privé dans les rapports des individus ; il n'y a pas de motifs pour ne pas l'appliquer aussi dans les relations que des collectivités ont entre elles-mêmes au avec des individus. Pour qu'il y ait lieu à la responsabilité juridique à la charge d'un Etat, il faut dès lors : 1o. qu'un dommage ait été causé par lui ; 2o. que ce dommage soit le résultat d'une action illicite de sa part ; 3o. qu'il lui soit imputable"[98].

The International Court of Justice clarified in the *Avena and Other Mexican Nationals* case that "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury"[99].

4. International human rights law and the development of individual victims' redress

As we have seen above, the early stages of international criminal law in the XXth century was focused on prosecution and punishment. Other areas of international law developed alongside international criminal law which had some impact on the development of reparations for victims of conflicts. The most significant development in this area was the advent of international human rights law, which, through its mechanisms, empowered victims to seek and obtain reparations from their State for violations of their rights. In this perspective, international human rights law does not concern a criminal dimension (i.e. it is not directly focused on criminal prosecutions or punishment of

[97] Dionisio Anzilotti, "La responsabilité internationale des États a raison des dommages soufferts par des étrangers", *Revue générale de droit international public*, p. 13.

[98] Paul Fauchille, *Traité de Droit International Public*, Tome I, Rousseau & Cie. (eds.), p. 515.

[99] ICJ, Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 59, para. 119; see also ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, p. 77, para. 273.

individual perpetrators), but rather a civil dimension, in the sense of reparations for victims of human rights violations.

The advent of international human rights law has provided avenues for individuals to seek reparations for acts committed by their State of origin[100]. It has significantly expanded the possibility for individuals to seek and obtain redress. The trailblazing instrument was the Universal Declaration of Human Rights[101], which then prompted the adoption of many other similar instruments[102]. The right of victims to seek and obtain a remedy has been codified in human rights treaties and instruments. It has also been firmly reiterated and expanded upon by international jurisprudence[103]. The European Convention on Human Rights[104], the American Convention on Human Rights[105], and the Optional Protocol to the African Charter establishing an African Court of Human Rights[106], provide their Courts the possibility of awarding reparation for violations of a conventional right.

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[100] Riccardo Pisillo Mazzeschi, "International Obligations to Provide for Reparation Claims", in *State Responsibility and the Individual – Reparations in Instances of Grave Violations of Human Rights*, Albrecht Randelzhofer & Christian Tomuschat, Kluwer Law International, 1999, p. 149.

[101] Proclaimed by General Assembly Resolution 217A (III), 10 December 1948.

[102] See generally, e.g. Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art. 2(3), 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (art. 14); the European Convention on Human Rights (art. 5(5), 13 and 41); the Inter-American Convention on Human Rights (art. 25, 68 and 63(1)); the African Charter of Human and Peoples' Rights (art. 21(2)).

[103] *See e.g.*, *Velásquez Rodríguez* Case, Inter-American Court of Human Rights, Serial C, No 4 (1989), par. 174 . *See also Papamichalopoulos* v. *Greece*, E.C.H.R. Serial A, No 330-B (1995), p. 36. *See e.g. Rodriquez* v. *Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995); *Blancov* v. *Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994); 2 IHRR 123 (1995); and *Bautista de Arellana* v. *Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996). The most impressive and significant jurisprudence on reparations in international human rights law has been developed by the Inter-American Court of Human Rights. This jurisprudence will be studied in the next chapter in the context of a discussion of principles of reparation.

[104] *European convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, entry into force 3 September 1953, CETS No. 5, as amended by Protocol 11 CETS No. 155, 11 May 1994, entry into force 1 November 1998.

[105] American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, 114 UNTS 123.

[106] Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

The Inter-American Court of Human Rights has interpreted the individual's right to a remedy as stated in Article 25 of the American Convention on Human Rights as requiring States to provide reparation to individuals who have suffered a violation of the Convention. Importantly, the Court has held that a State which violates the Convention is under a "duty to make reparation and to have the consequences of the violation remedied"[107]. The European Court of Human Rights, for its part, has taken a more timid approach to reparations. In its jurisprudence, the Court repeatedly refers to the provision of compensation "where appropriate"[108]. The jurisprudence of both Courts, and especially that of the Inter-American Court of Human Rights, may provide insightful guidance as to the examination of reparations in other fields of international law, particularly in international criminal law. For this reason, the next chapter (chapter 2) focuses on the experience of the Inter-American Court to draw some lessons that can inform, while not directly applicable, the development of a civil dimension to international criminal justice context.

Beyond the jurisprudence of regional human rights Courts, there have been other important developments in this field in the form of *soft law*. Already in 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[109], whereby the right of victims to obtain reparation was emphasised. The focus of this Declaration was on reparation for victims of domestic crimes[110]. Subsequently, another instrument was adopted by the United Nations General Assembly: the *Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law*[111]. The right of victims of gross violations of international human rights law or serious violations of international humanitarian law to obtain reparation was enunciated in Article 15, pursuant to which:

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[107] IACtHR, *Baldeón-García* v. *Peru*, Merits, Reparations and Costs, 6 April 2006, Series C No. 147, para. 147.

[108] See ECtHR, *Aydin* v. *Turkey*, Merits, Grand Chamber, 25 September 1997, 25 EHRR 251, para. 103.

[109] GA Res. 40/34, 29 Nov 1985.

[110] Cherif Bassiouni, "International Recognition of Victims' Rights", *Human Rights Law Review* 6 (2006), pp. 203-279.

[111] GA Res. A/RES/60/147, 16 Dec 2005.

> "In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."

Other recent documents have also affirmed victims' right to receive reparation. For example, the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* concluded that, on the basis of human rights law,

> "the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparation (including compensation) for the damage made"[112].

This brief analysis demonstrates that reparation for victims of conflicts is a basic tenet of international human rights law[113]. The concept of individual redress for victims of armed conflict is not as alien as it used to be before the development of international human rights law.

Be that as it may, it remains that, in spite of the impressive number of instruments providing for the possibility of seeking a remedy, as discussed above, there remains a large gap whereby individuals might not obtain redress through international human rights mechanisms. International human rights law is built upon the premise of State responsibility for violations of rights. This explains two limitations of international human rights law for the award of reparations to individual victims of international wrongful acts. The first limitation concerns the fact that victims cannot, under international human rights mechanisms, obtain reparation from individual perpetrators, as a State must have been involved in the violation. As it is widely known, many international crimes are committed by armed opposition or rebel groups, and thus, because the State in question might not held

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[112] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 598.

[113] Jurisprudence of regional human rights Courts provide examples of awards of reparation in relation to armed conflicts. In the European Court of Human Rights, e.g.: *Khatsiyeva et al.* v. *Russia*, Merits, 17 January 2008, unreported, Application No. 5108/02, para. 139; *Varnava et al*. v. *Turkey*, Merits, Grand Chamber, 18 September 2009, unreported, Application No. 16064/90.

accountable, the individual victim cannot use the mechanism of the international human rights system.

The second limitation which stems from this premise is that for a human rights Court (such as e.g. the European Court of Human Rights) to award reparation to victims, there needs to be a violation of the rights recognized in the basic human right instrument of that Court (i.e. the European Convention on Human Rights or the American Convention on Human Rights) and the State against whom reparation is sought must have acceded to the convention. Finally, the question of extraterritorial application of human rights might also restrict the possibility of victims of international armed conflicts to seek redress under international human rights law[114].

Thus, as it can be seen, international human rights law has provided an important avenue for victims who have experienced human rights violations (and victims of armed conflicts) to seek redress, albeit, it does not encompass all victims of violations. This is an interesting point to bear in mind for a later discussion of the appropriateness of a mechanism for individual redress within the realm of international criminal law.

5. International humanitarian law: reparation and its enforcement

In this section, the present chapter examines reparations for violations of international humanitarian law, within the same perspective of the broader framework of victim redress in different fields of international law. It also considers the possibilities and limitations of provisions of reparation under international humanitarian law.

Victims' individual right to reparation under international humanitarian law is a topic of much debate in legal doctrine[115]. It is submitted that there exists an obligation to make

[114] On this question, see generally, Marko Milanovic, "From Compromise to Principles: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", *Human Rights Law Review* 8 (2008), p. 411.

[115] See e.g., Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed forces", *International and Comparative Law Quarterly* 40 (1991), p. 827; Christopher Greenwood, "International Humanitarian Law (Laws of War)", in *The Centennial of the First International Peace Conference,* Frits Kalshoven, Kluwer Law International, 2000, p. 250.

reparation stemming from texts of international humanitarian law[116], as will be further expanded upon below. The controversy however hinges upon whether victims of international humanitarian law violations can claim reparation directly from the offender[117].

In relation to armed conflicts, both international human rights law and international humanitarian law may be applicable, the latter being the *lex specialis*[118]. In the present chapter, this study provides an overview of the question concerning the beneficiaries of reparation for international humanitarian law violations[119]. The present chapter does not aim at an extensive analysis of reparations under international humanitarian law[120].

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[116] Draft Articles on State Responsibility, Article 31; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 38; First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148; cf., Rule 150 of the ICRC Rules on Customary International Humanitarian Law: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused." As to examples of treaty provisions in international humanitarian law that establish an obligation to provide reparation for breaches, Article 3 of the Hague Convention No. IV of 1907 states that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Similarly, Article 91 of Additional Protocol I of 1977 states that: "A party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[117] See e.g., Conor McCarthy, "Victim Redress and International criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 356.

[118] Cf. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 136 (2004), p. 178.

[119] See Georges Abi-Saab, "The Specificities of Humanitarian Law", in *Studies and Essays of International Humanitarian Law and the Red Cross Principles in Honour of Jean Pictet*, Christophe Swinarski, Nijhoff , 1984, p. 269, where it is argued that international humanitarian law's objective goes "beyond the inter-state levels and [reaches] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals". See also, Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law* 94 (2000), pp. 239-278.

[120] See generally as to this question: Veronika Bílková, "Victims of War and Their Right to Reparation for Violations of International Humanitarian Law", *Mickolc Journal of International Law* 4 (2007), pp. 1-11.; Christian Tomuschat, "Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Marcelo G. Kohen, Nijhoff, 2007; Rainer Hofmann, "Victims of Violations of International Humanitarian Law: do they have an Individual Right to Reparation against States under International Law?", in *Common Values in International Law: Essays in Honour of Christian Tomuschat*, Pierre-Marie Dupuy et al., Kehl Engel, 2006; Emanuela-Chiarra Gillard, "Reparation for Violations of International Humanitarian

A study by the International Law Association addressing the question of reparations for victims of armed conflict devotes some attention to the conceptualisation of "victims"[121] for purposes of the application of the principles proclaimed therein:

> "1. For the purposes of this Declaration, the term 'victim' means natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict.
>
> 2. This provision is without prejudice to the right of other persons - in particular those in a family or civil law relationship to the victim - to submit a claim on behalf of victims provided that there is a legal interest therein. This may be the case where the victim is a minor child, incapacitated or otherwise unable to claim reparation."[122]

According to this conception of "victims", there must be (1) a violation of international law applicable in armed conflicts; (2) a harm must have been suffered; (3) there must be a link between the harm suffered and the violation of the international law applicable in armed conflict[123]. It has been argued that international humanitarian law ensures the protection and assistance to individuals that are victims of an armed conflict but when that same individual becomes a victim of a violation of international humanitarian law, the protection given by this field of international law does not seem sufficient[124].

Delving into the provisions that pertain to reparations for violations of international humanitarian law, as far as international armed conflicts are concerned, Article 3 of The Hague Convention IV provides that:

Law", *International Review of the Red Cross* 85 (2003), pp. 529-553.

[121] The word "victim" does not appear in all instruments of IHL. For example, the Geneva Conventions and other treaties do not mention the word "victim" in contrast with the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 and the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

[122] International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

[123] See commentary to: International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

[124] Liesbeth Zegveld, "Remedies for Victims of Violations of International Humanitarian Law", *International Review of the Red Cross* 85 (2003), pp. 497-526.

> "A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[125]

This same obligation appears in Article 91 of Additional Protocol I to the Geneva Conventions (concerning violations of the Additional Protocol or of the Geneva Conventions of 1949)[126]. The duty to make reparation for violations of international humanitarian law is also stated in Article 38 of the *Second Protocol to the Hague Convention for the Protection of Cultural Property*, and it is implied in the four *Geneva Conventions* of 1949, whereby States cannot absolve themselves for liability incurred in respect of grave breaches: First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148[127].

As to non-international armed conflicts, Common Article 3 to the four Geneva Conventions of 1949, Provisions of Additional Protocol II relating to Non-International Armed Conflicts[128], Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property[129], (which expressly refers to the duty of States to provide

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[125] *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, entry into force 26 January 1910, 9 UKTS (1910).

[126] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS (1979).

[127] ICRC, Customary International Humanitarian Law, Rule 150: Reparation. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, entry into force, 21 October 1950; 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entry into force 21 October 1950.

[128] Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS 609.

[129] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, entry into force 9 March 2004, 38 ILM (1999).

reparation, and which applies in any armed conflict), as well as other rules of customary international law form the legal framework for reparation in such types of conflict[130].

6. Conclusion on the legal duty of reparations

From the discussion above, it seems clear that a legal duty exists for States to provide reparations for internationally wrongful conduct, including violation of human rights norms and international crimes. This stems from decisions of international courts, numerous conventions imposing the specific duty to repair, and the ILC Work of State Responsibility, some of which were reviewed above.

Having established this principle, two related questions are pertinent, both of which lay the foundation of one of the premises of this study: whether there is a legal duty for *individuals* who have committed international crimes to pay reparations to *individual victims*. The first concerns the beneficiaries of reparations – that is, only States, or also individual victims? The second question pertains to whether individuals, just as States, can have a legal duty of reparation. These two questions will be addressed next.

IV. THE BENEFICIARIES OF REPARATION UNDER INTERNATIONAL LAW

Having set out the positive legal duty of States to provide reparation for violations of international human rights law and international law, both in international and non-international armed conflicts, an important question to be examined is the beneficiary of such reparation (i.e. who has the right to reparations), and whether individual victims may claim reparations directly. In other words, who can claim reparations from States - the individual who suffered harm or solely other States?

The *Basic Principles* distinguish between the right to a remedy and reparation. The latter is the focus of this study, thus the right to a remedy generally will not be discussed in the present dissertation[131].

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[130] ICRC, *Customary International Humanitarian Law*, Rule 150: Reparation. The ICRC concludes in its study on customary international law that a State that has violated the laws of war in relation to a non-international armed conflict has a duty to make reparation.

[131] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, in particular Sections VII and IX. See in particular Chapter 1, Section IV (1) of this study

Traditionally, the legal duty of States to repair was not owed directly to individuals, but rather to other States, due to the original architecture of international law as rights and duties among sovereign States. While legally a State's legal duty to repair can be owed to other States, there is also one fundamental question that should be considered.

When the harm is done solely and directly to individuals, is it morally acceptable that the State takes over all rights of reparation from the individual victim (presumably its national) without the consent of the victim, and without his/her participation in the reparation award, and to the exclusion of the any right of reparation the victim may eventually claim? The recent example of the agreement between Turkey and Israel concerning the killing of nine Turkish civilians by Israeli commandos on the Mavi Marmara flotilla set to Gaza Strip in May 2010 is telling. In this case, the State of the victims – Turkey – made an agreement with Israel which excludes any and all rights of individual victims (who actually suffered the harm) to claim reparation[132].

Importantly however if within the realm of international human rights law, individuals are able to claim reparations directly from the State. The entire system of international human rights litigation is based on the premise of individuals claiming reparations from the State. Thus, the traditional dichotomy of an international legal order that is solely on the basis of State vs. State (as having the legal duty and being the beneficiary of reparation) is no longer the only possibility when it comes to reparation.

As discussed above, the *Basic Principles,* provide that victims of gross violations of human rights and serious international humanitarian law violations should be provided with full and effective reparation. Article 18 provides that:

> "In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the

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concerning the right to a remedy and the right to reparations.

[132] See http://www.haaretz.com/israel-news/1.727369.

following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"[133].

Furthermore, Article 33(2) of the International Law Commission Draft Articles on State Responsibility posits that Part II (which deals with "Content of the international responsibility of a State") "is without prejudice to any right, arising from the international responsibility of a State, which may accrue *directly to any person or entity other than a State*"[134]. Similarly, the commentary on Article 33 furthermore states that:

> "When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights."[135]

The International Committee of the Red Cross ("ICRC") in reviewing the state of customary law regarding reparation in international humanitarian law also asserts a trend enabling victims to seek reparations directly from the State. The ICRC Commentary on Customary International Humanitarian Law concerning Rule 150 (Reparations) cites various examples of individuals seeking reparations directly from States, including: (i) Reparation provided on the basis of inter-State and other agreements; (ii) Reparation provided on the basis of a unilateral State act; (iii) Reparation sought in national courts[136].

A few domestic courts have had to decide cases where individual victims sought reparation from a foreign State, outside the realm of international human rights law, for violations of international humanitarian law[137]. While there have been instances – in

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[133] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[134] Emphasis added.

[135] International Law Commission, Commentary on Article 33 of the Draft Articles on State Responsibility.

[136] ICRC, Customary IHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150#refFn_2_28, accessed in April 2016.

[137] The question of whether or not States have an obligation to pay reparation to individual victims of international humanitarian law violations is intrinsically intertwined with questions of State immunity. See e.g.: Maria Gavouneli, "War Reparation Claims and State Immunity", *Revue Hellénique de droit international* 50 (1997); Brigitte Stern, "Vers une limitation de 'l'irresponsabilité souveraine' des Etats et chefs d'Etat en cas de crime de droit international?", in *Promoting Justice, Human Rights and Conflict Resolution through International Law*: *Liber*

Greece[138] and Italy[139] – where individuals were successful in seeking reparations against a State (for crimes against humanity and violations of international humanitarian law), there is also case law that stands against the possibility for individuals to claim reparation directly from a State[140].

Recently, this question was put to the International Court of Justice in the *Case concerning jurisdictional immunities of the State (Germany v. Italy; Greece intervening)*[141], in relation to the decisions of Greek and Italian Courts mentioned above, which awarded reparation to individual victims against a State (Germany) for violations that occurred during the Second World War. The question of whether or not individuals have a right to reparation (enforceable against a State) under international humanitarian law was debated during the proceedings[142]. Nevertheless, based on its decision that Germany enjoyed immunity under international law, the Court did not deem it necessary to dwell upon this question in the Judgment[143]. It follows that the question of State immunity is a limitation on the possibility of individual victims to obtain reparations from the responsible State.

Amicorum Lucius Caflisch, Marcelo Kohen, Nijhoff, 2007, pp. 511-548.

[138] *Prefecture Voiotia* v. *Federal Republic of Germany*, Hellenic Supreme Court, 4 May 2000, Case no. 11/2000. Note however, that the decision was not enforced due to a lack of authorization by the Minister of Justice of Greece. See also, at the European Court of Human Rights concerning a similar factual background, *Kalougeropoulou and Others* v. *Greece and Germany*, Admissibility, 12 December 2002, Application No. 59021/00.

[139] *Ferrini* v. *Federal Republic of Germany*, Corte di Cassazione (Sezioni Unite), 11 March 2004, 87 *Rivista di diritto internazionale* 539.

[140] See e.g. *Bridge of Varvarin case*, Landgericht (LG) Bonn, 1 O 361/02, NJW 2004, 525, HuV-I 2/2004, 111-113, confirmed by *Oberlandesgericht* (OLG) Köln, 7 U 8/04.

[141] Judgment of 3 February 2012 ("ICJ State Immunity Judgment").

[142] See e.g. *ibid.,* Counter-memorial of Italy, 22 December 2009, chapter V, Section II; Reply of Germany, 5 October 2010, chapter 4, sections 37-41.

[143] See para. 108 of the ICJ State Immunity Judgment. This Judgment has prompted many scholarly commentaries. Recent scholarship concerning this Judgment include: Benedetto Conforti, "The Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity", *Italian Yearbook of International Law* 21 (2011); Riccardo Pavoni, "An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State", *Italian Yearbook of International Law* 21 (2011); Carlos Espósito, "Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist", *Italian Yearbook of International Law* 21 (2011); Mirko Sossai, "Are Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?", *Italian Yearbook of International Law* 21 (2011).

Be that as it may, it is important to keep in mind that international law is constantly and tirelessly developing in this field. As was posited at the beginning of this century,

> "A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine. However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law."[144]

On the question of reparation to victims of violations of international humanitarian law, it has been stated that

> "[t]here is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims. This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award 'just satisfaction' or 'fair compensation', but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts. … The courts of various States have considered claims by individual victims of violations of international humanitarian law on a number of occasions and the results of such cases have been far from uniform."[145]

In a similar vein, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Jorda, also stressed this development of international law for the benefit of individuals in saying that

> "the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State responsibility for war crimes and other international crimes. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other

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[144] Rudolf Dolzer, "The Settlement of War-related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", *Berkeley Journal of International Law* 20 (2002), p. 296.

[145] Emanuela-Chiara Gillard, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross* 85 (2003),, pp. 536-537.

> contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation including compensation) for damage resulting from those abuses."[146]

History demonstrates, however, that reparation involving States has been generally settled by other means than an individual action against a responsible State: as for example, through claims processes and lump-sum agreements between States, especially relating to the Second World War, but also more recently[147]. Furthermore, claims commissions and arbitral tribunals have been set up to deal with reparation claims[148]; without purporting to be exhaustive, some examples of such institutions established to settle claims of redress arising out of international armed conflicts, include, in recent years, the Eritrea-Ethiopia Claims Commission[149], the Housing and Property Claims Commission (concerning the 1998-1999 conflict in Kosovo)[150], the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina[151].

Thus, it can be said that under certain circumstances, States as well as individuals may be the beneficiaries of reparations claimed directly from a State. It stems from the foregoing however that in many instances individual victims are left without reparation outside the international human rights system. This is because, *inter alia*, of the absence of arrangements for reparations or because the reparation received does not reach the individual victims. The analysis above demonstrates that it is not ideology that is driving

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[146] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* para. 597, citing a letter dated 12 October 2000 of Judge C. Jorda (the then President of the International Criminal Tribunal for the former Yugoslavia) to the United Nations Secretary General.

[147] See generally, Pierre d'Argent, *Les Réparations de Guerre en Droit International Public*, LGDJ, 2002; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules*, Cambridge University Press, 2005, pp. 539 et seq.

[148] See generally, Howard Holtzmann and Edda Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, 2007.

[149] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001). It does not grant individuals standing to submit claims.

[150] UNMIK Regulation No. 1999/23, 15 November 1999, UNMIK/REG/1999/23.

[151] Article 1, Annex 7, General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996), "Dayton Agreement".

the development of reparation for violations of international law but rather the remnants of the historical conception of international law as inter-State relationships.

Be that as it may, the fact that individuals can now claim reparation under international law does not by implication create an international obligation on individuals rather than States to repair. Does such a legal duty exist under international law and if so, what is its content? These are the questions that the present study turns to next.

V. CONCEPTUALIZING A CIVIL DIMENSION OF INTERNATIONAL JUSTICE: A NEW PARADIGM AND THE DEVELOPMENT OF AN INDIVIDUAL LEGAL DUTY TO REPAIR

Having explored, on the one hand, some key concepts of two justice theories that may provide some theoretical foundations for international criminal law, and on the other, the development of the duty of States to pay reparation in other areas of international law, this section now discusses the development of the legal basis of the duty of reparation for individuals.

The paradigm of this study is individual versus individual (i.e. individuals claiming a right to reparation from other individuals). Thus, the fundamental questions relate to the legal foundation for this paradigm. The legal duty discussed above is the legal duty of a State to provide reparations. The crucial question is thus: what is the basis of the duty upon individuals?

Under domestic law, individuals that commit crimes may also face civil or tort liability towards their victims, through the system of tort responsibility or *responsabilité civile.* Can this civil dimension be transposed into the international law context? Should criminal and civil liability be blended at the international level when it comes to international crimes? In this study, this is presented as the civil dimension of international criminal justice, which attaches civil liability to the accused and the possibility of civil claims of reparation by victims.

At the international level, alongside a right to reparation that victims may claim under certain circumstances from States as discussed above, it is worth recalling that the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation*

for Victims of Gross Violations of International Humanitarian Law confirms that both States and *individuals* have a legal *duty* to provide reparations for violations of human rights and international humanitarian law. According to the Principles: "a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law." Furthermore, where a *natural or a legal person* is found liable, "such party should provide reparation to the victim"[152]. Thus, under international law, according to the *Basic Principles*, a legal duty of reparation to victims exists for States as well as for individual perpetrators.

Under international criminal law, with the advent of the Rome Statute creating the ICC, individual perpetrators found guilty of crimes under the jurisdiction of the Court may have a legal duty of reparation. The individual right to reparation, and its accompanying duty imposed on individuals, have developed at a slower pace than international human rights law[153]. Indeed, a study on reparations in international criminal law explained that:

> "The idea that individuals are entitled to have international judicial fora deciding upon and awarding reparations is not new. First the European Court of Human Rights and then the Inter-American Court of Human Rights, have for decades been awarding victims reparations. As the first part of this study shows, the individual's right to reparation is a fundamental human right that is not only expressly guaranteed by global and regional human rights instruments but also routinely applied by international and national courts. Yet, it is only with article 75 of the Rome Statute that the idea of restorative justice against the individual perpetrators of violations has become a dimension of international criminal justice"[154].

Thus, it is not the fact that individuals can now claim a legal right to reparation under international law that created an international obligation (under international criminal law)

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[152] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147 of 16 December 2005, principle 15.

[153] Christine Evans, "Reparations for Victims in International Criminal Law", *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

[154] Shepard Forman, "The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Aritcle 79): Recommendations for the Court Rules of Procedure and Evidence", Prologue, prepared by the Center for International Cooperation, New York University, for the 26 July – 13 August 1999 Meeting of the Preparatory Commission for the International Criminal Court.

on individuals to repair. The basis of this duty to repair imposed on individuals rather than States comes from international criminal law itself, with the advent of the Rome Statute, which created a legal duty upon individuals. Article 75 of the Rome Statute, which will be examined in more detail in the following chapters, creates thus such duty:

> "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation [...]
>
> 2. The Court may make an order directly against a convicted person specifying reparations [...] Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79".

This duty was confirmed by the Appeals Chamber of the ICC in the Court's first case that dealt with reparations (this case will be discussed in detail below). The Appeals Chamber unequivocally confirmed that there exists a legal duty of reparation upon individuals in international criminal law. The Chamber recognized a "principle of liability to remedy harm" and stated that such liability flows "from the individual criminal accountability of the perpetrator"[155] This is an important point: according to the Appeals Chamber, the duty to repair flows from the criminal responsibility of the accused, contrary to a pure civil model where the guilt or innocence of the accused generally does not matter. In the ICC context, the Appeals Chamber decided, the civil liability is a corollary of criminal liability of the individual perpetrator.

Importantly, the Appeals Chamber also affirmed that the individual perpetrator (who is found guilty of crimes within the jurisdiction of the ICC) bears the legal duty to repair, even if the payment is to be made through the TFV. In other words, the civil liability rests upon the *individual perpetrator*, regardless of his/her eventual indigence condition[156].

Thus, in international criminal law, the legal duty to provide reparations is imposed on individuals from a different source than the ones discussed earlier in this chapter – it is

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[155] ICC, Appeals Chamber, "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations of 7 August 2012', 3 March 2015, ICC-01/04-01/06-3129, paras. 99 and 101.

[156] *Ibid.,* para. 105.

a creation of international law itself, and it is included in the formative texts of international criminal law. This legal basis is not limitless however. Reparation is not to be awarded to any and all victims of every international crime. There are some inherent limitations. First, reparation is to be awarded against a convicted person; thus, if an accused is not found guilty, then reparation cannot be awarded. Reparation is also for crimes within the jurisdiction of the Court, and not for all international crimes and/or human rights violations. These elements will be further evaluated in chapter 3 concerning the operationalization of the duty to repair in international criminal law at the international level. At this juncture, it is sufficient to simply introduce some of these limitations in order to draw the contours of the definition of the legal duty to repair imposed on individuals.

Furthermore, this duty on individuals for reparations in relation to international crimes is not in any way mutually exclusive of the responsibility of States. As Muttukumaru explains, the Rome Statute "does not diminish any responsibilities assumed by States under other treaties and will not – self-evidently – prevent the Court from making its attitude known through its judgements in respect of State complicity in a crime"[157]. State responsibility in regard to reparations to victims remains, as already discussed[158]. The legal duty imposed on individuals for reparations is additional to that of the State, just as the criminal responsibility of individuals did not do away with the responsibility of States, as discussed above.

This study does not claim that an individualized approach to reparation for international crimes (i.e. individual duty to repair) is more progressive or better than a State-based approach, which existed prior to this development in international criminal law. They are complementary; one is not to substitute the other, and they can co-exist. As it has been stated:

> "[R]esponsibility for reparations should maintain an element of state responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of state

[157] Christopher Muttukumaru, "Reparations to Victims", in *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results*, Roy S. K. Lee, Kluwer Law International, 1999, pp. 262– 270.

[158] In fact, Article 25(4) of the Rome Statute asserts that: "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

> authority. There are inherent dangers in shifting responsibility from states towards individuals as this may ultimately leave victims without redress. While the shift towards recognising victims and their right to reparations in international criminal law is welcome and positive, ideally this should operate alongside measures to establish potential state responsibility *vis-à-vis* victims"[159].

In this regard, there may be cases where maintaining a State-based approach to reparations for international crimes will be more suitable. For example, when States are involved and individual perpetrators are declared indigent and may not be able to provide reparation for victims. Furthermore, it is crucial to bear in mind one important aspect of international crimes: their collective nature. This can be seen as a mismatch with the idea of a duty on individuals to provide reparations due to the collective nature of international crimes. This is an important question that advocates in favour of a complementary approach to reparations for international crimes: individual reparations shall exist and further develop alongside States' duty to repair, which although not the main focus of this study, was briefly considered above[160].

Conversely, there may be instances where the State is not involved in international crimes, and thus, victims cannot claim State responsibility to ground reparations, as for example in cases of international crimes by rebel groups. Or, it may be that if reparations are not sought within international criminal justice processes, victims may find hurdles to obtaining reparations from the State[161]. Accordingly, this study argues that a complementary approach to reparations, both State-based and individualized, is the most appropriate manner to deal with the complexities of international mass crimes. In this prism, this study thus proposes to examine the paradigm of the individual *vis-à-vis* the individual, or in other words, the civil dimension of international criminal justice.

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[159] Christine Evans, "Reparations for Victims in International Criminal Law", *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

[160] For further insightful analyses on States' duty to repair, see: Albrecht Randelzhofer, and Christian Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Nijhoff , 1999; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002.

[161] See discussion above concerning State immunity and the decision of the ICJ in the case of *Germany v. Italy.*

Interestingly, this link complementarity between individual and State responsibility with regards to reparation is expressed in Articles 1 and 2 of the European Convention on Compensation of Victims of Crime:

> "1. When compensation is not fully available from other sources the State shall contribute to compensate:
> a those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
> b the dependants of persons who have died as a result of such crime.
> 2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished"[162].

VI. CONCLUDING REMARKS

Some conclusions can be drawn from the discussion above. On a legal theory level, international criminal justice has been traditionally aligned with theories of punishment, retribution and deterrence. International criminal justice as conceived today applies a mix of theories, with elements of retributive and restorative or reparative justice theories.

Upon having considered the possibilities of reparation for victims in other domains of international law, it stems that, one way or another, there is some avenue of victim redress for violations of international law. This chapter has reviewed how international law has evolved to allow individuals (victims) to claim reparations for international crimes. It has also overviewed the legal duty of States, and the construction of a legal duty upon individuals to provide reparations for victims. This chapter has thus demonstrated the evolution of international law concerning reparations: from an earlier singular state-State based approach, international law has evolved to include a State vis-à-vis individuals model and, more recently, also individuals versus individuals.

It has also been argued that an individualized approach to reparations for mass international crimes is not always better or more appropriate than the traditional State-based approach; it simply offers an additional avenue for victims to obtain redress and complement the criminal dimension of international justice with a civil dimension.

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[162] European Convention on the Compensation of Victims of Violent Crimes, European Treaty Series, European Treaty Series No, 116, Strasbourg, 24.XI.1983.

The enforcement of reparations is a different matter however. The brief overview above of the wider legal framework of victim redress under international law demonstrates that while reparations claimed directly by individuals under international law (generally speaking) is possible under certain circumstances, it remains that in each field of international law, there are gaps pertaining to the possibility of obtaining redress.

Having laid this theoretical foundation on justice theories and justifications for punishment within international criminal law, and having construed the legal basis of the duty of reparation for individuals, the next chapter focuses on the contents of this legal duty and to what extent the content of the duty of reparation upon States can inform the latter. It does so by looking at one specific system of victim redress, reparations directly from the State for human rights violations via international human rights law and mechanisms. The next chapter thus examines this question through the lens of one specific case study, the jurisprudence of the Inter-American Court of Human Rights.

CHAPTER 2: THE CONTENT OF REPARATION FOR VICTIMS OF INTERNATIONAL CRIMES: THE EXPERIENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

I. INTRODUCTION

In the previous chapter, this thesis examined the divide between punishment and reparations in theories of justice, and how areas of law other than international criminal law treat the question of reparation for victims. The aim of the previous chapter was to lay the foundation of the paradigm of individual versus individual: the construction of a legal duty upon individuals to give reparations to victims. It was noted that throughout the development of international law, a divide between State responsibility and individual criminal accountability has existed. While a State cannot be criminally convicted, and it is individual perpetrators that actually commit international crimes, with or without the apparatus of the State, international criminal justice law was originally conceived as a tool to bring the actual perpetrators to justice, thus enforcing international law.

Alongside this development, international human rights law was conceived so that victims can have a forum to claim reparation for human rights violations from the injuring State. Before regional human rights courts and mechanisms, victims can enforce their right to reparation against States. Thus, human rights law was created in parallel to the law on State responsibility, which applied purely on an inter-State level, leaving individual victims without an avenue when it came to reparations for harm they had suffered as a consequence of acts of other States.

International human rights law has thus filled the gap that existed before: it has provided victims with the right to seek reparation directly from their own States[163]. Victims' right to reparation has been solidified in the jurisprudence of human rights courts and mechanisms. These institutions have contributed a great deal to the elucidation of

[163] For reparation to victims of international wrongs committed by third States, see the law on the treatment of aliens: see generally, Edwin Borchard, *Diplomatic Protection of Citizens Abroad of the Law of International Claims*, Banks Law Publishing, 1919. This body of law however deals with claims on an inter-State level.

principles and forms of reparation under international law. Much can be learned from their experience.

Another development in international law, which is the main focus of the present study, happened through the integration of reparation for victims of international crimes within international criminal justice, which from its nature is divorced from State responsibility and focuses on individual criminal responsibility. Thus, reparation in international criminal law may fill another gap: where State responsibility (in the international human rights system or otherwise) is not engaged, victims may be able to claim a right of reparation against the individual perpetrator as discussed in the previous chapter.

In this context, in this early stage of the development of applicable principles on reparations in international criminal justice and of the architecture of the jurisprudence from the ICC, it is important to reflect upon the content of the legal duty to repair. In this development of reparations under international criminal law, principles of reparations will need to be solidified and many difficult questions will arise.

Having discussed the legal basis of the duty to repair under international criminal law at the international level, the aim of the present chapter is to dwell upon the contents of a duty to repair for individuals and to what extent the case law on the contents of duties to repair for States can be transposed to the international criminal law setting. This chapter has a specific focus and attempts to address some subsidiary research questions as outlined above[164]: what is the scope and content of a duty to repair for individuals? To what extent can principles and the case law on the duty of States to repair inform the duty to repair for individuals?

This chapter addresses these questions through the study of international human rights jurisprudence on reparation and how the latter may inform the development of the content of a duty to repair for individuals in international criminal law. This chapter uses the jurisprudence of the Inter-American Court of Human Rights ("IACtHR") given that this Court has the most far-reaching jurisprudence in the development of the doctrine and

[164] Cf. Introduction to the present thesis.

practice of reparation. The selection of the jurisprudence of the IACtHR is thus aimed to be focused and provide a case-study which can inform the content of the legal duty to repair in international criminal law. In particular, through the analysis of some key cases from the IACtHR, this chapter proposes how concretely it can inform individuals' duty to repair. It is acknowledged that the study of international human rights jurisprudence and the comparison between human rights law and international criminal law pose very broad questions; the purpose of this chapter is however limited and focused, and will thus not address an exhaustive discussion of these questions.

This chapter focuses on international human rights law due to the similarities of the two fields: like in international criminal law, under international human rights law, victims are the direct beneficiaries of reparations. Additionally, the violations that are the object of international human rights law are similar to those in international criminal law. Furthermore, the link between international human rights law and international criminal law has been recognized as: "The reference to human rights in the [Rome] Statute is an important recognition of victims' rights as jurisprudence on redress in international and regional human rights systems … has significantly contributed to developing the concept of reparations"[165].

It should be explained, at the outset, that due to some significant and systemic differences of a system based on State responsibility, and one based on individual responsibility, the principles and case-law of the IACtHR cannot be directly transposed to international criminal law; rather, it is submitted that it may provide some guidance as to the contents and scope of the legal duty to repair under international criminal law.

Within the context of the ICC concerning principles of reparation, it is interesting to note that Parties and participants, as well as the Chamber itself, have referred to the jurisprudence of regional human rights courts, particularly the IACtHR and the European Court of Human Rights, as well as other texts and documents dealing with the question of

[165] Gilbert Bitti & Gabriela Gonzalez Rivas, "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", in *Redressing Injustices through Mass Claims Processes, Innovative Responses to Unique Challenges*, The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, p. 312.

reparations under international law[166]. It is submitted that this is a positive development demonstrating the interconnectedness of different fields of international law.

In its first Decision on Reparations, ICC Trial Chamber I recognised the relevance of the experience of human rights institutions, in stating that

> "given the substantial contribution by regional human rights bodies in furthering the right of individuals to an effective remedy and to reparations, the Chamber has taken into account the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field"[167].

Against this background, in the present chapter, this thesis examines how the content of the duty of States to provide reparations to individuals for human rights violations developed particularly at the IACtHR could inform the content of the legal duty of reparations for individuals.

While not intended to be exhaustive, the present chapter aims at shedding light on some interesting aspects of the case-law of the IACtHR that could inform the doctrinal foundations of the reparations jurisprudence of the ICC. It also discusses how systemic and structural differences between the ICC and the IACtHR may affect the extent to which the ICC can directly draw on IACtHR case law or whether it should be informed by it in a more general and indirect manner. The underlying theme of this chapter is that the principles and contents found in international human rights law may inform the content of the legal duty of individuals to repair in international criminal law. Overall, it is submitted that much can be learned from a continuous dialogue among regional and international institutions committed to the promotion of international justice and the rule of law[168].

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[166] See e.g., ICC, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, ICC-01/04-01/06 ("Decision on Reparations"), para. 186 and footnote 377.

[167] *Ibid*.

[168] See in this regard, Antônio Augusto Cançado Trindade, *State responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Inaugural Address as Honorary Professor to the Chair in 'International and Regional Human Rights Courts', 10 November 2011 at Utrecht University, pp. 57-65.

II. INTERNATIONAL HUMAN RIGHTS COURTS AND INTERNATIONAL CRIMINAL COURTS: DIFFERENCES AND SIMILARITIES

International human rights courts, especially the IACtHR, have dealt with numerous cases of mass human rights violations, including cases of massacres. Much can be learned in terms of reparation for mass atrocities by looking to the jurisprudence of the IACtHR on this topic, considering its vast expertise and experience in the field. While this section examines general principles of reparation that could inform the architecture of the reparation scheme under international criminal law, attention will be given to cases of mass violations due to their similarity with international crimes and also the fact that often mass violations of human rights amount to international crimes[169].

The systems under which the IACtHR and the international criminal courts and tribunals operate share some similarities, but they are also divided by some structural and conceptual differences. For example, it has been noted that, although set up for the precise purpose of examining claims for reparation, human rights treaty bodies and human rights courts often suffer from limited budget and institutional constraints[170]. Furthermore, by their very nature, these institutions have to grapple with the individualized nature of human rights complaints when dealing with broader mass atrocities and mass victimisation. These constraints also form part of the reality under which the ICC operates. The main similarity between these two systems, it can be argued, rests on the nature of the violations that underlie both systems: international crimes involve mass violations of human rights. As it has been argued:

> "The practice of international human rights law bodies, like the IACtHR, is relevant for the ICC, not only because the Rome Statute clearly states that 'the application and interpretation of law pursuant to [article 21] must be consistent with internationally recognised human rights' but also

[169] See e.g. the crime of torture, which is considered a violation of human rights, which has been dealt with in many instances by human rights courts, and may also amount to an international crime, see e.g. Article 7 of the Rome Statute.

[170] See e.g. *Annual Report of the European Court of Human Rights*, 2006, Foreword by Jean Paul Costa, President of the European Court of Human Rights, p. 5 et seq.

> because most of the time the crimes that the ICC deals with also constitute a breach of international human rights law"[171].

In a similar vein, former ICC Judge Odio-Benito, stated that:

> "The extensive case law of the Inter-American Court of Human Rights, which has defined crucial concepts such as moral damage, damage to a life plan, and has interpreted the right to receive reparations taking into account the particu- larities of groups or communities (such as indigenous groups), could certainly serve as an exemplary model for our future judicial work"[172].

Importantly, however, some inherent and systemic differences between the IACtHR (and human rights systems more generally) and the ICC (and other international criminal courts) have a direct impact on how the jurisprudence of the IACtHR may influence the development of principles of reparation within the ICC. These differences make it impossible to *directly* transpose and apply the jurisprudence of the IACtHR to the ICC context, or more generically, to international criminal law.

For example, human rights reparations are awarded by a State to victims (individual or collective reparation awards), rather than against individual perpetrators of international crimes. With regards to the form of reparations and the principles followed for the award thereof, it is true that not all forms of reparation awarded on the basis of State liability can be directly transposed to international criminal proceedings, which is not aimed at State liability. This is a pivotal difference as some of the forms of reparation that have been awarded at the IACtHR which may require the participation of the State in question – for example, a change in legislation, or the building of a memorial, or the continuation of investigations – cannot be directly transposed to the ICC context and applied to individual perpetrators.

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[171] See Octavio Amezcua-Noriega, "Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections", *Reparations Unit, Briefing Paper No.1*, Dr. Clara Sandoval, University of Essex, 2011, no. 13.

[172] Elizabeth Odio-Benito, "Foreword", in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al. (ed.), Nijhoff, 2009, p. 3.

Furthermore, the aim of human rights systems is to examine claims of reparation against a State for its failure to prevent, punish or protect claimant victims. Conversely, reparation within an international criminal tribunal is a direct consequence of an international crime perpetrated by an individual. If one looks at Article 75 of the Rome Statute, the award of reparations depends on the conviction of the alleged perpetrator, whereas convictions of individual perpetrators are not necessary for the award of reparations at the IACtHR.

This also highlights a systemic difference between the ICC and the IACtHR pertaining to the objective of each system, and the role of victims therein: whereas in the IACtHR victims are parties, and the proceedings are aimed at deciding whether there has been a violation for which appropriate reparation is required, at the ICC, victims are participants in the proceedings, and their claims for reparation are not the principal object of the proceedings against the accused, but rather one possible consequence of a guilt verdict. Finally, as discussed in more detail below, the applicable law at the ICC may also limit the extent to which the ICC can use the jurisprudence of the IACtHR.

These important systemic, conceptual and structural differences that separate both systems need to be taken into account when assessing whether the jurisprudence of the IACtHR can be directly transposed to the ICC. Nevertheless, the principles developed by the IACtHR, along with its learned expertise, may prove helpful to the conception of the principles of reparation at the ICC. Specifically, the practice of the IACtHR may prove insightful to the building of a new system of international justice which aims at retribution as well as restoration[173].

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[173] There are not many studies, at the time of the writing of the present study, which examine how the jurisprudence and principles developed by regional human rights courts, and notably the IACtHR, could inform the interpretation of the ICC provisions on reparations. I am very thankful for the following contributions, which have provided insightful guidance in writing the present article: Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Chile Eboe-Osuji, Nijhoff, 2010, pp. 571-594. See also, Thomas Antkowiak, "An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice", *Stanford Journal of International Law* 47 (2011), and more generally, Antônio Augusto Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Inaugural Address as Honorary Professor to the Chair in 'International and Regional Human Rights Courts', 10 November 2011 at Utrecht University, pp. 57-65.

Thus, based on the foregoing observations, it seems that while the jurisprudence of the IACtHR cannot be readily and directly transposed the ICC context, it can provide insightful guidelines as to how the reparation system should develop at the ICC, especially in the construction of the contents of the legal duty to repair. In my view, reparations in international criminal law can be informed by the jurisprudence of the IACtHR in an indirect manner, while bearing dividing differences in mind.

III. THE INTER-AMERICAN COURT OF HUMAN RIGHTS TRAILBLAZING JURISPRUDENCE ON REPARATIONS[174]

With the advent of international human rights law, victims of human rights violations have been afforded the right to claim reparation before various fora of human rights mechanisms. These include, for example: the European Court of Human Rights, the recent African Court of Human and Peoples' Rights, treaty bodies, and the Inter-American Commission for Human Rights. The jurisprudence of these bodies has been rich and together, they have contributed to the formation of a meaningful human rights system, where victims' voices can be heard. While the experience of each of these institutions is undoubtedly valuable, this part of the study will focus on the jurisprudence of the IACtHR due to its consolidated experience, as well as its extensive, diverse and creative jurisprudence that may provide guidance in the architecture of the contents of the legal duty to repair in international criminal justice, both at the ICC and beyond.

[174] On the importance of the jurisprudence of the IACtHR to the development of a rich jurisprudence on reparations for human rights violations, see Philippe Weckel, "La justice internacionale en le soixantième anniversaire de la Déclaration Universelle des Droits de l'Homme", *Revue générale de Droit international public* 113 (2009), pp. 14-17.

1. Contextual background

The IACtHR and the Inter-American Commission of Human Rights are the main organs of the Inter-American system of Human Rights, which monitor the compliance of States Parties with their obligations to the Inter-American Convention on Human Rights of 1979 (Pact of San José)[175]. This system of human rights protection appears as a response to the countless atrocities that have occurred in the Americas in the past centuries, and to the struggle of peoples against their governments[176].

Article 63 (1) of the Inter-American Convention concerning reparations provides as follows:

> "1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

The IACtHR, since its first proceedings, has cultivated a far-reaching jurisprudence on reparations which elaborates on many concepts that are omnipresent in every system of reparation and which can be taken into account for the development of reparation principles within the ICC. Thus, the present study examines the jurisprudence of the Inter-American system of human rights through the lens of principles and concepts developed therein in hopes that this may shed light on similar notions at the ICC.

2. The concept of victims: who is entitled to receive reparation?

This is a key question concerning the award of reparation. The IACtHR has defined "victims" as persons whose rights have been violated[177]. A main feature of the jurisprudence of the IACtHR in this context is its broad conception of persons entitled to

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[175] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969 ("the Inter-American Convention").

[176] For an account of civil wars and dictatorships in Latin America in the past, see e.g. Paul H. Lewis, *Authoritarian Regimes in Latin America: Dictators, Despots, and Tyrants,* Rowman & Littlefield Publishers, 2005.

[177] Cf. e.g. ICtHR, *Amparo* v. *Venezuela,* Reparations Judgment, 14 September 1996, para. 40.

receive reparation; the Court developed the notion of "next of kin" which includes the immediate family of the victims, e.g. direct descendants, ascendants, siblings, spouses or permanent partners[178]. The development of the notion of "next of kin" as persons who may be eligible to reparation represents an enlargement of those who can receive reparation in addition to the direct victim of the violation for which reparation is awarded[179]. In this context, reparations have often been awarded to spouses and children of the direct victim since the Court considered that as a result of the violations, these persons also suffered material and moral harm[180].

Thus, it stems clearly from the jurisprudence of the IACtHR that the award of reparation goes beyond the strict definition of who is a "direct victim" of the violation in question and also includes "indirect victims" who may have suffered harm as a consequence of the violation[181]. It goes without saying that the award of reparations is not automatic to all persons related to the victim, and the Court has established some criteria on the basis of which reparation may be awarded[182].

At this juncture, it is also worth mentioning that the Court has taken a flexible approach in cases where the victim could not be found. For example, in cases of forced disappearances and massacres, surviving persons have been permitted to obtain reparation.

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[178] See IACtHR, *Garrido Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, para. 50.

[179] IACtHR, *Juan Humberto Sanchez* v. *Honduras*, Judgment, 7 June 2003, para. 155; IACtHR, *Lopez Alvarez* v. *Honduras*, Judgment, 1 February 2006, para. 120.

[180] *Ibid.*. See also, Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Chile Eboe-Osuji, Nijhoff, 2010, p. 577.

[181] IACtHR, *Garrido and Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, Series C No 39, paras. 62, 63; IACtHR, *Blake* v. *Guatemala*, Judgment, 22 January 1999, para. 37; IACtHR, *Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, paras. 33-36; IACtHR, *Aloeboetoe* v. *Suriname*, Reparations Judgment, 10 September 1993, para. 71; IACtHR, *Panel Banca* v. *Guatemala*, Reparations Judgment, 25 May 2001, para. 85, 86; IACtHR, *Case of Street Children* v. *Guatemala*, Reparations Judgment, 26 May 2001,para. 68; IACtHR, *Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 152; IACtHR, *Loayza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 92.

[182] See IACtHR, *Aloeboetoe* v. *Suriname*, *Reparations* Judgment, 10 September 1993, paras. 67, 68.

Thus, the Court considers as victims not only those who have been killed or forcefully abducted, but also those displaced as a result[183].

Another interesting aspect of the jurisprudence of the IACtHR, which could shed some light on the development of the jurisprudence of the ICC, relates to the identity of a victim. In cases related to indigenous groups, for example, the Court has established that when no identity document is available, a declaration which is made to the competent authority can be used to determine the identity of the victim[184].

Thus, it can be seen from the jurisprudence of the IACtHR referred to herein that the Court has adopted an approach concerning persons entitled to receive reparation which goes beyond a strict understanding of who qualifies as a victim within the system. The Court has recognized the inconvenient truth: that human rights violations generally harm persons beyond the direct victim and that such individuals shall be considered victims for the purposes of claiming and potentially receiving reparations[185].

These are important lessons which ought to be kept in mind, in spite of the inherent differences that exist between both systems of reparations, for the devising of reparation principles within international criminal law. In the context of international crimes, where the consequences thereof go beyond the direct victims[186] of the crime, affecting families

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[183] IACtHR, *Case of Acosta Calderon* v. *Ecuador*, Judgment, 24 June 2005, para. 154 and IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 256. Cf., Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 577.

[184] IACtHR, *Case of Moiwana* v. *Suriname*, Judgment, 15 June 2005, paras. 117 and 178; IACtHR, *Case of Massacre of Plan de Sanchez*, Reparations Judgment, 19 November 2004, para. 62.

[185] IACtHR, *Case of Caracazo* v. *Venezuela*, Reparations Judgment, 29 August 2002, paras. 63-73.

[186] Rule 85 of the Rules of Procedure and Evidence of the ICC provides the following definition of victims:

> "For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
>
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or

and communities, it is fundamental, in my view, that the award of reparations does not follow a formalistic or inflexible approach as to the persons who can receive reparation.

3. Assessment of harm

The IACtHR has produced a very rich jurisprudence concerning the definition and classification of damage[187]. According to the Court, moral damage is the psychological impact on a victim or his/her family members as a consequence of the violations of the rights and freedoms guaranteed by the Convention[188]. This type of damage has been considered to include changes and deterioration of the standard of living of the victims and eventual financial difficulties or family disintegration[189].

An important remark about the jurisprudence of the IACtHR in this respect is that the Court has relied on some assumptions as regards the proof of immaterial damages and has taken decisions on this basis which stem from the gravity of the violations[190]. For example, the Court has found that aggression and abuses are important causes of moral suffering and

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charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

[187] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 579.

[188] IACtHR, *Case of Velasquez-Rodriguez* v. *Honduras*, Judgment, 21 July 1989, para. 51.

[189] IACtHR, *Case of La Rochela Massacre* v. *Colombia*, Judgment, 11 May 2007, paras. 262, 263, 264.

[190] See e.g., IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 267; IACtHR, *Case of Villagrán Morales et al* v. *Guatemala, Street Children Case*, Reparations Judgment, 26 May 2001, , para. 79 ["in view of the lack of precise information on the real earnings of the victims, [the Court] should use the minimum wage for non-agricultural activities in Guatemala as a basis"]; IACtHR, *Case of Caracazo* v. *Venezuela,* ReparationJudgment, 29 August 2002, para. 88 [in the absence of detailed or reliable information, the reference for the Court was the minimum wage in national law]; IACtHR, *Case of Panel Blanca* v. *Guatemala*, Reparations Judgment, 25 May 2001, paras. 116-117 [in the absence of detailed or reliable information, the reference for the Court was the minimum wage in national law]; IACtHR*., Castillo Páez* v. *Peru*, Reparations Judgment, 27 November 1998, para. 75 [in the absence of detailed information, the reference for the Court was the minimum wage in national law]; IACtHR*, Case of Neira Alegría et al.* v. *Peru*, Reparations Judgment, 19 September 1996, paras. 49-52 [the Court determined the loss of income "for reasons of equity and in view of the actual economic and social situation of Latin America"]; IACtHR*, Case of Maritza Urrutia* v. *Guatemala*, Judgment, 27 November, 2003, paras. 158-159 [the Court determined the loss "in fairness"]; IACtHR*, Case of Suárez Rosero* v. *Ecuador*, Reparations Judgment, 20 January 1999, paras. 66 and 99; IACtHR*, Case of Cantoral Benavides* v. *Peru*, Judgment, 3 December 2001, para. 51.

that no evidence is necessary to arrive at such conclusion[191]. This is a particularly relevant consideration to be borne in mind when developing the contents of the legal duty of reparations under international criminal law. This is because it concerns the aftermath of international crimes where the gravity of the breach of international law is inherently present, but the moral harm pertaining to the consequences of conflicts and wars is often difficult to adduce.

Similarly, in relation to evidence of damage, reliance on presumptions and circumstantial evidence has been accepted "when they lead to consistent conclusions as regards the facts of the case"[192].

The use by the IACtHR of concepts of judicial fairness and equity, both in the decision to award moral damages as well as in the quantification of the damages, is worth taking into account also in the context of ICC reparations, as the latter may have to make a decision as to the award of reparation in contexts, where, for example, there is a lack of substantial evidence. In my view, it should not be overly formalistic to the detriment of the victim[193].

As to material damages, these concern the negative impact of the violations on the victim's earnings or the expenses resulting from the violations[194]. In this context, the Court

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[191] IACtHR, *Garrido Baigorria* v. *Argentina*, Reparations Judgment, 27 August 1998, para. 49; IACtHR, *Case of Loaiza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 138; IACtHR, *Case of La Rochela Massacre* v. *Colombia*, Judgment, 11 May 2007, para. 256; IACtHR, *Case of La Cantuta* v. *Peru*, Judgment, 29 November 2006, para. 217.

[192] IACtHR, *Gangaram Panday v. Suriname*, Merits, Reparations and Costs Judgment, 21 January 1994, para. 49.

[193] In some cases, the IACtHR decided on the basis of equity and guided by principles of fairness, for example: IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 54 (a); IACtHR, *Case of Goiburú et al.* v. *Paraguay*, Merits, Reparations and Costs Judgment, 22 September 2006, para. 156; IACtHR, *Case of Caracazo* v. *Venezuela*, Reparations and Costs Judgment, 29 August 2002, para. 94 [*N.B.* the Court established non-pecuniary damage *inter alia* "through reasonable application of judicial discretion and in terms of fairness"]; IACtHR, *Case of Ituango Massacre* v. *Colombia*, Merits, Reparations and Costs Judgment, 1 July 2006, para. 380; IACtHR, *Case of Neira Alegría et al.* v. *Peru*, Reparations Judgment, 19 September 1996, paras. 49-52 [the Court determined the loss of income "for reasons of equity"]; IACtHR, *Case of Cantoral Benavides* v. *Peru*, Judgment, 3 December 2001, para. 62; IACtHR, *Case of Yvon Neptune* v. *Haiti*, Judgment, 6 May 2008, para. 168 [the amount of compensation for moral damage was based on equity].

[194] IACtHR, *Case of Acevedo Jaramillo and others* v. *Peru*, Judgment, 7 February 2006,

has also applied numerous assumptions as regards loss of future income and has made awards based on the principle of fairness[195]. The Court has also found that the Judgment itself can constitute a form of reparation for material damages, as it will be discussed below[196]. At this juncture, it is also worth mentioning the notion of damage to the "proyeto de vida", a concept developed by the IACtHR, which concerns a long-term reduced ability to benefit from life in light of the altered circumstances as a consequence of the violation[197].

These approaches by the IACtHR as to the assessment of damages may provide interesting insights as to the route that international criminal law should take with regards to the assessment of evidence of damage and causation, as well as the method of quantification of damages.

4. Collective reparations

The IACtHR's experience with collective reparations may prove pertinent for the award of reparations in international criminal law in instances where calculating individualized reparations for victims may be a rather difficult task. The following section dwells upon the question of collective reparations in the context of the ICC; in the present chapter, the goal is simply to provide some concrete examples of collective reparations from a State-based perspective (in the IACtHR context specifically) to inform collective reparations in the international criminal law context.

Again, the jurisprudence of the IACtHR has been a pioneer in this area[198]. While establishing that the award of collective reparation entails direct damage to individual

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para. 301.

[195] IACtHR, *Case of Molina Theissen* v. *Guatemala*, Reparations Judgment, 3 July 2004, para. 57.

[196] See IACtHR, *Case of La Cantuta* v. *Perú*, Judgment, 29 November 2006, para. 162.

[197] See e.g. IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 80; IACtHR, *Case of Loayza-Tamayo* v. *Peru*, Reparations and Costs Judgment, 27 November 1998, para. 147. See also C. Droege, "El derecho a interponer recursos y a obtenir reparación por violaciones graves de los derechos humanos: guía para profesionales", 2 Serie de guías para profesionales, 2007, pp. 141-142; S.G. Ramírez, "Las reparaciones en el sistema interamericano de protección de los derechos humanos", in El sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI: tomo I (San José: Corte Interamericana de Derechos Humanos, 2001), pp. 150-152.

[198] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the

victims[199], in several cases, collective reparations to entire communities have been awarded. These cases deal with massacres of entire communities, as illustrated, for example, in the *Plan de Sanchez Massacre* case, which concerned a massacre to a Mayan village by the Guatemalan army. The massacre almost completely destroyed the village. During the massacre, women were raped, tortured and assassinated; children were beaten to death[200]. The Court heard the testimony of survivors of the massacre and experts about the impact of the crimes on the community as a whole. The Court recognized in its Judgment the consequences of violence and extermination towards women for a community. The Court, while recognizing that it could not award reparation to victims who were not individually indicated, decided to give reparation to the communities where the victims used to live[201]. Furthermore, this case is also interesting in that the Court considered the loss of traditions and cultural values (due to the death of those members of the community who transmitted such values) and it qualified such loss as grounds for the award of moral damages[202].

These findings of the IACtHR can be enlightening to the ICC, which will likely have a similar task of awarding reparations in the context of massacres, where many victims cannot be individually singled out. Similarly, the ICC may also have to grapple with having to award reparations for crimes such as mass rape, extermination and torture. In my view, like the IACtHR experience demonstrates, the ICC should take into account the impact of certain types of violations on the entire community where the victims come from.

The experience of the IACtHR may also prove useful as to the kinds of collective reparation that can be awarded. The Court has awarded various kinds of collective

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Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 584.

[199] IACtHR, *Case of Aloeboetoe* v. *Suriname*, Reparations Judgment, 10 September 1993, para. 83.

[200] IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004.

[201] *Ibid.*, para. 62.

[202] *Ibid.*, paras. 12-49. See also, J. J. Rojas Báez, "La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones y los Criterios del Proyeto de Artículos sobre Responsabilidad del Estado por Hechos Internacionalmente Ilícitos", *American University International Law Review* 92 (2007-2008), p. 110.

reparations in its jurisprudence, for example[203]: the creation of a project for the entire community to provide potable water and sanitary infrastructure[204]; establishment of a community fund for specific projects for education, health, housing, and agriculture for members of the indigenous tribe affected[205]; educational grants for the population affected by the violation[206]; setting in place safety measures for displaced persons in case they decide to return to their villages[207]; public apology and acknowledgment by the State to the community where the human rights violations took place[208]; the building of memorials as a means to prevent the reoccurrence of such serious violations[209]; and setting up courses in human rights[210], among others.

This list of collective reparations is of course not exhaustive; the jurisprudence of the IACtHR is not exhaustive either, as there are other types of collective reparations that can be awarded in cases of massacres[211]. The point to be taken from these examples of collective reparations, awarded in cases of massacres, is the open and creative attitude of the Court to award reparations that uniquely fit the violation with which it is seized. The lesson to be learned, it is submitted, is that the overwhelming task of assessing claims of reparation for massive human rights violations has not stopped the Court from awarding significant redress to victims.

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[203] See in this regard, Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 586.

[204] IACtHR, *Case of YakyeAxa* v. *Paraguay*, Judgment, 17 June 2005, paras. 205-206.

[205] *Ibid.*

[206] IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 43.

[207] IACtHR, *Case of Mapiripan Massacre* v. *Colombia*, Judgment, 15 September 2005, para. 313.

[208] *Ibid.* at para. 314.

[209] *Ibid.*, at para. 315.

[210] *Ibid.* at para. 316.

[211] See e.g. Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 586, who claims that: "… until now, these collective reparations do not include specific reparations for women survivors of sexual violence such as gynaecological clinics, HIV treatment programs, stigma-sharing programs, preventive campaigns on violence against women, etc."

5. Types of reparation

This thesis claims that one lesson that can be learned from the experience of the IACtHR is that reparations for mass atrocities ought to take into account the perspective of the victim and it should include a holistic approach to reparations, bearing in mind the goal and types of reparations that can be awarded.

One of the main challenges of reparations in the international criminal law context is that the accused may not have any financial resources at the end of the trial to pay reparations to victims[212]. This criticism can be easily rebutted if one takes a broader approach of what it means to "repair" the harm caused. In this section, this thesis examines the jurisprudence of the IACtHR with respect to the forms of reparations that have been awarded to victims of human rights violations. The aim of this section is not to be exhaustive, but rather to demonstrate that the mandate of reparations in international criminal law can be much more encompassing than the translation of reparations into a sum of money. This notion has guided the IACtHR in the development of its jurisprudence on reparation for human rights violations.

The IACtHR has taken a broad approach to reparations and has referred to the concept of "full reparation". In this perspective, it went beyond pecuniary reparations[213] and has awarded reparations in the form of restitution[214], rehabilitation[215], satisfaction and guarantee of non-repetition[216], reparations of symbolic or emblematic nature, going beyond individual victims and having an impact on the community in which the victim belongs.

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[212] See e.g. Saul Levmore, "Reparations in the Wake of Atrocities: A Plan for Encouraging Participation by Governments", *Human Rights and International Criminal Law Online Forum*, Invited experts on reparations question, available at: http://uclalawforum.com/reparations#Levmore

[213] See IACtHR, *Case of Loayza Tamayo* v. *Peru*, Reparations Judgment, 27 November 1998, para. 124.

[214] See e.g. IACtHR, *Case of Velazquez Rodriguez* v. *Honduras,* Reparations Judgment, 21 July 1989.

[215] See e.g. IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 42.

[216] See e.g. IACtHR, *Case of Villagrán Morales et al* v. *Guatemala*, Street Children Case, Reparations Judgment, 26 May 2001.

An example of the diversity of forms of reparations ordered by the Court is illustrated in the *Villagrán Morales and Others* case ("*Ninõs de la Calle*")[217]. In addition to indemnification for moral and material damage, the Court ordered a change in legislation to conform with Article 19 of the American Convention, the transfer of the mortal remains of one of the assassinated children and its exhumation in the place chosen by his family members, the designation of an educational centre with an allusive name of the victimized children and bearing a plate of the five victims as well as the investigation of the facts and punishment of those responsible[218]. This case demonstrates, it is submitted, the willingness of the Court to take the perspective of the victim in the award of reparations, their needs and their wishes.

Moreover, the IACtHR has awarded reparations to victims consisting of sums of money and has also relied on positive obligations by the State. For example, in the *Bulacio v. Argentina* case[219], which concerned the detention and killing of a teenager by the police, the Court ordered, in addition to financial compensation, the continuation of investigation in the case and the adoption of legislative and other measures in order to ensure the non-repetition of the violation[220].

Significantly, the Court has acknowledged that the right to truth[221] is also a form of reparation[222]. It has ordered, in this respect, *inter alia,* "the translation of the American

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[217] *Ibid.*

[218] *Ibid*.

[219] Merits, Reparations and Costs Judgment, September 18, 2003.

[220] C.f. also, Antônio Augusto Cançado Trindade, "The Inter-American System of Protection of Human Rights (1948-2009): Evolution, Present State and Perspectives", in *Dossier Documentaires/Documentary File- XL Session d'Enseignement* , Tome II, Strasbourg, IIDH, 2009, p. 102.

[221] See Revised final report of the Special Rapporteur on the question of impunity of perpetrators of human rights violations (civil and political), 2 October 1997, E/CN.4/Sub.2/1997/20/Re v.1, para. 19, where the Inter-American Commission on Human Rights stated that: "Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be commit ted, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources, so that the judiciary itself may undertake whatever investigations may be necessary. The Commission considers that the observance of the principles cited above will bring about justice rather than vengeance, and thus

Convention and Judgments into the language of the victims … [and also] that these be widely disseminated among the victims of violations and … published in official journals and newspapers with national circulation."[223] In addition to the right to truth, apology, public acknowledgement and acceptance of responsibility are also recognized by the Court as fundamental forms of reparation[224]. The IACtHR and the Inter-American Commission have also acknowledged that a Judgment of the Court in this respect provides a form of reparation[225]. Certainly, as the IACtHR itself has recognized, in cases of human rights

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neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized." See also, Report 21/00, Case 12.059, Carmen Aguiar de Lapacó (Argentina), 29 February 2000, where Argentina guaranteed "the right to truth, which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons."

[222] IACtHR, *Case of Prison Miguel Castro Castro* v. *Peru*, Judgment, 25 November 2006, para. 440. In this sense, the Court has ordered the translation of Judgments into the language of the victims and that the Judgments be disseminated among victims of violations, see IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004, para. 102; IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 79.

[223] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, pp. 590-591, citing IACtHR, *Case of Massacre of Plan de Sanchez* v. *Guatemala*, Reparations Judgment, 19 November 2004, para. 102 and IACtHR, *Case of Cantoral Benavides* v. *Peru,* Reparations Judgment, 3 December 2011, para. 79.

[224] For cases where the Court ordered recognition of responsibility and public apology: IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 44 e) and operative paragraph 5 e); IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 81; IACtHR, *Case of Durand and Ugarte* v. *Peru*, Reparations Judgment, 3 December 2001, para. 39 b) and operative par agraph 4 b); IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 84; IACtHR, *Case of Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 188; IACtHR, *Case of Plan de Sánchez Massacre*, Reparations Judgment, 19 November 2004, para. 100. Guatemala apologized publicly for the massacre: AP Guatemala Apologizes for 1982 Massacre [available at http://news.yahoo.com/s/ap/ 20050719/aponrelaamca/guatemala_human_rights]. For cases where the IACtHR has ordered States to make their Judgments public: IACtHR, *Case of Trujillo Oroza* v. *Bolivia*, Reparations Judgment, 27 February 2002, para. 119; IACtHR, *Case of Barrios Altos* v. *Peru*, Reparations Judgment, 30 November 2001, para. 44 (d) and operative paragraph 5 d); IACtHR, *Case of Cantoral Benavides* v. *Peru*, Reparations Judgment, 3 December 2001, para. 79; IACtHR, *Case of Durand and Ugarte v. Peru*, Reparations Judgment, 3 December 2001, para. 39 a) and operative paragraph 3 a); IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Reparations Judgment, 22 February 2002, para. 84; IACtHR, *Case of Caracazo v. Venezuela*, Reparations Judgment, 29 August 2002, para. 128; IACtHR, *Case of Juan Humberto Sánchez* v. *Honduras,* Judgment, 7 June 2003, para. 188. See also UN Human Rights Commission resolutions, Resolutions on Impunity E/CN.4/RES/2001/70, 25 April 2001, para 8; E/CN.4/RES/2002/79, para 9; E/CN.4/RES/2003/72 I, para. 8, where it is recognized that "for the victims of human rights violations, public knowledge of their suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation."

[225] IACtHR, *Case of Cesti Hurtado Case,* Reparations Judgment, 31 May 2001, para. 59, where the Court found that the judgment constitutes satisfaction with regard to the reputation and honour of the victim.

violations, the Judgment alone may fail to fully do justice to victims[226]. The point, however, is that the focus should not always and in all cases be on pecuniary reparation.

In this sense, in line with the findings of the IACtHR and the Inter-American Commission that the right to truth is a form of reparation[227], the ICC is already contributing to restoration and reparation within its activities, by investigating situations and cases, by outreaching to communities and victims and by revealing certain acts as criminal. The same is true for cases before national courts in relation to international crimes.

IV. How the jurisprudence of the IACtHR can inform the content of the duty to repair in international criminal law

Many kinds of reparations in international human rights courts can only be ordered against a State, as opposed to individual perpetrators. Nevertheless, the above review of collective reparation awards and other forms of reparations serve at least two purposes. First, it shows that reparation may take various forms in addition to financial compensation and that creativity has its place when awarding reparations for acts which are difficult to repair. Secondly, principles of reparation may be distilled from these examples in order to guide the content of the legal duty to repair for individuals, as well as the principles of reparation for the ICC and the Trust Fund for Victims in their mandate.

As ICC Trial Chamber Judge Odio Benito stated, the jurisprudence of the IACtHR "offers evidence of the complementarity between international human rights law and international criminal law."[228] It is argued that international criminal law, like other

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[226] IACtHR, *Case of El Amparo* v. *Venezuela*, Reparations Judgment, 14 September 1996, para. 35; IACtHR, *Case of Neira Alegría et al* v. *Peru*, Reparations Judgment, 19 September 1996, para. 56; IACtHR, *Case of Castillo Páez* v. *Peru*, Reparations Judgment, 27 November 1998, para. 84; IACtHR, *Case of Blake* v. *Guatemala*, Reparations Judgment, 22 January 1999, para. 55; *Case of Panel Blanca* v. *Guatemala*, Reparations Judgment, 25 May 2001, para. 105.

[227] The right to truth, as the Court defined it in the *Barrios Alto Massacre* case, "se encuentra subsumido en el derecho de la véctima o sus familiars a obtener de los órganos competentes de Estado el esclarecimiento de los hechos violatorios Ibid. las responsabilidades correspondientes, a través de la investigación Ibid. el juzgamiento que previenen los artículos 8 Ibid. 25 de la Convención", IACtHR, *Case of Barrios Alto* v. *Peru*, Judgment, 14 March 2001, para. 48. See also, IACtHR, *Case of Bámaca Velásquez* v. *Guatemala*, Judgment, 25 November 2000, para. 201.

[228] Elizabeth Odio Benito, "Development and Interpretation of Principles of Reparation: the

branches of international law, should not develop in a vacuum, without taking into account principles and the practice devised and applied in other areas of international law[229].

As stated above, the assessment and award of reparations to victims within international criminal proceedings is a new phenomenon in international criminal law. This is all the more reason to learn from institutions that have proven experience in the domain, albeit from a State-based perspective. It goes without saying that certain adaptations need to be put into place, as there are inherent differences between the two fields of international law. It remains, nevertheless, that much can be borrowed from the jurisprudence of the IACtHR in relation to reparations, especially pertaining to cases of massacres.

Turning specifically to the case of the ICC, and how the contents of the legal duty to repair for States can inform the legal duty to repair for individuals, some contextual analysis is required. As to formal criteria for utilizing international human rights principles and jurisprudence to inform the ICC framework for reparations for victims, one first needs to inquire into the legal applicability of the former within the Rome Statute "applicable law".

Article 21 of the Rome Statute establishes the applicable law at the International Criminal Court:

> "1. The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

Case Law of the IACHR and its Possible Contributions to the Jurisprudence of the ICC", in *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay, Chile Eboe-Osuji*, Nijhoff, 2010, p. 591.

[229] See as an example of the possibility of cross-fertilisation, the IACtHR in the *Case of Miguel Castro Castro Prison* v. *Peru* used the definition of sexual violence, and the typification as rape of certain acts, of the ICTR Trial Chamber in the Akayesu case: IACtHR, *Case of Miguel Castro Castro Prison* v. *Peru*, Judgment, 25 November 2006, para. 306, citing: ICTR, *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 688.

> 2. The Court may apply principles and rules of law as interpreted in its previous decisions.
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."[230]

As it can be perceived, where appropriate, the Court may apply principles and rules of international law (Article 21 (1) (b)). Thus, it could be argued, on a first read, that this provision grants the legal basis for the application of principles of international human rights law, as developed by the jurisprudence of international human rights courts, within the proceedings in the International Criminal Court.

This provision should however be read in light of the 2006 Judgment of the Appeals Chamber, whereas it stated that such sources of law can only be applied when there is a gap in the Rome Statute[231]. Furthermore, in its previous Judgment of 13 July 2006, the Chamber explained that the sources cited in Article 21 (1) (b) and (c) are subsidiary sources and thus cannot be applied so as to create procedures other than those included in the Statute and the Rules of Procedure and Evidence[232].

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[230] Compare and contrast the applicable law as stated in Article 21 of the ICC Statute with the sources of law at the International Court of Justice, pursuant to its Article 38:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

[231] ICC*, Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772, para. 34.

[232] ICC, *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, paras. 33-42.

It remains however that Article 21 (3) may potentially have a broad effect on the application of principles of international human rights jurisprudence to the work of the Court, in particular in relation to reparations. This provision states that the application and interpretation of the law as stated in Article 21 of the Rome Statute, "must be consistent with internationally recognized human rights…" As expected, this provision has been much commented upon[233]. One author has pondered that Article 21 (3) "provides a standard against which all the law applied by the court should be tested. This is a sweeping language, which, as drafted, could apply to all three categories in Article 21."[234]

As to the interpretation of Article 21(3), in its Judgment of 13 July 2006, the Appeals Chamber stated that the Rome Statute, being a treaty itself, is to be interpreted in accordance with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[235].

As the Preamble of the Statute recalls, "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". The Appeals Chamber, in its Judgment of 14 December 2006, dwelled further upon this provision. According to the Chamber:

> "Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and applied in accordance with internationally recognized human rights; …"[236]

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[233] See Mahnoush Arsanjani, "The Rome Statute of the International Criminal Court", *American Journal of International Law* 93 (1999), p. 22; Gilbert Bitti, "Article 21 of the International Criminal Law Statute and the Treatment of Sources of Law in the Jurisprudence of the ICC", in *The Emerging Practice of the International Criminal Court,* Carsten Stahn and Göran Sluiter, Nijhoff, 2008, pp. 285-304.

[234] Mahnoush Arsanjani, *ibid*.

[235] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155 ("VCLT"), p. 331.

[236] ICC, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772, para. 37.

Be that as it may, even if the Court is not required *per se* to refer to principles developed by the human rights courts and bodies, such reference may prove very useful and insightful in many respects. For instance, as illustrated above, the jurisprudence of human rights courts provide many examples of types of reparation awarded to victims. A well-developed practice of awarding collective reparations could also provide useful guidelines for determining those who can receive reparation and for defining the notion of harm.

A number of Judgments and decisions of the ICC Chambers referred to the jurisprudence of regional human rights courts to assist in the definition of some terms, such as "victim" and "harm". Such reference to the case law of the IACtHR, if applicable, will of course have to be adapted to the circumstances of each case and will need to take into consideration the differences that exist between the two systems (see above). Nevertheless, it remains that such jurisprudence may serve as trailblazers to some of the difficult questions the Court will be concerned with in the years to come.

As to the significance of the jurisprudence of the IACtHR to the development of principles and practice of the ICC, in my view, there are numerous ways in which the former can inform and, to a certain extent, indirectly influence the latter. First and foremost, I am of the opinion that a great contribution of such jurisprudence is the creative and holistic approach to reparations. As Judge Cançado Trindade, former President of the IACtHR has posited, in one of his Separate Opinions,

> "… one ought to focus the whole theme of the reparations of violations of human rights as from the integrality of the personality of the victims, discarding any attempt of mercantilization - and the resulting trivialization - of such reparations. It is not a question of denying importance to the indemnizations, but rather of warning for the risks of *reducing* the wide range of reparations to simple indemnizations. It is not by mere chance that contemporary legal doctrine has been attempting to devise distinct *forms* of reparation - *inter alia*, *restitutio in integrum*, satisfaction, indemnizations, guarantees of non- repetition of the wrongful acts - *from the perspective of the victims*, so as to fulfill their needs and claims, and to seek their full rehabilitation. (...) I am not at all convinced by the 'logic' - or rather, the lack of logic - of the *homo oeconomicus* of our days, to whom, amidst the new idolatry of the god-market, everything is reduced to the fixing of compensation in the form of amounts of indemnizations, since in his outlook human relations themselves have - regrettably - become commercialized. Definitively, to the integrality of the personality

> of the victim corresponds an *integral* reparation for the damages suffered, which is not at all reduced to the reparations for material and moral damages (indemnizations). (...) Article 63(1) of the American Convention, on the contrary, renders it possible, and requires, that reparations be enlarged, and not reduced, in their multiplicity of forms. The fixing of reparations ought to be based on the consideration of the victim as an integral human being, and not on the degraded perspective of the *homo oeconomicus* of our days. (...)"[237]

In my view, this is an important point that goes to the heart of critiques to reparations within the ICC, and international criminal law more broadly. As discussed above, one of the main challenges of awarding reparations within the context of an international criminal trial, in the aftermath of mass atrocities, and against individual perpetrators pertain to practical considerations. The first often mentioned is the concern that the individual perpetrator may not have the financial ability to pay compensation. Nevertheless, at this juncture, it is important to state clearly that such concern, in my view, misses the point. It misses the point because it is grounded on a potentially flawed premise: the idea that reparations must necessarily be monetary[238]. As it has been stated:

> "Monetary damages can provide funds for basic necessities. But commentators note that many civil plaintiffs want an apology above all else, and frequently only file a lawsuit when unsuccessful in obtaining one. Several observe that cash damages are often "much less important than emotional or symbolic reparation" for litigants. Monetary compensation does not aptly address a person's need for "dignity, emotional relief, participation in the social polity, or institutional reordering."[239]

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[237] IACtHR, *Case of Villagrán Morales et al* v. *Guatemala, Street Children Case*, Reparations Judgment, 26 May 2001, Separate Opinion of Judge Cançado Trindade, paras. 28, 35 and 37.

[238] There are many short-comings in a monetary award of reparation. It can be argued that money does not carry moral or symbolic significance and that money does not heal wounds. Also, it appears that monetary awards, especially when victims' wishes point away from such a type of award, places the offender in the centre of the proceedings on reparation which are intended to focus on victims; it is not supposed to be translated into a form of punishment of the offender. From a moral perspective, money can be spent and its moral and spiritual value, if any, lost.

[239] Thomas Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *Columbia Journal of Transnational Law* 46 (2008), p. 284, citing many relevant sources: Brent T. White, "Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy", *Cornell Law Review* 91 (2006), pp.1271-1272; John Braithwaite, "A Future Where Punishment Is Marginalized: Realistic or Utopian?", *UCLA Law Review* 46 (1999), pp. 1727, 1744 ; Eric K. Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-civil Rights America*, New York University Press, 1999.

Bearing this consideration in mind, the practice of the IACtHR can prove useful in its efforts to hear victims and not to focus solely on monetary compensation awards. Borrowing this idea, and applying it to ICC reparation proceedings, it can address the criticism that reparation awards may not be enforceable against a convicted person if he or she does not have financial resources to honour the award.

The reparation phase of proceedings is, more than any other phase, about the victim, his/her suffering and how an award may redress such suffering. In this context, it is important to take victims' views into account. For instance, it has been argued that the IACtHR's approach to reparation as not limited to monetary awards has been viewed positively and is constructive with victims[240]. In this regard, it has been noted that, for example, Mr. Cantoral Benavides, a victim in a case heard by the IACtHR, claimed that the state apology ordered by the Court was a "triumph" to him[241].

In conclusion, it is argued that one of the most important contributions of principle that the jurisprudence of the IACtHR can provide to the building of a solid jurisprudence at the ICC is the idea that harm caused must be accompanied by due reparation to the victim; the inclusion of the victim in the centre of the justice process; and the creativity exercised by the Court to award reparation even in cases where such an award is neither intuitive nor an easy task. This lesson should be borne in mind when the ICC Judges are to give life to the grandiose task of trying and punishing the accused while also including victims in the process and delivering justice.

V. CONCLUSIONS

It seems that, at the current print of international law, the civil and criminal dimensions of justice are not completely dissociated, they go in fact hand-in-hand: an international crime or a gross human rights violation may entail both the prosecution and eventual punishment of the offender as well as the right of the victims to seek and obtain

[240] Thomas Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *Columbia Journal of Transnational Law* 46 (2008), p. 287.

[241] Carlos M. Beristain, *Diálogos sobre la Reparación: Experiencias en el Sistema Interamericano de Derechos Humanos* (2008), p. 93.

reparation. Significantly, the right of victims to obtain reparation has transcended the realm of international human rights law and is contemporarily also recognized in international criminal law[242], demonstrating the doctrinal interconnectedness of the fields of international human rights law and international criminal law.

Although the ICC is an international criminal court, its mandate is a noble, yet ambitious, one: it includes perspectives for offenders, victims and the broader international community. The rights of victims are recognized in the founding documents of that institution and the ICC should live up to its grand task. My claim is that international courts and tribunals, and international law in general, should work in synergy, one feeding off of the other, and ensuring a fertilization and integration of systems[243]. In this perspective, while there are some systemic and structural differences between the ICC and the IACtHR which make it impossible to directly apply the jurisprudence of the IACtHR in ICC proceedings, the latter can be informed by the practice and jurisprudence of the former. This chapter has addressed the question of how the principles and case law from the IACtHR (dwelling upon State-based reparations) can inform the content of a legal duty of individuals of reparation within international criminal law. Within that framework, as this chapter has argued, the experience of the IACtHR in cases of reparation proves insightful in many ways in international criminal law[244].

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[242] Christine Evans, *Reparations for Victims in International Criminal Law*, available at: http://Ibid..rwi.lu.se/ktfestschrift/On-line_festschrift_in_honour_of_Katarina_Tomasevski_files/Reparations%20for%20Victims%20-%20Evans.pdf

[243] Antônio Augusto Cançado Trindade, *International Law for Humankind*, Nijhoff, 2010, pp. 57-65.

[244] Decision on Reparations.

CHAPTER 3: OPERATIONALIZING THE DUTY TO REPAIR WITHIN THE SETTING OF INTERNATIONAL CRIMINAL COURTS: THE ICC AND OTHER INTERNATIONAL/ HYBRID CRIMINAL TRIBUNALS APPROACHES TO VICTIMS' REDRESS

International prosecutions pertaining to international crimes are not a contemporary phenomenon. Since the end of the Second World War, international prosecutions were held in Nuremberg[245] and Tokyo[246]. The suffering of victims during the War was often referred to as a justification for the creation of the Tribunals and prosecution of those responsible before international fora[247]. While the American Chief Prosecutor Robert Jackson stated that a finding of guilt against the defendants meant that "justice may be done to these individuals as to their countless victims"[248], the conception of justice was through the punishment of Nazi and Japanese perpetrators[249]. Victim reparations for crimes which they had suffered were not part of the justice system. The building blocks of modern international criminal law, by these historical trials, conceived "justice for victims" through a criminal dimension – the trial and punishment of perpetrators – which provided victims a symbolic sense of justice. At its inception, international criminal justice had no space for a civil dimension that included reparations for victims.

Other more recent international and hybrid criminal tribunals followed this model: they delivered justice for victims through the prosecution and punishment of individual perpetrators, thus limiting international justice to a criminal dimension, as will be further discussed below. It stems from the jurisprudence of the *ad hoc* international criminal tribunals that trial and accountability of perpetrators were their primary goals.

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[245] Created by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945 (London Charter).

[246] Created by the Charter for the International Military tribunal for the Far East, Tokyo, 19 January 1946 (Tokyo Charter).

[247] Luke Moffett, Justice for Victims before the International Criminal Court, Routledge, 2014, p. 60.

[248] IMT Transcripts Vol. XIX, p. 434, cited in *ibid.*

[249] Sam Garkawe, "The Role and Rights of Victims at the Nuremberg International Military Tribunal", in *The Nuremberg Trials: International Criminal Law since 1945*, IBID.. Reginbogin, C. Safferling, and IBID.. Hippel (eds.), Kluwer, 2006, pp. 86-94, p. 86, cited in *ibid.,* p. 61.

Developments in modern international criminal law not only mean that victims play a more active role in the proceedings[250], but also include the possibility of the award of reparations, by imposing a legal duty on individual perpetrators. One of the main innovations of the ICC as compared to other precursor international criminal tribunals was to incorporate victims' rights within the framework of an international criminal tribunal[251]. This change in the dynamics of international criminal law however brings about many questions, challenges and critiques.

Having discussed in other chapters some theoretical questions relating to the development of a right to reparations under international law, the construction of a legal duty of reparation for individuals, and different forms of reparation in the context of international human rights law, this chapter now discusses the different approaches of international criminal and hybrid tribunals to victims' redress. Using a descriptive and comparative methodology, this chapter juxtaposes the different models established by these tribunals pertaining to redress for victims of international crimes in order to assess the feasibility and desirability, based on a "lessons learned approach", of including a civil dimension in international criminal trials.

In this regard, this chapter addresses the following research sub-questions:

- How do different international/hybrid courts and tribunals compare and contrast in regards to reparations for victims?
- How can the civil dimension of international criminal justice operationalize within the setting of international criminal tribunals?

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[250] Concerning victim participation in criminal proceedings, see e.g. Serge Vasiliev, "Victim Participation Revisited: What the ICC is learning about itself", in *The Law and Practice of the International Criminal Court*, Carsten Stahn (ed.), Oxford University Press, 2015; Charles P. Trumbull, "The Victims of Victim Participation in International Criminal Proceedings", *Michigan Journal of International Law* 29 (2007), p. 777; Gerard J. Mekjian & Mathew C. Varughese, "Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court", *Pace International Law Review* 17 (2005), pp. 1-413; Brianne N. McGonigle, "Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court", *Florida Journal of Internatinal Law* 21 (2009), p. 93; Christine IBID.. Chung, "Victim's Participation at the International Criminal Court: Are Concessions if the Court Clouding Promise", *Northwestern Journal of International Human Rights* 6 (2007), p. 459.

[251] The focus of the present study concerns victims' reparations within the ICC and other frameworks. This monograph will not review victims' right to participate in ICC proceedings.

- Are international criminal trials compatible with the adjudication of reparation claims in respect to international crimes?

In this light, this chapter dwells upon the manner in which the legal duty to repair imposed on individuals can be operationalized at the international level and the extent to which international criminal courts and tribunals are compatible with victims' redress. This chapter directly addresses the underlying theme of this study concerning a civil dimension of international justice: are the two dimensions (civil and criminal) blurred in international criminal justice at the international level? This chapter looks at reparations solely within international criminal trials and posits that at the international level, international criminal justice developed historically from a criminal dimension outlook to a blend of the civil and criminal dimensions with the advent of the ICC. This chapter trails along this spectrum of the development of international criminal justice, between the criminal and civil dimensions, at the international level.

In this context, in this chapter, I first briefly recall the legacy of the Nuremberg and Tokyo trials, the *ad hoc* criminal tribunals and their approaches to victims and reparation, and the more recent courts and tribunals such as the ICC, and the hybrid tribunals of Lebanon, Sierra Leone and Cambodia, for example. I contrast and compare the different approaches to reparation in a spectrum, from the early experiences where reparation was not part of the proceedings, to the other side of the spectrum, where victims' redress is an integral part of the system. The goal of this chapter is to set out the different models of international criminal proceedings and their approaches to victims' redress for international crimes.

I. HISTORICAL ACCOUNT - 'WHERE IT ALL BEGAN': MODERN INTERNATIONAL CRIMINAL LAW AND THE NUREMBERG AND TOKYO TRIALS

As already discussed, the Nuremberg and Tokyo trials did not provide for a possibility of victim reparation[252]. As a consequence, since victims of Nazi crimes were

[252] Concerning the legacy of the Nuremberg and Tokyo trials, see e.g. Yael Danieli, "Reappraising the Nuremberg Trials and their Legacy: The Role of Victims in International Law", *Cardozo Law Review* 27 (2005), p. 1633; Christian Pross, *Paying for the Past: The Struggle over Reparations for Surviving Victims of the Nazi Terror*, Johns Hopkins University Press, 1998; Benjamin B. Ferencz, "International Criminal Courts: The Legacy of Nuremberg", *Pace*

not able to claim civil redress against the perpetrators during the international criminal trial proceedings, they obtained reparation through other means, mainly through lump-sum agreements[253].

The main point of interest, in my view, of the precedent of the Nuremberg and Tokyo trials and reparations after World War II is that civil redress in relation to those crimes was mainly based on state responsibility[254]. These trials did not set up a regime for civil redress or individual civil responsibility at the international criminal level for the victims of World War II crimes (international crimes). Thus, under this regime, to obtain reparation, State responsibility was a prerequisite. Fast forwarding to recent conflicts, the problem is when State responsibility is engaged, that is, when the State (machinery) is not necessarily involved in the international crime. In this scenario, civil redress is not an option[255].

It seems paradoxical that while the main point of international criminal justice at its inception was to hold *individuals* criminally accountable for the crimes they committed, thus departing from a system based purely on State responsibility as "crimes are committed by men, not by abstract entities"[256], there is a visible reliance on States for civil redress at the international level[257].

International Law Review 10 (1998), p. 203; Won Soon Park, "Japanese Reparations Policies and the "Comfort Women" Question", *positions* 5, no. 1 (1997), 107-136.

[253] See Ariel Colonomos & Andrea Armstrong, "German Reparations to the Jews after World War II: A Turning Point in the History of Reparations", in *The Handbook of Reparations*, Pablo de Greiff, Oxford University Press, 2006, pp. 390-419. See also, John Authers, "Making Good Again: German Compensation for Forced and Slave Laborers", in *The Handbook of Reparations*, Pablo de Greiff, Oxford University Press, 2006, pp. 420-450.

[254] Ibid.

[255] For example, the attempt in Rome to include State responsibility for reparation for victims, see report on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, U.N. Doc. A/Conf.183/2/Add.1, 1998, article 73: "[b) The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of victims, including restitution, compensation and rehabilitation, be made by a state]: [if the convicted person is unable to do so himself/herself; [and if the convicted person was, in committing the offence, acting on behalf of that state in an official capacity, and within the course and scope of his/her authority]]; c) [in any case other than those referred in subparagraph b), the Court may also recommend that states grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation]." cited by Thordis Ingadottir, "The Trust Fund of the ICC", in *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, Dinah Shelton, Transnational Publishers, 2000, p. 159.

[256] "Judgment of the Tribunal", *American Journal of International Law* 41 (1947), p. 172.

[257] In the criminal dimension, see concerning the relationship between individual and State

This gap between the criminal and civil aspects in the aftermath of an international crime is slowly closing, as it will be examined below, with new Courts taking into account victims' right to reparation under international law. This new milestone in international law – where individuals are not only held criminally liable for their international crimes, but also face "civil" liability vis-à-vis their victims – brings about many new challenges and questions, which will be examined in this chapter.

II. THE *AD HOC* TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA

Unfortunately, the years since the Second World War and the Nuremberg and Tokyo trials have seen many wars, conflicts, and mass victimisation[258]. Similar to the Nuremberg and Tokyo trials, the statutes of the *ad hoc* tribunals of former Yugoslavia and Rwanda did not provide for a self-standing right of victims to claim reparation from convicted persons, within international criminal proceedings[259]. They address victims' redress for crimes under the jurisdiction of the tribunals in a limited way, through the restitution of unlawfully taken property. The ICTY's and ICTR's provisions on restitution are very similar - respectively, 24(3) and 23(3), which concern penalties - and read as follows:

> "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."[260]

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responsibility: Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes*, BRILL, 2009; Pierre-Marie Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State", in *International Criminal Court: A Commentary*, Antonio Cassese et al., Oxford University Press, 2002; André Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52 (2003), p. 615-640.

[258] See M.Cherif Bassiouni, "Assessing Conflict Outcomes: Accountability and Impunity", in *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, M. Cherif Bassiouni, Intersentia, 2010, p. 6: "[…] it is estimated that 92 to 101 million persons have been killed between 1945 and 2008. That does not include those who have died as a consequence of these conflicts, which a World Health Organization projection puts at twice the estimated number of persons killed during these conflicts. […] The 313 conflicts studied in this project reveal that they involve systematic human rights violations, including genocide, crimes against humanity, torture, slavery and slave-related practices, disappearances, rape and population displacement".

[259] See Carla Ferstman & Mariana Goetz, "Reparations before the International Criminal Court: the Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings", in *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 315.

[260] Restitution of unlawfully taken property has been further developed in the Rules of

There are conditions that must be fulfilled before the restitution of property can be ordered: it must be associated with a crime pursuant to the Statute and it must be the object of a specific finding in the Judgment[261]. Once these conditions are met, the Trial Chamber shall, at the request of the Prosecutor, or, acting *proprio motu,* may, hold a special hearing for the determination of restitution[262].

Importantly, Rule 106 ("Compensation for Victims") of the Rules of Procedure and Evidence of the ICTY provides that:

> "(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.
> (B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.
> (C) For the purposes of a claim made under Sub-rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury"[263].

It is clear from this provision that reparation for victims (and restorative justice, as a consequence thereof) is not part of the Tribunal's role, nor is it one of its goals. In this regard, it is worth recalling that the United Nations Security Council, in resolution 827 of 25 May 1993, which established the ICTY, stated that:

Procedure and Evidence of the Tribunals: see Rule 98 *ter* (B), of the ICTY "rules of evidence", adopted on 10 July 1998: "If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105." Rule 88 (B) of the ICTR makes a provision to the same extent.

[261] See Susanne Malmström, "Restitution of Property and Compensation to Victims", in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Richard May et al., Kluwer Law International, 2001, p. 375, *cited in* Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law,* Nijhoff, 2004, p. 198.

[262] See Rule 105 of the ICTY and the ICTR Rules of Procedure and Evidence, amended on 30 November 1999, IT/32/Rev.

[263] See Rules 106 (B) of the ICTR Rules of Procedure and Evidence, with a very minor difference in wording: "Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation" (emphasis added).

> "The work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."[264]

This resolution, however, on its face does not seem to exclude, once and for all, the possibility for victims to seek reparation through the Tribunals. However, Rule 106 makes it clear that the Tribunals are not completely denying that victims of crimes in their jurisdiction receive reparation – but this cannot be claimed through the Tribunal.

The Rules Committee of the ICTY, in the drafting process, made it clear that the exclusion of victims' right to reparation from the scope of the Tribunal's activities was not an oversight. It seems that the Tribunal made a clear decision to exclude any role in relation to reparation for victims of the crimes which fall under their jurisdiction. It was a deliberate decision that the Tribunal's sole purpose was to prosecute persons who allegedly committed crimes under their jurisdiction.

In this respect, it seems worth referring to a Report prepared in November 2000 in which the Committee dwells upon the question of victims' reparation. The Report

> "states that it is the view of the judges of the International Tribunal for the Former Yugoslavia that the victims of the crimes over which the International Tribunal has jurisdiction have a right in law to compensation for the injuries that they have suffered.
> (…) the judges have considered the possibility that the Security Council might be requested to amend the Statute of the International Tribunal in order to confer upon it the power to order the payment of compensation to the victims of the crimes that were committed by the persons whom it may convict.
> (…) the judges have, however, come to the conclusion that it is neither advisable nor appropriate that the Tribunal be possessed of such a power, in particular, for the reason that it would result in a significant increase in the workload of the Chambers and would further increase the length and complexity of trials. The judges doubt, moreover, whether it would be possible for the Tribunal to secure adequate resources to fund such awards as it might make. Furthermore, they consider that it would be inequitable that the victims of crimes which were committed by persons who are not

[264] See Ilaria Bottigliero, Redress for Victims of Crimes Under International Law, Nijhoff, 2004, p. 201.

> prosecuted and convicted by the Tribunal would not benefit from any orders of compensation that the Tribunal might make."[265]

The foregoing does not however suggest that the Tribunal did not deem that reparation had no role to play in the aftermath of the mass atrocities that happened in the region. In this sense, it was noted that in order to bring about reconciliation in the former Yugoslavia and to ensure the restoration of peace, it was necessary that the victims of crimes within the jurisdiction of the Tribunal receive compensation for their injuries[266].

There is no question as to whether or not victims of the crimes under the jurisdiction of the Tribunals deserve compensation: this much does not seem to be denied. The question is whether the way in which the Tribunals dealt with the issue of reparation – i.e. directing it to the appreciation of domestic courts – is satisfactory and attainable.

Be that as it may, the interesting aspects of this 2000 Report refer, in my opinion, to the challenges of including a civil dimension (i.e. reparation) within international criminal trials. The challenges put forth in the Report provide some justification for not entertaining the idea of including victims' reparations within the mandate of the Tribunal. These remain pertinent to date in the context of the critiques of the ICC reparation system (see further below) and the challenges it will face in the implementation of this mandate. It also fleshes out important considerations for the proposition of other methods of implementing reparation for victims, which will be the object of further discussion and conclusions (see further below).

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[265] "Victims' Compensation and Participation", Appendix to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, ANNEX to UN Doc. S/2000/1063 of 3 November 2000, p. 1. The Report further argued that the Security Council excluded the possibility of the Tribunal hearing victims' claims for compensation: "Victims' Compensation and Participation", Appendix to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, ANNEX to UN Doc. S/2000/1063 of 3 November 2000, p. X. See also, in this regard, Virginia Morris & Michael P. Scharf, *An Insiders Guide to the International Criminal Tribunals for the Former Yugoslavia*, Transnational Publishers, 1995, pp. 167, 286-287, *cited in* UN Doc. S/2000/1063, para. 24, in support of the idea that the Security Council was aware of the issue of reparation for victims but decided not to address it.

[266] "Victims' Compensation and Participation", Appendix to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, ANNEX to UN Doc. S/2000/1063 of 3 November 2000, p. 2.

In a nutshell, it seems that practical considerations played an important role in the decision not to have the Tribunal deal with reparation claims. The following were some of the reasons: the impact of reparation claims on the Tribunal's daily work; the possibility of causing delays in the accused's trial; and the costs related to implementing reparation awards, among others[267].

The ICTY and ICTR mechanisms allow for[268]: restitution of property and proceeds, compensation, and rehabilitation. For restitution of property, Article 24(3) of the ICTY Statute and Article 23(3) of the ICTR Statute[269] govern the institution. However, as it has been argued, victims have not received compensation through the Tribunals and according to Common Rule 106 of the ICTY/ICTR, issues concerning compensation are delegated to national courts or other competent bodies[270].

While these seem to be reasonable concerns, there is a broader issue which appears to have been overlooked: does the approach of the Tribunals to leave reparation matters to domestic jurisdictions wind up amounting to very little or no reparation at all for victims? As it has already been pointed out, given the nature of the crimes and the system of prosecution thereof (in an international tribunal set up in The Hague), it may be very difficult for victims to access domestic courts in order to claim for reparation, and if they are able to do so, they may encounter many practical difficulties to substantiate their claim[271]. Furthermore, one of the reasons for setting up an international tribunal to address the crimes committed in the Former Yugoslavia (and the same is true for Rwanda) was precisely because it was not possible to prosecute the alleged perpetrators in the State of

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[267] "Victims' Compensation and Participation", Appendix to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, ANNEX to UN Doc. S/2000/1063 of 3 November 2000, p. X.

[268] See generally, Susanne Malmström, "Restitution of Property and Compensation to Victims", in *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Richard May et al., Kluwer Law International, 2001, p. 373–84.

[269] Further elaborated by Common Rule 105 of the ICTY and ICTR Rules of Procedure and Evidence (RPE) and Rule 98 *ter* (B) of the ICTY RPE/Rule 88 of the ICTR RPE.

[270] Anne-Marie De Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families", *Leiden Journal of International Law* 20 (2007), pp. 214-215.

[271] See Ilaria Bottigliero, Redress for Victims of Crimes Under International Law, Nijhoff, 2004, p. 202.

the *locus delictum*; difficulties may similarly arise in relation to civil claims for reparation as it happens with criminal prosecutions[272].

Moreover, as a matter of legal principle, it does not seem entirely equitable that victims who have had their property taken are eligible to receive restitution through the procedure set up by the Tribunal, whereas victims of heinous crimes such as torture, rape and sexual slavery cannot claim other forms of reparation through the Tribunals. This can possibly create an undue hierarchy of victims, where some victims have rights to restitution within the proceedings of the Tribunals but other categories of victims struggle to secure redress outside the auspices of the Tribunals.

This brings this study to address a broader question: the institution of a fragmented approach to justice. As the former Prosecutor of the ICTY, Ms. Carla del Ponte, stated: "A system of criminal law that does not take into account the victims of crimes is fundamentally lacking"[273]. As stated above, the Report concludes that "the victims of the crimes over which the Tribunal has jurisdiction are entitled to benefit from a right to compensation"[274]; nevertheless, implementing a system of reparation for victims "would counter all efforts of the last few years to minimize the length of preventive detention, which is a fundamental right of the accused, by shortening the trials"[275]. Importantly, the Report further explains that:

> "There is a clear trend in international law to recognize a right of compensation in the victim to recover from the individual who caused his or her injury. …There does appear to be a right to compensation for victims under international law. Although there is an emerging right of compensation, the law is much less developed on the mechanism by which that right can be exercised"[276].

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[272] *Ibid*.

[273] Carla del Ponte, "Compensating Victims with Guilty Money", interview with Carla del Ponte, Chief Prosecutor of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, in *Judicial Diplomacy: Chronicles and Reports on International Criminal Justice,* The Hague, 9 June 2000.

[274] "Victims' Compensation and Participation", Appendix to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, ANNEX to UN Doc. S/2000/1063 of 3 November 2000.

[275] *Ibid.*, para. 32.

[276] Ibid.

The solution to what seems to be incongruous statements of law and principle – i.e. on the one hand, victims have a right to reparation under international law, but on the other, it is not the Tribunal's responsibility to implement this right – was the suggestion that "a far better approach would be for an international claims commission to be established", a point that was to be considered by the appropriate organs of the United Nations[277]. Nevertheless, such mechanism has not yet been instituted, and one can wonder whether it will ever be.

The same result came about in the ICTR[278]. The former President of the Tribunal, Judge Navanethem Pillay, on the issue of compensation, stated that:

> "The Judges wholeheartedly empathize with the principle of compensation for victims, but … believe that the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal. … if the Tribunals adds to its responsibilities a whole new area of law relating to compensation, then the Tribunal will not only have to develop a new jurisprudence; it will also have to expand its staffing considerably and establish new rules and procedures for assessing claims."[279]

As to the reasoning behind the rejection of implementing provisions on reparation for victims in the Statutes and the work of the Tribunals, the ICTR was driven by similar concerns. In the words of the then President of the Tribunal:

> "Research on compensation schemes presently in operation suggests that very few of the eligible victims receive the compensation to which they are entitled. Often, only victims represented by counsel achieve a satisfactory level of compensation. There are substantial overhead costs in collecting and processing documentation and the administration costs are usually very high. Victim satisfaction with compensation programmes appears to be quite low. Victims usually express considerable frustration with the complexity of compensation documentation procedures. … It seems likely that if the Tribunal embarks on the processing of claims for compensation, then, in addition to any dissatisfaction with its present

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[277] *Ibid*. See also, Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law,* Nijhoff, 2004, pp. 206-207.

[278] Cf. Letter of the President of the ICTR to the United Nations Secretary-General, annex to a letter of 14 December 2000 by the United Nations Secretary-General, Kofi Annan, to the United Nations Security Council, UN Doc. S/2000/1198 of 15 December 2000.

[279] *Ibid*.

> progress, it can expect to add to this the frustration and disappointment of those attempting to establish claims."[280]

The Judges at the ICTR, while putting forward the view that victims are entitled to compensation for international crimes, offer some suggestions as to ways for victims of the crimes committed in Rwanda to receive reparation:

> "(a) A specialized agency set up by the United Nations to administer a compensation scheme or trust fund that can be based upon individual application, or community need or some group-based qualification;
> (b) A scheme administered by some other agency or governmental entity on similar lines to (a);
> (c) An arrangement which could operate in tandem with options (a) and (b) and which would allow the Tribunal to exercise a limited power to order payments from a trust fund for victims actually appearing before it as witnesses in a case. It is noteworthy that such a power exists in the criminal courts of the United Kingdom of Great Britain and Northern Ireland, but is especially limited to compensation issues where the issue is factually clear and where there is no dispute as to quantum before the court. In that jurisdiction, extensive inquiry into compensation issues by criminal courts is expressly abjured."[281]

While these proposals point to some possible ways of redress for victims of crimes, they are only the tip of the iceberg. For such proposals to have any effect for victims, more thought would have to go into whether they are actually feasible and desirable in practice[282].

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[280] *Ibid.*, paras. 13-14. The latter refers in this regard to the work of Robert Elias, *The Politics of Victimization: Victims, Victimology and Human Rights*, Oxford University Press, 1986, especially pages 162, 212 and 238.

[281] *Ibid.*, para. 15.

[282] See e.g. Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1995, pp. 167, 286–287, concerning the possibility of establishing a claims commission for the victims. Concerning failed attempts by former Prosecutor Carla del Ponte to amend the Statute to be able to compensate victims, see Anne Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, 2005, at 406–409, *cited in*: Anne-Marie De Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families", *Leiden Journal of International Law* 20 (2007), p. 215. For an account that it was not the Tribunals' role to provide compensation for victims, see Ralph Zacklin, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice* 2 (2004), p. 544. See on the feasibility of transcending the distinction between punishment and court-ordered restitution, Marc Groenhuijsen, "Victims' Rights and Restorative Justice: Piecemeal Reform of the Criminal Justice System or a Change of Paradigm?", in *Crime, Victims and Justice: Essays on Principles and Practice*, Hendrik Kaptein & Marijke Malsch, Ashgate Publishing, 2004, p. 73. In this respect, according to Van Boven,

To conclude, the *ad hoc* criminal tribunals have been successful from the perspective of retribution, trial and punishment of the offenders; they have left a true legacy for international criminal justice[283]. However, part of this legacy is the exclusion or oblivion of victim reparation[284], as discussed above, by focusing their efforts on the offenders, their trial and their punishment. Their legacy will always include the fact that many victims of the crimes in the former Yugoslavia and Rwanda have been, for the most part, left without reparation[285].

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compensation during criminal proceedings can be regarded as follows: "First, it makes the criminal offender more aware that not only was a wrong committed against public order and public welfare but, in addition, an injury was inflicted on one or more human beings. Second, it establishes a link between punitive measures and measures of reparation. Third, it tends to facilitate and expedite the process of obtaining civil damages.": Theo van Boven, "The Perspective of the Victim", in *The Universal Declaration of Human Rights: Fifty Years and Beyond*, Yael Danieli et al., Baywood Publishing Company, 1999, p. 21.

[283] Much has been written recently about the legacy of the ICTY, from many different perspectives. See e.g., Máximo Langer & Joseph IBID.. Doherty, "Managerial Judging Goes International, But Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms", *Yale Journal of International Law* 36 (2011), p. 241-305; Giovanna M. Frisso, "The Winding Down of the ICTY : the Impact of the Completion Strategy and the Residual Mechanism on Victims", *Goettingen Journal of International Law* 3(2011), p. 1092-1121; Michael G. Karnavas, "The ICTY Legacy: A Defense Counsel's Perspective", *Goettingen Journal of International Law* 3 (2011), p. 1052-1092; Frédéric Mégret, "The Legacy of the ICTY as Seen Through Some of Its Actors and Observers", *Goettingen Journal of International Law* 3 (2011) p. 1011-1052; Maria Swart, "Tadic Revisited : Some Critical Comments on the Legacy and the Legitimacy of the ICTY", *Goettingen Journal of International Law* 3 (2011), p. 985-1009; Donald Riznik, "Completing the ICTY-Project Without Sacrificing Its Main Goals: Security Council Resolution 1966: A Good Decision", *Goettingen Journal of International Law* 3 (2011), p. 907-922; Richard IBID.. Steinberg, *Assessing the Legacy of the ICTY*, Nijhoff, 2011.

[284] See generally on retributive justice Mark A. Drumbl, "Sclerosis Retributive Justice and the Rwandan Genocide", *Punishment & Society* 2 (2000), p. 287-307. See Irene Scharf, "Kosovo's War Victims: Civil Compensation or Criminal Justice for Identity Elimination", *Emory International Law Review* 14 (2000), p. 1423, who claims that: "Given the apparent present inability of the Yugoslav courts to provide civil remedies to the victims at issue here, the question follows whether the United-Nations-created Yugoslav Tribunal might offer any assistance in developing a system to provide civil compensation to the victims. Unfortunately, the answer to that question is apparently negative, for the statute establishing the Tribunal does not provide for financial "or other compensation for damages suffered by the victims" of the war".

[285] See e.g. on the difficulties for victims' to obtain compensation at the national level: Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law,* Nijhoff, 2004, p. 211. See also, Jean Paul Mugiraneza, "Rwanda genocide: why compensation would help the healing", The Guardian, 8 March 2014, available at: http://Ibid..theguardian.com/global-development-professionals-network/2014/mar/04/rwanda-genocide-victims-compensation (last accessed 11 May 2016), claiming that "the government has established a fund, Farg, to provide healthcare and tuition for survivors. But does this go far enough? Though Rwanda and the international community have valiantly pursued justice, financial compensation for genocide survivors has still not materialized".

III. OTHER INTERNATIONAL OR HYBRID CRIMINAL TRIBUNALS

A few words on other *ad hoc* international/ hybrid tribunals are necessary to complete the picture of the approach to redress for victims, outside the scope of the ICC Statute, which will be discussed lastly. These other tribunals are discussed briefly in this chapter and comprise the Special Tribunal for Lebanon, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia ("ECCC")[286] will also be reviewed.

1. The Special Tribunal for Lebanon

The Special Tribunal for Lebanon ("STL") was inaugurated in March 2009. The mandate of the STL is very specific: to bring to justice those responsible for the attack of 14 February 2005 which killed 23 people, including the former Prime Minister of Lebanon, Mr. Rafiq Hariri, and injured many others[287].

Following the attacks that occurred in Lebanon in 2005, the Lebanese government requested that the United Nations create a tribunal of an "international character". In Resolution 1644, the United Nations Security Council acknowledged the letter of the Prime-Minister of Lebanon in this respect[288]. In January 2007, the Lebanese government and the United Nations reached an agreement concerning the creation of the STL, which was established in 2007 by resolution 1757, adopted under chapter VII of the United Nations Charter[289]. In this resolution, the Security Council did not adopt the Statute of the

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[286] The Kosovo and East Timor structures are outside the scope of this study due to their unique nature.

[287] For an overview of the STL, and special issues facing the Tribunal, see generally: Nidal Nabil Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon", *Journal of International Criminal Justice* 5 (2007), pp. 1125-1138; Marieke Wierda et al., "Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon", *Journal of International Criminal Justice* 5 (2007), pp.1065-1081; Choucri Sader, "A Lebanese Perspective on the Special Tribunal for Lebanon Hopes and Disillusions", *Journal of International Criminal Justice* 5 (2007), pp. 1083-1089; Marko Milanović, "An Odd Couple Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon", *Journal of International Criminal Justice* 5 (2007), pp. 1139-1152.

[288] See "The Situation in the Middle East", Security Council Resolution 1644 (2005), 15 December 2005, S/RES/1644.

[289] See Security Council Resolution 1757 (2007), Adopted by the Security Council at its 5685th meeting, on 30 May 2007.

Tribunal *per se* as it had done with the ICTY in 1993 and with the ICTR in 1994. Rather, it endowed the unratified agreement between the United Nations and Lebanon and the attached statute with legal force[290].

The STL thus differs from the *ad hoc* international criminal tribunals in the sense that it has a connection with the national legal system of Lebanon, highlighting its hybrid nature[291]. In fact, the staff, including the Judges, are a mix of internationally recruited and Lebanese nationals; the applicable law is also mixed.

This fact, in turn, has an impact on provisions for victims. Victims have a more active role during proceedings than in other *ad hoc* criminal tribunals. There is a special victims and witnesses unit. Victims also have the right to participate in proceedings[292] and can play a significant role on trial and appeal[293]. Article 17 of the STL Statute states that:

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[290] See Gianluca Serra, "Special Tribunal for Lebanon: A Commentary on its Major Legal Aspects", *International Criminal Justice Review* 18 (2008).

[291] See in general about hybrid tribunals, Kai Ambos & Mohamed Othmann, *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Max Planck Institute for International Law, 2003; Cesare P. R. Romano et al., *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford University Press, 2004; Taru Kuosmanen, *Bringing Justice Closer: Hybrid Courts in Post-Conflict Societies*, Erik Castrén Institute of International Law and Human Rights, 2007. Concerning the nature of hybrid tribunals, Jan Erik Wetzel, and Yvonne Mitri explain that:

> "It is not easy to categorize hybrid tribunals due to their varying forms and degrees of mixture of these national and international elements. One possibility would be to distinguish between hybrid tribunals set up within or outside of a national legal framework. An alternative approach would be to divide hybrid tribunals into three sub-categories according to their respective legal bases: first, tribunals within UN-administrations, such as the internationalized panels in Kosovo and Timor-Leste, whose authority ultimately stems from the Security Council resolutions establishing the peacekeeping operations; second, tribunals set up on the bases of bilateral agreements, such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and possibly a future Special Chamber for Burundi; and third, tribunals set up essentially as domestic courts by national law, which however contain a considerable degree of international impetus, such as the War Crimes Chambers in Bosnia and Herzegovina and Serbia, respectively, as well as the Iraqi Special Tribunal." Jan Erik Wetzel & Yvonne Mitri, "The Special Tribunal for Lebanon: A Court Off the Shelf for a Divided Country", *The Law and Practice of International Courts and Tribunals* 7 (2008), pp. 86-87.

[292] See Articles 17 and 25 of STL Statute.

[293] See generally concerning victims' participation at the STL, Jérôme De Hemptinne, "Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon", *Journal of International Criminal Justice* 8 (2010), pp. 165-179. See also, Cécile Aptel, "Some Innovations in the Statute of the Special Tribunal for Lebanon", *Journal of International*

> "[w]here the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

While the STL is more progressive towards granting an active role for victims during proceedings, in terms of reparation, it stands closer to the *ad hoc* criminal tribunals. In fact, Article 25(3) of the Statute, entitled "compensation to victims" states that:

> "Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation".

Thus, the STL creates an interesting dichotomy in relation to victims' rights, whereby victims have an active role during proceedings, but have no right of redress within the auspices of the STL, and are directed to national courts to seek redress. It seems still too early to tell whether such a system will guarantee that victims obtain redress for the crimes they have suffered.

2. The Special Court for Sierra Leone

The Special Court for Sierra Leone (SCSL) is a product of the civil war that devastated the country until the cessation of hostilities in 2002, with the signature in 1999 of the peace agreement between the Government of Sierra Leone and the Rebel United Front. The war left about 1.5 million people internally displaced or refugees and thousands of children were raped, killed or conscribed as child soldiers[294]. The Court was created by an agreement signed between the Government of Sierra Leone and the United Nations in 2002[295].

Criminal Justice 5 (2007), pp. 1120-1121.

[294] Celina Schocken, "The Special Court for Sierra Leone: Overview and Recommendations", *Berkeley Journal of International Law* 20 (2002), p. 436.

[295] See "Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone", available at: http://Ibid..sc-

In many aspects, the SCSL is similar to the STL. It has many of the characteristics of a hybrid tribunal, with sitting Judges from both Sierra Leone and the broader international community. The SCSL is supported by the Government of Sierra Leone, by international human rights groups, the United Nations Security Council, the United States, and the European Union[296]. It sits in the country where the crimes took place.

Similarly to the Statute of the *ad hoc* international criminal tribunals, the Statute of the Special Court for Sierra Leone also does not recognize a right to reparation for victims of crimes under its jurisdiction. Be that as it may, the SCSL has the power to order the forfeiture of the property, proceeds and assets of a convicted person to their rightful owner, if acquired unlawfully or by criminal conduct, pursuant to Article 19(3)[297]. This penalty can only be invoked after a conviction. It must be noted however that the Lomé Peace Agreement foresaw reparations for victims. In this regard, one author explains that:

> "Under the Lomé Peace Agreement a reparations program was established to address the needs of victims of the war in Sierra Leone, with the National Commission for Social Action (NaCSA) designated in 2007 as the implementing agency. Despite some progress in community-based and capacity-building projects, the Commission has suffered from chronic under-funding"[298].

In this context, on the basis of new developments at the SCSL, especially the conviction of Charles Taylor for crimes committed in Sierra Leone, and the rejection of his appeal[299], it is regretful that the Statute does not contain any kind of provision concerning reparation for victims. The issue of the lack of funding, for one, could be somewhat resolved if redress could be obtained from the convicted accused.

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[296] Celina Schocken, "The Special Court for Sierra Leone: Overview and Recommendations", *Berkeley Journal of International Law* 20 (2002), p. 436.

[297] See The Hague Justice Portal, "No signs of victim compensation in Sierra Leone: Chief Prosecutor at the Special Court for Sierra Leone, Brenda Hollis deplores the lack of assistance for victims", 18 November 2010, available at: http://Ibid..haguejusticeportal.net/index.php?id=12284

[298] Ibid.

[299] See *Prosecutor* v. *Charles Ghankay Taylor*, Judgment, Special Court for Sierra Leone, 18 May 2012, SCSL, 03-01-T. See also, for the appeals Judgment: *Prosecutor* v. *Charles Ghankay Taylor*, Appeals Judgment, Special Court for Sierra Leone, 26 September 2013, SCSL, 03-01-A.

3. Parting with the trend: the Cambodian Extraordinary Chambers (ECCC) approach to civil redress in the international criminal scene

Following the conflict three decades ago from 1975 to 1979[300], in May 2003, the United Nations and the Cambodian government concluded an agreement providing for United Nations assistance with the "Extraordinary Chambers" in the domestic courts of Cambodia[301].

The Extraordinary Chambers were created to prosecute those accused of serious violations of Cambodian Penal Law and of international humanitarian law during the Democratic Kampuchea period, which is considered to be one of the most violent periods in modern history, where the Khmer Rouge is estimated to have killed between 1.5 and 1.7 million people[302]. The Expert Report for Cambodia pursuant to General Assembly Resolution 52/135 indicates that this period was "marked by abuses of individual and group human rights on an immense and brutal scale"[303]. Along with other recent initiatives, such as the Regulation 64 panels in Kosovo and Special Panels in East Timor (which will not be discussed in this study)[304], the ECCC is an example of a hybrid criminal tribunal[305], which operates in conjunction with national and international efforts.

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[300] Concerning the background to the conflict that led to the creation of the ECCC, see e.g. David Chandler, *A History of Cambodia*, Westview Press, 4th ed., 2008, pp. 254-255; The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 1, U.N. Doc. S/1999/231, A/53/850 (16 March 1999). See also, Tessa V. Capeloto, "Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution", *Pacific Rim Law & Policy Journal Association* 17 (2008); Padraic J. Glaspy, "Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia", *Harvard Human Rights Journal* 21 (2008).

[301] See Draft Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 17 March 2003, approved by GA Res. 57/228B, 13 May 2003.

[302] The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 1, U.N. Doc. S/1999/231, A/53/850 (16 March 1999), para. 35. See also, Katheryn M. Klein, "Bringing the Khmer Rouge to Justice: The Challenges and Risks Facing the Joint Tribunal in Cambodia", *New Jersey International Human Rights* 4 (2006), pp. 549, 553-554, concerning the violations that occurred during this period.

[303] The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 1, U.N. Doc. S/1999/231, A/53/850 (16 March 1999), para. 18.

[304] See e.g. Suzanne Kartenstein, "Hybrid Tribunals: Searching for Justice in East Timor", *Harvard Human Rights Journal* 16 (2003), p. 245.

[305] See e.g. Laura A. Dickinson, "The Promise of Hybrid Courts", *American Journal of International Law* 97 (2003), p. 295; Suzannah Linton, "Cambodia, East Timor and Sierra Leone:

The Court has caught the attention of many commentators, many critical of it[306]. Be that as it may, the focus of this study is not on the structure and operation of the Court[307] as a whole, nor on its efficiency and its legitimacy; rather, the focus of this study is on the reparation provision of the ECCC and an assessment thereof.

The ECCC stands in the middle of the spectrum of examples of mechanisms providing reparation for international crimes within international criminal proceedings, between the reparation system at the ICC – which is more encompassing in terms of the scope of reparation than the ECCC – and the system at other tribunals, which do not have provisions on reparation for victims.

The ECCC provide, according to their Internal Rules (as revised on 1 February 2008) - rules 10, 11 - that the Chambers may make an award for reparations to civil parties for moral damage, which may take the following forms:

> "a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense;
> b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or
> c) Other appropriate and comparable forms of reparation."

Furthermore, according to the ECCC, it is useful to note that:

Experiments in International Justice", *Criminal Law Forum* 12 (2001), p. 185.

[306] Sarah Williams, "The Cambodian Extraordinary Chambers-A Dangerous Precedent for International Justice", *International & Comparative Law Quarterly* 53 (2004); Sylvia De Bertodano, "Problems Arising from the Mixed Composition and Structure of the Cambodian Extraordinary Chambers" *Journal of International Criminal Justice* 4 (2006),p. 285-293; Padraic J Glaspy, "Justice Delayed-Recent Developments at the Extraordinary Chambers in the Courts of Cambodia", *Harvard Human Rights Journal* 21 (2008), p.143; Tessa V. Capeloto, "Reconciliation in the Wake of Tragedy: Cambodia's Extraordinary Chambers Undermines the Cambodian Constitution", *Pacific Rim Law & Policy Journal* 17 (2008), p. 103; Phuong Pham, et al., "After the First Trial: A Population-Based Survey on Knowledge and Perceptions of Justice and the Extraordinary Chambers in the Courts of Cambodia", *Available at SSRN 1860963* (2011); Göran Sluiter, "Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers", *Journal of International Criminal Justice* 4 (2006), p. 314-326; James P. Bair, "From the Numbers Who Died to Those Who Survived: Victim Participation in the Extraordinary Chambers in the Courts of Cambodia", *University of Hawaii Law Review* 31 (2008), p. 507.

[307] For an excellent recent study concerning the ECCC: Sergey Vasiliev, "Trial Process at the ECCC: The Rise and Fall of the Inquisitorial Paradigm in International Criminal Law?" in *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law,* S Meisenberg & I Stegmiller (eds.), T.M.C. Asser Press, 2016 (concerning *inter alia* the inquisitorial model at the ECCC).

> "Civil Parties can seek moral and collective reparation. Such reparation can only be awarded if an Accused is convicted.
> Moral and collective reparations are measures that:
> a) acknowledge the harm suffered by Civil Parties as a result of the commission of the crimes for which an Accused is convicted and
> b) provide benefits to the Civil Parties which address this harm. These benefits shall not take the form of monetary payments to Civil Parties.
> The cost of the reparations shall either be borne by the convicted person, or by external funding which has already been secured to implement a project designed by the legal representatives of the Civil Parties in cooperation with the Victims Support Section."[308]

Interestingly, to date, some attention has been focused on the reparation mandate of the ECCC[309]. It stems from the framework of the ECCC, and the provision cited above, that only civil parties[310] are entitled to receive a specific kind of reparation (i.e. moral or symbolic)[311]. Reparation is to be collective in form. Reparation (thus the civil dimension) is connected to a conviction (the criminal dimension) of the accused. The ECCC does not provide for the possibility of all kinds of reparation to victims. When victims apply to become civil parties the application form permits claimants to propose a type of moral or collective reparation that they wish the Judges to make. The ECCC, by recognizing some form of reparation for victims within the proceedings before the Court, encompasses a civil

[308] ECCC official website available at: http://Ibid..eccc.gov.kh/en/topic/477 (last checked on 18 June 2013).

[309] See e.g. Toni Holness & Jaya Ramji-Nogales, "Participation as Reparations: The ECCC and Healing in Cambodia", *Cambodia's Hidden Scars: Trauma Psychology In The Wake Of The Khmer Rouge, Documentation Center of Cambodia* (2012),pp. 2011-2029; Ruben Carranza, "Imagining the Possibilities for Reparations in Cambodia", *International Centre for Transitional Justice*, Briefing Paper (2005); Hae Duy Phan, "Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia", *East Asia Law Review* 4 (2009), p. 277; Christoph Sperfeldt, "Collective Reparations at the Extraordinary Chambers in the Courts of Cambodia", *International Criminal Law Review* 12 (2012), pp. 457-490.

[310] On civil parties at the ECCC, and their rights of participation, see generally Alain Werner & Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law", *Northwestern University Journal of International Human Rights* 8 (2009), p. 301; Johanna Herman, "Reaching for Justice: The Participation of Victims at the Extraordinary Chambers in the Courts of Cambodia", CHRC Policy Paper No. 5, (2010); Silke Studzinsky, "Participation Rights of Victims as Civil Parties and the Challenges of Their Implementation Before the Extraordinary Chambers in the Courts of Cambodia", in *Victims of International Crimes: An Interdisciplinary Discourse*, Thorsten Bonacker & Christoph Safferling, TMC Asser Press, 2013, pp. 175-188.

[311] See Hae Duy Phan, "Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia", *East Asia Law Review* 4 (2009).

dimension in the proceedings before the Court, through civil liability for perpetrators and civil redress for victims.

It is interesting to note that the ECCC has taken the approach that compensation (i.e. monetary payments) is not a permissible form of reparation. Symbolic or moral reparation, bearing a lower cost and thus surpassing the hurdle of securing financial resources available for reparation (and considering the circumstances of the conflict that afflicted Cambodia happened decades ago[312]) is the avenue for victims of the conflict in Cambodia.

The ECCC implemented a new scheme for victim redress which stands in contrast with other hybrid tribunals of its generation, and predecessors. It shall also be seen that it differs from the scheme established at the ICC, which will be reviewed shortly, both in its scope and the manner in which it dealt with victim reparation in its first decision. In this regard, this study turns attention first to a unique feature of the ECCC – the concept of civil party – and then it turns to examine the first decision on reparation of the ECCC.

A) Civil parties at the ECCC

A civil party under ECCC proceedings is a victim of a crime being prosecuted at the Court who applies to participate as a party in the proceedings, alongside the defence and the prosecution. A civil party must be a natural person, or legal entity, who suffered physical, material or psychological harm as a direct consequence of one of the crimes alleged against the accused[313].

The concept of civil party (*partie civile)* is derived from French law and grants victims full-fledged legal party status in proceedings. This means that according to Rule 23 of the ECCC Internal Rules victims have the right to 'participate in criminal proceedings' with the status of civil parties and may seek 'seek collective and moral reparations'.

[312] *Ibid.*, at pp. 290-291.

[313] For a discussion of the civil party system at the ECCC, see Alain Werner and Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?", *Northwestern Journal of International Human Rights* 10(3), (2010).

According to Rule 23(3), civil parties are allowed to be represented as a "single, consolidated group" and present submissions on reparations in a "single claim for collective and moral reparations". It follows that, if the accused is convicted, civil parties will note be granted individual or material reparations.

While victims have the status of civil parties at the ECCC, the scope of their participation has been limited by the judges. In the first case (Case 001) against the Kaing Guek Eav ('Duch'), the Trial Chamber's decision of 9 October 2009 clarified that victims do not have the same standing as the Prosecutor and as such could not question the accused or witnesses, nor could they present their views on sentencing[314]. In the second case (Case 002) against senior leaders of the Khamer Rouge, 4000 victims applied to be civil parties and the Trial Chamber limited their participation through collective representatives rather individually.

Thus, the system at the ECCC is quite unique in the sense that it recognizes victims the status of civil parties, with nevertheless limited participation abilities as a result of jurisprudential construction and the possibility to claim reparations within the proceedings.

B) Reparation jurisprudence at the ECCC

The first case to reach the final conviction verdict, Case 001, granted modest reparations. The Trial Chamber ordered as a form of reparation the publication of the name of victims in the Judgment and a recording of apologies by the convicted person[315]. It rejected or failed to include various other forms of reparations requested by the civil parties[316], including the building of memorials and pagodas, and access to health care. On appeal, the ECCC Supreme Court accepted 10 additional requests for reparation. Some of

[314] Trial Chamber, "Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character", Case 001: Kaing Guek Eav (001/ 18-07-2007/ECCC/TC), 9 October 2009.

[315] ECCC, "Judgment", Case File/Dossier No. 001/18-07-2007/ECCC/TC, 26 July 2010.

[316] Such forms of reparation have been recognized, *inter alia*, by the jurisprudence of the IACtHR, as discussed above.

the reparation requests were rejected because of the "because of the lack of financial means to ensure their implementation"[317].

The first case of the ECCC thus included minimal reparations awards which fell short of some form of symbolic and collective reparations. It was also disappointing that both Chambers did not take the opportunity to clarify and discuss in-depth the meaning and scope of reparations within the ECCC and principles guiding reparations therein.

The second case, Case 002/01, which dealt with Civil parties submitted 13 requests for projects for reparation, including building of memorials, creation of a national remembrance day, therapy groups, documentation and education projects, among others. The Trial Chamber found that these projects complied with the requirements of collective and moral reparations. Two projects (relating to a Public Memorials Initiative and the construction of a memorial to Cambodian victims living in France) were not endorsed by the Chamber given that it was not demonstrated that they had secured sufficient external funding[318]. The appeal on this case is pending at the time of writing[319]. Other cases have not reached the judgment stage at the time of writing[320].

From the review of these decisions, it can be pondered that from Case 001 to Case 002/01 there has already been some recorded progress in terms of reparations awarded. The Court is still however shying from providing more clarity and guiding principles on the reparations scheme. It is still unclear thus how the jurisprudence on reparation will further develop and whether it will be ground-breaking or modest in its reparation awards.

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[317] ECCC, "Appeal Judgment", Case File/Dossier No. 001/18-07-2007-ECCC/SC, 3 February 2012.

[318] ECCC, "Case 002/01 Judgment", Case File/ Dossier No. 002/19-09-2007/ECCC/TC, 7 August 2014.

[319] As of June 2016.

[320] As of June 2016.

IV. REPARATIONS AND THE CONSTRUCTION OF A CIVIL DIMENSION OF INTERNATIONAL JUSTICE BEFORE THE INTERNATIONAL CRIMINAL COURT

The right of victims to obtain reparation for international crimes is now part of the proceedings at the ICC[321], by the operation of Article 75 of the Rome Statute[322]. This provision reads as follows:

> "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
> 3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
> 4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
> 5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
> 6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law. "

As it can be perceived from the foregoing discussion, before the adoption of the Rome Statute and the establishment of the ICC, victims had very limited reparation possibilities within international criminal proceedings. As such, this is a novel feature of

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[321] Gibert Bitti & Gabriela González Rivas, "Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", in *Redressing Injustices Through Mass Claims*, International Bureau of the Permanent Court of Arbitration, 2006, p. 301.

[322] See in this regard, e.g., Gioia Greco, "Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis", *International Criminal Law Review* 7 (2007), pp. 531–547; Carla Ferstman & Mariana Goetz, "Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, pp. 313–350.

the permanent international criminal court and one that may have a tremendous impact on the architecture and development of international criminal justice, both nationally and internationally. It will also likely influence the perception as well as the actual role of victims as part of the process of justice in the aftermath of international crimes.

Through the recognition of reparation for victims within the Court proceedings, the ICC is developing a civil dimension to international criminal justice. The same judges that sit on pre-trial, trial and appeals proceedings, to decide on criminal matters, to decide on the guilt or innocence of the accused, and an eventual criminal remedy, also decide on important questions of a civil nature, such as principles of reparations, beneficiaries of reparations, the type of reparations, the proof required for purposes of reparations, among others. The two dimensions of international criminal justice – civil and criminal - are apparent in the first case before the Court, examined below.

The interconnectedness of both dimensions is also a feature of the system: for example, reparations can only be claimed from the accused person if he or she is convicted (Article 75 (2) of the Rome Statute). At the ICC, the link between the criminal dimension and civil dimension is such that there is the creation of a *sui generis* system, where one dimension is not completely dissociated from the other.

The distinction between a civil and a criminal dimension is thus useful in this chapter as it relates to the beneficiaries of reparation, the forms of reparation and the role of an administrative mechanism connected to a judicial process (i.e. the Trust Fund for Victims). Through the discussion of these selected topics in this chapter, it will be demonstrated that we are moving towards a system that blends the two dimensions before the ICC, where many aspects of reparations are dependent upon, and are connected to, the criminal dimension of international justice.

This section of the present study focuses on the first case that reached the reparations stage before the ICC to set the scene of some of the issues analysed in this chapter. Then, this chapter dwells upon beneficiaries of reparation before the ICC and constructions of victimhood. The purpose of this chapter, or the present dissertation as a whole, is not to discuss in detail the reparation system of the ICC, a question that has been the object of

various interesting studies to date[323]. The goal is to describe and assess in a comparative perspective the ICC scheme of reparation for victims of international crimes alongside other mechanisms. For this purpose, some key features of the system of reparation at the ICC are discussed (without the aim of exhaustiveness) in order to allow for a more comprehensive analysis[324].

The purpose of this section of the present chapter is to provide a general overview of the system of reparation for victims at the ICC, by highlighting its main features[325]. It is important to draw, at first, a descriptive analysis of the unparalleled reparation scheme that was created by the ICC, which is, at the time of writing, still at an infancy state. Then the way will be paved for the development of normative arguments concerning an assessment of the different models of dealing with reparations in the context of international criminal trials.

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[323] See generally, Linda Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations", *Thomas Jefferson Law Review* 29, (2007), p. 189; Carla Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations", *Leiden Journal of International Law* 15 (2002), pp. 667-686; Conor McCarthy, "Reparations under the Rome statute of the International Criminal Court and Reparative Justice Theory", *International Journal of Transitional Justice* 3 (2009), pp. 250-271; Jo-Anne M. Wemmers, *Reparation and the International Criminal Court: Meeting the Needs of Victims*, International Centre for Comparative Criminology, University of Montreal, 2006; Jo-Anne M. Wemmers, "Victim Reparation and the International Criminal Court", *International Review of Victimology* 16 (2009), p. 123; Frédéric Mégret, "The International Criminal Court Statute and the Failure to Mention Symbolic Reparation", *International Review of Victimology* 16 (2009), pp. 127-147; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010.

[324] In other parts of the present study, some aspects of the ICC system of reparation are studied in more detail, see e.g. chapter 4 on the Trust Fund for Victims.

[325] This chapter is not intended to draw an exhaustive description and analysis of the scheme for reparation and support for victims at the ICC. For such study, see Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010; Claude Jorda and Jérôme de Hemptinne, "The Status and Role of the Victim", in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese et al., Oxford University Press, 2002, pp. 1387-1419; Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012; Carla Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations", *Leiden Journal of International Law* 15 (2002), p. 667; Edda Kristjánsdóttir, "International Mass Claims Processes and the ICC Trust Fund for Victims", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Carla Ferstman et al., Nijhoff, 2009, p. 167; T. Markus Funk, *Victims Rights and Advocacy at the International Criminal Court*, Oxford University Press, 2010; and Godfrey Musila, *Rethinking International Criminal Law: Restorative Justice and the Rights of Victims in the International Criminal Court*, Lambert Academic Publishing, 2010.

1. The search for victims' justice before the ICC: case law on reparations

Much debate has surrounded the question of reparations at the ICC and how the Chambers therein would develop and apply principles of reparations[326]. It took some time after the beginning of the activities of the ICC before one of the Court's Chambers had to examine requests for reparation. Many questions remain open to date as to how Article 75 will be interpreted and what practical effects it will have for awards of reparation to victims. At this juncture, it is worth bearing in mind that, at the time of the writing of this paper, the "reparation system" within the ICC is still at an infancy stage since only one case has reached the reparation judgment stage, the case of *The Prosecutor* v. *Thomas Lubanga Dyilo*[327].

Turning to the *Lubanga* case, considering that it is the precursor of the establishment of reparation principles at the ICC, it merits some discussion to set the context for this study. In 2012, in the case against Thomas Lubanga Dyilo, Trial Chamber I rendered the first decision of the ICC on the question of reparations[328]. The Appeals Chamber subsequently rendered its Judgment in 2015 further elaborating on principles of reparation and appending an amended reparation Order to its Judgment.

At this juncture, it will be useful to briefly examine both this first Decision of Trial Chamber I[329] and the Appeals Chamber Judgment concerning the principles to be applied

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[326] See e.g., Carla Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations", *Leiden Journal of International Law* 15 (2002); Liesbeth Zegveld, "Victims' Reparations Claims and International Criminal Courts", *Journal of International Criminal Justice* 8 (2010).); Marc Henzelin et al., "Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes", *Criminal Law Forum* 17 (2006); Gilbert Bitti & Gabriela Gonzales Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", in *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006.

[327] *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 ("the *Lubanga* case" or "the first case on reparations"). It is to be noted that at the time of the writing of this article, a second trial before the ICC, in the case of *Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, is at a very advanced stage, and reparations proceedings may follow the final Judgment in the case.

[328] ICC, Trial Chamber I, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision Establishing the Principles and Procedures to be applied to Reparations", 7 August 2012, ICC-01/04-01/06 ("Decision on Reparations").

[329] Upon the delivery of the first Judgment of the Court in the case of the *Prosecutor* v. *Thomas Lubanga Dyilo*, on 14 March 2012, Trial Chamber I issued a scheduling order on, *inter alia*, the issue of reparations.

as to the question of reparation and the procedure to be followed. The purpose of this paper is not to dwell upon all the important points of the Decision of Trial Chamber I and the Appeals Chamber Judgment in detail but rather to set out the main conclusions of the Chambers which offer some clarity as to the path ahead for reparations at the ICC.

In general terms, in its Decision, Trial Chamber I established principles relating to reparations and the approach to be taken to their implementation, and emphasized that the Decision on Reparations should not affect the right of victims in other cases. Then, the Chamber set out: the applicable law; the principles of dignity, non-discrimination and non-stigmatisation; the beneficiaries of reparations; accessibility and consultation with victims; principles relating to victims of sexual violence and child victims; the scope of reparations and the modalities thereof; the principle of proportional and adequate reparations; causation; standard and burden of proof; principles relating to the rights of the defence; questions relating to States and other stakeholders, as well as the publicity of the Principles established therein[330].

Interestingly, the Chamber has indicated that the convicted person, Mr. Lubanga Dyilo, has been declared indigent and that any symbolic reparation from him would need his agreement[331]. Similarly, the Trial Chamber decided not to order reparations against the accused directly given his state of indigence. Essentially, the Chamber outsourced to the TFV and found it unnecessary to "remain seized throughout the reparations proceedings"[332]. In the operative paragraphs, the Trial Chamber decided not to examine the individual applications for reparations and instructed the Registry to transmit to the TFV all the individual application forms received[333].

The Appeals Chamber reversed many of the Trial Chamber's findings. Among its many conclusions, established the minimum elements that are necessary in a reparations order. These are: 1) the order for reparations shall be directed at a convicted person; 2) it must establish and inform him/her of his/her liability regarding reparation; 3) it must

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[330] Decision on Reparations, pp. 64-85.

[331] *Ibid.,* para. 269.

[332] *Ibid.,* para. 261.

[333] *Ibid.*at para. 289 (b).

describe and reason the type of reparation in accordance with Rule 97(1) and 98 of the RPE; 4) It must describe the harm caused and the modalities of reparation that are appropriate in the circumstances; 5) it shall also identify the victims or set out eligibility criteria based on the link between the harm suffered and the crimes the accused was convicted[334]. The Appeals Chamber also confirmed that in this case, reparations should be ordered on a collective basis rather than an individual basis, given the number of victims involved. It also confirmed that reparations are to be awarded on the basis of the harm suffered as a consequence of the crime within the jurisdiction of the Court[335].

Another significant contribution of the Appeals Chamber Judgment is, as Carsten Stahn has put it well:

> "its articulation of the link between criminal conviction and reparation under Article 75. The ICC reparations regime differs from civil claim models due to its nexus to the criminal case, and specifically the focus on conviction. The judgment clarifies that 'reparation orders are intrinsically linked to the individual whose criminal responsibility is established in a conviction and whose culpability for these criminal acts is determined in a sentence'"[336].

In light of the Appeals Chamber Judgment, the essential elements set out by the Chamber cannot be delegated to an administrative organ like the TFV and thus continuous monitoring by the Trial Chambers will be necessary. This is a positive development as some issues in relation to reparations (including those "essential elements") are by nature legal issues and should be overseen by judicial organs.

All in all, the Appeals Chamber Judgment represented a step forward in the clarification of principles of reparation at the ICC, the rights of victims and convicted

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[334] ICC, Appeals Chamber, Judgment on the appeals against the "Decision establishing the Principles and Procedures to be applied to Reparations", 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015 (hereinafter: "Judgment on Reparations").

[335] *Ibid...*, at para. 1.

[336] Casten Stahn, "Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation", *Ejil: Talk!,* 7 April 2015, available at: http://Ibid..ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/#more-13286

persons, and the roles of Chambers and the TFV. In critically assessing the Judgment, Carsten Stahn has pondered that:

> "The Order for Reparation prioritizes accountability over other societal concerns, such as well-being, security or peace. Rationales, such as relief of suffering, deterrence of future violations, societal reintegration or reconciliation, are treated as secondary objectives that should be pursued "to the extent possible" … Critics are thus likely to remain skeptical as to whether this new liability regime will make an actual difference to the lives of victims. But the door is open for further creativity. This is the legacy of the decision – and an important turning point for future practice"[337].

Commenting on the *Lubanga* reparations case, Anja Wiersing states that: "regarding the ICC, as the current reparations framework stands it is not intended and is unable to provide reparations to all of the victims implicated in any one situation under investigation. This should not, at least for the present, be seen as a failure of the reparations system"[338].

In a recent interdisciplinary study on reparations, Mariana Goetz also comments on the shortcomings of the *Lubanga* case, as she critiques the Court's confusing reasoning regarding Mr. Lubanga responsibility and his ability to pay reparations to victims[339].

The question of reparations has not ended with the Judgment of the Appeals Chamber discussed above. Victims are yet to fully benefit from reparations. This case not only demonstrates the pitfalls of having to decide on the principles of reparations on a case-by-case basis (rather than by the adoption of guiding principles by the plenary of the Court) but also how internal delays are ultimately equated with delays of justice.

Once the long trial ended, victims are now caught in between a back and forth between the TFV and the Trial Chamber charged with monitoring the implementation of

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[337] *Ibid*.

[338] Anja Wiersing, "*Lubanga* and its Implications for Victims Seeking Reparations at the International Criminal Court", *Amsterdam Law Forum* 4:3, 2012, p. 37.

[339] Mariana Goetz, "Reparative Justice at the International Criminal Court: Best Practice or Tokenism?", in *Reparation for Victims of Crimes against Humanity: The Healing Role of Reparation: the Healing Role of Reparations*, Jo-Anne M. Webbers (ed.), Routledge, 2014, pp. 53-71.

reparation[340]. In fact, since the first decision on reparation in the *Lubanga* case by the Trial Chamber, in 2012, more than four years later, only very recently (end of October 2016) has the reparation plan been accepted by the Trial Chamber, which will admittedly take time to be fully implemented. While it is acknowledged that this is the first case of reparations before the Court, this example sheds light on the delays and complexities for the substantive realization of reparations for victims.

A final comment regarding the *Lubanga* case goes to the notion of an emerging civil dimension of reparations before the ICC. According to the pronouncements of the Court, reparation forms a special kind of civil liability since they are linked to the criminal liability of the accused (i.e. a criminal conviction). Carsten Stahn posits that reparations before the Court "differs from purely civil forms of liability due to its connection to criminal proceedings which requires reconciliation of different interests, namely 'the rights of victims and the convicted person'"[341]. The Appeals Chamber reliance on the principle of "liability to remedy harm" creates a sui generis reparation liability[342]. He also criticizes the approach of the Court for failing to acknowledge that reparations may have the effect of creating societal frictions and its minimalistic approach to other objectives of reparations that are non-accountability related[343].

While this study focuses on the *Lubanga* case as the first case that reached the reparations stage and set out the principles on reparations, at writing, a second case against Germain Katanga is very close to a decision on reparations[344].

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[340] For a detailed account of the numerous procedural stages of the implementation of reparations in the *Lubanga* case, see the procedural history summarized in ICC, Trial Chamber II, *Prosecutor v. Thomas Lubanga Dyilo*, "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations" , ICC-01/04-01/06, 21 October 2016, paras. 1-10.

[341] Carsten Stahn, "Reparative Justice after the Lubanga Appeal Judgment New Prospects for Expressivism and Participatory Justice or 'Juridified Victimhood' by Other Means?", *Jounal of International Criminal Justice* 13(4) (2015), pp. 801-813.

[342] *Ibid.,* p. 808.

[343] *Ibid.*

[344] See ICC, *Prosecutor v. Germain Katanga*, "Order instructing the parties and participants to file observations in respect of the reparations proceedings", 1 October 2015, ICC-01/04-01/07-3532-tENG.

Another recent development with regard to reparation is worth mentioning. In the case against Kenya's Deputy President William Ruto and former journalist Joshua arap Sang[345]. In light of the termination of the case against the accused (charges were vacated against the accused), the Trial Chamber was asked whether the State of Kenya had an obligation to give reparation to post-election violence victims and whether the TFV had an obligation to provide assistance to victims[346]. The Court decided by majority (2-1) that it was not the right forum to rule on the reparation requested given that the case against the accused was terminated[347]. In a Dissenting Opinion appended to this Decision, Judge Eboe-Osuji discussed at length the reparation mandate of the Court and stated:

> "To conflate considerations of punitive justice with those of reparative justice - and say that this Court cannot entertain questions about reparation for victims when a case against the accused has been terminated - will create more confusion and anxiety about the administration of justice in this Court."[348]

Judge Eboe-Osuji also added an important point regarding the role of the ICC and the role of States with regard to reparations:

> "There is a critical need to recall here that the role of the ICC as an instrument of justice - including reparative justice - is only complementary. In that regard, the ICC can only be a court of last resort. The primary responsibility for the administration of justice remains with the States- also possibly augmented by other complementary regional arrangements that do not in any way jeopardise the role of the ICC as a court of last resort.
> That being the case, the existence of the ICC should not result in a situation in which national Governments may feel free to abdicate their responsibility to attend to the needs of justice for their own citizens. This is particularly the case as regards the responsibility for reparative justice, where the concerned Government had failed in the first place to prevent the harm that so engaged the need for reparative justice"[349].

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[345] ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* ICC-01/09-01/11 ("*Suto and Sang* case").

[346] ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, "*Decision on the Requests regarding Reparations" ICC-01/09-01/11, 1 July 2016.

[347] *Ibid.*

[348] *Ibid.,* Dissenting Opinion of Judge Chile Eboe-Osuji, p. 8.

[349] *Ibid.,* p. 9.

Importantly, Judge Chile Eboe-Osuji raises an important point at the hear of the reparation system at the ICC: he questions whether reparations at the ICC are necessarily conditional on a conviction of the accused person(s):

> "[…] I see no convincing basis in law for the idea that an ICC Trial Chamber may not entertain questions of reparation merely because the accused they tried was not found guilty. The reasoning is […] inimical to the 'dictates of fundamental justice […] In my view, such formalistic approach could never supply a convincing system of reasoning that prevents an ICC Trial Chamber from entertaining questions of reparation in the absence of conviction. And this is especially so in a case, as the Ruto and Sang trial, in which there was never a question that the victims suffered harm - to the contrary, all the parties and the Government of Kenya had accepted that the victims had suffered harm.
> Indeed, there is a solid basis in international law to reject the no 'compensation without conviction thesis. International and transnational norms concerning criminal injuries compensation have completely rejected the idea. […]"[350]

In sum, while the first case of reparations before the ICC (the *Lubanga* case) clarified many questions and will pave the way for future developments, there remains many layers of complexities that are yet to be unraveled. The very recent example of the points raised by the majority and Dissenting Opinion in the *Suto and Sang* case demonstrate that there are many important questions that surround reparation proceedings at the ICC. One important issue is the question of the interconnectedness of the conviction of the accused person(s) and the ability of the Court to pronounce on reparations. Thus the shaping of the civil dimension of international criminal justice before the ICC is still in process of formation.

2. Beneficiaries of reparation awards

This section now turns to a discussion on the beneficiaries of reparation awards within the ICC by first examining the definition of victims with the framework of the Rome Statute, and then dwelling upon one critical point regarding categories of victims.

[350] *Ibid*., p. 4.

A) Definition of victims

It goes without saying that an individual has to qualify as a victim in order to be entitled to claim reparations under the ICC scheme. Legal proceedings for reparations are initiated by the filing of a request by the victims themselves or on their behalf. The Court may also initiate *proprio motu* the reparation procedure under exceptional circumstances[351].

According to Rule 85 of the ICC Rules of Procedure and Evidence, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." Victims may also include legal persons, such as organizations or institutions.

This Rule was interpreted by the Pre-Trial Chamber I in the *Situation in the Democratic Republic of Congo*[352] whereby the Chamber established the criteria for determining whether individual applicants meet the definition of victim in relation to natural persons. The four part test thus developed by Pre-Trial Chamber I has been subsequently followed by other Chambers and confirmed on appeal[353]. The test to identify whether an applicant could be considered a victim under Rule 85 of the Rules of Procedure and Evidence is based on the following:

> "(i) whether the identity of a natural person or legal person can be established;
> (ii) whether the applicants claim to have suffered harm;
> (iii) whether a crime within the jurisdiction of the Court can be established; and
> (iv) whether harm was caused "as a result" of the event constituting the crime within the jurisdiction of the Court"[354].

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[351] Article 75(1) of the Rome Statute and Rule 95(1) of the Rules of Procedure and Evidence. See also, Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, chapter 6.

[352] ICC, *Situation in the Democratic Republic of Congo*, "Decision on the Application for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6",17 January 2006, ICC-01/04-101-tEN-Corr, para. 9.

[353] ICC, *The Prosecutor v. Thomas Lubanga*, "Judgment on the Appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation", 18 January 2008, ICC-01/04-01/06-1432.

[354] ICC, Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ICC-01/04-1o1-t-ENG-Crr, 17 January 2006, para. 79.

As a preliminary question, the definition of victims for the purpose of being eligible to receive reparation needs to be addressed. In this regard, the jurisprudence of the Court is very extensive on the notion of victims[355]. The conceptualisation of "victims" in the context of participation in the Court's proceedings will likely inform the Court's assessment of this notion in the reparation phase[356].

Furthermore, it is worth noting that the Trust Fund (see a more detailed discussion in the following chapter) may provide support to victims outside the scope of Court-ordered reparations[357]. As commentators have noted, this mechanism is aimed at safeguarding victims' rights due to special circumstances of a given case (e.g. remote location of the victim, lack of information about the procedure for reparation, etc.)[358].

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[355] See e.g. jurisprudence in relation to the definition of "victims" pursuant to rule 85 of the Rules of Procedure and Evidence, in the context of application for victim participation, in the situation, pre-trial and trial phases: "Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6", 17 January 2006, ICC-01-04-101-t-ENG-Corr, para. 65 (situation phase); "Decision on Applications for Participation in Proceedingsa/0004/06 to a/0009/06, a/001606, a/0063/06, a/0071/06 to a/0080/06 and a/01/05/06", in the case of *The Prosecutor v. Thomas Lubanga Dyilo,* 20 October 2006, ICC-01/04-01/06-601; "Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/00337/07 and a/0001/08", 2 April 2008, ICC-01/04-01/07-357; "Decision on Victims' Application for Participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06", in the case of *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, 14 March 2008, ICC-02/04-01/05-282, (pre-trial phase); and "Decision on Victims' Participation", in the case of *The Prosecutor v. Thomas Lubanga Dyilo,* 18 January 2008, ICC-01/04-01/06-1119, (trial phase), cited in . Carla Ferstman & Mariana Goetz, "Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, pp. 313 et seq.

[356] Carla Ferstman & Mariana Goetz, "Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 320.

[357] See aConor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 360.

[358] Claude Jorda and Jérôme de Hemptinne, "The Status and Role of the Victim", in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese et al., Oxford University Press, 2002, pp. 1387 et seq., at 1408. See also, Christopher Muttukumaru, "Reparation to Victims", in *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, Roy S. K. Lee, Nijhoff, 1999, pp. 262 et seq.

B) Constructions of victimhood: inclusion and exclusion, and the collective versus the individual

When discussing the beneficiaries of reparation, the first question pertains to the legal definition of victim for purpose of ICC proceedings, as discussed above. A more fundamental question, one that cuts across law and morality, pertains to constructions of victimhood and the creation of a potential hierarchy of victims: is it proper to differentiate and prioritize victims and how does the civil dimension influence these dynamics? Should certain types of victims be differentiated and prioritized when it comes to reparation? This study offers more questions than answers in this regard.

An issue to be addressed concerns the effect that adding a civil dimension (that is, a dimension focused on reparations) to international criminal justice may have on different kinds of victims. In many different cross-roads, actual victims of international crimes are compartmentalized by the selection of which conflict to focus on, the timeframe of international crimes that occurred, the actual charges that are brought against perpetrators, the confirmation of such charges, and the conviction of the accused. All of these decisions put some victims closer to receiving reparation than other victims who may fall outside the scheme[359]. This may impose a hierarchy of victims when it comes to reparations proceedings: victims of international crimes who can obtain reparation and those who cannot.

To take this analysis further, looking at a concrete example, in the reparations phase of the Court's first trial in the *Lubanga* case, representative of victims, victim groups advocated that reparations should take into account the needs of individual victims and individual reparations were favoured[360]. Victims also claimed that individual awards should vary according to the experience and varying needs[361].

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[359] See Sara Kendall & Sarah Nouwen, "Representational Practices at the International Criminal Court: the Gap between Juridified and Abstract Victimhood", *Law and Contemporary Problems* 75 (2013).

[360] ICC, *Prosecutor v. Lubanga,* "Observations on the Sentence and Reparations by Victims", ('V01 Group'), 18 April 2012, ICC- 01/04-01/06, paras. 24–27.

[361] ICC, *Prosecutor v. Lubanga,* "Observations of the V02 Group of Victims on Sentencing and Reparations", ('V02 Group'), 18 April 2012, ICC-01/04-01/06, para. 27.

An interesting study conducted in 2015 by researchers from the Human Rights Center at the University of California, Berkely School of Law, reported similarly with regards to victims' interests in individual awards. The Center interviewed 622 victim participants at the ICC concerning the participation regime at the ICC: while it concluded that the participation regime needs to be reformed, it also had some interesting conclusions with regards to reparations. In particular, it concluded that:

> "Victim participants joined ICC cases with the expectation that they would receive reparations. In Uganda and DRC, the prospect of receiving reparations was the primary motivation for the overwhelming majority of victim participants; in Kenya and Côte d'Ivoire, less than half reported that receiving reparations was their main objective. Nearly all respondents, however, reported an interest in individualized reparations for themselves and others. Their conceptions of reparations were frequently interwoven with local conceptions of justice"[362].

Similarly, a 2013 study on victims' rights before the ICC reported that: "As the damage to participating victims is individual, victims do not understand collective reparations and feel that individual reparations would better fulfil their expectations"[363].

Human Rights Center, University of California, Berkely School of Law, "The Victims' Court: A Study of 622 Victim Participants at the International Criminal Court", p. 3, available at: https://Ibid..law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf. The Human Rights Center interviewed ICC victim participants, in four countries where the ICC had started investigations and prosecutions: Uganda, Democratic Republic of Congo, Kenya, and Côte d'Ivoire. Individuals interviewed were either registered as victim participants or had submitted applications for consideration as victim participants. Some of the questions addressed were: "What motivated these men and women to become victim participants? Was it to tell their story and to have it acknowledged by the court? Did they wish to see the accused punished? Or was it more important to receive reparations for the harms they suffered? What did they think of the process of becoming a victim participant? What were their perceptions of the court and how it operated? How were their interactions with court staff? And did they have security or safety concerns?".?"

[363] FIDH, "Enhancing Victims' Rights Before the ICC: A View from Situation Countries on Victims´ Rights at the International Criminal Court", November 2013, pp. 27-28, available at: https://Ibid..fidh.org/IMG/pdf/fidh_victimsrights_621a_nov2013_ld.pdf The Report addressed various issues relating to victims before the ICC, including reparations. FIDH selected a "group of 11 men and women, experts and representatives from local civil society from situation countries that have worked with victims of Rome Statute crimes in the field and/or have interacted with the ICC staff or have good knowledge of the Court. They came from Democratic Republic Congo (DRC), Kenya, Mali, Côte d'Ivoire, Sudan and Central African Republic".

These considerations raise the question whether including a civil dimension into international criminal justice necessarily creates a hierarchy among victims of international crimes and prioritizes some victims while excluding others. It also sheds light on the disconnect between real victims' interests and their perception of justice versus the rhetoric justice and what is actually delivered to victims. I further sheds light on the tension that exists between individualized and collective reparations, which will be considered below: Although individual awards permit the voices, needs and desires of victims to be heard, collective reparations are more inclusive and can benefit a greater number of victims. Individualized reparations also lead to greater selectivity – as awards have to be made to individual victims based on specific selection criteria – and may lead to prioritization of victims.

It is submitted that there is no entirely satisfactory answer to this dilemma: the civil dimension of international criminal justice will undoubtedly suffer from selectivity, hierarchy and prioritization, at one level or another. These are also marked characteristics of international justice. There is no easy answer to this dilemma: perhaps the most appropriate approach is to move forward on a case-by-case basis as each individual case presents unique characteristics and issues.

Further on the issue of prioritization and hierarchy of victims it is pondered that within the assistance mandate of the TFV (which will be further elaborated upon in the next chapter) it may be necessary to prioritize certain categories of victims in light of their urgent needs. Thus, again, much will depend on specific circumstances of each case.

The analysis that follows will discuss some of the characteristics of the ICC reparation system and critical insights on including reparation within a naturally criminal process.

3. Forms of reparation and the tension between collective and individual reparation in the ICC context

A further question to be addressed is the kind of redress that could possibly be awarded in the context of the ICC. Article 75 (2) states that:

> "2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79".

A preliminary comment regarding this definition pertains to the types of reparation mentioned therein. It is expressly mentioned "restitution, compensation and rehabilitation" but not symbolic reparations such as satisfaction and non-repetition. The focus thus seems to be on material forms of reparation. The precise reason for failing to mention symbolic reparations is unknown, and the assertion that ordering symbolic reparations to an accused person may raise human rights concerns is inconclusive[364]. As Frédéric Mégret argues:

> "Symbolic reparations have several uses. They may be particularly important in cases where the harm is hard to evaluate, or continuing, or where the injury cannot be repaired. Mere compensation might encourage a state to think that it can "buy its way out" of violations by simply paying the compensation but not remedying the situation … Symbolic reparations also cater to a broader range of victim concerns, and take seriously their need for recognition, respect, dignity and hope for a safe future"[365].

Much like Frédéric Mégret, this study submits that material and symbolic reparations are not mutually exclusive, they in fact complement one another. In the ICC context this also rings true in particular in light of the mass victimization and nature of international crimes.

A related point is that under the terms of Rule 97 of the ICC Rules of Procedure and Evidence the Court may award reparations on an individualized basis or, where it deems it

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[364] Fréderic Mégret, "The International Criminal Court and the Failure to Mention Symbolic Reparations", available at: http://ssrn.com/abstract=1275087

[365] *Ibid*.

appropriate, on a collective basis, or both. Trial Chamber I in the *Lubanga* case also recognized that reparations can be made both on an individual and collective basis[366].

According to the Rules of the Court, collective awards of reparation are channelled through the Trust Fund for Victims ("TFV")[367] to "set out the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation."[368] It is worth noting, however, that the assessment by the Fund is to be approved by the Court.

In the context of mass international crimes, collective reparations gain an important role as a means to redress the collective nature of the crimes that come before the ICC. In fact, it may be difficult, if not impossible to provide redress to each individual victim of an international crime[369].

A key practical advantage of collective reparation is the maximization of the limited resources that the Court may have to provide reparation for victims. In fact, because of the nature of the crimes which come before the ICC, mass victimization may occur, which in turn could potentially lead to a situation where victims may have to be selected for reparation purposes. On a normative perspective, in the context of international crimes where mass atrocities are committed, individual reparation may not be the most appropriate form of redress, which by its nature may exclude a large number of victims of a certain crime[370]. Another advantage of collective reparation awards concerns the form of reparation, a point which will be discussed below: collective awards may be symbolic,

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[366] Decision on Reparations, paras. 217-221.

[367] See Article 79 of the ICC Statute.

[368] Regulation 69 of the Trust Fund Regulations.

[369] For studies on collective reparations in the context of mass violations of human rights or international humanitarian law, see Friedrich Rosenfeld, "Collective Reparation for Victims of Armed Conflict", *International Review of the Red Cross* 92 (2010); see also Heidy Rombouts, *Victim Organizations and the Politics of Reparation: A Case-Study on Rwanda*, Intersentia, 2004, p. 34.

[370] See in this regard, Naomi Roht-Arriaza "Reparations, Decisions, and Dilemmas", *Hastings International and Comparative Law Review* 27 (2004), pp. 157 et seq.

which in turn, may provide a measure of "moral reparation" to victims[371]. Collective reparations can also be seen from an ontological lens. As Frédéric Mégret argues,

> "the opposition between individuals and groups is also partially artificial: international crimes target the "groupness" that is in the individual, and the individual that is in the group. More than trying to offer reparation to groups and/or individuals as such, one may wonder whether a truly groundbreaking theory of reparations would not try to direct itself less at mending the subjects – individual or collective – than the relations that exist between them and the rest of society. In the end, it seems, what is broken and torn apart by international crimes is not only the integrity of individuals or groups taken in isolation, as much as their place in the world and the ties that bind them. In that respect, however, looking at groups, the place of individuals within them, and the place of the group within society, is already in itself a way of focusing attention on the relational aspects of reparations"[372].

An interesting issue as to the discussion of collective reparations concerns their *raison d'être*. Often international crimes are not aimed at a specific individual but rather at a community, or a group of individuals, and often the crime is perpetrated against individuals due to the fact that they belong to a certain group[373]. Collective reparations can potentially offer a means of redress to a large number of victims, while acknowledging their suffering and losses as well as providing a means to reach victims, who for one reason or another, cannot claim reparation before the Court[374]. The jurisprudence of the IACtHR, as discussed in chapter 2, provides many important insights as to the award of

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[371] Birte Timm, "The Legal Position of Victims in the Rule of Procedure and Evidence", in *International and National Prosecution of Crimes under International Law*, Horst Fischer et al., Bochumer Schriften zur Friedenssicherung und zum Humanitären Völkerrecht, Berlin, Arno Spitz, 2001, pp. 289 et seq., p. 304, cited in Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 123.

[372] Fréderic Mégret, " The Case for Collective Reparations before the ICC", available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196911

[373] Raphael Lemkin, "Genocide as a Crime under International Law", American Journal of International Law 41 (1947), pp. 145 et seq., cited in Eva Dwertmann, The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations, Nijhoff, 2010, p. 122.

[374] Christian Tomuschat, "Darfur – Compensation for the Victims", *Journal of International Criminal Justice* 3 (2005), pp. 579 et seq.; Paul R. Dubinsky, "Justice for the Collective – The Limits of the Human Rights Class Action", *Michigan Law Review* 102 (2004), pp. 1152 et seq.; Anne-Marie de Brouwer, "Reparation to Victims of Sexual Violence – Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families", *Leiden Journal of International Law* 20 (2007), pp. 207 et seq.

collective reparation for mass human rights violations. As it was argued, their legacy can prove very helpful to the ICC.

An interrelated question is whether collectives have standing to claim reparation. This latter question calls for the analysis of whether "collectives" are included in the definition of "victims", as described above, which does not expressly exclude it because collective forms of reparation are envisaged within the ICC, which are meant to serve the benefit of a community, perhaps collectives could be recognized as victims[375]. Be that as it may, the Court's legal framework concerning the right to reparation does not provide many details as to this question. It will be for the Judges to decide on these issues[376] as the jurisprudential construction of the reparation regime is currently underway.

As argued in a previous chapter, much can be learned about the forms of reparations from the experience of other specialized tribunals. I argued that such lessons could inform decisions relating to forms of reparation for international crimes, not only at the ICC but also at other reparation mechanisms. Thus, given the importance of the question of the forms of reparation at the ICC context, as well as the Court's lack of experience in this field, this study has dedicated one chapter (see chapter 2 above) to a case-study of the rich jurisprudence of the IACtHR concerning reparation to victims of mass atrocities and how this jurisprudence can inform decisions at the ICC.

When it comes down to the adjudication and award of reparation, an obvious consideration pertains to the nature of international crimes versus the capabilities of international criminal justice, and the ICC in particular, to fulfill reparation needs. This stands at the heart of the tension between individual and collective reparation, which was evidenced in the first reparation case before the Court[377]. Individual reparations are provided to individual claimant victims, and necessarily take into account the individual

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[375] Birte Timm, "The Legal position of Victims in the Rule of Procedure and Evidence", in *International and National Prosecution of Crimes under International Law*, Horst Fischer et al., Arno Spitz, 2001, pp. 303 et seq. cited in Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 198

[376] See "Reparations before the International Criminal Court: Issues and Challenges, Conference Report", Peace Palace, The Hague, 12 May 2011, p. 5.

[377] The *Lubanga* case.

needs and desires of victims. Collective reparations can be provided to communities and victims. Collective reparations may "address the harm the victims suffered on an individual and collective basis"[378].

As discussed above, victims in the *Lubanga* case requested both individual and collective reparations. The Trial Chamber adopted a collective/ community-based approach, rejecting requests for reparation on an individual basis, due to the limited financial availability of funds. Since the convicted person was declared indigent, reparation would be provided on the basis of voluntary contribution to the TFV. By deciding to focus on collective reparations, the reparation net is wider and could benefit a greater number of victims but it also discharged the Court of having to craft individual remedies and assess each individual claim[379]. It is claimed however that by focusing on collective reparation, an abstract, intangible construction of victims in international criminal law is given priority over individual victims that have needs, interests and concrete claims of reparations desires as a result of their suffered harm[380]. The choice of collective reparation, despite the requests of victims raises the question of the true meaning of "justice for victims" before the ICC and the extent to which their voices are being heard[381].

1. The Trust Fund for Victims

Reparation within the ICC cannot be examined without mentioning the Trust Fund for Victims. The importance of this mechanism is illustrated in chapter 3, dedicated to an examination of the Trust Fund. In this chapter, the aim is to highlight the key issues relating to the Trust Fund in the context of reparation within the ICC.

The Trust Fund has an important role in the implementation of the mandate of the Court concerning reparation. The Trust Fund, and a five-member Board of Directors which

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[378] Decision on Reparations, para. 221.

[379] *Ibid*.

[380] Laurel Fletcher, "Refracted Justice: the Imagined Victim and the International Criminal Court", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 317-319.

[381] *Ibid*., pp. 317-319.

oversees its activities, were established in September 2002[382] and in 2004, a Trust Fund Secretariat was created as part of the Court's Registry[383]. The Trust Fund was established by the Assembly of States parties in accordance with Article 79 of the Rome Statue, which reads as follows:

> "(1) A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
> (2) The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
> (3) The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."

Many important aspects of the Trust Fund for Victims require in-depth analysis. I will review them in more detail in the next chapter of this study, which examines exclusively the Trust Fund as an administrative mechanism devised for the purpose of reparation for victims of international crimes within the jurisdiction of the ICC.

Suffice it to say for present purposes that a key aspect in relation to the role of the Trust Fund in the award of reparation to victims refers to whether it will act, in practice, as a sort of administrative body that takes care of the payment and logistics of reparation[384], or as a true mechanism of restorative justice, concerned with different forms of reparation and the rehabilitation of victims. Financial constraints, unsurprisingly, will be a challenge to the performance of the activities of the Trust Fund. The source of income of the Trust fund is not unlimited. The financial resources that the Trust Fund may have at its disposal will dictate, to a certain degree, not only the scope of its activities but also the extent and type of reparation victims may receive.

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[382] Resolution ICC-ASP/1/Res.6 (9 September 2002), and Annex to same, para. 7.

[383] Resolution ICC-ASP/3/Res.7, Establishment of the Secretariat of the Trust Fund for Victims, paras. 2 and 4 (10 September 2004). The Trust Fund for Victims is funded by the Court's budget and not from the funds that the Trust Fund holds for the benefit of victims.

[384] See Amnesty International, International Criminal Court: Ensuring an Effective Trust Fund for Victims, IOR 40/005/2001, 1 September 2001.

2. Victim participation and reparation

Victim participation[385] is distinct from victim reparation with the ICC context. While this study does not deal with the details of victim participation at the ICC, it is relevant to dedicate a brief discussion of this topic. While victim participation can happen throughout different stages of the proceedings, reparation necessarily needs to take place only at the end of a trial, if there is a conviction.

The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff reminds of important dimensions of reparation:

> "For a benefit to count as reparation and to be understood as a justice measure, it has to be accompanied by an acknowledgment of responsibility and needs to be linked with other justice initiatives such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence. The Special Rapporteur insists that each of these kinds of measures is a matter of legal obligation and warns against the tendency to trade one measure off against the others"[386].

Specifically relating to the participation of victims in the reparation process, the Special Rapporteur:

> "… calls on Governments to establish mechanisms for the meaningful participation of victims and their representatives. This requires guaranteeing their safety. … Victim participation can help improve the reach and completeness of programmes, enhance comprehensiveness, better determine the types of violations that need to be redressed, improve the fit between benefits and expectations and, in general, secure the meaningfulness of symbolic and material benefits alike. Moreover, active

[385] For thorough studies of victim participation before the ICC, see Luke Moffett, "Meaningful and effective? Considering victims' interests through participation at the International Criminal Court", *Queen's University Belfast School of Law, Research Paper 2016–03*; Sergey Vasiliev, "Article 68 (3) and personal interests of victims in the emerging practice of the ICC", in *The Emerging Practice of the International Criminal Court*, Carsten Stahn and Göran Sluiter (eds.) Brill, 2008, pp. 635-690; Sergey Vasiliev, "Victim Participation Revisited: What the ICC is Learning About Itself", in *The Law and Practice of the International Criminal Court Carsten Stahn (ed.), Oxford University Press*, 2015. See also other works cited in this study concerning victim participation.

[386] United Nations, General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", A/69/518, 14 October 2014, para. 83.

> and engaged participation may offer some relief in the light of the dismal record in the implementation of reparations"[387].

An interesting study conducted in 2015 by researchers from the Human Rights Center at the University of California, Berkely School of Law, interviewed 622 victim participants at the ICC concerning the participation regime at the ICC. While it concluded that the participation regime needs to be reformed, it also had some interesting conclusions with regards to reparations. In particular, it concluded that:

> "Victim participants joined ICC cases with the expectation that they would receive reparations. In Uganda and DRC, the prospect of receiving reparations was the primary motivation for the overwhelming majority of victim participants; in Kenya and Côte d'Ivoire, less than half reported that receiving reparations was their main objective. Nearly all respondents, however, reported an interest in individualized reparations for themselves and others. Their conceptions of reparations were frequently interwoven with local conceptions of justice"[388].

As a recommendation they propose that victims be better informed of the goals of participation and how they are distinct from reparation. By keeping the process of participation transparent to victims, and making clear that participation does not necessarily entail compensation will make the participation system more "meaningful"[389].

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[387] *Ibid.,* paras. 91 and 92.

[388] Human Rights Center, University of California, Berkely School of Law, "The Victims' Court: A Study of 622 Victim Participants at the International Criminal Court", p. 3, available at: https://Ibid..law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf. The Human Rights Center interviewed ICC victim participants, in four countries where the ICC had started investigations and prosecutions: Uganda, Democratic Republic of Congo, Kenya, and Côte d'Ivoire. Individuals interviewed were either registered as victim participants or had submitted applications for consideration as victim participants. Some of the questions addressed were: "What motivated these men and women to become victim participants? Was it to tell their story and to have it acknowledged by the court? Did they wish to see the accused punished? Or was it more important to receive reparations for the harms they suffered? What did they think of the process of becoming a victim participant? What were their perceptions of the court and how it operated? How were their interactions with court staff? And did they have security or safety concerns?"

[389] *Ibid.*, pp. 4-5.

3. Tackling the difficult dilemmas: reconciling reparations before the ICC with conflicting perspectives and new paradigms

It is submitted that the ICC cannot single-handedly be the promoter of reparation for international crimes. The Court faces many practical and systemic challenges from the inclusion of reparations within its mandate. The Court is part and parcel of broader systems and efforts: national justice systems and other international tribunals and mechanisms must work in synergy to attain the goal of reparations within international justice. It is hoped that the ICC can be the catalyst for other similar efforts to provide redress for victims of international crimes. For example, a narrow approach to the role of reparations within international criminal proceedings may lead to a timid development of the reparation system of the ICC[390]. On the other hand, a broader conception of the role of international criminal justice and the possibilities of the ICC relating to victims may lead to a more developed system of reparation for victims under the ambit of the ICC.

A) Critical scholarly outlook on ICC reparations

In this context, it is important to dwell upon critical scholarship concerning possible detrimental effects of including a civil dimension (i.e. reparations) to international criminal trials. The operationalization of a civil dimension of international criminal law within the ICC for example has been criticised from different perspectives including: the tension between the rights of victims and rights of the accused; detrimental effects on victims; and false creations of victimhood (discussed above)[391]. Taking into account these arguments, the overarching question is whether mixing criminal trial with civil processes ultimately is more detrimental than beneficial, especially for victims.

A prominent criticism of the right to reparation is that it may conflict with the rights of the defence in ICC trials. In this context, victims' rights (including the right to reparation) might have a different effect in relation to the overarching goals of the ICC as an institution than they do in relation to concrete criminal trials in light of competing rights of the defence. Thus, the differentiated application of victims' rights in criminal trial

[390] Some argue in this sense, see e.g. Eric A. Posner, "A Minimalist Reparations Regime for the International Criminal Court", *Human Rights and International Criminal Law Online Forum*, February 1, 2012.

[391] See section on "constructions of victimhood".

might actually militate against mixing criminal and civil dimensions of international criminal law[392]. Professor Zappalà argues that:

> "Any conflict between the rights of victims and the rights of defendants has to be the object of a *delicate balancing* that must be carried out in the knowledge that the overarching purpose of criminal procedure is to reach a finding of guilt or innocence whilst protecting at the highest level the rights of those subjected to the proceedings (i.e. the suspect and the accused)… The balancing of victim participation against the rights of the accused should be inspired by some *procedural principles of an imperative nature,* which represent *the backbone of international criminal procedure:* the presumption of innocence, the right to a fair hearing in full equality, the right to an expeditious trial, the right to confront and present evidence, and so on"[393].

In this regard, while reparation for victims work in different ways in theory (in relation to the broader institutional goals of the ICC) than in practice (in relation to concrete trials), where one primary consideration is the rights of the accused, the differentiated application of victims' rights in criminal contexts is not necessarily an argument against the operationalization of a civil dimension of international criminal law. What it does is remind us that the right to reparation shall not be to the detriment of the rights of the accused; for example, reparations shall not cause a delay in proceedings against the accused, and shall not set aside the presumption of innocence.

Another important contention in relation to reparations in the context of criminal trials refers to constructions and perceptions of victimhood. When including reparations within traditionally criminal processes (i.e. international criminal trials), could this create an abstract conception of victimhood which does not always correspond to reality and is to the detriment of "real" victims? In this regard, Laurel Fletcher submits that:

> "Although victims are entitled to limited participation in the trial and to seek reparations after a sentence is reached, the legal structure of the ICC prioritises retributive over restorative justice, punishment over reparations, and the conviction of perpetrators over the character of the charges they face. Looking at trial procedures, victims are framed as a consideration against which other rights and values are weighed. Thus the real victims

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[392] Cf. Salvatore Zappalà, "The Rights of Victims v. the Rights of the Accused", *Journal of International Criminal Justice* 8 (2010), pp. 137-164.

[393] *Ibid*. p. 140.

> are subordinated to the retributive justice aims of the ICC, and their desires are continually compromised despite their moral centrality to the integrated justice (retributive and restorative) mission of the Court"[394].

Laurel Fletcher claims that this dichotomy between the abstract construction of victims and the real victims of international crimes was evident in the first reparations proceedings at the ICC. She reviews the submissions of victims in regards to reparations and submits that while victims of the crimes perpetrators actually claimed for individual redress (in addition to collective awards), the Chamber only considered community-based reparations, so the "imagined victim worked again here to justify abstracted, collective forms of repair and obscured the particular and disparate preferences of individual victims for reparative justice"[395].

Another important consideration is the extent to which reparations is an inherently political act and whether it could further victimize vulnerable victims by submitting them to criminal processes, where they shall be "recognized" as victims in order to be considered for reparations with that system. In this regard, Peter Dixon argues that "provision of international criminal reparations is an inherently political act through which the ICC will necessarily become a player in local power relations" through the "politics of recognition", which is inherent in reparations[396].

What stems from some of these critical accounts of the reparation system and the broader question of the mixture of criminal and civil dimensions in international criminal justice is that when reparations for international crimes start to be unpacked at the ICC, many practical, moral, ethical, and political challenges arise. It is important to dwell upon and engage with these critical accounts, always bearing in mind the broader picture: the ICC, and the reparation system developed therein, is part of a plethora of alternatives for victim redress for international crimes. As reparations proceedings at the Court advance and principles are further developed, new lessons will also be learned from past practice.

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[394] Laurel Fletcher, "Refracted Justice: the Imagined Victim and the International Criminal Court", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 304-305.

[395] *Ibid*. p. 319.

[396] Peter J. Dixon, "Reparations and the Politics of Recognition", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, p. 326.

Additionally, there should be an emphasis on understanding the real experiences of victims. In this journey of discovery and improvement, it is also important to think of the symbolic gain of including a civil dimension of international criminal law at the international level and the potential for the system at the ICC to be a catalyst for further development of reparations for international crimes domestically, and with regards to administrative mechanisms.

B) Reparations and contemporary issues

In addition to some selected critical perspectives of including reparations within the ICC proceedings as discussed above, there are also some difficult and fundamental questions that the ICC will have to grapple with as it develops its reparation system. I focus here on two main themes: reparations for victims of sexual or gender-based crimes and reparations for victims who are both victims and perpetrators. These are by no means the only new paradigms or dilemmas concerning reparations for international crimes, but given their prominence in the early stages of the development of reparations before the ICC, they merit some words at this stage[397].

The first important dimension of reparations for international crimes, especially in the context of the ICC, refers to reparations for sexual and gender-based violence. Sexual crimes can be war crimes, crimes against humanity or genocide, for example, depending of the criminal conduct and other factors. When it comes to reparations, should victims of gender-based violence be treated differently from other victims? Should victims of sexual-based violence be prioritized due to urgent needs (e.g. medical needs, psychological needs, etc.)? For example, the *United Nations Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence* of June 2014 recommends some principles in relation to reparation:

> "1. Adequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations
> 2. Judicial and/or administrative reparations should be available to victims of conflict-related sexual violence as part of their right to obtain prompt, adequate and effective remedies

[397] It is acknowledged that these issues merit a more extensive discussion, however due to some space constraints of a doctoral thesis, they are treated here briefly. See references in this Section for recent and deeper discussions of these topics.

3. Individual and collective reparations should complement and reinforce each other
4. Reparations should strive to be transformative, including in design, implementation and impact
5. Development cooperation should support States' obligation to ensure access to reparations
6. Meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured
7. Urgent interim reparations to address immediate needs and avoid irreparable harm should be made available
8. Adequate procedural rules for proceedings involving sexual violence and reparations should be in place."[398]

Regarding whether victims of sexual and gender based crimes should be prioritized or treated differently, the report recommends that victims of sexual violence receive "priority access to services"[399]. This is so due to the nature of their harm and the possible need for treatment, and thus reparation orders should bear this dimension of sexual and gender based crimes into account.

Recent conflicts have left tens of thousands of victims of sexual and gender violence. This is compounded by criticisms that the ICC has met with concerning its reluctance to prosecute gender-based crimes[400]. In the *Lubanga* case the Office of the Prosecutor decided to limit prosecution to charges of conscripting child soldiers and did not bring any charges of sexual violence allegedly perpetrated by a rebel group, a decision which instigated fierce criticism[401]. The prosecutorial decision concerning what charges to bring against the accused, Mr. Lubanga, dictated which victims could potentially ask for reparations at the appropriate stage. This sheds light on the discussion above mentioned

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[398] United Nations Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence of June, 2014, p. 2.

[399] *Ibid.,* p. 5.

[400] Laurel Fletcher, "Refracted Justice: The Imagined Victim and the International Criminal Court", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 311-312. See similarly Kelisiana Thynne, "The International Criminal Court: A Failure of International Justice for Victims", *Alberta Law Review*, Vol. 46, Issue 4 (August 2009), pp. 957-982, p. 968 who claims that "[t]he fact that these charges [concerning sexual violence] were not brought in the *Lubanga* case means that the Court is excluding consideration of the major aspects of the conflict with which they are supposed to be dealing. In so doing, they are excluding the victims of all of these other crimes".

[401] Ibid.

concerning included and excluded victims for purposes of reparation. This hesitation to prosecute gender and sexual violence charges effectively created, in terms of reparation, two categories of victims: those who were victims of someone convicted by the Court and who could benefit from the reparations regime, and those that suffered from harm by those not convicted by the Court, who will not be part of a Court ordered reparations regime[402].

The first case before the Court also raises the question of the politics of gender justice at the ICC. In fact, Louise Chappell argues that "the failure [of the ICC] to adequately prosecute crimes of sexual and gender-based violence in its first two cases has made the Court's reparations regime appear selective and unfair to victims of these crimes, and could possibly do more harm than good in the fragile postconflict contexts in which it will be implemented"[403].

Theories concerning how reparations for sexual violence should develop have emerged. Some scholars claim that reparations for victims of sexual violence should be "transformative", which entails the rebuilding of political, social and economic relations that contributed to the exposure to the harm victims suffered[404]. A critical account of this transformative reparation theory claims that

> "this agenda threatens to bypass or displace reparative justice as a distinct and distinctly victim-centered ideal in favor of a different kind of justice agenda. In doing so, it threatens to efface or to demote in importance concrete forms of relief and support for individual victims as 'merely' remedial or restorative, and so to de- mote the importance of recognizing individual victims themselves whose status as bearers of rights and

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[402] Frédéric Mégret, "The Reparations Debate", 2012, *Invited Experts on Reparations Questions. ICC Forum*, Available at: http://iccforum.com/reparations

[403] Louise Chappell, The Politics of Gender at the International Criminal Court: Legacies and Legitimacy, Oxford University Press, 2015, pp. 156-157.

[404] See discussion and references cited in Margaret Urban Walker, "Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations", *International Journal of Transitional Justice*, (10), 2016, 108–125, including: Colleen Duggan and Adila Abusharaf, "Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice", in *The Handbook of Reparations*, ed. Pablo de Greiff, New York, Oxford University Press, 2006; Ruth Rubio-Marín and Pablo de Greiff, "Women and Reparations", *International Journal of Transitional Justice* 1(3), 2007, pp. 318– 337; Valérie Couillard, "The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence", *International Journal of Transitional Justice* 1(3), 2007, pp. 444–453; Anne Saris and Katherine Lofts, "Reparation Programmes: A Gendered Perspective", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, ed. Carla Ferstman, Mariana Goetz and Alan Stephens, Leiden: Brill, 2009.

> subjects of justice depends crucially on their standing to claim accountability and repair for violations to their individual persons"[405].

Reparations for sexual and gender based violence is thus far from a straight-forward issue. The ICC cannot lose sight of the fact that many of the conflicts that come before it have left far too many victims of sexual and gender violence[406]. It has been suggested, as a way forward, that "modifying initiatives of the ICC's Trust Fund for Victims and a greater emphasis by the ICC on the notion of member state 'reparative complementarity' may provide mechanisms for transforming conditions that trigger and perpetuate gender violence during conflict"[407].

Another dilemma in terms of reparations and definitions of victimhood concerns victim-perpetrators, and how they should be treated. Luke Moffett recently examined this dilemma by drawing from victimology studies and examined ways in which victim-perpetrators have been either included or excluded from reparation programmes[408]. The dilemma of how to treat victims who are also (or have been) perpetrators has been explained in the author's words as: "individual identities in protracted armed conflicts and political violence can be more complex than the binary identities of victim and perpetrator, where individuals can be both victimised and victimiser over a period of time"[409].

There will be no easy answers for the ICC when it is faced with such dilemmas. Some of the questions that may arise concerning reparation for victims before the ICC who also committed crimes concern their eligibility to receive reparation, whether they should

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[405] Margaret Urban Walker, "Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations", *International Journal of Transitional Justice*, (10), 2016, 108–125, p. 110.

[406] Cf. Louise Chappell, The Politics of Gender at the International Criminal Court: Legacies and Legitimacy, Oxford University Press, 2015.

[407] Andrea Durbach and Louise Chappell, "Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations", *International Feminist Journal of Politics*, 2014.

[408] Luke Moffett, "Reparations for 'Guilty Victims': Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms", *International Journal of Transitional Justice*, (10), 2016, pp. 146-167, p.

[409] Luke Moffett, "Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms", *Queen's University Belfast, School of Law Research Paper No. 2014B13,* p. 2-3.

be treated differently, and how the Court constructs notions of victimhood. Upon a thorough analysis of the topic, Luke Moffett posits that "[b]y affirming accountability as part of reparations we can hopefully depoliticise contentions around reparations for complex victims, by neither excluding them nor equating them with innocent victims"[410].

V. CONCLUSIONS

In this chapter the goal was to review the different approaches that international criminal courts and mechanisms have put in place regarding victim redress. Through a descriptive and comparative exercise, a spectrum of the different models can be perceived. At one end of the spectrum lie the Nuremberg and Tokyo Tribunals (precursors of modern international criminal law) followed by the *ad hoc* and hybrid tribunals, with a model that does not provide an avenue for victim redress within the proceedings as it focuses solely on the criminal aspects of trials. Victims' roles in these courts and mechanisms are primarily that of passive expectators and international criminal proceedings are not the *fora* for dealing with claims of reparation.

In the middle of the spectrum there is the model created by the ECCC, which includes a civil dimension for victim redress, and certain categories of victims have a (limited) possibility of obtaining reparation. This model strikes a balance between criminal trials and victims redress, criminal and civil dimensions, but not without its challenges, as reviewed above.

At the other end of the spectrum, there is the model of the ICC which has created a whole system of victim reparation that is still in its development years. In the ICC, a broader range of possibilities for reparation is available to victims than at the ECCC. A parallel administrative mechanism (the Trust Fund), functioning as part of the ICC system of reparation is in place for managing victim redress.

The consequences of these different approaches to victim redress in international criminal proceedings is that, according to one model, victims will be left to other

[410] *Ibid.*, p. 23.

mechanisms (e.g. national courts) to seek reparation for international crimes, whereas the model established by the ECCC and the ICC provide, at least theoretically, an avenue at the international criminal level for victims to obtain some sort of redress.

The questions that remain, and which are the focus of this study, are which of the models would be suitable for the international level and which model will international criminal justice embrace in the years to come. The compatibility of international criminal proceedings with a civil dimension that entails reparation for victims was also underlying the comparative analysis in this chapter. These questions will be tackled at the end of this study in light of the examination of the role of national courts and of administrative mechanism in the pursuit of redress for victims of international crimes.

CHAPTER 4: PAVING A NEW ROAD FOR REPARATION FOR VICTIMS OF INTERNATIONAL CRIMES: THE ICC TRUST FUND FOR VICTIMS AND BEYOND

I. INTRODUCTION

With the advent of the ICC, a new mechanism for providing redress for victims of international crimes within the jurisdiction of the ICC was created: the Trust Fund for Victims ("TFV")[411]. Its inclusion in the international criminal justice scene is both as unprecedented[412] as it is significant.

The TFV is a novel enterprise of the States Parties to the ICC to set out a unique mechanism, within the realm of the ICC framework, dedicated solely to victims, providing assistance and implementation of Court-ordered reparation for victims in relation to the harm caused by international crimes within the jurisdiction of the ICC. It is an important creation as it works towards ensuring that victim redress is part of international criminal justice.

With a very promising purpose, the TFV is bound, nevertheless, to encounter many challenges ahead. Its nature, mandate and objectives will dictate the scope of reparations

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[411] The TFV has gained much attention in the literature in recent years. For examples of essays about the TFV, see Peter G. Fischer, "The Victims' Trust Fund of the International Criminal Court-Formation of a Functional Reparations Scheme", *Emory International Law Review* 17 (2003), p.187; Pablo De Greiff & Marieke Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005; Heidy Rombouts et al., "The Right to Reparation for Victims of Gross and Systematic Human Rights Violations of Human Rights", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005; Linda Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations", *Thomas Jefferson Law Review* 29 (2007), p. 189; Tom Dannenbaum, "The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims", *Wisconsin International Law Journal* 28 (2010). See also on the Trust Fund, Sam Garkawe, "Victims and the International Criminal Court: Three Major Issues",*International Criminal Law Review* 3 (2003), pp. 345-367; Marc Henzelin et al., "Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes", *Criminal Law Forum* 17 (2006); David Boyle, "The Rights of Victims Participation, Representation, Protection, Reparation", *Journal of International Criminal Justice* 4 (2006), pp. 307-313.

[412] Pablo de Greiff & Marieke Wierda, "The Trust fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al. (eds.), Intersentia, 2005, p. 225.

for victims. These challenges are highlighted by the fact that other international criminal tribunals, as discussed in the previous chapters, did not provide for victim reparation, and less so, reparations through an administrative mechanism linked with a judicial procedure, such as the TFV. In this context, I argue that much can be learned from the experience of other similar administrative reparation mechanisms and mass claims processes[413].

In previous chapters, this study discussed whether a legal basis for an individualized approach to reparations can be construed and operationalized within the setting of international criminal courts. Thus, it analysed the legal basis and contents of reparations within international criminal proceedings.

In this chapter, this dissertation turns attention to another form of addressing the question of reparation to victims of international crimes: the use of administrative mechanisms (linked with judicial processes). The aim of this chapter is to examine the principled question of whether and to what extent an administrative mechanism linked with a judicial process may provide a path to deal with mass claims of reparation pertaining to international crimes. Thus, this chapter address the following specific sub-questions:

- Should reparations for international crimes be the object of another mechanism, such as an international administrative mechanism (linked with a judicial mechanism)?
- What role can international administrative mechanisms play in relation to reparations for victims of international crimes?

The goal of this chapter fits within the broader aim of this study, which is to examine different approaches to victim reparation in international criminal justice, administrative mechanisms linked with a judicial body, and to question whether a mixture of criminal and civil dimensions (or a *sui generis* system) makes sense at the international level. The TFV is a unique example of such a mechanism. As such, this chapter studies the endeavour of administrative mechanisms linked with a judicial processes as a possible route for civil redress for international crimes, and in this light, examines the TFV of the ICC.

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[413] The International Bureau of the Permanent Court of Arbitration, *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, Oxford University Press, 2006; Marc Henzelin et al., "Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes", *Criminal Law Forum* 17 (2006), pp. 317-344.

In order to examine whether the TFV should play a leading role in the ICC context[414], and in broader terms, the contribution that similar mechanisms may have on the quest for civil redress for international crimes, it is important to first briefly consider the legal framework of the TFV, and its connection with a judicial mechanism (the ICC Chambers). Following this, various rationales for reparations through the TFV are examined, along with the role of the TFV vis-à-vis the Chambers of the Court and the challenges ahead of the TFV. After the descriptive overview, this chapter discusses the measures taken by the TFV and their impact on victims at different stages of cases. It also explores the important role of the TFV in the reparation phase of the *Lubanga* case. As well, it critically examines in this regard how the budget has been spent. This chapter engages in a critical discussion of the pros and cons of administrative versus judicial mechanisms. In this respect, this chapter builds on critical scholarship pertaining to the detrimental effects that criminal justice may produce for victims.

In order to extract some lessons learned, this chapter considers various examples of other mechanisms that deal with mass claims for civil redress with a view to pulling together common themes that can shed light on some of the questions the TFV may have to grapple with. In the final part of the chapter, the question whether the TFV can pave the way for the creation of other administrative mechanisms in the international plane for redress for victims of international crimes is dwelt upon.

This chapter inquires whether the TFV should play a leading role in the award of reparation for victims of ICC crimes. It is argued that it should remain connected to the Court (the judicial proceedings) in the sense that the Court (the Chambers) should establish the principles of reparation, as stipulated in the Rome Statute. As Peter Dixon argues, it is imperative to have "close involvement by the Trial Chamber throughout the targeting process"[415].

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[414] See e.g., Pablo de Greiff and Marieke Wierda, "The Trust fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005, arguing for a greater role for the TFV in the reparations mandate of the ICC.

[415] Peter J. Dixon, "Reparations and the Politics of Recognition", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 327-328.

The Court will have a huge burden with the criminal proceedings. As such, the TFV might be better placed to deal with reparation awards swiftly and more appropriately due to its expertise and focused mandate. Nevertheless, it should be noted that the TFV should remain linked with judicial proceedings to ensure that the Court is playing its role of principle in the reparation proceedings.

It will also be demonstrated in this chapter that, while it is an important achievement to create an administrative mechanism that focuses on victims of the crimes under the jurisdiction of the ICC, it is also true that many victims of international crimes will necessarily be left out of the reparation scheme. Accordingly, this chapter analyses whether a link to criminal proceedings is desirable. In this regard, it is important to ponder about the question of whether linking trust funds with the international criminal justice process is desirable given the potential of further victimization that criminal trials may produce on victims[416]. Thus, in this chapter, the TFV will provide the main case study and will also be a lens through which the question as to whether administrative mechanisms may be a viable possibility for civil redress claims for international crimes will be assessed.

II. THE ROAD TO THE TFV AND ITS LEGAL FRAMEWORK

As already discussed, the award of reparations directed to perpetrators to the benefit of individual or collective victims is new in international law[417]. Historically, under international law, contrary to domestic law, there has been a significant divide between State reparation for wrongful conduct and reparation paid by the individual[418]. The

[416] Concerning the creation of perceptions and constructions of victims by international criminal justice, see Laurel Fletcher, "Refracted Justice: The Imagined Victim and the International Criminal Court", in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 302-325.

[417] See discussion in Part 2, chapter 1 of this study for a detailed overview of this question. See also, Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, pp. 22-23; Christine Evans, "Reparations for Victims in International Criminal Law", *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

[418] Article 58 of the ILC Draft Articles. See also, Christian Tomuschat, "Reparation for Victims of Grave Human Rights Violations", *Tulane Journal of International and Comparative Law* 10 (2002), p. 181.

breakthrough of individual *criminal* responsibility dates from the Second World War trials, as already discussed; however, the time then was not ripe to develop individual criminal as well as *civil or tort* responsibility for international crimes[419]. The evolution of the position of the individual in international law has brought about changes to this scenario. This divide between the State's and the individual's *civil* responsibility is becoming blurred at this print of international law, as it has already been discussed. Crimes are committed by individuals, who, admittedly, often operate behind the machinery of the State[420]. Now, they not only face criminal responsibility for their crimes, but they can also engage civil liability at the international level. In this light, the ICC Statute enables an international Court, for the first time in international criminal law, to order a perpetrator of an international crime to give reparation to the victims, as already discussed.

Against this context, the background to the inclusion of reparation for victims of international crimes within the jurisdiction of the ICC was not uncontroversial. One author who studied the reparation system of the ICC in detail, has suggested that "[i]n the formation of the Rome Statute there were widely varying views about the role of victims in the international criminal process, rooted in the different approaches varying national systems take to victims in criminal procedure."[421]

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[419] See discussion in Part 2, chapter 1 of this study.

[420] I subscribe however to the theory that individual and State responsibility for international crimes are not always disconnected, and may complement each other in cases where the State may have been involved in the international crime: see in this regard, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*, Judgment, 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, paras. 57-59, and references cited therein; Antônio Augusto Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", in *International Responsibility Today - Essays in Memory of Oscar Schachter*, Maurizio Ragazzi, Nijhoff, 2005, pp. 253-269; Pemmaraju Sreenivasa Rao, "International Crimes and State Responsibility", in *International Responsibility Today - Essays in Memory of Oscar Schachter*, Maurizio Ragazzi, Nijhoff, 2005, pp. 76-77; R. Maison, *La responsabilité individuelle pour crime d'État en Droit international public*, Bruxelles, Bruylant, Éds. de l'Université de Bruxelles, 2004, pp. 24, 85, 262-264 and 286-287.

[421] Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 25, citing William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2nd ed., 2004, p. 171 and Christopher Muttukumaru, "Reparation to Victims", in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Roy S.K. Lee, Kluwer Law International, 1999, pp. 262 et seq.

In this light, the ICC Statute is not only innovative because it has incorporated the possibility for victims of the crimes within the jurisdiction of the ICC to claim reparation within international criminal justice; but also because of its approach to the reparation mechanism, by the creation of an independent administrative mechanism connected to the Court, the TFV.

1. Relevant legal provisions

The TFV was established under the auspices of the ICC. As such, the main legal texts governing the ICC – that is, the ICC statute, the Rules of Procedure and Evidence, and the Regulations of the Assembly of States Parties (ASP) – also govern the operation of the TFV to some extent. In order to discuss legal issues surrounding the operation of the TFV, I will refer to the legal basis for the TFV; for ease of reference, relevant parts of legal provisions are cited hereunder.

In the ICC Statute, Article 75 concerns reparations to victims, and provides, in relevant part:

> "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
> 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
> Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. […]"[422]

As for the TFV, under the terms of Article 79 of the ICC Statute,

> "1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

[422] For a commentary on Article 75, see e.g. David Donat-Cattin, "Article 75 – Reparations to Victims", in *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, Otto Triffterer, Baden-Baden, 1999; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, Article 75.

> 2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
> 3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties."

Additionally, the Rules of Procedure and Evidence provide further guidance about the two mandates of the TFV. Rule 98(1-4) concerns reparations awarded by the Court against a convicted person; Rule 98(5) concerns the TFV's assistance mandate with regard to the use of "other resources" for the benefit of victims, subject to Article 79. Rule 98 reads as follows:

> "1. Individual awards for reparations shall be made directly against a convicted person.
> 2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
> 3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
> 4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
> 5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79".

The Regulations of the TFV were adopted by the Assembly of States Parties at the 4th plenary meeting on 3 December 2005. Their aim is to ensure the proper and effective functioning of the TFV. They regulate many areas; the TFV official website explains the provisions of the Regulations in the following terms:

> "Regarding the TFV's activities and projects, the Regulations specify that all resources of the Trust Fund shall be for the benefit of victims within the jurisdiction of the Court as defined by Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.
> The Regulations provide a detailed legal regime for the Trust Fund's two mandates:
> Under the TFV's Reparation mandate, the Regulations contain detailed provisions on awards for reparations by the Court, referring to individual awards (Rule 98 (2) of the Rules of Procedure and Evidence), collective

awards (Rule 98 (3)), and awards to an intergovernmental, international, or national organization (Rule 98 (4)).
With respect to the TFV's assistance mandate, the Regulations specify that before undertaking activities to provide physical rehabilitation, psychological rehabilitation, and/or material support to victims, the Board is required to formally notify the Court of its intentions"[423].

Additionally, some of the Resolutions of the Assembly of States Parties which concern the TFV. These include ICC-ASP/1/Res.6, ICC-ASP/3/Res.7, ICC-ASP/4/Res.3, ICC-ASP/4/Res.5, ICC-ASP/4/Res.7, ICC-ASP/6/Res.3. These Resolutions address some important aspects of the functioning of the TFV, for example, the voluntary contributions, and the term of office of members of the Board of Directors, among others. These texts together govern the operation of the TFV.

The conception of "victims" in the framework of the ICC has already been discussed in previous chapters of this study. At this juncture, it appears useful to recall the definition of victims contained in Rule 85 of the Rules of Procedure and Evidence of the ICC. In this sense, Rule 85(1) provides a broad definition of victims as including "natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court". Rule 85(2) states the victims may include "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

Reparation proceedings are not in principle limited to those who have suffered directly from the criminal acts of the accused. Article 75 of the ICC Statute refers clearly to victims of crimes and the families of such victims as potential beneficiaries of the reparation system[424].

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[423] Available at: http://trustfundforvictims.org/legal-basis.

[424] See also, Christopher Muttukumaru, "Reparations to Victims", in *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Roy S. K. Lee, Kluwer Law International, 1999, pp. 262 et seq., referring to a footnote inserted in the Report of the Working Group on Procedural Matters of 13 July 1998 (UN Doc. A/CONF.183/C.1/WGPM/L2/Add.7) to the effect that: "[Article 75 of the Statute] refers to the possibility for appropriate reparations to be granted not only to victims but also to victims' families and successors. For the purposes of interpretation of the terms 'victims' and 'reparations', definitions are contained in the text of article 44, paragraph 4 of the Statute, article 68, paragraph 1, and its accompanying footnote […], the Declaration of Basic Principles of Justice for Victims of

From the above-mentioned provisions, it stems clearly that the TFV is not a judicial mechanism that defines reparation beneficiaries, but rather an administrative mechanism linked to a judicial procedure (the ICC proceedings). It is a kind of complementary organ of the Court and an integral part of the reparative scheme established by the ICC[425]. The TFV is however independent from the Court[426].

By its nature, structure and reach of activities, the TFV is not a mechanism set up to provide for reparations for all victims of international crimes, but rather only to "natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court", pursuant to Rule 85 of the Rules of Procedure and Evidence[427]. Thus, the TFV has a limited scope in the redress it can afford to victims of international crimes, the principal limitation being the confines of international crimes within the jurisdiction of the Court. It is also limited by practical considerations such as the resources available.

Crimes and Abuse of Power […] and the examples in paragraphs 12-15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law" – cited in Marc Henzelin et al., "Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes", *Criminal Law Forum* 17 (2006), pp. 323-324.

[425] Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 265.

[426] See *Resolution of the Establishment of the Secretariat of the Trust Fund for Victims*, ICC-ASP/3/Res.7 (2004).

[427] On the jurisprudential construction of the definition of victims, see ICC, Situation in the Democratic Republic of Congo, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tEN-Corr, Pre Trial Chamber I, para. 79; ICC Bemba, "Fourth Decision on Victims' Participation", 12 December 2008, ICC-01/05-01/08-320, Pre-Trial Chamber III, para 30; ICC, Situation in Kenya, "Decision on Victims' Participation in Proceedings", 3 November 2010, ICC-01/09-24, Pre-Trial Chamber II, para 19. See also, E.g., ICC, Kony, Otti, Odhiambo & Ongwen, "Decision on Victims' Applications for Participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07", 21 November 2008, ICC 02/04-01/05-356, Pre-Trial Chamber II, para 7.ICC, Muthaura, Kenyatta and Ali, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", 26 August 2011, ICC-01/09-02/11-267, Pre-Trial Chamber II, para. 40.

2. Mandates of the TFV

Having reviewed the legal basis for the existence and operation of the TFV, it is now important to discuss the mandates of the TFV. On the basis of the framework provided in the Statute, the TFV can act in two ways: first, it can act as an institution through which the Court can order reparation awards or it can use its "other resources" for the benefit of the victims pursuant to rule 98 (5).

The TFV has a double role, both of which are aimed at providing support to victims of crimes under the jurisdiction of the ICC: it performs, on the one hand, a reparations mandate, and on the other, an assistance mandate to the victims. While this study is concerned with reparations for victims of international crimes, and thus more closely linked with the reparations mandate of the TFV, it is also relevant to examine the second mandate of the TFV, and critically analyze their differences in terms of practical implications.

Concerning the *reparations mandate*, according to Rule 98, the Court may order an award for reparations against a convicted person to be made through the TFV, if at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim. Reparations to victims can be individual or collective, and can include restitution, compensation and/or rehabilitation. Reparations may be provided in collective or symbolic measures that can help to promote peace and reconciliation within divided communities.

The *assistance mandate* stems from Rule 98 (5) which concerns "other resources" of the TFV. The assistance mandate is not linked to a conviction of accused persons, and it can happen prior to the end of trial proceedings, and prior to any conviction. The assistance mandate provides physical and psychological rehabilitation and material support as a means to assist victims in their recovery. This assistance mandate provides the TFV the autonomy to give support to victims outside the scope of Court-ordered reparations.

The TFV itself has expressed the view that the two mandates are separate and that support provided under Rule 98 (5) (the "assistance mandate") is actually broader than the

reparations, and is the "provision of assistance to victims in general through the use of other resources"[428].

While it seems that the assistance mandate can reach a greater number of victims and affected societies in a more timely fashion, (since it is not connected to the cases before the Court, and can affect victims of broader situations), the programs demonstrate that both mandates aim at repairing the harm suffered due to international crimes within the jurisdiction of the Court. The actual measures taken are not diametrically different: both mandates provide forms of reparation, and aim at providing some form of redress to victims. Collective reparations after a conviction and the assistance mandate will likely have similar impacts on victims, and the measures will also likely fall under one of the three categories of physical, psychological rehabilitation and monetary support.

More fundamentally, this study refers to the analysis of Peter Dixon in relation to these two mandates where he posits that "[m]orally, reparations are given to a recipient because she has been wronged, not because she is in need or is vulnerable. Politically, reparations are awarded because a recipient's rights have been violated"[429]. Similarly, the distinction between reparation and assistance "is the moral and political content of the former, positing that victims are entitled to reparations because their rights have been violated"[430].

In the context of the reparations mandate, how does the TFV fit within the dimensions discussed in the first chapter of this study? Chapter 1 referred to the report by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. It is relevant to mention this report again in relation to the mandate of the TFV. One significant conclusion of the report is the "scandalous" gap in the

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[428] ICC, *Situation in Uganda*, "Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims", 25 January 2008, ICC-02/04.

[429] Peter J. Dixon, "Reparations and the Politics of Recognition" in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 331-332.

[430] Naomi Roht-Arriaza & Katharine Orlovsky, "A Complementary Relationship: Reparations and Development", in *Transitional Justice and Development: Making Connections*, Pablo de Greiff & Roger Duthie, Social Science Research Council, 2009, p. 179.

implementation of reparations[431]. In this regard, the TFV has much to contribute to breach this gap by designing and implementing programmes to victims of crimes within the jurisdiction of the Court. In the words of the report, which are worth quoting in full here:

> "While well-designed reparation programmes should primarily be directed at victims of massive violations, they can have positive spillover effects for whole societies. In addition to making a positive contribution to the lives of beneficiaries and to exemplifying the observance of legal obligations, reparation programmes can help promote trust in institutions and the social reintegration of people whose rights counted for little before"[432].

Thus, in fulfilling its mandate, it is argued that the TFV should bear in mind the analysis and conclusions of this report.

3. Functioning of the TFV, budget and programs

The TFV is administered by a Board of Directors, with five members originating from each region of the world. They shall be nominated and elected by the Bureau of the Directors, the Assembly of States Parties. Each member shall serve for a mandate of three years with the possibility of re-election[433]. The Members serve in a *pro bono* and individual capacity.

The TFV counts on contributions from countries. It is reported that from 2004 to October 2014, the total of contributions from countries amounted to over €20.4 million euros, with over €5 million euros from 2014 alone[434]. The contributions are divided in two kinds: the earmarked contribution and the general contributions. The first category is for specific purposes, such as for victims of sexual and gender-based violence or child

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[431] United Nations, General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", A/69/518, 14 October 2014.

[432] *Ibid.,*para. 82.

[433] See *Resolution on the Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and the Families of such Victims*, ICC-ASP/1/Res.6 (2002), which established the Board of Directors. See also, *Resolution on the Procedure for the Nomination and Election of Members of the Board of Directors of the Trust Fund for the Benefit of Victims*, ICC-ASP/1/Res.7 (2202), 9 September 2002.

[434] See http://trustfundforvictims.org/financial-information.

soldiers, for example[435]. The conditions for the acceptance of these earmarked contributions are set out in Regulations 27-30 of the TFV, with the exception of assets acquired for the purposes of Court ordered reparations. In this regard, it is also interesting that the TFV has a reserve fund which is held for the purposes of payment of Court reparations in case the accused is declared indigent. In 2015, the amount of the reserve was at €3.6 million euros[436]. It is important to note that the TFV also receives funds from private donors, in addition to States Parties. The cost of functioning is included in the budget of the Court and the members of the Board of Directors act on a *pro bono* capacity, according to Regulation 16 of the Regulations of the TFV.

In 2015, the TFV received over €8.000 in individual donations and over €2.9 millions in donor state donations. It is reported that contributions have continuously risen since 2004, totalling 34 donor States in 2015. In 2016 the TFV has accumulated over €12.8 million and US$61.300. Some of the allocations of the budget include: €1 million for current projects in Uganda and the Democratic Republic of the Congo; €600,000 for assistance mandate activities in the Central African Republic. The TFV also carries a reparation reserve of €5 million from which the Board of Directors allocated €1 million to implement reparations in the *Lubanga* case[437].

Having reviewed the budget of the TFV, the question is how the budget is used for the benefit of victims. I shall now examine the programs and decisions of the TFV regarding victims. The programs in Northern Uganda and the Democratic Republic of the Congo were approved by the Pre-Trial Chamber in 2008. The programs provide assistance to victims as defined under Rule 85 of the Rules of Procedure and Evidence. The TFV partners with local organizations and provides services such as psychological rehabilitation, material support, medical referrals and physical rehabilitation[438]. In 2014,

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[435] See http://trustfundforvictims.org/financial-information.

[436] See http://trustfundforvictims.org/financial-information.

[437] The Trust Fund for Victims, "The Year 2015 in Donations", Newsletter No. 1/2016, 15 February 2016. See also, Trust Fund for Victims Board of Directors, 14th Annual Meeting, The Hague 18-21 April 2016.

[438] Some of the programs are: "Treating the Mental Health Needs of Ugandan Victims of War Crimes: A Service and Capacity Building Approach", "*Capacity Building, Advocacy and Medical Rehabilitation of Northern Uganda's Victims of War",* (Northern Uganda); *"*Accompagnement socioéconomique et psychosocial des victimes des Violences Sexuelles dans le

the Board of Directors approved assistance assessment missions for Kenya and Côte d'Ivoire[439].

In its most recent 2015 "Programme Progress Report" some of the activities of the TFV are reported, including both the implementation of the assistance and the reparations mandate. The programmes of the TFV focus on psychologica and physical rehabilitation and material support – the reported summary of achievements is as follows[440]:

Global Programme Indicators	DRC	Uganda	Total
Physical rehabilitation			
Number of beneficiaries received Physical Rehabilitation assistance and during the reporting period	82	1,246	1,328
No. of victims fitted with prostheses or orthotics	0	207	207
Number of victims receiving reconstructive or corrective surgery	1	0	1
Number of victim survivors of SGBV referred for specialized medical care	6	0	6
Number of mutilated victims referred for physical rehabilitation services	75	35	110
Psychological rehabilitation			
Number of direct beneficiaries received Psychological Rehabilitation during the reporting period	55,411	828	56,239
Number of individuals referred to a specialized mental health care	5	0	5
Number of TFV direct beneficiaries participated in facilitated community therapy sessions	786	0	786
Number of victim testimonies collected, translated and published for the Memory Project	150	0	150
Number of new counsellors trained in mental health care	0	37	37
Number of community workers trained in psychosocial care	47	16	63
Material support			
Number direct beneficiaries (adults and children) provided with IGA's and MUSO's support	2,700	0	2700
Number of literacy centres supported by the TFV	33	0	33

Territoire de Beni, au Nord Kivu", "Réintégration communautaires des jeunes victimes des conflits armés en Ituri pour la lutte contre toutes formes des violences", "Accompagnement psychosocial des victimes des violences sexuelles à Bunia et 8 localités périphériques" *, « Projet de Réinsertion Socio-économique des victimes des violences sexuelles dues à la guerre », « A l'école de la paix" (in the DRC).*

[439] See Record of the 11th Annual Meeting, March 2014.

[440] Trust Fund for Victims, "Assistance and Reparation: Achievements, Lessons Learned, and Transitioning – Programme Progress Report 2015", available at: http://Ibid..trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf

Number of learners registered at literacy centres supported by the TFV	662	0	662
Number of children provided direct support by the TFV to attend school (former child soldier, other victim, child of victim)	1806	0	1,806
Number of radio programs conducted to talk about peace and reconciliation	29	0	29

A review of the assistance programs currently in place demands some important remarks. The TFV partners with organizations in order to fulfill its assistance mandate and provide support to victims. It is crucial that the TFV play an active role on the type of support that is granted to victims. It has to avoid a situation where it becomes a mere fund contributor by engaging in decision-making and maintaining control of its activities. In this regard, further reporting would be appropriate. How is the TFV ensuring that all victims are being helped by the assistance programme? How are the needs of victims being met by the programmes in place? What lessons can be learned from experience? These are some of the questions that are raised and for which further reporting would be beneficial.

Furthermore, it is important to assess whether other situations within the jurisdiction of the Court also require the TFV to act under its assistance mandate. In addition to actually implementing the assistance programmes, the TFV needs to act proactively and assess situations that may fall under its assistance mandate. It is important that the TFV set out clear guidelines on how to prioritize programmes and how to attend to urgent requests. It may also be a good idea to report some best practices to inform future assistance programmes.

The next section will discuss the role of the TFV in the reparations stage and will examine specifically the implementation of reparations in the *Lubanga* case.

III. THE ROLE OF THE TFV VIS-À-VIS THE COURT IN THE REPARATIONS STAGE

An important question concerning reparations at the ICC pertains to how the Court will approach its reparation mandate and more specifically, the role of the TFV in this regard. Will the Court have an active role in the adjudication and administration of reparation awards, making the procedure similar to domestic litigation of civil claims? Or, will the TFV play a leading role in the implementation of awards of redress for victims?

In this regard, the Court and the TFV function in a kind of hierarchical system. This is so based on the provisions governing reparations within the ICC. The Court has discretion on whether or not to award reparations and it is the one to devise principles on reparation[441]. The Court is also to decide whether an individual or collective award should be ordered (or both)[442]. The Court furthermore determines whether the reparation award should be made through the TFV[443]. This latter situation occurs when the Court deems it "appropriate", according to the terms of Article 75(2) of the Rome Statute, or when it is "impossible or impracticable to make individual awards directly to each victim"[444]. Alternatively, awards "should be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate"[445].

From the foregoing and the provisions just mentioned, it seems that the Court's role is important and encompasses the establishment of principles of reparation: the use of the verb "shall" under Article 75 of the ICC Statute makes it clear that the Court must establish the principles under which the Court, or the TFV, will act in relation to reparations. As regards the actual award of redress and designing programmes for reparations, under Article 75, either the Court may award reparations to victims itself - directly through judicial Court proceedings - or it may order that the TFV take charge of the award of redress[446].

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[441] See Article 75(1) of the ICC Statute.

[442] See Article 75(2) of the Rome Statute and Rules 97(1) and 98(1)-(4) of the RPE.

[443] Article 75(2) of the Rome Statute.

[444] Rule 98(2) of the RPE.

[445] Rule 98(3) of the RPE.

[446] See generally for a commentary: Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, pp.

In this context, it is argued that the Court should have a limited role in the management of awards of reparation to victims. More specifically, the Court should have a supervisory role. In my view, such a role has two aspects. The first one is the establishment of principles of reparation, as stated in the Rome Statute. In this context, I have argued that the Court should look at the experiences of other institutions that have similar tasks. The second one should be the monitoring of the implementation of reparations, as more fully discussed below.

In the author's view, the Court's plenary should establish the principles of reparation that apply in all cases and situations. This approach would provide clarity and uniformity. It is submitted that the plenary deciding on reparation principles, rather than each Chamber deciding on principles applicable to each case (which are subject to review by the Appeals Chamber) would ensure that there is cohesion across cases in terms of principles of reparation. This is positive since it would avoid the creation of categories of victims depending on the situation and would ensure transparency and fairness. Moreover, it could be argued that the text of the Statute, Article 75, provides that it is for "the Court" to adopt the principles of reparation, and thus, it could be argued that it is for the plenary of the Court. This would ensure that reparation principles are applied evenly across the board, such that there is no disparity. Then each Chamber, in light of the specific circumstances of each case, could adapt the principles, or apply those principles, to the particularities of each case. For example, a case bearing a sexual violence component should be guided by principles of reparation that concern sexual crimes[447].

As discussed in the previous chapter, the recent Judgment of the Appeals Chamber in the *Lubanga* case developed some principles of reparations[448]. The principles laid out by the Appeals Chamber provide useful guidance. However, considering that the TFV will be in charge of implementing the reparations mandate, the TFV should have concrete

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265-271. Thordis Ingadottir, "The Trust Fund for Victims (Article 79 of the Rome Statute)", in *The International Criminal Court – Recommendations on Policy and Practice – Financing, Victims, Judges, and Immunities*, Thordis Ingadottir, Ardsley, 2003, pp. 111 et seq.

[447] See on this Anne-Marie De Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families", *Leiden Journal of International Law* 20 (2007), pp. 207-237.

[448] See *Lubanga Reparations Appeals Judgement*, discussed in the previous chapter.

guidance as to how to implement the reparations decision. While the Judgment is already a step forward in establishing rules that will ensure that some basic principles are met, more specific and direct guidance should have been given in relation to the role of the TFV. While there should be some freedom as to how the TFV will work with victims for reparation purposes, certain issues, such as deadlines for implementation and reporting on activities, should have been detailed in the Judgment. It is submitted that the reparation function of the TFV will be a learning process for everyone involved.

This second, more subsidiary aspect of the role of the Court, would entail supervision of the reparations designed by the TFV in order to ascertain that the programme meets the principles the Court previously set out. It is to be recalled that the TFV is an administrative mechanism, run by a Board of Directors. It is important in this light that it remains continuously attached to the judicial arm of the ICC, the Chambers. The TFV does not exist in a vacuum. While I argue for an active and leading role for the TFV in the reparation scheme of the ICC, I shall also underscore the key judicial role of the Court in ensuring the proper design of reparation programmes and implementation of reparation awards by the TFV.

It is thus submitted that this proposed approach would provide a uniform system of reparations, across cases and situations, and it would provide the "judicial" arm necessary in a reparation programme, through the Court's Chambers. The guidelines provided by the Court will enable the TFV to ensure that reparations follow the framework of the Statute, and to remain consistent in its administration of reparations.

This does not seem, however, to be the way in which the ICC has decided to proceed thus far. As already discussed, it was not the Court's plenary that adopted, upon study of the question, principles of reparation. Rather, an individual Chamber, upon reviewing the arguments of Parties and participants, established brief principles to guide the implementation of reparation by the TFV. It remains to be seen whether this will be the approach of each Trial Chamber, and how the jurisprudence on principles of reparation applicable in each individual case will be formed.

At the time of the writing of this study, the activities of the TFV were at an infant age, given that only one decision on reparation from Trial Chamber 1 in the case of

Prosecutor v. *Thomas Lubanga Dyilo* is available to date[449]. This decision is very telling as to the role that it is envisaged for the TFV concerning reparations.

The decision of Trial Chamber I, as the first decision in the history of the ICC concerning the award of reparation for victims, unfortunately left some questions unanswered. While the Decision of Reparation from Trial Chamber I dedicated much attention to the arguments of the Parties and participants (including NGOs), the principles on reparation have been treated more cursorily and superficially. One could expect that the Trial Chamber would accord more importance to its pivotal role of establishing the principles of reparation to be applied in the *cas d'espèce*.

Be that as it may, it was clear however that the Trial Chamber set up a major role for the TFV in the award of reparations. This is a positive development in my view, especially in the case of victims of Mr. Thomas Lubanga Dyilo, who was declared indigent[450], and thus he would not have any financial resources to contribute to compensation to victims. The Appeals Chamber Judgment in *Lubanga*, already discussed in the previous chapter, further clarified the principles on reparations and further strengthened the role of the TFV in the reparations mandate.

In fact, it is part of the two-fold mandate of the TFV that it not only implement the reparations ordered by the Court but also that it provide physical, material and psychological support for victims and their families[451]. The TFV has in place a few programmes that are not derivative of the Appeals Chamber Judgment on reparation in the

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[449] ICC, Trial Chamber I, *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision Establishing the Principles and Procedures to be applied to Reparations", 7 August 2012, ICC-01/04-01/06(hereinafter: "Decision on Reparations"). At the time of the writing of this article, the Decision on Reparations is pending of appeal: Defence, "Acte d'appel de la Défense de M. Thomas Lubanga à l'encontre de la 'Decision establishing the principles and procedures to be applied to reparation' rendue par la Chambre de première instance I le 7 août 2012", 6 September 2012, ICC-01/04-01/06; Legal Representatives of Victims, "Acte d'appel contre la '*Decision establishing the principles and procedures to be applied to reparation*' du 7 août 2012 de la Chambre de première instance I", 3 September 2012, ICC-01/04-01/06; Office of Public Counsel for Victims and Legal Representatives of Victims, "Acte d'appel à l'encontre de la '*Decision establishing the principles and procedures to be applied to reparation*' délivrée par la Chambre de première instance I le 7 août 2012", 24 August 2012, ICC-01/04-01/06-2909. See in this regard, chapter 3 which analyses in more detail this decision.

[450] Decision on Reparations, para. 269.

[451] See TFV website at Ibid..trustfundforvictims.org

Lubanga case, and thus, are not part of the reparations for the victims in the case. Nevertheless, they provide assistance to victims of situations, before the trial proceedings are finished and there is a convicted person. As discussed above, the programs in the assistance mandate can provide some guidance for the implementation of the Court ordered reparations in the *Lubanga* case.

In relation to the implementation of collective reparations in the *Lubanga* case the TFV reported consultations in Ituri District between May and July 2015 in order to assess the current location of direct and indirect victims for purposes of reparation in accordance with the Appeals Chamber Judgment mentioned above. The TFV also held consultations in 22 localities in Ituri to assess the damages suffered and collect views of victims concerning reparations. The TFV however reported that "is still lacking important information required to address comprehensively the tasks set by the Appeals Chamber. In particular, the Trust Fund considers that in order to assist the Trial Chamber with establishing the liability of the convicted person and to create the draft implementation plan, it is necessary to have access to reliable data on the direct victims as defined by the Court currently held by third parties in the DRC"[452].

Significantly, the TFV submitted to Trial Chamber II on 3 November 2015 a "Draft Implementation Plan" for implementing the collective reparations in the *Lubanga* case[453]. On 9 February 2016, in the exercise of its monitoring and supervisory function, Trial Chamber II, after examining the Draft Implementation Plan decided that it was incomplete and that it could not rule on the proposed plan[454]. According to the Chamber the plan did not include sufficient information on: the victims potentially eligible to benefit from the reparations, including the requests for reparations and the supporting material; the extent of the harm caused to the victims; proposals regarding the modalities and forms of reparations; the amount of the convicted person's liability. In response to the Trial

[452] TFV, "Assistance and Reparation: Achievements, Lessons Learned, and Transitioning – Programme Progress Report 2015", at p. 54, available at: http://Ibid..trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf

[453] TFV, "Filing on Reparations and Draft Implementation Plan", 3 November 2005, ICC-01/04-01/06-3177-Red, and its two annexes, ICC-01/04-01/06-3177-AnxA, and "Annex I", ICC-01/04-01/06-3177-Conf-Exp-AnxI.

[454] Trial Chamber II, "Order instructing the Trust Fund for Victims to supplement the draft implementation plan", 9 February 2016, ICC-01/04-01/06.

Chamber's Order, on 7 June 2016, the TFV provided a detailed explanation of the various issues and concerns arising from the Chamber's Order. In particular, the TFV:

> "respectfully request[ed] the Trial Chamber to accept its request for reconsideration made in the Victim Dossier Filing, to revise its current procedural approach and to instead consider approving the Draft Implementation Plan of 3 November 2015 in its entirety"[455].

As explained in the previous chapter, it was only very recently (in October 2016) that the process seems to have moved along (see discussion above). It follows that the TFV's plan for the first reparation order in the *Lubanga* case is, at the time of the writing, still in process of being implemented. It is thus premature to take any conclusions regarding the actual role of the TFV in the actual reparations awarded within the ICC.

While it has been submitted that other institutions can inform reparation measures at the ICC - such as the IACtHR [456], which has immense experience with victims of grave human rights abuse in terms of resources for the purpose of compensation, the ICC, unlike a human rights Court, does not have the power, nor the mandate, to hold States accountable for crimes committed under its jurisdiction and to order them to pay compensation. Even when the offender may have the assets to contribute to reparation awards[457], there seems to be no reason for the TFV to stay out of the equation[458].

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[455] TFV, "Additional Programme Information Filing", 7 June 2016, ICC-01/04-01/06-3209.

[456] See chapter 3.

[457] See Pablo de Greiff & Marieke Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005, p. 237, concerning the international experience recovering funds from perpetrators.

[458] Other authors have defended a more central role for the TFV, see e.g. Pablo de Greiff & Marieke Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005.

IV. JUSTIFICATIONS FOR CHANNELLING REPARATIONS THROUGH THE TFV

Having reviewed the legal framework of the TFV within the legal documents of the ICC, the innovation that the TFV represents, and the intertwine between the TFV and the Court, at this juncture, it is important to turn attention to the rationale, or justification, for having an administrative mechanism within the auspices of the ICC - but also independent from the administration of the Court[459] - that may have a major role in the provision of reparation for victims.

In addition to the question specifically referring to the TFV within the ICC framework, the broader question that in my view is prompted by an analysis of the TFV mechanism is whether administrative procedures, connected to a judicial function, may prove to be an efficient way to tackle mass claims of reparation for international crimes.

As to the inquiry of setting up an administrative mechanism for which a major part of its mandate relates to victims reparation, it has been argued that there are advantages to the TFV and further, that it should have an expansive role in the fulfilment of the reparations mandate for victims. For example, it has been posited that

> "given the freedom of the TFV from narrowly defined legal principles – a freedom unavailable to the Court itself – it will be more feasible for the TFV than for the Court to design reparations programs that attain whatever goals could be attained by a reparations program at this level."[460]

It can also be argued that including an administrative mechanism such as the TFV within the ICC framework will provide an efficient way to implement reparations. This may be so because the Court's Judges will be concerned with the trial proceedings and it will be arguably more efficient to have an administrative mechanism to handle the administration of the reparation order, with the Court's supervision. The question is where

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[459] Thordis Ingadottir, "The International Criminal Court: The Trust Fund for Victims (Article 79 of the Rome Statute), A Discussion Paper", ICC Discussion Paper #3, PICT, February 2001.

[460] Pablo de Greiff & Marieke Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005 p. 235.

to draw the line between implementation of the reparations and the TFV own-decision making. This demonstrates the importance of having clear pronouncements as to what kinds of decisions are for the TFV to make, and what decisions are for the Court to make.

At the outset, the governing texts of the TFV establish criteria that must be taken into account. For example, concerning the reparations mandate in relation to Court ordered reparations, Regulation 55 stipulates specific factors that the TFV shall take into account in determining the nature and/or size of awards when the Court does not stipulate how reparations are to be distributed. These include: the nature of the crimes, the size and location of the beneficiary group of victims, the particular injuries to the victims and the type of evidence to support such injuries. In relation to the assistance mandate pursuant to Rule 98 (5), the TFV enjoys more flexibility than with Court ordered reparations since it is less linked to the Court's judicial function, and the governing texts of the TFV do not set out specific factors to be taken into account[461]. Despite this larger discretion, Article 79 (3) of the Statute states that the TFV "shall be managed according to the criteria to be determined by the Assembly of States Parties", which in practice, are the TFV Regulations established by the resolution ICC-ASP/4/Res.3. Of particular relevance to the assistance mandate of the TFV, Regulation 48 states that "[o]ther resources of the Trust Fund shall be used to benefit victims of crimes … who have suffered physical, psychological and/or material harm as a result of these crimes". In addition, Regulation 50 (a) stipulates that the TFV shall be considered seised in relation to assistance to victims when "the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families". Thus, the assistance mandate, while broader than Court ordered reparations, still needs to benefit victims of the crimes under the jurisdiction of the Court who have suffered harm as a consequence of these crimes, as opposed to the general humanitarian and socio-economic needs of victims not connected with said crimes.

It is argued that due to the nature of the TFV (i.e. an administrative mechanism linked to a judicial body) there is a clear line of division between decision-making powers of the Court and the TFV. The Court is a judicial body that has a thorough knowledge of the legal aspects of the cases it encounters. It should be for the Court to make all decisions

[461] Connor McCarthy, *Reparations and Victims Support in the International Criminal Court*, Cambridge University Press, 2012, pp. 232-233.

in relation to the categories of victims and the classification of victims, since they are defined in a legal text, according to legal criteria, as discussed above. The decision on what is the harm for the purposes of reparation should also be left to the Court for the same reasons.

The types of reparation (e.g. symbolic or material reparations) should also be defined in broad terms by the Court, leaving the TFV with some autonomy so as to devise the reparation programs. For instance, the Court should decide in a given case whether collective reparations are allowed, and whether it is a case that rehabilitation or compensation are possible forms of reparation. From this point, with the assistance of broad guidelines, the TFV can decide how to actually implement the reparations program. While it is claimed that the Court should still hold all judicial definitions and guide the TFV in implementing reparations, the latter should be given a large degree of autonomy to ensure that reparations are appropriate for victims. The TFV has eyes on the ground, has experience with reparations programs, and has knowledge of the needs of victims. It is thus better placed to devise reparation programs for the full benefit of victims.

In this line of reasoning, it is within the nature of international crimes that a large number of victims will come before the Court for every case, and whom will be possible claimants of reparations[462]. In order to fulfil the need of victims for reparation, the ICC reparations system has to operate at a different level than that of human rights mechanisms where usually a limited number of victims appear before the Court or the human rights mechanism. At the ICC, many victims will be eligible to participate in proceedings, and then later claim reparation. Additionally, many other victims who do not qualify to participate in Court proceedings may still be real "victims of crimes within the jurisdiction of the Court", to use the language of Article 79 of the Rome Statute.

Thus, this study argues, as already stated above, that the approach to the conception of the kind of reparations available should be broad. More specifically, it should not be focused on compensation awards to individual victims, but also on symbolic reparations

[462] For example, in the *Lubanga* case, there were 120 victims participating the case; in the *Germain Katanga/Mathieu Ngudjolo Chui* case, there were 364 victims participating, see Eleni Chaitidou, *Recent Developments in the Jurisprudence of the International Criminal Court*, available at: http://Ibid..zis-online.com/dat/artikel/2013_3_740.pdf

and collective reparations[463] that will reach more victims by overcoming the issue of available funding to pay compensation. As the Trial Chamber in the *Lubanga* case has affirmed, "a community-based approach, using the TFV's voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available."[464] I have discussed this question in more detail in previous chapters; the point to be made here is that the TFV has a flexible mandate, and will likely be in a better position than the Judges to assess what kind of reparation will best assist victims of crimes within the jurisdiction of the ICC. This is, in my opinion, a testament to the argument that reparations should be channelled through the TFV.

Repairing victims of international crimes presents unique challenges, not only due to the multiplicity of victims, but also because it is impossible to repair what is irreplaceable. Mass suffering creates an emptiness not only for victims, but for society and humanity as a whole. A sum of money - which is likely to be modest, considering the usual lack of resources of the accused and limited sources available[465] - to isolated, individual victims, it is submitted, will certainly not correspond to the international law standard of *restitutio ad integrum* and will fall short of victims' needs. This is one of the reasons supporting the argument made in this chapter, and underpinning this study, that while it may be easier to address individual complaints with sums of money, this is not the best approach to redress in the aftermath of international crimes; compensation and the award of sums of money should be limited to attending to victims' special needs in light of the crimes they have suffered (e.g. victims of sexual crimes). This does not suggest that there should be a hierarchy or classes of victims in the sense that some victims have greater entitlements than others; victims shall be treated equally in terms of entitlement to receive reparation. It is simply posited that reparation programmes should take into account the needs of victims

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[463] See Frédéric Mégret, *The Case for Collective Reparations before the ICC* (November 15, 2012). Available at SSRN: http://ssrn.com/abstract=2196911 or http://dx.doi.org/10.2139/ssrn.2196911. The author argues, *inter alia*, that "collective reparations will in many cases be superior not only on pragmatic grounds but also because they make most sense from the point of view of transitional justice. Most importantly, collective reparations are the most faithful to a construction of most international crimes as crimes that target groups (e.g.: the Genocide Convention groups) or categories (e.g.: civilians) rather than individuals as such".

[464] Decision on Reparations, p. 274.

[465] Frédéric Mégret , *The Case for Collective Reparations before the ICC* (November 15, 2012). Available at SSRN: http://ssrn.com/abstract=2196911 or http://dx.doi.org/10.2139/ssrn.2196911, p. 7.

and thus be a sort of "custom-made" reparation. In this regard, hearing the voices of victims and attending to their needs is crucial.

It is in this line of argument that it can be hoped that members of the TFV will have expertise in mass claims processes and mass reparation for victims which can be used to design reparation programs that will, in pragmatic terms, make the most of the limited funds available to the victims. The Court's Judges, in all likelihood, will not have the resources or needed knowledge or expertise of victims' issues in order to establish and assess reparation programmes that will meet the needs of the many victims of crimes within the jurisdiction of the ICC. Designing programmes that will benefit a larger number of victims has the advantage of more holistically dealing with the question of redress in the aftermath of international crimes and minimizes the possibility of involuntary discrimination among victims.

Furthermore, the TFV, as outlined above, may also act in assisting victims before a reparation award is ordered against a convicted person. In this light, it also makes sense to have an organ that operates within the Court responsible for questions of reparation such as, for example, raising funds for reparation awards and assistance programs. The funds raised through the convicted individual may not be sufficient, even if one departs from the idea of reparation as monetary compensation, to fulfil reparation initiatives. Thus, the fund-raising possibilities of an administrative reparation mechanism such as the TFV should not be overlooked[466].

Having an administrative mechanism such as the TFV can also provide "eyes on the ground", which may be difficult for the Chambers to have. The TFV may be in a position, in light of its role and mandate, to design programs tailored to a number of victims, rather than individual victims, and direct such reparation initiatives to the reality on the ground[467].

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[466] For example, recently in 2013, the United Kingdom contributed £500,000 to the ICC Trust Fund for Victims as part of G8 Initiative on Preventing Sexual Violence in Conflict, see: http://Ibid..trustfundforvictims.org/news/united-kingdom-donates-%C2%A3500000-icc-trust-fund-victims-part-g8-initiative-preventing-sexual-viol

[467] See Pablo de Greiff & Marieke Wierda, "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al. (eds.), Intersentia,

In sum, it can be argued that channelling reparation efforts through the TFV meets many concerns. The TFV has a link with the judicial branch of the ICC (the Court's Chambers) as already discussed, and yet, they present more flexibility in their mandate and more opportunities to raise resources for reparation programmes, especially in cases where the accused is impecunious. The TFV will also have added expertise, in light of its core mandate, to design programmes that will address the needs of victims in a given specific case (e.g. sexual crimes as opposed to the use of child soldiers). This is due to its ability to act on the ground with projects that will assist victims, and act with the Fund's "other resources".

One may now turn to the important question of the justification for having a mechanism that operates within the ICC framework, rather than leaving the task of reparation to national courts or other kinds of procedures, as is the case with the Special Tribunal for Lebanon, for example.[468]. History has shown us that the consequence of setting up an international tribunal that deals solely with the criminal responsibility of offenders and leaves the civil liability to domestic courts results in most victims not receiving any reparation[469]. Thus, while national courts have a significant role to play in the quest for civil redress, as will be discussed, there is also an important role for administrative mechanisms at the international level which focuses on victim redress. In the following section, domestic schemes are examined to inform the practice of the TFV, as an administrative mechanism linked with a judicial branch. Specialized domestic proceedings are also discussed in order to determine their level of efficiency. As well, the following section will discuss a variety of lessons learned from other situations.

2005, pp. 239-240.

[468] See chapter 2.

[469] See discussion on this issue in chapter 2 above.

V. CHALLENGES AHEAD: THE TFV IN UNCHARTERED GROUND

The mandate of the ICC and the TFV in relation to reparations is a noble one, providing victims with the possibility of obtaining redress for international crimes. In saying this, it is also an ambitious one, including a civil dimension in international criminal justice. As it has been noted, "[t]he challenging and ambitious mandate assigned to the International Criminal Court under article 75 to ensure reparations for victims of crimes is in stark contrast with the embryonic structure put in place to ensure the fulfilment of that mandate."[470]

Especially due to the fact that the TFV mechanism for reparation is a novelty in international criminal law, it will face many difficult questions. Additionally, there are undoubtedly countless challenges that the TFV will face in the pursuit of its mandate. These will range from practical to symbolic challenges.

The most obvious challenge is the availability of funds and resources to provide redress for the large number of individuals that may unfortunately become victims of the crimes under the jurisdiction of the ICC. As explained above, the TFV may obtain funds from: (1) voluntary contributions of governments, international organizations, individuals, corporations and other entities (in accordance with criteria established by the ASP; (2) money and property gathered through fines or forfeitures transferred to the TFV by a Court order according to Article 79 of the ICC Statute; (3) resources gathered by awards for reparations if ordered by the Court; and (4) such resources other than assessed contributions as the ASP may decide to allocate to the TFV.

The funds of the TFV will thus necessarily be limited. As such, fund-raising should be an important aspect of the activities of the TFV so as to ensure that it has the available financial resources to fulfil its tasks[471]. In this light, the TFV should also focus attention on

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[470] Marc Henzelin et al., "Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes", *Criminal Law Forum* 17 (2006), pp. 338-339.

[471] See Peter G. Fischer, "The Victims' Trust Fund of the International Criminal Court-Formation of a Functional Reparations Scheme", *Emory International Law Review* 17 (2003), pp. 191-192 (concerning fund-raising).

gathering voluntary contributions that will ensure the fulfilment of reparation awards. As an example, according to the website of the TFV,

> "The total TFV income by November 2009 was € 4.5 million. Out of these, approximately € 2.2 million were obligated for grants in the Democratic Republic of the Congo and Uganda. Another € 600,000 were allocated for activities to start in 2010 in the Central African Republic. In addition, a current reserve of € 1 million is available for potential reparations."[472]

The financial limitations of the TFV do not however mean that the ability of the TFV to implement reparation awards will be completely hampered. In this scenario, the meaning and scope of redress becomes ever more important. Indeed, financial compensation is not the only means of reparation to victims of crimes within the ICC jurisdiction, as already discussed. Symbolic and collective reparations should be an important aspect of reparations through the TFV. The financial resources of the TFV should be used bearing in mind victims that need specific and urgent assistance as a consequence of the crimes committed against them, such as victims of sexual violence[473].

The number of victims of international crimes of the kind the ICC will prosecute will likely always be very high, and as a consequence, the potential claimants of reparation will also be of a high scale. As an example, in the *Lubanga* case, 120 individuals were recognized as victims. Similarly, in the *Germain Katanga/Mathieu Ngudjolo Chui* case, there were 364 victims participating in the case[474]. It is certainly important that victims get reparation for the crimes they have suffered; this however should not stand in the way of the Court's mandate of prosecuting serious international crimes and determining the guilt or innocence of the accused.

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[472] Trust Fund for Victims website, available at: http://Ibid..trustfundforvictims.org/financial-info (accessed on 7 March 2013). This stands in contrast for example with the United Nations Compensation Commission which approved the payment of more than US$3.2 billion in compensation for more than 860.000 successful "A" claimants, see http://www2.unog.ch/uncc/clmsproc.htm

[473] Anne-Marie De Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families", *Leiden Journal of International Law* 20 (2007), pp. 207-237.

[474] See references on http://icc-cpi.int.

It is in this light that I argue that the Court should be coherent with the principles of reparation to be applicable across the framework of reparations within the ICC, with the necessary modifications in relation to each case, and then perform a supervisory role of the administration of reparations by the TFV. This approach would lighten the burden of the Court, which has limited resources and is primarily in charge of criminal trials of accused persons. It is important, certainly, that the Court does not completely divorce itself from the TFV, but rather should have a more limited role. The TFV staff will also likely count on staff with expertise in administering the reparation award under the guidance of the principles of the ICC. The TFV should have the mandate of a true reparations body[475].

Another challenge refers to the practical implementation of the reparations principles the Appeal Chamber has established. As reviewed above, the Chamber has set out principles rather abstractly. The TFV will have to grapple with the principles when implementing the reparation for victims in the *Lubanga* case. The TFV thus has a significant responsibility to implement reparations, within the available budget, while keeping in line with the principles stated by the Court[476]. The TFV may consider taking a comprehensive approach in this first implementation which can inform future cases. In this sense, the TFV itself can establish principles to be followed in a transparent manner, within the limitations of the principles set out by the Court and the constraints imposed by the governing texts as explained above. For example, it may decide to set out some specific guidelines in terms of reporting on the implementation of the reparations, and timelines for implementing the order of the Court, which will not only apply in one case, but rather provide some transparent guidelines for future court-ordered reparations.

Furthermore, as reviewed above, the TFV has already acquired significant experience in programs for the benefit of victims of crimes in different situations under the jurisdiction of the Court. These experiences have given the TFV some specific knowledge and expertise in terms of what works and what needs victims may have. The TFV may consider using these experiences to inform the reparations for victims. In my view, the most important criterion however is determining the views of victims and following their needs in every reparation program.

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[475] Marc Henzelin et al., "Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes", *Criminal Law Forum* 17 (2006), p. 342.

[476] For the time being, the principles are those stated in the *Lubanga* case.

The challenges and difficult questions that the Court and the TFV will face in the implementation of the reparations mandate make it crucial for a concerted effort between the Court and the TFV so as to have an efficient reparations mechanism. It has been argued that the task of the Court in deciding thousands of claims for reparation may well be more difficult than deciding on several different cases for each situation[477], especially considering that the expertise of the Members of the Court will possibly be more focused on criminal law and procedure than on mass civil claims.

Having discussed some of the many challenges the TFV will likely face in the coming years, I turn next to the examination of lessons that can be learned by looking at mechanisms also in charge of reparation for mass victimization.

VI. CONCLUDING REMARKS: TRAILBLAZING A NEW REPARATION MECHANISM FOR INTERNATIONAL CRIMES?

As already discussed, the inception of reparation into international criminal justice came about in a more recent phase of international criminal justice. Previous international criminal justice enterprises, such as the *ad hoc* criminal tribunals, did not have a scheme for victim reparation[478]. Importantly, the ICC represents a major step towards providing redress for victims of international crimes, alongside the TFV. The ICC is unique in its conception of and activities in international criminal justice. An interesting question in this context is whether the TFV may be a trailblazer for similar initiatives in respect to reparations for international crimes or violations of international humanitarian law outside the scope of the ICC.

The ICC does not, unfortunately, have yet a global reach in respect of all international crimes that are committed worldwide. Limitations concerning the jurisdiction

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[477] Gilbert Bitti & Gabriela Gonzalez Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", in *Redressing Injustice Through Mass Claims Processes: Innovative Responses to Unique Challenges,* The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, p. 321.

[478] Michael Bachrach, "The Protection of Rights and Victims Under International Criminal Law", *International Law* 34 (2000).

of the Court[479] make the scope of the activities of the TFV also limited to the victims of crimes under the jurisdiction of the ICC. This means that many victims of international crimes will remain outside the civil dimension of international criminal justice. As Jann Kleffner and Liesbeth Zegveld argues, "while the ICC may, either upon request or on its own motion, afford reparations to victims of war crimes, these are reparations afforded within the individual responsibility framework of the ICC"[480].

Thus, it is submitted that the model of TFV could be a trailblazer for similar mechanisms competent to consider civil claims from individual victims of international crimes. The TFV provides a promising model of an administrative mechanism dealing with mass victimization in the aftermath of international crimes.

Thus, I argue that the TFV, and its potential success as a mechanism to foster reparation for victims of crimes within the ICC, may serve as a model for other similar approaches to provide reparation for victims of international crimes and in this sense, its message and example may stand as a catalyst for other similar reparations schemes for victims of international crimes. Such efforts could be on an individual basis, for example, in relation to victims of a specific conflict. Alternatively, they could be in a more global aspect[481], geared towards victims of international crimes in general, and with a view to

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[479] In general terms, the ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. The ICC has jurisdiction over natural persons, over the age of 18 years old at the time the crime was perpetrated. A crime falls within the jurisdiction of the ICC if it is perpetrated in a State Party to the ICC (or in a State having otherwise accepted the jurisdiction of the Court), by a national of a State Party (or of a State having otherwise accepted the jurisdiction of the Court), or if the Security Council has referred the case to the Court, irrespective of the nationality of the perpetrators) or the place of the crime. The ICC has jurisdiction for crimes committed after the entry into force of its Statute (1 July 2002); in the case of a State having joined the Court after 1 July 2002, the Court only has jurisdiction after its Statute entered into force for that State in question, unless the State accepts the jurisdiction of the Court for the period before the Statute's entry into force. On the jurisdiction of the ICC, see William A. Schabas, *An Introduction to the International Criminal Court,* Cambridge University Press, 4th ed., 2011, chapter 3.

[480] Jann K. Kleffner & Liesbeth Zegveld, "Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law", *Yearbook of International Humanitarian Law* 3 (2000), p. 384.

[481] Such fund, with a global reach, could be established for the benefit of all victims of international crimes. The trust fund would receive, like the TFV, voluntary contributions from individuals, international/regional organizations, nongovernmental organizations and States. As already discussed, the main source of funding of the TFV comes from voluntary contributions, as opposed to the accused. Such trust fund could be based on the example of the TFV and could

bridging the gaps of the TFV, which unfortunately does not have a universal reach due to its link with the ICC which does not have jurisdiction over all conflicts.

In this chapter, I reviewed the legal framework, challenges and possibilities of the TFV within the ICC framework. The aim was to both highlight this innovative perspective of the civil redress dimension of the ICC, and to provide a window into broader questions, such as the usefulness of administrative mechanisms linked with a judicial process as a new frontier for redress for victims of international crimes. In this sense, the TFV was the leading protagonist of the analysis.

It is reiterated in this chapter, in line with the overall theme of this study, that civil redress should be a part of the model of modern international criminal justice; the question, in my view, should not be whether or not victims' reparation should be included in international justice, but rather how to make it feasible. This is the real question to which this thesis hopes to make a contribution to enlighten, by referring to diverse models where victims can claim reparation for international crime. Thus, the TFV is another piece in the fabric of international justice, weaving the civil dimension within international criminal justice.

In this light, it is argued that the TFV should play a leading role in the administration of reparation to victims of crimes within the jurisdiction of the Court. Pragmatic reasons such as the larger degree of flexibility in terms of reparation programmes and the centrality of its mandate (i.e. the TFV was created for the benefit of the victims) stand for the argument that the Court's Judiciary should play a supervisory role and trust the TFV with the design of reparation programmes. The TFV could operate in this sense as the administrative arm of the ICC for the purposes of reparation awards.

The present chapter thus aimed at demonstrating that the reparation system at the ICC should move away from a complete reliance on the Court's judicial arm for the purpose of reparation, and that there should be a division of decision-making powers. As posited in a previous chapter, international criminal trial proceedings do not seem to be the most appropriate forum for decision-making on all kinds of reparation questions. It is my

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function under the auspices of the United Nations.

contention that the ICC's Chambers' role should be to decide on principles of reparation and the beneficiaries of reparation in a given case. The administration of the reparation award should be given to the TFV.

Furthermore, the study of the TFV has been undertaken as a lens through which the broader question of the use of administrative mechanisms to deal with civil redress for victims of international crimes has been considered. It is thus argued that the TFV, alongside other comparable initiatives reviewed herein, can pave the way for similar initiatives in areas where the TFV cannot act for certain victims of international crimes due to its jurisdictional limitations. The argument is thus made that while there are some obscure areas for the TFV to grapple with at this stage, it may still provide useful lessons, or at least inspiration, for the creation of similar initiatives. Such initiatives may be used to address specific conflicts, such as the Rwandan genocide, or, for a broader purpose, comparable to the Fund for torture victims reviewed above.

CHAPTER 5: THE ROLE OF NATIONAL COURTS IN THE ADJUDICATION OF CIVIL REDRESS FOR INTERNATIONAL CRIMES

There can be a variety of responses to deal with international crimes. International criminal justice, in particular, stands on two pillars: it has an international dimension, performed by international courts, coupled by administrative mechanisms, which were the object of previous chapters. It also has a national dimension, fulfilled by domestic courts which enforce international law[482].

This study already addressed two legal frameworks for reparations for international crimes and in this chapter, it focuses on the third framework concerning the role of national courts in relation to reparations for victims of international crimes. In particular, this chapter attempts to address the following research questions:

- What role should domestic courts play in relation to reparations for victims of international crimes?
- Are domestic courts better equipped to deal with reparations for international crimes?
- Can the doctrine of universal jurisdiction include a civil dimension?

The present chapter thus addresses the role of domestic courts in the adjudication and award of reparations through case studies, including a discussion of the principle of universal civil jurisdiction. In this regard, it advances the broader research goal of this thesis, that is, an inquiry into the civil dimension of international criminal justice. Underlying this chapter is the question of the implications of adding a civil dimension in domestic litigation in relation to international crimes.

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[482] The present chapter will focus on the question of the role of domestic courts in the award of reparation for victims of international crimes. In relation to domestic prosecutions of international crimes, many studies have addressed this question in detail. See e.g.: Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", *Journal of International Criminal Justice* 3 (2005), pp. 400-421; Anthony D'Amato, "National Prosecution for International Crimes", in *International Criminal Law*, Cherif Bassiouni (ed.), Nijhoff, 2008.

As it has been stated, bringing civil claims before domestic courts offers a potential for addressing international wrongs[483], including international crimes. This study focuses on reparations for international crimes claimed directly from individuals and examines how different mechanisms co-exist for providing civil redress (reparations) for victims of international crimes. In the present chapter, I dwell upon the possibilities and challenges for national courts in providing an avenue for civil claims from victims of international crimes. In doing so, this chapter keeps in line with this study's paradigm – individuals claiming a right to reparation from individual perpetrators – thus, it focuses on transnational tort litigation of individual versus individual, leaving out cases against the State and those against corporations.

In this sense, this chapter launches into two levels of inquiries: the first one, by analysing how (selected) different legal traditions treat the criminal (prosecution and punishment)/ civil (reparation) dichotomy, especially when it pertains to international crimes. This first dimension will highlight the possibilities of claiming civil redress for international crimes on the basis of the structure of the legal systems in question, and as an adjunct to a criminal prosecution. This chapter also briefly addresses how recent developments in international criminal law at the international level may work as a catalyst for civil claims in national courts, for example, by the implementation in national legislation of the provisions of the Rome Statute, including provisions on reparations. In this respect, this chapter examines how international criminal law at the international level can inform and influence domestic civil litigation in respect of international crimes.

This chapter then turns to a case study referring to civil claims for international crimes committed in Bosnia and Herzegovina during the war in the former Yugoslavia, for which an international criminal tribunal was established but which did not deal with claims for reparation. In this respect, the challenges of bringing civil claims for international crimes before domestic courts will also be examined which will shed light on the road ahead.

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[483] Jaykumar A. Menon, "The Low Road: Promoting Civil Redress for International Wrongs", in *Realizing Utopia: The Future of International Law*, Antonio Cassese, Oxford University Press, 2012, chapter 47.

In the last part of this chapter, I look at the doctrine of universal jurisdiction. I consider its scope, definition and whether it encompasses a dimension for reparation (i.e. a civil dimension), in addition to its criminal dimension. Starting from the *criminal* dimension of universal jurisdiction in relation to the prosecution of international crimes, I inquire whether universal jurisdiction can encompass a *civil* dimension to provide an avenue for victims to seek reparation from individual perpetrators of international crimes[484]. As well, I explore the implications of adding a civil dimension to universal jurisdiction.

Questions concerning the right to reparation under international law and State responsibility in relation to reparations for international crimes[485] were treated in a previous part of the present study. In this section, I dwell upon whether domestic courts can rely on the doctrine of universal jurisdiction to entertain victims' claims for reparation from individual perpetrators of international crimes. As explained[486], domestic mechanisms relating to transitional justice, such as truth and reconciliation commissions, as well as well domestic claims processes involving the State are also outside the scope of the present study.

In this analysis, it is pondered whether there should be an increased role for national courts concerning reparations for victims of international crimes and whether progress in international criminal law at the international level could work as a catalyst for national claims for reparation. This chapter nevertheless also highlights the challenges that lie ahead and ponder about ways to increase the role of national courts in the quest for reparation for international crimes.

It is important to focus the present chapter in the broader theme of this study. While reparations for international crimes often involve questions of State responsibility, such issues are outside the scope of the present study, which focuses solely on individual responsibility and reparations from an international criminal law perspective, leaving out

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[484] In this chapter, as throughout the entire study, I use the term "international crimes" to include the core crimes of the Rome Statute as discussed in the Introduction of the present study.

[485] See chapters I and II of the present study.

[486] See Introduction.

other related questions of State responsibility for international crimes[487]. The present analysis also leaves out cases dealing with the responsibility or liability of corporations.

I. DOMESTIC APPROACHES TO CRIMINAL PROSECUTIONS AND CLAIMS FOR REPARATION WITHIN CRIMINAL LAW PROCEEDINGS

This chapter starts with a brief overview of two models of adjudication of civil claims: one model where civil claims are completely dissociated from criminal prosecutions and processes and another where civil claims can be brought within the criminal process. The goal of this overview is to demonstrate how domestic courts may approach a claim for civil redress. This section is purely an overview, with limited selected examples of different jurisdictions purely to illustrate the point rather than provide an exhaustive or detailed discussion of this topic[488].

The concept of victim participation and the award of civil reparation in criminal proceedings[489] is common ground in many States[490]. In saying this, there is a difference within States in Europe depending on whether they come from a civil Germanic background, such as Austria and Germany, a Nordic background, such as Denmark and Norway, a civil Romanic background, such as France, Italy and Spain, or even a mixed background, such as the case of Greece. This being said, each of these systems grants

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[487] For a review of this question and related issues, see generally: Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002), pp. 833-856; André Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52 (2003), pp. 615-640; Lorna McGregor, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly* 55 (2006), pp. 437-445.

[488] For a detailed discussion see Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000.

[489] However, as Judge Pikis has indicated, no national system has a similar provision to article 68(3) of the Rome Statute concerning victims' participatory rights within ICC proceedings, see *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the Directions and Decision of the Appeals Chamber", 2 February 2007, ICC-01/04-01/06-925, Separate opinion of Judge Pikis, p. 16.

[490] See Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000.

victims participatory rights as a "partie civile"[491]. Prticipation in this section is discussed in connection with the ability to claim reparations.

Participation in criminal proceedings can vary from playing the role of a civil claimant, which allows the civil claim of victims to be integrated in the criminal proceedings[492], to acting as a private prosecutor[493]. Another trait of the civil law system is the "investigative judges", who hold investigation powers, which normally lie with the Prosecution; however, this characteristic is slowly disappearing[494]. Given the differences between various legal traditions this study will proceed to analyse some selected national criminal jurisdictions.

The participation of victims in criminal proceedings raises the possibility of claims for reparation from victims within the same criminal proceedings. Domestic proceedings for reparation may take dramatically different forms, depending on whether victims are permitted to participate in criminal proceedings and bring claims for reparation within the same proceedings, or whether claims for reparation are completely dissociated and separate from criminal prosecution against the accused.

Depending on the legal system's approach to dealing with civil claims of victims of crimes, the role of domestic courts, prosecutors and victims will be different in shaping the path to reparation. Domestic legal systems are largely influenced by the legal tradition to which they belong. In the next section, I shall review two legal systems (Romano-Germanic and common law systems), not with the purpose of exhaustive analysis of the

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[491] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 3. In regards to the concept of "partie civile", see in France articles 85 and 87 of the "Code de Procédure Pénale", in Belgium the "burgerlijke partij", articles 63, 66 and 67 of the Belgian Criminal Procedure Code "Wetboek van Strafvordering", and in Austria the "Privatbeteiligter", para. 47 of the Austrian Criminal Procedure Code "Strafprozessordnung 7975". In Germany, victims do not act as a "partie civile" but rather as auxiliary prosecutor, see paras. 395 to 402 of the German Criminal Procedure Code "Strafprozessordnung".

[492] See Mugambi Jouet, *ibid.*, p. 39.

[493] See Mugambi Jouet, *ibid.*, p. 3, where the author submits that in many continental European systems victims can prosecute criminals of felonies without the need of a public prosecutor.

[494] In regards to the role of investigative judges in national systems, see Jerome de Hemptinne, "The Creation of Investigating Chambers at the International Criminal Court", *Journal of International Criminal Justice* 5 (2007), p. 402.

legal traditions that exist, but rather to compare and contrast different countries' approaches to victims' claims for reparation, and to survey whether victims in certain instances may claim reparations within criminal proceedings. For this purpose, I first provide a general overview of two main legal systems and discuss whether victims may claim reparations within criminal proceedings or whether civil proceedings are the only avenue available to victims.

1. Romano-Germanic Systems

In France[495], victims may hold different roles within the criminal justice system. Victims may act as a "partie civile" (civil claimant), a complainant or private prosecutor[496]. A victim who reports a crime ("complainant" role) will not only inform the public authorities of the crime, but will also initiate criminal proceedings if they have not been started by the public prosecution[497]. In this sense, victims' rights are broader than the rights provided in the ICC system, since they can participate in proceedings without further conditions and begin criminal proceedings in the event that the prosecution has not yet done so. In certain cases, victims can also act as private prosecutors, which enable them to summon the accused to appear in court and start the prosecution[498]. However, once the prosecution has been initiated, the public prosecutor has to continue with the proceedings since it is the duty of the prosecution to carry on public prosecution[499]. As far as participation as a civil claimant goes, it concerns the right of victims to demand compensation in a criminal court of justice, in addition to his/her right in a civil court[500]. That being said, there are some conditions for the exercise of this right which are set out in section 2 of the French code of criminal procedure.

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[495] See generally, Mireille Delmas-Marty & J.R. Spencer, *European Criminal Proceedings*, Cambridge University Press, 2002, pp. 218-291.

[496] Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*,Wolf Legal Productions, 2000, p. 316.

[497] *Ibid.*, p. 317. Here, I will not analyse the case of certain crimes such as defamation in which filing a complaint is an essential condition for a public action, see for instance section 48 of the French Penal Code, cited in Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000, p. 318.

[498] See section 2 French Code of Criminal Procedure.

[499] Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000, p. 321.

[500] *Ibid.*, p. 318.

In Brazil, victims may act as assistants to the prosecutor throughout the criminal proceedings and no special application needs to be filed for them to be granted the status of victims in criminal proceedings[501]. Similarly, in Senegal, according to Articles 2 and 3 of the Code of Criminal Procedure also recognize the possibility of raising civil claims in criminal proceedings[502].

To sum up, these selected examples demonstrate that victims from countries which partake in a Romano-Germanic legal system are granted extensive participatory rights which are broader than the system established in the ICC. In this sense, if compared to Romano-Germanic legal systems, a broad interpretation of participatory rights within the ICC framework will be compatible. However, it is important to note that the large scope of participation in national systems is based on different provisions than those of the Rome Statute which confine participatory rights to a judge-oriented system[503]. Such extensive participatory rights cannot be convened in the absence of a supporting legal text.

2. Common law systems

In the common law system, victims are not granted participatory rights in criminal proceedings[504]. In general, victims only have the right to participate in the sentencing part of the proceedings. In Canada, victims are given a voice during sentencing where they can express their opinion as to the sentence the judge should give the convicted person[505]. In these cases, the judge is not obliged to follow victims' suggestions. Likewise, in the American legal system, most States grant victims a participatory right at the sentencing

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[501] See in general: Flaviane de Magalhães Barros Pellegrini, "Os direitos das vítimas de crimes no Estado Democrático de Direito – uma análise do Projeto de Lei nº 269/2003 – Senado Federal". The author suggests in this article that victims are lacking a few essential rights in the Brazilian criminal law system, such as the right to be informed of the initiation of proceedings, and also mentions the difficulty to effectively obtain reparation.

[502] For a discussion of Senegal and other countries, see Amnesty International, Annual Report 2012, "Universal Jurisdiction: the Scope of Universal Civil Jurisdiction", available at: http://documents.law.yale.edu/sites/default/files/Amnesty%20International%20-%20Universal%20Jurisdiction_%20The%20scope%20of%20universal%20civil%20jurisdiction%20_%20Amnesty%20International.pdf

[503] Article 68(3) of the Rome Statute states "where the Court considers it appropriate".

[504] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 4.

[505] See section 722 of the Canadian Criminal Code.

stage[506]. Private prosecutions are banned both in federal cases, as well as in every State[507]. In England and Wales, victims are granted no participatory rights other than that of initiating private prosecutions[508]. However, it is worth noting that in this system, victims are not granted any special status since any person can initiate a private prosecution, including non- victims[509].

This brief overview of the role and rights of victims in different domestic legal systems provides the backdrop for a discussion of specific case studies in the following section, and provides a context in which the initiatives in each case study came about. It also provides the fabric in which proposals for the role of domestic courts in adjudication of reparation claims for international crimes can develop.

II. CASE STUDY: FILLING IN THE REPARATION GAP IN THE FORMER YUGOSLAVIA

This study now turns to an analysis of a case-study through domestic mechanisms in the aftermath of the international crimes committed in the Balkans war, particularly in Bosnia and Herzegovina, alongside the international criminal prosecutions at the ICTY. This case study was selected on the basis of its potential to illustrate how domestic mechanisms for reparation can fill in the gaps left by international criminal tribunals pertaining to reparations. In this perspective, I shall examine how the proceedings at the international level were not concerned with reparations for victims of the crimes under their jurisdiction, and to what extent domestic mechanisms have filled in the gaps. In this section, domestic mechanisms, such as court proceedings in Bosnia and Herzegovina, as well as in foreign States will be examined.

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[506] Douglas E. Beloof, *Victims in Criminal Procedure*, Carolina Academic Press, 1998.

[507] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 5.

[508] See *inter alia*, *Queen's Bench Division R (on the application of Gladstone Pic) v Manchester City Magistrates* [2005] All.E.R. 56 (All England Law Reports); Divisional Court, *Jones v. Whalley* [2006] 2 Criminal Law Review 67 on appeal to the House of Lords, *Jones v. Whalley* [2006] 4 All.E.R 113; Cyprus: Supreme Court, *Ttofinis v. Theochandes* (1983) 2 Cyprus Law Reports 363.

[509] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 5.

The second dimension is forward-looking and analyses how international criminal tribunals may inform or influence reparation cases in domestic courts and mechanisms. This second dimension is dealt with at another section of this chapter.

1. The Balkans War: Reparations in Bosnia and Herzegovina[510]

The conflict in the Balkans took many lives and left hundreds of thousands of victims[511]. In additional to outrage and violence, the war was characterised by a campaign of sexual violence crimes[512]. The surviving victims of sexual violence during the war not only deserve reparation but also *need* reparation to continue to survive with the

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[510] Many pieces in the literature review efforts at the international and national levels concerning reparation for victims of international crimes committed during the Balkan wars. I rely on some accounts in detail in this section of the present chapter, see references *supra.* Other interesting works include: Dino Abazovic, "Reconciliation, Ethopolitics and Religion in Bosnia and Herzegovina", in *Post-Yugoslavia: New Cultural and Political Perspectives*, Dino Abazovic & Mitja Velikonja, Palgrave Macmillan, 2014. Antoine Buyse, *Post Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina*, Intersentia, 2008. Timothy Cornell & Lance Salisbury, "The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina", *Cornell International Law Journal* 35 (2000-2001), pp. 389-426. Lara J. Nettlefield, *Courting Democracy in Bosnia and Herzegovina, The Hague Tribunal's Impact in a Postwar State*, Cambridge University Press, 2010. Linda Popic & Belma Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*, Independent Research Publication, 2010 http://Ibid..justice-report.com/en/file/show//Documents/Publications/Linda_Popic_ENG.pdf . Eric Rosand, "The Right to Compensation in Bosnia: An Unfulfilled Promise and Challenge to International Law", *Cornell Journal of International Law* 33 (2000), pp. 130, 131. Rodri C. Williams, *Post Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement*, TESEV International Symposium on 'Internal Displacement in Turkey and Abroad', 5 December 2006, Istanbul, pp. 10, 11. David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice", *International Legal Perspectives* 14 (2004).

[511] Concerning official background information of the conflict see the ICTY website: http://Ibid..icty.org/sid/322

[512] Concerning studies of sexual violence during the war, see e.g. Kelly D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", *American Journal of International Law* 93 (1999), pp. 97-123; Colette Donadio, "Gender Based Violence: Justice and Reparation in Bosnia And Herzegovina", *Mediterranean Journal of Social Sciences* 5 (2014), p. 692. Anne-marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, 2005; Courtney Ginn, "Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY", *Emory International Law Review* 27 (2013). See also reports by Amnesty International concerning sexual violence during the conflict: "Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces", 1993; "'Whose Justice?' - The Women of Bosnia and Herzegovina Are Still Waiting", 2009; "Public Statement - Bosnia and Herzegovina: Amnesty International Calls for Justice and Reparation for Survivors of War Crimes of Sexual Violence", 2010; "Old Crimes, Same Suffering: No justice for Survivors of Wartime Rape in North-East Bosnia and Herzegovina", 2012.

consequences of *inter alia* rapes and sexual violence[513]. For example, unwanted pregnancies, internal injuries and mutilations, and contraction of HIV require care, and are lasting marks of the conflict.

As it has been stated, in countries like Bosnia and Herzegovina, devastated by war, and having left numerous victims in the aftermath of the war, the harm caused can never be fully repaired; yet there must be efforts towards reconciliation and lasting peace, and reparation is part of a sense of justice for victims[514].

2. Developments at the international level

The war in Bosnia and Herzegovina witnessed hundreds of thousands of victims of international crimes perpetrated on a massive scale. The war and the crimes committed therein prompted the establishment, by the Security Council acting under its chapter VII powers[515], of the ICTY, as already discussed. Nevertheless, the ICTY has been crucial only in so far as it pertains to criminal accountability for the crimes perpetrated during the war. The question of reparation for victims has not been fully addressed by the Tribunal[516].

Judge Jorda, then President of the Tribunal, expressed his concern about the need to develop mechanisms for the award of reparations to victims[517]. However, as already discussed in a previous chapter[518], the ICTY did not concern itself with the issue of reparations and did not award reparation for victims of the Balkans wars. The matter was

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[513] Concerning sexual violence crimes and rapes during the war in Bosnia, see Helsinki Watch, Human Rights Watch, "War Crimes in Bosnia-Herzegovina", 1992; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights,* U.N. ESCOR, 49th Sess., Annex, Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993); see also Yolanda S. WU, "Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act", *UCLA Women's Law Journal*4 (1993).

[514] Manfred Nowak, "Reparation by the Human Rights Chamber for Bosnia and Herzegovina", in *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005, p. 245.

[515] See chapter 3 of this study for details.

[516] See chapter 3 of this study, and references cited therein.

[517] Cf. UN Doc./S/ 2000/1063, 3 November 2000. See also discussion in Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 484.

[518] See chapter 3 of the present study.

highlighted by the Tribunal as an important one, and according to Rule 106 of the Rules of Procedure and Evidence of the Tribunal, a judgment condemning an accused is final and binding as to the criminal responsibility of the perpetrator concerning claims of compensation, which may be brought by victims in a national court. Thus, compensation for victims was left for national courts and domestic mechanisms.

Another development at the international level pertaining to reparations to victims of the Balkans wars derived at the International Court of Justice in the *Bosnia Genocide case*, concerning claims by Bosnia and Herzegovina against Serbia for reparation for alleged acts of genocide[519]. Although this is a case of State responsibility concerning a claim between States for reparation, it is relevant to refer to it at this juncture in the perspective of attempts at the international level to obtain reparations for international crimes committed during the war.

The ruling of the Court, in sum, was to the effect that Serbia had not committed genocide in Bosnia, nor was it an accomplice. Although the Court did find that Serbia incurred responsibility for its failure to prevent and punish the genocide that occurred in Srebrenica, it was held that the genocide could not be attributed to Serbia. For present purposes, it is important to note the Court's failure to order reparations, which can be explained by its finding that Serbia did not commit the genocide. In this sense, the Court held that compensation would not be an appropriate remedy for Serbia's breach of the obligation to prevent the genocide in Srebrenica:

> "The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so."[520]

In particular, the Court held that:

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[519] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007.

[520] *Ibid.* at para. 462.

> "the Court's findings […] constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5) [failure to prevent genocide], a direction to provide assurances and guarantees of non-repetition, would be appropriate."[521]

Another case concerning the application of the *Convention on the Prevention and Punishment of the Crime of Genocide*, between Croatia and Serbia, was recently adjudicated by the Court. This case refers to a claim by Croatia, and a counter-claim by Serbia, for reparation for allegations of genocide committed by Serbia in Croatia, and by Croatia in Serbia (during "Operation Storm"). This case provided another missed opportunity for the Court to address questions of reparation. The Court looked at the crimes alleged to have occurred in each of the municipalities put forward by Croatia, and although it found that the *actus reus* of the crime of genocide was proven in many localities addressed by Croatia, it could not find that the specific intent, or the *mens rea*, was proven by either Party in their respective claim and counter-claim. As a consequence of this finding, the claims for reparation were not entertained by the Court[522].

An analysis of the reasoning of the Court concerning the merits of the case, and in particular, the allegations of breaches of the Genocide Convention from a State responsibility perspective are beyond the scope of the present study[523]. The conclusion that can be drawn from the Judgment of the Court is that victims have yet again been left without reparation for international crimes that were committed during the wars in the Balkans[524].

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[521] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, p. 239.

[522] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Croatia v. Serbia)*, Judgment, 5 February 2015. For an in-depth discussion of the question of reparations, see the Dissenting Opinion of Judge Cançado Trindade.

[523] See in this regard a commentary on the case: Monica Moyo, "ICJ Delivers Decision on the Application of the Genocide Convention", *AJIL International Law in Brief*, 3 February 2015.

[524] See criticisms to the Court's Judgment in respect of its treatment of reparations: Marko Milanović, "State Responsibility for Genocide: A Follow-Up", *European Journal of International Law* 18 (2007), pp. 669-694; see also Christian Tomuschat, "Reparation in Cases of Genocide", *Journal of International Criminal Justice* 5 (2007), pp. 905-912, who states, in regard to the Court's treatment of the question of reparation: "in the human rights field the judges take into account the degree of pain and suffering endured by the victims. It is hard to understand why the

It is important nevertheless to place both cases in their right perspective in terms of the legal framework and the question of reparations claimed by the Applicant States. In both cases, the jurisdictional basis for the Court was the Genocide Convention, and thus, the legal claims of the Applicant States were circumscribed by the legal framework of that Convention. More importantly, they had to prove a breach of the Respondent State, Serbia in both cases, of the Convention. This was an important point since the Court could not adjudicate claims of war crimes or crimes against humanity[525]. Thus, the treatment of the question of reparation, in both cases, was limited by the finding of a breach of an obligation of the Genocide Convention (or otherwise). As already discussed, given the Court's finding in the Bosnia Genocide case of Serbia's failure to prevent genocide, reparation, in the form of compensation, could have been ordered. Instead, the Court limited itself in dealing with the request for reparation in a cursory manner by stating that the Court's finding was appropriate reparation[526].

The other question that needs to be put into perspective is that: if reparations were to be ordered by the Court, would they have reached the victims themselves? The ICJ deals with questions of State responsibility rather than individual criminal responsibility[527], and one of the consequences thereof is that individual victims have no role to play in the proceedings, including for purposes of reparation. Thus, even if the Court were to order reparation in the form of compensation, it is not clear whether individual victims would

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international judge at The Hague dismisses any such considerations, without even addressing the issue. The praetorian statement—one sentence!—that a simple declaration indicating the occurrence of a breach constitutes appropriate satisfaction fails to comply with the duty of any judge to support his or her decision by explicit reasons. This is all the more deplorable since the proceedings in the case had been going on for 14 years. There was ample time to assess every facet of the relevant facts. Instead, the Court rushes though the issue of satisfaction as if it intended to avoid giving it due consideration", p. 911.

[525] There is no universal Convention on Crimes Against Humanity on which the Applicant State could base its claims.

[526] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, 26 February 2007, p. 239.

[527] On the question of State responsibility and individual criminal responsibility relating to the proceedings before the Court and the Court's decision see: Richard J. Goldstone & Rebecca J. Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", *Leiden Journal of International Law* 21 (2008), pp. 95-112.

directly benefit from the compensation award, other than the obvious symbolic meaning to victims of such a decision.

Be that as it may, there have been developments both at the level of domestic Court decisions concerning reparations for the crimes committed in Bosnia and Herzegovina, and also the creation of other domestic mechanisms concerning reparations for international crimes committed therein. I first analyse examples of court proceedings within the Balkans and assess the adjudication of reparation claims, both in criminal and civil proceedings. Then I discuss some examples of cases brought in domestic courts of foreign States (i.e. outside the Balkans) for reparation regarding the crimes committed in the former Yugoslavia. Finally, other domestic mechanisms devised for the purpose of awarding reparation for the international crimes committed during the Balkan conflict are considered.

3. Domestic mechanisms in Bosnia and Herzegovina

In addition to the examples discussed above at the international level concerning crimes committed during the Balkan wars, there have also been initiatives at the domestic level. As Frederiek de Vlaming and Kate Clark have reviewed with great detail, victims have claimed reparation in relation to the war in various different fora[528].

In December 1995, the Dayton Peace Agreement was signed which put a formal end to the conflict. In its Annex 6, the Agreement provided for the establishment of a Commission on Human Rights and a Human Rights Chamber[529]. The Peace Agreement thus provided for two fora for dealing with reparations for victims. Annex 7 established a Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). The study of these two mechanisms demonstrate that they are rather *sui generis* in the sense that they are quasi-international mechanisms set up by a peace agreement.

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[528] Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & GlasiusMarlies, Springer International Publishing, 2014, pp. 163-185.

[529] See concerning the work of the Human Rights Chamber, David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice", *International Legal Perspectives* 14 (2004).

According to chapter 2 of Annex 6 of the Dayton Peace Agreement, the Human Rights Chamber was modelled on the basis of the European Court of Human Rights, and was set up to examine allegations of human rights violations of one of the Parties to the Dayton Peace Agreement (that is, the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska*)[530]. The Chamber only could hear claims that had occurred after the entry into force of the Dayton Peace Agreement dated 14 December 1995[531].

The Chamber was comprised of 14 members and heard hundreds of cases concerning human rights abuses during the war in Bosnia and Herzegovina. It was set up to be a court of last instance[532]. Naturally, given the number of victims devastated by the conflict, the Chamber had a busy docket and established some practices which aided in dealing with the high volume of cases, such as, for example, relying on ICTY cases to set the historical record of a given case[533]. The Chamber entertained applications from victims or legal entities in relation to allegations of human rights violations by the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska.*

The cases decided by the Human Rights Chamber were wide-ranging. In terms of reparations for international crimes committed during the war, it is worth mentioning that the Chamber ordered innovative and varied awards, and had a major impact on victims and society[534]. The Chamber dealt with important issues such as: cases concerning enforced

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[530] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 486.

[531] *Ibid.*

[532] *Ibid.* at pp. 487-488.

[533] See e.g. *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and Merits, 7 March 2003, where the Human Rights Chamber applied the trial chamber decision of the ICTY in the case of *Prosecutor v. Radislav Krstić*, [IT-98-33-T], to provide the overall context for the events at Srebrenica: "As the *Krstić* judgment contains a comprehensive description of the historical context and underlying facts of the Srebrenica events, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision", cited in Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 489.

[534] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and

disappearances, which was a major problem during the war[535]; repossession of property, and in this regard, the case-law of the Human Rights Chamber played a role in reviewing the laws, policies and practices which related to the return of property[536].

The Commission for Real Property Claims of Refugees and Displaced Persons ("CRPC"), established pursuant to Article XI of Annex 7 of the Dayton Peace Agreement, was a quasi-judicial entity, whose task was described as encompassing "hundreds of thousands of claims in a short period of time" where "the Commission developed a stream-lined approach aimed at maximising efficiency, and its operating procedures bore greater resemblance to a mass arbitration or claims process"[537].

The CRPC faced a few challenges[538] in dealing with property claims, but together with the Human Rights Chamber, provided a domestic mechanism where victims had a forum to claim varied types of reparations[539]. Many of the challenges were connected to the poor state of property books and the impact of this on deciding property claims; the handling of property transfers, and the enforcement of Commission decisions. It is reported that, at the end of the mandate of the Commission, local authorities in Bosnia and Herzegovina had decided approximately 93% of all claims[540]. Although a thorough review

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Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 491.

[535] To the extent that the Chamber deemed that the violation of enforced disappearance was a continuous violation after the entry into force of the Dayton Peace Agreements, such cases were admissible, see: *Palic v. Republika Srpska*, Decision on Admissibility and Merits, 11 January 2001, Case No. CH/99/3196; *Unkovic v. Federation of Bosnia and Herzogovina*, Decision on Admissibility and Merits, 9 November 2001, Case No. CH/99/2150; *Josip, Bozana and Tomislav Matanovic v. the Republika Srpska*, Decision on Admissibility, 13 September 1996, Decision on the Merits, 6 August 1997, Decisions on Admissibility and Merits, March 1996–December 1997,Case No. CH/96/01; *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and the Merits, 7 March 2003, CH/01/8365 et.al,.

[536] Examples of such cases relating to repossession of property: *Rasim Jusufović v. the Republika Srpska*, Decision on Admissibility and Merits, 9 June 2000, Case no. CH/98/698; *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, 10 September 1998, Case No. CH/97/46.

[537] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 502.

[538] *Ibid.*, pp. 507-511.

[539] *Ibid*.

[540] UNDP Access to Justice, 2009-2011, unknown year of publication; Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in*

of the activities of the Commission is outside the scope of this study, it is useful to refer to its activities for purposes of illustrating domestic mechanisms that exist for providing reparation.

In concluding the discussion on domestic mechanisms for reparation set up by the Dayton Peace Agreement in regards to international crimes committed in Bosnia and Herzegovina, it can be said that alongside court proceedings, which I will review next, there can be other forms of domestic mechanisms that deal with the question of reparation for victims.

Interestingly, for the purpose of this study, it can be said that these domestic mechanisms created by the Dayton Peace Agreement served not only to provide an avenue for victims to seek reparation domestically for international crimes they suffered, but also to cross-fertilise and feed other institutions. In this sense, it has been argued that:

> "In many ways, therefore, the Human Rights Chamber was a training ground for the Entities of *Republika Srpska* and the Federation of Bosnia and Herzegovina and State level institutions to bring their laws and practices in line with the European Convention"[541].

In terms of national laws and proceedings in Bosnia and Herzegovina, currently, there does not exist in Bosnia and Herzegovina a governmental reparation system for victims of war crimes committed during the Balkans war: as Popic and Panjeta rightly summarize, in terms of a domestic reparation scheme, Bosnia and Herzegovina count on "a complex array of on-going payments to people who suffered war-related personal harms"[542].

In this light, I turn attention to the activities of Bosnian domestic courts concerning proceedings on reparation. The following discussion of domestic court decisions in Bosnia is relevant both in light of the overall aim of the chapter, (i.e. to assess the current and

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the Making, Carla Ferstman et al., Nijhoff, 2009, p. 511.

[541] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 511.

[542] Linda Popic & Belma Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*, Independent Research Publication 2010 http://Ibid..justice-report.com/en/file/show//Documents/Publications/Linda_Popic_ENG.pdf .

potential role of national courts concerning reparations for victims of international crimes) and also to address how national courts may fill in the gaps left by international and domestic mechanisms.

4. Proceedings before domestic courts in Bosnia and Herzegovina

In the case study I review in the present chapter concerning reparations for international crimes in Bosnia and Herzegovina, it is important to bear in mind the broader context regarding reparations: at the international level, the ICTY (dealing with international criminal responsibility) and the ICJ (dealing with State responsibility of Serbia) have left victims without any significant form of redress; at the national level, the mechanisms devised by the Dayton Peace Agreement (the Human Rights Chamber and the CRPC discussed above) have halted activities in 2004.

In light of this background, numerous victims initiated suits to try to obtain reparations for international crimes[543]. In this section, this study now focuses on an overview of court cases in Bosnia and Herzegovina.

Most court cases were filed on behalf of collectives of victims, such as former detainees. Usually, the overall goal was to achieve changes from authorities, recognition of harm caused, and a reestablishment of the rule of law. Because they were unsuccessful in obtaining compensation from the governmental authorities, as they did not fall under the scope of the domestic governmental war victims reparation scheme described above, many former detainees filed suits before national courts in Bosnia[544].

[543] For a detailed analysis of case studies, see Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & GlasiusMarlies, Springer International Publishing, 2014, pp. 179-182.

[544] UNDP, "Access to Justice, Facing the Past and Building Confidence for the Future (2009–2011)", p. 10–12; Selma Boracic, "Bosnia War Victims' Compensation Struggle" (International War and Peace Reporting (IWPR) 3 August 2011, cited in Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & Glasius Marlies, Springer International Publishing, 2014, p. 182.

In summary, Bosnian courts have awarded compensation in a limited number of cases, were not uniform in terms of the amount, and it is reported that the actual sums of compensation have not yet been paid to victims[545].

While some claims for reparation were brought before national courts in Bosnia and Herzegovina, it is suggested that the gaps left by the international courts (ICTY and ICJ), as well as the scheme set up by the Dayton Peace Accords, could have been ultimately filled by domestic courts. Bosnian courts could have played (and could still play) a more active role in post-war reparation and thus assist in the process of healing and allowing communities to move forward.

In addition to cases brought before national courts and mechanisms in Bosnia and Herzegovina, there were also cases brought before courts of foreign States. These cases are relevant to demonstrate that often victims cannot find relief in the courts of their own countries and thus, end up relying on courts of foreign States by bringing suits based on heads of jurisdiction other than territoriality. This idea, and the associated cases, will be explored in the last section of this chapter, which dwells upon universal civil jurisdiction.

III. FOSTERING CIVIL REDRESS FOR INTERNATIONAL CRIMES IN DOMESTIC COURTS: RATIONALES AND CHALLENGES

The review above of different initiatives and mechanisms that were put in place after the war in Bosnia and Herzegovina demonstrate that there are both advantages and challenges in contouring the award of reparations for international crimes in the context of domestic proceedings, especially in war torn countries. This section addresses the rationales for fostering an active role of domestic courts in the award of reparations for international crimes, as well as some of the obvious challenges of domestic adjudication of such claims. It is not intended to address exhaustively the challenges of bringing reparation claims in domestic courts, but rather to paint a large picture of some important hurdles victims may face in domestic court proceedings.

[545] Denis Dzidic, "Bosnian ex-camp detainees join forces", 2012 *Balkan Transitional Justice*; see also, Selma Boracic, "Bosnia War Victims' Compensation Sttruggle", cited in Frederiek de Vlaming & Kate Clark, *ibid.*, p. 182.

The main rationale for fostering a greater role for domestic courts relates to the scarcity of appropriate international mechanisms and their limited scope of authority (due to limited jurisdiction or temporal limitations). National courts are already in place – i.e. they do not need to be devised to deal specifically with cases of reparations for victims of international crimes; the judicial machinery already exists, and in some form, civil recovery for wrongful conduct already exists under domestic laws, thus sparing the time and resources needed to create a special apparatus to deal with reparation claims.

Another advantage refers to logistical considerations of the conduct of proceedings, for example, in relation to witnesses and collection of evidence. National courts in the areas where international crimes were committed, *in theory*, could be in a privileged position to deal with claims for reparations: they are the closest forum for victims.

Be that as it may, it is not always straight-forward to use national courts for purposes of reparation for international crimes. The first important challenge relates to the lack of political will and functioning judicial institutions capable of entertaining reparation claims. The lack of political will may be connected, among other things, to the involvement of political authorities in the criminal conduct which is object of the proceedings. For example, in the Bosnian case study, victims often requested reparations directly from official authorities, and only once unsuccessful in this enterprise, would they revert to national courts.

As well, in post-war societies, the judicial machinery is often broken, making not only prosecutions but also civil redress difficult to obtain in domestic courts. Without domestic institutions able to address the (international) criminal conduct and the corresponding civil liability, victims are left with no domestic avenue to pursue. Another challenge relates to practical difficulties such as enforcement of decisions when the accused is outside the countries where the crimes were committed or when his/her assets are outside the country.

Thus, while it may initially seem that national courts are the most natural path for reparation, in practice, there are many challenges which victims may face in order to settle their grief domestically.

IV. THE ROAD AHEAD: HOW INTERNATIONAL CRIMINAL LAW AT THE INTERNATIONAL LEVEL CAN INFORM DOMESTIC REPARATION CLAIMS

This chapter has reviewed how different legal systems deal with claims for civil redress in the aftermath of mass violence, and it has discussed a case study emanating from the Balkan wars and the shortcomings in relation to reparations.

Civil claims in national courts may provide an avenue for victims to obtain redress for the crimes they have suffered. Additionally, in cases where bringing a civil suit is not possible or desirable, in many civil law countries, victims may participate in prosecutions as *parties civiles* and seek reparation within the criminal proceedings, if the defendant is convicted[546]. Nevertheless, more needs to be done in this respect for victims to be able to truly benefit from national claims and proceedings in countries torn by war, as discussed previously.

My claim is that international criminal mechanisms should promote the role of national courts and mechanisms regarding civil redress for victims. International criminal justice should not be fragmented in the sense that international and national proceedings and mechanisms operate in a dissociated and parallel manner. I argue that they should feed off each other, and work in conjunction. As Professor Noelkaemper has posited,

> "For one thing, international institutions can develop creative incentives for domestic actors to provide for reparation schemes; for instance, by the prospect that absence of proper domestic reparation will lead to top-down obligations by human rights courts. International institutions also can provide critical knowledge to attorneys, who will have the prime responsibility to raise such issues before the courts and other actors. They also may help to provide financial and material means to actually deliver reparation."[547]

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[546] See in general, Mireille Delmas-Martry & John Spencer, *European Criminal Procedures,* Cambridge University Press, 2002. Victims may also in some cases seek reparation from a civil fund, as for example, in France, where victims of some violent crimes may obtain compensation from the State through a solidarity fund where offenders do not have the necessary funds, Criminal code of France, Arts. 706-3.

[547] André Noelkamper, "The Contribution of International Institutions to Domestic Reparation for International Crimes", *Proceedings of the Annual Meeting (American Society of International Law)* 103 (2009), pp. 203-207.

It is further argued that a way in which international mechanisms can foster domestic initiatives is by means of implementing legislation. For example, States Parties to the ICC, in implementing the ICC Statute, may well institute in their own legislation avenues for victims to seek redress for international crimes. This would counter the practical difficulty experienced by victims who cannot turn to their own domestic courts for civil claims because victims' redress is not available, due to lack of legislation or legal tools, or for lack of political will in relation to reparation requests.

V. UNIVERSAL CIVIL JURISDICTION AS AN ALTERNATIVE AVENUE TO SEEK REDRESS FOR INTERNATIONAL CRIMES?

As already discussed[548], some jurisdictions combine criminal and civil dimensions in the same proceedings, allowing for a claim of reparation to be made in the context of criminal prosecutions[549]. Hence, in such systems, often as *parties civiles,* victims of international crimes may claim reparations within the same proceedings. Alternatively, depending on the intricacies of the precise legal system, victims may also initiate separate civil proceedings for reparation for a crime for which they have been victimised. A challenge can arise, as it has been discussed, when crimes are committed in a jurisdiction where access to the Courts is difficult due to, for example, collapsed justice mechanisms or political undue interferences. Another important challenge to bringing reparation claims in the State where crimes have been committed is the absence of the perpetrator from that jurisdiction. In this manner, by being outside the country where the crimes were committed, or by having assets located outside the territory where the crimes were committed, alleged perpetrators of international crimes may be shielded from legal action concerning reparations.

With this hypothesis in mind, this chapter now explores the possibilities and challenges of reverting to universal jurisdiction as a means to claim reparations from

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[548] See Part I of the present chapter.

[549] See references in chapter V of this study. See also, Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Wolf Legal Publisher, 2000.

individual perpetrators[550] for international crimes committed outside the jurisdiction of the forum State. In this respect, it enquires whether the rationales that supported the development of the doctrine in its criminal dimension permit its use in suits for civil redress. What is the current state of international law in this area? In this respect, I explore whether universal civil jurisdiction could provide an alternative means for victims to seek reparations from perpetrators of international crimes by countering the limitations of national courts operating under territorial jurisdiction.

In this light, this section proceeds as follows: first, it discusses the definition of the doctrine of universal jurisdiction; then it examines whether under the current state of international law, a civil dimension is permitted; the scope of this dimension – whether civil claims are connected with criminal trials or are completely separate civil proceedings– and how universal civil jurisdiction should develop. In this perspective, the discussion of universal civil jurisdiction takes into account new developments in the field and examines whether universal jurisdiction may assist in establishing new possibilities for reparation claims for international crimes in national courts.

1. The doctrine of universal criminal jurisdiction: definition, genesis and rationales

In a time of global concern about impunity for grave human rights atrocities that amount to international crimes[551], universal criminal jurisdiction has received much

[550] As already explained, procedures to obtain reparation from States are largely outside the scope of the present study. In any event, the examination of universal jurisdiction for claims of reparation does not concern claims against States.

[551] In recent years, many authors, governments and non-governmental organizations have expressed growing concern about human rights violations that happen within borders and across frontiers. The concern seems to be focusing around the idea of a need to end impunity and to achieve justice. Especially in an era where 'never again' is not a mirror image of reality when it comes to genocide and crimes against humanity, great efforts have been deployed to make the case for expanding national jurisdiction to prosecute serious human rights offenses. In the Annex to the question of the Impunity of Perpetrators of Human Rights Violations (civil and political), revised final report prepared by Mr. Joinet, impunity is "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to make reparation to their victims." *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

scholarly attention[552]. The exercise of criminal jurisdiction over non-nationals is by no means a new phenomenon[553], yet in the past few decades, discussions over the doctrine have re-emerged[554].

The exercise of jurisdiction is generally limited by dictates of the sovereign equality of States and the principle of non-interference[555]. International law generally requires some connection or link for the exercise of jurisdiction[556]. Such link is often found in territory[557],

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[552] In the past decades, scholarly literature and a great number of human rights defenders dedicated attention to the topic of universal jurisdiction. Some of the prominent efforts to describe the theory and practice of universal jurisdiction in modern international law: Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press, 2005; Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2003; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003, (in this study, the author not only addresses a comprehensive analysis of universal jurisdiction in international law but also provides an insightful account for the approach of national legal systems to universal jurisdiction). Amongst the non-governmental efforts to promote universal jurisdiction for human rights atrocities, some studies have proved insightful in the description and analysis of the principle: Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (September 2001), AI Index: IOR 53/002/2001 and Amnesty International, *Universal Jurisdiction: 14 Principles on Effective Exercise of Universal Jurisdiction* (1999); International Council on Human Rights Policy, *Hard Cases: Bringing Human Rights Violators to Justice Abroad- A Guide to Universal Jurisdiction*, (1999); Redress, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (1999); International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference (2000).

[553] Universal jurisdiction was the subject of various studies in the beginning of the past century: see e.g. IBID.. Eric Beckett, "Criminal Jurisdiction over Foreigners", *British Yearbook of International Law* 8 (1927). Universal jurisdiction was originally used as a means to prosecute piracy and slave trade.

[554] See *e.g.*, Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001). Scholarly collective initiatives have also created materials concerning universal jurisdiction: *cf.* TMC Asser Institute for International Law, *Universal Jurisdiction in Theory and Practice*; Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*.

[555] See Donald Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction", *American Journal of International Law* 100 (2006), p. 142.

[556] *Ibid.*, pp. 142-143.

[557] This principle stands for the proposition that acts committed within the limits of a State are subject to the laws of that State. The most interesting point to underscore about the territoriality principle relates to acts that have not been committed entirely in the territory of a certain State. The conduct of States varies with regards to the application of the territoriality principle. Thus, if part of an act occurred within the boundaries of the forum State, this is an exercise of the territoriality principle and not the universality principle.

the nationality of the offender[558] (or the victim)[559], or the need to protect the national security interests of the State[560].

By contrast, universal jurisdiction is based upon the premise that certain crimes are so grave that they should become universally abolished. As such, any State is entitled to prosecute the offender of said crimes regardless of the nationality of the accused or the victim, or the territory where the crime occurred[561]. The universality principle is not based upon a direct nexus between the offender and the forum; the reasoning behind its existence is rooted in law and morality, fundamental ethical values[562] and the "conscience of humankind"[563].

As one author puts it, universal jurisdiction holds the potential for a global system of accountability[564]. It can be argued that, from a time where universal jurisdiction played a role in the prosecution of piracy and slave trade[565], to an era of grave human rights

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[558] This principle concerns the jurisdiction of a State in relation to its nationals abroad. In this case, the nexus between the State exercising jurisdiction and the conduct is the nationality of the alleged criminal. States have competence to extend the application of their laws to nationals even when they are outside the territory. State practice under this principle varies greatly depending on the legal system.

[559] According to this principle, the national State of the victim of a crime committed abroad can assert prescriptive jurisdiction over the offender. This principle is intimately connected to certain offences, often targeted at nationals of certain countries, such as the offence of terrorism. See generally Geoffrey R. Watson, "The Passive Personality Principle", *Texas International Law Journal* 28 (1993), p.1.

[560] According to this principle, a State can exercise prescriptive jurisdiction over aliens for acts done abroad which affect certain "vital" interests of the State. This principle is often justified by reference to a State's right of self-defense. Common offenses for a claim of the protective principle are treason, espionage and attacks against embassies, see Manuel R. Garcia-Mora, "Criminal Jurisdiction over Foreigners for Treason and Offences Against the Safety of the State Committed Upon Foreign Territory", *University of Pittsburgh Law Review* 19 (1958), p. 567.

[561] See M. Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, Stephen Macedo, University of Pennsylvania Press, 2004.

[562] See Christopher Keith Hall, "Universal jurisdiction: New Uses for an Old Tool", in *Justice for Crimes Against Humanity*, Mark Lattimer & Philipe Sands, Hart, 2007, pp. 55-56.

[563] A. Bailleux, La compétence universelle au carrefour de la pyramide et du réseau, Bruxelles, Bruylant (2005), p. 137, cited in Antônio Augusto Cançado Trindade, International Law for Humankind: Towards a New Jus Gentium, Nijhoff, 2010, p. 386.

[564] Stephen Macedo , Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law, University of Pennsylvania Press, 2003, Introduction, p. 4.

[565] See M. Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in

atrocities, universal jurisdiction has been instrumental in addressing human rights violations and providing an important tool to combat impunity and enforce accountability[566].

A) Conceptualizing universal jurisdiction: legal basis and conditions for exercise

There are two main forms of jurisdiction within international law: prescribing jurisdiction and enforcement jurisdiction. Universal jurisdiction is an additional principle for exercising jurisdiction alongside other heads of jurisdiction in international law (i.e. territoriality principle, nationality principle, passive personality principle and protective principle). As Professor Cryer explains, universal jurisdiction

> "refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. It is a principle of jurisdiction limited to specific crimes"[567].

For the purposes of the present study, I refer to universal jurisdiction, in its criminal dimension, as a State having jurisdiction over foreigners for crimes committed abroad, when foreigners (alleged perpetrators) are present in their territory.

i. Legal basis for exercising universal jurisdiction: permissibility and the Lotus principle[568]

There are two main sources that may provide for the exercise of universal jurisdiction: customary international law and treaty law[569]. In this chapter, I will not focus

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International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, Stephen Macedo (ed.), University of Pennsylvania Press, 2004.

[566] Non-governmental organizations and human rights activists advocate for a broader use of universal jurisdiction for perpetrators of mass human rights violations. See *also* generally, Henry Steiner, "Three Cheers for Universal Jurisdiction- Or Is it Only Two?", *Theoretical Inquiries in Law* 6 (2004), p. 200. See *also*, Kenneth Roth, "The Case for Universal Jurisdiction", *Foreign Affairs* 80 (2001). See Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", *Human Rights Quarterly* 23 (2003).

[567] Robert Cryer et al., *An Introduction to International Criminal and Procedure*, Cambridge University Press, 2007, p. 44. See also, Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003, p. 220

[568] The *Lotus* principle refers to the Judgment of the PCIJ in the case of *The S.S. Lotus Case P.C.I.J. Ser. A, No. 10, p. 4 (1927)* ("Lotus case"). The principle per se will be explained in the following section of this chapter.

[569] A thorough study of whether a certain crime is a universal jurisdiction crime as a matter of treaty law or customary international law is outside the scope of this paper, see Luc Reydams,

on whether, as a matter of treaty or customary international law, a specific international crime is subject to universal jurisdiction[570]. The focus here is to first conceptualize and discuss the scope of universal jurisdiction and then explore the concept of universal civil (or tort) jurisdiction.

At this juncture, it is important to address the question as to whether it is necessary under international law to have a legal basis to exercise universal jurisdiction or whether the absence of prohibition is enough to allow a State to exercise universal jurisdiction. In other words, I address the question of permissibility or mandatory exercise of universal jurisdiction. To address this question, it is important to analyze the so-called *Lotus* principle.

The *Lotus* case involved a collision between a French ship (the S.S. Lotus) and a Turkish ship, leading to the death of Turkish sailors. France claimed before the Permanent Court of International Justice (P.C.I.J.) that Turkey did not have *jurisdiction* to try the French officers, because they were on a French boat in international waters at the time of the accident. The Court essentially decided that sovereign States may act in any way they wish, as long as they do not contravene an explicit prohibition. More precisely, in the words of the Court: "Restrictions upon the independence of States cannot . . . be presumed" as international law accords to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules."[571]

The question at this juncture is whether one can use the *Lotus* principle to adopt a permissible approach towards universal jurisdiction, that is, in the absence of express prohibition of universal jurisdiction, are States permitted to exercise universal jurisdiction? Thus, the lawful exercise of universal jurisdiction can be traced back to the *Lotus*

Universal Jurisdiction: International and Municipal Legal Perspectives, Oxford University Press, 2003 (for a thorough study of treaties and state practice regarding universal jurisdiction). See *also*, Jon B. Jordan, "Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crimes", *Michigan State University-DCL Journal of International Law* 9 (2000) (noting that treaties themselves can become customary international law; if they are accepted by a great number of countries, the treaty will become customary international law and will be binding upon all nations, even non-signatories).

[570] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003 (for a thorough analysis of domestic legislation supporting universal jurisdiction and an examination of treaties establishing universal jurisdiction).

[571] Lotus case, p. 18.

principle[572], and the permissibility to exercise universal jurisdiction, in the absence of prohibition. In this sense, Professor Scharf posited that:

> "In the setting of international criminal law, the contemporary logic of the *Lotus* Principle is supported by the nature of State sovereignty and the embryonic status of international law relative to domestic law. The continued growth and evolution of international criminal law requires a permissive legal culture, which encourages the collective expansion of extraterritorial jurisdiction over international crimes."[573]

Be that as it may, under customary international law, jurisdiction is primarily territorial[574]. The *Lotus* principle is not widely used as a justification for the exercise of universal jurisdiction. Ryngaert, upon providing a detailed study of jurisdiction under international law, has succinctly summarised the state of the law:

> "[A] jurisdictional assertion is lawful if it is justified under a generally accepted principle authorizing the exercise of jurisdiction. Only to the extent that there is uniformity of State practice as to the *lawfulness* of the exercise of universal criminal jurisdiction over core crimes could a State establish such jurisdiction"[575].

Universal jurisdiction under international law is either treaty-based (i.e. it is recognized as a basis for the exercise of jurisdiction under a treaty regime) or it is based on customary international law[576]. Some scholars claim that universal jurisdiction for a core international crime (i.e. war crimes, crimes against humanity, genocide) is lawful under

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[572] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 128.

[573] Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), p. 368.

[574] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 35.

[575] *Ibid.*, p. 129.

[576] Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), p. 363. See also, Lee A. Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Virginia Journal of International Law* 39 (1999); *see also* M. Cherif Bassiouni & Edward M. Wise, "Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law", Brill, 1995 (according to whom under international law, nations may agree through treaties to exercise universal jurisdiction over offenses that might not otherwise allow such exercise of jurisdiction).

customary international law[577]. Under current treaty law, a number of treaties recognize universal jurisdiction: 1949 Geneva Conventions, the 1958 Law of the Sea Convention, the 1970 Hijacking Convention, the 1971 Aircraft Sabotage Convention, the 1973 Internationally Protected Persons Convention, the 1979 Hostage Taking Convention, the 1984 Torture Convention, the 1988 Airport Security Protocol, the 1988 Maritime Terrorism Convention, the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the Suppression of Terrorist Bombings[578]. Thus, to assert universal jurisdiction over a certain crime, it is necessary that there be an applicable treaty or rule under customary international law.

ii. The presence of the accused as a pre-condition for the exercise of universal jurisdiction?

Universal jurisdiction involves two sub-categories[579]: the jurisdiction over offenses when the accused is present in the territory of the State asserting jurisdiction; and the jurisdiction of a State to try offences regardless of the offender's whereabouts. The latter is often called "pure universal jurisdiction"[580] or universal jurisdiction *in absentia*[581]. The manner in which universal jurisdiction is enforced according to the latter sub-category depends upon the cooperation of States to bring the accused to trial in the territory of the forum State[582], since the forum State does not have custody of the offender.

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[577] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 129.

[578] See Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), pp. 363-364 for full references and comments on each treaty.

[579] Robert Cryer et al., *An Introduction to International Criminal and Procedure,* Cambridge University Press (2007), at p. 45. See *also*, Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", 1 *Journal of Int'l Criminal Justice* 589 (2003) (for a discussion of this distinction).

[580] See Robert Cryer et al., *ibid*.

[581] For an analysis of the exercise of universal jurisdiction *in absentia,* see Ryan Rabinovitch, "Universal Jurisdiction *in Absentia*", 28 *Fordham Int'l Law Journal* 500 (2004-2005); Luc Reydams, "Belgium's First Application of Universal Jurisdiction: The Butare Four Case", 1 *Journal Int'l Criminal Justice* 428 (2003); Anthony J. Colangelo, "The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes", 36 *Geo. J. Int'l L.* 537 (2004-2005).

[582] See Stephen Ratner, "Belgium's War Crimes Statute: A Postmortem", 97 *American Journal of International Law* 888 (2003) (narrating the saga of Belgium concerning the exercise of universal jurisdiction over foreigners that are found outside of Belgium).

In this sense, the prescribing State is similar to an international criminal court that issues an international arrest warrant and requests that any State with custody of the alleged offender surrender him or her. The controversies that universal jurisdiction *in absentia* raise are complex and have been explored by scholars[583]. In the traditional conception of universal jurisdiction, States exercise jurisdiction over offenders present in their territory[584]. It may be argued that the presence of the accused is a criterion that justifies the interest of the prosecuting State to exercise jurisdiction over individuals present in its territory[585]. Under treaties that recognize universal criminal jurisdiction, none provide an express legal basis for universal jurisdiction *in absentia*[586]. The complexities and controversies of universal criminal jurisdiction *in absentia* are numerous and outside the scope of this study, thus, I will not examine in detail the practical and legal implications of the different uses of the principle, or the controversies relating to the use of universal jurisdiction *in absentia*.

iii. Some technical legal aspects

In analysing universal jurisdiction, some technical legal aspects need to be briefly discussed in light of some examples from State practice. These legal aspects may also be transposed to the civil dimension of universal jurisdiction, which will be examined later in the section.

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[583] For an example of some of the controversies raised by the exercise of universal jurisdiction *in absentia* relate, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press (2003); See also, *Arrest Warrant Case (Democratic Republic of Congo v. Belgium), ICJ Reports 3 (2002),* p. 43, Opinions of Judges Guillaume and Rezek.

[584] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005), p. 103, cited in Cedric Ryngaert, *Jurisdiction under International Law*, Oxford University Press, 2nd ed., 2015, p. 133.

[585] In The Netherlands, for example, there have been prosecutions on the basis of universal jurisdiction involving suspects who were residing in The Netherlands when the proceedings started. Under Dutch law, presence on the territory is a necessary precondition for the exercise of jurisdiction of national courts, see Liesbeth Zegveld and Jeff Handmaker (eds.), "Universal Jurisdiction: State of Affairs and Ways Ahead A policy paper", January 2012, p. 6 (Larissa van den Herik).

[586] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 133.

The first one refers to national statutes of limitations in relation to international crimes which may bar prosecution. The United Nations Convention on the Non-Applicability of Statutes of Limitations for War Crimes and Crimes Against Humanity[587] and the more recent European Convention on Non-Applicability of Statutes of Limitations for Crimes against Humanity and War Crimes (Inter-European)[588] have very few ratifications. For example, under domestic French law, while crimes against humanity and genocide are not subject to a statute of limitations, war crimes are subject to a 20 or 30 year limitation period (depending on the type of war crime)[589].

Another technical legal question that is relevant relates to the collection of evidence. Given that criminal prosecutions based on universal jurisdiction relate to conduct that happened outside of the forum State, the process of gathering evidence to build a case is of utmost importance. The complexity involved in collecting evidence is well-illustrated by Guus Kouwenhoven, a case involving a Dutch businessman who was charged with war crimes committed in Liberia in early 2000. In this case, there was much difficulty in collecting evidence and cooperation[590].

B) The evolution of theoretical rationales for universal jurisdiction: from piracy to crimes of universal concern

Piracy was the "traditional" universal jurisdiction crime[591]. Universal jurisdiction grew from its traditional application to piracy based upon some specific rationales[592].

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[587] 26 November 1968, 754 U.N.T.S. 73.

[588] Europ. T.S. No. 82.

[589] French Penal Code, arts. 462(10) and 213(5).

[590] See a discussion of this case at: Liesbeth Zegveld and Jeff Handmaker (eds.), "Universal Jurisdiction: State of Affairs and Ways Ahead A policy paper", January 2012, p. 6 (Larissa van den Herik).

[591] See *e.g*, Mark IBID.. Janis, *An Introduction to International Law* 325 (2003) (explaining universal jurisdiction as the jurisdiction of every State traditionally over pirates); see *also*, Eugene Kontorovich, "International Legal Responses to Piracy", 13 *American Society of Int'l Law* 2 (2009) ("Piracy is the original universal jurisdiction crime") and Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard Int'l Law Journal* 183 (2004) (the author criticizes the analogy between piracy and human rights violations for the purposes of applying universal jurisdiction).

[592] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of

Because of its central relevance to the foundation and development of universal jurisdiction, the next section focuses on conceptualizing piracy on the high seas and outlines the rationales justifying the exercise of universal jurisdiction for piracy[593]. This discussion will lay the foundations of the rationales for universal jurisdiction in order to then make an argument concerning the civil dimension of the doctrine[594].

Piracy is ancient[595] and, as one author states, it is the oldest offense that invokes the assertion of universal jurisdiction[596]. Piracy has been a crime of universal concern: "even before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis*"'. [597] The *United Nations Convention on the Law of the Sea* establishes universal jurisdiction over piracy in article 105:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith" [598].

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dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005), at pp. 45-60 (discussing the two main rationales for the development of universal jurisdiction).

[593] Understanding the crime of piracy in international law is not only important because it was the precursor of the doctrine of universality, see M. Cheriff Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Va. J. Int'l L.* 81 (2000-2001) (for an analysis of the evolution of universal jurisdiction). The importance of discussing piracy relies *also* on the premise that piracy is the precursor of the conception of international crimes. However important the study of the crime of piracy may be to understanding the broad scope of universal jurisdiction in contemporary international law, the majority of the literature concerning universal jurisdiction deals very superficially with the crime of piracy. The analogy between piracy and other crimes is done in a very subtle manner in scholarly writings and very few studies have been devoted to an in-depth analysis of this analogy.

[594] The focus on the crime of piracy in this section is because this is the genesis of universal jurisdiction and it provides an adequate framework to discuss the rationales underpinning universal jurisdiction.

[595] See Joshua Michael Goodwin, "Universal Jurisdiction and the Pirate: Time for an Old Couple to Part", 39 *Vanderbilt Journal Transnational l Law* 973 (2006); see Willard Cowles, "Universality of Jurisdiction over War Crimes", 33 *California Law Review* 177 (1945), at pp. 181-194 (noting that jurisdiction over piracy has occurred since the sixteenth century).

[596] *Ibid.*, p. 791. See generally, Dickinson, "Is the Crime of Piracy Obsolete?", 38 *Harvard Law Review* 334, 337-339 (1925) cited in Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), at p. 791.

[597] Oppenheim, *International Law* (1992), at 609.

[598] *1982 United Nations Convention on the Law of the Sea*, 21 ILM 1261 (1982), article 105.

Piracy involves acts of robbery and violence[599]. An important feature of the definition of piracy is the fact that it happens on the high seas, outside the jurisdiction of any State, "a global commons"[600]. Every State has an equal right to navigate the high seas. This characteristic of the high seas is sometimes argued to be one rationale for the exercise of universal jurisdiction since other traditional principles of jurisdiction would be inapplicable[601].

i. Theoretical rationales of universal jurisdiction in relation to crimes of universal concern

As it can be perceived from the discussion above, universal jurisdiction is not a recent phenomenon[602]. The principle that States can punish foreigners for crimes committed outside their territorial boundaries is a concept that has existed for a long time in international law[603]. Without purporting to provide a thorough analysis of the formation of

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This provision states the right, but not the obligation, to assert universal jurisdiction over acts of piracy, see Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), p. 792.

[599] See *Fitfield v. Ins. Co. of Pa*., 47 Pa. 166, 187 (1864) (concluding that pirates are sea robbers); see *also*, Alfred Rubin, *The Law of Piracy* 213 (1998) (noting that States can define statutorily what constitutes acts of piracy).

[600] Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard Int'l Law Journal* 183 (2004), at p. 190. The occurrence of piracy on the high seas could be seen as a third rationale (in addition to the ones I study in this paper). I will not examine this question in this paper. One interesting note is that universal jurisdiction, by definition, is exercised regardless of where the offense occurs, see Luc Reydams, "Universal Criminal Jurisdiction: The Belgian State of Affairs", 11 *Criminal Law Forum* 183, 185 (2000).

[601] See generally, *Sosa v Alvarez-Machain*, 124 US 2739, 2775 (2004) (Scalia, J., concurring in part and dissenting in part) (suggesting that the norm for piracy was developed because pirates were "beyond all…territorial jurisdictions"); Lee A. Casey, "The Case Against the International Criminal Court", 25 *Fordham Int'l Law Journal* 840, 855 (2002) (contending that universal jurisdiction for piracy has been accepted since it takes place "on the high seas, beyond the territorial jurisdiction of any single State"), cited in Eugene Kontorovich, "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Review* 111, (2004), at p. 151.

[602] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, Nijhoff (2010), p. 383 (affirming that universal jurisdiction "has a long history, which dates back to the thinking of the founding fathers of the law of nations").

[603] See generally, Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime", 29 *American Journal of InternationaL Law* 435 (1935), p. 739; Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), pp. 785, 793.

the principle of universality, this chapter analyses a few basic points in the evolution of this doctrine.

As already discussed, universal jurisdiction was developed to combat the crime of piracy based on the rationale that because the crime occurred on the high seas[604], no State could have jurisdiction over pirates unless they claimed the universality of jurisdiction[605]. The doctrine changed with time and the basis for a claim of universal jurisdiction shifted to the grave nature of the crime and the need to combat impunity for such conduct[606]. Thus, the underlying principles for asserting universal jurisdiction over certain crimes can be seen as two ends of a spectrum: the place where the offence occurred - outside the jurisdiction of any State - or the grave nature of the crime.[607]

In the case of universal jurisdiction over grave offences, "because a state exercising universal jurisdiction does so on behalf of the international community, it must place the overall interests of the international community above its own."[608] In its criminal dimensions, universal jurisdiction is mostly acclaimed to be an effective tool to fight impunity and to fill in the gaps of international criminal tribunals' proceedings[609]. In

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[604] It is often argued that the heinous nature of piracy is the basis for universal jurisdiction, see Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988). This rationale has been criticized, see Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard International Law Journal* 183 (2004).

[605] See Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988); Cheriff M. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Virginia Journal of International Law* 81 (2000-2001).

[606] *Ibid.*. The authors claim that the modern basis for universal jurisdiction is the grave nature of the crime and the need to combat impunity for those crimes.

[607] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005); Chandra Lekha Sriram, Globalizing Justice for Mass Atrocities, Routledge (2005).

[608] Cheriff M. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Virginia Journal of International Law* 81 (2000-2001), pp. 88-89.

[609] See Hays Butler, "Universal Jurisdiction: a Review of the Literature", *Criminal Law Forum* 11 (2000), pp**.** 353–373, citing Daniel T. Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", 10 *Criminal Law Forum* 87 (1999), p. 105 (concerning the limited scope of the Court's jurisdiction and arguing for an increased role of universal jurisdiction of national courts to complete the gaps of international institutions in prosecuting egregious crimes.

addition to being a resource for prosecuting serious human rights violations, universal jurisdiction is also esteemed as a tool for global justice, especially with regards to countries that are unwilling or unable to prosecute criminals[610].

Universal jurisdiction is premised upon the idea that, contrary to other principles of international jurisdiction, the heinous nature of the crime justifies the exercise of jurisdiction by any State[611]. In this sense, the seriousness of the crime allows for any State to prosecute the offender[612]. Due to the gravity of certain crimes, their consequences stretch beyond victims and their communities, and affect the international community as a whole[613].

These ideas can be traced back to the writings of the philosopher and political scientist Cesare Beccaria[614]. In his work *Dei Delliti e Delle Pene*[615], Beccaria appeals to the notion of rationality and humanity in the law. In line with the latter, Beccaria also claims that "an act of cruelty committed, for example, in Constantinople, may be punished at Paris for this exact reason, that he who offends humanity should have enemies in all mankind"[616]. I take Professor Bassiouni's point in concluding that Beccaria "did not propound universal criminal jurisdiction"[617] as it is understood today; however, the foundations for universal jurisdiction concerning crimes of grave nature can be said to find some explanation in Beccaria's work.

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[610] Anne IBID. Geraghty, "Universal Jurisdiction and Drug Trafficking: a tool for fighting one of the World's Most Pervasive Problems", 16 *Florida Journal of International Law* 371 (2004), p. 372.

[611] Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 42.

[612] *Ibid.*, pp. 41-44.

[613] *Ibid.*, pp. 42-43.

[614] See a discussion in Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 40.

[615] (1974), translation available at: http://Ibid..constitution.org/cb/crim_pun.htm.

[616] Cesare Beccaria, *Dei Delliti e Delle Penne* (1974), Translation.

[617] Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 43.

On the other end of the same spectrum, Hugo Grotius, in *The Law of War and Peace*[618] argued that freedom of navigation was applicable universally and, as a consequence, any infringement upon this right would provoke universal punishment[619]. In Grotius' conception, pirates were "enemies of human race"[620]. His theory of universal punishment is based on the nature and effect of the crime on all nations[621].

There thus seems to be three main points which have provided a theoretical basis for the development of universal jurisdiction in relation to the (original) crime of piracy. First, the fact that pirates are "stateless" and that no country can have jurisdiction over them based on the nationality principle. Secondly, the idea that crimes of piracy happen on the high seas where no State has jurisdiction based on the territoriality principle. Under these two rationales, States are not acting in violation of each other's sovereignty, but rather for a common objective, a sort of "mutual self-interest" to combat a crime that potentially affects all nations. The third rationale for universal jurisdiction is based on the claim that some crimes are so heinous that they are perpetrated against the international community and not only individual States[622]. Under this rationale, in exercising universal jurisdiction, States are acting on behalf of the interests of the international community as a whole, for the pursuit of the ultimate goal of justice. This last rationale provided the basis for the expansion of universal jurisdiction from piracy to crimes of universal concern.

Currently, universal jurisdiction arises from the concept that some kinds of crimes are so heinous that shock all humankind and thus preclude any claims against extraterritoriality. In this regard, it has been asserted that:

> "universal jurisdiction [is] founded on the sheer heinousness of certain crimes, such as genocide and torture, which are universally condemned

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[618] Translated by FW Kelsey, (1925).

[619] *Ibid.*

[620] *Ibid.*

[621] See Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, claiming that Grotius' theory is the basis for universal jurisdiction for international crimes.

[622] See M. Itsouhou Mbadinga, "Le recours à la compétence universelle pour la répression des crimes internationaux : étude de quelques cas", 81 *Revue de droit international et de sciences diplomatiques et politiques* (2003), pp. 286-287.

> and which every state has an interest in repressing even in the absence of traditional connecting factors. . . . [T]hough subject to evolution, the roster of crimes presently covered by universal jurisdiction includes . . . genocide, torture, some war crimes, and crimes against humanity"[623].

Thus, universal criminal jurisdiction as it is currently conceived has gone beyond the original crimes of piracy and slave trade to include international crimes such as genocide, torture, war crimes and crimes against humanity that shock the conscience of humankind[624].

Concerns based on comity and international relations between States are often cited against the human rights enforcement benefits of universal jurisdiction. In looking ahead at the development, or rather the retreat of universal jurisdiction, it may be wise, rather than balancing the pros and cons, the support against the criticisms of the doctrine, to actually focus on a reasonable exercise and development of the doctrine[625]. That would mean that States making use of universal jurisdiction would follow certain principles regarding, for example, comity, requests for extradition, the ability and willingness of the State having stronger grounds of jurisdiction (e.g. based on nationality or territoriality) to assert jurisdiction over the offender.

ii. Measuring universal jurisdiction: advantages and critiques

As already discussed, the main rationale for the modern exercise of universal jurisdiction is based on the nature of the crime[626]. Universal criminal jurisdiction is claimed to be a tool for combating impunity and bringing perpetrators to justice. The advantages of relying on universal jurisdiction are plenty. For instance, it stands against safe havens for perpetrators of international crimes. In its criminal dimensions, universal jurisdiction is mostly acclaimed as an effective tool to fight impunity, secure accountability

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[623] Donald Francis Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction", 100 *American Journal of International Law* 142 (2006), p. 143.

[624] See e.g., ICTY, *Prosecutor v. Furundžija,* Trial Chamber, Judgment of 10 December 1998 (no. IT-95-17/1-T).

[625] See on this point also, Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015.

[626] Noora Arajärvi, "Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?", *Tilburg Law Review 16 (2011) 5-29,* p. 7.

and to fill in the gaps that international criminal tribunals leave[627] with regards to countries that do not prosecute crimes committed in their territories[628]. Universal jurisdiction can also be used as a means of prosecuting crimes that occur outside the territory of any State (i.e. piracy on the high seas) that would otherwise go unpunished[629].

The criticisms of universal jurisdiction refer to the risks that it poses and the scope of its exercise. For example, Judge Guillaume in his Separate Opinion in the *Arrest Warrant* case before the ICJ stated that universal jurisdiction can create "total judicial chaos" and "encourage the arbitrary for the benefit of the powerful, acting as agent for an ill-defended 'international community'"[630]. This view summarizes the main points of criticism of universal jurisdiction: a tool that powerful States may use without proper checks and balances.

2. Towards a victim-orientated approach: a civil dimension of universal jurisdiction?

In this part of the chapter, I investigate the enforcement of victims' reparation through the doctrine of universal jurisdiction. This doctrine, as explained above, is grounded in concepts such as the fight against impunity and accountability for certain crimes of universal concern. The key question as it pertains to the further development of universal civil jurisdiction is whether the foundation of the doctrine, in its criminal dimension, can be expanded to include a civil dimension.

In this perspective, I first address the broader doctrinal question of criminal punishment and reparation. Then I examine the intricacies of universal civil jurisdiction in

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[627] See Hays Butler, "The Doctrine of Universal Jurisdiction: A Review of the Literature", 11 *Criminal Law Forum* 353, 355 (2000), citing Daniel Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", 10 *Criminal Law Forum* 87 (1999), at 105 (concerning the limited scope of the Court's jurisdiction and arguing for an increased role of universal jurisdiction of national courts to complete the gaps of international institutions in prosecuting egregious crimes).

[628] See Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (2001). See International Council on Human Rights Policy, *Hard Cases: Bringing Human rights violators to Justice Abroad- A Guide to Universal Jurisdiction* (1999).

[629] See Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime", 29 *American Journal of Int'l Law 439* (Supp. 1935), p. 739

[630] *Arrest Warrant Case (Democratic Republic of Congo v. Belgium),* Judgment, *ICJ Reports* 2002, p. 43.

order to dwell upon the rationale underpinning the inclusion of a civil dimension in universal jurisdiction. I also consider whether the doctrine can be an effective tool for bridging the gaps of justice and providing an effective mechanism to enforce victims' right to reparation. The *fil conducteur* of my analysis is that the relationship between criminal and civil dimensions of justice, offenders and victims, criminal sanctions and civil remedies, needs to be aligned for the ultimate goal of justice to be attained.

A) Defining the civil dimension of universal jurisdiction

Universal civil jurisdiction, often also called universal tort jurisdiction[631], similar to that of universal criminal jurisdiction, does not require any jurisdictional link between the forum and the wrongful act[632]. It has been defined "as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern."[633]

The concept of universal civil or tort jurisdiction is less known and less common than its counterpart, universal criminal jurisdiction. In short, as the other side of the coin, universal tort jurisdiction refers to civil action taken against perpetrators of international crimes, in any forum, irrespective of where the crime was committed and the nationality of the offender or the victim[634]. While universal criminal jurisdiction is reserved primarily for international crimes (see above), universal civil jurisdiction has been claimed for gross human rights violations, wherever they may have occurred[635]. Thus, at the current print of international law, it is not possible to refer to a clearly circumscribed list of criminal

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[631] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., pp. 135 *et suiv.* In this chapter, I will use the terms "universal civil jurisdiction" and "universal tort jurisdiction" interchangeably.

[632] Donald Donovan, "Universal Jurisdiction - The Next Frontier?", 99 *American Society of International Law Proceedings* 123 (2005), p. 117.

[633] Menno T. Kamminga, "Universal Civil Jurisdiction : Is it Legal ? Is it Desirable?", 99 *American Society of International Law Proceedings* 123 (2005), p. 123.

[634] See generally on the concept of universal tort jurisdiction, Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015, pp. 135 *et seq.* and Donald Donovan, *Universal Jurisdiction - The Next Frontier?*, 99 *American Society of International Law Proceedings* 123 (2005).

[635] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015, p. 135.

conduct that may be subject to universal civil jurisdiction. In saying this, the State practice reviewed below will demonstrate some of the conduct subject to universal civil jurisdiction.

Concerning the presence requirement, beyond questioning whether it is permissible under international law, it does not seem that universal civil jurisdiction *in absentia* is desirable. In order to obtain enforcement of civil awards of reparation, a minimal territorial connection such as the mere presence of the perpetrator in the forum State during the proceedings[636] may be necessary, without the need for formal links such as residence or nationality[637].

As to the scope and reach of universal civil jurisdiction, State practice, as discussed below, demonstrates that victims may claim reparation under this doctrine against individual perpetrators - as it is shown by cases against individuals alleged to be guilty of war crimes during the former Yugoslavia wars; against corporations - as it is shown by diverse cases brought before United States courts[638]; and (with more difficulty due to claims of State immunity) against States- as it is shown by the recent cases against Germany[639].

B) Lawfulness of universal civil jurisdiction

In this context, a question arises as to the lawfulness of universal civil jurisdiction and whether such exercise of universal jurisdiction is permitted by international law. It has been rightly observed that a general international treaty allowing for universal civil jurisdiction is lacking[640]. It can be stated at this stage that, unlike universal criminal jurisdiction, there is not yet enough State practice and *opinion juris* to ground unequivocally the argument that customary international law allows for the exercise of

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[636] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., p. 135, n. 216.

[637] *Ibid*.

[638] See discussion of cases and references in the following section of this chapter.

[639] See the *Case concerning Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, Judgment, *ICJ Reports* 2011 and related national proceedings in Italy and Greece.

[640] Luc Reydams, "Universal Jurisdiction in Context", 99 *American Society of International Law Proceedings* 123 (2005), p. 118.

universal civil jurisdiction for the same crimes as those allowing universal criminal jurisdiction.

This study reviews further below some State practice in regards to universal jurisdiction and it will be made clear that international law has not yet reached a stage where universal civil jurisdiction is recognized under customary international law. Nevertheless, an argument has been made that: "It would make sense to assume that the exercise of universal civil jurisdiction is permitted in respect of the same unlawful conduct as universal criminal jurisdiction and that similar conditions apply" [641]; and that "[i]nternational law authorizes universal civil jurisdiction, in part because it operates as a less intrusive form of jurisdiction than universal criminal jurisdiction." [642] In a similar vein, in a concurring opinion to the United States Supreme Court Decision in *Sosa* v. *Alvarez-Machain*, Justice Breyer stated that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well" and that the exercise of universal civil jurisdiction is no more threatening than that of universal criminal jurisdiction[643].

In discussing the lawfulness of universal civil jurisdiction, Cédric Ryngaert posits that "the fact that only a limited number of states allow the exercise of universal tort jurisdiction is not fatal to the lawfulness of such jurisdiction under international law". He goes on to claim that "[t]hese states may not provide for universal tort jurisdiction because they prefer criminal justice solutions, rather than because they consider such jurisdiction to be internationally unlawful"[644]. With regards to whether universal jurisdiction is actually permissible under international law, the author concludes that although only a few States have actually exercised universal civil jurisdiction, there is no crystallised customary rule that prohibits universal civil jurisdiction[645]. Thus, by looking at the lawfulness of universal

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[641] Menno T. Kamminga, "Universal Civil Jurisdiction : Is it Legal ? Is it Desirable?", 99 *American Society of International Law Proceedings* 123 (2005), pp. 124-125.

[642] Beth Van Schaack, "Justice without Borders: Universal Civil Jurisdiction", 99 *American Society of International Law Proceedings* 123 (2005), p. 120.

[643] 542 U.S. 692 (2004), p. 763.

[644] Cédric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007) 3-60.

[645] *Ibid*.

civil jurisdiction from a perspective of whether it is prohibited (rather than permitted), it is argued that universal civil jurisdiction is allowed.

Be that as it may, it does not seem that universal civil jurisdiction (in relation to international crimes) is uniformly accepted under international law. Some States have expressed the view that, although international law recognizes universal criminal jurisdiction, it does not "recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law."[646]

In any event, at this early stage of the development of the doctrine under international law, the examination of individual States' practice is not of much help to defining the contours of universal civil jurisdiction. In the author's view, universal civil jurisdiction should be justified on reliance on principles of international law, such as the right of victims to receive reparation, which transcends the realm of international human rights law. It is in this perspective that attention is now turned to recent State practice and possible *rationales* that may justify adding a civil dimension to universal jurisdiction.

C) Rationales for adding a civil dimension to universal jurisdiction

It is appropriate at this juncture to examine State practice and possible rationales that could eventually underpin universal civil jurisdiction. Universal jurisdiction (in its criminal dimension) has strengthened its foundation pursuant to the principle of combating impunity and providing accountability for serious violations of international law[647] by allowing prosecution in any State of certain crimes - such as, for example, piracy, genocide, slave trade, war crimes, torture - that defy traditional boundaries of criminal

[646] Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

[647] *Cf.* Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988); Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* 28-29 (2001); Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press, 2005.

justice and which shock the conscience of humankind[648]. Hence, at first sight, to include civil dimensions in universal jurisdiction may seem inappropriate[649].

As explained above, universal jurisdiction for international crimes has developed pursuant to the rationale that some crimes are so heinous that any State can prosecute the perpetrator, no matter where he/she may be found[650]. This rationale, based on the heinous nature of the conduct, provides, it may be contended, a foundation for the development of the civil dimension of universal jurisdiction: the same rationale that supported the expansion of universal jurisdiction for "crimes of universal concern" could potentially justify the exercise of universal civil jurisdiction[651]. Thus, victims of crimes subject to universal jurisdiction would be able to claim reparation in any forum, without necessarily a jurisdictional link to the offender or the place where the heinous conduct took place.

The question as to how to transpose from a criminal dimension to a civil dimension of universal jurisdiction poses itself from theoretical and practical perspectives. As to the practical perspective, as discussed above, it has been argued that universal criminal jurisdiction contemplates a degree of civil recovery.

The link between the criminal and civil dimensions of universal jurisdiction is the heinous nature of the criminal conduct and the gravity of the crime, which exclude a territorial nexus[652]. In its civil dimension, universal jurisdiction can serve as an alternative for victims of international crimes to seek and obtain reparation. Furthermore, civil proceedings provide victims a chance to tell their stories and have their day in court. It is also important to bear in mind that civil remedies may serve as an independent means of

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[648] American Law Institute, Restatement (Third), *The Foreign Relations Law of the United States* (1987), section 404; see *also Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), Concurring Opinion of Justice Breyer.

[649] See Beth Van Schaack, "Justice without Borders: Universal Civil Jurisdiction", 99 *American Society of International Law Proceedings* 123 (2005).

[650] See discussion in the chapter above.

[651] Donald Donovan, "Universal Jurisdiction - The Next Frontier?", 99 *American Society of International Law Proceedings* 123 (2005), p. 117.

[652] Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., p. 135.

enforcing international norms proscribing defined criminal conduct, and as a means to give victims access to international criminal justice pertaining international crimes[653].

The civil dimension of universal jurisdiction is also a means by which the goal of putting an end to impunity and creating a culture of accountability may be achieved, a goal which was one of the driving forces behind the modern expansion of universal jurisdiction. Civil judgments have an important declarative function as identifying conduct which is condemned by the international community as a whole.

These above considerations are necessarily abstract and there certainly remain some open questions and challenges regarding the exercise of universal civil jurisdiction in practice and its further development in international law. It remains however that Courts exercising (universal) jurisdiction over civil claims for reparations will usually have to follow their procedural rules and domestic laws. In this regard, the above discussion regarding some technical legal aspects, e.g. statutes of limitations, may also apply to civil claims in relation to international crimes, depending on the laws of the forum State. Other relevant questions include, for example, the impact of claims of State or official immunity on the exercise of universal jurisdiction for international crimes and breaches of *jus cogens* norms, the grants of amnesties and the enforcement of judgments based on universal jurisdiction. While a detailed analysis of such questions is outside the scope of the present chapter, the review of State practice that follows will shed some light on how these questions have been treated in practice.

D) Recent State practice and possible rationales for a civil dimension of universal jurisdiction

Universal jurisdiction in its civil dimension has developed in the case law of some States. I now turn to review some recent and select State practice. The following analysis is meant to be illustrative rather than exhaustive, and is thus necessarily selective, with reference to some relevant cases.

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[653] See Linda Malone, "Enforcing International Criminal Law Violations with Civil Remedies: The US Alien Tort Claims Act," in *International Criminal Law*, Brill, 3rd ed., Vol. III, 2008.

The main country where something akin to a civil dimension of universal jurisdiction has developed is the United States. This is because in the United States, there are two statutes that have been interpreted to allow for the exercise of a sort of universal civil jurisdiction. The *Alien Tort Claims Statute* ("ATS")[654], from 1789, states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Additionally, the *Torture Victims Protection Act* ("TVPA") provides a cause of action for any victim of torture and extrajudicial killing, wherever the crime was committed[655].

The majority of cases that relied on the ATS concern corporate liability rather than individual civil liability[656]. Without purporting to pursue a detailed analysis of all cases that dealt with individual civil liability for international crimes, this study discusses the some relevant examples and highlights of the ATS jurisprudence with a focus on transnational tort litigation.

While in the past decades there has been a great number of cases relying on the ATS concerning torts committed outside the United States[657], a notable recent case before the Supreme Court of the United States has somewhat changed the panorama for ATS litigation. While not dealing with individual civil liability for international crimes (which is the paradigm of the present study), this case is worth discussing due to its impact on the development of universal civil jurisdiction before US Courts. Recently, in 2013, the United States Supreme Court decided the case *Kiobel v. Royal Dutch Petroleum*[658] which dealt

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[654] 28 U.S.C. § 1350 (2006) ("ATS").

[655] Pub. L. 102-256, 12 March 1992, 106 Stat. 73, in particular Section 2(a) of the TVPA.

[656] For a list of ATS cases concerning corporations, see Michael D. Goldhaber, "Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard", *UC Irvine Law Review* 3, 2013, Appendix A (list of cases compiled by Jonathan Drimmer concerning corporate cases).

[657] See *ibid.*

[658] 133 S. Ct. 1659 (2013). Not long after the Judgment of the Supreme Court was rendered, many scholars commented on it, see e.g. Janine M. Stanisz, "The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of Kiobel v. Royal Dutch Petroleum Co.," *Brook. J. Corp. Fin. & Com. L.* 5 (2010), 573 (for a commentary before the Supreme Court Judgment); Frank Cruz-Alvarez and Laura E. Wade, "The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch", *University of Miami Law Review* 65 (2010), 1109 (for a piece before the Supreme Court Judgment). For commentary on the Supreme Court Judgment, see e.g.: Ingrid Wuerth, "The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.", *American Journal of International Law* 107 (2013), pp. 13-26; Anthony J. Colangelo, "The Alien Tort Statute and the Law of Nations in Kiobel and Beyond", *Georgetown Journal of*

with allegations that Shell entities planned, conspired and facilitated extrajudicial executions, torture and crimes against humanity by Nigeria in the Niger Delta between 1992 and 1995. The case was based on the ATS.

One of the main issues in the case hinged upon the question of the extraterritorial nature of the ATS, and more specifically, whether the United States Courts can rely on the ATS to hear civil claims concerning human rights violations that have no connection to the United States, that is, the violations were not committed on United States soil, or by an American national or against an American victim[659]. Thus, under these parameters, this case fell squarely within the conception of universal civil jurisdiction. Although this case centred on *corporate* civil liability, which is not the focus of this study, it also has implications for the development of universal civil jurisdiction concerning international crimes committed by individuals.

The Supreme Court made a decision that has a negative impact on the development of universal jurisdiction civil claims under the ATS. The Supreme Court decided that the ATS could not be applied in civil suit cases for acts committed outside the United States; it

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International Law 44 (2013); Vivian G. Curran, "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.", 28 *Md. J. Int'l L.* 76 (2013), available at: http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/6; Humberto Fernando Cantú Rivera, "Recent Developments in Kiobel vs. Royal Dutch Petroleum: An Important Human Rights Forum In Peril?." *Cuestiones Constitucionales* 28 (2013), pp. 243-254; Angelica Bonfanti, "No Extraterritorial Jurisdiction under the Alien Tort Statute: Which Forum for Disputes on Overseas Corporate Human Rights Violations after Kiobel?." *Diritti umani e diritto internazionale* (2013), pp. 377-398.

[659] The questions presented to the Supreme Court of the United States, on appeal from the Second Circuit, were:

"1. Whether the issue of corporate civil tort liability under the Alien Tort treated by all other courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held." Petition for Writ of Certiorari at, Kiobel, 133 S. Ct. 1659 (No. 10-1491).

In the oral arguments phase, the Court ordered the Parties to argue the following point: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel* v. *Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.). See on this question: Vivian G. Curran, "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.", 28 *Md. J. Int'l L.* 76 (2013), available at: http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/6

thus closed the extraterritoriality door of ATS suits. According to the United States Supreme Court, claims under the ATS cannot be brought before federal courts in the United States for violations of the law of nations occurring within the territory of a sovereign State other than the United States[660].

It may be argued, based on the focused questions before the Court[661], that this interpretation of the ATS applies only to cases concerning torts for violations of the law of nations, and not to a treaty of the United States, as the second prong for the application of the ATS. It has also been argued that the "Court's misunderstanding has not completely erased the possibility of future claims involving foreign elements from being brought under the [ATS]. The Court left the door open for claims that sufficiently 'touch and concern' the United States"[662].

As regretful as this precedent may seem for the development of a civil dimension of universal jurisdiction cases – the United States, under the ATS, represented a valuable avenue for the development of universal civil jurisdiction – it is not the end of the road just yet.

I turn now to examine other cases from Europe. A recent example may be cited in defense of universal civil jurisdiction. In 2012, a Dutch Court in The Hague awarded reparation in the form of compensation to a Palestinian doctor who was imprisoned in Libya for allegedly infecting children with HIV/Aids. The claimant alleged that he was unjustly detained and tortured by the defendants. The claimant, born in Egypt, who resided in The Netherlands, sued 12 Libyan officials pursuant to a universal jurisdiction Dutch law[663]. The plaintiff sought both material and non-material damages[664].

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[660] See *Kiobel* v. *Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

[661] See "2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held." Petition for Writ of Certiorari at, Kiobel, 133 S. Ct. 1659 (No. 10-1491).

[662] Anthony J. Colangelo, "The Alien Tort Statute and the Law of Nations in Kiobel and Beyond", *Georgetown Journal of International Law* 44 (2013), p. 1329.

[663] *El-Hojouj c*. *Amer Derbas* et al., 21 mars 2012, Case No. 400882/HA ZA 11-2252. See also, "Dutch court compensates Palestinian for Libya jail", BBC news, 28 March 2012, available at: http://Ibid..bbc.co.uk/news/world-middle-east-17537597 For a commentary, see Eugene

This case, decided by a first instance court in The Hague, proceeded on the basis that, as the case was of an international character, it had to be determined whether the Dutch court had jurisdiction. The alleged basis for jurisdiction was Article 9(c) of the Code of Civil Procedure. This provision states that jurisdiction is found when the case is "sufficiently connected with the Dutch legal order" and when "it would be unacceptable to ask of the plaintiff that he bring the case before a foreign court". The Court found jurisdiction on the basis that it was unacceptable to require the claimant to take the case before a court in Libya, considering the circumstances in Libya at the time of the initial filing of the case (in July 2011), and the claimant was a resident in The Netherlands[665].

While this is a judgment of a first instance court without much substantive analysis, it serves as an insightful and recent example of the use of universal civil jurisdiction through domestic laws and procedures – in this case, the crimes were committed abroad, the victim and alleged perpetrators were not nationals of the forum State. The Dutch court looked at two important aspects in order to found its jurisdiction: the first one is the fact that the claimant was a resident in The Netherlands, providing an important link with the forum State and a procedural basis upon which to found jurisdiction. The second important aspect of this case is the fact that the Court found that the criterion of "unacceptable to ask the claimant to bring the case in a foreign court" was met. These aspects point to two potential guiding principles for the development of universal civil jurisdiction in a sensible manner and with respect for certain international legal principles such as international comity. The first is the existence of a sufficient link with the forum State (e.g. a residency requirement); the second is the notion of "forum of necessity", where the claimants allege that their case could not be heard in another jurisdiction.

On this latter point, before turning to examine other important cases, it should be noted that the *Institut de Droit International*, in a recent report (2015) concerning universal

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Kontorovich, "Kiobel (IV): Precedent-setting Dutch Civil Universal Jurisdiction Case", *Opinio Juris*, 28 March 2012, available at: http://opiniojuris.org/2012/03/28/precedent-setting-dutch-civil-universal-jurisdiction-case/

[664] The analysis of this case is based on an unofficial translation of the Judgment (original in Dutch).

[665] *El-Hojouj c. Amer Derbas* et al., 21 mars 2012, Case No. 400882/HA ZA 11-2252.

civil jurisdiction for international crimes, provides a detailed review of State practice (concerning claims against individuals, corporations and States), and posits that

> "l'évolution du droit international européen est sensible à l'opportunité d'une certaine ouverture des tribunaux aux litiges portant sur des graves violations des droits fondamentaux même en l'absence d'un for fondé sur les règles ordinaires. L'existence d'un for de sauvegarde en tant que « for de nécessité » est de tradition dans plusieurs pays européens. Cependant, si l'opinion publique est plutôt favorable à un tel for, les positions politiques sont plus reservés"[666].

In reviewing the practice of States in Europe, including France and The Netherlands, as well as Canada, on the question of the applicability of the "forum of necessity," the report notes that:

> "La question n'est pas, dès lors, de savoir si des intérêts nationaux sont en jeu au point que le pouvoir juridictionnel doit être à disposition afin de fournir un remède à des crimes contre l'humanité commis par les «ennemis de l'humanité». La question est plutôt de savoir si les intérêts de la communauté internationale militent pour qu'un tel remède soit fourni par une juridiction appropriée de telle manière à ce qu'aucun « havre sûr » ne subsiste qui pourrait en fin de compte opérer comme un écran protecteur à l'encontre des demandes légitimes des victimes de torture, de génocide et d'autres atrocités de ce genre. Afin d'éviter une telle issue, le droit international devrait assurer l'existence et le bon fonctionnement de tribunaux aptes à en juger afin de protéger les victimes face à un déni de justice. Les quelques procès qui ont été menés ont permis, en raison de leurs effets désastreux sur l'image des sociétés visées, de provoquer une prise de conscience débouchant sur une approche de prévention par rapport aux droits de l'homme"[667].

Concerning cases relating to the Balkans war, in addition to cases brought before domestic courts and mechanisms in the Balkans reviewed above, domestic courts outside

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[666] *Institut de droit international, Commission I*, "La compétence universelle civile en matière de réparation pour crimes internationaux - Universal civil jurisdiction with regard to reparation for international crimes", Rapport par Andreas Bucher, p. 22, available on the site of the *Institut* (session of 2015, Tallinn) at: http://justitiaetpace.org/annuaire_resultat.php?id=16 (last accessed 10 May 2016).

[667] *Institut de droit international, Commission I*, "La compétence universelle civile en matière de réparation pour crimes internationaux - Universal civil jurisdiction with regard to reparation for international crimes", Rapport par Andreas Bucher, p. 26, available on the site of the *Institut* (session of 2015, Tallinn) at: http://justitiaetpace.org/annuaire_resultat.php?id=16 (last accessed 10 May 2016).

Bosnia and Herzegovina[668] have heard reparation claims from victims of the crimes perpetrated during the war[669]. Interestingly, such suits were mainly brought against alleged individual perpetrators. In the United States Courts[670], in the 90's, there were two cases brought against Radovan Karadzić, which concluded in default judgments[671].

These cases concerned civil suits brought by two individuals who claimed to be victims of the crimes allegedly perpetrated by Mr. Karadzić. The alleged crimes for which compensation was being sought included: "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death"[672]. In the first instance district Court, the claims were dismissed on the basis of lack of jurisdiction under the ATS (which the plaintiffs used as a basis of their action).

Nevertheless, the Second District Court reversed the decision of the first instance Court and found that there was subject-matter jurisdiction under the ATS for a violation of the law of nations committed by a non-state actor, such as the defendant, Mr. Karadzić. The Court thus decided that individual non-state actors could be held liable for crimes such as genocide and war crimes[673] and that individuals could bring a suit against the perpetrator

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[668] These cases are very detailed in the chapter by Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, pp. 167-175.

[669] See Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, pp. 484-485.

[670] Commentators have affirmed that "'[. . . it] appears these cases, when taken together with other anti-impunity efforts around the world, are also helping to create a climate of deterrence and [to] catalyze efforts in several countries to prosecute their own human rights abusers': Sandra Coliver, Jennie Green, and Paul Hoffman, "Holding human rights violators accountable by using international law in U.S. courts: Advocacy efforts and complementary strategies", 2005 *Emory International Law Review* 19 (1): 174–175. For a commentary from the representative of some of the victims, see Catherine MacKinnon, "Remedies for war crimes at the national level", 1998 *The Journal of the International Institute* 6. http://hdl.handle.net/2027/spo.4750978.0006.103 Accessed on 12 February 2015.

[671] *Kadic v. Karadzic*, 70 F.3d 232 (2d. Circ. 1995), cert. denied, 518 US 1005 (1996). For a commentary, see David P. Kunstle, "Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?", 6 *Duke Journal of Comparative & International Law* 319-346 (1996).

[672] Cf. *Kadic v. Karadzic*, 70 F.3d, 232.

[673] *Kadic v. Karadzic*, 70 F.3d, 241-43.

for redress for such violation. Given the decision of the Court, the jury awarded a total of US$ 745 million to the 14 plaintiffs (US$ 265 million compensatory damages and US$ 480 million punitive damages)[674].

Similarly, in 1998, a case was brought before a US court by four Bosnian Muslim plaintiffs against NikolaVucković, a Bosnian Serb soldier[675]. The claimants sought compensation and punitive damages for allegations of crimes committed against them during the course of the conflict. The claimants alleged they were victims of arbitrary detention, torture and abuse allegedly committed against Bosnian Muslims and Croats, and the forced relocation of Bosnian Muslim and Croat families living in the municipality of Bosanski Samac in Bosnia and Herzegovina. The Court found for the claimants and awarded US$ 10 million each in compensatory damages and US$ 25 million each in punitive damages[676].

These cases were remarkable having been brought to domestic courts even before the ICTY had custody of the accused. As one of the claimants against Mr. Karadzić stated: "verdict was not about monetary damages, but about gaining recognition of the acts committed by Bosnian Serb ultra-nationalists"[677]. The question then is whether the symbolic value of the judgment is sufficient when the enforcement of the award does not follow. This question is relevant as there were many other accused in the Balkans wars but there weren't as many civil suits brought in domestic courts – why was this precedent not followed? There are certainly many hurdles to bring cases of this magnitude. In the end, when examining civil suits before domestic courts, it is important to bear in mind what is the ultimate goal of bringing these cases as often monetary damages do not get enforced.

In addition to cases brought before the United States Courts, there have also been other cases brought before Courts in Europe, including in Serbia. The first case in Europe

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[674] *Kadic v. Karadžic*, No. 93 Civ. 1163, judgment (S.D.N.IBID.. August 16, 2000).

[675] *Mehinovic, Kemal, et al. 2009. v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

[676] *Mehinovic, Kemal, et al. 2009. v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

[677] David Rohde, "A Jury in New York Orders Bosnian Serb to Pay Billions, *New York Times,* 26 September 2000, available at*:* *http://Ibid..nytimes.com/2000/09/26/world/jury-in-new-york-orders-bosnian-serb-to-pay-billions.html*

in relation to the Balkan wars, in courts outside the region, took place in France, before the *Tribunal de Grande Instance.* The case concerned allegations of crimes committed during the Bosnian war by Bosnian Serb defendants, Radovan Karadzić and Biljana Plavsić. The Court ordered R. Karadzic and B. Plavsic to pay € 200,000 as reparation to the victims[678].

Another case was brought before Norway courts. A series of decisions from the District Court of Oslo (lower court) culminated with the 2010 decision of the Supreme Court of Norway's finding that former member of the Croatian Armed Forces, Mirsad Repak, who was a guard in the Dretelj detention camp in Bosnia and Herzegovina, and had been allegedly involved in the arrest and unlawful detention of civilian non-combatants, including allegations of torture. The defendant was found guilty and sentenced to imprisonment, and the victims were awarded compensation from 4.000-12.000 euros[679].

Commenting on the series of decisions in Norway, Frederiek de Vlaming and Kate Clark rightly posited that:

> "The case against Repak was the first of its kind in Norway. It demonstrates how judicial reasoning succeeded in weaving together domestic and international legal provisions that came into being at different times but were nonetheless aimed at protecting the same interests. Moreover, the extensive investigations that led to the indictment were done by the Norwegian prosecutor in cooperation with the Serbian war crimes prosecutor, and they involved the statements of at least 211 former detainees of the Detelj camp, almost all the prisoners who were detained in the camp at the time. The above points taken together show once again that the criminal prosecution of individual war crimes perpetrators can bring benefits to more than the small group of witnesses/victims involved in the case: They can help facilitate the intermeshing of national and international law to achieve broader jurisdiction over war criminals, and such cooperation between national and foreign prosecutors signals that

[678] See Ann Riley, 2011, "France court awards Bosnia civil war victims damages for injuries", *Jurist*, 14 March. http://jurist.org/paperchase/2011/03/france-court-awards-bosnia-civil-war-victimsdamages-for-injuries.php, and Irwin, Rachel, *Civil actions offer some closure for Bosnia victims*, Institute for War and Peace Reporting (IWPR), 26 April. http://iwpr.net/report-news/civil-actions-offersome-closure-bosnia-victims, cited in Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 170.

[679] For all judgments, see *The Public Prosecuting Authority vs Mirsad Repak*, Oslo District Court case no: 08-018985MEDOTIR/08, 2 December 2008; Borgarting Lagmannsretten, Court of Appeal, Judgement of 12 April 2010 (case summary at International Red Cross database on Humanitarian Law available at: http://Ibid..icrc.org/customaryihl/eng/docs/v2_cou_no_rule99. Supreme Court of Norway Judgement, case no. 2010/934, 3 December 2010).

crossing a border may no longer be enough to save a war criminal from prosecution"[680].

Similar to the Norway decisions, in Sweden, a district Court of Stockholm convicted another Dretelj camp officer, Mr Ahmet Makitan, of participation in the abuse of 21 Serb civilian prisoners and he was sentenced to 5 years in prison. In addition to the prison sentence, the defendant was also ordered to pay Krona 1.5 million (approximately € 170,000) in the form of compensation to victims[681].

Another interesting example currently under development refers to the case against Hissène Habré, a former Chadian dictator, who has been living in Senegal for decades. After much delay in prosecution, in 2016 Extraordinary African Chambers in the Senegal court system (created to prosecute crimes allegedly committed during Habré's regime in Chad) convicted Mr. Habré of torture, crimes against humanity and torture for life imprisonment[682]. In 2016, he was convicted for crimes against humanity. This case is worth mentioning since reparations proceedings are happening within the same Special Chamber, and within the same proceedings that tried and convicted Mr. Habré. At the time of writing, the judgment concerning reparations is under deliberation, but it has been reported that should there be a reparations award this would be against Mr. Habré, which would thus recognize his civil liability towards victims, in addition to his criminal responsibility, and within the same proceedings.

It is relevant to note that a year earlier, in 2015, twenty top security agents were convicted of murder, torture, kidnapping, and arbitrary detention perpetrated during the Habré dictatorship and sentenced to pay, along with the Chadian Government, US$125

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[680] Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 171.

[681] Stockholms Tingsrätt (Stockholm District Court), case no. B 382-10, 8 April 2011. See also, International Review of the Red Cross, Volume 93, Number 883, September 2011, English language summary, available at: http://Ibid..icrc.org/eng/assets/files/review/2011/irrc-883-reportsdocuments.pdf .

[682] See https://Ibid..theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal

million in reparations to more than 7.000 victims. Symbolic measures such as the construction of a monument and a museum to honour the victims were also ordered[683].

These examples of cases across the United States and Europe demonstrate that domestic courts, even in States outside the region, have indeed played a role in the adjudication and award of reparations for victims of international crimes. It is also interesting to note that victims turned to foreign courts often after it had become clear that they would not be able to settle their case with the authorities[684]. This is an important example of the argument that State and individual responsibility for reparation for international crimes are not mutually exclusive. While on doctrinal and symbolic levels the Court's order on reparations is very important, a year after the order, it is reported that reparations were still not implemented. This highlights how there is still a disconnect between theory and practice in reparations for international crimes.

E) Desirability, advantages and criticism of a civil dimension for universal jurisdiction

Having discussed the scope and lawfulness of universal civil jurisdiction under international law, based on State practice, it is important to turn attention to the advantages and downfalls of a civil dimension of the doctrine. The question to be asked is why States may wish to assert civil jurisdiction for crimes committed abroad, to non-nationals? This section highlights many of the underlying questions of adding a civil dimension to international justice: what features make it "civil"? What precisely is the difference to "criminal"? Why is this distinction useful and what are the contrasts with a criminal dimension (e.g. burden proof, procedural status, duties of Judges? In discussing the advantages and disadvantages of a civil dimension of universal jurisdiction, some of these inquiries are touched on.

[683] See https://Ibid..hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture

[684] Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 174.

These questions have been dealt with in detail by Ryngaert in his exhaustive analysis of universal tort jurisdiction, balancing the advantages and issues raised by universal tort jurisdiction[685]. The present section briefly weighs the advantages and disadvantages of universal civil jurisdiction in order to discuss the desirability of using universal civil jurisdiction as a means of claiming reparations for international crimes, the central question of this thesis.

Arguments in favour of universal tort litigation include the fact that it is a victim-orientated approach in the aftermath of mass atrocities. This means that victims may initiate proceedings (rather than prosecutorial bodies), they have control over the proceedings, they have their day in court and their voices and stories are heard (which can be a form of healing). Civil actions controlled by victim plaintiffs could also be effective in preserving the collective memory[686].

Another advantage is that the involvement of the State is limited in civil suits. This might work to preserve foreign relations concerning extraterritorial litigation, since "the greater involvement of the State in criminal prosecutions appears to be more likely to produce adverse effects on the conduct of foreign relations than the adjudicatory practice of civil judges"[687].

It may also be argued that universal civil jurisdiction complements the goals of international criminal justice, of which universal criminal jurisdiction is a tool. Civil awards may also bear a sanctioning effect, especially with the award of punitive damages, which, in addition to repairing, may also foster punitive goals. As to the deterrent effect which universal criminal jurisdiction (and international criminal justice in general) seek to attain, universal civil jurisdiction, through the award of reparation to victims, may also

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[685] Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 6-17.

[686] See Jose E. Alvarez, "Rush to Closure: Lessons of the *Tadić* judgment", 96 *Michigan Law Review* (1998), pp. 2101-2102.

[687] Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 7-8.

contribute to this goal, where individuals might be concerned with civil suits, and losing their assets[688].

As to criticisms and disadvantages of universal jurisdiction, the first one to be mentioned is the difficulty in enforcing judgments. Freezing assets and actually obtaining compensation for victims are not always straight-forward. Another difficulty is that of gathering evidence (although the burden of proof is less stringent in civil suits than in criminal prosecutions), for crimes committed elsewhere might lengthen proceedings or make it difficult for victims to actually make use of universal civil jurisdiction. In this regard, for example, in relation to civil suits brought against Mr. Karadzić in the United States and more recently in France, the Institute for War and Peace Reporting states that while victims are unlikely to ever receive the payments, this "does not diminish the enormous symbolic significance of these decisions"; such cases "contribute to the growing body of State practice relevant to the implementation of the right to reparation for violations of International Humanitarian Law"[689].

Another criticism is related to the private nature of civil suits and the community condemnation that international crimes call for. It may be argued that because universal civil jurisdiction does not involve prosecution and punishment, only private interests are pursued rather than community interests.

It has furthermore been claimed that, especially in regards to the exercise of universal civil jurisdiction as it relates to corporations, it could impinge on a foreign nation's prerogative to "regulate its own commercial affairs" and "affect much needed foreign investment in host countries"[690].

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[688] See however Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 11-12 stating that "it is no doubt true that universal tort litigation may hardly deter future human rights violations", p. 12.

[689] Rachel Irwin, *Civil Actions Offer Some Closure for Bosnia Victims*: *Huge damages demanded of perpetrators unlikely to be recovered, but the judgements do provide a degree of justice for the victims*, cited in Nuhanovic Foundation, *Center for War Reparations*, available at: http://Ibid..nuhanovicfoundation.org/en/reparations-cases/france-tribunal-de-grande-instance-kovac-vs-karadzic-march-2011/ (last accessed on 10 May 2016).

[690] See Supplemental Brief of the Governments of the Kingdom of the Netherlands and the United Kingdoms of Great Britain and Northern Ireland as *Amici Curiae* in support of neither party, *Kiobel v. Royal Dutch Petroleum Co.,* 133 S Ct 1659 (2013) (No 10-1491).

Having briefly discussed some of the reasons invoked in favour and against the exercise of universal jurisdiction, I will now review some recent State practice using universal civil jurisdiction in various States. This review is not intended to examine whether or not customary international law has formed in relation to universal civil jurisdiction for (certain) international crimes or to provide an exhaustive review of cases that have decided in favour or against universal jurisdiction. The following review is intended to illustrate the rationales and modalities of application of universal civil jurisdiction. It is also, and principally, intended to demonstrate whether universal civil jurisdiction might serve as a tool for victims to claim civil redress for international crimes where the crime was committed in another State. It also serves to argue for a legal basis for the claim of universal civil jurisdiction.

VI. ASSESSING UNIVERSAL CIVIL JURISDICTION AS A WAY TO SEEK REDRESS FOR VICTIMS OF INTERNATIONAL CRIMES

Certain criminal conduct is so heinous that it shocks the universal conscience of mankind and it affects the international community as a whole, which acts to repress the criminal conduct and punish the offender. It still remains, however, that often heinous conduct leaves victim(s) grieving the consequences thereof. Their grievances are rooted in the same conduct that prompted the juridical conscience of humankind to punish the offenders. Universal civil jurisdiction, on a normative level, offers the possibility for justice for international crimes not to be solely centred on the trial and punishment of the perpetrators of the offence, but also to take into account the internationally recognized right of victims to receive reparation.

The right to reparation transcends the realm of international human rights law and is established under general international law and, more recently, under international criminal law, as previously discussed. Offenders and victims are the cause and consequence of one another; the punishment of the offender cannot be oblivious to the consequences of the criminal act for which the offender is being punished.

While universal civil jurisdiction may provide an alternative avenue on a normative level, at the current print of international law, it is still not widely accepted. As well, customary international law has not crystallized to a rule of universal civil jurisdiction for international crimes. Nevertheless, as discussed, State practice reviewed above demonstrates that there is an emerging recognition of some form of universal civil jurisdiction, despite the recent retreat in the United States. At a minimum, it has been demonstrated that there is no customary international law prohibiting universal civil jurisdiction. If one applies the *Lotus* principle described above (if universal civil jurisdiction is not prohibited under international law), then States can exercise it.

In the wake of heinous conduct, the international community should, in addition to punishing the offender, have victims' rights at heart. In this sense, the criminal and civil dimensions in the aftermath of an international crime cannot be completely dissociated. In its civil dimensions, universal jurisdiction can prove to be an effective alternative model to enforce the right of victims to receive reparation. This is so because often claiming reparation under the domestic courts where the crime occurred can prove to be difficult, especially if the judicial system of the State concerned has fallen or if the offender is no longer in the territory where the crimes were committed, as discussed in this chapter. Nevertheless, the time is not yet ripe for affirming that universal jurisdiction can be exercised to pursue claims of civil redress, despite the progress in this direction.

As demonstrated by some State practice, universal civil jurisdiction in relation to international crimes could be further developed by taking into account the doctrine of "forum of necessity", which is in line with the notion of ensuring that victims have an avenue to claim a right to reparation from perpetrators and requiring some link between the alleged perpetrator and the forum State.

SUMMARY AND CONCLUSIONS

Victims of international crimes have always existed; yet, recently there have been many developments with regards to reparation for victims. Historically, the notion of justice for victims has evolved in international criminal law: from its inception, where justice for victims meant the criminal accountability of perpetrators, to a more contemporary notion of justice, one that includes a more active role for victims in the proceedings against the accused and the right to claim reparations directly from the perpetrator. From the inclusion of the right to reparation in international criminal tribunals, to the creation of administrative mechanisms, to domestic cases concerning reparations for international crimes, international criminal justice has been moving away from a purely criminal dimension, focused on retribution, to the inclusion of a civil dimension. This emerging new dimension of international criminal justice raises many questions, including a fundamental one concerning whether international criminal justice should have a dimension for reparation for victims. This dissertation has attempted to flesh out the meaning and scope of the civil dimension of international criminal justice as it pertains to reparations, and its application in different frameworks. This conclusion aims to bring together the key themes and research questions discussed in this dissertation as well as offer some findings and recommendations.

1. Goals of dissertation and summary of research questions

Before turning to some findings, critiques and recommendations, it is important to recall the goals of this dissertation as well as the focused researched questions it attempted to address. As such, in this study, the primary goal was to assess the civil dimension of international justice by examining the fabric of avenues for reparations for victims of international crimes. In this sense, this study offered a fresh analysis of reparations within the realm of international criminal justice, by going beyond the analysis of only the position of international criminal tribunals[691], and conceiving international criminal justice

[691] See other studies that address the question of reparation for international crimes from the perspective of international criminal tribunals which were fundamental to the development of the present study: Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*. Brill, 2010; J. Wemmers, "Victim Reparation and the International Criminal Court", *International Review of*

as a broader enterprise composed of international courts, administrative mechanisms and domestic courts. It is also recalled that the broader theme of this study – reparations for international crimes – is incredibly vast and rich, branching out into diverse research areas. The goal of this study was thus not to produce an exhaustive, all-encompassing assessment of reparations for victims of international crimes. Rather, it focused specifically on the development of reparations in international criminal justice within three frameworks: international trials and processes; administrative mechanisms linked with judicial processes, through the lens of the TFV; domestic civil litigation before courts. This study is thus, by its very purpose, necessarily selective in its treatment of the various interconnected issues.

The analysis in this study hopes to contribute to the development of the debate concerning reparations for victims of international crimes through its unique methodological approach: a triad of frameworks that assess reparations at two levels, the international and national levels, navigating from international criminal tribunals and administrative mechanisms to national courts. The advantage of this approach is that it paves the way for a holistic and all-encompassing analysis of reparations in international criminal justice to answer the question posited, that is, whether a mixture of criminal and civil dimensions makes sense in international criminal justice, and in the affirmative, how international criminal justice should develop in this regard.

This study fits within other academic and scholarly efforts that question and analyze the role of reparations in international criminal justice, and ultimately the relationship between punishment and reparation; victims, the offender and the community[692]; the interconnection and cross-fertilization of different fields of international law which deal with responses to mass atrocity; and the meaning of justice in this context[693]. It proposes a fresh analysis of these questions in an attempt to contribute to the academic debate in these fields.

Victimology 16, no. 2 (2009), 123; Frédéric Mégret, "The International Criminal Court Statute and the Failure to Mention Symbolic Reparation", *International Review of Victimology* 16, no. 2 (2009), 127-147.

[692] Be it the international community or the community where the international crime took place.

[693] See Chapter 1.

In this light, this study focused on some key research questions in relation to reparations for international crimes as applied in international justice. Specifically, the overarching research questions that this study offered an analysis are:

- Should international criminal justice be concerned with reparation for victims of international crimes? Specifically, is the blend of civil and criminal dimensions a desirable model in international criminal law, and if so, why?

This overarching research inquiry is interconnected with additional related research questions, which were generally addressed in specific chapters of this study and they all formed a single fabric and contributed to the analysis of the main research inquiry. The related sub-questions addressed in this study were as follows:

- Which justice theories provide the theoretical framework for the civil dimension of international criminal justice? What is the legal basis of a legal duty of reparation on individual perpetrators? Is the individualized approach to reparation always better and more progressive than a State-based approach to reparation? This was the focus of chapter one.

- What is the scope and content of a duty to repair for individuals? To what extent can principles and the case law on the duty of States to repair inform the duty to repair for individuals? These questions were examined in chapter two.

- Are international criminal trials compatible with the adjudication and awards of reparation for international crimes? How can the civil dimension of international criminal justice operationalize within the setting of international criminal tribunals? How do different international/hybrid courts and tribunals compare and contrast in regards to reparations for victims? Chapter three examined the operationalization of the civil dimension of international criminal justice within different international criminal tribunals.

- Should reparations for international crimes be the object of another mechanism, such as an international administrative mechanism (linked with a judicial mechanism)? What role can international administrative mechanisms play in relation to reparations for

victims of international crimes? These questions were the focus of chapter four which provided a discussion through the lens of the ICC Trust Fund for Victims as a case study.

- What role should domestic courts play in relation to reparations to victims of international crimes? Are domestic courts better equipped to deal with reparations for international crimes? Can the doctrine of universal jurisdiction include a civil dimension? Chapter five addressed the role of domestic courts in the adjudication and award of reparations through case studies, including a discussion of the principle of universal civil jurisdiction.

On the basis of the foregoing analysis, the thesis proposed in this study is that international criminal justice has evolved from a purely offender-oriented outlook, where the focus was on punishment and retribution, to one that includes a (civil) dimension for victims. The analysis in this study has however demonstrated that this dimension has not met without difficulties. From a normative, almost utopian perspective, it is argued that international criminal justice should include a civil dimension for victims, one that includes reparations for international crimes. Nevertheless, much still needs to be done before reparations can be said to be fully integrated in international criminal justice. This conclusion addresses some recommendations moving forward concerning how this civil dimension should develop. I claim that in the development of a civil dimension of international criminal justice, ideology and notions of justice are, in practice, overshadowed by the reminiscence of the historical development of international criminal law, focused on retributive goals and remedies.

Reparations for victims of international crimes should develop in a holistic manner, where national and international mechanisms are interconnected and feed off each other, and where national courts assume a crucial role in the award of reparations for victims, influenced by developments at the international level; or as Luke Moffett argues, "a victim orientated complementarity"[694]. It is also claimed that the individualized approach to reparations for international crimes, which forms the proposed paradigm and is the focus

[694] Luke Moffett, *Justice for Victims before the International Criminal Court,* Routledge, 2014, especially chapter 6.

of this research, is not always better than other approaches such as State-based reparations. It is purely complementary, and not mutually exclusive.

The basis for this assessment started with theoretical and conceptual chapters dealing with theories of justice and other fundamental concepts. This study then proceeded with an analysis of three different frameworks for reparations for victims of international crimes, focusing on international criminal justice at the international level (first framework) [695], administrative mechanism (TFV) linked with international criminal process[696] (second framework) , and finally, international criminal justice at the national level, including the notion of universal civil jurisdiction (third framework)[697].

In order to assess systems in place and make recommendations for the development of reparations in international law, this study followed interconnected methodologies that together contributed to the overall aim of the study. It first followed a theoretical methodology to lay the foundations for the discussion of the role of reparations in international law. It also followed a case study methodology in various parts of this study as a means to address specific questions in the study, and draw lessons from specific cases. For example, it addressed the question of State responsibility and reparation through the lens of a case study of an analysis of the jurisprudence of the Inter-American Court of Human Rights (in chapter 2). In chapter 5, on the role of domestic courts in the adjudication and award of reparations for victims of international crimes, this dissertation looked at a case study concerning reparations in the aftermath of the Bosnian war.

In the first introductory part, this study discussed, in chapter 1, theories of justice and the dichotomy between punishment and reparation, especially as it pertains to international crimes. Therein, it analyzed the different aims pursued by punishment of the offender and reparations for victims and whether these aims can converge. It also provided an overview of retributive and restorative or reparative justice theories. It examined the evolution of reparations under international law, starting from an inquiry of international responsibility, from State responsibility to individual criminal responsibility, and the right to reparations

[695] See Chapter 3.

[696] See Chapter 4.

[697] See Chapters 5 and 6.

under other fields of international law. It then assessed the role of reparations under international criminal law, thus laying the theoretical foundation for this study. This chapter assessed theories of justice to appraise a purely criminal function of international justice and plant the theoretical grounds of the question of this thesis, that is, whether international criminal justice can include a civil dimension.

In the same vein, in chapter 2, this study looked at reparations from a State responsibility perspective. In this respect, it examined State responsibility to pay reparations in the realm of human rights law and its distinctions with individual criminal responsibility. This study then looked at the trailblazing jurisprudence of the Inter-American Court of Human Rights as a precursor of enforcing claims for reparation at the state level, in the human rights fields. This case study is significant as it portrays how the Court has dealt with questions such as collective reparations.

The substantive discussion of the study followed three intertwined analytical frameworks. The first legal framework, in chapter 3, discussed international criminal law at the international level, navigating through the distinct international/ hybrid criminal tribunals, discussing the "evolution" of international criminal justice from a focus on purely criminal trials to the inclusion of a civil dimension for victims. It then compared the existing systems in this regard, by positioning them on a spectrum as it pertains to the treatment of reparation for victims. At one end of the spectrum are the ICTY and ICTR, and the hybrid Special Court for Sierra Leone, where victims cannot claim reparations within the international criminal process. In the middle of the spectrum is the ECCC where victims can obtain collective symbolic reparations. At the opposite end of the spectrum lies the ICC where victims have wide-ranging rights, from participation in various stages of the proceedings to claiming forms of reparation directly from the accused. On the basis of this comparative analysis of different institutions, an assessment can be made regarding a criminal function of international justice and whether or how reparations can be weaved into the process.

In the second legal framework, also looking at international criminal justice and reparations at the international level, this study examined a model of administrative mechanisms, a trust fund, linked to a judicial process, the TFV at the ICC, to evaluate the contribution of such avenue for victims to obtain reparations for international crimes that

they have suffered. This chapter addressed the trailblazing example of the TFV at the ICC, its mandate, its activities thus far, and its role, especially in light of the first Judgment of the ICC concerning reparations for victims in the DRC[698]. It assessed whether an administrative mechanism such as a trust fund, connected with a judicial institution, is a feasible avenue for victims to obtain reparation for international crimes.

In the third legal framework, at the national level, the focus was on domestic mechanisms, and specifically reparation claims before domestic courts. Chapter 5 thus analysed the role of domestic courts in adjudicating reparation claims, the challenges and rationales for reverting to national courts and mechanisms to claim reparations for international crimes. To address these questions, the first focus was on a case study of reparation claims before national mechanisms in the aftermath of the Bosnian war so as to flesh out some important aspects of the issue. The analysis then focused on the concept of universal jurisdiction applied in the civil dimension (as opposed to its criminal dimension) and addressed whether it is permissible under international law for reparations for victims, the pros and cons of using the concept for reparation claims pertaining to international crimes, and some recent practice in this regard.

2. Assessment and critiques

In the present study, having examined different frameworks for reparations for victims of international crimes, a preliminary assessment can be made regarding the current state of affairs. This assessment is made through some general remarks of findings and then some more specific assessments. Critiques and recommendations will follow.

By contrasting different judicial mechanisms, both at the national and international levels, some conclusions can be drawn. First, on a theoretical dimension, justice, in the aftermath of mass international crimes, is evolving to have a broader meaning, one that encompasses retribution to the offender, and reparation for their victims. Theories of justice – retributive and reparative justice – meet in the design of international criminal justice. A trend is indicating that punishment of the offender is no longer the sole and unique objective of international criminal justice. Similar to the manner in which

[698] Decision on Reparations. See in more detail, Chapter 3.

international law evolved in order to bring *individual* perpetrators to justice to be tried for their crimes, the way is (albeit slowly) being paved for victim redress for international crimes both at national and international levels.

Be that as it may, there are still some inconsistencies and uncertainties in this emerging dimension. At the current print of international criminal justice, the spectrum of how international courts and mechanisms treat victims and reparations is still wide-ranging, from no possibilities of claiming reparations, to a system of reparation that bears the potential of being meaningful. The same is true about national court proceedings and mechanisms.

At the beginning of this study, the question was whether the time is ripe for the inclusion of reparations for victims in international criminal justice, or whether reparations should be reserved to other areas of law. As examined, limiting reparations claims to the realm of State responsibility and human rights law leaves a gap where victims of international crimes may find no forum to make their claim. It has been demonstrated that while international human rights law can be informative to the development of international criminal justice as it pertains to reparations for victims, human rights law and State responsibility mechanisms cannot be directly transposed to international criminal justice. The existing mechanisms - in international human rights law, international humanitarian law and domestic law - are not mutually exclusive; they can co-exist and feed off each other; there is a place for international criminal justice to deal with reparations for victims; otherwise, many victims will be left unaccounted for.

Thus, the thesis that this study has attempted to defend is one of the progressive development of international criminal justice to include a dimension for victims. What has dictated the development of international criminal justice from its inception was the reminiscence of historical dichotomies and dogmas, and of a clear-cut division of theories of justice.

While some systems in place take an approach to international criminal justice that excludes victim redress, such as the *ad hoc* international criminal tribunals (ICTY and ICTR), the advent of the ICC has taken the notion of international criminal justice to a different level, with its reparation system. The system developed at the ICC is on the one

hand innovative, and on the other, still immature. Efforts should be made to develop it to its full potential, making sure there is legal certainty concerning principles for reparation and their application in concrete cases. In addition, it is important to recognize that the ICC is but one mechanism that exists, and it cannot carry more than its own weight with regards to reparation.

Another assessment that can be made in this study pertains to the role of national courts in the award of reparations for victims of international crimes. There are many challenges that victims face in obtaining reparations in countries where the international crime took place. Using the case study of the aftermath of the Bosnian wars, and the mechanisms instituted to provide victims with a forum to claim reparations, this study has illustrated that often times national courts do not provide the perfect road to redress and restoration. In the case of Bosnia, there were mechanisms set up by Dayton Agreements which filled in the gaps, for a period of time, of national courts.

This study also addressed the emerging doctrine of universal jurisdiction as applied in the civil dimension (i.e. universal jurisdiction for cases of reparation). This study has analysed the scope of universal civil jurisdiction under international law, how it can be further developed and how it can work to overcome some of the challenges of bringing cases before national courts where the international crimes were committed (for example, if the judicial system is collapsed after war, victims will not be able to claim civil redress from perpetrators in the courts where the crimes were committed). While it is not yet widely recognised, and there are limitations under international law, universal civil jurisdiction, within certain circumscribed parameters, could be used as an avenue for victims to claim reparations, as it was illustrated in the cases against *Karadizić* studied herein[699].

The final general assessment that can be made is that international criminal justice has gone through phases of development, evolving from a purely retributive outlook to an approach that takes into account victims and reparations. This study concludes that contemporary international criminal justice includes a dimension for victims, a "civil"

[699] See Chapters 5 and 6.

dimension where victims can seek and obtain some form of reparation. This "dimension" is still in the process of development.

Thus, in addressing different frameworks where reparations for victims can be assessed, this study concludes that this "civil dimension" of international criminal justice is still in its infancy stage, and that some efforts must be made to further develop it. It is on the basis that this study makes some recommendations for the progressive development of this civil dimension with regards to reparation.

A) The emerging civil dimension of international criminal justice

The leading research questions in this study are whether international criminal justice should be concerned with reparation for victims of international crimes and whether the blend of civil and criminal dimensions is a desirable model in international criminal law.

In short, the research and analysis of the themes addressed in this study suggests that there exists a legal duty for individuals to give reparations to victims of international crimes under certain circumstances, within the ambit of international criminal law. The contents of this duty are currently under development and there are many challenges ahead. The theoretical justifications for including a civil dimension include empowerment of victims and the notion of justice for victims. The question whether it is a desirable model hinges on how the civil dimension develops and is implemented in international criminal justice. In this sense, international criminal courts, and specifically the ICC, cannot single-handedly bear the responsibility of including a civil dimension in international criminal justice. National courts have an important role to play as discussed in the last chapter of this study. Based on this overall finding, this study now proposes some general conclusions of the research sub-questions developed in each chapter.

1. A civil dimension to international criminal justice brings about new paradigms

While this dissertation discusses a civil dimension of international justice primarily with a focus on reparations for international crimes, a civil dimension is not limited to questions of reparations, and includes for example victim participation in the criminal proceedings, a topic outside the scope of this dissertation. The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

is enlightening in this regard[700]. Including a civil dimension to international criminal justice also brings about new paradigms which may differ from the criminal dimension: the expertise of Judges dealing with reparation requests, the enforcement of reparation awards, the standard of proof, hierarchy as well as exclusion of victims, and instances when reparation is connected to a conviction.

2. Reparations is only one facet of the civil dimension of international criminal justice and the broader goal of delivering "justice for victims" of international crimes

Reparations for international crimes do not stand in a vacuum. There are important dimensions that accompany and are crucial to any reparation initiative, and that contribute in delivering justice for victims of international crimes. As the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence concluded, to be seen as a true justice mechanism, reparations must be "accompanied by an acknowledgment of responsibility and needs to be linked with other justice initiatives such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence"[701]. This calls for two related propositions. The first is that *symbolic* forms of reparation such as acknowledgement of responsibility and guarantees of non-repetition should not be discarded automatically. These are important forms of reparation and an effort should be made by the different actors involved in reparations proceedings to accommodate these dimensions, bearing in mind seemingly conflicting rationales such as the human rights of the accused. The second proposition that stems from the different dimensions of justice for victims is that reparations are distinct from assistance or development aid; they may complement one another but they are distinct ways in which justice for victims in the aftermath of international crimes may be delivered.

3. Individual perpetrators have a legal duty to provide reparations to victims of international crimes, in certain circumstances, and victims have a corollary right to receive reparations

International law has seen over the years an evolution with regard to reparations in general, and in particular in relation to international crimes. Traditionally, reparations were owed from one State to another State. With the advent of human rights law, individuals

[700] United Nations, General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", A/69/518, 14 October 2014.

[701] *Ibid*.

began to be recognized as the beneficiary of reparations owed by the State. The basis of this study was a third paradigm: the construction of a legal duty owed by the individual (perpetrator/ convicted person) to the individual victim (who is the direct beneficiary). It is submitted that a legal duty owed by individual perpetrators, separate from that of the State, exists in relation to international crimes. It is still at its infancy stage however, and the contours of this legal duty are in process of formation. The legal duty to pay reparations to victims under modern international criminal law is a corollary of the criminal accountability of perpetrators. Imposing a legal duty on perpetrators to pay reparations to victims serves symbolic purposes, contributes to the overall goal of international justice to deliver justice for victims, assists in ending impunity and contributes to reconciliation. This legal duty imposed on individuals has to move from rhetoric to real implementation; it has yet to be fully realized. The legal duty of perpetrators and the right of victims are two sides of the same coin: at this print of international law, this study suggests that an international crime gives rise both the accountability of perpetrators and the right to victims to receive reparation.

4. The contents of the legal duty to repair imposed on individual perpetrators are still under formation in international criminal justice and lessons can be learned from other reparations initiatives

Principles of reparation in other fields, such as in the human rights field, may inform the content of the legal duty to repair under international criminal law, while bearing in mind some systemic differences that exist across different fields. Importantly, international human rights law can inform matters such as the form of reparation (collective or individual), type of reparation (i.e. rehabilitation, apology, compensation, etc.). Other difficult questions that including a civil dimension to international criminal justice will bear are: the duties of judges in relation to reparation, evidence, the balancing of rights of the accused and rights of victims. Many of these challenges will have to be answered on a case-by-case basis, and looking at lessons from international human rights law (for instance) can be inspirational. The operationalization of reparations for international crimes before international courts and tribunals is in the process of development and in this process, it is important to devise clear and fair principles of reparation and keep striving to apply them consistently and meet the challenges required.

5. An individualized approach to reparations is complementary to State responsibility for reparations for international crimes

While the focus of this study was not on State responsibility for international crimes, the conclusion in this regard is that, an individualized approach to reparation is not better or worse that State-based reparations. The emphasis is different. Some forms of reparation, such as guarantees of non-repetition might make more sense within State-based reparations - where the State will continue in power and whereas an individual perpetrator may have lost his/her eventual position of power. One rationale for seeking reparations directly from individual perpetrators is to deliver on the promise of "justice for victims" which is not limited only to reparations and encompasses criminal and civil dimensions, and empowers victims, by connecting the criminal and civil liabilities of the perpetrators. Nevertheless, in order to fully achieve justice for victims of international crimes, the potential responsibility of States has to be still borne in mind. The nature of international crimes is such that individual accountability shall not automatically exclude State responsibility. Where State responsibility for international crimes is also involved, States shall be jointly liable to pay reparations in order to fully achieve the objective of "justice for victims". While at the ICC for example, State responsibility falls outside its jurisdiction, such responsibility has to be sought through other mechanisms such as a reparation fund.

This study posits that there are diverse avenues where victims can search and possibly obtain reparation for international crimes. Much will depend on some specific circumstances, such as whether a State is involved, and thus, whether reparations can be claimed against a State. Furthermore, in many instances, the State is not directly involved in the atrocities committed, thus, relying solely on the responsibility of States, and excluding the actual perpetrators might leave victims without any form of redress, which explains the importance of analysing individual responsibility in terms of redress for victims of international crimes. From a moral standpoint, it should also be questioned whether a State has the right to negotiate and enter into agreement relating to reparation for harm that individual victims suffered, without any form of consultation, participation or assignment of rights.

It is also argued that individual liability for reparations should not be to the exclusion of any other right victims might have against the State. Thus, victims' right to reparation against the individual perpetrator might be complemented by a right to reparation against

the State. Where the State can be involved in the fulfilment of reparations awards, even if it is found that individual perpetrators are liable, such approach should be preferred so as to afford the best chance for reparations to be implemented.

6. There is a disjuncture between the rhetoric that included reparations in international criminal justice, supported by the idea of justice for victims, and the substantive realization of reparations

The idea of "justice for victims" may theoretically justify reparations in international criminal justice. As Luke Moffett argues "the treatment and protection of the ICC is victims orientated justice by being inclusive to their needs"[702]. This study subscribes to his argument that:

> "Attaching responsibility for reparations to perpetrators, whether individual, state, or organisational, can provide an important psychological function for victims in appropriately directing blame at those who committed the atrocity against them and to relieve their guilt. Reparations made by the responsible perpetrator can also help to symbolise their commitment to remedying the past and to be held to account for their actions"[703].

The civil dimension of international criminal justice needs however to move beyond from the traditional rhetoric that broke away from a purely retributive approach to international crimes and start actually delivering justice for victims. Many are all too ready to claim that the inclusion of victims' rights is paramount to a complete international criminal justice system; however, this discourse often looks more like lip service. In the example of the first case before the ICC, after a decade, victims still have not received reparations. Once the long trial ended, victims are now caught in between a back and forth between the TFV and the Trial Chamber charged with monitoring the implementation of reparation[704]. In fact, since the first decision on reparation in the *Lubanga* case by the Trial

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[702] Luke Moffett, "Justice for Victims before the International Criminal Court", Routledge, 2014, p. 141.

[703] *Ibid.*, p. 147.

[704] For a detailed account of the numerous procedural stages of the implementation of reparations in the *Lubanga* case, see the procedural history summarized in ICC, Trial Chamber II, *Prosecutor v Thomas Lubanga Dyilo*, "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations", ICC-01/04-01/06, 21 October 2016, paras. 1-10.

Chamber, in 2012, more than four years later, only very recently (end of October 2016) has the reparation plan been accepted by the Trial Chamber, which will admittedly take time to be implemented. While it is acknowledged that this is the first case of reparations before the Court, this example sheds light on the delays and complexities for the substantive realization of reparations for victims. It is hoped that lessons can be learned from this first case and the process can be streamlined in the future with the objective of substantive realization of justice for victims.

7. A civil dimension of international criminal justice, including reparations for victims of international crimes, is not limited to the ICC

The ICC cannot single-handedly be responsible for reparations for victims of international crimes. Its possibilities are limited by numerous factors. Its jurisdiction provides a limitation: temporal jurisdiction and subject-matter jurisdiction mean that some international crimes, as well as other serious violations that do not amount to international crimes, will fall outside its scope and the victims of those atrocities will not be able to turn to the ICC. Furthermore, the ICC is limited by its resources (both human and financial resources) as well as systemic dictates, such as the inherent selectivity of international prosecutions and the connection between a conviction of the accused and adjudication of reparation claims.

Administrative mechanisms such as trust funds connected to judicial mechanisms (and the TFV is the primary example in this regard) could play an important role in the adjudication of reparations particularly in light of the massive nature of international crimes and the complexities of planning and implementing reparation awards. In the same vein, national courts have an important role to play in relation to reparations. The ICC is a court of last resort. This is so in relation not only to criminal proceedings but in relation also reparations. Thus, positive complementarity should include also dimensions for reparation - national courts should play an important role in cases of reparations for international crimes. Importantly, however, more efforts have to be put on implementation and enforcement of reparation awards. As the case against Karadzić demonstrates, rich reparations are often awarded but not always implemented, thus bearing only the symbolic advantage of the reparation award.

8. In the ICC context, victims may have too high expectations with regards to reparation

The potential for the ICC to provide reparations for victims of international crimes is limited. It is limited by the system itself, which links reparations to a conviction, and thus is limited to providing reparation to those victims of crimes whose perpetrator was prosecuted and punished by the ICC. This limited reach of the ICC is not always in line with victims' expectations[705]. Part of the journey of the Court in regards to its reparation mandate will be to manage victims' expectations. This can be done through a coherent and connected effort of all organs of the Court to inform affected communities of the Court's inherent limitations and explain its multifaceted mandates (i.e. accountability, reparation, etc.). The study conducted by the Human Rights Center at the University of California, Berkely School of Law indicates that many victims see the Court as a venue where they can get reparations for the harm they have suffered, that they joined the ICC proceedings with the expectation they would individually receive reparation[706]. Outreach to affected communities should include information about the possibilities as well as limitations of reparations through the ICC. Filling in this informational and knowledge gap about what the Court can realistically achieve in terms of reparation can indeed avoid false expectations and limit further victimization.

9. Victims' provisions at the ICC have a significant symbolic value and could be a catalyst for the implementation of reparations in other forums

Including a civil dimension in international criminal justice and the ICC in particular, provide theoretical justifications for the Court, which was instituted a Court to seek justice for victims. It might also add a degree of legitimacy to the Court, in that victims are part of the international criminal justice project. The symbolic meaning of recognizing victims' suffering and giving them rights empower them, and can have a rippling effect. But after a decade of existence, the Court has to capitalize on this significant symbolic value and start pro-actively being a catalyst for the implementation of

[705] See a discussion on this topic: Sharon Nakandha, "ICC Court Ruling on Reparation for Kenyan Victims: Does the ICC Oversell Its Mandate or Are Victims Simply Expecting Too Much?", *International Justice Monitor*, 25 July 2016, available at: https://Ibid..ijmonitor.org/2016/07/icc-court-ruling-on-reparation-for-kenyan-victims-does-the-icc-oversell-its-mandate-or-are-victims-simply-expecting-too-much/

[706] Human Rights Center, University of California, Berkely School of Law, "The Victims' Court: A Study of 622 Victim Participants at the International Criminal Court", p. 3, available at: https://Ibid..law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf

reparations before domestic courts and mechanisms. As Luke Moffett argues, "the Court will need to encourage states to implement justice for victims to overcome its structural limitations and to move beyond the rhetoric of realizing justice for victims of international crimes"[707].

10. Adding a civil dimension to universal jurisdiction may provide an avenue for victims' claims of reparation for international crimes

Using the doctrine of universal jurisdiction to allow victims to bring civil claims against individual perpetrators before domestic courts of foreign States is a way to counter some of the challenges of domestic civil litigation in the State where the crime occurred, such as lack of legislation supporting civil claims in relation to international crimes, political interference or the collapse of judicial institutions. As discussed in chapter 5 of this study, universal jurisdiction in its criminal dimensions has been gaining support in recent decades as a strong tool against impunity; a civil dimension, for all the hurdles it may encounter, could be the next frontier. This study examined the difficulties with universal civil jurisdiction and concluded that there isn't any customary international law rule prohibiting the exercise of universal civil jurisdiction (with some exceptions, such as in cases of State immunity). States could adopt legislation that allows for a civil claim to be brought against individual perpetrators for crimes for which universal jurisdiction is already recognized (in its criminal dimension) under domestic law.

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Having reviewed some general conclusions of the present study, the way is paved to provide some recommendations on the overarching themes and the road ahead.

B) Recommendations and the road ahead

The road ahead in terms of reparations for international crimes in the realm of international criminal justice, as examined in this study, looks more like a hill, a steep uphill. Nevertheless, the ground has previously been more arid than it is at the moment. In terms of international tribunals, only the ICC and ECCC provide the possibility for victims to obtain some meaningful form of reparation. In terms of administrative mechanisms, the TFV provides an interesting model, but it is still in the process of defining it contours. At the national level, much still needs to be done, and national courts need to play a more

[707] Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, p. 283.

important role in the adjudication of reparations and other domestic mechanisms such as trust funds should be envisaged. With these remarks in mind, this study turns to some recommendations.

1. The ICC shall move beyond the rhetoric of victims reparation and into concrete realization of reparations

Developing the civil dimension of international justice means empowering victims. Reparations, in whichever form, ultimately means acknowledging victims' suffering, and giving them a place in the justice process. This can be done at the Court through its organs (the OTP when making statements, interacting with victims, selecting its cases) and Chambers (when making and drafting decisions). The important is that the relevant stakeholders be willing to engage in *realizing* justice for victims.

2. At the ICC, all stakeholders have to make a sincere effort to get on board with the reparations mandate of the Court

All organs and stakeholders of the Court have to work towards realizing the reparations mandate of the Court. This includes limiting any influence of internal or external politics. The observed delay observed in the first case before the Court at the stage of reparations, as discussed above, can no longer be justified. The Court has to learn from its own mistakes and those who compose the Court shall have a genuine interest in realizing reparations for victims and empowering victims, as recognized in the Court's formative texts.

3. Victims should be factored in the OTP's decisions in relation to situations and cases

The decision of the OTP to bring charges affects the inclusion or exclusion of victims under the umbrella of the Court. When deciding to exclude certain criminal conduct for investigation or charges, the OTP has to bear in mind the potential impact this will have for individual victims, who have suffered from crimes within the jurisdiction of the Court, but whose perpetrators are not charged before the Court (or are not charged with a given crime), will be excluded, even though they are real victims. OTP's decisions shall not be solely guided by the prosecution of the accused and the criminal process before the Court.

4. ICC Judges should bear in mind the interests of victims when making decisions

The first case before the Court illustrated a disconnect between the requests and interests of victims and the decision of judges. This can create an impression amongst victims that their voices are not in fact being heard. When making decisions on cases Judges shall bear in mind the impact that such decisions might have on victims and affected communities. After all, victims' rights, including reparation, are part of the Court's endeavour. This may include a process of selection of the composition of the Court (or at least some) who have expertise and sensibility concerning victims' rights and victimology. Judicial training on victimology might also breach potential gaps of the criminal and civil dimensions of international justice from the judicial perspective.

5. More efforts have to be put into bridging informational gaps and managing victims' understanding and expectations of the mandate and limitation of the ICC

The first decade of the Court's operation has demonstrate a disconnect between what the Court can realistically do and what victims may expect it to do. In interactions with victims and affected communities more efforts have to be put into educating about the role of the Court, its different mandates (including reparations, and prosecution of the offender) and its inherent limitations. Victims should also be informed of the role of the TFV and other potential avenues to obtain redress. An educational approach to the role of the Court can avoid secondary victimization and a general sense of dissatisfaction on the part of victims and affected communities.

6. An individualized approach to reparation for international crimes is inherently selective and limited, and as such it should not exclude other models of reparations

The individualized approach to reparations in respect of international crimes is inherently selective, as this study has discussed. It is also limited, as international crimes do not encompass all kinds of human rights violations and mass atrocities. It further suffers from other practical restrictions such as lack of resources, especially when the perpetrator is indigent. It is important that it is thus seen for what it is: another avenue under which victims may claim and obtain reparations, that co-exists with other avenues and mechanisms.

7. States Parties shall complement reparations

It is suggested that with the recognition of the right to reparations for international crimes at the ICC, and the first decision on principles of reparations, the Assembly of States Parties can take this mandate of the ICC to another level by being a catalyst for a more significant domestic approach to reparations, through concrete reports and resolutions on an active role for States Parties to implement provisions on reparations for victims of international crimes, and the building of national trust funds for reparations for victims of international crimes (that fall within the jurisdiction of the Court)[708]. States Parties where mass international crimes were committed should be proactive in removing any barriers for allowing victims to claim reparations through domestic courts; also setting up trust funds or other administrative mechanism for the benefit of victims of the conflict might also provide an avenue for victims to obtain redress.

States Parties have to act on their responsibility to complement the Court in criminal and civil dimensions of international justice, including reparations. This is also in line with the *Basic Principles*, which provide in Article 16 that: "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations"; and Article 17 that: "States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements".

6. Victims of international crimes outside the jurisdiction of the ICC shall also receive redress

As discussed in this thesis, other international courts and tribunals in relation to distinct conflicts (such as the ICTY and ICTR) do not have provisions on reparations. This should not mean that victims of those conflicts are to be left without reparation. Created

[708] See in a similar vein, Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague", 13 *Journal of International Criminal Justice* 2, (2015), 281-311, who claims that the Assembly of States Parties and States Parties should play a greater role in implementing justice for victims domestically.

under the auspices of (or upon agreement with) the UN, a claims commission or trust fund should be set up by the UN to deal with reparations for victims of those conflicts, who could not turn to the tribunals for claims of assistance or reparation.

7. The context in which reparation is sought is important

Another important consideration is the context in which reparation is claimed: whether a post-conflict/ peace-time context, or an armed conflict context. While a conflict is still on-going, avenues are more limited in international criminal law as through the ICC, a conviction is necessary before reparation by the perpetrator is owed. Even when the broader conflict has not ceased, there may be possibility for reparation if individual perpetrators are brought to trial and convicted of crime(s) within the jurisdiction of the Court. Reparation in an armed conflict situation, where the conflict has not completely ceased, should take into account the difficulties imposed by the armed conflict and the particular needs of victims in those situations.

In post-conflict situations, one alternative model is that adopted in Rwanda in 1998 after the conflict[709], where the Rwandan government established a fund (FARG) which counts on a percentage of the government's annual fund, grants by foreign governments, individual donations and damages payable by those convicted of participating in the genocide[710]. Moving forward however, should a similar model be crafted, there are a number of lessons that ought to be learned from this experience, especially the fact that many victims have not been able to claim reparations[711].

One avenue that was briefly mentioned in this study, but that is nevertheless crucial, concerns the inclusion of claims in peace treaties. When peace is achieved and a peace treaty is signed, one way forward to ensure reparations to victims are provided is to include reparation provisions in the peace treaty. The issue however is that, as history

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[709] Law No 69/2008 of 30/12/2008, *Law relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1st October 1990 and 31st December 1994, and determining its organisation, powers and functioning*, Article 26.

[710] See *ibid.,* Article 22.

[711] Heidy Rombouts and Stef Vandeginste, "Reparations for Victims in Rwanda: Caught Between Theory and Practice", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations,* K. De Feyter et al. (eds.), Intersentia, 2005, p. 310.

demonstrates, if peace treaties are accorded between States, reparations are often provided to the injured State, rather than directly to individual victims. Reparation may be for injury suffered by States or their nationals, but the payment (usually in lump-sums) is provided to the injured State, who is responsible for its distribution[712]. One example to be noted is Article 16 of the 1951 Treaty of Peace between the Allied Powers and Japan where it was provided that the lump-sum awarded was a final settlement of all claims precluding individual claims by victims[713].

In post-conflict situations and peace time contexts, the focus might be different, such as in rebuilding communities and providing programs of rehabilitation and community stability. In the case of peace agreements with rebel groups, one way forward would be inclusion of claims of reparation for victims. There is also the possibility of including provision of a claims commission such as in the peace agreement between Eritrea and Ethiopia[714]. It is worth mentioning that in a decision of 2001, the Commission established that the appropriate form of reparation was in principle compensation, but it did not exclude that other forms of reparation could be given if in accordance with the principles of international law[715]. This Commission is tasked with deciding through binding arbitration all claims between the two States and private entities for losses and damages during the conflict (violations of international humanitarian law and other violations of international law). Another example, which was not explored or discussed in the present study, is mixed claims commissions (arbitral tribunals established by treaty), where individuals may be able to assert claims against States. One such commission is the Iran-US Claims Tribunal established by the so-called Algiers Accords between Iran and the United States in 1981. The tribunal can hear claims of nationals of one State against the other State (and also claims of one State against the other). Another possibility is to set up quasi-judicial institutions, either by peace treaties or the Security Council, to hear claims

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[712] Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *IRRC* September 2003, Vol. 85 No 851, pp. 535-536.

[713] *Ibid.*, p. 536.

[714] *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea*, 12 December 2000, Article 5, *International Legal Materials*, Vol. 40, 2001, p.260.

[715] Eritrea-Ethiopia Claims Commission, *Decision Number 3: Remedies*, 24 July 2001. See Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *IRRC* September 2003, Vol. 85 No 851, pp. 542-543.

for reparations. One notable example is the United Nations Compensation Commission, established by the Security Council in 1991, which has jurisdiction over claims against Iraq for "any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait."[716]

C) Final remarks

In sum, while different forms of reparations for international crimes (i.e. reparations obtained from individuals, reparations obtained from States) present some systemic differences, as explored above, they all form part of a broader system of reparation for international crimes. This study aimed at exploring a piece of this puzzle: the development and operationalization of a legal duty imposed on individuals to repair in the context of international criminal law – the emergence of a civil dimension in international criminal justice. This dimension is still developing from its infancy: just as a fragile baby bird, it needs to be nurtured in order to thrive. The present study trailed with this humble aim: to contribute to ongoing reflections of how this civil dimension fits in the broader framework of reparation for international crimes and how it should develop.

[716] UN Security Council resolution 687, 3 April 1991, para. 16. Technically, individuals do not bring claims directly to the Commission but rather do it through their State, who acts in an administrative function rather than espousing the claims in diplomatic protection.

SUMMARY

The main purpose of this research project is to launch an inquiry into the emerging civil dimension of international criminal law which, in contrast to the criminal dimension, focuses on reparation for victims both at national and international levels. There may be other aspects of the "civil" dimension, in addition to reparation for victims; however, such aspects are not focus of this study, and will not be dealt with in this dissertation. The ultimate goal of this project is to address how international criminal justice should develop in relation to civil redress for victims of international crimes.

There are two conceptual parameters within this project which guide its direction and inform its analysis: first, this project concerns international criminal law, thus, conceptually, proceedings against *individuals*, and *not* States; secondly, it concerns the *civil* dimension (i.e. reparation/ redress for victims, or "damages" in domestic courts terminology, see further below) of international criminal justice. As such, criminal accountability and criminal prosecutions will not be the main focus of this project. In saying this, it will draw upon the rich literature that exists in this field to inform the analysis herein.

For this purpose, this study will examine, compare and contrast three analytical frameworks for the adjudication of the civil dimensions of international crimes. The analysis starts the first framework from a theoretical and conceptual discussion of theories of justice grounding the right of victims to reparation juxtaposed with the development of a duty of reparation imposed directly on individuals. In order to build the theoretical foundations for the examination that will then follow, it will be necessary to address a theoretical question concerning the dichotomy between criminal punishment and reparation within the notion of justice. I address the relationship between punishment and reparation and their impact on victims, offenders and societies in general, in a theoretical perspective. The theoretical foundation of this thesis is pursued mainly in the first two chapters: *chapter one* discusses theories of justice and inquires upon the legal basis of the duty of reparation for individuals; and *chapter two* discusses the contents of a duty to

repair for individuals, as well as the extent to which case law pertaining to the contents of duties to repair for States can be transposed[717].

After this theoretical discussion, the first framework concerns the adjudication of civil claims within the international criminal process and deals with the evolving approaches to reparations before international criminal courts and tribunals. For this purpose, this dissertation studies international criminal justice institutions, not with a view to purely describe each institution but rather to compare their models (i.e. international criminal trials with only a criminal function and the international criminal process encompassing a civil dimension). Thus, *chapter three* addresses the operationalization of duties to repair within the setting of international criminal courts and tribunals.

In the second analytical framework, beginning at *chapter four*, I propose to examine the contribution of administrative mechanisms at the international level, which are linked to legal processes. This will be done through the lens of the Trust Fund for Victims (linked to the ICC), which is a relevant model, to examine whether similar models could be applied in the international criminal law context. In this part, I examine the advantages and disadvantages of concentrating civil redress claims in administrative mechanisms. I will also posit whether a novel administrative mechanism should be created at the international level to deal with civil claims resulting from international crimes.

The third analytical framework of this research concerns the civil dimension of international criminal law at the national level and is developed in *chapter five*. It looks at an alternative model for claims for reparations for victims of international crimes: before domestic courts on the basis of an extension of the doctrine of universal civil jurisdiction to encompass civil suits. In this framework, the dissertation examines selected transnational tort litigation that focuses on *individual versus individual* and questions whether a transnational torts litigation model provides an alternative avenue, and discusses a critical perspective on including a civil dimension to universal jurisdiction. In this part, I examine the role that national courts play in the adjudication of civil claims relating to international crimes. I also consider the possibilities that exist for civil litigation pertaining to international crimes within domestic courts.

[717] This inquiry will be carried out through a case study of the experience of the Inter-American Court of Human Rights.

At the conclusion of this project, I hope to be able to critique a purely criminal function of international justice with respect to international crimes. In this manner, I hope to be able to sustain the claim that international criminal justice should encompass a civil dimension in addition to its criminal function. Nevertheless, it may be pondered that the focus for the progressive development of this civil dimension should be on the building of a stronger domestic civil litigation framework pertaining to reparation for international crimes, and further development (or empowerment) of international administrative mechanisms linked to legal processes. This study differentiates between post-conflict context, armed conflict context, and peace time context in the conclusion.

In sum, the research goals are to analyse and critique a purely criminal function of international criminal justice and examine possibilities of a greater emphasis on victim reparation for international crimes through alternative avenues such as national courts and administrative mechanisms entertaining civil claims pertaining to international crimes.

SAMENVATTING

Schadevergoeding voor internationale misdrijven en de ontwikkeling van een burgerlijk aspect van de internationale strafrechtrechtspraak

Het hoofddoel van dit project is een onderzoek in te stellen naar het opkomende civiele aspect van het internationale strafrecht (dat zich, zoals hierboven is vermeld, in tegenstelling tot het criminele aspect richt op schadevergoeding voor de slachtoffers) zowel op nationaal als op internationaal niveau. Er zijn mogelijk nog andere aspecten van de "civiele" dimensie, naast de schadevergoeding voor de slachtoffers; deze zullen echter niet nader belicht worden. Het doel van dit project is na te gaan hoe het internationale strafrecht zich zou moeten ontwikkelen met betrekking tot burgerlijke schadeloosstelling voor de slachtoffers van internationale misdrijven.

Dit project is gebaseerd op twee conceptuele parameters die de richting bepalen en de analyse vormen: ten eerste, dit project betreft het internationale strafrecht, dit wil zeggen, conceptueel, procedures tegen *individuen* en *niet* tegen landen. Ten tweede, dit project behandelt het *civiele* aspect van het internationale strafrecht (zijnde schadevergoeding/schadeloosstelling voor de slachtoffers, of "schade" in de terminologie van de binnenlandse rechtspraak, zie hieronder). Strafrechtelijke aansprakelijkheid en strafrechtelijke vervolging staan als zodanig dus niet centraal in dit project. Dit gezegd zijnde, wordt er wel gebruik gemaakt van de rijke literatuur die in dit vakgebied bestaat om de analyse in dit project toe te lichten.

Met dit doel zal deze studie drie analytische kaders voor de berechting van de civiele aspecten van internationale misdrijven onderzoeken, vergelijken en tegen elkaar afwegen. De analyse begint het eerste kader vanuit een theoretische en conceptuele bespreking van de rechtspraak waarin het recht van de slachtoffers op schadevergoeding en de ontwikkeling van een schadevergoedingsplicht die rechtstreeks aan individuele personen wordt opgelegd, naast elkaar geplaatst worden. Om de theoretische basis voor het onderzoek vast te leggen, is het noodzakelijk om de theoretische tweedeling tussen straf en schadevergoeding binnen de rechtspraak te behandelen. De relatie tussen straf en schadevergoeding en hun impact op de slachtoffers, de daders en de gemeenschap in zijn geheel, wordt behandeld vanuit een theoretisch standpunt. De theoretische basis is hoofdzakelijk vervat in de eerste twee hoofdstukken: *hoofdstuk een* bespreekt

de theorie van de rechtspraak en onderzoekt de juridische basis van de schadevergoedingsplicht voor individuele personen; en *hoofdstuk twee* behandelt de betekenis van die plicht tot schadevergoeding voor individuele personen, en ook de mate waarin het gewoonterecht met betrekking tot schadevergoedingsplicht voor Staten kan worden omgezet[718].

Na deze theoretische uiteenzetting richt het eerste kader zich op de berechting van civiele vorderingen binnen de internationale strafrechtelijke procedure en behandelt de evoluerende aanpak van schadeclaims voor internationale strafhoven en tribunalen. Hiervoor onderzoekt dit proefschrift internationale strafrechtbanken, niet om elke instelling te beschrijven, maar eerder om hun modellen te vergelijken (dit wil zeggen internationale strafzaken met een uitsluitend strafrechtelijke functie en het internationale strafrechtelijke proces dat ook een civiel aspect bevat). Bijgevolg behandelt *hoofdstuk drie* de operationalisering van de plicht tot schadeloosstelling binnen het raamwerk van internationale strafhoven en tribunalen.

In het tweede analytische kader, dat begint bij *hoofdstuk vier*, wordt voorgesteld om de bijdrage te onderzoeken van de administratieve mechanismen op internationaal niveau die verbonden zijn aan de juridische procedures. Dit gebeurt vanuit het oogpunt van het Trust Fund for Victims (trustfonds voor slachtoffers – verbonden aan het International Strafhof), een relevant model, om te onderzoeken of gelijkaardige modellen toegepast kunnen worden binnen het internationale strafrecht. In dit hoofdstuk worden de voor- en nadelen van het onderbrengen van civiele schadeclaims in administratieve mechanismen onderzocht. Er wordt ook aangevoerd of een nieuw administratief mechanisme op internationaal niveau moet worden opgericht om burgerlijke vorderingen te behandelen die voortvloeien uit internationale misdrijven.

Het derde analytische kader van dit onderzoek richt zich op het civiele aspect van het internationale strafrecht op nationaal niveau en is uitgewerkt in *hoofdstuk vijf*. In deze context wordt er gekeken naar een alternatieve structuur voor schadeclaims van slachtoffers van internationale misdrijven voor nationale rechtbanken door de doctrine van universele

[718] Dit wordt onderzocht door middel van een case study van de ervaring van het Inter-Amerikaans Hof voor de Mensenrechten.

civielrechtelijke jurisdictie uit te breiden naar civiele rechtszaken. In dit verband wordt in het proefschrift onderzoek gedaan naar grensoverschrijdende rechtszaken die zich richten op *individu versus individu* en vraagt men zich af of een grensoverschrijdend model voor de berechting van misdrijven een alternatief kan bieden. Het toevoegen van een civiel aspect aan de universele jurisdictie wordt vanuit een kritisch perspectief besproken. Dit hoofdstuk onderzoekt de rol die nationale rechtbanken spelen in de berechting van civiele vorderingen die gerelateerd zijn aan internationale misdrijven. Tevens worden de mogelijkheden overwogen binnen nationale rechtbanken voor burgerlijke rechtszaken die betrekking hebben op internationale misdrijven.

Aan het einde van dit project hoop ik het een kritische analyse te kunnen geven van het louter criminele aspect van het internationale recht met betrekking tot internationale misdrijven. Op die manier hoop ik de stelling te bewijzen dat het internationale strafrecht naast een criminele dimensie ook een civiel aspect zou moeten omvatten. Niettemin valt te overwegen dat de nadruk voor de geleidelijke ontwikkeling van dit civiele aspect zou moeten liggen op een sterkere structuur voor binnenlandse burgerlijke rechtszaken met betrekking tot schadevergoeding voor internationale misdrijven en de verdere ontwikkeling (of "empowerment") van internationale administratieve mechanismen gekoppeld aan juridische processen. In de conclusie van deze studie wordt een onderscheid gemaakt tussen de context na een conflict, de context tijdens een gewapend conflict en de context in vredestijd.

Samengevat, het doel van dit onderzoek is de louter criminele functie van het internationale strafrecht kritisch te analyseren en te onderzoeken hoe een grotere nadruk gelegd kan worden op schadevergoeding voor de slachtoffers van internationale misdrijven door middel van alternatieve wegen zoals nationale rechtspraak en administratieve mechanismen die zich bezighouden met burgerlijke vorderingen met betrekking tot internationale misdrijven.

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We must never forget that the record on which we judge these defendants is the Record on which history will judge us tomorrow[719].

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Miriam Cohen has published in wide-ranging areas, including international criminal justice, international law and human rights, victims' rights, justice theories, and human trafficking Her research has appeared in law reviews and books in Canada, Europe, the United States, and Brazil. Miriam Cohen teaches and researches in the areas of international criminal law, human rights, public international law and international dispute settlement, and comparative constitutional law. Her research has been recognized by distinguished research institutions: she was recently awarded (2017) the *Canadian Bar Association Law For the Future Fund* and the *Foundation for Legal Research* grant in support of her research.