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

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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.