



Universiteit  
Leiden  
The Netherlands

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

Cohen, M.G.

### **Citation**

Cohen, M. G. (2017, June 28). *Reparations for international crimes and the development of a civil dimension of international criminal justice*. Retrieved from <https://hdl.handle.net/1887/50081>

Version: Not Applicable (or Unknown)

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/50081>

**Note:** To cite this publication please use the final published version (if applicable).

Cover Page



Universiteit Leiden



The handle <http://hdl.handle.net/1887/50081> holds various files of this Leiden University dissertation

**Author:** Cohen, Miriam

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

**Issue Date:** 2017-06-28

**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<sup>245</sup> and Tokyo<sup>246</sup>. 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<sup>247</sup>. 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”<sup>248</sup>, the conception of justice was through the punishment of Nazi and Japanese perpetrators<sup>249</sup>. 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.

---

<sup>245</sup> 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).

<sup>246</sup> Created by the Charter for the International Military tribunal for the Far East, Tokyo, 19 January 1946 (Tokyo Charter).

<sup>247</sup> Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, p. 60.

<sup>248</sup> IMT Transcripts Vol. XIX, p. 434, cited in *ibid.*

<sup>249</sup> 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<sup>250</sup>, 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<sup>251</sup>. 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?

---

<sup>250</sup> 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 International 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.

<sup>251</sup> 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<sup>252</sup>. As a consequence, since victims of Nazi crimes were

---

<sup>252</sup> 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<sup>253</sup>.

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<sup>254</sup>. 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<sup>255</sup>.

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”<sup>256</sup>, there is a visible reliance on States for civil redress at the international level<sup>257</sup>.

---

*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.

<sup>253</sup> 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.

<sup>254</sup> Ibid.

<sup>255</sup> 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.

<sup>256</sup> “Judgment of the Tribunal”, *American Journal of International Law* 41 (1947), p. 172.

<sup>257</sup> 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<sup>258</sup>. 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<sup>259</sup>. 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.”<sup>260</sup>

---

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.

<sup>258</sup> 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”.

<sup>259</sup> 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.

<sup>260</sup> 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<sup>261</sup>. 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<sup>262</sup>.

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”<sup>263</sup>.

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.

<sup>261</sup> 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 Bottiglieri, *Redress for Victims of Crimes Under International Law*, Nijhoff, 2004, p. 198.

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

<sup>263</sup> 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.”<sup>264</sup>

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

---

<sup>264</sup> 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.”<sup>265</sup>

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<sup>266</sup>.

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).

---

<sup>265</sup> “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.

<sup>266</sup> “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<sup>267</sup>.

The ICTY and ICTR mechanisms allow for<sup>268</sup>: 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<sup>269</sup> 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<sup>270</sup>.

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<sup>271</sup>. 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

---

<sup>267</sup> "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.

<sup>268</sup> 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.

<sup>269</sup> 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.

<sup>270</sup> 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.

<sup>271</sup> 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<sup>272</sup>.

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”<sup>273</sup>. 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”<sup>274</sup>; 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”<sup>275</sup>. 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”<sup>276</sup>.

---

<sup>272</sup> *Ibid.*

<sup>273</sup> 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.

<sup>274</sup> “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.

<sup>275</sup> *Ibid.*, para. 32.

<sup>276</sup> *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<sup>277</sup>. 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<sup>278</sup>. 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.”<sup>279</sup>

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

---

<sup>277</sup> *Ibid.* See also, Ilaria Bottigliero, *Redress for Victims of Crimes Under International Law*, Nijhoff, 2004, pp. 206-207.

<sup>278</sup> 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.

<sup>279</sup> *Ibid.*

progress, it can expect to add to this the frustration and disappointment of those attempting to establish claims.”<sup>280</sup>

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.”<sup>281</sup>

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<sup>282</sup>.

---

<sup>280</sup> *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.

<sup>281</sup> *Ibid.*, para. 15.

<sup>282</sup> 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<sup>283</sup>. However, part of this legacy is the exclusion or oblivion of victim reparation<sup>284</sup>, 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<sup>285</sup>.

---

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.

<sup>283</sup> 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.

<sup>284</sup> 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”.

<sup>285</sup> 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”)<sup>286</sup> 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<sup>287</sup>.

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<sup>288</sup>. 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<sup>289</sup>. In this resolution, the Security Council did not adopt the Statute of the

---

<sup>286</sup> The Kosovo and East Timor structures are outside the scope of this study due to their unique nature.

<sup>287</sup> 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.

<sup>288</sup> See “The Situation in the Middle East”, Security Council Resolution 1644 (2005), 15 December 2005, S/RES/1644.

<sup>289</sup> 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<sup>290</sup>.

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<sup>291</sup>. 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<sup>292</sup> and can play a significant role on trial and appeal<sup>293</sup>. Article 17 of the STL Statute states that:

---

<sup>290</sup> See Gianluca Serra, “Special Tribunal for Lebanon: A Commentary on its Major Legal Aspects”, *International Criminal Justice Review* 18 (2008).

<sup>291</sup> 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.

<sup>292</sup> See Articles 17 and 25 of STL Statute.

<sup>293</sup> 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<sup>294</sup>. The Court was created by an agreement signed between the Government of Sierra Leone and the United Nations in 2002<sup>295</sup>.

---

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

<sup>294</sup> Celina Schocken, “The Special Court for Sierra Leone: Overview and Recommendations”, *Berkeley Journal of International Law* 20 (2002), p. 436.

<sup>295</sup> 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<sup>296</sup>. 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)<sup>297</sup>. 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”<sup>298</sup>.

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<sup>299</sup>, 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.

---

[sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176](http://sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176)

<sup>296</sup> Celina Schocken, “The Special Court for Sierra Leone: Overview and Recommendations”, *Berkeley Journal of International Law* 20 (2002), p. 436.

<sup>297</sup> 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>

<sup>298</sup> Ibid.

<sup>299</sup> 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<sup>300</sup>, 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<sup>301</sup>.

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<sup>302</sup>. 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”<sup>303</sup>. 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)<sup>304</sup>, the ECCC is an example of a hybrid criminal tribunal<sup>305</sup>, which operates in conjunction with national and international efforts.

---

<sup>300</sup> 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).

<sup>301</sup> 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.

<sup>302</sup> 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.

<sup>303</sup> 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.

<sup>304</sup> See e.g. Suzanne Kartenstein, “Hybrid Tribunals: Searching for Justice in East Timor”, *Harvard Human Rights Journal* 16 (2003), p. 245.

<sup>305</sup> 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<sup>306</sup>. Be that as it may, the focus of this study is not on the structure and operation of the Court<sup>307</sup> 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.

<sup>306</sup> 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.

<sup>307</sup> 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.”<sup>308</sup>

Interestingly, to date, some attention has been focused on the reparation mandate of the ECCC<sup>309</sup>. It stems from the framework of the ECCC, and the provision cited above, that only civil parties<sup>310</sup> are entitled to receive a specific kind of reparation (i.e. moral or symbolic)<sup>311</sup>. 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

---

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

<sup>309</sup> 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.

<sup>310</sup> 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.

<sup>311</sup> 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<sup>312</sup>) 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<sup>313</sup>.

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’.

---

<sup>312</sup> *Ibid.*, at pp. 290-291.

<sup>313</sup> 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 not 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<sup>314</sup>. In the second case (Case 002) against senior leaders of the Khmer 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<sup>315</sup>. It rejected or failed to include various other forms of reparations requested by the civil parties<sup>316</sup>, 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

---

<sup>314</sup> 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.

<sup>315</sup> ECCC, “Judgment”, Case File/Dossier No. 001/18-07-2007/ECCC/TC, 26 July 2010.

<sup>316</sup> 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”<sup>317</sup>.

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<sup>318</sup>. The appeal on this case is pending at the time of writing<sup>319</sup>. Other cases have not reached the judgment stage at the time of writing<sup>320</sup>.

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.

---

<sup>317</sup> ECCC, “Appeal Judgment”, Case File/Dossier No. 001/18-07-2007-ECCC/SC, 3 February 2012.

<sup>318</sup> ECCC, “Case 002/01 Judgment”, Case File/ Dossier No. 002/19-09-2007/ECCC/TC, 7 August 2014.

<sup>319</sup> As of June 2016.

<sup>320</sup> 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<sup>321</sup>, by the operation of Article 75 of the Rome Statute<sup>322</sup>. 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

---

<sup>321</sup> 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.

<sup>322</sup> 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<sup>323</sup>. 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<sup>324</sup>.

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<sup>325</sup>. 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.

---

<sup>323</sup> 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.

<sup>324</sup> 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.

<sup>325</sup> 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<sup>326</sup>. 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*<sup>327</sup>.

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<sup>328</sup>. 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<sup>329</sup> and the Appeals Chamber Judgment concerning the principles to be applied

---

<sup>326</sup> 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.

<sup>327</sup> *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.

<sup>328</sup> 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").

<sup>329</sup> 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<sup>330</sup>.

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<sup>331</sup>. 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”<sup>332</sup>. 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<sup>333</sup>.

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

---

<sup>330</sup> Decision on Reparations, pp. 64-85.

<sup>331</sup> *Ibid.*, para. 269.

<sup>332</sup> *Ibid.*, para. 261.

<sup>333</sup> *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<sup>334</sup>. 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<sup>335</sup>.

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’”<sup>336</sup>.

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

---

<sup>334</sup> 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”).

<sup>335</sup> *Ibid.*, at para. 1.

<sup>336</sup> 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”<sup>337</sup>.

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”<sup>338</sup>.

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<sup>339</sup>.

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

---

<sup>337</sup> *Ibid.*

<sup>338</sup> Anja Wiersing, “*Lubanga* and its Implications for Victims Seeking Reparations at the International Criminal Court”, *Amsterdam Law Forum* 4:3, 2012, p. 37.

<sup>339</sup> 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<sup>340</sup>. 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’”<sup>341</sup>. The Appeals Chamber reliance on the principle of “liability to remedy harm” creates a sui generis reparation liability<sup>342</sup>. 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<sup>343</sup>.

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<sup>344</sup>.

---

<sup>340</sup> 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.

<sup>341</sup> Carsten Stahn, “Reparative Justice after the Lubanga Appeal Judgment New Prospects for Expressivism and Participatory Justice or ‘Juridified Victimhood’ by Other Means?”, *Journal of International Criminal Justice* 13(4) (2015), pp. 801-813.

<sup>342</sup> *Ibid.*, p. 808.

<sup>343</sup> *Ibid.*

<sup>344</sup> 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<sup>345</sup>. 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<sup>346</sup>. 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<sup>347</sup>. 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.”<sup>348</sup>

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”<sup>349</sup>.

---

<sup>345</sup> ICC, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11 (“*Suto and Sang case*”).

<sup>346</sup> 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.

<sup>347</sup> *Ibid.*

<sup>348</sup> *Ibid.*, Dissenting Opinion of Judge Chile Eboe-Osuji, p. 8.

<sup>349</sup> *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. [...]”<sup>350</sup>

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.

---

<sup>350</sup> *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<sup>351</sup>.

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*<sup>352</sup> 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<sup>353</sup>. 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”<sup>354</sup>.

---

<sup>351</sup> 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.

<sup>352</sup> 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.

<sup>353</sup> 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.

<sup>354</sup> ICC, Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ICC-01/04-101-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<sup>355</sup>. 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<sup>356</sup>.

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<sup>357</sup>. 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.)<sup>358</sup>.

---

<sup>355</sup> 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.

<sup>356</sup> 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.

<sup>357</sup> 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.

<sup>358</sup> 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<sup>359</sup>. 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<sup>360</sup>. Victims also claimed that individual awards should vary according to the experience and varying needs<sup>361</sup>.

---

<sup>359</sup> 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).

<sup>360</sup> 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.

<sup>361</sup> 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”<sup>362</sup>.

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”<sup>363</sup>.

---

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](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?”.?”

<sup>363</sup> 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\\_victimrights\\_621a\\_nov2013\\_ld.pdf](https://Ibid.fidh.org/IMG/pdf/fidh_victimrights_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 of justice and what is actually delivered to victims. I further shed 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<sup>364</sup>. 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”<sup>365</sup>.

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

---

<sup>364</sup> Frédéric Mégret, “The International Criminal Court and the Failure to Mention Symbolic Reparations”, available at: <http://ssrn.com/abstract=1275087>

<sup>365</sup> *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<sup>366</sup>.

According to the Rules of the Court, collective awards of reparation are channelled through the Trust Fund for Victims (“TFV”)<sup>367</sup> 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.”<sup>368</sup> 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<sup>369</sup>.

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<sup>370</sup>. Another advantage of collective reparation awards concerns the form of reparation, a point which will be discussed below: collective awards may be symbolic,

---

<sup>366</sup> Decision on Reparations, paras. 217-221.

<sup>367</sup> See Article 79 of the ICC Statute.

<sup>368</sup> Regulation 69 of the Trust Fund Regulations.

<sup>369</sup> 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.

<sup>370</sup> 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<sup>371</sup>. 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”<sup>372</sup>.

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<sup>373</sup>. 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<sup>374</sup>. The jurisprudence of the IACtHR, as discussed in chapter 2, provides many important insights as to the award of

---

<sup>371</sup> 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.

<sup>372</sup> Frédéric Mégret, “The Case for Collective Reparations before the ICC”, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2196911](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196911)

<sup>373</sup> 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.

<sup>374</sup> 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<sup>375</sup>. 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<sup>376</sup> 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<sup>377</sup>. Individual reparations are provided to individual claimant victims, and necessarily take into account the individual

---

<sup>375</sup> 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

<sup>376</sup> See “Reparations before the International Criminal Court: Issues and Challenges, Conference Report”, Peace Palace, The Hague, 12 May 2011, p. 5.

<sup>377</sup> 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”<sup>378</sup>.

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<sup>379</sup>. 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<sup>380</sup>. 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<sup>381</sup>.

### **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

---

<sup>378</sup> Decision on Reparations, para. 221.

<sup>379</sup> *Ibid.*

<sup>380</sup> 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.

<sup>381</sup> *Ibid.*, pp. 317-319.

oversees its activities, were established in September 2002<sup>382</sup> and in 2004, a Trust Fund Secretariat was created as part of the Court's Registry<sup>383</sup>. The Trust Fund was established by the Assembly of States parties in accordance with Article 79 of the Rome Statute, 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<sup>384</sup>, 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.

---

<sup>382</sup> Resolution ICC-ASP/1/Res.6 (9 September 2002), and Annex to same, para. 7.

<sup>383</sup> 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.

<sup>384</sup> 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<sup>385</sup> 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”<sup>386</sup>.

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

---

<sup>385</sup> 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.

<sup>386</sup> 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”<sup>387</sup>.

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”<sup>388</sup>.

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”<sup>389</sup>.

---

<sup>387</sup> *Ibid.*, paras. 91 and 92.

<sup>388</sup> 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](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?”

<sup>389</sup> *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<sup>390</sup>. 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)<sup>391</sup>. 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

---

<sup>390</sup> 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.

<sup>391</sup> See section on "constructions of victimhood".

might actually militate against mixing criminal and civil dimensions of international criminal law<sup>392</sup>. 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”<sup>393</sup>.

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

---

<sup>392</sup> Cf. Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused”, *Journal of International Criminal Justice* 8 (2010), pp. 137-164.

<sup>393</sup> *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”<sup>394</sup>.

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”<sup>395</sup>.

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<sup>396</sup>.

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.

---

<sup>394</sup> 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.

<sup>395</sup> *Ibid.* p. 319.

<sup>396</sup> 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<sup>397</sup>.

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

---

<sup>397</sup> 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.”<sup>398</sup>

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”<sup>399</sup>. 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<sup>400</sup>. 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<sup>401</sup>. 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

---

<sup>398</sup> United Nations Guidance Note of the Secretary General: Reparations for Conflict-Related Sexual Violence of June, 2014, p. 2.

<sup>399</sup> *Ibid.*, p. 5.

<sup>400</sup> 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”.

<sup>401</sup> *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<sup>402</sup>.

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”<sup>403</sup>.

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<sup>404</sup>. 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 demote the importance of recognizing individual victims themselves whose status as bearers of rights and

---

<sup>402</sup> Frédéric Mégret, “The Reparations Debate”, 2012, *Invited Experts on Reparations Questions. ICC Forum*, Available at: <http://iccforum.com/reparations>

<sup>403</sup> Louise Chappell, *The Politics of Gender at the International Criminal Court: Legacies and Legitimacy*, Oxford University Press, 2015, pp. 156-157.

<sup>404</sup> 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”<sup>405</sup>.

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<sup>406</sup>. 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”<sup>407</sup>.

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<sup>408</sup>. 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”<sup>409</sup>.

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

---

<sup>405</sup> 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.

<sup>406</sup> Cf. Louise Chappell, *The Politics of Gender at the International Criminal Court: Legacies and Legitimacy*, Oxford University Press, 2015.

<sup>407</sup> 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.

<sup>408</sup> 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.

<sup>409</sup> 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”<sup>410</sup>.

## 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

---

<sup>410</sup> *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.