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

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SUMMARY AND CONCLUSIONS

Victims of international crimes have always existed; yet, recently there have been many developments with regards to reparation for victims. Historically, the notion of justice for victims has evolved in international criminal law: from its inception, where justice for victims meant the criminal accountability of perpetrators, to a more contemporary notion of justice, one that includes a more active role for victims in the proceedings against the accused and the right to claim reparations directly from the perpetrator. From the inclusion of the right to reparation in international criminal tribunals, to the creation of administrative mechanisms, to domestic cases concerning reparations for international crimes, international criminal justice has been moving away from a purely criminal dimension, focused on retribution, to the inclusion of a civil dimension. This emerging new dimension of international criminal justice raises many questions, including a fundamental one concerning whether international criminal justice should have a dimension for reparation for victims. This dissertation has attempted to flesh out the meaning and scope of the civil dimension of international criminal justice as it pertains to reparations, and its application in different frameworks. This conclusion aims to bring together the key themes and research questions discussed in this dissertation as well as offer some findings and recommendations.

1. Goals of dissertation and summary of research questions

Before turning to some findings, critiques and recommendations, it is important to recall the goals of this dissertation as well as the focused researched questions it attempted to address. As such, in this study, the primary goal was to assess the civil dimension of international justice by examining the fabric of avenues for reparations for victims of international crimes. In this sense, this study offered a fresh analysis of reparations within the realm of international criminal justice, by going beyond the analysis of only the position of international criminal tribunals[691], and conceiving international criminal justice

[691] See other studies that address the question of reparation for international crimes from the perspective of international criminal tribunals which were fundamental to the development of the present study: Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press, 2012; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*. Brill, 2010; J. Wemmers, "Victim Reparation and the International Criminal Court", *International Review of*

as a broader enterprise composed of international courts, administrative mechanisms and domestic courts. It is also recalled that the broader theme of this study – reparations for international crimes – is incredibly vast and rich, branching out into diverse research areas. The goal of this study was thus not to produce an exhaustive, all-encompassing assessment of reparations for victims of international crimes. Rather, it focused specifically on the development of reparations in international criminal justice within three frameworks: international trials and processes; administrative mechanisms linked with judicial processes, through the lens of the TFV; domestic civil litigation before courts. This study is thus, by its very purpose, necessarily selective in its treatment of the various interconnected issues.

The analysis in this study hopes to contribute to the development of the debate concerning reparations for victims of international crimes through its unique methodological approach: a triad of frameworks that assess reparations at two levels, the international and national levels, navigating from international criminal tribunals and administrative mechanisms to national courts. The advantage of this approach is that it paves the way for a holistic and all-encompassing analysis of reparations in international criminal justice to answer the question posited, that is, whether a mixture of criminal and civil dimensions makes sense in international criminal justice, and in the affirmative, how international criminal justice should develop in this regard.

This study fits within other academic and scholarly efforts that question and analyze the role of reparations in international criminal justice, and ultimately the relationship between punishment and reparation; victims, the offender and the community[692]; the interconnection and cross-fertilization of different fields of international law which deal with responses to mass atrocity; and the meaning of justice in this context[693]. It proposes a fresh analysis of these questions in an attempt to contribute to the academic debate in these fields.

Victimology 16, no. 2 (2009), 123; Frédéric Mégret, "The International Criminal Court Statute and the Failure to Mention Symbolic Reparation", *International Review of Victimology* 16, no. 2 (2009), 127-147.

[692] Be it the international community or the community where the international crime took place.

[693] See Chapter 1.

In this light, this study focused on some key research questions in relation to reparations for international crimes as applied in international justice. Specifically, the overarching research questions that this study offered an analysis are:

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

This overarching research inquiry is interconnected with additional related research questions, which were generally addressed in specific chapters of this study and they all formed a single fabric and contributed to the analysis of the main research inquiry. The related sub-questions addressed in this study were as follows:

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

- What is the scope and content of a duty to repair for individuals? To what extent can principles and the case law on the duty of States to repair inform the duty to repair for individuals? These questions were examined in chapter two.

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

- Should reparations for international crimes be the object of another mechanism, such as an international administrative mechanism (linked with a judicial mechanism)? What role can international administrative mechanisms play in relation to reparations for

victims of international crimes? These questions were the focus of chapter four which provided a discussion through the lens of the ICC Trust Fund for Victims as a case study.

- What role should domestic courts play in relation to reparations to victims of international crimes? Are domestic courts better equipped to deal with reparations for international crimes? Can the doctrine of universal jurisdiction include a civil dimension? Chapter five addressed the role of domestic courts in the adjudication and award of reparations through case studies, including a discussion of the principle of universal civil jurisdiction.

On the basis of the foregoing analysis, the thesis proposed in this study is that international criminal justice has evolved from a purely offender-oriented outlook, where the focus was on punishment and retribution, to one that includes a (civil) dimension for victims. The analysis in this study has however demonstrated that this dimension has not met without difficulties. From a normative, almost utopian perspective, it is argued that international criminal justice should include a civil dimension for victims, one that includes reparations for international crimes. Nevertheless, much still needs to be done before reparations can be said to be fully integrated in international criminal justice. This conclusion addresses some recommendations moving forward concerning how this civil dimension should develop. I claim that in the development of a civil dimension of international criminal justice, ideology and notions of justice are, in practice, overshadowed by the reminiscence of the historical development of international criminal law, focused on retributive goals and remedies.

Reparations for victims of international crimes should develop in a holistic manner, where national and international mechanisms are interconnected and feed off each other, and where national courts assume a crucial role in the award of reparations for victims, influenced by developments at the international level; or as Luke Moffett argues, "a victim orientated complementarity"[694]. It is also claimed that the individualized approach to reparations for international crimes, which forms the proposed paradigm and is the focus

[694] Luke Moffett, *Justice for Victims before the International Criminal Court,* Routledge, 2014, especially chapter 6.

of this research, is not always better than other approaches such as State-based reparations. It is purely complementary, and not mutually exclusive.

The basis for this assessment started with theoretical and conceptual chapters dealing with theories of justice and other fundamental concepts. This study then proceeded with an analysis of three different frameworks for reparations for victims of international crimes, focusing on international criminal justice at the international level (first framework) [695], administrative mechanism (TFV) linked with international criminal process[696] (second framework) , and finally, international criminal justice at the national level, including the notion of universal civil jurisdiction (third framework)[697].

In order to assess systems in place and make recommendations for the development of reparations in international law, this study followed interconnected methodologies that together contributed to the overall aim of the study. It first followed a theoretical methodology to lay the foundations for the discussion of the role of reparations in international law. It also followed a case study methodology in various parts of this study as a means to address specific questions in the study, and draw lessons from specific cases. For example, it addressed the question of State responsibility and reparation through the lens of a case study of an analysis of the jurisprudence of the Inter-American Court of Human Rights (in chapter 2). In chapter 5, on the role of domestic courts in the adjudication and award of reparations for victims of international crimes, this dissertation looked at a case study concerning reparations in the aftermath of the Bosnian war.

In the first introductory part, this study discussed, in chapter 1, theories of justice and the dichotomy between punishment and reparation, especially as it pertains to international crimes. Therein, it analyzed the different aims pursued by punishment of the offender and reparations for victims and whether these aims can converge. It also provided an overview of retributive and restorative or reparative justice theories. It examined the evolution of reparations under international law, starting from an inquiry of international responsibility, from State responsibility to individual criminal responsibility, and the right to reparations

[695] See Chapter 3.

[696] See Chapter 4.

[697] See Chapters 5 and 6.

under other fields of international law. It then assessed the role of reparations under international criminal law, thus laying the theoretical foundation for this study. This chapter assessed theories of justice to appraise a purely criminal function of international justice and plant the theoretical grounds of the question of this thesis, that is, whether international criminal justice can include a civil dimension.

In the same vein, in chapter 2, this study looked at reparations from a State responsibility perspective. In this respect, it examined State responsibility to pay reparations in the realm of human rights law and its distinctions with individual criminal responsibility. This study then looked at the trailblazing jurisprudence of the Inter-American Court of Human Rights as a precursor of enforcing claims for reparation at the state level, in the human rights fields. This case study is significant as it portrays how the Court has dealt with questions such as collective reparations.

The substantive discussion of the study followed three intertwined analytical frameworks. The first legal framework, in chapter 3, discussed international criminal law at the international level, navigating through the distinct international/ hybrid criminal tribunals, discussing the "evolution" of international criminal justice from a focus on purely criminal trials to the inclusion of a civil dimension for victims. It then compared the existing systems in this regard, by positioning them on a spectrum as it pertains to the treatment of reparation for victims. At one end of the spectrum are the ICTY and ICTR, and the hybrid Special Court for Sierra Leone, where victims cannot claim reparations within the international criminal process. In the middle of the spectrum is the ECCC where victims can obtain collective symbolic reparations. At the opposite end of the spectrum lies the ICC where victims have wide-ranging rights, from participation in various stages of the proceedings to claiming forms of reparation directly from the accused. On the basis of this comparative analysis of different institutions, an assessment can be made regarding a criminal function of international justice and whether or how reparations can be weaved into the process.

In the second legal framework, also looking at international criminal justice and reparations at the international level, this study examined a model of administrative mechanisms, a trust fund, linked to a judicial process, the TFV at the ICC, to evaluate the contribution of such avenue for victims to obtain reparations for international crimes that

they have suffered. This chapter addressed the trailblazing example of the TFV at the ICC, its mandate, its activities thus far, and its role, especially in light of the first Judgment of the ICC concerning reparations for victims in the DRC[698]. It assessed whether an administrative mechanism such as a trust fund, connected with a judicial institution, is a feasible avenue for victims to obtain reparation for international crimes.

In the third legal framework, at the national level, the focus was on domestic mechanisms, and specifically reparation claims before domestic courts. Chapter 5 thus analysed the role of domestic courts in adjudicating reparation claims, the challenges and rationales for reverting to national courts and mechanisms to claim reparations for international crimes. To address these questions, the first focus was on a case study of reparation claims before national mechanisms in the aftermath of the Bosnian war so as to flesh out some important aspects of the issue. The analysis then focused on the concept of universal jurisdiction applied in the civil dimension (as opposed to its criminal dimension) and addressed whether it is permissible under international law for reparations for victims, the pros and cons of using the concept for reparation claims pertaining to international crimes, and some recent practice in this regard.

2. Assessment and critiques

In the present study, having examined different frameworks for reparations for victims of international crimes, a preliminary assessment can be made regarding the current state of affairs. This assessment is made through some general remarks of findings and then some more specific assessments. Critiques and recommendations will follow.

By contrasting different judicial mechanisms, both at the national and international levels, some conclusions can be drawn. First, on a theoretical dimension, justice, in the aftermath of mass international crimes, is evolving to have a broader meaning, one that encompasses retribution to the offender, and reparation for their victims. Theories of justice – retributive and reparative justice – meet in the design of international criminal justice. A trend is indicating that punishment of the offender is no longer the sole and unique objective of international criminal justice. Similar to the manner in which

[698] Decision on Reparations. See in more detail, Chapter 3.

international law evolved in order to bring *individual* perpetrators to justice to be tried for their crimes, the way is (albeit slowly) being paved for victim redress for international crimes both at national and international levels.

Be that as it may, there are still some inconsistencies and uncertainties in this emerging dimension. At the current print of international criminal justice, the spectrum of how international courts and mechanisms treat victims and reparations is still wide-ranging, from no possibilities of claiming reparations, to a system of reparation that bears the potential of being meaningful. The same is true about national court proceedings and mechanisms.

At the beginning of this study, the question was whether the time is ripe for the inclusion of reparations for victims in international criminal justice, or whether reparations should be reserved to other areas of law. As examined, limiting reparations claims to the realm of State responsibility and human rights law leaves a gap where victims of international crimes may find no forum to make their claim. It has been demonstrated that while international human rights law can be informative to the development of international criminal justice as it pertains to reparations for victims, human rights law and State responsibility mechanisms cannot be directly transposed to international criminal justice. The existing mechanisms - in international human rights law, international humanitarian law and domestic law - are not mutually exclusive; they can co-exist and feed off each other; there is a place for international criminal justice to deal with reparations for victims; otherwise, many victims will be left unaccounted for.

Thus, the thesis that this study has attempted to defend is one of the progressive development of international criminal justice to include a dimension for victims. What has dictated the development of international criminal justice from its inception was the reminiscence of historical dichotomies and dogmas, and of a clear-cut division of theories of justice.

While some systems in place take an approach to international criminal justice that excludes victim redress, such as the *ad hoc* international criminal tribunals (ICTY and ICTR), the advent of the ICC has taken the notion of international criminal justice to a different level, with its reparation system. The system developed at the ICC is on the one

hand innovative, and on the other, still immature. Efforts should be made to develop it to its full potential, making sure there is legal certainty concerning principles for reparation and their application in concrete cases. In addition, it is important to recognize that the ICC is but one mechanism that exists, and it cannot carry more than its own weight with regards to reparation.

Another assessment that can be made in this study pertains to the role of national courts in the award of reparations for victims of international crimes. There are many challenges that victims face in obtaining reparations in countries where the international crime took place. Using the case study of the aftermath of the Bosnian wars, and the mechanisms instituted to provide victims with a forum to claim reparations, this study has illustrated that often times national courts do not provide the perfect road to redress and restoration. In the case of Bosnia, there were mechanisms set up by Dayton Agreements which filled in the gaps, for a period of time, of national courts.

This study also addressed the emerging doctrine of universal jurisdiction as applied in the civil dimension (i.e. universal jurisdiction for cases of reparation). This study has analysed the scope of universal civil jurisdiction under international law, how it can be further developed and how it can work to overcome some of the challenges of bringing cases before national courts where the international crimes were committed (for example, if the judicial system is collapsed after war, victims will not be able to claim civil redress from perpetrators in the courts where the crimes were committed). While it is not yet widely recognised, and there are limitations under international law, universal civil jurisdiction, within certain circumscribed parameters, could be used as an avenue for victims to claim reparations, as it was illustrated in the cases against *Karadizić* studied herein[699].

The final general assessment that can be made is that international criminal justice has gone through phases of development, evolving from a purely retributive outlook to an approach that takes into account victims and reparations. This study concludes that contemporary international criminal justice includes a dimension for victims, a "civil"

[699] See Chapters 5 and 6.

dimension where victims can seek and obtain some form of reparation. This "dimension" is still in the process of development.

Thus, in addressing different frameworks where reparations for victims can be assessed, this study concludes that this "civil dimension" of international criminal justice is still in its infancy stage, and that some efforts must be made to further develop it. It is on the basis that this study makes some recommendations for the progressive development of this civil dimension with regards to reparation.

A) The emerging civil dimension of international criminal justice

The leading research questions in this study are whether international criminal justice should be concerned with reparation for victims of international crimes and whether the blend of civil and criminal dimensions is a desirable model in international criminal law.

In short, the research and analysis of the themes addressed in this study suggests that there exists a legal duty for individuals to give reparations to victims of international crimes under certain circumstances, within the ambit of international criminal law. The contents of this duty are currently under development and there are many challenges ahead. The theoretical justifications for including a civil dimension include empowerment of victims and the notion of justice for victims. The question whether it is a desirable model hinges on how the civil dimension develops and is implemented in international criminal justice. In this sense, international criminal courts, and specifically the ICC, cannot single-handedly bear the responsibility of including a civil dimension in international criminal justice. National courts have an important role to play as discussed in the last chapter of this study. Based on this overall finding, this study now proposes some general conclusions of the research sub-questions developed in each chapter.

1. A civil dimension to international criminal justice brings about new paradigms

While this dissertation discusses a civil dimension of international justice primarily with a focus on reparations for international crimes, a civil dimension is not limited to questions of reparations, and includes for example victim participation in the criminal proceedings, a topic outside the scope of this dissertation. The report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

is enlightening in this regard[700]. Including a civil dimension to international criminal justice also brings about new paradigms which may differ from the criminal dimension: the expertise of Judges dealing with reparation requests, the enforcement of reparation awards, the standard of proof, hierarchy as well as exclusion of victims, and instances when reparation is connected to a conviction.

2. Reparations is only one facet of the civil dimension of international criminal justice and the broader goal of delivering "justice for victims" of international crimes

Reparations for international crimes do not stand in a vacuum. There are important dimensions that accompany and are crucial to any reparation initiative, and that contribute in delivering justice for victims of international crimes. As the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence concluded, to be seen as a true justice mechanism, reparations must be "accompanied by an acknowledgment of responsibility and needs to be linked with other justice initiatives such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence"[701]. This calls for two related propositions. The first is that *symbolic* forms of reparation such as acknowledgement of responsibility and guarantees of non-repetition should not be discarded automatically. These are important forms of reparation and an effort should be made by the different actors involved in reparations proceedings to accommodate these dimensions, bearing in mind seemingly conflicting rationales such as the human rights of the accused. The second proposition that stems from the different dimensions of justice for victims is that reparations are distinct from assistance or development aid; they may complement one another but they are distinct ways in which justice for victims in the aftermath of international crimes may be delivered.

3. Individual perpetrators have a legal duty to provide reparations to victims of international crimes, in certain circumstances, and victims have a corollary right to receive reparations

International law has seen over the years an evolution with regard to reparations in general, and in particular in relation to international crimes. Traditionally, reparations were owed from one State to another State. With the advent of human rights law, individuals

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

[701] *Ibid*.

began to be recognized as the beneficiary of reparations owed by the State. The basis of this study was a third paradigm: the construction of a legal duty owed by the individual (perpetrator/ convicted person) to the individual victim (who is the direct beneficiary). It is submitted that a legal duty owed by individual perpetrators, separate from that of the State, exists in relation to international crimes. It is still at its infancy stage however, and the contours of this legal duty are in process of formation. The legal duty to pay reparations to victims under modern international criminal law is a corollary of the criminal accountability of perpetrators. Imposing a legal duty on perpetrators to pay reparations to victims serves symbolic purposes, contributes to the overall goal of international justice to deliver justice for victims, assists in ending impunity and contributes to reconciliation. This legal duty imposed on individuals has to move from rhetoric to real implementation; it has yet to be fully realized. The legal duty of perpetrators and the right of victims are two sides of the same coin: at this print of international law, this study suggests that an international crime gives rise both the accountability of perpetrators and the right to victims to receive reparation.

4. The contents of the legal duty to repair imposed on individual perpetrators are still under formation in international criminal justice and lessons can be learned from other reparations initiatives

Principles of reparation in other fields, such as in the human rights field, may inform the content of the legal duty to repair under international criminal law, while bearing in mind some systemic differences that exist across different fields. Importantly, international human rights law can inform matters such as the form of reparation (collective or individual), type of reparation (i.e. rehabilitation, apology, compensation, etc.). Other difficult questions that including a civil dimension to international criminal justice will bear are: the duties of judges in relation to reparation, evidence, the balancing of rights of the accused and rights of victims. Many of these challenges will have to be answered on a case-by-case basis, and looking at lessons from international human rights law (for instance) can be inspirational. The operationalization of reparations for international crimes before international courts and tribunals is in the process of development and in this process, it is important to devise clear and fair principles of reparation and keep striving to apply them consistently and meet the challenges required.

5. An individualized approach to reparations is complementary to State responsibility for reparations for international crimes

While the focus of this study was not on State responsibility for international crimes, the conclusion in this regard is that, an individualized approach to reparation is not better or worse that State-based reparations. The emphasis is different. Some forms of reparation, such as guarantees of non-repetition might make more sense within State-based reparations - where the State will continue in power and whereas an individual perpetrator may have lost his/her eventual position of power. One rationale for seeking reparations directly from individual perpetrators is to deliver on the promise of "justice for victims" which is not limited only to reparations and encompasses criminal and civil dimensions, and empowers victims, by connecting the criminal and civil liabilities of the perpetrators. Nevertheless, in order to fully achieve justice for victims of international crimes, the potential responsibility of States has to be still borne in mind. The nature of international crimes is such that individual accountability shall not automatically exclude State responsibility. Where State responsibility for international crimes is also involved, States shall be jointly liable to pay reparations in order to fully achieve the objective of "justice for victims". While at the ICC for example, State responsibility falls outside its jurisdiction, such responsibility has to be sought through other mechanisms such as a reparation fund.

This study posits that there are diverse avenues where victims can search and possibly obtain reparation for international crimes. Much will depend on some specific circumstances, such as whether a State is involved, and thus, whether reparations can be claimed against a State. Furthermore, in many instances, the State is not directly involved in the atrocities committed, thus, relying solely on the responsibility of States, and excluding the actual perpetrators might leave victims without any form of redress, which explains the importance of analysing individual responsibility in terms of redress for victims of international crimes. From a moral standpoint, it should also be questioned whether a State has the right to negotiate and enter into agreement relating to reparation for harm that individual victims suffered, without any form of consultation, participation or assignment of rights.

It is also argued that individual liability for reparations should not be to the exclusion of any other right victims might have against the State. Thus, victims' right to reparation against the individual perpetrator might be complemented by a right to reparation against

the State. Where the State can be involved in the fulfilment of reparations awards, even if it is found that individual perpetrators are liable, such approach should be preferred so as to afford the best chance for reparations to be implemented.

6. There is a disjuncture between the rhetoric that included reparations in international criminal justice, supported by the idea of justice for victims, and the substantive realization of reparations

The idea of "justice for victims" may theoretically justify reparations in international criminal justice. As Luke Moffett argues "the treatment and protection of the ICC is victims orientated justice by being inclusive to their needs"[702]. This study subscribes to his argument that:

> "Attaching responsibility for reparations to perpetrators, whether individual, state, or organisational, can provide an important psychological function for victims in appropriately directing blame at those who committed the atrocity against them and to relieve their guilt. Reparations made by the responsible perpetrator can also help to symbolise their commitment to remedying the past and to be held to account for their actions"[703].

The civil dimension of international criminal justice needs however to move beyond from the traditional rhetoric that broke away from a purely retributive approach to international crimes and start actually delivering justice for victims. Many are all too ready to claim that the inclusion of victims' rights is paramount to a complete international criminal justice system; however, this discourse often looks more like lip service. In the example of the first case before the ICC, after a decade, victims still have not received reparations. Once the long trial ended, victims are now caught in between a back and forth between the TFV and the Trial Chamber charged with monitoring the implementation of reparation[704]. In fact, since the first decision on reparation in the *Lubanga* case by the Trial

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[702] Luke Moffett, "Justice for Victims before the International Criminal Court", Routledge, 2014, p. 141.

[703] *Ibid.*, p. 147.

[704] For a detailed account of the numerous procedural stages of the implementation of reparations in the *Lubanga* case, see the procedural history summarized in ICC, Trial Chamber II, *Prosecutor v Thomas Lubanga Dyilo*, "Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations", ICC-01/04-01/06, 21 October 2016, paras. 1-10.

Chamber, in 2012, more than four years later, only very recently (end of October 2016) has the reparation plan been accepted by the Trial Chamber, which will admittedly take time to be implemented. While it is acknowledged that this is the first case of reparations before the Court, this example sheds light on the delays and complexities for the substantive realization of reparations for victims. It is hoped that lessons can be learned from this first case and the process can be streamlined in the future with the objective of substantive realization of justice for victims.

7. A civil dimension of international criminal justice, including reparations for victims of international crimes, is not limited to the ICC

The ICC cannot single-handedly be responsible for reparations for victims of international crimes. Its possibilities are limited by numerous factors. Its jurisdiction provides a limitation: temporal jurisdiction and subject-matter jurisdiction mean that some international crimes, as well as other serious violations that do not amount to international crimes, will fall outside its scope and the victims of those atrocities will not be able to turn to the ICC. Furthermore, the ICC is limited by its resources (both human and financial resources) as well as systemic dictates, such as the inherent selectivity of international prosecutions and the connection between a conviction of the accused and adjudication of reparation claims.

Administrative mechanisms such as trust funds connected to judicial mechanisms (and the TFV is the primary example in this regard) could play an important role in the adjudication of reparations particularly in light of the massive nature of international crimes and the complexities of planning and implementing reparation awards. In the same vein, national courts have an important role to play in relation to reparations. The ICC is a court of last resort. This is so in relation not only to criminal proceedings but in relation also reparations. Thus, positive complementarity should include also dimensions for reparation - national courts should play an important role in cases of reparations for international crimes. Importantly, however, more efforts have to be put on implementation and enforcement of reparation awards. As the case against Karadzić demonstrates, rich reparations are often awarded but not always implemented, thus bearing only the symbolic advantage of the reparation award.

8. In the ICC context, victims may have too high expectations with regards to reparation

The potential for the ICC to provide reparations for victims of international crimes is limited. It is limited by the system itself, which links reparations to a conviction, and thus is limited to providing reparation to those victims of crimes whose perpetrator was prosecuted and punished by the ICC. This limited reach of the ICC is not always in line with victims' expectations[705]. Part of the journey of the Court in regards to its reparation mandate will be to manage victims' expectations. This can be done through a coherent and connected effort of all organs of the Court to inform affected communities of the Court's inherent limitations and explain its multifaceted mandates (i.e. accountability, reparation, etc.). The study conducted by the Human Rights Center at the University of California, Berkely School of Law indicates that many victims see the Court as a venue where they can get reparations for the harm they have suffered, that they joined the ICC proceedings with the expectation they would individually receive reparation[706]. Outreach to affected communities should include information about the possibilities as well as limitations of reparations through the ICC. Filling in this informational and knowledge gap about what the Court can realistically achieve in terms of reparation can indeed avoid false expectations and limit further victimization.

9. Victims' provisions at the ICC have a significant symbolic value and could be a catalyst for the implementation of reparations in other forums

Including a civil dimension in international criminal justice and the ICC in particular, provide theoretical justifications for the Court, which was instituted a Court to seek justice for victims. It might also add a degree of legitimacy to the Court, in that victims are part of the international criminal justice project. The symbolic meaning of recognizing victims' suffering and giving them rights empower them, and can have a rippling effect. But after a decade of existence, the Court has to capitalize on this significant symbolic value and start pro-actively being a catalyst for the implementation of

[705] See a discussion on this topic: Sharon Nakandha, "ICC Court Ruling on Reparation for Kenyan Victims: Does the ICC Oversell Its Mandate or Are Victims Simply Expecting Too Much?", *International Justice Monitor*, 25 July 2016, available at: https://Ibid..ijmonitor.org/2016/07/icc-court-ruling-on-reparation-for-kenyan-victims-does-the-icc-oversell-its-mandate-or-are-victims-simply-expecting-too-much/

[706] Human Rights Center, University of California, Berkely School of Law, "The Victims' Court: A Study of 622 Victim Participants at the International Criminal Court", p. 3, available at: https://Ibid..law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf

reparations before domestic courts and mechanisms. As Luke Moffett argues, "the Court will need to encourage states to implement justice for victims to overcome its structural limitations and to move beyond the rhetoric of realizing justice for victims of international crimes"[707].

10. Adding a civil dimension to universal jurisdiction may provide an avenue for victims' claims of reparation for international crimes

Using the doctrine of universal jurisdiction to allow victims to bring civil claims against individual perpetrators before domestic courts of foreign States is a way to counter some of the challenges of domestic civil litigation in the State where the crime occurred, such as lack of legislation supporting civil claims in relation to international crimes, political interference or the collapse of judicial institutions. As discussed in chapter 5 of this study, universal jurisdiction in its criminal dimensions has been gaining support in recent decades as a strong tool against impunity; a civil dimension, for all the hurdles it may encounter, could be the next frontier. This study examined the difficulties with universal civil jurisdiction and concluded that there isn't any customary international law rule prohibiting the exercise of universal civil jurisdiction (with some exceptions, such as in cases of State immunity). States could adopt legislation that allows for a civil claim to be brought against individual perpetrators for crimes for which universal jurisdiction is already recognized (in its criminal dimension) under domestic law.

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Having reviewed some general conclusions of the present study, the way is paved to provide some recommendations on the overarching themes and the road ahead.

B) Recommendations and the road ahead

The road ahead in terms of reparations for international crimes in the realm of international criminal justice, as examined in this study, looks more like a hill, a steep uphill. Nevertheless, the ground has previously been more arid than it is at the moment. In terms of international tribunals, only the ICC and ECCC provide the possibility for victims to obtain some meaningful form of reparation. In terms of administrative mechanisms, the TFV provides an interesting model, but it is still in the process of defining it contours. At the national level, much still needs to be done, and national courts need to play a more

[707] Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, p. 283.

important role in the adjudication of reparations and other domestic mechanisms such as trust funds should be envisaged. With these remarks in mind, this study turns to some recommendations.

1. The ICC shall move beyond the rhetoric of victims reparation and into concrete realization of reparations

Developing the civil dimension of international justice means empowering victims. Reparations, in whichever form, ultimately means acknowledging victims' suffering, and giving them a place in the justice process. This can be done at the Court through its organs (the OTP when making statements, interacting with victims, selecting its cases) and Chambers (when making and drafting decisions). The important is that the relevant stakeholders be willing to engage in *realizing* justice for victims.

2. At the ICC, all stakeholders have to make a sincere effort to get on board with the reparations mandate of the Court

All organs and stakeholders of the Court have to work towards realizing the reparations mandate of the Court. This includes limiting any influence of internal or external politics. The observed delay observed in the first case before the Court at the stage of reparations, as discussed above, can no longer be justified. The Court has to learn from its own mistakes and those who compose the Court shall have a genuine interest in realizing reparations for victims and empowering victims, as recognized in the Court's formative texts.

3. Victims should be factored in the OTP's decisions in relation to situations and cases

The decision of the OTP to bring charges affects the inclusion or exclusion of victims under the umbrella of the Court. When deciding to exclude certain criminal conduct for investigation or charges, the OTP has to bear in mind the potential impact this will have for individual victims, who have suffered from crimes within the jurisdiction of the Court, but whose perpetrators are not charged before the Court (or are not charged with a given crime), will be excluded, even though they are real victims. OTP's decisions shall not be solely guided by the prosecution of the accused and the criminal process before the Court.

4. ICC Judges should bear in mind the interests of victims when making decisions

The first case before the Court illustrated a disconnect between the requests and interests of victims and the decision of judges. This can create an impression amongst victims that their voices are not in fact being heard. When making decisions on cases Judges shall bear in mind the impact that such decisions might have on victims and affected communities. After all, victims' rights, including reparation, are part of the Court's endeavour. This may include a process of selection of the composition of the Court (or at least some) who have expertise and sensibility concerning victims' rights and victimology. Judicial training on victimology might also breach potential gaps of the criminal and civil dimensions of international justice from the judicial perspective.

5. More efforts have to be put into bridging informational gaps and managing victims' understanding and expectations of the mandate and limitation of the ICC

The first decade of the Court's operation has demonstrate a disconnect between what the Court can realistically do and what victims may expect it to do. In interactions with victims and affected communities more efforts have to be put into educating about the role of the Court, its different mandates (including reparations, and prosecution of the offender) and its inherent limitations. Victims should also be informed of the role of the TFV and other potential avenues to obtain redress. An educational approach to the role of the Court can avoid secondary victimization and a general sense of dissatisfaction on the part of victims and affected communities.

6. An individualized approach to reparation for international crimes is inherently selective and limited, and as such it should not exclude other models of reparations

The individualized approach to reparations in respect of international crimes is inherently selective, as this study has discussed. It is also limited, as international crimes do not encompass all kinds of human rights violations and mass atrocities. It further suffers from other practical restrictions such as lack of resources, especially when the perpetrator is indigent. It is important that it is thus seen for what it is: another avenue under which victims may claim and obtain reparations, that co-exists with other avenues and mechanisms.

7. States Parties shall complement reparations

It is suggested that with the recognition of the right to reparations for international crimes at the ICC, and the first decision on principles of reparations, the Assembly of States Parties can take this mandate of the ICC to another level by being a catalyst for a more significant domestic approach to reparations, through concrete reports and resolutions on an active role for States Parties to implement provisions on reparations for victims of international crimes, and the building of national trust funds for reparations for victims of international crimes (that fall within the jurisdiction of the Court)[708]. States Parties where mass international crimes were committed should be proactive in removing any barriers for allowing victims to claim reparations through domestic courts; also setting up trust funds or other administrative mechanism for the benefit of victims of the conflict might also provide an avenue for victims to obtain redress.

States Parties have to act on their responsibility to complement the Court in criminal and civil dimensions of international justice, including reparations. This is also in line with the *Basic Principles*, which provide in Article 16 that: "States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations"; and Article 17 that: "States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements".

6. Victims of international crimes outside the jurisdiction of the ICC shall also receive redress

As discussed in this thesis, other international courts and tribunals in relation to distinct conflicts (such as the ICTY and ICTR) do not have provisions on reparations. This should not mean that victims of those conflicts are to be left without reparation. Created

[708] See in a similar vein, Luke Moffett, "Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague", 13 *Journal of International Criminal Justice* 2, (2015), 281-311, who claims that the Assembly of States Parties and States Parties should play a greater role in implementing justice for victims domestically.

under the auspices of (or upon agreement with) the UN, a claims commission or trust fund should be set up by the UN to deal with reparations for victims of those conflicts, who could not turn to the tribunals for claims of assistance or reparation.

7. The context in which reparation is sought is important

Another important consideration is the context in which reparation is claimed: whether a post-conflict/ peace-time context, or an armed conflict context. While a conflict is still on-going, avenues are more limited in international criminal law as through the ICC, a conviction is necessary before reparation by the perpetrator is owed. Even when the broader conflict has not ceased, there may be possibility for reparation if individual perpetrators are brought to trial and convicted of crime(s) within the jurisdiction of the Court. Reparation in an armed conflict situation, where the conflict has not completely ceased, should take into account the difficulties imposed by the armed conflict and the particular needs of victims in those situations.

In post-conflict situations, one alternative model is that adopted in Rwanda in 1998 after the conflict[709], where the Rwandan government established a fund (FARG) which counts on a percentage of the government's annual fund, grants by foreign governments, individual donations and damages payable by those convicted of participating in the genocide[710]. Moving forward however, should a similar model be crafted, there are a number of lessons that ought to be learned from this experience, especially the fact that many victims have not been able to claim reparations[711].

One avenue that was briefly mentioned in this study, but that is nevertheless crucial, concerns the inclusion of claims in peace treaties. When peace is achieved and a peace treaty is signed, one way forward to ensure reparations to victims are provided is to include reparation provisions in the peace treaty. The issue however is that, as history

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[709] Law No 69/2008 of 30/12/2008, *Law relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1st October 1990 and 31st December 1994, and determining its organisation, powers and functioning*, Article 26.

[710] See *ibid.,* Article 22.

[711] Heidy Rombouts and Stef Vandeginste, "Reparations for Victims in Rwanda: Caught Between Theory and Practice", in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations,* K. De Feyter et al. (eds.), Intersentia, 2005, p. 310.

demonstrates, if peace treaties are accorded between States, reparations are often provided to the injured State, rather than directly to individual victims. Reparation may be for injury suffered by States or their nationals, but the payment (usually in lump-sums) is provided to the injured State, who is responsible for its distribution[712]. One example to be noted is Article 16 of the 1951 Treaty of Peace between the Allied Powers and Japan where it was provided that the lump-sum awarded was a final settlement of all claims precluding individual claims by victims[713].

In post-conflict situations and peace time contexts, the focus might be different, such as in rebuilding communities and providing programs of rehabilitation and community stability. In the case of peace agreements with rebel groups, one way forward would be inclusion of claims of reparation for victims. There is also the possibility of including provision of a claims commission such as in the peace agreement between Eritrea and Ethiopia[714]. It is worth mentioning that in a decision of 2001, the Commission established that the appropriate form of reparation was in principle compensation, but it did not exclude that other forms of reparation could be given if in accordance with the principles of international law[715]. This Commission is tasked with deciding through binding arbitration all claims between the two States and private entities for losses and damages during the conflict (violations of international humanitarian law and other violations of international law). Another example, which was not explored or discussed in the present study, is mixed claims commissions (arbitral tribunals established by treaty), where individuals may be able to assert claims against States. One such commission is the Iran-US Claims Tribunal established by the so-called Algiers Accords between Iran and the United States in 1981. The tribunal can hear claims of nationals of one State against the other State (and also claims of one State against the other). Another possibility is to set up quasi-judicial institutions, either by peace treaties or the Security Council, to hear claims

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[712] Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *IRRC* September 2003, Vol. 85 No 851, pp. 535-536.

[713] *Ibid.*, p. 536.

[714] *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea*, 12 December 2000, Article 5, *International Legal Materials*, Vol. 40, 2001, p.260.

[715] Eritrea-Ethiopia Claims Commission, *Decision Number 3: Remedies*, 24 July 2001. See Emanuela-Chiara Gillard, "Reparation for violations of international humanitarian law", *IRRC* September 2003, Vol. 85 No 851, pp. 542-543.

for reparations. One notable example is the United Nations Compensation Commission, established by the Security Council in 1991, which has jurisdiction over claims against Iraq for "any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait."[716]

C) Final remarks

In sum, while different forms of reparations for international crimes (i.e. reparations obtained from individuals, reparations obtained from States) present some systemic differences, as explored above, they all form part of a broader system of reparation for international crimes. This study aimed at exploring a piece of this puzzle: the development and operationalization of a legal duty imposed on individuals to repair in the context of international criminal law – the emergence of a civil dimension in international criminal justice. This dimension is still developing from its infancy: just as a fragile baby bird, it needs to be nurtured in order to thrive. The present study trailed with this humble aim: to contribute to ongoing reflections of how this civil dimension fits in the broader framework of reparation for international crimes and how it should develop.

[716] UN Security Council resolution 687, 3 April 1991, para. 16. Technically, individuals do not bring claims directly to the Commission but rather do it through their State, who acts in an administrative function rather than espousing the claims in diplomatic protection.