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THE RIGHT TO REPARATIONS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

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NOTICE

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The thesis is presented in its 2013 version as approved by the Board of Professors of the University. The author was admitted, at the first session, to proceed for the final examen which involved thesis defence before a Committee composed by external examiners. The thesis was successfully defended on 24th July 2014 and thereafter the author was awarded the PhD in International Law and the Law of European Union.

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- ***Professor Roberta Clerici**, University of Milano*
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DEDICATION

To my beloved wife, Alphonsine and children,
my brother Pascal Buhayirwa and
all of my friends I dedicate this thesis.

Above all, I give all the glory and thanks to GOD
for all the wisdom and guidance He supplied during this research.

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THE RIGHT TO REPARATIONS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Abstract

The right to reparations for victims under international criminal law is a new topic which has been subject to increasing debates among professional lawyers and scholars of International Criminal Law. More particularly, the legal recognition and implementation of this right raise several questions that call for in-depth inquiry. Very few studies have so far focussed on the complex issues arising from the implementation of this 'emerging' right. The present study explores this topic through the lenses of Article 75 of Rome Statute for International Criminal Court.

With the Rome Statute for the international criminal Court, international criminal law introduces for the first time the right to reparations for victims against their offender. Article 75 of the Statute creates the right for victims to claim reparations before the court and vests the latter with the power to decide on reparations upon request or upon its own motion. This study aimed to unpack the *content* of this new right and assess *legal mechanisms* for its implementation. Specifically, this study sought to establish whether there is any substantive and procedural law applicable to reparation before the International Criminal Court (ICC), how the risk of conflict between national justice and the ICC is dispelled and how reparations orders are enforced.

This study found that the ICC Statute created the right to reparations as a *principle* whose content should gradually be shaped and developed by the Court on a case by case basis. As regards with legal mechanisms of the implementation of the new right, the study found that procedural mechanisms are at their *embryonic stage* and like the content of the right they shall be developed by the Court. In addition, the study noted that complementarity principle, which governs the jurisdiction of the ICC, should be applied to the right to reparation before the Court. Thus the principle appears as a mechanism to dispel the risk of conflict between national judicial institutions and the ICC. Moreover, it was observed that for effective and efficient implementation of the right to reparations the ICC Statute established a legal framework for the *interactivity* of institutional mechanisms - the Court, the TFV and States - which play crucial role in the enforcement of reparations orders. Furthermore, the study found that some legal and practical challenges facing the effective implementation of the right to reparation require reviewing the Court's procedure in order that collective approach may be prioritised in reparation proceedings. It was also observed that the

flexibility of the Statute provides opportunities for establishment of a Special Chamber for reparations within the Court for the purpose of complying with the requirements of fair trial.

It is expected that the findings of this study will constitute an invaluable contribution to the few research already carried out on this novel topic in international criminal law and inform various actors in the field including judges, lawyers and scholars.

Key Words: application, apology, assistance, award for reparations, burden of proof, causation, compensation, complementarity, conviction, cooperation, crime(s), damage(s), decision, expert(s), harm, indigence, injury, legal person(s), liability, notification, order(s), principle(s), proceedings, prosecution, protective measures, request(s), publicity, representative(s), reconciliation, rehabilitation, remedies, reparation(s), responsibility, restitution, standard of proof, State(s), Trust Fund for victims, victim(s).

CONTENTS

SELECT LIST OF ABBREVIATIONS

Art.	Article(s)
ASP	Assembly of States Parties (of United Nations)
CCPR	Covenant on Civil and Political Rights
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECtHR	European Court of Human Rights
Ed.	Editor(s)
etc.	and so forth
ff	and the following
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
Ibid	*Ibidem*
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
IMT	International Military Tribunal
LCLR	Lead Common Legal Representative
JDI	Journal de Droit International
NGO	Non-governmental Organization
OHCHR	Office of the High commissioner of Human Rights
OPCD	Office of Public Counsel for the Defence
Op. cit.	*Opere citato*
OTP	Office of the Prosecutor
Para(s)	Paragraph(s)
p.	Page
pp	Pages
PrepCom	Preparatory Committee
RC	Regulation of the Court

Res	Resolution(s)
RPE	Rules of Procedure and Evidence
RR	Regulations of the Registry
RegTFV	Regulations of Trust Fund for Victims
s.	Sentence
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TFV	Trust Fund for Victim
UK	United Kingdom
UN	United Nations
UNA	United Nations Assembly
UNCC	United Nations Compensation Commission
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
UNODCCP	United Nations Office for Drug Control and Crime Prevention
UNSC	United Nations Security Council
US	United Stated
VPRS	Victims Participation and Reparation Section
Vol	Volume
1985 UN Basic Principles	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Adopted on 29th November 1985)
2005 UN Basic Principles	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Adopted and proclaimed by the General Assembly resolution 60/147 of 16th December 2005)
2012 Decision on Principles and Procedures	*ICC, Prosecutor v Lubanga,* Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012, ICC-01/04-01/06-2904

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THE RIGHT TO REPARATIONS UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

GENERAL INTRODUCTION

Art.75 of the Rome Statute for the International Criminal Court (hereinafter ICC Statute) provides for reparations to victims of crimes under the jurisdiction of the Court. It introduces a new concept in international criminal justice: individual liability for reparations to victims of most serious international crimes. Whilst practitioners of international law were acquainted with States' responsibility to repair harm caused by violations of human rights under international human right law and individual criminal responsibility under international criminal law, the ICC Statute brings in the right for victims of international crimes to claim reparations against their offender(s) as individuals. The right to reparations created by the ICC Statute appears as one of the major and new features of the Court.[1]

The Assembly of States Parties to the ICC Statute (ASP), in its Resolution ICC-ASP/10/Res.3 on Reparations, adopted at the 7th plenary meeting, on 20th December 2011, noted that 'reparations to the victims of the most serious international crimes are *critical components of the Rome Statute* and that it is therefore essential that the relevant provisions of the Rome Statute are efficiently and effectively implemented [emphasis added]'[2]. By the same Resolution, it recognised that 'victims' rights to equal, expeditious and effective access to justice, protection and support, *adequate and prompt reparation for harm suffered*, and access to relevant information concerning violations and redress mechanisms are essential components of justice[emphasis added]'.[3] In the same vein, the ICC held that the reparation scheme provided for in the Statute is not only one of the Statute's unique features but is also a key feature and the success of the Court is, to some extent, linked to the success of its reparation system.[4]

Nevertheless, the ASP has recently underlined, in its Resolution *ICC-ASP/11/Res.7* on Victims and Reparations, adopted at the 8th plenary meeting, on 21st November 2012, '*the urgent*

[1] Besides the right to reparations to victims introduced in international criminal law and contrary to previous international tribunals, the ICC Statute established the Court as an international permanent judicial institution (See Art.1 of the ICC Statute).

[2] Para.1 of the Preamble of the Resolution *ICC-ASP/10/Res.3* on Reparations, Adopted at the 7th plenary meeting, on 20th December 2011.

[3] Para.2 of Preamble of the Resolution ICC-*ASP/11/Res.7* on Victims and Reparations, Adopted at the 8th plenary meeting, on 21st November 2012

[4] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012, ICC- 01/04-01/06-2904, para.178.

need to modify the system for victims to apply to participate in proceedings in the light of the existing situation, in order to ensure the sustainability, effectiveness and efficiency of the system, including any necessary amendments to the legal framework, while preserving the rights of victims under the Rome Statute [emphasis added]'.[5] The ICC Statute was adopted in the year 1998 and entered into force in the year 2002. Why then ten years after the Statute entered into force, is there the need of modifying the system and the legal framework for victims to participate in the proceedings before the ICC? Will not this modification affect the implementation of the right to reparations? This study aims principally to unpack the content and assess legal mechanisms for the implementation of the innovative right to reparations under the ICC Statute in the context of fair trial. This general introduction outlines the main research questions (I) as well as the interest and originality of the topic (II). In addition, it provides a brief description of the research methods used in the collection and analysis of data (III) as well as the structure of the thesis (IV).

I. The main research questions

The right to reparation for victims under ICC Statute raises a number of issues. This thesis endeavours to explore some of them through a series of questions:

(1) Is there any substantive law to be applied by the ICC in assessing damage, loss and injury and determining reparations for victims?

(2) Is there any procedural law to be applied by the ICC allowing it to balance the interests of parties to criminal proceedings with reparations proceedings?

(3) How will the risk of conflict of jurisdiction between the ICC and national courts be eliminated?

(4) Which kind of reparations will the Court award against an offender so as to meet the expectations of victims of the most serious international crimes under the jurisdiction of the ICC?

(5) Is there a legal framework which will facilitate the execution of reparation orders issued by the ICC?

All of these issues require in-depth analysis of the content of the right to reparation and an assessment of the legal regime used in the adjudication and execution process. The main findings of

[5] Para.4 of the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations, adopted at the 8th plenary meeting, on 21st November 2012

this study demonstrate that the content of the right to reparations and the procedure for adjudication are to be shaped and developed in the courtroom. They also indicate that the effectiveness of the implementation of the novel right to reparations under ICC Statute requires interaction of different players such as States and the Trust Fund for Victims (TFV).

II. The interest and originality of the topic

Before the establishment of the ICC, the World witnessed the creation of international criminal tribunals such as Nuremberg International Military Tribunal and *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda. Victims had no *locus standi* to claim reparations before these international tribunals.[6] The ICC Statute has shifted from their model to create the right to reparations for victims from their offenders. Thus, it appears that the momentum of international criminal law 'favours the twin objectives of ending impunity and reparation for the victims of the most serious international crimes'.[7]

Yet the ICC's power to deal with reparations matters has been left virtually forgotten by focused researches. On the contrary, the criminal aspects of the Court's jurisdiction has been subject of writings of many authors, academics and other researchers, lawyers and speeches of many politicians. The ICC Statute has been examined from various angles but none of its examiners has spent much on the right to reparations for victim as one of its important innovation in international criminal justice. One may assume that the lack of deep and focused researches on the victims' right to reparations from an individual offender, brought in by the ICC Statute, is directly linked to the aforementioned lacuna – absence of victims' *locus standi* to claim reparations against their offenders - that existed in international criminal law before the establishment of the ICC.

Nevertheless, it is interesting that very recently some scholars should have decided to clear the land and explore this new field of international criminal law. On 6th May 2010, Eva Dwertmann published *The reparation system of the international Criminal Court. Its implementation, Possibilities and Limitations*. Later, on 20th August 2012, Conor McCarty published the

[6] Victims were virtually absent at the Nuremberg International Military Tribunal, hardly victims were called to testify, and none of them could join as a civil party to receive reparations (see Zegveld, L., 2010, Victims' Reparations Claims and International Criminal Courts, Incompatible Values? *Journal of International Criminal Justice*, 8 (1), p.86). Similarly, a cursory review of the provisions of the ICTY and ICTR's statutes shows that the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda deal with victims principally in their role as witnesses (see Boven, T.V., 1999. The position of the victim in the stature of the international criminal court. In: H.A.V. HEBEL, Lammers J.G. And Schukking J., ed.,1999. *Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos*. The Hague: T.M.C Asser Press, p.80).

[7] Khan, K. and Dixon, R., 2009. Archbold. International Criminal Courts. Practice, Procedure and Evidence. London: Thomson Reuters, p. ix.

Reparations and Victim Support in the International Criminal Court. These important and worthy works are the first to discuss the ICC's power to order reparations to victims and have been very useful to the exploring of different aspects of our topic. The first book focuses on the right to reparations under the ICC regime by analysing its implementation by the Court and the challenges facing it. The second book makes a broad exploration of the right to reparation in order to 'consider whether, and in what ways, the creation of a regime for victim redress within the wider framework of international criminal justice, and specifically the Rome Statute, can make a contribution alongside other regimes or systems for redress at the international and national levels'. So, what is the new input this study intends to bring?

First of all, it is worth noting that the new right to reparations under ICC regime includes many unclear areas which still need clarifications. The right to reparation as a major and novel feature of international criminal justice raises a number of issues so far not yet discussed by scholars and not determined by case law of the Court. The two mentioned books could not explore all issues raised by the creation and the implementation of the right to reparations before the ICC. The five main research questions mentioned above were not clearly and deeply dealt with in the previous works. Besides, it is interesting that the case law of the ICC regarding victims' rights should have been evolving since the publication of the two books. The previous works launched a purely theoretical analysis of the power of the Court to establish principles to be applied to reparations, simply because until then there was no any decision on reparations to victims. Although at the time of writing this thesis there was no final decision of reparations, it is interesting that the study should have coincided with the first decision on reparations before the ICC: Decision establishing the principles and procedures to be applied to reparations, issued by the Trial Chamber I in the *Lubanga* case on the 7th August 2012.[8] Consequently, this study devotes enough part to the analysis of this Decision. This decision has been object of appeals from both the offender and the victims. At the time of this writing, the appeals were still pending before the Appeals Chamber. The nature of this decision as to whether it is or is not an order for reparations has been discussed before the Appeal Chamber which resolved the issue in its Decision on the admissibility of the appeals against Trial Chamber I's 'Decision, establishing the principles and procedures to be applied to reparations' and directions on the further conduct of the proceedings.[9] The Appeals

[8] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012, ICC-01/04-01/06-2904.

[9] ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953

Chamber's decision on admissibility of the appeals likewise constitutes the subject of this study. Therefore, this analysis and the conclusions that were reached by the previous appreciably mentioned works are confronted by the early case law of the ICC and criticized in the light of the context of the ICC Statute and principles of international law.

Furthermore, whereas the first book identifies challenges in implementing the right to reparations before the ICC, this study strives to explore the topic further by igniting a debate on the different alternatives to deal with those challenges. Considering the non-intangibility of the ICC Statute and the urgent need to modify the ICC system as underlined by the ASP, some of the suggested alternatives may require to revisit the text of the ICC Statute. More particularly, with regard to the McCarthy's book, this study shifts from its theorical and broad perspective and endeavours to practically analyse the right to reparations to victims of crimes that only falls under ICC Statute. In this line, the present study explores the right in the light of fair trial before the ICC.

The right to reparations is in close link with other victim's rights that are newly created by the ICC Statute, such as the victims' right to participate in criminal trial proceedings. Notwithstanding the importance of this innovative right for victims to participate in criminal proceedings, it does however not fall within the ambit of our study which is limited to the victims' right to reparations. Therefore, Art.75 of the ICC Statute titled 'Reparations to victims' will constitute the backbone of this dissertation. Concerning the procedural rights recognised in favour of victims by ICC Statute, you may please see T. Markus Funk's book: *Victims' Rights and Advocacy at the International Criminal Court* published on the 8th April 2010. This book focuses on the victims' right to participate in the proceedings before the ICC and the role of victims' legal representatives in criminal proceedings. Notwithstanding, those rights will be evoked in this dissertation on a subsidiary basis for a better understanding of reparations proceedings which are considered as 'an integral part of the overall trial process'.[10]

This research was worth doing as it strives to unpack the content of the right to reparations, elucidates and analyses complex issues arising from the implementation of this new right introduced in international criminal law. Particularly, this study is much devoted to the critical analysis of the principles to be applied to reparations as established by the Trial Chamber I in its Decision establishing the principles and procedures to be applied to reparations issued on 7th August

[10] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision establishing the principles and procedures to be applied to reparations, 7th August 2012, ICC-01/04-01/06-2904, para.260.

2012. It addresses, *inter alia*, the issues of application of the principle of complementarity in the deciding on reparations for victims. Different players, such as States and the TFV, and their role in the implementation of the ICC's reparation orders are among the issues discussed in this dissertation. Specifically, the analysis of the scope of States' obligation to give effect to reparations order led us to the enquiry of national legislations enacted in compliance with the ICC Statute as to whether they are consistent with the context of the Statute. In addition, this study adopts an audacious approach for it endeavours to explore legal strategies which should be adopted to deal with challenges in implementing the right to reparations before the ICC. In this regard, this study explores the opportunities the ICC has to opt for a *collective approach* in dealing with reparations matters. In the same vein, opportunies for the establishment of a *Special Chamber for reparations* within the ICC are discussed herein.

It is expected that a wide range of beneficiaries, such as judges, lawyers, academicians and other different players in the implementation of the right to reparations before the ICC, will benefit from this study.

III. Research methods

This dissertation used secondary sources and followed a case-study design, with in-depth analysis of the reparation regime established by the ICC Statute. The secondary sources include international instruments, case-laws analysis, books, journals, articles and online resources. A critical analysis of laws and regulations in connection with the ICC, the Court's and other international and national case-law and doctrines across the discipline helped to reach conclusions on different issues. The use of these secondary sources likewise led to the enquiry into some of the national laws about relevant issues. In so doing, Art.21 of the ICC Statute (*Applicable law*) and Art.31 of Vienna Convention on the Law of Treaties (*General rule of interpretation)* were taken into consideration.

Actually, when analysing the reparation regime established by ICC Statute the hierarchical order of the norms to be applied by the Court provided for by the Art.21 of the Statute was, at possible extent, taken into consideration. In similar way, to interpret some problematic provisions of the ICC Statute and its Rule and Regulations, recourse was made to the general rule of interpretation established by Art.31 of Vienna Convention on the Law of Treaties.

IV. The structure of the thesis

This thesis includes three parts which are further divided into chapters. The first part, *ICC Statute and recognition of the right to reparations for victims of core crimes*, intends to examine, by way of introduction, how the right to reparations for victims of international crimes evolved in international law up to its inclusion in the ICC Statute. This part comprises a single chapter, *Exploring the path that led to the right to reparations for victims before the ICC*. This chapter historically explores the development of the right to reparations, starting from the time of creation of international humanitarian law under which reparation was an affair between States, passing by the stage where international criminal law holds individuals criminally responsible of international crimes, up to the adoption of the ICC Statute which created the right to reparations for victims of the crimes. The chapter provides us with background information on how the right to reparations was created by the ICC Statute.

The second part, *The content of the right to reparations under ICC Statute and its implementation*, is the heart of the thesis and includes three chapters. This part heavily draws from Art.75 of the ICC Statute from which a close and critical analysis yields three major aspects of the right to reparations which inspired the title of each chapter. Chapter one, *Understanding substantive law applicable to reparations before the ICC*, deals with the content of the right to reparations. This chapter strives to unpack the scope of the substantial content of the right to reparations as provided for by Art.75 (1) (s1) of the ICC Statute. It brings clarifications to the first and fourth main research questions mentioned above.

Chapter two of Part two of this dissertation, *Analysis of procedural law applicable to reparations*, focuses on the analysis of Art.75 (1) (s2) – (4) of the ICC Statute which contemplates some procedural aspects of the right to reparations. This Chapter is the longest in this dissertation due to the complexities of the issues of implementation of the right to reparations before the Court. For the purpose of helping the reader not to be lost in the mess of the complex issues, this Chapter endeavours to follow the logical steps of reparation proceedings. Given that reparation proceedings may be triggered by a victim's request or by the Court, on its own motion, pursuant to Art.75(1)(s2) of the ICC Statute, Chapter two proceeds by discussing issues which should be considered by the Court *in limine litis* - at the earliest possible opportunity- such as the power of the Court to decide on reparation matters, the *locus standi* of parties in the reparations proceedings etc. It ends by analysing the nature of the decision which may result from reparation proceedings and legal

remedies which such decision may be subject to. Chapter two of part two of this study is expected to provide us with clear idea on how the Court will be able to balance the interests of different parties to criminal proceedings with reparation proceedings and how the risk of conflict of jurisdiction between the ICC and national courts should be dispelled. This chapter is expected to give an answer to the second and the third research questions mentioned above.

The third chapter of part two, *The implementation of reparation orders and Assistance to victims*, is principally built on Art.75 (5) and in a subsidiary way on Art.79 of the ICC Statute. The goal of this chapter is to analyse the efficiency of the ICC reparation regime in respect with the execution of reparation decisions issued by the ICC pursuant to Art.75 (5) of its Statute and assistance contemplated by Art.79 of the Statute. This chapter closes with a relevant conclusion on the last research question.

The third and last part of this thesis, *Reflexions on ways to strengthen the mechanisms of the implementation of the right to reparations*, explores possible legal solutions to the major challenges identified in part two related to the implementation of the right to reparations. This last part comprises a single chapter, *Revisiting and improving procedural and organisational aspects of the ICC.* Drawing from the early case-law of the ICC, this chapter aims to ignite discussions on how reparation procedure can mainly be based on a collective approach. It also discusses practical and legal opportunities to establish a Special Division for reparations within the Court.

Finally, this dissertation ends with a *general conclusion* which sum up the research findings. Whilst the different chapters of this thesis mainly deal with the specific issues pointed out as the main research questions, the general conclusion includes general observations on the right to reparations. Those observations help in understanding and characterising the analysed right with respect to its content and its implementation.

PART ONE

ICC STATUTE AND RECOGNITION OF THE RIGHT TO REPARATIONS FOR VICTIMS OF CORE CRIMES

Justice is immortal, eternal, and immutable, like God himself; and the development of law is only then a progress when it is directed towards those principles which, like him, are eternal; and whenever prejudice or error succeeds in establishing in customary law any doctrine contrary to eternal justice. [11]

[11] Louis Kossuth, *Select speeches*, [Online] available at *http://www.notable-quotes.com/l/law_quotes.html*, accessed 2nd January 2011

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ICC STATUTE AND RECOGNITION OF THE RIGHT TO REPARATIONS FOR VICTIMS OF CORE CRIMES

INTRODUCTION

The Statute of the International Criminal Court (hereinafter ICC Statute) adopted in 1998, created a permanent Court with jurisdiction over persons responsible for the most serious crimes of international concern defined by the Statute.[12] Art.75 of the Statute provides for reparations for victims of the crimes under the ICC jurisdiction. Thus, ICC appears as an international permanent criminal court with power to decide on reparations for victims. The call made by Moynier for the establishment of an International Criminal Court with power to decide on reparations for victims of crimes had to wait for 126 years to be granted by the international community?

In the late 19th century, precisely in 1872, after flagrant violations of the First Geneva Convention[13] by the belligerents in the Franco-Prussian War of 1870-1871, the Swiss jurist Gustave Moynier, one of the International Committee of Red Cross's founders, proposed the establishment of an international criminal court to punish the responsible and award reparations to the victims.[14] Moynier's draft convention for the establishment of an international criminal court, as reproduced by International Committee of the Red Cross,[15] provided in its Art.7 that '[w]here a complaint is accompanied by a request for damages and interest, the tribunal will have the competence to rule on this claim and to fix the amount of the compensation'.[16] Moynier was admired as the pioneer of

[12] According to Art.5 of the ICC Statute the Court has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

[13] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted in 1864 and replaced by the Geneva Conventions on the same subject which were concluded in 1906, 1929 and finally in 1949. The most important principles of the first Geneva Convention, which were also maintained in the revised texts of the Geneva Conventions adopted later was the requirement to treat the wounded regardless of nationality and neutrality (inviolability) of medical and health facilities.

[14] See Grotius International, 2010. La configuration de la CPI chez Gustave Moynier, available at: <*http://www.grotius.fr/la-prefiguration-de-la-cpi- chez-gustave-moynier*>, accessed on 29th February 2012

[15] International Committee of the Red Cross, 2010. The first proposal for a permanent international criminal court, by Christopher Keith Hall, [Online] available at : <*http://www.icrc.org/eng/resources/documents/misc/57jp4m.htm*>, accessed 15 February 2012

[16] *Idem*

this innovative idea,[17] but never understood by his contemporaries and his draft of the convention would consequently be judged as 'trop avant–gardiste pour son temps'.[18]

How has the international legal environment come to be mature enough to recognise the victim's right to reparations before an international criminal court? This question leads us to have a look at the development of the right to reparations for victims of international crimes that led to its recognition by the ICC Statute. In fact, as Caron argues, 'one way of introducing a field, is to provide an account of its development'.[19] This holds true in respects of the right to reparations for victims of international crimes, particularly since law is a dynamic human science. As such, our main objective is to understand the international legal environment that gave birth to the ICC with the power to decide on reparations to the victims (Single Chapter).

[17] As Keith Hall notes 'there may have been dozens of politicians, legal scholars and other writers, such as Rousseau, who mentioned before 1872 the idea of a permanent international court to resolve inter-State disputes [...] usually only in passing and often to reject it as impractical [..]. But, he goes on, 'it appears that Moynier's proposal was the first serious effort to draft a statute for a permanent international criminal court with jurisdiction over violations of humanitarian law' (see International Committee of the Red Cross, *op.cit.*)

[18] Grotius international, *op cit*

[19] Caron, D. D., 2007. Towards A political Theory of International Courts and Tribunals. *Berkeley Journal of International Law.* Vol. 24, p.402

SINGLE CHAPTER: EXPLORING THE PATH THAT LED TO THE RIGHT TO REPARATIONS FOR VICTIMS BEFORE THE ICC

INTRODUCTION

Art.75 of the ICC Statute gives authority to the Court to decide, after conviction, on reparations for victims of crimes under its jurisdiction. According to Art.5 of the ICC Statute the jurisdiction of the Court is limited to 'the most serious crimes of concern to the international community as a whole': crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. This chapter intends to demonstrate how it took a long time to recognise the right to reparations for victims of crime before an international criminal Court. In fact, the principle of reparation to victims of crimes is not as ancient at international level as it is at the national one.

As Williams has noted, 'compensation to crime victims is an ancient tradition in many cultures'[20] and restitution, in its broadest sense, was a paramount response to an offence. The individual rights of the victim of a crime were the focal point of criminal justice systems and restitution to a victim of a crime was the dominant concept of punishment. But later, the notion of victim of crime changed. Legal systems, inspired by libertarian philosophy, followed by the utilitarian philosophy, began 'to view lawbreakers as having committed offences against the crown, the king's peace or society rather than against the particular victim'.[21] Thus, as some commentators regret,[22] the rise of retributive approaches[23] gradually eroded the central position which victims had enjoyed in early tribal societies and this often hindered the development of adequate reparation mechanisms, frustrating the victims' right to redress and hopes for rehabilitation.[24]

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[20] Williams, B., 2005. Victims of Crime and Community Justice. London: Jessica Kingsley Publishers, p. 13. Early Mesopotamian civilizations for example contemplated the concept of liability for damages among their basic rules. Likewise, principles of restitution and compensation were enshrined in the Code of Hammurabi (1750 BC), the Assyrian Code (1450-1250 BC) and in Hittite Laws (1600 – 717 BC) (see Bottigliero, I., 2004. Redress for Victims of Crimes Under International Law. Leiden: Martinus Nijhoff Publishers, p.15). In the same vein, on may note how the Chinese Tang Code (AD 619 – 906) allowed 'redemption'' of a wrongdoer through the payment of compensation whereas African Bantu societies redressed victim situation by compensation instead of retaliation because 'all blood belongs to the chief' (see Shelton, D., 2005. Remedies in International Human Rights Law. 2nd ed. Oxford (US): Oxford University Press, p.25.

[21] Markus Funk, T., 2010. Victims' Rights and Advocacy at the International Criminal Court. New York: Oxford University Press, p.24.

[22] See for example Bottigliero, I., *op. cit*., p.13.

[23] For example the 'classical school of criminology', which emerged during the late 1700s and the early 1800s and 'positivist school of criminology' which emerged in mid 1800s and early 1900 tried to develop theories on the origins of crimes and the optimal method of crime prevention that ignore the right to reparations and the role to the victim in criminal system. Punishment was view as the 'quasi-clinical diagnosis' and 'treatment' in which victim has no role to play (see Markus Funk, T., *op. cit*., p.24).

[24] The decline of the rights of the victim of the crimes has led some to accuse the State, which currently holds the prosecution and imposes penal sanctions on the guilty, of having embezzled the rights of the victim of the crime. Murray for example would like to prosecute the governmental

Nevertheless, despite the past decline of victim's rights, lately there has been the resurgence at national level. Although the State has arrogated the right to deal with the process of prosecution, conviction and sentencing, countries from different legal traditions, civil law and common law systems have developed mechanisms to enable victims to be redressed.[25] There is also State compensation mechanisms established for victims of crimes that can be found in some countries from both the legal systems. All these mechanisms tend to reflect the effort made in allowing the victim to regain his place and restoring his rights within the national criminal justice system. Indeed, these mechanisms, as Markus Funk notes, could make 'victims feel that the State and society have taken an active interest in their plight'.[26]

Notwithstanding the real influence that the right of victims to reparations developed at the national level will later have on the development of the right at the supranational level and vice versa, only the latter dimension, the supranational one, will be discussed in this chapter. Thus, deliberately leaving aside the phenomenon of the decline and the resurgence of the right to reparations at national level, this chapter intends to paint a picture of the steps involved with the

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authorities for 'embezzlement' for he states that 'as the State grew more powerful did the governmental authorities encroach ever more into the repayment process, increasingly confiscating a greater proportion of the criminal's property for themselves, and leaving less and less to the unfortunate victim' (Murray, R., 1998. The Ethics of Liberty. New York and London: New York University Press, p.87). These serious accusations are supported by N. Christie (quoted by Ashworth, A., 1986. Punishment and compensation: Victims, Offenders and the State. *Oxford Journal of Legal Studies*. Vol.6, No.1, p. 91), who argued that State has stolen conflicts from the individuals concerned, victim and offender. Other scholars joined the current by defending the theory of paradigm 'restitution-punishment'. For example Barnett (cited by Ashworth, *op. cit*., p.,94), hold that compensating the victim of crime is sufficient. Those who support such an argument consider that punishment, of itself, is as ineffective, wasteful and even presumptuous. According to their point of view, the State should rather ensure that each victim's right to receive compensation is duly towards the offender who must even work, where appropriate, for his victim (Murray and Holmgren have the same point of view that the criminal could work for his victims to make restitution : see Murray, op. cit. and Holmgren, M.R., 1983. Punishment as Restitution: The Rights of the community. *Criminal Justice Ethics*, Vol.2, pp. 36-49.). Murray supports strongly the thesis that victim should be the central of criminal justice system. Drawing from libertarian theory, he develops the paradigm 'restitution-punishment' as the way to truly pursue justice against the criminal and on behalf of the victim. Murray assumes that criminal justice should only focuses on the immediate victim not on the community. According to him 'emphasis in punishment must be not on paying one's debt to 'society', whatever that may mean, but in paying one's debt to the victim' for justice means the right to the individual injured to exact restitution against his perpetrator (see Murray, op. cit.). In this context, it has been suggested, in default of payment of place upon the offender, an obligation upon the offender to work for the profit of his victim, either at liberty or in prison, until the compensation is discharged (Howard, C., 1958. Compensation in French Criminal Procedure. *The Modern Law Review*, Vol.21, p.399). For example, in 1969, Del Vecchio (cited by Ashworth, *op. cit*., p.95) proposed that 'in order to obtain the money to provide the compensation, the offender would be placed under a duty of labour according to his capacity'.

[25] Civil law countries for instance, provide the victim of crime with the right to participate in criminal proceedings. In most civil law countries, such as France, Italy …, victims of crimes long possessed the right to participate at various stages of the criminal process, from the pre-trial phase to the appeal. For example, Italian victims, through their attorneys, traditionally participated on an equal basis with the *Pubblico Ministero* (the prosecutor) and defence counsel. Likewise, in France, the justice system provides the victim with the rights to participate in the proceedings, and allows them, in some instances, to substitute for the public prosecutor (See Markus Funk, *T., op. cit.* and Howard, C., *op. cit.*). In Common law countries there are the mechanism of 'compensation order' which does not implies victim participation in criminal proceedings.

[26] Markus Funk, T., *op. cit.*, p.29

development of the victim's right to reparations at supranational level, culminating to the right to reparations as recognised by the ICC Statute adopted in 1998.

Victims' rights to reparations for international crimes[27] stem from various field of international law. Firstly, we will observe that international humanitarian law conceives war reparations as an issue between States (I.1.). At this stage the harm of a State citizen resulting from violations of humanitarian law is conceived as solely injury to the State. Secondly, our attention will be caught by how international law has recognised and required or recommended to domestic laws to provide for reparations for individual victims of crimes (I.2.) A review of international human rights related instruments which provide for the right to reparations, demonstrates that they adopted a common approach that recommends and urges States to recognise and implement the right to reparation under their national laws.[28] This stage is referred to as the 'coaching' or 'tutorial' stage. Thirdly, the contribution from regional judicial human right institutions will be highlighted as another step forward to the development of the principle of reparations to victims. These *a priori* judicial institutions contribute significantly to the development of the principle by awarding reparations against States in favour of individual victims of crimes as human rights violations[29] (I.3). Fourthly, the United Nations Commission for Compensation will also draw our attention since it pushed international law to another step by recognising and implementing victims' rights to reparations in case of war of aggression (I.4.).

Moreover, we will note that another important step was reached in international law by establishing mechanisms for prosecution against individuals responsible of international crimes. However, it will be noted that international law privileged prosecution and seemed to ignore the victims' right to reparation (I.5). Since the main objective of this chapter is to understand the international legal environment which pre-existed before and gave birth to the ICC in 1998 with the power to decide on reparations to victims, under this Chapter our analysis will be limited to observing how from Nuremberg to Rwanda, victims were absent before international criminal

[27] According to Duhamel's legal dictionary 'international crimes' are 'Crimes which affect the peace or safety of more than one State or which are so reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof', (see <http://www.duhaime.org/LegalDictionary/I/internationa%20crime.aspx>, accessed on 23rd February 2012).

[28] Some of those international instruments are binding and impose the obligation upon State parties to implement the victim's right to reparations, whilst others constitute a soft law and urge or recommend to States to recognise and implement the victim's right to reparations. In case of binding instruments, States parties have obligations to protect individuals by putting in place efficient mechanisms preventing any violations of their human rights.

[29] However, up to this stage, international law conceives the right to reparations as a case between individuals and their State. It is not yet the stage where individual perpetrators become liable for reparations to victims as a legal consequence of their actions that violate human rights.

tribunals. Finally, it will be noted how the creation of the right to reparations before the ICC produced a victim-centred system (I.6).

I.1. Reparations for violations of international humanitarian law traditionally as an affair between States

In matters of reparation of harm resulting from violations of international humanitarian law, States have been considered as the sole parties and the principle of reparations has been sought in this way. At this stage the harm caused to individuals is seen as harm caused to their States.

These concepts of victim and reparations could for example be confirmed by the spirit of the Hague Convention (IV) respecting the Laws and Customs of War on Land, adopted in 1907.[30] According to Art.3 of the Convention IV (1907) a Belligerent Party which violated the provisions of the Convention shall, if the case demands, be liable to pay compensation and shall be responsible for all acts committed by persons forming part of its armed forces. It might be observed that later, the same approach was adopted by the 1977 Protocol I, Additional to the 1949 Geneva Conventions.[31] This spirit guided and still inspires the negotiators of the peace agreements where the principle of restitution and compensation is conceived as a matter between belligerents.[32]

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[30] The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex (Regulations concerning the Laws and Customs of War on Land) was adopted in The Hague on 18 October 1907 by International Peace Conference and entered into force on 26th January 1910. The 1907 Convention replaced, according to its art.4, the 1899 convention respecting the Laws and Customs of War on Land. The Regulations regarding the Laws and Customs of War on Land constitute the annex of the 1907 Convention and provide for, among others, the rights of prisoners of war, the sick and wounded and other prohibited war acts.

[31] The Protocol (I) Additional to the Geneva Conventions was adopted in Geneva on 8th June1977 by the Diplomatic Conference, entered into force on 7th December 1978. Art. 91 of the Protocol provides that 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces'.

[32] The idea of restitution was reflected for example in the Treaty of Westphalia that ended the Thirty Year War in 1964 (see Shelton, D., *op. cit.*, p.400; Straumann, B., 2008. The Peace of Westphalia as a Secular Constitution. *Constellations*, 15 (2), pp. 173 - 188). The Peace Treaty of Versailles, concluded in 1919, set up the principle of restitution (Art. 223 of the Treaty), provided for a reparation regime (Art.231- 247) and established a Reparation Commission (Art.233) representing the victorious Allies powers to determine damages to be paid by Germany. Similarly, the Treaty of Sevres concluded between the Allies and Turkey in 1920 provided for the restitution of property of the Armenians killed by the Turks (see Shelton, D., *op. cit.*, pp.400-401). Likewise, an obligation to repair damage and suffering caused by Japan during the war is provided for by Articles 14 and 16 of the Peace Treaty concluded between Allies and Japan in 1951 to end the Second World War. More recently, namely in 1995, in order to maintain respect for human rights, the Peace agreement for Bosnia and Herzegovina resulted, among other, in the creation of The Human Rights Chamber for Bosnia and Herzegovina, that 'has competence to determine what steps shall be taken by the Party to remedy a breach by the Party concerned of its obligations, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures' (Bottigliero, I., *op. cit.*, p.187).

The concept of war reparations as issue between States has not been abandoned but prevails until now. To illustrate this assertion I may for instance refer to the case of the *Democratic Republic of Congo (DRC) / Burundi, Rwanda, Uganda* brought before the African Commission of Human and Peoples' Rights on the 8th March 1999 by DRC. In this case the, the DRC alleged grave and massive violations of human and peoples' rights, including series of massacres, rapes, mutilations, mass transfers of populations and looting of the peoples' possessions, as some of the violations committed by the armed forces of Burundi, Rwanda and Uganda in its eastern provinces. The African Commission found the Respondent States liable of the allegations made against it and recommended that adequate reparations be paid appropriately to the Complainant State for and on behalf of the victims of the human rights violations by the armed forces of the Respondent States, while in effective control of the provinces of the Complainant State which suffered these violations.[33] It is notable that, whereas the Commission recognises the crimes committed in eastern DRC against populations, it recommended adequate reparations to the State of DRC 'on behalf of the victims'.

In this regard, one would wonder whether a State has grounds of waving individual victims' rights to reparations in case of violations of humanitarian law. Unfortunately, this issue does not fall under the scope of this study. However, we will look at how compensation for harm resulting from war of aggression evolved to taking into account the interests of private victims.[34] With regards to the ICC regime, we will observe how international law started attributing not only criminal but also civil liability to individuals against private victims for acts which violate international humanitarian law.

I.2. International law recognising individual victims' right to reparation and requiring or urging States to provide for its implementation under their domestic laws: The 'coaching' or 'tutorial' stage

Focusing on international and regional instruments closely relating to human rights, one might observe that these instruments contemplate the right to reparations in favour of victims of crimes. Yet, one would wonder what relationship is there between victims of human rights and victims of crimes under ICC regime. Actually, it bears noting at the outset that, apart from the crimes of aggression, crimes under the ICC's jurisdiction can be considered as one of the categories

[33] African Commission of Human and Peoples' Rights, *Communication 227/99 - D. R. Congo / Burundi, Rwanda and Uganda*, May 2003.

[34] See the case of the UNCC at pp. 27ff.

of gross violations of human rights. The criminal acts provided by the ICC Statute violate, among others, the *security rights*[35] that protect people against crimes such as murder, massacre, torture, rape etc.[36] In regard to such crimes, international law recognises individual victims' right to reparations and requires or urges states to provide for its implementation under their national laws. This stage is referred to as 'coaching' or 'tutorial' stage.

Whilst binding international or regional instruments *impose* upon State parties an obligation to implement under their domestic laws the right to reparations for victims of crimes, the instruments that constitute the soft law *urge* or recommend to States to grant the right to reparations to the victims. International law recognises both substantive and procedural rights to reparations. As for procedural aspects of the right to reparations, the international and regional conventions seek for the establishment of competent either judicial, administrative or legislative authorities at national level to review and decide on victims' claims. In addition, the international law *requires* or *urges* States to facilitate the access of victims to such authorities which must be established not for form but to ensure procedural fairness to the victims. At this coaching stage some non-binding international instruments urge national laws to develop compensation schemes for victims of crime and provide for their reparations from individual perpetrators.

A situation where international law *requires* State parties to provide for the right to reparations, in favour of individual victims in domestic law, may be illustrated by referring to the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965[37] and the Convention against Torture and other cruel, inhuman or degrading treatment adopted in 1984. Specifically, Convention against forms or racial discrimination imposes an obligation upon State parties to manage their national systems so as to assure the victims of discrimination the rights

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[35] James Nickel defines human rights as 'international norms that help to protect all people everywhere from severe political, legal, and social abuses'. He divides human rights into six categories :'*security rights* that protect people against crimes such as murder, massacre, torture, and rape; *due process* rights that protect against abuses of the legal system such as imprisonment without trial, secret trials, and excessive punishments*; liberty rights* that protect freedoms in areas such as belief, expression, association, assembly, and movement; political rights that protect the liberty to participate in politics through actions such as communicating, assembling, protesting, voting, and serving in public office; *equality rights* that guarantee equal citizenship, equality before the law, and non-discrimination; and *social* (or 'welfare') *rights* that require provision of education to all children and protections against severe poverty and starvation'. Another family that might be included is *group right*s that include protections of ethnic groups against genocide and the ownership by countries of their national territories and resources [emphasis added]' (Nickel, J., 2010. Human Rights. In: N. Z. Edward, ed., 2010. The Stanford Encyclopaedia of Philosophy, [Online] available at: <http://plato.stanford.edu/archives/fall2010/entries/rights-human/>, accessed 10th June 2012.

[36] As regards the acts which constitute elements of crimes under the jurisdiction of the ICC see Art.5; 6; 7 and 8 of the ICC Statute.

[37] The 'forms of racial discrimination' may fall under the jurisdiction of the ICC as crimes against humanity. See the acts listed in Art.7 of the ICC Statute *(*crimes against humanity). Some of those acts are: persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, and apartheid.

to seek 'just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.[38] Further, the Convention implicitly requires the existence of 'tribunals' and other 'State institutions' to provide remedies to victims.[39] Although the international law requests States to develop 'the possibilities of judicial remedy', the obligation would be satisfied by the existence of other non-judicial remedy such as administrative or legislative ones.[40] Likewise, the Convention against Torture and other cruel, inhuman or degrading treatment requires State parties to ' ensure in [their] legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.[41]

Moreover, it is observable that, besides the binding international instruments, a range of recommendations and declarations speak for the right to reparations and *urge* States to grant reparations to victims of crimes. The role of such soft law would not be ignored since they constitute an important element of the international legal environment that existed before the establishment of the ICC. For example Art. 8 of the Universal Declaration of Human Rights adopted in 1948 states that 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. According to the Universal Declaration, violations of some of the rights proclaimed by the Universal Declaration of Human Rights constitute crimes under international law.[42] Another example is the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1975 which speaks for 'redress and compensation' for victims of 'an act of torture or other cruel, inhuman or degrading treatment or punishment' committed 'by or at the instigation of a public official'.[43] Similarly, the Declaration on the Protection of All Persons from Enforced Disappearance adopted in 1992, provides that victims of acts of enforced disappearance and their families shall obtain redress have

[38] Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination States provides that: 'States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals, just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.

[39] See Art 6 of the Convention on the elimination of Racial.

[40] See for instance the language of Art.2 (3) (b) of International Covenant on Civil and Political Rights.

[41] Art.14 (1) of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment. Acts of torture also fall under the jurisdiction of the ICC. See for example Art.7 (1) (f) of the ICC Statute.

[42] For instance, Art.2 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment considers any act of torture or other cruel, inhuman or degrading treatment or punishment 'as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights'.

[43] Art. 11 of the 1985 UN Basic Principles states: 'Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation in accordance with national law'.

the right to adequate compensation, including the means for as complete a rehabilitation as possible.[44]

To illustrate the situation where international law *urges* States to provide for procedural rights to reparations, one may refer to Declaration on Race and Racial Prejudice (1978) in its Art. 6(3) which states that 'Since laws proscribing racial discrimination are not in themselves sufficient, it is also incumbent on States to supplement them by administrative machinery for the systematic investigation of instances of racial discrimination, by a *comprehensive framework of legal remedies against acts of racial discrimination* [emphasis added]. Likewise, the Recommendation on 'Participation of the Public in Crime Policy adopted by the Committee of Ministers of the Council of Europe adopted in 1983 provides for '[e]stablishing an efficient system of legal aid for victims so that they may have access to justice in all circumstances'.[45] Another example is the Declaration of Basic Principles of Justice for Victim of Crimes and abuse of power adopted in 1985 (1985 UN Basic Principles). According to the Declaration, States are to adequately recognise victims' rights by providing victims with access to the mechanisms of justice, and victims are entitled to have access to justice and prompt redress. Moreover, the Declaration emphasizes the importance of keeping victims informed of case-related activities.[46]

Still, at the coaching or tutorial stage, it is observable that some of the international instruments, that constitute a soft law, expressly *urge* States to provide victims of crime with reparations from individual perpetrators. According to Art.8 of the 1985 UN Basic Principles,

> [o]ffenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

The 1985 UN Basic Principles constitutes itself an overview of crime victims' rights: the right to complain, to dignity, restitution and compensation, medical, and to psychological and social rehabilitation.[47] In the same vein, Recommendation 85 (11) adopted in 1985 by Council of Europe

[44] Art.19 of the Declaration on the Protection of All Persons from Enforced Disappearance reads as follows: 'The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation'.

[45] Para.29 of the Recommendation No R(83)7 of the Committee of Ministers to Members States on Participation of the Public in Crime Policy (Adopted on 23rd June 1983).

[46] See Para.5 of the1985 UN Basic Principles.

[47] Goodey considers the 1985 UN Basic Principles as 'wide-ranging in its definition of victimhood' although it 'can be described as soft law

urges State parties to reconsider their criminal justice by shifting from the relationship between States and offenders and adopting a system that takes into account the victims' needs.

Although national legislations are urged to provide for compensation for victims from their perpetrators, in many cases, the latter may not be able to repair the damage he has caused to his victims. This has led some international and regional instruments to predictably *require* or *urge* States to develop schemes for compensation of victims where offenders are unable to pay compensation. Some scholars have insisted on the importance of having compensation paid directly from the perpetrator, and suggested that the State should only hold a subsidiary obligation to pay damages in case the perpetrator should be unable to do so.[48] In this regards, it is noticeable that few specialised international or regional instrument prompted the creation of the voluntary fund for victims of crime.

For example the European Convention on the Compensation of Victims of Violent Crimes (1983) which is legally binding upon signatory States *requires* them to ensure compensation to victims of crimes. Where compensation is not fully available from other sources, States shall contribute to compensate victims or the dependant of persons who have died as a result of such crime.[49] Specifically, the 1985 UN Basic Principles *urges* States to establish funds for victims as by encouraging the establishment, strengthening and expansion of *national funds* for compensation to victims.[50] It goes on to contemplate the nature of compensation which may include necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.[51] In the same vein, one may observe how the Commission on the Truth for El Salvador, established in 1993 by the UN to investigate and report on human rights abuses during the civil war which occurred in El Salvador in 1980-1992, recommended that a special fund be established, as an autonomous body with the necessary legal and administrative powers, to award appropriate material compensation to the victims of violence in the shortest time possible.[52]

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because it is not legally binding on UN member states' (Goodey, J., 2005. Victim and Victimology: Research, Policy and Practice. Harlow (UK): Pearson Education Limited, p.129).

[48] Dwertmann, E., 2010. The reparation System of the International Criminal Court. Its Implementation, Possibilities and Limitations. Leiden: Koninklijke Brill NV, p. 22.

[49] See Art. 2 of the European Convention on Compensation of Victims of Violent Crimes (1983)

[50] See the 1985 Basic Principles, Principle 13.

[51] *Idem*, Principle 14

[52] See United States Institute of Peace, 1993. From Madness to Hope: The 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador, available at: <http://www.usip.org>, accessed on 8th March 2012.

It is worth noting that the International law does not only impose the obligation to States or urges them to create a fund for victims, but it also stepped forward in setting up an example through the creation, of a UN Trust Fund for the victims of torture in 1981.[53] Recognising the need to provide assistance to the victims of torture purely out of a humanitarian spirit, the UN decided to establish the UN Trust Fund for victims of torture 'in order to make it capable of receiving voluntary contributions for distribution, through established channels of humanitarian assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of *torture* and to relatives of such victims, priority being given to aid victims of violations by States'.[54] In the same vein, the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was created by UNGA Res.A/RES/46/122 in 1991.[55] By establishing this Fund, the UN hopes it would constitute a significant development for the protection of the human rights of victims of contemporary forms of slavery. The mission assigned to the Fund is 'to assist representatives of non-governmental organizations from different regions, dealing with issues of contemporary forms of slavery, to participate in the deliberations of the Working Group on Contemporary Forms of Slavery by providing them with financial assistance and, secondly, to extend, through established channels of assistance, humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of contemporary forms of slavery'.[56] The resources of this Trust Fund are constituted by funds obtained by means of voluntary contributions from either Governments or non-governmental organizations and other private or public entities.

Moreover, it is important to remember that State mechanisms for compensation existed long before the foregoing international or regional instruments which impose the obligation upon or urge States to compensate victims of crimes. Many nations have improved their legal systems in order to promote reparations made by the offender or - in case this proves to be impossible – State compensation.[57] In this regards, while Ashworth expresses his pride for his country by noting that England was the first to introduce it in 1964, the Criminal Injuries Compensation Scheme,[58] E. Veitch and D. Miers and Strang and Goodey would disagree with him. The latter contend that New

[53] See Resolution *A/RES/36/151* establishing the United Nations Voluntary Fund for Victims of Torture.

[54] See para.1 (a) of the Resolution A/RES/36/151establishing the United Nations Voluntary Fund for Victims of Torture.

[55] The ICC Statute includes sexual slavery among the crimes under the jurisdiction of the Court.

[56] See para.1 (b) of Resolution *A/RES/46/122* establishing the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery.

[57] Groenhuijsen, M., 2004. Victims' Rights and Restorative Justice : Piecemeal Reform of the Criminal Justice System of Change of Paradigm? In: H. Kaptein and M. Malsch, eds., 2004. *Crime, Victims and Justice, Essays on Principles and Practice*. Hampshire: Ashgate Publishing Limited, p.64.

[58] Ashworth, *op. cit*, p.,99.

Zealand was the first country to legislate for such a programme in 1963[59] and Britain followed closely with its curious extra-statutory scheme in 1964.[60] Veitch and Miers go on to emphatically report on how within a decade 'a positive plethora' of such schemes came into existence. They provide us with a meticulous list of countries which introduced the schemes designed to compensate victims of crimes of violence.[61] On the contrary, Puva deplores the failure of his country (Italy) to introduce measures to give effect to the European Convention on the Compensation of Victim of Violent crimes. He merely reports that in Italy, various schemes of public compensation for victims of crimes have been proposed but 'none has finally been enacted into law' except in the case of victims of terrorism and organised crime.[62]

Below it will be observed how the ICC Statute was inspired by the existing international instruments by providing for the establishment of a fund for victims.[63]

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[59] See Veitch, E. and Miers D., 1975. Assault on the Law of Tort. *The Modern Law Review*, Vol. 38, p.147; Strang, H., 2002. Repair or Revenge, Victims and Restorative Justice. Oxford (US): Oxford University Press, p.16 and Goddey, *op. cit*., p.143.

[60] See Veitch & Miers, *op. cit.*, p.147.

[61] According to Veitch and Miers some countries introduced compensation schemes as follows: *New Zealand* : Criminal Injuries Compensation Act 1963 (No 134) as amended by 1966, No. 22;1967, No.67 and 1969 No. 55.; *Britain* : The Criminal Injuries Compensation scheme which came into force on August 1, 1964. The Original proposals were set out in a White Paper of the Year : Cmnd. 2323; but the scheme has subsequently been amended, and for an up-t-date statement of its terms of reference see The Criminal Injuries Compensation Board, Tenth Report, Cmnd. 5791, Appendix E.; *Saskatchewa*n (Canada): The Criminal Injuries Compensation Act 1967 (84) as amended 1968 (c.16) and 1970 (c.12); *Ontario* (Canada): The Compensation for Victims for Crime Act 1971 (Bill 63); *Newfoundland* (Canada): The Criminal Injuries Compensation Act 1968, No. 26 as amended by 1971 No. 17; Alberta (Canada): The criminal Injuries Compensation Act 1970 (c.75) as amended by 1971 (c.21); *Manitoba* (Canada): The Criminal Injuries Compensation Act 1970 (c. C305) as amended by 1971 (c.37); *New Brunswick* (Canada): Innocent Crime Victims Compensation Act 1971 (c.10); *Quebec* (Canada): Crime Victims Compensation Act 1971 (Bill 83); British Columbia (Canada): Criminal Injuries Compensation Act 1972, No. 70; *Northern Ireland*: Criminal Injuries to Persons (Compensation) Act (N.I.) 1968, chap. 9; California (USA): Indemnification of Private Citizens (1966) Government Code 13961(c.5), Art. 1; *Hawaii* (USA) : Criminal Injuries Compensation (1967) H.R.S. (c. 351); *Maryland* (USA) : Criminal Injuries Compensation Act (1968) Ann. Code Art. 26A; *New York* (USA): Crimes Victims Compensation Board (1967), Art. 22, Executive Laws of States of New York 1966; *Massachusetts* (USA) : Compensation of Victims of Violent Crimes (1968), General Laws (c. 258A); *New Jersey* (USA): Criminal Injuries Compensation Act (1971), Code 52, C,4B; *Rhode Island* (USA): Criminal Injuries Compensation (1972),General Laws Criminal Procedure (c.12-24); *Illinois* (USA): Criminal Injuries Compensation Act (1973); *New South Wales* (Australia): Criminal Injuries Compensation Act 1968, No. 14; Queensland (Australia): The Criminal Code Amendment Act 1968, No. 44; South Australia (Australia): Criminal Injuries (Compensation) Act 190, No 69 (*Idem*.). See also Greer, D. ed., 1996a. Compensating Crime Victims, A European Survey. Freiburg im Breisgau: Ed. Iuscrim, p.681; Morgan, J. Winkel, F. and Williams, K., 1995. Protection of and Compensation for Victims of Crime. In: P. Fennell, C. Harding, N. Jörg and B. Swart, eds.., 1995. *Criminal Justice in Europe, A Comparative Study*. New York: Oxford University Press, p.312; Freckelton, I., 2004. Compensation for Victims of Crime. In : H. Kaptein and M. Malsch, eds., 2004. *Crime, Victims and Justice, Essays on Principles and Practice*. Hampshire: Ashgate Publishing Limited pp.31 – 62 and Doak, J., 2008. Victims' Rights, Human Rights and Criminal Justice. Preconceiving the Role of Third Parties. Portland : Hart Publishing.

[62] Piva, P., 1996. National Report on Crime Victim Compensation in Italy. In: D. Greer, ed., 1996. *Compensation Crime Victims, A European Survey*, Freiburg im Breisgau: Ed. Iuscrim, p. 376. The principle of solidarity led the Italian Parliament in 1990 to enact Law No. 302 of October 1990, which makes provision for victims of terrorism and criminal organisation (Norme a favore della vittime del terrorismo e della criminalità organizzata). Under that law 'a person who is injured physically or mentally, in connection with an act of terrorism or an act of a criminal organisation committed on Italian territory is entitled to claim monetary compensation from the State' (*Ibid.*, p. 381).

[63] See Art.79 of the ICC Statute; see also section *I.6.3*.of this chapter at p.39.

I.3. Judicial human rights bodies granting victims reparations from States

International judicial institutions for the implementation of the right to reparations in the context of State responsibility were established by the different international instruments of human rights. These institutions include different regional courts of human rights that can issue mandatory decision on the cases brought before them.[64] Besides the judicial institutions, some international instruments of human rights established commissions on human rights. But such commissions do not have competence to issue mandatory decision but to give views on the communications sent to them.[65]

Through their case-law, the judicial institutions significantly contributed to the development of victims' right to reparations. Notwithstanding the fact that ICC Statute does not provide for State liability for reparations in favour of victims of crimes, it is observable that regional tribunals of human rights holds States liable for reparations in case of gross violations of human rights. The basis of such liability is the failure of a State to comply with human right obligations imposed by international instruments. In this context, international law of a remedy implies that a wrongdoing State has the primary duty to afford redress to the victim of a violation; the role of international tribunals is subsidiary and only becomes necessary and possible when the State has failed to afford the required relief.[66] The case of *Velásquez-Rodríguez v Honduras* can be referred to as an outstanding example where the IACHR imposes upon States to grant the victim compensation. In this case, the Court was convinced, and so found, that the disappearance of *Manfred Velásquez*, a student at the National Autonomous University of Honduras was carried out by agents who acted under cover of public authority.[67] Accordingly, the Court decided, unanimously, that Honduras was required to pay fair compensation to the next-of-kin of the victim'.[68] The IACtHR explains the basis of the States civil responsibility towards the victims. The Court makes its reasoning in sense that 'State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its

[64] The Inter-American Court on Human Rights (IACtHR), an autonomous judicial institution based in Costa Rica, was established in 1979. The European Court of Human Rights (ECtHR) was established as a regional judicial body by the European Convention on Human Rights and operated as of 1st March 1998. The African Court on Human and Peoples' Rights is the most recent of the three regional human rights courts and came into being on 25th January 2004 (This Court has no much to teach us since it is posterior to the ICC and has not yet built its case law in this matter).

[65] At regional level, regional commission on human rights include the Inter-American Commission on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights.

[66] Shelton, D., *op. cit*. p.114.

[67] IACtHR, *Velásquez-Rodríguez v Hondura*s (Judgment of 29th July 2 1988 – *Merits*), para.182

[68] *Ibid*, para.194

jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation'.[69] However State's duty to prosecute is not an obligation of result but an obligation of diligence. In *Velásquez-Rodríguez v Hondura*s case, the IACtHR upheld this principle as follows:

> In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.[70]

If there is no diligence, the State would likely be responsible for the violation of human rights. Actually, the IACtHR reasoned that 'Where the acts of private parties which violate the Convention [on human rights] are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane'.[71] In this regard, the ECtHR has the same standing. For example, in *Finucane v The United Kingdom* the ECtHR, referring to Art 2 of the ICCPR 1966, found that when an individual is killed by the use of force, the States' obligation to protect the right to life includes the duty to ensure an effective investigation, which culminates in appropriate prosecutions and punishment.[72] Under international law, State's obligation to protect the right to life requires that there should be some form of effective official investigation when individuals have been killed. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life. National authorities must act on their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigation.[73]

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[69] *Ibid*, para.175

[70] *Ibid*, para.177

[71] IACtHR, *Velásquez-Rodríguez v Hondura*s (Judgment of 29th July 2 1988 – *Merits*), para.177

[72] Under international law, State's obligation to protect the right to life requires that there should be some form of effective official investigation when individuals have been killed. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life. National authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative (ECtHR, *Finucane v The United Kingdom, Application no 29178/95,* 1st July 2003, para.67)

[73] See ECtHR, *Finucane v The United Kingdom, Application no. 29178/95,* 1 July 2003, para. 67. In some situations, such as genocide or other systematic violations of human rights the government responsible may no longer be in place and the current one may have good will to investigate the alleged acts of human right violation. In that case, one may ask whether victims still have the right to compensation from the State. On this issue, the IACtHR reasoned as follow: 'According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred (IACtHR, *Velásquez-Rodríguez v Hondura*s (Judgment of 29th July 2 1988 – *Merits*), para. 184).

Based on the principle of effective remedy provided for by different human rights instruments, the human right tribunals tried to develop some forms of reparations. They discussed not only the substantial right to reparation but also its procedural aspects. For example the duty to prosecute has been focused on as one of the constituents of the right to effective remedy.[74] Other reparations principles which could range from the principles related to victims' right to know the truth and to be informed of the principles related to applicable law on substantial as well as on procedural issues.[75]

As mentioned earlier, at this stage only States are declared as responsible to pay compensation to the victims instead of individuals. The international law deals with States since the human right tribunals do not have jurisdiction over individuals responsible of human rights violations but over States. Nevertheless, by means of such cases being brought before human rights tribunals, the victim's right to reparations has been developed through their decisions. The actual functioning of these institutions constitute a shift from the coaching stage to the stage where international law does itself the implementation of the victim's right to reparations. The judicial institutions contribute a lot to developing the principle of the right to reparations for victims of human rights violations. Actually, they have interpreted the different international instruments on human rights and granted victims compensation or right to compensation from their States which are recognised as responsible for their prejudice resulting from human rights violations. Their case-law has been contributing, until present, to develop the victim's rights to reparation. The international tribunals were created on the *a priori* basis in relation with the case they have been dealing with. Similarly, it would be interesting to note that, not only the *a priori* international bodies contribute to develop the crime's victim to redress but also an *a posteriori* one, such as the United Nations Commission for Compensation, pushed international law to another step in redressing victim's situation.

[74] Inter-American Court have insisted on prosecution for violations of right to life and personal integrity as a remedy under Art. 8; 25 and 1(1) of the American Convention on Human Rights (see Shelton, D., *op. cit*., p.153).

[75] Concerning the applicable law at international level and in human right matters, the IACtHR held that the obligation to repair as well as the amount and forms of reparation must be determined according to international law instead of domestic law (see for example IACtHR, *Castillo Páez* case, para. 49 (quoted by Musila, G., *op. cit*. p.75).

I.4. Victims of war of aggression as recipients of compensation payments. A step forward made by the UN Compensation Commission (UNCC)

The UN Compensation Commission (UNCC), that resulted from the Iraqi invasion of Kuwait[76] brought a considerable input in developing the victim's right to reparation. The UNCC began operations in Geneva in July 1991 and whereas in September 1992 the Commission's Governing Council[77] adopted by consensus an innovative structure for collecting and verifying potential claims. The Commission, that concluded its work of processing claims in June 2005, appeared as a new and an innovative mechanism in implementing victim's right to reparation since private citizens were the focus of the compensation regime.

The creation of the UNCC and its functioning has risen lively debates among scholars. The Security Council's competence to establish such an institution led some commentators to portray the

[76] On 2nd August, 1990, Iraq invaded and annexed the State of Kuwait. The UN Security Council adopted different resolutions demanding immediate withdrawal of Iraqi forces from Kuwait but in vain. On 25th February 1991 Kuwait was liberated, officially, by allied forces led by United States. During Iraqi occupation, the Iraq's forces looted Kuwait's vast wealth and there were also reports of violations of human rights. The UN Security Council passed resolutions on Iraq's responsibility for its invasion and annex of Kuwait, and created the UN Compensation Commission (UNCC) as its subsidiary organ with mission to process claims and pay compensation for losses and damage suffered as direct result resulting from Iraq's unlawful invasion and occupation of Kuwait. The UN Security Council, for interests of victims of the Iraqi invasion of Kuwait, decided, in para.18 of the Resolution 687(1991) to create a fund to pay compensation for claims that fall within the scope of para.16 of the Resolution. The Resolution (para 19) directed the UN Secretary-General to develop and present to the Council for decision, recommendations related to the implementation and the functioning of the fund. The Secretary General complied with the Resolution by the Report pursuant to paragraph 19 of Security Council Resolution 687(1991) (UN Doc. S/22559, Report of The Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687(1991) (Done on 2nd May 1991). Available at: <http://www.uncc.ch/resolutio/res22559.pdf>, accessed on 19th March 2012). The report that was adopted by the Security Council considered the Fund as a 'special account of the United Nations and named it The United National Compensation Fund (para.3 of the Report). According to para.19 of the Resolution 687(1991) the Fund would be fed by Iraq' contribution based 'on a percentage of the value of its exports of petroleum and petroleum products (Concerning the Fund's resources, the Security Council Resolution 705 (1991) determines that Iraq's contribution to the Compensation Fund must not exceed 30% of the annual value of Iraq's oil exports of petroleum and petroleum products (para. 2 of the Resolution see also Resolution 706(1991), para. 4)'. At the same time, the Resolution 687(1991) sought to establish a Commission to administer the Fund (para. 18 of the Resolution). The Report of the United Nation Secretary-General, named it the 'United Nations Compensation Commission' (para. 4 of the Report). The Security Council decided, by endorsing the Secretary-General's recommendations, the UNCC be its subsidiary organ. The main functions of the UNCC was addressing 'a variety of complex administrative, financial, legal and policy issue, including the mechanism for determining the level of contributions to the Fund, the allocation of funds and payments of claims, the procedures for evaluating losses, listing claims and verifying their validity, and resolving disputed claims' (para.4 of the Report). The main goals of the UNCC 'were to effect a speedy, fair, and efficient evaluation of the claims and to process them in accordance with the various resolutions of the U.N. Security Council, and to make payments to claimants from the funds obtained from Iraq in accordance with the procedures and priorities decided by the Security Council' (McGovern F.E., 2009,171 -2). The UNCC had the Governing Council set up as its policy-making organ. The Governing Council had responsibility for establishing guidelines on all policy matters, in particular, those relating to the administration and financing of the Fund, the organisation of the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims (para 10 of the Secretary-General Report).

[77] The Governing Council was the organ of the UNCC that had to set its policy within the framework of relevant UN Security Council resolutions. As such, it established the criteria for claims' admissibility for compensation, the rules and procedures for processing the claims, the guidelines for the administration and financing of the Compensation Fund and the procedures for the payment of compensation. It reported regularly to the Security Council on the work of the Commission.

UNCC's regime as internationally illegal[78] whilst other commentators attempted to plead for the legitimacy of the creation of the UNCC.[79] On the other hand, nature of the UNCC led some commentators to interpret it as a hybrid entity, neither purely political, nor purely adjudicatory,[80] as a compensation facility, not as Court or tribunal[81] and as a corrective, instead of a punitive, international mechanism.[82] Further, the controversial fairness of the rough justice extolled and carried out by the UNCC was subject of hot discussions.[83]

Notwithstanding the importance of the foregoing issues under international law, the scope of this work does not allow us to engage in the debate. This section shortly focuses on and aims to scan the new input brought by the UNCC reparation regime in developing the right to reparation for crime's victims. Therefore, our attention will be focused on the new conception of the victim status in case of war crime, by interestingly looking at the plight of the individual victims as a centre of the compensation mechanism in case of war of aggression. Indeed, in this case, the State aggressor is officially held responsible toward private victims who are now recipients of compensation. And for the victims' interests the UN has established a fund. By addressing such an issue we must not lose sight of our main goal that is to understanding the international legal environment that pre-existed before the ICC reparation regime was born.

The Iraq's civil liability for direct losses stemming from the invasion and occupation of Kuwait was established by UN Security Council. The Resolution 674 (1990) (para.8), reminded Iraq that under international law it was liable for any loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal

[78] See Graefrath (1995,cited by Gattini, A., 2002. The UN Compensation Commission : Old Rules, new Procedures on War Reparations. *European Journal of International Law*, 13(1), p.164) and Arangio-Ruiz (2000, cited by Gattini, *Ibid*.).

[79] See Frigessi di Ramattalma (1995 cited by Gattini, *Ibid*.).

[80] McGovern, F.E., 2009. Dispute System Design: The United Nations Compensation Commission. *Harvard Negotiation Law Review*, Vol. 14, p.188

[81] Bassiouni (quoted by Musila, G., *op. cit*., p.221).

[82] Mundkur, R. Mucchetti, M.J. And Christensen D.C., 2001. The Intersection of International Accounting Practices and International Law : The review of Kuwaiti Corporate Claims at the United Nations Compensation Commission. *American University International Law Review*, p.1207.

[83] As McGovern notes, '[o]ne of the most striking aspects of its procedure was its lack of adversarialism with restrictions on Iraq's ability to participate in its decision-making processes' (McGovern F.E., *op. cit.*, p.188). For more details on the negative criticisms with regards to UNCC's fairness justice, see Bottigliero, I., *op. cit*., p.95; see also Schneider, M.E., 1998. How Fair and Efficient is the UNCC System? A Model to Emulate? In : Journal of International Arbitration. Kluwer Law International, 15 (1), [On line] available at: <http://www.casi.org.uk/info/mes-jia-98-2.pdf> [Accessed 17 February 2012 and Gillard, E-C., 2003. Reparation for violations of International Humanitarian Law. *Revue International de la Croix Rouge*, 85 (851), pp. 529 – 553; for positive criticisms see for example Gatinni, *op. cit*.

occupation of Kuwait by Iraq. The Iraq's responsibility was repeated and reinforced by the Resolution 687 (1991).[84]

Besides the fact that Iraq was internationally held liable for damage resulting from the aggression, individual and corporate victims were recipients of the compensation payments. This marks the step forward made by the creation of the UNCC. As it reflects from para.16 of the Resolution 687(1991), in this case, we are no longer at the stage where only States are solely considered as victims but also, 'nationals and corporations', are officially recognised as victims of Iraq's unlawful invasion and occupation of Kuwait. Para.16 of the Resolution 687(1991) provides for three categories of victims that may be awarded compensation: foreign Governments, nationals and corporations. The Rule 5 of the Provisional Rules of the UNCC seems to interpret the Resolution by including on the list of victims 'international organisations', and in regard with 'corporation' the Rule adds 'and other entities'. Therefore, besides Governments, individuals, private and public national and international entities were also entitled to compensation. In this point lies another innovative contribution of the UNCC's compensation scheme. However, claims from individuals and legal person could be brought before the UNCC through their government. This procedure allowed the UNCC to resolve more than two millions reparation claims.[85] Regarding claims from legal persons, Jean-Claude Aimé, the head of the UNCC, noted that it was 'the first time […] the UN [was] engaged in retrieving lost corporate assets and profits'.[86] Another interesting innovation in the UNCC's *modus operandi* is the priority for payment given to individual claims categories. In fact 'for humanitarian reasons', the Governing Council classified claims in categories 'A', 'B' and 'C' as 'urgent' claims, and accorded priority to their processing and

[84] The Res. 687(1991) was adopted by the UN Security Council under Chapter VII of the UN Charter, which concerns action with respect to threats to the peace, breaches of the peace and acts of aggression. Para.16 of the Resolution 687(1991) reads as follow 'Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law 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 Iraq's unlawful invasion and occupation of Kuwait'. By adopting the resolutions 674 (1990), and 687(1991), the UN Security reaffirms the principle of State responsibility to provide reparations to the injured in case of breach of international obligations. These resolutions declare Iraq's liability for prejudice resulting of its invasion and illegal occupation of Kuwait Council. According to the aforementioned Resolutions, the scope of such responsibility extends not only on the prejudice resulting from Iraq's action, but also on the prejudice resulting from other side's action. Although, this standing could draw criticisms, Gattin would prevent or reply them by arguing that such standing is grounded in a norm of contemporary international law that holds aggressors responsible for 'damage arising from the legitimate exercise of self-defence by the State that is the victim of the aggression' (Gattin, *op. cit.*, p.173).

[85] Payne informs us that the UNCC had to make 'extensive use of expert to assist the review of more than million claims for losses resulting from Iraq's invasion and occupation of Kuwait, including humanitarian claims for the millions of displaced people and the extensive damage to the environment of Kuwait and neighbouring countries' (Payne, C., 2011. Mastering the evidence: Improving fact finding by International Court. *Environmental Law*, Vol. 41, p.1205)

[86] Jean-Claude Aimé (quoted by Mundkur, R. Mucchetti, M.J. and Christensen D.C , *op. cit.*, p. 1197).

payment over larger individual claims and claims of legal entities, international organisation and Governments.[87]

However, at this point, it is worth noting that traditionally, in case of peace treaty agreements or other inter-State conflict settlement, reparations were sought as solely business between States. In fact in customary international law 'the State was originally conceived as the protector of its citizens, and had a right to resort to legal and diplomatic action to obtain redress on their behalf'.[88] Like this, State responsibility was conceived as liability to other States and the harm of a State citizen as solely injury to the State. But, the UNCC's reparation regime is an evidence that international law began to focus on the obligations of States toward individuals and private entities in case of war of aggression.

Actually, under the UNCC reparation regime, individuals and private entities are granted 'a quasi- independent, primary role in accession the compensation scheme'.[89] Still, the traditional aspect is apparent in this case. According to Rule 5 of the Provisional Rules, private victims have not *locus standi* before the UNCC. Whereas Governments and international organization can directly submit their claims for compensation, individuals and private corporate and other entities' claims must be presented via their Governments, or in the case of individual victims, through an international organization on behalf of individual who were not in a position to have their claims filed by a Government. Such kind of procedure before the UNCC, shows the residual aspect of the traditional approach where the issues of reparation were conceived as relations between States.

All in all, the establishment of the UNCC for claims against Iraq is a major development which indicates the shift from traditional approach of States responsibility to a new one that pays attention to the plight of individual victims of States violations of law.[90] The UNSC did not only provide for the principle of Iraq's responsibility to make reparation by compensating individual victims, corporations and governments, but also put in place the mechanisms for its implementation.

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[87] Concerning the categories set up by the Governing Council see the Governing Council's Decision S/AC.26/Dec.17 (1994) and the Decision S/AC.26/1991/7/Rev.1.; see also Townsend, G., 1995. The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies, 17 Loy. L.A. Int'l & Comp. L. Rev. 973, [Online] available at: <http://digitalcommons.lmu.edu/ilr/vol17/iss4/11>, accessed on 20th March 2012], pp. 987ff); see also Wooldridg, F. and Elias, O., 2003. Humanitarian considerations in the work of the United Nations Compensation Commission. *International Review of the Red Cross,* Vol. 85, p.563

[88] Doak, J., 2008, *op. cit*., p.208

[89] See Bottigliero, I., *op. cit.*, p.90.

[90] Doak, J., 2008, *op. cit*., p. 209.

I.5. International law privileging prosecution against individual perpetrators

From Nuremberg to Rwanda victims were absent before international criminal tribunals. After the Second World War, in 1945, the Nuremberg Military tribunal (NMT) was created to judge the responsible of war crimes committed during the World War. In the same vein, the International Criminal Tribunal for Yugoslavia (ICTY) and The International Criminal Tribunal for Rwanda were also respectively established in 1993 and 1994 after the atrocities of human rights violations committed in these parts of the world. Unfortunately, despite the consistent recognition of the right to a remedy in international law over the past century, none of these International Criminal Tribunals, that precede the ICC, was authorized to award reparations to victims of war crimes under their jurisdiction. Victims of crimes are absent before those tribunals (I.5.1). However, under the ICTY and ICTR regimes, some victims' rights are timidly recognised but not implemented (I.5.2.).

I.5.1. Absence of the victim before international criminal tribunals: Nuremberg IMT case

As consequence of the World War II, the London Agreement on 8 August 1945, qualified by some commentators as one of history's more brutal ironies,[91] was signed by the Allies[92] with the intention to punish war criminals of the European Axis. The Charter of the International Military Tribunal (IMT) - which constitutes the annexe of the Agreements, established and organized the functioning of the IMT – provided for individual responsibility for three categories of international crimes: crimes against peace, war crimes and crimes against humanity.[93]

The London Agreement and the Charter are totally silent about victims and their rights. Victims were ignored at the point; they were not called by the English and American prosecutors to testify in the first international trial held at Nuremberg.[94] During the London Agreement negotiations, the view was taken that 'it would be undesirable for victims to start legal actions, because that could impair international relations'.[95]

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[91] See Chesterman, S., 1997. Never Again… and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond. *Yale Journal of International law*, Vol. 22, p. 299). The Agreements was signed on 8th August 1945 (the date in the Japanese time zone was 9th August 1945) on the same day the United States dropped the second atomic bomb on Japan.

[92] The Allies were the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics.

[93] See Art. 6 of the Charter of the International Military Tribunal

[94] Fernandez, J., 2006. Variations sur la victime et la justice pénale internationale, [Online] available at: < http://amnis.revues.org/890>, accessed on 15th February 2012.

[95] Zegveld, L., *op. cit*., pp.86-87

Yet, the legitimacy of the rights to reparation for the victims of Nazi regime during the World War II did not give respite to the negotiators and drafters of the international instruments in human rights field. During the drafting of the Genocide Convention in 1948, reparation for victims through an international court was one of the discussed issues and reparation for victims of genocide was included in the draft. But at the end of the day the proposed article was left out, as it was believed that redress and compensation should be part of the jurisdiction of a possible *genocide court* that had not been created so far.[96] Would the future *ad hoc* international criminals tribunals, learn from the weakness of the IMT in respect of victims' rights and take into account the issue?

I.5.2. Victim rights under the ICTY and the ICTR regimes

The international criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were created by Security Council acting under Chapter VII of the Charter of the United Nations respectively created in 1993 and 1994 in response to grave violations of international humanitarian law committed in former Yugoslavia[97] and in Rwanda.[98] According to Art.2 to 4 of both Statutes of the ICTY and the ICTR, the list of international humanitarian law violations falls under their jurisdiction. For the ICTY, the statute lists and qualifies those crimes as 'grave breaches of the Geneva Conventions, violations of the laws or customs of war, the crime of genocide and crimes against humanity' whereas the Statute for the ICTR lists and qualifies 'Genocide, crimes against humanity, Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II'.[99]

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[96] See Zegveld, L., *op. cit.*, p.86.

[97] Regarding the former Yugoslavia case, by the end of February 1993 the conflict had been on-going for more than 18 months, the principal focus of the conflict shifting from Slovenia to Croatia and then to Bosnia. UNSC was concerned by international crimes such as mass executions, mass sexual assaults and rapes, the existence of concentration camps and the implementation of a policy of so-called 'ethnic cleansing was committed during the conflict (see the preamble of the Res 808(1993) and Res 827 (1993)). The UNSC Resolution 808(1993), para. 1 provides for the establishment of an international tribunal for prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Para.2 of the Resolution 827 (1993) repeats the principle of establishing the ICTY and reaffirms its temporal jurisdiction by specifying that Tribunal has jurisdiction on 'serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace'.

[98] By Resolution 955(1994), the UNSC decided, on the request of the Government of Rwanda (S/1994/1115) to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1st January 1994 and 31st December 1994.

[99] The ICTR Statute limits in time its jurisdiction by specifying that 'The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1st January 1994 and 31st December 1994, in accordance with the provisions of the present Statute'.

The crime of aggression which is under jurisdiction of the ICC was not recognised by the ICTR and the ICTR. With regards to victim's rights under both the ICTY and the ICTR we note that the victim is placed in auxiliary role as witness (I.5.2.1.). However, the right to restitution is provided for by the statutes of the both *ad hoc* tribunal (I.5.2.2.) but the matter of compensation has been relegated to national justice (I.5.2.3.).

I.5.2.1. Victim placed in an auxiliary role: Victim witness

With the establishment of the ICTY and the ICTR, the only step made by the international criminal justice in implementing victim's rights to reparation *vis a vis* the Nuremberg IMT, is the place given to victim as witness. According to the Statutes and RPE of both the ICTY and the ICTR, victims could be questioned by the Prosecutor[100] and could be heard as witnesses before the *ad hoc* tribunals and protection is provided for them. Hence, victims as witnesses serve only 'the interests of criminal justice'.[101]

As witnesses, victims are not entitled to lead additional evidence and they have no right to legal representation.[102] Moreover, during the hearings, a victim 'may speak only in the context of the examination and cross-examination conducted by the parties and he may neither demand the presence of a lawyer when giving evidence nor does he have any right of access to the evidence presented during the trial'.[103] Victims are not allowed to constitute an association before the *ad hoc* tribunals[104] or to 'demand to be kept informed of the progress of the proceedings, even where they are of personal concern to him'.[105]

However, a victim could enjoy the protection of their victim-witness status. The RPE of the ICTY and the ICTR elaborate the protection principle and afford protective measures to the victims 'until their testimony is given and the element of proof is collected'.[106] The statutes of the ICTY and

[100] See Art 18(2) of the ICTY Statute and Art.17 of the ICTR Statutes Rule 39 of the RPE of both the ICTY and ICTR.

[101] Boven, T.V., 1999, *op. cit*., p.81.

[102] Ntanda Nsereko, D.D., 2010. The role of victims in criminal proceedings – Lessons national juridictions can learn from the ICC. *Criminal Law Forum. The Official Journal of the Society for the Reform of Criminal Law*, Vol. 21, p. 409.

[103] Mekjian, G.J. & Varughese, M.C., 2005. Hearing the victim's voice: Analysis of victims' advocate participation in the proceeding of the International Criminal Court. *Pace International Law Review*, 17 (1), p. 12.

[104] Vincent, J., 2008. Le droit à la réparation des victimes en droit pénal international : Utopie ou réalité? *Revue Juridique Thémis*, 2010, Vol. 44, p.88.

[105] Mekjian, G.J. & Varughese, M.C., *op.cit*., p.12.

[106] *Idem*

the ICTR mandate the tribunal to provide in their RPE for the protection of victims and witnesses.[107] In this way, the RPE, which was initially identical for both the ICTY and the ICTR according to Art.14 of the Statute of the ICTR,[108] set up a Victim and Witnesses Support Unit with among other missions to protect victims and witnesses[109] and different measures of victim protection have been set up by the RPE of both the ICTY and the ICTR.[110] Called and protected as witness, a victim is not participant to criminal proceeding, and thus has no *locus standi* to claim restitution even though both the ICTY and the ICTR regime provide for the right to restitution.

I.5.2.2. The right to restitution of property

The ICTY and the ICTR Statutes recognise the victim's right to restitution of the property he/she would be deprived from. They provide for return of any property and proceeds acquired by criminal conduct as one the penalties under their regime.[111] In the same vein, Rule 105 (A), common of both *ad hoc* tribunals', determines the procedures that lead to the order of restitution. It reads '[a]fter a judgement of conviction [...], the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate'.

In respect of restitution of property, a Trial Chamber may determine the rightful owner of the property at issue. Once again, the wording of the Rule 105 does not give to the victim *locus standi*. If a Trial Chamber finds an accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it may, *proprio motu* or at the request of the Prosecutor, after a special hearing, order restitution of the property. Thus, a victim does not have standing to directly claim restitution of his or her property.[112] Again, although

[107] See Art.2 of the ICTY Statute and Art.21 of the ICTR Statute.

[108] The RPE for the ICTY was adopted in Febrary1994 by its judges according to Art 15 of the Statute. The RPE for the ICTR were adopted by its judges in June 1995 and were almost identical to the RPE for the ICTY according to Article 14 of the Statute of the ICTR. But later, as the judges of each tribunal have power to amend it, the two set of Rules have drifted somewhat apart.

[109] Rule 34 of the RPE common to both the ICTY and the ICTR.

[110] For more details on the victim's right to protection under the ICTY and the ICTR and some protective measures set up, see for example Art. 20(1) ICTY & 19 ICTR, Rule 11bis (D) ICTR, Rules 40 (ICTR & ICTR), Rule 40bis(B) ICTY & ICTR, Rule 65(B,I) ICTY & ICTR, Rule 69 ICTY & ICTR, Rule 75 ICTY & ICTR and Rule 79 ICTY & ICTR.

[111] See Art.24 (3) of the ICTY and Art.23 (3) of the ICTR.

[112] For details on the issue see also Vincent, J., *op. cit.*, p. 91.

property may be returned to the victim of crime, under the ICTY and the ICTR Statutes, victim is not entitled to compensation for any loss due to the deprivation of his/her property. Any claim of compensation is referred to national justice.

I.5.2.3. National justice expected to award compensation to victims

At the establishment of the ICTY and the ICTR the UNSC was aware of the victims' right to reparations, although, for some reasons, did not empower the *ad hoc* tribunals to decide on it. The issue has been referred to national tribunal. The Rule 106 (compensation to victims) common to both the ICTY and the ICTR Statutes reads as follow:

> (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.

As the aforementioned Rule states clearly, victims of the conflict in the former Yugoslavia and in Rwanda cannot rely only on the special Tribunals for compensation. Considering that the problem of national reconciliation is strongly related to the issue of reparation, one may ask how international tribunals can contribute to such reconciliation without grating victims the right to sufficient reparation measures.[113] Under the ICTY and the ICTR regimes, victims will be dependent on their national legal systems to be awarded compensation.

Unfortunately, national legal systems have to date proven not to be an efficient way for the victims. Amnesty International for example, almost two decades after the end of the conflict, has been repeatedly accusing successive governments of Bosnia and Herzegovina for failing until present 'to acknowledge the rights of civilian victims of wartime sexual violence and provide them with access to justice, truth and reparation'.[114] What about the case of Rwanda?, In Rwanda the popular *gacaca* courts were established in 2001. These popular courts ordered the convicted to return property looted or to pay compensation for destroyed or damaged property during the

[113] Vincent, J., *op. cit*. p.88.

[114] Amnesty International, 2010. Amnesty International Report 2010 - Bosnia and Herzegovina, [Online] available at: <http://www.unhcr.org/refworld/docid/4c03a83c53.html>, accessed on 31st March 2012] and Amnesty International, 2012. Old Crimes. Same Suffering. No justice for survivors of wartime rape in North-East Bosnia and Herzegovina, [Online] available at: <http://www.amnesty.org/en/library/asset/EUR63/002/2012/en/f688b1c8-1fa2-46ba-ae26-0b6ec344401f/eur630022012en.pdf>, accessed on 31st March 2012.

genocide. Without debating the issue of fairness of the popular *gacaca* courts,[115] merely should one note that debtors of reparations were sometimes found insolvable and that sometimes hindered the implementation of gacaca's compensation orders. Would the ICC then draw from the *ad hoc* tribunal failures in order to fill in the gaps in regards with victim's rights?

I.6. The Rome Statute of the ICC: Victim-centred system

By establishing the Nuremberg IMT and the *ad hoc* tribunal, the ICTY and the ICTR, the international community did not respond to Moynier's 1872's request to establish an international Criminal institution with jurisdiction to award compensation to victims of crimes. On the contrary, it needed 126 years for the international community to grant the request.

On 17th July, 1998, the ICC Statute was adopted. The ICC extends the list of the international criminal tribunals, but departs from its predecessors aforementioned by not only being a permanent and *a priori* institution but also by being vested with the power to decide on victim's reparations (I.6.1.). The creation of the right to reparation could not happen without a strong technical support specifically from NGO (I.6.2.). The ICC Statute does not only enshrine the possibility to grant victims reparations but also institute a compensation fund for them (I.6.3.). In addition, the innovative and victim-centred nature of the ICC Statute as international instrument is confirmed by the fact that the Statute provides for the victims' procedural rights which facilitate the access of individual victims to the ICC and allows them to participate in criminal proceedings (I.6.4.).

I.6.1. The establishment of the International Criminal Court with a mandate to decide on reparations to victims

The establishment of the ICC with the powers to decide on reparations for victims took quite long time. Art.VI of the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948 implies the establishment of an international criminal court. The article reads 'Persons charged with genocide or any of the other acts [enumerated by the convention] shall be

[115] Even in the initial stages of this process, not everyone believed the gacaca courts would be fair; in 2006 Human Right Watch reported that more than 10,000 Rwandans fled the country in anticipation of gacaca court inquiries, fearing 'false accusations and unfair trials. Unfortunately, as Le Mon, who served on secondment to the Office of the Prosecutor at the ICTR from September through October 2006, regrets 'many of these fears were quickly realized '(Le Mon, C.J., (n.d). Rwanda's Troubled Gacaca Courts, [Online] available at: <http://www.wcl.american.edu/hrbrief/14/2lemon.pdf?rd=1>, accessed on 31st March 2012).

tried by a competent tribunal of the State in the territory of which the act was committed, *or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction [*emphasis added]'. At the same time, in 1948, the UNGA gave an assignment to the ILC to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide. The first draft was produced by the ILC in 1950s, but the political and legal environment would wait 48 years to give birth to the ICC Statute.

Contrary to the Nuremberg IMT which was created by allies and the *ad hoc* tribunal, the ICTY and the ICTR, which were created by the UNSC Resolutions acting under Chapter VII of the Charter of the United Nations, the ICC was created by a treaty. On 17th July, 1998, in Rome (Italy), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted by vote the ICC Statute of the International Criminal Court (ICC).[116] Sixty (60) ratifications were secured in April, and in accordance with the ICC statute, the jurisdiction of the ICC commenced on 1st July 2002.[117] Thus, nearly fifty years after Nuremberg[118] the permanent International Criminal Court (ICC) was established but after long endeavour.[119]

The seat of the ICC is in The Hague.[120] The Court has jurisdiction over core crimes or international serious crimes namely: genocide, crimes against humanity, war crimes and aggression committed after its entry into force.[121] In this respect, the Court has mission to complement national tribunals in trying international core crimes for the purposes of establishing individual criminal

[116] The ICC conference took place in Rome from 15th June to 17th July 1998 with 160 countries participating in the negotiations. After intense negotiations 120 nations voted in favour of the adoption of the Statute of the ICC, with seven nations voting against the treaty, some of them were the USA, Israel, China, Iraq and Qatar, and 21 states abstaining (Coalition for International Criminal Court [n.d]. History of ICC, [Online] available at: <http://www.iccnow.org/?mod=icchistory&lang=en>, accessed on 22nd November 2010).

[117] According to its Art.126, the Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

[118] The Nuremberg International Military Tribunal was established pursuant to the agreements signed on 8th August 1945 by the governments of the United States of American, the United Kingdom, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic, to judge the leaders of the Third Reich.

[119] The efforts to establish a permanent ICC started with the League of Nations and were continued by the United Nations but failed due to the world crisis that followed the Spanish civil war, Italy's invasion of Abyssinia, and Germany's aggressive and militaristic policies in the years that preceded the World War II (For the history of the endeavour to establish a permanent ICC see Bassiouni, M.C. ed., 1998. The Statute of the International Criminal Court: A Documentary History. New York: Transnational Publishers, pp.10-11)

[120] See Art.3 of the ICC Statute.

[121] Art.5 of the ICC Statute

responsibility.[122] According to Art.75 of the Statute of the ICC, the Court may decide, on request or by its own motion, on reparations to be awarded to victims of the core crimes under its jurisdiction.

As mentioned earlier, the establishment of the ICC was the result of a long endeavour. Notwithstanding other thorny issues that arose after the creation of the ICC, the scope of this work limits us to focus our analysis only on the right to reparations that has been recognised by the ICC statute. In fact, it was easy for the drafters or negotiators of the ICC Statute to understand the necessity of establishing an international criminal court to punish those responsible of international crimes. However, it was not so easy empowering the same court with jurisdiction to deal with reparation issues. Taking into account the development of the right to reparation, it can be said that the international legal environment was more mature on criminal aspect than on 'civil aspect'. For that reason, the birth of the right to reparations before the International Criminal Court needed such a strong technical support.

I.6.2.The process of creating the right to reparation and the technical support it required

By analysing the Draft Statute of an International Criminal Court adopted by International Law Commission (ILC) in 1994, hereinafter '1994 Draft Statute of the ICC', we note the total absence of any provision on reparation. But incidentally, Art.47 of the 1994 Draft Statute evokes the idea of creation, by UN Secretary-General of a Fund for the benefits of victims of crime.[123] How did it happen that during the four following years the victim right to reparation appeared in the final document adopted in 1998?

With respect to victims' rights to reparations, the spirit of the previous *ad hoc* tribunal was still haunting some of the delegations to the ICC Statute negotiations. For example, in 1994, ILC decided to delete from its 1994 Draft Statute a provision on reparation 'on the basis of the argument that a criminal court was not an appropriate form in which to order reparations'.[124] But, on another

[122] See Art.1 of the ICC Statute.

[123] Art. 47 of the 1994 Draft Statute of the ICC provides that fines against an accused could be paid into 'a trust fund established by the Secretary-General of the United Nations for the benefit of victims of crime'.

[124] See Donat-CAttin, D., 2008. Article 75. In. O. Triffter, ed., *Commentary on the Rome Statute of the International Criminal Court, observers' Notes, Article by Article*, 2nd ed., München: Verlag C.H.Beck p.1401 and Zegveld, L., *op. cit*., p. 87). The opponents of inclusion of victim's right to reparations before the ICC had many arguments which Muttukumaru would sum up as follow: 'Opponents of the provision [for reparations] focused on the central purpose of the statute, which was to prosecute, in a fair and effective manner, those accused of the most serious crimes of international concern. Making reparations would distract the Court's attention from the trial and appeal functions of the Court. A second point, linked to the first, was the practical difficulty of asking a criminal court to decide on the form and extent of reparations. The problem would be

hand, strong advocacy for victims' rights played its role. The contribution of non-governmental organisation in the development of the right to reparations under ICC regime is undeniable.[125] In fact, observers recognise the NGOs' positive influence in international negotiations,[126] and note that 'the issue of victims' redress in the ICC was central to the work of many NGOs participation in the Preparatory Committee and the ICC Conference'.[127] As the drafters debated changes to the ILC Draft Statute, support for the option that the ICC should have the power to order reparations to victims grew. Finally, the voices for victims' rights were heard by international community[128] and the right to reparations was born by the adoption of the ICC Statute in July 1998.

I.6.3. The establishment of the Trust Fund for the benefit of victims and of their families

Besides the right to reparations introduced by Art.75 of the ICC Statute, the plight of victims led to adoption of Art.79 of the ICC Statute that provides for establishment of the trust fund for victims of crimes under the ICC's jurisdiction. Consequently, the Trust Fund for the benefit of victims and of their families was established by the Resolution *ICC-ASP/1/Res*.6 of 9th September 2002.[129] As mentioned earlier, the UN had created different voluntary funds for benefit of victims of violations of human rights.[130] Therefore, the creation of Trust Fund for Victim by the ICC Statute is not as innovative as is the ICC's mandate to decide on reparations. The Trust Fund for Victims seems to complete the list of some pre-existing UN Trust Funds for victims already mentioned. Nevertheless, the TFV 'is a novel feature of the Court, unprecedented in the history of international

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exacerbated by the fact that the judges would come from very different legal traditions. Thirdly, some delegations were concerned about the implications that awards of reparations by criminal courts would have on their domestic legal systems which, in a few instances, did not recognise the concept. Finally, it was widely believed that the reparation article was a stalking-horse for awards of reparations against States' (Muttukumaru, C., 1999. Reparation for Victims, in F. Lattanzi and W.A Schabas, eds., 1999. *Essays on the Rome Statute of the International Criminal Court*, Vol.1, Fagnano Alto: il Sirente, p.304).

[125] Some of the non-governmental organization which strengthened the position of victims, insufficiently addressed in the ILC Draft are: Redress Trust, European Law Students Association, Women's for Gender Justice, Human Rights Watch and many others (see Boven, T.V., 1999, *op. cit*., p.83).

[126] See for example Murphy, J.F., 1999. Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution. *Harvard Human Rights Journal*, Vol. 12, p. 56.

[127] Donat-Cattin, D., 2008, *op. cit*., p. 1401. For example in Dakar, from 3 to 4 February 1998, representatives from non-governmental organization, including among others, representatives of the International Committee of the Red Cross, Human Rights Watch and Amnesty International, met and adopted a Declaration by the International Forum of NGOs. The Declaration called, among others, for the immediate establishment of an international criminal court and the recognition of the right of reparations for victims. For the important role played by NGOs, see also Bassiouni, M.C., *op. cit*., pp.1o9-112; Kirsch, P. and Holmes, J.T., 2004. The Birth of the International Criminal Court: The 1998 Rome Conference. In: O. Bekou and R. Cryer, eds., 2004. *The International Criminal Court*. Burlington: Ashgate, p. 11.

[128] Indeed, as Strang notes, '[t]he victim movement worldwide has been enormously influential [….] in bringing to the attention of politicians, legislators, and the communities of which they are a part the needs and wishes of victims of crime' (Strang, H., *op. cit*., p. 24).

[129] The coming into force of the Fund took place at the same time as that of the International Criminal Court, on1st July 2002.

[130] See section *I.2* of this chapter, p.22.

criminal law'.[131] Some innovative aspects of the TFV under the ICC reparation regime could be found, as it will be demonstrated in Chapter three of Part two of this dissertation, in its funding and interactivity with the ICC in implementing victims' rights to reparations.

I.6.4. The access of individual victims to an International criminal Court

Unlike the *ad hoc* tribunal (ICTY and ICTR) which have not recognised the place of victim in criminal proceedings except participating as witness, ICC Statute appears to be a victim-centred criminal court. It is interesting that a whole range of articles providing for victims' rights to intervene in criminal proceedings should be found in ICC Statute. Victims are granted the right to intervene, through their representatives in pre-trial and trial proceedings, and specific reparations hearings are provided for by the Statute and Rules of Procedures and Evidence.

Art.68 of the ICC Statute appears to be the main provision providing for victims' procedural rights. It governs victims' participation in the proceedings for instance by requiring the Court to protect their safety, physical and psychological well-being, dignity, and privacy. It grants victims the right to present, through their representatives and at stages of the proceedings determined to be appropriate by the Court, their views and concerns where their personal interests are affected. But other provisions from the ICC Statute also speak for victims' right to participate in criminal proceedings. Victims are for example granted with right to make representation to the Pre-Trial Chamber with respect to the Prosecutor's decision to proceed with an investigation,[132] to submit observations relating to the jurisdiction of the ICC and the admissibility of cases[133] etc. Furthermore and foremost, regarding the right to reparations, Art.75 (1) of the ICC Statute allow victim to bring their claims for reparations before the ICC. As full party in reparations proceedings, victims are granted with the right to appeal against reparation orders.[134] The different provisions providing for victims procedural rights related to the right to reparations before the ICC are completed by its Rules of Procedures and Evidence (RPE) of the ICC.[135] Various provisions of the

[131] Abtahi H. and Arrigg Koh S., 2012. The Emerging Enforcement Practice of the International Criminal Court. *Cornell International Law Journal*. Vol.45.p.17

[132] See Art. 15 (3) of the ICC Statute

[133] See Art.19 (3) of the ICC Statute

[134] See Art.82 (4) of the ICC Statute.

[135] For example Rule 16 of the RPE of the ICC (Responsibilities of the Registrar relating to victims and witnesses) describes the responsibilities of the Registrar in respect with victims. These responsibilities include, assisting victims in obtaining legal advice and organizing their legal representation, providing victims' legal representatives with adequate support, assistance, and information at all stages of the proceedings, ensuring that victims are kept updated on the Court's decisions that may have an impact on their interests. In same vein, Rule 89 of the RPE of

ICC Statute regarding procedural rights granted to victims demonstrate the innovative step made by the ICC Statute of recognising victims' right to intervene in international criminal proceeding.

CONCLUSION

The ICC Statute by grating the Court the power to decide on reparations to victims of crimes under its jurisdiction undeniably produces a novel development in the arena of international criminal law and is also one of the Statute's most innovative features. After exploring the path that led to the introduction of the right to reparations before the international criminal court, one may conclude that it was a long journey and it also seems like the international community's conscience towards the ICC, in respect of reparation rights, evolved at a slower pace. The establishment of the ICC with mandate to decide on reparations to victims reflects the growing emphasis on the victim's perspective which 'is the visible expression of a gradual convergence of human rights law, international humanitarian law and the law pertaining to crime prevention and criminal justice'.[136]

With the ICC Statute, international criminal law no longer focuses only on the prosecution of international crimes but also on reparation for victims (who were previously treated as a subject of secondary importance). It bears reminding that on the coaching stage, the international law requires or urges States to manage their judicial systems and allow victims to have access to criminal proceedings regarding crimes of which they are victims. The ICC Statute is a step forward in international law by recognising and implementing the rights of victim of core crimes, and this is demonstrated by the victim-centred character of the Statute.

In addition, besides the permanent nature of the ICC and its power over crimes committed after its entry into force, the Court's mandate to decide on reparations makes it unique if compared with other exiting international or hybrid tribunals. Thus, the ICC Statute appears as a renewal of interest, a real rejuvenation of international criminal law and 'an advancement of the rights and status of the victims of serious crimes against international law that fall within the jurisdiction of the Court'.[137] Art.75 of the ICC Statute seems to cover a very serious lacuna of the Statutes of the ad hoc Tribunals - Nuremberg, ICTY and ICTR - which did not properly address the issue of

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the ICC grants the Chamber discretion to consider victims' applications to participate, and to determine the nature and scope of such participation during any phase of the proceedings. The RPE goes far by even allowing victims to express their views concerning the disposition of the convicted person's assets (Rule 221 of the RPE of the ICC).

[136] Boven, T.V., 1999, *op. cit*., p.80

[137] Oásolo, H., 2005. The Triggering Procedure of the International Criminal Court, Boston: Martinus Nijhoff Publishers, p.108.

reparations to victims[138] and the rights of victims enshrined in the Statute take a clear step forward in comparison with those previous international criminal tribunals.[139] Nevertheless, this new development of the right to reparations has to be strengthened and perpetuated by an adequate implementation by the Court.

[138] Donat-Cattin, D., 2008, *op.cit*., p.1411

[139] Oásolo, H., *op. cit*., p.108

PART TWO

THE CONTENT OF THE RIGHT TO REPARATIONS AND THE MECHANISMS FOR ITS IMPLEMENTATION

Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law. The role of the Judge has been transformed since Montesquieu's day but the historic tension still exists between the search for the 'true intent' of a legal norm and the desire for certainty and transparency in the application of the law.[140]

[140] The Report of Mr Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland, *Methods of Interpretation – Comparative Law Method, [Online] a*vailable at: <http://curia.europa.eu/common/dpi/col_murray.pdf>, accessed on 10th January 2011.

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THE CONTENT OF THE RIGHT TO REPARATIONS AND THE MECHANISMS FOR ITS IMPLEMENTATION

INTRODUCTION

Art.75 (Reparations to victims) of the ICC Statute is the main and single provision, among 128 articles the Statute comprises, which provides for reparations to victims. This article constitutes the backdrop of this work; it reads as follow:

> [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 [emphasis added].

The novel right to reparations created by ICC Statute raises three major problematic issues. The fact that the Statute requires the Court to *establish principles relating to reparations* raises the first issue of *substantive law* to be applied to reparations before the Court. Is there any existing set of international principles upon which the Court will rely on in its determination of reparations to the victims against a convicted person? At first glance one may assume that if international law provided for substantive law to be applied to reparations in the case of individual responsibility, the Statute could have referred the Court to such a body of law. The fact that the ICC Statute requires the Court to establish the principles to be applied to reparations may result from the absence of substantive law governing reparations under international law. In case this thesis holds true, how then will the Court create the contemplated principles? Chapter one of this Part intends to tackle the issue of the substantive law applicable to reparations before the ICC. The basis of our discussions will be limited to Art.75 (1) (s1) of the ICC Statute.

Secondly, the Article75 raises the problem of *procedural law* applicable to reparations before an international criminal court. According to Art.75 (1) (s2) of the ICC Statute, the Court may decide on reparation issues *upon request* or on its *own motion*. The provision goes on, in subsequent paragraphs, to provide for how the Court will proceed, by inviting representation from or on behalf of all interested persons, before the issuance of an order for reparations. It also provides for the possibility of the Court to seek protective measures for the sake of reparations to victims. All these procedural aspects[141] lead to the question as to whether the ICC reparation regime provides for an adequate procedural law to deal with reparation issues in criminal proceedings. How shall the principle of fair trial, in terms of expeditious and fair proceedings, be respected before the Court? In order to attempt to investigate the issue, Chapter two of this Part will deal with and focus on the analysis of procedural law applicable to reparations under ICC regime. The basis of the analysis will be limited to paras (1(s2) – (4) of Art. 75 of the ICC Statute.

Thirdly, Para.5 of Art.75 of the ICC Statute raises a question of execution of reparations orders issued by the ICC. The Statute requires State Parties to give effect to the decision made by the Court under Art.75. How will the implementation of such decisions be effective? Moreover, regarding the efficiency of the implementation of the right to reparations, Art.75 (2) provides for the possibility of the Court to order reparations through the TFV. As such, it is good to find out if the TFV would also intervene in execution of any reparation orders. If so, how could there be reconciliation between its mandate to assist victims and their families and the execution of reparation orders? Chapter three of this Part will focus on both issues of implementation of reparations and assistance to victims.

[141] The procedural aspects may implicitly be found in para.1 (s2) – para.4 of Art.75 of the ICC Statute.

CHAPTER ONE: UNDERSTANDING THE SUBSTANTIVE LAW APPLICABLE TO REPARATIONS UNDER THE ICC REGIME

INTRODUCTION

Unlike the criminal aspect of the ICC Statute which constitutes its core element, the right to reparations introduced is not substantially developed. The Statute does not define the right to reparations, its scope and purposes - even the Preamble of the Statute does not refer to the innovative right to reparations. Article 75 of the Statute entitled 'Reparations to victims' is the single article specifically reserved to the right to reparations. The first sentence of the first paragraph of Art.75 implicitly refers to substantive aspects of the rights to reparations. It reads as follows: *The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.* The rest of the paragraph and the subsequent paragraphs which make up the Article 75 are related to the procedure to be followed before the Court.

The Court is expected to establish principles or to develop the substantive law applicable to reparations, by creating, defining and regulating the duties and liabilities relating to reparations before the ICC. This task given to the Court will be challenging. First of all, one may wonder whether the Statute vests the Court with regulatory authority to establishing the principles. In other words will the judges of the Court 'promulgate principles relating to reparations by collective agreement'?[142] Or shall the Court establish the principles under its judicial function, that is, on the case by case basis? In the same line, there is a question of the scope of the authority the Court is vested with to establish the principles. What may be the limits to Court's mandate to establish principles relating to reparations? Will the Court establish principles which will directly or indirectly bind State parties to the ICC Statute? The Statute remains silent about these thorny issues. Consequently, we need to understand the exact meaning of the Art.75 (1) (s1) and how the provision will be applied by the Court. By analysing the scope of the task given to the Court to establish the principles relating to reparations (I.1), it will be demonstrated that the principles are to be established under the Court's judicial power instead of its regulatory authority. Consequently, it will be noted that the principles should be established not on an *a priori* basis but on a case by case basis and should be court-wide principles consistent with the spirit of the Statute.

[142] McCarthy, C., 2012. Reparations and Victim Support in the International Criminal Court. Cambridge (UK) : Cambridge University Press, p.209

Secondly, the purpose of the principles relating to reparations and their possible content will attract our attention. By examining the spirit of Art.75 (1) of the ICC Statute, we will note that the main purpose of the principles would be to ensure legal certainty in matters relating to reparations before the ICC. The content of the principles should intend to ensure legal certainty particularly for parties. Thus, it should constitute the substantive law to be applied by the Court as far as reparations to victims are concerned. Consequently, the purposes of the principles should arguably determine their content (I.2).

It is interesting that at the time of writing the Court should have already issued the first decision establishing the principles to be applied to reparations. On 7th August 2012 the Trial Chamber I, in *Prosecutor v Thomas Lubanga Dyilo,* issued the 'Decision establishing the principles and procedures to be applied to reparations'. Although this decision should not be taken as a settled case-law of the ICC, as it is still isolated and not yet final,[143] it will constitute our object of analysis. In which context was the decision issued? Does the Decision include principles which will ensure legal certainty for all involved parties? Could the established principles constitute the substantive law applicable to reparations before the ICC? By analysing the Trial Chamber I's Decision (I.3), we will realise that it is possible to deduce from the decision principles relating to reparations in general, principles relating to the standard of causation and recoverable harm and principles relating to the types of reparations. Briefly, this chapter discusses and is limited to the substantive aspects of the right to reparations. Other major principles upheld by the Decision are related to the procedure and are reserved to Chapter two of Part two of this dissertation.

I.1. The task of the Court of establishing the principles relating to reparations (Art.75 (1)(s.1) of the ICC Statute)

Art.75 (1) of the ICC Statute gives a mandatory mission to the Court to establish principles relating to reparations to, or in respect of the victims. The article begins with the following wording 'The Court *shall* establish principle' (emphasis added), which is translated in French version as 'La Cour *établit* des principes'. Such wording expresses the mandatory mission given to the Court to establish the principles to be applied to reparations. In this respect the Court is vested with a power to create reparation principles, 'appropriate to its own context, as distinct from a power merely to interpret or apply existing law'.[144]

[143] At the time of writing this thesis, appeals against the Decision were recorded by the Appeals Chamber from both the defence and legal representatives of victims and were still pending before the Appeals Chamber.

[144] McCarthy, C., *op. cit*., 2012, p.131

The wording of Art 75(1)(s1) has led to debates. On one hand, some commentators argued that the Court will fulfil its task by establishing the principles related to reparation throughout its case-law - on a case by case basis.[145] On the other side, others had interpreted the provision as it delegates the Court to establish general principles prior to the issuance of its first order for reparations and outside of the context of any single case.[146] This leads us to proceed by first understanding the exact nature of the authority granted to the Court by Art.75(1)(s1) to establishing the principles relating to reparations (I.1.1) before identifying the limits to such authority (I.1.2.).

I.1.1. The power of the Court to establish principles for reparations under Art.75 (1) (s1) of the ICC Statute

Art.75 (1) (s1) of the ICC Statute refers to the principles to be established by the *court*. According to Art.34 of the Statute, the *Court* is composed of the judges (the Presidency, an Appeals Division, a Trial Division and a Pre-Trial Division),[147] the Office of the Prosecutor and the Registry. The Art.75 does not specify which particular organ will establish the principles. Moreover, one may wonder whether they should be established by the Court in its judicial capacity or as an administrative organ performing its regulatory power.

Some commentators, such as Henzelin, Heiskanen and Mettraux,[148] and McCarthy,[149] assume that the Court is to pro-actively establish the principle prior and out of any particular case. By so arguing, they seem to consider that the Court is vested with the regulatory power. Particularly, McCarthy refers to Resolution ICC-ASP/10/Res.3 on reparations adopted on 20th December 2011 by the Assembly of States Parties (ASP) in New York, in its 7th plenary meeting. At the time of the adoption of the ASP Res.3 on reparations 2011 the Court had not yet established the principles respecting reparations. The ASP expressed its concerns that the Court had not yet established principles respecting reparations and that in the absence of such principles *pre-*

[145] See for example Bitti, G. and González Rivas, G., 2006. The Reparations Provision for Victims Under the Rome Statute of the International Criminal Court. In: The International Bureau of the Permanent Court of Arbitration, ed., 2006. *Redressing injustice Through Mass Claims Processes. Innovative Response to Unique Challenges.* Oxford (UK): Oxford University Press, p. 310.

[146] See for example War Crime Research Office, 2010. The Case-Based Reparations Scheme at the International Criminal Court. Washington: American University, p. 3.

[147] See also Art.39(2) of the ICC Statute.

[148] Henzelin, M. Heiskanen, V. and Mettraux, G., 2006. Reparations to victims before the international criminal court: Lessons from international mass claims processes. *Criminal Law Forum*, Vol. 17, p.330-331

[149] McCarthy, C., 2012. Reparations and Victim Support in the International Criminal Court. Cambridge (UK) : Cambridge University Press, pp.130-131.

established by the Court practical inconsistency and unequal treatment of victims may occur.[150] Consequently the Resolution requires the Court to ensure that 'Court-wide coherent principles relating to reparations shall be established in accordance with article 75, paragraph 1, based on which the Court may issue individual orders for reparations'.[151] Further, the Resolution requests 'the Court to report back to the Assembly at its eleventh session'.[152] Nevertheless, some of the proponents of this school of thought do not hide their concerns about the task of the judges to establish the principles which should on an *a priori* basis take into account all possible scenarios and cases.[153] Yet on the other hand they consider that the judges should establish an overarching framework of principles much of whose details will need be fleshed out into individual cases.[154]

Unlike the first school of thought, other commentators, such as Bitti and González Rivas, argue that the reparation principles would be developed gradually by the Court in the course of its case-law. They build their arguments on the postulate that '[t]he statute and Rules do not appear to grant the Court any legislative authority beyond its jurisprudence' since the Court, 'unlike other international courts and tribunals, does not even have the authority to draft its own procedural rules'.[155] Besides this argument *a fortiori*, Bitti and González, went on by using the 'textualist' method in interpreting Art.75 (1). They argue that since Art.75 'is found in Part 6 of the Statute ('The trial') and, although it refers to the 'Court' rather than to the 'Trial Chamber' (and therefore permits the Court's Chamber to be involved in the establishment of reparation principles), the placement of this Article suggests that it refers to the judicial functions of the Court'.[156] Accordingly, they concluded that 'the reparation principles [would] therefore be established

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[150] See Para.3 of the Preamble of the Resolution ICC-ASP/10/Res.3 on Reparations. In the Resolution ICC-ASP/11/Res.7 on Victims and Reparations (Adopted during the eleventh session held in The Hague on 14 - 22 November 2012), the ASP '*Takes note* of the decision of Trial Chamber I establishing the principles and procedures for reparations in the case against Thomas Lubanga Dyilo,4 dated 7 August 2012, *recalls* the need for the Court to ensure that coherent principles relating to reparations continue to be established in accordance with article 75, paragraph 1, of the Rome Statute and *further requests* the Court to report back to the Assembly at its twelfth session' (para.7).

[151] McCarthy thinks that by the words 'the Court' the resolution appears to envisage that the judges of the Court will promulgate principles relating to reparations by collective agreement (McCarthy, C., 2012, *op. cit.*, p. 130).

[152] Acting under Art.112(g) of the ICC Statute - which provides that Assembly of States perform function consistent with this Statute or the Rules of Procedure and Evidence – ASP requested the Court to report back to the Assembly concerning the establishment of the principles to be applied to reparations.

[153] Dwertmann, E., *op. cit*., p.46

[154] McCarthy, C., 2009, *op. cit*., p.131

[155] See Bitti, G. and González Rivas, G., op. cit., p 310. However, we observed that the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties .Moreover, they have a mandatory mission to adopt, by an absolute majority and in accordance with the Statute and the Rules of Procedure and Evidence, Regulations of the Court necessary for its routine functioning.

[156] Bitti, G. and González Rivas, G., *op. cit*., p.310

jurisprudentially by the chambers of the Court on a case-by-case basis'.[157] Likewise, by interpreting the Court's attitude before the adoption of the *2012 Decision on Principles and Procedures*, Dwertmann concluded that '[a]s the Court [had] refrained from establishing abstract reparation principles so far, it [seemed] that they [would] be established jurisprudentially by the court's chambers on a case-by-case basis'.[158] This point of view was supported by Donat-Cattin who, relying on the verb 'shall' of the first sentence of Article 75(1), noted that the Court's verdicts 'shall include prescriptions on the right to restitution, compensation and rehabilitation, even in cases in which the relevant Chamber would not decide to make any determination regarding specific means(s) of restitution'.[159] The proponents of this second school of thought are aware of the danger of such position in terms of the concern of the risk of 'practical inconsistency and unequal treatment of victims' as expressed by the ASP Res.3 on reparations 2011. However, in regard with such a risk, they assumed that 'the content of those principles could be harmonized by the appeals chamber of the Court, which has the power to consider appeals against an order for reparations made under Article 75'.[160]

The position of the latter school of thought seems to be consistent with the context of the ICC Statute. The Court's authority for establishing the principle could not be understood as regulatory power but as judicial function which will be performed by the Trial Chamber. First of all, we might admit that in some matters the Court, as an administrative body, is vested with regulatory power that it exercises as a group of judges meeting in a plenary session or a special plenary session.[161] In this regard, the judges may for example, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.[162] In the same line, we note that the judges have a mandatory mission to adopt, by an absolute majority and in accordance with the Statute and the Rules of Procedure and Evidence (hereinafter RPE), regulations of the Court necessary for its routine functioning.[163] Notwithstanding, the task of establishing the principles for reparations *as per* Art.75 (1) of the ICC Statute should not fall under the Court's regulatory power. Indeed, it is noticeable that, wherever the matter of the Court's regulatory power is concerned, the Statute uses the term *judges* instead of

[157] *Idem*

[158] See Dwertmann, E., *op. cit.*, p.48

[159] See Donat-Cattin, C., 2008, *op. cit.*, p.1401.

[160] See Bitti, G. and González Rivas, G., *op. cit.*, p. 310) and Dwertmann, E., *op. cit.*, p.48

[161] See Rule 4 of Rules of Procedures and Evidence of the ICC.

[162] See Art.51 (3) of the ICC Statute.

[163] See Art.52 of the ICC Statute.

the term *Court*.[164] One may actually assume that if it was the case of Court's regulatory power, the Statute would states that 'the judges shall establish the principles relating to reparations', for such a language is the same whenever the Statute refers to the regulatory power of the Court. In addition, the Statute should have specified the required majority in deciding on the principles as it does in respect of the regulatory power of drawing provisional rules and Court's regulations.

Secondly, Art.75 is found in Part 6 of the Statute, entitled 'The Trial'. This leads to an argument that the Court should establish the principles not as performing its regulatory power, but as its judicial function. It is worth observing the sequence in which the Article 75(1) refers to the term *Court*. It states that the *Court* shall establish the principle, the *Court* may determine the scope and extent of any damage, loss and injury and the *Court* may make an order against the accused. This demonstrates that it is the same organ which should and might perform the judicial function provided for by Art.75 (1) of the Statute. This analysis may reinforce the assumption that the Court should establish the principle in context of its judicial functions and should not establish the principles out of a particular case.

Notwithstanding, there is another question of which the chamber of the Court will be held responsible for establishing the principles. According to Article 39(2) of the Statute, the judicial functions of the Court shall be carried out in each division by the Chambers. The article goes on by specifying the different chambers which are the Pre-Trial Chamber, the Trial Chamber and the Appeals Chamber. Which one of these Chambers should establish the principles? Some commentators assume that since Art.75 refers to the Court instead of referring to the *Trial Chamber*, it permits the Court's other Chambers - Trial Chambers, or the Chambers in general - to be involved in the establishment of the principles.[165] However, taking into account the place where Art.75 is found and, as already noted, the sequence in which the term Court is used, one has to consider that the authority given to the Court to establish the principle relating to reparation fall under the judicial function of a Trial Chamber which alone has power to issue a reparation order. The Pre-Trial Chamber would not be involved in establishing the principles since it cannot decide on reparations sought after conviction.[166]

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[164] See for example Arts 51(3) and 54 of the ICC Statute.

[165] Dwertmann, E., *op. cit*. p.47

[166] In this regard, it is worth noting that this interpretation does not go against the possibility of the movement of judges from one chamber to another. This mobility is justified by the interest of good administration of justice but cannot modify in any way the jurisdiction each Chamber is vested with. Therefore, the Trial Chamber should be competent to establish the principles relating to reparations in its judicial capacity. According to Article 39(4) of the ICC Statute judges assigned to the Appeals Division shall serve only in that division. However, if the

Finally the binding wording of Art.75 (1)(s1) of the Statute raises the question as to whether the Court shall establish the principles even in the case where a trial concludes to the acquittal of an accused person. Considering the binding wording one should deduce that, in the context of a particular case, the Court has an obligation to set up the principles which may serve as the basis of any determination of the scope and extent of damage, loss and injury to or on behalf of the victims. In this respect, two alternatives are available. The Court may establish the principle at the beginning of any trial for the purpose of ensuring legal certainty to parties, particularly to the victims who intend to participate in criminal proceedings with the view to claim reparations.[167] Another option open to the Court is to establish the principles after conviction before dealing with reparation issues. Although the Trial Chamber I seem to have opted for the second alternative,[168] the first alternative seems to be more consistent with the spirit of Art.75 (1)(s1). In fact, the decision on principles does not depend on conviction or acquittal of an accused person. This should justify the binding wording used by Art.75 (1)(s1). Moreover, since victims have the right to participate in criminal proceedings with the view to claim reparations, a decision upholding principles relating to reparations may provide legal certainty to victims and keep them from nourishing ambitious expectations towards reparations before the Court.

I.1.2. Limits to the power of the Court to establish the principles relating to reparations

Having understood the nature of the Court's authority to establish the principles relating to reparations, it is worth examining the limits to its judicial power in establishing the principles. The ICC Statute does not specify the possible limits to the Court's authority to set up the principles relating to reparations. Once again, this situation led some commentators to interpret Article 75(1) in a sense that allows the Court to establish wide international principles relating to reparations with possible effect on States and other entities.

For example Dwertmann argues that the reparation principles established by the Court could 'aim at an external effect' by being for example 'addressed directly to neutral institutions, to States,

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Presidency considers that the efficient management of the Court's workload so requires, may decide the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

[167] The possibility of victims to participate in criminal proceeding with a view to claim reparations is discussed in Chapter two of Part two of this dissertation (pp.225ff).

[168] In *Lubanga* case, Trial Chamber I established principles relating to reparations after conviction against Mr Thomas Lubanga Dyilo.

and possibly to non-State actors or the international community'.[169] According to Dwertmann where the Court finds that a convicted person acted on behalf of States, or other legal entities, the principles established in a case-by case basis could address the corresponding entity, in the form of non-binding recommendations.[170] She goes on to argue that certain States, the international community or private legal persons could be called to make direct reparations to victims.[171]

Contrary to such a point of view, the Court is arguably required to create reparation principles which will be imposed, not against States or other entities, but against an individual responsible for criminal conduct.[172] Regarding the possibility of the Court to establish either binding or declaratory principles towards States, one may presume that the aforementioned arguments have led the ASP to react in opposite direction by stressing, in Resolution *ICC-ASP/10/Res.3* on Reparations, that 'under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparation awards, including in situations where an individual holds, or has held, any official position'.[173] The warning is repeated in Resolution ICC-ASP/11/Res.7 on Victims and Reparations (Adopted during the eleventh session held in The Hague on 14th – 22nd November 2012).[174] ASP seems to justify its warning position by reminding that, under article 75, paragraph 2, a reparations order may be made directly against a convicted person while the award for reparations may be made through the Trust Fund for Victims'. Consequently, it requires the Court 'to ensure that *Court-wide coherent principles* relating to reparations shall be established in accordance with article 75, paragraph 1, based on which the Court may issue individual orders for reparations [emphasis added]'.[175] Even though such kind of self-defence attitude of States Parties to the ICC Statute, against any attempt to order or to propose an order for reparations against the States, does not consider the possibility of an order for reparations against other legal persons, the ASP's position on individual responsibility should also protect other legal persons from being bound by the contemplated principles. In others words, since the exclusion of the possibility of the principle which should envisage an order for

[169] Dwertmann, E., *op. cit*. pp., 45-46.

[170] *Ibid*. p. 61

[171] *Ibid*. p.62

[172] McCarthy, C., 2012, *op. cit*., p.130

[173] See the Resolution *ICC-ASP/10/Res.3* on Reparations, para.2.

[174] Para.8 of the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations reads as follow '[…] liability for reparations is exclusively based on the individual criminal responsibility of a convicted person, therefore under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparation awards, including in situations where an individual holds, or has held, any official position*'.*

[175] Para.1 of the Resolution *ASP/11/Res.7* on Victims and Reparations

reparations against States is based on individual responsibility provided for by the Statute, other legal persons should also be protected as well as states. This sufficiently explained the position of the ASP in complying with the context of Art.75 (2) of the ICC Statute according to which an individual offender may bear the responsibility to repair the harm caused to his or her victims. Consequently, the principles to be established by the Court could not under no circumstances serve as basis of any order to utilize States and other legal person's properties and assets for reparations.

It has already been pointed out that the principles relating to reparations will be established on a case by case basis. Therefore, the case-law of the Court should finally result in Court-wide principles which may bind the Court with respect to reparations for victims pursuant to Art.21 (2), which provides that 'The Court may apply principles and rules of law as interpreted in its previous decisions'. In establishing the principles to be applied to reparations the Court should be confined within the context of individual liability for reparations.[176] Actually, ICC Statute does not recognise indirect civil liability as some national criminal systems where criminal courts are permitted to allow for claims not only against the person that was found criminally responsible, but also against persons civilly responsible for the accused's offence.[177]

In summary, the Court needs to be careful, as McCarthy warns, in order to tailor the principles relating to reparations before a criminal court that has the sole jurisdiction over individuals and cannot adjudicate upon the responsibility of States or require the latter to provide reparations.[178] Otherwise, by extending the power given to the Court through activist judicial adjudication may raise the risk of the Court to lessen its claim to neutrality and become *de facto* part-time politician.[179] Nonetheless, nothing prevents the Court to encourage and remind States of their obligations imposed upon them by the Statute. For example the Court can, through principles, remind States of their duty under Articles 75(5) and 109 of the Statute to cooperate as far as

[176] Should victims wish to pursue claims against a State or other third parties, such claims, as Henzelin et al. note, may be brought before a forum other than the ICC (Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit*., p. 330). This possibility is implicitly contemplated by the ICC Statute where it provides that the reparation regime established by the Statute is without prejudice to the rights of victims under national or international law (Article 75(6) of the Statute). It should be understood that the principles established by the Court will be confined in these limits. However, as Henzelin et al. observe, one may think that for victims' interests, nothing prevents 'competent international bodies, such as the security Council, from confiscation State assets to ensure the availability of reparations. Assets may be confiscated or otherwise set aside and placed in the custody of the Trust Fund for the purpose of satisfying reparation claims. Exclusion of State responsibility does not prevent the Security Council or any other competent body from taking a specific decision to assist the Court in the recovery of funds or obtaining the assistance of a State connected with the incidents that gave rise to the charges in question' (*Idem*).

[177] Dwertmann, E., *op. cit*. p.70

[178] McCarthy, C., 2012, *op. cit*., p.26

[179] See HarboT-G., 2010. The Function of the Proportionality Principle in EU Law. *European Law Journal, Vol. 16, No. 2*, p.164

reparations are concerned. In the same vein, the Court can, through non-binding principles, remind Governments, international organizations, individuals, corporations and other entities to contribute voluntary to the TFV.[180]

In this respect, it is notable that the Trial Chamber I's standing in *Lubanga* case does not determine any responsibility of States or other legal entities for reparations to victims, It only reminds States Parties their obligation under Parts 9 and 10 of the Statute, of cooperating fully in the enforcement of orders, decisions and judgments of the Court. Consequently, it enjoins States parties not to prevent the enforcement of reparations orders or the implementation of awards.[181] In addition, the Trial Chamber reminds that, according to Art.25 (4) and 75(6) of the Statute,[182] reparations under the Statute do not interfere with the responsibility of States to award reparations to victims under other treaties or national law.[183]

I.2. The purposes and content of the principles for reparations

Since it is the duty of the Court to create court-wide principles, their purpose and content ought to be discussed. One could inquire about the major purposes of the principles for reparation before the ICC and the content of such principles. Art.75 (1) of the Rome Statute does clearly specify neither the purposes of the principles nor their content. Consequently, it is worth considering the context of the provision in order that the major purpose of the contemplated principles may be understood (II.2.1.) and subsequently discussing their content (II.2.2.).

[180] The voluntary contributions are provided for by Resolution stabling the TFV (See Res. ICC-ASP/1/Res.6 on Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 2 September 2002, para.2(a)) and the Regulations of the TFV(See Regulation 21(a) of the Regulations of the TFV).

[181] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911 (hereinafter *The 2012 Decision on Principles and Procedures)*, para.256.

[182] Art. 25 (4) of the ICC Statute state that 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'; art.75 (6) reads as follows 'Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law'.

[183] See *The 2012 Decision on Principles and Procedures*, para.257.

I.2.1. The major purposes of the principles relating to reparations in the light of the context of Art. 75(1) (s1) of the ICC Statute

At the outset Art.75(1) (s1) of the ICC Statute raises the question of the exact meaning of the term 'principles'. The term may be understood as rules or legal theories to which the Court should refer to in its premises in order to rationalize its decision-making.[184] In other words, the Court's decisions on reparations should be based on those rules or those legal theories which should be developed case by case. Moreover, those rules or legal theories on reparations established through case-law should form the basis of expectation as to how the court will solve similar cases in the future; the reason why they should be made public'.[185] The attempted definition of the term *principles* and the spirit of Art.75 (1) of the ICC Statute may help to understand their main purposes.

In this regard, Art.75 (1) (s2) reveals the Court-binding nature of the principles. According to the article, the determination by the court of the scope and extent of damage, loss and injury to, or in respect of victim will be based on the established principles. Article 75(1) imposes an obligation for a reasoned decision where it provides that the Court 'will state the principles on which it is acting'. In the same vein, the context of the Art.75 (1) leads to the understanding that these principles will serve as basis for, not only the decision on the scope and extent of damage, loss and injury, but also the reparation orders the Court may issue on a specific case.[186] The implied purpose here is to attempt to lend the Court's decision some kind of neutrality, to secure that the decision is taken in an objective way.[187] For example that Resolutions 2011 on reparations expresses some preoccupations and concerns relating to the absence of the court-wide principles on reparations. According to the Resolution, in the absence of the contemplated principles, practical inconsistency and unequal treatment of victims may occur.[188]

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[184] A. S. Hornby defines the term *principle* as meaning 'a law, a rule or a theory that something is based on' (A. S.Hornby,Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.1153).

[185] See HarboT-G., *op. cit*., p.159

[186] See also the Resolution *ICC-ASP/10/Res.3* on Reparations (para.1) which states that 'Court-wide coherent principles relating to reparations shall be established in accordance with article 75, paragraph 1, *based on which the Court may issue individual orders for reparations*» (emphasis added) and *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.6.

[187] See HarboT-G., *op. cit*., p.160.

[188] See para.3 of the Preamble of the Resolution ICC-ASP/10/Res.3 on Reparations

Consequently, the issuing of the ICC's principles to be applied to reparations will be necessary for guidance and to provide parties - perpetrators and victims - and other interested persons and institutions, which will be involved in reparations proceedings, with legal certainty. The principles will provide clarity on the interpretation of the existing legal framework for cases before the ICC to ensure consistency and a sufficient degree of legal certainty and fairness for all participants in reparation proceedings.[189] In this regard, the principles should specify, *inter alia*, the purpose of reparations since the Statute does not determine them. It is regrettably noticeable that even the Preamble of the ICC Statute remains totally silent about the tremendous innovation of the right to reparations for victims introduced by it at international level. Actually, the Preamble was expected to 'set the tone and explain at least some of the philosophical bases'[190] of the mandate of the ICC to decide on reparations to victims. This legal gap could be filled by the Court by specifying the purposes of reparations provided for by the Statute.

In this regard, it is interesting that the Trial Chamber I's Decision of establishing principles and procedures to be applied to reparations issued in the *Lubanga* case should have inaugurated the development of reparations for victims before the ICC.[191] The decision determined, among others, the purposes of reparations in this particular and first case before the Court.[192] The determination of the Court on the issue would be extended to future similar cases brought before it.

In addition, some commentators argue that the principles would be utilised to impose pressure on other responsible organs and institutions, such as States, in order to join their efforts to redress the harm caused to victim.[193] But, as already discussed, since the results of the negotiations on adoption of the Statute resulted in ruling out State responsibility and the responsibility of other legal persons, the principles should be confined within the logic of individual responsibility, unless the principles are formulated in the spirit of *requesting for assistance* as provided for by the Statute.[194]

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[189] See *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.6.; Dwertmann, E., *op. cit*., p. 46.

[190] Slade, T.N. and Clark, R., *op. cit*., p.425

[191] See for example para.179 of the *2012 Decision on Principles and Procedures*

[192] The content of the Decision are analysed in section three of this chapter (pp 62ff).

[193] See for example Dwertmann, E., *op. cit.*, p.46.

[194] See Art.75 (4) and Art.93 (1) of the ICC Statute.

In sum, the principles should ensure the effective and efficient implementation of the victims' rights to reparations by preventing and dispelling the risk of practical inconsistency and unequal treatment of victims. They should address theoretical or philosophical challenges, practical issues and specify the purposes or the nature of reparations before the ICC.[195] Consequently, the content of the principle should be elaborated in a manner to achieve this tremendous goal by contributing to develop the concept *objectivity versus subjectivity* in reparations before the Court.

I.2.2. The content of the principles as substantive law to be applied to reparations

Apart from the Art.75 of the ICC Statute which recognises the right to reparation, there is no established body of law applicable at the ICC relating to victims' claims for reparations. In absence of coherent principles of reparations in context of individual responsibility at international level, the Court has a heavy task to establish the principles pursuant to Art.75 (1). The question is whether the Court would strive to create the principle *ex nihilo* or whether it should draw on some sparse pre-existing principles and establish *mutatis mutandis* coherent ones.

This paragraph intends to argue that in establishing the principles, the Court would not work in isolation but should draw from international law, such as human rights treaties or other conventional legal instruments, and/or from domestic laws as per Art.21 of its Statute.[196] In so doing, the Court can not only interpret and apply the existing international principles but can also develop, through its case-law, new principles tailored to its own legal context.[197] As mentioned earlier, the main purposes of the principles relating to reparations should constitute the backdrop of the construction of the content of the principles by the Court. In this sense, the content of the principles should constitute the substantive law applicable to reparations before the ICC.

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[195] See *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04- 01/06-2872, para. 4.

[196] Art.21 of the ICC Statute (Applicable law) provides that '[1]The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards. [2] The Court may apply principles and rules of law as interpreted in its previous decisions. [3]. The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

[197] McCarthy, C., 2012, *op. cit.*, p.131

With regard to the context in which principles relating to reparations should be established, we note that Art.21 of the ICC Statute establishes the hierarchy of norms which the judge should refer to in the decision-making. This provision should also apply to establishment of the principles. Therefore, in establishing the principle the Court would be inspired by principles and rules of international law, including the established principles of the international law of armed conflict. Taking into account Art.21 of its Statute, the Court would also draw from general principles of law from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with the Statute and with international law and internationally recognised norms and standards.

This leads to arguing that the Court should need to adopt principles which demonstrate substantial legitimacy for if one adopts such a principle one can be certain that many would question the legitimacy of the principle itself, not because of form but its substantial interpretation.[198] For this reason, principles relating to reparations need to be in conformity with the context of the Statute, its Rules of Procedure and Evidence (RPE) and also with international law. In this regard, reparation principles should include 'general provisions, which provide an underlying understanding of the concept of reparations in accordance with international law'.[199] Bearing in mind that the Statute shall prevail in all cases of inconsistency, the consistency of the ICC reparations regime should also require the principles to be in concordance with Regulations of the Court, Regulations of the Registry and Regulations of the TFV. The necessary consistency of the whole reparation regime should allow of such a requirement.

Besides the above requirement of legitimacy, the principles established by the Court should shape, at any extent, the substantive aspect of the right to reparations before the ICC. The first sentence of Art.75(1) in French version stipulates that 'La Cour établit des principes applicables aux *formes de réparation*, telles que la restitution, l'indemnisation ou la réhabilitation, à accorder aux victimes ou à leurs ayants droit » [emphasis added]. According to these provisions the principles should include guidelines relating to different types of reparations including restitution, compensation and rehabilitation. Victims' *right* to reparations, including restitution, compensation and rehabilitation, implies *obligations* imposed upon the perpetrator to repair a harm caused by his

[198] HarboT-G., *op. cit*., p. 163.

[199] Redress, 2011. Justice for victims: The ICC's reparations mandate, [Online] available at: <http://www.redress.org/downloads/publications/REDRESS_ICC_Reparations_May2011.pdf>, accessed on 5th July 2012, pp. 25-28.

or her criminal act or omission. Consequently, one may expect the principles to clarify victims' *rights* and offender's *obligations* to providing reparations. In this line, pursuant to Art.75 (1) (s2) of the ICC Statute, principles will constitute, as already observed, a framework for the determination of 'the scope and extent of damage, loss or injury' to victims.

Some commentators suggest that the principle should also address procedural issues.[200] Recognising the fact that in many cases it is not easy to fix limits between issues respecting substantive law and procedural issues, it is worth noting that the Court should have two alternatives in dealing with procedural issues. First of all, nothing prevents the principles established by the Court to include procedural aspects relating to reparations. In this regard, we will observe in section three of this chapter, that the 'Decision establishing principles and procedures to be applied to reparations' issued by Trial Chamber I, in *Lubanga* case, determines not only principles but also some procedures to be applied to reparations as its title indicates. Secondly, the Court has another alternative in dealing with procedural issues which are neither addressed by the statute nor by the RPE. As we have already noted, the Court as administrative organ is invested with a regulatory power to draw up provisional Rules to be applied to reparations until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.[201] The Court should use this power in case for instance there should be crucial inconstancies of its case-law regarding reparations proceedings.

In sum, the court-wide principles, which should be developed case by case, may finally constitute the substantive law for reparations under the ICC regime which does not develop in details the substantive aspects of the right to reparations as it does for criminal ones. By developing the principles, the Court should apply Art.21 of the Statute which refers the Court to applicable treaties and the principles and rules of international law, national laws and its previous decisions.[202] The Court should, where appropriate, draw on national, regional or other international case-law.[203]

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[200] See for example Prosecutor *v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012,
ICC-01/04-01/06-2872, para. 6 and Redress, 2011, *op. cit*

[201] See Art.51 (3) of the ICC Statute.

[202] See Art.21 (1-2) of the ICC Statute. In this respect, Zegveld suggests that the ICC may draw on the UN Convention on the Rights of the Child and the 2005 UN Basic Principles (Zegveld, L., *op. cit*., p.101).

[203] In this respect, Zegveld rapports that in its decisions in relation to victims, the ICC 'has referred to the case law of human rights courts, such as the European Court for Human Rights and the Inter-American Court for Human Rights' (*Idem*).

Arguably, the experience of regional human rights courts[204] and national jurisdictions of different legal systems could also provide the ICC with source of rules to adapt to its legal context.

I.3. The analysis of the early case-law of the ICC: The Trial Chamber's Decision establishing the principles and procedures to be applied to reparations

After discussing the purposes and the possible content of the principles relating to reparations provided for by Art.75(1) of the ICC Statute, it is worthwhile analysing the early case-law of the ICC to understand the substantive law applicable to the right to reparations as it is and shall continue to be developed in the courtroom. At the time of writing, as mentioned earlier, the Court had already issued its first decision establishing the principles applicable to reparations. The Trial Chamber I's Decision made in *Lubanga* case on 7th August 2012, (hereinafter *2012 Decision on Principles and Procedures*) will constitute our object of analysis.

Methodologically, it is important to first understand the context in which the *2012 Decision on Principles and Procedures* was issued (I.3.1.) before striving to unpack its substantial content (I.3.2.) and assess its consistency with reparations contemplated by Art.75(1) of the ICC Statute.

I.3.1. The context of the *2012 Decision on Principles and Procedures*

On 14th March 2012, Trial Chamber I issued the 'Judgment pursuant to Article 74 of the Statute' on guilt against *Thomas Lubanga Dyilo*.[205] The Trial Chamber found *Lubanga* guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the armed forces or groups or using them to participate actively in hostilities.[206] During the trial, 129 victims were granted the right to participate in the proceedings; and so far, only 85 victims filled with the Registry the application forms for reparations.[207] These applications led the Court to issue at the same time of the judgement on guilt, a Scheduling order establishing the timetable for sentencing

[204] While human rights courts, such as the IACtHR and the ECtHR, have the power to order reparations against States rather than individuals, general concepts relating to reparations which have been established through the case law of these courts can provide useful guidance to the ICC.

[205] See *Prosecutor v Lubanga,* Trial Chamber I, Judgement pursuant to Article 74 of the Statute, 14 March 2012 ICC-01/04-01/06-2842.

[206] *Idem*

[207] See ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.105; ICC, *Prosecutor v Lubanga,* Trial Chamber I, Decision on the OPCV's request to participate in the reparations proceedings, 5 April 2012, ICC-01/04-01/06-2858, para.3 ; First Report to the Trial Chamber on applications for reparations, 28 March 2012, ICC-01/04-01/06-2847, para.4 and para.7.

and reparations[208]. The Scheduling order, among other dispositions, required the Registry to send to the Chamber all applications for reparations, together with a report thereon, and invited parties and participants, the Registry and the TFV and other individuals or interested parties to file submissions concerning reparations after which the Court would decide whether to hold reparations hearings.[209]

The submissions referred to in the Scheduling order were to be based on the principles to be applied by the Chamber during proceedings with regards to reparations and the procedure. Those invited to file their submissions were asked to address the following issues concerning, *inter alia*:

- whether reparations should be awarded on a collective or an individual basis according to Rule 97(1) of the RPE of the ICC;
- whether there should be individual or collective reparations (or both); to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards;
- whether it is possible or appropriate to make a reparation order against the convicted person pursuant to Article 75(2) of the Statute;
- whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and
- whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.

After legal representatives of parties and different interested persons had filed their submissions[210] and some of them made their observations on different submissions, the Trial Chamber issued the *2012 Decision on Principles and Procedures*. In this decision the Trial Chamber I considered the different points of view expressed by representatives of parties and other interested parties by summarising their submissions and making its determination before concluding accordingly.

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[208] See *Prosecutor v Lubanga*, Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844

[209] See *Prosecutor v Lubanga*, Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844, para.7, 8, 9 and para.12

[210] The Chamber received among others submissions from the Registry, TFV, Prosecution, Legal representatives for victims, Office of Public Counsel for Victims (OPCV), submission from the United Nations Children's Fund ('UNICEF'), the International Centre for Transitional Justice ('ICTJ'), Women's Initiatives for Gender Justice and submissions from Avocats Sans Frontières (ASF) (representing different NGOs namely Justice-plus, Terre des Enfants, Centre Pelican -Training for Peace and Justice/Journalistes en action pour la Paix, and Fédération de Jeunes pour la Paix Mondiale (See *Prosecutor v Lubanga* ,Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844).

The context in which the *2012 Decision on Principles and Procedures* was issued demonstrates that the Decision results from the judicial function of the Court rather than its regulatory power. The judicial nature of the Decision can be depicted through its process as well as its content. The decision results from an adversary procedure since parties (the convicted person and victim through their legal representative and the Prosecution) had the opportunity to respond in writing to each submission. We particularly note that the Trial Chamber I followed a similar procedure to issue, in 2008, the Decision on victims' participation which provides parties and participants with general guidelines on all matters related to the participation of victims throughout the proceedings.[211] It is worth noting that at the time of writing this dissertation, the Decision had been appealed by both the convicted person and victims through their legal representatives and their appeals were still pending before the Appeals Chamber.

As its title indicates, the *2012 Decision on Principles and Procedures* establishes not only principles applicable to reparations but also determine some important procedural issues. For example, according to the Decision the Trial Chamber will not examine the individual applications forms for reparations so far received. The Registry is required to transmit them to the TFV. The Chamber decides so because it discharges its power of assessing reparations by delegating the TFV the task of selecting and appointing appropriate multidisciplinary experts and to oversee their work.[212] However, the delegation does not mean that the Trial Chamber exhausted its jurisdiction over the claims for reparations. Rather it remains seized of the reparations proceedings, in order to exercise any necessary monitoring and ensure that reparation proceedings are fair and expeditious and are conducted with full respect for the rights of the convicted and victims. The Chamber remains also seized to consider the proposals for collective reparations that are to be presented to the Chamber for its approval.[213] By issuing the *2012 Decision on Principles and Procedures* the Trial Chamber I also revealed its final decision on some issues. For example, the Chamber had already opted for award of reparations paid by (or through)[214] the TFV rather than an order for reparations directly made against the convicted person who was declared impecunious. Moreover, it is specified that its application scope is to be limited solely to the *Lubanga* case.[215]

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211 See, ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18 January 2008, ICC-01/04-01/06-1119.

212 *The 2012 Decision on Principles and Procedures*, para.265. Issues relating to the delegation of the Chamber's power to appoint experts will be discussed in Chapter two of Part two of this study (pp.258ff).

213 See the conclusions of the *2012 Decision on Principles and Procedures*.

214 The issue concerning the possibility of the Court to order that an award for reparation be made through the TFV and the meaning of the term 'through' is discussed in Chapter two of Part two of this dissertation (pp.285ff).

215 Para.181 of the *2012 Decision on Principles and Procedures* reads as follow 'Although in this decision the Trial Chamber has established certain

Was the Chamber required to invite the parties and interested persons to file their submission before issuing the Decision and made a decision after an adversary procedure? Although the ICC regime is silent on the question and since the principles are to be established under the judicial function of the Court instead of under its regulatory authority, the Chamber was arguably required to follow such procedure in respect with parties. However, it was not required to act in the same way as regards other participants such as the Registry and the TFV. Yet, there is no provision that excludes the possibility of the Court to invite representations from such organs for the purpose of enlightening its religion.

I.3.2. The principles established by the *2012 Decision on Principles and Procedures*

Having understood the context in which the *2012 Decision on Principles and Procedures* was made, let us take a look at its quintessence. In part entitled 'The Determination of the Chamber', point B 'Principles on reparations' the Chamber addresses issues respecting: 'Applicable Law'; 'Dignity, non-discrimination and non-stigmatisation'; 'Beneficiaries of reparations'; 'Accessibility and consultation with victims'; 'Victims of sexual violence'; 'Child victims'; 'Scope of reparations'; 'Modalities of reparations, Restitution, Compensation, Rehabilitation'; 'Other Modalities of Reparations'; 'Proportional and adequate reparations'; 'Causation'; 'Standard and burden of proof'; 'Rights of the defence'; 'States and Other Stakeholders' and 'Publicity of these Principles.' The Decision includes also point C 'Other Substantive and Procedures issues' in which the Chamber rules on issues relating to 'Chamber for the purpose of reparations'; 'Expert pursuant to Rule 97 of the Rule 86'; 'Participants in the reparations proceedings'; 'Reparations orders against the convicted person or 'through the Trust Fund for Victims'; and 'Other financing methods and Implementation of the reparations plan and role of the Judiciary'.

These issues dealt with by the *2012 Decision on Principles and Procedures* are mainly relating to both substantial and procedural law applicable to the right to reparations. Although it is not easy to draw a clear line between the two aspects of the right to reparations, this paragraph intends to explore those deemed as substantial issues. Procedural aspects will be reserved to Chapter two of

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principles relating to reparations and the approach to be taken to their implementation, these are limited to the circumstances of the present case. This decision is not intended to affect the rights of victims to reparations in other cases, whether before the ICC or national, regional or other international bodies'.

this Part. Therefore, issues such as those respecting accessibility and consultation with victims, standard and burden of proof,[216] publicity, participation in the reparations proceedings etc., will be postponed and discussed in the subsequent Chapter. In addition, remembering the definition given to the term 'principles', it is observable that all of the headings given to the addressed issues do not necessarily reflect the principles established by the Court. For example, whereas the heading *Dignity, non-discrimination and non-stigmatisation* could be seen as a principle *per se*, the heading *Victims of sexual violence* could not. In the latter case, principles established by the Court could be identified by analysing its reasoning included in the heading. In other words, we will not be bound by the headings given by the Decision; rather heed will be paid to the content of each paragraph comprising the Decision and its *ratio legis*. In addition, it is worth managing to categorise the principles established by the *2012 Decision on Principles and Procedures* in the light of Art.75 (1) of the ICC Statute so that the analysis may make itself comprehensible to the reader. Taking into account the context of the Art.75 (1) and the content of the Decision, it seems more logical to categorise and analyse the principles in the following order:

- principles relating to reparations in general (I.3.2.1);
- principles relating to the standard of causation and recoverable harm (I.3.2.2.); and
- principles relating to different types of reparations (I.3.2.3).

I.3.2.1. Principles related to reparations in general

Whilst Art.75(1) of the ICC Statute provides for the principles related to reparations to be established by the Court, the term *reparations* seems to encompass all forms of victim redress contemplated by the ICC Statute, including restitution compensation and rehabilitation. By analysing the content of the *2012 Decision on Principles and Procedures*, particularly its part entitled 'The Determination of the Chamber'; it is noticeable that the Decision establishes principles which may concern reparations before the ICC in general.

In its introductory remarks and throughout the whole part of determination the Decision determines the purposes of reparations before the ICC (A). In addition, the question of 'Applicable law' (B) evoked by the Decision in its part reserved to 'Principles on reparations' concerns also reparations in general. Likewise, the principle of 'dignity, non-discrimination and non-stigmatisation' (C) and the principle of proportionality which links to the principle of promptness of

[216] Issues related to the burden and proof is always connected to procedure. Consider for example the Rules of Procedures and Evidence of the ICC and the Rules of Procedures and Evidence of the ICTY and ICTR which combine issues of procedure and evidence.

reparations (D) are to be classed in the categories of principles related to reparations in general. In the same breath, by analysing the principles relating to reparations in general it is worth addressing the issue of the indigence of a convicted person evoked by the Decision as a factor of excluding the possibility of an order for monetary reparations against the convicted person (E).

Particularly, by unpacking the scope of the principles of non-discrimination it will be demonstrated that the principle should bear exceptions which may be seen as positive discriminations. As for the principle of proportionality, it arguably encompasses the principle of appropriateness and adequacy of reparations and may be deemed as an alternative to the principle of full reparations (*restitutio in integrum*) which appears as nearly impossible to be applied in the case of victims of crimes under the jurisdiction of the ICC.

A. The determination of the purposes of reparations before the ICC (para.179 of the *Decision 2012 on Principles and Procedures*)

As mentioned earlier, the ICC reparation regime does not specify the purposes of reparations introduced for the first time in international criminal justice. The Preamble of the ICC Statute is totally silent about this innovative aspect of the international justice whereas it 'is supposed to set the tone and explain at least some of the philosophical bases of the exercise in hand'.[217] The history of the ICC Statute reveals that during its negotiations, there was the idea of including reparations for victims among penalties.[218] But the idea was abandoned and reparations are not included in penalties applicable under the ICC Statute.[219] By excluding reparations from penalties, which are found in Part 7 of the Statute (penalties), and maintaining them in its Part 6 entitled 'The Trial', one may wonder what their purposes are. As already noted, the silence of the ICC's legal instruments about the question may lead to the expectation that the principles relating to reparations are to address the issue by determining the purposes of reparations provided for by the Statute.

In this regard, it is interesting that in its determination, the *2012 Decision on Principles and Procedures* should have explicitly specified the purposes of reparations before the ICC. In its determination the Decision considers that:

[217] Slade, T.N. and Clark, R., 1999. Preamble and Final Clauses. In: Lee R.S., ed., 1999. *The International Criminal Court, The Making of the Rome Statute, Issues. Negotiation. Results.* The Hague: Kluwer Law International, p.425

[218] See Art.76 of the 1998 Draft Statute of the ICC.

[219] Penalties are provided for by Art.77 of the ICC Statute.

> Reparations fulfil[l] two main purposes that are enshrined in the Statute: they oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts. Furthermore, reparations can be directed at particular individuals, as well as contributing more broadly to the communities that were affected. Reparations in the present case must - to the extent achievable - relieve the suffering caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers. Reparations can assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities [footnotes omitted].[220]

Some observations may be made on this point of view of the Chamber on the purposes of reparations. First of all, the aim of reparation before the ICC may achieve what some scholars, such as Bitti and González Rivas, name *true justice;*[221] for the offender is not only sentenced but also obliged to repair the harm caused to his or her victims (1). According to the Decision, reparations may also achieve restoration for victims and contribute to deter future violations (2) and assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities (3). These three tremendous goals of reparations as conceived by the *2012 Decision on Principles and Procedures* need to be understood in the context of the Decision before making some specific observations thereupon (4).

1. Reparations as a tool to oblige convicted persons to repair the harm they caused to their victims (para.179 (s1) of *the 2012 Decision on Principles and Procedures*): Achieving true justice?

According to the first sentence of para.179 of the *2012 Decision on Principles and Procedures*, reparations before the ICC 'oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts'. According to this determination, one may understand that reparations before the ICC aim to hold the offender responsible to his or her acts. This implies a duty on perpetrators of core crimes to make reparation and a right for victim to seek redress from them.[222] The determination also leads

[220] *The 2012 Decision on Principles and Procedures*, para.179

[221] Bitti, G. and González Rivas, G., *op. cit*., pp.300-301

[222] Compare with the Principle 31 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (8th February 2005 - Rights and duties arising out of the obligation to make reparation) which, in context of State's responsibility, stipulates that 'Any human rights violation gives rise to a right to reparations on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator' (See Commission on Human Rights, 2005. Updated Set of principles for the protection and promotion of human rights through action to combat impunity (Doc. E/CN.4/2005/102/Add.), [Online] available at: < http://www.derechos.org/nizkor/impu/principles.html>, accessed on 9th April 2013)

to assume that in order to achieve true justice, offender will not only be sentenced but also bear the responsibility of providing reparations to the victims of crimes.

The true justice will be achieved not only by considering the sentence meted on the offender but also addressing the sufferings of the victims.[223] In this way, the harm caused to a community by a crime would be fully repaired, not only by conviction and sentence against whoever is responsible for the crimes, but also by providing reparations to victims, and that is true justice. In this respect the ultimate goal arguably is to put an end to impunity since impunity and reparations are issues that are undoubtedly interrelated.[224] Nevertheless, in striving to implement justice for victims by reparations, one may not ignore the fact of the subjectivity of true justice. The subjectivity of the notion of justice can be illustrated by the controversy about the real conception of justice for victims of crimes. For example, whilst some scholars assume that '[most] victims will hardly be satisfied by a criminal conviction unless their harm is repaired in addition to the penalties applied',[225] others argue that victims could be satisfied by prosecution and their participation in the proceedings.[226] Likewise, a research to determine what victims of crimes really want in connection with peace and efforts for justice found complex answers that favoured both prosecution and conciliation.[227] Notwithstanding, victims' needs for reparations as a complement to prosecution as well as their desire to participate in proceedings, has been at any extent confirmed by other research findings. For example, Strang lists six things that many victims want as they have been summarized from Mrs Cameron's recollections[228]: a less formal process where their views count, more information

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[223] See Dwertmann, E., *op. cit*., p.43.

[224] Boven, T.V, 2010. The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. *United Nations Audio-visual Library of International Law*, *a*vailable at: < http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf>, accessed on 9th April 2013, p.1.

[225] See Dwertmann, E., *op. cit*., p. 43.

[226] Massidda rapports: 'The first thing that I do when I meet a client is to ask why they want to participate in the proceedings before the court. Majority of them say that they want their voice heard and they want that their story be known so that crimes will not be repeated in future. Very few in the *Lubanga* trial say that they want reparations. They want their voice heard and they seek to contribute to the establishment of the truth. And for them, the establishment of truth also means what happened to them is recognised as it happened, not differently' (Massidda, P., 2010. Most Victims in Lubanga Trial Are Not After Reparations, They Just Want Their Stories Told, *Interviewed by Wairagala Wakabi.* [Online] available at: <http://www.lubangatrial.org/2010/05/30/interview>, accessed on 20th November 2010.

[227] The International Centre for Transitional Justice (ICTJ), in collaboration with the Berkeley human rights project, carried out research in northern Uganda to determine what local people really wanted in connection with peace and justice efforts. And as ICTJ rapports, they found complex answers that favoured both prosecution and conciliation; as a consequence, they recommended that the ICC continue its prosecution efforts but expand its outreach program to explain to the local people what its mandate is and how prosecutions where intended to promote peace (ICTJ, 2005, quoted by Schiff, B.N., 2008. Building the International Criminal Court. New York: Cambridge University Press, p. 158).

[228] Strang, H., *op. cit*. Some writers consider Mrs Cameron as one of the founder of the victim movement. Strang who talked with Mrs Rita Cameron and other in the Canberra victim movement, and receive a lot from their experiences reports on Mrs Cameron as follow 'In spring 1987 Mrs Cameron's 14-year-old son was beaten to death at a Canberra school fête. His 17-year-old assailant was charged with murder but pleaded guilty to

about process and outcome to participate in their cases, respectful and fair treatment, material restoration, and emotional restoration, especially an apology. Although the author does not clearly indicate whether the list is made in a prioritised order, we note that the claim for *material restoration* - which can be understood as claim of *material reparation* - occupies, to some extent, a place among the whole victims' expectations as pointed out by Strang. In the same line, financial compensation for the harm caused to victims is one of the things they need as Markus Funk notes.[229] This reinforces the determination by the Court that reparations before the ICC oblige those responsible for serious crimes to repair the harm they caused to the victims.

Yet, one may wonder whether this purpose of reparations could be achieved where reparation is not made by an offender himself but by a fund created for that purpose. Actually, it was reported that 'victims' primary concern is to obtain some compensation from the offender himself'.[230] However, the way in which reparation is organised is often paramount of a victim's sense of justice.[231] The notion of *true justice* is not absolute but may be considered as subjective or relative. For this reason the Court should, in striving to achieve the *true justice*, take into account the victims' views.

2. Reparations as a means to achieve restoration for victims and contribute to the deterrence of any future violations (para.179 (s3) of the *2012 Decision on Principles and Procedures*)

The second sentence of the para.179 of the *2012 Decision on Principles and Procedures*, states that 'Reparations in the present case must - to the extent achievable - relieve the suffering

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manslaughter. He was convicted, sentenced to six years' imprisonment, and served twenty-one months. Mrs Cameron described the treatment that she and her husband received from the justice system as *just horrific – we had no support whatsoever ... we felt so alienated.* She said that they felt so distressed by the way they were dealt with that they scarcely had time to think about their son's death. In early 1988 the young daughter of another Canberra citizen was murdered. Soon afterwards, Mrs Cameron wrote to the father asking if she could help. In late 1988 the victim movement came to Canberra when the Victims of Crime Assistance league (VOACAL) was formed by these two people and twenty-four others who had suffered criminal victimization of some kind and who lived in the same community. Their objectives were primarily to provide support and assistance to victims of all crime in their community. Later they became important players in the struggle for recognition of the rights of victims to be treated as legitimated participants in the criminal justice process'(Strang, H., *op. cit.*).

[229] Markus Funk reports that 'victims' needs encompass, but are not limited to: a legitimate and unbiased forum in which the victims can speak, and can be heard [;] recognition and validation of their victimization, creation of a permanent historic record of the criminal activity generally, as well as a record of how the conduct affected particular victims, closure and truth about the political and social environment which permitted the crimes to take place, an explanation of the victimization, and a corresponding answer to the pivotal question of 'why me/us', an opportunity for victims to regain a sense of control over their lives, avoidance of future victimization, *financial compensation* for the harm the accused caused to the victims and their family members, a means of ensuring that those responsible for the criminal activity receive just punishment, and that the victims play some part in determining this punishment [emphasis added]' (Markus Funk, T., *op. cit*. p. 40).

[230] See J.M. Shapland, 'Victims, the Criminal Justice System and Compensation' (1984, quoted by Ashworth, A. *op. cit*. p. 95).

[231] Wierda and de Grieff, 2004 (cited by Doak, J., 2008, *op. cit.*, p.216

caused by these offences; afford justice to the victims by alleviating the consequences of the wrongful acts; deter future violations; and contribute to the effective reintegration of former child soldiers'. It is worth noting at outset that, in this respect, the term reparations has to be understood as an umbrella term encompassing all forms of victim's redress (restitution, compensation, rehabilitation etc.). In this context, it can be deduced from the Court's determination that reparations may achieve two goals: alleviating the consequences of the crimes and contributing to deter future crimes.

In the same vein, the Decision contemplates an ambitious goal where it provides that reparations may include programmes 'that have transformative objectives'.[232] Transformative reparations may serve not only as a form of reparative justice but also as an opportunity to overcome structural conditions of inequality and exclusion'.[233] In this regard, one may wonder whether the context and the purpose of the ICC Statute is to make a convicted person to bear a responsibility which should be extended not only to restoring the *status quo ante* of victims but also to contributing to overcome structural conditions which might have been the root cause of the crimes committed. Regarding this issue, it is observable right from the outset that neither the Statute nor the *2012 Decision on Principles and Procedures* intended to make a convicted person bear such extended responsibility. The transformative reparations should be sought in the context of reparations made *through* the TFV pursuant to Art. 75(2)(s2) of the ICC Statute.[234] Particularly, this kind of reparations should be conceived in the context of assistance provided by the TFV. Otherwise, it is inconceivable that a convicted person should bear the burden of transforming the society. This may constitute unfair justice against the accused person. All the more so as the defects of a community or a society which presumably led to the crimes should not be attributed to a convicted person (who also may be a victim of such situation). It is hard to conceive a justice system which requires a convicted person to contribute towards redressing the structural conditions of a society or a community. Consequently, in the context of the award for reparations against a convicted person, restorations to the victims of crimes should ultimately be understood as restoring, to some extent, the *status quo ante* of victims of crimes.

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[232] See for example para.236 of the *2012 Decision on Principles and Procedures*, see also Victims' Rights Working Group, 2011. A victims' perspective: Composition of the Chambers for reparation proceedings at the ICC, [Online] available at: <http://www.vrwg.org/VRWG_DOC/2011_VRWG_JudgesReparations.pdf>, accessed on 6th July 2012, pp. 9-10.

[233] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844, para.71

[234] Art.75(2)(s2) of the *ICC Statute* reads as follow 'Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79'. Art. 79 of the ICC Statute provides for establishment of a Trust 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.

As for the purpose of deterring future violations or crimes, such a purpose can primarily be achieved via a criminal process. Reparation alone cannot meet these demands. However, as a complement to the real punishment, reparations can only play an ancillary role in fulfilling the requirements of retribution and deterrence.[235] But, as we will observe, the purpose of deterring future violations may not justify punitive damages under the ICC reparation regime.[236]

3. Reparations as a means of promoting reconciliation between the convicted person, the victims of the crimes and the affected community (para.179 (s4) and 193 of the 2012 *Decision on Principles and Procedures*)

The *2012 Decision on Principles and Procedures* insists on the fact that reparations 'could assist in promoting reconciliation between the convicted person, the victims of the crimes and the affected communities'. This determination found in para.179 of the Decision under analysis, is also found in para.193 which reads as follows: 'Reparations should secure, whenever possible, reconciliation between the convicted person, the victims of the crimes and the affected communities'. The two paragraphs could help to understand the sense of reconciliation to be achieved. The resonance of reconciliation in context of crimes under jurisdiction of the ICC may draw attention. How could *reconciliation* be achieved in context of international criminal justice?

First of all, the relevance of the precision made by para.179 of the Decision which specifies that the sought reconciliation could be achieved 'without making Mr *Lubanga*'s participation in this process mandatory' needs to be understood. Normally, reconciliation between a convicted person and victims of the crimes committed require sincere *apology* from the convicted and sincere *forgiveness* from the victims' side. As we will observe, apology is one of the types of reparations, but it cannot be ordered as such by the Court since its enforcement is impossible.[237] The reason why, in para.241 of the *2012 Decision on Principles and Procedures*, the Chamber goes on to hold that ' Mr *Lubanga* is able to contribute to [the process of victim rehabilitation] by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis'. In this regard, reparations may arguably include voluntary actions on the part of the convicted person aimed at easing the victims' pain. It is interesting that on their side, victims should equally consider that reconciliation is a necessity. When interviewed by the panel set up by the Office of the

[235] See Zedner, L., 1996. National Report on Reparation in criminal law in England. In: A. Eser and S. Walther, eds., 1996. *Reparation in Criminal Law, International Perspectives,* Vol. 1, Freiburg im Breisgau: Edition Iuscrim, p.129.

[236] See discussions made on the issue at pp.74ff.

[237] See discussions made on 'apology' as one of the types of reparation (pp.147ff).

United Nations High Commissioner for Human Rights (OHCHR) during consultations on reparations modalities, victims reiterated 'their call for forgiveness so that people can live together as they used to'.[238] Apology from an offender may be one of the voluntary actions which, may lead to reconciliation. The fact that this useful kind of reparations cannot be ordered has led the Court to adopt a non-binding wording in para.241 of the Decision under analysis.

Nevertheless, the limited scope of the charges brought by the prosecution against Mr *Lubanga* would limit the category of victims entitled to reparations as it limited the categories of victims who participated in this case. The Chamber was aware that this situation 'could give rise to a risk of resentment on the part of other victims and the re-stigmatisation of former child soldiers within their communities'.[239] Actually, the victims of the crimes Mr *Luganga* was convicted for could 'come largely from the same ethnic group and they do not necessarily represent all those who suffered from crimes committed during the relevant conflict in Ituri', the region in DRC where the crimes were committed.[240] In such a situation, it is not clear on how Court-ordered reparations should achieve the goal of reconciling the convicted person with the victims especially those who may be excluded from reparations due to the limited scope of the charges an accused person is convicted for. One may think that, this concern would be one of the factors which might have led the Court to opt for reparations on collective basis along with or instead of reparations on individual basis and through the TFV.[241]

Be that as it may, reparations will unlikely achieve the tremendous goal of reconciliation without voluntary and honest involvement of the convicted person. In this regard, reconciliation should be understood as an end to conflict and the start of a good relationship again between the offender and his or her victims including both individual and community. How is such reconciliation achievable without the involvement of the two protagonists? The question may warrant suggesting that the ICC's reparations regime should not be separated from the sentencing system. The convicted person should be encouraged to engage in reconciliation process by involving himself or herself in the victims' reparations process. In this case, reparations should include sincere apology, especially public apology, from the convicted person. Consequently, sincere apology would be deemed by the Court as a mitigating circumstance for the purpose of

[238] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844, para.69

[239] See the *2012 Decision on Principles and Procedures*, para.193, footnote no. 383.

[240] *Idem*

[241] Concerining the issues arising from the collective and individual forms of reparation see at pp.291ff.

encouraging the convicted person to adhere to reconciliation process. In this respect, it is interesting that Rule 145 of the RPE of the ICC should provide for such kind of mitigating circumstances.[242] One may therefore hope that the combination of such a perspective of sentencing and reparations process would facilitate the contemplated reconciliation.

4. Some observations on the purposes of reparations before the ICC

It has been understood that reparations before the ICC aims at achieving the true justice which takes into account not only the conviction and sentencing but also obliges the offender to repair the harm caused to his or her victims. Moreover, the sense of restoration to the victim as one of the purposes of reparations has been unpacked. In this respect, it has been noted that reparations under the ICC regime could alleviate the suffering of the victim and further transform the whole society or community which could also be a victim of crimes. It has been agreed that, in so doing, reparation system under the ICC regime does not intend to make an offender bear the responsibility of contributing to the transformation of the defaults of the society which might have led to the commission of crimes, but, rather extend to restore a victim to the *status quo ante*.

All of the above considerations lead to arguing on one side that reparations as a mechanism of alleviating the consequences of crime may not imply punitive damages (a). On the other hand, reparations as a restorative mechanism may not admit double recovery (b).

a. The exclusion of punitive damages

Some commentators, in commenting on the ICC reparation regime, play on the Court's discretionary power to argue that the option of awarding punitive damages[243] in addition to compensatory damages is the discretion of the Court.[244] They go on to suggest that in deciding on reparations to victims the Court should take into account 'the gravity of the violation, including any aggravating circumstances'.[245] These points of views seem to suggest or support the idea of reparations that include punitive aspects.

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[242] According to Rule145(2)(a)(ii) of the RPE of the ICC, the Court should take into account as appropriate, mitigating circumstances such as: '[t]he convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court'. See also Art.110 (4)(b) and (c) of the ICC Statute.

[243] The term 'punitive', 'vindictive and 'penal' damages are generally used interchangeably with 'exemplary' damages.

[244] See for example Bottegliero, I., *op. cit*., p. 225.

[245] Victims' Rights Working Group, 2011. A victims' perspective: Composition of the Chambers for reparation proceedings at the ICC, [Online]

Contrary to such views, the role of reparations is primarily to alleviate the consequences of the crimes, and to redress victims. In this context, reparations should exclude the idea of punitive damages. In this regard, we have to bear in mind the fact that on criminal aspect a convicted person is to be sentenced and reparations is not provided for by the ICC Statute as an alternative to imprisonment or as an accessory penalty. It is worth noting that, besides the fact that reparations to victims are found in Part 6 of the Statute, entitled 'The Trial,' rather than Part 7, which is concerned with 'Penalties', Art.77 of the Statute which is devoted to 'applicable penalties' makes no reference to reparations. Reparations to victims are addressed in Art.75 of the Statute. This indicates that reparations under the ICC Statute are not intended to punish a convicted person as such but rather they are concerned with the harm suffered by victims.

Actually, in criminal justice, as some scholars note, the purpose of reparations by the offender is 'to remove the burden which the crime has unfairly placed upon the victim'.[246] The objective of reparation is not to make the criminal to 'pay back' for his wrongdoing, but to restore the victim to his base line positions.[247] In other words, the effect of reparations has to be 'retrospective in that it attempts to restore the victims to the position in which he or she would have been if the crime had not been committed'.[248] Before the ICC, reparations ordered against a convicted person, which shall differ from assistance to the victims, should not have penal character but would rather be 'a means of reviewing the past in order to reinstate it, as far as possible, to its normal form'.[249] The conception of the purpose of reparation in criminal justice is the basis of 'action civile' (civil action) known in French criminal justice. In civil law system such as French system the object of *action civile* is 'to put the victim back where he was or rather where he would have been […] no matter how the damages are calculated they must in no case exceed the loss they are designed to repair'.[250] Likewise, under general international law, the purpose of reparation is to restore the victim so far as possible by wiping out all the consequences of the illegal act and re-establishing the situation which would, in all probability, have existed if that act had not been committed.[251] This may reinforce the position accordingly that 'the purpose of reparation is not to

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available at: <http://www.vrwg.org/VRWG_DOC/2011_VRWG_JudgesReparations.pdf>, accessed on 6th July 2012, p. 9.

246 Ashworth, A. *op. cit*

247 Holmgren M.R., *op. cit.*

248 Ashworth, A. *op. cit*., p. 107. Ashworth continues by arguing that where 'a person intentionally or recklessly causes harm or loss should pay compensation or make restitution to his victim may be described as the very essence of corrective justice' (*Idem*).

249 *Idem*

250 Howard, C., *op. cit.*, p.388

251 McCarthy, C., 2009. Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory. *The International Journal of Transitional Justice*, Vol. 3, p. 257.

punish the responsible party but to address the harm caused to the injured party'.[252] In this respect, it is worth noting with Barker that punitive or aggravated damages have traditionally been excluded from the international law of compensation, with classical doctrine holding that international compensation is essentially restorative in nature, seeking to match the harm caused.[253] Therefore, reparations should exclusively be aimed at remedying the damage resulting from a crime, and not conceived as an exemplary measure.[254]

Arguably, the useful purposes that punitive damages should serve have already been achieved through the criminal conviction and sentence. Therefore, it should be unnecessary and inappropriate making an additional punishment through reparations.[255] Consequently, the gravity of a crime is an element that is to be excluded when determining reparations which should be based only on the gravity of the damage and its corollary.[256] In other words, the gravity of harm sustained by a victim should be the sole criterion for reparations.[257] As a result, a horrible crime with slight impact on a victim would result in a lower substantial award for reparations whereas a possible simple crime with terrible sad impacts on the victim would result in a higher substantial award.[258] The crimes under the ICC's jurisdiction could disintegrate its victims from the society by impeding their moral, physical or material fulfilment as normal human beings. Thus, reparations before the Court should be commonly sought as a mechanism for alleviating the consequences of crimes and facilitating effective integration. The mechanism must relieve, in general and to the extent achievable, the suffering caused by crimes.[259] Since the *2012 Decision on Principles and Procedures* does not address explicitly the issue of excluding punitive damage, for the legal security, the principles relating to reparations should provide for the prohibition of punitive reparations.

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[252] *Idem*

[253] Barker, J., 2010. The different forms of reparation: compensation. In : J. Crawford A. Pellet and S. Olleson, eds., 2010. *The Law of International Responsibility*. Oxford (US): Oxford University Press, p. 605

[254] Amezcua-Noriega, O., 2011. Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections. Edited by Dr Clara Sandoval, p.3 [Online] available at: <http://www.essex.ac.uk/tjn/documents/Paper_1_General_Principles_Large.pdf.>, accessed on16th August 2012.

[255] Dwertmann, E., *op. cit*., p.161

[256] Coutant-Lapalus, C., 2002. Le Principe de Réparation Intégrale en Droit Privé. Marceille: Presses Universitaires d'Aix-Marseille (PUAM), p.18.

[257] See details on discussions made on the notion of *harm* or *damage*, *loss* or *injury* at pp.111ff.

[258] Coutant-Lapalus, C., *op.cit*., p.25

[259] See the *2012 Decision on Principles and Procedures*, para.179.

b. Avoiding double recovery

The principle of restorative reparations raises another issue relating to the admissibility or inadmissibility of double recovery under the ICC reparation regime. The ICC reparation regime is silent on the issue and the *2012 Decision on Principles and Procedures* does not address the issue. One may presume that it is the silence of the ICC reparation regime on the issue which has led some commentators to interpret Art.75 (6) of the ICC Statute as allowing cumulative benefits for victims of crimes under jurisdiction of the ICC.[260] The Article 75(6) reads as follow: 'Nothing in this article shall be interpreted as prejudicing the rights of victims under the national or international law'.

The Trial Chamber I, in *Lubanga* case, adopted a flexible position on the issue which seems to allow the use of its discretionary power in order to avoid or admit double recovery. Para.201 of the *2012 Decision on Principles and Procedures* reads as follow:

> Pursuant to Article 75(6) of the Statute, a decision of the Court on reparations should not operate to prejudice the rights of victims under national and international law. Equally, decisions by other bodies, whether national or international, do not affect the rights of victims to receive reparations pursuant to Article 75 of the Statute. However, notwithstanding those general propositions, *the Court is able to take into account any awards or benefits received by victims from other bodies in order to guarantee that reparations are not applied unfairly or in discriminatory manner* [emphasis added].

Some observations may be made with regard to the position of the Chamber. It is worth understanding the Chamber's position in interpreting Art.75 (6) of the Statute. As already mentioned the Chamber seems to be endorsing the position according to which the ICC reparations regime admits cumulative benefits for victims of crimes under jurisdiction of the ICC. If this is the case, the Chamber's position could be questionable on some grounds.

First of all, such a position might violate the principle of *res judica*[261] which intends to protect the rights of an accused person and to insure legal security.[262] A convicted person cannot be compelled to provide reparation at national and international level. The principle of *res judicata* may be applied in such a case[263] and bind the Court as far as an order for reparations against a

[260] See for example Musila, G., *op. cit*., p. 200 and Vincent, J., *op. cit*., p. 100.

[261] The principle *res judicata* means, on the one hand, that what has been judged cannot be ignored or even denied by another judge and on the other hand it requires parties to implement the decisions taken against them (Caldeira Brant, L.N., 2003. L'autorité de la Chose Jugée en Droit International Public. Paris: Librairie Générale de Droit et de Jurisprudence (LGDJ), p. 5). See also discussions made on the principle *res judica* in Chapter two of Part two of this dissertation (pp.173ff).

[262] For further comments on the principle of *res judica* see Section one of Chapter two of Part two of this dissertation (pp.173ff).

[263] See discussions made on the principle *res judicata* in Chapter two of Part two of this dissertation (pp.173ff).

convicted person is concerned. However, one may ask whether the principle *res judicata* could be applied where an order for reparations is made not against a convicted person but by means of assistance to the victims through the TFV. Arguably, the principle of *res judicata* could, in this case, not be applied for there is no burden for a convicted person to support the double recovery. In this respect, the position of the Chamber does not violate the principle of *res judica* since, in the *Lubanga* case; the Chamber has already ruled out the possibility of an order for reparations against *Lubanga* who was found impecunious.

Regarding the interpretation of the para.6 of Art.75, as already mentioned, some commentators consider that it allows double recovery. Proponents for double recovery such as Vincent, argues that para.6 of Art.75 allows accumulation of national and international reparations in order to fully compensate a victim.[264] Likewise Musila argue that victims who choose to participate in the ICC reparation proceedings do not 'relinquish potential claims available to them in domestic and international law merely by obtaining some form of remedy from the ICC or the VTF'.[265] Such an interpretation is to be considered with caution in the light of the aforementioned observations regarding the principle of *res judica* already evoked.

Contrary to Vincent and Musila, one may argue that para.6 of the Art.75 'responds to the need of affirming that rights under international law (as codified in the law of international courts and human rights bodies, and developed in their evolving practice, as well as customary norms) are applicable in order to avoid national authorities choosing lower standards, and to ensure that the highest standard of protection prevails'.[266] It is noticeable that the paragraph is a reserving provision. A similar reserving provision with the same wording is also found in Art.80 of the ICC Statute entitled 'Non-prejudice to national application of penalties and national laws' which is found in Part 7 related to penalties. According to the Art.80 'Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part'. Could this reserving provision be interpreted on criminal ground, as allowing cumulative penalties against a convicted person and allowing national law to impose other penalties against the convicted person other than penalties imposed by the ICC?

[264] According to Vincent 'le paragraphe 6 de l'article 75 permet un cumul des réparations nationales et internationales, favorisant ainsi une indemnisation plus adéquate et complète pour les victimes' (Vincent, J., *op. cit*., p. 100) ; see also ICC, *Prosecutor v Lubanga*, Registrar's observations on reparations issues, 18 April 2012, ICC-01/04-01/06-2865, para.11).

[265] Musila quoting Mullenix & KB Stewart (2002), argues that victims who choose to participate to ICC reparation proceedings do not 'relinquish potential claims available to them in domestic and international law merely by obtaining some form of remedy from the ICC or the VTF' (Musila, G., *op. cit*., p. 200).

[266] Redress (1998, quoted by Donat-Cattin, C., 2008, *op. cit*. p.1410).

The answer is obviously negative. Likewise, although reparations could not be considered as penalty, Art.75(6) of Statute should not, on *civil ground*, be interpreted as meaning that national courts could determine other reparations awards against the convicted person other than those determined by the ICC or vice versa. Consequently, Para.6 of Art.75 of the Statute should be understood as providing the minimum of victims' rights which does not prevent the national laws or other international instruments to provide for more benefits for victim of crimes. In this context, the fact that the Art 75 rules out State responsibility does not prejudice the right for victim to claim reparations before national or international possible fora against States and corporate or other individual persons with indirect civil liability. Moreover, one should understand the meaning of the provision in the sense that when national court will be deciding on claims on reparations they will not be bound by minimum rights provided for by Art.75 of the ICC Statute. Hence, Para.6 of Art.75 of the Statute aims at 'prohibiting the interpretation of the law of the ICC as crystallising developing legal standards and/or codifying existing rules in the area of victims' right to reparations'.[267]

Actually, it is worth noting that international and some national laws and practices are against double recovery. International law has established the principle of avoiding double recovery. To illustrate this it may for example be referred to Art.9 of the European Convention of the Compensation of Victims of Violent crimes which explicitly states that '[w]ith a view to avoiding double compensation, the State or the competent authority may deduct from the compensation awarded or reclaim from the person compensated any amount of money received, in consequence of the injury of death, from the offender, social security or insurance, or coming from any other sources'. The convention provides for *deduction* that may be considered as a mechanism to avoid double recovery. The Convention goes on to provide, in its Art.10, for *subrogation* as another mechanism to avoid double recovery. According to the Convention a State or a competent authority may be subrogated to the rights of the person compensated for the amount of the compensation paid.

The principle of avoiding double recovery has also been consecrated by some national domestic system. For example, in Italy, according to Art.10 of the Law no. 302 of 1990 which makes provision for victims of terrorism and criminal organisations where 'compensation under the Law is paid to a person who subsequently obtains redress from the offender […] there must be a

[267] Donat-Cattin, D., 2008, *op. cit*., p. 1411

proportional *reduction* of the compensation [emphasis added]'.[268] Likewise, in Austria Art.1324 of the General Civil Code also provides for the mechanism of *deduction* in the case where an injured person obtained a pecuniary advantage from another source.[269] In the same line, in Denmark the mechanism of *deduction* is provided for by the Damages Liability Act 1984, Section 2.[270]

Arguably, the purpose of reparations under the ICC regime is to put the victim into the position in which he or she would have been without the occurrence of the injury or damage. Therefore, in a case of an order for reparations against a convicted person, the Court should be bound by the principle of *res judica* and should avoid deciding in a sense which opens a room for double recovery. Likewise, where an award for reparations is to be made through the TFV, the Court would consider the context of the international law and domestic laws so that double recovery, which may result in unfair and discriminatory reparation, may be avoided. The losses which a victim has suffered, as Raschka notes, should be fully compensated – but not overcompensated.[271] Consequently, the Court should, in its determination of awards, take into account any benefit received by victims through other national or international process. [272]

B. Determination of applicable law to reparations (paras 182-186 of the *2012 Decision on Principles and Procedures*)

As already mentioned, at the international level there are no coherent principles relating to reparations for the victims of crimes. The ICC Statute does not develop the substantive law but rather assigns to the Court the task of establishing the principles relating to reparations. It has been

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[268] Piva, P., *op. cit*., p.383.

[269] See Raschka, W., 1996. National Report on Crime Victim Compensation in Austria. In: D. Greer, ed., 1996. *Compensation Crime Victims, A European Survey*, Freiburg im Breisgau: Ed. Iuscrim, p. 24.

[270] See Lerche, M., 1996. National Report on Crime Victim Compensation in Denmark. In: D. Greer, ed., 1996. *Compensation Crime Victims, A European Survey*, Freiburg im Breisgau: Ed. Iuscrim, p.107. The Damages Liability Act 1984, Section 2. states that 'In assessing [damages for loss of earnings] the following items shall be deducted: wages received during the period of illness, daily allowances paid by the employer or the social committee, and insurance payments in the nature of damages, as well as similar payments made to the injured person' (*Idem*).

[271] Raschka, W., *op. cit.*, pp. 23-24.

[272] In the Lubanga case the TFV, in its submissions, proposed that Court take into account, in its determination of awards, any benefits received by victims with respect to the harm they suffered through other national or international processes (e.g. benefits arising from national transitional justice processes, or the Disarmament, Demobilization and Reintegration (see ICC, *Prosecutor v Lubanga* ,Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14 March 2012, ICC-01/04-01/06-2844, para.54; see also ICC, *Prosecutor v Lubanga*, Equipe de la Defense de Monsieur Thomas Lubanga, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « *Decision establishing the principles and procedures to be applied to reparations* », rendue par la Chambre de première instance le 7 août 2012, 5 Février 2013, ICC-01/04-01/06-2972, para.165.

noted that Art.21 of the ICC Statute (Applicable law), establishes a hierarchic order of applicable law to which the Court should refer in accomplishing this judicial mandate.

In this regards, the *2012 Decision on Principles and Procedures* holds that when deciding on reparations the Court shall apply the Statute, the Element of Crimes and the Rules, the Regulations of the Court, the Regulation of the Registry and the Regulation of the TFV.[273] One may assume that these legal instruments, which constitute the ICC regime, will be applied in first place because the Chamber, by listing them, refers to Art. 21(1)(a) of the Statute. In the second place the Court will consider, where appropriate, the applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.[274] Failing that, the Court would consider, in third position, the general principles of law delivered by the courts from national laws of legal systems of the world.[275] Taking into account the context of the ICC Statute and the Trial Chamber's Decision, domestic law should only be applied on subsidiary basis. With respect to the question as to whether domestic law would be applied at international level the IACtHR considered that international law prevails against domestic law and determine the obligation to make reparation, the amount and forms of compensation it should take. Indeed, the court affirmed the principle by reasoning, in *Castillo Páez* case that 'the obligation to make reparation established by the international Courts is governed, as has been universally accepted, by international law in all its aspect : scope, nature, modality and determination of beneficiaries, none of which the respondent State may alter by invoking its domestic law'.[276] Nevertheless, in *Aloeboetoe et al. v Suriname* case, where gaps regarding succession issues are discussed, the court adopted a flexible attitude by stating that it was useful to refer to the national family law in force, for certain aspects of it might be relevant. Consequently, it applied the tribal law of victims to establish beneficiaries of compensation.[277]

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[273] *The 2012 Decision on Principles and Procedures*, para.182

[274] In this respect, it should be kept in mind that in chapter one of Part one of this dissertation it was observed how different international instruments relating to reparations for crimes established previously to the ICC Statute in the context of States' responsibility were mentioned in sense that they constitute the international legal environment which would had given birth to the ICC. The umbilical cordon would remain intact in order to help the ICC to improve its practice. Moreover, after the adoption of the ICC Statute other international instruments were adopted and on may expect that ICC should also draw from them pursuant to Art.21(1) of the Statute. For example in *Lubanga* case where most of his victims are children, the Court would consider relevant international instrument such as the 2005 UN Basic Principles, UNICEF's Paris Principles, principles and guidelines on children associated with armed groups, and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

[275] *The 2012 Decision on Principles and Procedures*, para.183

[276] IACtHR, *Castillo Páez* case, para.49 (quoted by Musila, G., *op. cit*. p.75)

[277] IACtHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10 September 1993, paras 55 and 62

By adopting the same hierarchical order of applicable law provided for by Art.21 of the Statute, the *2012 Decision on Principles and Procedures* deliberately omits reference to paragraph 2 of the article which states that the 'Court may apply principles and rules of law as interpreted in its previous decisions'.[278] Presumably the Chamber omitted the second paragraph of Art.21 of the Statute because it was the first time to deal with a reparations issue. Actually, it is noticeable that at some points, the *2012 Decision on Principles and Procedures* refers to either its previous decisions or decisions issued by other Chambers of the ICC.[279] This leads to argue that Art.21 (2) of the Statute will also apply when deciding on reparations.

It is worth noting, as far as the application of Art 21(2) to reparations is concerned, the change in wording of the Article. Whereas, the first paragraph of Art.21 uses the term *shall*, which implies an obligation imposed upon the Court to comply with the legal instruments referred to, the second paragraph of the same Article use the term *may*, which implies Court's discretion. This leads to infer that a chamber is not obliged to comply with previous decisions issued by the Court on similar issues. But in this case, the chamber should be required to justify the reversal of the precedent. Moreover, as far as applicable law to reparations is concerned, the ICC should draw from the regional courts of human rights, in particular the IACtHR which has already developed a rich case-law in the field of gross human rights violations. Although the jurisdiction of the IACtHR is based on State responsibility, this Court has developed some principles which may be applied, *mutatis mutandis*, by the ICC or may inspire the Court in dealing with reparations matters.

C. The scope of the principle of non-discrimination (paras 187 and 191 of the *2012 Decision on Principles and Procedures*)

The *2012 Decision on Principles and Procedures* establishes the principle of non-discrimination as well as the principle of dignity and non-stigmatisation. Except in the context of protection of victim and witnesses where the ICC Statute provides for the obligation of the Court to take measures to protect dignity of victims,[280] the concepts of dignity, non-discrimination and non-stigmatisation are not provided for by the Statute in matters regarding reparations for victims. Inappropriate reparations may, to some extent, produce a negative effect by stigmatising a victim

[278] Art. 21(2) of the ICC Statute

[279] See for example paras194; 198; 217 and 272 of the *2012 Decision on Principles and Procedures*, which refer to previous decisions in interpreting Rule 85 of the RPE of the ICC in respect with victims entitled to reparations.

[280] See Art.68 (1) of the ICC Statute.

and affect his or her dignity.[281] The risk of second victimization could be avoided, at any extent, by applying the principle of dignity, non-discrimination and non-stigmatisation in deciding on reparations.

Notwithstanding the fact that the concepts of dignity, non-stigmatisation and non-discrimination could have the same common denominator which may be *equal respect to all victims* the first two principles seem to be related to the implantation of victims' right to participate in criminal proceedings. Indeed, the notion of dignity and non-stigmatisation is more appropriate to the treatment of victims during criminal proceedings whereas the concept of non-discrimination fits better with the substantive rights to reparations for victims.[282] Therefore, let us focus on the principle of non-discrimination since it has been indicated that victims' right to participate in trial does not lie under this dissertation. By searching the purpose of the principle of non-discrimination (1) we will find that there are some exceptions to the principle (2). Those exceptions, which should be considered as positive discriminations, intend to particularly protect and promote the rights of the category of vulnerable victims.

1. The purpose of the principle of non-discrimination: Equality of all before the law

The *2012 Decision on Principles and Procedures* establishes the general principle of non-discrimination recognised by international law in different fields.[283] But the decision does not define explicitly the term *discrimination* nor indicate what may constitute discrimination in respect with reparations. The ICC Statute and RPE do not provide for the principle of non-discrimination. But, it is notable that Regulations for the TFV contemplates, yet implicitly, a prohibition of discrimination. According to Regulation 27 (b), the Fund should not accept earmarked contributions from non-governmental entities which would result in *discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or*

[281] In order to avoid second victimization in deciding on reparations measures be taken by the Court 'should not stigmatise or reinforce existing stigma, for instance by singling out categories of victims inappropriately' (Redress, 2011, *op. cit.*, pp. 25-28).

[282] It is arguable that where for the Trial Chamber holds that '[w]hen deciding on reparations, the Court shall treat the victims with humanity and it shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety' (para.190 of the *2012 Decision on Principles and Procedures*), it refers to reparations proceedings. Likewise, where the Chamber holds that victims ' are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings' (para.188, of *The 2012 Decision on Principles and Procedures*), it refers to procedural issues.

[283] See for example Art. 26 of the International Covenant on Civil and Political Rights and Art.14 of the European Convention on Human Rights as amended by Protocols Nos.11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

other status. By analysing the *2012 Decision on Principles and Procedures*, we will find that it first and implicitly brings out a narrow conception of the term *discrimination*.

The implicit and narrow definition of the principle of non-discrimination may be deduced from the first sentence of the para.187 of the Decision, which states that 'All victims are to be treated fairly and equally as regards reparations, *irrespective of whether they participated in the trial proceedings* [emphasis added]'. According to the para.187, discrimination is sought not in general and broad sense but limited on the fact that victims participated in criminal proceedings or did not. One may wonder why does the Trial Chamber in developing the principle of non-discrimination start by such narrow conception. Actually, discrimination may arise in various ways such as on the basis of sex, language, religion, race, colour, political or other opinion, national, ethnic or social origin, property, disability, birth or other status etc. The context or the background of the *2012 Decision on Principles and Procedures* may help us to understand the reasons behind such narrow definition of the principle of non -discrimination.

In their submissions on the principles to be applied to reparations, as they were invited to do so by the Trial Chamber I, some legal representatives of victims considered that, in awarding reparations, the Chamber should give priority to the victims who participated in the proceedings.[284] Such a plea would create the risk of distinguishing victims who participated in criminal proceedings from those who did not. As we will later observe, participating in criminal proceedings is a right granted to victims but does not constitute a requirement to claim and to be granted with an award for reparations.[285] For the purpose of dispelling the risk of discrimination unjustly based on participation or non-participation of victims in criminal proceedings, the Chamber, by establishing the principle of non-discrimination, first took care to precise that victims are to be treated fairly and equally as regards reparations 'irrespective of whether they participated in the trial proceedings'. In its reasoning the Trial Chamber I goes on to specify, in the same para.187, that, 'it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations'.[286]

[284] See Para.40 of the *2012 Decision on Principles and Procedures* and ICC, *Prosecutor v Lubanga,* Représentants Légaux des Victimes, Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations. 18 Avril 2012, ICC-01/04-01/06-2869, paras 14-16.

[285] For more details on the issue see Section three of Chapter two of Part two of this dissertation (pp.232ff).

[286] This reasoning leads us to argue that the principle of non-discrimination and non-stigmatization could be one the factors or the bases of the decision of the Court to award reparations *proprio motu* to victims who did not applied for. The issue of the power of the Court to decide on reparations on its own motion is discussed in Chapter two of Part two of this dissertation (pp.177ff).

After dispelling the particular risk of the discrimination based on the procedure, the Chamber broadens the scope of the principle of non-discrimination. In para.191 of the *Decision*, the Chamber explains that 'reparations shall be granted to victims without adverse distinction on the grounds of gender, age, race, colour, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth or other status'.[287] By extending the scope of the principle of non-discrimination the Chamber refers to Art.21 (3) of the ICC Statute.[288] The reference has a relevant meaning since the principle of non-discrimination should be considered when applying and/or interpreting all of the sources of applicable law provided for by Art.21(3). Therefore, the application and interpretation of the applicable law to reparations must not only be consistent with internationally recognised human rights, but also without any discrimination.[289]

As far as reparations for victims are concerned, the principle of non-discrimination should guarantee victims of crimes under jurisdiction of the ICC equality before the law. In this respect the Trial Chamber I has recognised that:

> Reparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes [footnotes omitted]. Equally, the Court should avoid further stigmatisation of the victims and discrimination by their families and communities.[290]

Consequently, all organs of the Court and its staff and other organs or institution or persons who will be involved in the reparations process should be bound by the principles of non-discrimination. They should treat all victims fairly regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy level or any other such characteristic. Nonetheless, in some cases the principle of non-discrimination should allow some exceptions which intend to rectify some existing inequalities. In fact, as the TFV notes '[n]on-discrimination does not mean […], uniformity of treatment of all victims, yet the reason for differentiation has to be reasonable and justified'.[291] Therefore let us

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[287] Compare with TFV's submission on principles to be applied to reparations. In the Lubanga case, TFV suggested that '[i]n addressing access to reparations, the Court may wish to explicitly recognise the principle of non-discrimination on any grounds, including on the basis of gender, ethnicity, race, age, political affiliation, class, marital status, sexual orientation, nationality, religion and disability' (ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.27)

[288] Art.21(3) of the ICC Statute reads as follow 'The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender […] age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status'.

[289] See also Art.25 of the 2005 UN Basic Principles.

[290] *The 2012 Decision on Principles and Procedures, para.192*

[291] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.80

consider, in subsequent point, the possible exception to the principle established by the *2012 Decision on Principles and Procedures*.

2. The exceptions to the principle of non-discrimination in redressing inequalities affecting vulnerable victims

Rule 86 of the RPE of the ICC provides that 'A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all the victims […], in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence'. The Rule refers to Art.68 of the ICC Statute which provides for protection of victims; yet it can be interpreted as being in accordance with the context of the special measures justified by the particular attention paid to vulnerable victims. Although the *2012 Decision on Principles and Procedures* does not explicitly provide for exceptions to the principle of non-discrimination, it is observable that the exceptions are implicitly established. The Decision particularises some categories of victims such as victim of sexual violence (a), child victims (b) and other vulnerable victims (c). Therefore, it is worth understanding the relevance of such kind of exceptions to the principle of non-discrimination.

a. Victim of sexual violence and gender-based violence (para.207 of the *2012 Decision on Principles and Procedures*)

The *2012 Decision on Principles and Procedures* stresses the particularity of the victim of sexual and gender-based violence in the following wording:

> The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence. The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls [footnote omitted] men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.[292]

Whereas the crimes under jurisdiction of the ICC are numerous and may make many categories of victims, the Decision provides that particular attention should be paid to the victims of sexual and gender-based violence. One may ask whether, based on the principle of equality, victims of sexual and gender based crimes are ontologically more deserving of particular attentions than victims of other crimes in proportion to the harm suffered. Is that not a type of discrimination? How

[292] *The 2012 Decision on Principles and Procedures*, para.207

is it justifiable? The answer would be recognition 'that the reality of certain criminal acts causing large-scale victimization requires a differentiated approach'.[293]

The Chamber recognises that the sexual and gender based crimes affect women, girls, men and boys. However, international law specifies that 'the destructive impact of armed conflict is different on women and men'.[294] In this regard, the Paris Principles and Guidelines on Children associated with Armed Forces or Armed Group (Paris Principles) states that:

> While there are commonalities between the circumstances and experiences of girls and boys, the situation for girls can be very different in relation to the reasons and manner in which they join the armed forces or armed groups; the potential for their release; the effects that the experience of being in the armed force or armed group has on their physical, social and emotional well- being; and the consequences this may have for their ability to successfully adapt to civilian life or reintegrate into family and community life after their release.[295]

This international instrument implicitly recognises the vulnerability of the girl child to crimes of being enlisted and involved in hostilities. In the same vein, it is notable that sexual crimes may have particular impact on female victims. One may imagine for example, former girl child soldiers, who bore children during their captivity and who, upon their return, were often not accepted back by their families and communities![296] The nature of harm that may be sustained by some categories of victims of sexual crimes was recognised by the ICC Statute which requires the Court to take appropriate measures to protect such victims.[297] The safety, physical and psychological well-being, dignity and privacy of victims must be considered. In so doing, the Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

The foregoing observations reinforce the importance of gender-sensitive approach in reparations proceedings which allow for any differential impact of sexual crimes on boys and girls. The Trial Chamber recognised this approach by referring to protection of victims,[298] but one can

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[293] United Nations, 2011. The Criminal Justice Response to Support Victims of Acts of Terrorism. New York: United Nations, p. 71.

[294] The Resolution A/RES/S-23/3 on Further actions and initiatives to implement the Beijing Declaration and Platform for Action (16 November 2000), para.15

[295] See also Principle 4.0 of the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.

[296] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.40

[297] Article 68(1) of the ICC Statute provides that 'The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims […]. In so doing, the Court shall have regard to all relevant factors, including age, gender […], and health, and the nature of the crime, *in particular, but not limited to, where the crime involves sexual or gender violence or violence against children*' [emphasis added].

[298] See the *2012 Decision on Principles and Procedures*, para.210 which refers to Article 68(1) of the ICC Statute entitled 'Protection of the victims

expect that the approach should be adopted in evaluating and determining the scope and the extent of harm suffered by victims which may accordingly reflect in awarding reparations. Moreover, the approach should also be applied in encouraging victims to participate in reparations proceedings.[299] The principle of non-discrimination established in the *Lubanga* case should be applied to other similar cases as a general principle and where reparation awards are to be considered, 'female victims, because of the nature of their experience and because of their social and cultural surroundings, need distinct mechanisms that facilitate their recovery and reintegration in a different way than their male peers'.[300] Reparation measures would for example focus on physical and psychological rehabilitation programmes that should address harm sustained by women and girls victims of crimes under jurisdiction of the ICC and facilitate their reintegration into the society.

b. Child victims: Considering the principle of 'best interests of the child' (para.211 of the *2012 Decision on Principles and Procedures*)

According to the *2012 Decision on Principles and Procedures*, in reparation decisions respecting children, 'the Court should be guided, *inter alia*, by the Convention on the Rights of the Child and the fundamental principle of *the best interests of the child* that is enshrined therein [emphasis added]'.[301] Child victims in general, constitute another category of vulnerable victims which may draw particular attention in reparation process.

It is argued that child victims encounter significant challenges in asserting their right to reparations. They lack access to adequate information presented in a child-friendly format, often because they are not explicitly considered in the design of outreach campaigns.[302] The

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and witnesses and their participation in the proceedings'.

[299] According to the TFV's experience from administering assistance to victims under its assistance mandate women and girls often face socio-economic obstacles and discrimination in seeking access to justice, including reparations (ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.32).

[300] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.30

[301] *The 2012 Decision on Principles and Procedures*, para.2101; see also Art.3 of the Convention on the Rights of the Child. In its Art.39 the Convention requires States Parties to the Convention to: '[...] take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'. See also the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime.

[302] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.32)

particularities of the problems that may be encountered by child victims are exposed by the TFV which submitted that:

> Children also lack full legal autonomy. Most have little if any understanding of their rights or how to ensure their rights are upheld, especially when those violating them are authority figures or agents of the State. Children often lack the documentation needed to present their claims, such as deeds to land, housing or property […] Children may be fearful to come forward to reveal the violation if it was perpetrated by those possibly still wielding power. Children who are perceived as perpetrators; those who were part of fighting forces and groups; those forcibly married, enslaved or prostituted during the conflict; those who were sexually violated; children born of rape; or children now heading households may rightly fear stigma and possible reprisals for coming forward to voice the harms committed against them and try to claim reparation [footnotes omitted].[303]

Therefore, the best interests of child require that during reparation process special consideration be given to children victims by ensuring that they have access to reparation proceedings and appropriate reparations which may promote their 'physical and psychological recovery and social reintegration.[304] The best interests of child led the Trial Chamber I to hold that in all matters relating to reparations, it shall take into account the needs of all victims (principle of non-discrimination), and particularly children (as a positive discrimination).[305] In this regard, 'the best interests of the child shall be the guiding principle in developing appropriate measures, according to the evolving capacities of the child, including support to those whom the child is dependent upon'.[306]

c. Priority for certain victims in a particularly vulnerable situation (para.200 of the *Decision 2012 on Principles and Procedures*)

The principle of non-discrimination encourages the taking into account special needs of particular victims. In some circumstances, such as where there are limited amount of resources, the Court should give priority to victims with particular needs. The Trial Chamber I was aware of the issue when issuing the *2012 Decision on Principles and Procedures.*

The Chamber recognised that 'priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance'.[307] Besides the case of victims of sexual or gender based violence and child victims, this exception to the principle of non-

[303] *Ibid*, paras 37-38

[304] See Art.39 of the Convention on the Rights of the Child.

[305] See para.189 of the *2012 Decision on Principles and Procedures*.

[306] Victims' Rights Working Group, *op. cit.,* p.11

[307] *The 2012 Decision on Principles and Procedures*, para.200

discrimination may also apply towards, *inter alia*, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized victims, for instance following the loss of family members. Vulnerable situation may constitute a handicap for victims to have access to reparations process and appropriate reparations. For this reason, 'the Court will need to pay special attention to facilitating effective access to the reparations regime; as well as, adequate consideration to their needs in designing both the process and the substance of reparations'.[308] In other words, as far as vulnerable victims are concerned, the Court would adopt 'measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims'.[309]

Besides Rule 86 of the RPE of the ICC, already referred to as contemplating the possibility of exceptions to the principle of non-discrimination, it is noticeable that the international law likewise recognises the principle of paying particular attention to vulnerable victims. To illustrate this assumption reference may be made to the 1985 UN Basic Principles which stress that 'in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted' or because of factors 'such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability'.[310]

This leads to argue that the particular measures which take into account the interests of some categories of victims could be seen as *positive discrimination* and constitute exceptions to the principle of non-discrimination. Although the *2012 Decision on Principles and Procedures* does not refer to the notion of *positive discrimination* the concept is implicitly or explicitly recognised by the international law.[311] The justification of positive discriminations may be found in the search of addressing the problem of inequality in treatment of victims and the concern of achieving the purpose of reparations which needs to be effective. Nonetheless, it is not easy to objectively and fairly define the concept of special needs. Therefore, the Court should find and justify factors of

[308] ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.28

[309] *The 2012 Decision on Principles and Procedures,* para.200 and Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparations, para.7

[310] See the 1985 UN Basic Principles, paras 3 and 17

[311] See for example Art. 4 of the Convention on the Elimination of All Discrimination against Women and Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparations, para.7

neediness so that the risk of potential conflicts between victims or their communities which can arise from the positive discrimination are reduced or dispelled.[312]

D. The principle of proportionality and promptness of reparations (paras 242 and 243 of the *2012 Decision on Principles and Procedures*)

In its para.242, the *2012 Decision on Principles and Procedures* formulates a general principle according to which victims 'should receive appropriate, adequate and prompt reparations'.[313] The Para.242 is one of the paragraphs whose common heading is entitled *Proportional and adequate reparations*. In this title the term *adequate* is connected to the term *proportional* whereas in Para.242 it is connected to the terms *appropriate* and *prompt*. Could we then deduce that *proportional* reparations refer to *appropriate* and *prompt* reparations? Does *adequate* reparations defer from *proportional* reparations? With such a combination of terms, it is knotty to determine whether the Trial Chamber considers that the qualifying or descriptive adjectives *proportional, appropriate, adequate* and *prompt* are interchangeable or different as far as reparations are concerned. Since the Decision does not provide definitions to the three ambiguous terms, it is hard to know whether there is any difference between them.

According to Oxford dictionary the term *proportional* may refer to 'an *appropriate* size, amount or degree in comparison with something [emphasis added]', whereas the term *adequate* may mean '*enough* in quantity, or good enough in quality [emphasis added]'.[314] In turn, the dictionary defines the term *appropriate* as 'suitable, acceptable or correct for the particular circumstance'.[315] The term *prompt* is defined as 'done without delay'.[316] Considering these definitions one may promptly make an appropriate combination of the term *adequate reparations* with the term *appropriate reparations* for the both terms may mean *proportional reparations. Proportional reparations* may mean *enough reparations, appropriate reparations* in comparison with a harm sustained. The third term *prompt* would refer to *time limit* of the reparations. Therefore, the definitions of the terms and their possible combination lead us to consider the context of the

[312] See Dwertmann, E., *op. cit*. p.103.

[313] See also Para.2 of the Preamble of the Resolution ICC-ASP/11/Res.7 on Victims and Reparations and Para.17 of the Preamble of the Resolution ICC-ASP/11/Res.8 on Strengthening the International Criminal Court and the Assembly of States.

[314] A S Hornby, Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.17 &1177

[315] *Ibid*. p. 60

[316] *Ibid*. p.1174

principle established by the Trial Chamber in paragraph 242 as the *principle of proportionality and promptness of the reparations.*

Nonetheless, it is worth going beyond the pun and concretely understanding the meaning of the principle *of proportionality and promptness of the reparations* under the ICC regime reparations. Let us first consider a possible concrete meaning of proportional reparations which may encompass, as already observed appropriate and adequate reparations (A) before striving to contextualise the principle of prompt reparations under the ICC regime (B).

1. Victims to receive proportional reparations (para.243 of the *2012 Decision on Principles and Procedures*)

According to para.243 of the Decision under analysis, reparations ought to be proportionate to the harm, injury, loss and damage as established by the Court. In addition, the measures for reparations will depend on the particular context of each case and circumstances of the victims, and should accord with the overarching objectives of reparations.

It can be deduced from the Decision that proportional reparations may refer to the *type* of reparations (restitution, compensation, rehabilitation or other type of reparations or their combination[317]) which take into account the 'scope and extent of any damage, loss or injury'[318] sustained by a particular victim (individual victim, group of victims, vulnerable victim etc.). With respect of the harm resulting from a crime, one may submit that reparation ought to be 'proportionate to the gravity of the harm inflicted'.[319] Adequacy, which 'requires that reparation be proportionate to the injury suffered',[320] also demands taking into consideration the needs of all victims, and particularly special categories of victims such as survivors of torture and rape.[321] In the *Lubanga* case for example where victims of crimes are principally child soldiers, one may submit that 'an assessment of *adequate* compensation should involve consideration of the long-term

[317] The UN Secretary General report recognised that 'No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required' (UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, submitted to the Security Council on 23 August 2004, UN Doc. S/2004/616, para.55).

[318] See Art.75 (1) (s2) of the ICC Statute and Rule 97(1) of the RPE of the ICC.

[319] ICC, *Prosecutor v Lubanga*, OPCV, Observations on issues concerning reparations, 18 April 2012, ICC-01/04-01/06-2863, paras 19-30. ; see also Musila, G., op. cit. p. 195 and Nicole Zarifis, I., *op. cit.* Assessing the need for a comprehensive reparations policy for victims of mass violations in Uganda. *East* African *Journal Of Peace & Human Rights*, 16(2), p.326

[320] Kerbrat, Y., 2010. Interaction between the forms of reparation, in: J. Crawford A. Pellet and S. Olleson, eds., 2010. *The Law of International Responsibility*. Oxford (US) : Oxford University Press, p.579

[321] Nicole Zarifis, I., *op. cit*. p.326

consequences of the violations'.[322] With respect to the particularities of some victims, which may require *appropriate* and *adequate* reparations in determining reparations, the Court should take into account for instance 'the importance of age-sensitive measures ensuring that awards are considered in terms of appropriateness for their life-stage, and within their socio-legal context'.[323]

Moreover, proportional reparations may imply *modalities* of reparations (individual or collective award for reparations) chosen by the Court. Drawing on Rombouts, Sardaro and Vandeginste, the TFV describes appropriateness of reparations as referring to 'the fact that the forms and modalities of reparations should be suitable, taking into account the harm, the victims, the violations, and the broader society'[324] and 'with a view to optimal usage of the scarce resources, both in qualitative and quantitative terms'.[325] In this respect, it is notable that Rule 97(2) of the RPE uses the term *appropriate*, which may be included in the general term proportionality, where it provides that the Court, taking into account the scope and extent of any damage, loss or injury, may award reparations on an individualized basis or, where it deems it *appropriate*, on collective basis or both.[326] Likewise, according to Rule 98(3) of the RPE collective award may be the *appropriate modality* of reparations having regard to the number of the victims and the scope of reparations. In the same vein, Regulation 110(2) of the RR refers to *appropriateness* of awarding reparations on an individual or a collective basis. This demonstrates that appropriate reparations 'will have to be tailored to the individual case as a result of the assessment of concrete victimization of individuals and groups of individuals'.[327]

The principle of proportionality established by the *2012 Decision on Principles and Procedures* is not a new fashion introduced by the Decision but is already contemplated by the international law. To illustrate this, one may refer to the Principle 15 of the 2005 UN Basic Principles according which '[r]eparation should be *proportional* to the gravity of the violations and the harm suffered [emphasis added]'. It also recognises that *adequate* reparations will promote justice by redressing international crimes. Likewise, Principle 18 of the 2005 UN Basic Principles

[322] ICC, *Prosecutor v Lubanga*, UNICEF, Submission on the principle to be applied, and the procedures to be followed by the Chamber with regard to reparations, 10 May 2012, ICC-01/04-01/06-2878, paras 39-41; *The 2012 Decision on Principles and Procedures*, para.117.

[323] Redress, 2011, *op. cit.*, p.25-28

[324] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.81

[325] *Idem*

[326] See also Rule 97(2) of the RPE of the ICC which refers to appropriate types and modalities of reparations.

[327] Donat-CAttin, D., 2010. Victims' Rights in the International Criminal Court (ICC). In: M. Natarajan, ed., 2011. *International crime and justice*. New York: Cambridge University Press, p.376

provides that 'victims of gross violations of international human rights law and serious violations of international humanitarian law should, as *appropriate* and *proportional* to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation [emphasis added]'. In the same vein - in the context of State responsibility - Article 51 of Articles on States Responsibility establishes the principle of proportionality by providing that 'Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question'. In the context of the ICC reparation regime, Resolution ICC-ASP/11/Res.7 adopted by ASP at the 8th plenary meeting, on 21st November 2012 endorses the principle of adequacy of reparations by recognising that victims' rights to adequate reparations for harm suffered is one the essential components of justice.[328]

The principle of proportionality requires the Court, in deciding on reparations, to allow for all possible factors which may play their role in determining appropriate and adequate reparations. The factors may include among others, the scope and the extent of harm sustained by a victim,[329] the number of victims,[330] the environment in which a victim lives, cultural dimension of the groups and communities,[331] difficulties in establishing with exactitude the damage, loss or injury suffered by a particular victim, the particularities of vulnerable victims,[332] availability of resources or possible indigence of perpetrators and the possibility of implementation. Further, reparation should be adapted to each region, each country, each political situation and the future stability of an affected society would depend on the choices made in deciding on reparations.[333]

2. The principle *restitutio in integrum*

One may wonder whether the principle of proportionality established by the *2012 Decision on Principles and Procedures* may mean *restitutio in integrum.*[334] The principle *restitution in integrum* seems to equate the reestablishment of the *status quo ante*. In others words, reparations should be sufficient to remedy *all the consequences* of the violations that took place. The *2012*

[328] Para.2 of the Preamble of the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations

[329] The factor *harm* may be the basis in determining the types of reparations (restitution, compensation, rehabilitation, symbolic reparations or combination of different types of reparations).

[330] The factor *number of victims* may lead the Court to order reparations on a collective basis (see at pp.293ff).

[331] Aubry, S. and Henao-Trip, M.I., 2011. Collective Reparations and the International Criminal Court. Edited by C. Sandoval, [Online] available at: <http://www.essex.ac.uk/tjn/documents/Paper_2_Collective_Reparations_Large.pdf>, p.11, accessed 3rd April 2012].

[332] The factor *vulnerability of victims* would justify the positive discriminations (see discussions made on the issue in this dissertation at pp.82ff).

[333] L. Joinet (2002, quoted by Vincent, J., *op. cit*., p. 88).

[334] For further explanation on the concept of 'réparation intégrale' see Coutant-Lapalus, C., *op. cit*.

Decision on Principles and Procedures does not refer to the principle *restitutio in integrum*. Actually, this principle could raise a number of problems not only due to the lack of consensus on its definition but also to the difficulties of its implementation.[335]

In the context of reparations for victims of crimes, the principle *restitutio in integrum* could be understood as reparations that strive to restore as accurately as possible the equilibrium destroyed by a harm resulting from a crime and reposition the victim in the situation he or she would have had without the harm.[336] The international law does not explicitly provide for the principle. 1985 UN Basic Principles contemplates the principle of *full compensation* where it provides that '[w]hen compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation'.[337] A similar provision is found in the European Convention of the Compensation of Victim of violent Crimes.[338] These international instruments, mentioned as examples, were adopted in the context of criminal law and urges States to strive to erase harm suffered by victims of crimes. Can we deduce from these instruments that the principle *restitutio in integrum* is a rule of international order? According to French case-law, it is classically held that the principle *restitutio in integrum* is not a rule of international order.[339] Indeed, absolute equivalence of harm and reparations may only be achieved in a system of *full reparation (restitution in integrum)*; but any reparation could not be full, 'complete, with nothing missing'.[340]

This denotes the difficulties of the implementation of the principle. In many cases the gross violations of human rights cause irreparable or irreversible damage. In such a case the injurer is not capable to restore his victim in his/her previous situation by restitution *in integrum*. Thus, how can the victim's right to redress be implemented in such a situation? In developing the rights to reparation in the context of State responsibility, human rights committees and courts of human rights have reasoned on such an issue by speaking about the principle of *restitutio in integrum*, especially in cases of violation of the right to life.

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[335] *Ibid*., pp. 19-20.

[336] According to Pollaud-Dulian F. (in préface au Coutant-Lapalus, *op. cit*., p.7) 'Le principe de la réparation intégrale consiste à s'efforcer, dans l'indemnisation, de rétablir, aussi exactement que possible, l'équilibre détruit par le dommage et de replacer la victime dans la situation qui aurait été la sienne sans le dommage'.

[337] Principle 12 of the 1985 UN Basic Principles

[338] Art.2 of the European Convention of the Compensation of Victim of violent Crimes, also adopted in context of criminal law, states that '[w]hen compensation is not fully available from other sources the State shall contribute to compensate' victims.

[339] JDI (1964, quoted by Coutant-Lapalus, C., *op. cit*., p. 120)

[340] According to the Oxford Advanced Learners Dictionary, one of the meanings of 'full' is 'complete; with nothing missing' (A S Hornby,Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.603)

In the *Aloeboetoe et al. v. Suriname* case, for instance, in which several tribesmen had been killed by soldiers, and numerous summary executions and disappearances had occurred, the Inter-American Commission of Human Rights (IACHR) interpreted Article 63(1) of the ACHR as instituting the obligation to re-establish the *status quo ante*. In another part of its brief, the Commission to which it is referred *in integrum restitutio*, which it seems to equate to the re-establishment of the *status quo ante*. But, the IACtHR recognises the irreversible or irreparable nature of some damage caused by core crimes as follow:

> Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causæ est causa causati*. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects. To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.[341]

Consequently, the Court holds that in matters involving violations of the right to life reparation must of necessity be in the form of *pecuniary compensation*, given the nature of the right violated.[342] Moreover, this issue has led the Court to establish the principle that the responsible party has to make reparation for the immediate effects of his acts that cause immeasurable effects.

As noted earlier the principle of proportionality requires, when deciding on reparations, to take into account a number of factors such as limited resources, difficulties in establishing damage, loss or injury with exactitude.[343] This implies deciding with a margin of appreciation which authorizes departure from the principle of *restitution in integrum* towards providing appropriate and adequate reparation.[344] Actually, as far as crimes under jurisdiction of the ICC are concerned, the application of the principle *restitutio in integrum* appears inoperative due to the irreparable damage caused by atrocities like extermination, murder, rape or torture, and the possible big number of their victims and particular harm they cause.[345] In this respect, the IACtHR confirmed, in context of State responsibility, that reparations ordered 'must be proportionate to the violations' and recognised the inapplicability of the principle of *restitutio in integrum*.[346] The Court held that '[t]o compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely

[341] IACtHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10 September 1993, para.47

[342] IACtHR, *Ibid*, para. 46

[343] Musila, G., op. cit. p. 195.

[344] ICC, *Prosecutor v Lubanga*, UNICEF, Submission on the principle to be applied, and the procedures to be followed by the Chamber with regard to reparations, 10 May 2012, ICC-01/04-01/06-2878, para.79.

[345] In most cases the number of potential beneficiaries of reparation awards will be large and victims will have suffered multiple forms of harm difficult to repair (*Ibid*, para.82).

[346] See Kerbrat, Y., *op. cit.*, p. 579.

impossible, since that action caused effects that multiplied to a degree that cannot be measured'.[347] Since the principle of *restitutio in integrum* has proved ineffective in cases of State responsibility, should one nourish the hope to render it effective in the context of individual responsibility adopted by the ICC Statute? Obviously, *restitutio in integrum* could appear as utopic in most cases of prejudice resulting from crimes under the ICC's jurisdiction as '[t]he dead could not be brought back to life'.[348]

The principle of proportionality does not refer to *restitutio in integrum*. Actually, except where restitution in kind is possible, one cannot expect that in all cases full reparations would be possible for harm resulting from the crimes under jurisdiction of the ICC. It is up to the Court to determine the measures most appropriate and adequate reparations. Indeed, as far as the right to reparations is concerned, the discretionary power the Court is invested with by its statute and RPE echoes the maxim *ubi jus, ibi remedium* (for every wrong, the law provides a remedy) used in law of common law. According to the maxim, courts have inherent power to order the most appropriate reparations.[349] The complexities of the implementation of the principle of proportionality already discussed may justify the necessity of the Court to appoint experts with mission to assess all of these factors and propose appropriate and adequate reparations. This principle could apply on different types of reparations (restitution, compensation and rehabilitation) and on different modalities of reparation (individual or collective reparations).

3. The promptness of reparations

As mentioned earlier, the principle of proportionality which encompasses the aspects of appropriateness and adequacy is linked to the principle of promptness which needs also to be understood. The ICC reparations regime does not provide for the promptness of reparations. This principle is established by the *2012 Decision on Principles and Procedures* where it stipulates that victims should receive prompt reparations.[350] But the Decision does not explain further what it exactly entails in the ICC context.

In the context of the ICC reparation regime, the principle of promptness may be implicitly deduced from the Resolution RC/Res.2 on the Impact of the Rome Statute system on victims and

[347] IACtHR, *Aloeboetoe et al. v Suriname* (Reparations and Costs, Judgment of 10 September 1993), para.48

[348] Tomuschat, C., 2007. Reparation in Cases of Genocide. *Journal of International Criminal Justice*, Vol.5, p.907

[349] ICC, *Prosecutor v Lubanga*, Justice-plus et al., Observations relatives au régime de réparations, 10 Mai 2012, ICC-01/04-01/06-2877, para.20

[350] Para.240 of the *2012 Decision on Principles and Procedures*

affected communities adopted by the ASP during its 9th plenary meeting held on 8th June 2010. The Resolution called upon the States Parties, international organizations, individuals, corporations and other entities to contribute to ensure that *timely* reparations can be provided to victims.[351] More explicitly, the Resolution ICC-ASP/11/Res.7 adopted by the ASP at the 8th plenary meeting, on 21st November 2012, recognises that victims' rights to prompt reparations for harm suffered is one the essential components of justice.[352] This is also notably contemplated by the 2005 UN Basic Principles, and Nairobi Declaration on Women's and Girl's right to a remedy and reparation.[353]

Notwithstanding, the international law does not concretely elucidate what promptness mean. Consequently, one may argue that promptness refers to the notion of *reasonable time*. As early noted, the principle of promptness refers to the *time limit* of reparations so as to avoid undue delay. Its importance lies in the fact that '[t]he more time lapses between harm suffered and the implementation of reparation awards, the more difficult it will be to effectively redress harm'.[354] The notion of reasonable time is referred to by the international law. For example Art. 6(1) of the ECHR provides that everyone is entitled to a fair and public hearing within a *reasonable time*. Unfortunately, the notion of *reasonable time* also remains ambiguous and has been defined neither by international law nor by national laws. The concept can be defined as acceptable and appropriate time in a particular situation.[355] Therefore, assessing the *reasonable time* is a factual issue which should be considered in every case, and it seems impossible to fix a time limit in context of reparations under the ICC regime.

E. Indigence of a convicted person as a possible factor for the exclusion of an order for monetary reparations (para.269 of the *2012 Decision on Principles and Procedures*)

The ICC reparation regime does not link the convicted person's ability to pay and the possibility of the Court to issue an order for reparations against the convicted person. Such link is

[351] Para.7 of the Resolution RC/Res.2 on Impact of the Rome Statute system on victims and affected communities

[352] Para.2 of the Preamble of the Resolution ICC-ASP/11/Res.7 on Victims and Reparations

[353] Art.15 of the UN 2005 Basic Principles provides that 'Adequate, effective and *prompt reparation* is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law [emphasis added]'. See also General Principle 3(E) of the Nairobi Declaration on Women's and Girl's right to a remedy and reparations.

[354] ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.59

[355] See A S Hornby defines the term 'reasonable' as 'acceptable and appropriate in a particular situation' (see A S Hornby Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.1212).

expressly provided for as regard to fine.[356] Then the issue would be whether the Court can order reparations against a convicted person who, at the time of the decision, lacks financial resources. The question requires an understanding of the Trial Chamber I's findings on the issue (1) before contributing to the debate on the impact of indigence of an offender on his/her obligation to repair (2).

1. Understanding the Trial Chamber I's standing on the issue of indigence and reparations

In the *Lubanga* case, the Trial Chamber I held that:

> The convicted person has been declared *indigent* and no assets or property have been identified that can be used for the purposes of reparations. The Chamber is, therefore, of the view that Mr Lubanga is only able to contribute to *non-monetary reparations*. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement. Accordingly, these measures will not form part of any Court order.[357]

Can it be deduced from the Chamber's reasoning that it establishes the principle according to which indigence is a factor preventing the issuance of an order for monetary reparations? At the first glance, one may assume that according to the Chamber, the indigence is a factor that prevents it from issuing an order for monetary reparations against a convicted person declared indigent. [358] But on the other hand, a close analysis of the *2012 Decision on Principles and Procedures* leads to the assumption that the stand of the Trial Chamber still recognises the obligation of the convicted person to repair the harm caused to a victim. The Decision seems not to rule out the possibility of the Court to issue an order for monetary reparations against an indigent convicted person. In this respect, one may note that the Trial Chamber, when resolving the issue relating to reparations through the TFV, incidentally provides that '*In the circumstances where the Court orders reparations against an indigent convicted person*, the Court may draw upon 'other resources' that the TFV has made reasonable efforts to set aside [emphasis added]'.[359] This reasoning may reveal the intention of the Chamber not appearing to set a precedent where indigence of a convicted person

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[356] Rule 146(2) of the RPE of the ICC. According to Rule 146 of the RPE, in exercising its discretion to order a fine and in fixing the amount of the fine, the Court is to consider the financial capacity of the convicted, including any orders for forfeiture and orders for reparations. In no case can the Court impose a fine of more than 75 per cent of the convicted person's identifiable assets and property after deducting an amount necessary to satisfy the financial needs of the convicted person and his or her dependants.

[357] *The 2012 Decision on Principles and Procedures*, para.269

[358] The indigence of an offender is declared by the Registry of the ICC pursuant to Regulations of the Court (Regulation 84 and 85 of the RC). It should be noted for example that contrary to the Lubanga case, the Bemba's request for indigence was denied by the Registrar in 2008 (see International Bar Association (2010, quoted by Aubry, S. and Henao-Trip, M.I., *op. cit*., pp. 13-16).

[359] Para.271 of the *2012 Decision on Principles and Procedures*

should be a factor preventing the Court from making an order for monetary reparations against a convicted person.

Be that as it may be, the Chamber did not satisfactorily respond to the submissions which pleaded for an order for monetary reparation against Mr Lubanga despite his indigence. The argument of the submission made by some victim groups was that 'Mr Lubanga may acquire assets, either during the course of his term of imprisonment or after its completion, which could be used for reparations';[360] therefore, the submission went on to argue that the Chamber has the power to order, regardless of the current indigence, that any property and assets that Mr *Lubanga* receives at a later date can be the subject of an order for reparations.[361] These submissions were implicitly endorsed by the Office of Public Counsel for Victims (OPCV) which submitted that 'if assets belonging to Mr Lubanga are identified in the future, they should be used to meet the Court's reparations order'.[362] The OPCV supported its submission by referring to Regulation 117 of the RC which states that '[t]he Presidency shall, if necessary, and with the assistance of the Registrar as appropriate, monitor the financial situation of the sentenced person on an on-going basis, even following completion of a sentence of imprisonment, in order to enforce fines, forfeiture orders or reparation orders'.[363] Moreover, there were some submissions, such as those from the TFV[364] and Prosecution,[365] which pleaded for an order for reparations against Mr Lubanga notwithstanding his limited resources; yet they argued for and suggested a financial symbolic payment.

Few submissions on the other hand, namely from the Registry[366] and legal representatives of a group of victims,[367] considered *Lubanga*'s indigence a sufficient factor to prevent the Court from

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[360] See the *2012 Decision on Principles and Procedures*, para. 125 and ICC, Prosecutor *v Lubanga*, Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10. 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864, para. 35.

[361] See *Ibid*, para.125

[362] See also ICC, *Prosecutor v Lubanga*, OPCV, Observations on issues concerning reparations, 18 April 2012, ICC-01/04-01/06-2863, para.127 and the *2012 Decision on Principles and Procedures*, para.127.

[363] See also ICC, *Prosecutor v Lubanga*, OPCV, Observations on issues concerning reparations, 18 April 2012, ICC-01/04-01/06-2863, para.126.

[364] See also ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.241

[365] ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18 April 2012, ICC-01/04-01/06-2867, para.30

[366] See ICC, *Prosecutor v Lubanga*, Registrar's observations on reparations issues, 18 April 2012, ICC-01/04-01/06-2865, para.27 and *The 2012 Decision on Principles and Procedures*, para.143

[367] See ICC, *Prosecutor v Lubanga* ,Représentants Légaux des Victimes, Observations du groupe de victimes VO2 concernant la fixation de la peine

issuing an order for reparations against *him* and proposed that an order for reparations would be issued through the TFV. It seems that the Chamber adopted the position in accordance with the latter minority submissions.

It would be good to have the Chamber motivate its decision to show why it did not consider the majority submissions which demonstrated that indigence should not stand in the way of the court when issuing monetary compensation orders. The Chamber kept silent about the implicit interpretation put on Regulation 117 of the RC by the OPCV. With this isolated case, the *Lubanga* case, it would be premature to argue that the position of the Trial Chamber I constitute inanimate case-law of the ICC on the issue especially that it considered the decision in the *Lubanga* case, ' not intended to affect the rights of victims to reparations in other cases'.[368]

Moreover, due to the indigence of the convicted person, the Trial Chamber evoked the possibility of him giving a contribution of *non- monetary reparations*. Which kind of non-monetary reparations could the Court order against the convicted person declared indigent? Is there any possibility of ordering a convicted person to work for his victim as some scholars, such as Holmgren[369] and Murray[370] argue? This alternative is unthinkable in the cases of crimes under jurisdiction of the ICC, for not only is the option conceived as an alternative to imprisonment, but also the number of victims of such crimes should not reconcile with such an alternative. One may think about the system of community service which may be imposed to convicted persons like for example the system established in Rwanda under the *Gacaca* system.[371] Once again, the community services innovated in Rwanda with the *Gacaca* courts is an alternative to imprisonment which defers from the ICC regime. Finally, it is worth noting that the *2012 Decision on Principles and Procedures* contemplates a *voluntary apology* from Mr *Lubanga* to individual victims or to groups of victims, on a public or confidential basis.[372] The voluntary apology, in Chamber's point of view, may contribute to the process of, among others, addressing the shame felt by his victims.[373] Such

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et des réparations. 18 Avril 2012, ICC-01/04-01/06-2869, para.39 and *The 2012 Decision on Principles and Procedures,* para.126

[368] *The 2012 Decision on Principles and Procedures*, para.181

[369] See Holmgren M.R., *op. cit*.

[370] See Murray, R., 1998, *op. cit*.

[371] See the Rwandan Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1st October 1, 1990 and 31st December 1994 as modified and complemented up to 2008.

[372] *The 2012 Decision on Principles and Procedures,* para.241

[373] *The 2012 Decision on Principles and Procedures,* paras240 and 241

symbolic reparations could not be object of an order for reparations, for where voluntary apology is lacking, it would be unthinkable to implement such an order.

2. A debate on the impact of indigence of an offender on his/her obligation to repair

In the Lubanga case, the Trial Chamber I adopted a position which is similar to that adopted by the Supreme Court Chamber in the *KAING Guek Eav alias Duch* case. In the latter case, the Supreme Court Chamber held that:

> Considering that in the ECCC context there is no externally subsidised funding mechanism that could give effect to orders issued against an indigent convicted person, this Chamber concurs with the Trial Chamber's implicit finding that it is of primary importance to limit the remedy afforded to such awards that can realistically be implemented, in consideration of the actual financial standing of the convicted person. In purely abstract terms it is imaginable that KAING Guek Eav may enrich himself in the future or even that a third party will come forward to provide means necessary to fund the reparations, opting to do so on behalf of KAING Guek Eav rather than in its own name. Such possibilities are nevertheless so remote that they can practically be excluded, and, as such, cannot constitute a basis for ordering reparations. An award that is modest but tailored to what is in practical terms attainable is appropriate in the ECCC reparations framework. The Supreme Court Chamber also stresses that the limited reparations available from the ECCC do not affect the right of the victims to seek and obtain reparations capable of fully addressing their harm in any such proceedings that could be made available for this purpose in the future [footnotes omitted].[374]

Such a position raises a number of questions. The first issue arising is the legal link between the *indigence and the obligation to repair*. On one hand, one may wonder whether the indigence can be a cause of exoneration of a convicted person from repairing the harm caused to a victim. On the other side there is a question of what would happen if the Court orders monetary reparations against a convicted person declared indigent. For in the latter case the order will not be enforced.

Some commentators argue that there is no reason to issue an order for reparations against the convicted person declared impecunious. For example Mututkumaru argues that '[w]hatever form the reparations may take, they must be sufficiently practicable, clear and precise to be capable of enforcement' and they must 'take account of the offender's means'.[375] Still, some commentators, such as Musila, submit that financial capacity of the convicted person must only be taken into account when determining the scope of compensation in the event that direct reparation awards are ordered, 'in order to avoid a proliferation of unenforceable reparation'.[376] Other compensation

[374] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.668

[375] Muttukumaru, C., *op. cit.*, p. 307.

[376] Musila, G., *op. cit*. p.198.

scholars still go far by arguing that 'imposing large financial burdens on impecunious offenders may increase the probability that the offender will commit further offences, thereby victimizing more citizens'.[377] But, in absence of reliable research data on the issue, it would be hard to admit the assumption. Moreover, some may find pertinent the question asked by Ashworth: 'Yet, since there is a loss to be borne, why should it not be borne by the offender and his family rather than by the victim and his family'?[378]

The position of taking into account the indigence of an offender and not order monetary award for reparations, is found in English criminal justice system where, according to the Powers of the Criminal Courts Act 1973, courts are obliged to take account of the offender's means when determining whether to award compensation and also in fixing the amount and the rate at which it has to be paid.[379] A similar but not identical system may be found in Denmark where a tortfeasor's liability to pay damages may either be reduced or abrogated altogether where such liability may impose an unreasonable burden on the tortfeasor or where other very specific circumstances make it reasonable to do so.[380] Some commentators such as Dignan criticise this position for it produces negative effects on victims since when most offenders have extremely limited means, victim are rarely compensated in full for their loss.[381]

Contrary to the foregoing permissive position, in France, where a civil action brought before a criminal court is dealt with according *to droit civil de la responsabilité (tort law)*, the case-law has taken an opposite direction. According to the French case-law, in assessing the harm sustained by a victim and determining an amount of reparations to be paid by the offender, the Court should ignore

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[377] See Ashworth, A. *op. cit.* p.110.

[378] *Idem*

[379] Dignan, J., 2005. Understanding victims and restorative justice. Berkshire : Open University Press, p. 81. and Zedner, L., *op. cit*., p.174. In England there exists a system which seems to be strange for in case a victim of crime chooses to bring his claim for damages before a civil court, he may, if he gains the case, be compensated without reference to the defendant's means, whereas if he chooses for a compensation order, in criminal proceedings (before the criminal court), 'the compensated order should not be beyond the means of offender' (Ashworth, A., *op. cit*., p. 110).

[380] As Lerche notes, under the Damages Liability Act 1984, Section 24(1) a tortfeasor's liability to pay damages may be either reduced or abrogated altogether where such liability will impose an 'unreasonable burden' […] on the tortfeasor or where other very specific circumstances make it reasonable to do so. This power to modify liability in order to avoid an unreasonable burden is intended to be used in cases where an award of full damages would mean a burden of payment on the tortfeasor which, on the basis of social and humane considerations, appears unacceptable. However, Lerche notes that 'the court, in deciding whether the burden of full damages would be unreasonable, will also take into account consideration to the contrary, such as the extent of the injury suffered by the injured party, the nature of the liability, the interests of the injured party generally' (Lerche, M., *op. cit*., p.104).

[381] Dignan, J., *op.cit*.., p.81

offender's financial situation. Therefore, financial situation of parties has no influence on the amount of an award for reparations.[382]

International law is laconic on this issue. But in the context of the ICC regime, as pointed out by the OPCV, Regulation 117 of the RC seems to contemplate the possibility of the Court to order an indigent convicted person to pay an award for reparation to his or her victims. Further, it is worth observing that the Resolution ICC-ASP/11/Res.7 on Victims and Reparations, adopted during the eleventh session held in The Hague on 14th – 22nd November 2012 is clear on the issue. The Resolution '[recalls] that the declaration of indigence of the accused for the purpose of legal aid bears no relevance to the ability of the convicted person to provide reparations, which is a matter for judicial decision in each particular case'.[383] Although the Resolution refers to 'ability' of the convicted person to provide reparations instead of 'liability', the Resolution intends to break any link between the indigence of an accused person and his/her obligation to provide reparations to victims. Actually, without losing sight of the inviolability of judicial independence[384] on which nothing may infringe, it is noticeable that the Resolution goes far to *request* the Court to review its position on the issue and to report to the Assembly at its twelfth session.[385]

All after all, the standing of the Trial Chamber I is not very clear on the issue but as mentioned earlier, it seems to recognise the obligation of the indigent convicted person to repair the harm caused to a victim. It would be hard for the Chamber to opt considering indigence as a cause of exoneration of responsibility to repair whereas reparations primarily are the responsibility of the convicted individual,[386] and the responsibility may not be affected by his or her indigence.[387] In other words, reparation of the harm suffered by victims should not be linked to the convicted

[382] Coutant-Lapalus, C., *op.cit*. p.194

[383] Para.12 of the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations

[384] Art.40 (1) of the ICC Statute states that 'The judges shall be independent in the performance of their functions'

[385] Para.12 of the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations

[386] See ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10. 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864, para.3; *The 2012 Decision on Principles and Procedures*, paras125 and 128 and ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.14

[387] See ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10. 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864, para.34 and *The 2012 Decision on Principles and Procedures*, para.125

person's capacity to pay.[388] The context of Regulation 117 of the RC should lead the Court to take into account the view of victims and at least to order symbolic monetary reparations against a convicted person regardless of his indigence. Indeed, the Court should have considered victims' request in the light of international law which requires that 'human rights violators provide reparations to their victims'.[389] At the stage of implementation of the order for reparations, the symbolic monetary reparations can be complemented by the TFV by drawing on its resource pursuant to Regulation 56 of the Regulations of the TFV.[390]

I.3.2.2. Principles related to the standard of causation and recoverable harm

The ICC reparation regime does not define the precise requirements of the causal link between the crime and the relevant harm for the purpose of reparations. The Statute and RPE do not provide any specific guidance as to the damage, loss or injury for which reparation may be made. The determination of the scope and extent of damage, loss and injury raises two main issues: causation and recoverable harm.

The first issue of causation will be to determine whether a victim has suffered harm and if so whether harm is the result of the crimes for which the defendant is convicted. Harm as a result of a crime raises the thorny issue of causation on which depends the determination of the extent of liability for reparations by a convicted person. Actually, to decide on the matter of legal liability requires resolving the issue of causation since recoverable harm suffered by a victim has to be caused by a crime committed by a convicted person.[391] The problem of causation is connected to the problem of burden and standard of proof which will be discussed in Chapter two reserved to procedural issues. Regarding the issue of causation, the *2012 Decision on Principles and Procedures* opts for *proximate causation* instead of immediate causation and goes on to establish the *but/for test*. The combination of these two theories – proximate caution and the *but/for test* – will retain our attention (A). Another issue, which needs to be discussed in this sub-paragraph, will be the determination of recoverable harm (B).

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[388] Victims' Rights Working Group, *op. cit.*, p.10

[389] Access to Justice Asia LLP and The Center for Justice & Accountability and The International Human Rights Law Clinic, 2011. Victims' right to Remedy: Awarding meaningful reparations at the ECC, [Online] available at: http://www.law.berkeley.edu/files/Victims_Right_to_Remedy.pdf, accessed on 5th June 2013, p.11.

[390] The possibility of the TFV to complement the awards for reparations is contemplated by Regulation 56 of the RegTFV.

[391] See Scheines R., 2008. Causation, Truth, and the Law. Brooklyn Law Review, Vol. 73.2, p. 625.

A. The *proximate causation* criterion and the '*but /for test'* in determining the extent of liability for reparations (paras 249 and 250 of the *2012 Decision on Principles and Procedures*)

The determination of the scope and the extent of the damage as per Art.75 (1) (s2) of the ICC Statute implies to the determining of the causal link between a damage and the crime committed by a convicted person. By defining the notion of victim, Rule 85 of the RPE refers, in respect with natural person, to *harm as a result of commission of any crimes within the jurisdiction of the Cour*t[392] whereas, with regard to legal person, it refers to *direct harm* to property.[393] In this respect, the *2012 Decision on Principles and Procedures* opted for the proximate *cause* criterion (1) and the '*but/for test'* (2) in determining the extent of liability for reparations.

1. The criterion of proximate cause (para.249 of the *2012 Decision on Principles and Procedures*)

In the *Lubanga case*, where crimes of enlisting and conscripting children under the age of 15 years were confirmed against the accused, the Trial Chamber I, holds that 'Reparations should not be limited to 'direct' harm or the 'immediate effects' of the crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in the hostilities, but instead the Court should apply the standard of 'proximate cause [footnote omitted]'.[394] The Chamber goes on to specify that 'the Court must be satisfied that there exists a 'but/for' relationship between the crime and the harm and, moreover, the crimes for which Mr *Lubanga* was convicted were the 'proximate cause' of the harm for which reparations are sought'.[395]

The Decision opts for the *proximate cause* which should be applied in assessing the harm suffered by victims so that the degree of liability for reparations against Mr *Lubanga* may be determined. However, the Chamber does not give any definition of the proximate cause in context of reparations under the ICC regime. The proximate cause is a notion known and applied by tort law according to the maxim *in iure non remota causa sed proxima spectator* (in law the near cause is looked to, not the remote one). A proximate cause can be understood as an event related to a

[392] Rule 85(a) of the RPE.

[393] Rule 85(b) of the RPE. The notion of victim for the purpose of reparations will be discussed in Chapter two of Part two of this dissertation (pp.179ff)

[394] *The 2012 Decision on Principles and Procedures*, para.249

[395] *Ibid*., para.250

legally recognisable injury to be held on to as the cause of that injury.[396] The standard of proximate cause should take into account, in determining the liability of reparations, the closest condition as the legal cause of harm (causa proxima).[397] According to this standard of causation, the scope of recoverable harm must not go up a remote harm but must be an *immediate* and *direct* and *natural result* of a crime.[398]

The standard of proximate cause seems to go beyond the immediate cause applied by the IACtHR inasmuch as it goes up to the *natural* result of a crime. The IACtHR recognised that '[t]o compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured'.[399] In the context of State responsibility, the IACtHR considered that the solution is 'demanding that the responsible party make reparation for the *immediate effects* of such unlawful acts [emphasis added]'.[400] This standard of causation was also adopted by the ECCC reparation regime. Rule 23bis (1)(b) of the Internal Rules of the ECCC as revised on 3rd August 2011, provides that in order for the Civil Party action be admissible, the injury must be a *direct consequence* of the offence, be personal and has actually come into being. This kind of standard of legal causation, that is directness – was also referred to by the UNSC Resolution 687 on Iraq where it states that Iraq is liable under international law for any *direct* loss, damage or injury as a result of its unlawful invasion and occupation of Kuwait.[401] Similarly, the RPE of the Special Tribunal for Lebanon defines a victim as 'A natural person who has suffered physical, material, or mental harm as a *direct result* of an attack within the Tribunal's jurisdiction [emphasis added]'.[402] However, the standard of proximate cause adopted by the Trial Chamber I is similar to the standard of the *proximate result* long time ago provided for by the Rules of Procedures of the Mixed Claims Commission which the United States and Germany established in pursuance to the Agreement between them that was adopted on the 10th August 1922. According to the Rules of Procedures of the Mixed Claims Commission, '[t]he fact that an exceptional war measure was applied to

[396] West's Law and Commercial dictionary defines *proximate cause* as an event 'which, in natural and continuous sequence, unbroken by efficient intervening cause produces injury, and without which the result would not have occurred' (West Publishing Company Editorial Staff, 985. West's Law and Commercial dictionary in five languages. Minnesota: West Publishing Company).

[397] See Caringella F., *op. cit.*

[398] West's Law and Commercial dictionary defines proximate damage as 'the immediate and direct damage and natural result of act complained of, an such as are usual and might have been excepted'

[399] IACtHR, *Aloeboetoe et al. V Suriname* (Reparations and Costs, Judgment of 10 September 1993), para.48

[400] *Ibid*, para.49

[401] Para.16 of the Resolution Res.674 (1990) on Iraq

[402] Rule 2 of the RPE of the Special Tribunal for Lebanon

American-owned bonds is in itself not sufficient to justify a claim for compensation on account of depreciation in value but the claimant will be required to establish by evidence that the damage sustained was the *proximate result* thereof [emphasis added]'.[403]

Nevertheless, the proximate cause retained by the Trial Chamber I or the proximate result is a vague notion. Actually one may ask to what extent harm could be considered as proximate to a crime. The position of the Trial Chamber I seems however to be in accordance with Rule 85 of the RPE which, in defining a natural victim' refers to 'harm as a result of the commission of any crime within the jurisdiction of the Court'. [404] The Rule does not refer to 'direct harm' or 'direct result' except in the case of legal persons whose harm to property has to be *direct*.[405] This leads to a consideration that in the case of natural persons, the harm is *any natural result* of crime either direct or indirect within the context of Rule 85(a) of the ICC.[406] On the contrary, in case of an organisation and an institution (legal person), the harm has to be *direct* as provided for by Rule 85(b) of the RPE of the ICC.

In this context, the Trial Chamber I holds, for example, that the proximate cause criterion, in the *Lubanga* case, should permit 'reparation awards to victims of sexual and gender-based violence, provided that the facts have been established to the relevant standard and the crimes of enlisting and conscripting children under the age of 15 years or using them to participate actively in the hostilities are the proximate cause of the sexual violence'.[407] The adoption by the Chamber of the principle of the proximate cause has already constituted a motive of appeal against the Decision by the defence. The defence considers that the 'the Chamber's 'proximate cause' criteria is excessively vague'.[408] The Chamber granted leave to appeal in regard to this matter, though at the time of writing the Appeals Chamber had not as yet delivered its verdict. Arguably, the vagueness of the standard of proximate cause will be diluted by balancing it with the *but/for test*.

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[403] Rules of the Procedure of the Mixed Claims Commission United States and Germany Established in pursuance of the Agreement between the United States and Germany dated August 10, 1922, (As adopted November 15, 1922, and amended from time to time, to December 31, 1932.]), Appendix III, *Order of May 7, 1925, announcing rules applicable to debts, bank deposits, bonds, etc.* Rule 14, [Online] available at: <http://untreaty.un.org/cod/riaa/cases/vol_VIII/469-511.pdf>, accessed on 13th June 2013.

[404] Rule 85(a) of the RPE of the ICC

[405] See Rule 85(b) of the RPE of the ICC

[406] Issues relating to direct and indirect victim are discussed in Chapter two of Part two of this dissertation (pp.188ff).

[407] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911, para.32.

[408] *Ibid*, para.9

2. The '*but/for test'* (para.250 of the *2012 Decision on Principles and Procedures*)

In the Lubanga case, the Trial Chamber I assured that the right of both the accused and the victim would be safeguarded in applying the standard of 'proximate cause' by balancing proximate cause with the *but/for* test. In this respect, the *2012 Decision on Principles and Procedures* holds that:

> […] as to the relevant standard of causation to be applied to reparations, and particularly to the extent that they are ordered against the convicted person, the Chamber needs to reflect the divergent interests and rights of the victims and the convicted person. Balancing those competing factors, at a minimum the Court must be satisfied that there exists a 'but/for' relationship between the crime and the harm and, moreover, the crimes for which Mr Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought. 'Damage, loss and injury', which form the basis of a reparations claim, must have resulted from the crimes of enlisting and conscripting children under the age of 15 [years] and using them to participate actively in the hostilities'.[409] This means that after conviction the Court shall consider whether *Lubanga* can also be found responsible for particular harm alleged by [the] victims [footnotes omitted]. [410]

The 'but/ for test*'* introduced by the Trial Chamber's Decision is also applied in tort law.[411] Whereas, the proximate cause is considered as legal cause, the 'but /for test*'*, also called factual caution,[412] is used to determine the cause-in-fact. It refers to the theory of the *conditio sine qua non* according which a conduct is a cause of an event when that conduct is considered as a necessary condition of the occurrence of the event[413]: would the harm have occurred 'but for' the conduct of the responsible party?[414] In determining whether the convicted person's crime caused or did not cause victim's harm, the Court will determine whether the harm would have happened even if the offender had not committed the crime. In the other words, for the purpose of holding the defendant liable for reparations, it must be shown that, 'but for' the defendants' act, the event would not have occurred;[415] the act must be a *causa sine qua non* ('cause without which')[416] of the harm suffered by a victim.

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[409] *The 2012 Decision on Principles and Procedures*, para.247

[410] *The 2012 Decision on Principles and Procedures*, para.250

[411] See for example Scheines R., op. cit., p. 625.

[412] See for example McCarthy, C., 2012, *op. cit*., p. 137.

[413] Caringella explains that '[s]econdo la teoria della *condicio sine qua non*, la condotta è causa d'evento quando è condizione necessaria dello stesso, da accertare ex post attraverso il c.d. giudizio confrontale. La condotta è accertabile come causa necessaria quando eliminandola mentalmente dal processo causale, l'evento verrebbe meno' (Caringella F., 2011. Manuale di Diritto Civile. Vol. I. La responsabilità extracontrattuale. Roma : Dike Giuridica Editrice, p. 114.

[414] McCarthy, C., 2012, *op. cit*., p.137

[415] Law, J. and Martin E.A.(ed.), 2009. A Dictionary of Law. 7th ed., Oxford: Oxford University Press, p.81

[416] *Idem*

The *but/for test* has been used in the context of State responsibility and can be applied, *mutatis mutandis* in the case of individual responsibility under the ICC Statute. To illustrate the case where the 'but/for test', or the standard of factual caution, was used I may refer to the *Bosnia and Herzegovina v. Serbia and Montenegro.* In this case when the ICJ had to rule on the claim for reparations and before it reached its conclusion reasoned as follows:

> [The Court] must ascertain [as to] whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent with the consequence that the Respondent should be required to make reparation for it, in accordance with the principle of customary international law […]. In this context, the question just mentioned, whether the genocide at Srebrenica would have taken place even if the Respondent had attempted to prevent it by employing all means in its possession, becomes directly relevant, for the definition of the extent of the obligation of reparation borne by the Respondent as a result of its wrongful conduct. The question is whether there is a *sufficiently direct and certain causal nexus* between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established *only if* the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica *would in fact have been averted if the Respondent had acted in compliance with its legal obligations* [emphasis added]'.[417]

In this case, although the ICJ does not use the term *but/for* test in its reasoning does however apply this standard of factual causation sought in testing the nexus between an act and its consequences. This reasoning can be applied by the ICC, especially in the case of responsibility of commanders and other superiors.[418] Nevertheless, whilst the *but/for test* may easily be applied where a convicted person acted as an individual, its application can be complicated where the offender committed a crime 'jointly with another or through another person'[419] also criminally responsible. In some cases, the co-perpetrator will not be prosecuted by the ICC. It is worth noting here that while the perpetrator's contribution to the crime is relevant to his or her conviction, reparations focus on the perpetrator's contribution to the consequence of the crime's victim.[420] Will the Court, in the case of co-perpetrators- opt for liability *in solidum* for all indivisible harm that results from a crime?[421] Or will it strive to share liability for reparations between them? This remains an open question.

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[417] ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Case concerning application of the Convention on the prevention and punishment of the crime of the crimes of genocide (Judgment of 26 February 2007)

[418] For details on criminal responsibility of commanders and other superiors see Art.28 of the ICC Statute.

[419] See Art.23 (a) of the ICC Statute. According to this article, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

[420] Dwertmann, E., *op. cit*., p. 71.

[421] Some national criminal justice systems adopted the approach of holding a co-perpetrator liable for reparation *in solidum* but they provide a mechanism that enables a perpetrator who pays a full award for reparation to recover his share of any joint liability. This mechanism is not provided for by ICC reparation regime (See McCarthy, C., 2012, *op. cit.*, pp. 130-145).

It should be admitted that the 'but/for test' as well as the proximate causation is an ambiguous notion whose definition is elusive. Nevertheless, the *but/ for test* contemplated by Para.250 of the *2012 Decision on Principles and Procedures* intervenes to restrict the scope of the proximate cause provided for by para.249 of the Decision. This requires that the Court should apply the two principles case by case. In the context of Rule 85(a) – that is natural persons - by combining the proximate cause criteria and the *but/for text*, the Court should determine where to draw the line on the degree of proximate causation required in determining the extent of offender's liability for reparations. In the case of Rule 85(b) of the RPE of the ICC – that is legal person – the Court will apply direct causation and '*but/for'test*. Before deciding on proximate or direct causation, the Court must decide on the truth of the cause-in-fact question (*but/for test*): was the harm, loss or injury suffered by the victim caused by the crimes committed by a convicted person?[422] Such a nexus could be considered as established only if the Court were able to conclude from the case and with a sufficient degree of certainty that the harm, loss or injury suffered by a victim would not have occurred if the offender had not committed the crime.

B. Recoverable harm encompasses all forms of damage, loss and injury including material, physical and psychological harm (para.229 of the *2012 Decision on Principles and Procedures*)

The ICC reparation regime does not specify recoverable harm. The *2012 Decision on Principles and Procedures* seems to fill the gap by striving to definite the term harm. As for the issue of recoverable harm, the *2012 Decision on Principles and Procedures* refers to *harm* as all forms of damage, loss and injury provided for by Art.75(1)(s2) of the ICC Statute. It does not list or define a recoverable harm but recognises that 'compensation requires a broad application, to encompass all forms of damage, loss and injury, including *material*, *physical* and *psychological harm* [emphasis added]'.[423]

The Trial Chamber I, in the *Lubanga* case, hold that the term *harm* 'denotes 'hurt, injury and damage'.[424] The definition was previously given by the Appeal Chamber which held that '[t]he word 'harm' in its ordinary meaning denotes hurt, injury and damage. It carries the same meaning in legal texts, denoting injury, loss, or damage and [the same] is the meaning of 'harm' in rule 85

[422] Scheines, R. *op. cit*., p.625

[423] *The 2012 Decision on Principles and Procedures,* para.229

[424] *Ibid*, para.228

(a) of the Rules'.[425] After defining the concept of harm, the *2012 Decision on Principles and Procedures* goes on to hold that 'compensation requires a broad application, to encompass all forms of damage, loss and injury, including *material*, *physical* and *psychological* harm [emphasis added]'.[426] The Decision determines that, '[t]he harm does not necessarily need to have been direct, but it must have been personal to the victim'.[427] By deciding on forms of recoverable harm, the Trial Chamber complies with previous decision of the Court regarding forms of harm referred to by Rule 85 of the RPE of the ICC which defines a victim. It is also in accord with international human right law which suggests different forms of recoverable harm.

In the *Lubanga* case, the Appeal Chamber found that *material*, *physical*, and *psychological* harm all fall under the definition, but only insofar as the harm is suffered personally by the victim (personal harm).[428] It is notable that these forms of recoverable harm have been recognised by Internal Rules of the ECCC, which provides that in order for Civil Party action to be admissible, the injury must be 'physical, material or psychological'.[429] Likewise, the IACtHR noted that victims suffer 'not only materially, but also other sufferings and damages of a psychological and physical nature and in their life projects, as well as other potential alterations of their social relations and to the dynamics of their families and communities'.[430] In the same vein, the 2005 UN Basic Principles also contemplates physical or mental harm, material damages and moral harm as suggested forms of recoverable harm.[431] In this respect, it is also worth noting that the UNCC reparation regime, which was established not on the basis of international humanitarian law but general international law,[432]

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[425] *ICC, The Prosecutor v Thomas Lubanga*, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, par. 31.

[426] See *The 2012 Decision on Principles and Procedures*, para.229

[427] *Ibid*, para.228

[428] *ICC, Prosecutor v Lubanga*, Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18th January 2008, 11th July 2008, ICC-01/04-01/06-1432, par. 32. See also *Prosecutor v Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10th June 2008, ICC-01/04-01/07-579, paras 69, 71 and 115; ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22nd March 2006), 17th January 2006, ICC-0I/04-101-tEN-Corr., paras 132, 147, 162 and 173; ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Correction version, 14th December 2007, ICC-02/05-111-Corr, para. 40 and ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2nd April 2008, ICC-01/04-01/07-357, p.11.

[429] Rule 23bis (1) (b) of the Internal Rules of the ECCC as revised on 3rd August 2011

[430] See IACtHR, '*Las Dos Erres' Massacre v Guatemala*, (Judgment of 24th November 2009, Preliminary Objection, Merits, Reparations, and Costs) para. 226.

[431] See Principles 8 and 20 of the 2005 UN Basic Principles.

[432] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit*., p. 324 (footnote no.15)

recognised a wide range of recoverable harm, including 'departure costs, illegal detention, torture and witnessing of traumatic events, personal injury and death, personal property, bank accounts and securities, loss of income, real property, and various types of business losses and public services expenditures, including evacuation costs incurred by Governments.'[433] This demonstrates that, by recognising different forms of recoverable harm, the *2012 Decision on Principles and Procedures* takes the same path of international law. The Decision does not only recognise the same forms of recoverable harm but also strives to specify without limiting the scope of each categories of harm.

1. The scope of physical harm (para.230 (ex. a) of the *2012 Decision on Principles and Procedures*)

The concept of *physical harm* is not explained by the *2012 Decision on Principles and Procedure*. By giving an example the Decision simply states that physical harm may include, for an individual, loss of the capacity to bear children.[434] However, the early case law of the ICC in the context of participation of the victims in criminal proceedings demonstrates that physical harm includes among others, injury by gunshots,[435] beatings and torture,[436] detention, denial of medical treatment and limited access to food.[437]In absence of any definition of physical harm, these examples are to be considered as not exclusive.

International law does not give a specific definition of physical harm which is sometimes defined by examples of forms of harm it may include. The Governing Council of the UNCC for instance gave a similar definition, by examples, where it defines *serious personal injury* as meaning dismemberment, permanent or temporary significant disfigurement, such as substantial change in one's outward appearance, permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system, any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.[438] The scope of

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[433] *Ibid*, p.324

[434] *The 2012 Decision on Principles and Procedures*, para.230

[435] ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case, 10 June 2008, ICC-01/04-01/07-579, paras 71 and 115

[436] *Ibid*, paras 69 and 67

[437] *ICC, Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Correction version, 14th December 2007, ICC-02/05-111-Corr, para.40

[438] See the Decision S/AC.26/1991/3 (taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18th October 1991, Personal Injury and Mental Pain and Anguish), p.2.

physical harm is not limitative. For example the UNODCCP observes that victims may suffer, after a crime, 'a range of physical effects, including insomnia, appetite disturbance, lethargy, headaches, muscle tension, nausea and decreased libido'.[439] This may likewise include physical rape, sexual enslavement, assaults and battery, and other similar acts.[440] Similarly, the ECCC noted that the term 'harm' can be used interchangeably with the term 'injury' and thereafter held that physical injury denotes biological damage, anatomical or functional. The ECCC has described physical harm as a wound, mutilation, disfiguration, disease, loss or dysfunction of organs, or death.[441]

In short, physical harm can be understood as 'any physical injury to the body, including an injury that caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement. In no event shall physical harm include mental pain, anguish, or suffering, or fear of injury'.[442]

2. The scope of moral harm (para.230 (ex. b) of the *2012 Decision on Principles and Procedures*)

Like physical harm, the *2012 Decision on Principles and Procedures* when recognising moral harm as recoverable harm does not give its definition, but implicitly notes that moral and non-material damage may result 'in physical, mental and emotional suffering'.[443] At the outset it can be deduced from this holding that a single act may cause to victim both physical and moral harm. In this context, moral harm may refer to emotional or psychosocial harm. The early case law of the ICC shows that moral harm includes, *inter alia*, emotional suffering related to the loss of family members, forced recruitment into rebel movements and participation in hostilities resulting to continuous psychological problems,[444] emotional and physical suffering related to enslavement and detention,[445] and displacement of families.[446]

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[439] United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, 1999. Handbook on Justice for Victims. *On the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power*. New York: UNODCCP, p.4

[440] Markus Funk, *op. cit*., p. 101

[441] ECCC, *KAING Guek Eav alias Duch*, Appeal Judgement of 3rd February 2012, para.415

[442] See 6 CFR 25.2 (Title 6 - Homeland Security; Chapter I - Department Of Homeland Security, Office Of The Secretary; Part 25 - Regulations To Support Anti-Terrorism By Fostering Effective Technologies), [Online] available at : <http://www.law.cornell.edu/cfr/text/6/25>, accessed 12th April 2013.

[443] *The 2012 Decision on Principles and Procedures*, para.230

[444] ICC, *Prosecutor v Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008, ICC-01/04-01/07-357, para. 11.

[445] ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS

In the same vein, the Trial Chamber of the ECCC, in the *Kaing Guek Eav* case, held that '[i]n addition to physical suffering, the injury in question may also be psychological and include mental disorders or psychiatric trauma, such as post-traumatic stress disorder'.[447] The Supreme Court Chamber added that '[t]he psychological injury results from uncertainty and fear about the direct victim's fate, knowledge of their suffering, or the loss of the sense of safety and moral integrity. In grave or prolonged cases, psychological injury may lead to physical injury by causing various ailments [footnotes omitted]'.[448] Likewise, the moral harm could also refer to the terms 'mental pain and anguish' adopted by the Governing Council of the UNCC.[449] According to the Governing Council, following persons may experience moral harm: ' (a) A spouse, child or parent of the individual suffered death; (b) The individual suffered serious personal injury involving dismemberment, permanent or temporary significant disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (c) The individual suffered a sexual assault or aggravated assault or torture; (d) The individual witnessed the intentional infliction of events described in subparagraphs (a), (b) or (c) on his or her spouse, child or parent; (e) The individual was taken hostage or illegally detained for more than three days, or for a shorter period in circumstances indicating an imminent threat to his or her life; (f) On account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained, the individual was forced to hide for more than three days; or (g) The individual was deprived of all economic resources, such as to threaten seriously his or her survival and that of his or her spouse, children or parents, in cases where assistance from his or her Government or other sources has not been provided'.[450]

The Governing Council recognised that the fact of being 'deprived of all economic resources' may also cause moral harm. It is not uncommon that loss of property is considered as cause of moral damages. For example, in *Loizidou v Turkey* an award was made in respect of anguish and frustration from being deprived of use of property.[451] A number of additional examples would be given to demonstrate how moral damage has been recognised at international level as

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1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22 March 2006), 17 January 2006, ICC-0I/04-101-tEN-Corr, para.147

[446] ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Correction version, 14 December 2007, ICC-02/05-111-Corr., para.40

[447] ECCC, *KAING Guek Eav alias Duch*, Judgement, 26th July 2010, para.641

[448] ECCC, *KAING Guek Eav alias Duch*, Appeal Judgement of 3rd February 2012, para.417

[449] See the Decision S/AC.26/1991/3 (taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18th October 1991, Personal Injury and Mental Pain and Anguish), p.2.

[450] *Idem*

[451] Barker, J., *op. cit*., p. 604.

recoverable harm. The ECtHR for example recognised non-pecuniary harm as including pain and suffering.[452] In the same vein, in the *Lusitania* arbitration, the arbitral commission stated that there can be no doubt that an injured person is 'under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position, or injury to his credit or to his reputation'.[453] National laws likewise recognise this form of moral harm. For example in Belgium, compensation 'is payable for pain and suffering by way of moral damages and, in appropriate cases, for loss of appearance (*préjudice esthétique*) and loss of marriage prospects (*pretium voluptatis*)'.[454]

Although, the assessment of damages for such injuries cannot be made using a precise mathematical formula, and their evaluation in economic or financial terms is objectively difficult,[455] this does not render them unrecoverable.[456] These listed but not limited examples of acts that may cause moral harm would inspire the ICC in deciding on moral harm. In many cases moral harm would be proven by presumption. In such a case a convicted person would bear the burn of contrary proof.[457]

3. The scope of material harm (para.230 (ex.c) of the *2012 Decision on Principles and Procedures*)

Without purporting to define material harm, the *2012 Decision on Principles and Procedures* simply mentions that material harm may include 'lost earnings and the opportunity to work; loss of, or damage to, property; unpaid wages or salaries; other forms of interference with an individual's ability to work; and the loss of savings'.[458] In this regard, it is worth remembering that

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[452] McCarthy, C., *op. cit*., 2009, pp. 261-262.

[453] *Idem*

[454] In the UK, 'The level of damages for pain and suffering, at least when judged by English standards, is quite high – for example, an award of […] £78,000 […] for *moral damages* and an additional […] £15,500 […] in respect of *préjudice esthétique* and […] £ 22,500 […] for *pretium voluptatis* may be expected in a case of paraplegia, where the victim is a single woman aged 20 at the time of the injury' (Van den Wyngaert C., 1996. National Report on Crime Victim Compensation in Belgium. In: D. Greer, ed., 1996. . *Compensation Crime Victims, A European Survey*, Freiburg im Breisgau: Ed. Iuscrim, p.74). In respect of the *préjudice esthétique*, Van den Wyngaert assumes that a lower award will be made if the injured person is a man (*Idem*).

[455] According to the 2005 UN Basic Principles '*Compensation* should be provided for any economically assessable damage (Principle 20). Likewise, the *2012 Decision on Principles and Procedures* held that 'Although some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted' (para.230).

[456] McCarthy, C. *op. cit*., pp. 261 - 262.

[457] See discussions made on the issue relating to standard and burden of proof in Chapter two of Part two of this study (pp.249ff).

[458] *The 2012 Decision on Principles and Procedures*, para.230

the Trial Chamber I issued the Decision in the context of the *Lubanga* case. Although the principles established by the Chamber may be applied to future similar cases, they are principally established in the context of a particular case. Consequently, the Chamber could not imagine all kind of forms of material harm. Moreover, there may be other forms of harm which could not be radically included in material harm or in moral harm.

Material harm sometimes considered as a financial impact of crime is a little well documented. Such kind of damage may result for example to the pillaging of the victim's personal belongings, destruction of household items, cattle, goats, and sheep, or the destruction of the victims' home.[459] In short, material may refer 'to a material object's loss of value, such as complete or partial destruction of personal property, or loss of income'.[460]

Besides the examples given as physical harm, moral harm, material and non-material harm, the *2012 Decision on Principles and Procedures* extents the list of forms of harm by mentioning *costs*. Are costs substantially different from material harm? Costs born resulting from a crime should be considered as material harm. The Decision refers to 'costs of legal or other relevant expertise, medical services, psychological and social assistance, including, where relevant, help for boys and girls with HIV and Aids'.[461] These costs can be classed into the categories named by some commentators as 'consequential pecuniary losses'.[462] In respect of medical services, it is observable that they have been recognised as recoverable harm by regional Court of human rights such as the ECtHR.[463] In the context of State obligation to compensate victim of crimes, the European Convention on the Compensation of Victims of Violent Crimes (1983) provides that compensation shall cover 'medical and hospitalization expenses'.[464] Medical expenses have also been recognised as recoverable harm by domestic laws.[465] The list of this kind of consequential harm – costs - may be extended by other similar damages or loss, such as expenses in obtaining professional counselling

[459] Markus Funk, T., *op. cit*., p. 1 and United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, *op. cit*., p.5

[460] ECCC, *KAING Guek Eav alias Duch*, Appeal Judgement of 3rd February 2012, para.415

[461] *The 2012 Decision on Principles and Procedures*, para.230

[462] See for example McCarthy, C., 2012, *op. cit*., p. 104.

[463] *Aksoy v Turkey* (Application no. 21987/93), Judgement, 18th December 1996), paras111 and 114

[464] Art.4 of the European Convention on the Compensation of Victims of Violent Crimes

[465] 'Medical expenses are for example expressly referred to in the Greek Civil Code, Art. 929; German Civil Code; Argentine Civil Code, Art. 2086; Austrian Civil Code, Art. 1325; Czech Civil Code, s. 449; Polish Civil Code, Art. 444, para.1, Chinese civil code, Art. 199. Reasonable medical expenses can be recovered in full in many European states and the victim is not limited to the least expensive treatment (Shelton, 2005,35)'. For example, in Denmark, according to the Damages Liability Act 1984 - section 1(1) – medical expenses 'cover expenses for reasonable and necessary treatment for the purpose of restoring the injured person to health'(Lerche, M., *op. cit*., p.106).

to come to terms with the emotional impact and the cost of maintaining a child born as a result of a sexual offence.[466] Other indirect material harm can be included on the list such as costs in repairing property or replacing possessions, installing security measures, participation in the criminal justice process, attending the trial, taking time off work or from other income-generating activities, funeral or burial expenses[467] etc.

The three main categories of harm: *physical, moral* and *material harm* could not include all kind of forms of damage. For this reason, the *2012 Decision on Principles and Procedures* determines that 'compensation requires a broad application, to encompass all forms of damage, loss and injury including material, physical and psychological harm'.[468] The list of harm is not limitative. The difficulties to classify different forms of harm break from the Decision. Whereas it can be easy to classify the costs in material harm, it seems difficult to classify the loss of opportunities in material or moral harm. For example the Decision includes, on one hand, lost opportunities in material harm and on other side considers it as an independent category of harm. Yet, one may ask the question of the importance of listing and classifying different kinds of harm that may be recovered through compensation? Although some commentators argue that what may be important for a victim is not necessarily the proliferation of recoverable harm,[469] the determination of recoverable harm could avoid the risk of divergence on the issue which would create uncertainty if not injustice for the victims.

4. Lost opportunities (para.230 (d) of the *2012 Decision on Principles and Procedures)*

Lost opportunities are another category of recoverable harm retained by the *2012 Decision on Principles and Procedures.* In this respect, the Decision specifies that reparations will include lost opportunities 'relating to employment, education and social benefits, loss of status; and interference with an individual's legal rights'.[470] This kind of harm may include pecuniary and non- pecuniary opportunities which may be included in a victim's life plan.[471]

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[466] Greer, D., 1996b. National Report on Crime Victim Compensation in United Kingdom: Great Britain. In: D. Greer, ed., 1996. *Compensation Crime Victims, A European Survey*, Freiburg im Breisgau: Ed. Iuscrim, p.608).

[467] See also Art.4 of the European Convention on the Compensation of Victims of Violent Crimes.

[468] *The 2012 Decision on Principles and Procedures*, para.229

[469] See Coutant-Lapalus, C., *op.cit*. p.17.

[470] *The 2012 Decision on Principles and Procedures*, para.230(d)

[471] The Trial Chamber I noted that the concept of 'damage to a life plan', adopted in the context of State responsibility by IACtHR may be relevant to reparations at the ICC (see *The 2012 Decision on Principles and Procedures*, footnotes no. 418).

The lost opportunities are considered as recoverable harm in the *Lubanga* case where children under the age of 15years were enlisted and conscripted and used to participate actively in hostilities. The act of enlisting and conscripting the children and using them to participate in hostilities has direct effect of depriving the children of the opportunities relating to education and social benefits, and loss of employment, loss of status etc. In this particular case, loss of opportunities of employment may logically refer to pecuniary lost opportunity whereas the rest of losses can be deemed as non-pecuniary loss.

As far as recoverable harm is generally concerned, one may wonder whether the ICC reparation regime includes *lucrum cessans (*the lost profit) as well as *damnum emergens* (the loss suffered). Whilst the *2012 Decision on Principles and Procedures* seems to refer to *damnum emergens* when providing for material harm[472] there is room for doubt on the assumption that they may also include the '*lucrum cessans*'. Can we deduce that loss of opportunities encompasses the loss of future earnings? It is not clear whether this is the intention of the Decision. Another question is whether the Court will hold a convicted person liable for *potential future harm*.

In principle a victim 'is entitled to full compensation for loss of earnings, past and future, actually caused by the injury'.[473] In this respect, at the national level both civil law and common law seek 'to provide a victim with compensation which is exactly equivalent to the earnings which he has lost, or will lose, as a result of his injuries'.[474] Domestic laws recognise both loss of past and future earnings or earning capacity as recoverable harm.[475] Consequently, one may put forward a motion of the transposition to the international legal order of the principle according to which

[472] *The 2012 Decision on Principles and Procedures*, para.230

[473] Raschka, W., *op. cit.* p.25

[474] Greer, D., 1996b, *op. cit*., p.608

[475] For example in France the *Cour de Cassation* considered that future harm is reparable when its realisation is certain and direct result of the crime (ICC, *Prosecutor v Lubanga*, Equipe de la Défense de Monsieur Thomas Lubanga, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations », rendue par la Chambre de première instance le 7 août 2012, 5 Février 2013, ICC-01/04-01/06-2972, para.161). Compensation for future harm is used on rare occasions in England and fairly common, but still controversial, in the United States (Porat, A. and Stein, A. 2009. Liability for Future Harm, [Online] available at: <http://www.law.uchicago.edu/files/file/SSRN-id1457362.pdf>, accessed on 12th April 2013, p. 32). In Hungary claims for future salary increases are allowed provided they are established with some certainty. 'In contrast, in Italy the courts have regards not only to the earning capacity the claimant has already demonstrated but also to the possibilities indicated by his technical and professional training. The Norwegian Penal Code provides that in personal injury and false imprisonment cases compensation for future loss is paid only as seems equitable considering the fault of the acting party and all other circumstances of the case. The Swiss federal *Code des Obligations*, Arts. 45(2), 46(1) specifies 'that damages can be given for loss or detriment to one's future'. The German Civil Code, s.842, specifies that damages can be given for loss or detriment to one's future. In contrast, in China, lost wages are fully recoverable, but no damages are awarded for loss of earning capacity. If a person is injured but able to resume work, he or she cannot recover damages on the theory that the injury will prevent him or her from receiving promotions or otherwise advancing his or her career' (Shelton, D., *op. cit*., p.35).

compensation must cover not only the *damnum emergens*, but also the *lucrum cessans*. A legal justification of such a proposal may be that 'since reparation must be at least equivalent to restitution, compensation should wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed'.[476] However, having regard to the discussions made on the principle *restitutio in integrum*, the motion should be considered with caution. Actually, it is worth remembering that in case of crimes under the jurisdiction of the ICC some situations may occur where a big number of victims and huge damage perhaps combined with indigence of the perpetrator, would not even permit to compensate the *damnum emergens*. In this case, priority should be given to compensation of loss suffered. Since the ICC reparation regime is silent on future harm the *2012 Decision on Principles and Procedures* should have determined the issue. In this regard, one should note that the ECCC reparation regime does not consider future harm as recoverable insofar as it requires that reparable harm must be 'personal and have come into being'.[477] Nevertheless, nothing prevents the ICC to balance all factors and take into account the seriousness of risks of future illness or injury as reparable harm where victims can satisfy the requirement of the standard of proof determined by the Court.[478]

With regard to recoverable harm, it is noticeable that, the *2012 Decision on Principles and Procedures* strives to give some non-exhaustive examples of recoverable harm pertaining to the *Lubanga* case but which may also apply for future similar cases. With respects to recoverable harm, the spirit of the Decision is in accordance with international and national law. With regard to national law, despite differences in procedural rules among various legal systems, especially between civil law and common law jurisdictions, there is little difference in substantive heads of compensation for injury and the basic theory that compensation should be provided and compensable injury includes the same basic elements in virtually all legal systems.[479] Consequently, one may hope that in implementing the principles relating to recoverable harm, the ICC would usefully draw on international law and national laws pursuant to Art.21 of the ICC Statute. Nonetheless, all of these categories of recoverable harm could be summarised into two main categories: pecuniary and non-pecuniary harm. The category of pecuniary harm could encompass all material harm, direct and indirect harm whereas non pecuniary harm could include physical and moral harm.

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[476] Kerbrat, Y., *op. cit*., p.586

[477] See Rule 23(2) of the Internal Rules of the ECCC and ECCC, *Case KAING Guek Eav alias Duch* , Trial Chamber, Judgement of 26th July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para. 640.

[478] For details on the standard of proof see Chapter two of Part two of this dissertation (pp.249ff)

[479] Shelton, D., *op. cit*., p. 35.

I.3.2.3. Principles relating to types of reparations

According to Art.75 (1) and (2) of the ICC Statute victims have a right to reparations '*including* restitution, compensation and rehabilitation'. Although Art.75 of the Statute lists restitution, compensation and rehabilitation as forms of reparations, this list is not exclusive. According to the context of the Art.75, which uses the verb 'including', the three forms of reparations mentioned in the provision are neither exhaustive nor mutually exclusive. This interpretation has led the Trial Chamber I to recognise that '[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate'.[480]

The *2012 Decision on Principles and Procedures* refers to 'restitution, compensation and rehabilitation' as modalities of reparations. But according to the RPE of the ICC, *modalities of reparations* would probably refer to *individual* and *collective* reparations whereas 'restitution, compensation and rehabilitation' should be referred to as *types* or *forms* of reparations. This assumption could be illustrated by Rule 97(2) of the RPE which provides for 'types and modalities of reparations'[481] and Rule 98(3) of the RPE which provides for 'forms and modalities of reparations'. Both Rule 97(2) and Rule 98(3) provide for the possibility of the Court to order reparations on collective basis which would be understood as one of the modalities of reparations. In this dissertation, I refer to the term *type* of reparations to mean reparations such as 'restitution, compensation and rehabilitation' and the term *modality* by referring to individual or collective award for reparations.

Having agreed on the terminology, it is noticeable that the *2012 Decision on Principles and Procedures* lists different types of reparations: restitution, compensation, rehabilitation and other types of reparations. What are the substantial meanings of restitution, compensation and rehabilitation under the ICC reparations regime? Are there other possible types of reparations the Court could find besides the three suggested ones? All of these questions call for the analysis of the different types of reparations contemplated by the *2012 Decision on Principles and Procedures* in the light of the ICC reparation regime.

[480] *The 2012 Decision on Principles and Procedures*, para.222

[481] See also Regulation 110(2) of the RR of the ICC.

A. Restitution (para.223 and 224 of the *2012 Decision on Principles and Procedures*)

The ICC reparations regime provides for restitution as one of the suggested types of reparations; but it does not define the term *restitution* as such. The Trial Chamber I, by striving to achieve its mission of establishing the principles relating to reparations in the *Lubanga* case, did not give explicit definition. Instead of defining the term, the Chamber strived to determine its purposes, which can help to understand the Chamber's position on the meaning of the restitution under the ICC regime. According to the Chamber restitution *should, as far as possible, restore the victim to his or her circumstances before the crime was committed* (footnote omitted).[482]

By such reasoning, one may think that according to the Chamber the concept of restitution equals to reparation as an umbrella encompassing all types of victim's redress provided for by the ICC regime. This conception of the term would raise difficulties in its implementation under the ICC reparations regime. As the Chamber noted, *restitution* in such sense 'will often be unachievable for victims of the crimes of enlisting and conscripting children under the age of 15 [years] and using them to participate actively in the hostilities'.[483] However, the Decision goes on to adopt a narrow sense of restitution which may be in concordance with the context of the ICC Statute. The Decision holds, in its para.224 that '[r]estitution is directed at the restoration of an individual's life, *including a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property* [footnote omitted and emphasis added].' Under the ICC reparations regime, the term restitution should not be confused with reparations in general (1) but should be understood in its strict sense as giving back to a victim what he or she lost or was stolen. In other words restitution is deemed as recovering in kind what a victim had lost (2).

1. 'Restitution' conceived as 'reparations' in general (para.223 of the *2012 Decision on Principles and Procedures*)

As already noted the purpose of reparations before the ICC has the main objective of restoring a victim to his or her circumstances before the crime was committed. Reparation in general is usually understood to include the obligation to erase if possible the effects, both in law and in fact, of the wrongful act.[484] The *2012 Decision on Principles and Procedures* cannot be

[482] *The 2012 Decision on Principles and Procedures*, para.223

[483] *Ibid.*, para.223

[484] Conforti, B., 1993. International Law and the role of Domestic Legal Systems. Dordrecht: Maritinus Nijhoff Publishers, pp.197ff

understood as expecting the purpose to be achieved by restitution alone as one of the suggested type of reparation provided for by Art.75 of the ICC Statute. Paragraph 223 of the Decision determines that restitution 'should, as far as possible, restore the victim to his or her circumstances before the crime was committed'. In this determination the Trial Chamber refers to the IACtHR which established, in the context of State responsibility, that 'the concept of 'integral reparation' *(restitutio in integrum)* entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused'.[485] The reference seems to be irrelevant for the 'integral reparation' to which the IACtHR has referred, in context of State responsibility, could not be applied, even *mutatis mutandis*, to *restitution* as conceived by the ICC reparations regime. The reference could only be relevant in respect with reparation used as an umbrella term to encompass all types of victim's redress including restitution, compensation and rehabilitation. The real risk of confusion between *restitution* and *reparation* requires clarification of the terms. In fact, as Doak notes, 'it is not uncommon for the term 'reparation' to be used interchangeably with terms such as 'compensation', [or], 'restitution' [...] which stems from a common misconception that 'reparation' equates to financial compensation'.[486]

Some scholars such as Harging and Donnat-Cattin consider *restitution* in its wider scope to include financial payment by the offender for harm done, be it material loss, damage or injury. Harging considers restitution as a 'general word to convey the idea of an offender making amends through service or money to a victim or named substitute'.[487]Likewise, Donnat-Cattin argues that the principle of *fair restitution* to victims and their families 'should include, the return of property, the payment of the harm or loss suffered, the reimbursement of expenses incurred as a result of the victimisation [including legal and medical assistance], the provision of services and the restoration of rights'.[488] The Trust Fund for Victims also seems to consider 'restitution' in such broadest sense.[489] According to such a school of thought, restitution means reparation in general. Such position was taken by the IACtHR which, in *Maritza Urrutia v. Guatemala,* reasoned in sense that, whenever possible 'reparation of the damage caused by the violation of an international obligation requires full *restitution* (*restitutio in integrum*), which consists in the re-establishment of the

[485] See the *2012 Decision on Principles and Procedures*. para.223 (footnote no 407).

[486] Doak, J., 2008, *op. cit*., p. 207

[487] Harging (1982, quoted by Zedner, L., *op. cit*., p.152)

[488] Donat-Cattin, D., 2008, *op. cit*., p. 1403.

[489] See Trust Fund For Victims, 2011. Trust Fund's First Report on reparations in Lubanga Case. Situation in the Democratic Republic of the Congo in the case Prosecutor v Thomas Lubanga Dyilo, [Online] available at: <http://www.trustfundforvictims.org/node/28/documents/pdf>, accessed on 17th April 2012, pp.11 and 111.

previous situation'.[490] This conception is also endorsed by the 1985 UN Basic Principles which stipulates that fair *restitution* 'should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights'.[491] This kind of 'restitution' refers to reparations in general and could also be understood as 'restoration. Indeed, as Braithwaite specifies, the following are important for a victim to be restored : 'restoring property loss; restoring injury; restoring a sense of security; restoring dignity; restoring a sense of empowerment; [...] restoring harmony based on a feeling that justice has been done [and] restoring social support'.[492] In addition, restitution in its broad sense may refer to 'redress' since the term 'redress' has a fairly broad meaning. Black's Law Dictionary defines 'redress' as '[s]atisfaction for an injury or damages sustained; [d]amages or equitable relief and then mentions the terms 'recovery' and 'restitution as synonyms'.[493] Bottigliero considers and uses the term *redress* as 'the umbrella term to encompass broadly redress-related concepts as they are employed in various legal regimes dealing with the question of reparations'.[494]

The forms or types of reparations suggested by Art.75 (1-2) of the ICC Statute are almost the same as those found in Art.34 of the Draft articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001 which provides that 'full reparation for the injury caused by the internationally wrongful act shall take the form of *restitution, compensation and satisfaction* [emphasis added]'. In this regard, some commentators, such as Kerbrat, argue that the question of 'the interaction of the forms of reparation in the international legal order was resolved by the International Law Commission (ILC) in an apparently simple way, structured on the basis of a hierarchical principle: priority is to be given to *restitution*; then immediately following restitution are the forms of reparation by equivalent: compensation first and satisfaction where compensation is not possible'.[495] Nevertheless, confusion still reigns on these concepts since Article 35 of the Draft on Responsibility of States for Internationally Wrongful Acts defines 'restitution' as re-establishing 'the situation which existed before the wrongful act was committed''. Such a definition does not defer from that given by Principle 8 of the 1985 UN Basic Principles.

[490] IACtHR, *Maritza Urrutia v Guatemala* (Judgement of 27 November 2003), para.143

[491] See Principle 8 of the 1985 UN Basic Principles.

[492] Braithwaite (1996, quoted by Strang, H., *op. cit*., p. 45)

[493] Black's Law Dictionary (fifth Edition 1979, quoted by Bottigliero, I., *op. cit*., p.5)

[494] Bottigliero, I., *op. cit*., p.5

[495] Kerbrat, Y., *op. cit*., p. 573; see also Art.36 and 37 of Articles on Responsibility of States for Internationally Wrongful Acts.

Presumably, Paragraph 223 of the *2012 Decision on Principles and Procedures* which uses the term restitution in its broad meaning has drawn from the school of thought which considers restitution as reparations in general. But, there are good reasons for arguing that restitution contemplated by the ICC reparations regime is to be understood in its strict sense as referring to return of property or recovering in kind what had been lost.

2. Restitution as recovering in kind what a victim lost (para.224 of the *2012 Decision on Principles and Procedures*)

Arguably, restitution conceived in the broad sense should not comply with the context of the ICC Statute which details reparations unto different types of reparations. In the context of Art.75 of the Statute the term *restitution* does not intend to encompass all types of victim's redress contemplated by the ICC reparations regime like reparation in general.

The first form of reparation expressly mentioned in Art.75 (1) and (2) of the ICC Statute is 'restitution'. As Henzelin *et al.* notes, restitution is the primary form of reparation provided for 'in general international law and most domestic criminal proceedings'.[496] In the absence of a coherent definition of the term 'restitution', it has been used to convey a number of differing meanings from the narrow to the broad one and seems to be a confusing term that needs to be clarified in the light of the context of the ICC Statute. Paragraph 224 of the *2012 Decision on Principles and Procedures* seems, contrary to the Para. 223, to adopt the narrow sense of *restitution* as provided for by the ICC reparations regime. According to Para.224 of the Decision restitution may include 'a return to his or her family, home and previous employment; providing continuing education; and returning lost or stolen property'.[497]

According to the Chamber's reasoning *restitution* refers to the act of allowing a victim to *recover in kind* what he or she lost. Restitution in its stricter sense could be understood in circumstances of recovering tangible assets. However, as the Trial Chamber I held, restitution could be contemplated in case of 'return to his or her family, home and previous employment' which a victim lost as result of crime. Restitution as return to tangible assets was contemplated by the ICTY and ICTR regimes. The Statutes of these tribunals do not expressly use the term 'restitution' but provides for 'the return of any property and proceeds acquired by criminal conduct, including by

[496] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.331

[497] *The 2012 Decision on Principles and Procedures*, para.234

means of duress, to their rightful owners'.[498] However, Rule 105 of both the ICTY and ICTR's RPE, titled 'Restitution of property', explicitly provide that the Trial Chamber where it is able to determine the rightful owner on the balance of probabilities, 'shall order the *restitution* either of the *property* or *the proceeds* or make such other order as it may deem appropriate [emphasis added]'.

The strictness of the term *restitution* under the regimes of both the ICTY and ICTR may be similar under the ICC regime. Art.75 (1) and (2) of the ICC Statute use the term 'restitution' without specifying that it refers to return of property. However, the Rule 94(1)(d) of the RPE of the ICC provides for the procedure for reparations upon request, and the sense it gives to the term 'restitution is explicit. The Rule provides that where '*restitution* of assets, property or other tangible items is sought, the 'victim's request for reparations under article 75 shall be made in writing and shall contain a description of them'. The same language is found in Rule 218(3)(c), of the RPE of the ICC which requires a reparation order to be clear by specifying the scope and nature of the reparations ordered by the Court, including, where applicable, 'the property and assets for which *restitution* has been ordered'. The analysis demonstrates that under the ICC reparation regime, restitution seeks to restore the victim to the financial situation and will only take the form of return of assets, property or other tangible items.

Consequently, restitution as return to family, home and previous employment is arguably a precision of the scope of restitution provided for by art.75(1) given by the Trial Chamber I but different from the broad meaning as already discussed. Allowing a victim to return to family, home and previous employment which a victim lost as the result of crime can be seen as a sort of restitution in kind. Whereas restitution in sense of return of property and other tangible assets would apply in both case of natural victim and legal person, restitution in sense of return to family, home and previous employment will only apply in the former case.[499] This conception of restitution in kind has been adopted by the 2005 UN Basic Principles which provides that *restitution* means restoration to the *status quo* but precise that it 'includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.[500] In this regard restitution in kind may also

[498] See Art. 24(3) of the ICTY Statute and Art 23(3) of the ICTR Statute

[499] For this reason the Trial Chamber held, in the *Lubanga* case, that 'Restitution may be apposite for legal bodies such as schools or other institutions' (*The 2012 Decision on Principles and Procedures*, para.225)

[500] See Principle 19 of the 2005 UN Basic Principles.

mean 'the good unlawfully confiscated is restored to its owner, the act which caused the injury is annulled, etc.'[501]

One may assume that restitution must not be confused with reparation in general and the latter must not be confused with compensation or rehabilitation. Restitution in its strict sense is one of the types of reparations which intend to allow a victim to *recover in kind* what he or she lost. Beyond such an interpretation, we inter into the field of 'compensation' or rehabilitation as other types of reparations provided for by the ICC Statute.

B. Compensation (paras 226 and 230 of the *2012 Decision on Principles and Procedures*)

The second form of reparations provided for by Art. 75(1) and (2) of the ICC Statute is 'compensation'. At the outset, it is worthy alerting the reader of the fact that the ICC Statute uses the term 'compensation' for two different situations: compensation to an arrested or a convicted person contemplated by Art.85 of the ICC Statute and compensation to a victim of crimes under the ICC jurisdiction provided for by Art.75 of the Statute. Compensation to an arrested or a convicted person is contemplated under certain circumstances. The right to compensation is granted in case of unlawful arrest or detention and when a conviction has later been reversed due to a miscarriage of justice and the convicted person has suffered punishment. Compensation to an arrested or a convicted person due to a miscarriage does not fall under this study.

Compensation for harm a victim suffered can be understood as something, especially money that is given to the victim because of the harm he or she experienced. Generally, compensation is required, when our purposes are thwarted from being deprived of the means to pursue them.[502] Under the ICC reparation regime compensation should not be confused with reparation in general or restitution. The *2012 Decision on Principles and Procedures* clarifies the context of compensation provided for by the ICC Statute by defining it as a form of economic relief (1) and bringing out deciding factors for such a type of reparations (2).

[501] Kerbrat, Y., *op. cit*., p. 573. The three terms (*restitutio in integrum*, *restitutio in pristinum*, or *naturalis restitution*) have the same meaning and can literally be translated as 'putting back to initial state'.

[502] Davis *et al*. (1987, quoted by Zedner, L., *op. cit*., p. 157)

1. Compensation as a form of economic relief (para.230 of the *2012 Decision on Principles and Procedures)*

According to the *2012 Decision on Principles and Procedures* '[a]lthough some forms of damage are essentially unquantifiable in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted [footnote omitted]'.[503]

Different kinds of recoverable harm which may result from a crime and which include material harm, physical harm and moral harm have been already discussed. Moreover, it has been observed how restitution, under the ICC reparation regime is conceived as restitution in kind. Although restitution seems to have primacy in the context of the ICC Statute[504] as well as in international law,[505] in many cases restitution in kind is not possible.[506] Consequently, as some scholars such as Barker, observe, compensation becomes 'a prevalent remedy, typically in cash or its equivalent, calculated to make good elements of loss of, or injury to, legally protected interests'.[507] This conception of compensation is recognised by other scholars such as Henzelin *et al.* who consider that compensation is to make good, normally in monetary terms, any economically assessable damage suffered by the victim, or victim's family, as a result of the crimes for which the accused was convicted.[508]

Even though in case of core crimes such as those under the jurisdiction of the ICC some victims could consider monetary compensation 'as a kind of mockery',[509] the fact is that 'in practice monetary compensation is likely to be the most common form of compensation'[510] in international

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[503] *The 2012 Decision on Principles and Procedures*, para.230

[504] Actually, the fact that Art.75 of the ICC Statute mentions first 'restitution' among other types of reparations may lead to considering this as a textual indication that the primacy is given to restitution (see McCarthy, C., 2012, p.160)

[505] *Idem*

[506] For example 'restitution will not be possible in the event of the disappearance or fundamental alteration of the property whose return is requested' (Gray, C., 2010. The Different Forms of Reparation : Restitution. In : J. Crawford, A. Pellet and S. Olleson, eds., 2010. *The Law of International Responsibility*. Oxford (US): Oxford University Press, pp.596)

[507] Barker, J., *op. cit*., p.599

[508] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.332

[509] But, on the other hand, not granting the compensation when the parents or relatives choose to ask for it would perhaps be even more insulting and degrading'(Lappi-Seppala, T., 1996. National Report on Reparation in Criminal Law in Finland. In: A. Eser and S. Walther, eds., 1996. *Reparation in Criminal Law, International Perspectives, V*ol. 1, Freiburg im Breisgau: Edition Iuscrim, p. 375 footnote no. 187).

[510] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.332

law in general and particularly in international human rights.[511] As such, compensation may cover direct and indirect material harm, physical and moral harm as already mentioned. However, taking into account the nature of a harm sustained by a victim the pecuniary compensation may be completed by fair non-pecuniary compensation[512] as it will be demonstrated in this Section.[513]

2. Factors required for compensation to be ordered (para.226 of the *2012 Decision on Principles and Procedures*)

After providing a definition of the concept of compensation under the ICC reparation regime, the *2012 Decision on Principles and Procedures* goes further to set up three deciding factors for compensation. According to the Decision, compensation should be considered when:

a. the economic harm is sufficiently quantifiable;
b. an award of this kind would be appropriate and proportionate (bearing in mind the gravity of the crime and the circumstances of the case); and
c. the available funds mean this result is feasible.[514]

These requirements seem naturally cumulative. In fact, according to the Decision, compensation should not be possible where the harm is economically quantifiable but lacking in funds to cover it. Likewise, the harm may be economically quantifiable and funds are available to cover it, but compensation could be an inappropriate type of reparations or may not in effect meet the requirements of the principle of proportionality due to different circumstances. The effectiveness of compensation, which in theory appears as important type of reparations, should depend on the three preconditions outlined above.

a. The existence of economic harm sufficiently quantifiable?

The first requirement needed by the *2012 Decision on Principles and Procedures* for compensation is the existence of an 'economic harm sufficiently quantifiable'. Economic harm sufficiently quantifiable as one of the precondition of deciding compensation raises a number of questions. Does it mean that only economic harm or pecuniary damage should be repaired by means

[511] McCarthy, C., 2009, *op. cit*., p.262

[512] See discussion made on possible combination of different types of reparations in section *I.3.2.3.*of this chapter (p.151).

[513] See Possible combinations of various types of reparations at p.155ff

[514] *The 2012 Decision on Principles and Procedures*, para.226

of compensation? What is the meaning of 'economic harm sufficiently quantifiable'? Is it practicable to economically evaluate all kind of recoverable harm? All of these questions require us to dig deeper and grasp how the threefold deciding factors may be relevant to compensation under the ICC reparation regime.

The 'economic harm sufficiently quantifiable' may at first glance be understood as actual economic damage, measureable, quantifiable damages, like lost wages, real or personal property and the like. What about non-pecuniary damage, such as pain and suffering? Cannot this kind of harm fall under harm recoverable by means of compensation? The *2012 Decision on Principles and Procedures* does not seem to exclude non-pecuniary harm from compensation since it provides that 'compensation requires a broad application, to encompass all forms of damage, loss and injury, including material, physical and psychological harm'.[515] The Decision goes on to dispel the risk of misunderstanding the condition of 'economic harm sufficiently quantifiable' where it provides '[a]lthough some forms of damages are essentially *unquantifiable* in financial terms, compensation is a form of economic relief that is aimed at addressing, in a proportionate and appropriate manner, the harm that has been inflicted'.[516] Yet, one may ask whether there is no contradiction between the two qualifying adjectives *quantifiable* and *unquantifiable* which are both referred to by the Decision.

It should be observed that the ILC Articles similarly limits compensation to 'financially assessable damage'.[517] But, it is notable that under the ILC Articles the qualification 'financially assessable' in context of State responsibility 'is intended to exclude compensation for what is sometimes referred to as 'moral damage' to a State'.[518] Indeed, in the context of the ILC Articles, 'financial assessable damage' covers a wide range of harm but excludes the affront and injury caused by a violation of rights not associated with actual damage to a person or property.[519] It has already been noted how the *2012 Decision on Principles and Procedures* issued in the context of individual responsibility does not intend to exclude moral damage on the list of harm entitled to

[515] *The 2012 Decision on Principles and Procedures*, para.229

[516] *The 2012 Decision on Principles and Procedures*, para.230

[517] ILC Articles, Commentary on Art.36, pp. 98-99, para.1 (Draft articles on Responsibility of States for Internationally Wrongful Acts, Adopted in 2011), [Online] available with commentaries at: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, accessed on 31st March 2012.

[518] Zyberi G., 2011. The International Court of Justice and applied forms of reparation for international human rights and humanitarian law violations, [Online] available at: http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/155/154, accessed on 30th August 2012; see also ILC Articles, Commentary on Art. 36 at p. 99, para.1

[519] McCarthy, C., 2009, *op. cit.*, p. 263. See also ILC Articles, Commentary on Art. 36 at p. 99, para.1

compensation. Presumably, the Trial Chamber by referring to 'economic harm sufficiently quantifiable' has drawn on the 2005 UN Basic Principles where it provides that:

> *Compensation* should be provided for any *economically assessable damage*, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (*a*) Physical or mental harm; (*b*) Lost opportunities, including employment, education and social benefits; (*c*) Material damages and loss of earnings, including loss of earning potential; (*d*) Moral damage; (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services [emphasis added].[520]

However, it is noticeable that the 2005 UN Basic Principles contemplates compensation for *any economically assessable damag*e instead of *economic harm sufficiently quantifiable*. In addition, the 2005 UN Basic Principles lists some of the economically assessable damage which include for example mental harm and moral damage.[521]

Therefore, the *2012 Decision on Principles and Procedures* should refer to 'any economically assessable harm' instead of referring to the 'economic harm sufficiently quantifiable' which is a confused notion. The *economically assessable harm* may range from material harm, physical harm to moral harm, including for example physical and mental harm; lost opportunities, including employment, and any education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

For economic loss the claimant should be able to show the amount of his loss or damage by producing relevant documents or other appropriate evidence.[522] But, since the spirit of the *2012 Decision on Principles and Procedures* is not to exclude non-pecuniary damage from compensation, the thorny issue relating to economically assessing the damage should arise when determining scope and extent of any damage, loss and injury. It may be easy for the Court to assign the task of assessing the damage to experts, but are the latter able to economically evaluate the non-pecuniary harms? It is interestingly observable that the IACtHR, when challenged by the issue of calculation of the amounts payable in compensation in case of grave violations of rights to life, should have repeatedly applied the *principle of equity.*[523] The Court was prudent in applying the

[520] Principle 20 of the 2005 UN Basic Principles

[521] Note how the *2012 Decision on Principles and Procedures* drown on this international instrument not only in the substantive matter but also in the form. See the content and the form of Para.230 of the *Decision*.

[522] See discussions made on the issue of burden and standard of proof in Chapter two of Part two of this study (pp.249ff).

[523] IACtHR, *Ibid*, paras 85-86. The principle of equity was for example evoked in the IACtHR's judgement of 21st July 1989, in *Velasquez*

'vague' principle of equity in order to avoid injustice. With regard to the estimation of the damages, the Court found a method of calculation based on the income that the victims would have earned throughout their working life had they not been killed.[524] In this regard, one may hope that experts could help the ICC to introduce and apply where appropriate the principle of equity.

b. The appropriateness and proportionality of compensation

The second requirement wanted by the *2012 Decision on Principles and Procedures* for ordering compensation is the appropriateness and proportionality of such a type of reparations. The principle of proportionality which may be understood as including the principle of appropriateness of reparations has been already discussed. Only should it be remembered that the Court has discretionary power to appreciate the proportionality and appropriateness of compensation as a type of reparations. However, as Rule 97(2) of the RPE provides, the Court may appoint appropriate experts to assist it in determining whether the compensation is the appropriate type of reparations in accordance with the particularities of any case.

c. The availability of funds

The third requirement for compensation listed by the *2012 Decision on Principles and Procedures* is the *availability of funds*. The availability of funds could be considered in two ways. Firstly, it was already noted that, in the *Lubanga* case, the indigence of the accused person has been established as a motive for the Trial Chamber I not issuing an order for pecuniary reparations against him.[525] Notwithstanding the criticism of and observations made on such a standing of the Chamber, one may note that according to Trial Chamber I, since compensation is conceived as 'a form of economic relief', it could not be decided where a convicted person was declared indigent. Secondly, in the case of indigence of an accused person, another alternative would be to expect that the Trust Fund for victim would complement reparation awards ordered against a convicted person. The fund, as we will observe in Chapter three, is principally financed by voluntary contributions and could face cash-flow problems. This must be another reason which led the Trial Chamber I to consider that it may be comprehensible that where the convicted person is indigent and the TFV has

Rodriguez v Honduras (Judgment of 21st July 1989 – Compensatory Damages. (ART. 63 (1) American convention on human rights), para.27

[524] IACtHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10th September 1993, para.88-89

[525] See the *2012 Decision on Principles and Procedures*, para. 269

no sufficient resources, there should be no reason to issue an order for compensation which will not be implemented.[526]

As noted earlier, the three requirements of compensation as a type of reparation should be understood as cumulative. The Court should ensure that the three preconditions are met before making an order for compensation. Otherwise, an order for compensation would remain unimplemented or inappropriate. And inappropriate reparations may create problems, instead of resolving them, such as conflict between victims, or between victim and their 'families and communities'[527] or second victimization.[528] These requirements could be in accordance with the 'do no/less harm principle' which would require the Court to strive to 'do no harm' or to minimize the harm that may inadvertently result simply from providing reparations to victims.[529]

Nevertheless, criticisms and observations made in respect to the position of the Trial Chamber I concerning the indigence of a convicted person and his or her liability for reparations are applicable to the requirement of availability of funds. In other words, unavailability of funds at the time of a reparation decision could arguably not prevent the Court from issuing a pecuniary reparation order for compensation against the convicted person.

C. Rehabilitation and its scope (para.233-236 of the *2012 Decision on Principles and Procedures)*

Rehabilitation is the third type of reparations suggested by the ICC Statute. Rehabilitation has been used as a form of reparation or redress 'particularly in respect of gross violations of human rights law and serious violations of international humanitarian law'.[530] This type of reparation raises the question of its definition (1). The *2012 Decision on Principles and Procedures* contemplates rehabilitation measures which may include medical (2) and social (3) rehabilitation. The relevance of such subdivision of rehabilitative measures needs to be grasped. Further, one may ask how can

[526] We have not to lose sight of criticisms made on the position of the Chamber in case of indigence of a convicted person (pp.98ff).

[527] See ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.67

[528] Victims, in some situations, could consider monetary compensation 'as a kind of mockery' (Lappi-Seppälä, T., *op. cit*., p. 375, footnote no.187).

[529] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, paras 65-67

[530] Vrdoljak, A.F., 2009. Reparation for cultural loss. In: F. Lenzerini, ed., 2009, *Reparations for Indigenous Peoples, International and Comparative Perspectives*, New York: Oxford University Press, p. 221.

such rehabilitative measures which are generally sought in the context of State responsibility comply with the context of individual responsibility (4).

1. The concept of rehabilitation

The term 'rehabilitation' is difficult to define and to differentiate with other forms of reparations such as 'satisfaction'. Like restitution and compensation, the ICC reparation regime does define the concept of rehabilitation. Neither does the international law nor the *2012 Decision on Principles and Procedures* provide any definition for the concept. The Decision limited itself in enumerating some of the measures which should be taken for victims' benefit in order to support them from grief and trauma.[531]

Some scholars, such as Roht-Arriaza, try to define rehabilitation as 'a wide range of measures, most having to do with a felt need for telling the story, for justice and for measures to avoid repetition'.[532] This definition of rehabilitation could be confused with 'satisfaction' which could be defined as 'the good feeling that you have when you have achieved something or when something that you wanted to happen does happen'.[533] The question of limits between rehabilitation and satisfaction arises. Rehabilitation as a type of reparations could be understood as all measures aimed at helping a victim 'to have a normal, useful life again'[534] after sustaining a trauma resulting from a crime. Whereas compensation, as already seen, is commonly sought as monetary compensation, rehabilitation goes beyond such a conception with the objective of healing both physical and psychological trauma and integrating a victim into the society. Moreover, gross violations of human rights, such as the core crimes that fall under the ICC jurisdiction, may often lead to a massive trauma that, as Shelton notes, 'can be life-long or even multi-generational'.[535] Accordingly, reparations of such trauma can consist of rehabilitation which seeks to address the individual or the community victim. In this respect, rehabilitation may consist of remedies intended to assist victims to reintegrate in the society 'under the best possible conditions by providing, for instance, medical, psychological, and legal or social services'.[536]

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[531] See the *2012 Decision on Principles and Procedures*, para. 233.

[532] Roht-Arriaza (2004, quoted by Doak, J., 2008, *op. cit.*, p. 215)

[533] A S Hornby, Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.1297

[534] *Idem*

[535] Shelton (2005, quoted by Vrdoljak, A.F., *op. cit.*, p. 222)

[536] See Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p. 331.

Having regard to the measures contemplated by the Trial Chamber I's Decision to support victims from grief and trauma, one can identify two types of rehabilitation: medical and social rehabilitation. The *2012 Decision on Principles and Procedures* in its para.233 holds that '[r]ehabilitation shall include the provision of *medical services* and healthcare (particularly in order to treat HIV and Aids), psychological, psychiatric and *social assistance* to support those suffering from grief and trauma; and any relevant legal and social services [footnotes omitted and emphasis added]'.[537] Under the ICC reparation regime a victim may benefit from *medical rehabilitation* and *social rehabilitation* which may be decided in the specific context of individual responsibility. Let us discuss the relevance of this categorisation and the adequacy of the measures which may be included in each category.

2. The medical rehabilitation

Rehabilitation involves measures designed to alleviate among others the physical and psychiatric harm suffered by victims.[538] Medical rehabilitation may include the provision of medical services, healthcare, psychological and psychiatric assistance. The World Health Organisation (WHO), in the Second Report of its Expert Committee on Medical Rehabilitation considered *medical rehabilitation* in the context of treatment of persons with disabilities as 'the process of medical care aiming at developing the functional and psychological abilities of the individual, and, if necessary, his compensatory mechanisms, so as to enable him to attain self-dependence and lead an active life'.[539] The process of medical rehabilitation could apply to victims of crimes who sometimes experience physical and psychiatric trauma.[540] In this regard, victims should receive the necessary material, medical and psychological assistance and should be informed of the availability of relevant health assistance and be readily afforded access to them.[541]

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[537] *The 2012 Decision on Principles and Procedures*, para.233

[538] McCarthy, C., 2009., *op. cit.*, p. 261.The 2005 UN Basic Principles provide that rehabilitation 'should include medical and psychological care as well as legal and social services' (para. 21).

[539] WHO Expert Committee on Medical Rehabilitation, Second Report, Technical Report Series 419, (1969, quoted by Redress, 2009. Rehabilitation as a form of reparations under international law, [Online] available at: <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>, accessed 30th August 2012, p.8).

[540] Crime victims may experience physical trauma, serious injury or shock to the body they may have cuts, bruises, fractured arms or legs, or internal injuries have intense stress reactions; they may feel exhausted but unable to sleep, and they may have headaches, increased or decreased appetites, or digestive problems, as result of crimes.

[541] Some researches demonstrate that victims of gross violations of human rights would appreciate such kind of reparation (medical rehabilitation). For example in Uganda, as Nicole Zarifis rapports, interviews with victims, shown that 'for those who experienced physical violence for which they continue to experience poor health there was a great interest to receive medical services and psychosocial counselling for the trauma related to acts of torture, rape and other forms of cruel and unusual treatment' (Nicole Zarifis, I., *op. cit*. pp. 326- 328).

Medical rehabilitation as one aspect of rehabilitation in general has been recognised by international law. For example medical and psychological cares for victims of crime are contemplated by the 2005 UN Basic Principles as rehabilitative measures.[542] Similarly, the 1985 UN Basic Principles, although does not refer to the term 'rehabilitation', provides for 'assistance' to the victim of crime which should include 'medical' and 'psychological' assistance.[543] In the same vein, it is noticeable that medical rehabilitation has been recognised by regional courts of human rights in the context of State responsibility. For example the consistent jurisprudence of the IACtHR recognises that medical and psychological treatments of the victims are measures for rehabilitation and a form of reparations. The IACtHR repeatedly held that 'a measure of reparation is required that provides adequate attention to the physical and mental ailments' suffered by victims[544] and ordered states to' provide medical and psychological or psychiatric care, free of charge and in an immediate, appropriate and effective manner' through their specialized public health institutions to victims who so request it.[545] In its jurisprudence the IACtHR ordered different measures which could be seen as aiming to implement medical rehabilitation, such as healthcare and medicine for victims.[546]

The foregoing observations demonstrate the importance of medical rehabilitation in case a victim could have experienced serious physical and mental harm. This should allow of the fact that victims or their legal representative should claim such measures. In the *KAING Guek Eav* case for example civil parties claimed collective reparations in form of access to free medical care (both physical and psychological assistance), including free transportation to and from medical facilities'. Although the request was rejected by the Chamber, not on the ground of their pertinence but of its competence, [547] this demonstrates the importance that victims may attach to such a kind of reparations. However, the nature of harm experienced by a victim or a group of victims sometimes would require not only medical rehabilitation but also social rehabilitation to achieve full rehabilitation.

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[542] See Principle 21 of the 2005 UN Basic Principles.

[543] See Principle 14 of the 1985 UN Basic Principles.

[544] IACtHR, *The Barrious Family v Venezuela*, Judgement of 24 November 2011(Merits, reparations and costs), para.329; IACtHR, *Contrera et al, v El Salvador*, Judgement of 31 August 2011 (Merits, Reparations and Costs, para.199 and IACtHR, *Atala Riffo and Daughters v Chile*, Judgement of 24th February 2012, para.254.

[545] IACtHR, *Atala Riffo and Daughters v Chile*, Judgement of 24 February 2012, para.254 and orders; See also IACtHR, *Mapiripán Massacre v Colombia*, Judgement of 15th September 2005 (Merits, Reparations and Costs), para.312

[546] *IACtHR, Mapirip´an Massacre v Colombia*, Judgement of 15th September 2005 (Merits, Reparations and Costs), para.312

[547] See ECCC, *Case KAING Guek Eav alias Duch* , Trial Chamber, Judgement of 26th July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC, paras 653, 654, 656 and 674.

3. The social rehabilitation

Social rehabilitation may involve measures designed to alleviate social harm suffered by victims including the provision of social and legal assistance. The WHO in the Second Report of its Expert Committee on Medical Rehabilitation considered the context of treatment of persons with disabilities and contemplated social rehabilitation, referring to 'the part of the rehabilitation process aimed at the integration or reintegration of a disabled person into society by helping him to adjust to the demands of family, community, and occupation, while reducing any economic and social burdens that may impede the total rehabilitation process'.[548] Although such a conception of social rehabilitation was conceived in the context of disabled person, it could also be relevant in the context of reparations for victims of crimes who some time experience disabilities as a result of crime.

Social rehabilitation may include also what some commentators refer to as *vocational rehabilitation*[549] or *occupational rehabilitation.*[550] This kind of social rehabilitation may refer to 'the provision of education and vocational training, along with sustainable work opportunities that promote a meaningful role in the society'.[551] According to the WHO, vocational rehabilitation could be distinguished from medical rehabilitation and social rehabilitation. The WHO refers to vocational rehabilitation as 'the provision of those vocational services, e.g. vocational guidance, vocational training and selective placement, designed to enable a disabled person to secure and retain suitable employment'.[552] Contrary to the WHO's point of view, such vocational rehabilitation or occupational rehabilitation could be included in social rehabilitation, for those measures could be seen as aiming to facilitate integration of a victim into a society. The *2012 Decision on Principles and Procedures* holds that rehabilitation of victims of child soldier should include measures that are directed at facilitating their reintegration into the society, taking into account the differences in the impact of these crimes on girls and boys.[553] For victim reintegration, measures such as 'programmes

[548] WHO Expert Committee on Medical Rehabilitation, Second Report, Technical Report Series 419, (1969, quoted by Redress, 2009, *op. cit*. p.8).

[549] WHO distinguishes medical, social and vocational rehabilitation. See WHO Expert Committee on Medical Rehabilitation, Second Report, Technical Report Series 419, (1969, quoted by Redress, 2009, *op. cit.*, p.8).

[550] According to Raschka, occupational rehabilitation may include ' measures for supplementary education and vocational retraining' (Raschka, W., *op. cit.* p.42).

[551] *The 2012 Decision on Principles and Procedures*, para.234

[552] WHO Expert Committee on Medical Rehabilitation, Second Report, Technical Report Series 419, (1969, quoted by Redress, 2009, *op. cit*. p.8).

[553] *The 2012 Decision on Principles and Procedures*, para.234. The fact of taking into account the differences between the impacts of these crimes on girls and boys, is in accordance with the 'positive discrimination' already discussed. The positive discrimination implied here, by particularising girls and boys, is also implied by Principle 17 of the 1985 UN Basic Principles which states that in providing *services and assistance* to victims attention should be given to those who have special needs because of the nature of the harm inflicted or because of their race, colour, sex, age,

for social rehabilitation of a community where a serious human rights atrocity has occurred'[554] could be taken. These reparations programmes would involve local communities of victims, to the extent that the reparations programmes are implemented where their communities are located.[555] In this regard, where collective reparations may be appropriate, the Court could for example order assistance such as 'housing, education and training'.[556] As far as social rehabilitation is concerned, one may note how the South African Constitutional Court determined that in some cases involving a family, victims may best be assisted by reparation which allows the young in the family to maximise their potential through bursaries and scholarships.[557] As such, social rehabilitation 'is likely to be linked, and form part of a peace- building or socio-economic programme put in place, by a competent international body, to enhance regional recovery from the crisis in which the relevant crimes occurred'.[558] Furthermore, social rehabilitation may include the 'means of addressing the shame that child victims may feel, and they should be directed at avoiding further victimisation of the boys and girls who suffered harm as a consequence of their recruitment'.[559] It could include education programmes to empower victims. These programmes should provide for example education services to the children born as a consequence of rape and the next of kin of the murdered victims.[560]

Measures for social rehabilitation have been recognised by international law as one form of reparations either as element of (full) rehabilitation or assistance. Principle 21 of the 2005 UN Basic Principles provides for 'legal and social services' as one of the rehabilitative measures. Likewise, although the 1985 UN Basic Principles does not, as already noted, refer specifically to rehabilitation as one of the types or forms of reparations, the 'assistance' it contemplates is similar to 'rehabilitation' provided for by the ICC Statute. Specifically, the 1985 UN Basic Principles contemplates a kind of 'social assistance' as one of the measures of reparation in the form of assistance to victim of crime.[561]

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language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability (see Principle 3 and Principle 17 of the 1985 UN Basic Principles).

[554] McCarthy, C., 2009, *op. cit*., p.261

[555] *The 2012 Decision on Principles and Procedures*, paras 236 and 240

[556] *The 2012 Decision on Principles and Procedures*, para.221

[557] See *Azanian Peoples Organization* (AZAPO) and Others v President of the Republic of South Africa and Others (Judgement of Constitutional Court of South Africa of 26th July 1996), [Online] available at: <http://www.saflii.org/za/cases/ZACC/1996/16.pdf>, Accessed on 12th April 2012, para. 45.

[558] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.331

[559] Para.235 of the *2012 Decision on Principles and Procedures*

[560] Aubry, S. and Henao-Trip, M.I., *op. cit.*, p.16

[561] Principle 14 of the 1985 UN Basic Principles

It is argued that victims would welcome social rehabilitation as one of the adequate types of reparations. Actually, in the *Lubanga* case, some former child soldiers interviewed, so far aged between 18 and 23 years, claimed that their future careers are jeopardised and would be happy to benefit from measures to help them engage in economic activities.[562] In this regard, some researches also demonstrated that victims of gross violations of human rights would appreciate such kind of reparation (social rehabilitation). For example in Uganda, as Nicole Zafiris reports out of interviews with victims, an overwhelming interest of youth victims was to return to school and receive assistance with the payment of school fees.[563] Such measures could be ordered by the Court in the *Lubanga* case where most of the victims are children who were enlisted and conscripted when they were under the age of 15years and used to participate actively in hostilities.

In addition, medical rehabilitation and social rehabilitation arguably constitute full rehabilitation. The relevance of distinguishing the two kinds of rehabilitation – medical and social rehabilitation- may facilitate to identify appropriate measures aimed at adequate rehabilitation for the victims of crime. Measures of medical rehabilitation cannot substitute those of social rehabilitation. A risk of confusion between the two kinds of measures could lead to an ambiguous order for reparations and may undermine the interests of victims by, among others, complicating its implementation. Rehabilitation should not be restricted to helping the victim to regain his physical condition, it is also designed to facilitate his reintegration into work and society' through the provision of *medical rehabilitation*,[564] and *social rehabilitation* (which should include vocational or occupational rehabilitation).[565] Thus rehabilitation may include all measures aimed at reducing the impact of victimization and at enabling the victim to achieve social integration. As far as full rehabilitation is concerned, it is noticeable that 'assistance' seems to be a very recurrent term used when defining rehabilitative measures. The jurisprudence of the IACtHR, demonstrate that such

[562] ICC, *Prosecutor v Lubanga,* Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10. 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864, para.20. Some of the former child soldiers would like to benefit from microcredit which would for example help them to acquire motorcycles taxi or agricultural land others would like to be trained in trading and others suggested to be appointed as workers in a company which would specifically be created to generate employments for child soldier victims.

[563] Nicole Zafiris, I., 2010. *op.cit*., pp.326- 328

[564] In the context of individual responsibility, a monetary award might, for example, 'enable provision to be made for medical or psychological treatment' (Muttukumaru, op. cit., p. 304), 'payment of the cost of attending rehabilitation centres and the subsequent costs of doctors, remedies and therapeutic expedients directly connected with rehabilitation' (Raschka, W., *op. cit.*, p. 42)

[565] For example 'the grant of money for a transitional period, as well as a subvention for the attainment (if necessary) of a special driving licence which is caused by the invalidity' (Raschka, W., *op. cit.*, p. 42).

assistance has been ordered against the State responsible for human right violations and for the benefit of individual victims.

4. Rehabilitative measures within the context of individual responsibility

Whereas rehabilitative measures are accurate in the context of State responsibility, one may wonder how they can be appropriate in the context of individual responsibility adopted by the ICC regime. Notwithstanding the usefulness of rehabilitative measures in reparation programmes, there is a question of whether such *assistance* can be ordered against a convicted person in the context of individual responsibility contemplated by the ICC Statute. How should a convicted person be required to provide medical and social rehabilitation to victims? One may argue that in a case where a convicted person is not indigent, rehabilitative measure could be sought in context of Rule 98(3) of the RPE. The Court may order that an award for pecuniary reparations against a convicted person, aimed at victims' rehabilitation, be made through the TFV which should implement rehabilitative measures.[566] Such reparations should likely be on a collective basis.

Yet, the practice of the ECCC whose civil jurisdiction is limited to order only collective and moral reparations awards[567] may warn us about the fragility of such collective rehabilitative measures. In *KAING Guek Eav* case for example, civil parties requested access to free medical care (both physical and psychological), but the Trial Chamber rejected the request on grounds that, among others:

> Provision of free medical care to a large and indeterminate number of victims may purport to impose obligations upon national healthcare authorities and thus exceed the scope of the ECCC's competence. The Chamber is similarly unable to order measures that may impact on national education policies such as teacher training, salaries, and curriculum development.[568]

The Trial Chamber rejected the claims not on the fact that they were not relevant but on the ground that its civil jurisdiction is limited to only ordering reparations against individuals. The Trial Chamber holding was espoused by the Supreme Court Chamber which held that:

> It follows that any reparation claim is predestined for rejection that *necessarily* requires the intervention of the [Royal Government of Cambodia] to the extent that, in effect, such request predominantly seeks a measure falling within governmental prerogatives. This is the case, for instance, with respect to requests for State apology,

[566] Issues relating to implementation of an order for reparations by the TFV are discussed in Chapter three of Part two of this dissertation (pp.354ff).

[567] See Rule 23(1)(b)) of the Internal Rules of the ECCC.

[568] ECCC, *Case KAING Guek Eav alias Duch* , Trial Chamber, Judgement of 26th July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para.674

> organisation of health care, institution of national commemoration days, and naming of public buildings after the victims.[569]

In the case of the ICC, State responsibility was deliberately excluded from its jurisdiction. Subsequently, State Parties, in their 7th plenary meeting held on 20th December 2011 took care to recall that 'under no circumstances shall States be ordered to utilize their properties and assets including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position'.[570] Could the ICC order rehabilitative measures on collective basis which will avoid, at the stage of their implementation, the risk of impacting national healthcare and social services, or by ricochet, State properties? This question may refer us to the cooperation between the ICC and States contemplated by the ICC regime. Following consultations with interested States and the TFV for example, the Court may order that an award for reparations be made through the TFV to an intergovernmental, international or national organization approved by the TFV pursuant to Rule 98(4) of the RPE of the ICC. In the same vein, nothing prevents the Court to order that an award for pecuniary reparations against a convicted person be made through the TFV in a manner provided for by Rule 98(4).[571] Thus consultations and cooperation between the ICC, the TFV and interested States parties should render the twofold rehabilitation (medical and social rehabilitation) as appropriate reparations for victims.

In this regard, it is worth observing that the Trial Chamber I recognises that the 'international cooperation and judicial assistance' provided for by the ICC Statute could constitute a framework for implementing innovative measures aimed at repairing harms suffered by victims. The *2012 Decision on Principles and Procedures* mentions measures which could be implemented in the framework of international and judicial assistance, such as establishing or assisting campaigns that are designed to improve the position of victims', 'educational campaigns that aim at reducing the stigmatisation and marginalisation of the victims of the present crimes'. In this respect, it is worth noting that not only the rehabilitation measures but also the implementation of other types of reparations may require multiple stakeholders. Certain types and modalities of reparations may not be directly executable without the assistance of a concerned State. Consequently, where appropriate, the ICC may request the cooperation of the national authorities in accordance with

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[569] ECCC, *Case KAING Guek Eav alias Duch* , Supreme Court Chamber, Appeal Judgement of 3 February 2012, Case File/Dossier No.001/18-07-2007-ECCC/SC, para.664

[570] Resolution ICC-ASP/10/Res.*3* on Reparations, para.2

[571] Issues relating to awards for reparations made through the TFV are discussed in chapter two of this dissertation (pp.285ff)

Article 93 (1) for the implementation of a different type of reparations including rehabilitative measures.

D. Other types of reparations contemplated by the *2012 Decision on Principles and Procedures*

The extent of damage caused by crimes and the different interests of victims would make impossible to predetermine all types of reparations which may be appropriate to redress the victims. It is reasonable to presume that this has led the ICC statute to use a flexible language in providing for different types of reparations, which allows the judge to appreciate and decide according to the particularities of each case. However, beside the three suggested types of reparation - restitution, compensation and rehabilitation - one may wonder which other type of reparation would be conceived by the Court?

In its part of determination, the *2012 Decision on Principles and Procedures* includes a heading entitled *Other modalities of reparations*[572] but does not list other types of reparations. Nevertheless, by analysing the five paragraphs included in the heading, it is observable that the Trial Chamber I strives to provide for other possible types of reparations than restitution, compensation and rehabilitation. Yet, difficulties in setting limits or differentiating some types of reparations are apparent from the Decision. For example the Decision, mentions again measures relating to educational campaigns,[573] measures to address the shame by victims etc.,[574] which may be included in rehabilitative measures already discussed.

The analysis of the *2012 Decision on Principles and Procedures* demonstrates that besides the measures which can be classed in rehabilitative measures, the Decision conceives other types of reparations. The Decision implicitly recognises that *conviction* and *sentence* constitute *per se* another type of reparation, as well as *publication* of the Decision on conviction. In the same vein, *voluntary apology* is also contemplated by the Decision as another reparative measure. Further, according to the context of the Decision, the Court is entitled, in context of international cooperation and judicial assistance, to innovate other types of reparations not specified in the Decision. Bearing in mind that sometimes it is not easy to set clear limits between types of reparations which may interlock, for the purposes of achieving the main goal of reparations already

[572] The words *modalities of reparation* refer to 'types of reparations'.

[573] See the *2012 Decision on Principles and Procedures*, para. 239.

[574] *Ibid*, para.240

mentioned, let us take a look into the relevance of these reparative measures. It will be observed that besides conviction and sentence (1), publication of the decision (2) and voluntary apology (3) as reparative measures, the *2012 Decision on Principles and Procedures* contemplates a variety of other possible innovative measures for reparation (4).

1. Conviction and sentence deemed as reparative measures (para.237 of the *2012 Decision on Principles and Procedures*)

In its para.237 the *2012 Decision on Principles and Procedures* determines that '[t]he conviction and the sentence of the Court are examples of reparations, given they are likely to have significance on the victims, their families and communities [footnote omitted]'. By such a determination Trial Chamber I seems to consider that, in the *Lubanga* case, one of the types of reparations was already implemented by the decision on the conviction and sentence of Mr *Lubanga*. With regard to reparations to victims, it is worth understanding the significance and the impact that conviction and sentence are likely to have for and on victims, their families and communities as expected by the Decision.

In this respect it can be for instance observed that in *Bautista de Arellana* case, among other forms of reparations to victims the UNHRC urged the State (Colombia) to prosecute and punish those responsible for the abduction, torture and death of Nydia Bautista'.[575] A similar decision was taken by the same Committee in *Chongwe v Zambia*.[576] In cases involving arbitrary detentions, forced disappearances, torture, and extrajudicial executions the UNHRC has ruled that an *effective remedy* for direct victims and family members must include a criminal investigation that brings to justice those responsible.[577] By commenting on Art.2 para.3 of the General Comment 31 [80] adopted in 2004 by the UNHRC on the Nature of the General Legal Obligation imposed on States Parties to the CCPR 1966, the UNHRC includes the obligation of 'bringing to justice the

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[575] UNHRC, *Nydia Erika Bautista de Arellana v Colombia 1995*, para. 10.

[576] UNHRC, *Rodger Chongwe v Zambia* 2000 (25th October 2000), Communication No. 821/1998. Paragraph 7 of the case of *Chongwe v Zambia* stipulates that 'Under article 2, paragraph 3(a), of the [CCPR]; the State party is under the obligation to provide Mr Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future'.

[577] For more cases, see Office of the United Nations High Commissioner for Human Rights, Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol.5, [Online] available at: <http://www.ohchr.org/Documents/Publications/SDecisionsVol6en.pdf>, accessed on the 14th March 2012.

perpetrators of human rights violation' on the list of the suggested forms of reparation that States have to implement.[578] In the same vein, the Inter-American Commission and the Court have insisted on prosecution for violations of right to life and personal integrity as a *remedy* under the American Convention on Human Rights.[579] Likewise, the European Commission of Human Rights (ECHR) considers investigation and prosecutions as *remedies* a State owes the victims of violent crime.[580]

In the same vein, victims would presumably be more satisfied by their participation in a trial. Although victims' right to participation in criminal proceedings does not fall under the scope of our study, it can be noted that some commentators would support such assumption. For example Massidda's report speaks a lot on the issue. In respect of her experience in reparations for victims before the ICC, she makes the following report:

> The first thing that I do when I meet a client is to ask why they want to participate in the proceedings before the court. Majority of them say that they want their voice heard and they want that their story be known so that crimes will not be repeated in future. They want their voice heard and they want to contribute to the establishment of the truth. And for them, the establishment of truth also means what happened to them is recognized as it happened, not differently.[581]

According to this report, victims are interested in participating in criminal proceedings and could enjoy a certain satisfaction when their voice is heard and the truth established. In the same vein, as Justice Weinstein B.J. reports, another research indicates that, to a large degree, satisfaction or dissatisfaction of litigants with the justice system is based on their expectations that they will participate in litigation.[582] It was also reported that the drafters of the Rome Statute, included victim participation for the sake of reparations and to advance more general restorative goals in the context of post-conflict justice, such as to help victims break cycles of violence by giving them a voice, and to rehabilitate and empower them, allowing them to regain some sense of normalcy in their lives.[583] One may believe that 'the participation of victims in the proceedings before an International

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[578] UNHRC, *General Comment* No 31 [80]. The Nature of the General Legal Obligation imposed on States Parties to the Covenant (Adopted on 29 March 2004), Principle 6, [Online] available at: <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>, accessed on 2nd June 2012.

[579] Shelton, D., *op. cit*., p.153

[580] *Idem*

[581] Massidda P., *op. cit*.

[582] Weinstein B.J, 1995. Individual Justice in Mass Tort Litigation, The effect of class Action, Consolidations, and Other Multiparty Devices, Evanston: Northwestern University Press, p.10

[583] Markus Funk, T., *op., cit*. p.188

Tribunal may really constitute an effective part of their process of rehabilitation'.[584] Participation in trial allows victims to know the truth. This kind of rehabilitation has been recognised by the ECCC as follows:

> [T]his Chamber is of the view that although collective and moral reparations may not reinstate the victims of human rights abuses either physically or economically, other general purposes of reparations are fulfilled before the ECCC to the extent the reparation responds to 'the psychological, moral, and symbolic elements of the violation.' This is achieved through the 'verification of the facts and full and public disclosure of the truth' as fostered by the findings of the Co-Investigating Judges and three Chambers, through the access and participation of victims to proceedings,1329 and through victims' identification and individual recognition in the final judgement that represent a public acknowledgement of their suffering [footnotes omitted].[585]

Knowing the truth could be seen as another form of reparations for the victims of crimes. In this respect the UNHRC has for example acknowledged the right of victims to know the truth as a way to end or prevent the psychological torture of families of victims of enforced disappearances or secret executions.[586] Actually, 'participation in the proceedings must be recognised as an important component in facilitating the process of healing for victims of crimes, which is essential for rendering the ICC [as] an institution effectively respondent to the questions of those who suffered immense pain and require that 'justice is done and is seen to be done'.[587] It can be argued that prosecution which would result in conviction and sentence, if combined with victims' participation, will constitute a form of satisfaction as moral reparations for the victims of crimes.

2. Wide publication of conviction and sentence decisions (para.238 of the *2012 Decision on Principles and Procedures*)

The *2012 Decision on Principles and Procedures*, in its para.238, stipulates that the wide publication of the judgement on Mr *Lubanga* as guilty 'may also serve to raise awareness about the conscription and enlistment of children under the age of 15 [years] and their use to participate actively in the hostilities, and this step may help deter crimes of this kind [footnote omitted]'. Whereas the Decision explicitly declares that the conviction and the sentence constitute forms of reparations, it does not do the same concerning publication of decision on conviction. Rather, the

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[584] Donat-Cattin, D., 1999. The Role of Victims in the ICC Proceedings. In: F. Lattanzi and W.A. Schabas, ed., 1999. *Essays on the Rome Statute of the International Criminal Court*, Vol. I. Fagnano Alto: il Sirente, p. 258.

[585] ECCC, Case KAING Guek Eav *alias* Duch, Supreme Court Chamber, Appeal Judgement of 3 February 2012, Case File/Dossier No.001/18-07-2007-ECCC/SC, para. 661.

[586] UNHRC, *R.A.V.N. Et al v Argentina*, (1990, quoted by Mcgonigle Leyh, B., 2011. Procedural Justice? Victim Participation in International Criminal Proceedings. Cambridge: Intersentia, p.105).

[587] *Ibid*, p.271

Decision seems to refer to one of the functions of conviction and sentence that is the deterrence of crimes. However, it should be noted that one of the purposes of reparations before the ICC, as considered by the Decision and already discussed, is the deterrence of crime. Consequently, it can be deduced from the spirit of the para.238 of the *2012 Decision on Principles and Procedures* that it contemplates publication of the decision on guilty and sentence as a type of reparations. The Decision considers publication of judgement as a means of *public education initiative*. Presumably, the Chamber has drawn from the practice of the IACtHR which has ordered such measure in its reparation judgements issued in the context of State responsibility.[588]

Actually, publicity of the judgement condemning those responsible has been considered as a *form of satisfaction* by a constant jurisprudence in human rights matter. For example in *Bulacio v Argentina* the IACtHR ordered, as a measure of satisfaction, that its judgements must be published in the Official Gazette.[589] Likewise, in the *KAING Guek Eav* case, the ECCC recognised the importance of publication of a sentencing judgement. It noted that the 'public provision of information regarding the judgement will occur as a feature of the ECCC Public Affairs Section's outreach activities, which are likely to contribute significantly to reconciliation initiatives within Cambodian society at large and public education'.[590] In this regard, it should be noted that, beside the deterrence function of publicity of decision on conviction and sentence, victims may be satisfied by such measures as another type of reparation. Indeed, in the *KAING Guek Eav* case civil parties had requested for, amongst other things, the production of documentaries and the dissemination in the broadcast media of portions of the judgement. [591]

The decision of publication should not be limited to the decision on guilty but should be extended to the publication of the sentence which may produce the same expected effects. It may also be suggested that the ICC Statute provide for the possibility of translating such decisions in national languages of the victims. This suggestion needs modification of Art.50 of the Statute which stipulates that 'The judgements of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages'. The article determines the official

[588] See for example IACtHR, *Radilla-Pacheco v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 23rd November 2009, para.350

[589] See IACtHR, *Bulacio v Argentina*, para.145 and p.60. See also IACtHR, *Juan Humberto Sánchez Vs. Honduras* (Judgement of 7th June 2003) para.188 and IACtHR, *Radilla-Pacheco v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 23rd November 2009, para.350

[590] ECCC, *KAING Guek Eav alias Duch* , Judgement of 26th July 2010, Trial Chamber, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para. 669.

[591] But the request was rejected by the Chamber on the grounds of lack of specificity. The Chamber held that '[t]he precise nature of the measures sought and their costs are uncertain and indeterminable and accordingly not amenable to an award against KAING Guek Eav'.

languages of the Court that are Arabic, Chinese, English, French, Russian and Spanish. In case the Court is allowed to order translation of its decisions in national language of victims it will strive to cooperate with interested states in order to publish the decisions in their official gazettes if there is any or by other media. Notwithstanding, in some cases, such as rape and other sexual violation victims should not appreciate that their names be public. In such cases the Court should order that their names be redacted. Actually, the wide publication contemplated by the *2012 Decision on Principles and Procedures* could go beyond the fact that the decisions are issued publicly and made available on the ICC website to include other possible forms of publicity.

3. Voluntary apology (para.241 of the *2012 Decision on Principles and Procedures*)

In the *Lubanga* case the Trial Chamber I determined that 'Mr Lubanga is able to contribute to [reparations] process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis'.[592] The Chamber implicitly underlined the relevance or the utility of apology in the context of reconciliation but did not define the concept of apology as a type of reparation. It only considered the voluntary character of the apology and specified its possible modalities which may be public or confidential. The apology may be addressed to individual or to groups of victims. But yet, in its decision, the Trial Chamber I did not go far to provide for forms of apology which may be verbal or written, explicit or implicit.

Apology can be defined as an 'expression of regret'[593] or 'expression of remorse'[594] by a convicted person. Apology may be expressed explicitly or implicitly. Although one may wish an apology should only be expressed explicitly, it should be agreed that the apology does not necessarily need to be limited to a verbal or written statement by a perpetrator in court. Rather, it could also be for example manifested more tangibly through the willing participation of the perpetrator in a ceremony which serves as an act of atonement.[595] Although some submissions in the *Lubanga* case suggested that the 'Chamber could order the convicted person to make a public apology, including an acknowledgment of the material facts and an acceptance of responsibility',[596]

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[592] *The 2012 Decision on Principles and Procedures, para.241*

[593] See *Prosecutor v Lubanga,* Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified as a public document on 19th March 2012, ICC-01/04-01/06-2806, para.77

[594] See *Ibid,* para.77.

[595] *Idem*

[596] ICC, *Prosecutor v Lubanga,* OPCV, Observations on issues concerning reparations, 18th April 2012, ICC-01/04-01/06-2863, para.128. In the same vein the Registry of the ICC submitted that 'there is, in the Registry's submission no reason in principle why, in the context of individual criminal responsibility, an individual could not, where appropriate, be requested to provide victims with an expression of regret or to participate

apology has to be voluntary as held by the Trial Chamber I. Otherwise, an order against a convicted person to make apology would not be implemented. Actually, one may wonder how a decision ordering an apology should be enforced in case of non-voluntary execution.

Nevertheless, one may wonder whether an apology would really constitute a form of reparations. Do victims positively appreciate an apology offered by their injurer? Some commentators argue that the relative absence of apology may be related to the tendency by the legal system to reducing all harms to a monetary metric, even where no economic loss is entailed.[597] Respecting the ICC Statute, it has been reported that during the negotiations of the Statute, apology was proposed as a form of reparations.[598] Finally such a kind or form of reparations was not explicitly listed among the suggested types of reparations - restitution, compensation and rehabilitation – but it can be conceived by the Court. Apology has been recognised by international law as a type of reparation in the context of State responsibility. The importance of apology in the reparations process in the case of gross violation of human rights has been for example recognised by the IACtHR. The IACtHR has considered a public apology as a form of satisfaction.[599] Likewise, it can be argued that a genuine apology in the context of individual responsibility may constitute a form of satisfaction for the victims. It may also constitute a guarantee of non-repetition or no recidivism. In other words, voluntary and sincere apology should constitute effective moral reparation and a form of guarantee for non-repetition for victim of crime such as those under the jurisdiction of the ICC. In this respect, one may agree that 'the power and importance of apology lie in its potential to offer to victims a moral recognition or acknowledgement of their human worth and dignity'.[600] Particularly, in the *Lubanga case,* as the Trial Chamber implicitly noted, Mr Lubanga's voluntary apology might contribute 'to address the shame felt by some former child soldiers, and to prevent any future victimisation, particularly when they endured sexual violence, torture and inhumane and degrading treatment following their recruitment'.[601] Thus '[p]ersonal

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in some form of event to signify his or her contrition (ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified as a public document on 19th March 2012, ICC-01/04-01/06-2806, para.77). See ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18 April 2012, ICC-01/04-01/06-2867, para. 13.

[597] Strangang drawing from Wagatsuma and Roseet (1986, quoted by Strang, H., *op. cit.*, p. 20)

[598] Muttukumaru, C., *op. cit*., p.307

[599] See IACtHR, IACtHR, *Moiwana Village v Suraname*, Judgement of 15th June 2005, para.216.

[600] Govier and Werwoerd (n.d, quoted by Thompson, J., 2005. Apology, justice and respect: a critical defence of political apology, [Online] available at: <http://www.unisa.edu.au/hawkeinstitute/gig/aapae05/documents/thompson.pdf>, accessed on 14th April 2012).

[601] *The 2012 Decision on Principles and Procedures*, para.240

acknowledgement by Mr Lubanga himself of the harm suffered by individual claimants would further restore their dignity'.[602]

Nevertheless, the fact that victims who already applied and/or participated in the *Lubanga* case did not request for such form of reparations could reveal, on one hand, the relative character of apology as a type of reparations.[603] But on the other hand, views according to which an apology could constitute an important element in healing victims could be confirmed for example, yet implicitly, by the *KAING Guek Eav* case. In this case, victims requested the compilation and publication of all statements of apology made by KAING Guek Eav during the trial before the ECCC.[604] The Court granted the request by considering that the compilation of these apologies 'may provide some satisfaction to victims and as they are in substance the only tangible means by which KAING Guek Eav may acknowledge his responsibility and the collective suffering of the victims of his criminal conduct'.[605] This demonstrates the importance given by victims to apology and affirmed by the Court in the context of reparation against an individual. Indeed, when an offender offers an apology or shows remorse, the experience can be very meaningful to many victims.[606]

Some experiences and practices at national level could confirm the importance of apology in healing victims of gross human rights violations. It has been reported for instance that British victims are reluctant to accept material reparation from their offenders and are usually content with their explanations and apologies'.[607] Rwanda could be referred to as another example where, in genocide context, some perpetrators publicly expressed their apology and obtained forgiveness from their victims. In Rwanda, a country which was torn by genocide, war crimes and crimes against humanity in 1994, genuine apology expressed by individual perpetrator out of official procedures,

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[602] ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18th April 2012, ICC-01/04-01/06-2867, para.13

[603] The submissions of legal representatives for victims for principles and reparations procedures to be applied in Lubanga reparations proceedings do not mention apology as a form of reparations (see ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10. 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864 and Représentants Légaux des Victimes, Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations. 18 Avril 2012, ICC-01/04-01/06-2869.

[604] ECCC, *Case KAING Guek Eav alias Duch* , Trial Chamber, Judgement of 26 July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para.668

[605] *Idem*

[606] Herman, S., 2004. Restorative Justice Possible Without A Parallel System for Victims? In : H. Zehr and B. Toews, eds., 2004. *Critical Issues in Restorative Justice*, New York: Criminal Justice Press, p.76

[607] Launay (1987, quoted by Zedner, L., *op. cit*., p.156)

but under religious context, met forgiveness and then made possible family reconciliation after the emotional healing of both the offender and his victim.[608]

Forgiveness is seen as a moral and private act[609] which 'involves overcoming one's resentment of an offender for having inflicted an injury'.[610] The concept of forgiveness could not, in any case, be understood as to exclude bringing perpetrators to justice since the latter act 'is seen by some as an essential component of a victim's recovery and psychological healing'.[611] By forgiving, a victim may let go of anger and the desire for revenge, and develops a more positive, accepting attitude toward a convicted person. It is interesting that a research should have shown that forgiveness 'can lessen the psychological burden of people who have been harmed'.[612] Consequently, one may argue that a formula 'apology and forgiveness' may also constitute a unique form of reparation in the context of Art.75 (1) of the ICC Statute which could be developed by the ICC and lead to effective reconciliation contemplated by the Court.[613]

Actually, bearing in mind that one of the purposes of reparation before the ICC is to 'secure, whenever possible, reconciliation between the convicted person(s), the victims of the crimes and the affected communities',[614] voluntary apology and forgiveness can effectively, and arguably, allow true reconciliation after the commission of crimes. In case of mass victims of crimes under

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[608] The following testimony is an example of rare experiences in Rwanda where an apology healed both the offender and the victim and their family and the reconciliation made possible the marriage between the offender's son and the victim's daughter. The offender himself and the victims give their testimonies that have been reported by Hirondelle News Agency as follow: 'I killed her husband,' says Nyaminani designating Mukabera Bernadette, the widow of the deceased. 'I thank his family for forgiveness she gave me and that I will not stop asking 'With these words, the sexagenarian has his arm raised, as a consolation, on the shoulder of the woman he has reduced to widowhood. The latter [the victim woman], a practicing Christian well known throughout the parish raises his arms to heaven and said: 'Our children love each other, it would have been another crime to oppose their union, which sealed a return to harmony between our two families '(Hirondolle News Agency, 2010. Rwanda/génocide - Réconcilier Bourreaux et Victimes, le Pari de la Paroisse Mushaka. [Online] available at <http://fr.hirondellenews.com/content/view/15503/616/>, accessed 14th April 2012).

[609] Hamber, B., 2007. Forgiveness and Reconciliation: Paradise Lost or Pragmatism. *Peace and Conflict: Journal of Peace psychology*, Vol.13 (1), p.119

[610] Bibas, S., 2007. Forgiveness in Criminal Procedure. *Ohio State Journal of Criminal Law*, p.331

[611] See Hamber, B., *op. cit.*, p.120

[612] For more details see American Psychological Association, 2006. Forgiveness: A Sampling of Research Results. Washington, DC: Office of International Affairs, p.31. See also Staub, E., Pearlman, L.A., Gubin, A. and Hagengimana A., 2005. Healing, Reconciliation of violence after genocide or mass killing: An intervention and its experimental evaluation in Rwanda. Journal of Social and Clinical Psychology, Vol. 24(3), pp.297-334.

[613] Concerning the positive effect of forgiveness on victims and its effective positive impact on reconciliation in the context of mass crimes, it was reported that in Rwanda members of community groups led by facilitators trained in this approach showed fewer trauma symptoms, and more 'readiness to reconcile' consisting of a more positive orientation to members of the other group and greater 'conditional forgiveness' (American Psychological Association, *op. cit.*, p.31).

[614] *The 2012 Decision on Principles and Procedures,* para.193

jurisdiction of the ICC, an emphasis has been put on the fact that reconciliation could be achieved by appropriate collective reparations.[615] Notwithstanding the importance of financial or material collective reparations in promoting reconciliation between a convicted person and victims, apology from the former could meet forgiveness from the latter and constitute an effective moral form of reparation for victims. The combination of the two courageous acts[616] (sincere apology from the offender and sincere pardon from his or her victim(s)) may likely produce the sought reconciliation.

Some scholars consider reconciliation as an act of two people coming together following separation,[617] or a mutual acceptance by members of formerly hostile groups of each other.[618] The positive connotation of the term 'reconciliation' may also refer to, among others, the healing and repair of valuable friendship. Actually, one may assume that 'one may forgive and not reconcile, but one never truly reconciles without some form of forgiving taking place'[619] Nevertheless, whilst forgiveness could be seen as 'the forerunner to reconciliation'[620] there is a room for debate as to whether there can be reconciliation without forgiveness or vice versa.[621] However, at the minimum it appears that some form of apology or public recognition of wrongdoing is needed for forgiveness even to be contemplated.[622] In other words, forgiveness can be better fostered by an acknowledgment by the harm doers of their actions, empathy with those they have harmed and expressions of regret and apology.[623] Consequently, the ICC should direct reparations proceedings in the way which encourage and facilitate this unique form of reparation: apology and forgiveness.[624]

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[615] See for example ICC, *Prosecutor v Lubanga,* Justice-plus et al., Observations relatives au régime de réparations, 10 Mai 2012, ICC-01/04-01/06-2877, para.38 ; ICC, *Prosecutor v Lubanga*, UNICEF, Submission on the principle to be applied, and the procedures to be followed by the Chamber with regard to reparations, 10 May 2012, ICC-01/04-01/06-2878, para.35 and *The 2012 Decision on Principles and Procedures*, paras 63 and 64.

[616] According to Paul Recoeur, who devoted a substantial epilogue to the issue of forgiveness, forgiveness is not impossible but difficult (quoted by Ricot, J., 2003. Le pardon, notion philosophique ou notion religieuse, *Horizons philosophiques*, vol. 13, n° 2, 2003, p.136).

[617] Hamber, B., *op. cit*., p.119

[618] Staub, E., Pearlman, L.A., Gubin, A. and Hagengimana A., *op. cit.*, p.301

[619] Enright (2001, quoted by Hamber, B., *op. cit*., p.119)

[620] See Hamber, B., *op. cit.*, p.119

[621] *Idem*

[622] See *Ibid*, p.120

[623] American Psychological Association, *op.cit*, p.31

[624] See also comments on the issue regarding reconciliation between victims and a convicted person (p.415).

4. Variety of other possible innovative measures for reparation

One may wonder whether there are other types of reparations which may be imagined by the Court besides those already discussed above. As already mentioned, most of the measures for reparations not included in the three suggested types of reparation – restitution, compensation and rehabilitation – could be grouped in satisfaction as any other type of reparation. Bearing in mind that 'reparations are laden with value judgements for victims',[625] the remit of what constitutes satisfaction as a type of reparations can be fairly wide and could include other innovative measures which could be ordered by the Court.

The *2012 Decision on Principles and Procedures* determines, yet implicitly, other innovative reparation measures. The Decision evokes for example the *certificat*es that acknowledge the harm which particular individuals experienced.[626] The possibility of the Court to issue certificates that acknowledge the harm which particular individuals experienced seems to be conceived as one of the reparation measures which may be taken by the Trial Chamber in the framework of international cooperation and judicial assistance. But, it is hard to understand the intention of the Chamber in establishing the relationship between the *certificates* and the international cooperation and judicial assistance. Furthermore, one may wonder what would be the relevance of such certificates in the context of reparations. Does the Chamber implicitly refer to the decision on the scope and extend of any damage, loss and injury provided for by Art.75 (1) (s2)? Issues linked to the decision on the scope and extent of any damage, loss and injury provided for by Art.75 (1) (s2) are discussed in Chapter two of Part two of this dissertation in connection with the order for compensation. At this stage, it can be observed that in *Lubanga* case, some former child soldiers welcomed a war victim status (materialized by a card or certificate) involving certain benefits such as access to free medical care or discounted even easier to pass the police barriers. Nonetheless, many others considered that such a *card* or *certificate* would instead be a very bad idea insofar as it can cause further stigmatization and even hostility.[627] This calls the wisdom of the Court in issuing the contemplated certificate by taking into account victims' views and the context of each case.

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[625] Hamber, B. and Palmary I., 2009. Gender, Memorialization, and Symbolic Reparations. In: R. Rubio-Marín, ed., 2009. *The Gender of Reparations. Unsettling sexual hierarchies while redressing human rights violations*. New York: Cambridge University Press, p. 326.

[626] See the *2012 Decision on Principles and Procedures*, para. 239.

[627] See ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes, Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10, 18 Avril 2012, ICC-01/04-01/06-2869, ICC-01/04-01/06-2864, para.23

The *2012 Decision on Principles and Procedures* goes on to evoke, in its para.240, *measures to address the shame* felt by the victims. Unfortunately, the Decision does not give any example of such measures. Besides the voluntary apology already mentioned, it is hard to understand which kind of concrete measures could be taken to address the shame felt by victims. One may assume that such measures may refer either to social rehabilitation or measures that constitute satisfaction. In addition, the analysis of submissions made by representatives of victims in the *Lubanga* case demonstrates that some victims (indirect victims) welcomed the creation of *a memorial* for the children who died fighting (direct victims).[628] However, the *2012 Decision on Principles and Procedures unfortunately* remains silent about such suggested types of symbolic reparations. In this regards, it is noticeable that in *KAING Guek Eav* case civil parties also requested for the construction of pagodas and other memorials. But the ECCC nevertheless rejected their request holding that:

> While sympathetic to these requests, the Chamber lacks sufficient specificity regarding the exact number of memorials sought and their nature, their envisaged location, or estimated cost. No information has been provided, for example, regarding the identity of the owners of all proposed sites, whether they consent to the construction of each proposed memorial, or whether additional administrative authorisations such as building permits would be necessary to give effect to each measure. As the material before it does not enable the Chamber to issue an enforceable order against KAING Guek Eav to pay a fixed or determinable amount in reparation, these requests are rejected.[629]

As it can be observed, the Chamber rejected the claim on two main grounds. Firstly, that the claim is not clear. Secondly, that there is imprecision on the claims which renders it impossible to implement such an order as reparation in the context of individual responsibility. Could we then assume that the silence of the *2012 Decision on Principles and Procedures* over submissions which suggested the creation of memorial prefigures its decision and hence the Decision implicitly espouses the ECCC's position?

A comparative analysis of the ECCC and the ICC reparation regimes shows that the framework of international cooperation and judicial assistance provided for the latter court particularises its mandate. The ICC reparation regime could, unlike the ECCC's one, facilitate the implementation of a possible decision ordering the creation of the memorial. As already mentioned

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[628] *Ibid*, para.19

[629] ECCC, *Case KAING Guek Eav alias Duch* , Trial Chamber, Judgement of 26th July 2010, Case File/Dossier No. 001/18-07-2007/ECCC/TC, para.672. As Redress observes, this position, 'whereby the Court faulted its own internal rules as the basis for its limited approach, is quite unfortunate, particularly as the internal rules have subsequently undergone a revision by the Judges, leaving the claimants in the first trial far from being repaired. In this respect, drawing lessons for the ICC, it is clear that a pro-active and thoughtful course of action must be considered well in advance of the reparations phase in order to ensure that the process is fit for purpose' (Redress, 2011, *op. cit.*, p.23).

in respect with social rehabilitation, in case the ICC should have granted the victims' request for the creation of a memorial, it should make consultations with concerned States and the TFV and examine the possibility of implementing such symbolic type of reparations. In other words, contrary to the ECCC, the ICC reparation regime allows States and the TFV to intervene in implementation of an order for reparations.[630] Such interactivity between these institutions may render possible the implementation of such an order for reparations.

One may expect that such kind of symbolic reparations – certificate or memorial - could give satisfaction to certain victim whereas could not do so for others. This supports the idea that consultations with victims are critical to decide on such kind of reparations. This is of greater importance 'when considering symbolic reparations, because such reparations will realize their maximum symbolic power only if they resonate with those they intend to assist or offer redress to'.[631] Arguably, these measures contemplated by the *2012 Decision on Principles and Procedures* constitute, beside restitution, compensation and rehabilitation, another type of reparation referred to as *satisfaction*. Satisfaction has been included in different forms of reparation for victims of core crimes by international law. The European Convention for the Protection of Human Rights for example, tersely provides for 'just satisfaction',[632] but fails to determine what satisfaction means as a type of reparations. According to the 2005 UN Basic Principles, satisfaction can include among others 'public apology, including acknowledgement of the facts and acceptance of responsibility'.[633] Likewise, some commentators agree that some of the main forms of satisfaction are an apology, a sanction, a commemoration of and tribute to the victims.[634] In the same line, one may consider allowing a victim to make symbolical statements at the Court in criminal proceedings as a form of 'psychological' reparation granted to him[635] which fall under satisfaction. In regard to satisfaction, international jurisprudence has repeatedly established that the judgement constitutes *per se* a form of reparation, but not exclusive or *per se* sufficient.[636] One may contend that this kind

[630] Concerning the role of States and the TFV in the implementation of reparation orders see Chapter three of Part two of this dissertation (pp.324ff).

[631] Hamber, B. and Palmary I., *op. cit.* p.380

[632] Art. 41 of the ECHR states that 'If the [European Court of Human Rights] finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party'

[633] Principle 22(e) of the 2005 UN Basic Principles

[634] Vandeginste, S., 2003. Reparations. In: D. Bloomfield, T. Bames and L. Huyse, eds., 2003. *Reconciliation after Violent Conflict*. Stockholm: IDEA, p. 146.

[635] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.331

[636] For example the IACtHR, in *Maritza Urrutia v Guatemala*, reasoned that a judgement condemning the responsible for human right violations

of satisfaction, that is the judgement, should not exclude the apology which is also considered as a form of satisfaction especially where it meet forgiveness.

E. Possible combinations of the various types of reparation

The ICC reparation regime does not provide for a possible combination of types of reparations. Neither does the *2012 Decision on Principles and Procedures*. Despite the silence of the ICC reparation regime and the *2012 Decision on Principles and Procedures,* there are good reasons for arguing that such possibility should be contemplated. Restitution of property for example should not rule out other types of reparations such as compensation or rehabilitations or vice versa. The combination of types of reparation could comply with the principle of proportionality established by the Decision and already discussed in this chapter.

As pointed out earlier, the purpose of reparations before the ICC is to restore as far as possible the situation of a victim which would, in all probability, have existed if that crime had not been committed. In addition, the particularity of the ICC reparation regime intends to go beyond this conception with the possibility of transforming the *status quo* of victims which presumably was one of the causes of their victimization.[637] This tremendous objective could not be achieved by a single type of reparations but a combination of reparation measures could make it possible at some extent. The principle of proportionality – which refers to appropriateness and adequacy-, could allow of the combination of reparative measures aimed at fulfilling the purpose of reparation before the ICC. In combining types of reparations, due consideration should be given to victims to determine for themselves what type of reparations are best suited to their situation justified by 'the realities they face'.[638]

Without losing sight of the fact that the nature of harm caused by the core crimes under the jurisdiction of the ICC could render impossible reparation *in integrum*, it should be agreed that a victim may sustain at the same time multiple harms such as material, physical and moral harms. Consequently one type of reparations could not be appropriate or adequate to redress the victim but a combination of types of reparations could be needed. Let us illustrate the situation by an example.

'constitutes, *per se,* a form of reparation and satisfaction for the victim (para. 178); but given the grave circumstances of a case the Court recognised that the judgement itself cannot be the only non-pecuniary damage awarded for the moral harm suffered by the victims and deemed that it must order payment of a compensation for non-pecuniary damages, in fairness (IACtHR, *Myrna Mack Chang v Guatemala, para. 260*).

[637] See for example the *2012 Decision on Principles and Procedures*, paras 222 and 236.

[638] Victims' Rights Working Group, *op. cit.*, p.10

During hostilities **A**, a young girl aged 17 years witnessed the horrific death of her father and mother killed by attackers, who were members of a group of rebels. The attackers, after killing, looted properties of the victims, raped the young girl and left her in critical condition but she survived. The unfortunate young girl was infected with HIV. Moreover she gave birth to an unwanted child. Suppose that **B**, a responsible member of the group of the rebels who committed such crimes had been convicted by the ICC for crimes against humanity pursuant to Art.7(1)(a)(f)(g) and war crimes pursuant to Art.8 (2)(a)(iv) of the ICC Statute and were sentenced to a total 20 years of imprisonment. **A** had been recognised as one of the victims of the crimes of which **B** was found guilty. **B** had been declared indigent by the Registry of the Court. Which type of reparation could alleviate all possible harms sustained by the unfortunate young girl currently a young single mother?

Bearing in mind that issues relating to the burden and standard of proof will be discussed in Chapter two of Part two of this study, let us consider the possible harms suffered by A in order to determine the appropriate reparations, if there are any. First of all, one should consider that the decision of *conviction* of **B** and *sentencing* may constitute a form of satisfaction as a type of reparation for **A**, as already discussed. But, such satisfaction cannot alleviate all the harm **A** have suffered. Possible *apology* offered by **B** could contribute to reparations for A, but would not be proportional to the harm she suffered. In this regard, we should recognise our impossibility of determining the scope and the extent of harm sustained by **A**. Only should we consider that **A** sustained material, physical and moral damage. Our impossibility of determining the scope and the extent of such damage should justify the fact that 'the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury' sustained by A, pursuant to Rule 97(2).[639]

Secondly, we should consider that **A** is entitled to claim *restitution* or compensation for looted properties in respect of her dead parents.[640] However, whereas restitution may be an appropriate type of reparation for the looted properties, *rehabilitation* (both *medical* and *social*) could be a complement type of reparation in order to strive to heal **A** from her trauma. **A** may needs not only, *medical assistance* for HIV resulting from the rape, but also psychiatric assistance according to possible psychosocial trauma she is suffering from. **A** as a young single woman infected with HIV could lose her chance for marriage, could experience shame for she has been

[639] Issues relating to the role of experts in reparation proceedings are discussed in Chapter two of Part two of this study (pp.258ff).

[640] The issues relating to *ayants droit* is discussed in Chapter two of Part two of this study (pp.192ff).

victim of rape and that resulted to an unwanted child. Consequently, *social rehabilitation* could be an appropriate type of reparation for such harm. Furthermore, psychological and social rehabilitation should not exclude *financial assistance* which may help **A** to care for the child born out of the rape.

After all, the principle of proportionality already discussed could serve as the basis for all possible combination of types of reparations or reparative measures by taking into account, the scope and extend of harm and the vulnerability of the victim. In this respect, symbolic reparations such as apology, and monetary compensation could be useful, but they can never wholly meet all the psychological needs of victims and reparation could remain a site of social and personal struggle. Medical and social rehabilitation can be another complement in helping a victim to gain a normal life. Actually 'the best form of reparation is likely to constitute a mixture of symbolic and material awards'.[641] In this respect, several combinations can be identified but individual circumstances of each case must be considered in combining different forms of reparation to be awarded. It is worth noting that Articles on State Responsibility highlights this possibility of combining different types of reparation where it provides that the forms of reparation can be taken 'either singly or in combination'.[642] This provision may easily comply, *mutatis mutandis*, with the context of individual responsibility recognised by the ICC Statute.

CONCLUSION

Art.75 (1)(s1) of the ICC Statute tasks the Court to create principles relating to reparations. Thus the Statute delegates to the court the duty to create the substantive law to be applied to reparations by shaping the content of the right introduced before the ICC. The content of the right to reparations should be developed on a case by case basis. The judicial nature of authority the Court is vested with as per Art.75(1) (s1) of the Statute to establish the principle has been demonstrated. It is expected that the principles should be developed in accordance with Art.21 of the Statute which provides for applicable law in the general context of implementation of the ICC Statute. The main purpose of the principles could be summarised as providing a consistent legal basis of any decision on reparations contemplated by the ICC Statute and ensure legal certainty for parties.

[641] Doak, J., 2008, *op. cit*., p.216

[642] Art.34 of the Articles on State Responsibility

The Trial Chamber I's *2012 Decision on Principles and Procedures* paves way for creation of the substantive law to be applied by the ICC. The decision confirms the assumption that the principles contemplated by Art.75(1)(s1) of the ICC Statute are to be established on a case by case basis and will constitute a legal basis in determining the scope and extent of harm suffered by victims and in deciding on appropriate and adequate reparations. The principles need to continue to develop so that they will constitute an efficient framework of the ICC's decisions on reparations. In developing such principles, the Court should remain aware that reparations 'need to be sufficient for the victims to enhance their livelihoods; effective so that the majority of the victims are covered; timely so that victims receive reparations within a reasonable time frame; favourable to those groups of victims that are especially vulnerable; and differentiated so as to meet the needs of the different groups of victims affected' by crimes adjudicated by the Court.[643] The *2012 Decision on Principles and Procedures*, as the first decision issued in the context of Art.75 (1)(s1), does not as far constitute a consistent jurisprudence of the ICC for future decisions could depart from its position on certain issues. At the time of writing for example, the principles established in respect to the standard of causation where the Decision adopted the criterion of proximate cause instead of the criterion of immediate cause, has already led the defence to appeal against the *Decision*.[644]

Nonetheless, the *Decision has* already determined the main purpose of reparations before the ICC which is to achieve true justice by not only sentencing but also by implementing different reparative measures aimed at restoring victim's situation. It has been suggested that such purposes of reparation should exclude punitive damages and avoid double recovery for fair justice particularly with respect to the right of an accused person. It has been demonstrated that the Decision follows the same path of international law, in establishing the principle of non-discrimination which should bear some exceptions (or positive discrimination) for the interests of vulnerable victims. Likewise, the principle of proportionality adopted by the *2012 Decision on Principles and Procedures* seems to establish a relevant alternative to the principle to *restitio in integrum* which could not apply in some cases due to the number of victims of core crimes under jurisdiction of the ICC, the nature of harm sustained by the victims and other practical circumstances such as indigence of a convicted person and insufficiency of funds. Moreover, by

[643] Garci′a-Godos, J. and Knut Andreas O.Lid, 2010. Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case of Colombia. *J. Lat. Amer. Stud*. 42, p.508

[644] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, 29th August 2012, ICC-01/04-01/06-2911, para.9. See also ICC, *Prosecutor v Lubanga*, Equipe de la Défense de Monsieur Thomas Lubanga, Acte d'appel de la Défense de M. Thomas Lubanga à l'encontre de la « *Decision establishing the principles and procedures to be applied to reparation* » rendue par la Chambre de première instance I le 7 août 2012, 6Septembre 2012, CC-01/04-01/06-2917.

adopting principles relating to standard of causation and recoverable harm, the Decision strives to specify the scope of liability for reparations. Notwithstanding, the criterion of proximate cause and the *but/for test* adopted by the Decision, there is still vagueness which requires a judge's wisdom in determining the scope of liability for reparations of a convicted person. In addition, by endorsing the three types of reparations – restitution, compensation and rehabilitation – the *2012 Decision on Principles and Procedures* brings some clarifications on their possible meaning under the ICC reparation regime. For example, the Decision limits restitution to its narrow meaning by referring to restitution in kind whereas some international instruments and major part of doctrine consider restitution as an umbrella term which encompasses all forms of reparation. It has been noted that compensation could be understood as a form of economic relief whose applicability does not only require an economic harm sufficiently quantifiable as the Decision holds,[645] but also an economically assessable harm. In this regard, we note that the Trial Chamber I, in the *2012 Decision on Principles and Procedures* did not deal with the issue of calculation of the quantum of compensation especially in the case of non - pecuniary harm. However, since the Chamber has decided to appoint experts whose mission will include the identification of the most appropriate types and modalities of reparation and the assessment of funds for these purposes,[646] one may expect that experts will assist in calculating and suggesting the quantum of compensation for harm sustained by victims.

The analysis of the *2012 Decision on Principles and Procedures* has demonstrated that the nature of harm sustained by a victim could lead to adopt reparative measure which may achieve full rehabilitation which includes medical and social rehabilitations. The *Decision* confirm the fact that the ICC Statute suggests the three types of reparation and opens room to the Court to find other types of reparation. In this respect, the Decision evokes different reparative measures which may be included in one type of reparation named *satisfaction*.

In sum, the mandate assigned to the Court to create and develop effective principles to be applied to reparation is a task central to the success of the ICC reparation regime.[647] The *2012 Decision on Principles and Procedures* is a good sign that the ICC's jurisprudence will create a consistent framework for the Court in dealing with substantive reparations issues. Keeping in mind the difficulties in setting limit between issues relating to substantive law and those concerning

[645] See the *2012 Decision on Principles and Procedures*, para. 226.

[646] Ibid, para. 262

[647] McCarthy, C., 2012, *op. cit*., p.182

procedure, it has been noted that the Decision establishes other principles which seem to relate to procedural issues and have been reserved to the next Chapter which deals with procedural aspects of the right to reparations.

CHAPTER TWO: ANALYSIS OF PROCEDURAL LAW APPLICABLE TO REPARATIONS (Art.75 (1(s2) – (4) of the ICC Statute)

INTRODUCTION

Affirming the right to reparations entails the need of establishing corresponding judicial mechanisms in order that victims of crimes might exercise such a right.[648] In Chapter one of Part two of this study it has been demonstrated how the Court shall establish the court-wide principles which may constitute the substantive law to be applied to the victims' right to reparations provided for by Art.75 of the ICC Statute. This chapter intends to discuss some main legal and practical issues relating to reparations proceedings before the ICC. The main objective of this chapter is not to discuss all the procedural rights linked to the right to reparations, such as victims' right to participate in criminal proceedings, rights to representations and information, but rather to understand how reparations proceedings will take place in the context of the whole trial before the ICC. The ICC Statute stresses the need of fairness and expeditiousness of a trial;[649] and one may wonder whether dealing with reparations matter during a trial will not constitute an impediment for the Court to fulfil the requirements of a fair trial. How should the Court conciliate the requirements of the rights of an accused person and victims' rights to reparations during a trial?

According to Art.75(1)(s2) of the Statute, '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'. The provision raises a number of questions on how reparation proceedings may be triggered. First of all, it should be noted that reparation proceedings maybe triggered upon request. The Statute does not specify who will request the Court to decide on reparation issues. By inquiring the RPE of the ICC on the issue, we note that Rule 94 entitled 'Procedure upon request' refers to 'the victim'. The Rule 94, in turn, raises another issue relating to the status of the victim for the purpose of reparations. As regards the status of the victims, Rule 85 of the RPE of the ICC defines the notion of the victim for

[648] United Nations, 2011, *op. cit.*, p. 72. In this regard, the Appeals Chamber noted that victim right to participate in criminal trial differs from the right to claims reparations 'because a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence' (ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.69).

[649] For example Art.64 (2) of the ICC Statute states that 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.

many purposes under the ICC regime, such as participation, protection, information, representation, reparation etc. Does it then suppose that all victims entitled to participation, protection, information etc., will qualify to request and obtain reparations before the Court? How will the victims gain access to the ICC justice? These issues are to be discussed in this chapter.

Secondly, in exceptional circumstances, reparation proceedings may be triggered by the Court on its own motion. At the outset, one may wonder which circumstances may lead the Court to initiate proceedings on its own motion. Neither the Statute nor the RPE specify the exceptional circumstances which may lead the Court to trigger reparation proceedings. In this respect, it will be observed that Rule 95 of the RPE of the ICC provides for the procedure on the motion of the Court with different scenarios which need to be understood. Article 75(3) of the Statute goes on by stating that '[b]efore making an order [for reparations], 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'. The permissive wording concerning the invitation of parties raises a question on how reparation hearings should be conducted. Can the Court issue an order for reparation without inviting the convicted person to defend himself by making observations on reparations claims? This question will be discussed in the light of Rule 94(2) of the RPE of the ICC which seems to exclude the possibility of the Court to order reparations, in case of reparation procedure upon request, without inviting the convicted person to make his or her representation. The fact that the RPE of the ICC refers to a convicted person raises the question of at what stage of a trial shall reparation proceedings take place. Will all procedural reparation issues await the conviction of the accused person or some of them can be dealt with during a trial and before the conviction? Reparation hearings, if within the Court's criminal proceedings, will raise the problem of related evidence and its possible expert assessment. Unfortunately, the ICC regime does not provide for the problematic issues related to the modes, burden and standard of proof of reparations. However, it is interesting that the *2012 Decision on Principles and Procedures* should have established some principles relating to the standard and burden of proof in the *Lubanga* case which will be discussed in this Chapter. In this respect, it will be observed how the *Decision* opted for the standard of 'balance of probabilities' as opposed to a *prima facie*[650] standard of proof which should be applied at the stage of participation in criminal proceedings and that of *beyond any reasonable doubt* which applies during conviction. In the same vein, it will be demonstrated how the burden of proof principally lies on the claimants but, in some circumstances, may be alleviated by the admission of the presumption as one of the modes of evidence in reparation proceedings.

[650] *Prima facie* (first appearance), prima facie evidence is evidence of fact that is of sufficient weight to justify a reasonable (Law, J. and Martin E.A.(ed.), 2009. A Dictionary of Law. 7th ed., Oxford: Oxford University Press, p.422)

Subsequently to reparation hearings, an order for reparations may be issued against a convicted person pursuant to Art.75(2) which reads as follows '[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. The question regarding the nature of the *decision* which may result from reparation proceedings is more complex than it seems to be. The relation between the decision provided for in para.1 (s2) of Art 75 of the ICC Statue and the *order* referred to in para.2 and 3 of the Art. 75 will draw our attention in order to determine whether there is or is not any substantial difference between the two judicial acts to which the Art.75 refers.

Before embarking into a critical analysis of all the foregoing issues, there are some preliminary ones which require to be addressed. Actually, one may assume that the Court would not deal with reparation issues, either upon request or on its own motion, unless it examines its competence to decide on the matter. Likewise, a victim or his or her representative, before requesting reparations, should allow for the competence of the Court to decide on his or her request. This requires us to first discuss the judicial mandate of the Court in respect to victims' right to reparations. The main issue of judicial mandate of the Court raises surrounding questions which need to be discussed in this section:

- the applicability or non-applicability of complementarity principle which governs the jurisdiction of the ICC;
- statute limitations to the right to reparations; and
- the question of the discretionary power of the Court to decide on reparations which may be deduced form the permissive wording adopted by Art.75 of the ICC Statute.

Consequently, Section one will be devoted to the foregoing preliminary issues and will constitute a springboard to the other procedural issues. After unpacking the scope of the judicial mandate of the ICC in respect with victims' right to reparations (I.1) we will discuss the issues linked to triggering and conducting reparation proceedings. In this respect the issues respecting the initiation of reparations proceedings will be discussed (II.2) before handling the questions relating to the place of reparation hearing in the proceedings before the ICC (II.3). In this process, it will be demonstrated that before any decision on reparations the Court may decide protective measures which could guarantee the effectiveness of future reparation orders (II.4). The very purpose of reparation proceedings which is adjudicating on liability for reparations will also draw our attention and constitute the object of Section five (II.5). Subsequently, the evoked question concerning the decision which may result from reparation proceedings will constitute the object of Section six

(II.6). Lastly, in section seven we will discuss issues relating to possible legal remedies against a reparations order (II.7).

II.1. The scope of the ICC's judicial mandate in respect of victims' right to reparations

The principal mission of the ICC is to adjudicate upon those responsible for core crimes determined by the Statute. Besides this main vocation, Article 75 of the ICC Statute vests the Court with the power to determine the scope and extent of any damage, loss and injury and to issue an order for reparations. This second judicial mandate of the Court raises a number of questions on the applicability of the complementarity principle which applies on the criminal jurisdiction of the Court. Will the principle of complementarity be applied to victims' right to reparations before the Court? Or, may one consider that since there Court has decided on the admissibility of a case,[651] the decision applies *de facto* to reparation matters? Neither the Statute nor its RPE gives an answer to these questions.

This section intends to argue and suggest that the scope of the judicial mandate of the Court to decide on reparations should be determined in the context of the principle of complementarity which is the backdrop of the whole mandate of the ICC (II.1.1.). In addition, the Court should satisfy that it has to exercise its judicial mandate on reparations in any case brought before it, by determining whether the right to reparations is or is not subject to prescription. Will there be applicability or non-applicability of statute of limitations to the right to reparations before the ICC (II.1.2.)? Furthermore, by analysing the scope of the second mandate of the Court – that is dealing with reparation issues – it will be observed that the exercise of such power is under the discretionary power of the Court due to the permissive wording adopted by Art.75 of the ICC Statute (II.1.3.).

II.1.1. The principle of complementarity and the judicial mandate of the Court to decide on reparations

The ICC statute is silent about the question of applicability or non-applicability of the complementarity principle in regards to the competence of the ICC to adjudicate on reparations to victims. What will be the attitude of the Court for example where an accused person has already provided reparations or the process is on-going at national level? One may imagine the scenario

[651] With respects to issues of admissibility of a case see Art.17 and 19 of the ICC Statute.

where the problem of reparations has been resolved or is being dealt with by national courts, Truth and Reconciliation Commissions or in case of real transaction concluded between an offender and his or her victims etc. Bearing in mind that these mechanisms of reparations available at national level should not prevent the Court from prosecuting the crimes under its jurisdiction, one may wonder whether the Court will override and decide on reparations to victims against a convicted person.

Some commentators assume that the complementarity principle needs not to be applied on the right to reparations under the ICC regime. For instance Oásolo argue that '[u]nlike the penal dimension, the triggering and civil dimensions of the ICC's jurisdictional powers are not subject to the complementarity regime and thus their exercise is not conditional on the inaction, unwillingness or inability of the States concerned'.[652] Such a position can be advantageous for victims but problematic and controversial on legal grounds. For instance, how to avoid the risk of *pendency* or *conflict of jurisdiction* between the ICC and national institutions which may occur when a claim for reparations is brought at the same time before the ICC and before a national Court? Moreover, how shall the principle of *res judicata*, which could be similar to the principle of *ne bis in idem* applied on criminal ground, be respected?

The solution to the above legal problems will require that the principle of complementarity be applied not only on the criminal ground but also on the Court's power to decide on reparations. This can be possible by considering the *primacy of national judicial institutions*, which can dispel the risk of *pendency* or the *conflict of jurisdiction* between the ICC and national institutions and the principle of *res judicata*. For a good understanding of these arguments let us take a look into the notion of complementarity principle from criminal perspective (II.1.1.) before discussing its applicability to the Court's power to decide reparations (II.1.2.). It is worth noting from the outset that the following observations are relevant in the context of reparations ordered by the ICC against an offender and does not concern any award provided by the Trust Fund for victims and their families in the context of its mandate to assist such victims pursuant to Art.79 of the ICC Statute.

[652] Oásolo, H., *op. cit.*, p. 32.

II.1.1.1. The complementarity principle from a criminal perspective

Complementarity is one of the cornerstone principles which sustain the existence and the function of the ICC. According to Art.1 of the ICC Statute the Court shall be complementary to national criminal jurisdictions.[653] The complementarity principle is also expressed in para.10 of the Preamble of the Statute which emphasizes that the ICC 'shall be complementary to national criminal jurisdictions'. In the same line, para.6 of the Preamble implicitly provides for the principle of complementarity where it recalls that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. Likewise, Art.17 entitled 'Issues of admissibility' specifies when the principle should be applied. Specifically, Art.17 of the ICC Statute stipulates that:

> The [ICC] shall determine that a case is inadmissible where: [1] (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court. [2] In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court […]; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. [3] In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

This principle, which is explicitly established by the ICC Statute, interlocks with other principles such as the principle of *ne bis in idem*. Contrary to the ICTY and ICTR regimes complementarity under the ICC regime implies that cases are admissible before the Court if a State remains wholly inactive or lacks the capacity or genuine will to investigate and prosecute atrocity

653 Art.1 of the ICC Statute stipulates that 'An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute'. Likewise, para.10 of the Preamble of the ICC Statute emphasizes that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

cases within the ICC's subject matter jurisdiction.[654] In other words, the principle of complementarity allows the ICC to act in case of impunity at national level - where there is inaction, unwillingness or inability of national jurisdictions to investigate and prosecute crimes allegedly committed within a crisis situation.[655] A case should be inadmissible before the ICC where it is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution'.[656] In the same vein, since investigation has been made by national competent institution but has concluded not to prosecute, the case should be inadmissible before the ICC unless the decision not to prosecute resulted from the unwillingness or inability of the State to genuinely prosecute.[657]

Arguably, the principle of complementary stands on three underlying rationales.[658] First, the principle of complementarity is deemed as consistent with the one of State sovereignty. Its respect allows the ICC to play effective role in putting an end to impunity 'while not trampling on national sovereignty'.[659] Secondly, it is assumed that domestic courts are the best indicated to deal with the targeted crimes since they 'would likely have more means available to collect the necessary evidence and to collar the accused'.[660] On its side, the ICC could face the problems of limited resources, infrastructure and personnel[661] and can only prosecute a small fraction of the large-scale human rights violations[662] that qualify as crimes under its jurisdiction. For this reasons, one may assume that justice might be advanced more by State prosecution of a wider scope of activity than the narrow conduct covered by the ICC charges[663] and this will provide victims with a better opportunity to yield more retributive justice.[664] Thirdly, the principle of complementarity enlarges the battle field against the culture of impunity by incentivizing a large plurality of domestic

[654] Gordon, G.S., 2009. Complementarity and alternative justice, p.4 [Online] available at: <http://works.bepress.com/gregory_gordon/5>, accessed on 16th April 2013. The ad hoc International tribunals, the ICTY and ICTR, have primacy over national courts.

[655] For more details on the conditions of admissibility of a case before the ICC see for example Perrin, B., 2006. Making sense of complementarity: The relationship between the International Criminal Court and National Jurisdictions. *Sri Lanka Journal of International Law*, Vol.18, pp. 301-325.

[656] Art.17, 2a of the ICC Statute

[657] Art.17, b of the ICC Statute

[658] Gordon, G.S., *op. cit*., p.5

[659] Perrin, B., *op. cit.*, p.304

[660] Gordon, G.S., *op. cit*., p.5

[661] *Idem*

[662] Concannon, B., 2000. Beyond complementarity: The International Criminal Court and national prosecutions, A view from Haiti. Columbia Human Rights Law Review, Vol.32, p.225

[663] Keller, L.M., 2010. The Practice of the International Criminal Court: Comments on 'The Complementarity Conundrum'. *Santa Clara Journal of International Law, Vol.1*, p.229

[664] *Ibid*, p.228

jurisdictions to become more operational and effective at investigating and prosecuting cases of core crimes.[665] In this context, the principle of complementarity objectively provides 'a valuable opportunity both to force the local justice system to perform better and to build public confidence in that system'.[666]

The principle of *ne bis in idem* also comes into play. According to Art.17 (2)(c) and Art.20(3) of the ICC Statute, a case should be inadmissible where it concerns a person already tried for the same conduct. More specifically, Art.20 of the Statute entitled 'Ne bis in idem' reads as following:

> [1] Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court. [2] No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court. [3] No person who has been tried by another court for [the crime of genocide, crimes against humanity or war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Although the principle *ne bis in dem* requires that a case should be inadmissible where it concerns a person already tried for the same conduct, yet the ICC Statute provides that the principle does not apply in the situations determined by Art.20(3) of the Statute. Nevertheless, the responsibility to investigate and prosecute those responsible for international crimes lies primarily with the States. The ICC's criminal jurisdiction is conceived and has to be exercised in accordance with the complementarity principle. The basis of admissibility of a case before the ICC is the evidence of impunity at national level. In this regard, the principle of complementarity may also be deemed, in normal situations, as a mechanism to dispel the risk of conflict of jurisdiction between national courts and the ICC. Moreover, the potential risk of violation of the principle of *ne bis in idem* is cleared since the ICC Statute has included this principle among the criteria for inadmissibility of a case before the Court.

[665] Gordon, G.S., *op. cit*., p. 5.

[666] Concannon, B., *op. cit.*, p. 225

II.1.1.2. The applicability of the principle of complementarity to the Court's power to decide on victims' reparations

As noted earlier, when the drafters of the ICC Statute based the Court's criminal jurisdiction on the principle of complementarity, the main objective was to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.[667] Similarly, in respect to reparations, the same principle should be applied to the ICC's mandate to adjudicate reparations in the same context of eradicating the culture of impunity.

It is worth remembering that the main purpose of reparations before the ICC is to achieve true justice by not only sentencing but also by repairing the harm sustained by the victims.[668] Reparation for victims of crimes under jurisdiction of the ICC appears as a complement mechanism to put an end to impunity. As mentioned earlier, international law imposes an obligation on States to provide for reparations for victims of crimes.[669] For this reason national courts should have primacy to deal with reparations for victims of crimes under jurisdiction of the ICC. The latter should intervene in case of inability by States to fulfil their international obligation. Actually, responsibility to provide for reparations to victims lies firstly with States.

Moreover, one of the criteria provided for by the ICC Statute in deciding on admissibility of a case before the ICC, in the context of complementarity principle, is the respect of the principle of *ne bis in idem.* This principle applied on criminal ground should be considered as similar to the principle of *res judicata* applied on a civil ground.[670] The latter principle could apply as criteria in deciding on the admissibility of the claim for reparations. Consequently, the principle of primacy of national courts (A) and the principle *res judicata* (B) call for the application of the principle of complementarity to the power of the ICC to adjudicate victims' reparations.

A. The consecration of the principle of primacy of national courts in determining reparations

Bearing in mind that ICC has an interpretative autonomy to decide whether it has or has not supremacy to decide on victims' reparations,[671] the ICC should find a claim for reparations

[667] See Paras 4; 5 and 10 of the Preamble of the ICC Statute and Art.1 of the Statute.

[668] See Chapter one of Part two of this dissertation (pp.68ff).

[669] See Chapter one of Part one of this dissertation (pp.17ff.

[670] The mandate of the ICC to decide on reparations could be deemed as its civil jurisdiction beside the criminal one.

[671] According to Art.119 (1) of the ICC Statute 'Any dispute concerning the judicial functions of the Court shall be settled by the decision of the

admissible or qualify for reparations where it is satisfied that victims do not have opportunity to justice due to inadequacy of national judicial system.

Actually, responsibility to provide for reparations to a victim of crime from his or her offender lies with a concerned State firstly. In this regard, reference may be made to the Resolution ICC-ASP/11/Res.7 on Victims and Reparations, adopted during the eleventh session held in The Hague on 14th - 22nd November 2012 which calls upon States Parties where crimes under the Court's jurisdiction have been committed, to adopt victims-related provisions appropriately, consistent with the 1985 UN Basic Principles.[672] This Resolution urges States to fulfil their obligation of providing victim with appropriate reparations. It is also worth remembering for example that according to Art.8 of the 1985 UN Basic Principles, States should ensure that offenders or third parties responsible for their behaviour make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights. In the same context, we must not lose sight of the international obligation upon States to provide 'tribunals' and other 'State institutions' to provide remedies to victims.[673] Consequently, the ICC should intervene to deal with reparation issues only where a State is unable or is unwilling to fulfil its international obligation.

Secondly, there are practical considerations which also call for the application of the principle of complementarity to reparation matters before the ICC. On the one hand one can fear that national courts may not always be impartial, especially when they have to rule on reparation claims against State's agents.[674] But on the other hand, one must agree that national courts 'are theoretically the preferable venue, as they are closer to and more familiar with the facts relevant to reparation and victims'.[675] Actually, local proceedings are better understood by victims than proceedings before an international court which applies rules that victims are wary of.[676] Yet, it is assumed or feared that only a few States have the means and willingness to adjudicate damages

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Court'.

[672] Resolution *ICC-ASP/11/Res.7* on Victims and Reparations, para.9

[673] See for example Art.6 of the Convention on the elimination of Racial Discrimination. For more details on States' obligations of providing remedies for victims of crimes see Section two (I.2) of Chapter one of Part one of this dissertation, p.17.

[674] Zegveld, L., *op. cit*., p. 92

[675] *Ibid*, p.91

[676] Concannon, B., *op. cit.*, pp. 227- 228

claims,[677] and the impartiality of national courts in some sensitive cases would not be guaranteed. In other words, the collapse of the national judicial system may be a reason prohibiting access to the national courts.[678] Such collapse would then justify the intervention of the ICC in adjudicating on reparations to victims in the context of the principle of complementarity. Thus the principle could be seen as an efficient backup mechanism for the justice.

To emphasize this reasoning, one may argue that the principle of primacy of national courts should be recognised by the ICC. The inability of national courts to deal with reparation issues could be the basis for Court's power of deciding on reparations in order to put an end to impunity. Although the ICC Statute does not define the concept of impunity, it may include among others the absence of reparations for victims of crimes. The concept of impunity can be understood as 'the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced with appropriate penalties, *and to making reparations to their victims [*emphasis added*]*'.[679] This definition of impunity has the merit to include absence of victim redress among the criteria of impunity. Consequently, fighting against impunity includes among others the recognition and implementation of the right to reparations. Therefore, in case of such impunity the principle of complementarity provided for by the ICC Statute at criminal level, should apply, *mutatis mutandis*, to the ICC's 'civil jurisdiction'- that is the mandate to decide victims' reparations. Thus, the unwillingness of a State to provide for and implement victims' reparations could be the basis of the legitimacy and admissibility of victims' claims for reparations.

Yet, the problem would be to determine the criteria for admissibility of claims for reparations. On criminal grounds certain commentators do not believe in the effective

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[677] Zegveld, L., *op. cit*., p.92

[678] *Idem*

[679] Diane Orentlicher , the Report of the independent expert to update the Set of principles to combat impunity (The report was submitted after the deadline in order to take into account replies of all respondents as well as the results of the expert workshop held in November 2004, point A). In the same vein, it is observable that the Universiteit Leuven adopted the same definition. According to Universiteit Leuven, impunity can be defined as 'l'absence, en droit ou en fait, de la mise en cause de la responsabilité pénale des auteurs de violations des droits de l'homme, ainsi que de leur responsabilité civile, administrative ou disciplinaire, en ce qu'ils échappent à toute enquête tendant à permettre leur mise en accusation, leur arrestation, leur jugement et, s'ils sont reconnus coupables, leur condamnation *y compris à réparer le préjudice subi par leurs victimes [emphasis added]*' (the failure of indictment, *de jure* or *de facto*, of criminals responsible of violations of human rights and the absence of any liability at civil, administrative or disciplinary level that could make possible the arrest, prosecution and sentencing that includes *reparations order* in case of conviction) (See Ligue des droits de la personne dans la région des Grands Lacs (LDGL), 2005). Burundi: Quarante ans d'impunité, Rapport final Juin 2005, p.11 [Online] available at: <htt://www.er.uqam.ca>, accessed 2nd March 2012.

complementarity principle because they consider the ICC as an 'arbiter of its own jurisdiction' in the matter.[680] In this regard, it is obvious that the ICC Statute goes far by empowering the Court to challenge the principle of *ne bis in idem* where it considers that the trial at national level was a travesty of justice.[681] Can one suggest that the Court should similarly challenge the principle *res judicata* with respect to reparations issues? Notwithstanding the relevance of the principle of primacy of national courts that, as mentioned above can clear the risk of conflict of jurisdiction or pendency, the ICC should remain with the supremacy in deciding whether reparations proceedings at national level are fair. This may result in empowering the Court to challenge the principle of *res judicata* as well as *ne bis in dem*.

It bears noting that the question of how to deal with competing reparations proceedings at international and national level is still intriguing since the ICC Statute is silent on the issue. The majority of domestic laws adopted in compliance with the ICC Statute likewise do not deal with the issue. Yet, national laws could not legally be the best mechanism to resolve the issue for the Statute has supremacy. Consequently, only the jurisprudence of the ICC should be expected to bring clarifications on the issue. Notwithstanding, it is observable that the tendency of some national laws is to establish the primacy of the ICC in respect of victims' reparations. For example, according to the Sweden law where 'an action for reparations has been instituted at a Swedish court in a matter that is already the subject of proceedings at the International Criminal Court and if the proceedings at the Court may result in a ruling that applies in Sweden [..], the action shall be dismissed or a stay of the proceedings declared pending the ruling of the International Criminal Court entering into final force'.[682] Sweden legislature gave priority to the ICC proceedings which will operate as a procedural bar to the beginning or continuation of national proceedings. Will the ICC, in case of conflict of pendency, ignore the above observations made on the primacy of national courts and espouse the choice made by the Sweden legislature? This issue can be seen as a dispute concerning the judicial functions of the Court which shall be settled by the decision of the Court pursuant to Art.119 of the ICC Statute (Settlement of disputes). Be that as it may, one can suggest that the ICC should consider the principle of complementarity and give priority to national courts where it is satisfied that at national level there are willingness and genuine ability to deal with offender's liability for reparations to the victims.

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[680] Holmes, J.T., 2002. Complementarity: National Courts versus the ICC. In: A. Cassese, P. Gaeta, and J.R.W.D. Jones, eds., 2002. *The Rome Statute of the International Criminal Court: A commentary*. Vol. 1, New York: Oxford University Press, p.672.

[681] See Art. 17(1)(c) and 20(3) of the ICC Statute.

[682] Section 30 of the Cooperation with the International Criminal Court Act (2002:329).

B. The recognition and the application of the principle of *res judicata*

On criminal ground the ICC Statute provides for the principle of *ne bis in idem* according which 'no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court'.[683] Consequently, according to the principle of complementarity provided for by the Statute, a case should be inadmissible where a person 'concerned has already been tried for conduct which is the subject of the complaint'.[684] This demonstrates that, on criminal ground the principle of *ne bis in dem* is one of the criteria of admissibility of a case before the Court.

In respect with reparations before the Court, the principle of *res judicata* which is recognised by the doctrine and known in both civil law system and common law system[685] and internationally widely accepted as a binding principle, should similarly apply on reparations matter before the Court. According to Art.21 of the ICC Statute, the Court can apply general principles of law derived by the Court from national laws of legal systems which are not inconsistent with the Statute and with international law and internationally recognised norms and standards'. *Res judicata* is a general principle recognised at national and international level. As stated by the International Court of Justice the principle of *res judicata* 'signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose'.[686] The principle aims to ensure legal security to parties insofar as it acts to prevent a party from re-litigating a matter in which a judgement on the merits has been entered. The justification of the principle is normally found in the maxim *interest reipublicae ut sit*

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[683] See Art. 20(1) of the ICC Statute

[684] See Art.178(1)(c) of the ICC Statute

[685] Different national legal systems recognise the principle of *res judicata* in a variety of terminology as Van de Velden, J. and Stefanelli, note: England & Wales (merger and bar), France (exception de chose jugée, art. 1351 CC, 122 and 440 CPC), Germany (materielle Rechtskraft, §322(1) ZPO), Netherlands (gezag van gewijsde, Article 236 Rv), Romania (putere de lucru judecat, 1201 Civil Code), Spain (efecto negativ de la cosa juzgada), Sweden ([negative] rättskraft, Code of Judicial Procedure Chapter 17, section 11), Switzerland (materielle Rechtskraft, rule based on case law), and United States (bar and merger, Restatement (Second) of Judgments ss 18 and 19) (see Van de Velden, J. and Stefanelli, J., 2006. The Effect in the European Community of Judgement in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process. Comparative report, available at: <http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf>, pp. 67-96, accessed on 17th April 2013. For example the US Supreme Court recognised that the purpose of *res judicata* is to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication' (*Allen v McCurry*, 449 U.S. 90, 94 (1980, quoted by Vickers, J., 2010. *Res Judicata* claim preclusion of properly filed citizen Suits. *Northwestern University Law Review*, Vol. 104(4), p.1624.

[686] ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Case concerning application of the Convention on the prevention and punishment of the crime of the crimes of genocide (Judgment of 26th February 2007), para.115

*finis litium (*in the interest of society as a whole, litigation must come to an end). According to this principle '[s]ave in those exceptional cases where his opponent can prove that the judgement was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again'.[687] Therefore, two purposes both general and specific underlie the principle of *res judicata:* the stability of legal relations requires that litigation come to an end and it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again.[688] The importance of the principle of *res judicata* has also been recognised by the European Court of Justice by holding that:

> The importance of the principle of *res judicata* cannot be disputed […] In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called in question.[689]

This demonstrate that according to the principle *res judicata*, on one hand, what has been finally adjudicated by a judge cannot be ignored or even denied by another one and, on the other hand, parties are bound by a final judicial decision and are required to execute the decision issued against them.[690]

The question is now how can the principle of *res judicata* be applied to the ICC reparation regime? One may argue that, by applying the principle of *res judicata,* the ICC would determine that national court have already decided on claims for reparations against the accused unless the national judicial system is manifestly geared to depriving victims of their right to redress.[691] In this regard, it is worth drawing attention to the fact that some national laws implicitly expect the ICC to respect this principle. To illustrate this assertion it can be referred to the Swedish legislation. According to Cooperation with the International Criminal Court Act (2002:329), an order for reparation issued by the ICC may not apply and may not be enforced in Sweden if such an order has entered into final force concerning the same matter which has been made in Sweden before such time.[692] In addition, the principle of *res judicata* should bind the ICC where there is real transaction

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[687] *Bricklayers' Hall case* (Judgement of the Irish Supreme Court delivered on 24th July, 1996 by Keane J), [Online] available at: <http://www.ucc.ie/law/restitution/archive/irelcases/brick.htm>, accessed 27th April 2012.

[688] See ICJ, ICJ, *Bosnia and Herzegovina v Serbia and Montenegro*, Case concerning application of the Convention on the prevention and punishment of the crime of the crimes of genocide (Judgment of 26 February 2007, para.116

[689] Case 224/01 Gerhard Köbler v Republik Österreich (2003, quoted by Van de Velden, J. and Stefanelli, J., *op. cit*., p.37)

[690] Caldeira Brant, L.N., *op.cit*. p.5

[691] The principle of *res judicata* could be understood in the light of the principle of *non bis in idem* provided for by Art.20 of the ICC Statute.

[692] Section 29 (para.2) of the Swedish Cooperation with the International Criminal Court Act (2002:329); see also Friman, H., 2005. Sweden. In: C. Kreb, B. Broomhall, F. Lattanzi, V. Santori (eds), 2005. The Rome Statute and Domestic legal Orders. Vol. II, Fagnano Alto: Il Sirente, p.422.

between offender and his or her victim(s). A real transaction may for example result from reconciliation. Therefore, transaction should have same effects as a judgement. But, taking into account the interests of a victim, in case of transaction, the ICC would rigorously consider the free will of the victim. Likewise, where a convicted person has already paid voluntary compensation to a victim there should not be an option open to the court to award reparations.[693]

Finally, one may assume that not considering the complementarity principle by the ICC before it admits victims' reparation claims or before it considers *proprio motu,* reparation matters may raise the problem of *pendency* or conflict of jurisdiction between national courts and the ICC should face the risk of violation of the principle *res judicata*. The failure to take into account the complementarity principle potentially increases the risk of pendency where the issue concerning reparations is still being dealt with by the national court. The violation of the principle of *res judicata* may occur when a national court has already issued its final decision on reparation claims brought again before the ICC. For these reasons and in absence of any explicit provision of the ICC Statute, the Court should refer to Art.21 of its Statute and consecrate the principle of complementarity which would dispel both the risk of the pendency and the violation of the principle of res judicata.

II.1.2. Applicability or non-applicability of statute of limitations to the right to reparations

Statute of limitations or limitation periods aim to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice that might arise if courts were required to decide upon events which took place in a distant past'.[694] One imagines that after a certain past time for certain number of facts, specified by law, the justice completely stops working due to the assumption that the time gradually reduces the resentment and the eagerness for repair.[695] What is the position of the ICC reparation regime respecting the applicability or non-applicability of statute of limitations to the right to reparations? The ICC reparation regime does not give an explicit answer to the question.

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[693] Miers (1990, quoted by Zedner, L., *op. cit*., p.174)

[694] *Stubbings and others v the United Kingdom* (quoted by Redress, 2004. Legal Remedies for Victims of 'international Crimes'. Fostering an EU Approach To Extraterritorial Jurisdiction (FINAL REPORT), p. 10 [Online] available at: <http://www.redress.org/downloads/publications/LegalRemediesFinal.pdf>, accessed on 28th April 2012

[695] Onfray, M., 2001. Antimanuel de philosophie, Paris : Bréal, p.199

At the national level 'courts around the world have, for the most part, applied statutes of limitations under ordinary tort laws to dismiss reparation claims based on human rights crimes'.[696] At international level, in the case of State compensation scheme for example European Convention on the Compensation of Victims of Violent Crimes provides that '[t]he compensation scheme may specify a period within which any application for compensation must be made'.[697] For civil liability-based reparations, some national legal systems provided for time limitation for the core crime such as genocide. For example the Federal Supreme Court of Germany has long held that 'compensation claims brought by victims of Nazi concentration camps are subject to the ordinary prescription periods of the German Civil Code (which are only three years for torts)![698] This lead one to wonder what will be the attitude of the ICC toward statute of limitations in respect with victims' right to reparations.

The ICC Statute provides for non-applicability of statute of limitations for crimes within the ICC's jurisdictions.[699] International crimes are not or should not be subject to statute of limitations. Even at national level States are urged not to apply statute of limitations to international crimes. For example the 2005 Basic Principles provides that '[d]omestic statutes of limitations for other types of violations that do not constitute crimes under international law, *including those time limitations applicable to civil claims and other procedures*, should not be unduly restrictive'.[700] Since crimes under the jurisdiction of the ICC are not subject to the statute of limitations, reparation claims asserted against an accused person before the Court are not subject to statute of limitations either. Reparation claims are to be considered as imprescriptible as well as the crimes under the ICC jurisdiction from which they derive.[701] Actually, since the '[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations' and the exercise of the right to reparations

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[696] Hessbruegge, J.A., 2012. Justice delayed, not denied: statutory limitations and human rights crimes. G*eorgetown Journal of International law*, Vol.43, p.377

[697] Art.6 of the European Convention on the Compensation of Victims of Violent Crimes

[698] Hessbruegge, J.A, *op. cit*., p.377

[699] See Art.29 of the ICC Statute.

[700] Principle 7 of the 2005 UN Basic Principles. In this regard, it is observable that there is a tendency of reinforcing the right to reparations by making it independent of criminal prosecution in regard with prescription. Principle 23 of the Report of the independent expert to update the Set of principles to combat impunity provides that where prescription does apply to crimes under international law, it 'shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries. The Principle goes on by providing that '[p]rescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available' (See Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher . The report was submitted after the deadline in order to take into account replies of all respondents as well as the results of the expert workshop held in November 2004).

[701] Hessbruegge, J.A, *op. cit*., p.376

before the ICC is ancillary to prosecution and conviction, the same limitations rule should apply to the right to reparations.

It has been demonstrated how reparation play its role in fighting against impunity and provide true justice to victims of core crimes. Therefore, one should agree with some scholars who consider that 'the time which blunts all things, the time which gradually waves sorrow as it gradually gully mountains, the time which favours forgiveness and forgetfulness, the time that comforts, the liquidator and healing time does not dilute the colossal carnage; on the contrary it continues to heighten its horror [therefore], the crimes against humanity are not subject to the statute limitations, that is to say they cannot be cleared by the time, the time does not have any effect on them.[702] Consequently, it should be agreed that '[d]amages claims related to international crimes are concerned with such seriousness that they cannot be forgiven or forgotten'.[703]

II.1.3. Understanding the discretionary power of the Court to decide on reparations

Art.75(1) and (2) of the ICC Statute uses the term 'may' instead of 'shall', when providing for the determination by the Court of the scope and extent of any damage, loss and injury to, or in respect of, victims and the possibility of issuing an order for reparations.[704] The 'permissive nature of the statutory language used' lead to an assumption that the 'application of the provision to order reparation awards is discretionary'.[705] The Court has 'full discretion to decide whether to make a reparation order and to determine the kind of reparation to award in each specific case'.[706] As some commentators observe, Art.75 does not establish by itself a positive right of victims to reparations.[707] One may assume that such a situation has resulted from the fear expressed by some delegations to the ICC Statute negotiations that the complex decision-making in the area of reparations could jeopardize the expediency in adjudication.[708]

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[702] Jankélévitch V. (1971, quoted by Onfray, M., *op. cit*., p.199)

[703] Zegveld, L., *op. cit*., p.107

[704] Art.75(1)(s2) of the ICC Statute states that 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 [emphasis added]'. Para.2 of the same Article goes on to stipulate that ' 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' and '[w]here appropriate, the Court *may* order that the award for reparations be made through the Trust Fund [emphasis added]'.

[705] Dwertmann E., *op. cit*., p.67

[706] Bottigliero, I., *op. cit*., p.241

[707] See ICC, *Prosecutor v Lubanga*, Registrar's observations on reparations issues, 18 April 2012, ICC-01/04-01/06-2865, para.6.

[708] Donat-Cattin, D., 2008, *op. cit.*

However, it will be demonstrated that ICC reparation regime set up a framework for the Court to establish a positive right of victims to reparations so as to achieve the true justice contemplated by the *2012 Decision on Principles and Procedures*.[709] In order to grasp the scope of the framework two scenarios provided for by Art. 75(1) are to be distinguished: where the court can exercise discretion and act on its own motion (II.1.3.1.) and where the Court might establish a positive right to reparations for victims' claims (II.1.3.2.).

II.1.3.1. The Court's discretionary power to act on its own motion

According to Art.75 (1) and (2) the Court *may* 'on its own motion in exceptional circumstances, determines the scope and extent of any damage, loss and injury to, or in respect to the victims'. In this case, the Court has a discretionary power to decide whether it may deal with reparations issue and determine the scope and extend of harm suffered by a victim and order reparations for a victim. It is worth noting that where the Court has a discretionary power to order reparations on its own motion, it remains bound by the principle of legality which include the principle of motivation.

Normally, where there is no claim for reparations, the Court is not obliged to deal with reparation issues. The general principle is that the Court decides on referral and the adversarial principle needs to be respected.[710] Nonetheless, the Statute and the RPE provide for reparation procedure on the motion of the Court. In the context of Art.75 (1) (s2) of the ICC Statute, Rule 95 of the RPE of the ICC provides for the possibility of the Court to trigger reparations proceedings on its own motion. In this case the Registrar is required to notify the intention of the Court to deal with reparations issue. One of the scenarios provided for by Rule 95(2), a victim may react to the notification by filling with the Registry a request for reparations. However, as it will be discussed in paragraph two of section two of this chapter, the spirit of Rule 95 does not rule out the possibility of the Court to use its discretionary power and award reparations to victims who, due to exceptional

[709] See discussions made on the principles established by the *2012 Decision on Principles and Procedures* in Chapter one of Part two of this Dissertation (pp.65ff).

[710] It should be kept in mind that the IACtHR has implicitly reaffirmed the adversarial principle. In *Velasquez Rodriguez v Honduras* the Commission requested the IACtHR to award compensation to the victims, but did not offer evidence regarding the amount of damages or the manner of payment. It also failed to plead costs. Consequently, the Court held that it would not be proper' to rule on them in the absence of a pleading. The issue was raised again during the compensatory damages phase of the case. The Court once again rejected the award of attorneys' fees and costs because they were not pleaded or proven opportunely (see IACtHR, *Velasquez Rodriguez v Honduras* (Judgment of 21st July 1989 – Compensatory Damages (ART.63 (1) American convention on human rights), para.42, and IACtHR, *Velásquez-Rodríguez v Honduras*, Judgment of 29th July 2 1988 (*Merits*), para.193).

circumstances, did not file any request for reparations.[711] This is the scenario where the Court is really vested with discretionary power to trigger reparation proceedings or to award reparations to victims on its own motion. The case should be different where a victim has lodged a reparation claim with the Court against an accused person.

II.1.3.2. The Court's power to act upon requests

Notwithstanding the discretionary power vested on the ICC by Art.75 of the Statute, reparations regime provides a legal framework which requires the Court to establish a positive right to reparations to victims of crimes under its jurisdiction. This avenue is open by the scenario of victims' requests for reparations submitted to the Court pursuant to Art.75(1)(s2) of the ICC Statute.

Pursuant to Art.75 (1)(s2) of the Statute, the Court *may*, *upon request*, 'determine the scope and extent of any damage, loss and injury to, or in respect to victims'.[712] It should be noted that the request is not subject to any leave from the Court. What will be the subsequent step where there is a request for reparations? According to Rule 94(2) of the RPE of the ICC, entitled 'Procedure upon request', 'the Court *shall* ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States [emphasis added]'. The persons notified may make their observations. It is worth noting that Rule 94(2) does not use the same permissive wording found in Art.75 (1)(s2). Rather, it deliberately uses a binding language by requiring the Court to ask the Registrar to provide notification of the request to other parties or potential participants. One may argue that victim's request binds the Court since Rule 94(2) imposes such obligation upon the Court. It is not in discretionary power for the Court to decide whether it is relevant to invite other parties to make their representations. It would be time wasting and costly to notify other parties and invite them to make representation where the Court will use its discretionary power not to deal with reparation claims lodged with it.

Secondly, according to Rule 95(2)(a) of the RPE of the ICC in case the Court should decide to trigger reparation proceedings upon its own motion, a potential request from a notified victim

[711] See also the *2012 Decision on Principles and Procedures, para*.219.

[712] Procedural issues relating to the reparation procedure upon request are discussed in details in paragraph one of Section two of this chapter (pp.183ff)

should be determined as if it should had been brought under rule 94 (that is the case of a reparation claim lodged by a victim on his or her initiative). It becomes clear that in case of request made in context of procedure on the motion of the Court, the RPE unreservedly refers to reparation procedure made upon request. In this respect the requests made in the two contexts should produce the same effect. When a request for reparations is lodged with the Court, the latter should rule on all issues arising as long as it has jurisdiction on the matter. Actually, it would be hard to imagine a situation where the Court may communicate its intention to deal with reparation issues pursuant to 95(2)(a) of the RPE only to retract once a notified victim has filed his or her request. The Court cannot abuse its discretionary power in such a way.

Yet, one may ask how the permissive wording used by Rule 97(1) of the RPE entitled 'Assessment of reparations' came to be. The Rule states that ' Taking into account the scope and extent of any damage, loss or injury, the Court *may* award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both [emphasis added]'. It is clear here that in case of Rule 97(1) of the RPE of the ICC the Court has already dealt with reparation claims and has determined the scope and extent of any damage. The decision on the scope and the extent of any damage, loss and injury seems to defer from an order for reparations.[713] Deciding on issue an order for reparations, as a subsequent step in dealing with reparation issues, would depend on different factors. One may think about the nexus between harm and crimes which must be determined by application of the standard of proximate cause and the but/for test; where the degree of harm sustained by a victim is trivial and where the principles for reparations include the principle of *de minimis non curat praetor*,[714] the Court on the basis of the principle, would hold for no relevance an order for reparations.[715] Another scenario would be the situation where the Court found that a victim has already received reparations from the convicted person and applies the principle *of res judicata* etc.

[713] For more details on the difference between a decision on the scope and extent of any damage, loss and injury and an order for reparations see Section II.6 of this Chapter (The nature and the content of the Court's decision under art.75 of the ICC Statute, at pp.274ff).

[714] Art.5 of the European Convention on the Compensation of Victim of Violent Crimes seems to implicitly envisage such a principle where it states that 'The compensation scheme may, if necessary, set for any or all elements of compensation an upper limit above which and a minimum threshold below which such compensation shall not be granted'.

[715] This principle was not established by the *2012 Decision on Principles and Procedures*, but as the decision was established in specific case, namely the Lubanga case, nothing prevents the Court to establish the principle in future. The principle *de minimis non curat praetor* could be similar to the principle implicitly established by art 17(d) of the ICC Statute according which the Court shall determine that a case is inadmissible where '[t]he case is not of sufficient gravity to justify further action by the Court'.

Taking into account the aforementioned observations, where there are requests for reparations the Court should arguably deal with them. The Court should proceed first by considering the admissibility of the claims before ruling on their merit. We have to bear in mind that the judge is bound by the internationally recognised principle of motivation of judicial decisions. This obligation can be implicitly found in Art 75(1) which provides that the Court, when ordering reparations to the victims 'will state the principles on which it is acting'. This principle of motivation would not run in one-way but in a two-way process. If the Court does not order reparations to victims who have applied for it, it should explain its reasons. Respecting the admissibility of victims' claims for reparations some scenarios may occur. The Court may decide that the claims are not admissible due to the different aspects of the complementarity principles already analysed. Where the complementarity principle pleads for admissibility of a victim's claim for reparations, it would be hard for the Court to justify its reason for not moving to the second phase of considering the merit of the request. Can the Court argue that it is overloaded so that it is not able to decide on victims' request without delaying criminal adjudications? The Court may not rely on such motivation by rejecting a request duly filled a victim or his representative. Such position would amount to denial of justice. It is pertinent to observe that the Court has recognised, still implicitly, its imperative mandate to deal with reparation issues as follows:

> The reparation scheme provided for in the Statute is not only one of the Statute's unique features. It is also a key feature. In the Chamber's opinion, the success of the Court is, to some extent, linked to the success of its reparation system, [footnotes omitted]'.[716]

Likewise the ASP stressed that victims' rights to equal and effective access to justice and adequate and prompt reparation for harm suffered are essential components of justice[717] and recognised that' reparations to the victims of the most serious international crimes are critical components of the Rome Statute and that it is therefore essential that the relevant provisions of the Rome Statute are efficiently and effectively implemented'.[718] In this regard, it bears noting that, in its Revised Strategy in relation to victims, the ICC has admitted that according to its Statute and the other legal instruments of the Court, victims have a right to seek reparations in the event of a conviction.[719]As such, the ICC should consider the merit of their claims subject to the considerations related to the complementarity principle. In other words, once a victim or his

[716] ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10th February, ICC-01/04-02/06-20-Anx2, para.150 and *The 2012 Decision on Principles and Procedures*, 7th August 2012, ICC-01/04-01/06-2904, para.178

[717] Preamble of the Resolution ICC-ASP/11/Res.7 on victims and reparations, para.2

[718] Preamble of Resolution ICC-ASP/10/Res.3 on reparations, para.2

719 ASP, Court's Revised strategy in relation to victims, 5th November 2012, ICC-ASP/11/38, para.15(c).

representative has duly filled a request for reparations, the Court should decide on the claims and completely dispose of them and *may* issue an order for reparations. In other words, the Court *should* issue an order for reparations where the victims' claims are admissible and well grounded.

II.2. The initiation of reparation proceedings before the ICC (Art.75(1)(s2) – (3) of the ICC Statute)

As already mentioned Art.75 (1)(s2) of the ICC Statute provides for two alternatives for triggering reparation procedures before the Court. According to the Art.75 (1)(s2), the Court may deal with reparations issues 'either upon request or on its own motion in exceptional circumstances'. In the same vein, the RPE distinguishes the two alternatives of starting reparation procedures. Whereas Rule 94 of the RPE deals with procedure upon request, Rule 95 provides for procedure on the motion of the Court. The issues relating to the discretionary power of the Court to decide on reparations in both two cases have already been discussed in section one of this chapter. For these reasons this section intends to critically discuss these two modes of triggering reparation proceedings: the initiation of reparation proceedings as a result of a victim's request (II.2.1.) and reparation procedure on the motion of the Court (II.2.2.). It will be demonstrated that the second mode of triggering reparation proceedings may in turn entail three scenarios. One of those scenarios is that a victim be informed about the Court's intention to deal with reparations may not give any feedback to the Court. What will be the Court's attitude in such a case? This question will be answered in the light of the context of the whole reparation regime of the ICC. In case the Court decide to hold reparation proceedings, either upon request or on its own motion, Rule 96 of the RPE requires the Registrar of the Court to provide for notification and publicity of reparation proceedings. The procedure and the importance of notification and publicity in reparations proceedings will also draw our attention (II.2.3.).

II.2.1. Reparation proceedings as a result of a victim's request (Art.75 (1) (s2) of the ICC Statute and Rule 94 of the RPE)

Rule 94(1) of the RPE of the ICC provides that '[a] victim's request for reparations under article 75 shall be made in writing and filed with the Registrar'. Who may qualify as a victim or who is entitled to claim reparations? The notion of a victim, entitled to submit such a request, screams out as a matter to be discussed before analysing the process of a victim's request for reparations (II.2.1.1.). Subsequently, the process of the victim's request for reparations, that is the

application procedure for reparations, will be analysed (I.2.1.2.). As far as the victim's request for reparations is concerned, it is relevant to unpack its content by bringing out the pre-requisite factors which determine a comprehensive reparation request (I.2.1.3.). Thereafter, the role of the Registry in facilitating victims to efficiently fill their requests as determined by the Regulations of the Registry will be discussed (I.2.1.4.).

II.2.1.1. The notion of the victim for the purpose of reparation proceedings

The ICC Statute does not give a definition of victim. During the ICC Statute negotiations, it was suggested that for the purposes of defining 'victims' and 'reparations' reference be made to the 1985 UN Basic Principles and the Revised Draft Basic Principles and Guidelines on the right to reparations for victims of gross violations of human rights and humanitarian law[720]. Subsequently, a definition of victim was given by Rule 85 of the RPE of the ICC which reads as follow:

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

It is quite obvious that the definition of victims is given for many purposes under the ICC Statute and the RPE such as *the protection*, *participation* in proceedings, *reparations* and *assistance* for victims. The limited ambit of this dissertation requires us to restrict our discussions on the notion of victim for the purpose of reparation proceedings. According to Rule 85, a victims must be a natural person as per Rule 85(a) or an organization or an institution as set forth in Rule 85(b), must have suffered harm, the crime from which the harm resulted must fall within the jurisdiction of the Court and must be a causal link between a crime and the harm. This Rule distinguishes two categories of victims: natural victims and organizations or institutions. Additionally, the rule distinguishes the two categories of victims on the basis of the degree of the link between the harm suffered and the crime committed. Whereas for natural person, the Rule 85 provides for ' harm as a result of the commission of any crime within the jurisdiction of the Court'[721] it provides for ' direct harm' to property which is dedicated to religion, education, art or science or charitable purposes, and to historic monuments, hospitals and other places and objects for humanitarian purposes'.[722]

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[720] See observations made on Art. 73 of the 1998 Draft of the ICC (Report of the preparatory committee on the establishment of an international criminal court, A/CONF.183/2/Add.1, 14th April 1998).

[721] Rule 85(a) of the RPE of the ICC.

[722] Rule 85(b) of the RPE of the ICC.

The term *harm* appears as a general criterion in defining 'victim'. The notion of harm and its scope under the ICC reparation regime has already been discussed in Chapter one of Part two of this study. The notion of victim for the purpose of reparation proceedings slightly differs from the notion of victim as far adopted by the ICC for the purpose of victim participation in criminal proceedings. Considering the nexus between harm and a crime, early jurisprudence of the ICC has developed and distinguished two notions of victims for the purpose of participation in criminal proceedings. The Court has differentiated the notion of *victims of a situation* and *victims in a case* for the purpose of participation of a victim in trial. At the very stage of reparations proceedings a third category of victims could be identified: *victims of a convicted person*. Therefore, it is worth understanding the notion of 'victim of a situation', 'victim in a case' and 'victim of a convicted person' (A) before considering the two main categories of victims established by the Rule 85: Natural persons (B) and Legal persons (organization or institutions) (C).

A. Distinguishing the notions of 'victim of situation', 'victim in a case' and 'victim of a convicted person'

Rule 85(a) of the RPE of the ICC arguably adopts a wide definition of 'victim' insofar as it establishes a link between the harm suffered and *any crime within the jurisdiction of the Court.* This definition raises the question whether all natural persons who claim to be victims of *any crime within the jurisdiction of the Court* should be granted the status of victim for the purpose of reparation proceedings and entitled to reparations. A similar question raised at the stage of participation of victim in criminal proceedings and the Court distinguished two categories of victims on the basis of the stage of procedures: victims of situation and victim in a case.

In regard with *victim of situation* the Court considered that during an *investigation of a situation* the status of victim will be accorded to applicants who seem to meet the definition of victims set out in Rule 85 of the RPE in relation to the situation in question.[723] A situation may be understood as a region or a country where the crimes under jurisdiction of the ICC were committed and are being investigated by the Prosecutor after the Court's decision on admissibility. The term *victim of situation* may be understood as a broad notion of victim which may also apply in case of assistance for victims provided by the TFV.[724] The notion of *victim of situation* may reassure some

[723] See ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22nd March 2006), 17th January 2006, ICC-0I/04-101-tEN-Corr., para.66.

[724] At the time of writing situations pending before the ICC were DRC, Uganda, Darfur (Sudan), Kenya, Libya, Centre African Republic and

commentators such as Cassese, Gaeta and Jones, who fear that referring to individual as a victim (rather than 'alleged victims') before an accused's trial has begun 'may undermine the presumption of innocence and suggest that '[a] more appropriate nomination might be wisely sought'.[725] With respect to *victim in a case*, the Court holds that at the *case stage*, victim status will be accorded to applicants who meet the eligibility criteria in the context of the case.[726] In others words, individual or legal persons will be considered as victim if they seem to have suffered harm as a result of a crime a defendant is *charged with* before the Court.

Besides the two categories of victim another category of victim can be found: the 'victim of a convicted person'. This third category of victim may be complicated to define than it seems. Given that case-based reparations are ordered 'directly against a convicted person' in the light of the damage, loss, and injury caused by the crimes for which that person has been convicted, due process concerns require that the Court determines which individuals qualify as 'victims' of the convicted person'.[727] For example, in the *Lubanga* case, victimization should be limited to the recruitment and use in hostilities of child soldiers. Victims are defined as recruited child soldiers under the authority of Thomas Lubanga. Indirect victims are parents of such children and those who suffered harm as a result of an attempt to prevent these children from being recruited.[728] This conception of *victim of a convicted person* should exclude victims of other related crimes under the jurisdiction of the Court which had not been confirmed against the convicted. In this view, having considered that reparation proceedings may likely take place after conviction, the notion of victim may become narrower than both victim of situation and victim of the case. In this respect, victims entitled to reparations would be those whose harm is linked to the crimes of which the person has been convicted, 'because reparations ordered following a conviction may be regarded as a consequence falling on the person as a result of that conviction, and therefore they should bear a

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Republic of Cote d'Ivoire.

[725] Cassese, A., Gaeta, P. and Jones, J.R.W.D. Eds, 2002. The Rome Statute of the International Criminal Court: A commentary, Vol. I & II. New York: Oxford University Press, p. 1909.

[726] See ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22nd March 2006), 17th January 2006, ICC-0I/04-101-tEN-Corr, para.66. See also ICC, *Prosecutor v Lubanga*, Appeals Chamber, Judgement on the Appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18th January 2008, 11th July 2008, ICC-01/04-01/06-1432, 11th July 2008, para. 2; ICC, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case', ICC-01/04-01/07-579, 10th June 2008, paras 66-67 and ICC, *Prosecutor v Bahar Idriss Abu Garda, Pre-Trial Chamber I,* Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case, 25th September 2009, ICC-02/05-02/09-121, para. 13.

[727] War Crime Research Office, *op. cit.*, p.4

[728] ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para.16.

clear nexus to the conviction itself'.[729] For example by applying the standard of 'proximate cause' and the 'but/for' test, in establishing the link between the harm sustained by a victim and the crimes committed, victims of crimes committed in Ituri other than Mr Lubanga who was found guilty are not entitled to reparations. Whereas for example, Mr Lubanga was found guilty for enlisting and conscripting children under the age of 15 years and using them in hostilities, victims who should be eligible for reparations may include, *inter alia*, former child soldiers (as direct victims) and their parents/guardians (as indirect victims)[730] persons who suffered harm when helping or intervening on behalf of direct victims.[731] In this regard, victims of a case could be the same victims of a convicted person where the charges against an accused person are all confirmed by the conviction.

B. Natural persons as victims entitled to claim reparations (Rule 85(a) of the RPE)

By defining *victims* as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court' Rule 85(a) RPE of the ICC departs from the approach adopted by Rule 2(A) of the RPE of the ICTY and ICTR. Under the ICTY and ICTR regimes the concept *victim* refers to 'a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed'.[732] Whereas the RPE of the ICTY and ICTR adopted a definition which seems to be limited to direct victim of crime, the RPE of the ICC adopts a broader definition which may include both direct and indirect victim of crime. The *2012 Decision on Principles and Procedures* by interpreting Rule 85 of the RPE of the ICC introduces, yet implicitly, the notions of *direct and indirect victim* which need to be understood in terms of the degree of link which must exist between the crime committed and the harm suffered by the victims (1). Secondly, the term 'natural person' raises the question as to whether the *deceased and disappeared persons* may be considered as natural victims entitled to reparations (2). Thirdly, there is a question whether *groups* of natural persons could qualify as victims under Rule 85 (3). This last issue rises from the fact that some crimes under the jurisdiction of the ICC, such as genocide and crimes against humanity include acts committed against groups (national, ethnical, racial, religious etc. group)?

[729] ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18th April 2012, ICC-01/04-01/06-2867, para.17

[730] *The 2012 Decision on Principles and Procedures,* para.195

[731] *Ibid*, para.196

[732] See Rule 2 of the RPE (Definitions) common to both the ICTY and ICTR.

1. The notion of direct and indirect victims

The *2012 Decision on Principles and Procedures* held that 'Pursuant to Rule 85 of the Rules, reparations may be granted to *direct* and *indirect* victims, including the *family* members of direct victims […]; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings [footnotes omitted]'[733] The *Decision* explicitly introduced the notions of *direct* and *indirect* victim. It also implicitly refers to the concept of *family* and *Good Samaritan* (anyone who attempted to prevent the commission of crimes) which will retain our attention.

The notions of *direct* and *indirect* victim are not defined by the *2012 Decision on Principles and Procedures*. These terms are not expressly provided for neither by the ICC Statute nor by the RPE. Nevertheless, it is observed that Rule 85(a) provides for harm in general with respect to natural persons whilst Rule 85(b) mentions *direct harm* in respect with legal persons. Arguably, Rule 85 (a) includes both direct and indirect victim of crime in case of natural persons and restrict the victim status to only direct victim in case of legal person. This interpretation has been made by the Court in the *Lubanga* case where the Trial Chamber I in its analysis of the link between 'the harm allegedly suffered and the crime' juxtaposed rule 85 (a) and rule 85 (b) of the RPE, observed the omission of the word 'direct' in rule 85 (a) and determined that on a purposive interpretation of Rule 85 (a) 'people can be the direct or indirect victims of a crime within the jurisdiction of the Court'.[734] As already noted, by including indirect victim in its definition of victim, the RPE of the ICC departs from the RPE of the ICTY and ICTR. It also departs from some national laws which do not admit compensation for persons other than the direct victim.[735] Nonetheless, there is a question as to what extent victim status will be granted to indirect victims? Should it be left to the Court to assess on a case-by-case basis degrees of indirect victimisation that fall in the proper scope of Rule 85 for reparation purposes? Before trying to find an answer to the question let us consider the context of the Rule 85 of the RPE of the ICC.

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[733] *The 2012 Decision on Principles and Procedures*, para.194

[734] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, para.91.

[735] Lappi-Seppälä informs us for example that in Finland the law does not recognise compensation for persons other than a direct victim. 'The third party has no right to compensation for non-material damages caused by a criminal offence. The issue has been the subject of several decisions by the Finish Supreme Court. The court has ruled that persons other than the direct victim are eligible for compensation only if the offender acted purposefully with regard to harm to that person. The court thus granted a mother compensation for the suffering caused by the death of her child, on the grounds that the offender's purpose included doing harm to the mother. In subsequent decisions the court has systematically denied compensation for non-material harm of third parties, both in intentional crimes and in crimes of negligence' (Lappi-Seppälä, T., *op. cit*., p.374).

During the ICC Statute negotiations one of the problems discussed was the decision to be made by the Court as the *locus standi* of persons other than direct victims to pursue claims for reparations.[736] The discussions ended by suggesting that the judges might find some guidance in the 1985 UN Basic Principles. Therefore, in the light of the 1985 UN Basic Principles, the concept of indirect victim and its scope can be understood as including, where appropriate, 'the *immediate family* or *dependants* of the direct victim and *persons who have suffered harm in intervening to assist victims in distress or to prevent victimization* [emphasis added]'.[737] Such a definition of indirect victim has also been adopted by the 2005 UN Basic Principles.[738] In this context, the notion of indirect victim includes the *Good Samaritan* established in some countries such as United States.[739] Further, the definition given by the 1985 UN Basic Principles introduces notions of *immediate family* or dependants as indirect victim for they are considered as such with regard to direct victim. It is inferred from the definition of victim given by the 1985 UN Basic Principles that the concept of victims refers to direct and indirect victims. The category of indirect victims includes immediate family or dependants and the Good Samaritan. It is quite clear that the *2012 Decision on Principles and Procedures* has been inspired by the 1985 UN Basic Principles in its determination on indirect victims. Therefore, members of immediate family or dependants of direct victim as well as *Good Samaritan* may be considered as victims and may claim reparation in such capacity on their behalf. The notion of family, with respect to victims' rights to reparations, is also provided for by Art.79 of the ICC Statute.[740] In the case of *Lubanga* for instance, since the accused was found guilty of enlisting and conscripting children under the age of 15years into the armed forces and using them to participate actively in hostilities,[741] direct victims may be all former child soldiers, whereas the category of indirect victims remains limited to the direct victims' family and those who intervened to prevent their recruitment (Good Samaritan). Nevertheless, there is a question of how to define the concept of family. International law does not explain what family means. Neither does the ICC Statute nor the RPE bring solution to the issue. The *2012 Decision on Principles and Procedures* refers to family in general instead of immediate family. How should the concept family or /and immediate family be understood in the context of reparations before the ICC?

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736 See Muttukumaru, C., *op. cit.*, p. 309.

737 See Principle 2 of the 1985 UN Basic Principles.

738 See Principle 8 of the 2005 UN Basic Principles.

739 In United States, according to the Good Samaritan law 'anyone injured or killed in the course of trying to prevent a crime is eligible for compensation' (Doerner and Lab 2002, quoted by Williams, B., *op. cit*. p. 99).

740 Art.79 (1) of the ICC Statute provides that '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* [emphasis added]'.

741 See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Judgement pursuant to Article 74 of the Statute, 14th March 2012 ICC-01/04-01/06-2842.

Regarding the notion of 'immediate family', it seems ambiguous and may differ according to domestic laws and customs. When dealing with the issue related to victim participation the Appeals Chamber of the ICC determined that close personal relationships, such as those between parents and children, are a precondition of participation by indirect victims.[742] Likewise, the *2012 Decision on Principles and Procedures* states that:

> In order to determine whether a suggested 'indirect victim' is to be included in the reparations scheme, the Court should determine whether there was a close personal relationship between the indirect and direct victim, for instance as exists between a child soldier and his or her parents. It is to be recognised that the concept of 'family' may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures. In this context, the Court should take into account the widely accepted presumption that an individual is succeeded by his/her spouse and children [footnotes omitted].[743]

The Decision recognises the fact that the concept of 'family' may have many cultural variations and consequently considers that it ought to have regard to the applicable social and familial structures by taking into account the widely accepted presumption that an individual is succeeded by his/her spouse and children.[744] Although the Decision refers to 'family' instead of 'immediate family', the latter concept is arguably the one implied by the Decision. Actually, it is noticeable that the Decision by means of example of members of a victim's family refers to 'parents of a child soldier' and evokes the presumption that an individual is succeeded by his or her spouse and children. This demonstrates that the Decision implies a victim's 'immediate family'.

The notion of immediate family should be understood as a nuclear family which includes spouses or and their children.[745] In this respect, the relationship by blood or marriage may be considered as a presumption of victim status but, the defence may reject it in some circumstances.[746] But, one may wonder whether members of the extended family, such as aunts, uncles, step-mothers or step-fathers, step-sons, and even girlfriends or boyfriends, fiancé or companion may not fall under the definition given by Rule 85, as indirect victims? Arguably, although these relatives cannot be considered as member of the immediate family, some of them may fall under the category of *dependants* to a direct victim according to cultural considerations.

742 See ICC, *Prosecutor v Lubanga,* Trial Chamber I, Redacted version of 'Decision on 'indirect victims'', 8th April 2009, ICC-01/04-01/06-1813, para. 50.

743 *The 2012 Decision on Principles and Procedures,* para.195

744 See the *2012 Decision on Principles and Procedures*, para.195; see also IACtHR, *Aloeboetoe et al. v Suriname*, Reparations and Costs, Judgment of 10th September 1993, para.62.

745 Shelton, D., *op. cit*., p. 420.

746 See Section relating to burden and standard of proof (pp.249ff).

Other may prove *special bonds* of affection connection them with the direct victims which might entitled them to reparations.

The special bonds of affection have been upheld by international case law as a criterion of grating the status of indirect victims out of the immediate family. In the KAING Guek Eav *alias* Duch case for instance the ECCC found that 'the criterion of special bonds of affection or dependence connecting the applicant with the direct victim captures the essence of inter-personal relations, the destruction of which is conducive to an injury on the part of indirect victims'.[747] The Court went on to determine that the criterion of special bonds of affection 'applies to all persons who claim to be indirect victims, whether family or not, because without prior bonds tying the claimants emotionally, physically or economically to the direct victim, no injury would have resulted to them from the commission of the crime'.[748]

The term 'dependency' is sometimes understood as 'financial dependency'. For example in Italy, '[w]here the victim has died as a result of his injuries, his heirs or other persons with an expectancy of financial maintenance from the deceased are entitled to damages for the estimated financial loss which they have suffered as a result of the death'.[749] In t*Aloeboetoe et al. v Suriname* the IACtHR required three conditions which may be applied to indirect victim who financially depended on a direct victim so that they can be entitled to compensation:

> *First*, the payment sought must be based on *payments actually made* by the victim to the claimant, regardless of whether or not they constituted a *legal obligation* to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important here is the effectiveness and regularity of the contributions. *Second*, the nature of the relationship between the victim and the claimant should be such that it provides some basis for the *assumption that the payments would have continued had the victim not been killed. Lastly*, the claimant must have *experienced a financial need* that was periodically met by the contributions made by the victim. This does not necessarily mean that the person should be indigent, but only that it be somebody for whom the payment represented a benefit that, had it not been for the victim's attitude, it would not have been able to obtain on his or her own [emphasis added].[750]

In addition, one may agree with the determination made in this regard by the ECCC. In the *KAING Guek Eav alias Duch* case, the Supreme Court Chamber noted that:

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[747] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.447

[748] *Idem*

[749] Piva, P., *op. cit*., p.388. In this respect, Piva notes that [t]he criminal judges tend to construe this right of compensation on behalf of relatives financially dependent on the victim as a right j*ure proprio* and not *jure haereditatis*. In other words 'the sum to be awarded must correspond to the probable prospective financial benefit to each dependant from the future earnings of the victim, had he or she not been killed [...]'.

[750] IACtHR, *Aloeboetoe et al. v Suriname* case, Judgment of September 10, 1993 (Reparations and Costs), para. 68

> Absent any limiting provision, the category of indirect victims is not restricted to any specific class of persons such as family members. It may encompass common law spouses, distant relatives, friends, *de facto* adopters and adoptees, or other beneficiaries, provided that the injury on their part can be demonstrated. On the other hand, persons who did not suffer injury will not be considered indirect victims even if they were immediate family members of the direct victim [footnotes omitted].[751]

Therefore, the fact of not being considered as a member of immediate family should not prevent a person to claim reparations as a dependant of or having special bonds of affection with the direct victim. The ability of other claimants to prove their beneficiary status by demonstrating their dependence on the deceased victim for example, in a manner consistent with local practices and customs accepted by their community, may entitle the claimants to be granted reparations.[752] In sum, with regard to natural person entitled to claim reparations and save the considerations of victim of situation and victim of case, the direct victim will be a person against whom the crime for which a convicted person has been found guilty by the Court was committed. The limits of considering indirect victim should be set by application of the established standard of causation: proximate cause and the '*but/for'* test. Thus indirect victim should include but not exclusively, members of the immediate family of direct victims, anyone who attempted to prevent the commission of one or more of the crimes under consideration (Good Samaritan) and those who are dependant to the direct victims. It could be suggested that in determining the scope of immediate family and dependants to the direct victims, the Court should be guided by the principle according which 'awards should not leave the victims worse off than they would be under domestic law'.[753]

[751] ECCC, *Case KAING Guek Eav alias Duch,* Appeal judgement of 3rd February 2012, para.418

[752] Shelton, D., *op. cit*., p. 420. In the *KAING Guek Eav alias Duch* case the for example, the ECCC noted that 'Concerning the scope of the presumption of injury, it would be reasonable to define it by taking into account the nature of the injury claimed in the context of Cambodian familial relationships. In this respect, an expert retained by the Trial Chamber testified that Cambodian families generally live close together and codepend on one another so that strong bonds are usually formed. Families encompass not just couples and their offspring but also 'other family members, such as ageing parents,' or 'siblings and their families' or 'grandparents, cousins, uncles and aunts. […] In Cambodian culture, there is a tradition of showing homage and respect to older family members. In most circumstances the older generation acts as a role model in the lives of the younger generation, thus generating a very special and close bond [footnotes omitted] (ECCC, *Case KAING Guek Eav alias Duch*, Appeal judgement of 3rd February 2012, para.449).

[753] Kristjánsdóttir, E., 2009. International Mass Claims Processes and the ICC Trust Fund for Victims. In: C. *Ferstman***,** M. Goetz and A. Stephens, eds., 2009. *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity. Systems in Place and System in the Making.* Leiden: Martinus Nijhoff, pp.182 -183.

2. The case of deceased and disappeared persons

It has been observed that members of immediate family or dependants should claim reparations in their victim capacity. Consequently they can do so at the same time with direct victim. One may ask what should happen in case the direct victim is a deceased or disappeared person. Can a deceased or disappeared person be entitled to reparations? Are the deceased or disappeared persons natural persons referred to by Rule 85 of the RPE of the ICC? In other words, does the notion of natural person (personne physique) used by the Rule 85 of the RPE include both alive human beings and the deceased persons, or the latter are not included in the notion? May the indirect victims that are members of a deceased's family cumulate two statuses of both indirect victims and successors and claim reparations on their own behalf and on behalf of the deceased or disappeared person? These questions are not clearly addressed by neither the Statute or by its RPE. And there is no unanimous jurisprudence on the issue.

For the purpose of participation in proceedings the Pre-Trial Chamber III of the ICC held that 'it is self-evident that a victim does not cease to be a victim because of his or her death'.[754] Drawing from the jurisprudence of the regional human rights courts the Pre-Trial Chamber admitted victim status for deceased persons and determined that 'albeit a deceased person cannot be a participant in the proceedings, his or her rights can be represented in proceedings before the Court by his or her successor, if the successor is a victim recognised as a participant in the proceedings'.[755] This position was endorsed by the Trial Chamber I in the *Lubanga* case.[756]

A divergent position was adopted by the Pre-Trial Chamber I which previously determined that 'deceased persons do not fall within the meaning of 'natural persons' under Rule 85(a) of the RPE of the ICC and therefore they cannot be represented in proceedings before the Court. Pre-Trial Chamber I reasoned that an application *on behalf* of a person requires his or her consent, and 'such consent is impossible in the case of deceased persons'.[757] The same determination was made by the

[754] See ICC, *Prosecutor v Bemba Gombo*, Pre-Trial Chamber III, Fourth Decision on Victims' Participation, 12th December 2008, ICC-01/05-01/08-320, para.39

[755] *Ibid*, para.44. With respects to the right to participate in proceedings by the deceased persons, the Single judge of the Pre-Trial Chamber, found that where an application is made on behalf of a deceased person, the Single Judge recognises this person as a victim of the case provided that (1) the deceased was a natural person, (2) the death of the person appears to have been caused by a crime within the jurisdiction of the Court and (3) a written application on behalf of the deceased person has been submitted by his or her successor (*Ibid*., para.39).

[756] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Order issuing confidential and public redacted versions of Annex A to the 'Decision on the applications by 7 victims to participate in the proceedings' of 10th July 2009 (ICC-01/04-01/06-2035), 23rd July 2009, ICC-01/04-01/06-2065 and ICC-01/04-01/06-2065-Anx2, p.15

[757] ICC, *Situation in Darfur, Sudan*, Pre-Trial Chamber I, Decision on the Applications for Participation in the Proceedings of Applicants a/0011/06 to a/0015/06, a/0021/07, a/0023/07 to a/0033/07 and a/0035/07 to a/0038/07, Correction version, 14th December 2007, ICC-02/05-111-Corr,

Trial Chamber II which, in the *Prosecutor v Germain Matanga* and *Mathieu Ngudjolo Chui,* held that 'a relative of a deceased person can only submit an application for participation in his or her own name, by invoking any mental and/or material harm suffered personally as a result of the death of the said person'.[758] The Trial Chamber II did not espoused the determination by the Chambers which granted victim status to the deceased by arguing that such jurisprudence would not apply at the stage of participation in criminal proceedings 'given that the ICC Statute draws a clear distinction between the phase of participation in the proceedings and the reparations phase, once an accused has been found guilty, with the former not being a precondition for the latter'.[759] This reasoning seems to predict the judge's position regarding the victim status for reparations purpose. The Trial Chamber II rejects the approach according to which a deceased person should be granted the victim status for participation in proceedings but seems to predict the possibility at the stage of reparations proceeding which are likely to take place after conviction. If this is the case, it may be inconsistent to refuse victim status to a deceased person at the stage of proceedings and predict that this status may be granted to at the reparations stage as post convicted procedure. What may be the substantial basis of such distinction? The issue regarding victim status for the purpose of reparation has not yet been addressed by the ICC and the foregoing observations may predict a controversy which may arise at the stage of reparation stage.

The case law of other international judicial institutions or the determination made by other non-judicial bodies is for less help since it is neither unanimous on the issue. The IACtHR admitted for example the status of victims for the deceased persons and grant them reparations. In the *Aloeboetoe et al. v Suriname* the IACtHR held that victims who died as a direct result of crimes committed against them suffered moral damages. The Court reasoned as follows:

> [Victims who died suffered moral damages] were abused by an armed band which deprived them of their liberty and later killed them. The beatings received, the pain of knowing they were condemned to die for no reason whatsoever, the torture of having to dig their own graves are all part of the moral damages suffered by the victims. […]In the Court's opinion, it is clear that the victims suffered moral damages, for it is characteristic of human nature that anybody subjected to the aggression and abuse described above will experience moral suffering. The Court considers that no evidence is required to arrive at this conclusion; the acknowledgement of responsibility by Suriname suffices. […] The damages suffered by the victims up to the time of their death entitle them to compensation. That right to

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para.36

[758] ICC, *Prosecutor v Katanga and Ngudjolo Chui,* Trial Chamber II, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23rd September 2009, ICC-01/04-01/07-1491-Red-tENG, para.56

[759] ICC, *Prosecutor v Katanga and Ngudjolo Chui,* Trial Chamber II, Grounds for the Decision on the 345 Applications for Participation in the Proceedings Submitted by Victims, 23rd September 2009, ICC-01/04-01/07-1491-Red-tENG, para.55. The Trial Chamber II, held that 'a relative of a deceased person can only submit an application for participation in his or her own name, by invoking any mental and/or material harm suffered personally as a result of the death of said person (*Ibid*., para.56).

> compensation is transmitted to their heirs by succession. The damages payable for causing loss of life represent an inherent right that belongs to the injured parties. It is for this reason that national jurisprudence generally accepts that the right to apply for compensation for the death of a person passes to the survivors affected by that death. In that jurisprudence a distinction is made between successors and injured third parties. With respect to the former, it is assumed that the death of the victim has caused them actual and moral damages and the burden of proof is on the other party to show that such damages do not exist. Claimants who are not successors, however, must provide specific proof justifying their right to damages [...].[760]

According to the IACtHR the deceased are to be granted the status of victim and are entitled to reparation for moral damages. But, since the deceased cannot exercise their rights the Court is of the view that the right to compensation is transmitted to heirs by succession.[761] Paradoxically, the Court seems inclined to not recognising personal moral damage that successors can suffer from the death of the direct victim. Rather it admits that injured third parties who are not successors may be entitled to compensation for moral harm.

Unlike the IACtHR, the European Court of Human Rights (ECtHR) recognised the harm suffered by a direct victim and his successor and the latter was entitled to receive a combined compensation. In the case of *Keenan v The United Kingdom* for instance the Court found that the deceased must be regarded as having suffered significant stress, anxiety and feelings of insecurity prior to his death (which is not direct result of the crime) and awarded compensation for moral damage in respect of the decease. In the same case the Court also recognised the successor that is the mother of the deceased, as having suffered moral damage and awarded reparation to her and in her personal capacity.[762] It is not clear whether the ECtHR should adopt the same position in case the death should have been a direct result of the crime. However, it is obvious that the ECtHR admits that a successor of direct victim is entitled to claim compensation on behalf of the deceased victim and his or her own behalf.

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[760] See IACtHR, *Aloeboetoe et al. v Suriname* case, Judgment of September 10th, 1993 (Reparations and Costs, para 54. IACtHR, *Garrido and Baigorria v Argentina*, Judgement of 27th August 1998 (Reparations and Costs), paras51, 52 and 54

[761] See IACtHR, *Aloeboetoe et al. v Suriname* case ,Judgment of September 10, 1993 (Reparations and Costs, para.54. IACtHR, *Garrido and Baigorria v Argentina*, Judgement of 27th August 1998 (Reparations and Costs), para.50

[762] In *Keenan v The United Kingdom* the ECtHR found that a direct victim of inhuman punishment 'must be regarded as having suffered significant stress, anxiety and feelings of insecurity resulting from the disciplinary punishment prior to his death. The applicant, his mother, must also be regarded as having suffered anguish and distress from the circumstances of his detention and her inability to pursue an effective avenue of redress. Making an assessment on an equitable basis and bearing in mind that this was a case of suicide and not deliberate torture, the Court [awarded] for non-pecuniary damage the sum of GBP 7,000 in respect of [direct victim] to be held by the applicant for his estate, and GBP 3,000 to the applicant in her personal capacity' (*Keenan v The United kingdom*, Judgement of 3rd April 2001, (Application no27229/95), para.138.

Contrary to the determinations made by both the IACtHR and ECtHR, the Trial Chamber of the Extraordinary Chambers in Courts of Cambodia (ECCC) implicitly adopted another approach in respect with deceased victims. Whilst addressing an issue relating to the successor of a civil party, the ECCC held that:

> [I]n order to obtain moral reparation, the successors of a dead victim who intend to act on behalf of this party must demonstrate that he or she has filed a Civil Party application. […]In the absence of proof that a Civil Party application has been filed by a victim, successors can act only for themselves to seek reparation for personal damage arising from the death of the victim, and the death must be linked directly to an offence with which the accused has been charged. [763]

The Chamber did not acknowledge that a deceased victim has right to claim compensation for moral harm which would pass to his or her successors. However, the Trial Chamber's holding was reversed by the Supreme Court Chamber on its own motion. The Supreme Court Chamber held that '[a]lthough the Trial Chamber's decision on the admissibility of successors of deceased Civil Party applicants has not been appealed, the Supreme Court Chamber considers it necessary for the sake of clarity to point out that the Trial Chamber's decision to limit the scope of eligible successors to circumstances where the direct victim had personally filed a civil party application before his or her death has no basis in applicable law'.[764] One may deduce from this holding that successors are entitled to claim reparations on behalf of deceased direct victims. Nevertheless, it remains unclear whether under the ECCC's reparation regime successors of a deceased direct victim may claim and be granted cumulative awards for compensation if they also qualify as indirect victims.

The Transitional Rules of Criminal Procedure in East Timor adopted a definition of the term victim which consider the fact of death as a prerequisite for the individuals surviving the deceased to qualify as victims in their personal capacity and not on behalf of the deceased.[765] This point of view was also adopted in the early 1920s by the USA-Germany Mixed Claim Commission in the *Lusitinia* Cases. According to the Commission, 'in death cases the basis of damages is not the

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[763] See ECCC, *Case KAING Guek Eav alias Duch*, Trial Chamber, Decision on motion regarding deceased civil party, 13th March 2009, Case File/Dossier No. 001/18-07-2007/ECCC/TC, paras 11& 12

[764] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.421

[765] According to the Transitional Rules of Criminal Procedure in East Timor '*Victim* means a person who, individually or as a part of a collective, has suffered damage, including physical or mental injury, emotional suffering , economic loss or substantial impairment of his or her fundamental rights through acts or omissions in violation of criminal law. By way of illustration and not limitation, *a victim may be the spouse, partner or immediate family member of a deceased person whose death was caused by criminal conduc*t; a shareholder of a corporation with respect to criminal fraud by the administrators or officers of the corporation; or an organization or institution directly affected by a criminal act' (emphasis added) (General Provisions, Section I(X)).

physical or mental suffering of the deceased, their loss or the loss to their estate, but the losses resulting to claimants from the death of the individual'.[766]

Considering the foregoing dissenting point of views as regard the status of deceased persons - which could be similar to disappeared person - it is wise to investigate the meaning of the term 'in respect of victim' used by Art.75(1)-(2). The two paragraphs of this article respectively refer to 'damage, loss and injury in respect of victim' and 'reparation in respect of victims'. The terms *in respect of* are translated into French version by *ayants droit*. One may ask who may be considered as *ayants droit.* Neither the ICC Statute nor the RPE define the notion of *ayants droit*. One of the definitions given by *Jurimol.com* may help to understand the meaning of the term. Jurimol.com defines the term *ayants droit* as a person who has rights because of his or her family connection with the direct beneficiary of the right. As an example of ayants droit *Jurimol.com* refers to heirs as the beneficiaries of the deceased.[767] In the light of this definition it is reasonable to argue that Art.75 (1-2) provides for the right to reparation for *ayants droit* (heirs), as successors of the deceased direct victims.

Learning from the aforementioned divergent opinions of different international courts, the ICC should find a plausible position that may comply with the context of Art.75 (1-2) of its Statute. The Court should distinguish between recoverable harm which is *inherent or personal to a direct victim* and cannot pass to successors in inheritance and recoverable *harm which can pass to ayants droit* (heirs). The moral harm which is considered by the IACtHR as suffered by a deceased victim could be considered as inherent or personal to the victim and could not pass to his or heirs. Consequently, as determined by the USA-Germany Mixed Claims Commission, the basis of reparations should not be the physical or mental suffering of the deceased but moral harm suffered by his or her successors. Consequently, as the ECCC held, successors should act only for themselves in seeking reparation for personal harm arising from the death of the direct victim. Respecting recoverable harm which can pass to ayants droit, this category should include all kinds of material harm suffered by the deceased victim. In this case, the deceased victim should be granted the right to claim restitution. But since the deceased cannot exercise his or her rights, as the

[766] Bachvarova, T., 2011. Victims' Eligibility before the International Criminal Court in Historical and Comparative Context. *International Criminal Law Review*, Vol.11, p.673

[767] The definition is given in French as follow 'L'ayant droit est celui qui est titulaire d'un droit. L'ayant droit est donc une personne bénéficiant d'un droit en raison de sa situation juridique, financière ou fiscale ou de *son lien familial avec le bénéficiaire direct de ce droit*. Par exemple, les héritiers sont les ayants droit du défunt [emphasis added]' (see <http://dictionnaire-juridique.jurimodel.com/Ayant%20droit.html>, accessed 8th August 2012).

IACtHR held, the right to compensation or restitution should be transmitted to his or her ayants droit. The latter should be entitled to claim reparation on behalf of the victim. Actually, it is easy to understand the relevance of compensation or restitution claimed by successors on behalf of a deceased victim in case of damage to property. On the contrary it would be hard to conceive by principle some types of reparations such as rehabilitation measures on behalf of a deceased victim. It is worth remembering that the case of disappeared persons is similar to deceased victims and the above observations could apply in the case of the former.

Yet, there is room for question on how the *ayants droit* may file request for reparation on behalf of a deceased victim. This possibility is not provided for by the RPE and Rule 89(3) of the RPE does not offer any help since it provides that an application for participation may be made 'by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled'. However, the Standard Application Form for reparation for individuals[768] clarifies that those who do not qualify as victims have standing to file applications for reparations on behalf of victims. This is possible in cases where the direct victim is a deceased person. But could we rely on the standard application form? Does the form have any legal authority?[769] In dealing with this dilemma, two alternatives should be considered. Firstly, since there are already controversies, as already noted, between different chambers of the Court, regarding participation in proceedings on behalf of deceased victims, which would occur at reparations stage, the Court can use its power provided for by Art.51(3) of the Statute[770] and open a breach for the *ayants droit* to act on behalf of the deceased victims. The second alternative is to consider the case of the deceased victims as one of the circumstances which may allow the Court to award reparations in respect to the victims on its own motion.[771] Without losing sight of the foregoing observations, one should consider the first alternative as the most plausible and which could better comply with the principle of fair trial since successors of a direct victim could participate in proceedings and request for reparations on behalf of deceased or disappeared victims.

[768] The standard application forms for reparations are prepared by the Registry and approved by the Presidency of the ICC.

[769] Concerning discussions made on the issue of the legal authority to give to the standard application form see at (pp.205ff).

[770] Art.51(3) of the ICC Statute provides that ' in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties'.

[771] See discussions made, in Para.2 of section 2 of this chapter, on the question of when the Court may order reparation in favour of a victim who did not apply for (pp.219ff)

3. Can a group of persons be classified as victims?

The ICC reparation regime does not provide for the possibility for a collective or a group of filling, as such, a request for reparations. As observed earlier, Rule 85 of the RPE of the ICC conceives victims as natural persons or an organization or institution (legal persons). As for the *2012 Decision on Principles and Procedures* instead of resolving the issue it only determines that victims and groups of victims may apply for and receive reparations and reparations may be awarded to: a) individual victims; or b) groups of victims, if in either case they suffered personal harm.[772]

The *2012 Decision on Principles and Procedures* goes on to state that victims of crimes, together with their families and communities should be able to participate throughout the reparations process and they should receive adequate support for the purpose of making their participation substantive and effective.[773] Can the Decision be understood as contemplating the possibility of collectives and groups to be granted with status of victim before the ICC since it refers to 'families' and 'communities'? It is very hard to confirm such a hypothesis since the Decision does not explicitly express it. Apparently, the term 'group of victims' referred to by the Decision does not mean a group 'recognised as having standing to claim in its own right for the violation of its collective/community interests.[774] Rather, it refers to a consolidated group of individual victims and shall not be confused with a collective or a group as a victim *per se*. We must not lose sight of the fact that even in international human right law the issue of whether or not groups can claim remedies for damage to the collective body is a controversial one.[775] Some commentators address the issue but conclude to the openness of the question.[776] Notwithstanding, there are some reasons which may lead to suggest that collectives or groups should be granted the status of victim and should have *locus standi* before the ICC.

First of all, although groups have no legal identity, the ICC Statute provides for crimes against groups or a collectivity. For example the crime of genocide is defined as 'acts committed

[772] *The 2012 Decision on Principles and Procedures*, para.217

[773] *Ibid*, para.203

[774] ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16 March, 2012, ICC-02/11-01/11-62, para.5

[775] Shelton, D., *op. cit*., p. 245.

[776] See for example Dwertmann E., *op. cit.*, pp. 196 and 202.

with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'.[777] Likewise, '[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender' can be an act of crime against humanity pursuant to Art.7(1)(h) of the ICC Statute[778] as well as the crime of apartheid' as per Art.7(2)(h) of the Statute. In these cases, 'victims are chosen on the basis of being a member of a national, ethnic, racial or religious group, not because of his or her individual identity'.[779] These are some examples which demonstrate that under the ICC Statute a group can be victim of crimes which fall under the jurisdiction of the Court. Consequently, one may argue that a group should have *locus standi* before the Court.

In addition, despite the controversy on the issue, we witness a growing recognition in international law that victims and groups of victims may apply for and receive reparations.[780] For example, the definition given by both the 1985 UN Basic Principles and the 2005 UN Basic Principles provide for the possibility of harm to be sustained not only individually but also collectively.[781] They both note that 'contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively'.[782] As far as the standing of groups to claim reparations is concerned, it can be noted that the IACtHR has awarded compensation to communities for pecuniary and non-pecuniary damages,[783] as well as restitution measures regarding traditional lands.[784] According to the Court, the notion of communities extends to peoples, indigenous or not,[785] 'who are connected by a strong and unique bond with their ancestral land that determines their culture, way of life, beliefs and survival'.[786] The IACtHR recognised a family as group itself and awarded patrimonial damage to it

[777] Art.6 of the ICC Statute

[778] 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity (Art.7(2)(g) of the ICC Statute).

[779] Aksar, Y., 2004. Implementing International Humanitarian Law, From The Ad Hoc Tribunal to a Permanent International Criminal Court. London: Routledge, p. 210.

[780] *The 2012 Decision on Principles and Procedures*, para.217

[781] See Principle 1 of the 1985 UN Basic Principles and Principle 8 of the 2005 UN Basic Principles.

[782] See the Preambles of both the 1985 UN Basic Principles and the 2005 UN Basic Principles.

[783] IACtHR, *Saramaka People v Suriname*, Judgment of 28th November, 2007 (Preliminary Objections, Merits, Reparations, and Costs), paras198-202; IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17th June 2005, (Merits, Reparations and Costs), paras. 194 and 205; and IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of March 29, 2006 *(Merits, Reparations and Costs)*, para. 218.

[784] Aubry, S. and Henao-Trip, M.I., *op. cit*., p.5

[785] IACtHR, *Saramaka People v Suriname*, Judgment of 28th November, 2007 (Preliminary Objections, Merits, Reparations, and Costs), para.79

[786] Sandoval, C., 'The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations', Sandoval-Villalba, C., 'The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations, [Online] available at: <http://www.corteidh.or.cr/tablas/r26221.pdf>, accessed on 12th June 2013, p. 273; IACtHR, *Saramaka*

as a victim.[787] A group has also be considered as a victim by the Trial Chamber of the ICTR where, in the *Prosecutor v Jean-Paul Akayesu*, it held that 'the victim of the crime of genocide is the group itself and not only the individual' even if the *actus reus* (physical element) may be limited to one member of the group (but the *mens rea* - mental element - of the crime must target the group'.[788]

Taking into account this international growing recognition of the victim status to a group or collectivity, *locus standi* should be granted by the ICC to this category of victims. Yet the definition of a group or a collectivity as a victim and the determination of harm suffered by such victims could be a challenge. For example the Peruvian Truth and Reconciliation Commission faced such a challenge. The Commission recognised that 'the armed conflict affected a larger universe: the family members of victims and groups of individuals who because of the concentration of massive violations in their midst suffered a collective harm and the violation of their collective rights'.[789] In order to define the identity of victims in the context of groups, the Peruvian Commission used 'a set of indicators relating to the impact of the violence, including: the level of concentration of individual violations in the area, whether the community was razed, the existence of forced displacement, fractures in the community's institutional life (including killings of community leaders), and loss of family and community infrastructure'.[790] This could inspire the ICC to define what a collective victim is. Notwithstanding, granting victim status to groups or collectivities should require the modification of the current legal framework of the ICC specifically by revisiting Rule 85 of the RPE.

People v Suriname, Judgment of 28th November, 2007 (Preliminary Objections, Merits, Reparations, and Costs), para. 84 and Aubry, S. and Henao-Trip, M.I., *op. cit*., p. 5)

[787] See IACtHR, Castillo Paez (reparations).

[788] See ICTR, *Akayesu Case*, Trial Chamber, Judgements, Case No. ICTR-96-4-T (2nd September 1998), paras 6.3.1.316-17

[789] Peruvian Truth and Reconciliation Commission, *Final Report* (2003, quoted by Aubry, S. and Henao-Trip, M.I., *op. cit*., p. 7)

[790] Aubry, S. and Henao-Trip, M.I., *op. cit.*, p. 7.

C. Organizations and institutions as victims entitled to reparations (Rule 85(b)) of the RPE)

According to Rule 85(b) of the RPE of the ICC, victim status may be granted to legal persons - that is organizations or institutions - which have sustained *direct harm* to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[791] Some observations could be made regarding the nature of the legal persons and recoverable harm provided by the Rule.

Regarding the nature of legal persons, Rule 85(b) of the RPE does not distinguish private or public, national or international organisation or institutions. It does not use the term 'legal person' but mentions 'organization or institutions'. The term 'organisation' and 'institution' 'may include, *inter alia*, non-governmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships'.[792] Without pretending to discuss the definition of the terms 'organization or institution,[793] the relevant question to consider is the common criterion of selection of legal persons made by Rule 85(b) for reparations purposes under the ICC regime. The exclusion is not based on the nature of legal persons but on allocation of a property linked to the harm suffered by the legal persons. The concerned property are those dedicated to *religion, education, art* or *science* or *charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.* Although a legal person may have sustain harm to any other properties not listed by Rule 85(b), they will not have right to claim compensation for other properties such as dedicated to business, industries etc. Should they intend to claim reparations for the harm related to the latter category of property, they need to find other *fora* of justice outside of the ICC. In this respect, it should be kept in mind that according the

[791] For example, in the *Lubanga case*, although the vast majority of victims of child conscription are natural persons falling within the scope of Rule 85(a), institutional victims, such as schools, may also have suffered harm for their damaged or destroyed properties. At least one institutional victim – a school – participated as victim in the *Lubanga case* (See ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para. 118).

[792] ICC, *The 2012 Decision on Principles and Procedures*, 7th August 2012, ICC-01/04-01/06-2904, para.197

[793] Hodgson for example considers *institutions as* 'systems of established and embedded social rules that structure social interactions' and o*rganizations as* 'special institutions that involve (a) criteria to establish their boundaries and to distinguish their members from non-members, (b) principles of sovereignty concerning who is in charge, and (c) chains of command delineating responsibilities within the organization' (Hodgson, G.M., 2006. What are institutions? *Journal of economic issues*. Vol. XL, No.1. p. 18 [Online] available at: <http://www.geoffrey-hodgson.info/user/image/whatareinstitutions.pdf>. Accessed 25th July 2012)

Art.75(6) not having *locus standi* before the ICC shall not be interpreted as prejudicing the rights of victims under national or international law. In addition, respecting 'harm' sustained by organisations and institution, as mentioned earlier, Rule 85(b) provides for *direct harm*. Unlike natural persons whose direct and indirect harm fall under repairable harm, Rule 85(b) rules out *de facto* any idea of indirect harm possibly sustained by legal persons.

Finally, it should be kept in mind that the fact of including legal persons among victims entitled to reparations was introduced under the UNCC reparation regime. However, under the UNCC reparation regime there was no exclusion of some categories of material harm sustained by legal persons as it is under the ICC reparation regime. The exclusion made by the ICC reparation regime in regard to material harm sustained by legal persons may be justified by the sole individual responsibility established by the ICC Statute. Solely an individual convicted, in most cases with limited resources if there is any, may be ordered to repair damage of property sustained by legal person. Moreover, one cannot help but notice the glaring paradox resulting from the fact that legal persons are not liable for reparations before the Court but are however entitled to!

II.2.1.2. Application procedure for reparations

Having understood that both natural persons and legal persons may claim to be victims and therefore trigger reparation proceedings by lodging their claims with the Court, one may subsequently and logically ask when and how will victims apply for reparations? Regarding the first question of when to apply for reparations (A), the ICC statute and the RPE do not give an explicit answer. However, by investigating the context of the provision regarding victim participation in criminal proceedings it can be inferred that the victim may apply for reparations either before or after conviction. With respect to the second question of how to apply for reparations, Rule 94 of the RPE provides that request for reparations 'shall be made in writing and filed with the Registrar' (B).

A. When may a victim apply for reparations?

The question of when a victim can apply for reparations before the ICC implies the issue of time limits for victims' claims. In other words, it is whether there is any time limit to apply for reparations before the ICC. According to Rule 101 of the RPE entitled 'Time limits', the Court has power to make any order setting time limits regarding the conduct of any proceedings. In exercising

such power the Court 'shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind the particular rights of the defence and the victims'.[794] Although this provision provides for 'conduct of any proceedings'- including reparation proceedings - it does not provide for time limit for reparation applications and nor do the provisions of the RPE do so. The issue seems to be left to the discretionary power of the Court.

The discretionary power of the Court to fix time limits can also be inferred from Regulation 34 of Regulation of the Court (RC) entitled 'Time limits for documents filed with the Court'. According to Regulation 34(a) '[u]nless otherwise provided in the Statute, Rules or these Regulations, or unless otherwise ordered [a] Chamber *may* fix time limits for the submission of the *initial document* to be filed by a participant [emphasis added]'. Arguably, the initial document referred to by Regulation 34 can include victim request for reparations, for its opposite could be a document filled in response or a reply document which is provided for in subsequent paragraph of Regulation 34.[795] Therefore, the time limits for victims' application for reparations should be fixed by the Trial Chamber on a case by case basis. Moreover, it can be noted that, according to Regulation 33(2) of the RC, a request for reparation will principally be filed with Registry between 9am and 4pm The Hague time or the time of such other place as designated by the Registrar.

Notwithstanding, they are good reasons to argue that a victim may request for reparations, in a given case, before or after conviction. First of all, under the ICC regime a victim has the right to participate in criminal proceedings with the view to claim reparations since he or she is allowed to produce evidence relating to reparations during criminal proceedings pursuant to Regulation 56 of the RC.[796] It is observable for example that most of the victims who applied to participate in criminal proceedings in *the Lubanga* case applied also for reparations.[797] Indeed, a victim may apply for reparations at the same time of applying for participation in criminal proceedings. This hypothesis can be confirmed by the fact that the Registry, as it will be observed in the subsequent sub-paragraph, has prepared a combined standard application form for victim participation and for victim's request for reparations. Secondly, a victim who did not participate in a trial can apply for reparations after conviction for, as it will be demonstrated, the true reparation proceedings are

[794] Rule 101(1) of the RPE of the ICC

[795] According to Regulation 34(b) of the RC a response shall be filed within 21 days of the document to which the participant is responding.

[796] For more details on the possibility of a victim to adduce evidence for the purpose of reparations before conviction see Section three, paragraph two (II.3.2.) of this chapter (The importance of victims seeking reparations in participating in criminal proceedings, pp.228ff)

[797] See ICC, *Prosecutor v Lubanga*, Registry, Request for instructions on victim's applications for participation and reparations received by the Registry, 2nd November 2011, ICC-01/04-01/06-2817, p.4

conceived as post-conviction procedure.[798] Moreover, after the Court has decided to hold reparation proceedings until a given stage which may be determined by the Court, the victim may be allowed to apply for reparations.[799]

Finally, there is arguably advantage for the Court to use its discretionary power to set time limit for filling request for reparations. In this regard, time limits may facilitate expeditious reparation proceedings, for an early submission of claims may 'help the Court in the collection and preservation of evidence and in ordering appropriate measures to prevent the dissipation of assets'.[800] Moreover, filling claims within a certain time limit, before the conviction 'enables the Court to consider all claims for reparations before making a reparation order against the convicted person'.[801] Yet one may assume that victims will be more confident in filling requests for reparations after conviction for they can easily measure their chances of succeeding in their request. Notwithstanding the risk of disappointment of victims in requesting for reparations before the conviction, taking into account the advantages of an earlier request already pointed out, the Court should ensure that 'victims are able to apply for reparations in a given case from the confirmation of charges, and reminded of this right in all outreach'.[802] Furthermore, as provided for by Rule 101 of the RPE, in a case where the Court uses its power to set limit for a victim's request, it should have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the victims.[803] The time limit for filing reparation claims should be for instance reasonable 'in light of prevailing circumstances of the victims, where they live, [and] what logistical challenges they may have'.[804]

[798] See Section three (*I.3*) of this Chapter (pp.225ff).

[799] Consider the context of Rule 95 of the RPE of the ICC (Procedure on the motion of the Court).

[800] Dwertmann E., *op. cit.*, p.107

[801] *Idem*

[802] Redress, 2011, *op. cit.*, p.36

[803] Rule 101of the RPE of the ICC (Time limits) reads as follow: '[1] In making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims. [2] Taking into account the rights of the accused, in particular under article 67, paragraph (1) (c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court.'

[804] Redress, 2011, *op. cit.*, p.36

B. A victim's request shall be made in writing and filed with the Registrar (Rule 94 of the RPE)

According to Rule 94 of the RPE of the ICC '[a] victim's request for reparations under Art.75 shall be made in writing and filed with the Registrar'. It is worth noting at the outset that applicant has whatever his or her financial resources are, not to pay any fees when applying for participation and requesting reparations.[805] As to facilitating the application process, the Registry is required to develop a standard form for victims to present their requests for reparations.[806] At the time of writing there were a common application form for both participation and reparations for individuals and a common application form for organisations and institutions.[807] As regard a victim's request, one may wonder whether a victim is required to fill and submit by himself or herself the request for reparations. There is also a question of the relevance of the common standard application form for participation and for reparations and whether it is mandatory.

Respecting the first question as to whether a victim has or has not to submit himself or herself the request for reparations neither the RPE nor the RC and Regulations of the Registry (RR) gives a clear response. However, a victim may arguably be assisted or represented in the process of applying for reparations before the Court. First of all, there is no provision prohibiting the victim from choosing a legal representative at the stage of filling his or her request for reparations.[808] Secondly when a victim intends to apply for reparations, the Registrar is required to assist victims in completing his or her request.[809] What may be the assistance from the Registry? According to

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[805] An application form for participation and a request for reparation include the mention that applicant has to pay no fees in applying for reparations.

[806] See Regulation 88(1) of the RC entitled 'Requests for reparations in accordance with rule 94'. There is a similarity between the wording of Regulation 88(1) of the RC and the wording of Regulation 86(1) of the RC which provides that the Registry shall develop standard application forms for the purpose of participation in the proceedings. See also Regulation 104 of the RR entitled 'Standard application forms': '[1] The standard application forms provided for in regulations 86 and 88 of the Regulations of the Court, and the explanatory material shall, to the extent possible, be made available in the language(s) spoken by the victims. The Registry shall endeavour to prepare the standard application forms in a format that is accessible, that can be used by the Court, and that is compatible with the electronic database referred to in regulation 98, sub-regulation 2. [2] The Registry may propose amendments to the standard application forms on the basis of, *inter alia*, experience in using the forms and the context of specific situations. The proposed amendments shall be submitted to the Presidency for approval in accordance with regulation 23, sub-regulation 2, of the Regulations of the Court'.

[807] The Registry informs us that 'Initially, following consultations in the field, separate application forms for requesting participation and reparations were made available by the Court. However, experience showed that these two forms were sometimes confusing for victims, who sometimes filled in one instead of the other, or believed that in completing an application for participation in proceedings they were also applying for reparations. It was therefore decided to merge the two forms under the [Regullation 86(1) and the Regulation 88(1) of the RC] into one common form, which was approved by the Presidency in 2010' (See ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para.174).

[808] Concerning the fact that a victim is entitled to a legal representative see Part three of this dissertation (pp.394ff).

[809] See Regulation 88(2) of the RC.

Regulation 128 of the RR entitled 'Assistance by Registry' found in Section 2 entitled 'Provisions on counsel and assistants to counsel' of the RR, the Registry should assist a victim to find a legal representative. As it was determined by the Pre-Trial Chamber I, the Office of Public Counsel for Victims (OPCV) 'should be available to provide support and assistance to the applicants for whom powers of attorney have not been submitted'.[810] In addition, the assistance for victims in filing their request for reparations is not limited to the Registrar's assistance or legal representative. Other persons can act on behalf of victims or with their consent. In case of application for participating in criminal proceedings, Rule 89 of the RPE, entitled 'Application for participation of victims in the proceedings' expressly provides that the application may 'be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child [under 18 years of age] or, when necessary, a victim who is disabled'.[811] Arguably, this provision which is in the context of victim participation in criminal proceedings is to be applied, *mutatis mutandis*, in case of reparation proceedings. Indeed, the fact that the RPE of the ICC is silent about the possibility of victim to mandate a person to fill the request in his or her name or a person acting on behalf of the victim, should not be interpreted in the sense of denying such right to a victim at the stage of requesting for reparations.

With regard to the second issue concerning the relevance of the common application form for participation and for reparations, it can be learnt from the Registry that practical conveniences may allow of such an application form. The Registry explains the practical conveniences as follow:

> Initially, following consultations in the field, separate application forms for requesting participation and reparations were made available by the Court. However, experience showed that these two forms were sometimes confusing for victims, who sometimes filled in one instead of the other, or believed that in completing an application for participation in proceedings they were also applying for reparations. It was therefore decided to merge the two forms under [Regulation 86(1) of the RC] and [Regulation 88(1) of the RC] into one common form, which was approved by the Presidency in 2010.[812]

The Regulation 86(1) to which the Registry refers above requires the Registrar to develop standard forms for participation of a victim in criminal proceedings. It is similar to the Regulation 88(1) which concerns standard forms for request for reparations for victims.

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[810] ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17th August 2007, ICC-01/04-374, para.50). It was held by the Pre-Trial Chamber that 'the Registrar, when an applicant has no legal representation or in the absence of any document signed by that person, to automatically appoint the OPCV as his or her legal representative to provide support and assistance to the applicant until such time as the applicant has been granted victim status and a legal representative is chosen by him or her or appointed by the Court' (*Idem*).

[811] See Rule 89(3) of the RPE of the ICC; see also Regulation 86(7) of the RC.

[812] See ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para.174

Since the practical conveniences are one of the plausible justifications of the common application form, one may question the justification in respect of the principle of impartiality by arguing that the common application form seems to be a way of encouraging and suggesting the victim to request reparations against the accused person. But, it can be assumed that the common application form may not only dispel the risk of confusion for the victim as it is explained by the Registry, but also complies with the requirements provided for by the ICC reparation regime relating to victim information at any possible extent.[813] Victims have to be informed on their right to claim reparations before the ICC against their harm doer.

As regard the third question as to whether the standard application form is or is not mandatory, there is no provision which gives a clear response. Nonetheless, some reasons lead us to consider that the use of the standard form is not mandatory. Firstly, according to Regulation 88(1) of the RC, the standard form is to be used by victim *to the extent possible.* The wording, *to the extent possible,* reveals the non-mandatory of the standard form. Secondly, according to the practice within the Court, before the application form for participation was issued most victims had filed their requests for participation without using any standard form.[814] As noted earlier, there is similarity between the requirements regarding a standard form for participation in criminal proceedings and one for request for reparations. Notwithstanding the non-mandatory nature of the standard form, it is worth noting that it is recommended to victims to use it as much as possible since it is already available. The standard form is prepared by the Registry and requires approval by the Presidency.[815] The request may be submitted at the seat of the Court or at field office of the Court.[816] The application form must be available to victims, groups of victims, or intergovernmental and non-governmental organizations, which may assist in their dissemination, as widely as possible.[817]

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[813] See for example Regulation 106 (2) of the RR which stipulates that 'The Registry shall take measures to encourage victims to complete their applications'.

[814] Schiff reveals to us that the first requests for participation in the situation of the DRC were filed by the NGO international Federation of Human Rights Leagues before the standard form for participation was issued (Schiff, B.N, *op. cit*., p. 132).

[815] Regulation 88(1) of the RC. See also Regulation 23(2) of the RC which stipulates that, 'All standard forms and templates for use during the proceedings before the Court shall be approved by the Presidency. The Presidency may refer any matter relating to the standard forms and templates to the Advisory Committee on Legal Texts for its consideration'.

[816] The possibility of the ICC to create field offices is inferred from Regulation 106(1) of the RR (Receipt of applications) which states that 'Applications for participation or reparations may be submitted either to the seat of the Court or to a field office of the Court'.

[817] See Regulation 86(2) of the RC.

There are others advantages of using the standard form. One may think for instance about facilitation for the victim to submit a complete request which will meet the Court's exigencies at different stages of reparation proceedings (granting victim status for reparation purpose, assessing damage, loss or injury sustained by a victim and determination of types of reparations etc.). The standard application form could also facilitate an easy assessment of victims' requests by the Court. In this respect, it may contribute to the expediency of reparation proceedings. Issues relating to the completeness of a request for reparation lead to analyse the content of this standard form in the subsequent sub-paragraph.

II.2.1.3. The prerequisite factors which determine a comprehensive request for reparations

A request for reparations must meet particular requirements so as to be termed to be complete and comprehensive. In particular, Rule 94(1) of the RPE of the ICC lists essential elements of information which a victim's request for reparations has to provide.[818] The elements of information may be grouped into three categories: information on victim identification, information on harm allegedly suffered and information on types of reparations sought by the applicant. Thus, an applicant is required to give information related to his or her *identification*, *harm* suffered and *type of reparations*. These information need to be supported, to the extent possible, by relevant documentation, including names and addresses of witnesses. It is observable that the application forms for both individuals and organisations were prepared in this common context. An analysis of the application forms demonstrates that they both include seven pages, but in filling them an applicants may attach annexes. Yet there are page limits for any document filed with the Registry including the request for reparations.[819] Since the standard application forms are common for participation and reparation purposes, they include some information specific for participation in criminal proceedings but not necessary relevant for reparation purposes.

[818] Regulation 94(1) of the RPE of the ICC states that 'A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars: (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) Claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses'.

[819] Regulation 37 of the RC (Page limits for documents filed with the Registry) states that '[1]A document filed with the Registry shall not exceed 20 pages, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber. [2] The Chamber may, at the request of a participant, extend the page limit in exceptional circumstances'.

Having regard to the content of the request for reparations as provided for under Rule 94(1) and the application forms prepared by the Registry, one may ask about the relevance of the required or suggested information in filing the victims' reparation requests. In order to investigate the issue, it is useful to proceed by analysing the three categories of elements of information provided for by Rule 94(1) of the RPE of the ICC: information on identification of victim (A), the harm allegedly suffered by a victim (B) and indication of types or reparations sought by a victim (C).

A. Information on identification of victim

When filling reparations application forms, both natural persons and legal persons are required to provide information on their identification, by specifying and to possible extent, attaching to their requests supporting identity documentation. Although proof of identity of natural person may differ from legal persons, there are many similarities between identification of natural and legal persons. Both natural and legal persons may be identified by their name(s), domicile and nationality. Therefore, let us focus our analysis on natural persons bearing in mind that most of observations made could apply, where appropriate, to legal persons.

With respect to natural persons, the application form for an individual requires all possible information relating to identification and which will be useful at the stage of the assessment of reparation claims.[820] An applicant is required to indicate his or her *sex*. The information may help for example the Court to take into account victims of sexual or *gender*[821] violence as it is required by Rule 86 of the RPE,[822] or in case of crimes against humanity with element of persecution against any identifiable group or collectivity on gender basis[823] or in matters regarding protection of the victims etc. Likewise, a victim is required to indicate his or her *date of birth*. It should be kept in mind for example that the RPE consider a person under the 18 years as a *minor* who requires to be represented in his or her relation with the Court. Moreover, Rule 86 requires the Court, in making any direction or order, to take into account, in particular, needs of victims who are *children* or *elderly* among others. Nevertheless, in regard with the date of birth, a problem may occur with

[820] See the content of the Application Form for individual, Request for Participation in Proceedings and Reparations at the ICC for Individual Victims prepared by the Registry as joint participation/reparations form for individuals.

[821] According to Art.7 (3) of the ICC Statute 'the term 'gender' refers to the two sexes, male and female, within the context of society'.

[822] Rule 86 of the RPE of the ICC states that 'A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence'.

[823] See, Art. 7(1) (h) of the ICC Statute

some persons from remote areas where there may be a problem of illiteracy and some persons may not know their date of birth. In this case, an applicant is required to give approximate date or age or provide any information that will enable the age to be identified.[824] According to the application form for individuals, information regarding the applicant's tribe and ethnic group is optional. However, this information may be essential in the case of victims of genocide and apartheid. When determining collective reparation for example the element of tribe and ethnic group would be taken into account. In addition, the applicant is required to give information on his or her current occupation by indicating his or her work, if any, or whether the applicant is a student or unemployed. The information may help for instance in determining the criteria of *neediness* in awarding individual reparations.

A critical issue may arise with the question of number 11 of the Application form for individual: 'What proof of identity is the victim providing'? The question is important for the fairness of the reparation proceedings, but may be troublesome for some applicants. In normal situations the applicant would be required to attach to his or her request an official copy of his or her identity card. The identity of an applicant should be confirmed by a document issued by a recognised public authority, stating the name and the date of birth of the holder, and showing a photograph of the holder.[825] However, application challenges may arise where some victims of crimes within jurisdiction of the Court would have gone through tragic situations so that they would have been unable to collect their documentation relating to their identification, or the documentation would have been completely destroyed. Actually, as regards the *proof of identity* the early case law of the ICC demonstrates that judges are aware of it. In the *Situation in Uganda* for example, the Pre-Trial Chamber III, pointed out, that 'in a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an on-going conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties.'[826] Likewise, in the *Situation of DRC,* the Pre-Trial

[824] See the Application form for individual, Request for Participation in Proceedings and Reparations at the ICC for individual victims, observations on point 5.

[825] See ICC, *Situation in Uganda*, Pre-Trial Chamber III, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10th August 2007, ICC-02/04-101, para.16

826 See ICC, *Situation in Uganda*, Pre-Trial Chamber III, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10th August 2007, ICC-02/04-101, para.16

Chamber I also noted that, 'in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, may be difficult or too expensive to obtain'.[827]

The Court's awareness of the potential difficulties in obtaining or producing copies of official identity documents, led it to consider that applicants may establish proof of their identity by way of a range of official and non-official documents.[828] Consequently, in the *Situation of DRC* the Court considered that a 'natural person' may establish proof of his or her identity by, *inter alia*, (i) official identification documents, such as a national identity card, a passport, a birth certificate, a death certificate, a marriage certificate, a family registration booklet, a will, a driving licence or a card from a humanitarian agency; (ii) non-official identification documents, such as a voting card, a student identity card, a pupil identity card, a letter from local authority, a camp registration card, documents relating to medical treatment, an employee identity card or a baptism card; (iii) other documents, such as a certificate or attestation of loss of specified official documents, school documents, a church membership card, an association or political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality or a pension booklet. In default of the above document, the Court may consider other document such as a statement signed by two credible witnesses attesting to the identity of the applicant and including, where relevant, the relationship between the victim and the person acting on his or her behalf, providing there is consistency between the statement and the application.[829] Respecting organization or institution, the Court would 'recognise any credible document that constituted the body in order to establish its identity'.[830] One may ask whether the above mentioned documents, which were considered by the Court in deciding on victim status for participation in criminal proceedings, will be likewise considered for the purpose of reparations. This issue will be discussed in paragraph reserved for standard of proof.[831] Nonetheless, taking into account the fact that 'the exigencies in the countries where victims are located, proving identity has been a complex, arduous and time-consuming process for victims'[832] an applicant could be requested to attach to his or her request any document which may inform the Court about his or her identity.[833]

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[827] See ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, 17th August 2007, ICC-01/04-374, para.13

[828] See for example ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, para.87

[829] *Ibid*, paras 87 and 88; *The 2012 Decision on Principles and Procedures* para.198

[830] *The 2012 Decision on Principles and Procedures*, para.199

[831] Concerning administration of evidence in reparations proceedings see paragraph two of Section five of this Chapter (p.248).

[832] Ferstman, C. and Goetz, M., 2009. Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its

Still, regarding victim identification where another person is acting on behalf of the victim, who is minor or disabled or adult who gives his or her consent, the person is also required to give information on his or her identity. The person has to mention and to give proof of the relationship between him or her and the victim. The information may help to verify whether the person is entitled to act on behalf of the victim. Moreover, a victim or a person acting on his or her behalf is required to indicate his or her *address* and precise how he or she can be contacted. This can be a victim's own address or the address of an organisation, a family member or other individual, if the victim prefers to be contacted through someone else. The information regarding contact address is useful for victim notification and information. In this respect, a victim can elect a domicile for communication and notification.

Most part of important required information concerning victim identification seems to be useful for reparation proceedings. However, the relevance of some required information may be questioned such as *number of dependants*. An applicant is required to indicate in the request a number of dependants, people such as children, orphans or other family members who are dependant on the victim for financial or other support. How may the information be in connection with reparations proceedings? Notwithstanding the fact that dependants of a direct victim can be granted with victim status as indirect victim, one may not think that this element will be taken into account when fixing amount of individual reparation awards for the direct victim.

On the other hand, there is some missing information which however could be useful for reparation proceedings. For example there is no information about the nationality of an applicant victim. This information would be required, beside the required information relating to victim's tribe or ethnic group, where an individual award is granted. In fact, for the purpose of enabling States to give effect to an order for reparations, an order should specify the complete identity of the victims, which should include the nationality of victims, to whom individual reparations have been granted.[834] Moreover, having agreed with the principle of complementarity and its different aspects, a victim should be required to give information about any previous law suit he or she may have instituted against an accused or a convicted person and its outcome, or any transaction with the

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Impact on Future Reparations Proceedings. In: C. *Ferstman***,** M. Goetz and A. Stephens, eds., 2009. *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity. Systems in Place and System in the Making*. Leiden: Martinus Nijhoff, p. 316.

[833] In the application form for individual, on point 11 it is indicated that 'It is a requirement that the victim provide proof of identity. This can include, for example, national identity card, birth certificate, voting card, passport, driver's licence, student or employee card, letter from a local authority, camp registration card, card from a humanitarian agency, tax document or other document identifying the victim'.

[834] See Rule 218(3) (b) of the RPE of the ICC.

accused concluded in respect with reparations. Likewise, taking into account the complementarity principle in respect with the victim's right to reparations, as already discussed, the victim should demonstrate that there is unwillingness or inability of national justice to deal with his or her claim for reparations. In the similar line and lastly, an applicant should indicate any 'reparation award' or assistance he or she should have received before. This information would particularly be relevant if the Court established the principle of avoiding undue enrichment in awarding reparation to victims.

B. Information on the harm allegedly suffered

In respect of information on harm allegedly suffered by a victim, it is once again worth noting the similarities between harm sustained by natural persons and legal persons as regard damaged or destroyed properties. In this respect, the difference is the fact that legal persons, as already pointed out, may claim reparations only for direct harm. Having regard to recoverable harm in general, natural persons have particularities since they are entitled to claim reparations for material and moral harm they suffered. As it was processed in regard to the identification of victim, by focusing on natural persons, let us proceed on the same with regard to the harm allegedly suffered by victims, still bearing in mind that some observations and consideration may apply *mutatis mutandis* to legal persons in respect with damage to properties.

The analysis of the standard application form for individual victims shows, in its part (B), that an applicant is required to give information about the alleged crime(s) from which the alleged harm resulted. In this respect an applicant should describe what happened to him or her in as much details as possible by indicating when the event(s) occurred (specifying if possible day(s), month(s) and year(s), or where the exact dates are not known by providing any information that will help to identify the dates). He or she should precise where the event(s) took place (if necessary, by attaching a drawing or a sketch map of the location) and indicate who he or she believes is responsible for the event(s) and, if possible, explaining why. This information is important for they may contribute to understanding the link between the crimes and the harm sustained by the victim. Where a victim is able to give such information they could be confronted with other information from the Prosecution in order to determine whether the applicants is a victim entitled to reparations. Nonetheless, things may be more complicated than they seem. First of all, some survivors of crimes such as those which fall within the jurisdiction of the ICC may be as traumatized as they may be unable to remember what happened to them or give precision on days, months etc. Moreover, prosecution and conviction would intervene after quite a long time such that victims would not be

able to give such information. The situation raises an issue concerning proof, which will be discussed in paragraph one of section five of this chapter.[835]

In part (C) of the same standard application form for individuals, an applicant is required to inform about injury, loss or harm suffered. He or she should explain what effect the events had on his or her life and others around him/her. In so doing, he or she should describe physical or mental injury, emotional suffering, harm to reputation, economic loss and / or damage to property or any other kind of harm. If the applicant has documents demonstrating the harm he/she suffered, copies of these can be attached. This may include, for example, medical records or proof of economic loss or damage to property. As for the economic loss, for example '[m]edical, hospital, and perhaps funeral expenses could be included and established by receipts, bills, statements, or correspondence' and '[r]easonable compensation for mental suffering, shock, or loss of companionship could be estimated by medical opinion'.[836] In regard to the damage to properties,

> [e]vidence of the value of the loss may include purchase price, age and condition of the property, appraisals by experts and by individuals having personal knowledge of the facts, as well as rental income and values determined for similar types of property in the same or adjacent areas. Total loss value is generally the reasonable or fair market value of the property.[837]

With respect to restitution of assets, property or other tangible items, victims are to provide a description of them and supporting documents as far as possible.

One may assume that evaluating the harm suffered by a victim would be principally the domain of the experts. Moreover, as it will be discussed in paragraph one of section five of this chapter reserved to burden and standard of proof, following the conviction some types of harm may be recognised by presumptions. For example, in case of a woman sexually assaulted, she may suffer a physical harm but one may presume she also sustained a moral damage. But, the problem may be to determine the degree of the moral damage and this should be the task of experts.

C. Indication of types of reparations sought

In part E of the standard application form (Reparations), an applicant is asked to specify whether he or she would like to apply for reparations, if so what he or she would want and expect if the accused person is found guilty (in case the request is made before conviction). Types of reparations, as

[835] See Section five of this Chapter (p.248)

[836] Shelton, D., *op. cit*., p. 67

[837] *Ibid*, p.74

discussed earlier, include restitution (such as receiving back lost land or property), compensation, rehabilitation, various forms of assistance, or symbolic or moral measures such as apologies, memorial monuments etc.

In this regard, an applicant may list any measures which the victim would claim including restitution, compensation or/and rehabilitation. Claims for compensation may quantify any loss as far as possible, including elements such as lost earnings, loss or damage to property or expenses incurred. Claims for rehabilitation should provide sufficient information as to cover physical, psychosocial or other needs, including needs for legal services.[838] This required information on what a victim wants as reparations is relevant for they may help the Court to determine, case-by-case which type of reparations may be appropriate. In addition, the standard application form goes far to require an applicant to answer the following question: 'If reparations are ordered, whom the victim wants the benefits to go to?' The standard application form includes the following suggested responses: the victim, the victim's family, the victim's community (specifying the community) or other. An applicant can choose more than the suggested responses. It is hard to understand the relevance of the question. Does the question mean that a victim needs to predict and inform the Court whom he or she wants to assign or mandate to be granted individual award for reparations? The application form reveals the possibility of a victim to claim reparations which, once awarded, may be of benefit to others persons, but such possibility is not provided for by the ICC regime reparations.

The rest of the content of the standard application form concerns participation of the victim in criminal proceedings (Part D), legal representation (Part F) and communication of a victim's identity which is linked to the issue of victim protection (Part G). Save the issues which will be discussed in regard with participation of the victim in criminal proceedings with the view to claim reparations,[839] all of these issues do not fall under this study. Victims who want to participate in criminal proceedings may know that 'their request may be granted or rejected by the Chamber on the basis, *inter alia*, of information provided by them and that they may submit a new application later in the proceedings if their application is rejected by the Chamber'.[840]

[838] Redress, 2011, *op. cit.*, p.41

[839] See Section three, paragraph two (II.3.2.) of this Chapter (pp.232ff).

[840] See Regulation 107(3) of the RR.

When an applicant who claims to be a victim has filed the application form for reparations with the Registry, the latter should present all applications for reparations to the Chamber, together with a report thereon, where requested.[841] In addition, the Registrar shall seek all necessary additional information from a victim in order to complete his or her request.[842] At the commencement of the trial, where there is any request for reparations, the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States.[843] The notification aims, among others, a requirement for those notified to file with the Registry with any observations. Notification of the request to parties is not discretionary or optional but an obligation. The Court has the obligation to ask the Registry to provide such notification. Yet one may wonder why the Registrar needs to be asked by the Court before notifying on the request? Was it not sufficient to impose the obligation directly upon the Registry? The procedure has its meaning and positive impact on reparations proceedings. Actually, as already discussed, this obligation established upon the Court limits or diminishes or better sets aside the discretionary power of the Court to decide on reparation matter where there is a victim's request. In this context, we note that the obligation imposed upon the Court is in connection with that imposed upon parties to react by making their observations. Consequently, the decision made by the Court to notify all interested parties and participants and the possible subsequent representations made by the latter may be deemed as the commencement of reparation proceedings which should result in the Court's decision on reparations claims.

Lastly, it bears to note that Regulations for the Registry (RR) provide for the possibility of victims withdrawing their request for reparations.[844] This possibility of victims withdrawing their request is similar to that provided by Internal Rules 23(10) of the ECCC, where its states that, 'At

[841] See Regulation 110(1) of the RR. At the request of the Chamber, the Registry may present information or recommendations regarding matters such as the types and modalities of reparations, factors relating to the appropriateness of awarding reparations on an individual or a collective basis, the implementation of reparations awards, the use of the Trust Fund for Victims, enforcement measures, and appropriate experts to assist in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations (See Regulation 110(2) of the RR and Rule 97(2) of the RPE of the ICC).

[842] See Regulation 88(2) of the RC.

[843] Rule 94(2) of the RPE of the ICC

[844] If a victim decides to withdraw an application for participation or reparations before the Registry has presented the application to the Chamber, the Registry shall present the application and the withdrawal to that Chamber, together with a report including any reasons given for the withdrawal. If the application has already been presented to the Chamber, the Registry shall present the withdrawal to that Chamber, including any reasons given for the withdrawal (Regulation 101 (1) of the RR). See also Regulation 97(2) of the RR which implicitly recognises that a victim who have requested for reparations may withdraw his or her request. It stipulates that 'If a victim decides to withdraw an application for participation or reparations at any time, the Registry shall maintain the confidentiality of the communication'.

any time, a civil Party may expressly waive the right to request reparations, or abandon a Civil Party action. The waiver of the right or abandonment of the action shall not stop or suspend the criminal prosecution'.

II.2.1.4. The role of the Registry in facilitating victims' requests

Victims' requests for reparations may be granted or rejected by the Court on the basis, *inter alia*, of information provided by them. Although an applicant has the possibility to submit a new application later in the proceedings in the event his or her application is rejected by the Chamber,[845] it helps in all respects as long as the claims are as complete as possible. The Registry has a role to play in facilitating complete and comprehensive victims' requests.

In order to ensure that the standard application forms for reparations are completed as efficiently as possible, the Registry is *urged* to establish contact and maintain regular relations with the groups of victims, and may, *inter alia*, prepare guidance booklets and other materials, or provide education and training, in order to guide those assisting victims in completing the standard application forms.[846] The registry is *required* to take measures to encourage victims complete their applications and to provide further information and communications in a working language of the Court. Such steps may include, *inter alia*, seeking the assistance of groups of victims or intergovernmental and non-governmental organizations which may assist in the dissemination of the standard application forms for reparations as widely as possible.[847] In the same vein, the Registrar is required to seek all necessary additional information from a victim in order to complete his or her request for reparations.[848] In this regard, liaison offices established by the Court may assist victims not only in filling out application forms for reparations but also in collecting evidence. In doing so, one may suggest that in certain situations 'individual claims could be

[845] See Regulation 107(3) of the RR.

[846] According to Regulation 105 of the RR '[1] In order to ensure that standard application forms […] are completed as efficiently as possible, the Registry may establish contact and maintain regular relations with the groups [of victims], and may, *inter alia*, prepare guidance booklets and other materials, or provide education and training, in order to guide those assisting victims in completing the standard application forms. [2] The Registry shall, as far as possible, encourage the use of the standard application forms by victims in making applications'. It is observable that, some of the methods provided for by Regulation 105 of informing victims of their rights are also applied in some national justice systems. For example in 1982 the first *Guide des droits des victimes* (Guide to Victims' Rights) was published in France. In other national justice systems it can be found brochures outlining the criminal justice system as well as the rights and duties of the victims (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, *op. cit*., p.36).

[847] See Regulation 106 of the RR and Regulation 86(1) of the RC.

[848] See Regulation 88 of the RC.

grouped together – such as by village or district- for the purpose of preparation, to ensure consistency and efficiency'.[849]

Arguably, the purpose of all the provisions relating to assistance to victims in filing request for reparations is to facilitate the access to the ICC justice for the victims. For such a purpose, Regulation 86(9) of the RC provides for the establishment of a specialised unit dealing with victims' participation and reparations under the authority of the Registrar. This unit shall be responsible for assisting victims and groups of victims. In application of the Regulation Victim Participation and Reparation Section (VPRS) has been established under the authority of the Registrar. This Section is responsible for assisting victims and groups of victims.[850] In addition there is possibility of the Registry to establish liaisons which may assist victims in some areas such as in countries where crimes under investigation were committed.

Although, the Registry is *urged* to assist victim in filing application forms for reparations, one may be concerned by the issue regarding the effectiveness of application for reparations where claimants are not provided with legal representative. In this regard, the Registry is required to provide a legal representative to claimants who do not yet have their legal representative. The VPRS may assist a claimant in this capacity. Yet a victim may choose his or her legal representative; but in case of indigence of a victim the court may appoint a legal representative for the victim. In this respect, one may assume that the provision regarding legal representation for participation of victim in proceedings may apply.[851]

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[849] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p. 328. See also some suggestions made on collective approach in dealing with reparation issues before the ICC (Section two of Single Chapter one of Part three of this dissertation (pp.385ff*)*.

[850] See Regulation 86(9) of the RC. Already in 2006, as Schiff informs us, the aim was to have VPRS staff on the ground as soon as the Office of the Prosecutor (OTP) initiated serious investigations. The strategies of the VPRS in the field was to identify and work with Non-Governmental Organisation (NGOs) and other local groups, such as local authorities, religious and traditional leaders, to inform and assist victims about how they could participate in the ICC's proceedings (Schiff, B.N, *op. cit*., p.132). These strategies should also, if this was not the case, be used to inform victims of their rights to claim reparations and the procedures to follow.

[851] Concerning legal representation for the purpose of participation Rule 90 of the RPE of the ICC (Legal representatives of victims) reads as follow, '[1] A victim shall be free to choose a legal representative. [2] Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives. [3] If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives. [4] The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims […] are represented and that any conflict of interest is avoided. [5] A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.

II.2.2. Reparation procedure on the motion of the Court (Art75 (1) (s2) of the ICC Statute and Rule 95 of the RPE)

As per Art.75 (1) of the ICC Statute the Court 'may make determinations in relation to reparation on its own motion in view of exceptional circumstances'.[852] The Court may decide to trigger, on its own motion, reparation proceedings in order to determine the scope and extent of any damage, loss and injury to, or in respect of, victims. In this regard, the Court 'shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States'.[853]

According to certain commentators such a mode of triggering reparation proceeding may be based on presumptions that unidentified victims exist.[854] Such presumptions were for example established by the IACtHR in the case of *Plan de Sanchez Massacre*. In this case, the IACtHR Court held that victims were those identified in the judgement and those that might subsequently be identified, since the complexities and difficulties faced in identifying them had led to the presumption that there might be victims yet to be identified.[855] Notwithstanding, after failing to get identification of the victims the IACtHR concluded that it was unable to establish any compensation for victims who had not been individualized at the time of judgement on reparations.[856] Save the conclusion reached by the IACtHR, the ICC should likewise, after a decision on conviction for example and taking into account the nature of crimes, establish a presumption that there may still be unidentified victims or victims who may not be informed about the proceedings.

Where the Court has decided to deal with reparations it asks the Registrar to provide the notification to potential parties and to take all the necessary measures to give adequate publicity to the Court's intention to initiate reparation proceedings. Rule 95(2) of the RPE provides for two scenarios which may occur where there is notification. Firstly, where there is notification and publicity of the Court's intention to deal with reparation issues, a victim may make a request for reparations. In this case, according to the Rule 95(2) (a), the Court will proceed as if the request was

[852] Victims' Rights Working Group, *op. cit.*, p.7

[853] Rule 95(1) of the RPE of the ICC

[854] Redress, 2011, *op. cit.*, p.45

[855] IACtHR, *Plan de Sánchez Massacre v Guatemala*, Judgement of 29th April 2004 (Merits), para.48

[856] IACtHR, *Plan de Sánchez Massacre v Guatemala*, Judgement of 19th November 2004 (Reparations), para.62

brought by a victim on its own initiative pursuant to the Rule 94 already discussed. Secondly, a victim can give his or her feedback by requesting the Court not to issue an order for reparations against a convicted person. In this case, the Court may not act against the victim's request. According to Rule 95(2) (b) the Court 'shall not proceed to make an individual order in respect of that victim'. This second scenario raises a question as to whether the victim who does not want the issuance of an order for reparations against a convicted person could later benefit from a possible collective award ordered by the Court against a convicted person. Actually, although a victim can want, for any reasons, to spare an accused or a convicted person from an order for reparations, the Court may order a collective one. Can the Court expressly exclude the victim from the benefit of the order? The ICC reparation regime does not give any answer to the question. Arguably, the Court might identify in the collective order for reparations against the convicted person victims who does not want to benefit from the collective reparations ordered by the Court. This is in respect for the rights of the victims. This assumption would be in accordance with the context of Rule 97(3) which provides that '[i]n all cases, the Court shall respect the rights of victims'. However, verification as to whether the victim's attitude is not conditioned by a stigma or trauma should be made given that it can be found that the person primarily needs psychological assistance.[857] If not, it bears to refer to the *2012 Decision on Principles and Procedures* which established the principle of voluntary reparations by holding that '[r]eparations are entirely voluntary and the informed consent of the recipient is necessary prior to any award for reparations, including participation in any reparations programme'.[858]

In addition to the above two scenarios foreseen by Rule 95 of the RPE of the ICC a third one can be expected and inferred from the same provision. Where there is notification and publicity of the Court's intention to deal with reparation issues, a victim may, for some reasons, not give his or her feedback. Maybe he or she may not be reached by the notification or informed about the proceedings before the Court or may still be unknown at the time of notification. What will happen in such case? The RPE does not provide for such scenarios. Although the Rule 95 of the RPE remains silent on the issue, its context leads to argue that the Court may not be refrained to consider this case and by its discretionary power, may order reparations for unidentified victims. This point of view may be supported by the analysis of Regulation 60 of the Regulation of the TFV (RegTFV) which is found in Section II (of Chapter III) entitled 'Cases where the Court does not identify the

[857] According to the Trust Fund's experience in assisting victims, a victim may or may not want to participate in an activity aimed at rehabilitation because of fear of stigma, discrimination and personal security (ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25 April 2012, ICC-01/04-01/06-2872, para. 43)

[858] *The 2012 Decision on Principles and Procedures*, para.204; see also Principle 3.8 of the Paris Principles.

beneficiaries'. Regulation 60 reads as follow 'Where the names and/or locations of the *victims are not known*, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, *as defined in the order of the Court*, and shall list options for determining any missing details for approval by the Board of Directors [emphasis added]'. This provision can be understood as envisaging 'situations where victims may benefit from an award even without having submitted a formal request to the Court prior to the award having been made'.[859] This situation presupposes the case of collective reparations ordered by the Court since in the case of individual reparations the Court is obliged to specify the identity of the victims to whom individual reparations have been granted. In this regard, we must remember that a formal request for reparations set out in Rule 94 requires a complete identification of victim applying for reparations. Consequently, ignoring the third scenario where the Court may award reparation to a victim who did not request reparations would lead one to accuse the ICC reparation regime as being inconsistent or conflicting in this regard. Therefore, one may still maintain that in exceptional circumstances, the Court may use its discretionary power, to trigger reparation proceedings which may result in an order for reparations for victims who, after the notification or the publicity, filed a request for reparations and/or for those whose identity or feedback remain unknown.

With respect to the award for reparations granted on collective basis as one of the cases where a victim would benefit from an order for reparations without having applied for reparations, it is noticeable that this possibility has been implicitly confirmed by the Court. In the *Lubanga* case Trial Chamber I held that 'victims who may benefit from an award for collective reparations will not necessarily participate in the proceedings, either in person or through their legal representatives'.[860] This reasoning was repeated by the Chamber in the *2012 Decision on Principles and Procedures* where it held that '[g]iven the uncertainty as to the number of victims of the crimes in this case -save that a considerable number of people were affected - and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified'.[861]

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[859] ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified as public document on 19th March 2012, ICC-01/04-01/06-2806, para. 191.

[860] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the OPCV's request to participate in the reparations proceedings, 5th April 2012, ICC-01/04-01/06-2858, para.10

[861] *The 2012 Decision on Principles and Procedures*, para.219

The fact that the ICC reparation regime provides for the possibility of awarding reparations to victims who have not filed such a request and participated in reparations proceedings, is however similar, at some extent, to the system adopted by some countries of common law. For example in England and Wales a criminal court is vested with the power to order compensation to a victim of a crime who is not a party in the proceedings.[862] This system is different from the one adopted by civil law countries where compensation for the victims can only be granted by a criminal court if both procedural and substantive conditions for such compensation are fulfilled. The procedural requirement is that the victim must be a party to the criminal proceedings by constituting himself as a civil party. Therefore, a judge will never decide *ex officio, in his or her own initiative,* to compensate the victim but can only do so subject to the victim's request.[863] On the contrary, under the ICC reparation regime the situation may occur where reparation proceedings are triggered by the Court and may result in an order for reparations in favour of unidentified victims or victims who did not apply for the reparations.

It has been reported that the ICC Statute's option was adopted after intense debates. During the negotiations for the Statute, a number of delegations 'were hostile to the possibility that the Court might *proprio motu*, embark on an examination of the merits of making an award of reparation' and '[m]uch of that hostility was centred on the need to be fair to a convicted person'.[864] Proponents of the Court's *proprio motu* power to award reparations were probably inspired by the common law system whereas the reasoning of the opponents fed on the civil law practice. The compromised solution was allowing the Court to act on its own motion in exceptional

[862] For example in Britain, where there is no equivalent of the *partie civile* know in many civil law systems, 'when sentencing a person following conviction for any offence other than most road traffic offences, a criminal court has since 1973 had a general power to order the offender to pay the victim compensation for any personal injury, loss or damage resulting from that offence' (Greer, D., 1996b, *op. cit*., pp. 580 - 581). In any case in which the court has not made a compensation order in the victim's favour, it is required, according to section 104(1) of the Criminal Justice Act 1988, to explain its reasons for not doing so (*Ibid*. p.,581 and Dignan, J., *op. cit*., p. 80). The following have been suggested as good reasons for refusing to make a compensation order : (1) the victim does not want compensation; (ii) a compensation order might aggravate an unhappy relationship between the victim and the offender; (iii) the victim was injured by an offender with whom he had a close relationship; (iv) there is a dispute as to whether the defendant acted in self-defence or was provoked by the 'victim'; (v) the offender has no clearly identifiable means to pay compensation, even by way of instalments; (vi) as between a number of victims, this victim is better placed to pursue a civil action; (vii) a custodial sentence is to be imposed and there is no evidence that the offender will thereafter have the means to pay compensation, and (viii) the offender should not be permitted to by his way out of what would otherwise be the appropriate sentence for his offence. Reasons which are not valid include (a) the court cannot make an exact assessment of the victim's injury, loss or damage, but there is evidence on which an assessment can be made in an appropriate amount; (b) the court has difficulty in assessing the compensation payable for pain and suffering, although there is agreed evidence on the nature and impact of the offence on the victim; (c) the offender, though fit for work, is at present unemployed, and (d) the court wishes to impose a fine and the offender lacks the means to pay both compensation and a fine' (Greer, D., 1996b, *op. cit*., pp. 581 - 582 footnote). According to Powers of Criminal Court Act 1973, section 35(1A) and (4), the prosecutor and the offender, but not the victim, have a right to be heard if the court is considering making a compensation order (Greer, D., 1996b, *op. cit*., p.581).

[863] Van den Wyngaert C., *op. cit*., p.70

[864] Muttukumaru, C., *op. cit*., p.309

circumstances. With this ambiguous expression - exceptional circumstances - some think that it could be a way of incorporating victims from peasant communities in remote parts of the world[865] whose participation to proceeding would be impeded by 'geographical distance or lack of financial means'.[866] These victims would suffer serious consequences of criminal conduct. The condition of the victims can even be exacerbated when such victims have limited understanding of their right.[867] Exceptional circumstances could also be considered in cases of conflict and post-conflict situations, where victims, particularly the most vulnerable ones and mostly in need of reparation, may not be in a position to request reparation in their own accord.[868] In any event, exceptional circumstance should be identified by the judges when they examine the concrete situation of victims. In this regard, one may think that the circumstances impeding victims to participate in reparations proceedings could also allow of the option of the Court conduct some of the reparation hearings at a location where victims can attend and participate in a safe manner if the court is of such an opinion.[869] This assumption is in accordance with Art.3 (3) of the ICC Statute which allows the Court to 'sit elsewhere, whenever it considers it desirable'.

Nevertheless, for preserving the principle of fair trial and protecting the rights of an accused person, it should be better at least to empower the Prosecution, or some recognised victims' organisations, to represent some victims in the exceptional circumstances by claiming reparation before the Court on their behalf. This avenue would prevent the judge of the ICC from being both the judge and the party in reparations matters. Arguably, the Prosecutor is seen as the person who knows very well the situations of the victims since he or she has been collaborating with them during preliminary proceedings. Likewise, victims' organisations could be involved, even before the admissibility of a case, in the problems of the victim where crimes may have been committed. Notwithstanding, the concern of the fairness of the procedure can be dispelled by the recent practice of the Court which allows the Office of Public Counsel for Victim (OPCV) to represent the unidentified victims. Fox example Trial Chamber I, in the *Lubanga* case, held that in all the circumstances, the Office of Public Counsel for Victim (OPCV) 'may […] represent the interests of victims who have not submitted applications'.[870] Still this practice is controversial. In reparations

[865] Donat-Cattin, D., 2008, *op. cit*., p.1406

[866] Zegveld, L., *op. cit.*, p.88

[867] Donat-Cattin, D., 2008, *op. cit*., p.1406

[868] Victims' Rights Working Group, *op. cit.*, p.7

[869] *Ibid*, p.8

[870] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the OPCV's request to participate in the reparations proceedings, 5th April 2012, ICC-01/04-01/06-2858, para.12

proceedings before the Trial Chamber I, in the *Lubanga* case, the OPCV acted as legal representative of specific individuals who had applied for reparations and was allowed to make submissions in relation to the interests of unidentified victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules. Subsequently, the OPCV appealed against the *2012 Decision on Principles and Procedures* on behalf of both categories of the victims. The Appeals Chamber determined that, the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative. However, with regard to the unidentified individuals the court boldly stated that they cannot have a right of appeal because at the stage of the proceedings it was impossible to discern who will belong to this group as no concrete criteria exist. Consequently, the Appeals Chamber rejected as inadmissible the OPCV's appeal on behalf of those unidentified individuals.[871] The decision of the Appeals Chamber demonstrates that under the current legal framework of the ICC reparation regime, it is hard to admit that the OPCV can represent unidentified victims before the Court. In conclusion, ordering reparations *proprio motu* where there is no claim from victims is a discretionary power of the Court that can make such an order in exceptional circumstances and based on strong motivation.

II.2.3. Notification and publicity of reparation proceedings (Rule 96 of the RPE)

With respect to reparation matters before the ICC, the RPE provides for different kinds of notification which are different from each other by their purposes or objectives. There is notification of the request for reparations provided for by Rule 94(4) of the RPE and notification provided for by Rule 95 of the RPE. The object of the latter is related to the court's intention to deal with reparation issues in the case of reparation proceedings triggered by the Court on its own motion whilst the former is in relation with the victim's request for reparations. All of these two

[871] In the *Lubanga case*, in the reparation proceedings before the Trial Chamber, OPCV acted as legal representative of specific individuals who had applied for reparations. In addition, the OPCV made submissions in relation to the interests of unidentified victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the RPE. Subsequently, the OPCV appealed the *2012 Decision on Principles and Procedures* on behalf of both categories of victims. But the Appeals Chamber determined that, 'the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative' and considered that the unidentified individuals 'cannot have a right of appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist'. Consequently the Appeals Chamber rejected as inadmissible the OPCV's appeal on behalf of those unidentified individuals. (See ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.72).

types of notifications are not substantially different from the notification of reparation proceedings which are provided for by Rule 96 of the RPE of the ICC and subject to discussions in this paragraph. The methods of notification are the same for all these types of notification although their objectives and recipients may be different.

Rule 96 of the RPE of the ICC reads as follows:

> [1]Without prejudice to any other rules on notification of proceedings, the Registrar shall, insofar as practicable, notify the victims or their legal representatives and the person or persons concerned. The Registrar shall also, having regard to any information provided by the Prosecutor, take all the necessary measures to give adequate publicity of the reparation proceedings before the Court, to the extent possible, to other victims, interested persons and interested States. [2] In taking the measures described in sub-rule 1, the Court may seek, in accordance with Part 9, the cooperation of relevant States Parties, and seek the assistance of intergovernmental organizations in order to give publicity, as widely as possible and by all possible means, to the reparation proceedings before the Court.

By focusing on notification of reparation proceedings it is noted that, although Rule 96 of the RPE is entitled 'Publication of reparation proceedings', it provides for both notification and publicity of reparation proceedings. Why does the provision refer to the term *notification* and *publicity*? Is there any legal difference between the two notions? What is their impact on reparation proceedings? These question need to be addressed by analysing the methods and the purpose of notification (II.2.3.1.) and the publicity (II.2.3.2.) of reparation proceedings.

II.2.3.1. The methods and purpose of notification of reparation proceedings

Regulation 31(1) of the RC provides that 'all participants in the relevant proceedings shall be notified of any *document registered by the Registry* or any *decision* or *order*, unless, with regard to a document, the participant submitting that document requests otherwise [emphasis added]'. According to the Regulation the Registry is required to notify the convicted person and other interested parties of the request for reparations made by a victim and the Court's decision to hold reparation hearings. With respect to the methods of notification the Registry should, according to Rule 96 (1) of the RPE, use all possible practicable ways. The Registry will take the necessary steps to ensure that the information is indeed safely received by all interested parties, particularly victims, in a format that they understand and to address any challenge faced in that regard.[872] However, it is observable that electronic method of notification is a privileged one since Regulation 34 of the RR provides that, documents, material, orders or decisions *shall be notified as an email attachment*.

[872] Victims' Rights Working Group, *op. cit.,* p.7

Problems may occur for victims who live in remote parts of the world where there are no efficient methods of communication. Victims may not always have access to the internet. Where it is not possible to notify documents, material, orders or decisions electronically, they shall be notified by facsimile, by post or by hand together with a notification form. Moreover, according to the context of Regulation 32(3) of the RC a victim represented by legal representative should be deemed notified when his or her legal representative has been notified. Likewise, a person who is not represented by counsel shall be deemed notified when that person, organisation or institution designated by that person has been notified of a document, decision or order. We must not lose sight of the fact that at the time of filling a request for reparations, a claimant is required to give information relating to how he or she or the person acting on behalf of the victim can be contacted.[873]

In the context of Rule 96 of the RPE of the ICC notification may be understood as a procedural act of informing a party, or other interested person already identified and in contact with the Court, about reparation proceedings. In case of notification there should be a proof that notification has been made in accordance with the RPE. In fact, the failure to notify a party should have negative consequences on reparation proceedings. Where a party has not been notified and as a result he or she was for example unable to make the required observations, the adversarial principle would require that the reparation hearings be postponed in order to fulfil the requirements of notification of the party. Although such incident is not explicitly provided for by the RPE such an argument is however in accordance with the context of Regulations 31(2) of the RC entitled 'Notification'[874] and Regulation 35(2) of the RC entitled 'Variation of time limits'.[875]

II.2.3.2. Publicity of reparation proceedings

According to Rule 96 of the RPE, the Registrar is required to take all the necessary measures to give *adequate publicity* of the reparation proceedings before the Court, to the extent possible to

[873] See Application Form for Individual Victims, Request for Participation in Proceedings and Reparations at the ICC for Individual Victim, point 22.

[874] Regulation 31(2) of the RC states that 'Unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber, a participant is deemed notified, informed of or to have had communicated to him or her, a document, decision or order on the day it is effectively sent from the Court by the Registry. Such date shall be written on the notification form to be appended to all copies of the document, decision or order, as relevant. If the document, decision or order is not received, a participant may raise the issue and, as appropriate, may ask for a variation of the time limit […]. The Registrar shall retain and, if required, produce proof that the document, decision or order was effectively sent'.

[875] Regulation 35(2) of the RC provides that 'The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control'.

other victims, interested persons and interested States. These recipients of the publicity may be understood as other potential victims and participants than those already identified and in touch with the Court.

Publicity of reparations proceedings might require that the Court seeks cooperation of relevant States Parties, and seek the assistance of intergovernmental organization in order to give publicity, as widely as possible. In this regard, the *2012 Decision on Principles and Procedures* stresses the importance of outreach activities to be conducted by the Registrar. The Decision stipulates that '[o]utreach activities, which include, firstly, gender and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensuring that reparations have broad and real significance'.[876] It goes on to consider that '[i]n accordance with Rule 96 of the Rules, entitled 'Publication of reparation proceedings', the Registrar is responsible for taking all the necessary measures in this context, including outreach activities with the national authorities, local communities and the affected populations, in order to publicise […] any reparation proceedings before the Court [footnotes omitted]'.[877] In so doing, the Registrar should give particular attention to women, girls and children by taking adequate measures for their information in order to facilitate their participation in reparation proceedings. Indeed, access to justice for this category of victims could be impeded by their particular vulnerability due to the aftermath of crimes. Publicity should for example include outreach strategies which 'must consider the specific needs of children, including by ensuring that information is also available in child friendly formats, and that children, as well as parents and teachers, are informed'.[878] Although the Rule 96 does not provide for possible involvement of private NGOs, their role could be important in informing and giving publicity to reparations proceedings. In this respect, the Registry would collaborate with local authorities and NGOs in informing victims about their rights to participate in the ICC proceedings and claim reparations. The NGOs may play a big role in giving publicity to victims and interested persons.

Arguably, publicity of reparation proceedings is one of the aspects of victims' rights to information. It is different from the notification inasmuch as it cannot be seen as a procedural act which has legal impact on proceedings. Its purpose is to inform other potential parties and participants in reparation proceedings. As a result of the publicity, other potential victims may fill

[876] *The 2012 Decision on Principles and Procedures*, para.205; see also Victims' Rights Working Group, *op. cit*., p.6

[877] *The 2012 Decision on Principles and Procedures*, para.258

[878] Victims' Rights Working Group, *op. cit*., p.6

requests for reparations and other interested parties, such *bona fide* third parties and interested States, may intervene in reparations proceedings. Focusing on victims' rights to information, the publicity is an important factor in facilitating the implementation of the victims' rights to reparations before the ICC.[879] In fact, how could victims apply for reparations if they are not informed? And how could they be informed if there are no efficient measures of publicity? In other words, victims should be properly informed of proceedings so that they can lodge with the Court their claims for reparations. Such information for victims may include the steps they should take to protect their rights and assert a claim.[880]

II.3. The place of reparation proceedings within the whole trial before the ICC

According to Art.75 (3) of the ICC Statute before making an order for reparations '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'. The provision raises the question as to when the Court should deal with reparation issues. The question of how the Court may deal with evidence relating to reparation during criminal proceedings also comes up. Where a request for reparations has been made by a victim, discussing evidence relating to reparations at the stage of criminal proceedings supposes that the victim participates in the proceedings. Is the victim who has applied for reparations required to participate in criminal proceedings? Or does the participation of victim in the proceedings suppose that a victim has necessarily applied for reparations? These questions require us to discuss the proper place of reparation hearing during a trial so that the relationship between participation of a victim in criminal proceedings and reparations proceedings may be understood.

The clear distinction between the phase of participation of victim in the criminal proceedings and the reparations phase is not as evident as it seems. However, there are some reasons which lead to consider on one hand that reparations hearings should be a post-conviction procedure (II.3.1.). But on the other hand, there are some arguments which lead to argue that a victim who requested for reparations has interest to participate in criminal proceedings with view to supporting his or her claim for reparations (II.3.2.).

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[879] Moreover, as the *2012 Decision on Principles and Procedures* holds, victim as defined in Rule 85 of the RPE 'are to enjoy equal access to any information relating to their right to reparations and to assistance from the Court, as part of their entitlement to fair and equal treatment throughout the proceedings' (para. 188 of the Decision).

[880] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.327

II.3.1. Reparation proceedings as a separate post-conviction procedure

The term 'convicted person' used by the Art.75 (3) of the ICC Statute instead of 'accused person', presupposes that reparations proceedings could take place after conviction. In the similar vein, Art.76(2-3) of the Statute provides for the possibility of the Court to hold, after conviction, a further hearing during which it will deal with among others reparations issues.[881] Likewise, the Resolution ICC-ASP/11/Res.7 on reparations implicitly provides for a judicial phase of reparations as post trial hearings where it stipulates that 'evidence concerning reparations may be taken during trial hearings so as to ensure that the judicial phase of reparations is streamlined and does not result in any delay thereof.' In the similar line, Regulation 56 of the RC entitled 'Evidence under article 75 ' allows the Court to hear witnesses and to take evidence, for the purposes of a decision on reparations, at the same time as for the purposes of the trial. This demonstrates on one hand that the Court may, at the commencement of the trial, realise that there will be a necessity to deal with reparation issues and consequently may receive relevant evidence concerning reparations. On the other hand a victim may have already applied for reparations and the Court can take evidence from the victim.

The implementation of Regulation 56 of the RC has sparked intense debates and contradictions before the Court between the defence and victims' legal representatives. Whilst the latter, relying on Regulation 56, requested to present evidence relating to the harm suffered by victims during criminal proceedings, the former objected by arguing that victims should be permitted to tender evidence at separate reparation hearings since the issue of reparations only arises if there is a guilty verdict.[882] The defence assumed that permitting evidence on reparations during the trial will undermine the rights of the accused person, especially the presumption of innocence.[883] The Court adopted a position which seems to reconcile the interests of both parties and complies with the context of Regulation 56 of the RC.

The Court examined the issue and accepted that 'the extent of participation by victims during trial will to a significant degree depend on the Chamber's decision as to whether or not

[881] According to Art.76 (2) and (3) of the ICC Statute where the Trial Chamber hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence, any representations under article 75 of the Statute shall be heard during the further hearing referred and, if necessary, during any additional hearing.

[882] See, ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, para. 51.

[883] *Ibid*, para.119. Some commentators expressed their fears about victim participation. For example Schiff fears that '[i]nvolving victims in Court proceedings before a conviction has been obtained could jeopardize the presumption of innocence' (Schiff, B.N, *op. cit*., p. 88).

evidence concerning reparations will, at least in part, be considered during the trial or as a separate procedure after the trial'.[884] At the same time, the Court held that Rule 56 does not undermine the rights of the defence and the presumption of innocence[885]. The Court reassured to work out its responsibilities in implementing the principle articulated by Regulation 56 by stating that '[i]n discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, and to ignore the latter until the reparations stage [if the accused is found guilty]'.[886]

A parallel analysis of both Art.75 (3) of the ICC Statute, Regulations 56 of the RC and the determination of the Court on the issue demonstrates that reparations hearings are principally held separately from the trial. Moreover, the spirit of Art.76 (2)-(3) of the ICC Statute and para.4 of the Resolution ICC-ASP/11/Res.7 on reparations may reinforce this conclusion. Nevertheless, for the purpose of ensuring expeditious reparations proceedings, evidence relating to reparation may be taken during pre-conviction proceedings but, as the Court stated, the court's decision on merit related to will be reserved for reparations stage.

The fact that the phase of reparations is likely to be the post-conviction procedure has led some submissions in the *Lubanga* case to suggest the possibility of allowing a Chamber other than the Trial Chamber which dealt with the trial to take over reparations hearings. They even went far to conceive the possibility of leaving adjudication upon reparations to a single judge from the Pre-Trial Chamber.[887] But the Trial Chamber I did not agree with such suggestions. By the *2012 Decision on Principles and Procedures*, the Trial Chamber I held that reparation proceedings are an

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[884] See, ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, para. 119.

[885] *Ibid*, para.120; The Trial Chamber I explained that 'The objective of this provision is to enable the Chamber to consider evidence at different stages in the overall process with a view to ensuring the proceedings are expeditious and effective. This will enable the Chamber to avoid unnecessary hardship or unfairness to the witnesses by removing, where appropriate, the necessity of giving evidence twice. This will guarantee the preservation of evidence that may be unavailable to the Chamber at a later stage of the proceedings' (*Ibid*.).

[886] See *Ibid*. para.121

[887] For example, in the Lubanga case, the Registrar submitted that 'Article 75's reference to 'the Court' leaves the door open to other options, […]. The matter of reparations could for instance be referred to a different chamber or to a single judge. Under Article 39(2)(b)(iii) of the Rome Statute, only Pre-Trial Chamber judges may work as a single judge. Although referring the reparation proceedings back to the Pre-Trial Division after completion of the trial may not have been contemplated to date, there would be no contradiction as long as the judge of the Pre-Trial Division would limit his or her intervention to reparations proceedings only, without having had any involvement in pre-trial proceedings in the same situation or case. The fact that the reparation judge would be from the Pre-Trial Division would thus be purely incidental. Under Article 39(4) of the Rome Statute, Judges from the Pre-Trial or Trial Divisions may be temporarily assigned to the other Division, if the Presidency considers that the efficient management of the Court's workload so requires. This would not imply fulfilling any other pre-trial functions. Should the single Judge be selected from the Trial Division, this would require an amendment of Article 39(2)(b) of the Rome Statute, unless he or she were to be attached to the Pre-Trial Division under Article 39(4) for that purpose' (ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para. 154).

integral part of the overall trial process and the tasks of monitoring and supervising the part of reparation proceedings 'fall within the responsibilities and functions of the Judiciary'.[888] According to the Chamber's reasoning all determinations on reparations remain in the hands of the Trial Chamber in charge of the trial. This reasoning is in accordance with the context of the ICC Statute in regard with reparation proceedings. It is notable for example that the reparation phase is connected to sentencing phase.[889] The Pre-Trial Chamber cannot deal with the matter reserved to the Trial Chamber and vice versa. The latter cannot deal with issues reserved to the former. It is worthwhile noting that:

> This approach is consistent with the practice in civil law jurisdictions, where the chamber that has determined issues of culpability also issues decisions on reparations, without the need for the victim to make a claim before another chamber. It seems that this civil law example played a key role in influencing the development of the relevant provisions in the Rome Statute. After issuing its judgment on guilt and sentence – or together with it -, the Trial Chamber may issue orders as to what forms of reparations should be granted to which victims.[890]

Notwithstanding, Art.64 (4) the ICC Statute (Functions and powers of the Trial Chamber) provides for the possibility of the Trial Chamber to refer to the Pre-Trial Chamber preliminary issues. Specifically, the article stipulates that 'The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division'. Yet all reparation matters could not be included in the preliminary issues which can be referred to the Pre-Trial Chamber pursuant to Art.64 (4) of the Statute. The issuance of an order for reparations falls within the competence of the Trial Chamber.

The foregoing observations demonstrate that reparation hearings are primarily to be post-convicted procedure. In addition, 'the full panel of the Trial Chamber is expected to handle reparations'.[891] Should a judge, after sentencing, no longer be available for reparation proceedings, he or she should be replaced, allowing for efficiency while limiting the organizational demands.[892]

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[888] *The 2012 Decision on Principles and Procedures,* para.260

[889] See for example Art. 76(3) of the ICC Statute entitled 'Sentencing'.

[890] ICC, *Prosecutor v Lubanga,* Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para. 153.

[891] See also the Preamble of the Resolution ICC-ASP/10/Res.3 on Reparations (penultimate paragraph).

[892] However see reflections made on the possibility of establishing a Special Division for Reparations within the ICC (Part three of this dissertation, pp.410ff)

II.3.2. The importance of victims seeking reparation in participating in criminal proceedings

Bearing in mind that this dissertation does not focus on all victims' rights under the ICC Statute[893] but only on the rights to reparations, it is arguable that victims who request for reparations have advantages in participating in criminal proceedings. Yet the participation of a victim in criminal proceedings is not a precondition to obtain an award for reparations. A victim can obtain reparations without participating in criminal proceedings. On the other hand a victim can participate in criminal proceedings without intending to claim other types of reparations.[894] Therefore, the right for a victim to participate in criminal proceedings seems to be independent to, although useful for, the right to reparations.[895] Consequently, a question regarding legal basis of a victim to participate in criminal proceeding with the view to claim reparations crops up.

Art.68 (3) of the ICC Statute provides that:

> Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

This provision allows victims to set out in the court their views and concerns on matters of fact and law.[896] Can the provision be seen as the basis of victim participation with the view to claiming reparations? According to Musila '[p]articipation as it relates to the right to reparations is not used in the same sense as participation under Art.68 (3)'. Therefore, he suggests that participation that relates to the right to reparations 'must be considered as participation in proceedings other than article 68(3) proceedings'. Otherwise, he goes on to maintain, 'it would

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[893] Under the ICC Statute, victims of crimes enjoy a variety of rights such as right to information, right to protection, rights to participation in proceedings, rights to have a legal representative. Arguably, the exercise of all of these rights may interlock in order to make effective the victims' right to reparations before the ICC.

[894] Participating in criminal proceedings can constitute a form of satisfaction for a victim which can be considered as a type of reparations (See observations made on 'Other types of reparations contemplated by the *2012 Decision on Principles and Procedures*' in Chapter one of Part two of this dissertation, pp.142ff.

[895] In this regard, the Appeals Chamber notes that victim right to participate in criminal trial differs from the right to claims reparations 'because a request for reparations pursuant to rule 94 of the Rules of Procedure and Evidence is not dependent upon either the filing of an application for participation pursuant to rule 89 of the Rules of Procedure and Evidence or being granted the right to participate in the proceedings in relation to the accused person's guilt or innocence or the sentence' (ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against the Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.69).

[896] Casse, A., 2004. The Statute of the International Criminal Court: Some Preliminary Reflections. In: O. Bekou and R. Cryer, ed., 2004. *The International Criminal Court*. Burlington: Ashgate, p.64

produce undesirable results'.[897] In opposition to this point of view, the 'views and concerns' provided for by Art.68(3) of the Statute may arguably include among others evidence concerning reparations and therefore, this article should be considered as the basis of a victim's participation in the trial *with view to claiming reparations*. Indeed, Regulation 56 of the RC already mentioned, does not create a new procedural right for a victim, but intervenes to clarify how a victim may participate in criminal proceedings *with a view to claiming reparations* pursuant to Art.68(3). In addition, the case law of the Court has already brought some clarifications on the issue. It is noticeable that in the *Lubanga case*, in accordance with Art. 68(3) of the Statute, victims have participated in pre-conviction proceedings and in particular they have applied to introduce evidence[898] and the Court granted them that right.[899] These observations would reinforce the justification of the joint standard application form for both victim participation and reparations. The ICC practice informs us that an applicant would apply for participation in proceedings without applying for reparations.[900] However, this does not mean that the applicant will not later seek reparations since the possibility to request reparations remain open for him even after the Court has decided on the conviction. On other hand, it can be observed that most of the victims who applied for reparations in the *Lubanga* case for example, applied also to participate in the proceedings.[901] A victim who participates in criminal proceedings pursuant to Art.68 (3) of the ICC Statute, with view to support his or her claim for reparations, may get an opportunity to produce evidence for reparations against the accused person.

The usefulness of participation of victims in the proceedings has been acknowledged, still implicitly, by the Court where it held that participation of victims at the investigation stage 'can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered'.[902] Indeed, although the onus is on the prosecutor to prove the guilty of the accused pursuant to Art. 66(2) of the ICC Statute, the Appeals Chamber has held that this responsibility on

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[897] Musila, G., *op. cit.*, pp.188-189

[898] See *Prosecutor v Thomas Lubanga Dayilo*, Judgement pursuant to Article 74 of the Statute (Trial Chamber I), 4th March 2012 ICC-01/04-01/06-2842, para.13

[899] See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, paras 98, 119 and 121.

[900] See ICC, *Prosecutor v Lubanga*, Registry, and Request for instructions on victim's applications for participation and reparations received by the Registry, 2nd November 2011, ICC-01/04-01/06-2817, p.5

[901] See ICC, *Prosecutor v Lubanga*, Registry, Request for instructions on victim's applications for participation and reparations received by the Registry, 2nd November 2011, ICC-01/04-01/06-2817, p.4

[902] ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22nd March 2006), 17th January 2006, ICC-0I/04-101-tEN-Corr., para.63

the part of the prosecution does not preclude the possibility for victims to lead evidence pertaining to the guilt of the accused.[903] Regarding evidence produced in criminal proceedings for reparation claims, it had been observed earlier that the Court's decision on such evidence will be reserved to reparation proceedings as a post-conviction stage. Further, it is also arguable that a victim has interest to participate in criminal proceedings since he or she may also be involved in proceedings relating to the locations, freezing and seizure of the accused person's assets for a future reparation order.[904]

Moreover, certain commentators believe that, participation of a victim in criminal proceedings would contribute to various forms of satisfaction.[905] But without empirical data other commentators expresses their reservations since it remains unclear whether active participation of a victim in trial circumvents secondary victimization[906] so as to provide satisfaction to him or her. Notwithstanding, taking into account the pros and cons, one may assume that participation of a victim in criminal proceedings would contribute to various forms of satisfaction on condition that secondary victimisation is avoided. The measures for victim protection provided for by the ICC Statute[907] constitute one of the mechanisms for avoiding secondary victimisation for victims. The measures for victim protection to be taken by the Court aim to protect the safety, physical and psychological well-being, dignity and privacy of victims. In so doing, the Court shall have regard to all relevant factors, including age, gender and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

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[903] Office of Public Counsel for Victims (OPCV), 2012. Representing Victims before the International Criminal Court. A manual for legal representatives. The Hague: Office of Public Counsel for Victims (OPCV) /International Criminal Court, p.241

[904] Consider for example the context of Rule 99(1) of the RPE of the ICC which provides that 'The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor *or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so*, determine whether measures should be requested [emphasis added]'.

[905] In this regard Markus Funk notes for example that 'The drafters of the ICC Statute, after all, included victim participation not only for the sake of reparations, but also to advance more general restorative goals in the context of post-conflict justice, such as to help victims break cycles of violence by giving them a voice, and to rehabilitate and empower them, allowing them to regain some sense of normalcy in their lives' (Markus Funk, T., op., cit. p.188). In the same vein, Donat-Cattin believes that 'the participation of victims in the proceedings before an International Tribunal may really constitute an effective part of their process of rehabilitation'. He goes on to argue that 'participation in the proceedings must be recognised as an important component in facilitating the process of healing for victims of crimes, which is essential for rendering the ICC an institution effectively respondent to the questions of those who suffered immense pain and require that 'justice is done and is seen to be done' (Donat-Cattin, D., 1999, *op. cit*., p.271)

[906] McGonigle Leyh, B., *op. cit.* p.343

[907] Art. 68 of the ICC Statute provides for the protection of the victims and their participation in the proceedings.

These measures would include conducting any part of the proceedings in camera, as an exception to the principle of public hearings,[908] or allowing the presentation of evidence by electronic or other special means. These measures are provided not only for a victim to participate in proceedings but also for a victim either participating in criminal proceeding with view to claim reparations or participating in reparation proceedings as a post-conviction procedure. In this regard, the *2012 Decision on Principles and Procedures* stressed that '[w]hen deciding on reparations, the Court shall treat the victims with humanity and it shall respect their dignity and human rights, and it will implement appropriate measures to ensure their safety, physical and psychological wellbeing and privacy[footnotes omitted]'.[909]

Be that as it may, as far as participation of a victim in trial is concerned, it is arguable that the burden of proof still lies on the prosecution pursuant to Art.66 (2) of the ICC Statute. In this regard, at the stage of criminal proceedings a victim who has been allowed to participate in criminal proceedings should not be asked to share with the prosecution the responsibility to prove the guilt of the accused. Yet this should not prevent the victim from leading evidence pertaining to the guilt of the accused as the Appeals Chamber held.[910] By participating in criminal proceedings at the earlier stage, a victim may have the opportunity to contribute to seeking protective measures which may guarantee the effectiveness of a future reparation order. Moreover, allowing a victim to participate in criminal proceedings could constitute a form of satisfaction which is considered as a type of reparations for the victim. Yet such satisfaction resulting from participation in criminal proceedings requires that the proceedings are conducted in a manner which avoids second victimization.[911]

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[908] The principle of public hearings is provided for by Art.67 of the ICC Statute.

[909] *The 2012 Decision on Principles and Procedures*, para.190; see also Rules 87 and 88 of the RPE of the ICC which respectively provide for protective measures and special measures in protecting victims and witnesses.

[910] ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the applications for participation in proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (Public redacted version, 22 March 2006), 17 January 2006, ICC-0I/04-101-tEN-Corr., para.63

[911] Actually, as the UNODCCP rapports, 'some research indicates that victim participation places an unwanted burden on the victims themselves, beyond that of serving only as a witness for the prosecution. In particular, placing the victim in a decision-making role may lead to even greater harassment and intimidation by the defendant and may otherwise cause the victim anxiety. It is in this light that one can understand why, following the introduction in some jurisdictions of mechanisms designed to give victims a more active role in the process, a considerable number of victims have chosen not to exercise such a right' (United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, *op. cit.*, pp.36-37).

II.4. Protective measures as a guarantee to the effectiveness of future reparation orders (Art.75 (4) of the ICC Statute)

The ICC Statute provides for the possibility of the Court to seek cooperation with States by requesting provisional measures to preserve property or assets 'that may become the subject of a future reparation order'. [912] In this respect, Art.75 (4) of the ICC Statute provides that in exercising this power '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* [emphasis added]'. In the same line, the ASP stresses that, since 'the freezing and identification of any assets of the convicted person are indispensable for reparations, it is of paramount importance that the Court should seek to take all measures to that end, including effective communication with relevant States so that they are in a position to provide timely and effective assistance pursuant to article 93, paragraph 1 (k), of the [ICC Statute]'.[913]

At first glance the above references lead to assume that the competence the Court is vested with is to be exercised after conviction. Is there another alternative for the Court to order provisional measures before conviction? Another question comes up with the reference to Art.93 (1) by Art.75 (4) of the Statute which provides for 'identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of [not reparation orders but) eventual forfeiture'.[914] Could provisional measures target property and assets more than those subject to eventual forfeiture? In order to attempt to find answer to these questions, it is worth proceeding by analysing, within the context of the ICC Statute, the proper stage of the determination of the necessity of seeking protective measures (II.4.1) before discussing the issue concerning property and assets that may be targeted by the protective measures (II.4.2). By so proceedings, issues relating to execution of protective measures should be spared in this section for they may be totally similar to ones relating to execution of an order for reparations at least as regards to the States obligation to give effect to an order for reparations.[915]

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[912] Fédération Internationale des Droits de l'Homme (FIDH), 2010. Victims' Rights *bef*ore the ICC/Chapter VIII: Reparation and the Trust Fund for Victims, p.18, [Online] available at: <www.fidh.org/IMG/pdf/10-CH-VII_Reparations.pdf>, accessed on 15th November, 2010.

[913] Resolution ICC-ASP/11/Res.7 on Victims and Reparations (Adopted during the eleventh session held in The Hague on 14 – 22nd November 2012), para.11

[914] Art.93 (1) (k) of the ICC Statute

[915] Concerning issues relating to execution of reparation orders see Chapter three of Part two of this dissertation, pp.318ff.

II.4.1. The stage of the determination of the necessity of seeking protective measures

Where appropriate protective measures of a provisional nature are not timely undertaken the accused has the chance to hide or destroy property or assets which should be subject to restitution or reparations to his or her victims.[916] Consequently, protective measures can hinder the convicted person and third parties from selling or in other ways disposing off the property. Although Art.75 (4) of the ICC Statute provides that the measures contemplated by Art.93 (1) of the Statute could be sought by the Court after a person is convicted, the context of the ICC Statute does not exclude the possibility of the Court to order such measures before conviction. The purpose of protective measures may help to determine the stage of determination of such measures in the context of the ICC Statute. It is observable that protective measures may be sought after conviction pursuant to Art.75(4) of the ICC Statute (II.4.1.1.) as well as at the pre-trial stage *as per* Art.57(3)(e) of the Statute (II.4.1.2.).

II.4.1.1. Protective measures sought after conviction (Art.75 (4) of the ICC Statute)

Pursuant to Art.75(4) of the ICC Statute, following a conviction and while awaiting reparation proceedings, the Trial Chamber may, if appropriate, order such provisional measures for the preservation and protection of the property or proceeds which may be allocated for reparations. The Trial Chamber may exercise this authority, on its own motion or on the application by the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so.[917] To such an end, the Court may seek cooperation with national authorities and, if appropriate, with international organizations[918] for identification, freezing or seizure of proceeds, property and assets for the purpose of eventual reparations, but without prejudice to the right of *bona fide* third parties.[919] In addition, the Court

[916] Donat-Cattin, D., 2008, *op. cit*., p. 1403. In this regard, the Pre-Trial Chamber III reasoned in the same sense where, in *Bemba case*, it held that 'La Chambre est consciente que les technologies disponibles actuellement peuvent permettre à une personne de mettre rapidement une grande partie de ses biens et avoirs hors de portée de la Cour. La Chambre considère dès lors que l'identification, la localisation, le gel ou la saisie des biens et avoirs de M. Jean-Pierre Bemba est nécessaire dans l'intérêt supérieur des victimes pour garantir que, dans l'hypothèse où M. Jean-Pierre Bemba serait déclaré coupable des crimes qui lui sont reprochés, lesdites victimes puissent, en application de l'article 75 du Statut, obtenir réparation des préjudices qui peuvent leur avoir été causés [footnotes ommitted]' (See ICC, *Prosecutor v Bemba Gombo***,** Pre-Trial Chamber III, Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise, 27 Mai 2008, ICC-01/05-01/08-8 17-11-2008 1/6 VW PT, p.4).

[917] Rule 99(1) of the RPE of the ICC

[918] See Art75 (4) and 93(9) (b) of the ICC Statute.

[919] See Art.75 (4) and 93(1) (k) of the ICC Statute.

may seek any other type of assistance which is not prohibited by the law of the requested State with a view to execute an eventual reparation order.[920]

As per Art.75 (4) of the Statute the purpose of protective measures, in context of reparations to victims, is to guarantee the effectiveness of future reparation orders. In other words, in order to give effect to an order for reparation which may be issued under Art.75 of the ICC Statute, the Court may order protective measures. The option chosen by Art.75 (4) is similar to the one adopted by the RPE of the ICTY in respect with restitution of property. The RPE of the ICTY provides that after a judgment leading to conviction the Trial Chamber may, while waiting for a special hearing to determine the matter of the restitution of property, order such provisional measures for the preservation and protection of property or proceeds as it considers appropriate.[921] It is clear that the protective measures under Art.75 (4) of the ICC Statute that intend to specifically give effect to a reparation order, could only be ordered after conviction even though their impact may be limited.[922]

Since, under Art.75 (4) of the Statute, the protective measures for the purpose of reparations could not be sought before the conviction, one may fear the risk of the accused person or third party to hide or dispose of property or assets which may constitute reparations to victims. Therefore let us have a look to the possibility for the Court to order protective measures for the purpose of reparation at pre-trial stage.

II.4.1.2. Protective measures sought at the pre-trial stage (Art.57 (3) (e) of the ICC Statute)

Some commentators warn that allowing protective measures before conviction may violate the principle of presumption of innocence and also cause damage to the rights on property of the accused person.[923] Notwithstanding, there are good reasons to argue that protective measures for the purpose of reparations to victims may also be ordered before conviction but not by the Trial Chamber but the Pre-Trial Chamber. In other words, besides the Trial Chamber, the Pre-Trial

[920] See Art75 (4) and 93(1) (l) of the ICC Statute.

[921] See Rule 105(A) of the RPE of the ICTY.

[922] See also Malmastöm S., 2001. Restitution of Property and Compensation to Victim. In: R. MAY et al., eds. 2001. *Essays on ICTY Procedure and Evidence*, *in Honour of Gabrielle Kirk McDonald*. The Hague: Kluwer Law International, p.378

[923] During the ICC Statute negotiations several States participating in the negotiations 'had been extremely cautious in dealing with this matter. On one hand, they based their attitude against protective measures on the strict interpretation of the presumption of innocence, and more broadly, the right of the accused not to be potentially damaged by a provisional measure such as freezing of assets (with all problematic consequences in the area of compensation for damage in the hypothesis of acquittal or pre-trial dismissal of charges)' (Donat-Cattin, D., 2008, *op. cit*., p.1408).

Chamber has also authority to order the protective measures at the pre-trial stage and for the same purposes provided for by Art.75(4).

To illustrate the above assertion it is relevant to consider the context of Art.57 (3)(e) of the Statute and Rule 99(1) of the RPE of the ICC in the light of Art75(4) of the Statute.[924] As far as protective measures are concerned, Art.57(3)(e) of the ICC Statute, provides that the Pre-Trial Chamber may,'[w]here a warrant of arrest or a summons has been issued [by the Pre-Trial Chamber], and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take *protective measures* for the purpose of forfeiture, in particular *for the ultimate benefit of victims* [emphasis added]'. Although Art 57(3)(e) is found in Part 5 (Investigation and Prosecution), it intends to protect victims' rights to reparations since it specify that the protective measures may be taken for the purpose of forfeiture in particular for the ultimate benefit of victims. Indeed, in the context of Art.57 (3)(e) once a warrant of arrest or a summons has been issued, the Pre-trial Chamber may make an order for protective measures to ensure that assets which might be the subject of a future reparation order are maintained.[925]s In the same vein, Rule 99(1) of the RPE of the ICC Statute provides that 'The Pre-Trial Chamber, pursuant to article 57, paragraph 3 (e), or the Trial Chamber, pursuant to article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be requested'. According to this Rule, before conviction and after conviction respectively the Pre-Trial Chamber and the Trial Chamber may determine whether protective measures should be requested from interested States or international organizations.

The interpretation which acknowledges the authority of the Pre-Trial Chamber to order protective measures for the purpose of reparations to a victim has been upheld by the early case law of the ICC. In the *Lubanga* case, the Pre-Trial Chamber I, on its own motion, requested the States Parties to the Statute ('the requested States') to take all necessary measures, in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr Thomas Lubanga Dyilo on their territory, including his moveable and immoveable

[924] See also Donat-Cattin, D., 2008, *op. cit.*, p. 1409.

[925] Ferstman, C., 2003. The right to reparation at the International criminal Court, [Online] available at: <http://www.article2.org/mainfile.php/0106/62/#2>, accessed 15th June 2011

property, bank accounts or shares, without prejudice to the rights of bona fide third parties.[926] In its decision the Pre-trial Chamber refers to Art.75 of the ICC Statute and considers that, 'the identification, tracing, freezing and seizure of the property and assets of Mr Thomas Lubanga Dyilo is necessary in the best interest of the victims in order to guarantee that, should Mr Thomas Lubanga Dyilo be found guilty of the crimes of which he is accused, the said victims, by virtue of article 75 of the Statute, will obtain reparations for the harm they may have suffered'.[927] Likewise, in 2008, the Pre-Trial Chamber III, on the request of the Prosecutor, asked the Government of Portugal to freeze and seize property and assets of Mr Bemba in the country.[928] In its decision, the Pre-Trial Chamber III held that identification, tracing and freezing or seizure of proceeds as soon as possible of the property and assets of the person against whom a case is opened is necessary to ensure reparations for victims in case of a conviction.[929] In its decision the Pre-Trial Chamber refers also to, among others, Art.75 of the ICC Statute.[930]

The above early case law of the ICC demonstrates that at the stage of investigation and prosecution a Pre-Trial Chamber has authority to order protective measures for the purpose of reparations to victims. At this stage of proceedings, in order to ensure that eligible victims receive reparations for their suffering, the Pre-Trial Chamber may be requested,[931] or act on their motion, to both issue and enforce orders to State authorities or other third parties for the purpose of confiscating, freezing or obtaining information about the assets of the accused'.[932] Returning to the view of some commentators according to which protective measures before conviction may violate the principle of presumption of innocence, one may consider that protective measures do not violate the principle since these measures are still provisional. On the contrary, the evoked risk of damage to the rights on property of the accused person raises the issue of whether protective measures

[926] ICC, *Prosecutor v Lubanga*, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo, 31 March 2006, ICC-01/04-01/06-62-tEN, p.4

[927] *Ibid*, p.3; concerning the authority of the Pre-Trial Chamber to order protective measure for the purpose of reparations to victim see also Donat-Cattin, D., 2008, *op. cit*., p.1409

[928] See ICC, *Prosecutor v Bemba Gombo***,** Pre-Trial Chamber III, Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise, 27 Mai 2008, ICC-01/05-01/08-8 17-11-2008 1/6 VW PT.

[929] *Ibid*, para.6

[930] However, it bears to point out that the defence of Mr Bemba requested to lift such measures in order for Mr Bemba to pay his defence services and the request was accepted by Pre-Trial Chamber (Aubry, S. and Henao-Trip, M.I., *op. cit*., p.16).

[931] See Rule 99(1) of the RPE of the ICC Statute. Although the Prosecutor may also request the Court to order protective measures for the purpose of reparations, one may assume that '[v]ictims and their representatives must be proactive in seeking such orders as early as possible in the proceedings' (Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.236).

[932] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.236

decided by both the Pre-Trial and Trial Chambers can target the same property. Subsequently, let us have a look at the property and assets that may be targeted by the protective measures.

II.4.2. Property and assets that may be targeted by protective measures

The fairness of the ICC's decision requires considering the question of which property or assets should be targeted by protective measures. The question arises where the Pre-Trial Chamber's decision effects confiscation and freezing of property and assets of an accused prior to a conviction. This might pose a prejudicial effect to the accused person's property under freeze and seizure. Should an acquitted person claim compensation for any damage caused to his or her property by an order for forfeiture and seizure made before conviction? The ICC Statute does not provide for such compensation as it does in the case of miscarriage of justice.[933] There is another problematic question that crops up. For instance, one can ask whether the Pre-Trial Chamber is competent to request State Parties to identify, trace, freeze and seize the property and assets of an accused person other than those subject to forfeiture.

In order to discuss the issue let us first consider the 'Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo' made by the Pre-Trial Chamber I on 31st March 2006.[934] The request by the Pre-Trial Chamber read as follow:

> [The Pre-Trial Chamber requests] the States Parties to the Statute ('the requested States') to take all necessary measures, in accordance with the procedures provided in their national law, in order to identify, trace, freeze and seize the property and assets of Mr Thomas Lubanga Dyilo on their territory, including his movable and immovable property, bank accounts or shares, without prejudice to the rights of bona fide third parties; […] requested States, in accordance with article 96 (3) of the Statute, to advise the Court as appropriate of any specific requirements of their national law; […]the requested States to inform the Chamber if appropriate of the name and address of any interim administrator appointed in accordance with their national law to administer, during proceedings before the Court, the property and assets of Mr Thomas Lubanga Dyilo which may have been frozen or seized;

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[933] Art.85 of the ICC Statute (Compensation to an arrested or convicted person) provides that '[1] Any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. [2] When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her. [3] In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason'.

[934] See ICC, *Prosecutor v Lubanga*, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo, 31st March 2006, ICC-01/04-01/06-62-tEN.

> […] the requested States to inform the Court of any problem which may impede or prevent the execution of this request in accordance with article 97 of the Statute .

The legality of such a request is questionable. First of all, the Trial Chamber refers to articles 57 (3) (e), 75, 87, 93 (1) (k), 96 and 97 of the Statute and rule 99 (1) of the Rules of Procedure and Evidence,[935] but the crux of the matter is the compliance of the request with Art.93 (1) (k). It bears repeating the wording of the Art.93(1)(k) which reads as follows: *The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties*. The French version reads as follows: *L'identification, la localisation, le gel ou la saisie du produit des crimes, des biens, des avoirs et des instruments qui sont liés aux crimes, aux fins de leur confiscation éventuelle, sans préjudice des droits des tiers de bonne foi*. In the same line, it is noticeable that Art.57(3)(e) refers to 'forfeiture' where it states that having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence [the Pre-Trial Chamber may] seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of *forfeiture*, in particular for the ultimate benefit of victims [emphasis added].

The *forfeiture* to which the above provisions refer is an additional penalty provided for by Art.77(2)(b) of the Statute where it states that in addition to imprisonment, the Court may order '[a] forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties'. This demonstrates that the proceeds, property and assets are to be in link with the crimes an accused person is suspect to have committed. Therefore, the Court should avoid any extensive interpretation of Art.93 (1)(k) which may result in allowing the Pre-Trial Chamber to request to freeze or seizure at the pre-trial stage other property of an accused without any link to the crimes. Only the Trial Chamber has such power but still after conviction as per Art.75 (4) of the Statute. It is noticeable that whereas the power of the Pre – Trial Chamber is limited to paragraph 1(k) of the Art.93 of the Statute, the Trial Chamber has broad power under the whole paragraph 1. It is quite clear that the protective measures under Art.93 (1)(k) of the Statute concern not all the accused person's property but those that are in link with the crimes and which would be subject to forfeiture.

[935] See ICC, *Prosecutor v Lubanga*, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo, 31st March 2006, ICC-01/04-01/06-62-tEN, p.3

Secondly, the Pre-Trial Chamber refers to Resolution 1596 (2005) adopted by the Security Council at its 5163rd meeting, on 18th April 2005 (The situation concerning the Republic Democratic of the Congo) where it states that '[…] all States shall, […] immediately freeze the funds, other financial assets and economic resources which are on their territories from the date of adoption of this resolution, which are owned or controlled, directly or indirectly, by persons designated by the [Sanctions] Committee pursuant to paragraph 13 above, or that are held by entities owned or controlled, directly or indirectly, by any persons acting on their behalf or at their direction […]'.[936] Taking into account of the foregoing observations and bearing in mind that Art.21 of the ICC Statute requires the Court to apply primarily the Statute, it is arguable that any decision of the UNSC which is contrary to the Statute cannot be applied by the Court.

Inversely, the Pre-Trial Chamber III, in its request to the Republic of Portugal to identify, trace and freeze or seize the property and assets of Mr *Jean-Pierre Bemba Gombo* [937] made on 28th March 2008, adopts a different position by complying with Art.93 (1) (k) of the ICC Statute. The request made by the Pre-Trial Chamber III refers also to 57(3)(e), 75, 87, 93(l)(k), 96 et 97 of the ICC Statute, but does not mentions the Resolution 1596 (2005) adopted by the Security Council at its 5163rd meeting, on 18th April 2005 (*The situation concerning the Democratic Republic of the Congo*). More interesting, the Pre-Trial Chamber III's reasoning complies with the context of Art.93 (1) (k) where it states that:

> La Chambre prend en compte les arguments du Procureur à savoir que M. Jean- Pierre Bemba *serait en possession d'avoirs susceptibles d'être liés à la commission des crimes et qui pourraient servir à répondre à toute éventuelle ordonnance de réparation future*. Par ailleurs, il semble avoir les moyens de mettre ses biens et avoirs hors de portée de la Cour à bref délai [emphasis added].

Unlike the Pre-Trial Chamber I, Pre-Trial Chamber III addresses its request to a determined State, the Republic of Portugal, instead of all States Parties. Although the Chamber does not explain why its request targets the Republic of Portugal, one may assume that the Chamber has enough reasons to think that the accused's *property and assets derived directly or indirectly from the crime* may be localized on the territory of that State. But one may assume that nothing prevents a

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[936] Resolution 1596 (2005) adopted by the Security Council at its 5163rd meeting held on 18th April 2005 (*The situation concerning the Republic Democratic of the Congo*), para.15. See also ICC, *Prosecutor v Lubanga*, Pre-Trial Chamber I, Request to States Parties to the Rome Statute for the identification, tracing and freezing or seizure of the property and assets of Mr Thomas Lubanga Dyilo, 31st March 2006, ICC-01/04-01/06-62-tEN, p.3

[937] See ICC, *Prosecutor v Bemba Gombo***,** Pre-Trial Chamber III, Décision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise, 27 Mai 2008, ICC-01/05-01/08-8 17-11-2008 1/6 VW PT.

Chamber to addresses it request to all State parties on condition that the targeted property or assets are in link with crimes allegedly committed by the accused person.

In the light of the foregoing observations, it is arguable that protective measures taken by a Pre-Trial Chamber pursuant to Art.57(3)(e) of the ICC Statute , that is before a conviction, should only target an accused's property and assets derived directly or indirectly from a crimes under prosecution before the ICC. In other words, contrary to the position of the Pre-Trial Chamber I which targeted all assets and property of the accused and addressed to all State parties, the request should target only those in link with a crime.[938] However, protective measures taken by a Trial Chamber as per Art.75 (4), which is after conviction, may target all property and assets of a convicted person which might be the subject of a future reparation order. In other words, the convicted person's identifiable assets, liquid or realizable and property may be subject to future reparation order and consequently may be targeted by protective measures taken by a Trial Chamber. Nevertheless, both the Pre-Trial and Trial Chamber when deciding on protective measures should consider human rights law and make allowance for reasonable living expenses of the offender and his or her family.[939] In this regard, the respect of the right of the offender and his or her family was for example implicitly recognised in the *Bemba* case by the Pre-Trial Chamber III. In this case, the Chamber expressly held that the accused had financial obligation to his family, consequently protective measures should not result in preventing him to pay for the basic needs of his wife and children.[940] Further, it should be noted that the rights of *bona fide* party have to be respected in the implementation of the request for protective measures as provided for by Art.93(1)(k) of the ICC Statute.[941]

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[938] This interpretation is also in opposition to the point of view of certain commentators who assume that '[o]nce a warrant of arrest or a summons has been issued, the Pre-trial Chamber may make an order for protective measures to ensure that *any assets* which might be the subject of a future reparations order are maintained [emphasis added]' (Ferstman, C., 2003, *op. cit.*). The term 'any assets' may be understood as 'all assets' and this meaning cannot comply with the provision of Art.57 (3) (e) of the ICC Statute.

[939] McCarthy, C., 2012. *op. cit*., pp. 202-219.

[940] ICC, ICC, *Prosecutor v Bemba Gombo*, Pre-Trial Chamber III, Decision on the Defence's application for lifting the seizure of assets and request for cooperation of the competent authorities of Portugal, 10th October 2008, ICC-01/05-01/08-251-Anx, para.16. The reasoning of the Chamber may be compared with Rule 146(4) of the RPE of the ICC (Imposition of fines under article 77) and Rule 166(3) of the RPE (Sanctions under article 70) which provide that under no circumstances may the total amount of a fine exceed 75 per cent and 50 per cent respectively, of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants.

[941] See observations made on the issue of protection of *bona fide* third party within the context of the implementation of the ICC's reparation orders (Chapter three of Part two of this dissertation, pp.336ff)

Notably, where there is dispute regarding the legality of a request for cooperation relating to seizure or freezing of property and assets of an accused or convicted person, a requested State may apply for a ruling from the competent Chamber (Pre-Trial or Trial Chamber) pursuant to Regulation 108(1) of Regulation of the Court.[942] Moreover, pursuant to the procedural requirements provided for under the ICC Statute, a request for identification, tracing and freezing or seizure of proceeds, property and assets shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.[943] Consequently, cooperation 'will be essential, particularly in the early stages of identification, tracing and freezing of assets which might later become the object of a reparation order'.[944] Arguably, prompt State's action at the request of the Court's competent organs could effectively prevent the alleged offender from relocation his or her assets to countries not willing to enforce a Court's reparation order'.[945]

II.5. The purpose of reparation proceedings: Adjudicating on liability for reparations

Whilst criminal proceedings will focus on adjudicating on individual criminal responsibility, reparation proceedings should focus on liability for reparations by assessing the harm sustained by victims of crimes and deciding on appropriate and adequate reparations. Adjudicating liability for reparations implies principally the issue of the administration of evidence in reparation proceedings. This main issue entails other surrounding ones, such as the burden and standard of proof and the possible role of expert in assessing liability for reparations. Yet before discussing the issue of the administration of evidence there is a preliminary question that comes up and needs to be answered: Who will be parties in reparation proceedings as a post-convicted procedure? Whereas victims and the convicted person may be, at first glance, considered as the *parties in reparation proceedings* one may wonder whether the Prosecution will continue to play any role at this stage. The preliminary issue of parties in reparations proceedings needs to be addressed (II.5.1.) before discussing the main issue of administration of evidence (II.5.2.).

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[942] A ruling concerning the legality of the request may be sought only after a declaration has been made by the requesting body that consultations have been exhausted and within 15 days following such declaration. In this respect, a State's request for decision on the legality 'shall not of itself have suspense effect, unless the Chamber so orders. Before making a decision the chamber may hear from participants to the proceedings on the matter and in case the Chamber rejects the application. The Chamber may grant the requested State additional time within which it shall execute the request or the Chamber shall lift any suspension of direct execution (Regulation 108(1)-(5) of the RC.

[943] Art.99 of the ICC Statute

[944] Bottigliero, I., op. *cit*., pp.238-239

[945] *Idem*

II.5.1. Parties in reparation proceedings

The ICC Statute and its RPE do not explicitly specify who will be parties in reparation proceedings. However, Art.75 (3) of the ICC Statute provides that 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. Although the Statute uses a permissive wording 'the court may invite', one may assume that the Court shall not make an order for reparations without hearing or receiving observations from a convicted person and victims.

The permissive wording used by Art.75 (3) can be understood in the light of Rule 94(2) of the RPE of the ICC (Procedure upon request) which states that where there is a victim's request for reparations,

> the Court shall ask the Registrar to provide notification of the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States. *Those notified shall file with the Registry any representation made under article 75, paragraph 3*[emphasis added].

A parallel reading of Art.75(3) of the Statute and Rule 94(2) lead to argue that the Court may invite participants to reparation proceedings to make their representations where they have not discharged their obligation resulting from the act of their notification as per Rule 94(2). Otherwise, one cannot imagine the scenario where the Court should issue an order for reparations without giving opportunities to interested parties or participants to express their views and observations. It is worth noting that even in the case of reparation proceedings triggered by the Court on its own motion, the Court 'shall ask the Registrar to provide notification of its intention to the person or persons against whom the Court is considering making a determination, and, to the extent possible, to victims, interested persons and interested States' and '[t]*hose notified shall file with the Registry any representation made under article 75, paragraph 3 [emphasis added]'*.[946]

Considering the context of Art.73 (3) of the ICC Statute one may infer that the principal parties to reparation proceedings are *a convicted person* and *victims.* Besides the parties, other participants may be invited in reparation proceedings. Arguably, other interested participants implied by Art.73(3) may be States which will be requested to execute an order for reparations, the TFV which may intervene in implementation of an order for reparations[947] and the Prosecution

[946] Rule 95(1) of the RPE of the ICC Statute (Procedure on the motion of the Court).

[947] For details on the role of States and the TFV in the implementation of the ICC's reparation orders see chapter three of Part two of this dissertation, pp.324ff

which was a party in criminal proceedings from which reparation proceedings stem, *bona fide* parties who may be affected by any reparation order etc.

Nevertheless, in respect with participant to reparation proceedings in the *Lubanga* case, the Trial Chamber I determined that 'the reparation phase is an integral part of the trial proceedings, but unlike […] the sentencing stages when the principal focus is on the defence and the prosecution, the Court is mainly concerned at this juncture with the victims, even though the prosecution and the defence are also parties to the reparation proceedings'.[948] According to this determination the prosecution seems to be one of the parties in reparation proceedings which are considered as closely linked to the phase of sentencing. The fact reparation phase is an integral part of the trial proceedings can be inferred from the RPE of the ICC which seems to establish a close link between reparation and sentencing. For example according to Rule 145 (determination of sentence), in its determination of the sentence the Court shall take into account, as appropriate, mitigating circumstances such as: 'The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court'. In addition, in the context of the fines as penalty against a convicted person, Art.146 (Imposition of fines under article 77) stipulates that the Court, before imposing such a penalty, shall give due consideration to the financial capacity of the convicted person, including any orders for forfeiture, […] and, as appropriate, any orders for reparation in accordance with article 75'. These rules establish a certain link between reparations to victims and sentencing. The link established by the RPE is based on the fact that reparations could have impact to the sentence either as mitigating circumstances or as a factor of priority between fine as penalty against a convicted person and reparations to victims due to the financial capacity of the convicted person. Besides such a link, the ICC Statute establishes another procedural link between reparation phase and sentencing stage. According to Art.76(2-3) of the Statute where the Court hold a further hearing to hear any additional evidence or submissions relevant to the sentence, any representations under article 75, that observation related to reparations for victims, should be heard during the further hearing. These different aspects of the existing link between reparations and sentencing might justify the determination made by the Trial Chamber I according to which reparation phase is an integral part of the trial proceedings.

Be that as it may, could these observations support the standing of the Court which considers the prosecution as a party to reparation proceedings? The evoked link cannot serve as a legal ground for the determination of the Chamber. It is hard to justify the status of a party to the

[948] *The 2012 Decision on Principles and Procedures*, para.267

prosecution in reparations proceedings as is for victims in criminal proceedings. In criminal proceedings victims are merely participants. Likewise, there are good reasons for arguing that the prosecution should be merely a participant in reparations proceedings where a convicted person and victims are principal parties. Actually, the prosecution should not contribute to bring evidence of harm suffered by victims since the burden of proof should lie with the victims.[949] On the other hand the Prosecution should not be called to reverse any evidence for reparations provided by victims since this responsibility lies upon a convicted person. Moreover, the prosecution is not granted with the right to appeal an order for reparations as is the case with the convicted person, victims and bona fide party adversely affected by such an order.[950] Consequently, the link between reparations and sentencing could justify the Prosecution's quality of participant but not of party in reparation proceedings. Only are the convicted person, victims and perhaps *bona fide* party parties to reparation procedures. The rest of persons and institution which may be invited to make their representations are merely participants.

II.5.2. Administration of evidence in reparation proceedings

The importance and necessity of evidence in ruling has been affirmed by the ICC as follow:

> [I]t is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings; courts do not base their decisions on impulse, intuition and conjecture or on mere sympathy or emotion. Such a course would lead to arbitrariness and would be antithetical to the rule of law.[951]

At the stage of reparation proceedings, the accused person has already been found guilty on the basis of evidence produced by the Prosecution who has the onus to prove the guilt of the accused.[952] During trial, certain victims who have participated in criminal proceedings with view to claim reparations have had an opportunity to produce evidence relating to reparations[953] of which

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[949] For further comments on the question of who bears the burden of proof see subsequent paragraph of this section, pp.246ff. See also the *Decision 2012 on Principles and Procedures, para.252.* The decision implicitly recognises that victims have obligation to provide evidence of their claims.

[950] See Art.82 (4) of the ICC Statute. For more details on the issue see Paragraph one of Section 7 of this Chapter (II.7.1: The right to appeal against an order for reparations pursuant to Art-82(4) of the ICC Statute, pp.298ff).

[951] ICC, *Prosecutor v Kony, Vincent Otti,okot Odhiambo, Dominic Ongwen***,** Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06, a/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/120/06, a/021/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II', 23rd February 2009, ICC-02/04-01/05-371, para.36

[952] See Art.66 (2) of the ICC Statute.

[953] See Regulation 56 of the RC.

the evaluation have been reserved for the stage of reparation proceedings.[954] The evidence produced by Prosecution was supposed to be beyond reasonable doubt so that an accused person might be held responsible for crimes charged against him or her. Subsequently, it is arguable that the purpose for reparation proceedings is to provide and evaluate evidence for reparations in order to determine appropriate reparations to victims. The assessment of reparations refers to the evaluation of evidence relating to the status of a victim, the recoverable harm he or she suffered,[955] and appropriate reparations thereof. The problem of administration of evidence will entail the question of burden and standard of proof (II.5.2.1.), *types of evidence* admissible for reparation matters (II.5.2.2.). The administration of evidence will also call upon *experts* (II.5.2.3.).

II.5.2.1. The burden and the standard of proof

At the reparation stage the critical issues of burden and standard of proof crop up. Who shall bear the *burden of proof* and what may be the required *standard of proof*? Unlike for trial where the Statute provides for both the issue regarding onus and standard of evidence,[956] it is totally silent on these issues in respect with reparation proceedings. In respect with burden of proof during a trial, the onus is on the Prosecutor.[957] As for the standard of proof with respect to a trial, in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.[958] It may be noted from the outset that since reparations could not be sought before the ICC unless there is conviction, the standard of proof in respect to a trial has important impact on reparations. Victims should not have rights to case-ordered-reparations unless there is evidence which should convince the Court of the guilt of an accused person beyond reasonable doubt.

Regarding the party who bears the onus of proof in reparations proceedings, it is arguable that even in a case where there is conviction and save the circumstances where the presumptions can be considered as evidence, the burden of proof will be borne by the party claiming reparations (A). Respecting the standard of proof the Pre-Trial Chamber II held that, 'In the absence of any such rules, the Chamber has a broad discretion in assessing the soundness of a given statement or

[954] The Court has reassured to work out its responsibilities in implementing the principle articulated by Regulation 56 by stating that '[i]n discharging its judicial function, the Chamber will be able, without difficulty, to separate the evidence that relates to the charges from the evidence that solely relates to reparations, *and to ignore the latter until the reparation stage* (if the accused is convicted) [emphasis added]' (See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, para.121).

[955] See different kinds of recoverable harm discussed in Chapter one of Part two of this dissertation, pp.111ff.

[956] See particularly Art.69 of the ICC Statute (Evidence).

[957] See Art.Art.66 (2) of the ICC Statute.

[958] See Art.Art.66 (3) of the ICC Statute.

other piece of evidence'.[959] More specifically, the *2012 Decision on Principles and Procedures* established the standard of 'balance of probabilities' which needs to be understood in terms of its definition and its relevance in reparation before the ICC (B).

A. The burden of proof resting on the party claiming reparations

Before the silence of the ICC regime on the question of who bears the burden of proof in reparations proceedings, it is arguable that the general principle of law according to which 'the burden of proof of elements supporting a claim lies on the party making the claim'[960] will apply. This principle is applied by domestic civil and criminal courts[961]as well as international courts.[962]

According to the above general principle he who asserts must prove. A claimant should for instance bear the burden of proving his or her status of victim and the harm suffered. The general principle according to which a claimant bears the burden of proof was implicitly established by the legal framework of the UNCC reparation regime. Provisional Rules for claims Procedures, Decision taken by the Governing Council of the United National Compensation Commission at the 27th meeting, Sixth session held in Geneva on 26th June 1992, provided that 'Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claim is eligible for compensation pursuant to Security Council resolution'.[963] This general principle justifies the fact that, according to the standard application form for reparations, when applying for reparations, an applicant is required to produce, at the possible extent, evidence of the information he or she gives relating to his or her identification and harm suffered.

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[959] ICC, *Situation in Uganda*, Pre-Trial Chamber III, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101, para.13

[960] ICC, *Situation in Uganda*, Pre-Trial Chamber III, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 10 August 2007, ICC-02/04-101 para.13

[961] Zegveld, L., *op. cit*. p. 105.

[962] For example, according to Rule 23 *bis* of the Internal Rules of the ECCC(Application and admission of Civil Parties) ' In order for Civil Party action to be admissible, the Civil Party applicant shall: [a] be clearly identified; and [b] demonstrate as a direct consequence of at least one of the crimes alleged against the Charged Person, that he or she has in fact suffered physical, material or psychological injury upon which a claim of collective and moral reparation might be based'.

[963] See Art.35(1) of the Provisional Rules for claims Procedures. For the payment of fixed amounts in the case of serious personal injury not resulting in death, claimants were required to provide documentation of the fact and date of the injury, in the case of death, claimant are required to provide simple documentation of the death and family relationship. Document of the actual amount of loss will not be required' (Art 35(2)(b) of Provisional Rule for claims Procedures (Provisional Rule for claims Procedures, Annex to the Decision S/AC.26/1992/10 of 26 June 1992, taken by the Governing Council of the UNCC on 26 June 1992).

One may wonder how the principle should be applied in case the Court should have triggered reparations proceedings on its own motion and yet victims whom the Court should intend to grant an award for reparations should have not applied for reparations despite notification made under Rule 95 of the REP of the ICC. In exceptional circumstances where the Court would order reparations on its own motion and with scenario of default of a victim, the Court should bring out evidence which justifies an order for reparations in compliance with the obligation of motivation.[964] In addition, it bears noting that the Trial Chambers of the ICC established the controversial practice which allows the OPCV to represent victims who are still unidentified.[965] In case this practice is confirmed, one may argue that, in its capacity as Legal Representative of unidentified victims, the OPCV will bear the onus of proof on behalf of the unidentified victims. Yet, as already suggested, the concern of unfairness would be dispel if it was provided that the unidentified victims are to be represented in exceptional circumstances by the Prosecutor or victims organisations.[966]

B. The standard of 'a balance of probabilities' (para.253 of the *2012 Decision on Principles and Procedures*)

With respect to the standard of proof, the *2012 Decision on Principles and Procedures* determined that, whereas at trial the prosecution must establish the relevant fact to the criminal standard which is beyond a reasonable doubt, a less exacting standard should apply to reparation proceedings.[967] The Decision considers that given an accused person has been found guilty *the*

[964] Concerning the obligation of motivation of an order for reparations see Art. 83 (4) of the ICC Statute and Rule153 (2) of the RPE of the ICC and then compare them with Art.74 (5) of the ICC Statute.

[965] In the *Lubanga case*, in the reparation proceedings before the Trial Chamber, OPCV 'acted as legal representative of specific individuals who had applied for reparations. In addition, the OPCV made submissions in relation to 'the interests of [unidentified] victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules Subsequently, the OPCV appealed the *2012 Decision on Principles and Procedures* on behalf of both categories of victims. But the Appeals Chamber determined that, 'the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative' and considered that the unidentified individuals 'cannot have a right of appeal because at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist'. Consequently the Appeals Chamber rejected as inadmissible the OPCV's appeal on behalf of those unidentified individuals. (ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.72

[966] In Britain for example 'the Home office in 1988 issued two circulars, (i) instructing police forces to ensure that sufficient information was obtained of the losses or injuries suffered by victims and given to the Crown Prosecution Service for notification to the criminal court, and (ii) providing guidelines for the courts as to the amounts of compensation appropriate for various types of personal injury' (Greer, D., 1996b, *op. cit*., p.584). 'The need for more positive action by the police was underlined in 1990 by the Victims' Charter, which provides that – The police should ensure that they know what loss or injury the victim has suffered – to pass on to the Crown Prosecution Service and court if someone is charged, in order to ensure that no victim loses their right to compensation by oversight' (*Idem*). See also discussions on the possibility of victims' organisations to represent their members in Part three of this dissertation (pp.398ff).

[967] *The 2012 Decision on Principles and Procedures*, para.251

standard of 'a balance of probabilities' is sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person.[968] How will one understand the standard of 'a balance of probabilities' adopted by the Decision? And how will it concretely be applied in reparation proceedings?

At the stage of participation in the proceedings a *prima facie* standard of proof was established by Chambers of the ICC for the purpose of establishing eligibility for participation.[969] In the *Lubanga case*, some submissions argued that the same standard of proof should be appropriate for the purpose of awarding individual reparations, given the availability of relevant evidence so far collected, the victims' inability to obtain additional supporting materials and the factual findings of the Chamber in its judgement of guilty on Mr Lubanga.[970] The notion of *prima facie* evidence is not provided for neither by ICC Statute nor by the RPE. On the contrary, the Rules of Procedure and Evidence for Special Tribunal for Lebanon explicitly provides for the notion. Rule 86 of the *RPE* of the Special Tribunal for Lebanon stipulates that 'In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider […] whether the applicant has provided *prima facie* evidence that he is a victim'.[971] The *prima facie* standard of proof 'is widely accepted at the international level as the standard used at the initial assessment of victim status'.[972] Nevertheless, as the ECCC determined, 'significant differences may occur between the pre-trial and reparations stages of a case, including the quantity and quality of evidence affecting a civil party's standing and reparation claims, resulting from evidence adduced by the [victim] and from the findings as to the criminal responsibility of the accused person'.[973]

At the stage of reparation proceedings, the *2012 Decision on Principles and Procedures* adopted the standard of 'a balance of probabilities'. This standard of proof should be, on one hand, considered as higher than the prima facie evidence. In fact, 'it is expected that given the material

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[968] *Ibid.* para.253

[969] See for example See ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on victims' participation, 18th January 2008, ICC-01/04-01/06-1119, paras 99-100 and ICC, *Prosecutor v Lubanga*, OPCV, Observations on issues concerning reparations, 18th April 2012, ICC-01/04-01/06-2863, para. 39.

[970] See ICC, *Prosecutor v Lubanga*, OPCV, Observations on issues concerning reparations, 18th April 2012, ICC-01/04-01/06-2863, paras 38-39; see also *The 2012 Decision on Principles and Procedures*, paras 97 and100.

[971] Rule 86 of the RPE of the Special Tribunal for Lebanon (STL) states that 'In deciding whether a victim may participate in the proceedings, the Pre-Trial Judge shall consider […] whether the applicant has provided *prima facie* evidence that he is a victim as defined in Rule 2'. Rule 2 of the RPE of the STL provided that 'A natural person who has suffered physical, material, or mental harm as a direct result of an attack within the Tribunal's jurisdiction'.

[972] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.523

[973] *Ibid*, para.512

consequences of the reparation phase, a higher standard of proof will be adopted to prove the identity as well as the substance of the claims'.[974] But, on the other hand, the standard of 'a balance of probabilities' should be considered as lower than the one of 'beyond a reasonable doubt' which applies in criminal matters. Because, as the *2012 Decision on Principles and Procedures* held, '[s]everal factors are of significance in determining the appropriate standard of proof at this stage, including the difficulty victims may face in obtaining evidence in support of their claim due to the destruction or unavailability of evidence.'[975] In this respect, it is notable that Rule 94(1)(g) of the RPE of the ICC provides that victims' requests for reparations shall contain '[*t]o the extent possibl*e, any relevant supporting documentation, including names and addresses of witnesses[emphasis added]'. The Rule uses a non-mandatory wording in providing for the evidence that victims should produce in supporting their claims. Moreover, regarding the low standard of proof and in respect with evidence relating to victim identification, it should be noted that the Court admitted the likelihood that in some areas the available proofs of identity may not be of the same type as they should be in other less tumultuous areas.[976] Subsequently, the requirements of proof were lowered and adapted to the particular factual circumstances.[977]

The *2012 Decision on Principles and Procedures* does not give any definition of the standard of 'a balance of probabilities'. The concept of probability may be defined as 'an evaluation of the likelihood of a past event having happened, given the facts and assumptions, expected or adopted for the purposes of the evaluation'.[978] More specifically, *Black's Law Dictionary* defines the 'balance of probabilities*'* as 'the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other'.[979] The standard of balance of probabilities or preponderance of evidence appears as the less demanding standard of proof. By applying the standard of proof, the Court should compare

[974] Ferstman, C. and Goetz, M., *op. cit*., p.323

[975] *The 2012 Decision on Principles and Procedures*, para.252

[976] See ICC, *Prosecutor v Kony, Vincent Otti,okot Odhiambo, Dominic Ongwen***,** Appeals Chamber, Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06, a/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/120/06, a/021/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II', 23rd February 2009, ICC-02/04-01/05-371, para. 17.

[977] Bachvarova, T., *op. cit*., p. 671.

[978] Geneva Academy of International Humanitarian Law and Human Rights, 2012. Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions, by Stephen Wilkinson, p. 63 [Online] available at: <http://www.geneva-academy.ch/policy-studies/ongoing/standards-of-proof-in-ihl>, accessed 20th September 2012.

[979] *Black's Law Dictionary*, Eighth Edition (2004 quoted by *The 2012 Decision on Principles and Procedures*, footnote 439).

information that confirms a fact with information that questions it, if the former proof is the most convincing; the fact will be considered established.

The standard of 'balance of probabilities' was recognised by the Supreme Court Chamber in the Courts of Cambodia as consistent with the decisive standard of proof in a civil case.[980] The Internal Rules of the ECCC refers to the phrase 'more likely than not to be true'. Rule 23 *bis* of the Internal Rules(Application and admission of Civil Parties) provides that 'When considering the admissibility of the Civil Party application, the Co-Investigating Judges shall be satisfied that facts alleged in support of the application are more likely than not to be true'. Although this provision may be relevant to the pre-trial stage or at the initial assessment of victim status, the ECCC determined that the phrase 'more likely than not' has been used to describe the standards of proof known as 'preponderance of evidence' and 'balance of probabilities'[981] applied at the stage of reparation proceedings in the case of the ICC. The standard of 'balance of probabilities' is also expressly provided for by the ICTY rules concerning the determination of the matter of the restitution of the property associated with a crime under its jurisdiction.[982] Similarly, the possibility of considering evidence at its *reasonable minimum* was provided for by the UNCC reparation regime.[983] This demonstrates that the Trial Chamber, in adopting the standard of 'balance of probabilities, does not depart from the international practice already acquired in this matter'.

Arguably, the fairness of a trial might require that the standard of 'balance of probabilities' runs in two ways. A convicted person could also produce a proof to rebut any victims' allegations and such a proof will be evaluated on the standard of 'balance of probabilities'. Such counterbalance standard of evidence may be similar to that applied by the European Court of

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[980] ECCC, *Case KAING Guek Eav alias Duch*, Supreme Court Chamber, Appeal Judgement of 3rd February 2012, Case File/Dossier No.001/18-07-2007-ECCC/SC, para.524

[981] *Ibid*, paras 523 &524

[982] See Rule 105(D) of the RPE of the ICTY: 'Should the Trial Chamber be able to determine the rightful owner on the *balance of probabilities*, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate [emphasis added]'.

[983] Under the UNCC reparation regime, for consideration of claims up a certain amount (up to US$ 100,000 for instance) of actual losses, claims must be documented by appropriate evidence of the circumstances and amount of the claimed loss and documents and other evidence required would be the *reasonable minimum* that is appropriate under the particular circumstances of the case. A lesser degree of documentary evidence ordinarily would be sufficient for smaller claims (such as those below US$ 20.000) (See Art 35(2)(c) of the Provisional Rule for claims Procedures, Annex to the Decision S/AC.26/1992/10 of 26th June 1992, taken by the Governing Council of the UNCC on 26th June 1992). In fact, '[t]he UNCC trended away from the traditional standard of proof in an effort to cope with the large number of claims and the paucity of evidence in some cases given the circumstances of the loss [..] For expedited claims, the claimant only had to 'demonstrate satisfactorily' that a particular claim is eligible for compensation [..] A heightened standard of proof was applied to larger and more complex claims' (see ICC, *Prosecutor v Bgagbo*, Pre-Trial Chamber III, Second decision on issues related to the victims' application process, 5th April 2012, ICC-02/11-01/11, para.54).

Human Rights (ECtHR) in the area of forfeiture of offender's property. In this respect, the ECtHR held that the forfeiture of property is permissible where the prosecution has established a *prima facie* case that the property is derived from crime and, in reply, the perpetrator cannot establish on the *balance of probabilities* that the property has been obtained lawfully.[984]

II.5.2.2. Types of evidence admissible in reparation proceedings

The ICC Statute and its RPE do not provide for the types of evidence admissible in reparation proceedings. Nor the Decision does determine the possible types of evidence which would be admitted and comply with the standard of 'balance of probabilities' it established. As regards the trial, Art.69 (3) of the ICC *Statute* provides that '[...] The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth'. Will the Court have the same authority at reparation phase to request the submission of all evidence that it considers necessary for the determination of the truth? Article 69 of the Statute entitled 'evidence' provide for a range of types of evidence at criminal trial including, *testimony* of witness, *documentary evidence* and all evidence that the Court may considers necessary for the determination of the truth. Although these types of evidence are provided for in a criminal trial, it is arguable that they may also apply for reparations proceedings. Further, particularly to reparations proceedings evidence by presumption, which is not admissible in criminal proceedings,[985] may be admissible against a convicted person in reparation proceedings. However, one may wonder whether all of these types of evidence should have the same value in reparations proceedings.

Respecting *documentary evidence* it has already been observed how a victim who applies for reparations is required to produce documents supporting his or her information relating to his or her identification. A victim is also recommended to produce, if possible, documents demonstrating the harm he/she suffered. This may include, for example, medical records or proof of economic loss or damage to property. This type of evidence may also be required and produced for example in proving relationships between victim and his 'ayants droit'.

Moreover, in reparations proceedings the testimony under oath may be admissible. Testimony may be given by witness or expert witness. In regard to expert witnesses the Court may

[984] *Phillips v United Kingdom*, Merit, 5th July 200, quoted by McCarthy, C., 2012. op. cit., p.222

[985] Presumption in criminal proceedings is provided for the accused benefit. Art. 66 of the ICC Statute entitled 'presumption of innocence' states that 'Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law'.

also admit oral as well as documentary testimony for moral harm. For instance in *Velásquez Rodriguez v Honduras*, moral damages sustained by the wife and children of the victim of disappearance was demonstrated by expert documentary evidence and the testimony of a psychiatrist. The evidence demonstrated and convinced the Court that they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family (the direct victim).[986]

Notwithstanding, *presumption* as evidence may also be admissible in some circumstances during reparations proceedings.[987] The term 'presumption' may be understood as 'a reasonable conjecture concerning something doubtful that is drawn from arguments and appearances, which by the force of circumstances can be accepted as proven'.[988] The ICC reparations regime does not provide for the application of presumption as evidence. However they are good reasons to argue that the Court may form presumptions by itself (*praesumptio iudicis*, discretionary presumption) pursuant to the principle of free evaluation of evidence.[989] Arguably, after conviction, the very fact that a convicted person has committed a crime will serve as a proof that a victim of such a crime has suffered certain harm. Such a presumption might be similar to what some doctrine calls 'presumed damages' that are awarded without any actual evidence of injury. According to the doctrine 'substantial injury may be presumed to flow from certain tortuous acts, even though the plaintiff has presented no proof of actual loss, when the torts invade interests that are intangible, rather than physical or economic'.[990] This type of evidence may for example apply in the case of moral damage. An established jurisprudence of the IACtHR demonstrates that presumption was admitted as proof in case of grave human rights violations. For example, in the case of torture the IACtHR repeatedly held that it is obvious 'the victim suffered moral damages, for it is characteristic of human nature that anyone subjected to the kind of aggression and abuse proven in the instant case will experience moral suffering', therefore, '[n]o evidence is required to arrive at this finding'.[991]

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[986] See IACtHR, *Rodriguez v Honduras*, Judgement of 21 July 1989 (Compensatory Damages.), (ART. 63 (1) American convention on human rights), para.50

[987] See Victims' Rights Working Group, *op. cit*., p.9

[988] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.426

[989] In the KAING Guek Eav *alias* Duch , the Supreme Court Chamber, noted that it has authority to use discretionary presumptions which derives from the principle of free evaluation of evidence. The Chamber determined that 'The basis of discretionary presumptions is in the probable, 'natural' conclusions drawn, in accordance with the indications of logic, science and common human experience, from ordinary happenings of common life and the consideration of the motives that usually sway individuals in certain circumstances' (ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, paras 436&437).

[990] Lee, S.R., 2012. Unwarranted presumptions: Common Law, Injury and Presumed Damages for Constitutional Torts, p. 39 [Online] available at: <http://ssrn.com/abstract=2035814>, accessed 24th April 2013.

[991] IACtHR, *Loayza-Tamayo v Peru*, Judgement of 27th November 1998 (Reparations and Costs), para.138; see also IACtHR, *Suárez-Rosero v*

Likewise, in case of death resulting from grave human rights violations the Court found that 'it is assumed that the death of the victim has caused [to the successors] actual and moral damages and the burden of proof is on the other party to show that such damages do not exist'.[992] Moreover, where a victim cannot provide for example receipts or other sufficient evidence to determine the actual amount of expenses, the IACtHR found that it has a discretionary authority to estimate their amount within reasonable limits, given the circumstances of the case. The discretionary power allows the Court to consider factors such as the duration and complexity of the case in its determination of the reasonableness of the amounts.[993] Drawing on the IACtHR's case law, the ECCC determined that 'presumptions may be of assistance for the ECCC inasmuch as they attest to the universality of certain probabilities in given circumstances. The ECCC, however, exercises its own discretion in formulating presumptions in the factual context of the cases before it'.[994]

In the a smilar way, the ICC might also admit presumptions as evidence in some circumstances such as which led the IACtHR to consider presumption as a type of evidence. Moreover, in certain circumstances, as it was mentioned earlier, evidence on specific loss will not be given for documents may have been unavailable, lost or destroyed, or means of proving possession of livestock or other possessions will be impossible. Such circumstances may also allow of the admission of presumptions of harm and the use of the discretionary power by the Court to adopt other creative approaches to evidential obstacles. In this regard, some suggest for example that presumptions of harm might be considered, for indirect victims based on close family relationships for certain types of crimes or the particular circumstances of certain types of crimes.[995] In the case of presumption of harm, the burden may be on the accused person to rebut it. For example, when spouses were in divorce proceedings or when a child was in vagrancy or rebellion to his parents at the time of crimes, the convicted person can demonstrate and try to convince the Court that the alleged indirect victim had not sustained any moral harm as a result of crimes committed against his or her spouse or parent.

Some evidence used to rule on the conviction should perhaps be useful at reparation proceedings. This can be the case for instance where the Court have proceeded to the examination

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Ecuador, Judgment of 20th January 1999, (Reparations and Costs), para.65

[992] IACtHR, *Aloeboetoe et al. v Suriname*, Judgment of 10th September1993 (Reparations and Costs), para.54; see also IACtHR, *Gangaram-Panday v Suriname*, Judgement of 21st January, 1994 (Merits, Reparations and Costs), para.49

[993] IACHR, *Suárez-Rosero v Ecuador*, Judgment of 20th January 1999 (Reparations and Costs), para.99

[994] ECCC, Case KAING Guek Eav *alias* Duch, Appeal Judgement of 3rd February 2012, para.444

[995] Redress, 2011, *op. cit.*, p.56

of places or sites, searches and seizures, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes etc. Consequently, during criminal proceedings, the Court should collect, as well as possible, all evidences relating to reparations and reserve them for the reparation proceedings for the economy of time and costs.

II.5.2.3. Experts assisting in judicial assessment of reparations (Rule 97(2) of the RPE)

Rule 97(2) of the RPE of the ICC provides that, 'At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect to the victims and to suggest various options concerning the appropriate types and modalities of reparation'. The RPE provides for the possibility of the Court to recourse to experts in the assessment of reparations in order to determine the scope, extent of any damage, loss and injury to, or in respect of victims and the modalities of reparations. The Court may do so upon request or on its own motion. The request may be made by victims or their legal representatives or a convicted person.

The assistance of experts provided for by Rule 97 raises a number of questions which may retain our attention. The first question may concern the appointment of experts. This question arises particularly from the *2012 Decision on Principles and Procedures* which delegated the task to appoint the experts to the TFV.[996] Can the power of appointing experts be delegated to a non-judicial organ? The answer to this question requires discussing the issue of the *appointment of experts* (A). Another issue concerns the mission and the *modus operandi* of experts. How should experts perform their task in assisting the Court? Will experts have power to interrogate parties and other interested participants? These questions require understanding the modus operandi of experts in reparations proceedings (B). Thirdly, there is another issue concerning the legal force of reports or conclusions of the experts? Will the reports or conclusion be binding toward the Court and parties? This may lead us to discuss in this paragraph the effect of an experts' report or opinion on the decision-making of the ICC (C). These thorny issues are raised when there is no ICC case law which should help tackle them since the ICC Statute and its RPE are silent about the issues. The *2012 Decision on Principles and Procedures* will provide a lesser contribution inasmuch as it is still insulated and, as already mentioned, not yet final. Therefore, the issues are to be tackled by principally searching the context of the ICC Statute and its RPE.

[996] See *The 2012 Decision on Principles and Procedures*, para.265

A. The appointment of the experts

Rule 97(2) of the RPE of the ICC determines the authority of the Court to appoint experts. Upon the request of victims or their legal representatives, the Court may appoint experts. The word 'may' used by the Rule implies that the Court is not required to appoint experts. An option is open for the Court to recourse to experts where necessary. Arguably, Rule 97(2) allows the Court to exercise broad discretion in choosing and utilizing a court-appointed expert and there are no procedural checks on the court's inherent power.

Yet, motions for the appointment of experts may be filed by the victims or their legal representative or a convicted person.[997] Arguably, parties and participants in reparations proceedings may propose experts to the Court,[998] but the responsibility of choosing an appropriate and neutral expert is incumbent upon the Court. Actually, Rule 97(2) of the RPE seems also to prevent the ICC from the practice of shopping for experts and venality.[999] Nevertheless, bearing in mind that the burden of proof lies with the claimant, it is arguable that parties are not prevented from bringing experts before the ICC (experts *ex parte*) as evidence of their claims. Indeed, by obtaining assistance from court-appointed expert the court does not take the place of a party in satisfying its burden of proof'.[1000] However, court-appointed experts or experts *ex curia* contemplated by Rule 97(2) of the RPE of the ICC might arguably be expected to be more neutral and 'less susceptible to pressures to tailor their testimony to support a particular legal outcome' [1001] than parties experts. Moreover, it is worth noting that parties do not have to bear the costs of any Court-appointed expert for they are borne by the Court.[1002]

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[997] Shelton, D., *op. cit*., p.233

[998] See ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.258

[999] Shopping for experts, as Reisinger explains 'is a partisan practice whereby parties select an expert based on the conformity of the expert's opinion to that party's theory of the case'. Reisinger defines 'a venal expert' as 'one whose opinion tends to change based, in part, on his fee, or, based on the position of the party that hired him' (Reisinger, K.B., 1998. Court-appointed expert panels: A comparison of two models (Notes). Indian Law Review, Vol. 32. N.1, p.232).

[1000] Payne, C., *op. cit*., p. 1208. The recourse to experts by the Court may be required when the parties failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues. During reparations hearing, victims can provide the Court with expert testimony which may spare it to recourse to supplement expertise. In this case, the Court may appoint its expert 'when the parties' experts offered directly conflicting testimony on topics that were beyond the comprehension of the court' (Cecil, J.S. and Willging, T.E., 1993. Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706. Washington, DC: Federal Judicial Center, p.13).

[1001] Reisinger, K.B., *op. cit.*, p. 234.

[1002] See Art.100 (1) (d) of the ICC Statute.

Considering the possible complexity of reparation matters before the ICC, one may expect the Court to opt for a panel of expert instead of a single Court- appointed expert. Actually, the court-appointed expert panels could offer viable solutions.[1003] In the *Lubanga* case for example, where most of the victims were child soldiers, some submissions considered that the case required experts who are anthropologists, child protection specialists, psychoanalysts, social workers, public health specialists, and conflict analysts with relevant knowledge of Ituri[1004] where the crimes were committed. In this case, the appropriate neutral experts should be either individuals or organizations. The submission went on to suggest the appointment of the mixed panel of experts which should include local and international experts in order to understand the circumstances in different parts of Ituri.[1005] In the context of crimes under the ICC's jurisdiction, experts should also include specialists in different areas such trauma, sexual violence and violence against women and children, in addition to those with area-specific or country expertise or technical expertise on reparations such as valuation specialists.[1006] In the *Lubanga* case the Trial Chamber I retained the option of a multidisciplinary team of experts to provide assistance to the Court instead of sole expert.[1007]

Regarding the possibility of the ICC to appoint organizations as experts, the RPE neither explicitly provides for such an alternative nor prevent the Court from opting for such alternative. The legal framework of some international or regional courts provide for the possibility of appointing organizations as well as individuals as experts. For example the International Court of Justice 'may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.[1008] Likewise, the chamber of European Court on Human Rights 'may also ask any person or institution of its choice to express an opinion or make a written report on any matter considered by it to be relevant to the case'.[1009] Similarly, one may note that such an option was also found, yet implicitly, under the UNCC regime which allowed the panels of commissioners to 'request additional

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[1003] Reisinger, K.B., *op. cit.*, p.238

[1004] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25thApril 2012, ICC-01/04-01/06-2872, para.262

1005 *The 2012 Decision on Principles and Procedures*, para.3 ; ICC, *Prosecutor v Lubanga*, UNICEF, Submission on the principle to be applied, and the procedures to be followed by the Chamber with regard to reparations, 10th May 2012, ICC-01/04-01/06-2878, para.18

[1006] Victims' Rights Working Group, *op. cit.*, p.8

[1007] *The 2012 Decision on Principles and Procedures*, para.3 and ICC, *Prosecutor v Lubanga*, UNICEF, Submission on the principle to be applied, and the procedures to be followed by the Chamber with regard to reparations, 10th May 2012, ICC-01/04-01/06-2878, paras 263-264

[1008] Art. 50 of the Statute of the International Court of Justice

[1009] See Rule A1 (2) of the annex of the Rules of the European Court on Human Rights (concerning investigations).

information *from any other source*, including expert advice, as necessary [emphasis added].[1010] Arguably, the words 'any other source' may include individual or organization as experts. The practice of the UNCC may support this interpretation. The UNCC faced a big challenge of assessing the claims for environmental restoration which included massive amounts of scientific and technical data and analysis in many different subject matter areas so that it hired a consulting firm that in turn sought out and retained independent experts in the necessary scientific and technical disciplines.[1011]

The legal framework of the international or regional courts and the UNCC should inspire the practice of the ICC in appointing, where appropriate, organization as experts in reparations proceedings. As regards the Trust Fund established by the ICC Statute, it is worth noting that its Secretariat can consult expert organization in developing options for determining any missing details regarding beneficiaries of collective awards for reparations where the Court has not identified them in its order.[1012] In addition, allowing for the nature of the crimes committed by a convicted person and the harm they caused to victims, the Court-appointed experts should not be the compatriots of the parties. This should be considered so as to ensure that experts shall independently and impartially fulfil their mission. In the *Lubanga case*, the Trial Chamber determined that the team of experts 'ought to include representatives from the DRC, international representatives'.[1013] One may expect that, although the parties in reparation proceedings – in the *Lubanga* case- should be mostly of Congolese nationality – the nationality of most of all the parties, the presence of international representatives in the team of expert may prevent the risk of partiality.

Considering the question of the possibility of the ICC to delegate the task of appointing experts to another organ, it is arguable that such possibility is excluded by the context of Rule 92(2) of the RPE. In the *Lubanga* case, The Trial Chamber I acted on its own motion in deciding to involve experts in reparation proceedings. But in so doing it discharged its powers under Rule 97(2) by delegating the task of selecting and appointing appropriate multidisciplinary experts to the TFV. In addition the TFV was given the task to oversee the work of the experts.[1014] The delegation made by the Trial Chamber I to a non-judicial organ to select, appoint experts and oversee their work is legally questionable. Why did the Trial Chamber decide to delegate its responsibility? Is there any

[1010] UNCC, Governing Council Decision Approving Provisional Rules for Claims Procedure, art. 36(b), U.N. Doc. S/AC.26/1992/10 (26th June 1992).

[1011] Payne, C., *op. cit*., pp.1205-1206

[1012] See Regulation 60(c) of the Regulations of the Trust Fund for Victims (RegTFV).

[1013] *The 2012 Decision on Principles and Procedures*, para.264

[1014] *The 2012 Decision on Principles and Procedures*, para.265

legal ground for such delegation of responsibility? The reasons that led the Trial Chamber to delegate its inherent authority to the TFV are implicitly pointed out as follows:

> The Chamber, in discharging its powers under Rule 97(2) of the Rules, delegates to the TFV the task of selecting and appointing appropriate multidisciplinary experts, and the TFV is to oversee their work. Experts in the fields of child soldiers, violence against girls and boys and gender issues should be amongst those appointed by the TFV. […]The Chamber is of the view that the TFV is well placed to determine the appropriate forms of reparations and to implement them. It is able to collect any relevant information from the victims, and the Chamber notes the TFV is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part.[1015]

This justification of delegating a non-judicial organ to appoint expert in the context of Rule 97(2) could stand where the Court appointed the TFV as expert to assist it in deciding on reparation issues. Instead of appointing the TFV as expert to assist it, the Trial Chamber has discharged its powers under Rule 97(2) of the RPE and delegates to the TFV the task of selecting and appointing appropriate multidisciplinary experts, and the TFV is to oversee their work.[1016]

Arguably, the Trial Chamber misinterpreted the Rule 97(2) and erred in delegating its inherent authority of appointing experts. Indeed, the Rule 97(2) invests the Court with the authority to appoint and not to delegate its decision-making power to an expert or other organ. Yet, one may agree that there may be a difficulty of identifying a truly neutral person, an expert suitable for appointment. [1017] The Trial Chamber I might have faced such a difficulty in the Lubanga case as it is reflected by its determination. Notwithstanding, should the Chamber be unable to select appropriate experts, it might seek advice from parties and other interested participants, such as the TFV which could propose appropriate experts before their appointment by the Court pursuant to Rule 97(2). Moreover, since the court acknowledges that the TFV 'is well placed to determine the appropriate forms of reparations and to implement them', nothing prevents the appointment of the TFV as expert. In fact, wherever practicable, a Chamber can designate the TFV as the appropriate experts.[1018] The Registrar could also help in appointing expert by the Chamber, since he or she has

[1015] *Ibid*, paras 265-266

[1016] *Ibid*, para.265

[1017] Cecil, J.S. and Willging, T.E., *op. cit*., p.21

[1018] For example in the Lubanga case, War Crimes Research Office proposed in its submissions to appoint the TFV as expert to assist the ICC in the processing and determination of a reparations award (War Crimes Research Office , *op.cit,* 8). In so doing, War Crimes Research Office assumed that '[s]everal factors support the use of the Trust Fund for victims in this context: [1] because the Fund is authorized to provide assistance to victims of crimes falling within the jurisdiction of the Court *outside* the context of case-based reparations, by the time a Trial Chamber issues a final judgement in a case, the Trust Fund will often have already conducted significant activity of the benefit of victims of the more general situation from which the individual case arose; [2] in determining which projects to implement under its general assistance mandate, the Fund engages in many of the activities that will need to be undertaken in the processing and determination of case-based

the obligation of creating and maintaining 'a list of experts accessible at all times to all organs of the Court and to all participants'.[1019]

In short, the appointment of experts under Rule 97(2) should be considered as the inherent power of the court which cannot be delegated to another non-judicial organ. The other organs or institutions can assist or help the Court, but not take over the task, in choosing and appointing the experts.

B. The mission and *modus operandi* of the court-appointed experts

As regards the mission of experts in reparation proceedings one may wonder what might be the exact task of the expert in assisting the Court. The Rule 97(2) of the RPE determine a general mission which may be assigned to the experts: providing *assistance* to the Court in assessing harm suffered and appropriate types and modalities of reparations. What shall be the scope of such assistance in the light of judicial authority which is incumbent to the judges? Another issue is the *modus operandi* of the experts in reparation proceedings. How shall the court-appointed experts communicate with parties and interact with the Court? Shall their *modus operandi* comply with the adversary principle and allow ex parte communication with parties? In order to tackle these problematic issues let us proceed by unpacking the scope of the assistance court-appointed experts should be called to provide during reparation proceedings (1) before discussing the *modus operandi* of experts in reparations proceedings (2).

1. The scope of assistance of court-appointed experts

The exact scope of the assistance which court-appointed experts should be asked to provide in reparation proceedings before the ICC stems from the sovereign decision of the Court which has the power to assess the necessity of appointing experts. Arguably, before the Court issues an order appointing the experts it may give notice to the parties and provide them with the opportunity to express their views concerning the appointment.[1020] However, it is also arguable that parties must

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reparations awards; and [3] the Fund is a permanent institution that will have an on-going relationship with the Court, which offers a benefit over the use of ad hoc bodies of experts in a variety of ways' (War Crimes Research Office, *op. cit.*, p. 8).

[1019] Regulation 44 of the RC

[1020] In *Lubanga* case for example, the Trial Chamber I invited parties and interested participants to submit their representations on, among other, the issue relating to the appointment of experts (See ICC, *Prosecutor v Lubanga* ,Trial Chamber I, Scheduling order concerning timetable for sentencing and reparations, 14th March 2012, ICC-01/04-01/06-2844, para.8).

not have to consent to the scope of the mandate of the court-appointed experts which has to be specified by the Court since the latter knows in which area it needs assistance.

In the context of Rule 97(2) of the RPE of the ICC, the recourse to court-appointed experts is justified only to the extent strictly limited to where claims raise issues of technical nature that the court cannot resolve on its own. This is to prevent any abuse consisting in discharging a case by giving an expert the general mission to provide information on all the circumstances of the case, including questions of law. In other words, the court, in seeking assistance from the experts, *is not allowed to delegate its judicial function to the experts*.[1021] Actually, one may not assume that the context of Rule 97(2) of the RPE is to provide the Court with the authority to appoint a 'special master' who may take on some of its judiciary functions.[1022] The idea behind the appointment of experts under the ICC reparation regime is to assist the Court to come to an accurate understanding of complex issues and, thus, ensure a fair outcome after its deliberations.[1023]

A decision of the Court appointing the experts should be precise and detail tasks assigned to them. The tasks may generally be requiring time and skills which the Court does not have in assessing reparations claims which could be too numerous and technically complicated. In fact, in straightforward cases valuation and calculation of damages may be complex. The Court is likely to be dealing with violations numbering in the hundreds, if not thousands, in each case and, the judges of the Trial Chambers are not necessarily experts in claims evaluation and processing, nor were they elected to perform such tasks.[1024] The mission of evaluating physical harm may for example call

[1021] See Savadogo, M-L., 2004. Le recours des juridictions Internationales à des experts. *Annuaire français de droit international*, vol.50, p. 244 [Online] available at: <http://www.persee.fr/web/revues/home/prescript/article/afdi_0066-3085_2004_num_50_1_3795>, accessed on 13th February 2013.

[1022] Some legal systems such as the US's one, masters are provided for and the Court may appoint them as experts with a broad mandate since a master takes on some of the authority of the judge. In US, the Federal Rules of Civil Procedure provides that unless directed otherwise, the master's basic authorities include the ability to 'regulate all proceedings; take all appropriate measures to perform the assigned duties fairly and efficiently;' and exercise the same authority possessed by the appointing court 'to compel, take, and record evidence. A mater has authority to hold mini-trials or to directly communicate with the parties' (Payne, C., *op. cit*., p.1202)

[1023] Cecil, J.S. and Willging, T.E., *op. cit*., p. 12. In fact as Savodogo notes, a judge cannot be omniscient: if you can ask him to consider questions of law, it is impossible to expect him to master all problems extra-legal, the understanding which may enable him fulfil accurately his or her function (Savadogo, *op. cit*., p.1).

[1024] War Crimes Research Office, op. cit., p.7. The ICC Statute, when providing for the qualification of judges of the Court does not refer to the competence of judges in reparation matter. A Candidate for election to the Court is required to have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court (Art.36(3)). Moreover, the assignment of judges to divisions should be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal

for, among others, specialist physicians. The involvement of experts might 'be vital to establish a causality link that goes beyond material damages and also looks carefully at non-material damages such as the level of trauma or emotional harm'.[1025]

In the *Lubanga* case, Trial Chamber I considered that a multidisciplinary team of experts[1026] should assist in the following areas: a) an assessment of the harm suffered by the victims; b) the effect that the crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities had on their families and communities; c) identifying the most appropriate form of reparations in this case, in close consultation with the victims and their communities; d) establishing those individuals, bodies, groups or communities who should be awarded reparations; and d) accessing funds for these purposes.[1027] The Court could already be having a group of experts within the Victim and Witness Unit under the Registry. Indeed, the ICC Statute established a Victim and Witnesses Unit within the Registry which shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.[1028] In regard to the expertise of the staff within this unit, Rule 19 of the RPE of the ICC specifies that the unit may include, as appropriate, persons with expertise in various areas such as psychology in criminal proceedings; gender and cultural diversity; children, in particular traumatized children; elderly persons, in particular in connection with armed conflict and exile trauma; persons with disabilities; social work and counselling etc. Therefore, the Court may appoint some of these experts to assist in the judicial mission of evaluating harm sustained by victim and appropriate types and modalities of reparations. Moreover, the Trial Chamber considered, still in the Lubanga case, that the team of experts 'needs to be in a position to assist the Court in the preparation and implementation of a reparation plan.[1029]

The foregoing missions assigned to the experts are to appreciate facts and not the law. Merely, confusion could arise on the fourth mission that may consist in 'establishing those

law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience (Art.39 (1)).

[1025] Amezcua-Noriega, *op. cit*., p.8

[1026] The Trial Chamber I considered that the team ought to include representatives from the DRC, international representatives and specialists in child and gender issues (See the *2012 Decision on Principles and Procedures*, para. 264).

[1027] *The 2012 Decision on Principles and Procedures*, para.263

[1028] Art.43 (6) of the ICC Statute provides that 'The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.

[1029] *The 2012 Decision on Principles and Procedures*, para.263

individuals, bodies, groups or communities who should be awarded reparations'. Actually, the determination of the status of a victim who has right to reparation is to be considered as a question of law since it implies the interpretation and application of Rule 85 of the RPE. Arguably, the experts' mandate of establishing the recipients of reparations awards may be understood in the context of Regulations 60 and 61 of the RegTFV which provide for individual awards to victims in cases where the Court does not identify beneficiaries. These regulations refer to the cases where the Court may issue an order for reparations without identifying beneficiaries when the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable to determine these with precision. The implementation of such an order shall require the Secretariat of the TFF to set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and to list options for determining any missing details.[1030] Such task appears to be of technical nature and reserved for appropriate experts who should be selected and appointed by the TFV.

In a nutshell, the scope of the assistance court-appointed experts would be asked to provide to the court might include principally the analysis and determination of the scope of recoverable harm (physical, material and moral harm), the determination of the different possible types of reparations (restitution, compensation, rehabilitation) and modalities of reparations (individual or collective reparations). In addition, the experts could play a role at the stage of implementation of an order for reparation in the context of Regulations 60 and 61 of the RegTFV. However, taking into account the context of these regulations, experts are normally to be appointed, at such a stage, by the TFV which may need their assistance in implementing a collective reparation order.

2. The *modus operandi* of experts

Concerning the question of how experts may perform their task, whilst the RPE of the ICC is silent, the Regulations of the Court provides that 'The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction, the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report'.[1031] This demonstrates that where the Court appoint experts, it has to specify their *modus operandi* which refers, *inter alia*, to the *mode* of their instruction, their

[1030] Issues relating to the implementation of reparation orders by the TFV are discussed in chapter three of Part II of this dissertation (pp.359ff).

[1031] Regulation 44 of the RC

communication with parties and other participants, the *manner* in which their evidence is to be presented and the *time limits* for the preparation and *notification* of their report.

The question of the number of experts to be appointed by the Court was discussed above and it was noted that the Court might opt for a panel of experts instead of a sole expert. Therefore, let us take a look into the *modus operandi* of experts by focusing on the mode of their instruction. The mode of instruction by experts implies, in turn, the question of the collaboration between the Court and the experts on one hand and on the other hand the relationship between parties in reparations proceedings and the experts.

As regards the collaboration between the Court and the court-appointed experts, save the unique Trial Chamber I's decision which delegates the non- judicial organ to appoint experts, it should be agreed that the experts' activities are under permanent supervision of the appointing judge. Certainly, in the technical field the experts are free to conduct their investigations. Notwithstanding, as his or her mission stems from the judicial imperative of justice, he or she cannot be freed from certain obligations which could be imposed by the appointing judge. The latter could for instance establish a framework for the mission of the experts which comply with the need to organize on-going collaboration between the court and the expert so that, within the time limits, the appointing court may get from the experts' report useful information to make a fair decision.[1032] Going back to the supervision of experts' activities, it has been noted that the *2012 Decision on Principles and Procedures* specified that the TFV shall oversee the work of experts. However, the Decision determined that the experts' work 'must be undertaken with the cooperation and assistance of any relevant ICC officials'.[1033] It is not clear whether the phrase 'any relevant ICC officials' refer to judicial and non-judicial staff of the ICC.

With respect to the relationship between the experts and the parties, the framework to be established by the appointing judge should allow and determine the collaboration between victims, a convicted person and the experts. Parties in reparation proceedings should be associated with experts' investigations so that, as some scholars note, even before the filing of the experts' report, the parties can make their observations.[1034] In the *Lubanga* case, the Trial Chamber I held that the work of the team of experts might include 'a preliminary consultative phase involving the victims

[1032] Savadogo M-L., *op. cit.*, p.246

[1033] ICC, *The 2012 Decision on Principles and Procedures*, para.264

[1034] See for example Savadogo M-L., *op. cit.* p.251

and the affected communities, to be carried out by the team of experts, with the support of the Registry, the OPCV and any local partners'; and as already mentioned, the 'work must be undertaken with the cooperation and assistance of any relevant ICC officials'.[1035] In the Lubanga case, the Trial Chamber determined an implementation of reparation plan which will involve the TFV, the Registry, the OPCV and experts. The implementation of reparation plan seems to be a framework determining among others the relationship between the experts and parties. The Trial Chamber contemplates the involvement of experts in the implementation of reparations plan as follows:

> First, the TFV, the Registry, the OPCV and the experts, should establish which localities ought to be involved in the reparations process in the present case (focusing particularly on the places referred to in the Judgment and especially where the crimes committed) […] Second, there should be a process of consultation in the localities that are identified. Third, an assessment of harm should be carried out during this consultation phase by the team of experts. Fourth, public debates should be held in each locality in order to explain the reparations principles and procedures, and to address the victims' expectations. The final step is the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval [footnotes omitted].[1036]

The implementation of reparation plan refers to the process of consultation. The consultation phase has been considered as the preliminary consultations stage where experts will consult victims and the affected communities.[1037] It should also be kept in mind that the OPCV will, if necessary, play the role of legal representative of victims. At first glance there is an absence of the convicted person in the experts' operations. The absence of the convicted person is also remarked where the Chamber does not include him or his defence among those who have been represented in order to express their views and concerns in accordance with the management of reparations proceedings arranged by the Registry.[1038] One may wonder why the convicted person is totally absent in such a process. Does not this oblivion or better this implicit exclusion of the convicted person – Mr Lubanga – from this stage of reparations proceedings prejudice his rights to a fair and impartial trial? How to reconcile his absence at this stage of proceedings with the determination made by the

[1035] *The 2012 Decision on Principles and Procedures*, para.264

[1036] *The 2012 Decision on Principles and Procedures*, para.282

[1037] *Ibid*, para.264

[1038] According to Regulation 37of the RR (Management of proceedings) '[t]he Registry, in concurrence with the Chamber where necessary, shall make all the necessary practical arrangements for proceedings, whether held in public or in closed session '. Therefore, '[i]ssues related to the management of proceedings shall be addressed to the Registry'. The raison why, the Trial Chamber I, in the *Lubanga* case, held that '[t]he Registry shall decide, in accordance with its powers under Article 43(1) of the Statute, the most appropriate manner in which the current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparation plan, are to be represented in order to express their views and concerns' (*The 2012 Decision on Principles and Procedures*, para. 268).

Trial Chamber I according to which nothing in the reparations principles it set out 'will prejudice or be inconsistent with the rights of the convicted person to a fair and impartial trial'?[1039]

In this regard the implicit justifications given by the Trial Chamber I could be found in its reasoning. The Chamber holds that, 'the reparation phase is an integral part of the trial proceedings, but unlike [the trial] or the sentencing stages when the principal focus is on the defence and the prosecution, *the Court is mainly concerned at this juncture with the victims*, even though the prosecution and the defence are also parties to the reparation proceedings [emphasis added].'[1040] Should this reasoning convince the Chamber of Appeals which has already recorded the appeal from the defence of Mr *Lubanga* against the Trial Chamber I's decision? The defence claims, before the Appeals Chamber, that in its decision the Trial Chamber did not specify a framework for the defence to assert their rights. The Decision, the defence goes on to explain, did not provide for notification to the defence about the application forms for reparations filed by the victims - at the stage of the implementation of the reparation plan- nor in regard to the Defence participation in the assessment of the harm suffered by the victims and in determining the appropriate type of reparations, or in identifying the beneficiaries. In addition, the defence maintains, it is not expected from the Trial Chamber I's decision that the defence is to be informed of possible reparation orders or decisions made by the TFV.[1041] At the time of writing the Appeals Chamber has not yet issued its decision on the defence's appeal except the decision on the merit of the case.

One may argue that defence's appeal is based on satisfactory grounds. Notwithstanding the fact that Mr Lubanga is still claiming his innocence and has appealed against the conviction decision and the sentence, there are good reasons to argue that his exclusion from reparation proceedings prejudices to his right to fair trial. The Trial Chamber I, as already mentioned, has implicitly held that it shall not issue any reparation order against Mr Thomas Lubanga Dyilo since he has been declared indigent. However, the Chamber noted that 'Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement'.[1042] The Trial Chamber admitted that a convicted person might express a voluntary public or private apology as symbolic reparations to his victims. The Trial Chamber did not only

[1039] *The 2012 Decision on Principles and Procedures*, para.255

[1040] *Ibid*., para.267

[1041] See ICC, Equipe de la Défense de Monsieur Thomas Lubanga, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « *Decision establishing the principles and procedures to be applied to reparations* », rendue par la Chambre de première instance le 7 août 2012, 5 Février 2013, ICC-01/04-01/06-2972, para.42

[1042] *The 2012 Decision on Principles and Procedures*, para.269

recognise this kind of reparations from the convicted person but also invited the latter, yet implicitly, to provide such a kind of symbolic reparation. Indeed, the *2012 Decision on Principles and Procedures* holds that Mr *Lubanga* is able to contribute to the process of reparation 'by way of a voluntary apology to individual victims or to the groups of victims, on a public or confidential basis'.[1043]

Consequently, since Mr Lubanga may contribute to the reparations, let it be the symbolic one as held by the Chamber, he has arguably undisputable right, as well as the victims, to be involved in all stages of reparation proceedings including the experts' operations. One should not lose sight of one of the missions assigned to the experts, which is to identify 'individuals, bodies, groups or communities that should be awarded reparations'. In other words, experts have mission of identifying victims of crimes committed by Mr Lubanga (in case the conviction is confirmed in appeal). In present instance, it is arguable that the convicted person has the right to know who exactly are granted the status of victims and the extent of the harm sustained by the victims. This should allow the convicted person to make a sincere and consequent public or private apology contemplated by the Trial Chamber I's decision. In the same vein, still in the logic of the Trial Chamber I's decision, the experts should identify the most appropriate form of reparations in the *Lubanga* case. Once again the convicted person should not be deprived of his right of being informed and giving his views on the forms of reparations which should be proposed by the experts. In fact, the forms of reparations may include or be complemented by the voluntary and sincere public or private apology expected from the convicted person. The foregoing arguments demonstrate that there is a risk of the *2012 Decision on Principles and Procedures* to prejudice the rights of the convicted person and violate the principle of fair trial since it seems to ignore or relegate him to the second place in the stage of reparation proceedings. Consequently, the Decision risks to be inconsistent with itself since the contemplated stage of expertise does not comply with the principle - established by the same Decision- according to which nothing 'will prejudice and be inconsistent with the rights of the convicted person to a fair and impartial trial'.[1044] The Decision should provide, without relying on any interpretation, a clear framework that allows the convicted person to participate in all stages of reparation proceedings including the stage of the expertise.

[1043] The implicit invitation made by Trial Chamber I to the convicted person results particularly from the para.241 of the *2012 Decision on Principles and Procedures*. The Chamber holds that 'Mr Lubanga is able to contribute to this process by way of a voluntary apology to individual victims or to groups of victims, on a public or confidential basis'.

[1044] *The 2012 Decision on Principles and Procedures*, para.255

Respecting the determination of an appropriate framework allowing victims to participate in proceedings, the Chamber requires the Registry to 'decide, in accordance with its powers under Article 43(1) of the Statute, the most appropriate manner in which the current victims participating in the proceedings, along with the broader group of victims who may ultimately benefit from a reparation plan, are to be represented in order to express their views and concerns'.[1045]

Having agreed on the right of all parties to participate in the stage of expertise, it is worth noting that the participation by the parties may encourage them to present the clearest evidence of their claims and focus attention on the key issues to resolve.[1046] Save the personal strategies to be used by the appointed experts to perform their mission as experts, in appointing experts the decision of the Court should set up guidelines concerning their *modus operandi* which respect the right of parties to participate in all stages of reparations proceedings. Particularly, the very process of consultation with victims regarding their needs and desires can contribute to victims' healing.[1047] Actually, before awarding compensation the capital importance of listening to the voice of the victims should be emphasized[1048] and '[t]he first step of reparation process is to generate specific private spaces in order to reflect and debate on how victims define reparation and on the forms deemed suitable for returning them, as far as is possible, to the *status quo ante* – the situation they were in before the [crime]'.[1049] This reasoning holds true since for example the task of evaluating the extent of damage, loss and injury by experts may need to interrogate victims. In this mission, experts need to be very wise and use interview methods which would not cause second victimization of the interviewed victims. In fact, it was reported for example that, in assessing harm sustained by Holocaust survivors, victims complained that the evaluation procedure and the interviews with the doctors were a rather unpleasant and inhumane experience and many of the victims abstained from filing a claim.[1050] As Colonomos and Armstrong report, many victims complained about 'the complexity of the procedure' and claimed that 'they had to suffer the cold,

[1045] *The 2012 Decision on Principles and Procedures*, para.268

[1046] Reisinger, K.B., *op. cit.*, p.255

[1047] War Crimes Research Office, *op. cit.*, p.7

[1048] Gómez, N., 2009. Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities. In : F. Lenzerini, ed., 2009. Reparations for Indigenous Peoples, International and Comparative Perspectives, New York: Oxford University Press, p. 147.

[1049] *Ibid.*, p.149

[1050] Colonomos A, and Armstrong A., 2006. German reparations to the Jews after World War II: a turning point in the history of reparations. In: P. De Greiff, ed., (2006). The Handbook of Reparations. Oxford (USA): Oxford University Press, p. 404. According to Colonomos and Armstrong 'Filing a claim and being examined by a doctor, who would coldly judge the impact of the injuries on the victims' earning capability, was emotionally too difficult to bear for many victims, some of whom felt guilt for surviving, or shame, not to mention the pain of reliving these traumatic experiences' (*Idem*).

impersonal, and inhumane tone of the evaluators'.[1051] Therefore, the decision of the Court appointing the experts should remind them of their duty to respect victims and to use their expertise to avoid, in all fairness, the risk of second victimisation. In fact, experts should be bound by the Court's premise according to which no action of the Court should harm, and respect must be paid to each individual.[1052]

In respect to the relations between appointed experts and parties in the reparations proceedings one may conclude that according to the determination made by the *2012 Decision on Principles and Procedures*, there will be a relationship between the experts and victims for the former should consult the latter during their mission. Although the Decision did not mention the convicted person in reparation plan one may assume that the appointed experts are not prevented from consulting with him, where appropriate, since they are also free to conduct their investigations in order to fulfil their mission.

C. The experts' opinion or report and its effect on a judicial decision on reparations

In the logic of the Trial Chamber I's *2012 Decision on Principles and Procedures* the final step of the experts' mission which requires, as already mentioned, close collaboration with the TFV, shall be 'the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber *for its approval* [emphasis added]'.[1053] First of all, the uniqueness of the Decision raises a significant question, which organ between the 'team of experts' and the TFV shall present the report to the Court? Another procedural question is whether the team of experts testifies in reparations hearing or only submit a written report. Thirdly, the Decision reveals the non-binding nature of the report since it shall include proposals which need to be approved by the Court.

Concerning the organ which may report to the Court, the Trial Chamber's decision is silent. However one may assume that the TFV and not the team of experts shall report to the Court. The reasoning of the Chamber leads us to argue that, contrary to the context of Rule 97(2) of the RPE, the experts are to assist not the Court but the TFV in assessing harm sustained by the victims.[1054]

[1051] Colonomos A, and Armstrong A., *op. cit*., p.410

[1052] See the Court's Revised strategy in relation to victims, 5th November 2012, ICC-ASP/11/38, para.11.

[1053] *The 2012 Decision on Principles and Procedures*, para.282

[1054] According to Rule 97(2) of the RPE of the ICC court-appointed experts are to assist the Court not the TFV.

Indeed the Trial Chamber I determined that 'the assessment of harm is to be carried out by the TFV during a consultative phase in different localities'.[1055] Consequently, the experts shall assist the TFV in this mission. On the other hand, one may infer that, though the Trial Chamber I did not express its intention; it appointed the TFV to act as a Court appointed expert with the possibility for the latter to appoint in its turn another team of experts to assist it. Consequently, notwithstanding the uniqueness of the Trial Chamber's decision, one may assume that the TFV is the principal Court appointed expert which has to report to the Court.

The unresolved procedural question of whether the experts shall be invited to testify before the Court in reparations hearing or only submit a written report, may lead to argue that both possibilities are open. However, the proposals being presented to the Court as determined by the Trial Chamber I's Decision implies the submission of a written report. Although the team of experts shall include experts from different areas, the TFV should present to the Court a single report including all essential findings particular to each area of expertise. The practice gives a standard content to experts' written report in which the expert relates the operations he or she conducted and discuss the findings before reaching clear conclusions and formulating an opinion on the points covered by his or her mission.[1056] Though parties should have had opportunity to give their view to experts, they should have the same opportunity to question the experts' report before the Court issue its decision on approbation. Moreover, besides the parties, reports by experts should be 'subject to comments by the persons and entities involved in reparations proceedings'.[1057] In other words, the convicted person, victims and other interested participants or their representative may, with the leave of the Court, challenge reports of experts by making their observations.[1058] Despite the written report submitted by experts nothing will prevent the Court from inviting the authors of the export in reparations hearing for more clarifications.

Since the experts shall provide the Court with proposals which need to be approved by the Court, it is in sovereign power of the latter to approve the proposals totally or partially. The principle is that the expert's opinion does not bind the judge. This principle stems from another principle according to which *l'interlocutoire ne lie pas le juge* (the interlocutory does not bind the

[1055] *The 2012 Decision on Principles and Procedures*, para.283

[1056] See Savadogo M-L., *op. cit.* p.250

[1057] Shelton, D., *op. cit*., p.233

[1058] The second sentence of Rule 97(2) of the RPE of the ICC states 'The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts'. See also Scomparin (2003 quoted by Vincent 2008, 99-100).

judge).[1059] However, according to the practice, one may note that generally, the court probates experts' report by endorsing the findings and analysis of the experts.[1060] Nevertheless, 'no international court is bound by expert opinions, not even those they sought and appointed'.[1061] Rather, before international courts experts 'are just witnesses and their deposition is evidence that the Court will weigh along with much other evidence coming from other admissible sources'.[1062] Taking into account the report of the expert(s) and observations of the parties and interested participants, the Court should make a decision which may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit with instructions on the expert's proposals.[1063]

Lastly, in accordance with the principle of promptness established by the *2012 Decision on Principles and Procedures* the Court should specify an indicative *time limit* for expert in submitting their report. The Decision, of delegating its power to appoint expert to the TFV does not provide for such time limit. Shall we hope that the delegated organ will fill the gap? For the need of transparency and clarity, besides the determination of the mission of experts, the judicial decision of appointing experts in reparation proceedings should also establish procedures for assembling information, communicating with the parties, and reporting findings and opinions and fixes time limits.

II.6. The nature and content of the Court's decision under Art.75 of the ICC Statute

Reparation proceedings might culminate in a decision on reparations for victims. As regards the decision which may result from reparations proceedings Art.75(1)(s2) of the ICC Statute provides that in its *decision* the Court may determine the scope and extent of any damage, loss and injury to, or in respect of the victims and will state the principles on which it is acting.

[1059] Savadogo M-L., *op. cit.*, p.252

[1060] *Ibid*. In fact, research has demonstrated that court-appointed experts may exercise a strong influence on the outcome of litigation as it has been reported that there is high degree of consistency between outcome of litigation and the opinion of court-appointed experts. For details on this findings see Cecil, J.S. and Willging, T.E., *op. cit.*

[1061] Romano C.P.R., *op. cit*., p.3

[1062] *Idem*

[1063] One may wonder whether the judge who had recourse to experts' assistance due to the complexities of a case could be able to criticise the experts' report. However, Erica Beecher-Monas would respond that 'even non-scientists' can learn to critique science if they are willing to learn about the probabilistic and analogy-based reasoning that underlies all scientific disciplines'. To face this challenge, Erica Beecher-Monas would recommend to the Court, which appointed experts and has to analyse their report to determine its admissibility, to apply five requirements: (i) Identify and understand the underlying theory and hypothesis; (ii) Examine all available information in concert; (iii)Fill information gaps with scientifically justifiable default assumptions; (iv) Assess whether the methodology—laboratory, observational, and statistical methods—conform to generally acceptable practices in the field; and (v) Make a probabilistic assessment of the strength of the links between theory, assumptions, methodology, and the conclusion proposed (Erica Beecher-Monas, 2000, quoted by Payne, C., *op. cit*., pp. 1211 - 1212).

Subsequently, Art.75(2)(s1) states that '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 [emphasis added]'. The two paragraphs of Article 75 raise the question of the nature of the judicial act which may result from reparations proceedings and its exact content. Actually, Art.75 seems to distinguish a *decision* on the scope and extent of harm and an *order* for reparations. In order to investigate whether there is a difference between the two contemplated judicial acts, let us first discuss the decision determining the scope and extent of any damage, loss and injury to, or in respect of the victims (I.6.1.); then we will deal with the order for reparations and its content (I.6.2.).

I.6.1. The decision determining the scope and extent of any damage, loss and injury to, or in respect of victims (Art.75 (1)(s2) of the ICC Statute)

Article 75(1) (s2) does not specify the nature of the decision which may determine the scope and extent of any damage, loss and injury to, or in respect of the victims. Does the decision refer to the criminal judgement which may include the determination of the scope and the extent of any damage, loss and injury? Or could it be an independent decision limited only to the determination of the scope and extent of any damage, loss and injury? Is there any possibility for the Court to limit its power of deciding on reparations to the 'decision determining the scope and extent of any damage, loss and injury to, or in respect of victims' without issuing any reparation order against a convicted person? Or, do both terms decision and order used respectively by para.1 (s2) and para.2 (s1) of Art.75 of the Statute have the same meaning with the same purpose or object?

The background of the Art.75 and the spirit of the RPE of the ICC in respect of reparations may help us to understand what the *decision* and the *order* are meant for. During the ICC Statute negotiations, it was suggested that the judgement (criminal judgement) of the Court should determine the extent of any damage in order that victims might rely on the judgement and request reparations, including compensation, either before national courts or through their governments, at international level. This was the position of the draft of the ICC Statute of 1996 (1996 Draft Statute of the ICC).[1064] At this stage the negotiations were still in the logic where victims, relying on the principles to be established by the ICC and the determination of any extent of damage, they should

[1064] See propositions made on Art. 43 of the 1996 Draft Statute of the ICC in *Rapport du Comité préparatoire pour la création d'une Cour criminelle internationale, Volume II (Compilation des propositions), UN Doc. No 22A (A/51/22), 1996*, p.206.

then bring their civil action before the national courts or, through their government request reparations according to international law.

The conception of victim's rights to reparations evolved with the 1998 Draft Statute of the ICC. The 1998 Draft includes Art.73 entitled 'Reparations to victims' which states that 'The Court may, upon request, [or upon its own motion if the interests of justice so require,] determine, *in its judgement*, the scope and extent of any damage, loss and injury to, or in respect to the victims [emphasis added]'. The Art.73 includes para.2 of which the first sentence stipulates that in accordance with the principles it established, '[t]he Court may *make an order directly against a convicted person* for an appropriate form of reparations to, or in respect of victims, including restitution, compensation and rehabilitation [emphasis added]'. Finally, the Art.73 became Art.75 of the ICC Statut*e* and the term judgement was replaced with the term decision. Yet, the change of the used terms does not clarify whether the term decision refers or does not refer to the criminal judgment.

Nonetheless, there are good reasons not to consider the decision provided for in Art.75 (1) as part of the criminal judgement. The close analysis of the ICC Statute and its RPE shows that there is no provision which may support the alternative that the term decision refers to criminal judgement. All of the provisions of both the Statute and its RPE related to criminal judgement do not mention or refer to the issue of reparations. Although the Statute provides for the possibility of the Court to hold a separate hearing exclusively reserved to sentencing and reparations,[1065] there is no indication that the sentence decision should include the determination of the scope and extent of any damage, loss and injury. With regard to enforcement, there is clear separation between a criminal judgement and a decision on reparations. For example Rule 220 of the RPE of the ICC which is found in section IV (Enforcement of fines, forfeiture measures and reparation orders) entitled 'Non-modification of judgements in which fines were imposed' , provides for '*transmitting copies of judgements* in which *fines* were imposed to State Parties for the purpose of enforcement [emphasis added]'. There is no provision, with regard to reparations, which might refer to judgements in which the scope and extend of damage, loss and injury to, or in respect of, victims are determined. On the contrary, there is a similar provision which refer to an order for reparation. Rule 219 of the RPE entitled 'Non-modification of orders for reparation' provides for '*transmitting copies of orders for reparations* to State Parties [emphasis added]'. These observations lead us to argue that the decision provided for by Art.75 (1) (2) of the ICC Statute is not the criminal or

[1065] See Rule 143 of the RPE of the ICC.

sentencing judgement. If it were the case, the Statute would be clear on the matter. The reason why it is arguable that the *decision* determining damage, loss and injury to or in respect of victims is a separate judicial act with regard to criminal or sentencing judgement.

Notwithstanding, it remains the question of whether the decision may be a separate judicial act with regards to an order for reparations or whether both the decision and the order remain the same judicial act with the same object and purpose. Once again, besides the Art.75(1)-(2) under analysis, a decision determining the scope and extend of any damage, loss or injury to, or in respect of victims independent from an order for reparations, is not found neither in the Statute nor in the RPE. On the contrary, we note that Rule 97 of the RPE entitle 'Assessment of reparations' provides that '[t]aking into account the *scope and extent of any damage, loss or injury*, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'. According to this rule, the determination of the scope and the extent of any damage, loss or injury should justify an order for reparations. In addition, the RPE rather than mentioning the term *decision* in its Rule 219 refers only to *order for reparation*. The Rule 219 reads as follows '[...]in giving effect to *an order for reparations*, the national authorities shall not modify the reparations specified by the Court, *the scope or the extent of any damage, loss or injury determined by the Court […] in the order*, and shall facilitate the enforcement of such order [emphasis added]'. In the context of rule 219 of the RPE, the scope or the extent of any damage, loss or injury are to be determined in an order for reparations. Besides these provisions there is no reference to any decision determining the scope or the extent of any damage, loss or injury to or in respect of the victim which may be transmitted to states for implementation as a separate judicial act.

The foregoing observations lead to considering two alternatives. The first alternative is to consider that the decision mentioned by Art.75 (1)(s2) of the Statute is not a judicial act independent from the order for reparations but one of its parts. In this regard, the *decision* could be considered as having the same purpose and object as the order mentioned by Art.75 (2). The decision could be understood as a *decision on merit* which serves as the basis of an order for reparations. In this case, one may assume that the *decision on merit* may be issued either separately with the order for reparations or as incorporated in an order for reparations. In case the decision should be used separately, it will remain ineffective unless the order for reparations is issued. Otherwise, what would be the purpose and the usefulness of the decision determining the scope or the extent of any damage, loss or injury to or in respect of victims independent from the order for reparations? Actually, unlike the order for reparations, as already observed, there is no any

provision which provides for transmitting *the decision* as an independent act - from an order for reparations- to national authorities for execution or for any other appropriate action. Arguably, such an idea which marked both the 1966 Draft and the 1998 Draft Statute was abandoned with adoption of the Statute in July 1998 for it was feared that 'the national courts could render a decision with respect to reparations in conflict' with a Court's *decision.*[1066] Where the decision on merit is incorporated in an order for reparations, such an order will be a single judicial act which includes both the *decision on merit* which determines the harm sustained by a victim and appropriate award for reparations determined by the Court. Therefore, it is arguable that both the *decision* and the *order*, referred to by Art.75 (1)-(2) of the Statute may be used interchangeably. In this context, reparations proceedings, either triggered by a request for reparation or by the Court on its own motion, may result in a *decision* or an *order* for reparation against a convicted person. The *decision* or the *order* for reparation may determine the scope and extend of damage, loss or injury and specify appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Be that as it may, how can we explain the fact that the two terms which might refer to the same judicial act are found in two different paragraphs of Art.75? Taking into account the proposition made on Art. 43 of the 1996 Draft Statute of the ICC and the wording of Art.73 of the 1998 Draft Statute of the ICC and the final text of Art.75 of the ICC Statute, one might think that there was a small lag between the evolution of the conception of victims' rights to reparations before the ICC and the adaptation of the definitive text of the Statute. The second alternative is to consider the decision as an act different from an order for reparations. In Chapter one of Part two of this dissertation, concerning the types of reparations, it has been noted that, in *Lubanga* case some victims – child soldiers – would welcome a 'war victim' *certificate*.[1067] Presumably, this has led the Trial Chamber I to consider that it is entitled to issue '*certificates* that acknowledge the harm particular individuals experienced [emphasis added]' as one of the types of reparations.[1068] Shall the *certificate* contemplated by the *2012 Decision on Principles and Procedures* be deemed as referring to the *decision* determining the scope and extent of damage, loss or injury to or in respect to the victims as per Art.75(1)(s2) of the Statute? The answer is likely to be affirmative, for such an alternative could be endorsed by the fact that the decision provided for by Art.75 (1) (s2) of the Statute can also refer to an independent act separated from an order for reparations. As such, the

[1066] See commentary on Art.73 (2) of the 1998 Draft Statute of the ICC.

[1067] See the *2012 Decision on Principles and Procedures*, para.103

[1068] *Ibid*, para.239

decision cannot be transmitted to State Parties for execution since it does not include any specific order. In this context, the decision would remain as a *certificate* that acknowledges the harm suffered by an individual victim. It is not clear whether this kind of *certificate* could serve for bringing a civil action before national civil Courts.[1069] The ICC Statute does not bring any indication that national civil Court should be bound by such decision which should be considered as a decision on the convicted person's liability to pay damages.

Finally, it is worth noting that the obligation of motivation requires that before granting reparations to the victims, the Court should first determine the scope and the extent of harm suffered by a victim of crime committed by a convicted person. According to Art.75 (1) (s2) of the ICC Statute, the Court will state the principles on which it is acting. The principle should serve as the basis of the legal motivation of an order for reparation. In fact, reparation awards must be with a view to ensuring that reparations awards are fully motivated and explained to those affected.[1070] Moreover, in determining the scope and extent of any harm, the Court should take into account the facts which constitute evidence of the harm. The reason why, Rule 97 entitled 'reparations assessments' repeat the obligation of the Court to take 'into account the scope and extent of any damage, loss or injury' before awarding reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both. The Court might have already gotten the experts' report and observations of the convicted persons, victims and perhaps the interested parties. This will enable the Court to reach its conclusions on the extent of harm sustained by victims.

II.6.2. The order for reparations and its content (Art.75 (2) of the ICC Statute)

As regards the content of an order for reparations there are some provisions from both the Statute and the RPE which may implicitly or explicitly give some information on the exact content of an order for reparation on both its form and substance. Arguably an order or a decision on reparations will, *mutatis mutandis*, fulfil the requirements of a Trial Chamber's decision provided for by Art.74 of the ICC Statute (Requirements for the decision) which provides that:

[1069] Under some national judicial systems, like the one of Italy, where a criminal court notices that assessment of the compensation would involve a complex investigation, it can simply determine whether the injured party is entitled to compensation (*condanna generica*) and then remit the case to the civil judge for assessment (Piva, P., *op. cit*., p. 390). The same system exists in Austria (see Raschka, W., *op. cit.*, p. 29). In the same line, under some national judicial system like in Denmark, a court may pass judgement on the offender's liability to pay damages and on the items for which damages are payable, leaving the precise assessment of those damages for later negotiations between the parties; for adjudication in civil proceedings or for resolution by a victim compensation board (see, Lerche, M., *op. cit*., p.114).

[1070] Redress, 2011, *op. cit*., pp.25-28

> [1] All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending. [2] *The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings* […].*The Court may base its decision only on evidence submitted and discussed before it at the trial*. [3]The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges [emphasis added].

According to Art.74 of the Statute the Court's decisions are to be motivated, based on an evaluation of the evidence and the entire proceedings. Likewise an order for reparations is to be based on evidence. Regarding evidence, the Court *may* (and not shall) base its decision only on evidence submitted and discussed before it at the trial. This permissive wording can justify the fact that the Court can base its decision on presumption.

According to Art.75 (2) of the ICC Statute and Rule 98(3) of the RPE the Court may order that an award for reparations be made *through* the TFV. One may wonder what should be the circumstances which may lead the Court to order that an award for reparations be made through the TFV. In the same line, the question of the meaning of an award for reparations made *through* the TFV needs to be clarified. Rule 97(1) of the RPE provides for three alternatives of the Court in ordering reparations. The Court may order reparations either on *individual basis* or on *collective basis* or both. I refer to these two alternatives as *modalities of reparations*. Which circumstances may lead the Court to opt for one of these two alternatives? Moreover, Rule 98(2) of the RPE provides for the possibility of the Court to order that an award for reparations against a convicted person be *deposited* with the TFV. In what circumstances may the Court order so? Besides these provisions which implicitly inform us about the content of an order for reparations, Rule 218(3) of the RPE explicitly determines which information shall be given by an order for reparations. Bearing in mind that the types of reparations which may be ordered by the Court have been discussed in Chapter one of Part two of this dissertation let us examining the *specific content* of an order for reparations pursuant to Rule 218(3) of the RPE of the ICC (II.6.2.1.). Subsequently, we will explore the possibilities of the Court to order that an award for reparations be deposited by the TFV (II.6.2.2.) or made through the Fund (II.6.2.3.). Lastly, we will examine the modalities of reparations which may be specified by an order for reparations (II.6.2.4).

II.6.2.1. The specific content of an order for reparations pursuant to Rule 218(3) of the RPE

For the purpose of its implementation, an order for reparations needs to be clear and specific or exempt from ambiguity. According to Rule 218(3) of the RPE, in order to enable States to give effect to an order for reparations, the order shall specify (a) the identity of the person against whom the order has been issued; and, (b) in respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for reparations shall be deposited with the TFV, the particulars of the TFV for the deposit of the award; and (c) the scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.

The Rule 218(3) enumerate a number of elements which might be mentioned by an order for reparation in 'order to enable States to give effect' to it. Besides, the identity of parties, and the particulars of the TFV for the deposit of the award where collective awards are ordered (A), Rule 218(3) requires an order for reparations to specify 'the scope and nature of the reparations ordered by the Court' (B).

A. The identity of parties and where appropriate the particulars of the TFV (Rule 218(3) (a)-(b) of the RPE)

An order for reparations, as any judicial decision, should by principle indicate the identity of parties. Whereas the identity of a convicted person shall be specified in all cases (individual or collective awards), the identity of the victims is required in the case of individual award as well as financial nature of reparation is concerned.

Actually, in the case of collective reparations it may be impossible at the time of issuance of an order for reparations, to list and identify all recipients of such an order. The impossibility of an order for reparations to mention in all cases the identity of all recipients is contemplated by Regulations 60 and 61 of Regulations of the TFV. These Regulations provide for the cases where the Court does not identify the beneficiaries of reparations and how at the stage of implementation messing details will be determined.[1071] An award for reparations could also be deposited by the

[1071] Regulations 60 and 61of the RegTFV are found in Section entitled '*Cases where the Court does not identify the beneficiaries*'. Regulation 60

TFV.[1072] In this case an award for reparations is required to specify the particulars of the TFV for the deposit of the award. All of these identity elements are required for the clarity of an order for reparation and ultimately for its implementation.

B. The scope and nature of reparations (Rule 218 (3) (c) of the RPE)

The obligation of motivation requires that before granting reparations to victims, the Court should first determine the scope and the extent of harm suffered by a victim of crime committed by a convicted person. It will state the principles on which it is acting[1073] and may make an order specifying appropriate reparations to, or in respect of the victims, including restitution, compensation and rehabilitation.[1074] In the same line, for the purpose of enabling States give effect to an order for reparations, the scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered shall be specified.[1075] In the case of compensation, a victim or a group of victim may be awarded an amount of money and the order should specify the amount. Likewise, in a case of rehabilitation or satisfaction there is need for the order to specify which form of rehabilitation or satisfaction is ordered for victims benefit.

One may wonder whether, the Court may order a type of reparations (restitution and/or compensation and/or rehabilitation) more than or different from that requested by a victim. Can the Court order more reparations than claimed? These questions refer to the respect by the Court of the rule *non ultra petita*. According to the rule a victim would not be awarded by a way of reparations more than he or she has actually claimed. This rule 'is an emanation of the general principle that an

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states that 'Where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors'. Concerning the options referred to by Regulation 60, the subsequent Regulation 61 specifies that 'Such options may include: (a) The use of demographic data to determine the members of the beneficiary group; and/or: (b) Targeted outreach to the beneficiary group to invite any potential members of the group who have not already been identified through the reparation process to identify themselves to the Trust Fund, and, where appropriate, these actions may be undertaken in collaboration with interested States, intergovernmental organizations, as well as national or international non-governmental organizations. The Board of Directors may put in place reasonable deadlines for the receipt of communications, taking into account the situation and location of victims. (c) The Secretariat may consult victims or their legal representatives and the families of individual victims, as well as interested persons, interested States and any competent expert or expert organization, in [developing these options]'.

[1072] See Rule 98(2) of the RPE of the ICC.

[1073] See Art.75 (1) (s2) of the ICC Statute.

[1074] See Art.75 (2) of the ICC Statute.

[1075] See Rule 218 (3) (c) of the RPE of the ICC.

international tribunal's powers are limited to what is conferred upon it by the parties' and accordingly, the court is 'confined to acting on and cannot go beyond the submissions of the parties themselves'.[1076] However, neither the Statute nor the RPE refer to such a rule. International courts and tribunals quite frequently apply, either explicitly or implicitly the principle. For example in *Corfu Channel* case, before the ICJ, the United Kingdom claimed £700,087 for the replacement value of the destroyer Saumarez (a ship) whereas the Court's experts assessed the true replacement cost at a slightly higher figure (£716,780). The Court awarded the lower figure, stating that '[i]t cannot award more than the amount claimed in the submissions of the United Kingdom Government'.[1077] In this case, although the ICJ did not explicitly refer to the principle *non ultra petita*, it applied it implicitly.

Rule 97(3) of the RPE entitled *Assessment of reparations* provides that '[i]n all cases, the Court shall respect the rights of victims and the convicted person'. Could the bounding wording used by this rule be referred to in respect with the Rule *non ultra petita*? Arguably, the Court cannot order more types of reparations or awards for reparations than that requested by a victim without violating the principle of not deciding *ultra petita* and the right of the accused person. According the context of Rule 97(3) of the RPE, the Court shall taking into account victim claims and respect the right of a convicted person. Actually, relevant principles established at the international level emphasise the importance of those affected by reparations being consulted in their design.[1078] One may consider the Rule 97(3) as implicitly establishing the principle of fair justice for both sides of victims and a convicted person. The rule *non ultra petita* might be reinforced, in this instance, by the principle of fair justice so that the Court should be prevented from granting more than sought. However, in respect with modalities of reparation, the Court has discretionary power to grant reparations on collective basis though the victims may have claimed individual awards. This is inferred in the context of Rule 97(1) of the RPE of the ICC.

[1076] Prager, D.W., 2002. Procedural Developments at the International Court of Justice. *The Law and Practice of International Courts and Tribunals*,Vol.1, p.414

[1077] ICJ., *Corfu Channel Case* (Assessment of the amount of compensation due from the people's Republic of Albania to the United Kingdom of Great Britain and Northern of Ireland), p.249. By contrast, the Court awarded the full claim for repairs for the second damaged ship, the *Volage*, notwithstanding that the experts' assessment was slightly lower (*Idem*).

[1078] ICC, *Prosecutor v Lubanga*, Registrar's observations on reparations issues, 18th April 2012, ICC-01/04-01/06-2865, para.21; see also the UN Secretary General's Report to the Security Council, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), 2004, paras 16, 18 and 26; the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 1997, 2(b); and the Inter-American Commission on Human Rights, Principal Guidelines for a Comprehensive Reparations Policy (OEA/Ser/LN/II.131Doe. 1), 1998, paras 4 and 13

In addition to the aforementioned elements of the content of an order for reparation, the obligation of motivation should lead the Court to incorporate, among others, victims and expert testimony and evidence where appropriate in its decision, and particularly in its consideration of the relationship between the harm sustained by victims and the crimes committed by the convicted person. Particularly, concerning individual reparation awards, the Court should include an express and detailed analysis of each reparation request, including a reasoned determination on the 'nexus requirement' (that is the relationship between the harm and the crimes committed), including relevant facts, evidence, or testimony provided by the victims and experts.[1079] In other words, an order for reparation needs to be motivated and exempt of ambiguity in order to facilitate its implementation.

II.6.2.2. The decision of the Court for deposing an award for reparations by the TFV (Rule 98(2) of the RPE)

According to Rule 98(2) of the RPE, '[t]he Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim'. In other words, in the case of impossibility for the Court to order an individual award directly to each victim at the time of making the order, it may specify in the order for reparations that an award be deposited with the TFV.

The case provided for by Rule 98(2) of the RPE defers from the one concerning collective awards provided for by Rule 98(3) of the RPE. In the case of Rule 98(2), the individual character of the ward appears at the stage of execution. The second sentence of Rule 98(2) reads as follows: 'The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to *each victim* as soon as possible [emphasis added].' At the time of making an order for reparations, the Court contemplates individual award for reparations

[1079] See also Access to Justice Asia LLP and The Centre for Justice & Accountability and The International Human Rights Law Clinic, *op. cit*., p.12. In this regards, we can learn a lot from the *Aloeboetoe et al. v Suriname* case, since IACtHR had to resolve different issues in the case. Some procedural issues were resolved in this case. For example, the fact that the claimant applied for compensation did not produce any evidence regarding the amount of damages or the manner of payment and n either did the parties discuss the matter, the Court stated that in such case it is not proper for the to rule on it. Hence, the Court *excludes the possibility to award compensation proprio motu*. Consequently, the Court concluded that parties can agree, within a fixed period, on the damages though the case is handing before the court. However, the Court reserved the right to approve the agreement and, in the event no agreement was reached, to set the amount and order the manner of payment (IACtHR, *Aloeboetoe et al.v Suriname*, Reparations and Costs, Judgement of 10th September 1993, para.191).

but due to some circumstances is hindered in identifying each recipient. At the time of execution the award shall be forwarded to each victim not collectively but individually. Such an award could be considered as an *indirect individual award* for reparations. In the case of Rule 98(3) it is quite clear that the Court has explicitly opted for a collective award for reparations and the implementation of such an order for reparations shall be carried out on collective basis as well.

II.6.2.3. The decision of the Court for making an award for reparations through the TFV (Art.75 (2) (s2) of the ICC Statute)

Art.75 (2) (s2) of the ICC Statute and Rule 98(3) of the RPE raise a number of questions where they provide for the possibility of the Court to order that an award for reparations be made *through* the TFV. What is the meaning of the words 'through the TFV' and when can the Court order that an award for reparation be made through the TFV? Can the phrase 'the Court may order that the award for reparations be made through the Trust Fund' be understood as the possibility given to the Court to order that the TFV provides victims of a convicted person with awards for reparations? Or should the sentence be understood as providing for the possibility for the Court to order that an award for reparations against a convicted person be forwarded to victims via the TFV? By striving to find plausible answers to these questions, it is worth searching the context of Art.75 (2)(s2) of the Statute in the light of Rule 98 of the RPE.

The words 'through the Trust Fund' has led to hot debates in order to determine whether, in the context of the ICC Statute, the TFV could be ordered by the Court to use its resources for reparations for victims. In the *Lubanga* case some submissions assumed that 'One plausible interpretation of Article 75 (2) second sentence is [...] that only once an order for reparations has been made against a convicted person, the award can be ordered to be made through (the intermediary of) the Trust Fund'.[1080] They referred to the language of the French version of Art. 75 (2) second sentence which reads: 'Le cas échéant, la Cour peut décider que l'indemnité accordée à titre de réparation est versée par l'intermédiaire du Fonds visé à l'article 79'.[1081] In the light of this, they argued that the terms 'through the Trust Fund' 'is to be understood to indicate the intermediary/implementation role of the Trust Fund in the Court's reparation system as juxtaposed

[1080] *Prosecutor v Lubanga*, TFV, Public Redacted Version of the ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations, 11th September, 2011, ICC-01/04-01/06-2803-Red, para.98

[1081] *Ibid*, para.99

with the word 'directly' [against the convicted person] used in the first sentence'[1082] of art 75(2) of the Statute. According to the submissions, the use of the Trust Fund's other resources to pay for reparation awards can only take place upon decision by and at the discretion of the Trust Fund Board.[1083]

Other submissions on the issue adopted a nuanced and ambiguous position. For example, the Prosecution submitted that 'individual and collective reparation awards may be paid through the Trust Fund's '*other resource*'[since] Rule 98(5) of the [RPE] stipulates that: *other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 7"*.[1084] The Prosecution went on to argue that, 'Article 75(2), supported by the intention of the drafters of the Statute, entitles the Court to *request* the TFV to use its 'other resources [emphasis added]'[33] for the purpose of compensation to victims'.[1085] In its submission the Prosecution avoided to use the phrase 'to order' but preferred the use of 'to request' which does not give clarifications on the meaning of the phrase under analysis. Nevertheless, the Prosecution 'considers valid the argument presented by the Trust Fund that the funds it collected for various purposes cannot be ordered by the Court to fund payments'[1086] of awards for reparations. The Prosecution's position is nuanced in the sense that the Court should instead *order* the TFV to pay awards for reparations may however *request* it to draw from its other resources to pays such awards. This position is ambiguous since Art.75 (2) does not use the terms 'may request' but uses 'may order'.

Some commentators consider that the Court has power to order the TFV to draw upon its resources, other than an award for reparation ordered against a convicted person, and complement or surrogate a convicted person in providing reparations to the victims. This point of view is for example put forward by Aubry andd Henao-Trip who refer to Regulation 42 of the RegTFV[1087] to argue that it is admissible for the Court to order the TFV to act as a surrogate body and repair victims of harm by a convicted person who was declared indigent [1088] by the ICC. In the same vein,

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[1082] *Ibid*, para.100

[1083] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.243, See also Rule 98(5) of the RPE of the ICC.

[1084] ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18th April 2012, ICC-01/04-01/06-2867, para.32

[1085] *Idem*

[1086] *Idem*

[1087] Regulation 42 of the RegTFV reads as follows: 'The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families'.

[1088] Aubry, S. and Henao-Trip, M.I., *op. cit*., p. 13-14.

the Registry of the Court argue that 'one possible interpretation of article 75(2) is that when making a reparation order 'through' the Trust Fund the Court is, in so doing, making such an order 'by means of' the Fund, drawing upon both the logistical and financial means it offers in the implementation of the award'.[1089] The Registry grounds its position by considering the definition given to the term 'through' by the *Oxford English Dictionary* which refers to 'by means of'.

The Trial Chamber I adopted the Registry's position where it held that:

> As regards the concept of 'reparations through the Trust Fund', and applying the Vienna Convention on the Law of Treaties, the Chamber gives the word 'through' its ordinary meaning, namely 'by means of'. Thus, when Article 75(2) of the Statute provides that an award for reparations may be made 'through' the Trust Fund, *the Court is able to draw on the logistical and financial resources of the Trust Fund in implementing the award*. […] Moreover, the Chamber is of the view that when the convicted person has no assets, if a reparations award is made 'through' the Trust Fund, the award is not limited to the funds and assets seized and deposited with the Trust Fund, but the award can, at least potentially, be supported by the Trust Fund's own resources. This interpretation is consistent with Rule 98(5) of the Rules and Regulation 56 of the Regulations of the TFV. Rule 98(5) of the Rules provides that the Trust Fund may use 'other resources' for the benefit of victims [footnotes omitted and emphasis added].[1090]

According to the Chamber's reasoning there is a possibility for the Court to issue an order for reparations by drawing on voluntary contributions received by the TFV and referred to as 'own resources'. For this reason, the Chamber issued the following decision:

> [b] Decides not to examine the individual application forms for reparations and instructs the Registry to transmit to the TFV all the individual application forms received thus far; [c] Remains seized of the reparations proceedings, in order to exercise any necessary monitoring and oversight functions in accordance with Article 64(2) and (3) (a) of the Statute (including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval); and [d] Otherwise declines to issue specific orders to the TFV on the implementation of reparations that are to be funded using voluntary contributions.[1091]

The decision seems to be ambiguous. The Trial Chamber I decided not to examine individual requests for reparations and referred them to the TFV by indicating that reparations were to be funded by the TFV using voluntary contributions. One may think that, since the Chamber has considered the indigence of the convicted person, it referred all victims to the TFV in order to be assisted or for support pursuant to Art 79 of the ICC Statute. But, on the other hand the Chamber concluded that it remained seized of the reparation proceedings in order to 'ensure that a trial is fair

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[1089] ICC, *Prosecutor v Lubanga,* Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para.125

[1090] *The 2012 Decision on Principles and Procedures*, paras 270-271

[1091] *Ibid*, para. 289

and expeditious', as provided for by Art 64(2) and (3) (a), 'including considering the proposals for collective reparations that are to be developed in each locality, which are to be presented to the Chamber for its approval'. This demonstrates the difficulties raised by definition given to the term 'through the TFV' by the Chamber. The Chamber avoided issuing an explicit order to the TFV to provide reparations to victims which will encroach on the powers of the Board of Directors of the TFV. Still, the very fact that the Chamber referred all of the victims' requests to the TFV by specifying that 'reparations are to be funded by using voluntary contributions' creates uncertainty about the roles to be played by both the Court and the TFV in the case of court-ordered reparations and assistance or support to victims of crimes within the jurisdiction of the Court, and of the families of such victims.[1092]

There are good reasons that may lead to questioning the Chamber's reasoning. First of all, the definition given to the term 'through' does not clarify the exact context of the Art.75 (2)(s2) of the Statute. Art.75 (2)(s2) could be read, as the Court considers, as follows: 'Where appropriate, the Court may order that the award for reparations be made *by means of* the Trust Fund'. Unfortunately, such rephrasing may not put an end to the debate. Actually, the term 'means' may also be understood as 'a way of achieving or doing something'.[1093] In this case the TFV may be a canal through which an award for reparations ordered against a convicted person could reach the recipients (victims). But also the term 'means' may be understood as 'the money that a person has', in the present instance the money of the TFV. This demonstrate that it not yet clear whether the term 'through' used by Art.75 (2)(s2) refer to 'a way' or 'a canal' to 'the money'.

The above predicament in searching the exact meaning of the phrase *through the TFV* in the context of the ICC reparation regime leads us to consider Art.31 (2) (b) of *Vienna Convention on the Law of Treaties* which provides that the context for the purpose of the interpretation of a treaty shall comprise of 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. Is there any instrument made by one or more parities in connection with the *ICC Statute*? There are two instruments which will be considered: the RPE of the ICC and Regulations of the Trust Fund for Victims (RegTFV) both adopted by Assembly of State Parties to the ICC Statute. The two instruments provide also for award of reparations *through* the TFV.

[1092] Concerning the role of the Court and the TFV in implementing court-ordered reparations and assistance to victims and their families see Chapter three of Part two of this dissertation.

[1093] A.S Hornby, Oxford Advanced Learner's Dictionary of Current English, 7th ed. Oxford: Oxford University Press, p.914.

According to Rule 98(3) of the RPE of the ICC '[t]he Court may order that an award for reparations *against a convicted* person be *made through the Trust Fund* [emphasis added]'. It is quite clear that, Rule 98(3) explicitly mentions 'an award for reparations against a convicted person'. In the same vein, Regulation 50(b) of Regulations of the TFV provides that '[w]hen the Court makes an order for reparations *against a convicted person* and orders that the award be deposited with or *made through* the Trust Fund in accordance with rule 98, sub-rules 2 to 4 of the Rules of Procedure and Evidence' the TFV shall be considered to be seized for implementing reparations for the victims. From the Rule 98(3) and Regulation 50(b) it can be inferred that where the Court does not issue an award for reparations *against a convicted person*, it cannot order that reparations be made through the Trust Fund.

However, Rule 98 (4) provides for another scenario where it stipulates that 'Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made *through* the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund'. In this case Rule 98(4) does not mention an award for reparations *against a convicted person* as implicitly does Regulation 50(b) of Regulations of the TFV by referring to Rule 98 sub-rules 2 to *4*. Nevertheless, it is observable that Rule 98(5) of the RPE which stipulates that 'Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79' excludes 'other resources' from the TFV's resources which may be object to an order for reparations. What are the 'other resources' of the TFV? Regulation 47 of Regulations of the TFV provides an answer to the question where it specifies that, '*other resources of the Trust Fund' set out in of rule 98, paragraph 5, of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeitures.*[1094] Implicitly, we can infer that Rule 98(4) also refers to awards for reparations against a convicted person which may be implemented by intergovernmental, international or national organization approved by and *through* the Trust Fund. This analysis demonstrates that the Court could order that an award for reparations be made *through* the Trust Fund where it issues an order for reparations *against a convicted person*. Art. 75(2)(s2) of the Statute provides for awards for reparation ordered against a convicted persons to be paid through the TFV as a canal rather than directly to victims. Indeed, according to Art.75 (2) of the Statute and Rule 98(1) of the RPE of the ICC, the liability of reparations lies on the convicted person. There is no provision under the ICC reparation regime which mentions that the TFV can surrogate a convicted person in providing

[1094] Concerning the use of the resources collected from fines and forfeitures see discussions made in Chapter three of Part two of this dissertation, pp.360ff

reparations to victims declared indigent by the Court. The Trial Chamber's reason opens the room of confusion between the award for reparations under Art.75 of the ICC and assistance for victims and their families under Art.79 of the Statute. Reparation under Art.75 is based on liability of a convicted person to repair the harm caused by crimes but assistance from the TFV is not.

Voluntary contributions referred to as 'other resources of the Trust Fund' should be used to complement the resources collected through awards for reparations. This should result not from an order issued by the Court but from a decision made by the Board of Directors which 'shall advise the Court accordingly'.[1095] Actually, Regulation 50(b) of Regulations of the TFV which specifies when the TFV should be considered as seized by the Court to implement its activities, does not include voluntary contributions. According to the Regulation 50(b), the Trust Fund shall be considered to be seized ' [w]hen the Court makes an order for reparations against a convicted person and orders that the award be deposited with or *made through the Trust Fund* in accordance with rule 98, sub-rules 2 to 4 of the Rules of Procedure and Evidence [emphasis added]'. The sub-rule 5 of Rule 98 of the RPE related to other resources of the TFV is omitted. Thus, the Court should not make an order for reparations which intend to draw on voluntary contributions. It is the power of the Board of Directors to 'determine whether to complement the resources collected through awards for reparations with 'other resources of the Trust Fund' and shall advise the Court accordingly'.[1096] The Court 'has no control over resources received by the Fund from voluntary contributions'.[1097]

Concerning the question of when the Court may order that an award for reparations be made through the Trust Fund, the RPE of the ICC determines that '[t]he Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.'[1098] This alternative should be conceived in the case of collective awards. Moreover, [f]ollowing consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund'.[1099] The Court can specify, in its order for reparations, the organization(s) which will implement a collective reparation order. However, the

[1095] See Regulation 56 of the RegTFV.

[1096] *Idem*

[1097] War Crimes Research Office, *op. cit*., p.2

[1098] Rule 98(3) of the RPE of the ICC

[1099] Rule 98(4) of the RPE of the ICC

Court should delegate to the TFV such a task of determining the organizations. Arguably, in the case of collective award for reparations it can be easier for the TFV to set out the concerned organizations and a summary of their relevant expertise. The TFV could easily establish the list of the specific functions that the concerned organization(s) is/are to undertake in implementing an order for reparations and to set out a memorandum of understanding and/or other contractual terms regarding implementation of the Court-ordered reparations, roles and responsibilities. In addition, it should be the responsibility of the TFV to monitor and oversee the activities of the concerned organization in implementing the collective reparation awards, monitoring and oversight.[1100]

II.6.2.4. Determination of the modalities of reparation: A reparation order on an individual or a collective basis (Rule 97(1) of the RPE)

Once the scope and extent of harm sustained by a victim have been determined, the Court may indicate whether reparations are to be made on an individual or on a collective basis pursuant to Rule 97(1) of the RPE of the ICC. According to Rule 97(1) the Court, taking into account the scope and extent of any damage, loss or injury, may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both. The ICC regime does not specify the circumstances in which the Court should opt for individual or collective reparations. The Rule 97(1) leaves the issue to the wisdom of the Court. Moreover, one may wonder whether a victim could benefit from both individual and collective reparations. Before awarding reparations on individualized basis the Court should consider different factors so that reparations should not be counterproductive.

A. The appropriateness of a reparation order on an individualized basis

According to Art.75 (2) of the ICC Statute reparations are ordered against a convicted person.[1101] Moreover, due to the nature of the crimes under the jurisdiction of the ICC, victims of the convicted person could be numerous[1102] with different kinds of harm which, as already

[1100] All of these activities should be necessary where the implementation of an order for reparation is delegated to another organization. See Regulation 73 of the RegTFV; see also discussions made on the role of the TFV in enforcing reparation orders (pp.359ff).

[1101] Besides the nexus between the victim's harm and the crime committed by the perpetrator, the fact that Court-ordered reparations are to be provided by the convicted person – not by the TFV (see discussion made on 'reparation through the TFV) constitutes a major limitation for the Court for awarding collective reparations (Aubry, S. and Henao-Trip, M.I., *op. cit*., pp.8-9).

[1102] For instance, it is 'estimated that thousands of individuals are believed to have been victims in the district of Ituri (DRC) and it would be a

mentioned, can range from physical, moral or material harm. All of these factors should be taken into account by the Court when deciding to award reparations on individual basis. One may assume that in most cases the purpose of an individual award is to provide an equivalent to a specific harm suffered by a victim of crime and may consist in monetary or non-monetary nature.[1103] However, whereas financial reparations may help some victims, one may fear that 'for others it may be a low priority, and may even appear as an insulting attempt to buy them off'.[1104] Likewise, one may assume that individualised payments 'when faced with limited funds and mass victimisation could result in *de minimus* awards that can lose all practical meaning for beneficiaries'.[1105]

This could lead the Court to order for example rehabilitative measure on individual basis. In so doing the Court should consider appropriate reparations which 'will have to be tailored to the individual case as a result of the assessment of concrete victimization of individuals'.[1106] Nevertheless, due to the complexities of most cases brought before the ICC, 'targeting victims as individuals or as identifiable members of a group for reparation purposes, while legally justifiable under the [ICC] Statute, risks being counter-productive'.[1107] In the *Lubanga* case for example, where former child soldiers are victims, some observers fear that individual award may at the level of the community, 'lead to jealousy, tension and, in the worst case, a resurgence of violence'. Actually, 'if the former child soldiers are seen as being 'rewarded' for their role in the conflict, this may further deepen an existing lack of understanding of the crime in the affected communities'.[1108] Besides the possible resurgence of violence that may result from individual awards for reparations, some commentators fear that 'individualised payments can be costly to administer'.[1109] In the *Lubanga* case, it was suggested that the Court should take into account the risks of an individual

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resource-intensive and time-consuming undertaking for the Court to attempt to assess the position of each of them' (ICC, *The 2012 Decision on Principles and Procedures* para. 44; ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.106).

[1103] Dwertmann E., *op. cit.*, p.121

[1104] Doak, J., 2008, *op. cit*., pp.225-226

[1105] Ferstman, C. and Goetz, M., *op. cit*., p.341

[1106] Donat-CAttin, D., 2010, *op. cit*., p.376

[1107] ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.151

[1108] ICC, *Prosecutor v Lubanga,* TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.151

[1109] Ferstman, C. and Goetz, M., *op. cit*., p.341

approach which may not be compatible with the principle of 'do no/less harm'[1110] and particularly individual award to child soldier which may be counterproductive to a reconciliation process.[1111]

B. The issuance of a reparation order on a collective basis

Regarding collective reparations, it is noticeable at the outset that the ICC reparation regime does not give any guidance as to what is meant by reparations on collective basis. Nor the international law defines the concept of collective reparations. The absence of a legal definition of collective reparation under international law makes it ambiguous and it can be understood in several ways.[1112]

Sometimes collective reparation is understood as reparations awarded 'for the violation of a collective right or for the violation of a right that has an impact on a community'.[1113] This view has for example been given by national authorities in the context of restorative justice where they consider collective reparations 'as a fundamental right of groups, villages, and social and political organizations that have been affected by the damage caused by the violation of collective rights, the grave and flagrant violation of individual rights of members of groups, or the collective impact of the violation of individual rights'.[1114] However, at other times, a reparative measure may be collective when it is 'endorsed not as a substitute for reparations but as a *modality of distribution*, collective here meaning that instead of being given to each victim individually, the benefit is given to a 'group' or to certain 'groups' of victims'.[1115] Given that the ICC reparation regime does not provide any definition or delimit the scope of collective reparations, reparations 'on collective basis' should be understood within its broader sense which may compass all the above conceptions of collective reparations. Indeed, the possibility of the ICC to order a collective award instead of

[1110] According to TFV, reparation may have the risk, especially in post-conflict situations, 'of becoming part of the dynamics of a conflict and may even fuel tensions'. TFV fears that, '[i]f reparations are administered without regard to local contexts, victims may be harmed again by stigmatizing them or putting them in danger with their families and communities. Poorly designed reparations may even cause additional tensions and re-ignite conflict.'(TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.65- 68)

[1111] ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.137

[1112] Aubry, S. and Henao-Trip, M.I., *op. cit*., pp.2-3

[1113] *Ibid*, pp.3-4

[1114] Access to Justice Asia LLP and The Centre for Justice & Accountability and The International Human Rights Law Clinic *op. cit*., p.8

[1115] Rubio-Marín R. et al., 2009. Repairing Family Members: Gross Human Rights Violations and Communities of Harm. In: R. Rubio-Marín, ed., 2009. *The Gender of Reparations. Unsettling Sexual Hierarchies While Redressing Human Rights Violations.* New York: Cambridge University Press. p.385; see also Aubry, S. and Henao-Trip, M.I., *op. cit*., pp.2-3

individual one may reveal the intention of giving various tools to the Court – which will have to adjudicate in very different circumstances - in order to better respond to a wide range of situations.[1116]

The RPE of the ICC Statute implicitly provides for some raisons which may lead the Court to order a collective award instead of individual one. In this regards, Rule 98(3) implicitly refers to 'the number of the victims and the scope, forms and modalities of reparations', as the factors which may make a collective award more appropriate. One may think for example of a big number of victims of crimes committed by a convicted person which may pose the difficulty of identifying all of them at the time of issuing an order for reparations. Apart from the number of victims, other factors allow of reparations on collective basis, such as the scope, forms or types of reparations (such as rehabilitative measures). Besides the factor implicitly provided for by the Rule 98(3), the Court may face other circumstances with may justify a collective award for reparations. It should be the case for instance where most of the victims of the crimes envisaged by the Court are traumatised and 'will often be living in the midst of on-going violence or in societies newly emerging from years of conflict and widespread atrocities, meaning resources may be scarce and tensions among groups of victims, or between victims and the government, may be high'.[1117] The same difficulty may be encountered when for instance individual victims are deceased,[1118] or are traumatized as a result of the crimes or lack of financial resources, and consequently many victims will not be able to participate in the ICC proceedings and/or file claims.[1119] Such circumstances may require the Court to 'ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified'.[1120] In addition, as the ECCC held, the reconciliatory function of reparations may lead to considering that collective harm merits collective reparation.[1121] Furthermore, '[i]n addition to minimising the difficulty in attempting to determine individual eligibility for reparations, collective awards can use the limited available resources to provide the greatest benefit

[1116] Aubry, S. and Henao-Trip, M.I., *op. cit*., pp.3-4

[1117] War Crimes Research Office, *op. cit.*, p.26

[1118] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.335

[1119] Zegveld, L., *op. cit*., pp.98-100

[1120] *The 2012 Decision on Principles and Procedures*, para.219; see also ECCC, Supreme Court Chamber, Appeal Judgement of 3 February 2012, Case File/Dossier No.001/18-07-2007-ECCC/SC, para.659

[1121] ECCC, Supreme Court Chamber, Appeal Judgement of 3rd February 2012, Case File/Dossier No.001/18-07-2007-ECCC/SC, para.660. The Supreme Court Chamber drawn from and espoused the recommendation made in the report of the Guatemalan Historical Clarification Commission according which 'collective reparatory measures for survivors of collective human rights violations and acts of violence, and their relatives, should be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favour the entire population without distinction between victims and perpetrators'.

to groups of victims'.[1122] It is worth remembering that the possibility of the Court to make reparation award without identifying beneficiaries is contemplated by the RegTFV.[1123] By awarding collective reparations the Court may address its inability to identify all the victims of a convicted person and attempts to repair as many victims as possible.

Besides the above issues regarding the definition and the raisons of collective award, one may wonder whether all types of reparations – such as restitution, compensation and rehabilitation- may comply with the collective approach when deciding on reparations. Arguably, all of these types of reparations may comply, under certain circumstances, with the collective approach. In this respect the ICC should for instance lean from the practice of the IACtHR. Concerning restitution on collective basis for example it can be observed that in *Sawhoyamaxa Indigenous Community v Paraguay*, the IACtHR awarded restitution measures regarding traditional land.[1124] Likewise, in respect with compensation, the same Court awarded compensation to communities for pecuniary and non-pecuniary damages.[1125] In this respect, bearing in mind that collective reparations, as already discussed are to be ordered against a convicted person but through the TFV, the ICC may for instance consider the collective award which may consist in: 'a certain amount of money ('lump sum') to an organisation or foundation that represents the interest of the collective of victims' or a financial award granted 'to community institutions or projects designed to benefit the group of victims as a whole'.[1126]

Much more, rehabilitative measure and other reparative measures as a form of satisfaction[1127] may be awarded as collective reparations. Particularly to rehabilitative measures, the Trial Chamber I held, in the *Lubanga* case, it 'should consider providing medical services (including psychiatric and psychological care) along with assistance as regards general rehabilitation, housing, education and training'.[1128] Likewise, the 'wide publication' the judgement

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[1122] ICC, *Prosecutor v Lubanga*, OTP, Prosecution's Submissions on the principles and procedures to be applied in reparations, 18th April 2012, ICC-01/04-01/06-2867, para.15

[1123] See for example Regulation 60ff of the RegTFV.

[1124] IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29th March 2006 *(Merits, Reparations and Costs,* para.215; see also Aubry, S. and Henao-Trip, M.I., *op. cit*., p.5

[1125] IACtHR, *Saramaka People v Suriname*, Judgment of 28 November, 2007 (Preliminary Objections, Merits, Reparations, and Costs, paras. 198-202; IACtHR, *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005, (Merits, Reparations and Costs), paras 194 and 205; IACtHR, *Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of March 29, 2006 (*Merits, Reparations and Cost,*), para. 218; see also Aubry, S. and Henao-Trip, M.I., *op. cit*., p.5

[1126] Dwertmann, E., *op. cit*., p.116

[1127] See observations made on these types of reparations in Chapter one of Part two of this dissertation, p.131ff.

[1128] *The 2012 Decision on Principles and Procedures*, para.221

of conviction contemplated, as already mentioned, by the *2012 Decision on Principles and Procedures*[1129] could be understood as forms of collective reparation. Some commentators suggest different reparative measures which may be ordered by the ICC in the *Lubanga case* and understood as collective reparations. The Court can for example order for the establishment of a monument recognising the conscription, enlistment and use of child soldiers in the region of Ituri and how this illicit war tactic affected the community as a whole. It could also 'Order Mr Lubanga to contribute financial resources, (even if as a symbolic measure) with the amount to be determined by the Court, to support the TFV to: [i] Develop psychological rehabilitation programmes with the aim of reintegration of child soldiers into the community; [ii] Support the project(s) that the TFV is developing in [the] DRC in relation to child soldiers. [iii] Develop programmes to raise awareness and sensitisation in relation to child soldiers issues (for example radio programmes); [iv] Develop educational programmes for former child soldiers; [v] Create a communal development fund in favour of former child soldiers and victims of child soldiers; [vi] Create a programme for the search of children abducted and their families.[1130]

It appears that all types of reparations could comply with the collective approach. One may expect collective reparations to 'be extremely beneficial for victims, particularly if victims are involved in the conceptualisation of the reparations package'. Collective reparations may be awarded in order to 'address the harm the victims suffered on an individual and collective basis'.[1131] Moreover, collective forms of reparation appear as a complex form of reparations which may encompass symbolic and material reparations,[1132] and should be a logical approach to offer redress to traumatised communities.[1133] We have to keep in sight that collective reparation measures, which may not be confused with assistance measures provided by the TFV, can only be awarded by the Court against a convicted person to victims who suffered the harm as the result of the crime for which the person has been convicted for.[1134] Consequently, the Court may award collective reparations from a convicted person which might be supplemented by the TFV. The latter should decide, independently of any order from the Court, to draw on money received from voluntary

[1129] *Ibid*, para.238

[1130] See Aubry, S. and Henao-Trip, M.I., *op. cit*., pp.13-14

[1131] *The 2012 Decision on Principles and Procedures*, para.221

[1132] See Garci′a-Godos, J. and Knut Andreas O.Lid, *op. cit.*, p.512

[1133] Walleyn, L., 2009. The Prosecution of International Crimes and the Role of Victim's Lawyers. In: C. Ferstman**,** M. Goetz and A. Stephens, eds., 2009. *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity. Systems in Place and System in the Making*. Leiden: Martinus Nijhoff, p.363

[1134] Concerning the nexus between the harm suffered by victims and crimes committed see discussions on the Principles relating to the standard of causation and recoverable harm in Chapter one of Part two of this dissertation (pp.105ff).

contributions and to complement collective awards for reparations ordered against the convicted person through it.[1135]

It is worth noting that the possibility of awarding reparations on individual or collective basis falls under the Court's discretionary power. Indeed, the context of Rule 97(1) and Rule 98(3) of the RPE of the ICC, the Court may decide appropriate modalities of reparations. Nevertheless, in all cases, 'the Court shall respect the rights of victims and the convicted person.'[1136] Therefore, victims' requests 'specified through application forms, consultation, hearings or other means should be given due consideration in determining the nature and form of awards'.[1137] Moreover, where appropriate, the Court should allow for representations from the TFV and interested States pursuant to Rule 98(3-4) of the RPE of the ICC.

Still, one may fear that collective reparation may 'lose their reparative objective, becoming humanitarian or developmental in nature.[1138] This may lead one to argue that where appropriate, collective awards could not exclude individual ones. In other words, individual and collective reparations 'are not mutually exclusive, and they may be awarded concurrently'.[1139] In fact, according to Rule 97(1) individual and collective reparations may coexist in the same award.[1140] Consequently, a victim may be the recipient of an individual award and also benefit from an award made to a collectivity of which he or she is a member.[1141] In deciding the combination of the modalities of reparation, the Court should primary target vulnerable victims so that they can benefit from both individual and collective awards for reparations. Indeed, the Court by establishing some exceptions to the principle of non-discrimination intending to redress inequalities affecting vulnerable victims[1142] held that 'not all victims are equal'.[1143]

[1135] Concerning the competence of the TFV to decide of complementing awards for reparations see regulation 56 of the RegTFV

[1136] Rule 97(3) of the RPE of the ICC

[1137] Victims' Rights Working Group, *op. cit.*, p.11

[1138] Ferstman, C. and Goetz, M., *op. cit*., p. 341. For example, in societies where reparations is an individual affair, like in most occidental legal systems (Walleyn, L., *op. cit*., p. 363), the risk of collective forms reparation of not meeting victims expectations and lose their reparative objective could increase.

[1139] *The 2012 Decision on Principles and Procedures*, para.220

[1140] Rule 97(1) of the RPE of the ICC reads as follows: 'Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'.

[1141] Dwertmann E., *op. cit.*, p.119

[1142] See the *2012 Decision on Principles and Procedures*, paras 200, 207 and 211

[1143] The Commission for Reception, Truth and Reconciliation Timor-Leste considered that 'All East Timorese people have been touched and victimised by the conflict in one way or another. However, in the course of its contact with many communities the Commission became acutely aware of those among us who still suffer daily from the consequences of the conflict and whose children will inherit the disadvantages their

II.7. Legal remedies against a reparation order

The ICC Statute, in its Part 8 (Appeal and revision), provides for appeal against a decision of acquittal or conviction or against sentence[1144] and other decisions,[1145] and revision of conviction or sentence. The Statute provides for appeal against an order for reparations since such an order is included in *other decisions* referred to by the Statute. Nevertheless, there is no provision which determine other possible remedies against an order for reparations. It is not clear whether an order for reparation can be subject to revision before the ICC as conviction and sentence are.

Respecting the appeal against an order for reparations, one may wonder who are entitled to challenge a decision on reparations before the Appeals Chamber. It is arguable that the right to appeal is granted to those who have been parties to reparations proceedings. Are there, besides the appeal, other legal remedies against an order for reparations? Although the ICC Statute is silent on the issue, one may assume that an order for reparations can be subject to revision as well as conviction and sentence. There is also a question of how the potential requests for interpretation and rectification of an order for reparations will be dealt with since the ICC reparation regime is silent. These issues lead us to examine first the right to appeal against an order for reparations (II.6.1.) before discussing other possible legal remedies against an order for reparations (II.6.2.).

II.7.1. The right to appeal against an order for reparations pursuant to Art.82 (4) of the ICC Statute

Art.82(4) of the ICC Statute entitled 'Appeal of other decisions' reads as follows: 'A legal representative of the *victims*, the *convicted person* or a *bona fide owner* of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence [emphasis added]'. The *time limit* of appeal against an order for reparations is 30 days from the date on which the party filing the appeal is notified of a reparation

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parents face as a consequence of their victimization. They include those who live in extreme poverty, are disabled or, who — due to misunderstandings — are shunned or discriminated against by their communities. *We are all victims but not all victims are equal*. We must acknowledge this reality and lend a hand to those who are most vulnerable [emphasis added]' (See Commission for Reception, Truth and Reconciliation Timor-Leste (CAVR), 2005. Chega! Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary, pp. 492-493. [Online] available at: <http://etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>, accessed 1st March 2013.

[1144] See Art.81 of the ICC Statute.

[1145] See Art.82 of the ICC Statute.

order.[1146] The appeal may be against a whole reparation order or parts of it.[1147] The right to appeal against a reparation order raises two major procedural issues. The first question concerns the *admissibility* of appeal (II.7.1.1.). In other words, what are the requirements for exercising the right to appeal an order for reparations? The second issue is related to *effect* of appeal on the implementation of an order for reparations (II.7.1.2.). Indeed, one may wonder whether an appeal against an order for reparations will have or will not have suspensive effect.

II.7.1.1. The factors determining the admissibility of an appeal against an order for reparations

The right to appeal is reserved to victims, the convicted person or a bona fide owner of property adversely affected by an order for reparations. From the provision of Art.82 (4) of the Statute' two pre-conditions of appeal can be pointed out: having been party to reparation proceedings (A) and having been adversely affected by an order for reparations (B). In addition, the provision refers to 'an order for reparations' and raises in turn the question as to whether a decision by the Chamber of not ordering reparations can be challenged before Appeals Chamber. Does the right to appeal strictly require an order for reparations or implicitly refer to any decision on reparations (C)?

A. Having been a party to reparation proceedings

Parties to reparation proceedings which are not to be confused with other participants to reparation proceedings have already been identified (the convicted person, victims and possibly a *bona fide* owner of property).[1148] Only those who are parties to reparation proceedings are entitled to form appeal against an order for reparations. Although victims can fill themselves requests for reparations which trigger reparation proceedings, a victim cannot appeal himself or herself against the order for reparations, unless through his or her legal representative.[1149] The right to appeal lies with the victims, not with the legal representatives of victims insofar as it has to be understood that

[1146] See Rule 153(1) of the RPE of the ICC.

[1147] The appellant shall file a notice of appeal which shall state '[w]hether the appeal is directed against the whole decision or part thereof' (See Regulation 57 of the RC).

[1148] Participants to reparation proceedings may be the Prosecutor, the TFV and other interested persons or interested States. Participants are invited or request to submit their observations on different issues arising from a case.

[1149] Consider the context of Art.82 (4) of the ICC Statute.

article 82 (4) of the Statute provides that victims may only appeal with the assistance of a legal representative.[1150]

According to the Appeals Chamber, having been a party to reparation proceedings means having applied for reparations. Indeed, the Appeals Chamber, in the *Lubanga* case, held that, for the purpose of Art.82 (4), victims granted with the right to appeal are not those 'who were granted the right to participate in the proceedings in relation to the accused person's guilty or innocence or sentence', but those 'who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted and *who request reparations* [emphasis added]'.[1151] Having applied for reparations has another consequence. A victim who applied for both participation and reparations but to whom the stand to participate in criminal proceedings was refused may however be granted the right to participate in reparation proceedings. Consequently, such a victim may appeal any decision which denies this right of participation in reparation proceedings or affects his or her interests. In the *Lubanga* case, the Trial Chamber I, by the *2012 Decision on Principles and Procedures*, decided not to consider the individual applications for reparations that it had so far received but to transfer all of them to the Trust Fund. Victims whom *were refused to participate in criminal trial* and who had applied for reparations appealed the decision. The Appeal Chamber has considered that the Trial Chamber I's decision 'affected those claimants for reparations whose requests for participation in the proceedings in relation to the accused person's guilt or innocence or the sentence was rejected or whose right to participate was withdrawn in the Conviction Decision'.[1152] Consequently, their appeal was declared admissible by the Appeal Chamber. This leads one to argue that a victim become party to reparation proceedings at the very time he or she applies for reparations regardless of whether or not he or she participated in the linked criminal proceedings.

Likewise, as regards victims who did not request reparations, the Appeals Chamber determined, in the same case of *Lubanga*, that *having been a party to reparation proceedings* means having been invited by the Court to submit their representations. Specifically, the Appeals Chamber held that:

[1150] See ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.67

[1151] *Ibid*, para.69

[1152] *Ibid*, para.70

> [I]n the reparations proceedings, the Trial Chamber invited submissions from victims who did not request reparations, even though they participated in the proceedings in relation to Mr. Lubanga's guilt or innocence. Thus, the Trial Chamber accorded to those victims a role in the reparations proceedings, which the victims accepted by making submissions. This also demonstrates their interest in the reparations proceedings. For these reasons, the Appeals Chamber finds that it is possible that they are affected by the Impugned Decision, in particular because the Impugned Decision was the result of reparations proceedings in which they participated and made submissions. In this regard, the Appeals Chamber has also taken note of the submissions of the Legal Representatives of Victims V02 explaining that not all individuals that they represent have applied for reparations, at least in part because the legal representatives have been unable to contact them in relation to submitting a request for reparations [footnote omitted]'.[1153]

This reasoning can be questioned on the ground of fair trial. Actually, the Appeal Chamber noted that the victims who participated in reparation proceedings (through their legal representatives) had not filed any request for reparations and declared however their appeal admissible. Arguably, the fact of participating and making submissions in reparation proceedings should not necessarily mean that the participant becomes a party to reparation proceedings. Unless the submissions made by the invited victims include *a clear request for reparations* pursuant to Rule 95 of the RPE of the ICC, victims who have not filed any request for reparations should not be considered as parties to reparation proceedings but as merely participants. If, in the *Lubanga* case, the Trial chamber invited submissions from victims who did not apply for reparations and when making their submissions did not claim them, these victims should arguably be considered as not willing to ask for any issuance of reparations against the convicted person. Consequently, their case might arguably fall under Rule 95(2) (b) of the RPE of the ICC which provides for the case of a requesting that the Court does not make an order for reparations. The Appeals Chamber should assure itself that, when making their submissions, those victims applied explicitly for reparations before the Trial Chamber so to that effect they have become parties to reparations proceedings. Otherwise, those victims remain merely participants in the proceedings. Nevertheless, the Appeals Chamber seems, in its reasoning, to admit the appeal on the ground of the willingness and the inability of the victims to file the requests. It is not clear whether the position of the Appeal Chamber strives to comply with one of the purposes of collective awards which is reaching victims who were unable to file their requests for reparations as well as those unidentified ones.[1154] Besides such a particular case, the Appeals Chamber itself determined that victims who can appeal an order

[1153] *Ibid*, para.70

[1154] See the *2012 Decision on Principles and Procedures*, para.219. It has been noted how the ICC's reparation regime provides for the possibility of the Court to award reparations on the collective basis without identifying the beneficiaries. At the stage of the implementation of such reparation awards the TFV will carry out the task of identifying the beneficiaries (see for example Regulations 60 &61 of the RegTFV).

for reparations are not those who participated in proceedings but those who requested reparations. Specifically, in Lubanga case, the Appeals Chamber held that:

> The Appeals Chamber considers that the term 'victim' in article 82 (4) of the Statute has to be understood in its context - it allows individuals to appeal an order for reparations rendered by a Trial Chamber as a result of the reparations proceedings. The Appeals Chamber finds that this may also include individuals who did not participate in those proceedings, but who claim to have suffered harm as a result of the crimes in relation to which the accused was convicted *and who request reparations [emphasis added.*[1155]

Yet, the requirement for appealing against an order for reparations – having been a party to reparation proceedings - raises questions related to *unidentified victims* and *bona fide third parties* who may be affected by a collective order for reparations. As regards unidentified victims, it bears remembering that the Trial Chamber I, allowed the OPCV to represent such victims in reparation proceedings. Subsequently, the OPCV appealed against the *2012 Decision on Principles and Procedures* claiming that it should be allowed to appeal in the name of those unidentified victims who may be affected by a collective order for reparations but who have not applied for reparations.[1156] It is worth repeating here that the Appeals Chamber rejected the appeals where it decided as follows: 'To the extent that the Office of Public Counsel for victims filed its appeal on behalf of unidentified individuals who have not applied for reparations but whose interests might be affected by collective reparations, the appeal is rejected as inadmissible'.[1157] To reach such a decision, the Appeal Chamber reasoned as follows:

> The Appeals Chamber recalls that the OPCV, in the reparations proceedings before the Trial Chamber, *acted as legal representative of specific individuals who had applied for reparations*. In addition, the OPCV made submissions in relation to 'the interests of [unidentified] victims who have not submitted applications but who may benefit from an award for collective reparations, pursuant to Rules 97 and 98 of the Rules". Subsequently, the OPCV has appealed on behalf of both categories of victims. The Appeals Chamber determines that, in the circumstances of the present case, *the OPCV is entitled to bring an appeal with regard to those individuals in respect of whom it was appointed as a legal representative*. However, the Appeals Chamber considers that the unidentified individuals referred to above cannot have a right of appeal because *at this stage of the proceedings it is impossible to discern who would belong to this group as no concrete criteria exist*. Accordingly, to the extent that the OPCV has appealed the Impugned Decision on behalf of those unidentified individuals, *the appeal must be rejected as inadmissible*. This is without prejudice to the OPCV potentially being invited to make submissions on behalf of such individuals at a later stage in the proceedings [footnotes omitted and emphasis added].[1158]

[1155] See ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para.69

[1156] *Ibid*. para.29

[1157] *Ibid*. (Decision and Directions, para.3)

[1158] *Ibid*, para.72

From the foregoing reasoning, one may infer that even though the OPCV can make submission in relation to interests of unidentified victims, it cannot be considered as a legal representative for this category of victims. For a legal representative is allowed to appeal on behalf of his client. And the power of a legal representative stems from an oral or written representation agreement concluded between a legal representative and his or her client before the Court.[1159] The required representation agreement is not possible between the OPCV and unidentified victims. Notwithstanding, it is worth noting that the interests of justice can allow a Chamber to appoint a legal representative without prior consultation with the concerned victims. In exercising its power, the Chamber can appoint a counsel from the OPCV as legal representative to a victim or victims. This reasoning can be endorsed by the context of Regulation 80 of the RC which stipulates that, 'following consultation with the Registrar and, *when appropriate*, after hearing from the victim or victims concerned, may appoint a legal representative of victims where the interests of justice so require [emphasis added]'.[1160] The words 'when appropriate' denote the non-binding provision in respect to prior consultation with the concerned victim(s). In other words, in some circumstances, such as the impossibility to identify all victims at the time of reparation proceedings, the interests of justice can require the Chamber to appoint legal representative for such victims. The regulation goes on to provide that '[t]he Chamber may appoint counsel from the Office of Public Counsel for victims' who fulfills the requirements for inclusion in the list of counsel.[1161] In the light of this regulation, it is arguable that unidentified victims can legally be represented by a Court-appointed counsel from the OPCV for the interest of justice. This may be seen as an exception of the required representation agreement between a counsel and his or her client. Consequently, the right to appeal should be granted to unidentified victims represented by a counsel from the OPCV. In this case, the OPCV could challenge an order for reparations before the Appeals Chamber on behalf of unidentified victims. Otherwise, denying the right to appeal to the counsel from the OPCV does not comply with the context of Regulation 80 of the RC.[1162]

What about a *bona fide* third party who may be affected by an order for reparations? May a person who did not participate in reparation proceedings be entitled to appeal against an order for reparations? For instance, in the case of a *bona fide* owner of property, it may happen that he or she

[1159] For more details on representation agreement see Art.2 and Art.11 – 22 of the Code of Professional Conduct for counsel adopted by the Resolution ICC-ASP/4/Res.1 (adopted by the ASP at its 3rd plenary meeting on 2nd December 2005).

[1160] Regulation 80 of the RC (as amended 2nd November 2011, entered into force 29th June 2012)

[1161] For requirements for inclusion on the list of counsels see Regulation 67 of the RC (as amended 2nd November 2011, entered into force 29th June 2012).

[1162] See also Regulations 60 & 61 of the RegTFV.

was not informed about the reparation proceedings which have resulted in an order affecting his or her rights to property. Which remedy is available for such a third party, since he or she did not participate or was not represented in reparation proceedings? The *bona fide* third party cannot appeal an order for reparations for he or she does not meet the requirements needed within the context of Art 82(4) of the ICC Statute. Indeed, the context of Art.82 (4) of the ICC Statute excludes the third party from the list of those granted with the right to challenge an order for reparations before the Appeal Chamber. Moreover, an order for reparations could not be challenged by an application from a third party to reparation proceedings for such a remedy is unknown under the ICC's reparation regime.

Arguably, the matter of *bona fide* third party is referred to national authorities. Indeed, Rule 217 of the RPE of the ICC (Cooperation and measures for enforcement of fines, forfeiture or reparation orders) stipulates that '[t]he Presidency shall, as appropriate, inform the State of *any third-party claims* or of the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75 [emphasis added]'. This rule can be understood as referring to any third-party's claim against an order for reparations to a State concerned by execution of such an order. This reasoning can be reinforced by the fact that State Parties have obligation to enforce the ICC's reparation order but without prejudice to the rights of bona fide third parties.[1163]

B. Having been affected by an order for reparations

A party in reparation proceedings is entitled to appeal against an order for reparations where he or she can demonstrate that his or her interests are affected by such an order. The issue of affected interests can raise a controversy in a matter of reparations to victims since the notion of 'interests' is quite ambiguous. It is arguable that the Appeals Chamber will appreciate whether appellant's interests are or are not affected by an order for reparations

In the *Lubanga* case for example, the *2012 Decision on Principles and Procedures has* excluded the possibility of the Chamber to issue an order for reparations against the convicted person, Mr Lubanga, who was declared indigent. Mr Lubanga still appealed the Decision and his appeal was declared admissible by the Appeals Chamber. Mr Lubanga argued that he has standing

[1163] For more details on the issue of the rights of *bona fide* third parties at the stage of execution see Chapter three of Part two of this dissertation (pp.340ff).

to raise an appeal against the Decision because article 82 (4) of the Statute expressly provides him, as the convicted person, a right to appeal. He went on to submit that the right under article 82 (4) of the Statute of a convicted person to appeal an 'article 75 decision' is not predicated upon that 'decision' being rendered directly against the convicted person. Additionally, Mr. Lubanga argued that the Statute and the Rules of Procedure and Evidence provide him, as a convicted person, the status of a 'party' to the reparation proceedings and therefore his right to appeal cannot seriously be called into question. Specifically, Mr. Lubanga submitted that he is 'necessarily' *affected* by an order for reparations whether or not it is made directly against him and whether or not he is able to contribute to the finding of any reparation award. According to the appellant, the question whether an order for reparations affects his proprietary interests is immaterial because his moral rights are unarguably affected as reparation proceedings involve allegations of a new and separate civil charge of harm caused by his actions.[1164]

In reaction the OPCV argued that Mr. Lubanga should not have the right to appeal against the Decision because it does not have a specific and concrete effect on his rights and interests.[1165] Likewise, the legal representatives of victims submitted that Mr. Lubanga's appeal pursuant to article 82 (4) of the Statute was inadmissible as the Trial Chamber had not issued an order for reparations against him. According to the legal representatives of victims, Mr. Lubanga's appeal would be admissible if the impugned decision had contemplated the payment of reparations from his assets or property.[1166] This contention was supported by the Prosecutor's submission which argued that Mr. Lubanga should not have a stand against the Decision as the Trial Chamber did not issue an order for reparations against him.[1167]

The Appeals Chamber rejected the arguments developed and sustained to challenge Mr. Lubanga's right to appeal against the *2012 Decision on Principles and Procedures.* The Appeal

[1164] The appellant supported his contentions by referring to the Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, which held that an order for reparations is the 'expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person' and therefore 'Mr Lubanga is affected by the reparations awards (see *Prosecutor v Lubanga,* Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 24).

[1165] See ICC, *Prosecutor v Lubanga,* Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 30.

[1166] *Ibid*., paras 33 and 38.

[1167] *Ibid*., para. 42.

Chamber granted the right to appeal to Mr Lubanga. In so doing the Appeal Chamber reasoned as follows:

> As to the appeal brought by Mr. Lubanga, the Appeals Chamber notes that article 82 (4) of the Statute gives the convicted person the right to appeal orders for reparations. This right is unencumbered. Furthermore, the Appeals Chamber does not have to determine, in the present case, whether an appeal by the convicted person is inadmissible if he or she is not adversely affected by an impugned decision. This is because, at this stage and for the purposes of the admissibility of his appeal, *it appears possible that Mr. Lubanga is adversely affected by the Impugned Decision. The Impugned Decision is intrinsically linked to his conviction, with the Trial Chamber finding that reparations should be awarded for the crimes for which Mr. Lubanga was convicted in the case brought against him.* The Appeals Chamber does not agree with the submissions that monetary contributions to reparations awards by the convicted person are the only basis for determining whether or not that individual is affected by an order for reparations. Consequently, the Appeals Chamber considers that Mr. Lubanga is entitled to appeal the Impugned Decision under article 82 (4) of the Statute [emphasis added].[1168]

The Appeals Chamber implicitly endorsed the contention of Mr. *Lubanga* who implicitly argued that the affected interests do not exclusively refer to material interest but also to moral or immaterial interests. The Appeals Chamber upheld automatically the convicted person's right to appeal an order for reparations since in the context of Art.75 of the ICC Statute the principle of individual criminal responsibility underlies such an order. Consequently, according to the Appeals Chamber, any reparation order is issued against him as the convicted person and automatically and personally affects him. Actually, even the Trial Chamber I implicitly, admitted the very fact that any order for reparation affects automatically a convicted person. It its Decision on the defence request for leave to appeal the *2012 Decision on Principles and Procedures*, the Trial Chamber I held that although the reparations contemplated by the Chamber are likely to be by way of collective awards, 'they will be an expression of the Court's disapproval and condemnation of the wrongdoing of the convicted person. Thus, Mr. Lubanga is affected by the reparation awards even though they will not be funded using his assets or property'.[1169] This case leads to the conclusion that the notion of 'affected interests' has to be understood in its broad sense including material and moral interests.

C. An order for or a decision on reparations

As far as victims' right to appeal is concerned, one may wonder whether victims can appeal against the Court's decision of not ordering reparations or not to examine their claims against a

[1168] *Ibid*., para. 66.

[1169] ICC, *Prosecutor v Lubanga*, Trial Chamber I, Decision on the defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations, 29 August 2012, ICC-01/04-01/06-2911, para. 23.

convicted person. The ICC's reparation regime does not provide any clarification on the question. At the first glance, one may assume that victims do not have a right of appeal against the Trial Chamber's decision of not ordering reparations since the Statute and its RPE refer to appeal against a reparation order.[1170] Nevertheless, considering the context of Art.75 of the *ICC Statute* and its historical background, it is arguable that it is possible for legal representative of victims to appeal against a Trial Chamber's decision of not examining victims' claims or not to order reparations for victims.

The 1998 Draft Statute of the ICC provided for appeal not against an order for reparations but against a judgement on reparations'.[1171] In the context of reparations to victims the term 'judgement' may be understood as 'decision' and can encompass both the decision grating reparations to victims and any opposite decision, that is a decision refusing explicitly or implicitly to make an order for reparations.[1172] In this regard, one may argue that 'it would be in line with the object and purpose of granting victims a right of appeal against the Court's decisions on reparations and that the right also encompasses cases in which a reparation order has not been made'.[1173]

In the *Lubanga* case, the Trial Chamber I decided, by the *2012 Decision on Principles and Procedures*, not to consider the individual applications for reparations that it had received but referred them to the Trust Fund. Legal representatives for victims who filed individual application appeal the decision on that ground and the appeal was declared admissible by the Appeal Chamber. Specifically, the legal representative of victim V01 argued that 'if a decision granting reparations to victims is an order for reparations, a decision refusing reparations is also such an order'.[1174] Subsequently, the Appeal Chamber after noting determining that whether the decision of the Trial Chamber of not examining individual application but referring all of them to the TFV was correct

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[1170] See for example Dwertmann E., *op. cit.*, p. 262. Art 82(4) refers to 'appeal against the order for reparations'. Similarly, Rule 153 of the RPE of the ICC (Judgement on appeals against reparation orders) states that '[t]he Appeals Chamber may confirm, reverse or amend *a reparation order* made under article 75'.

[1171] Art.75(7) of the 1998 Draft Statute of the ICC states that 'Victims or any person acting on their behalf, the convicted person [or any interested State] [or other interested persons] may appeal against judgement under this article, in accordance [with [Part 8 of the Statute and] the Rules]'.

[1172] See also Staker who assumes that 'Although this provision only refers to an appeal against an 'order for reparations' presumably it would also be possible for a legal representative of the victims to appeal against a decision refusing to make an order of reparations' (Staker, C., 2008b, Article 82. In: O. Triffter, ed., 2008. *Commentary on the Rome Statute of the International Criminal Court, observers' Notes, Article by Article*, 2nd ed. München: Verlag C.H.Beck, p. 1480).

[1173] Dwertmann E., *op. cit.*, p. 262.

[1174] See ICC, *Prosecutor v Lubanga,* Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 32.

may have to be determined on the merits of the appeals, held that 'it follows that those individuals who requested reparations and who now seek to appeal the Impugned Decision are entitled to do so, because the Impugned Decision contained a ruling that affected them'.[1175]

In this case, it is notable that the Trial Chamber I's decision of not examining individual reparations[1176] justified the admissibility of the victims' appeal. This analysis leads to argue that *parties to reparation proceedings* are granted with the right to lodge an appeal not only against an order for reparations in its strict sense but against any Trial Chamber's decision on reparations under Art.75 of the ICC Statute which affects their interests. Such a decision includes the decision of not ordering reparations to victims.

II.7.1.2. The suspensive effect of an appeal against an order for reparations

The ICC reparation regime is not clear as regards the suspensive effect of an appeal against an order for reparations. Respecting the appeal against a decision of acquittal, conviction or sentence, ICC Statute is very clear inasmuch as it expressly provides that 'execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings'. The issue concerning suspensive effect of an appeal against an order for reparations was discussed in the *Lubanga* case before the Appeals Chamber. The question was of whether an order for reparation should be automatically suspended by the sole fact of being appealed or whether the appealing party might request that the appeal have suspensive effect. In addition one may wonder whether a convicted person's appeal against the conviction could suspend an order for reparation. These issues lead us to discuss the legal gap as regards suspensive effect of appeals against orders for reparations (A) and the impact of an appeal against the conviction on reparation orders (B).

A. The legal gap as regards suspensive effect of an appeal against reparation orders

The possibility to appeal against an order for reparations is provided by Art.82(3) where its stipulates that 'A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for

[1175] *Ibid*, para.70

[1176] It bears remembering that the decision of referring all of individual application for reparations to the TFV may be the consequence of the Trial Chamber's decision of not issuing an order for reparations against the convicted person due to his indigence.

reparations, as provided in the Rules of Procedure and Evidence. In his appeals against the *2012 Decision on Principles and Procedures*, Mr Lubanga, the convicted person, requested suspensive effect of his appeal on the impugned Decision. He sought suspension of the Impugned Decision pursuant to article 82 (3) of the Statute and rule 156 (5) of the RPE of the ICC. Article 82(3) provides that 'An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence'. Concerning Rule 156(5) of the RPE of the ICC, it stipulates that 'When filing the appeal, the party appealing may request that the appeal have suspensive effect in accordance with article 82, paragraph 3'. Notwithstanding, these provisions are not clear on the issue as they seem to be.

First of all, Rule 156(5) of the RPE of the ICC does arguably not concern an order for reparations. The rule is found in Section III entitled 'Appeals against other decisions' whilst appeal against an order for reparations is dealt with by Rules 150 – 153 of the RPE found in Section II entitled 'Appeals against convictions, acquittals, sentences and reparations orders'. It is quite clear that the RPE does not consider an order for reparations as other decisions provided for by Rule 156(5). Consequently, Rule 156(5) does not regulate suspensive effect in relation to appeals against orders for reparations insofar as it deals with appeals regulated by rules 154 and 155. It cannot serve as the legal basis to argue that the party appealing an order for reparations might request that the appeal have suspensive otherwise the order is executable despite the appeal. This may lead to investigate whether Rule 150 (4) of the RPE could be referred to as regulating the suspensive effect of an appeal against an order for reparations According to Rule 150(4) where an appeal against an order for reparation is not filed in due time the order shall become final. It can be inferred from the context of Rule 150(4) that an order for reparations is not final at the right time of its issuance and during the time limits provided for appeal and after an appeal filed in due time and form. Yet, one may wonder whether this interpretation can lead to arguing that during the period allowed for appeal and for the duration of the appeal proceedings an order for reparations shall automatically be suspended so that there is no need for the appealing party to request the suspensive effect of his or her appeal. The answer to the question needs to understand the meaning of 'final order' within the context of the RPE. Within the context of the RPE the concept of 'final order' should not be linked to the suspension effect of an appeal against an order for reparations. As the Appeal Chamber of the ICC held:

> [T]here is a difference between an order for reparations becoming final and the suspension of an order for reparations pending the outcome of an appeal against it. An order being final provides legal certainty in that it is known that it will not be the subject of a further appeal (and therefore will not potentially be reversed or amended). Suspensive effect, on the other hand means that the order for reparations cannot be enforced during the period of its

> suspension. As the order for reparations is under appeal, there remains the possibility that it will be reversed or amended [footnotes omitted].[1177]

This reasoning is to be endorsed; it excludes any idea or assumption according to which Rule 150(4) of the RPE an appeal against an order for reparations shall render the order not final and automatically suspended. If the context of Rule 150(4) of the RPE the appeal had automatically suspensive effect, Rule 154(3) could not refer to appeals under articles 82 (1) (a), (b) or (c) of the ICC Statute since the rule makes applicable Rule 150(4) to those appeals as well. Actually, the appeals under Art.82 (1) (a); (b) or (c) of the Statute do not produce suspensive effect pursuant to Art.82 (3) which provides that 'An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence'. In case the context of Rule 150(4) of the RPE the appeal automatically should have suspensive effect, Rule 154(3) will be in conflict with Art.82 (1) – (3) of the Statute which excludes the idea of automatic suspensive effect in regard with the decisions provided for by Rule 154(1) and (2).[1178] This analysis demonstrates that Rule 150(4) of the RPE does not intend to regulate the suspensive effect of an appeal against an order for reparations.

Going back to Art.82(3) of the ICC Statute, this article appears confusing regarding the suspensive effect of an appeal against on order for reparations for it open room for two opposite interpretations. Article 82 of the Statute reads as follows:

> [1] Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) A decision with respect to jurisdiction or admissibility; (b) A decision granting or denying release of the person being investigated or prosecuted; (c) A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3; (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. [2] A decision of the Pre-Trial Chamber under article 57, paragraph 3 (d), may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis. [3] *An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence*. [4] *A legal representative of the victims, the convicted person or a bona fide owner of property*

[1177] ICC, *Prosecutor v Lubanga,* Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para.79

[1178] Rule 154 of the RPE of the ICC stipulates that '[1]. An appeal may be filed under article 81, paragraph 3 (c) (ii), or article 82, paragraph 1 (a) or (b), not later than five days from the date upon which the party filing the appeal is notified of the decision. [2]. An appeal may be filed under article 82, paragraph 1 (c), not later than two days from the date upon which the party filing the appeal is notified of the decision. [3*]. Rule 150, sub-rules 3 and 4, shall apply to appeals filed under sub-rules 1 and 2 of this rule* [emphasis added*]'.* Rule 150, sub-rules 3 and 4 provides that '[3]The appeal shall be filed with the Registrar. [4] If an appeal is not filed as set out in sub-rules 1 to 3, the decision, the sentence or the reparation order of the Trial Chamber *shall become final* [emphasis added]'.

> *adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence* [emphasis added].

On one hand, one may argue that according to a textual interpretation of Art.82(3), an order for reparations provided for in subsequent paragraph 4 is not included in the *other decisions* against which an appeal requires a specific request to produce a suspensive effect. Actually, one may assume that whilst *an order for reparation* implies one of the *other decisions* provided for by Art.82 of the Statute - by opposition to decision of acquittal or conviction or against sentence provided for by Art.81 of the Statute – it is not concerned by the suspensive effect evoked by paragraph 3 of the Art.82. The fact that the 'appeal against an order for reparations' is provided for in the last paragraph (4) - after paragraph 3 - may have its particular meaning. It can mean that paragraph 3 applies only to paragraphs 1 and 2 but does not to paragraph 4. Otherwise paragraph 3, in order to be common to all of the rest of paragraphs included in Art.82 should be the last (as a conclusion) or the first (as an introduction) paragraph of the article 82. Consequently, one may infer from the textual interpretation of Art.82(3) and (4) of the ICC Statute that, unlike other decisions provided for by Art.82(1) and (2) of the Statute, the context of the article contemplates an automatic suspensive effect of an appeal provided for in Art.82(4) of the Statute. Unfortunately, there is no provision under the RPE of the ICC which may espouse such an interpretation. The RPE seems to regulate appeals against convictions, acquittals, sentences and reparation orders in the same way, but yet shows a legal gap in respect of suspensive effect of an appeal against reparation orders.

In the *Lubanga* case, the Appeal Chamber faced the foregoing dilemma and made a convenient interpretation which allowed it to grant a request for suspensive effect. The Appeals Chamber reasoned as follows:

> The Appeals Chamber notes that article 82 (4) of the Statute, which provides for appeals against orders for reparations, appears within the same article of the Statute as article 82 (3), which gives the Appeals Chamber power to order suspensive effect 'in accordance with the Rules of Procedure and Evidence'. The Rules of Procedure and Evidence contain, in rule 156 (5), a provision on requests for suspensive effect. This provision, however, deals with appeals regulated by rules 154 and 155 of the Rules of Procedure and Evidence and is as such not applicable to appeals under article 82(4) of the Statute, which are regulated by rules 150 to 153 of the Rules of Procedure and Evidence. There is no other provision in the legal texts that specifically regulates suspensive effect in relation to appeals against orders for reparations, including article 81 (4) of the Statute. Therefore, because of its placement in article 82 of the Statute and the need for the Appeals Chamber to be able to order suspensive effect when an order for reparations is appealed, the Appeals Chamber considers that it has the power to grant a request for suspensive effect under article 82 (3) of the Statute and rule 156 (5) of the Rules of Procedure and Evidence when seized of such a request in relation to an appeal under article 82 (4) of the Statute. Accordingly, the legal basis for dealing with Mr

> Lubanga's request for suspensive effect is indeed article 82 (3) of the Statute [footnotes omitted].[1179]

The Appeals Chamber opted for a second interpretation of Art.82 (3) of the ICC Statute which excludes an automatic suspensive effect of an appeal against an order for reparations. Nevertheless, the Chamber did not found any provision under the RPE which endorsed such an interpretation. Indeed, the Chamber is aware that Rule 156(5) of the RPE cannot, in normal case, be applied to an appeal against an order for reparations. Consequently, despite that awareness, the Chamber forcefully married Art.82 (3) and Rule 156(3) of the RPE so that it could find a basis for dealing with Mr. Lubanga's request for suspensive effect.

In so doing, the Appeals Chamber determined that an appeal against an order for reparations shall not of itself have suspensive effect unless it orders so upon request. Previously, the Chamber had held that the decision on such a request is within its discretion.[1180] In other words, 'when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances'.[1181] The circumstances in which the Appeals Chamber has exercised its discretion to grant suspensive effect where there was appeal under Art.82 (3) have been summarised as follows:

> [T]he Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) 'would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant', (ii) would lead to consequences that 'would be very difficult to correct and may be irreversible', or (iii) 'could potentially defeat the purpose of the [...] appeal.[1182]

Having considered all of the foregoing factors in the *Lubanga* case the Appeals Chamber granted the request for suspensive effect with respect to the *2012 Decision establishing the principles and procedures*.

[1179] ICC, *Prosecutor v Lubanga, Appeals* Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14 December 2012, ICC-01/04-01/06-2953, para. 80.

[1180] *Ibid*, para.82 and the footnotes referred to

[1181] *Ibid*, para.81 and the footnotes referred to

[1182] *Ibid*., para.82 and the footnotes referred to

B. The effect of an appeal against a conviction on a reparation order

Since an order for reparations is based on conviction, one may wonder whether a potential appeal or an appeal against the decision of conviction still pending before the Appeals Chamber may suspend the enforcement of an order for reparations. The ICC regime is total silent on the issue. Arguably, an appeal against the decision of conviction should not have suspensive effect on an order for reparations thought the latter stems from the former. Nevertheless, such an appeal could constitute a circumstance in which the Appeals Chamber might grant a request for suspensive effect with respect to an order for reparations.

The issue was evoked in the *Lubanga* case before the Appeal Chamber. Some submissions argued that 'an appeal against the conviction would directly affect the implementation of an order for reparations because of the principle of individual criminal responsibility' for, they went on to explain, '[o]nce granted, reparations would hardly be reversible should the conviction be overturned'.[1183] The Appeal Chamber was asked to clarify this issue[1184] and it noted that:

> [G]iven that Mr. Lubanga has also appealed the Conviction Decision, an order for reparations could not, in any event, have been executed, unless and until Mr. Lubanga's conviction had been confirmed by the Appeals Chamber. This is because of article 81 (4) of the Statute, which expressly provides that: '[...] execution of the decision [of conviction] [...] shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings'. Given that an order for reparations depends upon there having been a conviction, if the decision on conviction cannot be executed unless and until it is confirmed on appeal, it follows that an order for reparations also cannot be executed until that time [footnotes omitted].[1185]

The Appeal Chamber's findings are logical and plausible as regards the discussed issue. Arguably, subject to the protective measure contemplated by Art.75(4) of the ICC Statute, the Court should not request States Parties to give effect to an order for reparations pursuant to Art.75(5) of the Statute unless the decision on conviction is final. One may assume that an order for reparations although final pursuant to Rule 150(4) of the RPE of the ICC could be suspended upon request by the Appeal Chamber where it is seized with an appeal against a decision of conviction. Regarding the final character of an order for reparations against a convicted person, it should result from the final decision of conviction for the latter constitutes the ground on which stands the former. Besides, it is worth noting here that the *final character* of an order for reparations has been

[1183] *Ibid*, para.48 and the footnotes referred to

[1184] *Idem*

[1185] *Ibid*, para.86

established by national laws established in compliance with ICC Statute as a pre-requisite to qualify the decision for enforcement.[1186]

II.7.2. Other possible legal remedies against an order for reparations

Besides the appeal against an order for reparations, one may wonder whether such an order may be subject to other legal remedies such as for example *revision* as well as the decision on conviction or sentence. In the similar line, there may be a question of potential *requests for interpretation or rectification* of a decision or an order for reparations. As already noted the ICC reparation regime is silent on these issues

With respects to *revision* of an order for reparations, the purpose of revision of a judicial decision should justify the possibility of an order for reparations to be subject to revision before the ICC. On criminal ground, the requirements of revision are, *inter alia*, new evidence discovered after final judgement. The new evidence will be admissible on conditions that (i) it was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) it is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict'. The new evidence can likewise be the fact that it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified.[1187] These requirements should also apply on an order for reparations since the purpose of the revision is to avoid obvious injustice. But more importantly, one may assume that in case of a successful revision against the decision on conviction, an order for reparations has also to be subject to revision. In this case a decision of acquittal will be considered as new evidence that an order for reparations should not have issued against the former convicted person. In addition, the successful revision of conviction reverse the previous decision of conviction on which was based an order for reparations. Consequently, in case

[1186] For more details on the pre-conditions established by national legislations, including the final character, for enforcement of an order for reparations see Chapter three of Part two of this dissertation (pp.327ff).

[1187] Art. 84(1) of the ICC Statute (Revision of conviction or sentence) provides that ' [1]The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office'.

of acquittal resulting from the revision should lead to revision of an order for reparations issued against the acquitted person. This argument might also apply where an order for reparations had become final pursuant to Rule 150(4) of the RPE of the ICC before a decision of acquittal was issued by the Appeals Chamber seized by an appeal against conviction.

As for the potential requests for *rectification or interpretation* of an order for reparations, one may ask what will happen where there are some ambiguities in an order for reparation which may be an impediment to its implementation. Indeed, the ingenuity of judges in performing their hard task of drafting an order for reparations may not completely eliminate the risk of difficulties that may occur particularly at the phase of its implementation. This raises the question of interpretation or rectification of an order for reparations and the Statute and the RPE are silent about it. Rule 219 of the RPE of the ICC (Non-modification of orders for reparation) prohibits the modification of orders for reparation by national authorities.[1188] This leads to argue that the Chamber which issued the concerned order, but not necessary the same judges, may admit such requests and rectify or interpret its decision on reparations. This position complies with the *principle of congruence* which is generally applied in administrative and legislative field. The principle requires that an act be amended by another act with the same nature and level. In other words, an act is to be rectified or interpreted by another act of the same author. The authentic interpretation of an act is one made by the author of the act. In the present instance, the Chamber, not necessary the same judge(s), should have competence of interpretation of rectification of an order for reparations.

Altogether, one may assume that beside the appeal provided for by the ICC regime, the admissibility of other possible remedies against an order for reparations will be dealt with case by case by the Court. Moreover, since remedies against an order for reparations fall under procedural issues the Court may, where appropriate, apply Art.51 (3) of the ICC Statute which provides that, 'in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties'. In the context of this article, where the Court faces issues related to a request for revision, interpretation or rectification, it should establish provisional rules to be applied in dealing with such issues.

[1188] Even though this interdiction is addressed to national authorities, it is arguable that it can also apply to TFV which, as it will be observed in Chapter three of Part two of this study, intervene in implementing orders for reparations.

However, the Court has also the possibility of dealing with those issues on a case by case basis through its jurisprudence.

CONCLUSION

The procedural system set up by the ICC reparation regime appears as unique and innovative for, besides a victim request, it contemplates the possibility of the Court to trigger reparations proceedings and in some circumstances order awards for reparations for unidentified victims. The system establishes the principle of victims to participate in proceedings with view to claim reparations. However, the effectiveness of the system will depend mainly on the ingenuity of judges who are called to interpret and implement different provisions which seem to draw from and combine, at some extend, the practice of both civil law and common law. Therefore, one may expect that 'the fairness and effectiveness of the ICC reparation regime will depend much on the extent to which the Court will be able to translate into international practice concepts originally developed in the context of domestic legal procedure'.[1189]

After investigations, it is observable that the ICC reparation regime, as a victim-centred system, establishes mechanisms that facilitate victims to access to justice before the ICC for the Registry has to play an active role in facilitating and assisting them to apply for reparations. It has been observed how the Statute, RPE, Regulations of the Court and the Regulations of the Registry provide for the combination of all possible means of communication, privileging the electronic media, in informing and notifying victims about reparation proceedings. In this respect, it has been demonstrated how under the ICC reparation regime the Registry is required to facilitate victims in filling their claims for reparations. The assistance from the Registry could include legal assistance to victims who are not yet provided with legal representative.

Reparation proceedings mainly conceived as a post-conviction proceedings can dispel, at some extend, the feared risk of violation of the rights of an accused person. Moreover, one may note that both the reparation proceedings triggered by a victim's request and those triggered by the Court on its own motion finally converge to the same goal: victims have to request for reparations in both cases.[1190] Nevertheless, the unique system which allows the Court to award reparations to victims who did not applied for remains questionable in terms of a fair trial. It has been noted that the

[1189] Bottigliero, I., *op. cit*., p. 40.

[1190] Compare Rule 94 with Rule 95 of the RPE of the ICC.

representation of unidentified victims by the OPCV is still controversial according to the early case law of the Court. In this respect, the Court should harmonize its case law in order that the unidentified victims might be fully represented by the OPCV in reparation proceedings with the right to appeal. In addition, it is noticeable that the system needs to be developed particularly in regards with the administration of evidence in reparations proceedings as a crucial stage of adjudicating of liability for reparations. In this respect, the ICC procedural system is very embryonic and needs to be shaped and developed on a case by case basis. Nevertheless, where appropriate, the Court has power to draw up provisional Rules to be applied until adopted by the ASP pursuant to Art 51(3) of the ICC Statute. Finally, one may agree that issuing an order for reparation is one thing and carrying it out is another thing. For this reason the subsequent chapter will investigate whether there is an efficient legal framework for the implementation of an order for reparation.

CHAPTER THREE: THE IMPLEMENTATION OF REPARATION ORDERS AND ASSISTANCE TO VICTIMS

INTRODUCTION

Victims' right to reparations implies that the implementation or enforcement of reparations orders should in itself be effective. For an order for reparations to be effective it needs to be enforceable.[1191] The enforcement of reparations orders is a novel topic in international criminal law as well as the competence of the ICC to issue such orders. Whilst the enforcement of the sentence of imprisonment under the ICC Statute has drawn attention of a number of commentators,[1192] the implementation of reparation orders has not. International law is unfortunately also laconic on this crucial issue. The international practice relating to enforcement of decisions taken by other international tribunals, such as the International Court of Justice and regional court of human rights, is of no help for such decisions are not issued against individuals (a convicted person) but against States. Whereas doctrine and international law shows void in respect to the implementation of reparation orders issued in the context of individual responsibility, there is no case law of the ICC, at the time of writing, which should constitute the object of the analysis in this chapter.

The ICC Statute simply provides that a state party shall give effect to a decision on reparations to victim as it shall give effect to fines and forfeiture orders.[1193] Are the legal framework for and the practice of the implementation of fines and forfeiture orders developed under the ICC regime so as they may help in analyzing issues relating to enforcement of reparation order? If yes, may all the aspects of enforcement of fines and forfeiture orders be applied *mutatis mutandis* to the enforcement of reparation orders? These questions require a close examination in this dissertation. Consequently, this chapter intends to examine whether the ICC regime offer an appropriate framework for the enforcement of reparation orders. In this regard, one may wonder to what extent reparation orders made against convicted persons 'will yield substantial and concrete results'?[1194]

[1191] Redress, 2006, Enforcement of Awards for Victims of Torture and Other International Crimes, p.6 [Online] Available at: http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf. Accessed 24 January 2013

[1192] See for example Ba Amady, 2010. L'effet et l'exécution des décisions internationales. In : Cours Judiciaires Francophones (AHJUCAF), ed, 2010. Internationalisation du droit, internationalisation de la justice. 3ème Congrès, pp. 37-59, [Online] available at: <http://www.ahjucaf.org/IMG/pdf/Internationalisation_du_droit.pdf>, accessed 4th December 2012; see also Abtahi and Arrigg Koh, *op. cit*.

[1193] See Art.75 (5) of the ICC Statute.

[1194] Boven, T.V., 1999, *op. cit*., p. 88.

Respecting the implementation of reparation orders, one may ask by whom and how shall the reparation orders be enforced since the Court is not vested with executive power to enforce its own decisions? In this regard, Art.75 (5) of the ICC Statute provides that States parties shall give the same effect to a decision under this article as to the provisions of Art.109 which pertain to enforcement of fines and forfeiture. Besides states, which shall intervene in implementing reparations orders, the role of the TFV at the stage of execution of the decision on reparations requires also a close attention. In fact, it is worth remembering that Art 75(2) contemplates the possibility of the Court to order an award for reparations to be made through the TFV. The paragraphs 2 and 5 of Art.75 of the ICC Statute already demonstrate that the implementation of reparation orders may call upon many stakeholders. Therefore, in section one this chapter deals with issue regarding different stakeholders and their role in implementing reparation orders (III.1).

In addition, assistance to victims of crimes under the jurisdiction of the ICC will also draw our attention. Indeed, assistance to victims constitutes another major aspect of victims' redress. It will be observed that assistance to victims may be a response to urgent needs of victims of crimes under the jurisdiction of the ICC. The mandate to provide assistance is entrusted to the TFV and does not depend on the outcome of judicial proceedings. The second section of this chapter will deal with the second mandate of the TFV which is to provide assistance to victims and their families (III.2). In order to understand the degree of effectiveness of this mandate, resources allocated to assist the victims will be identified and the scope of the competence of the Board of Directors of the TFV unpacked. In this regard, it will be good to note how the TFV, through the Board of Directors has competence, but not exclusively, in determining activities and projects to assist victims. The non-exclusivity of its competence results from the role which the Court has to play in initiating such activities or projects. This will require a plausible justification of the involvement of the court in the mandate of the TFV.

III.1.Different stakeholders and their role in implementing reparation orders

Besides a convicted person against whom a reparation order may be issued and upon whom principally lies the obligation to comply with such an order, there are others stakeholder required by the ICC reparation regime to intervene in such a process. These are the Courts, States and the TFV. Before analysing the role to be played by each of them, let us take a look at the foreseeable scenario of voluntary compliance under the ICC reparation regime.

III.1.1. The foreseeable scenario of voluntary compliance with a reparation order by a sentenced person

The ICC Statute does not explicitly provide for voluntary compliance with a reparation order by a convicted person. Does the silence of the Statute infer that voluntary compliance might not pertain to reparation orders? Arguably, an enforcement of a reparation order should be sought where there is no voluntary compliance with the order by a sentenced person. Although the ICC reparation regime does provide explicitly for the voluntary compliance, this scenario should not be excluded from the context of the ICC Statute. A spontaneous execution of a reparation order may be rare but should be foreseeable and arguably a precondition to the enforcement of a decision on reparations for the victims.

First of all, one may consider Art.110 (4) (b) of Statute which implicitly provides for *voluntary assistance* of a sentenced person in enabling the enforcement of orders of the Court. The voluntary assistance could for example include locating assets subject to orders for reparations. Such voluntary assistance is considered as one of the factors which could lead the Court to review and reduce a sentence.[1195] This mechanism should encourage a sentenced person to cooperate with the Court. Such cooperation or assistance should reduce the cost of enforcement (seeking cooperation with States Parties or non-parties in monitoring financial situation of the sentenced person[1196]). It is reasonable to infer from the foregoing observations that in the context of the ICC statute, it is possible to have a convicted person voluntarily comply with reparation orders by spontaneously executing the order. Another reason that leads us to uphold this argument is the similarities between enforcement of fines and reparation orders. According to Art.75 (5) and Art.109 of the ICC Statute, reparation orders are to be enforced by the States Parties in the same way as fines are.[1197] In this regard, it is worth pointing out that, pursuant to Rule 146(5) of the REP States should not intervene in enforcing fines unless the convicted person fails to pay the fine imposed within a fixed period. Likewise, it can be inferred from these provisions that the

[1195] Art. 110(4)(b) of the ICC Statute reads as follows: 'The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims'.

[1196] Regulation 117 of the RC provides for an on-going monitoring of financial situation of a sentenced person, even following completion of a sentence of imprisonment, in order to enforce fines, forfeiture orders or reparation orders.

[1197] According to Art.75(5) of the ICC Statute a State party shall give effect to a decision regarding reparations to victim as if the provisions of article 109, which provides for *enforcement of fines and forfeiture measures*, were applicable to reparation measures. In this respect, see also Rule 217 of the RPE of the ICC (*Cooperation and measures for enforcement of fines, forfeiture or reparation orders*). Procedures of enforcement of reparation orders are analysed in the subsequent section.

enforcement of reparation orders should only be sought in case the convicted person has not voluntarily carried out the reparation order.

Consequently, one may argue that before directing its request to states to assist or cooperate in carrying out reparation orders the Presidency of the Court should first ask the sentenced person to comply with the reparation order. In other words, states might be requested to enforce an order for reparation only in case of non-execution. However, one may argue that in most cases a sentenced person might be in custody so that he or she could be in material impossibility to execute the decision of the Court. In that case, States on whose territory his or her assets or property are located should intervene in enforcing an order for reparations even in the case where a sentenced person is willing to execute the order by him or herself. In the latter scenario the sentenced person may provide his voluntary assistance in enabling the enforcement of an order for reparations for example by providing assistance in locating his/her property or assets.

In the context of the Art.110 (4) (b) of the Statute, the voluntary compliance should be considered as a factor of possible review and reduction of a sentence. In fact, the voluntary compliance with reparation orders is to be seen as an act of repentance by a convicted person. This may also spare both the Court and national authorities from the risk of costly enforcement procedures. The foreseeable scenario of voluntary compliance of a sentenced person with a reparation order should lead the RPE to fix a term within which it should take place. The Court should not proceed to enforce an order unless there is no voluntary compliance at the expiration of the fixed term. Nonetheless, before the legal gap showed by the RPE of the ICC one may argue that it is within the court's discretion to stipulate the time limit for the voluntary compliance.

III.1.2. The role of the Court in implementing its reparation orders

Under the ICC reparation regime, it is observable that when the Court has issued a final reparation order against a convicted person,[1198] it automatically remains seized by enforcement procedure. The Presidency of the Court has to play a crucial role in the enforcement of reparation orders. Indeed, as it will be demonstrated in subsequent paragraph of this section, cooperation and assistance between the Court and States is required at this stage of implementing victim's rights. In this regard, the Court has been given a mandate to establish an enforcement unit within the

[1198] Concerning the question of when a reparation order is final see at pp.313&334.

Presidency to assist in the exercise of its functions in enforcement of reparation orders among others.[1199]

Regarding the crucial role of the Court in enforcement procedure it may particularly be referred to Rule 217 of the RPE which reads as follow 'For the enforcement of [fines, forfeiture] or reparation orders, the Presidency *shall*, as appropriate, *seek cooperation and measures for enforcement* in accordance with Part 9 [of the ICC Statute], as well as *transmit copies of relevant orders* to any State with which the sentenced person appears to have a *direct connection* by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection [emphasis added]'. In the same vein, it is relevant to consider Rule 222 of the RPE which stipulates that 'The Presidency *shall assist* the State in the enforcement of [fines, forfeiture] or reparation orders, *as requested*, with the service of any relevant notification on the sentenced person or any other relevant persons, or the carrying out of any other measures necessary for the enforcement of the order under the procedure of the national law of the enforcement State'. This shows that at the phase of the implementation of an order for reparations the Court will play a crucial role in two ways for it shall request the assistance of States and the latter may in turn request the assistance of the Court so that the implementation becomes effective.

From the provisions mentioned above it can be inferred that the Court has to show diligence in the enforcement procedure by seeking cooperation and taking measures for enforcement, transmitting copies of the orders to interested States and by assisting those States in their enforcement. The cooperation referred to is between the Court and the State parties or not parties to the ICC Statute provided for in Part 9 of the Statute entitled *International cooperation and judicial assistance*. For the purpose of enforcement of a reparation order, the Court should first identify a relevant State that could enforce it or be concerned by measures for enforcement. One may assume that victims or their representative should help the Court to identify the State which may give effect to a reparation order. The State that will carry out the enforcement or that is concerned with measures for enforcement could be one in direct connection with a convicted person or a victim. The direct connection could exist by reason of nationality of the sentenced person or the victim, his or her domicile or habitual residence or the location of his or her assets or property.

[1199] Regulation 113(1) of the RC provides that 'The Presidency shall establish an enforcement unit within the Presidency to assist it in the exercise of its functions under Part 10 of the Statute, in particular: (a) The supervision of enforcement of sentences and conditions of imprisonment; and (b) The enforcement of fines, forfeiture orders and reparation orders'.

In addition, in exercising its due diligence during the enforcement procedure, the court may also seek information on location of the sentenced person who has completely served or is about to completely serve his or her sentence.[1200] In the same line, the Presidency of the Court is required to ensure the ongoing monitoring of financial situation of the sentenced person, even after the completion of the sentence of imprisonment in order to enforce reparation orders.[1201]

Furthermore, whilst the Court may request States to enforce or to cooperate in enforcing its reparation orders,[1202] it could in turn be requested by the States to assist them in the process of enforcement of such an order. This assistance may consist of providing notification to any interested person or other relevant services relating to any procedural act required by national laws which govern the enforcement of an order for reparations at national level.[1203] This demonstrates how the role of the Court in implementing the victims' right to reparations does not end with the issuance of a reparation order but the Court has also the critical role in the process of their enforcement. This role of the Court will also be pointed out when analyzing the role of the TFV in carrying out reparation orders. It is worth reminding ourselves that the success of enforcement procedure will depend not only on the diligence of the Court but also on the willing cooperation of the requested States concerned with the enforcement of such orders.

[1200] Rule 212 of the RPE of the ICC (Information on location of the person for enforcement of fines, forfeitures or reparation measures) stipulates that 'For the purpose of enforcement of fines and forfeiture measures and of reparation measures ordered by the Court, the Presidency may, at any time or at least 30 days before the scheduled completion of the sentence served by the sentenced person, request the state of enforcement to transmit to it the relevant information concerning the intention of that State to authorize the person to remain in its territory or the location where it intends to transfer the person'.

[1201] Regulation 117 of the RC (Ongoing monitoring of financial situation of the sentenced person) stipulates that 'The Presidency shall, if necessary, and with the assistance of the Registrar as appropriate, monitor the financial situation of the sentenced person on an ongoing basis, even following completion of a sentence of imprisonment, in order to enforce fines, forfeiture orders or reparation orders, and may, *inter alia*: (a) Request relevant information, expert opinions or reports, where necessary by way of a request for cooperation, and, if appropriate, on a periodic basis; (b) Contact, where appropriate in the manner described in rule 211, paragraph 1 (c), the sentenced person and his or her counsel in order to inquire into the financial situation of the sentenced person; (c) Ask for observations from the Prosecutor, victims and legal representatives of victims'.

[1202] Issues relating to the obligation upon States to cooperate with the Court for enforcement of reparation orders are discussed in paragraph 3 (pp.324ff)

[1203] Regarding the law governing the procedure of enforcement of reparation orders see Art.75 (5) and Art. 10 9(1) of the ICC Statute. Issues which may arise from national procedure of the enforcement are discussed in the subsequent paragraph 3 (pp.333ff).

III.1.3. The scope of the States' obligation to give effect to reparation orders as per Art. 75(5) of the ICC Statute

Where a convicted person does not voluntarily comply with an order for reparations, the Court may request States to enforce it. The Court is not endowed with a coercive mechanism enabling it to implement its decisions on the territory of the concerned States. The ICC Statute imposes the obligation upon State parties to give effect to reparation orders in the same way as they are to enforce fines and forfeiture measures. The Statute does not impose, and cannot impose, the obligation upon States which are not Parties to the statute, but some provisions contemplate their cooperation with the Court in order to enforce its decisions. Therefore, the scope of the obligation imposed upon State parties requires being analysed (III.1.3.1.) as well as the legal framework for third states to execute an order for reparations (III.1.3.2.) then the degree of effectiveness of the enforcement of reparation orders may be understood. In the same vein, it is worthwhile to discuss enforcement challenges which may arise at national level and how they will be dealt with (III.1.3.3.), before discussing the destination of property or proceeds of the sale of property (III.1.3.4.) as a result of enforcement procedure.

III.1.3.1. The obligation imposed upon *State parties* to give effect to reparation orders

According to Art.75(5) of the ICC Statute, States parties shall give effect to reparation orders as they shall for fines and forfeiture measures ordered by the Court as penalty.[1204] Fines and forfeiture have a common denominator which is their financial character. The ICC Statute lays down a very limited number of provisions concerning enforcement of fines and forfeitures which should help to understand the efficiency of enforcement of reparation orders. What can be observed at first glance is that Art.109 of the Statute imposes a general obligation upon all States parties to give effect to the Court's orders, without prejudicing the rights of *bona fide* third parties. Moreover, the provision provides the State parties with an alternative way of enforcing forfeitures which is taking measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited where they are unable to give effect to the order. It also indicates the destination of all

[1204] According to Art.77(2)(a) and (b) of the ICC Statute 'in addition to imprisonment, the ICC is authorised to require convicted persons to pay fines and to order the forfeiture of proceeds, property and assets derived from the crime being prosecuted' (King, F.P. and La Rosa, A.M., 1999. Penalties Under the ICC Statute, in F. Lattanzi and W.A. Schabas, eds., 1999. *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, Fagnano Alto: il Sirente, p. 325). Learning from the *ad hoc* tribunals, King and La Rosa do not hide their pessimism in regard with the enforcement of these kinds of penalties. They note that 'all but one of the defendants currently being prosecuted before the ICTY have established their indigence [and instead of] getting any money from them, the ICTY is paying their indigence'. Hence the authors would conclude that '[i]n practical terms […] international courts can be expected to have difficulty enforcing such penalties' *(Ibid.*, p. 326).

proceeds resulting from the enforcement of fines and forfeitures.[1205] The RPE does not give a lot of details on the issue regarding enforcement of reparation orders as some commentators expected before its adoption.[1206]

The fact that reparation orders are to be enforced by States raises the question of whether such orders are unconditionally and directly binding on the national jurisdictions. In other words, shall reparation orders directly be recognised and enforced by States parties on their territory? This requires us to proceed by discussing the issue of recognition and the enforcement of reparation orders at national level in the context of the ICC Statute (A). Subsequently, it is worthwhile to interrogate national legislations and see whether they comply with the Statute in regards to the enforcement of reparation orders (B).

A. The recognition and enforcement of reparation orders by State parties

The ICC Statute imposes an obligation upon the States parties to give effect to ('faire executer' in French version) reparation orders in accordance with the procedure of their national law.[1207] The first implication of this obligation which may retain our attention is the recognition of reparations decisions issued by the Court. By considering the context of the ICC Statute it is observable that it implicitly provides for direct recognition. However, it allows States to take further measures relating to enforcement procedure. This requires us to analyse the implications of the option of referring to the procedure of domestic law instead of harmonisation of procedures of enforcement of reparation orders.

Concerning the recognition of reparation orders by States parties, one may wonder whether the decision made by the ICC on reparations should at national level be subject to any act of recognition or 'exequatur', which implies the verification of the competence of the court issuing the decision in case of a foreign judgement. The ICC Statute does not give an explicit answer to the question. However, it is arguable that there shall be automatic recognition of the ICC's final decisions by States parties. First of all, there is absence, in the ICC Statute, of the provision on general obligation regarding *recognition of judgements* issued by the ICC as it is found in 1998

[1205] Marchesi, A., 1999. The Enforcement of Sentences of the International Criminal Court, in the Strengthening of International Criminal Law. In: F. Lattanzi. and W.A Schabas, eds., 1999. *Essays on the Rome Statute of the International Criminal Court*, Vol.1, Fagnano Alto: il Sirente, pp.444-445

[1206] See for example Marchesi (*Idem*)

[1207] See Art.75(5) and 109 of the ICC Statute

Draft Statute of the ICC. In the 1998 Draft, it was envisaged that States parties should undertake to recognise the judgment of the ICC.[1208] This idea does not appear in the ICC Statute. The fact that the idea was dropped should be understood as there being an automatic recognition of the ICC judgement by virtue of becoming party to the ICC Statute. Secondly, one may argue that, contrary to the regime of 'double consent' adopted by the ICC Statute for the sentence of imprisonment,[1209] States parties are automatically bound by the ICC reparation orders at their ratification of the Statute as they are for fine and forfeitures. In this context, it is worth noting the bounding wording of Art.75 (5) of the Statute which conveys the idea of State parties to be automatically bound by the decisions of the Court. Thirdly, the principle of immutability of reparation orders at national level provided by Rule 219 of the RPE needs to be considered in this respect.[1210] That should be understood to mean that the final character of a reparation order should prevent any State from reviewing it. Moreover, the Statute does not stipulate the enforcement to be carried out 'in accordance with national law' but refers to 'the procedure' of national law.[1211] This should confirm the application of the principle of immutability of reparation orders at domestic level. Also, one may consider that the order for reparations is issued on behalf of the international entity of which the executing State is no stranger.[1212] Therefore '[t]he effect of the order does not depend on any domestic law and the convicted person cannot escape from the obligation to make restitution and compensation on the grounds of any domestic legislation'.[1213]

Nevertheless, the genesis of Art.109 of the Statute could lead to arguing that, despite the automatic recognition and the obligation to execute, direct enforcement by States parties is not required. In this respect, one may note how the 1998 Draft Statute included Art. 93 entitled

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[1208] See Art.93 of the 1998 Draft Statute of the ICC.

[1209] Concerning the State's acceptance of a sentenced person, the principle is that States Parties are free to express their willing in general, and case by case when considering such a request by the Court (see Ba Amady, op. cit. p.51). Art.103(1) of the ICC Statute (Role of States in enforcement of sentences of imprisonment) provides that '[a] A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. [b] At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part. [c] A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation'. According to Rule 200(5) of the RPE 'the Court may enter bilateral arrangements with States with a view to establishing a framework for the acceptance of prisoners sentenced by the Court'.

[1210] Rule 219 of the RPE of the ICC (Non-modification of orders for reparation) provides that 'The Presidency shall, when transmitting copies of orders for reparations to States Parties […], inform them that, in giving effect to an order for reparations, the national authorities shall not modify the reparations specified by the Court, the scope or the extent of any damage, loss or injury determined by the Court or the principles stated in the order, and shall facilitate the enforcement of such order'.

[1211] Consider the language of Art.109 (1) of the ICC Statute which has to be read along with Art.75 (5) of the Statute.

[1212] See Ba Amady, *op. cit.*, p. 50.

[1213] Shelton, D., *op. cit.*, p. 23

'General obligation regarding recognition [and enforcement] of judgements'. With respect to the obligation regarding enforcement of judgements, Art.93 of the Draft, located in Part 10 'Enforcement', contained two alternative formulas as follows:

> States Parties [shall] [undertake to recognize] [[and to] *enforce directly on their territory*] [give effect to] the judgements of the Court [, in accordance with the provisions of this part]. [The judgements of the Court shall be binding on the national jurisdictions of every State Party as regards the criminal liability of the person convicted and the principles relating to compensation for damage caused to victims and the restitution of property acquired by the person convicted and other *forms of reparation ordered by the Court*, such as restitution, compensation and rehabilitation [emphasis added and footnotes omitted].

Remembering that the above provision does not appear in the ICC Statute, one can deduce from it that the original idea was to provide for an obligation upon State parties to *directly* enforce fine and forfeiture as well as reparation measures. However, the final text of the Statute leads us to argue that the idea was dropped. And according to Art.75(5) and 109(1) of the Statute, States Parties shall give effect to reparations orders issued by the Court under Art.75, without prejudice to the rights of *bona fide* third parties, and in accordance with the *procedure of their national law*. The final text of the Statute rejects the idea included in the 1998 Draft by which such orders of the Court should be enforceable directly. If the ICC Statute endorsed the idea of direct enforcement one should consider the option as 'soothing that presumably would have required the Court to develop its own procedural regime in this area'[1214] - concerning direct enforcement of reparation orders made by the ICC. In this respect, one may argue that the reference to *the procedures of national laws* implies that the question of execution of such orders is in a sense delegated to the national legal system'[1215] and 'States Parties are free in choosing their preferred enforcement technique under their national law'.[1216] Yet, since the Statute does not provide for the procedure of enforcement, States are supposed to take further actions in accordance with their national procedure.

B. Analysis of procedures of enforcement established by national laws in compliance with the ICC Statute

By subjecting the enforcement of reparation orders to 'the procedure of national law', the drafters of the ICC Statute were certainly aware of the diversity of procedures applied by domestic

[1214] Schabas, W.A., 2008, Article 109. In: O. Triffter, ed., 2008. *Commentary on the Rome Statute of the International Criminal Court, observers' Notes, Article by Article,* 2nd ed. München: Verlag C.H.Beck, pp.1679-1680.

[1215] *Idem*

[1216] Kress, C. and Sluiter, G., 2002. Fines and Forfeiture Orders. In: A. Cassese, P. Gaeta, and J.R.W.D. Jones, eds., 2002. *The Rome Statute of the International Criminal Court: A commentary*, Vol. I. New York: Oxford University Press, p. 1829.

laws. The context of the Statute implies the obligation of State parties to review and to harmonize their legislation to the Statute. Actually, Art.88 of the Statute entitled 'Availability of procedures under national law' imposes an obligation upon State parties to 'ensure that there are procedures available under their national law for *all of the forms* of cooperation [emphasis added]'.

Although Art.88 is located under Part 9 pertaining to cooperation and assistance with the Court whereas enforcement of order for reparations is found in Part 10 (Art.75 (5) and 109), it is worth noting that Rule 217 of the RPE which relates to enforcement of reparation orders stipulates that 'For the enforcement of fines, forfeiture or reparation orders, the Presidency shall, as appropriate, *seek cooperation and measures for enforcement in accordance with Part 9* [emphasis added]'. A parallel reading of Art.109 of the Statute – which applies to reparation orders - and Rule 217 brings us to argue that the object of Art.109 is as much an issue of judicial cooperation (found in Part 9) as it is of enforcement (found in Part 10). Further, Art.75 (4) allows the Court to seek cooperation and assistance under Art.93 (1) (found in Part 9) in order to give effect to an order for reparations to victims.[1217] Consequently, it should be clear that Art.88, despite its location in Part 9 of the ICC Statute pertains to the issue of enforcement of reparation orders. In other words, the provision should be interpreted as requiring State parties 'to provide for all necessary substantive and procedural rules so as to permit the implementation of the forms of co-operation with the Court'[1218] including enforcement of reparation orders. The context of the ICC regime requires State parties to review and to harmonize their legislation with the Statute in order to give effect to reparation orders. What are the procedures of enforcement of the ICC's reparation orders? Are they managed at national level so that they can comply with the ICC Statute? Do those procedures ensure efficiency in enforcing the reparation orders?

Since the ICC Statute refers to procedure of domestic law as regards the enforcement of reparation orders by States, it is worth analyzing some existing national legislations relating to the enforcement of reparation orders issued by the ICC. The objective is not to identify all of national laws already put in place in compliance with the ICC Statute, but to analyse the major tendencies

[1217] Art 75(4) of the ICC Statute reads as follows: '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'.

[1218] Rinoldi, D. and Parisi, N., 1999. International Co-operation and Judicial assistance Between the International Criminal Court and States Parties, in F. Lattanzi F. and W.A. Schabas (ed.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I, Fagnano Alto: il Sirente., p.373

which rise from some of them. A short comparative analysis of national laws set up in compliance with the ICC Statute demonstrates two tendencies:

- enforcement is confined to a national body vested with executive powers: The shortened procedure of enforcement; or
- enforcement requires the intervention of national Courts.

Before illustrating these two tendencies, it is worth noting at outset that many states have designated a specific authority responsible for the enforcement of sentences and interlocutor of the ICC (often the Department of Justice or the Ministry of Foreign Affairs).[1219] This complies with the requirements of the ICC Statute which formally provides for such designation in the context of requests for international cooperation and judicial assistance in Chapter 9 of the Statute.[1220]

1. Procedure of enforcement confined to national bodies vested with executive powers: The shortened procedure

Some national laws put in place in compliance with the ICC Statute implicitly recognise the direct effect of reparation orders issued by the ICC on the territory of a concerned State. National authorities of State parties are bound by the request of enforcement and the order itself. However, the enforcement of the order needs formal authorization from national executive authorities as per the domestic law relating to cooperation or assistance provided for by the ICC Statute. A case where such a formal authority is given by national executive authorities instead of judicial ones could be illustrated by the Kenyan, Ugandan and Italian legislations.[1221]

Kenya adopted the International crimes Act 2008 on 24th December 2008 (entered into force 1st January 2009) and Uganda followed by adopting the International Criminal Court Act 2010 adopted on 25th May 2010 (entered into force 25th June 2010). The analysis of both Kenyan and Ugandan laws shows that where the ICC requests for enforcement of an order for reparations, the Attorney General (in case of Kenya) or Minister responsible of Justice (in case of Uganda) shall give authority for the request to proceed. The national authorities shall give authority to proceed after they have reasonable ground to believe that neither the conviction in respect of which the order

[1219] See Ba Amady, *op. cit*., p.50.

[1220] See Art. 87(1)(a) of the ICC Statute which specifies that 'The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each state party upon ratification, acceptance, approval or accession'.

[1221] It is worth noting that at the time of writing Kenya and Uganda were ones of the situations pending before the ICC.

was imposed nor the order requiring reparations is subject to further appeal. Thereafter, they shall refer the request, for enforcement, to the appropriate agency – which defers from a court- which shall take such steps as are necessary to enforce the order as if it were issued by a national court.[1222]

The same system could also be found in Italy under the Law no 237 - adopted on 20th December 2012, entered into force on 8th January 2013 - regarding norms for compliance with the Statute establishing the International Criminal Court, as approved by the Senate on 19th September 2012. The law does not provide for registration before or examination by a national Court as a precondition of their enforcement. Rather, it provides that orders for reparations to victims issued by the ICC as per Art.75 of the ICC Statute are executed according to their *form* and content as they were issued by the Court of Appeal of Rome.[1223] This results into direct enforcement of the decision issued by the ICC. The Court of Appeal of Rome is vested with the power to decide on issues which may arise from the execution.[1224]

This process of the request for enforcement of an order for reparations from the ICC demonstrates that there is no intervention of national court as pre-condition to enforcement. This system of direct enforcement objectively shortens the process of enforcing reparations orders by confining it to national bodies vested with executive powers.

[1222] See Section 119 of the Kenyan International crimes Act 2008, Section 64 of the Ugandan International Criminal Court Act 2010. In *Uganda* an order for reparation shall be enforced according to section 129 of Trial on indictments Act. But the request from the ICC for enforcement of fine is processed pursuant to Section 65 of International Court Act 2010. The procedure in case of fine is almost similar to one for reparation-order enforcement. However, the procedure is different in respect of the enforcement of forfeiture orders which require the intervention of Registrar and High Court (See Art 66 of the International Criminal Court Act 2010). In case of a forfeiture order, the request of enforcement shall be referred by the Minister responsible of Justice to the Registrar. The latter shall file the original or a copy of the forfeiture order with the High Court and upon being filed with the High Court the order is carried out as a judgement of that Court. The procedure for enforcement of forfeiture orders is longer than the one for reparation order (compare Art 64, 65 and 66 of the ICC Act 2010). In Kenya, Section 119(2)(b) of the International Crimes Act stipulates that '(i) in a case where the order requires a monetary payment, take such steps as are necessary to enforce the order as if it were a judgment of the High Court in favour of the Republic in a civil matter for an amount equal to the amount of the monetary payment; (ii) in a case where the order requires the restitution of assets, property or other tangible items, take such steps as are necessary to enforce the order as if it were a writ of restitution awarded in favour of the Republic under section 178 of the Criminal Procedure Code; or (iii) in a case where the order requires another remedy, take such steps as are necessary to enforce the order as if it were enforceable under the High Court Rules'. The same system is adopted by New Zealand (See Art. 124 of New Zealand International Crimes and International Criminal Court Act 2000).

[1223] See Art. 21(6) of the Italian law no 237 regarding Norms for compliance with the Statute establishing the International Criminal Court (adopted on 20th December 2012, entered into force 8th January 2013).

[1224] *Ibid*, Art. 15(1); this Article refers to Art.665 of the code of criminal procedure which states that [s]*alvo diversa disposizione di legge, competente a conoscere dell'esecuzione di un provvedimento è il giudice che lo ha deliberato* (Unless otherwise provided by the law, the court which issued a decision has jurisdiction on matters which relate to its execution).

2. Authority from or registration before national courts as requisite procedures for enforcement of a reparation order

Other systems have been developed by national legislations where enforcement of an order for reparations issued by the ICC needs authority given by or registration made before national Courts. Under these systems, a designated national court has to be seized by a request from a designated person or institution in order to *authorize* enforcement of the decision from the ICC or to *register* a reparation order. The authorization from a national court or the registration is the pre-requisite to the enforcement by enforcement agencies. These systems seem to be longer than the previously discussed one where such an order is immediately enforced by executive authorities without the intervention of the domestic courts. Under these systems the request from the ICC for enforcement of an order for reparations has to first transit via diplomatic authorities, or other designated national authority before it is referred to the national courts.

The system of *authorization* can be found in France and Sweden. France adopted the Law no 2002-268 of 26th February 2002 relating to cooperation with the ICC which modifies and completes the code of criminal procedure by inserting provisions relating to among others, execution of reparations measures ordered by the ICC. According to the French code of criminal procedure reparations orders, fines and forfeitures orders issued by the ICC are enforced in the same way. Where a request for enforcement has been made by the ICC according to Art.87 of the ICC Statute (Requests for cooperation) the execution of fines and confiscation or decisions regarding reparations imposed is *authorized* by *Tribunal Correctionnel de Paris* (Criminal Court of Paris). The *Tribunal Correctionnel de Paris* acts upon request made by the Prosecutor of the Republic and is bound by the decision of the ICC.[1225] A similar procedure has been adopted by Swedish Cooperation with the International Criminal Court Act (2002:329). According to the Swedish law an application for enforcement of an order for reparation made by the ICC is to be considered by Svea Court of Appeal.[1226] However, there is a difference between the French and the Swedish procedures in that, as it will be demonstrated,[1227] the Svea Court of Appeal is not bound by an order for reparations made by the ICC whilst the *Tribunal Correctionnel de Paris* is.

[1225] See Art. 627-16 of the French Code of criminal procedure as modified and completed by Law no 2002-268 of 26th February 2002 on cooperation with the International Criminal court.

[1226] See Section 29 of the Swedish Cooperation with the International Criminal Court Act (2002:329).

[1227] See the subsequent point 3 (The risk of inconsistency of some preconditions of enforcement imposed at the national level, pp.333ff).

The system under which enforcement of an order for reparations requires the *registration* before national Courts could be illustrated by national laws put in place by the UK, Australia and Mauritius. In the UK for instance, according to the International Criminal Act 2001, an order for reparations needs to be registered by a court in England and Wales or Northern Ireland in order to be enforced.[1228] The request for enforcement is received by the secretary of State who shall appoint a person to act on behalf of the ICC for the purposes of enforcing an order for reparations.[1229] For the purpose of enforcement, an order so registered has the same force and effect as an order issued by a court of England and Wales or Northern Ireland. Moreover, the same powers are exercisable in relation to its enforcement and proceedings, for its enforcement may be taken in the same way as if the order were an order of a court in England and Wales or Northern Ireland. [1230] A similar procedure is found in Australia where a request from the ICC for enforcement of an order for reparations to victims is to be executed by the Attorney-General by authorising, by written notice in the statutory form, the Director of Public Prosecution to apply for the registration of such an order in an appropriate court.[1231] The procedure of enforcement under Australian law seems longer than the one provided for under the UK legislation because in the former legislation, notice of the registration must be published in a manner and within the period that the court considers appropriate.[1232] Like under the UK system, an order for reparations issued by the ICC and registered in an Australian court has effect, and may be enforced, as 'if it were an order for the payment of money made by the court at the time of the registration'.[1233] Mauritius has adopted a similar process. The request from the ICC for execution of an order for reparations is received by the Attorney General who lodges with the Clerk of a Court in Mauritius having jurisdiction or the Master and Registrar, [1234] as the case may be a certified copy of the document confirming the order.

[1228] See Section 49(3)(s1) of the U.K International Criminal Act 2001 (Chapter 17). See also the International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders)Regulations 2001.

[1229] See Regulation 3 of the UK International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001. If the secretary of State so directs, the person appointed shall apply to a court in England and Wales or Northern Ireland for registration of the Order for enforcement. On the application of the person so appointed the court shall register the Order as a precondition of enforcement. The registration of the Order under this regulation shall be cancelled if the Order is satisfied by other means (Regulation 4 of The International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001).

[1230] See Sect.49 (4) of the UK International Criminal Act 2001 (Chapter 17) and Regulation 5 of the UK International Criminal Court Act 2001 (Enforcement of Fines, Forfeiture and Reparation Orders) Regulations 2001.

[1231] See Section 151 (Assistance with enforcement of orders for reparation to victims) of the Australian International Criminal Court Act 2002 (Act No. 41 of 2002). See Brandy, H., Australia. 2005. In: C. Kreb, B. Broomhall, F. Lattanzi, V. Santori (eds), 2005. The Rome Statute and Domestic legal Orders. Vol. II, Fagnano Alto: il Sirente, pp.29-30

[1232] See Section 153(1) of the Australian International Criminal Court Act 2002 (Act No. 41 of 2002).

[1233] *Ibid*, Section 154(1)

[1234] The Master and Registrar is an officer of the Supreme Court whose duties consist among others in the taxing of costs, to conduct and manage judicial sales (See Section 19 of the Mauritius Courts Act 5/1945).

The Clerk of a Court or Master and Registrar will forthwith give written notice of the registration of the order to the person on whom it was imposed or against whom it was made or who has effective control over the relevant property in Mauritius.[1235] After registration, such an order for reparations issued by the ICC has the effect of a civil judgement of a court in favour of the State as represented by the Attorney-General.[1236]

It is interesting that some State parties should have already enacted legislations for cooperation with the ICC which include aspects of enforcement of decisions concerning reparations to victims issued by the ICC. Notwithstanding, it is worth noting that the reference by the ICC Statute to the national procedure 'should not be construed so as to limit the obligation to enforce to those States whose national law provides for a procedure to enforce the ICC orders in question'.[1237] Where there is no national legislation providing specifically for enforcement of such an order, the Court could seek cooperation and assistance as provided for by Part 9 of the Statute.[1238]

3. The risk of inconsistency of some pre-conditions of enforcement imposed at the national level

The analysis of some enacted legislations in compliance with the ICC Statute in either system demonstrate that besides the protection of the rights of *bona fide* third parties there are no, with a few exceptions, substantial conditions imposed for enforcement of a decision issued by the ICC on reparations for victims. It is worthwhile to remember that the ICC Statute provides for the respect at national level of the rights of *bona fide* third parties.[1239] Bearing in mind that the issue relating to the protection of the rights of *bona fide* third parties at the stage of execution will be discussed below,[1240] it should be noted that the ICC Statute implicitly provides for a pre-condition to enforcement of its decision on victims reparations. The pre-condition is the non-violation of the right of *bona fide* third parties. According to the context of Art.75 (5) and Art 109(1), a decision for reparations issued the ICC has to be enforced as such at national level unless the enforcement prejudices interests of *bona fide* third parties.

[1235] See Section 34 of Mauritius International Criminal Court Act 2011 (Act No. 27 of 2011).

[1236] Ibid, Section 36(2); see also Swedish Cooperation with the International Criminal Court Act (2002:329), arts 29 and 31.

[1237] Kress, C. and Sluiter, G., *op. cit*., p. 18249.

[1238] See also Rule 217 of the RPE of the ICC.

[1239] See Art.75 (5) and 109(1) of the ICC Statute.

[1240] See at pp.340ff.

Besides the pre-condition provided for by the ICC Statute, it is observable that at national level in both systems where enforcement is sanctioned by the authorities in charge of enforcement (that is national executive authorities) and where it requires authorization from or registration before national courts, the *final character* of the decision issued by the ICC is the common pre-requisite to qualify the decision for enforcement. An order for reparations has to be final and not subject to review.[1241] It was argued that the final character of such an order should imply the finality of the conviction, in that should there be a successful appeal which translates into an acquittal, the reparation order should automatically collapse. Notwithstanding, as regards the final character of a reparation order, it is worth noting that the possibility of revision of the conviction cannot impede enforcement of a reparation order as it is not for the sentence. The revision of conviction could be deemed as a special recourse against a final decision which intervenes in exceptional circumstances provided for by Art.84 of the ICC Statute.[1242]

Besides the protection of *bona fide* third parties and the final character of an order for reparations required by national legislations as one of the prerequisites for enforcement of reparation orders, some preconditions imposed by these legislations raise a risk of contradiction with the context of the ICC reparation regime. Under this regime, State parties are required to give effect to reparation orders made by the ICC and are forbidden from making any modification of such orders. In this respect, the systems adopted by Mauritius and Sweden should be pointed out as ones which do not comply, at some extent, with the context of the ICC Statute as regard reparation orders.

The Mauritius and Swedish legislations raise some concerns in respect with their compliance with the context of the ICC Statute. The Mauritius International Criminal Court Act 2011 (Act No. 27 of 2011) provides for pre-conditions to enforcement of a reparation order which can give latitude to national authorities to verify the fairness of the decision issued by the ICC.

[1241] See for example Section 49(3) (s2) of the UK International Criminal Act 2001 (Chapter 17); Section 34(1) (a) of the Mauritius International Criminal Court Act, Section 64(a) of the Ugandan International Criminal Court Act 2010, Section 119(b) of the Kenyan International crimes Act 2008; Section 151(1) (b) of the Australian International Criminal Act 2002 (Act No. 41 of 2002).

[1242] According to Art.84 of the ICC Statute 'The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgement of conviction or sentence on the grounds that: (a) New evidence has been discovered that: (i) Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; (b) It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; (c) One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office'.

Section 34(1) of the Act stipulates that where the Attorney-General, not a court, receives a request from the International Criminal Court for assistance in the execution of an order for payment of compensation for damages to any person made in criminal proceedings, ' he shall ascertain that (a) the sentence or order is final and not subject to review or appeal; (b) *the person on whom the sentence was imposed or against whom the order was made, had the opportunity of defending himself*; (c) the sentence or order cannot be satisfied in full except by confiscating and realising property; and (d) the person concerned holds property in Mauritius'[emphasis added]'. The second and underlined condition imposed by the Mauritius law gives a leeway to national authorities to challenge the fairness of a decision issued by the ICC in respect with reparations for victims. The opportunity of an accused person to defend himself or herself is one the aspect of the right to fair trial. Though one could not doubt the fairness of a final decision of the ICC, one may however fear that the condition imposed by the Mauritius law should be a source of obstacles to the enforcement of reparation order. If national authorities reserve the right to control the fairness of the sentence and the decision on reparations to victims issued by the ICC, this may result in violation of the ICC Statute by State parties as regard to enforcement of reparation orders.

Yet, the system which may raise more concerns is the one found in Sweden. As already mentioned, under the Swedish Cooperation with the International Criminal Court Act an application for enforcement of an order for reparation made by the ICC is to be considered by Svea Court of Appeal. The concerns result from the preconditions provided for by the Act. According to the Swedish Act, the Svea Court of Appeal may reject the request for enforcement '[1] if the recognition or enforcement of the ruling is manifestly incompatible with the *fundamental principles of the Swedish legal system*, or [2] if a ruling that has entered into final force concerning the same matter has been made in Sweden before such time [emphasis added]'.[1243] The latter pre-condition may not raise any concern and could not be discussed since it has already mentioned that this provision recognises and aims to respect the principle of *res judicata* which should be considered by the ICC in context of the principle of complementarity.[1244] Rather, the first pre-condition raises the issue concerning the obligation of states parties to comply with the decision made by the ICC which shall not apply national principles but the principles it shall establish pursuant to Art.75(1) of its Statute.[1245] The Sweden law establishes enforcement procedure which is framed as *exequatur*

[1243] Section 29 of the Swedish Cooperation with the International Criminal Court Act (2002:329).

[1244] See discussions made on the issue of the principle of *res judicata* in Chapter two of Part two of this dissertation, pp.173ff.

[1245] Concerning the principles to be applied to reparations by the ICC see Chapter one of Part two of this dissertation.

proceedings.[1246] It is worth emphasising that States parties should comply with the final decision of the ICC as they accept its competence by becoming parties to its Statute. Also, they should not consider its decisions as they were made by a court of a foreign State.[1247] It can be maintained that States parties are required by the ICC Statute to ensure that reparation orders are enforceable on their territories[1248] and that they are accordingly compelled to enact the appropriate legislative amendments to their legislations.[1249] Consequently, national principles could not prevail over those established by the Court within the context of the ICC Statute and execution of reparation orders should not be hindered by national legal systems.

In this respect, the French system may serve as a good example. Indeed, under the French law, authority to execute an order for reparations (or fine and forfeiture) issued by the ICC cannot, under no condition, be refused by the *Tribunal Correctionnel de Paris*. The French law explicitly specifies that *Tribunal Correctionnel de Paris* is bound by a reparation order issued by the ICC.[1250] However, in case it finds that the enforcement of such an order (or fine and forfeiture) could result in harm to *bona fide* third parties; it informs the Prosecutor of the Republic to refer back the matter to the ICC which may give all appropriate directions.[1251] It appears that under the French law, the authorization from the Tribunal is purely formal as the Tribunal is bound by the decision issued by the ICC.[1252] The Tribunal cannot challenge the regularity of the decision.[1253] In this respect, the French system complies with the ICC reparation regime which, besides the states' obligation to enforce a reparation order, provide for non-modification of an order for reparations. Similarly, compliance with the ICC reparation regime may also be found in the Italian law regarding Norms for compliance with the Statute establishing the International Criminal Court. Under the Italian law a reparation order of the ICC will be executed as it was a decision issued by the Court of Appeal of Rome. There are no preconditions for implementing such an order. The French and Italian option appear to be more reassuring than the Mauritius and Swedish ones about the effectiveness of

[1246] Friman, H., *op. cit.*, pp. 422.

[1247] In case of a decision made by a court of a foreign State, the State of execution will apply the procedure of exequatur. For more details on the issue see Tomasin, D., 1975. Essai sur L'autorité de la chose jugée en matière civile. Paris: LGDJ. pp. 24 - 26.

[1248] Consider the context of Art.75 (5) and Art.109 of the ICC Statute.

[1249] Schabas, W.A., 2008, *op. cit.*, p. 1680. See also Art.88 of the ICC Statute (Availability of procedures under national law).

[1250] See para.2 of Art.627(16) of the French code of criminal procedure as modified and completed by the Law no 2002-268 of 26 February 2002 on cooperation with the International Criminal court.

[1251] *Ibid*, Art.627(16)

[1252] Bitti, G. 2005. France. In: C. Kreb, B. Broomhall, F. Lattanzi, V. Santori (eds), 2005. The Rome Statute and Domestic legal Orders. Vol. II, Fagnano Alto: il Sirente, pp. 106 – 106.

[1253] According to Art.627-16 of French Code of criminal procedure national courts are bound by the ICC's decision, including the provision relating to the rights of bona *fide* third parties.

enforcement of reparation orders issued by the ICC. States could not rely on their domestic laws in order not to give effect to the ICC's order for reparations.

III.1.3.2. The legal framework for *third states* to give effect to reparation orders

Besides the obligation imposed upon states parties to cooperate with the ICC, one may wonder whether an order for reparations is enforceable by or on the territory of a 'third state'- that is not a party to the ICC Statute.[1254] Is there any legal framework under which reparation orders issued by the ICC will, where appropriate, be enforced by a third state?

It is worth noting from the outset that under international law '[a] treaty does not create either obligations or rights for a third State without its consent'.[1255] However, '[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing'.[1256] Does the ICC Statute provide for such a scenario? Art.12 of the ICC Statute contemplates the possibility of a third State to accept the jurisdiction of the Court with respect to the crime in question, by declaration lodged with the Registrar. It is arguable that the third State which accepted the jurisdiction of the Court shall be under the obligation to give effect to an order for reparation like a State party. Indeed, Art.12 (3) of the Statute provides that 'The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9'. Consequently, the Court will seek cooperation with the accepting State in the same way for a state party.

On the other hand, the ICC Statute contemplates the possibility for a third State which did not accept the jurisdiction of the Court to give effect to a reparation order. Rule 217 of the RPE of the ICC states that '[f]or the enforcement of fines, forfeiture or reparation orders, the Presidency *shall*, as appropriate, *seek cooperation and measures for enforcement in accordance with Part 9*, as well as transmit copies of relevant orders to *any State* with which the sentenced person appears to have *direct connection* by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with which the victim has such connection [emphasis added]'.A third State which is not in connection with the situation referred

[1254] Concerning the definition of 'third states' see Art. 2 (h) of the Vienna Convention on the Law of Treaties 1969.

[1255] Art.34 of the Vienna Convention on the Law of Treaties **(**1969)

[1256] *Ibid*, Art. 35

to the Court may be with *direct connection* with a sentenced person or by reason of either nationality, domicile or habitual residence or by virtue of the location of the sentenced person's assets and property or with a victim. In this case, Rule 217 of the RPE of the ICC (Enforcement of fines, forfeiture measures and reparation orders) may be applied. Where it is appropriate to request a third State to implement an order for reparations, such request and such implementation may be made under cooperation between the Court and the state. The Presidency of the Court shall act under Part 9 of the ICC Statute (International cooperation and judicial assistance) to seek such cooperation. Actually, Art.87(5)(a) of the Statute provides that the Court may invite *any third State* to provide assistance under Part 9 on the basis of *an ad hoc arrangement*, an *agreement* with such a State or on any other appropriate basis. It bears observing that Art 87 of the ICC is a general provision related to requests for cooperation which include request for execution of an order for reparations. In the same vein, Art 93 of the ICC Statute may be applied where 'identification, tracing and freezing or seizure of proceeds, property and assets'[1257]or/ and 'execution of searches and seizures'[1258] are concerned. Further, taking into account the reference made by Rule 217 of the RPE of the ICC to Part 9 of the ICC Statute, it is arguable that where appropriate, the Court may direct its request to a third State or international organization which has control to property by virtue of an international agreement as provided for by Art.93(9)(b).[1259] This demonstrate that the possibility of a third States to implement a reparation order is implicitly contemplated by the ICC Statute and will result from *ad hoc arrangement, an agreement with such State or any other on an appropriate basis* provided for by Art.87(5) of the ICC Statute.

One may wonder whether a third State will be bound by the obligation of cooperation and assistance under the ICC Statute where the United Nations Security Council (UNSC) has referred the situation to the Court with a decision on such an obligation.[1260] On which legal basis may the Court request such a third State to cooperate for enforcement of an order for reparations? Let us consider for example Resolution 1593 (2005), adopted by the UNSC on 31st March 2005 which refers the situation in Darfur (Sudan), to the Prosecutor of International Criminal Court. The Resolution obliges the Government of Sudan and all other parties to the conflict in Darfur *to*

[1257] Art. 93(1) (k) of the ICC Statute

[1258] Art. 93(1)(h) of the ICC Statute

[1259] Art. 93(9)(b) of the ICC Statute reads as follows : 'Where, however, the request from the Court concerns information, *property* or persons which are subject to the control of a third state or an international organization by virtue of an international agreement, the requested States shall so inform the Court and *the Court shall direct its request to the third State or international organization* [emphasis added]'.

[1260] The possibility of the UNSC to refer the situation of a third State to ICC is inferred from Art.13(b) of the ICC Statute which provides that the Court may exercise its jurisdiction with respect to crimes if 'A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.[1261] Similarly, the UNSC adopted Resolution 1970(2011) on 26th February 2011 which refers the situation in Libya to the ICC and imposes an obligation upon Libyan authorities to cooperate fully with and provide any necessary assistance to the Court.[1262] Are Sudan and Libya bound by the obligation to cooperate with and assist the Court as to enforce reparation orders by virtue of the Resolutions? In other words, shall the Court seek such cooperation with and assistance from the authorities of these countries as they were already bound by such an obligation under the ICC Statute?

In this regard, one may argue that Sudan and all parties to the conflict in Darfur as well as Libya are third States to the ICC Statute, but members of United Nations Organisation, are obliged to cooperate with and to assist the ICC in compliance with the mentioned Resolutions respectively pursuant to Art.25 of the UN Charter.[1263] Nevertheless, concerning the procedures through which the Court shall seek cooperation and assistance for implementation of a reparation order, it is arguable that the Court shall be confined within the limits of its Statute. The Court cannot go beyond what is permitted by the Statute's terms but must still act in compliance with the Statute.[1264] In the case of Sudan and Libya for example, the Court might seek cooperation and assistance as it shall deal with *third states* pursuant to Art 87(5) of the ICC Statute.[1265] Indeed, the two states cannot be considered as parties to the ICC Statute despite the two mentioned UNSC resolutions.[1266]

In addition, it bears remembering that the Court has to apply in the first place its Statute[1267] of which the provisions govern its jurisdiction and functioning.[1268] Since the Court is not party to

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[1261] The resolution was adopted as per the Chapter VI of Charter of the United Nations and Art.13 (b) of the ICC Statute.

[1262] Para.5 of the Resolution 1970(2011) reads as follow: 'the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognising that states not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor'.

[1263] Art.25 of the UN Charter provides that 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter'.

[1264] McCarthy, C., 2012. op. cit., p. 312.

[1265] It is worth reminding ourselves that Art.87(5) of the ICC Statute states that '[a] The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. [b] Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council'.

[1266] See also Cimiotta, E., 2011. Immunità personali dei capi di stato dalla giurisdizione della corte penale internazionale e responsabilità statale per gravi illeciti internazionali. Rivista di Diritto Internazionale, Vol. XCIV., pp.1115ff.

[1267] See Art.21 (a) of the ICC Statute.

[1268] See Art.1 of the ICC Statute.

the UN Charter, it is not bound by its provisions and consequently should not be competent to act in a manner inconsistent with the Statute even though the UNSC decided so.[1269]

III.1.3.3. Dealing with enforcement challenges

Some challenges may arise at the stage of enforcement of an order for reparations. Mindful that it is not possible to guess all possible obstacles which may be encountered in enforcing a decision on reparation by States, the ICC Statute contemplates some of them. One of the possible challenges may be the incident relating to the protection of the rights of *bona fide* third parties (A) to which Art.109(1) of the Statute refers. Besides the possibility of the intervention of *bona fide* parties at the stage of execution, other circumstances may render a State party unable to give effect to an order for reparations. What will happen when a requested State is *unable* to give effect to such an order? (B). There may also be complications relating to execution which may arise where a requested State *fails* to cooperate with the Court (C). How can the issue of unwillingness by a requested State to comply with the request of the Court be dealt with? All these are challenges to the effective enforcement of a decision for reparations to victims and they require close analysis.

A. The rights of *bona fide* third parties as incident to enforcement procedure

The enforcement of the decisions of the ICC involving proceeds, property or assets may eventually raise the issue concerning the protection of the rights of third parties (these are the persons who were not involved in reparation proceedings and are not adversely concerned by the decision). The decision made by the Court under Art.75 of the Statute may affect individuals even 'States or other legal entities in another way'.[1270] Consequently, Art.75(5) and Art 109(1-2) by requiring States parties to give effect to a decision on reparations for victims, remind them to protect the rights of *bona fide* third parties.

Neither the ICC regime nor international law provides a definition for the concept of '*bona fide* third party'.[1271] Consequently, one may assume that the Court may rely on the principles applied by national law as long as they are not inconsistent with international law pursuant to

[1269] McCarthy, C., 2012, *op. cit*., pp.312-313

[1270] The case could occur where for instance ' an order for reparations is made directly against the convicted person, but the stolen property is in the hands of a *mala fide* third party (such as a state or other legal entity), especially if the convicted person was acting on behalf of that third party and the origin of the property was known' (Bitti & González Rivas, *op. cit.*, 311).

[1271] McCarthy, C., 2012, *op cit.*, pp. 202 - 203

Art.21(1)(c) of the ICC Statute. Arguably, *bona fide* third parties, as a barrier to enforcement of fines and forfeiture and therefore reparation orders, should not include those 'who lack *bona fide* credentials'[1272] of proceeds or property targeted by such an order. Those who took advantage of the situation of the prior owners or who knew or ought to have known that the property was derived from crime should be considered as *mala fide* parties.[1273] Therefore, *mala fide* party 'may be under an obligation to return the property or to recover the value of the property, even if that party was not the subject of the order'.[1274]

At the stage of enforcement the question of which court shall deal with the possible third party claim may arise. Shall the ICC or a domestic court decide on the incident? The protection of the rights of *bona fide* third parties at the stage of the implementation of a reparation order may raise both the problem of competence and procedure to deal with this crucial issue. The issue raises the risk of conflict between the ICC and domestic courts. The ICC Statute does not expressly determine how the claims from third parties should be dealt with at the stage of enforcement nor determine the scope of the rights of *bona fide* third parties. This question drew the attention of the drafters of the 1994 Draft Statute of the ICC [1275] but the answer was left to the negotiators[1276] and unfortunately the ICC regime does not adopt a clear position on the issue.

The ICC Statute managed to avoid any prejudice to such parties whenever proceeds, property or assets are concerned by any decision.[1277] Particularly at the phase of reparation hearings, third parties owners of property could be heard by the ICC before issuing its decision for reparations to victims. This right of third parties may result from the interpretation of Art. 75(3) of the Statute that states 'Before making an order for reparation to victims, the Court may invite and take account of representations from or on behalf of the convicted person, victims, *other interested persons or interested States* [emphasis added]'. The phrase *other interested persons or interested States* may include the third parties who claim any right on the properties, proceeds of assets

[1272] *Ibid*. p. 203

[1273] Victims' Rights Working Group, *op. cit*., p. 11.

[1274] Bitti & González Rivas, *op. cit*., p. 311; see also McCarthy, C., 2012, *op. cit*., p. 202.

[1275] See the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. General Assembly Official Records Fiftieth Session Supplement No. 22 (A/50/22), 1995, p.44.

[1276] *Ibid*, p.56

[1277] For example in case of forfeiture Art. 77(2)(b) of the ICC Statute provides that the Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, *without prejudice to the rights of bona fide third parties.* Likewise, according to Art 93(k) where States intervene in the procedure of identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of possible forfeiture, they have to avoid causing any prejudice to the rights of *bona fide* third parties.

targeted by a decision on reparations. This interpretation may be supported by Art 82(4) of the Statute which grants a *bona fide* owner of property adversely affected by an order for reparation with the right to appeal against such an order. In this regard the ICC shall make a final decision in relation to claims by *bona fide* third parties. The interested person who participated in reparations proceedings with any claim of *bona fide* credentials to property or proceeds can no longer be considered as third party as regard an order for reparations resulting from such proceedings. Such interested person has become party to reparation proceedings and is granted with the right to appeal such an order where it affects his or her interests *as per* art 82(4) of the ICC Statute.[1278]

However, as for claims from third parties which may arise at the stage of enforcement the Statute only provides that enforcement is to be made without prejudice to the right of *bona fide* third parties. Some commentators simply argue that 'States who encounter parties that claim to be *bona fide* third parties must not make decisions on the validity *o*f such claims – which is a decision of the ICC'.[1279] In so doing they refer to the fact that Art.82(4) of the Statute provides for the right of third parties to appeal an order in relation to property affected by an order under Art.75 of the Statute.[1280] The problem with this simple conclusion is that it does not consider that the right to appeal is only granted to third parties who are *adversely affected* by an order for reparations. The conclusion could not be consistent with the case where the claim of third parties arises after final decision on reparations - that is at the stage of enforcement.

Other commentators argue that since 'the concept of 'prejudice to rights of *bona fide* parties' is not further defined in the ICC Statute, the determination of the existence of this condition is basically left to national court'.[1281] They go on to note that '[t]his marks a striking difference with the inter-state cooperation context where the requesting State generally identifies the right of *bona fide* third parties and where the requested State is, in principle, bound to recognise the relevant judicial decisions taken by the requesting State'.[1282] This position raises the question as to whether national authorities shall not be bound by the decision made by the ICC on the issue regarding *bona fide* parties. It apparently confuses the *bona fide* parties and the *bona fide third* parties to which Art.109 (1) refers. It is arguable that national authority shall be bound by the ICC's decision

[1278] For more details on the right to appeal a reparation order granted to *bona fide* third party see discussions made in Section seven of this Chapter (pp.295ff)

[1279] Victims' Rights Working Group, *op. cit.*, p. 12.

[1280] *Idem*

[1281] Kress, C. and Sluiter, G., *op. cit.*, p. 1830.

[1282] *Idem*

concerning *bona fide* parties. Indeed, these parties, as already noted, are granted with the right to appeal before the ICC. As already noted a final decision made by the ICC, including its determination on the issue concerning *bona fide* parties, shall bind national authorities.[1283]

The competence of national authorities to deal with claims presented by the third parties could be deduced from Rule 217 or the RPE which apparently relegates the issue to national authorities. According to the Rule 217, for the enforcement of reparation orders '[t]he Presidency shall, as appropriate, inform the State of any *third-party claims* or of the fact that no claim was presented by a person who received notification of any proceedings conducted pursuant to article 75 [emphasis added]'. The provision could be understood in sense that any third-party claims presented to the Court after a decision on reparations has been made, shall be referred to State required to give effect to the decision. This interpretation could be reinforced by the fact that the neither Statute nor the RPE provide for any recourse by a third party against a decision on reparations.[1284] Some commentators assume that the claims from third parties presented after a decision on reparations should be considered by national authorities and in the case those parties are found *bona fides* the ICC should be informed and could give all appropriate action.[1285] Yet the ICC reparation regime does not provide for any suitable action the Court could take. This leads to argue that the case is to be dealt with according to Art 75(5) and Art 109(2) which provide for inability of a State to give effect to an order for reparations.[1286]

The foregoing argument could comply with the position adopted by some national legislation on the issue. For example according to Art.627-16 of French code of criminal procedure (as modified and completed by Law No 2002-268 of 26th February 2002) national court is bound by the decision of the ICC including provisions concerning the rights of third parties. However, where national court finds that the enforcement of an order for reparations could prejudice the rights of a *bona fide* third party *who may not appeal against such an order*, it shall inform the Prosecutor of the Republic to refer back the matter to the International Criminal Court which gives the appropriate directions. In the same vein, I may refer to the United Kingdom International Criminal Court Act 2001. Pursuant to the Act, an order for reparation issued by the ICC shall not be enforced

[1283] This is the position of the French code of criminal procedure as modified and completed by French law no 2002-268 of 26 February 2002 regarding the cooperation with the international criminal court (see Art.627-16).

[1284] See discussions made on the issue relating to appeal against an order for reparations, pp.299ff.

[1285] As Kress and Suiter note the Presidency should be competent to determine that the argument of *bona fide* third parties is made in an abusive manner in the concrete case' (Kress, C. and Sluiter, G., *op. cit*., p. 1830 footnote no 25).

[1286] The issue regarding the inability of a State to give effect to an order for reparations is discussed in subsequent point B (pp.344ff).

by the UK unless a national court is satisfied that a reasonable opportunity has been given to persons holding any interest in the property to make representations to the court, and that the exercise of the powers will not prejudice the rights of *bona fide* third parties.[1287]

Arguably, the person holding interest in the property should not include, under the UK Act, a person owner of property who was heard by the ICC during reparation hearing since the Act refers to 'third parties'. Similarly, under the French law the bona fide third party who may appeal against an order for reparations is only that who is adversely affected by such an order.[1288] Otherwise there could be negative conflict of jurisdiction between the ICC and French courts where the latter could refer to the former regarding the claims from third parties to an order for reparations whilst the ICC reparation regime refers the issue to national authorities.[1289] Consequently, under the systems adopted by the French and UK legislations the claims from bona fide third parties are arguably to be dealt with by national courts. Where national courts found that the third parties are *bona fide* an order for reparations could not be implemented without prejudice to their interests. Consequently, the case should arguably be dealt with pursuant to Art.75 (5) and Art.109 (2) of the ICC Statute by noting the inability of the requested State to give effect to an order for reparations.

Having agreed that national authorities have competence to decide on the rights of *bona fide* third parties, it should be noted that the reference to the rights of *bona fide* third parties is likely to create a situation where the ICC Statute is applied unevenly. [1290] One may think for instance that different rules exist in national judicial systems 'with respect to the priority given to various categories of creditors'.[1291] Moreover, as early mentioned, in some cases the right of the *bona fide* third parties could be one of the possible factors which may incapacitate States to give effect to an order for reparations since they are not allowed to modify a reparation order.[1292]

B. The *inability* of a requested State to give effect to an order for reparations

Article 109(2) of the ICC Statute specifically provides for enforcement of forfeiture orders. Pursuant to this article, a requested State where it is unable to give effect to an order for forfeiture,

[1287] See Section 49(5) of the UK International Criminal Court Act 2001.

[1288] See Art 82(4) of the ICC Statute

[1289] See Rule217 of the RPE of the ICC.

[1290] Schabas, W.A., 2008, *op. cit.*, p. 1680.

[1291] *Idem*

[1292] Rule 219 of the RPE of the ICC forbids any modification of an order for reparations by national authorities.

shall take measures *to recover the value of the proceeds*, property or assets ordered by the Court to be forfeited. With regard to reparation orders, Art.109 (2) can only apply, *mutatis mutandis*, where restitution in kind has been ordered by the ICC.

Where restitution in kind has been ordered by the decision of the ICC, requested states could find themselves unable to give effect to such a decision. The cases of inability to execute such a decision may result for example, as mentioned above, from the rights of *bona fide* third parties to the property specified in the restitution order. It may also happen that domestic legal systems provide that some forms of property are immune from judicial process or seizure, such as a family residence in which minor children reside.[1293] It may be hard to imagine all possible factors which may render the requested State unable to give effect to an order for restitution of property due to diversity of national law which shall be applied in present instance. Besides legal situations, other practical circumstances of post-decision could also render restitution in kind impossible such as for example the destruction of real property or such property may 'have been moved out of the reach of the Court'.[1294] One may simply note that the purpose of the provision is to prevent a State from refusing to proceed when the items concerned by on order for restitution cannot be given back in kind. With regard to restitution orders, it could be deduced from Art.75(5) and Art.109(2), that the requested State may only proceed to value real property targeted by an order for restitution where it is unable to give effect to such an order due to legal and practical reasons. The alternative to enforcement provided for by Art.109 (2) intends to prevent any barriers to reparations in national law that may impede the enforcement of the ICC reparations orders. Indeed, although Art.109 (1) provides that orders for reparations shall be implemented in accordance with the procedure of the State party's national law, it should not allow the imposition of barriers either *de facto* or *de jure*.[1295]

One may wonder whether this alternative could not constitute a violation to the Rule 217 of the RPE which prevents the requested State to modify the reparation mode specified by the Court since restitution in kind could change to be a form of compensation. In this respect, it is arguable that there is no legal problem since the alternative of proceeding to value real property where restitution in kind is not legally or practically possible is contemplated by the Statute which prevails on the RPE. Nevertheless, since the alternative implies modification of the type of reparation

[1293] See Kress, C. and Sluiter, G., *op. cit.*, pp. 1829 -1830) and Schabas, W.A., 2008, *op. cit.*, p. 1681.

[1294] McCarthy, C., op. *cit.*, p. 320.

[1295] Victims' Rights Working Group, *op. cit.*, p. 13.

specified by the Court – restitution in kind may change into compensation - the parties should be heard and agree on the value of the property. Altogether, it is arguable that where a requested Stated is unable to give effect to an order for reparations should inform and consult with the Court and the latter could advise the State on the specific measures to be taken.

C. The *failure* of a requested State to cooperate with the Court

State parties as well as State not parties to the ICC Statute which have entered into an ad hoc arrangement or an agreement with the Court are required to cooperate with the Court as to enforce its decision on reparations to victims pursuant to the Statute or the ad hoc arrangement or agreement. This obligation is to be understood in the context of the international rule of *pacta sunt servanda* established by Art.26 of Vienna Convention on the Law of Treaties.[1296] It is worth noting that that Art.75(5) and Art.109 of the ICC Statute do not refer to any ground for refusal, as it does for enforcement of the ICC sentences of imprisonment, except the special case of the rights of *bona fide* third parties.[1297] However, despite the obligation upon a requested State to cooperate with the Court for enforcement of its decision on reparations to victims, the Court can encounter challenges of possible refusal to cooperation. What will happen in that case? Which action may the Court take and how should it be efficient?

At the outset, it can be observed that, as regards general obligation of States to cooperate with the ICC, the Statute is laconic on the crucial issue of refusal by a State to comply with a request for assistance and cooperation.[1298] The Statute simply provides that where a requested State, either State party or State not party to the Statute which has entered into an ad hoc arrangement or an agreement with the Court, fails to comply with a request to cooperate with the Court contrary to the provision of the Statute or arrangement or agreement, the Court may so inform the Assembly of State Parties (ASP) or, where the UN Security Council (UNSC) referred the matter to the Court, the Security Council.[1299] Arguably, the failure of a requested State to cooperate with the Court is to be a

[1296] Article 26 of the Vienna Convention on the Law of Treaties (*Pacta sunt servanda*) provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

[1297] See also Kress, C. and Sluiter, G., *op. cit*., p. 1829.

[1298] Rinoldi, D. and Parisi, N., *op. cit.*, p. 373.

[1299] Art. 87(5) (b) of the ICC Statute Stipulates that 'Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council'. In the same vein, Art. 87(7) of the Statute specifies that 'Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer

stumble block preventing the Court from exercising its functions and power under its Statute[1300] so that the court may refer the case to the ASP or the UNSC. One may wonder whether the failure of a requested State to implement an order for reparation issued by the ICC falls under the condition so that the case may be referred to the ASP or the UNSC. Yet, we should not lose sight of the fact that, as regards reparations to victims, the role of the Court does not end with the issuance of a reparation order. Rather, as it has been noted, the Court has to play crucial role in implementing its reparation orders.[1301] Moreover, it is worth reminding ourselves that 'reparations to the victims of the most serious international crimes are critical components of the Rome Statute and that it is therefore essential that the relevant provisions of the Rome Statute are efficiently and effectively implemented'.[1302] Consequently, the refusal of States to cooperate with the Court for enforcement of its decision on reparations may prevent it from exercising its functions and powers under the Statute. As a result, the Court will, where there is the refusal to cooperate, refer the issue to ASP or Security Council pursuant to Art.87(5)(b) and (7) of the Statute. However, it is in the discretionary power of the Court to refer the case to ASP or to the Security Council. Actually, Art.87 (5) (b) and (7) of the Statute adopts a permissive wording by using the term 'may'. The Court may consider the refusal to provide assistance and co-operation for enforcement likely to compromise the exercise of its powers and the performance of its duties, whereby it may formally take note thereof and may refer the matter to the ASP or where appropriate to the Security Council.

The position adopted by the ICC Statute with regard to the case that may be referred to the Security Council is similar to the one adopted by Art.94(2) of United Nations Character of enforcement of judgement of ICJ in case of non-execution by a State.[1303] Whilst the ICJ is a judicial institution established under the framework of the UN,[1304] the ICC is not; the latter is a judicial

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the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'. See also Regulation 109 of the RC.

[1300] See Art.87 (7) of the ICC Statute.

[1301] See Paragraph two of this Section (II.1.2: *The role of the Court in implementing its reparations orders*) (pp.318ff).

[1302] Para.2 of the Preamble of the Resolution ICC-ASP/10/Res.3 on Reparations

[1303] Art. 94(2) of the United Nations Charter of enforcement of judgement of ICJ reads as follows:' If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment'. However, as Tanzi notes, after more than sixty years of functioning of the UN, 'the instances in which action by the Security Council has been invoked under Article 94(2) are still rare: this Article was used by the UK, in 1951, with respect to the *Anglo-Iranian Oil Company* case; by Nicaragua, in 1986, in the case against the United States and by Bosnia-Herzegovina, in 1993, in the case against the Federal Republic of Yugoslavia' (Tanzi A., 1995. Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations. European Journal of Internal Law, Vol.6, p. 540).

[1304] According to Art.7 of the United Nations Charter, the ICJ is one of the principal organs of the UN and constitutes the principal judicial organ of the United Nations pursuant to Art 92 of the Charter.

institution independent of the UN. However, the ICC is required to establish a relationship with United Nations pursuant to Art.2 of the Statute (*Relationship of the Court with the United Nations*) which stipulates that 'The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf'. Such an agreement which provides for the cooperation between the ICC and the United Nations was adopted and entered into force on 4 October 2004 according to Art.23 of the Agreement. The nature and the scope of such an agreement between the Court and the United Nations lie out of our dissertation. The legal issue of the ICC Statute's option to allow the UNSC, an external organ to the ICC Statute, to refer a situation to the ICC and the latter to refer to the former any case of states' failure to cooperate with or to assist the Court lie also out of this study.[1305]

The option of the ICC Statute to refer to the ASP a requested State which fails or refuses to cooperate is also similar to the one found in the Statute of African Court of Human Right which provides that 'Where a party has failed to comply with a judgment, the Court shall refer the matter to the Assembly, which shall decide upon measures to be taken to give effect to that judgment'.[1306] A similar procedure has been established by Internal Rule of the ECCC. According to Rule 5(2) of Internal Rule of the ECCC where any State fails to provide judicial assistance the ECCC 'the Co-Prosecutors, the Co-Investigating Judges or the Chambers seized of the matter may take appropriate action, through the Office of Administration, including a request for assistance from the Secretary-General of the United Nations and/or the Royal Government of Cambodia'.

Nevertheless, by referring to the ASP or the UNSC the case of States' failure or refusal to cooperate with or to assist the Court, the ICC Statute does not specify which action should be taken by these organs in order to compel a State to fulfill its obligations. One may assume that the rest of action to be taken by the ASP or by the Security Council may fall under diplomatic and political ground in accordance with the legal framework of each organ.[1307] These sovereign bodies may, if it

[1305] Concerning the issue related to the option of the ICC Statute to involve in its activities the UNSC which is external organ to the ICC Statute see Cimiotta, E. *op. cit.*, pp. 1115ff.

[1306] Art.46(4) of the Statute of African Court of Human Right

[1307] Concerning the UNSC see Art. 41 and 42 of the Charter of the United Nations; regarding the ASP to the ICC Statute see Art.112 (8) of the Statute. It seems hard to think that the UNSC may use its power under Chapter VII of Charter of United Nations. Can one think that a requested State's refusal to implement an order for reparations may fall under Art 39 of the Charter? The Article states that 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. The action which the UNSC may take remains uncertain. In this respect, one may observe that in case of African Court of Human Rights where a State party has

deems necessary, make recommendations or decide upon measures to be taken against a recalcitrant state.[1308]

III.1.3.4. Destination of the property or proceeds of the sale of real or other property

In most of times reparation orders issued against a convicted person may be of financial nature as compensation to the harm caused to the victims or where applicable restitution of property and assets that belong to the victims. By enforcing reparation orders, States should have to collect real or other property or sell it in order to collect the proceeds for victim benefit in accordance with a reparation order. Since States are to give effect to such orders and according to the procedures of their domestic law, one may wonder whether the States shall immediately transfer the property or proceeds of the sale of real property or other property to victims or to the Court or to the TFV. Another question which may arise at this stage is whether States are allowed to defray their own costs due to enforcement by drawing on such property or proceeds.

Regarding the destination of the money or property, the parallel reading of Art75(5) and 109(3) of the ICC Statute demonstrates that property or the proceeds of the sale of real property or, other property, which is obtained by a State party as a result of its enforcement of an order for reparations shall be transferred to the ICC. Concerning a State not party to the Statute which is concerned by enforcement of such an order, one may assume that the Court should strive as to reach arrangements or agreements on cooperation which is consistent with the context of the Art75(5) and 109(3). In regard to the transfer of the money or property to the Court, the Presidency must make the necessary arrangements to receive them. After receiving the money or property, the Court in turn must ensure its transfer to either the TFV or to the relevant victims in accordance with a reparation order made under Art 75(2) of the ICC Statute and Rule 98 of the RPE.[1309] After the transfer to or deposit in the TFV of property or assets realized through enforcement of an order of the Court, any issue regarding their disposition or allocation shall be dealt with by the Presidency of the Court. In dealing with such issues, the Presidency shall be subject to Art.75 (2) of the ICC

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failed to comply with its judgment the Assembly may impose sanctions 'such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly' (see Art.46 (5) of Statute of African Court of Human Rights and Art.23 (2) of Constitutive Act of African Union).

[1308] See also Brizzi, L., 2010. La cooperazione degli stati con i tribunale penali internazionali. *Atti del Convegno in memoria di Luigi Sico a cura di Talitha Vassilli di Dachenhausen*. Napoli: Editorial Scientifica. pp. 236 – 239.

[1309] Concerning the possibility for the Court to decide to transfer to or deposit in the Trust Fund of property or assets realized through enforcement of an order for reparations see Rule 98(2-4) of the RPE of the ICC. See also Regulation 116(1)(d) of the RC.

Statute and Rule 98 of the RPE of the ICC and comply with an order for reparation issued by the competent Chamber under Art.75 of the Statute.[1310]

Regarding the question whether States are allowed to defray their own costs due to the enforcement of an order for reparation by drawing on property or proceeds realized through sale of property assets or real estate, the Statute does not provide any express answer to the question as it does not for fine and forfeiture.[1311] However, since enforcement of reparation orders shall be realized in framework of cooperation between the Court and relevant states, one may argue that a requested state shall bear the costs for enforcement of an order for reparations pursuant to Art.100 of the ICC Statute (Costs).[1312] Therefore, states parties to the Statute could not draw on property or assets realized through enforcement of an order for reparations in order to defray the costs for execution. As for State not parties, the Court should negotiate with such States and conclude arrangements or agreements which are consistent with the context of the Statute. Actually, one should not lose sight of the fact that national authorities are prohibited from modifying reparations specified by the Court.[1313] States cannot draw on property or assets realized through enforcement of an order for reparation for the purpose of defraying their own costs as this could result in modifying reparations ordered for victims benefit. The analysis of some national laws demonstrates that some national enforcement systems have opted to lay the costs of enforcement on a convicted person.

[1310] See Rule 221of the RPE of the ICC (Decision on disposition or allocation of property or assets) which provides that '[1]The Presidency shall, after having consulted, as appropriate, with the Prosecutor, the sentenced person, the victims or their legal representatives, the national authorities of the State of enforcement or any relevant third party, or representatives of the Trust Fund provided for in article 79, decide on all matters related to the disposition or allocation of property or assets realized through enforcement of an order of the Court. [2] In all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims'. See also Regulation 116(2) of the RC which stipulates that 'Following the transfer to or deposit in the Trust Fund of property or assets realized through enforcement of an order of the Court, the Presidency shall, subject to article 75, paragraph 2, and rule 98, decide on their disposition or allocation in accordance with rule 221'.

[1311] Concerning fine and forfeiture, as Jennings observes, the Statute does not provide for States 'to retain a share of the money or property obtained through the enforcement of *fines and forfeitures ordered by the Court*. Nor does it provide for the Court to draw on such money and property to defray its own costs. The Fund is intended to be the recipient of this money and property' (Jennings, M., 2008. Article 79. O.Triffter (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed. München: Verlag C.H.Beck, p. 1441).

[1312] Art. 100 of the ICC Statute (Costs) specifies that:'[1]The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court: (a) Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody; (b) Costs of translation, interpretation and transcription; (c) Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court; (d) Costs of any expert opinion or report requested by the Court; (e) Costs associated with the transport of a person being surrendered to the Court by a custodial State; and (f) Following consultations, any extraordinary costs that may result from the execution of a request. [2] The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution'.

[1313] See Rule 219 of the RPE of the ICC.

Under these systems, reasonable costs for enforcement of an order issued by the ICC are recoverable as if they were sums recoverable under the order.[1314] In this context, there is an extra charge against a convicted person who has to support enforcement costs. Other States have decided to bear such kind of costs instead of the convicted person.[1315] It is notable that according to both national systems, there is no risk of modifying reparations ordered for victim benefit.

III.1.4. The implementation of reparation orders by the TFV (Rule 98(2-4) of the RPE)

The role of the TFV in enforcement of reparation orders differs from the one played by States. At a first glance the TFV Appears as a transit of resources collected through reparation orders.[1316] However, a close look at its missions reveals it as an entity which is capable of transforming court-ordered reparations into credible and tangible forms of redress for victims of crimes adjudicated by the ICC.

Before embarking on the above crucial aspects of the role of the TFV in implementing Court-ordered reparations, one may ask some questions relating to the status of the TFV. Is it an organ of the ICC as some commentators assume[1317] or one of its accounts reserved for the benefit of victims and their families? Or is it an entity independent of the Court? The independence of the TFV is evoked by the Resolution ICC-ASP/1/Res.6 of 9th September 2002, establishing the TFV.[1318] It is worth discussing, by way of introduction, the status of the TFV (III.1.4.1.) before analysing its role in enforcing reparation orders (III.1.4.2.). Such an introduction helps to understand how the TFV should assume its other missions regarding assistance to victims. Beside the award for reparations resulting from an order for reparations, property and assets collected through fine and forfeiture orders could be allocated to reparations for victims of convicted person. This requires us to examine the particular use by the TFV of these resources (III.1.4.3.).

[1314] See for example Art.12 (b)(iv) of the Maltese International Criminal Court Act (ACT XXIV of 2002).

[1315] See for example the Australian International Criminal Act 2002 (Section 182) and the Swedish Cooperation with the International Criminal Court Act (Section 19).

[1316] A simple reading of Rule 98(2-4) of the RPE can lead us to conclude that the TFV is an organ to transfer to or to deposit the money or property allocated to reparations for victims.

[1317] See for example Fischer, P.G., 2003. The victims' Trust Fund of The International Criminal Court – Formation of a Functional reparations Scheme. *Emory International Law Review*, Vol. 17, p. 221.

[1318] See para.2 of the Resolution *ICC-ASP/1/Res.6* of 9th September 2002 Establishing a Fund for the benefit of victims of crimes within the jurisdiction of the Court and their families

III.1.4.1. An introduction to the status of the TFV

The TFV can be considered, to some extent, as an independent entity with two missions or mandates concerning reparations and assistance to victims. Its first mandate is to implement 'Court-ordered reparation awards against a convicted person when directed by the Court to do so. The second one is to provide assistance to natural victims as defined by Rule 85 of the RPE and their families. The ICC Statute created two independent entities: that is the Court with its different organs and the TFV. Nonetheless, with regard to reparations to victims the two independent entities are in close relationship and are interdependent with each other. The notion of independence of an international organization may be defined as the' ability to operate in a manner that is insulated from the influence of other political actors- especially States'.[1319] In the present instance the independence of the TFV will be observed from two perspectives: the TFV and the Court and the TFV and its contributors. Yet, our purpose is not to discuss the theory of functional independence or analyse all aspects of the TFV's independence, which could range from the process of selection and removal of its personnel, the latter's capacity, the financial autonomy, the process of its decision making to the clearness of its policy and directives etc. Rather, the focus will be on the relationship between the TFV and the Court (A) and the TFV's independence of its contributors (B).

A. The relationship between the TFV and the Court

To some extent, the TFV appears on one hand as an independent entity detached from the Court. On other side, it is noticeable that the two entities need to collaborate so as they can achieve their missions in respects with victims of crimes under the jurisdiction of the Court. How to measure the level of independence of the TFV of the Court and how to characterise their collaboration? Whilst the level of independence of the TFV of the Court (1) can be observed from different perspectives, it is arguable that the two entities act as two communicating vessels (2).

1. The level of the TFV's independence of the Court

Whilst the Statute provides for independence of the Court[1320] it is totally silent about the independence of the TFV. Nor the Resolution establishing the TFV does provide for the TFV's

[1319] Haftel and Thompson (2006 quoted by Park, I.J., 2011. Autonomy and Independence of International Institutions: ICSID 'Master's Thesis, University of Tennessee, p.13, [Online] available at: <http://trace.tennessee.edu/utk_gradthes/903>, accessed on 20th April 2012.

[1320] See Para. 9 of the Preamble of the ICC Statute which stipulates that States Parties are determined to 'establish *an independent permanent*

independence. Presumably, this led some commentators to consider the TFV as an organ of the ICC.[1321] Considering the TFV as an organ of the ICC should not comply with the Statute which enumerates the organs of the Court. The TFV is not included in the different organs that compose the Court.[1322] As mentioned above, the TFV's independence of the ICC is implicitly evoked at the first time by para.3 of the Resolution ICC-ASP/3/Res.7 on the Establishment of the Secretariat of the Trust Fund for Victims which stipulates that 'mindful of the independence of the Board and the Secretariat' of the TFV, Registrar of the Court may provide assistance as is necessary for the proper functioning of the Board and the Secretariat of the TFV. The TFV's independence of the ICC may be observable from two or better three perspectives: administrative and organizational and financial perspectives.

In respect of *administrative* and *organisational* aspects, the ASP endowed the TFV with a Board of Directors (hereinafter the Board) which is responsible for the management of the Fund. The Board is composed of five members elected by the ASP.[1323] Regulation 3 of the RegTFV sets up criteria of choosing the members of the Board. Those criteria are, among others, high moral character, impartiality and integrity and competence in the assistance to victims of serious crimes. The TFV includes a Secretariat which assists for the proper functioning of the Board in carrying out its tasks.[1324] According to Regulation 11 of Regulations for the TFV (RegTFV), the Board reports annually not to the Court but to the ASP (its creator). However, although the Secretariat 'shall operate under the full authority of the Board of Directors in matters concerning its activities' the total independence of the TFV is questionable since, according to para.2 of Res. ICC-ASP/3/Res.7 on Establishment of the Secretariat of the Trust Fund for Victims, the staff of the Secretariat 'shall be attached to the Registry of the Court as part of its staff and as such as staff of the Court'. Consequently, one may argue that the Secretariat of the TFV has two chief managers: the Registrar in matter concerning its administrative and financial purposes and the Board in matter concerning reparation activities. This situation may raise the concerns of risk of malfunction of the Fund that may result from this kind of bicephalism under which the TFV's staff shall function.

International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole [emphasis added]'.

[1321] See for example Fischer, P.G., *op. cit.*, p. 221.

[1322] Art. 34 of the ICC Statute states that 'The Court shall be composed of the following organs: (a) The Presidency; (b) An Appeals Division, a Trial Division and a Pre-Trial Division; (c) The Office of the Prosecutor; d) The Registry'.

[1323] See Regulations 1 and 2 of the RegTFV.

[1324] See the Resolution *ICC-ASP/3/Res.7* on Establishment of the Secretariat of the Trust Fund for Victims.

As regards the *financial* aspect, the TFV has its own budget but sourced from the Court's General Fund which is administered by the Registrar in his/her capacity as the principle administrative officer of the Court.[1325] The ASP's Committee on Budget and Finance examine the budget of the TFV annually and submits to the ASP a report and recommendations for the best possible financial management of the Trust Fund. And, the Financial Regulations and Rules of the Court shall apply *mutatis mutandis* to the administration of the Trust Fund.[1326] There is a difference between the disposition of the funds allocated to administrative costs of the TFV and those allocated to reparations and assistance to the victims. However, as it is provided for by Para. 6 of the annex of Res.ICC-ASP/1/Res.6 establishing the TFV, when the workload of the TFV increases and leads the ASP to create an expanded capacity,[1327] the ASP 'shall, as part of such consideration, after consulting with the Board and the Registrar, consider the payment of expenses of the Trust Fund from the voluntary contributions accruing to it'. As it has already noted, the fact that the TFV depends on the Court's General Fund for its functioning, should not negatively affect its independence in accomplishing its mission in providing reparations to victims. In this respect, the Board of Directors submits the annual financial report on the activities of the Trust Fund not to the Court but to the Committee on Budget and Finance and the External Auditor and the Assembly of States Parties, through its President (Regulation 76 of the RegTFV).

Furthermore, the ASP allows the Board to *independently* negotiate with donors (Governments, corporations and individuals) to make voluntary contributions. However, this does not prevent the Board to 'ask for the assistance of the Registrar in this matter' as it is provided for by Regulation 53 of the TFV.[1328] In sum, the TFV appears as a separate entity independent of the Court but it has to operate under a collaborative framework provided for a proper administration of justice under the general ICC reparation regime. The TFV is not subordinated to the Court, but an

[1325] It is worth warning against the possible confusion between the ICC's General Fund and the TFV (Trust Fund for Victims). A General Fund was established by the ASP for the purpose of accounting for the expenditures of the Court, including the Office of Prosecutor. The General Fund support all expenditures of the Court and its organs, the ASP and it subsidiary bodies including the Board and the Secretary of the TFV, but not the reparations to victims of crimes under the ICC jurisdiction

[1326] See Paras 12 and 13 of the annex of the Res. *ICC-ASP/1/* on the Establishment of the TFV.

[1327] In case of the increasing of workload of the TFV the ASP may, after consultation with Registrar of the Court, create an expanded capacity including the appointment of an Executive Director, either within or outside the Registry as appropriate, to provide further assistance with the proper and functioning of the TFV (see Para 6 of the Annex of the Res. *ICC-ASP/1/Res.6* on Establishment of the FTV).

[1328] On this point, Fischer reveals that during the RPE negotiations some participants such as the Italian Delegation proposed the designation of a percentage of a states party's annual contribution to the ICC General Trust Fund to the TFV. The independence of the TFV was supported by many of the States that understood the TFV's independence as precondition to 'adapt to the growing and unique needs of such a large population of potential victims' (Fischer, P.G., *op. cit*., p. 220).

'institution that is independent from the Court, even though, as demonstrated, it bears many organic links to it'.[1329]

2. The TFV and the Court acting as two communicating vessels

Although the TFV is not under the control of any organ of the Court, it works in collaboration with them. Victims' rights to reparations and assistance to victims require the TFV and the Court to collaborate or communicate so that the mission of providing redress to victims of crimes under the ICC jurisdiction may be achieved. Notwithstanding, whilst the two entities (the Court and TFV), may collaborate in implementing reparations to victims under Art.75 of the ICC Statute, the TFV has no role in the criminal process.[1330] The collaboration between the two entities created by Rome Statute'[1331] is required by Resolution *ICC-ASP/11/Res.8* on Strengthening the International Criminal Court and the Assembly of States Parties, adopted during the eleventh session held in The Hague on the 14th – 22nd November 2012. The Resolution requests '*the* Court and the Trust Fund for Victims to develop a strong collaborative partnership, mindful of each other's roles and responsibilities, to implement Court-ordered reparations'.[1332] The interactivity between the TFV and the Court may be analysed on both administrative and judicial level.

On the *administrative level*, collaboration between the TFV and the Court may be observed through the advisory capacity which the Registrar of the Court is vested with to participate in sessions of the Board or its technical assistance which may be given to the TFV for its proper functioning. Moreover, the administrative collaboration between the two institutions is observed by the power vested in the President of the Court (or the Court) to suggest or propose some decisions to be taken by the ASP regarding the TFV. The Court is one of the institutions entitled to propose the amendment of the Regulations of the TFV, besides States Parties and the Board of the TFV.[1333] The principle of collaboration between the TFV and the Court is also contemplated by the Res. ICC-ASP/3/Res.7 of 10th September 2004 establishing the Secretariat of the TFV. The Resolution acknowledges the *independence* of the Board and the Secretariat of the TFV and provides that the

[1329] Mégret, F., 2009. Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes, p.3, [Online] available at <http://ssrn.com/abstract=1501295>, accessed on 10th June 2013.

[1330] Dannenbaum, T., 2010. The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims. *Wisconsin International Law Journal*, 28(2) p.251.

[1331] *Ibid*. p. 3

[1332] See para. 62 of the Resolution *ICC-ASP/11/Res.8* on Strengthening the International Criminal Court and the Assembly of States Parties, adopted during the eleventh session held in The Hague on 14 - 22 November 2012.

[1333] Regulation 78 of the RegTFV

Registrar of the Court may provide *assistance* as is necessary for the proper functioning of the Board and the Secretariat.[1334] The assistance provided for by Res. ICC-ASP/3/Res.7 has to be understood in its broad sense. However, some aspects of such assistance as well as the cases where the advisory opinion from the Court may be useful for the Board of the TFV are specified by the legal texts. For example, since the TFV does not have its own office, its Board shall meet at the seat of the Court. Therefore the Registrar of the Court shall be responsible for providing such assistance as is necessary for the proper functioning of the Board in carrying out its tasks. Moreover, the Registrar may give suggestion for agenda items for regular and special sessions of the Board. According to Regulation 8 of the RegTFV, the President of the Court as well as the Registrar may give suggestions for the agenda of the sessions of the Board. The Registrar is also entitled to participate in meeting of the Board in an advisory capacity.[1335] Since the staffs of the Secretariat of the TFV are attached to the Registry, the Board has advantage since some of its services may be accomplished by the Registry. This is the case for example where the Chair of the Board, where appropriate, may issue a communiqué of its meetings or session through its Secretariat or the Registry, as appropriate.[1336] Moreover, for the purpose of raising voluntary contributions, the Board may ask for the assistance of the Registrar in this matter. In addition, still 'bearing in mind the independence of the Secretariat', when reporting to the Board, the Secretariat of the TFV shall consult the Registrar on all administrative and legal matters for which it receives the assistance of the Registry'.[1337] In the similar line, the decisions and minute of the Board shall be communicated to the Court pursuant to Regulation 9 of the RegTFV.

Regarding the collaboration on the *judicial level*, it is noticeable le that according to Rule 98 of the RPE, the TFV and the interested States alike may be consulted by the Court before ordering that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the TFV. As De Greiff and Wierda note, where the Court decides to make an order for reparations other than to specific individuals, the TFV should play an active role in the design of the Court's order.[1338] Likewise, according to Rule 221 of the RPE, the Court may consult the representatives of the TFV before deciding on all matters relating to the

[1334] See para.3 of the Res. ICC-ASP/3/Res.7 of 10th September 2004 establishing the Secretariat of the TFV

[1335] See paras 4 and 5 of the annex of the *Res. ICC-ASP/1/Res.6* establishing the TFV and Regulations 5 and 7 of the RegTFV

[1336] See Regulation 9 of the RegTFV.

[1337] Regulations 18 and 19 of the RegTFV

[1338] De Greiff, P. and Wierda, M., 2005. The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints. In: K. de Feyter, S. Parmentier, M. Bossuyt and P. Lemmens, eds. 2005. *Out of the ashes. Reparation for Victims of Gross and Systematic Human Rights Violations.* Antwerpen: Intersentia, p.228.

disposition or allocation of property or assets realized through enforcement of an order of the Court. The collaboration between the Court and the TFV is also contemplated by Regulations of the Court at the stage of enforcement of the reparation orders.[1339]

The foregoing observations demonstrate that the two entities, the Court and the TFV are required to act as communicating vessels for the purpose of achieving their mission of deciding on and implementing reparations to victims. The collaboration and communication between the ICC and the TFV will be practically observed through the analysis of the role of the TFV in enforcing reparations and its mission of assistance to victims.[1340] Such collaboration will arguably dispel the risk of institutional tension between the Court and the TFV, both granted by the ICC Statute with the authority over victim redress.[1341]

B. The TFV's independence of its contributors

The aspects of the TFV's independence of its contributors can be implicitly found in the Regulations of the TFV. Regulation 30 of the RegTFV for example expressly states that the Board of the Fund *shall* refuse voluntary contributions which may affect its *independence*.[1342] Moreover, according to the paragraphs 8-10 of the Annex of the Res. *ICC-ASP/1/Res.6* (relating to the management of the TFV) '[8]Voluntary contributions from Governments, international organizations, individuals, corporations and other entities *shall be submitted to the Board for approval*, in accordance with the criteria laid down in paragraphs 9 and 10'. The para.9 states that 'The Board *shall refuse* such voluntary contributions envisaged in paragraph 8 *that are not consistent with the goals and activities of the Trust Fund*. And the para.10 provides that 'The Board *shall also refuse* voluntary contributions of which the allocation, as requested by the donor, would

[1339] See for example Regulation 118 of the RC.

[1340] Concerning the mission of the TFV to assist victims see at p.367

[1341] As McCarthy notes, the fact that the ICC Statute 'grants authority over victim redress to two separate bodies could give rise to a degree of institutional tension. While the Court's Trial Chambers focus on the victims in specific cases before it, the Trust Fund's mandate requires it to have regard to all victims of crimes within the Court's jurisdiction. Moreover, the two institutions may well have different methodological perspectives in respect of the provision of redress to victims, one judicial, the other bureaucratic or managerial' (McCarthy, C., 2012., *op. cit*., p. 240)

[1342] Regulation 30 of the TFV reads as follow: 'The Board shall refuse voluntary contributions (a) which are deemed not to be consistent with the goals and activities of the Trust Fund; (b) which are deemed to be earmarked in a manner inconsistent with [with the Regulation 27 of the RegTFV]. Before refusing such a contribution, the Board may seek a decision by the donor to withdraw the earmarking or to change it in an acceptable manner (c) which would affect the independence of the Trust Fund (d) the allocation of which would result in a manifestly inequitable distribution of available funds and property among the different groups of victims'.

result in a manifestly *inequitable distribution of available funds and property among the different groups of victims [*emphasis added]'.

In addition, the contributors to the TFV have to respect the principle of non-discrimination by not earmarking their contributions except some contributors that could do it under certain conditions fixed by the Regulations of the TFV (RegTFV). All voluntary contributions shall be approved by the Board which can refuse such contributions that are not consistent with the goals and activities of the TFV. It is arguable that this situation guarantees the independence of the TFV of its contributors which is a precondition in assisting victims objectively and without discrimination. Indeed, from a parallel analysis of Para.7 of Res.ICC-ASP/3/Res.7 on the Establishment of the Secretariat of the TFV and the Para.8, 9 and 10 of the Annex to Res.ICC-ASP/1/Res. 6 (relating to the management of the TFV), it is arguable that the Board of Directors is urged by the ASP to force itself in fund-raising,[1343] but to refuse any contribution which would compromise its independence and then jeopardize victims' interests.[1344] The Board of Directors has competence to evaluate the motive and objective of each voluntary contribution. It must ensure that goals and activities planned or already engaged will not be compromised by any proposed contribution. Moreover, the principle of equality and justice in distributing available funds and property among the different groups of victims need to be protected by the Board. In the case of earmarked contributions, before refusing such kind of contributions, the Board may seek a decision by the donor to withdraw the earmarking or to change it in an acceptable manner. This reasoning is confirmed by the Regulations of the TFV of which the context is to ensure 'the proper and effective functioning of the Trust Fund'.[1345]

Finally, as Fischer pointed out, the TFV's dependence on voluntary contribution 'makes it essential to prevent the Trust Fund from being used as a political instrument'.[1346] Regulation 26 of the RegTFV provides that the Board 'shall establish mechanisms that will facilitate the verification

[1343] Para.7 of the Res. ICC-ASP/3/Res.7 on the Establishment of the Secretariat of the TRF reads as follows: '[ASP requests] the Board of Directors to pursue its invaluable efforts in [fund-raising] in accordance with paragraphs 8, 9, 10 and 11 of the annex to resolution ICC-ASP/1/Res. 6'.

[1344] According to the paragraphs 8-10 of the Annex of the Res. *ICC-ASP/1/Res. 6* on the Establishment of the Fund for the benefit of Victims of crimes within the jurisdiction of the Court [ICC], and of the families of such victims 'Voluntary contributions from Governments, international organizations, individuals, corporations and other entities *shall be submitted to the Board for approval*, in accordance with the criteria laid down in paragraphs 9 and 10' (para.8). Para.9 states that 'The Board *shall refuse* such voluntary contributions envisaged in paragraph 8 *that are not consistent with the goals and activities of the Trust Fund*. Para. 10 provides that 'The Board *shall also refuse* voluntary contributions whose allocation, as requested by the donor, would result in a manifestly *inequitable distribution of available funds and property among the different groups of victims* [emphasis added]'.

[1345] See the last paragraph of the Preamble of the RegTFV.

[1346] Fischer, P.G., *op. cit*., p. 233.

of the sources of funds received by the Trust Fund'. These mechanisms, which were not yet set up at the date of writing, and the specific criteria for contributions set up by Regulation 30 of the RegTFV may provide a good level of prevention against corruption or undue influence on the management and disbursement of the Fund. Thus, the independence of the TFV may determine its efficiency and fairness in implementing victims' right to redress (including reparations as assistance).

III.1.4.2. The role of the TFV in enforcing reparation orders

In respect to enforcement of reparation orders, the TFV plays the role of managing the money and property collected through awards for reparations ordered by the Court. In accordance with the decision of the Court to transfer awards for reparations to the TFV, the latter may become the depositary of individual award(s) for reparations against a convicted person (A). On other hand the TFV may become a canal or an implementer of collective awards for reparations against a convicted person (B). The two functions may be deduced from Art.75 (2) of the ICC Statute and Rule 98(1-4) of the RPE. Moreover, it will be demonstrated how the TFV in fulfilling its missions could call upon intermediaries (C).

A. The TFV as a depositary of indirect individual awards for reparations (Rule 98(2) of the RPE)

As mentioned earlier, the Court may order that an *indirect individual award* for reparations against a convicted person be deposited with the TFV,[1347] and the latter shall arrange to disburse the reparation awards to the beneficiaries. Two scenarios may occur: where the Court identifies each beneficiary and where it does not. In both scenarios, the TFV shall take receipt of resources collected from reparation orders which shall be separated from other resources of the TFV.[1348]

Particularly to the first scenario, where the Court has identified each beneficiary, the task of the Secretariat of the TFV shall consist of elaborating a draft implementation plan setting out 'the names and locations of victims to whom the award applies, where known (and subject to confidentiality), any procedures that the Trust Fund intends to employ to collect missing details, and

[1347] See Rule 98(2) of the RPE of the ICC.

[1348] See Rule 98(2)(s2) of the RPE of the ICC and Regulation 34 of the RegTFV.

methods of disbursement.'[1349] The second scenario should complicate the task of implementing the indirect individual award for reparations. Actually, it may be the case where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision. In these circumstances the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors.[1350] In fulfilling such a mission the TFV could be assisted by the experts.

Furthermore, the enforcement of reparation order in both scenarios should require the TFV to verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with an order for reparations. Where an order for reparations have only set out principles relating to the identification of individual beneficiaries, a problem concerning proof of identity may arise. In this regard Regulation 63 of the RegTFV provides that 'Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence'. As the matter of the standard of proof should be evoked at the stage of enforcement, one may argue that, the Board of Directors should apply the same standard of proof provided for by the principles of reparations established by the Court.[1351] This may prevent any contradiction between the Court and the TFV and guarantee fairness in implementing victims' right to reparations.

Moreover, at the stage of enforcement the principle of non-discrimination and its possible positive exceptions could apply.[1352] In fact, '[t]aking into account the urgent situation of the beneficiaries, the Board of Directors may decide to institute phased or priority verification and disbursement procedures' In so proceeding 'the Board of Directors may prioritize a certain sub-

[1349] Regulation 59 of the RegTFV

[1350] See Regulation 60 of the RegTFV. According to this Regulation, 'Such options may include: (a) The use of demographic data to determine the members of the beneficiary group; and/or: (b) Targeted outreach to the beneficiary group to invite any potential members of the group who have not already been identified through the reparation process to identify themselves to the Trust Fund, and, where appropriate, these actions may be undertaken in collaboration with interested states, intergovernmental organizations, as well as national or international nongovernmental organizations. The Board of Directors may put in place reasonable deadlines for the receipt of communications, taking into account the situation and location of victims. (c) The Secretariat may consult victims or their legal representatives and the families of individual victims, as well as interested persons, interested states and any competent expert or expert organization, in developing these options'.

[1351] Concerning the standard of proof see the *2012 Decision on Principles and Procedures*, para.253.

[1352] See discussions made on the principle of non-discrimination and its exceptions see at p.82ff.

group of victims for verification and disbursement'.[1353] In case of the insufficiency of money collected of a reparation order, one may fear that some victims or group of victims could receive nothing. The ideal option should be a pro rata sharing of the money among recipients. However, for the purpose of avoiding such disproportionality, the TFV should complement the money by drawing from its other resources as provided for by Regulation 56 of the RegTFV.[1354]

The final stage in enforcing indirect individual awards for reparation is the disbursement of such awards which shall be executed under the modalities determined by the TFV. Moreover, in implementing the indirect individual award, the TFV should be bound by the principle of promptness of reparations as established by the Trial Chamber I. In this regard, the RegTFV should determine a reasonable term for the disbursement. In so doing, the RegTFV could consider the date of the receipt of the resources collected from reparation orders by the TFV as a *dies a quo* of the term.

B. The TFV as a direct implementer of collective awards for reparations (Rule 98(3) of the RPE)

Where an order for reparations stipulates that an award for reparations against a convicted person be made through the TFV, the latter shall receive resources collected from enforcement of such orders. Receipt of such resources should be taken by the TFV and the resources should be separated from the remaining resources of the Trust Fund in accordance with Rule 98 of the RPE.[1355] In the case of the order is not precise about the nature of the collective awards, the TFV shall fill the gap by setting out the nature of collective awards as well as the methods for its implementation.[1356]

The scenario where the nature of the collective awards has to be determined by the TFV is contemplated by Regulation 69 of the RegTFV which stipulates that:

> Where the Court orders that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate, in accordance with rule 98, sub-rule 3, of the Rules of Procedure and Evidence, the draft implementation plan shall set out

[1353] See Regulation 65 of the RegTFV.

[1354] Regulation 56 of the RegTFV specifies that the Board of Directors of the Trust Fund shall determine whether to complement the resources collected through awards for reparations with 'other resources of the Trust Fund' and shall advise the Court accordingly.

[1355] See Regulation 34 of the RegTFV.

[1356] See Regulation 69 of the RegTFV (Collective awards to victims pursuant to Rule 98(3) of the RPE of the ICC).

> the precise nature of the collective award(s), where not already specified by the Court, as well as the methods for its/their implementation. Determinations made in this regard should be approved by the Court.

The collective awards ordered by the Court which need to be specified by the TFV pursuant to the RegTFV require the intervention of the Court so as to approve such determination.[1357] The TFV may consult victims or/and, where natural persons are concerned, their families, as well as their legal representative so as to make the determination of collective award(s). As noted earlier, such determination may require the TFV to call upon expert assistance.[1358] Consulting victims should allow them to come together and decide how to practically implement the collective award and subsequently serve to prevent corruption in the execution of collective reparation orders. In this regard, Regulation 70 of the RegTFV refers to victims as defined in Rule 85 of the RPE. This may raise a challenge of who is a beneficiary to collective reparations. In fact, Rule 85 pertains to the victims of the situation as already discussed, whilst court-ordered reparations should restrictively relate to the victims of a convicted person.[1359] Arguably, in case of collective reparations, observations on their implementation should be made by their recipients who are the victims of a convicted person pursuant to an order for reparations. All victims as defined by Rule 85 should be the beneficiaries of assistance to be provided by the TFV which should not be confused with court-ordered reparations.

In case the Court should have ordered collective reparations without specifying beneficiaries and the nature of award, the TFV should fulfill the heavy task of 'determining the nature and/or size of awards, inter alia: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group'.[1360] Such a task may require the TFV to consult any competent expert or expert organization on the nature of the collective award(s) and the methods for its/their implementation'.[1361]

[1357] See Regulation 69 of the RegTFV.

[1358] See Regulation 70 of the RegTFV.

[1359] Concerning the two categories of victims see Chapter two of Part two of this dissertation, pp.184ff.

[1360] Regulation 55 of the RegTFV

[1361] Regulation 70 of the RegTFV; see also Regulation 8 of the RegTFV which provides that 'The Board of Directors may invite others with relevant expertise to participate, as appropriate, in specified sessions of the Board and to make oral or written statements and provide information on any question under consideration'.

C. The TFV using intermediaries to implement reparation orders

In both the cases of *indirect* individual awards and collective awards through the TFV, the implementation could require that the TFV uses intermediaries. Concerning indirect individual award, Regulation 67 of the RegTFV allows the Trust Fund to decide, if appropriate, to use intermediaries to facilitate the disbursement of reparation awards. Likewise, as regards collective reparations, Regulation 71 provides for the possibility of the TFV to 'identify intermediaries or partners' that will implement collective reparations. According to Rule 98(4) and Regulation 67 of the RegTFV, the Intermediaries may include interested States,[1362] intergovernmental organizations, as well as national or international nongovernmental organizations working in close proximity with the beneficiary groups.[1363] In order to implement particularly collective reparations the TFV could be forced to utilize humanitarian and international community as intermediaries.[1364] These intermediaries could be specified by the Court or by the TFV which have not already been determined by the former.

The implementation of an order for reparations by intermediaries shall require a memorandum of understanding and/or other contractual terms between the TFV or where appropriate, the Court and the concerned intermediary.[1365] Where an order for reparations determines that an award for reparations against a convicted person will be made through the TFV to an organization (intermediary), the needed memorandum of understanding should set out roles and responsibilities of each player. The Secretariat of the TFV shall oversee the work of the concerned organization(s), subject to the overall oversight of the Court.[1366]

The use of intermediaries could possibly raise the risk of corruption. For the purpose of avoiding the potential for fraud or corruption the TFV should put in place, in case of the indirect individual awards, procedures to verify that awards were received by beneficiaries and '[a]dditional spot checks and monitoring of the receipt of awards should be implemented'.[1367] Likewise, in case

[1362] States are included in intermediaries in case of individual awards (see Regulation 67 of the RegTFV).

[1363] See Rule 98(4) of the RPE of the ICC and Regulation 73 of the RegTFV.

[1364] Fischer, P.G., *op. cit*., p., p. 238.

[1365] The possibility of the Court to specify, in an order for reparation, the organization(s) to implement an award for reparations, as contemplated by Regulation 73 of the RegTFV leads us to assume that the Court could conclude a memorandum of understanding and/or other contractual terms with the concerned organization(s).

[1366] See Regulation 74 of the RegTFV.

[1367] See Regulation 68 of the RegTFV.

of collective reparations the TFV should put in place procedures to monitor their implementation.[1368]

In all the alternatives for implementation of court-ordered reparations, particularly in case of collective award, the TFV 'shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award'.[1369] It shall also provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber's order.[1370] Consequently, at the end of the implementation period the TFV shall submit a final narrative and financial report to the relevant Chamber.[1371] As already mentioned, this demonstrates the collaboration between the TFV and the Court in implementing reparation orders. In addition, the mechanisms of consultations and reports will allow the Court to oversee the implementation of reparation award. This demonstrates, once again, that the role of the Court does not end with the issuance of a reparation order but is also crucial at the stage of the implementation of such an order.

III.1.4.3. The use by the TFV of resources collected through fine and forfeiture

The ICC Statute empowers the Court to impose a fine[1372] and a forfeiture of proceeds, property and assets derived directly or indirectly from that crime as additional penalty of imprisonment against a convicted person.[1373] According to Art.79 (2), money and other property

[1368] Regulation 72 of the RegTFV

[1369] Regulation 57 of the RegTFV

[1370] Regulation 58 of the RegTFV

[1371] Regulation 58 of the RegTFV

[1372] Art.77 (2) (a) of the ICC Statute provides that 'In addition to imprisonment, the Court may order […] A fine under the criteria provided for in the Rules of Procedure and Evidence'. According to Rule 146(1) of the RPE, in determining whether to order a fine and fixe the amount of the fine, the Court shall (1) 'determine whether imprisonment is a sufficient penalty'; (2) 'give due consideration to the financial capacity of the convicted person'; and examine (3) 'whether and to what degree the crime was motivated by personal financial gain'. These three criteria provided for by Rule 146(1) demonstrate that in many cases fine is not likely to be imposed to the convicted person. Imposing a fine is optional and will depend on financial capacity of the convicted person and on the profit motivation that sparked the offender. Concerning the financial capacity of the convicted person, as it has been already said, the *ad hoc* Tribunals' practice informs us that most of the offenders claimed to be indigent and were considered as such (see Schabas, W.A., 2004. An Introduction to the International Criminal Court, 2nd ed. Cambridge (UK): Cambridge University Press, p. 175 at footnote 26). At last, the RPE reserves 25% of identifiable assets of the convicted person which may not be seized when determining or enforcing fine. The percentage is calculated 'after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants. Indeed, Para.2 of the Rule 146 of the RPE of the ICC stipulates that 'Under no circumstances may the total amount [of fine] exceed 75 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants'.

[1373] See Art. 77(2) (b) of the ICC Statute which states that 'In addition to imprisonment, the Court may order […] A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of *bona fide* third parties'.

collected through fines or forfeiture may be transferred to the TFV. The use of the resources collected through fine and forfeiture is not clear. There is no precise answer to the question as to whether these resources are to be allocated to reparations for victims of crimes committed by a convicted person or to the assistance of victims and their families as defined by Rule 85. The decision is left to the Court which may transfer such resources to the TFV.[1374] But, in case the Court is silent on the issue, the decision on their use is left to the Board of Directors of the TFV.[1375] Nonetheless, such resources are likely to be allocated to collective reparations as complement to collective awards ordered against a convicted person.

In regard to the above argument one may consider Regulations 43 – 46 of the RegTFV. Regulation 43 of the RegTFV implicitly provides for the same disposition or allocation of resources collected through fines or forfeiture and awards for reparations. It reads as follows: 'When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the Rules of Procedure and Evidence, the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s)'. This Regulation combines fines, forfeiture and award for reparations and refers to Art.75 (2) of the ICC Statute, which pertains to reparations award ordered against a convicted person. It also refers to Rule 98(2)-(4) of the RPE which provides for the *indirect individual* award(s) and collective award(s) for reparations. Consequently, the Court, when transferring resources collected through fines or forfeiture, should precise the scope of beneficiaries and the nature and amount of the award(s). The beneficiaries may include individual or group of victims of crimes committed by a convicted person. But still, the decision of the Court may allocate such resources to assist all victims and their families as defined by Rule 85 of the RPE since Regulation 43 refers also to Art.79 which pertains to the TFV established 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.[1376] Where the Court has given no indication on the use of such resources the tendency is to allocate them to the benefit of victims of crimes committed by a convicted person. The context of Regulation 44 of the RegTFV apparently gives such orientation.[1377] It reads as follows: 'Where no further stipulations or instructions accompany the

[1374] See Regulation 43 of the RegTFV.

[1375] See Regulation 44 of the RegTFV.

[1376] Art. 79(1)-(2) of the ICC Statute

[1377] Regulation 44 of the RegTFV is found in the Section entitled *Resources collected through fines or forfeiture and awards for reparations* (located in Chapter I – *Use of funds* - of Part III – *The activities and project of the Trust Fund).*

orders, the Board of Directors may determine the uses of such resources in accordance with rule 98 of [the RPE], taking into account any relevant decisions issued by the Court on the case at issue and, in particular, decisions issued pursuant to article 75, paragraph 1, of the Statute and rule 97 of [the RPE]'. Regulation 44 refers to the Art.75 and Rules 98 and 97 of which the common connection relates to reparation to victims of a convicted person rather than to the assistance of victims and their families to which Art.79 of the ICC Statute refers.

Therefore, mindful that the Court may decide otherwise, it is arguable that resources collected through fine or forfeiture are likely to be used to collective or individual reparations instead of assistance to all victims of a situation. Moreover, we should not lose sight of the fact that the Presidency of the Court is competent to decide on all matters related to the disposition or allocation of property or assets realized through enforcement of fines or forfeiture pursuant to Rule 221 of the RPE of the ICC.[1378] And '[i]n all cases, when the Presidency decides on the disposition or allocation of property or assets belonging to the sentenced person, it shall give priority to the enforcement of measures concerning reparations to victims'.[1379]

Concerning resources from enforcement of fines particularly, one may wonder whether all kind of fines, including other fines than those ordered under Art.77 of the ICC Statute found in Part 7 (Penalties) may be transferred to the TFV. Another kind of fine, which is not governed by Art.77 of the Statute, is provided for by Art.70 (3) of the ICC Statute and Rule 166 of the RPE of the ICC. This kind of fine is provided for against anyone who commits offence against the administration of justice, such as false testimony or evidence, corruptly influencing witness, etc.[1380] Moreover, Art.71 of the ICC Statute and Rule 171(4) of the RPE of the ICC provide for sanctions for misconduct before the Court.[1381] In the latter case, fine is one of the administrative measures other than

[1378] See also observations made on the issue of the destination of the property or proceeds of sale of real or other property in this chapter at p.345ff

[1379] Rule 221 of the RPE of the ICC

[1380] Art. 70 of the ICC Statute vests the Court with the power to deal with offences against the administration of justice, such as false testimony or evidence, corruptly influencing witness etc. The penalties provided for by the Statute are : a term of imprisonment not exceeding five years or a *fine* in accordance with the RPE, or both. In this respect, Rule 166 of the RPE specifies that each offence, provided for by Art. 60 of the ICC Statute may be separately fined and those fines may be cumulative. As regards the convicted person, the RPE reserves a part of the sanctioned person's asset which cannot be object of seizure. The Rule 166 (3) provides that ' Under no circumstances may the total amount [of fine] exceed 50 per cent of the value of the convicted person's identifiable assets, liquid or realizable, and property, after deduction of an appropriate amount that would satisfy the financial needs of the convicted person and his or her dependants'.

[1381] Art.71 of the ICC Statute (Sanctions for misconduct before the Court) provides that '[1] The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence. [2] The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence'. According to Rule 171(4) of the RPE a fine imposed under Art.71 of the Statute 'shall not exceed 2,000

imprisonment, which the Court may use to sanction the misconduct (which includes disruption of the Court proceedings or deliberate refusal to comply with its directions).[1382] The question is whether all of these types of fines when ordered will have the same appropriation of fines ordered under Art.77. The ICC Statute does not give a clear answer to the question. However, the analysis of the ICC regime shows that it does not differentiate fines where it provide for the possibility of the Court to order that money and other property collected through *fines* be transferred to the Trust Fund.[1383]Therefore, the term 'fines' arguably includes all kind of fines ordered either as penalties in both cases provided for by Art. 77 and 70(3) of the Statute or ordered as administrative measures as provided for by Art.71 of the Statute.

Although resources realised through fine or forfeiture are likely to complement or to be used as reparation award(s) to victims of crimes committed by a convicted person, all these resources may not suffice to provide appropriate reparations to the victims, the reason why Regulation 56 of the RegTFV provides for the possibility of the Board of Directors of the TFV to determine whether to complement reparation award by drawing from voluntary contributions or other resources determined and allocated to the TFV by the ASP.[1384]

III.2. The TFV providing assistance to victims (Art.79 of the ICC Statute)

The second mandate of the TFV is, as already mentioned, to provide assistance to natural victims and their families. The ICC regime does not use the term 'assistance' but refers to 'the benefit of victims of crimes within the jurisdiction of the Court'. The phrase 'the benefit of victims of crimes within the jurisdiction of the Court' may be understood to mean assistance to all natural

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euros, or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative'.

[1382] Regarding this kind of fine the RPE fixes the maximum to 2,000 Euros 'or the equivalent amount in any currency, provided that in cases of continuing misconduct, a new fine may be imposed on each day that the misconduct continues, and such fines shall be cumulative'. But, where the misconduct under Art.71 also constitutes one of the offences defined in Art. 70, the Court shall proceed in accordance with the latter article.

[1383] See for example Art. 79(2) of the ICC Statute which pertains to assistance to victims and their families; Rule 217 of the RPE which pertains to Enforcement of fines, forfeiture measures and reparation orders and Regulation 43 of the RegTFV which provides for Resources collected through fines or forfeiture and awards for reparations.

[1384] Regulation 56 of the RegTFV reads as follows: 'The Board of Directors shall determine whether to complement the resources collected through awards for reparations with 'other resources of the Trust Fund' and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.'

victims as defined by Rule 85 of the RPE already referred to as 'victims of a situation'.[1385] Legal persons are excluded from the category of victim beneficiaries of the assistance provided by the Fund.

To achieve this mandate the TFV may depart from the individualized approach of the Court and then 'function not so much as a reparation fund, but as a fund providing humanitarian assistance to victims'.[1386] However the TFV has the discretion to adopt the individualised approach in assisting victims whenever appropriate. Although assistance to victims ought not to be provided by means of reparation awards against a convicted person, it is worth noting that it contributes to the 'reparation' of the harm caused to the victims. In fact, although the principle is that paying reparation is an obligation of the offender,[1387] the TFV plays a residual but more important role in providing assistance to the victim of the core crimes within the ICC jurisdiction. Considering the experience of the *ad hoc* Tribunals - before which most defendants succeeded in claiming indigence, it may be unrealistic to expect the convicted person before the ICC to be capable of contributing substantially to repair the damage he/she will have caused to his/her victim[1388]. As Trust Fund for Victims, its assistance mandate may allow it 'to respond to the needs of victims in the entire territory of the *situation* that is recognized within the jurisdiction [of] the ICC'[1389]. Besides the assistance for victims of situations, the TFV may also complement court-ordered reparations as noted earlier.

Consequently, it is worthwhile to take a look into what kind of 'assistance' that may be provided by the TFV. In fact, the assistance to victims by the TFV might raise questions as to its

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[1385] See at p.184ff. In fact, the TFV should not 'interpret its second mandate as linked to a specific case before the Court, but rather to a broader conception of victims at the situation level' (Abtahi and Arrigg Koh, *op. cit*., p.19). Such assistance to victims and their families is referred to by some commentators as 'victim support' (see for example McCarthy, C., 2012, *op. cit.*).

[1386] Zegveld, L., *op. cit*., p.98

[1387] See Art 75 of the ICC Statute and Rule 98 of the RPE. As Aubry and Henao-Trip notes, the ICC statute, the RPE and RegTFV Regulations 'do not mention that the TFV can act as a surrogate body to provide reparations to victims of a convicted person declared indigent by the Court. Indeed, following article 75 of the Rome Statute and rule 98 of the RPE, the responsibility of reparations lies on the convicted person' (Aubry, S. and Henao-Trip, M.I., *op. cit*., p. 14).

[1388] As Schabas regrets, the experience of the *ad hoc* tribunals demonstrates that most of the defendants succeed in claiming indigence (Schabas, W.A, 2004, op. cit., p.175) and they are almost invariably represented by tribunal-funded counsel. Consequently, it may simply be unrealistic to expect the new Court to be able to locate and seize substantial assets of its prisoners.

[1389] In this regard, Ms Elisabeth Rein when she was the Chair of the TFV Board of Directors reported, in 2012, that in a 'over the past four years, the Trust Fund for Victims has made a tangible difference to over 80,000 victims in the DRC and northern Uganda' (Trust Fund For Victims, 2012a. Ms Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims Speech given on Wednesday 21 March 2012 on the occasion of the 9th Annual Board Meeting, p. 4, [Online] available at: <http://www.trustfundforvictims.org/node/28/documents/pdf>, accessed on 17th April 2012).

effectiveness to natural victims and their families contemplated by Art.79 of the ICC Statute. First of all, it is arguable that such effectiveness shall depend on the availability of resources. This brings up the issue of which resources may be allocated to victims' assistance? One may also ask about the nature of assistance the TFV should provide to victims and their families. Furthermore, the nexus between assistance to victims and reparations which may be decided by the Court could lead to conflicts. Both the Court and the TFV may respectively make decision on reparation awards and assistance to the victims as defined by Rule 85 of the RPE. Therefore, there is a risk that the two independent bodies may diverge on the definition or the considerations on the status of the victims. Is there any regulatory mechanism which can prevent such a possible conflict? All of these problematic issues need to be addressed by first proceeding to consider the resources allocated to assist the victims and their utilisation by the TFV (III.2.1.), before demonstrating that the TFV, instead of the ICC, is vested with the competence to decide on the nature of assistance to victims and their families (III.2.2.). However, we will subsequently observe that the ICC shall fulfil a regulatory or preventive role in the TFV's mission of assisting victims (III.2.3.).

III.2.1. Resources allocated to the TFV for the assistance to victims and their utilisation

The Res. ICC-ASP/1/Res.6 adopted by ASP of 9th September 2002 establishing the TFV provides for four possible funding sources. According to para.2 of the Resolution, the TFV shall be funded by:(a) voluntary contributions from Governments, international organizations, individuals, corporations and other entities; (b) money and other property collected through fines or forfeiture transferred to the Trust Fund if ordered by the Court pursuant to Art. 79(2) of the Statute; (c) resources collected through awards for reparations if ordered by the Court pursuant to Rule 98 of the Rules of Procedure and Evidence and (d) such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund.[1390] It has already demonstrated how the resources collected through reparation order are allocated to indirect individual and collective reparations. Likewise, we have noted how the resources collected through fine or forfeiture are likely to be allocated to individual or collective reparations to victims of crimes committed by a convicted person. Therefore, '[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79',[1391] that is assistance to victims as defined by Rule 85 of the RPE. However, it is worth reminding that the TFV may independently

[1390] Presumably, this system of diversity of sources for such a Fund has drawn from the existing national compensation schemes. For example in Britain, State compensation schemes are financed through taxpayers' money while in the United States they are financed through a combination of taxpayers' money and payments, or fines, collected from offenders (see Goddey, *op. cit*., p. 141).

[1391] Rule 98(5) of the RPE of the ICC

decide to complement awards for reparations ordered by the ICC by drawing from voluntary contributions and other resources as the ASP may decide to allocate to the TFV.

States, international organization, individual, corporation and other entities are urged to voluntarily give contribution to the TFV. [1392] In this regard, ASP encourages the Board of Directors of the TFV to make effort in fund-raising. The Resolution ICC-ASP/3/Res.7 adopted by the ASP on 10th September 2004 (Establishment of the Secretariat of the Trust Fund for Victims), encourages the Board of Directors to pursue its efforts in fund-raising.[1393] In the same line, Regulation 22 of the RegTFV specifies that the Board, as part of its annual report to the ASP on the activities and projects of the Trust Fund 'shall present an annual appeal for voluntary contributions to the Trust Fund'. In this regards, the Board need to make contacts with potential contributors.[1394] The fact that the ASP authorizing the Board of the TFV to recourse to fund-raising and calling the States and other possible donors to respond favourably to requests for contributions to the TFV is a common practice for trust funds and claims commissions under the UN system.[1395]

Concerning the TFV it is worth remembering that, in the interests of victims, the principle of non-discrimination is provided for the management and allocation of this kind of resources[1396]. Regulation 27 of the RegTFV establishes the principle of not earmarking the voluntary contributions. The strict interdiction of earmarking is formal toward voluntary contributions from Governments whereas an exception is provided for in respect of voluntary contributions from donors other than Governments, but still under certain conditions. Although many donors 'insist on

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[1392] See the Res. *ICC-ASP/4/Res.3* on Regulations of the Trust Fund for Victims, para.5. The call upon such institutions to give their contributions to the TFV has been repeated many times by the ASP (see the Res. *ICC-ASP/3/Res.7* on the Establishment of the Secretariat of the Trust Fund for Victims, para.9).

[1393] See Para.7 of the Resolution *ICC-ASP/3/Res.7* adopted by the ASP on 10th September 2004 (Establishment of the Secretariat of the Trust Fund for Victims).

[1394] See Regulation 23 of the RegTFV.

[1395] See for example paras 1 and 2 of the *UNAG Res. A/RES/36/151* adopted on 16 December 1981, establishing the United Nations voluntary fund for victims of torture; Point 57 of the Report of the Secretary-General on The Implementation of the Programme of Action for the Third Decade to Combat Racism and World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doc. A/56/481 (point 57) (the Report was adopted on 17th October 2001, after the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held from 31st August to 7th September 2001).

[1396] Regulation 27 of the RegTFV, as amended by the Res. *ICC-ASP/6/Res.3*, specifies that 'Voluntary contributions from governments shall not be earmarked. Voluntary contributions from other sources may be earmarked by the donor for up to one third of the contribution for a Trust Fund activity or project, so long as the allocation, as requested by the donor fulfils the criteria listed in (a) and (b) of this regulation. The above restrictions may, however, be waived when the funds have been raised at the initiative of the members of the Board of Directors and/or the Executive Director, provided that there is full compliance with the following: 'would not result in discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status, provided that contributions aimed at assisting those enjoying specific protection under international law should not be considered to be discriminatory'.

earmarking contributions on the basis that it provides them with a more concrete insight into the use of grants',[1397] the RegTFV establishes conditions to earmark contributions in order to protect the interests of victims.[1398] Therefore, the accounting system of the Trust Fund shall allow for the separation of funds from earmarked contributions and other money and other property from other funding sources.[1399] As some commentators note, it could be justified to earmark contribution from for instance 'a foundation with limited mandate to support victims of sexual violence in particular [which] may wish to extend specific support to projects of the Trust Fund that target such victims'.[1400] There is a risk that the 'earmarked contributions may inadvertently affect the neutrality of the Trust Fund by differentiating the level of funds available to support certain categories of victims'.[1401] However, one may suggest that where 'the potential inequalities of funding are tracked and flagged […] projects requiring funding could be identified so that potential donors could be encouraged to donate to the underfunded projects that might meet their criteria'.[1402] Moreover, as already mentioned, voluntary contributions from Governments, international organizations, individuals, corporations and other entities need to be approved by the TFV 'in accordance with relevant criteria' adopted by the ASP.[1403] The purpose of this provision could have been to avoid any contributions motivated by subjective considerations, since all victims must be treated equally.

One may assume that the funds from donors could enable the TFV to accomplish its complementary duty to provide residual compensation to victims of international crimes who do not receive adequate compensation from their offender(s). This however raises the issue regarding the theoretical basis for introducing a system where Governments, corporations and individual are called upon to contribute in redressing the victims of core crimes. The Rome Statute and all legal texts related to the TFV are silent on this issue. At a national level, different theories have been

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[1397] Redress, 2003. The International Criminal Court's Trust Fund for Victims. Analysis and options for the development of further criteria for the operation of the trust fund for victims, p. 20, [Online] available at: <http://www.redress.org/downloads/publications/TFVReport.pdf>, accessed on 19th April 2012.

[1398] According to Regulation 27 of the RegTFV contributions from other donors than governments, may be earmarked 'for up to one third of the contribution for a Trust Fund activity or project, so long as the allocation, as requested by the donor, (a) benefits victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families; (b) would not result in discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status, provided that contributions aimed at assisting those enjoying specific protection under international law should not be considered to be discriminatory'.

[1399] Regulation 38 of the RegTFV provides that 'The accounting system of the Trust Fund shall allow for the separation of funds to facilitate the receipt of earmarked contributions, money and other property collected through fines or forfeiture transferred by the Court where the Court has stipulated particular usages, or resources collected through awards for reparations'.

[1400] Redress, 2003, *op. cit.*, pp.20 - 21

[1401] *Ibid*, p. 21

[1402] *Idem*

[1403] See Regulation 21 of the RegTFV.

developed to justify the introduction of State compensation schemes for victims of crimes. One of the theories is the moral duty to assist victims on humanitarian and welfare ground.[1404] This justification may also be found in the Res.A/RES/36/151 of 16th December 1981 establishing the UN Voluntary Fund for victim of torture. In its Preamble, the Resolution recognises the need to provide assistance to the victims of torture *in a purely humanitarian spirit*. [1405] Drawing on this Resolution, it is arguable that the voluntary contribution to the TFV are likewise sought and made in purely humanitarian spirit. In fact, like the UN voluntary for victim of torture, all governments are appealed to favourably respond to requests for contribution to the TFV. Such voluntary contributions do not imply any responsibility of contributors to the crimes under the ICC jurisdictions.

Concerning other resources as the ASP may decide to allocate to the TFV, Regulation 35 of the RegTFV provides that the Board of Directors may make suggestions to the ASP concerning financial or other contributions, other than assessed contributions, that may be allocated to the TFV. However, up to the time of writing the TFV's projects put in place for victims are exclusively financed by voluntary contributions.[1406]

III.2.2. The competence of the TFV to decide on assistance to victims

In fulfilling its mandate of assisting victims of crimes under jurisdiction of the ICC, the TFV may, through its Board of Directors, consider to 'provide *physical* or *psychological rehabilitation* or

[1404] A number of rationales or justifications for state victim compensation can be summarised as: a contract between state and citizens (Ashworth, A., op. cit., p.104; Veitch & Miers, *op. cit*., p. 48; Strang, H., *op. cit*., p.16; Galaway & Rutman 1974, cited by Strang, H., *op. cit*., p. 16), a form of loss distribution along the lines of social insurance at international level from taxpayers' money (Goddey, *op. cit*., p. 142); as a benefit to the state because it affords political credibility to those who introduce and administer the Trust Fund (Miers1978, quoted by Goddey, *op. cit*., p.142), social responsibility in crimes (Wolfgang, M.E., 1970. Social Responsibility for Violent Behaviour. *Social Californian Law Revue*, Vol.43, pp. 5-21; J.Baldwin and A.E., 1975 and R.Tarling,1982 cited by Ashworth A. 1986,101; Zedner, L., *op. cit*., pp. 125 - 126; Freckelton, I,. op. cit., p. 58 and Kaptein, H., 2004. Against the Pain of Punishment: Retribution as Reparation through Penal Servitude. In: H. Kaptein and M. Malsch, eds., 2004. *Crime, Victims and Justice, Essays on Principles and Practice*. Hampshire: Ashgate Publishing Limited, p. 94); State insurance (Fry, 1951, cited by Williams, 2005, 93); equity and social solidarity (Piva, P., *op. cit*., p. 380), moral duty of State to assist victims on humanitarian and welfare grounds (Marguire and Shapland, 1990, cited by Goddey, J., *op. cit.*, p.141).

[1405] See the last paragraph of the Preamble of the Res.A/RES/36/151 of 16th December 1981 establishing the UN Voluntary Fun for victim of torture.

[1406] In 2011, as Trust Fund for Victim reports, the total revenue of the Trust Fund for Victims from voluntary contributions was 3.2 million Euros – the highest annual revenue ever and more than twice the amount of 2010 (Trust Fund for Victim, 2012, *op. cit.*, p. 1) . On this point, Ms Elisabeth Rehn, the Chair of the TFV Board of Directors, observed that the amount was quite modest (*Idem.).* In December 2011, at the occasion of the 10th annual meeting of the Assembly of States Parties to the Rome Statute, the Swedish International Development Agency (Sida) has announced a voluntary contribution of 10 million Swedish crowns - approximately 1.1 million Euros - to the Trust Fund for Victims at the International Criminal Court. At this time, the promise was the highest contribution made to the TFV.

material support to victims and their families'.[1407] This scope of assistance deduced from Regulation 50(a)(i) of the RegTFV could respond to the rehabilitation measures contemplated by the *2012 Decision on principles and procedures*.[1408]

According to the TFV, physical rehabilitation in the context of assistance 'includes reconstructive surgery, general surgery, bullet and bomb fragment removal, prosthetic and orthopedic devices, referrals to services like fistula repair and HIV and AIDS screening, treatment, care and support'.[1409] Regarding psychological rehabilitation, the TFV considers that it may include 'both, individual and group-based trauma counseling; music, dance and drama groups to promote social cohesion and healing; community sensitization workshops and radio broadcasts on victims' rights, information sessions and large-scale community meetings.[1410] Community awareness responses may include broad-based community education on sexual and gender-based violence and the links between peace, justice, reconciliation and rehabilitation'.[1411] In the TFV's point of view, concerning the third legal category of assistance, *material support*, 'initiatives may include livelihood activities, vocational training, or access to referral programmes that offer income generation and training opportunities to focus on longer-term economic empowerment [and] education grants for victim survivors and their children'.[1412] The conception of these three legal categories of assistance by the TFV may arguably correspond to the rehabilitation envisaged by the *2012 Decision on Principles and Procedures*.[1413]

In this area of rehabilitation the TFV could for example finance or put in place projects specialised in those three major categories of assistance to victims. Those activities and projects could be of benefit to victims of *situations*[1414] and their families.[1415] Victims and their families may

[1407] See Rule 50(a)(i) of the RegTFV.

[1408] See the analysis of the *2012 Decision on principles and procedures* made in Chapter one of Part two of this dissertation (*Rehabilitation and its scope*, pp.131ff).

[1409] TFV, Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1st July 2010 to 30 June 2011, ICC-ASP/10/14, para.9

[1410] *Idem*

[1411] *Idem*

[1412] *Idem*

[1413] See the analysis made on the notion of rehabilitation as conceived by the *2012 Decision on Principles and Procedures*, in Chapter one of Part two of this dissertation (*Rehabilitation and its scope*, pp133ff)).

[1414] Concerning the definition of victim of a situation see Chapter two of Part two of this dissertation (pp.184ff).

[1415] For more details on projects approved and financed by the TFV in assisting victims of crimes under jurisdiction of the ICC see for example

also 'be helped through collective projects implemented at that national level which provide for instance, the establishment of [a] treatment centre'[1416] or/and other 'specific projects tailored to the needs of victims, but also larger projects that help communities rebuild themselves and establish an enduring peace and reconciliation'.[1417] This heavy task should justify, as mentioned earlier, the use of intermediaries,[1418] and recourse to experts and consultation with concerned victims.[1419]

The foregoing observations demonstrate that the initiative and the determination of activities and/or project for the benefit of natural victims of crimes under the jurisdiction of the ICC and their families are under the competence of the TFV through its Board of Directors. The rehabilitation assistance shall require the TFV to put in place activities and projects similar to those which could be fulfilled in the case of collective reparations ordered by the Court. Although assistance may be of benefit to the victims or crimes under jurisdiction of the ICC, it is worth noting that these victims should be assisted since the situation is referred to and admitted by the Court.[1420] Whilst reparation awards, individual or/and collective', which benefit the victims of a convicted person should be implemented after conviction and an order for reparations is issued. However, the competence of the TFV to initiate and determine activities and/or activities for assistance to victims is not exclusive. The Court may intervene particularly at the stage of starting such activities and/or project. How can the intervention of the Court at that stage be justified? The subsequent paragraph intends to discuss the issue.

TFV, Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1st July 2010 to 30th June 2011, ICC-ASP/10/14; ASP, Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations (Note by the Secretariat), Eleventh session, The Hague, 14th -22nd November 2012, ICC-ASP/11/32.

1416 De Brouwer, A-M., 2007. 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*, Vol. 20, p.234

1417 Abtahi H. and Arrigg Koh S., *op. cit*., p.19

1418 See observations made on the issue of using intermediaries by the TFV in implementing reparations orders, at pp.358ff. In this regards, Fischer assume that the TFV should for instance support among others independent humanitarian agencies. And through 'grants to these specialized agencies, the Trust Fund will be able to support directly the social and economic infrastructure of the victimized region'. The TFV 'should not be acting alone in its support of the victims, and should, rather, be a key source of funding and support for a coalition formed to heal a victimized region' (Fischer, P.G., *op. cit.*, p.239).

1419 See also Regulation 49 of the RegTFV which stipulates that 'The Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families as well as their legal representatives and may consult any competent expert or any expert organisation in conducting its activities and projects'.

1420 Whilst there is not any decision on conviction against the persons suspected of crimes committed in Uganda, nor any final order for reparations issued against the convicted person for crimes committed in DRC (Thomas Lubanga was convicted for some crimes committed in DRC but at the time of writing his appeal was still pending before the Appeals Chamber), the TFV has already initiate assistance projects in these countries which benefit victims of the situations (For details see ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, paras.36 and 189).

III.2.3. The preventive role played by the Court

The ICC shall play a role of which the purpose is to prevent the risk of contradiction between the activities and projects of the TFV and the decision of the Court particularly regarding the determination of the jurisdiction of the Court t on the admissibility of a case.

Bearing in mind that activities and projects envisaged by the TFV should only benefit the victims of crimes under jurisdiction of the Court, it is worth noting that the latter 'shall satisfy itself that it has jurisdiction in any case brought before it'.[1421] Likewise, the competence of determination of admissibility of a case lies with the Court.[1422] In this regards, the decision of the TFV to provide assistance to a victim, shall not pre-determine or contradict the decision of the Court. Moreover, the decision of the TFV shall not violate the presumption of innocence or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[1423] In order to prevent such risks, the Board of Directors of the TFV has to notify the Court of its conclusion to undertake the activities and projects for the benefit of victims. The decision of the Court aiming to dispel the mentioned risks by preventing the TFV to act should bind the latter. In other words, the TFV should not act where the Court considers that a specific activity or project would pre-determine any issue which falls under the exclusive jurisdiction of the Court.[1424]

In this regard, when notifying the Court of activities or projects the TFV intends to initiate, the Board of Directors should precise activities and projects envisaged so as the Court should examine them pursuant to Regulation 50 of the RegTFV.[1425] Nonetheless, in so doing the TFV should avoid to refer to any identified, alleged perpetrator or specific crime or location so as to avoid the risk of violating the principle of presumption of innocence.[1426] Moreover, on procedural

[1421] Art.19 (1) of the ICC Statute

[1422] See Art.17 and 18 of the ICC Statute.

[1423] See Regulation 50(a)(ii) of the RegTFV.

[1424] See Regulation 50(a)(ii) of the RegTFV.

[1425] The non-specification of such activities has led the Pre-Trial Chamber not to consider itself formally seized by the Board of Director of the TFV when the latter wanted to initiate the activities. Indeed, on 30th October 2009, the Chamber received the 'Notification from the Board of Director of the TFV in accordance with Regulation 50 of the RegTFV in which the Board of Directors of the Trust Fund for Victims notified the Chamber of its conclusion to undertake certain specified activities in the territory of the Central African Republic. The Chamber considered that the notification did not amount to a notification within the meaning of regulation 50 (a)(ii) of the RegTFV due to the lack of proposed 'specified activities' on the part of the TFV. The Board of Directors was obliged to make a new notification with specification of the sought activities and projects (See ICC, *Situation in Central African Republic*, Pre-Trial Chamber I, Decision on the 'Notification by the Board of Directors in accordance with Regulation 50 a) of the regulations of the Trust Fund for Victims to undertake activities in the Central African Republic", 23rd October 2012, ICC-01/05-41 23-10-2012 1/7 RH PT).

[1426] See ICC, *Situation in Uganda*, Pre-Trial Chamber I, and Decision on Notification of the Trust Fund for Victims and on its Request for Leave to

level, the decision of the Court in response to the notification from the Board of Directors might lead the Court to invite representations from interested parties, particularly the Prosecutor, the suspect person and victims. Actually, the issue regarding admissibility and the presumption of innocence provided for by Regulation 50 of the RegTFV may respectively concern both the Prosecutor and the suspect person. The current practice of the Court may confirm the assertion. In the *Lubanga* case, the Prosecutor and the legal representatives of victims were invited to make their representations before the Pre-Trial Chamber issued its decision on the notification of the Board of Directors to initiate activities and projects in some situations.[1427]

What will happen in the case of silence by the Court despite the notification? The Court has to inform the Board of Directors of its decision within the period of 45 days. This time limit may, if necessary and by agreement between the Court and the Board, be extended by 30 days. The silence of the Court shall be considered as a favorable or positive opinion to the TFV's decision to initiate activities or/and project for the benefit of the victims. In other words, after the expiry of the relevant time of period, and unless the Court has given an indication to the contrary based on the mentioned risks, the Board may proceed with the specified activities or projects.[1428]

The above observation shows that the intervention of the Court consist in regulating assistance activities and preventing any risk of contradiction between the ICC and the TFV's decisions and to protect the principle of presumption of innocence. To add to that, one may assume that this role could not only be played *a priori* but also *a posteriori* in the sense that, after a positive decision of the Court 'the implementation of the proposed activities should not go beyond the descriptions outlined in the Notification, as approved by the Chamber'.[1429]

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respond to OPCD's Observations on the Notification, 19rd March 2008, ICC-02/04-126 19-03-2008 1/6 CB PT, p.5); see also Dannenbaum, T., 2010. The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims. *Wisconsin International Law Journal*, 28(2) pp. 234 - 298.

[1427] See ICC, *Situation in the Democratic Republic of Congo*, Pre-Trial Chamber I, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, 11th April 2008, ICC-01/04-492 11-04-2008 1/11 VW PT and ICC, *Situation in Uganda*, Pre-Trial Chamber I, Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification, 19th March 2008, ICC-02/04-126 19-03-2008 1/6 CB PT.

[1428] See Regulation 50(a)(ii) of the RegTFV.

[1429] See ICC, *Situation in Uganda*, Pre-Trial Chamber I, and Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification, 19th March 2008, ICC-02/04-126 19-03-2008 1/6 CB PT, p.6.

CONCLUSION

The analysis of the process of enforcement of reparation orders demonstrates that victims are spared from seeking, at international level, further actions after the issuance of a reparation order. The framework established by the ICC reparation regime assigns the task of seeking enforcement of a reparation order to the Court. Thus, save the procedure put in place by national law, it is arguable that the ICC reparation framework prevents the risk of non-execution of an order for reparation which may result from the inability of victims to undertake the procedure of execution and to face all possible enforcement challenges at international level. Yet, under the national law, victims may need to intervene in enforcement procedures either by applying for registration of an order for reparations before a competent national court or in seeking authority from the same court to enforce such an order. For example, in Sweden for example an application before a court for authority to enforce an order for reparations may be made by the person who has been awarded reparations by a reparation order. However, the ICC may subrogate the victims by making such an application if it has been decided that reparations to victims of crime should be paid out through the TFV.[1430] Victims could also intervene in the enforcement proceedings at national level where such proceedings face the challenge of determining the rights of *bona fide* third parties. Notwithstanding, it has been noted that the diligence of enforcement lies with the Court.

The effectiveness of the framework on the enforcement of reparation orders established by the ICC regime will depend on two cumulative preconditions: the availability of property or assets of the convicted person and the full willingness of States to give effect to an order for reparations. In the case of indigence of the convicted person, an order for reparations may remain unimplemented. However, the framework put in place by the ICC reparation regime provides for a palliative solution for this enforcement challenge. In this regard, it has been demonstrated that the ICC reparation regime assigns the task to the Court to undertake an ongoing monitoring of financial situation of the sentenced person.[1431] The ongoing monitoring does not have a term. This means that a convicted person declared indigent at the time of an order for reparation may remain debtor towards his or her victims. In addition, the possibility of the TFV, through its Boards of Directors, to independently decide to complement the award for reparations by drawing from its other resources has been noted.

[1430] See Section 29, the last paragraph, of the Swedish Cooperation with the International Criminal Court Act (2002:329).

[1431] See also Regulation 117 of the RC.

Concerning the second precondition of the effectiveness of enforcement mechanisms, it is argued that the enforcement of the ICC reparation orders will only be successful if concerned States 'cooperate whole-heartedly with the Court',[1432] particularly in the search of the convicted person's property or assets. This should infer that, in this respect, the strength of the ICC reparation regime rests on the possibility of a shared responsibility and joint action between the Court and national authorities as it is in respect of criminal matter.[1433] In this context, it has been observed that if States fails to cooperate with the Court, the case may be referred to ASP or the UN Security Council. Unfortunately there is no indication on the possible action which may be taken by these organs. The non-cooperation with the Court for enforcement reparation orders could weaken the ICC reparation system which stands on two pillars: a judicial pillar represented by the Court, and an enforcement pillar represented by States 'which undertake a legal obligation to cooperate with the Court'.[1434]

Although, as regards enforcement procedures, Art75 (5) of the ICC Statute refers to enforcement of fines and forfeiture orders, all of the provisions pertaining to the enforcement of the latter cannot apply to the enforcement of the former. For example in the case of willful non-payment of a fine, the Presidency, on its own motion or at the request of the Prosecutor, after it is satisfied that all available enforcement measures have been exhausted, it may as a last resort extend the term of imprisonment for a period not exceeding a quarter of such term or five years, whichever is less'.[1435] One should not assume that this provision could apply in a case of willful non-payment of an award for reparations by a convicted person. Since the ICC reparation regime does not expressly provide for such a penalty, one shall not interpret it extensively. In the same line, concerning enforcement of forfeiture order, it has been demonstrated how the alternative provided by Art.109 (2) of the ICC Statute could only pertain to an order for restitution in kind.

In addition, one may assume that the obligation of States to give effect to reparation orders in the same way of fine and forfeiture orders is limited to the context of the ICC Statute and cannot be extended to the context of national procedure. In other words, enforcement procedures under domestic law could differ from fines and forfeitures and reparation orders.[1436] Furthermore, concerning the recognition and the enforcement of reparation order by States parties, it is arguable that the latter shall put in place laws which comply with the ICC Statute as far as reparation orders

[1432] King, F.P. and La Rosa, A.M., *op. cit*., p.326

[1433] See Ba Amady, *op. cit.*, p.48

[1434] Abtahi and Arrigg Koh, *op. cit.*, p.2

[1435] Rule 146(5) of the RPE of the ICC

[1436] See for example the Kenyan International Crimes Act (Act NO. 16 of 2008) and the Ugandan International Criminal Court Act 2010 (Act 11).

are concerned. In other words, national laws should not constitute in any way an obstacle to the enforcement of reparation order except in the case of the rights of *bona fide* third parties. Another observation is that unlike the execution of the sentence of imprisonment, the ICC does not supervise the execution of reparation orders at national level.[1437]

Regarding assistance to victims and their families, it has been noted that assistance to victims and their families defers from reparation awards under Art.75 of the ICC Statute. It has been demonstrated that reparation awards under Art.75 of the Statute are ordered, directly or indirectly, against a convicted person whereas activities and assistance shall be financed by resources from voluntary contributions or other resources allocated to the TFV by the ASP. Whilst reparation awards should not be decided unless there is a conviction, the TFV could initiate activities and/or projects which will benefit victims and their families when a *situation* gets to be admitted by the Court. The beneficiaries of the reparation award are only the victims of a convicted person while assistance services may benefit the natural victims of a situation and their families. In this regard it has been demonstrated that the competence to initiate activities and/or projects to assist victims is entrusted to the TFV through its Board of Directors. Nevertheless, the TFV's competence has limits which shall be protected by the Court. Indeed, the latter should prevent the Board of Director from taking any decision which would pre-determine any issue to be determined by the Court or which may be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. This preventive role to be played by the Court does not violate the principle of the independence of the TFV since its main purpose is to safeguard the legality of decisions which shall bind both the Court and the TFV. In this context, where redress for victims is not available at national level, or where it is available only to a limited degree, the TFV may provide an important means by which such redress can be supplemented and any assistance can be obtained by victims and their families.[1438]

[1437] Regarding supervision of enforcement of sentences Art.106 (1) of the ICC Statute provides that 'The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners'.

[1438] McCarthy, C., 2012, *op. cit*., p. 360.

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PART THREE

REFLEXIONS ON WAYS TO STRENGTHEN THE MECHANISMS OF THE IMPLEMENTATION OF THE RIGHT TO REPARATIONS

Just as energy is the basis of life itself and ideas the source of innovation, so is innovation the vital spark of all human change, improvement and progress.[1439] *Good ideas are not adopted automatically. They must be driven into practice with courageous patience.*[1440] *So many new ideas are at first strange and horrible, though ultimately valuable that a very heavy responsibility rests upon those who would prevent their dissemination.*[1441]

[1439] Tedit Levitt at: <http://thinkexist.com/quotations/innovation/ >, accessed on 20th February 2013.

[1440] Hayman Rickove (1900-1986), at: < http://www.quotationspage.com/subjects/ideas/>, accessed on 20th February 2013

[1441] J.B.S. Haldane (1892-1964), at: < http://www.quotationspage.com/subjects/ideas/>, accessed on 20th February 2013.

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REFLEXIONS ON WAYS TO STRENGTHEN THE MECHANISMS OF IMPLEMENTATION OF THE RIGHT TO REPARATIONS

INTRODUCTION

The ICC Statute imposes an obligation upon the Court to 'ensure that a trial is fair and expeditious'.[1442] Nevertheless, the implementation of the novel right to reparations before the ICC appears as a challenge to the Court. The analysis of the procedural aspects of the right to reparations for victims along with the ICC's early practice in reparation proceedings reveal the complexity of issues raised by the right to reparations before the Court. Meeting the requirement of fairness particularly in terms of expeditious procedures[1443] and full respect of the right of all parties involved in reparation proceedings proves to be a tremendous task for the Court.

It has been for example demonstrated how reparation proceedings shall principally be a post -conviction proceedings[1444] which, at the current state, are conducted by the Trial Chamber which deals with the criminal case from which the right to reparation stems.[1445] The implementation of victims' right to participate in the proceedings before the ICC, which is in close connection with the right to reparations, has already caused an accumulation of backlogs before the Court.[1446] This has led the ASP to request the Court to review the system for victims' applications with a view to ensuring its sustainability, efficiency and effectiveness.[1447] To resolve the problem resulting from application to participate in the proceedings, it has been suggested that the application process for participating in the proceedings should be separated from applications seeking reparations.[1448] Yet

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[1442] Art. 64(2) of the ICC Statute

[1443] The concerns of expeditious procedures led the ASP to recognise that 'evidence concerning reparations may be taken during trial hearings so as to ensure that the judicial phase of reparations is streamlined and does not result in any delay thereof' (Resolution *ICC-ASP/10/Res.3* adopted on 20th December 2011on reparations, para.4).

[1444] See at p.225.

[1445] Actually, '[r]eparation proceedings are an integral part of the overall trial process' (*The 2012 Decision on Principles and Procedures*, para.260). Therefore, 'All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations' (Art 74(1) of the ICC Statute).

[1446] The ICC recognises experiencing 'difficulties processing applications in a timely manner so as to keep pace with the proceedings and enable victims to effectively exercise their rights under the Statute' (See the Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC-ASP/11/22, 5th November 2012; see also the Resolution ICC-ASP/11/Res.8 on Strengthening the International Criminal Court and the Assembly of States Parties, para.58).

[1447] See the Resolution ICC-ASP/11/Res.*8* on Strengthening the International Criminal Court and the Assembly of States Parties, para. 58.

[1448] See the Report of the Court on the review of the system for victims to apply for participation in proceedings, 5th November 2012, ICC-

this risks to complicate the situation since victims have both the right to participate and to seek reparations in the ICC proceedings.[1449] In case the joint standard application form[1450] is modified, victims shall be obliged to fill different forms at different times and their assessment will also be duplicated.[1451] Besides the process of applying for participation and reparations by the victims and the assessment of the applications, the specific reparation proceedings constitute another heavy task for the Trial Chamber which has finished the stage of conviction and has to move to the sentence stage. Here is the heaviness of the task of the Court of which the principal judicial mandate is the adjudication on the individual criminal responsibility.[1452]

The Part three of this dissertation strives to suggest or introduce a debate on some ways to face procedural challenges in the implementation of the right to reparations for victims before the ICC. It includes a single Chapter, *Revisiting and Improving and procedural and organisational aspects of the ICC*, which intends to examine the adaptation of court's procedures to mass victim cases and the possibilities of the establishment of a Special Division for reparations within the Court.

ASP/11/22, para.23. It bears reminding ourselves that before 2010 the application forms for participation and reparations were separated due to concerns expressed in the early situation countries that having a joint form would create unrealizable expectations among victim communities concerning reparations at an early stage in proceedings.

[1449] Concerning the advantages for victims to participate in trial proceedings see Chapter two of Part two of this dissertation (pp.232ff*).*

[1450] Regarding the use of the joint standard application form see Chapter two of Part two of this dissertation (pp.205ff).

[1451] Moreover, one may assume that the fact of asking victims to fill in the forms for participation and for reparations could at different time put them 'at a greater risk of re-traumatisation as it implies that they would have to recall and to explain twice their harm suffered. Such a system of separate applications may therefore reduce the effectiveness of the right of victims to seek reparations' (Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC-ASP/11/22, 5th November 2012, para. 23)

[1452] See Art.1 of the ICC Statute and the Resolution *ICC-ASP/10/Res.3* on reparations, 20th November 2011, para.4.

SINGLE CHAPTER: REVISITING AND IMPROVING PROCEDURAL AND ORGANISATIONAL ASPECTS OF THE ICC

INTRODUCTION

The difficulties experienced in the accomplishment of the ICC's mission regarding reparations to victims lead us to make some reflections on how may reparation procedure should be improved in order to be effective in case of *mass victims* (I.2.*)*. In the same line, it is worthwhile examining the possibilities provided for by the ICC Statute for revisiting organizational aspects of the Court in order to meet the requirement of fairness and expeditious of reparation proceedings. In this regards, one may suggest the the establishment of a Special Division for reparations to victims within the ICC (I.3.). Before exploring these ways, let us first make an overview of legal and practical challenges facing the Court in the light of its early case law (I.1).

I.1. Challenges due to the cumbersome nature of procedures: Learning from the ICC's victim reparation early practices

The main points of the Trial Chamber I's *2012 Decision on Principles and Procedures* revealed challenges faced due to the cumbersome nature of procedures before the ICC. These challenges may justify organizational and procedural adaptations and changes. A good number of major challenges can be brought out.

Firstly, as it has mentioned earlier in Part two of this dissertation, the Trial Chamber I held that the TFV is better indicated to select and appoint experts provided for by Rule 97(2), of the RPE of the ICC and thereafter *delegates* its incumbent power to the non-judicial organ to appoint experts and oversee their work. Such delegation has been criticised as inconsistent with the judicial inherent power.[1453] The delegation seems to implicitly stand on the lack of appropriate expertise of the Chamber to select and appoint appropriate expert. Indeed, as already observed the Court considered that the TFV, 'is well placed' in matters of reparations to victims.[1454] Does this not demonstrate that there is a need to have within the ICC qualified judges with expertise in tort law and civil procedure especially reparation matters? It is worth remembering that the ICC Statute when providing for the qualification of the needed judges, only underscores the necessity of each

[1453] See the comments made on the issue of 'the appointment of expert' in Chapter II of Part II of this dissertation, pp.259ff.

[1454] *The 2012 Decision on Principles and Procedures*, para.266

division of the Court to 'contain an appropriate combination of expertise in criminal law and procedure and in international law' but not in reparation matters. Specifically, it specifies that the Trial Chamber, which deals with reparations issue, 'shall be composed predominantly of judges with criminal trial experience'. Selecting experts to assist the Court in assessing reparations claims, defining and oversee their work as well as directing reparation proceedings require expertise in civil procedure and tort law.

Secondly, the Trial Chamber decided to refer the judiciary monitoring and oversight functions relating to the implementation of reparation measures to *a newly constituted chamber* at the reparation stage. In this regard the Chamber held that:

> In order for the Judiciary to exercise its monitoring and oversight functions, *the newly constituted Chamber* should be updated on [the implementation plan for reparations[1455]] on a regular basis. In accordance with Article 64(2) and (3)(a) of the Statute, the Chamber may be seized of any contested issues arising out of the work and the decisions of the TFV [emphasis added].[1456]

According to the Chamber, the *newly constituted Chamber* shall take over the case of reparations in order to monitor and oversee the implementation of reparation measures and shall eventually deal with enforcement disputes. The Chamber does not bring out the justification of contemplating the *newly constituted Chamber*. The representatives of victims criticize the decision arguing that it 'is inconsistent with the Trial Chamber's own previous decisions, which stipulate in particular that reparation proceedings are an integral part of the trial and that there must be a full bench of three judges throughout the trial [footnotes omitted]'.[1457] However, bearing in mind that the decision was issued in the *Lubanga case* of which the proceedings before the Trial chamber had almost lasted three years at the time of issuance of the Decision,[1458] one may assume that the judges assigned in the Trial Chamber I shall no longer serve in the same Chamber after they issue final decision on reparations. This justifies the fact that implementation challenges shall be dealt with by a newly constituted Chamber. Indeed, the judges assigned to the Trial Chamber shall serve in those

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[1455] The Trial Chamber I's decision contemplates a five-step implementation plan which, as determined the Chamber, is to be executed in conjunction with the Registry, the OPCV and the experts. For more details on the implementation plan see the *2012 Decision on Principles and Procedures*, para. 281 - 282, and observations made on the *modus operandi* of experts in reparation proceedings in Chapter two of Part two of this dissertation (pp.263ff).

[1456] *The 2012 Decision on Principles and Procedures*, para.286

[1457] See ICC, *Prosecutor v Thomas Lubanga Dyilo*, Représentants Légaux des Victimes (équipe V01), Acte d'appel contre la '*Decision establishing the principles and procedures to be applied to reparation*' du 7 août 2012 de la Chambre de première instance I, 3rd Septembre 2012, ICC-01/04-01/06-2914, para. 23. See also observations made on 'Reparation proceedings as separate post-conviction procedure' in Chapter two of Part two of this dissertation, p.225ff.

[1458] The trial was opened on 26th January 2009 whereas the *2012 Decision on Principles and Procedures* was issued on 7th August 2012.

divisions 'for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division'.[1459]

From the *2012 Decision on Principles and Procedures* it is reasonable to infer that the judges assigned in a Trial Chamber I shall no longer be seized after the approval of the expert's proposals for collective reparations in the *Lubanga* case.[1460] In this regards, it bears noting that the Trial Chamber I's decision establishing principles and procedures to be applied on reparations has been subject to appeals which, at the time of writing, was still pending before the Appeals Chamber.[1461]At the same time, the decision on conviction, upon which an order for reparations is depended, was still pending before the Appeals Chamber. The latter has already suspended the execution of the Decision establishing principles and procedures to be applied on reparations. This means that for example the TFV could not appoint experts in compliance with the Decision. Consequently, reparation proceedings are suspended until the decision by the Appeals Chamber on appeals against both conviction and the Decision establishing principles and procedures to be applied on reparations.[1462] The fact is that reparation proceedings may resume before the Trial Chamber I, after the decision of the Appeals Chamber. How long will it take the Appeals Chamber's decision? And how long will it take the reparation proceedings in case they resume before the Trial Chamber I? It is not easy to predict the time these proceedings will take. This constitutes a big challenge to fair trial which includes expeditiousness of proceedings.

Thirdly, the Chamber did not assess individual applications for reparations but rather ordered the Registry to transmit them to the TFV by allowing the TFV to use the unfettered

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[1459] Art. 39(3)(a) of the ICC Statute.

[1460] Concerning the final step of reparation proceedings before the Trial Chamber as regards the *Lubanga* case see the *2012 Decision on Principles and Procedures*, para. 282. According to the Decision, the final step will be 'the collection of proposals for collective reparations that are to be developed in each locality, which are then to be presented to the Chamber for its approval'.

[1461] See, ICC, *Prosecutor v Lubanga*, Appeal against Trial Chamber I's Decision establishing the principles and proceduresto be applied to reparations of 7th August 2012, 24th August, ICC-01/04-01/06-2909-tENG; ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes (équipe Vo1), Acte d'appel contre la 'Decision establishing the principles and procedures to be applied to reparation' du 7 août 2012 de la Chambre de première instance I, 3 Septembre 2012, ICC-01/04-01/06-2914; ICC, *Prosecutor v Lubanga*, Equipe de la Défense de Monsieur Thomas Lubanga, Acte d'appel de la Défense de M. Thomas Lubanga à l'encontre de la « Decision establishing the principles and procedures to be applied to reparation » rendue par la Chambre de première instance I le 7 août 2012, 6 Septembre 2012, CC-01/04-01/06-2917 and ICC, *Prosecutor v Lubanga*, Equipe de la Défense de Monsieur Thomas Lubanga, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre de la « Decision establishing the principles and procedures to be applied to reparations », rendue par la Chambre de première instance le 7 août 2012, 5 Février 2013, ICC-01/04-01/06-2972.

[1462]See ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953.

discretion and decide on whether applicants are to be included in its reparation programmes.[1463] In this regard, it bears repeating the justification brought out by the Trial Chamber which held that '[g]iven the uncertainty as to the number of victims of the crimes in this case save that a considerable number of people were affected - and the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified.[1464] The representatives of victims, who formed an appeal against the Decision, claim that the Trial Chamber I by 'deciding not to examine the individual applications for reparations before it, the Trial Chamber failed in its obligation to give full effect to the victims' right to reparations [and] thereby deprived *de facto* the victims who had submitted the applications of the full exercise of their right to reparations under [Art. 75 of the ICC Statute], that is, the right to have their applications for reparations duly examined and decided upon'.[1465] Bearing in mind that the Appeals Chamber has not yet decided on this issue, it is arguable that, according to Rule 97(1) the Trial Chamber is vested with the power to award reparations on collective basis, where it deems it appropriate, despite the individual applications for reparations. Consequently, such a grievance against the decision should not stand. Rather, the concerns should be about time consumed. How could the Court be time effective in filing and assessing reparation applications where there are plausible reasons to justify reparations awards on collective basis? How could the Court meet the needs of fairness and expeditiousness, as far as reparation proceedings are concerned? In other words, '[w]hat structures and procedures have to be put in place in order to ensure effective and efficient processing of reparation claims'?[1466] In this regard, the ICC reparation regime 'provide little insight as to how the Court is expected to process the waves of reparation claims that are expected to reach its shores'[1467] and the Trial Chamber I's *2012 Decision on Principles and Procedures* does not bring a satisfying solution to the issues. Rather, it reveals the challenges the Trial Chamber faced and the difficulties to overcome them.

Fourthly, by delegating its power to the TFV the Trial Chamber did not specify how the right of parties should be respected. The Trial Chamber I's Decision does not, as already observed,

[1463] See ICC, *Prosecutor v Lubanga*, Représentants Légaux des Victimes (équipe Vo1), Acte d'appel contre la 'Decision establishing the principles and procedures to be applied to reparation' du 7 août 2012 de la Chambre de première instance I, 3 Septembre 2012, ICC-01/04-01/06-2914.

[1464] *The 2012 Decision on Principles and Procedures*, para.219

[1465] ICC, *Prosecutor v. Lubanga*, OPCV V02 team of legal representatives, Appeal against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparations* of 7th August 2012, 24th August 2012, ICC-01/04-01/06-2909-Teng, para.19

[1466] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.321

[1467] *Ibid*. p.318

provide a framework which may allow both the convicted person and victims to participate in the stages of reparation proceedings.

These foregoing challenges are clear examples, which require the reexamination of the procedure of the ICC and its organisation in order to meet the requirement of fair trial. The two first aforementioned challenges call for reflections on the possibility of establishing a Special Division for reparations within the ICC whereas the third and fourth issues pointed out call for adaptation of the Court's procedures and practices to mass victims cases.

I.2. Adaptation of Court's procedures and practice to mass victim cases

Most of the crimes within the jurisdiction of the ICC - the crime of genocide, crimes against humanity, war crimes and the crimes of aggression - are, by their nature, mass crimes that involve large numbers of victims'.[1468] Yet, the exact number of potential victims linked to a case depends on the scope of the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber.[1469] Since the right to reparations is granted to the victims, the ICC will face the problem of mass victim

[1468] ICC, Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC-ASP/11/22, 5th November 2012, para.5. Concerning the possible big number of victims of crimes under ICC jurisdiction, Rwandan genocide can illustrate the assertion. According to the UN, Rwandan genocide made about 800,000 victims, about 10 per cent of the total population (see Roberts, P., 2003. Restoration and Retribution in International Criminal Justice: An Exploratory Analysis. In: A. von Hirsch al., eds., 2003. *Restorative Justice and Criminal Justice, Competing or Reconcilable Paradigms?* Oxford (US): Hart Publishing, p. 123). In the Darfur conflict, the United Nations estimated there were 1.65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad. There has been large-scale destruction of villages throughout the three states of Darfur (see UN, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18th September 2004, 25th January 2005, p.3). Moreover, although there are no precise data on number of victims of conflict in the DRC, one may consider, for example, the number of potential victims of ' ethnic cleansing, systematic rape, forced labour, torture, killing, maiming, looting by government troops and rebel fighters spread terror throughout the countryside' (Markus Funk, T., *op., cit.* p.119). According to some reports on the situation in the DRC, during the period between August 1998 and April 2004, the war in the DRC resulted in the deaths of over three million people as '[v]ery few Congolese and foreign civilians living on the territory of the DRC managed to escape the violence, and were victims of murder, maiming, rape, forced displacement, pillage, destruction of property or economic and social rights violations' (OHCHR, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, para.127, p.48). The International Rescue Committee (IRC) conducted four mortality surveys in the DRC between 1998 and 2004. According to the IRC, 'from the start of the Second Congo War in August 1998 to the end of April 2004 around 3.8 million people were thought to have died as the direct or indirect victims of the War and the armed conflict. It should be noted, however, that the methodology used by the IRC to determine the number of indirect deaths is based on epidemiological studies and population growth estimates that have been disputed' (OHCHR, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, p.48 (footnotes)).

[1469] ICC, Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC-ASP/11/22, 5 November 2012, para.5. According to the report of the ICC at the rate at which the Court received victims' applications to participate in proceedings has increased by 300 per cent, from 187 applications received on average per month in 2010, to 564 in 2011. As at the end of April 2012, 19,422 victims' applications for participation and for reparations have been submitted, and 4,107 victims have been accepted to participate in proceedings before the Court.

cases as a challenge particularly in upholding the principles of fair trial. Actually, mass victims – with identified and unidentified victims[1470] - may have consequences such as process costs and time of sentencing. In the context of victim participation in criminal proceedings, the challenge of conciliating victims' rights with the principles of a fair trial has already sobered the Court reviewing its practices. The Court is already aware of these challenges for, in the *Laurent Gbagbo* case it held that 'it is imperative to put in place a system that is adequate to deal with numerous applicants'[1471] to participate in proceedings as victims.

The RPE of the ICC does not provide for specific procedures to be applied to reparations as it does for the conduct of criminal proceedings. As already mentioned the Court is vested with the power to fill the vacuum by adopting provisional Rules of Procedures. Yet so far it has not exercised this power to handle procedural issue. Rather, the Trial Chamber I established, in the *Lubanga* case, some procedures to be applied to reparations. In this regard, the Chamber determined that all of the reparations claims so far received by the Registry would be sent to and dealt with by the TFV so that collective awards could be granted to victims.[1472] Without repeating all challenges so far faced by the Trial Chamber I in the Lubanga case, it is remarkable that dealing with reparations for a big number of victims (either known or not yet known) is a thorny issue which requires review of procedures and practices of the ICC. Some commentators advice the ICC to draw on the wealth of experience that international mass claims programmes have developed in mass victim claims[1473] and to borrow from some national private law by allowing a form of class actions.[1474] Actually, borrowing from such experience should help the Court to adapt its procedures

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[1470] In the *Lubanga case*, the Trial Chamber I recognised the uncertainty as to the number of victims of the crimes in this case but was aware that a considerable number of people were affected. This led the Chamber to hold that given 'the limited number of individuals who have applied for reparations, the Court should ensure there is a collective approach that ensures reparations reach those victims who are currently unidentified' (*The 2012 Decision on Principles and Procedures*, para.219).

[1471] ICC, *Prosecutor v Bgagbo*, Pre-Trial Chamber III, Second decision on issues related to the victims' application process, 5th April 2012, ICC-02/11-01/11, para 6

[1472] See observations made on the determination of participants in reparation proceedings in the *Lubanga* case (at the stage of expertise) in Chapter two of Part two of this dissertation especially concerning the non-consideration of the participation of the convicted person (Thomas Lubanga Dyilo) in reparation proceedings (pp.266ff).

[1473] Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p. 334. The Kosovo Housing and Property claims Commission (HPCC) described the basic characteristics of a mass claim mechanism as follows: 'The Commission […] notes that a mass claims process can be broadly understood as a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with a decision making body within a limited period of time, thus claimants in a mass claims process are generally in the same situation, having suffered the same or similar losses within the same period of time' (See HPCC Res. 7/2003, 11 April 2003, quoted by Zegveld, L., *op. cit.*, p.95).

[1474] In the United State of America (USA) for example the legislator has set out particular legislation in respect of mass tort litigation by establishing the 'class action' system. The class action system was adopted as mechanism for dealing with a large number of victims. Currently, some countries, outside the common law system, have borrowed and adapted the device to their civil law system. Mulheron informs us for example

and practice in order to provide 'a practical avenue to numerous victims of international crimes wishing to bring claims for reparations that would be too costly and time consuming' [1475] to assess individually. In the same vein, the ICC should learn from the practice of the ECCC about the possibility of consolidating victims in groups and allowing victims associations to act on their behalf. This may help to rethink the relationship between the Court and victims particularly where the latter are numerous. Indeed, where there are thousands of victims in need of justice, procedures and practices may inevitably be adapted accordingly.[1476]

Consequently, this section intends to demonstrate how the Court can develop a collective approach in dealing with reparation issues (I.2.1). At this juncture, it is of necessity redefining the role of victims and their representatives in reparation proceedings. In addition, it will be noted that appointing a Lead Expert whose mission may include facilitating reconciliation between victims and the convict (I.3.2.) may not only reduce the task of the Court but also allow the innovative form of reparations referred to as 'apology and forgiveness'.[1477]

I.2.1. Privileging a collective approach in dealing with reparation issues before the ICC

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The process of reparations before the ICC includes, as already observed, different steps which may stem from victim's request for reparations or from a motion of the Court.[1478] The current legal framework of the Court seems to privilege an individual approach in dealing with reparation issues with some room for collective approach. Rule 89(3) for example opens a room for natural persons to be represented by a person acting with their consent whereas other provisions contemplated the possibility of victims to form a group and enjoy some procedural rights as a group.[1479] In the same line, as it has already been observed, the RPE vests the Court with the power to 'award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'.[1480]

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that Quebec, Sweden and Brazil have developed, within their civil law systems a formal doctrine of class actions (Mulheron, R., 2004. The Class Action in Common Law Legal System: A comparative Perspective, Oxford: Portland Oregon, p.5). The list could be completed by Zegveld who likewise mentions some countries that have adopted, in varying forms, class actions such as Switzerland and Israel (Zegveld, L., *op. cit.*, p.97 footnotes).

[1475] Zegveld, L., *op. cit.*, p.97

[1476] See also Shelton, D., *op. cit.*, p.426.

[1477] See discussions made on this innovative form of reparations (apology&forgiviness) in Chapter one of Part two of this dissertation (pp.147ff).

[1478] Consider the context of Art 75(1)(s2) of the ICC Statute

[1479] See for example Rule 50(1) and 90(2) – (5) of the RPE of the ICC.

[1480] Rule 97(1) of the RPE of the ICC

The need of reviewing the legal framework of the ICC so as to adopt a collective approach in dealing with victims is already felt by the ASP which encourages collective approach and *requests* its Bureau 'to prepare, in consultation with the Court, any amendments to the legal framework for the implementation of a predominantly collective approach in the system for victims to apply to participate in the proceedings'.[1481] In the context of victim participation, the Pre-Trial Chamber III already considers that although 'under the existing legal framework collective victims' applications cannot be imposed [,] individual victims may be encouraged to join with others so that a single application is made by a person acting on their behalf, with their consent, in accordance with Rule 89(3) of the Rules'.[1482] One may assume that, not only should the collective approach already foreshadowed by the Chamber apply to victim participation in criminal proceedings but also to victim participation in reparation proceedings.

How could the collective approach concretely work under the ICC reparation regime? The collective approach could work by recognising and allowing for example consolidated groups of victims, which may include individuals and communities, and victims' association to represent their members before the ICC with a common intervener or legal representative (I.2.1.1.). The collective approach should also require a redefinition of a legal representative's responsibilities to actively play dual role as an advocate and officer of the court (I.2.1.2.).

I.2.1.1. The formula of consolidated groups of victims with a common intervener and victims' associations

Under current legal framework of the Court it is possible to adopt and develop the formula of consolidated group of victims with a common intervener[1483] by encouraging victims to form groups which may apply for reparations and participate in reparation proceedings on behalf of their members (A). In the same vein, the ICC reparation regime should introduce the procedural mechanism of victims' association (B). Still there are good reasons to maintain individual approach

[1481] See the Resolution *ICC-ASP/11/Res.7* on Victims and Reparations (adopted during the eleventh session held in The Hague on 14th – 22nd November 2012), para.5.

[1482] ICC, *Prosecutor v Bgagbo,* Pre-Trial Chamber III, Second decision on issues related to the victims' application process, 5th April 2012, ICC-02/11-01/111, para.8. According to Rule 89(3) of the RPE of the ICC an application for participation of victims in criminal proceedings 'may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled'.

[1483] Under the IACtHR system a common intervener 'shall be the only person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings' (See Art. 25(2) of the Rules of Procedures of the Inter-American Court of Human Rights, Approved by the Court during its LXXXV Regular Period of Sessions, held from 16th to 28th November 2009).

in dealing with reparations to victims and this require flexibility of collective approach and its compatibility with individual approach (C).

A. The consolidated groups of victims under the current legal framework of the ICC

The notion of consolidated groups of victims could be found in the reviewed Internal Rules of the Extraordinary Chambers in the Courts in Cambodia (ECCC) where, at the trial stage and beyond, civil parties (victims) have to comprise a single, consolidated group of which the interests are represented by the Civil Party Lead Co-Lawyers.[1484] Bearing in mind that the ECCC's reparation regime is different from the ICC's one,[1485] the latter should borrow from the former and adapts its procedures and practice to the necessity of a fair and effective conduct of reparation proceedings.

Under the ICC's reparation regime, the mechanism of consolidated groups of victims is possible under Rule 89(3) and Rule 90 (2) and (5) of the RPE of the ICC. According to Rule 89(3) an application for participation of victims in the ICC's proceedings may be made by a person acting with the consent of the victims. Although this article applies particularly to participation of a victim in criminal proceedings it also applies for reparation proceedings which are inseparable with criminal proceedings.[1486] Indeed, Art.75 (3) contemplates the possibility of a victim to be represented by a person acting on his or her behalf at the stage of reparation proceedings.[1487] In the same line, Rule 90(2) of the RPE provides that '[w]here there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or *particular groups of victims*, if necessary with the assistance of the Registry, to choose a common legal representative or representatives [emphasis added]'. Rule 90(5) goes on by considering 'group

[1484] See Rule 23(3) of the ECCC Internal Rules (Rev.8) (General Principles of Victims Participation as Civil Parties) which provides that 'At the pre-trial stage, Civil Parties participate individually. Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers'.

[1485] Contrary to the ICC's reparations regime, the ECCC's reparation regime recognises only collective and moral reparations to civil parties. If an accused is convicted, the ECCC may award only collective and moral reparations to victims (who are civil parties). The collective and moral reparations are measures that a) acknowledge the harm suffered by victims 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 (see Rule 23 *quinquies*(1) of the ECCC's Internal Rules (Rev.8)).

[1486] Indeed, it has observed that a victim has the right and advantages to participate in criminal proceedings with view to claim reparations (See discussions made on the issue in Chapter two of Part two (pp.228ff). Likewise, where there is a special Division for reparations, it was argued that the chamber should be a referral Chamber and bound by the decision referring a case before it by a Trial Chamber. In other words, the special chamber for reparations should take into account and continue the reparations proceedings initiated before the Trial Chamber.

[1487] Art. 75(3) of the ICC Statute provides that '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'.

of victims' as a participant which may receive assistance from the Registry when the members lack the necessary means to pay for a common legal representative.[1488]

The notion of 'group of victims' introduced by the Rule 90(2) and (5) could be developed by the Court and apply the formula of consolidated group of victim with a common intervener. In developing this formula, the ICC could also draw from the system of class actions adopted by different legal systems. A class action is understood as a civil lawsuit of a large group of people, with similar legal claims who collectively bring a case before a court. The group must be approved or certified by the judge before the class action can proceed. After certification of a class, notification is sent to the unnamed plaintiffs to inform them of the lawsuit and they are given the opportunity to opt out of the class. Individuals who so choose are not members of the class, and the class action litigation will not impact their legal rights. Likewise, non-members of the class are not entitled to any recovery which may be awarded to the class; however, they may bring their own separate lawsuits asserting their own legal claims.[1489] As such class actions are often considered as a particularly appropriate way to obtain redress for a big number of victims 'because of their capacity to involve and reunite a large number of individuals who have suffered the same or a similar fate'.[1490] Particularly, in the USA, Rule 23 (a) of the US Federal Rules of Civil Procedures determines prerequisites for a class action. The rule reads as follow: 'One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class'.

The big number of victims of crimes under the jurisdiction of the ICC led some scholars to suggest that ICC borrows from class action systems for the purpose of providing a practical avenue to numerous victims wishing to bring claims for reparations that would be too costly and time consuming to litigate individually.[1491] In the context of the ICC's reparation regime, individual victims may, where appropriate, file their claims jointly and 'group themselves in order to facilitate

[1488] Rule 90(5) of the RPE of the ICC reads as follows: 'A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.

[1489] See Zegveld, L., *op. cit*., p. 97.

[1490] Bottigliero, I., *op. cit*., p.57

[1491] Zegveld, L., *op. cit*., p. 97

the administrative handling or decision-making of the claims'.[1492] A group of victims could be based on determined criteria. Victims may for instance be grouped by taking into account the crimes of which they are victims, the harm suffered and type of reparations contemplated. The ICC Statute determines the crimes and defines each act which constitutes a crime under the jurisdiction of the ICC.[1493] Victims of each act or similar acts of crimes under the jurisdiction of the ICC could for example be grouped as they almost sustained the same harm and could be redressed almost in the same way. Besides, victims groups could include *inter alia*, victims with special or particular needs like victims of sexual violence, children, the elderly, persons with disabilities and the severely traumatised. In other words, a group should include victims whose personal interests are similarly situated with others in the group.[1494] For example in the case of genocide there could be a group of victims who lost their parents and their relatives killed for being members of a group.[1495] These victims could have sustained moral harm for losing their beloved and material harm by losing the person on whom they depended. Reparations for each member of this group could be an award for moral harm calculated by applying *a tariff* since it is not possible to value moral harm. Likewise, compensation for material harm could be calculated by applying *a tariff* since the number of victims and the amount of resources could not permit full reparation.

In the same vein, the crime of genocide could create victims by causing serious bodily or mental harm to members of a group.[1496] This category of victims could constitute another group since reparations for this group could consist particularly in medical and social rehabilitation. The acts of '[i]mposing measures intended to prevent births within the group' and '[f]orcibly transferring children of the group to another group' could make victims who may suffer from almost the same moral harm. Victims of these acts could constitute a group. Concerning the act of '[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', victims of such an act could be found in the previous group according to the harm they sustained. This example could give an idea how the Court, taking into

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[1492] ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, para.5

[1493] It bears repeating that the ICC Statute provides that the Court 'has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression (Art.5 of the ICC Statute). See also The Elements of Crimes adopted at the 2010 Review Conference (replicated from the *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31st May - 11th June 2010* (International Criminal Court publication, RC/11).

[1494] ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, p.4

[1495] Killing members of a group is one of the acts of genocide (see Art. 6(a) of the ICC Statute).

[1496] See Art. 6(b) of the ICC Statute

account the specificities of each case, could encourage victims to form groups and to act on collective basis.

In addition, where appropriate, sub-groups should also be recognised. Large groups consolidated according to legal categories (similar harm suffered, similar strategy for trial/reparation),[1497] should include sub-groups based on ethnicity for example in order that the risk of tensions between them might be avoided.[1498] Likewise, geographical location should help form sub-groups among victims in order that meetings between members might be facilitated, etc.

For the purpose of helping and encouraging victims to request for reparations on collective basis the Registry, by fulfilling its responsibility under regulation 86(1) of the RC,[1499] should provide an appropriate standard application forms for participation and reparations on collective basis which should be filled in by common interveners on behalf of the groups. The standard application forms should be accompanied by annexes which include all needed information on members of group (complete identification, harm suffered and particular type of reparation sought by each victim). All information regarding individual victims should be registered by the Registry into a database which will be accessible to victims' representative and, subject to victim security measures, to the defence. In the same context, the Registry should produce a mapping report that should allow, *inter alia* to '(i) identify main communities or groups of victims; (ii) identify potential persons that could act on behalf of [groups, with consent of their members and] (iii) encourage potential individual applicants to join with others and to that effect consent to a single application to be made on their behalf.[1500]

[1497] ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, para.32

[1498] Actually, we must not lose sight of challenges for victims to constitute by themselves as a group, and some of those challenges could be ethnic tensions between victims. To illustrate this challenge one may refer to the cases of Cambodia and Rwanda. As Redress Trust rapports **'**At the ECCC, this tension [ethnic one] became apparent when after all civil parties were regrouped into one consolidated group, the Vietnamese victims were perceived by other groups as not entitled to any reparations, despite the general acknowledgement among civil parties, that they were all victims for the purpose of participation. In Rwanda, victims of genocide typically find it difficult to identify with victims from different ethnic backgrounds who may have suffered crimes against humanity or war crimes; to link these victims within a single grouping would for them be tantamount to equalising the crimes' (ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, para.37).

[1499] As already noted, Regulation 86(1) of the RC requires the Registrar of the ICC to develop standard application forms for the purposes of participation of victims in ICC proceedings. These standard forms are to be made available to 'victims, groups of victims, or intergovernmental and nongovernmental organizations, which may assist in their dissemination, as widely as possible.'

[1500] ICC, *Prosecutor v Laurent Gbagbo*, Second decision on issues related to the victims' application process (Pre-Trial Chamber III), 5th April 2012, ICC-02/11-01/11, para.10

The members of each group or sub-group of the victims might be known to the Court for the purpose of consolidation. The group of victims has to be recognised by the Court after verification of identified members and determined criteria in case of identified members. However, a question could arise as to how unidentified victims at the time of consolidation could join the group and benefit from an award for reparations. In order to resolve the problem, where victim members of a group or sub-group are not identified due to practical difficulties at the time of an order for reparation, they should be identified and might join relevant groups of victims at the stage of implementation of collective reparations. The suggested procedure could comply with Regulation 60 of the RegTFV which provides for how the TFV will proceed to identify victims who are recipient of an award for reparation where they are not identified by the Court.[1501] A victim who wants to be a member of a group at the stage of implementation should be accepted by the Board of Directors of the TFV which is responsible for the execution of collective reparations pursuant to Rule 98(2-4) of the RPE of the ICC. In this context, it could be held that unnamed victims are not obliged to be part of a group of victims. For the purpose of victims to freely become members of a group of victims, the Court should put in place a mechanism of notification of a recognised and consolidated group of victims by the Court to participate in reparation proceedings.[1502] The possibility of unnamed victims to become members of a group already recognised by the Court could remain open up the stage of execution of an order for reparations. In order to determine unidentified victims who may become members of a group, the TFV should, *inter alia* and with assistance of experts, set out all relevant demographic/statistical data about the group or association of victims already recognised by the Court.

A consolidated group of victim should choose a common intervener who should be the person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings. However the common intervener could in turn be represented by a legal representative. Should there be no agreement within a consolidated group as to the appointment of a common intervener in a case, the Registry could help the group to choose a common one or better suggest a legal representative.

[1501] According to the RegTFV, where the Court has not identified beneficiaries the Board of Directors is vested with the power to approve a final list of beneficiaries prepared by the Secretariat of the TFV after verifying that any persons who identify themselves to the TFV are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court (see Regulations 62 and 64 of the RegTFV).

[1502] A similar mechanism of notification exists under the class action system where '[a]fter certification of a class, notification is sent to the unnamed plaintiffs to inform them of the lawsuit and they are given the opportunity to opt out of the class' (Zegveld, L., *op. cit*., p.97).

In this perspective, it is worth noting that '[s]ome treaty bodies, such as the UN Human Rights Committee, and regional courts, such as the European Court of Human Rights, allow for cases to be brought by a representative on behalf of a number of named individuals'.[1503] For example, and particularly, according to the Rules of Procedures of the Inter-American Court of Human Rights,'[w]hen there are several alleged victims or representatives, these shall designate a common intervener, who shall be the only person authorized to present pleadings, motions, and evidence during the proceedings, including the public hearings'.[1504] This demonstrates that the mechanism of group of victims to represent individual victim is already established by international law and could also be developed by the ICC.

B. Discussing the possibility of victims' associations to represent their members before the ICC

Whilst the ICC's regime provides, as already demonstrated, for groups of victims which may, as such, enjoy procedural rights, it does not evoke the notion of victims' associations. Unlike the group of victims, it is hard to argue that victims' association may exercise procedural right before the ICC under its current legal framework, unless they are simply considered as groups in its extensive sense. Otherwise, allowing victims' association to participate in reparation proceedings as a representative of their members could require some modifications of the RPE of the ICC.

Under the ECCC's reparation regime victims or groups of victims can choose to organise themselves in a *victims' association* which 'refers to an association made up solely of victims of crimes coming within the jurisdiction of the ECCC, which is validly registered in the country in which it is carrying on activities at the time of its intervention before the ECCC, and has been validly authorised to take action on behalf of its members'.[1505] For the purpose of facilitating such a collective organization of civil party action the Victims Support Section of the ECCC may provide victims with a list of approved Victims' Associations drawn up under the supervision of the Co-Investigating Judges and the Trial Chamber. Victim members of an approved Victims' Association are represented by the association's lawyers, and summons and notifications concerning its members are served via the association.[1506] It should be clarified that Victims' Associations are not

[1503] ICC, *Prosecutor v Bgagbo*, Pre-Trial Chamber III, Second decision on issues related to the victims' application process, 5th April 2012, ICC-02/11-01/11, para.8

[1504] Art. 25(2) of the Rules of Procedures of the Inter-American Court of Human Rights.

[1505] See the ECCC Internal Rule (Rev.8) (Glossary).

[1506] See Rule 23 *quater* of the ECCC Internal Rule (Rev.8).

themselves civil parties to the proceedings. Rather, they simply represent their members who are civil parties.[1507] Moreover, it is worth noting that the role of Victims' Associations before the ECCC shall not be confused with the *actio popularis* system which allows for instance an organization to bring an action before an international judicial or non-judicial body on behalf of third persons. Such a system is for example established by the Rules of Procedure of the Inter-American Commission on Human Rights[1508] and the practice of the African Commission of Human and Peoples' rights.[1509] On the contrary, Victims Associations may file complaints on behalf of their members,[1510] and consequently be represented by lawyers.[1511]

In the case of the ICC, like the formula of consolidated groups of victim, the procedural mechanism of allowing Victims' Association to act before the ICC on behalf of their members can arguably resolve the problem of mass victims. Victims' Association might participate in reparation proceedings before the ICC on behalf of victim members where the latter would otherwise have locus *stand* in their own rights. The Associations could easily organize their members and coordinate their claims. The opportunity of such a procedural mechanism might require the modification of the RPE of the ICC.

C. The flexibility of the collective approach and its compatibility with the individual one

The collective approach in dealing with reparation issues before the ICC should not be coercive or rigid but flexible and should not rule out the individual approach. Victims should not be compelled to join any victims' association and collective approach should not preclude a possible individual award. In principle, the collective approach, in terms of procedures in dealing with mass victim cases, should result in collective awards contemplated by the ICC's reparation regime.

[1507] Art.5 of the Practice Direction on Victims Participation of the Extraordinary Chamber in the Courts of Cambodia (Practice Direction 02/2007/Rev.1)

[1508] According to Art.23 of the Rule of Procedure of the Inter-American Commission on Human Rights 'Any person or group of persons or nongovernmental entity legally recognised in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right'.

[1509] See for example African Commission of Human and Peoples' Rights, *Communication 157/96:* Association pour la sauvegarde de la paix au Burundi / Kenya, Uganda, Rwanda, Tanzania, Zaire (DRC), Zambia. The *Association pour la sauvegarde de la paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a [NGO] based in Belgium submitted a communication to the African commission. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It considered the issue in the light of Arts 56(5) and 56(6) of the African Charter and noted that 'it has been the practice of the [African] Commission to receive communications from NGOs'. Consequently, drawing from general international law and taking into account its mandate for the protection of human rights as stipulated in Article 45(2), the Commission took the view that the communication deserved its attention and declared it admissible.

[1510] See the Practice Direction on Victims Participation of the ECCC, Art.2(2)

[1511] *Ibid*, Art.5(9)

Actually, the suggested collective approach should be conceived as principally referring to collective harm, collective communication, collective participation and collective award for reparations but with an individual approach as an exception.

Under the ECCC regime, certain victims choosing to take action through a Victims' Association does not affect the right of other victims to be joined as civil parties in the same case.[1512] Likewise, the procedural mechanism of allowing victims to be represented before the ICC by their associations shall not result in requiring victims to constitute or to join any association in order to participate in reparation proceedings before the Court. Otherwise, the mechanism should obviously violate the international principle according which '[n]o one may be compelled to belong to an association'.[1513]

Concerning the group of victims, they cannot be considered as associations since they do not have separate and independent personality but constitute a method of organizing mass victims. As this argumentation is in sync with the current legal framework of the ICC, one may argue that where victims are encouraged to proceed as a group and they do not accept the formula, the individuals will be allowed to proceed as individuals,[1514] since '[i]n all cases, the court shall respect the rights of victims'[1515] But, where appropriate, the legal framework of the ICC could be revisited in order that the formula of consolidated groups of victims might be implemented by the Court.

Furthermore, it has been noted that collective reparations should not exclude individual award, rather they may coexist. Therefore, collective approach should not result in exclusive and collective reparations. The individual approach should be maintained especially as far as the award for reparations is concerned in order to take into account some particular cases which need particular attention. Therefore, the principle of possible combination of collective and individual award could be maintained but as exceptional and selective approach.

For example within a group of victims or victims' association some vulnerable victims might need particular attention and the particular harm they suffered might require, besides a collective award, an adequate individual award for their redress. In this regard, members of groups

[1512] *Ibid*, Art.5(12)

[1513] *Ibid*, Art.20(2)

[1514] See also ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, para.14

[1515] Rule 97(3) of the RPE of the ICC

of victims or of victims' association could help to identify vulnerable victims among them who need individual award for reparations. In fact, in the case of collective reparations, individual reparations must be considered 'in some cases, particularly those in which the consequences of the violations continue to have a major impact on the lives of victims'.[1516]

Collective approach with the formula of consolidated groups of victim and victims' associations are not without particular challenges. These challenges may be for example the risk of diversity of victim's views, victims' being unable to constitute themselves as a group or association, the issue regarding the capacity of the common intervener or representative of a group or an association, challenges with regards to groups' legitimacy and representation and eventually logistical challenges.[1517] Particularly to victims' associations one may fear that such associations could be created by opportunists whose objectives could not be fair but attracted by false expectations of benefiting from the ICC. However, on other side, it is arguable that the collective approach presents advantages. In terms of efficiency and sustainability, the collective approach should help the ICC speed reparation proceedings and avoid a volume of backload of cases.[1518] The procedural mechanisms of consolidated group and victims' association could provide a degree of anonymity to victims who might otherwise face repercussions from the defendants for filling individual claims.[1519] Within a group of association of victims, 'members are already providing each other with support in connection with their experiences'.[1520] In adapting its procedures and practice to the suggested collective approach the Court should take into consideration all of these parameters.

[1516] OHCHR, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010, pp.498-499

[1517] For more details on the challenges faced by mass victims in applying for participation in court proceedings see ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, paras 25 to 53.

[1518] See also ICC, *Prosecutor v Bgagbo*, Pre-Trial Chamber III, Second decision on issues related to the victims' application process, 5 April 2012, ICC-02/11-01/11, para.43

[1519] *Idem*

[1520] ICC, *Prosecutor v Laurent Gbagbo*, Redress Trust, Observations to Pre-Trial Chamber of the of the International Criminal Court pursuant to Rule 103 of the Rules of Procedure and Evidence, 16th March, 2012, ICC-02/11-01/11-62, para.13

I.2.1.2. Appointing a common legal representative to act as both an advocate and an officer of the Court

The current ICC's reparation regime establishes the principle according to which a victim is free to choose a legal representative.[1521] Yet, it is arguable that in the case of mass victims which, as already discussed may justify the collective approach in handling reparation issues, for 'it is not practically possible to respect the principle 'one plaintiff one attorney'.[1522] Can one imagine how the ICC would 'be able to address individual en masse pre-trial filings submitted by hundreds, or thousands, of lawyers representing individual victims'?[1523] It is reasonable to presume that this practical challenge led the RPE to provide for the possibility of victims choosing a common legal representative or representatives.[1524] In addition, although victims are free to choose a legal representative, this right is subject to the important practical, financial, infrastructural and logistical constraints which may face the Court. Consequently, the common legal representation can be the primary procedural mechanism for reconciling the conflicting requirements of having fair and expeditious proceedings.[1525]

Since the issue under consideration in this section is how to ensure the effectiveness of the proceedings in the case of mass victims, the attention is to be focused not on an individual legal representative but on collective one. Indeed, 'the rationale behind a common legal representation system is the effectiveness of the proceedings'.[1526] How could a group of victims choose and be effectively assisted or represented by a common legal representative? How should the latter efficiently discharge his obligations toward his or her clients in conformity with the current ethical framework of the ICC? These questions, which are relevant in the case of group of victims and Victims' Associations alike, lead to discussing the issues related to choosing a common legal representative (A) before dealing with challenges facing the common legal representative of a group of victims (B). Thirdly, we will examine the desirability of a Lead Common Legal Representative for victims and his role in mass claims (C).

[1521] See Rule 90(1) of the RPE of the ICC.

[1522] Weinstein B.J, *op. cit.*, pp.9-12

[1523] Markus Funk, T., *op., cit.* p.105

[1524] See Rule 90(1) of the RPE of the ICC.

[1525] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328, para.11

[1526] See ICC, *Prosecutor v Banda Abakaer Nourain and Saleh Mohammed Jerboa Jamus*, Trial Chamber IV, Decision on common legal representation, 25th May 2012, ICC-02/05-03/09-337, para.38

A. The appointment of a common legal representative

Victims are free to choose a legal representative pursuant to Rule 90(1) of the RPE of the ICC. Nevertheless, Rule 92(2) of the RPE provides that 'Where there are *a number of victims*, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or *particular groups of victims*, if necessary with the assistance of the Registry, to choose a *common legal representative or representatives* [emphasis added]'.[1527] In case 'victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives'[1528] out of a pool of qualified attorneys. Rule 90(5) of the RPE provides for the possibility for the group of victims who are not able to afford a common legal representative, to receive assistance from the Registry which may include financial assistance. This demonstrates how the drafters of the Rules were aware of the most likely problem of the ability of victims to choose and/or afford a common legal representative.[1529]

The Rule 90 of the RPE is to be understood as providing for two-fold open options: (i) a single lawyer may represent a large number of victims as a group or sub-group of victims or (ii) a team of lawyers could represent them (a group or a sub-group of victims). The criteria of determining a group of victims which may be assisted or represented by a common representative are similar to those already evoked as regards the suggested consolidated groups. Specifically, Regulation 79(2) of the RC states that when choosing a common legal representative for victims in accordance with Rule 90(3) of the RPE of the ICC consideration should be given *to the views of the victims*, and the need to respect *local traditions* and to assist specific groups of victims. The regulation brings out some criteria which may be taken into consideration in choosing and appointing a common legal representative: considering views of victims and respect to local traditions. These criteria were espoused and completed by the Pre-Trial Chamber III in the *Prosecutor v Jean-Pierre Bemba Gombo*. In this case, the Chamber envisaged some criteria for

[1527] Rule 90(2) of the RPE of the ICC

[1528] Rule 90 (3) of the RPE of the ICC. The system is almost similar to the ECCC's system under which a group of civil parties may choose to be represented by a common lawyer chosen from the list held by the Victims Unit. The Victims Unit may help to organise such common representation. If necessary, the judges may require a group of civil parties to choose common representation or may themselves appoint such representation (Art. 4(4) of ECC Practice Direction 02/2007/Rev.1 for victim participation). Under ICC's regime, the assistance from the Registry to victims does not limit itself to choosing a common legal but may also include financial assistance. Actually, according to Rule 90(5) of the RPE of the ICC where 'A victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance'.

[1529] Mekjian, G.J. & Varughese, M.C., *op. cit.*, p.23

appointing a common legal representative which are adapted to the circumstances of the case such as '(i) the language spoken by victims, (ii) links between them provided by time, place and circumstances, (iii) the specific crimes of which they allege to be victims, (iv) the views of victims, and (v) respect of local traditions'.[1530] The need to respect local traditions in choosing and appointing common legal representatives has been underscored by the different Chambers of the ICC.[1531] The need could be met for example by considering that 'the common legal representatives (or one member of their legal team) speak the victims' language, share their culture and know their realities'. [1532] This should allow victims' representation to be more meaningful.

In the same line, the ICC wishes to appoint a common legal representative from the same region of the victims (or at least one member of his or her team) who has a strong connection with the local situation of the victims and the region in general.[1533] The Court believes that, unless victims object to such legal representation, this will help the common legal representative 'in presenting the genuine perspective of the victims, as is his or her primary role'.[1534] Here, it bears noting that legal representative should work with technical support of the Registry, preferably the Victim and Witness Unit.[1535]

Nevertheless, taking into account 'the somewhat politicized nature of the ICC, and the need to know the written and unwritten ins and outs of handling a case at the Court',[1536]victims should,

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[1530] ICC, *Prosecutor v Bemba Gombo* Pre-Trial Chamber III, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, 16th December 2008, ICC-01/05-01/08-322, para.9

[1531] See ICC, *Prosecutor v Banda Abakaer Nourain and Saleh Mohammed Jerboa Jamus*, Trial Chamber IV, Decision on common legal representation, 25th May 2012, ICC-02/05-03/09-337, para.36

[1532] In the *Abdallah Banda Abakaer Nourain and Saleh Mohammed case* (Situation in Darfur, Sudan)The Trial Chamber IV, endorsing the approach adopted in decisions on common legal representation issued by other Chambers, emphasised 'the need to respect local traditions' as set out under Regulation 79(2) of the RC, and considered it 'desirable' that the common legal representatives (or one member of their legal team) ' speak the victims' language, share their culture and know their realities in order for the victims' representation to be more meaningful' (See ICC, *Prosecutor v Banda Abakaer Nourain and Saleh Mohammed Jerboa Jamus*, Trial Chamber IV, Decision on common legal representation, 25th May 2012, ICC-02/05-03/09-337, para.36); see also ICC, *Prosecutor v Ruto and Joshua Arap Sang* , Trial Chamber V, Decision on victims' representation and participation, 3 October 2012, ICC-01/09-01/11-460, para.60).

[1533] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328, para.15; see also ICC, *Prosecutor v Bemba Gombo* Pre-Trial Chamber III, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, 16th December 2008, ICC-01/05-01/08-322, para.9

[1534] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328, para.15 and ICC, *Prosecutor v Bemba Gombo* Pre-Trial Chamber III, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, 16th December 2008, ICC-01/05-01/08-322, para.14

[1535] For more details on the function of Victim and Witness Unit see Rule 17(Function of the Unit), Rule 18 (Responsibilities of the Unit) and Rule 19 (Expertise in the Unit) of the RPE of the ICC

[1536] Markus Funk, T., *op., cit.* p.109

where possible, be represented by ‘a ‘mixed’ team of victim representative, namely, one or more ICC ‘insiders’ with the knowledge of the politics and the rules of the ICC, one or more experienced trial attorneys from the victims' domestic jurisdiction (‘external representatives’) who can best relate to the victims and help the victims feel comfortable’.[1537] The formula group of victims with a common legal representative should contribute to resolve the above mentioned challenges due to the cumbersome procedures. However such form formula presents a number of ethical challenges which may be faced by a common legal representative.

B. Challenges facing Common legal representative in cases of mass victims

According to Rule 90(4) of the RPE of the ICC ‘The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims […] are represented and that any conflict of interest is avoided’. Appointing a common legal representative for the suggested consolidated group or sub-group of victims, in the context of collective approach, raises the issue of whether the common legal representative represent the group or/and individual victims member of the group. In the same context, Rule 90 of the RPE evokes another issue relating to the risk of conflicting interests of victims. Consequently, it is worth examining the question of appointing a common legal representative for a group of victims or /and it individual members (1) and how conflict of interests among victims should be dealt with (2).

1. A common legal representative for a group of victims or/and its individual members

Code of Professional Conduct for Counsel of the ICC provides for the establishment of the representation agreement. A representation agreement ‘is established when counsel accepts a request from a client seeking representation or from the Chamber’.[1538] In the case of a consolidated victim group, one may wonder which parties are in an agreement for representation. In other words, who is the client of a legal representative between the group and its members? A similar question may be how should the common legal representative manage to fulfil his mandate so that the participation of victims, through their legal representatives ‘must be as meaningful as possible as opposed to being purely symbolic’?[1539]

[1537] *Idem*

[1538] Art.11 of the Code of Professional Conduct for Counsel of the ICC

[1539] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims,

As regards the foregoing questions, the Trial Chamber II, in the *Germain Katanga* and *Mathieu Ngudjolo Chui* case, held that '[t]he common legal representative shall be accountable to the victims as a group, who may petition the Registry in case of significant problems with the representative function of the common legal representative'.[1540] This determination supposes that the common legal representative has to be in close relationship with the group of victims for whom he or she has been appointed. However, the Chamber considered that the common legal representative has also to 'respond to a reasonable number of specific legal inquiries from individual victims'.[1541] This demonstrates that a common legal representative should endeavour to accomplish its mission toward both the group of victims and individual members of the group. The common legal representative has to '[k]eep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel'.[1542] In this regard, a common legal representative has to '[r]eceive general guidelines or instructions from his or her clients as a group and particular requests from individual victims'.[1543]

Consequently, it is arguable that the client of a common legal representative is a victim member of a group. A group of victims is a procedural arrangement which allow meeting the requirements of fair, rational and expeditious proceedings. In addition, the representation agreement is principally established between individual victims and a common representative.[1544] Therefore, a lawyer representing a group has to manage to communicate with his clients not only through the

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22nd July 2009, ICC-01/04-01/07-1328, para.10; see also ICC, *Prosecutor v Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para. 59.

1540 ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-13288, para.13

1541 *Ibid*, para.17(a)

1542 *Idem*

1543 *Ibid*, para.17(b)

1544 Art.11 of the Code of professional conduct of counsel (Establishment of the representation agreement) provides that 'The agreement is established when counsel accepts a request from a client seeking representation or from the Chamber.' In this context, the term *agreement*' refers to the *oral* or *written* legal relationship which binds counsel to his or her client before the Court [emphasis added]' (Art. 2(2) of the Code of professional conduct of counsel). The fact that the agreement can be established in oral or written form could dismiss some criticisms against the clarity of the Code. International Bar Association (IBA) endorses criticisms according to which the Code of professional conduct of Counsel lacks clarity in the terminology with respect to victims and victims' counsel by arguing that 'while a representation agreement can conceivably be established between a defence counsel and an individual accused, it is difficult to envisage a common legal representative representing 300 or more victims signing individual agreements with each..' (International Bar Association, 2012. Counsel Matters at the International Criminal Court: A Review of Key Developments Impacting Lawyers Practising before the ICC, (p.17) [Online] available at: <http://www.ibanet.org/Document/Default.aspx?DocumentUid=156FBA79-7A9D-4BD2-93D6-A81A91A4FFBA>, accessed on 15th March 2013. Contrary to the point of view of the IBA, one may argue that a it is easy for a common legal representative to conclude an oral representation agreement with 300 or more victims grouped in a group since such an agreement could be implicit at the time a victim accept explicitly or implicitly to become member of the group represented by a common legal representative.

representative of a group but also individually.[1545] For the purpose of facilitating the task of communicating with clients, a common legal representative can appoint an assistant common legal representative[1546] and should be assisted by the Victim Participation and Reparation Section (VPRS).[1547] The Code of Professional Conduct for counsel imposes an obligation upon legal representatives to 'provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation'.[1548] Then the common legal representative is expected to be the point of contact for the victims, whom he/she represents, to formulate their views and concerns, defend their claims for reparations and to appear on their behalf at critical junctures of the

[1545] In order to communicate with both the group and individual victims members of the group, legal representative should hold meetings and hearings with their clients. Groups of victims should maintain close contact with their legal representative. Where large numbers of victims are represented, a group of victims can be more effective if it has leadership and can become more active in discussions with its legal representative. In case of groups of victims a legal representative may communicate with his or her clients (groups of victims and its members), using all potential forms of communication – both traditional and innovative, which should be explored, tested and minded for the benefits they offer in collective approach dealing with mass victims. Common legal representatives and their clients (groups of victims and individual victims members of the groups) 'can keep in touch by *telephone* (telephone links permitting a wider, geographically scattered audience will be available at reasonable rates), through *group meetings* in public and private halls, *cable television* (television hook-ups may be used to provide a kind of national town meeting that is cheaper and more efficient than having people travel to a central location) and '*videotapes to be used in clients' home [emphasis]*' (Weinstein B.J, *op. cit.*, p. 58). But, '[p]ublic meetings with a group of clients are sometimes preferable because the give-and-take with the more aggressive or well-informed clients can raise issues most clients would not be aware of. However, confidentiality concerns may place some limitations on the scope of such open meetings and must be carefully considered' (Weinstein B.J, *op. cit.*, p. 57). In the same vein, correspondence can do most of the work. So, where it is possible, can electronic mail, which is available for very little cost now that many attorneys have computer and modems. The problem should be the victims whose majority live in countryside without any infrastructure which can allow access to internet services. In fact, all available forms of communication may offer considerable promise of improving fair administration of big groups of victims and could be used for communication between lawyers and their clients and between the Court and legal representative or teams of legal representatives. All this focuses on means of combining the efficient resolution of cases with a meaningful hearing of individual voices. Actually, common legal representative should 'tailor their approach very much like a class action lawyer approaches representing the interests of a large number of individuals in a class action lawsuit (Markus Funk, T., *op., cit.* p.111). In order to facilitate the task of communicating with clients, a common legal representative can appoint an assistant common legal representative and should be assisted by Victim Participation and Reparation Section (VPRS).

[1546] According to Rule 22(1) of the RPE of the ICC, a counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise. The assistants are referred to by Regulation of the Registry as 'assistant to counsel' (see Regulation 2 of the RR). In the context of the ICC regime, the 'assistant to counsel' may also be appointed not only for a counsel for the defence but also for victims. In this line for example Regulation 112 of the RR provides that 'In order to assist victims in choosing a legal representative or representatives, the Registry may provide victims with the list of counsel […] and information regarding counsel *or assistants to counsel [*emphasis added]. In the same vein, the Court some time request common legal representatives of victims to appoint an assistant (see for example ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328).

[1547] VPRS has mandate to assist victims for their participation in proceedings and reparation. In this context the VPRS may be asked to perform other related tasks such assisting or collaborating with common legal representatives for the interest of victims. For example in the *William Samoei Ruto and Joshua Arap Sang case*, the Trial Chamber V determined that 'on the basis of the registration database administered by the Registry, the Chamber will direct the VPRS to periodically provide detailed statistics about the victims' population. These statistics shall be appended to a comprehensive report on the general situation of the victims as a whole, including registered and nonregistered victims. *The reports shall be prepared in cooperation with the Common Legal Representative who shall provide the VPRS with detailed information relating to his or her activities amongst the victims* [emphasis added]' (ICC, *Prosecutor v Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para.55).

[1548] Art.15(1) of the Code of Professional Conduct for counsel of the ICC

trial'.[1549] In this context, the Common Legal Representative has to ensure that the views and concerns he or she represents are those of group and all individual victims in a concerned case.[1550] This may be possible by ensuring that all of the victims represented are kept informed and are consulted in an appropriate manner.[1551]

2. Tackling the problem of conflict of interests among victims

Under the current framework of the ICC a common legal representative 'shall be responsible for both representing the common interests of the victims during the proceedings and for acting on behalf of specific victims when their individual interests are at stake'.[1552] A common legal representative, when acting under the collective approach, may face the challenge of conciliating different interests within a group or a sub-group of victims. Neither the RPE nor the Code of professional conduct of counsel gives a definition of conflict of interests of victims. In this regard, we note that the approach so far adopted by the ICC is that where 'the common legal representative receives conflicting instructions from one or more groups of victims, he or she shall endeavour to represent both positions fairly and equally before the Chamber'. The conflicting instructions from one or more groups of victims may be seen so far as an example of circumstances in which there is conflict of interests of victims.

Victim members of a group, as well as the Court, have to take into account this risk of conflict of interests when choosing and appointing a common legal representative. The drafters of the RPE were aware of the issue since they managed to establish an obligation upon a Chamber of the ICC and the Registry to avoid such a risk. In choosing and appointing a common legal representative, the Chamber and the Registry shall take all reasonable steps to ensure that distinct interest of victims are to be represented and any conflict of interest must be avoided.[1553] In others words, the Court has to be aware that in the selection of common legal representatives, following

[1549] ICC, *Prosecutor v Ruto and Joshua Arap Sang,* Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para.42

[1550] In the context of victims participation in proceedings, the Trial Chamber V held that 'the Common Legal Representative will ensure that the views and concerns he or she represents are those of all individuals qualifying as victims' (ICC, *Prosecutor v Ruto and Joshua Arap Sang,* Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para.53).

[1551] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22 July 2009, ICC-01/04-01/07-1328, para.7

[1552] ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328, para.13

[1553] See Rule 90(4) of the RPE of the ICC.

rule 90(4) of the Rules, the distinct interests of the victims must be taken into consideration and that any conflict of interest should be avoided.[1554] This risk of conflicting interests between victims has led the Trial Chamber II, in the *Germain Katanga and Mathieu Ngudjolo Chui case*, to categorize victims into two groups. A large group included all victims who had been admitted to participate in this case and represented by one common legal representative except a small number of applicants who were former child soldiers. The Chamber considered that the latter categories of victims (child soldiers) may have perpetrated some of the crimes that victimized other victims.[1555] In this case the interests of the victims were manifestly opposed to the extent that the appointment of different legal teams was not only appropriate but necessary so that the appointment of two legal teams were necessary to address the issue of representation of child soldiers on the one hand, and the remaining victims on the other.[1556] But still, when appointed, a common legal representative 'shall exercise all care to ensure that no conflict of interest arises'.[1557] To this end, a common legal representative has to advise his or her clients of the nature of the representation and the potential conflicting interests within the group'.[1558]

Although the mechanism of common legal representation may raise the issues of conflicting interests of victim members of a group or sub-group, a common legal representative shall spare the Court from dealing with a big number of legal representatives as far as there are a big number of victims. This will help to save time and cost for both the Court and victims and shall contribute to the efficiency of proceedings. Moreover, a common legal representative may arguably constitute a better guarantee for confidentiality in case of mass victims. Instead of individual victims, only the common legal representative may have access to confidential filings,[1559] the public and confidential documents in Ringtail.[1560] Nevertheless, since the circumstances of a case should justify the

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[1554] ICC, *Prosecutor v Bemba Gombo* Pre-Trial Chamber III, Fifth Decision on Victims' Issues Concerning Common Legal Representation of Victims, 16th December 2008, ICC-01/05-01/08-322, para.4

[1555] See ICC, *Prosecutor v Katanga and Mathieu Ngudjolo Chui*, Trial Chamber II, Order on the organisation of common legal representation of victims, 22nd July 2009, ICC-01/04-01/07-1328, paras 12 and 13.

[1556] See ICC, *Prosecutor v Banda Abakaer Nourain and Saleh Mohammed Jerboa Jamus*, Trial Chamber IV, Decision on common legal representation, 25th May 2012, ICC-02/05-03/09-337, para. 43.

[1557] Art.16 (1) of the Code of professional conduct of Counsel of the ICC

[1558] *Ibid*, Art.16 (2)

[1559] ICC, *Prosecutor v Ruto and Joshua Arap Sang* , Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para.67.

[1560] ICC, *Prosecutor v Ruto and Joshua Arap Sang* , Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para. 69. Unfortunately, it has been reported that 'legal representatives for victims and counsel experience difficulties in accessing court filings and evidence when in the field, due to the fact that they must access their email and the Ringtail database via Citrix, which requires a relatively robust internet connection. Lack of access to a reliable internet connection impedes their ability to conduct any analysis or review of documents on Ringtail [footnotes omitted]' (International Bar Association, *op. cit*., pp.21- 22)

appointment of a number of common legal representatives for groups and sub-groups of victims, the collective approach should requires examining the possibility of designating a Lead common legal representative in order to efficiently manage a complex case of mass victims.

C. The desirability of a Lead Common Legal Representative for victims

In the context of the ICC, a Lead Common Legal Representative (hereinafter a LCLR) should play the reinforced dual role as advocate and officer of the court by performing both judicial and administrative judicial tasks during reparation proceedings. This innovation falls under the context of fair and expeditious proceedings. Therefore, the LCLR as representative of victims and officer of the Court should be obliged to promote justice and the fair and effective conduct of proceedings.[1561] The LCLR should derive his powers from the RPE of the ICC. In other words the introduction of a LCLR may require some modifications of Rules and Regulations of the ICC.

The judicial role of the LCLR may consist in dealing with and defending common issues to all victims, groups and sub-group of victims so that each common legal representative or a team of common legal representative, if any, shall only deal with and defend specific or particular issues, if any, concerning victims, group or sub-group he or she represent. The LCLR will organize the work of common legal representatives in a given complex case so that their communications with the Court, their representations and intervention in proceedings shall be exempted of repetitions or duplication. In this regard, one may assume that the major purpose of provisions concerning *Format of documents and calculation of page limits of* documents filed with the Court is to require consistency and relevance of different filings and to avoid cumbersome files and records which may constitute a stumbling block to expeditious proceedings. In the same line, the suggested judicial functions to be assigned to the LCLR should avoid cumbersome procedures which may result from different victim representatives' representations and communications or interventions. Where there is only one consolidated group of victims without specific or particular claims, the LCLR should represent the group before the Court without recourse to other legal representative. However, where appropriate, he or she should be assisted by an assistant counsel.[1562]

[1561] Compare with Rule 12 *ter* (2) of the ECCC's Internal Rules (Rev.8).

[1562] The possibility of a lead counsel to be assisted by an assistant counsel is provided for by Rule 22(2) of the RPE of the ICC which provides that 'Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise'. Although the Rule refers to counsel of the defence, the practice of the ICC has logically been extending its application to legal representative for victims. See also Regulation 68 of the RC.

The administrative role may consist of organizing a meeting of common legal representative, helping in resolving problem which may arise among common legal representatives, helping common legal representatives to resolve the possible problem of conflicting interests between them or between them and victims or between victims or groups of victims before referring the issue to the Chamber. The LCLR should also help common legal representative and contribute to organize their representations in the context of efficient and expeditious reparation proceedings. The LCLR should administratively represent the interests of victims' legal representatives before the Court, thus he should for example be vested with the power to propose some modification of the Court's practices in the interest of administration of justice.

Although judicial functions of the OPCV have raised arduous controversial debate, the role of the LCLR should be played by the OPCV. The OPCV is established within the Registry of the ICC for solely administrative purposes and functions in its substantive work as a wholly independent office.[1563] It includes counsels who may assist victims before the Court.[1564] According to the Regulations of the Court, the OPCV is vested with the mandate which encompasses forms and methods of assistance to victims who fall short of legal representation.[1565] The tasks of the Office include *inter alia* '[r]epresenting a victim or victims throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interest of justice'.[1566] As far, the practice of the ICC has been to appoint both OPCV and external lawyers to represent victims. Yet, whilst some call for the enhancement of the OPCV's role as a legal representative of victims before the ICC,[1567] others are opposed at such a shift. The proponents for the enhancement of the OPCV's role take into consideration of how the representation is funded or the cost-saving considerations.[1568] In other words, allowing the OPCV to represent victims before the ICC could reduce the costs. The opponents of such a shift consider that 'victims' representation must be based

[1563] For details on the aspect of the independence of the OPCV see Regulation 155 of the RR of the ICC.

[1564] See Regulation 81 of the RC.

[1565] Office of Public Counsel for Victims (OPCV), 2012. Representing Victims before the International Criminal Court. A manual for legal representatives. The Hague: Office of Public Counsel for Victims (OPCV) /International Criminal Court, p.168

[1566] Regulation 81(4)(e) of the RC of the ICC.

[1567] The role of the OPCV can be enhanced by allowing the Office to take over common legal representation of victims and acting as common legal representative whenever legal aid is required. Depending on the workload and needs of the case, external counsels or support personnel might be called to reinforce or complement the OPCV capacities. Subsequently, legal aid for victims would disappear as far as takeover is effective, although it would be necessary to allocate the funds needed to reinforce OPCV on a case-by-case basis where necessary.

[1568] Coalition for International Criminal Court (CICC), 2012. Recommendations and comments to the committee on budget and finance at its nineteenth session. Comments on the 'Supplementary Report of the Registry on four aspects of the Court's legal aid system', p.3, [Online] available at: <http://www.iccnow.org/documents/CICC_Legal_Representation_Team-Comments_to_CBF_19th_session.pdf>, accessed on 15th March 2013.

on the particular needs of victims in order to ensure meaningful representation in each case, and then consideration may be given to the most cost-effective means to implement this representation'.[1569] As regards this issue, the Trial Chamber V determined, in the context of victims' representation and participation, that:

> The OPCV's primary responsibility will be to act as the interface between the Common Legal Representative and the Chamber in [the] day-to-day proceedings. To that end, the OPCV will be allowed to attend hearings on behalf of the Common Legal Representative, during which it may be permitted to intervene and question witnesses. The OPCV shall also assist the Common Legal Representative in preparing relevant written submissions. The representation in the courtroom through the OPCV will allow the victims to benefit from the experience and expertise of the OPCV and thereby maximise the efficiency of their legal assistance. [The] involvement of the OPCV will also ensure that confidential information is handled safely and securely.[1570]

Although the Chamber does not specify in which circumstances the OPCV would act on behalf of a common legal representative, one may assume that the Chamber endorses the option of enhancing the role of the OPCV in representing victims before ICC.

Nevertheless, taking into account both arguments from the proponents and the opponents of the idea of enhancement of the role of the OPCV, 'a two-tier system' should be maintained. In other words, both the OPCV and the external lawyers could be engaged in the representation of victims in the Court proceedings.[1571] The importance of appointing a legal representative who shares the same tradition with victims has been discussed. Nevertheless, since the LCLR should a play dual role, judicial and administrative role, the OPCV is better indicated to play the role of the LCLR. Specifically, the judicial role of the LCLR might consist of defending common interests of all victims whereas particularity and specificity of the victims' interests should be defended by external legal representatives or a common legal representative of group or sub-group of victims. This system of two-tier system in representing victims before the ICC should slightly defer from the victim representation system adopted by ECCC's regime where, at trial stage, victims are represented by Civil Party Lead Co-Lawyers which falls under the Civil Party Lead Co-Lawyers' Section of the ECCC.[1572]

[1569] *Idem*

[1570] ICC, *Prosecutor v Ruto and Joshua Arap Sang ,* Trial Chamber V, Decision on victims' representation and participation, 3rd October 2012, ICC-01/09-01/11-460, para.43

[1571] Coalition for International Criminal Court, 2012, *op. cit*., p.4

[1572] See Rule 12 of Rule of Internal Rules of the ECCC (Rev.8).

I.2.2. The Lead expert and reconciliation between victims and a convicted person as a component of his or her mission

Remembering that under the ICC's regime, the Court is vested with the power to appoint experts for its assistance, it is arguable that the current legal framework of the ICC's may comply with the appointment of a Lead expert. Is there any opportunity of appointing Lead experts in reparation proceedings? What could be his mission and his impact on fair and expeditious reparation proceedings? How will the mission of experts comply with reconciliation between victims and convicted person?

Although the idea of promoting reconciliation before the ICC seems at first glance not squaring easily with the mandate of the Court, it will be demonstrated that the innovative formula of *voluntary apology and forgiveness*, as already mentioned, could be developed as a form of reparations contemplated by Art.75(1) of the ICC Statute and could likely produce effective reconciliation. In this regard, it is interesting that the concept of reconciliation in the context of crimes under jurisdiction of the ICC should already be contemplated by Trial Chamber I's decision establishing principle and procedures to be applied on reparations.[1573] This paragraph intends to argue that the Court could delegate a Lead Expert to facilitate reconciliation between parties (victims and a convicted person).

The Trial Chamber I's *2012 Decision on Principles and Procedures* could help to bring out some arguments which call upon the appointment of Lead experts in a particular case (I.2.2.1.). Moreover, the mission of Lead expert could include innovative aspects by becoming, where appropriate, a framework of reconciliation contemplated by the same Decision (I.2.2.2.).

I.2.2.1. The opportunity to appoint a Lead Expert in reparation proceedings

As already mentioned, in the *Lubanga case*, the Trial Chamber I determined that a multidisciplinary team of experts is retained to provide assistance to the Court'.[1574] Moreover, in the light of the context of Rule 97(1) of the RPE of the ICC, criticisms of the option of the Trial Chamber I to discharge its power of appointing an expert by delegating to the TFV, a non-judicial

[1573] *The 2012 Decision on Principles and Procedures*, para.193

[1574] *Ibid*, para.193

organ, the appointment experts, have been made.[1575] Taking into account the criticisms, it is suggested that in the case of complex reparation proceedings with mass victims a Lead of experts should be appointed with a specific mission.

Where a multidisciplinary team of experts is appointed by the Court, a Lead of experts should be appointed in order to coordinate its operations. The Lead Expert could for example organise and supervise specified aspects of reparations proceedings related to expertise such as the preliminary consultations with victims and their affected communities aiming to determine appropriate reparations to the victims. A preliminary consultative phase involving the victims and the affected communities, to be carried out by the team of experts is envisaged by Trial Chamber I's decision establishing principles and procedures to reparations in the *Lubanga* case.[1576] The Trial Chamber I determined that it 'should consult with victims on issues relating, inter alia, to the identity of the beneficiaries, their priorities and the obstacles they have encountered in their attempts to secure reparations'.[1577] This task could be for example discharged to the Lead Expert so that the Chamber may be allowed to devote time to more urgent matters. Moreover, where appropriate the team of experts might need their own secretariat in order to successfully discharge their responsibilities. In this regard, experts' task of assessing harm suffered by mass victims and determining appropriate reparations should require an administrative secretariat to support their work. Where this is the case the Lead Expert should be responsible for such an administrative secretariat.[1578] At the end of the mission of experts, the Lead Expert will make a consolidated report which includes findings and recommendations from different appointed experts.[1579]

Where appropriate the Court could appoint the TFV as Lead Experts. In this respect, it bears repeating that the Court acknowledged that 'the TFV is well placed to determine the appropriate forms of reparations and to implement them'.[1580] Indeed, at the stage of reparation proceedings, as post-conviction proceedings, the TFV should likely have already initiated its activities in the context of assistance to the victims of a situation and thus will be already acquainted with the victims' problems.[1581] It is worth maintaining that the power of appointing experts and a Lead

[1575] See at pp259ff.

[1576] See *The 2012 Decision on Principles and Procedures* para.264.

[1577] *Ibid*, para.206

[1578] See also Henzelin, M. Heiskanen, V. and Mettraux, G., *op. cit.*, p.334.

[1579] For further comments on the report of experts see at pp.272ff.

[1580] See the *2012 Decision on Principles and Procedures*, para.266.

[1581] By delegating its power of appointing experts in the *Lubanga* case the Trial Chamber I notes that the TFV is able to collect any relevant

Experts is incumbent upon the Court. Consequently, the mission of Lead Experts should not include appointment of experts.

I.2.2.2. Reconciling victims and the convicted person as a component of Lead Experts' mission

The relationship between reparations and reconciliation is one of the underlying philosophical questions related to the rights of victims of international crimes which should be taken into account in dealing with reparation issues before the ICC.[1582] In this regard, some submissions in the *Lubanga* case suggested that the principle for reparations provided for by Art.75 of the ICC Statute should determine explicitly that reparations should be directed at reconciliation.[1583] Arguably, reparations are unlikely to rectify all the consequences of Mr. Lubanga's crimes and as a result the Court should particularly promote social *reconciliation* and a collective approach.[1584] Likewise, some submissions in this case suggested that experts should address various issues including those relating to *reconciliation*'.[1585] Consequently, the Trial Chamber I underscored the idea that '[r]eparations can assist in promoting *reconciliation* between the convicted person, the victims of the crimes and the affected communities [emphasis added]'.[1586] In this regard, it bears noting that already in 1987, the European Committee on Crime Problems had considered that '[e]xperiments on a national or local basis in mediation between the offender and his victim should be encouraged and the results evaluated with particular reference to how the interests of the victim are served'.[1587] How should the ICC and its criminal nature play a role in such reconciliation?

In Chapter one of Part II of this dissertation, it was noted how the Trial Chamber I determined that reparations can assist in promoting reconciliation between the convicted person, the

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information from the victims since it 'is already conducting extensive activity in the DRC for the benefit of victims in the context of the general situation of which this case is a part' (*The 2012 Decision on Principles and Procedures*, para.266).

[1582] See ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.7 and *The 2012 Decision on Principles and Procedures*, para.22

[1583] See for example ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14th March 2012, 25 April 2012, ICC-01/04-01/06-2872, para.69-71 and the *2012 Decision on Principles and Procedures*, para.57

[1584] *The 2012 Decision on Principles and Procedures*, para.122; see also ICC, *Prosecutor v Lubanga*, Justice-plus et al, Observations relatives au régime de réparations, 10 Mai 2012, ICC-01/04-01/06-2877, para.22

[1585] *The 2012 Decision on Principles and Procedures*, para.159 and ICC, *Prosecutor v Lubanga*, TFV, Observations on Reparations in Response to the Scheduling Order of 14the March 2012, 25th April 2012, ICC-01/04-01/06-2872, para.257

[1586] *The 2012 Decision on Principles and Procedures*, para.179 and 193; see also observations made on the issue (reconciliation as one of the purposes of reparations before the ICC), pp.72ff.

[1587] Greer, D. ed., 1996a. Compensating Crime Victims, A European Survey. Freiburg im Breisgau: Ed. Iuscrim, p.689

victims of the crimes and the affected communities and Mr. Lubanga can contribute to such process by voluntary apology.[1588] In this regard, it was suggested that the Court could develop the formula 'apology and forgiveness' as a form of reparation to victims. The formula has been understood as a possible form of reparation which may be developed by the ICC in the context of Art.75 (1) of the ICC Statute and may lead to reconciliation between victims and their offender(s).[1589] Considering the Court's heavy task of adjudicating, it is arguable that the appointed Lead expert may assist the Court and constitute a framework of reconciliation between a convicted person and victims. Bearing in mind that reparation proceedings are likely to be post-conviction and separate proceedings, the Lead Experts and the panel of expert should constitute a framework under which victim-offender mediation could be encouraged. This should help the *offenders to express remorse, victims to forgive, and communities to reintegrate and employ the offender'*.[1590] How should this work?

During the preliminary consultations with victims and their families, the Lead Expert assisted by experts, should encourage victims to forgive a convicted person who would or would not have offered his apology for the crimes committed. In this context, after conviction, the Court should also encourage the convicted person to express his apology to the victims. However, where appropriate, the convicted person could again get an opportunity at the stage of reparation proceedings to understand the usefulness of his apology in the process of reconciliation. This opportunity could be arranged by the Lead Expert in collaboration with the Registry and the defence during consultations with victims and their families. In this mission the Lead Expert could be assisted by experts in psychology, trauma and relationship etc. Should a victim or group of victims wish, in the process of reconciliation, to personally meet with the convicted person or vice versa, the Lead Expert in collaboration with the Court could facilitate such a meeting. Forgiveness could be a personal or collective act from victim(s). Nevertheless, legal representatives for both victims and a convicted person should be actively involved in this process.

Where a convicted person and a victim or group of victims reach a voluntary reconciliation the Lead Expert should take note of it and shall report to the Court. Reconciliation could result, but not necessarily, in modification or abandonment of claims for reparations by a victim or a group of victims. Where reconciliation results for victims, in waiving their right to request reparations, or abandoning their claims already filed with the Registry pursuant to Regulation 101(1) of RR and

[1588] See at pp.72ff.

[1589] The notion of apology, forgiveness and reconciliation were discussed in Chapter one of Part two of this dissertation, pp.147ff

[1590] Bibas, S., *op. cit.*, p.329

Regulation 97(2) of RR, such reconciliation could be considered as a transaction between a convicted person and a victim or group of victims.

The mission of the Lead Expert to facilitate victims and a convicted person to reconcile could be seen as an obligation of means and not an obligation of results. An order appointing Lead Experts should explicitly specify this mission among those assigned to him or her.

I.3. The establishment of a Special Division for reparations to victims within the ICC

Currently, the ICC Statute provides that the Court shall be composed of three Divisions that is: Appeals Division, Trial Division and Pre-Trial Division[1591] and provides for the organization of each Division.[1592] Specific articles of the Statute provide for functions and powers of each Division.[1593] Although, nothing 'shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires',[1594] adjudication on the individual criminal responsibility shall remain the focus of their judicial mandate.[1595] Consequently and logically, adjudication on reparations is an ancillary mandate. The challenges already underscored demonstrate that in many cases a Trial Chamber might not get enough time to assess thoroughly the extent of injury suffered by the victims of crimes in order to determine promptly and adequately the awards for reparations. Taking into account this fact, some submissions in the *Lubanga* case suggested that instead of keeping all determinations on reparations in the hands of the Trial Chamber in charge of the trial, '[t]he matter of reparations could for instance be referred to a different chamber or to a single judge'.[1596] They maintained that under the current legal framework of the ICC Statute it is possible for the Trial Chamber to refer the matter of reparations to the Pre-Trial Chamber which should sit as a single judge.[1597] Yet, it has already demonstrated how such a suggestion would not comply with the functions and powers of each division of the ICC which is currently vested with by the Statute.

[1591] See Art.34 of the ICC Statute.

[1592] *Ibid*, Art.39

[1593] See principally Arts 57-61 of the ICC concerning functions and powers of the Pre-Trial Chamber, Art. 64 of the Statute regarding the Trial Chamber and Art.83 of the Statute in regard with the Appeals Chamber.

[1594] Art. 39(2)(c) of the ICC Statute.

[1595] See Art.1 of the ICC Statute and Resolution ICC-ASP/10/Res.3 on Reparations, 20th December 2011, para.4.

[1596] ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para.154

[1597] *Idem*. According to the Registry's point of view 'Although referring the reparation proceedings back to the Pre-Trial Division after completion of

Some commentators assume that since the TFV has been established by the ICC Statute 'it may be desirable to institute an administrative-based claims commission process for reparations rather than through the criminal process'.[1598] They suggest for example to transform the TFV into a reparation commission which shall deal with victims' reparation claims. Under this new system, they go on to explain their point of view; victims will be detached from the ICC and will be allowed to bring directly their claims to the TFV. According to the commentators, victims would not be those of a convicted person but might include all victims of a situation.[1599] This suggestion would, whether espoused, be a complete negation of the right to reparation before the ICC. The right to reparations established by Art.75 of the ICC Statute would be abolished and only assistance or support to victims and their families as per Art.79 of the Statute would remain. Victims would no longer have the *locus standi* before the ICC in order to claim reparations against a convicted person. Consequently, it would be seen as a bitter failure by the ICC and a step backward of international criminal justice in respect to the right to reparations.

Contrary to the foregoing attempted and questioned solutions, this section aims to demonstrate that the ICC Statute could be revisited in order to provide for a *Special Division for reparations* within the Court (hereinafter the 'Special Division') of which the judicial mandate should exclusively be to decide on reparation issues. The suggested Special Division may principally be composed of a single judge (I.3.1). The claims from victims could, where it is deemed appropriate, be referred to the Special Division by the Trial Chamber. Therefore, the Special Division may be conceived as a referral chamber for reparations (I.3.2.).

I.3.1. A Single-judge Chamber for proper administration of justice

The establishment of a Special Division for reparations might introduce amendments to some provisions of the ICC Statute in order to provide for it and this would extend the list of the

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the trial may not have been contemplated to date, there would be no contradiction as long as the judge of the Pre-Trial Division would limit his or her intervention to reparations proceedings only, without having had any involvement in pre-trial proceedings in the same situation or case. The fact that the reparation judge would be from the Pre-Trial Division would thus be purely incidental. Under Article 39(4) of the Rome Statute, Judges from the Pre-Trial or Trial Divisions may be temporarily assigned to the other Division, if the Presidency considers that the efficient management of the Court's workload so requires. This would not imply fulfilling any other pre-trial functions. Should the single Judge be selected from the Trial Division, this would require an amendment of Article 39(2)(b) of the Rome Statute, unless he or she were to be attached to the Pre-Trial Division under Article 39(4) for that purpose'.

[1598] Mcgonigle Leyh, B., *op. cit*., p.345

[1599] See Frederic K. Cox International Centre, 2011.Victims before International Criminal Courts: A challenge for international criminal justice (Presentation made by Hon. Christine Van den Wyngaert, Judge of the ICC, during a seminar in Human Right organized by the Frederic K. Cox International Center.), Video, [Online] available at: <http://www.youtube.com/watch?v=DYb19TIPOBU>, accessed on 26th April 2013.

Divisions provided for by Art.34 (b) of the ICC Statute. After election of the judges of the ICC,[1600] the Court shall organize itself into the divisions specified by Art. 34(b) of the Statute as it should be modified, and the Special Division for reparations should be composed of no more than three judges.[1601] Since '[t]he judicial functions of the Court shall be carried out in each division by Chambers',[1602] the functions of the Special Chamber for Reparations should be carried out by a *single judge* of the Special Division for Reparations.

The system of a single-judge Chamber would not be a new brand under the ICC Statute since Art.39 (2)(b)(iii) of the Statute already provides for the possibility of a single judge of the Pre-Trial Chamber to carry out its judicial functions. The system should not be a unique creation of the ICC regime since other statutes of international and regional Courts established it. To illustrate the assertion one may refer to the ECHR which provides for the single judge system,[1603] who, contrary to the suggested Special Chamber, renders a final decision.

A single judge could carry out the judicial function of the Special Chamber for Reparations. This Chamber could be composed by lesser number of judges than the ordinary chambers (no more than three judges). According to Art.39(1) of the ICC Statute 'The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges'. The Special Division should be composed of not less than three judges. The assignment of judges to the Special Division should be based on the nature of the functions to be performed by the Division - that is decision on reparations to victims of crimes within the jurisdiction of the ICC. Whilst, the ICC Statute recommends that the qualifications and experience of the judges elected to the Court be in such a way that each division contains an appropriate combination of expertise in criminal law and procedure and in international law, the Special Divisions for reparations should be composed predominantly of judges with experience in tort law and civil procedure. Concerning the term of service of the judges assigned to the Special Chamber, it should be the same for the Judges assigned to the Trial Chamber and the Pre-Trial Chamber.[1604]

[1600] Concerning election of judges of the ICC see Art36 of the ICC Statute

[1601] The determination of the number of the judges of the Special Division for reparations requires the modification of Art. 39(1) of the ICC Statute.

[1602] Art. 39(2)(a) of the ICC Statute.

[1603] See Articles 24, 26, 27 of the European Convention on Human Rights.

[1604] Concerning the term service of judges assigned to the Chamber see Art. 39(3-4) of the ICC Statute

The single judge formula could contribute to the good administration of justice before the ICC in the sense of fair and expeditious procedures. It has already demonstrated that reparation proceedings are mostly to take place after conviction.[1605] Moreover, it has been pointed out that the purpose of reparations proceedings shall principally consist in assessing evidence for the harm suffered by victims and evaluating appropriate reparations to the victims of a convicted person.[1606] Since reparations issues could, in many cases, require the appointment of expert in accordance with Rule 97(2) of the REP, the single judge, assisted by the Registry could also be assisted by a panel of experts whom he shall have power to appoint and oversee their operations. Like the Trial Chamber, nothing should preclude the simultaneous constitution of more than one Special Chamber 'when the efficient management of the Court's workload so requires'.[1607]

I.3.2. The powers of the Special Chamber for reparations

Even though it has been suggested to establish a Special Division for reparations, its establishment could not impinge on the original mandate of the Trial Chamber. It should still be acknowledged that the full panel of the Trial Chamber is expected to handle reparations pursuant to the current article 39(2)(b) of the ICC Statute.[1608] The idea of creating the Special Chamber is to provide for the possibility of the Trial Chamber in the case of complex cases of reparations and for the expeditious proceedings, to disjoint reparation issues from the criminal case they stem from and refer them to the Special Chamber for reparations.

In this regard, it is worth noting that, unlike national criminal court, when victims' claims may complicate the proceedings, the ICC cannot refer victims to a civil court operating at the same level to deal with their claims, as no international civil court exist.[1609] Consequently, the Special Chamber for reparations with referrals competences could be a solution to that problem. The principle according to which the Trial Chamber may, upon request or on its own motion, issue a decision on reparations should remain unmodified. The Trial Chamber should remain seized by the

[1605] See at pp.229ff

[1606] See at pp.245ff

[1607] Art. 39(2)(c) of the ICC Statute.

[1608] Penultimate paragraph of the Preamble of the Resolution ICC-ASP/10/Res.3 on reparations

[1609] Zegveld, L., 2010, *op. cit*., p.108. Zegveld suggests starting to think about creating an international civil court. He assumes that 'an international civil court may turn out to be a better alternative and provide greater redress for victims of international crimes'. Notwithstanding the good soundness of Zegveld's idea, our purpose, as already mentioned is to try to find a way of strengthening the current ICC's system for the better implementation of the right to reparations for victims.

reparation matters as far as the nature of the case might allow issuing a reparation order at the same time of the sentence or within a reasonable time after the sentence.

Yet keeping all determinations on reparations in the hands of the Trial Chamber in charge of the trial presents advantages since the Chamber may already have 'intimate knowledge of the details of the case, and its determinations as regards reparations would follow from and be fully consistent with the judgment on guilt'.[1610] Nevertheless, where reparation issues appear complex and creating a cumbersome task after a conviction, and this is likely to happen in all the cases before the ICC, the Trial Chamber should refer the case, upon request or *proprio motu*, to the Special Chamber. In this context, the Trial Chamber will identify, as early as possible, whether reparation issues are complex and refer them to the Special Chamber. However, the referral could not prevent victims to exercise their right of participation in criminal proceedings pursuant to Art.68 (3) of the ICC Statute.

The Special Chamber which the case is referred to will be bound by the referral decision made by the Trial Chamber acting upon request or *proprio motu*. However, the Special Chamber could exercise its competence in regard to complementarity principle which should be applied, as already discussed, to victims' right to reparations before the ICC.[1611] The Special Chamber should strive to be familiar with the case since, as already mentioned, some elements of evidence relating to reparations could be brought during criminal proceedings according to Regulation 56 of the Regulation of the Court.[1612] However, it could be allowed to the referral Chamber to recall, upon request or *proprio muto*, any witness whose testimony is material to the case but disputed, and who is available to testify again without undue burden.

In addition, the Special Chamber should wait for the expiration of the period allowed for appeal and for the duration of the appeal proceedings against the judgment of guilt before starting reparation proceedings. Here it bears reminding ourselves that there shall not be issuance of an order for reparations unless there is conviction. Therefore, it might be wise for the referral judge for reparations not to act before being sure that the judgment of guilt has become final. Otherwise, it would be wasting time, should the judgment of guilt be invalidated in full or in part and thus

[1610] ICC, *Prosecutor v Lubanga*, Registry, Second Report of the Registry on Reparations, Submitted on 1st September 2011, classified public on 19th March 2012, ICC-01/04-01/06-2806, para. 153.

[1611] Concerning the discussions made on the complementarity principle see Chapter two of Part two of this dissertation (pp.166ff).

[1612] See also observations made on 'The place of reparation proceedings within the whole trial before ICC' (Chapter two of Part two of this dissertation, pp.228ff).

causing unnecessary cost and creating false expectations for the victims. In addition, issuing and implementing an order for reparations before a final judgment of guilty may 'raise issue of recovery of the person's properties and assets already allocated to reparation measures',[1613] where the judgment is reversed in appeal.[1614] Therefore, in this context, that the principle '*le criminel tient le civil en état*' should be applied before the ICC.

The suggested reorganization of the ICC should reduce the volume of work of the Trial Chamber which should no longer be obliged to discharge its inherent power of appointing expert to a non-judicial organ. The Special Chamber for reparations could be able to conduct reparation proceedings freshly as a post-conviction procedure. The expeditious procedures would allow it to likely be seized of any contested issues arising at the stage of implementation of its decision on reparations.[1615] The creation of a Special Division within the ICC requires a review of the Statute. Such a review is currently possible according to Art.122 and Art.123 of the ICC Statute since the period of seven years of intangibility of the Statute has already expired.[1616] Further, the importance of the ICC Statute to the victims and affected communities has led the ASP to underline the necessity, where appropriate, of 'amendments to the legal framework, while preserving the rights of victims' under the ICC Statute.[1617]

[1613] ICC, *Prosecutor v Lubanga*, Second Report of the Registry on Reparations, 1st September 2011, ICC-01/04-01/06-2806, para.161

[1614] See also ICC, *Prosecutor v Lubanga*, Appeals Chamber, Decision on the admissibility of the appeals against Trial Chamber I's 'Decision establishing the principles and procedures to be applied to reparations' and directions on the further conduct of proceedings, 14th December 2012, ICC-01/04-01/06-2953, para. 86.

[1615] The expeditious procedures allowing, there will not be necessity of constituting a new Special Chamber at the stage of implementation of reparations measures, since the judge who decided on reparations could likely still be in service within the same Special Chamber. Concerning the term of judges see Art.36 of the ICC Statute.

[1616] The creation of a Special Division requires amendments to the provisions of the ICC Statute which are of the institutional nature, such as Art.39 of the Statute. Such amendments can be proposed at any time according to Art.122 of the Statute and are to be adopted by consensus. Where the consensus cannot be reached, the amendments 'shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference' (Art.122(2) of the ICC Statute). The Review Conference can be held seven years after the entry into force of this Statute the Secretary-General of the United Nations as per Art.123 of the Statute. Art.123 of the ICC Statute provides that 'Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article […] The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions […] At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference […] The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference'. It bears remembering that the ICC Statute entered into force in 2002. Therefore, the period of intangibility of the ICC Statute has expired.

[1617] See the Resolution ICC-ASP/11/Res.7 on Victims and Reparations (adopted during the eleventh session held in The Hague on 14th – 22nd November 2012), para.4

CONCLUSION

The early case law of the ICC in respect to the reparations for the victims, specifically the Trial Chamber I's Decision establishing principles and procedures to be applied to reparations, teaches a lot on the challenges resulting from mass victims of crimes under jurisdiction of the ICC. Some suggested strategies for facing these challenges, such as establishment of a Special Division for reparations within the Court, call for revisiting its organizational aspects shaped by the Statute. Likewise some innovative mechanisms, such as allowing victims' associations to represent their members before the Court, the appointment of Lead common legal representatives for victims, require revisiting procedures of the Court. However, some innovative formulas could comply with the current framework of the ICC, with just a few changes in its practice. This may be the case in the formula of a consolidated group of victims in dealing with reparations in the context of collective approach, and the appointment of Lead Expert with the mission, among others, of facilitating parties to reach reconciliation. It has been demonstrated how reconciliation should be sought at the preliminary consultative phase with victims and their communities, and where reached, should be considered as a transaction between victim and a convicted person which should bind the Court. Therefore, reconciliation between victims and their harm doers can reduce the task of the Court in assessing reparation claims.

Concerning the suggested mechanisms which call for revisiting the current legal framework of the ICC, it is interesting that the ICC environment should almost be ready for such changes. Actually, it has been noted that the necessity of adapting procedures and practices to the reality of mass claims before the ICC is already felt by the Court. Likewise, it has been pointed out that the will of revisiting the legal framework where appropriate is explicitly expressed by the ASP. Moreover, it has been demonstrated that the ICC Statute is no longer intangible but is currently open for modifications.[1618] These are opportunities for improving the ICC reparation regime by introducing the innovative mechanisms and strategies regarding both organizational and procedural aspects of the Court.

[1618] Art.123 of the ICC Statute provides that 'Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article […] The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions […] At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference […] The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference'.

The introduction of the different mechanisms discussed in this chapter can contribute to improve the case management before the ICC as far as reparation issues are concerned. Those mechanisms are not exclusive and are not without challenges, the reason why reflexions on how to deal with the issue of mass victims should continue. The main objective here is to find ways to improve the ICC reparation regime which meets the requirements of fair and expeditious proceedings.

GENERAL CONCLUSION

The central and main objective of this dissertation was to unpack the content and assessing the implementation of the right to reparation under the ICC Statute in the context of fair trial. The backdrop of this study was Art.75 of the ICC Statute. It has been demonstrated, in part one of this dissertation how long time it took to adopt the ICC Statute with the recognition of the right to reparations. After unpacking the content of the right to reparations, in chapter one of part two, different procedural mechanisms of its implementation have been discussed. The implementation of the right to reparations needs both procedural and institutional mechanisms. Procedural mechanisms are the different legal procedural acts provided for the whole process of reparations proceedings (that is a victim's request, notification and publicity, an invitation of representations from different interested parties, a decision or an order for reparations, legal remedies etc.). Institutional mechanisms are those different players who intervene in implementing reparations orders such as states, the TFV and the Court itself. Moreover, reflexions have been made on how the ICC reparation regime can be improved and challenges efficiently faced.

Conclusions to the relevant issues described in general introduction were drawn out at the end of each chapter. Therefore, let us evaluate our research findings by making five main general observations. First of all, one may conclude that the ICC Statute establishes a principle of the right to reparations which shall be shaped and developed in the court room (case by case) (I). Secondly, the exercise of the right created by the Statute is ancillary to the prosecution (II). Thirdly, the right is strictly conceived in the context of individual responsibility (III). Fourthly, the effective implementation of the right to reparations requires states cooperation with the ICC (IV). Lastly, since we started by an overview on the path made by the right to reparations before the ICC, it is worth, at the end of this study, taking a look to the possible impact of the ICC Statute on international criminal law (V).

I. The development of the substantive and procedural law applicable to reparations on a case by case basis

In chapter one of part two of this dissertation notable is the absence, in international law, of any substantial theoretical bases of reparations for a victim from his or her offender. Consequently, the Court is endowed with the power of establishing the principles to be applied to reparations. In so doing the Court will apply Art.21 of the ICC Statute which establishes a hierarchy of the different

sources of law applicable before the Court. The Court will also draw from the practice and jurisprudence of existing international and regional courts that have developed principles for reparations in the context of states responsibility and will apply, *mutatis mutandis*, some of such principles in the context of individual responsibility.

With the first decision on reparations, namely the *2012 Decision on Principles and Procedures*, it has been observed how the Court tends to use its power to assure that victims of crimes under its jurisdiction receive reparations. Nevertheless, instead of focusing and affirming the convicted person's liability for reparations for victims, the Decision, which is not yet final, has only played on the voluntary contributions received by the TFV in deciding on awards for reparation. The indigence of the convicted person has been given as the justification of such an option. In this regard, it has been argued that indigence could not exempt the offender of his or her liability for reparations. Likewise, it has been demonstrated that the context of Art.75(2) of the ICC Statute should not be understood as providing the possibility of the TFV to relieve the convicted person's liability by replacing the offender in paying awards for reparations. The possibility of the TFV to *complemen*t reparations ordered against a convicted person should not be misunderstood as a replacement of the convicted person in providing reparations to his /her victims. The ICC should deal with reparations matter mindful that one of the purposes of the framework for victims' reparations established in the context of its Statute is to enable 'individuals to be held more fully accountable for the crimes for which they are responsible'.[1619] Moreover, in shaping and developing the right to reparations and procedures to be applied in its implementation, the ICC should admit the applicability of the principle of complementarity to the right to reparations. Thus, some felt risks such as the conflict of jurisdiction between the ICC and national courts, the risk of violating the principle *res judicata*, the risk of double recovery, could be dispelled. As regards the risk of conflict of jurisdiction between the ICC and national courts, one may also assume that such a risk will be resolved by the Court on a case by case basis pursuant to Art.119 (1) of the ICC Statute (Settlement of disputes) which states that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'.

The ICC may play a central role in affirming the right to reparations for victims established by its Statute, by determining principles which may fill the gap of substantive law to be applied to reparations before the Court. Likewise the Court may develop procedures to be applied to reparations which comply with the principles of a fair trial. The principles require that the Court

[1619] McCarthy, C., 2012, *op. cit*., p.360

'ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused'[1620] or the convicted person and other parties to the proceedings (victims and perhaps *bona fide* parties).

Altogether, since at the time of writing there was not any final decision on reparations, there are still areas for future and further researches. Actually, future researches may focus on how the jurisprudence of the ICC evolves as regards reparations to victims. Will the ICC endorse different theories so far developed on different problematic issues such as the application of the principle of complementarity to the right to reparations? Will the Court clarify certain situation so far debatable such as the impact of indigence of a convicted person on his or her liability for reparations to his/her victims? How will the Court react on the different suggestions so far made for strengthening procedural mechanisms for the implementation of the right to reparations such as different aspects of collective approach in reparation adjudication? These are interesting issues which should be watched and analysed by future research in the light of the ICC's jurisprudence.

II. A right whose exercise is ancillary to prosecution

The assessment of the mechanisms for the implementation of the right to reparations has demonstrated that the exercise of the right to reparations is ancillary to the prosecution. From the ancillary nature of the exercise of the right to reparations results a number of consequences.

First of all, victims do not have a direct right to bring their claims for reparations before the Court. In other words, reparations could not be sought before the ICC unless there is a trial before it. Consequently, reparations proceedings cannot be sought and reparations could not be contemplated unless there is conviction. The primary criminal nature of the Court automatically rules out any possibility to adjudicate claims for reparations outside of a criminal case. Likewise, the Court cannot *proprio motu* decide on reparations if there is no prosecution which has resulted in conviction of the accused person. The fact that reparations proceedings should mainly take place after conviction, as it has been discussed in chapter two of part two of this dissertation, can dispel the risk and clear the concerns of violation of the rights of the accused person. Although a victim participating in criminal proceedings may produce evidence relating to reparations as per Regulation 56 of the RC, it has been noted that the Court will reserve the issue to the post-conviction stage of reparations proceedings.

[1620] Art. 64(2) of the ICC Statute

Secondly, since its exercise is ancillary to prosecution, the right to reparations may be less affected by principle of relativity of international law. In this regard, the ICC Statute seems to dilute the principle of treaties according to which 'A treaty does not create either obligations or rights for a third State without its consent'.[1621] Whilst State Parties to the ICC Statute have competence to refer to the Prosecutor a situation,[1622] or the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court[1623] committed in one of the States parties, the UN Security Council (UNSC), acting under Chapter VII of the Charter of the United Nations can also refer a situation in which one or more crimes under the jurisdiction of the ICC appears to have been committed.[1624] By the latter mechanism a situation can be referred to the ICC even though the concerned State is not party to the ICC Statute but member of United Nations. This has been the case of the situation in Libya[1625] and Sudan[1626] referred to the ICC by the UNSC. Unfortunately, the issue related to the legality of the option chosen by the ICC Statute to empower the UNSC, an external organ to the Statute, to refer to the Court a situation of States not parties to its Statute lies out of this study.[1627]

Nevertheless, one may merely note that where a situation of a non-State party is referred to the ICC by the UNSC or a situation of State party is duly referred to the, victims may, in an ancillary way and in all those cases, exercise their rights under Art.75of the ICC Statute.

III. A right strictly conceived in the context of individual responsibility

In this dissertation it has been demonstrated that Art.75 of the ICC Statute provides for the possibility of the Court to issue an order for reparations exclusively against a convicted person. As per Art.75(2) of the ICC Statute, 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.

[1621] Art. 34 of the Vienna Convention on the law of treaties

[1622] See Art. 14(1) of the ICC Statute

[1623] See Art. 15(1) of the ICC Statute

[1624] See Art. 13((b) of the ICC Statute. According to Chapter VII of the Charter of the United Nations (Action with respect to threats to the peace, breaches of the peace and acts of aggression) the Security Council has power to take measures to restore international peace and security where it determine the existence of any threat to the peace, breach of the peace, or act of aggression (See Art. 39, 41, and 42 of the Charter of the UN).

[1625] See the Resolution 1970(2011) adopted by the Security Council at its 6491st meeting, on 26th February 2011 on Libya, para.4.

[1626] See the Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on 31st March 2005 on Sudan, para.1.

[1627] Concerning the issue of the UNSC's competence to refer to the ICC a situation of a State non- partie to its Statute see Cimiotta, E. *op. cit.*, pp.1115ff

For preventing any tentative of extensive interpretation of the provision, the Assembly of States Parties (ASP), by Resolution ICC-ASP/10/Res.3 on reparations adopted at the 7th plenary meeting, on 20th December 2011, has expressly and formally excluded any idea of State responsibility. Paragraph 2 of the Resolution reads as follows '[...] as liability for reparations is exclusively based on the individual criminal responsibility of a convicted person, under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position'. This prohibition was repeated in Resolution ICC-ASP/11/Res.7 on Victims and Reparations adopted during the eleventh session held in The Hague on 14th – 22nd November 2012.

Some witnesses reveal that during the ICC Statute negotiations, responsibility of a State to award reparations following an order or a recommendation of the Court was the most controversial element ultimately deleted from the article on reparation.[1628] It has been assumed that the ICC Statute excluding States' liability has made victims' right to reparations more acceptable to States Parties. The competence of the ICC remains distinct from that of the regional human rights courts, which are empowered to adjudicate questions of State responsibility and to order States to make reparation to their citizens where found responsible for gross violations of international human rights law. Likewise, there were contentious debates in the Preparatory Committee with respect to court's jurisdiction in the prosecution of corporations, but the idea did not reach a consensus.[1629] The outcome of negotiations on these issues was deleting from the Statute any provision relating to states and legal persons responsibility before the ICC. With respect to legal persons' criminal responsibility, some commentators try to justify such controversial position by assuming that '[w]hile all national legal systems provide for individual criminal responsibility, their approaches to

[1628] See for example Boven, T.V., 1999, *op. cit*., p.85; Muttukumaru, C., *op. cit*., p. 307. Art. 73(b) of the 1998 Draft Statute of the ICC provided that '[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]*] [emphasis added] (Report of the preparatory committee on the establishment of an international criminal court, A/CONF.183/2/Add.1, 14th April 1998).

[1629] Johnson, S., 2003. Peace Without Justice, Hegemonic Instability or International Criminal Law? Aldershot: Ashagate, p. 73. 'The delegate of Portugal felt that the court should be free to pursue the prosecution of corporations, while those of South Africa and Israel vehemently opposed granting the court such latitude. The Canadian delegate noted that the possibility of corporate responsibility for committing 'core crimes' envisaged in the statute was remote […]. The U.S. Delegate emphasized the inclusion of a 'criminal responsibility of corporations' clause in the area of restitution, since some corporations could indeed benefit from crimes in the jurisdiction of the court (such as Dow Chemical for the explosion in its Bhopal, India plant) and might well be assessed a certain liability' (*Idem.*). For more details on the issue see also Kyriakakis, J. 2008. Corporations and the International Criminal Court: the Complementarity Objection Stripped Bare. Criminal Law Forum, Vol.19(1), pp. 115-151.

corporate criminal liability vary considerably'.[1630] They go on by arguing that with a Court predicated on the principle of complementarity 'it would have been unfair to establish a form of jurisdiction that would in effect be inapplicable to those States that do not punish corporate bodies under criminal law'.[1631] On this point, one may however note that some international instruments already recognise the principle of corporate criminal liability. Yet in this regard, international law is still at the stage referred to as coaching or tutorial one. To illustrate this, one may consider the 2005 UN Basic Principles which recommend to States to provide for the possibility of holding legal person or other entity liable for reparation to a victim.[1632] Another example is the United Nations convention against corruption adopted by resolution 58/4 of 31st October 2003 and entered into force on 14th December 2005 which provides for criminal responsibility of legal persons.[1633]

At the end of this study, it is worth noting that victims' right to reparations under the ICC Statute does not exclude possible State and legal persons' liability for reparations under the current or future national or international legal frameworks. According to Art.75 (6) of the Statute, nothing in the entire Art.75 (Reparations to victims) shall be interpreted as prejudicing the rights of victims under national or international law. Particularly under current international law, victims of crimes under jurisdiction of the ICC, which are also grave violations of human rights, keep their right in the context of State responsibility before existing human rights courts and commissions pursuant to their respective legal framework. In this respect, one may refer to Inter-American Court of Human Rights and the European Court of Human Rights and the African Court on Human and Peoples' Rights which have jurisdiction over States on cases which include those under international criminal law. Nevertheless, even though individuals can have *locus standi* before some of these courts and sue their States before them,[1634] their jurisdiction is geographically limited. As their

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[1630] Schabas, W.A., 2004, *op. cit.*, p.101

[1631] *Idem*, see also Ambos, K., 2008. Article 25. In: O. Triffter, ed., 2008. *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article*, 2nd ed. München: Verlag C.H.Beck, p.746

[1632] See Principle 15 of the 2005 UN Basic Principles.

[1633] Art.26 of the Convention against corruption provides for liability of legal persons, it states that '[1] Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. [2] Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. [3] Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. [4] Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions'.

[1634] See for example Art. 34 of the European Convention on Human Rights and Elias, T.O., 1983. The international Court of Justice and some contemporary problems, The Hague: Martinus Nijhoff Publishers, p. 150. See also Art. 5(3) of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights. Concerning the Inter-American Court, 'Only the States Parties and the Commission shall have the right to submit a case to the Court' (Art. 61 of the American Convention on Human rights 'Pact of San Jose, Costa Rica').

names suggest, they are geographically limited as to their composition and jurisdiction.[1635] States which are not parties to the statutes of these courts cannot be sued before them. Moreover, concerning the geographical limits of these courts, it is worth observing that there is no regional human rights court (or human rights commission) in the Asia Pacific region.[1636] This means that there is no international mechanism in the region which may deal with State responsibility in case there should be grave violations of human rights.

Unlike the regional courts of human rights, the International Court of Justice (ICJ) has jurisdiction on international level. The jurisdiction of the ICJ 'comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force'.[1637] Parties who refer their cases before the Court shall be bound by its decision on that particular case.[1638] However individual victims of gross violations of human rights cannot sue their States or foreigner States before the ICJ since an individual – contrary to the regional court of human rights - may not be a party to contentious cases before the Court'.[1639] Consequently, the ICJ cannot provide reparations to individual victims. This demonstrates that with its current legal framework, the ICJ cannot be an effective international mechanism in dealing with States' liability for reparations for individuals accused of international crimes.

Notwithstanding, one may agree that the right to reparations under the ICC Statute, which is strictly conceived in the context of individual responsibility, does not exclude possible States and legal persons' liability for reparations under the current or future national or international legal frameworks. In addition, it has been understood that Art.75 (6) of the ICC Statute cannot be interpreted in the sense which prejudices the principle of *res judica* and hence violates the right of a convicted person. In this respect, further researches could address the issue of complementarity between reparations awarded in the context of individual responsibility and reparations based on States or legal persons' liability.

[1635] Ratner, S.R. Abrams, J., and Bischoff, J., 2009. Accountability for Human Rights Atrocities in International Law, Beyond the Nuremberg Legacy. 3rd ed. Third Edition, New York: Oxford University Press, p. 256.

[1636] Some commentators assume that the lack of such a mechanism may be attributed to the region's vast size and to the diversity of political, economic, and religious traditions. The absence of such human rights mechanism also 'reflects the region's strong commitment to Westphalia concepts of sovereignty and the principle of non-interference in the internal affairs of neighboring countries' (Petersen C.J., 2011. Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific. *Asian-Pacific Law & Policy Journal*. Vol. 13(1), p.174)

[1637] Art. 36(1) of the Statute of the ICJ

[1638] See Art.59 of the Statute of the ICJ

[1639] See also Schwebel, S.M., 1994. Justice in International Law, Selected Writings of Stephen M. Schwebel, Judge of the International Court of Justice. New York: Cambridge University Press, p.146

IV. State cooperation as a key factor for the effective implementation of the right to reparations

The effective implementation of the new right to reparations under the ICC Statute requires interaction of different players. It is not enough for the Court to issue an order for reparations, but also that States be willing to cooperate with the Court as to implement its decisions. In addition, States should ensure that sufficient funds are available to the TFV in order to complete court-ordered reparations against a convicted person. Actually, although the wealth of perpetrators or the proceeds of their crimes should be used for the benefit of the victims of crimes under the jurisdiction of the ICC, voluntary contributions – mainly from states - may enable the TFV to complement awards for reparations so that, with a convicted person's limited resources, they may be more than merely symbolic. Appropriate and prompt reparations to victims contemplated by the *2012 Decision on Principles and Procedures* require an active participation and a positive will of all actors and players in the international community at all level.

Particularly to State cooperation, protective measures – identification, tracing and freezing or seizure of proceeds, property and assets - and the execution of reparation orders require the willingness of requested State to fully cooperate with the Court. Such willingness implies that States enact laws in compliance with the ICC Statute and consistent with the context of Statute. Unfortunately, the comparative analysis of different national laws made in Chapter three of Part two of this study has found that some of such national laws are not consistent with the Statute in regard to the implementation of the ICC's reparation orders. States Parties and States which have accepted the jurisdiction of the ICC have obligation to cooperate with the Court and to give effect to its reparation orders without imposing preconditions as if it was the case of judgement from a foreign State of which the execution is subject to the procedure of *exequatur*. It is worth remembering that under the ICC Statute State parties have an obligation to 'ensure that there are procedures available under their national law for all of the forms of cooperation'[1640] with the Court. A State of which the national legislation may be an obstacle to the execution of an order for reparations should be considered as failing to cooperate with the ICC and arguably Art.87(7) of the ICC Statute may apply.[1641] In this regard, it is also worthwhile noting that according to the Vienna Convention on

[1640] Art.88 of the ICC Statute

[1641] Art. 87(7) of the ICC Statute provides that 'Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council'.

law of treaties a State party 'may not invoke the provisions of its internal law as justification for its failure'[1642] to perform the provision of the ICC Statute.

Eventually, the issue of cooperation between States for the purpose of reparations to victims needs in-depth investigation by observing the evolution of the jurisprudence and practice of the ICC for at the time of writing there was no case law of the Court related to the issue.

V. The impact of the creation of the right to reparations by the ICC Statute on international criminal law

It has been demonstrated in part one of this dissertation how reparations to the victims of core crimes developed from the stage where reparations to victims was an affair between States to the stage where, under ICC Statute, individual offender is held not only criminally responsible but also liable for reparations to his or her victims. At this level, one may ask whether the creation of the right to reparation before the ICC will have any impact on international criminal law in respect to this novel right.

First of all, it is noticeable that the ICC Statute does not bring any input in developing international law in respects with States or legal persons' liability for reparations. As regards individual offenders there is a question as to whether the creation of the ICC with the power to grant victims with an award for reparations means that international criminal law has completely abandoned the stage where prosecution is privileged and reparations to victims ignored. After the adoption of the ICC Statute we have witnessed the creation, under the UN system, the creation of hybrid or special tribunals. Those criminal judicial institutions include those created with jurisdiction to try international crimes under the United Nations arrangements such as that established in Sierra Leone (SCSL),[1643] in Cambodia (the ECCC)[1644] and in Lebanon (STL).[1645]

[1642] Art. 27 of the Vienna Convention on law of treaties 1969 (*Internal law and observance of treaties)*

[1643] The Special Court of Sierra Leone (SCSL) was created in 2002 (about four years after the adoption of the ICC Statute), under the agreement between the UN and the Government of Sierra Leone to create a Special Court to Sierra Leone (SCSL). In its resolution 1315 (2000) of 14th August 2000, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law. The Secretary-General of the United Nations held such negotiations And the Special Court for Sierra Leone (SCSL) was created by the 'Agreement between the United Nations and the Government of Sierra Leone on the establishment of a special court for Sierra Leone' reached on 16th January 2002.

[1644] The ECCC were created after the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of Democratic Kampuchea, done at Phnom Penh on 6th June 2003. See the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27th October 2004 (NS/RKM/1004/006)

Concerning the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon, the statutes of these tribunals do not vest them with the power to decide on reparations. In respect with reparations to victim, Rule 105 (A) of SCSL for example states that '[t]he 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'. This provision is similar to Art.25 of the Statute of the Tribunal of Lebanon (STL) which likewise refers victims to national courts.[1646] Rule 105 (B) of SCSL goes on to specify that '[p]ursuant 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'. Once again this provision is a copy of the Art 25(3) of the Statute of STL.[1647] Unlike the SCSL and the STL regimes, under the regime of the Extraordinary Chambers in Courts of Cambodia (ECCC), victims are granted with the right to claim collective reparations against an accused person.[1648] Yet, the ICC reparations regime remains more developed than the ECCC reparation regime since under the latter victims cannot claims individual reparations as they can under the former.

As for those hybrid tribunals of which the statutes do not provide for reparations (STSL and STL) and the ICC Statute which preceded them, one can draw a conclusion that international criminal law develops *horizontally*. This is to avoid classifying the regime of those tribunals as a decline of international criminal law with regards to reparations regime established before by the

(Law on the establishment of extraordinary chambers in the courts of Cambodia for the prosecution of crimes committed during the period of democratic Kampuchea).

1645 The Special Tribunal for Lebanon (STL) was created in 2007 (about nine years after the ICC Statute was adopted) under Agreement between the United Nations and the Lebanese Republic pursuant to the Security Council resolution 1664 (2006) of 29th March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon.

1646 Art. 25 of the Statute of the STL (Compensation to victims) provides that '[1] The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal. [2] The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim. [3] 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. [4] For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person'.

1647 The Special Tribunal for Lebanon was established in 2007 by an Agreement between the United Nations and the Lebanese Republic pursuant to Security Council resolution 1664 (2006) of 29th March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others (see Annex to the Resolution 1757 (2007) of 30th May 2007). The Statute of the Special Tribunal entered into force 10th June 2007 (see attachment to the Resolution 1757 (2007) of 30th May 2007, the Statute entered into force on 10th June 2007).

1648 Internal Rule 23 of the ECCC provides that 'The purpose of Civil Party action before the ECCC is to (a) Participate in criminal proceedings against those responsible for crimes within the jurisdiction of the ECCC by supporting the prosecution; and (b) Allow Victims to seek collective and moral reparations'.

ICC Statute. Indeed, it has been observed that even the decision of conviction and sentence constitutes a form of satisfaction to victims which is deemed as a type of reparation. On the other hand, the very fact that the ECCC's regime provides for the right to reparations to victims leads to a conclusion that the ICC has impacted international criminal law so that it has developed *vertically*. Notwithstanding, there is a question as to whether the vertical development of international criminal law, as regard the right to reparations, will evolve and result in a complete shift from the stage where only prosecution is prioritized and reach the stage of the ICC Statute which marries prosecution and reparations to victims. Where such a vertical development is perpetuated under international criminal law, the right to reparations created by the ICC Statute will become not only a milestone but also a catalyst for the development of international criminal law. Presumably, after the adoption of the ICC Statute, reparations to victims as well as participation in criminal proceedings 'will be one of the most important issues in criminal law and procedure'.[1649] However, this issue needs further investigations by watching the evolution of international criminal law as regard the right to reparations to victims of international crimes.

[1649] Buruma, Y., 2004. Doubts on the Upsurge of the Victim's Role in Criminal Law. In : H. Kaptein and M. Malsch, eds., 2004. *Crime, Victims and Justice, Essays on Principles and Practice*. Hampshire: Ashgate Publishing Limited, p.3

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