Reparations in international criminal law

1.1 Theoretical framework
The theoretical framework of reparations in international criminal law is mainly based in Human Rights Law (IHRL). However, several human rights treaties provide for reparations for individuals that suffered harm from states, rather than from other individuals. This thesis will discuss the right to reparations for victims that suffered harm from individuals, with regards to the core crimes under the jurisdiction of the International Criminal Court. This concerns the most serious crimes under international human rights law, as well as humanitarian law, namely crimes against humanity, war crimes, genocide and the crime of aggression.

Reparation for victims can be defined as “a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form”. This principle has, informally, existed for centuries. It consists of an obligation to redress the damage a wrongdoing party has caused to an injured party. The purpose of reparation is that “reparation must, as far as possible, 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”. In other words: the victim’s situation must be repaired to how it was before the harm was done.

Under international law, the right to reparation generally has a dual dimension. The first dimension is substantive, which can be translated into the duty to provide redress and can take the form of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. The second dimension is procedural and can be translated into an
The UN General Assembly 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 ("the Basic Principles"), can be regarded as a result of a "lengthy process of consideration and review by non-governmental and governmental experts and that the significance of the document was considerably enhanced by its adoption by the UN.

1 Rome Statute of the International Criminal Court (further: Rome Statute), Art. 5.

2 Judgment No 13, PCIJ Series A No 17, ICGJ 255 (PCIJ 1928) (Chorzow Factory Case (Ger. V. Pol.)). 3 Ibid.

7 General Assembly without a dissenting vote".4 This illustrates the complexity of the concept of reparations. The Basic Principles define several accepted forms of reparations. The first form is restitution. The purpose of restitution is to "restore the victim to the original situation before the gross violations (…) occurred".5 Examples of restitution are the restoration of identity, family life, liberty, enjoyment of human rights and citizenship. Other examples are the return to one’s place of residence or the return of property, and the restoration of employment. Restitution is often not suitable for the more heinous crimes, because it seems impossible in such situations to restore the victim’s original situation.6 Other forms of reparation are
then necessary. The second form is compensation, which is often provided if the damage is economically assessable. The compensation should be proportional and appropriate to the specific circumstances and the gravity of the violation. The damage can be the result of “physical or mental harm; lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential; moral damage or costs required for legal or expert assistance, medicine and medical services, and psychological and social services”. The third form is rehabilitation, which has the purpose to provide medical care, psychological care, and legal and social services. These means of rehabilitation should make it possible, or at least easier, to restore the victims’ original situation. The last form is reparation as satisfaction and guarantees of non-repetition. Satisfaction can include, for example, public apologies and acknowledgement, public disclosure of the truth, effective measures that are aimed at cessation of continuing violations, sanctions, tributes to the victims, etc. Guarantees of non-repetition contributes to prevention as well. Examples are the strengthening of the independence of the judiciary, protecting persons in the medical and health-care and legal professions, providing education on international human rights law and international humanitarian law, promoting mechanisms to prevent and monitor social conflicts, etc. Note that

4 Theo van Boven, Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines, (Martinus
5 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 (further: Basic Principles and Guidelines), para. 19.


8 Basic Principles and Guidelines, para. 21.

9 Basic Principles and Guidelines, para. 22.

10 Basic Principles and Guidelines, para. 23.

8 these forms are established by the Basic Principles, and the International Criminal Court (ICC) does not have its own principles to acknowledge all of them.

The Rome Statute of the ICC represents a step towards the acknowledgement of the right to reparations for victims, which is laid down in Article 75 as follows: “the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” This article constitutes an obligation for the Court to create a framework with regards to the right to reparations for victims.

Another institution that has a mandate towards victims, under the Rome Statute, is the Trust Fund for Victims (TFV).11 In 2002 the TFV was established as a separate institution.12 The mandate of the TFV is twofold: the mandate concerning reparations and the implementation of reparation awards13, and the mandate to provide general assistance to victims and their
families concerning material support, psychological and physical rehabilitation. The resources for this assistance come from voluntary contributions by donors such as international organizations or governments.

1.2 Realization within the ICC

The ICC is, according to Article 1 of the Rome Statute, complementary to national criminal jurisdictions and therefore they can only exercise jurisdiction in a case where a national court fails to act.14 The ICC can be considered as the first international criminal tribunal that recognizes the right to reparation for victims as a legal remedy by an individual against another individual. However, the ICC has not developed principles regarding this matter yet and this raises the question how the right to reparation should be realized. With problems such as economic inequalities, poverty, the likelihood of the ICC being approached by victims, the number of victims to receive reparations and a lack of economic resources, the ICC copes with challenges in realizing the right to reparations. The establishment of principles, and therefore a judicial framework, could make it easier in the future to give the victims a realistic overview of the procedure and what is likely to happen, or what their possibilities are. However, currently the framework is more broad and flexible than clear and evident, which means victims do not know what to expect, and the realization of

11 Rome Statute, Art. 79.


reparations is not always certain or sufficient. Realization of the right to reparation within the ICC therefore forms a challenge, as there is a lack of principles and uncertainty
for the victims.

1.3 Focus

In chapter 2 the Lubanga case, the first case on reparations decided by the ICC, will be analyzed and it will serve as an illustration for the process on reparations. The roles of the convicted individuals as well as the scope of beneficiaries and other victims will be discussed. Then, in chapter 3, the lack of principles and therefore the importance of a judicial framework will be pointed out, as the realization of the right to reparations is highly dependent on those factors. The importance lies in budgetary reasons, expectations for victims and creating a steady framework that provides for a clear basis. Further on, in chapter 4, the crucial collaboration between the ICC and the Trust Fund for Victims (TFV) will be analyzed. The overlapping mandates of these two actors will be discussed and how this makes the process even more complex. Furthermore, chapter 4 points out the issue whether it is preferable to deal with reparations as a separate trial, or to combine it with the main criminal trial. In the last chapter, chapter 5, the relationship between the ICC and jurisdictions on the national level will be outlined. Generally states have their own obligation to provide remedies to victims, but the ICC takes over this obligation if a state fails to investigate and prosecute. The question in this chapter is whether the principle of complementarity is also applicable to the context of reparations under the Rome Statute.

This thesis focuses on how the reparations provisions of the Rome Statute can be translated into practice, in order to make it a “living law”. The main topics that will rise in this thesis are the lack of general principles, the consequences for realization of reparations, the complementarity between States parties and the ICC, and the responsibilities of the ICC and the TFV. The research question can therefore be formulated as follows: “What are the challenges for the ICC to make the right to reparations a living law?"
2 – DEFINING SCOPES

The Lubanga case is the first case on reparations the ICC decided on. In this chapter, the Lubanga case therefore serves as an illustration for the process on reparations and the roles of the convicted individuals as well as the scope of beneficiaries or other victims.

2.1 The Lubanga case

The first ICC-case on reparations was formed in the Lubanga case. In this case the Trial Chamber did not rule on individual claims, but it did establish procedures and principles that should be followed.15

2.1.1 Overview of events

On 14 March 2012 the Court found Mr. Lubanga guilty for co-perpetration of enlisting, conscripting and the use of child soldiers, under the age of 15, during the Ituri conflict in the Democratic Republic of Congo (DRC).16 Later that year, on 10 July 2012, Mr. Lubanga received the sentence of 14 years imprisonment.17 He appealed the conviction as well as the sentence. Eventually, on 1 December 2014, both the conviction and the sentence became final.18

On 7 August 2012, the decision on reparation was issued by the Trial Chamber.19 The Chamber established principles on reparation and endorsed the Trust Fund’s plan to implement these reparations.

In its decision the Trial Chamber stated that the reparation would be implemented by the Trust Fund for Victims (TFV), which had to propose an accurate and suitable form of reparation in accordance with Article 75(2) of the Rome Statute. This reparation tends to be collective. Individual 15 Decision establishing the principles and procedures to be


11 applications would be passed on to the TFV, in stead of being considered by the Judges. Also, formulating and implementing the reparation awards appropriate for the victims of gender-based and sexual violence should be done by the Court. Furthermore, Mr. Lubanga could only contribute to non-monetary reparation (such as apologies) and was not responsible for
This decision was appealed by the participating victims in the case, as well as the Defence of Mr. Lubanga. The arguments of the victims’ legal representatives were as follows. First, the Chamber should have considered the victims’ claims because it was the victims’ right to have Judges consider their claims. The Chamber should not have refused considering the claims. Second, the consideration of the claims should not have been delegated to the TFV. Third, the Chamber should have allowed more victims to apply for reparation, and to make submissions. Last, the victims argued that Mr. Lubanga should have been found liable to at least contribute to the reparation. If he later obtains money, Mr. Lubanga could reimburse the funds that were advanced by the TFV.

The Defence (Mr. Lubanga) argued that the Chamber was wrong in enabling reparation for victims of sexual violence as well, given the fact that this crime was not one which he was convicted for. Also, Mr. Lubanga argued that the Chamber’s approach was too broad. The evaluation of the harm of the victims, as well as the determination of suitable measures of reparation and the identification of beneficiaries were delegated to the Registry (and experts). Furthermore, by delegating several functions to the TFV, the Chamber violated the Rome Statute.

On 3 March 2015, the ICC Appeals Chamber gave its final decision on the reparations appeal. It found that the decision of Trial Chamber I contained errors, which resulted in an amendment of the order for reparation. The order must have been made against Mr. Lubanga, since he was the convicted person. The order for reparations must also inform Mr. Lubanga about his liability. In other words: Mr. Lubanga should know what his responsibilities are when it comes to paying, and how much he needs to pay. The Appeals Chamber now asked the TFV to determine the required reparations of the harm Mr. Lubanga caused. The type of awarded reparations (either individual,
collective, or both) should be specified by the order for reparations. The Appeals Chamber made clear there were only collective reparations. The types of repairable harm need to be defined as well and there must be a link between the crimes Mr. Lubanga is convicted for, and the harm suffered by


21 Ibid.

12 those crimes. The final amendment of the order for reparations is that it has to identify the beneficiaries and it has to set out criteria of being eligible. The Appeals Chamber made clear that the victims eligible for for reparation were only those who suffered from the crimes for which Mr. Lubanga was convicted.22

In the case of Lubanga the Chamber expressed several different objectives regarding reparations. It can be concluded that reparations have (according to the Chamber) two explicit purposes, which are laid down in the Statute. One purpose is that reparations give those responsible for grave and serious crimes, the obligation to repair the harm they caused with their wrongdoing. At the same time, reparations make it possible for the Chamber to ensure accountability. Furthermore, reparations cannot only be directed at specific individuals, but they also contribute, in a more broad way, to the affected communities. The purposes of reparations in the case of Lubanga are that they must relieve the suffering, afford justice, deter future violations, and they must contribute to the reintegration of the children who used to be child soldiers. Also, assisting in the promotion of
reconciliation between the victims (and others who are affected) and the convicted person, is one of the purposes of reparations.23

The final view of the Chamber is that the application of reparations should take place in a flexible and broad manner. Principles of non-discrimination, non-stigmatization and dignity need to be respected.24 Furthermore the TFV is identified as the principal agency for dealing with reparations and the Chamber recommended that assistance to the Court will be provided by a multidisciplinary team of experts.25

2.1.2 How further: realization

The decision of the Appeals Chamber clearly set out instructions to the TFV with regards to the next steps. However, with regards to the draft implementation plan, the TFV did not receive instructions whatsoever. In November 2015 the TFV submitted a draft implementation plan.26 The Trial Chamber II rejected this plan and noted that the TFV did not comply with the orders of the Appeals Chamber. Furthermore, the plan should have included an estimation of Mr. Lubanga’s financial liability.27 In addition, the Chamber found that the plan was not sufficient enough in details such as locations of reparation activities, who would implement those activities, their specific costs, and providing an overview. The new...
request of the Chamber towards the TFV was a more detailed overview, a clear estimation of costs and more details on it should be monitored. Furthermore, the request included providing information on locations and identities of the victims in order to assess the harm suffered and to determine the potential beneficiaries. In response to this request, the TFV reported in May and June of 2016 the start of identification of potential beneficiaries, but they stressed that the process was re-traumatising for victims and expensive. In response, the Chamber also expressed concerns, this time with regards to the TFV’s position and that they were unable to comply with its orders. It ordered assistance from the Registry and called for submissions.

Furthermore, the Chamber ordered the TFV to consider whether implementing symbolic collective reparations would be feasible. On its own turn, the TFV responded on 16 August 2016 that: “the Board remains concerned that the current procedure is legally and systemically flawed, unnecessarily cumbersome, very resource intensive in terms of staff time and costs, not in the interests of victims and not conducive to meaningful redress through collective reparations awards to eligible victims”. After two hearings (11 and 13 October 2016), on 12 October 2016 the Trial Chamber II approved a plan with regards to symbolic
reparations that the TFV submitted, and it ordered the TFV to continue with identifying victims.33

Almost ten years after the submissions of requests for reparations in this case, and more than four years after the Trial Chamber decided on the Lubanga reparations, it appears the situation is

27 ICC, Order instructing the Trust Fund for Victims to supplement the draft implementation plan, ICC-01/04-01/06-3198, 9 February 2016.

28 Ibid.

29 ICC, First submission of victim dossiers, ICC-01/04-01/06-3208, 31 May 2016; ICC, Additional Programme Information Filing, ICC-01/04-01/06-3209, 7 June 2016.

30 ICC, Order instructing the Registry to provide aid and assistance to the Legal Representatives and the Trust Fund for Victims to identify victims potentially eligible for reparations, ICC-01/04-01/06-3218, 15 July 2016.


32 ICC, Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2015 to 30 June 2016, ICC-ASP/15/14, 16 August 2016, para 35.

33 ICC, Order approving the proposed plan of the Trust Fund for Victims in relation to symbolic collective reparations, ICC-01/04-01/06-3251, 21 October 2016.
standing still. This delay causes dissatisfaction with the victims, and they lost the confidence in the Court to deliver them meaningful reparations in the future.34

2.1.3 A comparison: the Katanga case

In relation to an attack on Bogoro (Ituri, DRC) on 24 February 2003, Mr. Katanga was convicted,

35

on 7 March 2014, of crimes against humanity and war crimes. With regards to reparations the Chamber still has to issue a decision and therefore it is to early to determine possible challenges of implementation. However, in comparison to the Lubanga case, the process so far has been relatively smooth.36 Hundreds of victims have been identified and the Registry and the Legal Representatives of Victims (LRV) managed to submit concrete proposals to the Chamber concerning how the harm suffered must be quantified in financial terms.37 Through the process the victims were able to specify their reparation claims and to come forward, which allowed the Chamber to take their views into account.38

2.1.4 A comparison: the Al Mahdi case

On 26 September 2015, Mr. Al Mahdi surrendered and admitted his guilt of intentionally attacking historic and religious monuments and buildings in Timbuktu (Mali), between June 2012 and July 2012. He was convicted on 27 September 2016, one year later.39 The Trial Chamber VIII immediately issued the phase of reparations on 29 September 2016.40 Although the guilty plea must be taken into account, the Al Mahdi case can so far be considered as an example of efficiency and promptness.41 The Court needed only a year to conduct the pre-trial, as well as the trial proceedings. However, the crimes involve a large
number of victims, in the capacity of individuals, but also defined groups, who together form “the people of Timbuktu”. It is not clear how these individuals


40 ICC, Reparations Phase Calendar, ICC-01/12-01/15-172, 29 September 2016.


42 ICC, Public redacted version of “Prosecution’s submissions on sentencing”, ICC-01/12-01/15-139-Red, 22 July 2016, para. 24-29.

and groups of people will be characterized.

2.2 Responsible individuals

In the context of international criminal law and more specific the ICC, an individual can be held responsible for committing international crimes with a nature of mass human rights violations or serious IHL violations. Issues with regards to state responsibility do not fall under the ICC’s
jurisdiction. The typical ICC-crimes such as war crimes, genocide and crimes against humanity mostly involve a large number of victims. One major challenge for the ICC is therefore the misbalance between on the one hand the large number of victims and on the other hand one or two responsible individuals. This misbalance makes the realization of reparation a difficult task. In the Lubanga case for example, the available resources were very limited as any assets that Mr. Lubanga would have, were hard to trace. As a consequence, the lack of these economic resources undermines the realization of reparations and therefore making the right to reparation into a living reality fails.

However, even if resources were available, other problems could occur. According to findings of REDRESS, large numbers of victims are waiting for response concerning their participation and their victim status. Furthermore, potential reparations are not only meant for already recognized victims, but also for victims that are not known to the ICC yet, but who could also potentially apply. This means that the number of victims applying is likely to increase, as they can request reparations at any point during the proceedings. Thus, this could result in a high number of beneficiaries of reparations.

2.3 Victims

Opposed to the convicted individuals are the victims. Under the ICC’s Rules of Procedure and Evidence (RPE), victims have been defined as: “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” and “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

43 Eva Dwertmann, The reparation system of the International Criminal Court: its implementation, possibilities and
other places and objects for humanitarian purposes”.

The general principle is laid down in Rule 86 and constitutes 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”. The ICC has also been called the “victim’s Court”. It is clear that victims are acknowledged by the ICC, but not every victim turns into a beneficiary. The next paragraph provides an analysis regarding this issue.

2.4 Beneficiaries

The high number of victims mentioned in the previous paragraph, results in a challenge to define the scope of beneficiaries in a case. More specifically, what happens to the victims that are left out of reparations? In order to define the scope of beneficiaries it is highly relevant to determine the ICC process. First, preliminary investigations are opened by the Prosecutor of the ICC, over a situation
where (probably) international crimes have been committed. Such a situation is broad and generally temporal, territorial and personal parameters are relevant. Then, the investigation will further be limited to a specific case, which commences with a request for an arrest warrant against an identified individual, if there are reasonable grounds to assume that the individual is criminally liable for a crime within the ICC’s jurisdiction. If these criteria are fulfilled, the Pre-Trial Chamber will issue an arrest warrant. During the investigation, the prosecution strategy is mainly focused on the most serious crimes and on those individuals who will presumably be responsible for those crimes. For example, in the Lubanga case the charges are limited to the conscription, enlistment and forced participation in hostilities of an armed conflict, of children under the age of 15 years. Article 75(2) of the Rome Statute states that reparations are ordered “(...) directly against a convicted person”, which means that it is linked to guilt-finding and the individual’s responsibility


48 Human Rights Center, The Victims’ Court? A Study of 622 Victim Participants at the International Criminal Court, (UC Berkeley School of Law 2015).


for the harm caused. In the Lubanga-case the victims are the children, although they had also committed crimes that fall under the ICC’s jurisdiction. The victims of the crimes committed by the children are not recognized as victims in the specific case.53

As illustrated above, determining the charges in a specific case has an impact in the determination of the scope of beneficiaries and therefore in realizing the right to reparation. Not all victims seem to fall within the scope of beneficiaries of a specific case, even though they do fall within the jurisdiction of the ICC.54 They are considered as “the other victims”, namely victims of the situation. The consequences of this distinction could be an imbalance between victims, creating a new conflict and adverse effects on rehabilitation, social structures and reconciliation, which results in an unfavourable situation for the victims.

2.5 Conclusion

The Lubanga case is the first case on reparations on which the ICC decided. It is an example of how the process works, and what could be challenging issues. This chapter illustrated the relevance of determining the responsible individuals and their charges, as well as the scope of beneficiaries. Reparations are meant to redress, not to cause unfavourable situations for the already harmed victims. A proper determination on how to address the “other victims” is therefore crucial, as more
conflicts must be avoided. The determination of convicted violations and the scope of beneficiaries links to the establishment of principles on the right to reparations, which will be discussed in the next chapter.
