

Eva Dwertmann

The Reparation System of the International Criminal Court

Its Implementation, Possibilities
and Limitations

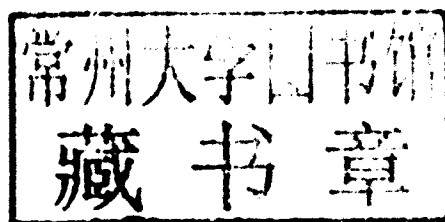
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by

Eva Dwertmann



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Table of Abbreviations

ASP	Assembly of States Parties
American Convention	American Convention on Human Rights
Court Regulations	Regulations of the International Criminal Court
2001 EU Framework	Council of the European Union Framework Decision on
Decision	the Standing of Victims in Criminal Proceedings
ECHR	European Convention for the Protection of Human
	Rights and Fundamental Freedoms
2005 Guidelines on Child	Guidelines on Justice in Matters involving Child Victims
Victims	and Witnesses of Crime
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for the Prosecution of
	Persons Responsible for Genocide and Other Serious
	Violations of International Humanitarian Law Commit-
	ted in the Territory of Rwanda and Rwandan Citizens
	Responsible for Genocide and Other Such Violations
	Committed in the Territory of Neighbouring States be-
	tween 1 January and 31 December 1994
ICTR Rules	Rules of Procedure and Evidence of the International
	Criminal Tribunal for Rwanda
ICTR Statute	Statute for the International Criminal Tribunal for
	Rwanda
ICTY	International Tribunal for the Prosecution of Persons Re-
	sponsible for Serious Violations of International Humani-
	tarian Law Committed in the Territory of the Former
	Yugoslavia since 1991
ICTY Rules	International Criminal Tribunal for the Former Yugosla-
	via, Rules of Procedure and Evidence
ICTY Statute	Statute for the International Criminal Tribunal for the
	Former Yugoslavia
ILC Draft Articles	International Law Commission Draft Articles on the
	Responsibility of States for International Wrongful Acts

Nuremberg Charter	Charter of the International Military Tribunal, Nuremberg
Preparatory Commission	Preparatory Commission for an International Criminal Court
Registry Regulations	Regulations of the Registry of the International Criminal Court
Rules	Rules of Procedure and Evidence of the International Criminal Court
Standard Application Form for Individuals	Standard Application Form for Reparations before the International Criminal Court for Individuals and Persons Acting on their behalf
Standard Application Form for Organizations	Standard Application Form for Reparations before the International Criminal Court for Victims which are Organizations or Institutions
Tokyo Charter	Charter of the International Military Tribunal for the Far East
Trust Fund	Trust Fund for Victims of the International Criminal Court
Trust Fund Regulations	Regulations of the Trust Fund for Victims of the International Criminal Court
UNCC	United Nations Compensation Commission
UN Handbook	United Nations Handbook on Justice for Victims on the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
2005 Victims 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
1985 Victims Declaration	Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
Victims Participation Booklet	Booklet – Victims Before the International Criminal Court – A Guide for the Participation of Victims in the Proceedings of the Court

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A. Aims of the Study

Before the International Criminal Court (“ICC” or “the Court”), victims of crimes which fall within its jurisdiction have the right to file applications for reparations. Victims are accorded rights and a “double status” before the ICC in that they can both seek reparations from the Court and participate in the proceedings.¹ This stands in contrast to other international criminal tribunals established before the ICC which did not recognize victims as rights-holders.

In the view of one of the ICC’s Chambers, “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 to its reparation system”²

Also from the outside, high expectations have developed specifically of the ICC reparation system. Commentators have regarded to it as “one of the most important aspects” of the ICC Statute³, and an appropriate means to repair grave violations of international humanitarian law.⁴ Others have said that the ICC reparations scheme is “[f]rom many points of view [...] the ideal solution for victims of crimes under

¹ Art. 68 (3), Art. 75 (2) ICC Statute. Furthermore, victims may transmit information to the Prosecutor requesting the initiation of an investigation, Art. 15 (3), and make observations on the decision on admissibility or jurisdiction, Art. 19 (3). Victims and witnesses are to be protected by appropriate measures by the Court, Art. 43 (6), Art. 57 (3), Art. 68 (1), (4).

² Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, Pre-Trial Chamber I, 10 February 2006, ICC-01/04-01/06 (annexed to ICC-01/04-01/06-8-Corr, 24 February 2006), para. 136.

³ P. Lewis; H. Friman: “Reparations to Victims”. In: *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*. Ed. R. S. Lee. Ardsley, New York, 2001, pp. 474 et seq.

⁴ W. Heintschel von Heinegg: “Entschädigung für Verletzungen des Humanitären Völkerrechts”. In: *Entschädigung nach bewaffneten Konflikten – Die Konstitutionalisierung der Welthandelsordnung*. Eds. W. Heintschel von Heinegg; S. Kadelbach; B. Heß (et al.). Heidelberg, 2003, pp. 1 et seq. at p. 55 with further references.

international law”⁵ and a “historic possibility to the world community to recognise and enforce the right of victims to reparations.”⁶ Moreover, the ICC’s Trust Fund for Victims (“Trust Fund”) has been termed a “very promising reparations mechanism”⁷, which has “the potential to be one of the most significant international human rights organs in the world.”⁸

Generally, the ICC Statute has been defined as “victim-centered”⁹, the position of victims in the ICC system has been described as “one of the most distinctive features of the [ICC] Statute”¹⁰ and “one of the great innovations” of the ICC.¹¹

Thus, the ICC’s reparation system in particular, has already received much praise, although it is yet untested. The concept that individual criminal responsibility in international law requires the perpetrator to make reparations to the victims of his or her crime has not been tried in practice and in fact faces multiple challenges. This study will examine this concept, as embodied in the ICC reparation system, with four main aims. In view of the novelty of reparations to victims in international criminal law, first the historical and legal background of the concept is to be examined. The second aim is to analyze the reparations mechanism as provided in the ICC’s constituting legal instruments. Third, this study attempts to outline a draft for a potential effective functioning of the ICC reparation system by developing criteria for its possible implementation. Finally, the potential of the ICC reparations mechanism to repair the harm of victims of crimes under its jurisdiction is to be critically assessed.

- 5 I. Bottiglieri: *Redress for Victims of Crimes under International Law*. Leiden, 2004, p. 242 with further references.
- 6 D. Donat-Cattin: “Article 75 – Reparations to Victims” In: *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*. Ed. O. Triffterer. Baden-Baden, 1999, pp. 965 et seq. at p. 966.
- 7 C. Lasco: “Repairing the Irreparable – Current and Future Approaches to Reparations”. In: *Human Rights Brief* 10 (2003), pp. 18 et seq. at p. 21. See Resolution on the Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and the Families of such Victims, adopted 9 September 2002, ICC-ASP/1/Res.6 (2002).
- 8 P. G. Fischer: “The Victim’s Trust Fund of the International Criminal Court – Formation of a Functional Reparations Scheme”. In: *Emory International Law Review* 17 (2003), pp. 187 et seq. at p. 239.
- 9 C. M. Bassiouni: *Introduction to International Criminal Law*. Ardsley, New York, 2003, p. 528.
- 10 S. A. Fernandez de Gurmendi; H. Friman: “The Rules of Procedure and Evidence of the International Criminal Court”. In: *Yearbook of International Humanitarian Law*. Ed. A. McDonald. Vol. 3. The Hague, 2000, pp. 289 et seq. at p. 312.
- 11 G. Bitti; G. González Rivas: “The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court”. In: *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges*. Ed. The International Bureau of the Permanent Court of Arbitration. Oxford, 2006, pp. 299 et seq. Similarly F. Terrier: “The Procedure before the Trial Chamber”. In: *The Rome Statute of the International Criminal Court – A Commentary*. Eds. A. Cassese; P. Gaeta; J. R. W. D. Jones. Vol. 2. Oxford, 2002, pp. 1277 et seq. at p. 1317.

This study intends to comprehensively analyze the ICC reparation system. This is being undertaken because while multiple references can be found in academic literature, studies offering in-depth and comprehensive analysis on ICC reparations are insufficient.¹² Thus, all aspects of the ICC's legal framework that are linked with reparations shall be examined. This covers the Court's obligation to establish reparation principles (Art. 75 (1)), its competence to order convicted persons to make reparations to victims (Art. 75 (2)), the reparations procedure (Art. 75 (3), Art. 76 (3)), and protective measures and the enforcement of the reparation order (Art. 75 (4), (5)). Further aspects of the ICC reparations mechanism that will be evaluated are the interdependence between penalties and reparations (Art. 76, 77 (2)) and the role of the Trust Fund for Victims (Art. 79).

The focus of this study is the ICC's power to order the convicted person to make reparations to victims (Art. 75 (2)). In this context, the following issues will be examined in depth: The first issue covers the question as to when the Court can make use of its competence to order the convicted person to make reparations to victims, as well as the pre-conditions for the exercise of this power. Further key questions are who can be considered a victim or other person eligible for reparations, what forms of reparations can be ordered, and what kinds of damages be compensated. Another issue concerns the factors that can or need to be considered when determining the scope of a compensation award. The question as to how reparation orders are to be implemented will be dealt with, and, in particular, how the tasks between the Court and Trust Fund, experts, and national, intergovernmental and non-governmental organizations can be distributed, and how applications for reparations can be verified. Other relevant questions that concern protection measures and the enforcement of ICC reparation orders and Trust Fund assistance will be touched on.

The ICC reparations regime faces challenges unique to reparations awarded in the context of international criminal justice. The ICC has the mandate to hold individuals accountable for international crimes and to find them responsible for reparations to the victims of such crimes. The ICC's legal instruments also grant individual victims

12 See for recent publications covering certain aspects of the ICC reparation system A.-M. de Brouwer: "Reparation to Victims of Sexual Violence – Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families". In: *Leiden Journal of International Law* 20 (2007), pp. 207 et seq.; M. Henzelin; V. Heiskanen; G. Mettraux: "Reparations to Victims before the International Criminal Court – Lessons from International Mass Claims Processes". In: *Criminal Law Forum* 17 (2006), pp. 317 et seq.; G. Bitti; G. González Rivas: "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court". In: *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges*. Ed. The International Bureau of the Permanent Court of Arbitration. Oxford, 2006, pp. 299 et seq.; C. Ferstman: "The International Criminal Court's Trust Fund for Victims – Challenges and Opportunities". In: *Yearbook of International Humanitarian Law* 2003. Ed. A. McDonald. Vol. 6. The Hague, 2006, pp. 424 et seq.; D. Shelton: *Remedies in International Human Rights Law*. 2nd ed. Oxford, 2005, p. 233; I. Bottiglierio: *Redress for Victims of Crimes under International Law*. Leiden, 2004; M. Heikkilä: *International Criminal Tribunals and Victims of Crime*. Turku, 2004.

of crimes under its jurisdiction the right to claim reparations.¹³ In this way, the ICC reparation system creates an international legal relationship between private persons.¹⁴

At the same time, all crimes under international law require that the deed be committed in the context of gross or systematic violations, and it is regularly a collective that is responsible for the violations, typically a state.¹⁵ International criminal law, in contrast to international law, does not establish the responsibility of a state, and the ICC is not authorized to order states to make reparations.¹⁶ Rather, by criminalizing the deed and punishing the perpetrator, and ordering him or her to make reparations for the harm caused, the responsibility for the crime is individualized.¹⁷ However, its consequences, the victimization, remain collective in nature.

13 Art. 75, Rule 94. Thus, an individual right to claim reparations has been established as a part of international (treaty) law, this study does not need to discuss the question as to whether there exists an individual right to reparation based on customary international law. Much academic discussion is related to this issue, see e.g. R. Hofmann: "Victims of Violations of International Humanitarian Law – Do They Have an Individual Right to Reparation against States under International Law?" In: *Völkerrecht als Wertordnung – Common Values in International Law – Festschrift für Christian Tomuschat – Essays in Honour of Christian Tomuschat*. Eds. P.-M. Dupuy; B. Fassbender; M. N. Shaw; K.-P. Sommermann. Kehl am Rhein (et al.), 2006, pp. 341 et seq.; M. Nowak: "The Right to Reparation of Victims of Gross Human Rights Violations". In: *Reparations – Redressing Past Wrongs*. Eds. G. Ulrich; L. Krabbe Boserup. (Human Rights in Development – Yearbook 2001). The Hague, 2003, pp. 275 et seq.; E.-C. Gillard: "Reparation for Violations of International Humanitarian Law". In: *International Review of the Red Cross* 851 (2003), pp. 529 et seq.; C. Tomuschat: "Reparation for Victims of Grave Human Rights Violations". In: *Tulane Journal of International and Comparative Law* 10 (2002), pp. 157 et seq. See also below Chapter 2 B. II ("Historical and Legal Context of Reparations for Victims of Crimes under International Law").

14 C. Tomuschat: "Reparation for Victims of Grave Human Rights Violations". In: *Tulane Journal of International and Comparative Law* 10 (2002), pp. 157 et seq. at p. 182.

15 G. Werle: *Principles of International Criminal Law*. The Hague, 2005, p. 34. The contextual requirements for the crimes under the jurisdiction of the ICC (Art. 5 ICC Statute) are that an act is "committed with the intent to destroy, in whole or in part, a national, ethnical, racial, religious group" (Art. 6, Genocide), "committed as part of a widespread or systematic attack directed against any civilian population" (Art. 7, Crimes Against Humanity), committed in the context of armed conflict, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes" (Art. 8, War Crimes).

16 Under Art. 75 (2) "[t]he Court may make an order directly against a convicted person specifying appropriate reparations [...]".

17 Furthermore, the Office of the Prosecutor has declared its intention to focus on those who bear the greatest responsibility of the crime: "The global nature of the ICC, its statutory provisions and logical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes", see Paper on Some Policy Issues before the Office of the Prosecutor, ICC-OTP, September 2003. Available

Thus, a distinct asymmetry exists between the individualized responsibility to provide reparations, and the collective nature of the crimes that commonly leads to massive qualitative and quantitative harm is inherent to the ICC reparation system. It creates a tension that impacts virtually all aspects of reparations ordered by the ICC.

Furthermore, in the implementation of the reparations provisions in its proceedings the Court is likely to face serious challenges in ensuring the expeditious conduct of proceedings.¹⁸

This work attempts to offer some clarification as to how the concept of reparations in the context of international criminal justice could function, within the parameters set in the ICC's legal foundations. Due to the wide spectrum of issues discussed, some of the relevant aspects can only be shortly addressed.¹⁹

Finally, the potential of the ICC reparations mechanism to repair the harm suffered by victims of crimes under its jurisdiction shall be critically assessed. Are praise and high expectations towards the ICC reparations regime justified, or must it be expected that its practical effects are likely to be rather modest?²⁰ Is there even a chance that the reparations mechanisms incorporated into the ICC Statute will in fact have a negative impact on victims of crimes under international law who are receiving reparations? It is to be assessed whether reparations awarded in the context of international criminal justice are an appropriate approach to redress the harm caused to victims of crimes under international law.

B. Structure and Methodology of the Study

This study is structured in eight Chapters. In Chapters 1 to 3 of this study, the foundations of reparations in international criminal law are briefly examined. This includes an overview of their historical and legal context, the interests protected by international criminal law, and the purpose of reparations, particularly in the context of international criminal law. Chapters 4 to 7 contain the main part of this study. Their structure is guided by the order in which the ICC Statute presents the different issues regarding reparations in the key Articles 75, 76, 77 and 79. In Chapter 8, conclusions

at http://www.icc-cpi.int/library/organs/otp/03/09/05_Policy_Paper.pdf, last accessed 21 April 2009, p. 7.

- 18 Art. 64 (2). According to G. Bitti; G. González Rivas: "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court". In: *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges*. Ed. The International Bureau of the Permanent Court of Arbitration. Oxford, 2006, pp. 299 et seq. at p. 321: "it may, arguably, be much more difficult for the Court to determine thousands of claims than to decide on several criminal cases for each situation".
- 19 Furthermore, generalization will often be necessary as in different jurisdictions and legal traditions the same legal issues are discussed under different headings or terms, particularly regarding causation, liability and proof. This examination attempts to abstract from national variations and to concentrate on the discussion of essential principles.
- 20 As assumed by C. Tomuschat: "Reparation for Victims of Grave Human Rights Violations". In: *Tulane Journal of International and Comparative Law* 10 (2002), pp. 157 et seq. at p. 181.

will be summarized and the potential of the reparations mechanism to restore the lives of victims of the crimes under the ICC's jurisdiction will be critically assessed. As the main aim of this study is to analyze the provisions in the ICC's legal instruments and to examine how they could be implemented, the Statute's Art. 21 is crucial to evaluate as it provides the guidelines for the method to be applied. The article specifies the law applicable to the Court in its decisions. It states that the application of the ICC Statute and its Rules of Procedure and Evidence ("ICC Rules" or the "Rules") has priority.²¹ Then, "applicable treaties and the rules and principles of international law" are to be applied, and, failing that, "general principles of law derived by the Court from national laws of legal systems of the world".²²

The Statute and Rules provide only rough guidance for a number of issues that concern the functioning of the ICC reparation system.²³ Their drafters opted not to clearly determine the substantive and procedural aspects of reparations to victims and the Trust Fund.²⁴ With regard to reparations, the ICC Statute consciously leaves lacunae, and obliges the Court to establish principles on reparations (Art. 75 (1)).²⁵ However, the wording of Art. 21 clarifies that the Court in its decision-making is also and especially bound to proceed in accordance with the determinations made by Art. 21 when the ICC Statute does not provide for a proximate solution to a particular question. In addition, due to its principal character the relevance of Art. 21 goes beyond the ICC Statute. Thus, it is necessary to consult the sources of law listed in Art. 21 when implementing the ICC reparations mechanism.²⁶ In particular, under Art. 21 (3) the application and interpretation of law "must be consistent with interna-

21 Rules of Procedure and Evidence, ICC-ASP /1/3 (2002).

22 Art. 21 (1) ICC Statute.

23 See M. Henzelin; V. Heiskanen; G. Mettraux: "Reparations to Victims before the International Criminal Court – Lessons from International Mass Claims Processes". In: *Criminal Law Forum* 17 (2006), pp. 317 et seq. at p. 320.

24 C. M. Bassiouni: *The Legislative History of the International Criminal Court*. Vol. 3. Ardsley, New York, 2005, p. 97 suggests that this is because international law is not settled in the question of victims' rights.

25 C. Jorda; J. de Hemptinne: "The Status and Role of the Victim". In: *The Rome Statute of the International Criminal Court – A Commentary*. Eds. A. Cassese; P. Gaeta; J. R. W. D. Jones. Vol. 2. Oxford, 2002, pp. 1387 et seq. at p. 1409 point out that while certain decisive issues expressly are to be resolved by the Court, other major problems seem to have been swept under the carpet. C. M. Bassiouni: *The Legislative History of the International Criminal Court*. Vol. 3. Ardsley, New York, 2005, p. 97 observes that Art. 75 and 79 would not satisfy most legal codifications.

26 See also D. Donat-Cattin: "Article 75 – Reparations to Victims". In: *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*. Ed. O. Triffterer. Baden-Baden, 1999, pp. 965 et seq. at p. 972 pointing out that the Court will make use of the sources of law listed in Art. 21. Similarly G. Bitti; G. González Rivas: "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court". In: *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges*. Ed. The International Bureau of the Permanent Court of Arbitration. Oxford, 2006, pp. 299 et seq. at p. 312.